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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SUSAN D. LINTZ,

Cross-complainant and Appellant,

v.

BLUE GOOSE DEVELOPMENT, LLC,
et al.,

Cross-defendants and Respondents.

G048325

(Super. Ct. No. 30-2011-00502087)

O P I N I O N

SUSAN D. LINTZ,

Cross-complainant and Appellant,

v.

AMBERHILL DEVELOPMENT, LTD.,
et al.,

Cross-defendants and Respondents.

G048381

<p>SUSAN D. LINTZ,</p> <p style="padding-left: 40px;">Cross-complainant and Appellant,</p> <p style="text-align: center;">v.</p> <p>PADDOCK JONES MORSE, INC., et al.,</p> <p style="padding-left: 40px;">Cross-defendants and Respondents.</p>	<p>G048382</p>
<hr/> <p>SUSAN D. LINTZ,</p> <p style="padding-left: 40px;">Cross-complainant and Appellant,</p> <p style="text-align: center;">v.</p> <p>ROBERT WILLIAMS et al.,</p> <p style="padding-left: 40px;">Cross-defendants and Respondents;</p> <p>BLUE GOOSE DEVELOPMENT, LLC, et al.,</p> <p style="padding-left: 40px;">Cross-defendants and Appellants.</p>	<p>G048520</p>

Appeals from judgments and a postjudgment order of the Superior Court of Orange County, Nancy Wieben Stock, Judge. Judgment affirmed in G048325. Judgment affirmed in part, reversed in part, and remanded in G048381. Judgment affirmed in G048382. Judgment and postjudgment order affirmed in G048520. Appellant Susan D. Lintz’s request for judicial notice. Denied. Respondents MJ3, LLC, and GGG3, LLC’s request for judicial notice. Denied. Respondents MJ3, LLC, and GGG3, LLC’s supplemental request for judicial notice. Denied.

Lytton Williams Messina & Hankin and Richard D. Williams for
Cross-complainant and Appellant.

Broedlow Lewis, Jeffrey Lewis and Kelly Broedlow Dunagan for Cross-defendants and Appellants Blue Goose Development, LLC, and Yellow Duck Investments, LLC, in G048520, and for Cross-defendants and Respondents Blue Goose Development, LLC, and Yellow Duck Investments, LLC, in G048325.

Law Offices of Ernest Mooney and W. Ernest Mooney for Cross-defendants and Respondents Amberhill Development, Ltd., Grey Goose Development, LLC, Grey Goose Investments, LLC, Castletown Investments, LLC, Blue Goose Investments, LLC, Margate Holdings, LLC, and Songbird Investments, LLC, in G048381.

Thomas Vogeles & Associates, Thomas A. Vogeles and Timothy M. Kowal for Cross-defendants and Respondents MJ3, LLC, and GGG3, LLC, in G048381.

Lewis Brisbois Bisgaard & Smith, Michael B. Wilk and Christina M. Guerin for Cross-defendants and Respondents Paddock Jones Morse, Inc., and Leon Jones, in G048382.

Solomon Ward Seidenwurm & Smith, Lawrence J. Kaplan; Metsch & Mason and Michael J. Mason for Cross-defendants and Respondents Robert Williams and ILA Consulting, Inc., in G048520.

* * *

INTRODUCTION

These five consolidated appeals are part of protracted and ongoing litigation between Susan D. Lintz (Susan) on the one side, and her ex-husband, William F. Dohr (Dohr), his business partner, Mark Child (Child), various corporations alleged to be the alter egos of Dohr and/or Child, and two accountants and their accounting firms, on the other. The litigation arose out of disputes over the management of the affairs and estate planning of Susan's father, Robert Lintz, and the ownership of a corporation he created.

Four of the five appeals are from judgments entered after the trial court sustained demurrers without leave to amend, respectively, to Susan's third, fourth, and fifth amended cross-complaints. The fifth appeal is from an order denying a motion for attorney fees brought by two of the cross-defendants alleged to be Dohr's alter egos.

The five appeals, and our disposition as to each, are as follows:

Appeal No. G048325 (Discussion section, part I.): Affirm the judgment.

Appeal No. G048381 (Discussion section, part I.): As to respondent Amberhill Development, Ltd. (Amberhill), reverse the judgment as to the first through sixth causes of action of the third amended cross-complaint and the eighth cause of action of the fourth amended cross-complaint, and affirm the judgment as to the seventh cause of action of the third amended cross-complaint. As to all other respondents, affirm.

Appeal No. G048382 (Discussion section, part II.): Affirm the judgment on the 12th cause of action of the fourth amended cross-complaint.

Appeal No. G048520 (Discussion section, part III.): Affirm the judgment on the ninth, 10th, and 11th causes of action of the fifth amended cross-complaint.

Appeal No. G048520 (Discussion section, part IV.): Affirm the order denying the motion for attorney fees.

In addition, three requests for judicial notice have been filed. We deny all of them (Discussion section, part I.E.).

THE PARTIES

The parties to the litigation are:

1. Cross-complainant and appellant Susan and her brother, James Lintz (James), are the adult children of the late Robert Lintz. James is not a party to any of these appeals.
2. Cross-defendant Dohr is a former employee of Robert Lintz and Susan's ex-husband. Dohr is not a party to any of these appeals.

3. Cross-defendant Child is a business associate of Dohr. Child is not a party to any of these appeals.

4. Cross-defendant and respondent Amberhill is alleged to be an alter ego of Dohr and Child. Amberhill was the manager of Atavus.

5. The following eight cross-defendants and respondents are alleged to be alter egos of Dohr: Grey Goose Development, LLC; Grey Goose Investments, LLC (Grey Goose Investments); Castletown Investments, LLC; Blue Goose Development, LLC (Blue Goose Development); Blue Goose Investments, LLC; Margate Holdings, LLC; Songbird Investments, LLC; and Yellow Duck Investments, LLC (Yellow Duck Investments). Collectively, these entities will be referred to as the Dohr Companies.

6. The following two cross-defendants and respondents are alleged to be alter egos of Child: GGG3, LLC (GGG3), and MJ3, LLC (MJ3). Together, these entities will be referred to as the Child Companies.

7. Cross-defendant Sterling Homes Corporation (Sterling) is a Nevada corporation and is not a party to any of these appeals. Susan and James are shareholders of Sterling. A core issue is the percentage of Sterling stock owned by Susan.

8. Cross-defendant Atavus Investments, LLC (Atavus), is a California limited liability company and is not a party to any of these appeals. Susan, James, and Sterling are members of Atavus.

9. Cross-defendant and respondent Robert Williams is an accountant. Cross-defendant and respondent ILA Consulting, Inc. (ILA), is a California limited liability company and is alleged to be the alter ego of Williams. Williams and ILA are alleged to have provided professional services for Sterling, Atavus, and Amberhill.

10. Cross-defendant and respondent Paddock Jones Morse, Inc. (PJM), is a professional accountancy corporation. PJM appears in the appeal as Paddock Sheck Morse, Inc. Cross-defendant and respondent Leon Jones is alleged to have been a partner

of PJM. PJM and Jones are alleged to have performed accounting services for Sterling and Atavus, and Jones is alleged to have performed accounting services for Susan.

11. Cross-defendant William Frederic Dohr Revocable Trust Dated January 22, 1999 (the Dohr Trust) is not a party to any of these appeals.

PROCEDURAL HISTORY

I.

Dohr's Complaint/Susan's Cross-complaint

Dohr initiated the litigation by filing a complaint against Susan for declaratory relief. For our purposes, Dohr's complaint is relevant only because it was the means by which the litigation started.

In response to the complaint, Susan filed a cross-complaint against Dohr and others. At the same time, Susan filed a separate complaint against Amberhill, Dohr, Child, the Dohr Companies, the Child Companies, Williams, ILA, PJM, Jones, and others, asserting the same claims made in the cross-complaint but as derivative claims on behalf of Sterling and Atavus. Susan consolidated the claims of her cross-complaint and those of her derivative action in the second amended cross-complaint.

II.

Third Amended Cross-complaint

The third amended cross-complaint named the following as cross-defendants: Dohr, Amberhill, Child, Williams, ILA, PJM, Jones, the Dohr Companies, the Child Companies, Sterling, Atavus, James, and the Dohr Trust. No charging allegations were made against Sterling, Atavus, James, and the Dohr Trust: They were named as nominal cross-defendants because Susan asserted derivative causes of action on their behalf.

The third amended cross-complaint asserted 12 causes of action, as follows:

1. First Cause of Action

- a. For breach of fiduciary duty
- b. By Susan individually
- c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies

2. Second Cause of Action

- a. For breach of fiduciary duty
- b. By Susan on behalf of Sterling and Atavus (derivative)
- c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies

3. Third Cause of Action

a. For fraud and misrepresentation (when a cause of action is for fraud and misrepresentation, we refer to it as for fraud).

- b. By Susan individually
- c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies

4. Fourth Cause of Action

- a. For fraud
- b. By Susan on behalf of Sterling and Atavus (derivative)
- c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies

5. Fifth Cause of Action

- a. For fraudulent concealment
- b. By Susan individually
- c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies

6. Sixth Cause of Action
 - a. For fraudulent concealment
 - b. By Susan on behalf of Sterling and Atavus (derivative)
 - c. Against Dohr, Child, Amberhill, Dohr Companies, and Child Companies
7. Seventh Cause of Action
 - a. For declaratory relief of alter ego status
 - b. By Susan individually and on behalf of Sterling and Atavus
 - c. Against Amberhill, Dohr Companies, and Child Companies
8. Eighth Cause of Action
 - a. For breach of contract and reformation of promissory note
 - b. By Susan individually
 - c. Against Amberhill
9. Ninth Cause of Action
 - a. For fraud
 - b. By Susan on behalf of Sterling and Atavus (derivative)
 - c. Against Williams and ILA
10. Tenth Cause of Action
 - a. For fraudulent concealment
 - b. By Susan on behalf of Sterling and Atavus (derivative)
 - c. Against Williams and ILA
11. Eleventh Cause of Action
 - a. For professional malpractice
 - b. By Susan on behalf of Sterling and Atavus (derivative)
 - c. Against Williams and ILA

12. Twelfth Cause of Action

- a. For professional malpractice
- b. By Susan on behalf of Sterling and Atavus (derivative)
- c. Against PJM and Jones

The trial court sustained without leave to amend demurrers by the Dohr Companies and the Child Companies to all causes of action alleged against them, and sustained without leave to amend demurrers by Amberhill to the first seven causes of action. A “partial judgment” was entered on February 20, 2013, in favor of Blue Goose Development and Yellow Duck Investments. A separate judgment was entered on March 6, 2013, in favor of Amberhill, the remaining Dohr Companies, and the Child Companies.

Susan filed a notice of appeal from the judgment in favor of Blue Goose Development and Yellow Duck Investments, which was docketed as No. G048325. Susan filed a separate notice of appeal from the judgment in favor of Amberhill, the remaining Dohr Companies, and the Child Companies, which was docketed as No. G048381.

III.

Fourth and Fifth Amended Cross-complaints

Susan filed a fourth amended cross-complaint which deleted the seventh cause of action, the Dohr Companies, and the Child Companies. The fourth amended cross-complaint named Amberhill and Atavus as cross-defendants to the eighth cause of action. The trial court sustained without leave to amend demurrers brought by Amberhill and Dohr to the eighth cause of action and by PJM and Jones to the 12th cause of action. On March 6, 2013, a judgment was entered in favor of PJM and Jones. Susan filed a notice of appeal from the judgment in favor PJM and Jones, which was docketed as No. G048382.

Susan filed a fifth amended cross-complaint that deleted the seventh, eighth, and 12th causes of action. The trial court sustained without leave to amend demurrers brought by Williams and ILA to the ninth, 10th, and 11th causes of action. The court overruled demurrers brought by Dohr and Child. Judgment in favor of Williams and ILA was entered on May 28, 2013. Susan timely filed a notice of appeal from the judgment in favor of Williams and ILA, which was docketed as No. G048520.

ALLEGATIONS
(THIRD AMENDED CROSS-COMPLAINT)

We review in detail the allegations of the third amended cross-complaint as to the general allegations and to Susan’s first seven causes of action, which were asserted against Dohr, Child, the Dohr Companies, the Child Companies, Amberhill, and the nominal cross-defendants Atavus and Sterling. The allegations of the eighth cause of action (breach of contract and reformation) of the fourth amended cross-complaint are reviewed in part I.F. of the Discussion section. The specific allegations against PJM and Jones are reviewed in part II. of the Discussion section, and the specific allegations against Williams and ILA are reviewed in part III. of the Discussion section. We accept the well-pleaded facts of Susan’s third amended cross-complaint as true. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

I.

General Allegations and Background

A. Robert Lintz’s Estate and Asset Protection Plan

Robert Lintz was a highly successful businessman and real estate developer in Orange County. Sterling served as his “anchor” corporate entity and, over the years, became the owner of many valuable assets, primarily real estate, either directly or through subsidiary and related corporations. Before selling his shares, Robert Lintz

owned 92 percent of Sterling stock, with Susan and James each owning 4 percent. Beginning in the 1980's, Dohr worked as an employee of Robert Lintz at Sterling.

Williams was primarily responsible for "initiating, structuring and implementing" Robert Lintz's estate and asset protection plan. Williams prepared a memorandum dated October 13, 1998, entitled "Overall Structure Planning," in which he described discussions with Robert Lintz and Dohr. In the memorandum, Williams concluded, "[Robert Lintz] is ready to move the assets of Sterling into an ownership position whereby the assets are owned by his children and other people close to Bob." Williams stated, "[Robert Lintz] has indicated that we [sic] simply wants enough money on an annual basis to live on."

The plan structured by Williams was to be accomplished in two steps, or "leg[s]" as Susan calls them. First, Robert Lintz would sell his stock in Sterling to a dummy corporation. Second, the dummy corporation would sell the Sterling stock to a new limited liability company owned by Susan, James, and Robert Lintz's grandchildren.

In the first leg of Robert Lintz's estate and asset protection plan, Robert Lintz sold his 92 percent interest in Sterling to Riviera Holdings, LLC (Riviera), in return for a promissory note in the face amount of \$15 million (the Riviera Note). Once completed, this first leg would transfer Robert Lintz's holdings in Sterling to a family-owned investment company at an historic low tax basis.

Robert Lintz and Williams approached Dohr and another employee, named Dean Duncan, and asked them to cooperate in carrying out Robert Lintz's directives regarding the second leg of the transaction. This second leg was a "back-end" sale/transfer of 100 percent of Sterling's assets to the new family investment company. At this time, Robert Lintz's family included his daughter, Susan (age 42 years), son, James (age 41 years), grandson, Peter (age 12 years), grandson, Morgan (age 8 years), and daughter, Mackenzie (age 8 years), from his third wife.

“To effectuate the stock sale, accountant Williams structured Riviera . . . to be owned 50% by Duncan and 50% by Dohr as ‘safe interim owners’ of the Sterling stock. Dohr and Duncan were to have no upside or downside for themselves in any part of Robert’s estate planning transaction. It was never intended that Dohr or Duncan would profit from the estate planning transactions or pay off the Riviera Note personally. All Riviera Note payments to Robert were to come from the assets of Sterling itself.” In December 2000, Duncan withdrew as an interim co-owner of Robert Lintz’s stock, and Dohr was substituted in as the sole interim owner.

Riviera was supposed to pay the Riviera Note in a complicated two-step process by which Dohr acted as a conduit for note payments from Sterling to Robert Lintz. First, Sterling was to distribute assets to Dohr in exchange for a portion of Dohr’s interim stockholding in Sterling. Second, Dohr was to use those distributed assets to make principal and interest payments to Robert Lintz on the Riviera Note. Dohr never used any of his own money to pay off the Riviera Note or to purchase any stock in Sterling for his own benefit. The Riviera Note was supposed to have been paid off in full as of December 31, 2002.

B. Creation of Atavus and Transfer of Assets

By November 2002, Robert Lintz was ready to complete the “second leg” of his estate and asset protection plan. Riviera had become an “unnecessary entity” and Williams recommended the creation of Atavus as a new family investment company to serve as the ultimate repository of Sterling’s assets.

Williams explained that Dohr’s very limited role was to “help with the implementation of Robert’s plan” and “Dohr’s nominal ownership of Sterling stock was solely as an accommodation to Robert and his family.” The purpose of the estate and asset protection plan was “to transfer the Sterling assets from one generation of Robert’s family to another, and Dohr’s duty was to cooperate with Robert and Robert’s adult

children (Susan and James) in selling/transferring 100% of the Sterling assets to the new entity that ultimately became Atavus.”

Williams was primarily responsible for the creation and formation of Atavus, which was intended to conduct all activities previously conducted by Sterling. In a memorandum dated November 10, 2003, Williams explained the purpose of Atavus as follows: “The entity is intended to create liquidity for the minor members only when they achieve adult age. The entity is intended to possess controls that prevent the minor members from realizing liquidity before that point. The adult members [Susan and James] will have the ability to realize liquidity currently through preference distributions to Sterling Homes, of which they are shareholders.” (Italics omitted.) The only members of Atavus were to be Sterling and Robert Lintz’s children and grandchildren. “Neither Dohr, nor Child, nor Amberhill, nor any of their related alter ego entities was included as a Member of Atavus.”

Susan and James were to own 100 percent of Sterling stock, while Dohr was to hold only a nominal interest in Sterling solely as an accommodation to Robert Lintz. Dohr’s ownership interest in Sterling ended on December 31, 2002, when “all of the 92% stock interest previously held by Robert was fully redeemed (even though the redemption was not properly recorded on the books and records of Sterling).”

C. Amberhill’s Role as Manager of Atavus

Atavus operated pursuant to a written operating agreement signed by its members. Amberhill acted as the manager of Atavus, with compensation set according to section 5.1.5 of the operating agreement. Articles 5 and 6 expressly define Amberhill’s manager duties, which “cover the full spectrum of Company operations.”

Section 3.1 of the operating agreement required each member to make an initial capital contribution in cash. Section 2.5 of the operating agreement defines capital contributions to mean “the total amount of money and the Initial Gross Asset Value of

property (other than money) contributed to the capital of [Atavus] by a Member, whether as an initial Capital Contribution or as an additional Capital Contribution.” Under section 3.2, additional capital contributions receive a preferential rate of return of 10 percent annually, and the amount of additional capital contributions and the preferential rate of return are entitled to preferential payment.

Starting in 2002, Sterling transferred to Atavus a real estate asset called “Riverlakes” and another real estate asset called “Regent Archibald.” Those two assets constituted additional capital contributions under section 3.2 of the operating agreement. The value assigned to Riverlakes and Regent Archibald was to be “Initial Gross Asset Value,” defined in section 2.11.1 as “the gross fair market value of such asset, as determined by the Manager.” Dohr and Williams undervalued Riverlakes and Regent Archibald by using “an artificial, ‘back-in’ valuation number which reflected their view of the amount of money that would supposedly be needed to pay off the Riviera Note.” In doing so, they breached the operating agreement and “completely disrupt[ed] Robert’s intent for his estate/asset protection plan.” Dohr and Williams also misstated the amount due on the Riviera Note, and, as of December 31, 2002, they should have recorded that note as fully paid.

Under the operating agreement, distributions of “Cash Available for Distribution” are within the manager’s discretion. Article 4 of the operating agreement sets forth an order of priority of distribution when such distributions are made. The third amended cross-complaint alleged, “[t]he Amberhill cross[-]defendants breached these provisions, and instead elected to distribute the vast proportion of Atavus cash to . . . *themselves.*”

D. *Susan’s Discovery of the Alleged Wrongdoing*

Robert Lintz did not discuss his estate and asset protection plan with Susan before he died in 2009. Whatever information Susan received about her father’s wishes

and intentions came from Dohr, Child, and accountants and attorneys for Sterling and Atavus. Information was withheld from Susan: “Sterling and Atavus financial statements, accounting reports, . . . tax documents and attorney presentation materials provided to Susan failed to disclose the true facts with respect to the ownership and affairs of Sterling and Atavus; misstated and concealed the true facts; and failed to include information which was necessary to make the information provided to Susan not misleading. The ownership and relevant business affairs of Sterling and Atavus were fraudulently concealed from Susan.”

In July 2010, Susan retained legal counsel and a forensic accountant to investigate the ownership and business affairs of Sterling and Atavus. Early in this forensic examination, Dohr and Child provided some financial documentation, but, at some point, declined to provide Susan’s forensic accountant with further documentation or to answer other questions. The preliminary findings and conclusions of Susan’s forensic accountant were presented in a detailed letter from Susan’s attorneys, dated July 28, 2011, which was attached to and incorporated into the third amended cross-complaint.

II.

Breach of Fiduciary Duty Allegations

The first and second causes of action of Susan’s third amended cross-complaint were for breach of fiduciary. The first cause of action was brought by Susan individually, and the second cause of action was brought by Susan derivatively on behalf of Sterling and Atavus. Both causes of action were based on the same allegations of wrongdoing. Both causes of action were asserted against Dohr, Child, Amberhill, the Dohr Companies, and the Child Companies.

“Central to the allegations of wrongdoing” was the “core misrepresentation” made by Dohr that he is “the legal, beneficial and equitable owner of

68% (or more) of the stock of Sterling” and that “Susan and her brother James are minority shareholders of Sterling with ownership interests of 16% (or less).” The third amended cross-complaint alleged Susan and James own 100 percent of Sterling stock while Dohr held only a nominal interest in Sterling solely as an accommodation to Robert Lintz. Dohr’s ownership interest in Sterling ended on December 31, 2002 when “all of the 92% stock interest previously held by Robert was fully redeemed (even though the redemption was not properly recorded on the books and records of Sterling).”

Dohr controlled Sterling in conspiracy with Child, Amberhill, and the Dohr Companies. The Child Companies managed and controlled Atavus through the rights and powers granted to Amberhill, as manager, under the operating agreement. The third amended cross-complaint alleged some 20 acts from 2002 through 2009 that allegedly constituted breaches of fiduciary duty owed to Susan, Sterling, and Atavus.

III.

Fraud and Fraudulent Concealment Allegations

The third and fourth causes of action were for fraud against Dohr, Child, Amberhill, the Dohr Companies, and the Child Companies. The third cause of action was brought by Susan individually, and the fourth cause of action was brought by Susan derivatively on behalf of Sterling and Atavus. Both causes of action are based on the same allegations of wrongdoing. The fifth and sixth causes of action were for fraudulent concealment against Dohr, Child, Amberhill, the Dohr Companies, and the Child Companies. The fifth cause of action was brought by Susan individually, and the sixth cause of action was brought by Susan derivatively on behalf of Sterling and Atavus.

The third through sixth causes of action were identical and based on the same allegations of wrongdoing. Those four causes of action incorporated the allegations of breach of fiduciary duty from the first and second causes of action and included the core allegation that Dohr falsely held himself out as “the legal, beneficial and equitable

owner of 68% (or more) of the stock of Sterling” and that “Susan and her brother James are minority shareholders of Sterling with ownership interests of 16% (or less).” The third through sixth causes of action alleged some 19 misrepresentations made by Dohr, Child, and/or Williams from 1999 through 2010.

STANDARD OF REVIEW

“We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. [Citation.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and matters of which judicial notice has been taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context. [Citation.] ‘We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court’s stated reasons. [Citation.]’ [Citation.]” (*Entezampour v. North Orange County Community College Dist.* (2010) 190 Cal.App.4th 832, 837.)

DISCUSSION

I.

Causes of Action Against the Dohr Companies, the Child Companies, and Amberhill (Appeal Nos. G048325 and G048381)

A. Outside Reverse Piercing of the Corporate Veil

With respect to the first seven causes of action of the third amended cross-complaint, at the outset, we address liability under the doctrine of outside reverse piercing of the corporate veil. The Dohr Companies, the Child Companies, and Amberhill contend the third amended cross-complaint premised liability against them entirely under that disapproved doctrine. Susan denies any reliance on the outside reverse piercing doctrine.

“Under the standard alter ego doctrine, in appropriate circumstances the corporate form may be disregarded and the corporate veil pierced so that an individual shareholder may be held personally liable for claims against the corporation. Some courts have recognized a variant of the alter ego doctrine, called third party or ‘outside’ reverse piercing of the corporate veil, by which the corporate veil is pierced to permit a third party creditor to reach corporate assets to satisfy claims against an individual shareholder.” (*Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1513 (*Postal Instant Press*).

In this case, application of outside reverse piercing of the corporate veil would mean that if the allegation of alter ego were proven, the Dohr Companies would be liable for the acts and debts of Dohr, the Child Companies would be liable for the acts and debts of Child, and Amberhill would be liable for the acts and debts of Dohr or Child. In *Postal Instant Press*, a panel of this court squarely and firmly rejected the doctrine of outside reverse piercing of the corporate veil. (*Postal Instant Press, supra*, 162 Cal.App.4th at pp. 1513, 1517-1524.) Outside reverse piercing of the corporate veil is not a permissible means of recovery against the Dohr Companies, the Child Companies, or Amberhill.

*B. Breach of Fiduciary Duty
(First and Second Causes of Action)*

1. Liability Based on Alter Ego

Susan argues she does not rely upon the doctrine of outside reverse piercing of the corporate veil, but instead argues the Dohr Companies and the Child Companies owed her, Sterling, and Atavus fiduciary duties by virtue of their alter ego relationships with Dohr and Child.¹ Susan asserts, “[t]here is no need to plead separate and stand alone

¹ For purposes of the appeal, we accept as true the allegations that Dohr and Child owed fiduciary duties to Susan, Sterling, and Atavus. Dohr and Child brought demurrers to the

legal duties owing from each of the Related Alter Ego Entities because the legal duties owed by Dohr and Child apply with full force to their alter egos.” (Underscoring omitted.) We reject this theory as it is a version of outside reverse piercing of the corporate veil. The fiduciary duties owed, respectively, by Dohr and Child were personal to them. Susan does not contend otherwise. To extend those personal duties, and any liability arising from their breach, to the corporate alter egos is the same as attempting to reach corporate assets to satisfy claims against individual shareholders. (*Postal Instant Press, supra*, 162 Cal.App.4th at p. 1518.)

In support of her argument, Susan relies on *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1136, 1144, in which an attorney and several corporations, for which the attorney was the alter ego, were held liable for breaches of fiduciary duty owed by the attorney to his clients, Doris Day and Martin Melcher. Susan argues: “Nowhere in the *Day* opinion is there any requirement that each [attorney] alter ego entity must have its own stand alone legal duty to Doris Day and Martin Melcher. In the *Day* case, it was sufficient that [the attorney] have a fiduciary duty to the Melchers.” (Underscoring omitted.) But the issue of alter ego liability was not addressed in the *Day* opinion and apparently was not contested on appeal. “[A]n opinion is not authority for a proposition not therein considered.” (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

2. *Liability Based on Allegations of Direct Participation and Wrongdoing*

a. *Dohr Companies and Child Companies*

Susan’s other theory for imposing liability against the Dohr Companies and the Child Companies is that the third amended cross-complaint included allegations that the Dohr Companies and the Child Companies directly participated in the wrongdoing by

fourth amended cross-complaint on the ground, among others, that Susan failed to plead facts establishing they were fiduciaries. The trial court overruled the demurrers.

Dohr and Child and engaged in wrongful conduct of their own.² Because the Dohr Companies and the Child Companies did not owe Susan fiduciary duties, their alleged wrongful conduct could not constitute a breach of such duties. A nonfiduciary may be held liable for aiding and abetting a breach of fiduciary duty (See *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476-1478), but Susan does not argue an aiding and abetting theory against the Dohr Companies or the Child Companies.

b. *Amberhill*

The trial court treated Amberhill in the same way as the Dohr Companies and the Child Companies in sustaining without leave to amend Amberhill's demurrer to the third amended cross-complaint. That was error. Amberhill is in a different position from the Dohr Companies and the Child Companies because Amberhill was alleged to have been the manager of Atavus, which is a limited liability company. "The manager [of a limited liability company] owes the same fiduciary duties to the limited liability company and to its members as a partner owes to a partnership and to the partners of the partnership." (*People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212, citing Corporations Code former section 17153.) Susan is a member of Atavus.

The third amended cross-complaint included allegations of wrongdoing by Amberhill, which constituted breaches of its fiduciary duties owed to Atavus and its members. Most importantly, though not exclusively, paragraph 55.(N) of the third amended cross-complaint alleged Amberhill improperly borrowed \$4,719,755 from Atavus but repaid only \$2,544,131. Paragraph 55.(S) alleged that from 2002 through 2009, Amberhill "looted" over \$5 million from Atavus and Sterling "through improper,

² The third amended cross-complaint alleged that each cross-defendant "conspired one with another" to commit fraud and breach of fiduciary duties. The trial court concluded the third amended cross-complaint failed to allege facts to show the Dohr Companies and the Child Companies conspired with Dohr and Child. On appeal, Susan does not advance her conspiracy theory.

excessive and unauthorized management fees” and Amberhill “charged unauthorized management fees to numerous projects or entities in which Atavus had an interest, and to Sterling itself.”

*C. Fraud and Fraudulent Concealment
(Third through Sixth Causes of Action)*

The misrepresentations and acts of concealment alleged in the third through sixth causes of action were alleged to have been made or carried out by Dohr, Child, Dohr’s attorney, Williams, or PJM. With two exceptions, none of the alleged misrepresentations or acts of concealment was alleged to have been made or carried out by the Dohr Companies, the Child Companies, or Amberhill. None of the alleged misrepresentations or acts of concealment was alleged to have been made or carried out by Dohr or Child while acting on behalf of the Dohr Companies, the Child Companies, or Amberhill.

The two exceptions pertain to Amberhill. First, at paragraphs 99.(E), 119.(E), 139.(E), and 159.(E) of the third amended cross-complaint, it was alleged: “Dohr, Child and Williams have consistently represented from and after December 31, 2002 that a balance remained due on the Riviera Note in the amount of approximately \$4.8 million from and after December 31, 2002. This representation has been made orally to Susan on multiple occasions by Dohr, *and is expressed in writing in two schedules which Susan is informed and believes were prepared by Amberhill and Child* premised upon general journal accounting entries generated by ILA Consulting (Robert Williams) on the books and records of Sterling.” (Italics added.)

Second, paragraphs 99.(P), 119.(P), 139.(P), and 159.(P) of the third amended cross-complaint alleged Dohr and Child concealed “that excessive and unauthorized management fees in excess of \$5 million” were taken by Amberhill as manager of Atavus. Paragraphs 55.(S) and 76.(S) alleged Amberhill took in excess of

\$5 million in “improper, excessive and unauthorized management fees” from Atavus. Paragraphs 55.(S) and 76.(S) were part of the breach of fiduciary duties causes of action and were incorporated into the fraud and fraudulent concealment causes of action. Dohr was alleged to have been the principal owner of Amberhill, Child was alleged to have been its chief financial officer, and Amberhill was a fiduciary of Atavus and its members. Thus, a reasonable interpretation of those allegations is that Amberhill was alleged to have concealed the \$5 million in excessive management fees. These two exceptions are enough to keep alive the causes of action against Amberhill for fraud and fraudulent concealment.

Each of the third amended cross-complaint’s causes of action for fraud and fraudulent concealment incorporated by reference the allegations of the breach of fiduciary duty causes of action. None of those allegations in the breach of fiduciary duty causes of action implicated the Dohr Companies or the Child Companies.

*D. Declaratory Relief/Alter Ego
(Seventh Cause of Action)*

The seventh cause of action of the third amended cross-complaint sought a declaration “with respect to alter ego as to and among Amberhill, Dohr, Child and the Related Alter Ego Entity cross defendants.” The trial court sustained demurrers to the seventh cause of action without leave to amend on the grounds “the conclusory allegations” were “woefully insufficient” and “inappropriate for declaratory relief.”

Susan failed to allege the bare necessities required to plead alter ego. Detailed pleading is not required, indeed, as explained in *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236, a plaintiff need allege “only ‘ultimate rather than evidentiary facts’” to support an alter ego theory. Those ultimate facts included domination and control, a unity of interest, use of the corporate alter ego as “a mere shell and conduit,” inadequate capitalization, failure to abide by the formalities of

corporate existence, use by the shareholder of the corporate assets as his or her own, and the recognition that the separate existence of the corporation would promote injustice. (*Id.* at p. 235.)

Susan did allege that Amberhill, the Dohr Companies, and the Child Companies “are mere conduits and instrumentalities of Dohr and Child” and that recognition of separate corporate existence “would work an injustice in this proceeding.” She did not, however, allege any of the other ultimate facts required for alter ego, i.e., domination and control, unity of interest and ownership, undercapitalization, failure to abide by corporate formalities, and commingling of assets. (*Rutherford Holdings, LLC v. Plaza Del Rey, supra*, 223 Cal.App.4th at p. 235.) The trial court was correct to sustain the demurrers to the seventh cause of action without leave to amend.

E. *Requests for Judicial Notice*

Susan has filed a request that we take judicial notice of a complaint in a case entitled *Dohr v. Lintz*, Orange County Superior Court case No. 30-2014-00705465; and a ruling and statement of decision, a notice of ruling, and a notice of entry of judgment in a case entitled *Shapiro v. Dohr*, Orange County Superior Court case No. 30-2009-00118305. According to Susan, the documents of which she requests judicial notice establish that Dohr had a judgment entered against him in the amount of \$5,141,372 in June 2014. She argues, “[t]he \$5.14 million judgment against Dohr and his ill-conceived lawsuit against Susan Lintz for \$14 million illustrate in the clearest possible way that Dohr is continuing his longstanding policy of vigorously resisting any recognition of his wrongful conduct.”

“The Court of Appeal has the same power as the trial court to take judicial notice of matters properly subject to judicial notice” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193, citing Evidence Code section 459), which include court records (Evid. Code, § 452, subd. (d)). But only relevant material may be

judicially noticed. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, disapproved on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.)

None of the documents of which Susan requests judicial notice is relevant to the issues in these appeals. With respect to the Dohr Companies, the Child Companies, and Amberhill, our decision is limited to the legal issue whether the first seven causes of action of the third amended cross-complaint and the eighth cause of action of the fourth amended cross-complaint stated causes of action against those cross-defendants. A complaint and judgment against Dohr in a different, though perhaps related, action are irrelevant to our resolution of that issue. Susan does not argue the judgment in *Shapiro v. Dohr* results in claim preclusion (*res judicata*) or issue preclusion (*collateral estoppel*).

In the event we were to grant Susan's request for judicial notice, the Child Companies have requested that we take judicial notice of two notices of appeal filed in *Shapiro v. Dohr*. Since we deny Susan's request for judicial notice, we also deny the Child Companies' request for judicial notice.

The Child Companies also have submitted a supplemental request that we take judicial notice of (1) a notice of ruling filed February 11, 2014, granting Dohr's motion for summary judgment or summary adjudication in the underlying case; (2) a minute order entered on October 9, 2014 in the underlying case; and (3) a minute order entered November 20, 2014 in the underlying case. The Child Companies argue, "[t]o the extent these rulings become final, the identical claims that Ms. Lintz seeks to revive on appeal on an alter-ego basis will become moot and preclude her from establishing prejudicial error." We deny the supplemental request for judicial notice because appellate review is limited to the record before the trial court when it made the challenged rulings. (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1021.) Although an exception to this rule is for postjudgment events that render the appeal moot (*Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813), the Child Companies have not

explained how the orders on the summary judgment motions would render these appeals moot. There is no indication that judgments have been entered, or, if so, whether Susan has appealed from them.

*F. Breach of Contract and Reformation
(Eighth Cause of Action)*

In the eighth cause of action of the fourth amended cross-complaint, Susan sought to reform a promissory note to name Amberhill as payor in place of Atavus and to recover from Amberhill for breach of the note. Susan alleged: “Prior to 2008, Amberhill became indebted to Susan in the amount of \$320,000 plus interest. Amberhill paid \$40,000 in principal against this indebtedness; and principal in the amount of \$280,000 plus accrued interest remains due, owing and outstanding from Amberhill to Susan on the debt. [¶] . . . On or about October 1, 2008, Amberhill purported to transfer its loan obligation of \$280,000 to Atavus, with no consideration flowing from Amberhill to Atavus as a result of this purported transfer. Amberhill’s purported attempt to transfer its loan obligation to Atavus without consideration was a breach of Amberhill’s fiduciary duty to Atavus; and Amberhill is (and remains) the true obligor on the debt owing to Susan.”

The fourth amended cross-complaint alleged that in February 2010, Amberhill issued a promissory note to Susan in the amount of \$280,000 with Atavus as payor. “In truth and in fact, this note reflects an obligation of Amberhill, not of Atavus, and the note is a false representation in writing by Amberhill (as manager of Atavus) that Atavus is a payor of the debt obligation.” Susan alleged the promissory note was issued with Atavus as payor “through fraud by Amberhill” or “through a mistake by Susan about the identity of the true payor of the note which Amberhill as manager and Atavus as payor at the time knew or suspected.” The promissory note did not express the parties’ true intention, “which was that Amberhill, not Atavus, was the payor and obligor on the

debt of \$280,000 represented by the written note.” Susan alleged she was not aware of the mistake until after her forensic accountant examined the books and records of Atavus, commencing in July 2010 with partial completion in July 2011.

We invited the parties to appeal No. G048381 to address the issue whether the eighth cause of action of the fourth amended cross-complaint stated a cause of action for a common count. We received a letter brief from Susan and a letter brief from Amberhill.

“The common law, from which we derive our forms of pleading known as the ‘common counts,’ knew a count for ‘money lent’ which was the appropriate form in which to state a cause of action for money loaned.” (*Jones v. Re-Mine Oil Co.* (1941) 47 Cal.App.2d 832, 843.) To state a common count for money lent, the plaintiff need only allege that the defendant is indebted in a certain sum for money loaned by the plaintiff and that the defendant has not repaid the money. (*Pleasant v. Samuels* (1896) 114 Cal. 34, 36-38; see 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 564, p. 691.)

The eighth cause of action met the requirements for alleging a common count for money lent. Susan alleged that Amberhill became indebted to Susan in the amount of \$320,000 plus interest, Amberhill has paid \$40,000 in principal against this indebtedness, and principal in the amount of \$280,000 plus accrued interest remains unpaid. No more is required.

Amberhill argues Susan cannot proceed on a common count under the rule that “if plaintiff is not entitled to recover under one count in a complaint wherein all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count.” (*Jones v. Daly* (1981) 122 Cal.App.3d 500, 510, quoting *Hays v. Temple* (1937) 23 Cal.App.2d 690, 695.) Amberhill asserts, “a common count would be based upon the same set of facts as the defective claims which the trial court dismissed.” Recovery under a common

count for money lent would not be based on the same set of facts as recovery for breach of contract and reformation of the promissory note. Instead, the common count would be based on a subset of those facts; that is, Susan loaned money to Amberhill and the debt has not been repaid. Susan cannot recover under both the promissory note and a common count, but her allegations Amberhill improperly assigned the debt to Atavus is consistent with a theory of recovery based on money lent.

Amberhill argues Susan failed to plead the requirement of consideration for the indebtedness. Consideration is an element of the common count of money and/or goods had and received, not the common count of money lent. (*First Interstate Bank v. State of California* (1987) 197 Cal.App.3d 627, 635.) Money lent is a different common count from money had and received. (*Langford v. Eckert* (1970) 9 Cal.App.3d 439, 443; see 4 Witkin, Cal. Procedure, *supra*, Pleading, §§ 561, 564.)

“A pleading which is sufficient as a common count is not generally subject to general demurrer or to special demurrer on the ground of uncertainty.” (*Moya v. Northrup* (1970) 10 Cal.App.3d 276, 279.) The order sustaining the demurrer to the eighth cause of action of the fourth amended cross-complaint without leave to amend is therefore reversed. Because the eighth cause of action pleaded a common count for money lent, we need not decide whether that cause of action sufficiently pleaded breach of contract or reformation.

II.

Cause of Action Against PJM and Jones (Appeal No. G048382)

In the 12th cause of action of the fourth amended cross-complaint, Susan asserted professional malpractice against PJM and Jones. The 12th cause of action was a derivative cause of action brought by Susan on behalf of Sterling and Atavus. Susan did not assert a personal cause of action against PJM or Jones.

In the 12th cause of action, Susan alleged, “PJM and Jones were retained by Sterling and/or Atavus to perform accounting services at relevant times from 2003 to 2008 and by Susan as her personal tax accounting professionals from 2000 to 2010.” The essence of Susan’s derivative claims against PJM and Jones was: “Among other things, PJM and Jones were retained by Sterling and/or Atavus to prepare and transmit reviewed financial statements for Atavus for the years ending December 31, 2003 through December 31, 2007, and had a duty to comply with the professional standards applicable to reviewing accountants. In particular, reviewing accountants have a duty to take steps in accordance with applicable professional standards such that their reviewed financial statements are not materially false and misleading in presentation. In the instance of reviewed financial statements for Atavus for the years ending December 31, 2003 and December 31, 2004, such financial statements were false and misleading in presentation, and PJM and Jones knew, or in the exercise of reasonable diligence should have known, of their falsity.”

Susan alleged, “PJM did not report in any of their reviewed statements the major misconduct that Dohr and Child were engaged in during the 2003-2007 time period.” In particular, PJM and Jones reported misleading valuations for Regent Archibald and “allowed the low valuation numbers to be presented in their reviewed financial statements without note or comment.” Susan alleged that, as a proximate result of the alleged malpractice, Dohr and Child were able to carry out their allegedly fraudulent conduct of “divert[ing] Regent Archibald distributions away from Atavus to themselves,” which occurred starting no later than 2005.

Susan failed to allege PJM or Jones owed a duty to Sterling. She alleged PJM and Jones were retained to prepare and transmit reviewed financial statements only for Atavus. An accountant retained by a corporation does not owe an independent duty of care to third parties. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 376.) Susan

did not allege, nor does she argue on appeal, that PJM or Jones was retained to prepare financial statements or engage in accounting work for Sterling.

The two-year limitations period of Code of Civil Procedure section 339, subdivision 1 applies to actions for accounting malpractice. (*Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 714.) “The two-year statute of limitations under section 339, subdivision 1 commences ‘when (1) the aggrieved party discovers the negligent conduct causing the loss or damage and (2) the aggrieved party has suffered actual injury as a result of the negligent conduct.’ [Citation.]” (*Id.* at p. 715.)

Susan filed her initial cross-complaint in the *Dohr v. Lintz* action and her separate complaint, both of which included a professional malpractice claim against PJM and Jones, in September 2011, far more than two years after Atavus suffered the alleged injury.

Susan alleged in the fourth amended cross-complaint, and argues on appeal, that she did not discover the alleged accounting malpractice until she received the preliminary result of her forensic accountant’s investigation during the period July 2010 to July 2011. In determining when the two-year statute of limitations commenced, we consider when Atavus, not Susan, discovered the negligent conduct causing the loss or damage. Although no reported California decision has addressed this issue, our conclusion is the logical product of shareholder derivative law and the purposes for statutes of limitations.

When a shareholder brings a derivative action on behalf of the corporation, the causes of action belong to the corporation. (*Frederick v. First Union Securities, Inc.* (2002) 100 Cal.App.4th 694, 697.) “A *derivative* action . . . does not transfer the cause of action from the corporation to the shareholders. Rather, the cause of action in a shareholder derivative suit belongs to and remains with the corporation. Such a lawsuit is derivative, i.e., brought in the ‘corporate right,’ to recompense the *corporation* for injuries done to it. [Citation.] Though it is named as a defendant, the corporation is ‘the

real plaintiff and it alone benefits from the decree; the stockholders derive no benefit therefrom except the indirect benefit resulting from a realization upon the corporations' assets.' [Citation.]" (*McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 382, citing *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107.)

Because the derivative cause of action belongs to the corporation, and the corporation is the real plaintiff, it is the corporation's, not the shareholder's, discovery of the negligent conduct causing the loss or damage that would be relevant to commencement of the statute of limitations. Further delaying commencement until a shareholder also discovers the conduct is contrary to the purpose of statutes of limitations. "Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.) Once the holder of the shareholder derivative cause of action—the corporation—discovers the alleged wrongdoing, it would be unjust to deny the defendant the right to defend within the limitations period.³

The fourth amended cross-complaint alleged that Dohr and Child were aware of the alleged accounting malpractice at the time it occurred. Indeed, Susan alleged PJM's undervaluation of Regent Archibald on reviewed financial statements of

³ Susan's theory that commencement of the statute of limitations of a shareholder derivative cause of action is tied to a shareholder's discovery of the wrongful conduct leads to the question: discovery by which shareholder? Does the statute of limitations commence upon the first discovery of a shareholder of the wrongdoing, or upon the last discovery by a shareholder of the wrongdoing? Susan's theory also raises a troubling alter ego issue. By equating the corporation's discovery and knowledge of the wrongdoing with a shareholder's discovery and knowledge, Susan's theory blurs the distinction between the corporate existence and that of its shareholders.

Atavus allowed Dohr and Child to divert Regent Archibald distributions to themselves. Dohr and Child were the principals of Amberhill, which was the manager of Atavus under the operating agreement.

Susan argues that pegging commencement of the statute of limitations of a shareholder derivative cause of action for professional malpractice to the corporation's discovery of the alleged wrongdoing would leave a shareholder without recourse if the corporation fails to take timely action. The shareholder is not without recourse. In that situation, the shareholder may seek recovery against the officers and directors of the corporation, who failed in their duties.

To the extent Susan is pursuing her allegations of fraudulent concealment of the cause of action (it is unclear whether she is), the alleged concealment of Dohr, Child, or Williams did not and cannot toll the applicable statute of limitations. When a defendant conceals a cause of action, the statute of limitations is tolled. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 533.) “[T]he defendant’s fraud in concealing a cause of action against him tolls the applicable statute of limitations” [Citations.] In articulating the doctrine, the courts have had as their purpose to disarm a defendant who, by *his own* deception, has caused a claim to become stale and a plaintiff dilatory. [Citations.]” (*Ibid.*, italics added.) Thus, only fraudulent concealment by PJM or Jones could toll the statute of limitations on the accounting malpractice cause of action. Susan did not allege either of them engaged in fraudulent concealment.

III.

Causes of Action Against Williams and ILA (Appeal No. G048520)

In appeal No. G048520, Susan challenges the judgment entered in favor of Williams and ILA after the trial court sustained without leave to amend their demurrers to

the fifth amended cross-complaint. Susan asserted three causes of action against Williams and ILA: fraud (ninth cause of action), fraudulent concealment (10th cause of action), and professional malpractice (11th cause of action). All three causes of action were derivative causes of action brought by Susan on behalf of Sterling and Atavus. Susan did not assert a personal cause of action against Williams or ILA.

Williams and ILA include in their respondents' brief a "Statement of Facts" (boldface, underscoring, & some capitalization omitted), which has not a single citation to the record. The respondents' brief is in blatant violation of rule 8.204(a)(1)(C) of the California Rules of Court. On our own motion, we strike the following from Williams and ILA's respondents' brief: page 3, starting with "II [¶] Statement of Facts" (boldface, underscoring, & some capitalization omitted) through the first full paragraph on page 7, ending with "Williams did nothing wrong." (See *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427-428.) We do not consider the stricken passages.

A. Allegations

Susan alleged Williams is an accountant and was retained by Sterling, Atavus, Amberhill, Dohr, and Child to perform accounting services. She alleged ILA was "the corporate alter ego" of Williams and likewise was retained by Sterling, Atavus, Amberhill, Dohr, and Child to perform accounting services.

In the ninth cause action, Susan alleged that Williams and ILA, acting in conspiracy with Dohr and Child, made the following misrepresentations:

1. During the period 1999 through 2010, Williams, Dohr, Child, and Amberhill were carrying out the wishes and intent of Robert Lintz.
2. Dohr was intended to be and was the owner of all legal, equitable, and beneficial right, title, and interest in 68 percent (or more) of the stock of Sterling. This representation was affirmed in schedule K-1 tax documents provided to Susan each year, prepared by Williams and Child, and in letters over the years.

3. Dohr and Williams “consistently represented over a period of years” that their \$7 million valuation of the assets of Sterling was proper and legitimate. However, the undervaluation of Regent Archibald was a central factor which allowed Dohr and Child to divert Regent Archibald distributions to themselves.

4. After December 31, 2002, Dohr, Child, and Williams consistently represented that a balance remained due on the Riviera Note in the amount of about \$4.8 million.

5. In April 2003, Dohr, Child, and Williams prepared a fraudulent stock repurchase agreement purportedly affirming that Dohr’s 68 percent stock ownership position in Sterling was legitimate.

6. In January 2003, Dohr represented to Susan that money received from the sale of Coast Roof Company had been used to pay down the Riviera Note, and, in April 2003, Dohr represented to Susan that the money due to Robert Lintz in connection with the Sterling stock repurchase agreement also had been used to pay down the Riviera Note. Dohr, Child, and Williams concealed from Susan and failed to disclose to her that Dohr took Sterling assets in connection with the stock redemption transaction recorded as of December 31, 2002 and did not pay those assets over to Robert Lintz.

7. Dohr orally misrepresented to Susan that adult members of Atavus (Susan and James) “were not intended by Robert [Lintz] to receive liquidity on a current basis.” Dohr concealed Robert Lintz’s true intent that Susan and James were supposed to receive current liquidity distributions through their Sterling stock ownership. Susan alleged on information and belief that “Williams was aware of this misrepresentation, and conspired with Dohr in concealing Robert Lintz’s true intent that Susan and her brother were supposed to receive current liquidity distributions.”

8. The reviewed financial statements of Atavus for the years 2003, 2004, and 2005 included “improper and illegitimate valuations of the Atavus assets, specifically Regent Archibald” and were “false and misleading.” The misstatements in those

financial statements were alleged to have been based “in significant part” on “false and misleading accounting entries in the books and records of Atavus and Sterling which were generated by accountant Williams and ILA.” The fifth amended cross-complaint alleged, in detail, five allegedly false and misleading journal entries made by Williams.

In addition, Susan alleged: “Williams was the architect of many, many false and misleading accounting entries and computations in the Sterling books and records. . . . Williams breached professional responsibilities as an accountant, but perhaps even more significantly, Williams, Dohr and Child made false representations to Susan and concealed material facts from her directly at a meeting conducted on February 9, 2005.”

The 10th cause of action (fraudulent concealment) alleged that the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct prohibits a member of the accounting profession from “knowingly misrepresenting facts or subordinating his or her judgment when performing professional services.” The AICPA imposes the following obligation: “[I]f an accountant concludes that financial records of an entity could be misstated by an act of management, the accountant’s duty under the Code is to make his concerns known to the next higher level within the organization—to senior management, the audit committee, the board of directors, *or the company owners*.” Susan alleged that Williams had a duty to advise her and James about the wrongdoing of Dohr and Child. Williams was alleged to have violated other duties imposed by the AICPA Code of Professional Conduct, including the duty not to make false or misleading entries in an entity’s financial statements.

The 10th cause of action alleged Williams and ILA conspired with Dohr and Child to conceal material facts in breach of their duty of disclosure, and realleged the eight fraudulent acts from the ninth cause of action. The 10th cause of action realleged the remaining allegations of the ninth cause of action, including the allegation of the February 9, 2005 meeting. Based on the same allegations of wrongdoing alleged in the

ninth and 10th causes of action, the 11th cause of action alleged Williams and ILA committed professional malpractice.

B. *Fraud and Fraudulent Concealment*
(*Ninth and 10th Causes of Action*)

The ninth cause of action, for fraud, suffered a simple yet fatal pleading defect: Susan did not allege that Sterling or Atavus detrimentally relied on representations made by Williams or ILA. Justifiable or detrimental reliance on the alleged misrepresentation is a required element of a fraud cause of action. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Susan did allege she detrimentally relied, but the ninth cause of action (as well as the 10th and 11th causes of action) is a *shareholder derivative* claim.⁴ As we have explained, a shareholder derivative action belongs to the corporation, which is the real plaintiff. *McDermott, Will & Emery v. Superior Court, supra*, 83 Cal.App.4th at p. 382.) It was therefore necessary for Susan to allege how Sterling and Atavus detrimentally relied. She failed to do so.

The 10th cause of action, for fraudulent concealment against Williams and ILA, suffered a similar defect. An element of a cause of action for fraudulent concealment is that the plaintiff was unaware of the concealed fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.) Susan did not allege Sterling or Atavus was unaware of the concealed facts and would not have acted as they did if either had known of them.

⁴ Williams and ILA argue the ninth and 10th causes of action were not truly derivative in nature. Susan is adamant that the ninth and 10th causes of action are derivative and the relief those causes of action sought “is stated to be on behalf of Sterling and Atavus.” Susan is the master of her complaint (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1202), and it is not for us to decide which theories for her to advance and which causes of action to plead.

*C. Professional Malpractice
(11th Cause of Action)*

Williams and ILA argue the 11th cause of action is barred by the two-year statute of limitations of Code of Civil Procedure section 339, subdivision 1. (See *Sahadi v. Scheaffer, supra*, 155 Cal.App.4th at p. 714.) Susan filed her initial cross-complaint in the *Dohr v. Lintz* action and her separate complaint, both of which included fraud and professional malpractice claims against Williams and ILA, in September 2011, far more than two years after Sterling and Atavus suffered the alleged injury.

In the fifth amended cross-complaint, Susan included lengthy allegations explaining why and how her discovery of the alleged wrongdoing was delayed until she received the preliminary result of her forensic accountant's investigation during the period July 2010 to July 2011. But, as Susan emphasizes, the 11th cause of action was a derivative claim brought on behalf of Sterling and Atavus. As was the case with the causes of action against PJM and Jones, Susan did not allege delayed discovery by Sterling or Atavus—the real plaintiffs in this derivative cause of action. Although the fifth amended cross-complaint included allegations that Williams and ILA engaged in fraudulent concealment, Susan does not argue that Williams or ILA fraudulently concealed the professional malpractice cause of action, which would have tolled the statute of limitations. (*Regents of University of California v. Superior Court, supra*, 20 Cal.4th at p. 533.) The 11th cause of action is therefore time-barred.

IV.

**Attorney Fees
(Appeal No. G048520)**

Following entry of judgment, Blue Goose Development and Yellow Duck Investments brought a motion to recover \$15,046.25 in attorney fees from Susan. In appeal No. G048520, Blue Goose Development and Yellow Duck Investments appeal

from the trial court's order denying that motion. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if the trial court abused its discretion.

Blue Goose Development and Yellow Duck Investments sought attorney fees under section 10.6 of the operating agreement. Section 10.6 of the operating agreement, which was effective as of January 1, 2003,⁵ stated: "In the event that any action or proceeding is filed by any Member or by the Company as against the Company or any other Member to enforce any of the covenants or conditions hereof, the prevailing party shall be entitled to have and recover of [*sic*] and from the other reasonable attorneys' fees."

The trial court denied the motion for attorney fees on the ground that Dohr, Blue Goose Development, and Yellow Duck Investment were not members of Atavus under the operating agreement. The trial court correctly interpreted the operating agreement. Under the operating agreement, effective January 1, 2003, the members of Atavus were Sterling, Susan, James, Dohr (as trustee of the MacKenzie Sayre Lintz Trust, UTD October 12, 1993), Dohr and Susan (as custodians for Peter Christian Dohr under the California Uniform Transfers to Minors Act), and James (as custodian for Morgan Lintz under the California Uniform Transfers to Minors Act).

Neither Blue Goose Development nor Yellow Duck Investments is or was a member of Atavus. Thus, Susan's causes of action against them were not an action "filed by any Member or by the Company as against the Company or any other Member" under section 10.6 of the operating agreement.

Blue Goose Development and Yellow Duck Investments argue they should be treated as members of Atavus because Susan has asserted they are alter egos of Dohr, who is a member of Atavus, and therefore under reciprocity principles should be able to

⁵ The agreement recites the corporate name as Riverlakes Ranch Land Development Company, LLC. The name was later changed by amendment to Atavus.

recover attorney fees from her. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129.) Dohr is a member of Atavus but only in his capacity as trustee of the MacKenzie Sayre Lintz Trust, UTD October 12, 1993, and, with Susan, in his capacity as custodian for Peter Christian Dohr. Susan did not sue Dohr *qua* trustee or *qua* custodian. She sued him only in his individual capacity. Were Susan ultimately to prevail against Dohr in this lawsuit, she would not be able to invoke section 10.6 of the operating agreement to recover attorney fees from him. The order denying Blue Goose Development and Yellow Duck Investments's motion for attorney fees is affirmed.

DISPOSITION

Our disposition of the appeals and cost awards are as follows:

1. Appeal No. G048325: The judgment is affirmed. Respondents Blue Goose Development and Yellow Duck Investments shall recover costs incurred on appeal.

2. Appeal No. G048381: The judgment as to the first, second, third, fourth, fifth, and sixth causes of action of the third amended cross-complaint is reversed as to Amberhill and the matter is remanded for further proceedings. In all other respects, the judgment on the third amended cross-complaint is affirmed. The judgment as to eighth cause of action of the fourth amended cross-complaint is reversed and the matter is remanded for further proceedings. In the interest of justice, no party shall recover costs incurred on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

3. Appeal No. G048382: The judgment as to the 12th cause of action of the fourth amended cross-complaint is affirmed. Respondents PJM and Jones shall recover costs incurred on appeal.

4. Appeal No. G048520: The judgment as to the ninth, 10th, and 11th causes of action of the fifth amended cross-complaint is affirmed. Respondents Williams and ILA shall recover costs incurred on appeal. The order denying the motion for

attorney fees of Blue Goose Development and Yellow Duck Investments is affirmed. Respondent Susan Lintz shall recover costs incurred on appeal against Blue Goose Development and Yellow Duck Investments only.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.