APPENDIX A-(i)

(i) Panel Denied EN BANC Hearing Jan 07, 2025

(ii) Sep 27, 2024, Appeal Court's Memorandum

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 7 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KIRTI MEHTA, Plaintiff-Appellant, v. VICTORIA PARTNERS, doing business as Park-Mgm Casino & Hotel Operator; et al., Defendants-Appellees.	No. 23-15244 D.C. No. 2:21-cv-01493-CDS-VCF District of Nevada, Las Vegas ORDER

Before: WARDLAW, BADE, and H.A. THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.

Mehta's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 51) are denied.

Mehta's motions "for stay order" (Docket Entry Nos. 55, 56) are denied.

No further filings will be entertained in this closed case.

APPENDIX: A-II

Sep. 27, 2024.

U.S. District Ct

Memorandum

AFFIRMED

NOT FOR PUBLICATION

FILED

SEP 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIRTI MEHTA, Plaintiff-Appellant, v. VICTORIA PARTNERS, doing business as Park-Mgm Casino & Hotel Operator; ANN HOFF; LONDON SWINNEY; MGM INTERNATIONAL; BILL HORNBUCKER; TERRENCE LANNI; JOSEPH A. CARBO, Jr.; RYAN GUADIZ; PAUL SALEM; TRAVIS LUNN; NIKLAS RYTTERSTROM; BRANDON DARDEAU; CLIVE HAWKINS; CHUCK BOWLING; ANTON NIKODEMUS, Defendants-Appellees.	No. 23-15244 D.C. No. 2:21-cv-01493-CDS-VCF MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Cristina D. Silva, District Judge, Presiding

Submitted September 17, 2024**

Before: WARDLAW, BADE, and H.A. THOMAS, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Kirti Mehta appeals pro se from the district court's judgment dismissing his action alleging various federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). We affirm.

The district court properly dismissed Mehta's claims against defendants Park MGM, LLC, Ann Hoff, London Swinney, William Hornbuckle, Joseph Corbo, Jr., and Ryan Gaurdiz because Mehta failed to allege facts sufficient to state any plausible claim against them. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (citation and internal quotation marks omitted)); *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280-81 (Nev. 2009) (setting forth elements of a negligence claim in Nevada); *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 798 (Nev. 2009) (explaining that commercial liquor vendors cannot be held liable for damages related to any injuries caused and sustained by the intoxicated patron in Nevada); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992) (setting forth elements of a fraud claim); *Sports Form, Inc. v. Leroy's Horse & Sports Place*, 823 P.2d 901, 904 (Nev. 1992) (explaining that no private cause of action exists under Chapter 463 of the Nevada Revised Statutes).

The district court did not abuse its discretion by dismissing Mehta's claims against the remaining defendants because Mehta failed to obtain a waiver or provide proof of service to the district court in accordance with Fed. R. Civ. P. 4(d), and otherwise failed to show good cause for failure to serve the summons and complaint in a timely manner, despite being given notice and an opportunity to do so. *See* Fed. R. Civ. P. 4(a)-(c) (setting forth requirements for service of process); Fed. R. Civ. P. 4(d) (setting forth requirements for waiver of service); Fed. R. Civ. P. 4(m) (explaining that district court must dismiss for failure to serve after providing notice and absent of a showing of good cause for failure to serve); *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 511 (9th Cir. 2001) (setting forth standard of review).

The district court did not abuse its discretion by denying Mehta leave to file a second amended complaint because amendment would have been futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that leave to amend may be denied when amendment would be futile); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008) (explaining that "the district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by granting reduced attorney's

fees for Park MGM because the release agreement expressly provided for such an award. *See CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1104 (9th Cir. 2007) (setting forth standard of review); *Davis v. Beling*, 278 P.3d 501, 515 (Nev. 2012) (explaining that, under Nevada law, attorney's fees may be awarded if the parties provided for such fees by express contractual provisions). Contrary to Mehta's contention, the district court retained jurisdiction to rule on defendants' motion for attorney's fees. *See Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956-57 (9th Cir. 1983) (the district court retains jurisdiction to award attorney's fees after a notice of appeal from the decision on the merits has been filed).

We reject as meritless Mehta's contention that the district court was biased against him.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Appellees' request for costs, set forth in the supplemental answering brief, is denied without prejudice to the filing of a bill of costs. All other pending motions and requests are denied.

AFFIRMED.

APPENDIX B

Jan 17, 2013,
County Defendant's
Motion to Dismiss

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Kirti A. Mehta,

Plaintiff

v.

Victoria Partners, et al.,

Defendants

Case No. 2:21-cv-01493-CDS-VCF

Order Granting Defendants' Motion to Dismiss

[ECF Nos. 72, 73, 83, 84]

Five years ago, Bruno Mars informed the world that "gold jewelry shining so bright; strawberry champagne on ice" were items he liked. Bruno Mars, That's What I Like (Atlantic Records 2017). Now, plaintiff Kirti A. Mehta alleges that defendants Park MGM, its corporate officers, and various other entities did some things that Mehta dislikes, including denying Mehta complimentary concert tickets to a Bruno Mars performance. *See generally* First Am. Compl., ECF No. 66. The defendants who have been served now move to dismiss Mehta's amended complaint, arguing that there is no legal basis on which to hold defendants liable for Mehta's personal predilections. *See generally* Mot. Dismiss, ECF No. 73. Because Mehta's amended complaint alleges no facts which could support a claim against any defendant and as further amendment would prove futile, I grant the served defendants' motion and dismiss them from the first amended complaint with prejudice, deny all other pending motions as moot, and warn Mehta that I will dismiss claims against the yet-unserved defendants without prejudice if he fails to show good cause for not serving them.

I. Relevant Background Information[1]

a. Statement of Facts

This lawsuit stems from two trips Mehta took to Las Vegas in March and July of 2021. Mehta stayed at the Park MGM beginning on March 16, 2021, and seemingly enjoyed his vacation until the night of March 18. ECF No. 66 at 9. On that day, Mehta, who "is not a regular drinker . . . and avoids drinks as much as possible" because he takes medication for his blood pressure, diabetes, and anxiety, imbibed six bottles of beer at the Tropicana Casino & Hotel pool. *Id.* at 10. He returned to the Park MGM and started playing slots at 6:00 p.m. *Id.* After losing his free play[2] and $3,500 in cash, Mehta went to the high-limit room. *Id.* Beginning at 8:00 p.m., Mehta hit a series of slot jackpots totaling approximately $62,000. *Id.* at 9. By 5:00 a.m. on March 19, Mehta "was holding . . . around $62,000 in winning[s] . . . in his sport coat." *Id.* At that point, Mehta consumed a six-pack of Heinekens within twenty minutes. *Id.* He has "no knowledge" of what came next and states that he "does not remember what happen[ed]." *Id.* at 9–10. Defendants state, and Mehta does not dispute, that "Mehta blacked out and put his winnings back into slot machines." ECF No. 73 at 6. At roughly 8:00 a.m., Mehta's wife found him, and they returned to Mehta's hotel room. ECF No. 66 at 10. Mehta then "rested for 24 [hours]." *Id.* Despite Mehta's claim that he is not a regular drinker, this was not the first occasion when Mehta blacked out and lost large sums of money at a casino. *See* ECF No. 66 at 11–12 (admitting a similar situation occurred in March 2020 at the Park MGM, in 2019 at the Mirage,

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[1] Mehta names "MGM International, Inc." as a defendant in this case and references "MGM" several times throughout his first-amended complaint. *See generally* ECF No. 66. Defendants claim these entities do not exist but are named similarly to multiple entities affiliated with MGM Resorts International. ECF No. 73 at 3 n.1. Mehta is a pro se plaintiff, and "pro se pleadings must be construed liberally[.]" *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016). I do so here and thus consider Mehta's references to "MGM International, Inc." as references to "MGM Resorts International," and his references to "MGM" as either references to "Park MGM" or "MGM Resorts International" depending on the context.

[2] Free play refers to promotional casino chips or virtual currency awarded by a casino to a patron, often to entice the patron to the property. *See, e.g.*, *Harrah's Club v. State*, 659 P.2d 883, 885 (Nev. 1983) ("As part of their marketing and promotional activities, many casinos utilize gaming 'loss leaders' such as free slot play, promotional coupons or 'lucky bucks,' and free 'wheel of fortune' play. The casino patron has no 'stake' at risk in these promotional 'wagers,' as they cost the patron nothing.").

and "repeated[]" other times between 2005 and 2021 in multiple casinos across various states).

Upon waking, Mehta complained to multiple named defendants—including his host, Ryan Guadiz; Park MGM's then-president, Ann Hoff; and Park MGM's vice president of casino operations, London Swinney—that he had been overserved alcohol. ECF No. 66 at 10–11. After a few telephone conversations, Swinney offered Mehta two options: (1) he could accept $5,000 in free casino play to resolve his complaint, or (2) he could "pursue [his complaints to Swinney] from a legal standpoint" and "make a complaint with . . . the Nevada Gaming Control Board." ECF No. 66-1 at 10–11 (emails from Swinney). Mehta accepted the former offer and signed an agreement with defendant Joseph A. Corbo, Jr.—senior vice president and legal counsel acting as an authorized officer of MGM Resorts International—purporting to "release . . . *any* potential claim[s] [Mehta] had against the MGM parties and others" that "existed before June 7, 2021" in exchange for the $5,000 of free play. *Id.* at 13, 21–22. Mehta now challenges the validity of that agreement—even though he does not dispute signing it—because Swinney communicated the offer to him, but Corbo was the individual who signed the contract. ECF No. 66 at 15. However, Mehta has challenged the validity of the agreement only *after* accepting the Park MGM's offer of $5,000 in free play (plus a food-and-beverage credit of $500); returning to the Park MGM for a trip between July 1–5, 2021; and gambling away that $5,000. *Id.* at 14–16. He claims that upon his return to Las Vegas for that trip, he was deceived into spending his free play on slot machines that do not allow free play to trigger progressive jackpots (jackpots which grow over time in proportion to the amount of total amount of wagers placed on the machine). *Id.* at 16.

On July 2, 2021, Mehta alleges that he complained to Guadiz, whom Mehta overheard describing him as an "Indian free[-]loader" to another individual at the hotel. *Id.* at 17–18. The next day, Mehta requested three complimentary Bruno Mars concert tickets for a Fourth of July show at the Park MGM. *Id.* at 18. Mehta's request was denied because he did not "have enough play to qualify for comp[ed] tickets." *Id.* He alleges that "white players" received complimentary tickets to the Bruno Mars performance. *Id.* He does not describe further events from this trip. On

July 12, 2021, MGM sent Mehta a letter "regarding [his] dispute related to [his] gaming history with the MGM parties . . . in response to the various emails and the draft complaint [he] sent" following his Fourth of July trip. ECF No. 66-1 at 21–22. The letter explained MGM's bases for denying Mehta the complimentary Bruno Mars tickets, copied the release Mehta signed extinguishing his claims against the MGM defendants, and effectively banned Mehta from MGM properties. *Id.* Mehta claims that the letter was sent as retaliation for his legal demands. ECF No. 66 at 22–23.

b. Procedural History

Mehta initiated this suit on August 11, 2021, against MGM Resorts International, Park MGM, various other subsidiaries of MGM Resorts International, and some of its corporate officers. ECF Nos. 1, 3. Most defendants, including Park MGM and the executives listed in the original complaint (the "original defendants"), waived service. ECF No. 6. However, MGM Resorts International did not. Review of the docket indicates that MGM Resorts International was never served with this lawsuit. I dismissed Mehta's original complaint, finding his causes of action insufficiently pled, but granted him leave to amend on September 2, 2022. ECF No. 61.

Mehta filed an amended complaint—now the operative pleading—on October 6, 2022, adding a host of additional executives from (seemingly arbitrary) MGM-affiliated casinos. ECF No. 66. As with MGM Resorts International, these newly added defendants have not been served with Mehta's lawsuit, nor have they waived service. The original defendants moved for reconsideration of my order granting Mehta leave to amend, arguing that amendment to the original complaint by adding new defendants would prove futile and unfairly prejudicial. ECF No. 72. The original defendants—the only entities upon which Mehta has effectuated service—now move to dismiss Mehta's first amended complaint. ECF No. 73. Mehta responded, ECF No. 76, and the original defendants replied, ECF No. 79.

Mehta moved for default judgment while the motion to dismiss was still pending. ECF No. 78. I denied that motion, finding that default judgment is inappropriate when, as here, all of

the served defendants have actually defended themselves in this suit. ECF No. 82. Mehta now moves for reconsideration of my order denying default judgment. ECF No. 84. He also moves for declaratory relief, requesting that I rescind the release agreement described *supra* page 3 and exclude it as admissible evidence from the remainder of this suit. *See* ECF No. 83 at 1–3, 6 (arguing that the contract should be declared null and void because it was not properly executed). The original defendants oppose both motions. ECF Nos. 85, 87.

II. Legal Standard

Dismissal is appropriate under Rule 12(b)(6) when a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which it rests, and although a court must take all factual allegations as true, legal conclusions couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard "asks for more than a sheer possibility that the defendant has acted unlawfully." *Id.*

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). "However, material which is properly submitted as part of a complaint may be considered." *Id.* Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into one for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of "matters of public record." *Mack v. S. Bay Beer*

Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986).

III. Discussion

a. Motion to Dismiss

Mehta's lawsuit suffers from the fundamental problem that his first amended complaint describes no legal wrongdoing on the part of any defendant. He brings claims for (1) negligence against Park MGM and MGM Resorts International, (2) willful and wanton misconduct against all defendants, (3) national origin discrimination against MGM Resorts International, (4) disclosure violations and/or equal-access-of-information violations against MGM Resorts International, (5) retaliation against MGM Resorts International, and (6) emotional stress and distress against all defendants. ECF No. 66 at 8–24. His first, second, and sixth causes of action fail on their merits and have not remedied the defects that I identified in my prior order (ECF No. 61) when I dismissed Mehta's original complaint. I need not reach the merits of his third, fourth, or fifth causes of action (asserted against MGM Resorts International only) because Mehta has failed to serve MGM Resorts International altogether. I find that further amendment in this case would be futile and therefore dismiss Mehta's claims with prejudice. Finally, I deny the remaining pending motions in this case as moot.

1. Mehta's Negligence Claim is Barred by the Economic Loss Doctrine

I previously found that Mehta's original complaint may have stated a plausible case for negligence on its face, but I pointed out that the economic-loss doctrine precluded him from recovering his requested remedy of monetary damages. ECF No. 61 at 11–13. Mehta did not rectify this issue in his amended complaint. After reviewing Mehta's first-amended complaint, I conclude that he cannot make out a prima facie case for negligence and find that even if Mehta could plausibly plead a negligence claim, the economic-loss doctrine precludes recovery under that theory.

In Nevada, "to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280 (Nev. 2009). The existence of a duty is "a question of law to be determined solely by the courts." *Turner v. Mandalay Sports Ent., LLC*, 180 P.3d 1172, 1177 (Nev. 2008). Generally, a premises owner or operator owes entrants a duty to exercise reasonable care. *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 152 (Nev. 2012). However, Mehta pleads no facts supporting his claim that the Park MGM or MGM Resorts International owed him a duty, let alone that they breached it. Even if Mehta's allegations that the Park MGM overserved him alcohol are true, "it is well settled in Nevada that commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron, which are sustained by either the intoxicated patron or a third party." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 798 (Nev. 2009) (citing *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358, 359 (Nev. 1969); *Snyder v. Viani*, 885 P.2d 610, 612–13 (Nev. 1994)). This is because "Nevada subscribes to the rationale underlying the nonliability principle—that individuals, drunk or sober, are responsible for their torts." *Id.* Because Mehta has not pled—and cannot plead—that the Park MGM owed a duty to Mehta, breached its duty, and caused Mehta damages, his claim for negligence cannot proceed. And even if I were to find that Mehta adequately pled negligence, he would still be barred from proceeding with that claim under the economic-loss doctrine.

"The economic[-]loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 2000) (citation omitted), *overruled on other grounds by Olson v. Richard*, 89 P.3d 31 (Nev. 2004). The economic-loss doctrine exists to prevent contract law from drowning in a "sea of tort." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 866 (1986). It thus provides that certain economic losses are properly remediable

only in contract. *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007). The Nevada Supreme Court has applied this doctrine to negligence cases unrelated to products liability. *Id.* at 879 (collecting cases). The primary purpose of this doctrine is "to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 86–87 (Nev. 2000) (en banc).

In Nevada, the doctrine bars unintentional tort claims when a plaintiff seeks to recover "purely economic losses." *Calloway*, 993 P.2d at 1259 (citations omitted). "Purely economic loss is a term of art that does not refer to all economic loss but only to economic loss not recoverable as damages in a normal contract suit." *Progressive Ins. Co. v. Sacramento Cnty. Coach Showcase*, 2009 WL 1871947, at *4 (D. Nev. June 29, 2009) (citing *Giles*, 494 F.3d at 877). Economic losses are not recoverable "absent personal injury or damage to property other than the defective entity itself." *Calloway*, 993 P.2d at 1267.

Mehta's negligence claim seeks the remedy of purely economic losses, but even accepting the allegations in Mehta's amended complaint as true, as I must, I find that Mehta has not pled any personal injury or damage to property which could support such a remedy. *See generally* ECF No. 66. He does allege that the March 18–19, 2021, beer-induced blackout "caused emotional and physical injury when it was combine[d] with [Mehta] taking his daily medicines," *id.* at 10, but he fails to describe what injury he suffered or how any defendant's negligence contributed to the injury. Fundamentally, Mehta seeks to recover gaming losses from his slot play at a casino via a negligence suit— but he has not cited any law, nor can I find any, indicating that such an action is viable. I thus dismiss his first cause of action.

2. Mehta Has Not Plausibly Pled Willful and Wanton Misconduct or Fraud

Mehta's second claim for relief, titled "willful & wanton misconduct," alleges that the original defendants "attempt[ed] . . . to deceive and cheat" him in a variety of manners. ECF No. 66 at 15. Defendants claim that neither Nevada nor federal law recognize a standalone cause of

action for willful and wanton misconduct but agree that "[t]he label that a plaintiff places on his pleadings . . . does not determine the nature of his cause of action." *Johnson v. United States*, 547 F.2d 688, 691 (D.C. Cir. 1976); *Rains v. Criterion Sys.*, 80 F.3d 339, 343 n.2 (9th Cir. 1996). Nonetheless, according to Nevada law, willful misconduct in other contexts is "intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results." *Davies v. Butler*, 602 P.2d 605 (Nev. 1979); *see also Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220 (Nev. 1981) (defining willful misconduct as an act "that the actor knows, or should know, will very probably cause harm" (quotations and citations omitted)); *Bell v. Alpha Tau Omega Fraternity*, 642 P.2d 161 (Nev. 1982) (stating that willful misconduct "requires a consciousness that one's conduct will very probably result in injury").

Mehta's cause of action for willful and wanton misconduct could be construed as either a claim for aggravated or gross negligence or for fraud. For his part, Mehta seems to agree that his own allegation sounds in fraud. *See* Pl's Reply Br., ECF No. 76-1 at 2 (alleging that Swinney and other MGM executives "deceptively . . . committed fraud of will full [*sic*] wanton misconduct"). Furthermore, the substance of his specific allegations requires me to conclude that he meant to charge the defendants with fraud, and I thus analyze this cause of action as such.

First, Mehta alleges that the parties (i.e., himself and Corbo) to the release agreement did not actually witness each other sign the contract, as they instead circulated the document electronically to have parties sign it on their own. *Id.* This allegation appears to stem from either a misinterpretation or confusion regarding the language above the signatory page of the release agreement which states, "IN WITNESS WHEREOF, the Parties hereby execute this Agreement." ECF No. 66-1 at 13. He also alleges that Corbo's signature on the release agreement renders the agreement invalid, as he negotiated the agreement with Swinney, not Corbo. ECF No. 66 at 14–15.

Second, Mehta alleges that MGM Resorts International's offer of $5,000 free play was "designed to lie, cheat[,] and deceive players who come to play [at] MGM casinos" because the free play was not eligible for certain progressive slot jackpots. *Id.* at 15. Mehta played $4,300 of his $5,000 in free play on machines with such progressive jackpots. *Id.* at 16 ("Mehta played . . . [a] $100 denomination slot machine in [a] high[-]limit area, where [the] machine sticker said, free play is not allowed . . . and [it] took $4300 free play without any bonus spin [*i.e.*, it did not award Mehta an opportunity to win the progressive jackpot]."). Contradicting Mehta's claim of deception are Mehta's own admissions, *see id.* at 15–16 ("Mehta played . . . [a] slot machine in [the] high[-]limit area, where [a] machine sticker said" free play was not allowed), and his own photographs, which he attached as exhibits to his first amended complaint. *See* ECF No. 66-1 at 15–17 (zoomed-in photo states "FREE PLAY Not Available" on the left-hand exterior of the slot, above where Mehta would have inserted his player's card).

The elements of fraud under Nevada law require a plaintiff to plead (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or the defendant's insufficient basis for making the representation; (3) the defendant's intention to induce the plaintiff to act or refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage resulting from such reliance. *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992). The Federal Rules of Civil Procedure further heighten the pleading requirement for fraud, demanding that a plaintiff "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

Mehta cannot meet his pleading burden for fraud. Even if the boilerplate "in witness thereof" language on the signature page to the release agreement were a clause requiring each signatory to witness each other's signatures, Mehta does not explain how Carbo's signature induced his own reliance on the signature or what the resulting damages were. Furthermore, Corbo's signature on the agreement rather than Swinney's does not constitute a fraudulent

"misrepresentation" because nothing in the agreement states that Swinney would be the signatory—the contract required only that an authorized officer of MGM Resorts International sign the page. *See* ECF No. 66-1 at 13 (no mention of a specific signatory). Nowhere does Mehta allege that Corbo was not authorized to sign on behalf of MGM Resorts International.

As for Mehta's allegations regarding the free play and the limitations about how it could be redeemed, he cannot demonstrate that any misrepresentation occurred. His claim that he was "deceived" is not plausible given the fact that the machine he played on and took a photograph of explicitly mentions, "FREE PLAY Not Available" on its exterior. *Id.* at 15–17. Mehta does not state that anybody lied to him or otherwise contradicted the placard on the machine, that anyone knowingly misrepresented the availability of free-play jackpots, or that he relied upon such a misrepresentation. *See generally* ECF No. 66. Because Mehta's claim for willful and wanton misconduct sounds in fraud and he cannot meet the heightened pleading burden for fraud, I dismiss his second cause of action.

3. Mehta's Claim for Violations of NRS Chapter 463 Fails Because There is No Private Right of Action for Gaming Violations

Mehta also brings a claim for violations of Nevada's gaming regulations and statutes. ECF No. 66 at 14–16. While this appears to be intermingled with his fraud claim, I address it separately because no private cause of action exists for gaming violations, and thus Mehta's claim is not viable. The Supreme Court of Nevada has long held that "the legislature vested authority for enforcement of Chapter 463 [Nevada's statutes pertaining to licensing and control of gaming] in the Nevada Gaming Control Board and the Nevada Gaming Commission." *Sports Form v. Leroy's Horse & Sports Place*, 823 P.2d 901, 904 (Nev. 1992). "Therefore, absent express language to the contrary, the legislative scheme of Chapter 463 precludes a private cause of action." *Id.* Mehta cannot identify a specific statute that permits him to bring a cause of action for gaming violations. He references "NRS 465.070" in his reply brief when discussing "gaming fraud" but NRS 465.070 simply describes the elements of gaming fraud. *See generally* NRS

465.070. It does not permit an individual, like Mehta, to assert gaming violations via a lawsuit. *Id.* As a result, Mehta's claim for violations of the gaming control regulations must be dismissed.

4. Mehta's Claim for Emotional Stress and Distress Does Not Have a Remedy in Law

Mehta's final claim for relief alleges that he has lost sleep, gets more frequent anxiety attacks, and experienced financial issues to the point where he has "become financially broke" because of the defendants' actions. ECF No. 66 at 24. A showing of emotional distress may satisfy the damages element in some circumstances. *S. Nev. Adult Mental Health Servs. v. Brown*, 498 P.3d 1278 (Nev. 2021) (table) (recognizing that the negligent infliction of emotional distress can be an element of the damage sustained by the negligent acts committed against the plaintiff) (internal citations omitted). However, "emotional distress" does not stand alone as a cause of action, and Mehta has not identified authority permitting him to bring such a claim. To the extent that Mehta pleads damages resulting from emotional distress as part of his other causes of action (*i.e.*, his negligence- or fraud-based claims), those other causes of action have failed to survive dismissal. Consequently, Mehta's claim for emotional stress and distress must be dismissed as well.

5. Mehta's Claims against Unserved Defendants

I sua sponte address the issue of the unserved defendants who remain in this lawsuit: Travis Lunn, Niklas Rytterstrom, Brandon Dardeau, Clive Hawkins, Chuck Bowling, and Anton Nikodemus. *See* ECF No. 66 (adding these defendants as part of the first-amended complaint). The Federal Rules of Civil Procedure provide that "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). The court may extend the time for service if the plaintiff shows good cause. *Id.* Based on Mehta's continued failure to effect service on the newly added defendants, dismissal of these unserved defendants appears to be warranted. *Patrick v. McDermott*, 2019 WL 10255472, at *13 (C.D. Cal. June 24, 2019). Consequently, this order constitutes notice

465.070. It does not permit an individual, like Mehta, to assert gaming violations via a lawsuit. *Id.* As a result, Mehta's claim for violations of the gaming control regulations must be dismissed.

4. Mehta's Claim for Emotional Stress and Distress Does Not Have a Remedy in Law

Mehta's final claim for relief alleges that he has lost sleep, gets more frequent anxiety attacks, and experienced financial issues to the point where he has "become financially broke" because of the defendants' actions. ECF No. 66 at 24. A showing of emotional distress may satisfy the damages element in some circumstances. *S. Nev. Adult Mental Health Servs. v. Brown*, 498 P.3d 1278 (Nev. 2021) (table) (recognizing that the negligent infliction of emotional distress can be an element of the damage sustained by the negligent acts committed against the plaintiff) (internal citations omitted). However, "emotional distress" does not stand alone as a cause of action, and Mehta has not identified authority permitting him to bring such a claim. To the extent that Mehta pleads damages resulting from emotional distress as part of his other causes of action (*i.e.*, his negligence- or fraud-based claims), those other causes of action have failed to survive dismissal. Consequently, Mehta's claim for emotional stress and distress must be dismissed as well.

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to Mehta under Rule 4(m) that unless he shows good cause for the failure to serve these six "new" defendants, I will dismiss without prejudice this action against them. In addition, although the unserved defendants are listed in the caption of the amended complaint, they are not mentioned or referenced anywhere in Mehta's statement of facts or the recitations of his causes of action. *See generally* ECF No. 66. Therefore, dismissal of the unserved defendants for Mehta's failure to state any claims against them also appears to be warranted, as it is not clear from the face of his complaint how, if at all, these defendants are involved in this lawsuit.

No later than February 17, 2023, Mehta is ordered to file a response addressing his failure to serve the newly added defendants and whether (and how) there exists good cause for further extending the service deadline. He must also show cause why the newly added defendants should not be dismissed for his failure to state claims against them. If Mehta fails to file an adequate response by February 17, 2023, I will dismiss this action without prejudice as to the unserved defendants. As no claims or defendants will remain, I will order this case be closed on that date.

6. Amendment of the Complaint Would Prove Futile

After a party has amended a pleading once as a matter of course, it may only amend further after obtaining the court's leave or the adverse party's consent. Fed. R. Civ. P. 15(a). Generally, Rule 15 advises that "leave shall be freely given when justice so requires." *Id.* This policy is "to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 224 F.3d 708, 712 (9th Cir. 2001) (internal quotation omitted). District courts, when deciding whether to grant leave to amend, should consider "undue delay, bad faith[,] or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). It is the "consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Dismissal with prejudice and without leave to amend is inappropriate unless it is

clear that the complaint could not be saved by amendment. *Id.*

I have thoroughly considered the *Foman* factors and find that further amendment would be both futile and unduly prejudicial to the original defendants to this case. A claim is considered futile—and leave to amend to add to it shall thus not be given—if "there is no set of facts which can be proved under the amendment which would constitute a valid claim or defense." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 538–39 (N.D. Cal. 2003) (citing *Miller v. Rykoff-Sexton*, 845 F.2d 209, 214 (9th Cir. 1988)). There is no set of facts that can support Mehta's claim for negligence, as his damages are strictly economic in nature and are thus precluded by the economic-loss doctrine. There is no set of facts that can support Mehta's claim for willful and wanton misconduct, as Mehta has explicitly contradicted his own assertion of misrepresentation by providing evidence proving that the MGM defendants did not mislead him. There is no set of facts that could support Mehta's claim for gaming regulation violations, as violations of NRS Chapter 645 do not permit private causes of action. And finally, there is no set of facts that could support Mehta's isolated cause of action for emotional distress, as neither Nevada law nor federal law recognize emotional distress as a standalone claim.

Consequently, amendment of any of Mehta's claims would be futile. Allowing Mehta to continue this litigation against the original defendants would serve only to tether those individuals and entities to a lawsuit with no possibility of success on the merits. Because justice does not so require further amendment in this case, I dismiss Mehta's claims against the original defendants with prejudice.

b. Other Pending Motions

Having dismissed Mehta's claims against the original defendants with prejudice, I order that all other pending motions brought by and against the original defendants are now moot. The original defendants move for reconsideration of my prior order permitting Mehta to amend his original complaint. ECF No. 72. Mehta also requests declaratory relief (ECF No. 83) and reconsideration of my order denying his motion for default judgment (ECF No. 84). The

declaratory relief he seeks is moot as I have no basis for rescinding the release agreement. And the default judgment he seeks is moot as I have no basis for issuing a default judgment against parties who have been served, participated in the lawsuit, and are now being dismissed from it.

IV. Conclusion

IT IS HEREBY ORDERED that defendants' motion to dismiss **(ECF No. 73)** is GRANTED.

IT IS FURTHER ORDERED that the other motions pending in this case **(ECF Nos. 72, 83, 84)** are **DENIED as moot.**

IT IS FURTHER ORDERED that plaintiff must file, **no later than February 17, 2023**, a response explaining his failure to serve the newly added defendants and addressing whether and how there exists good cause for further extending the time for service. He must also show cause why the newly added defendants should not also be dismissed for Mehta's failure to state claims against them.

DATED: January 17, 2023

Cristina D. Silva
United States District Judge

APPENDIX C

(i) order denying Plaintiff's motion and Closing Case

(ii) [redacted]

(iii) Plaintiff's motion to Amend Complaint & Magistrate's order Granting Motion.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Kirti A. Mehta,

Plaintiff

v.

Victoria Partners, et al.,

Defendants

Case No. 2:21-cv-01493-CDS-VCF

Order Denying Plaintiff's Motions and Closing Case

[ECF Nos. 93, 94, 95, and 97]

On January 17, 2023, I issued an order granting defendants' motion to dismiss[1] wherein I ordered plaintiff to file, no later than February 17, 2023, a response explaining his failure to serve the newly added defendants ("new defendants") to his first amended complaint. ECF No. 91 at 12–13. I further ordered him to address if and how there was good cause to extend time for service. *Id.* at 15. Last, I ordered plaintiff to show cause why the new defendants should not also be dismissed for Mehta's failure to state claims against them. *Id.*

Shortly after issuing that order, Mehta filed a response that neither provided an explanation for failing not serve the newly added defendants, nor addressed why this action should be dismissed for failing to state a claim. *See generally* ECF No. 92. Instead, the filing makes unsupported allegations against opposing counsel and includes a request to file a second amended complaint.[2] *Id.* at 2. Plaintiff also filed a motion to vacate (ECF No. 93), a motion for sanctions (ECF No. 95), and an amended motion for sanctions (ECF No. 97). I address each pending filing herein.

[1] That order also dismissed several other motions as moot.

[2] Mehta then filed a motion for leave to file a second amended complaint on January 31, 2023 (ECF No. 94).

I. Discussion

Federal Rule of Civil Procedure 12(b)(5) authorizes dismissal when there is insufficient service of process. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("In the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as defendant.") (citations omitted). Service of process is a procedural requirement that must be met before because this court may exercise personal jurisdiction over a defendant. *Strong v. Countrywide Home Loans, Inc.*, 700 Fed. App'x 664, 667 (9th Cir. 2017) (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). Service is to be provided pursuant to the law of the forum state.[3] Fed. R. Civ. P. 4(e)(1). Ordinarily, services of a summons and complaint on a named party must occur within 90 days of the date a complaint is filed. Fed. R. Civ. P. 4(m). When service of process occurs within the United States, proof of service must be made to the court by the server's affidavit. Fed. R. Civ. P. 4(l)(1). A party may serve all other court "papers" via multiple delivery methods, including regular mail, personal delivery, and electronic means such as the court's electronic filing system. Fed. R. Civ. P. 5(a), (b). The Rules require a party to show proof of service for all other court documents through a "certificate of service." Fed. R. Civ. P. 5(d).

District courts have broad discretion to either dismiss an action entirely for failure to effectuate service or to quash the defective service and permit re-service. *See SHJ v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006). Here, the court has instructed the plaintiff of the failure to effectuate service on certain defendants two times (ECF No. 61 at 15–17; ECF No. 91 at 12–13). Plaintiff has not corrected or attempted to correct service, nor has plaintiff provided any explanation regarding why he has not properly served the defendants. Instead, he has only provided copies of envelopes showing he has mailed dockets to attorney Jason Sifers. ECF Nos. 92-2, 92-3, 92-4. One exhibit, 92-4, states that it was returned to sender.

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[3] The Nevada Rules of Civil Procedure provide that "[s]ervice upon the United States and its agencies, corporations, officers, or employees may be made as provided by Rule 4 of the Federal Rules of Civil Procedure." NRCP 4.3(5).

Service by mail is not permitted under Nevada or federal law. *Vaughn v. Nash*, 2018 WL 6055552, at *3 (D. Nev. Oct. 29, 2018); *Campbell v. Gasper*, 102 F.R.D. 159, 161 (D. Nev. May 18, 1984) (citation omitted) ("Service by mail, even if actually effected, does not constitute personal service."); *see also* Fed. R. Civ. P. 4(e); NRCP 4.2. Where service of process is insufficient, the district court has discretion to dismiss the action or to quash service. *S.J. Issaquah Sch. Dist. No. 411*, 470 F.3d at 1293. However, "[d]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained." *Id.* (citation omitted). Finding no reasonable prospect that Mehta serves the new defendants within the time limits permitted by the federal rules of civil procedure, I hereby dismiss plaintiff's amended complaint for failing to effectuate service.

I also deny plaintiff's motion for leave to file a second amended complaint (ECF No. 94). Federal Rule of Civil Procedure 15 states that "the court should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). To determine whether justice requires leave to amend, the court considers: (1) the presence or absence of undue delay, (2) bad faith, (3) dilatory motive, (4) "repeated failure to cure deficiencies" in previous amendments, and (5) futility of the amendment. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 181, 83 (1962)). "Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (quoting *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995)). Here, plaintiff has repeatedly failed to cure deficiencies in his pleadings and as failed to effectuate service within the timeframe proscribed by the Federal Rules of Civil Procedure, and after providing him time to explain why service as not been perfected. I find amendment to the complaint would be futile. Further, plaintiff's motion to amend fails to address why he should be permitted to file an amended complaint at this juncture; there is no explanation for the delay in seeking amendment. Accordingly, plaintiff's motion to amend (ECF No. 94) is

denied.

I also deny plaintiff's motion to vacate (ECF No. 93), which I liberally construe as a motion for reconsideration of my order denying plaintiff's motion for declaratory judgment and granting defendant's motion to dismiss.[4] ECF No. 91. Motions for reconsideration are "highly disfavored," LR 59-1, and "should not be granted, absent highly unusual circumstances." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted). Reconsideration is appropriate where the district court: "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." LR 59-1; *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Although the court enjoys discretion in granting or denying a motion under this rule, "amending a judgment after its entry remains an extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (internal quotation marks and citation omitted). Even liberally construing plaintiff's motion, he does not provide points and authorities to support the request the relief he seeks. *See* LR 7-2(d) ("The failure of a moving party to file points and authorities in support of the motion constitutes a consent to the denial of the motion."). Consequently, plaintiff's motion to vacate (ECF No. 93) is denied.

Last, plaintiff has failed a motion for sanctions (ECF No. 95) and an amended motion for sanctions (ECF No. 97). Mehta asks this court to impose sanctions upon Jason Sifers, including

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[4] The motion also includes a request that this case be reassigned because plaintiff believes there is a conflict. ECF No. 93 at 5. I liberally construe the request as a motion for recusal. A judge of the United States shall disqualify herself from a proceeding in which her impartiality "might reasonably be questioned." 28 U.S.C. § 455(a). In addition, a judge of the United States shall disqualify herself under circumstances in which she has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. 28 U.S.C. § 455(b)(1). Normally, a judge should not be recused when the only basis for the recusal motion is that the judge made adverse rulings in the case where the party seeks the judge's disqualification. *Liteky v. U.S.*, 510 U.S. 540, 555 (1994); *In re Marshall*, 721 F.3d 1032, 1041 (9th Cir. 2013); *see also United States v. Holland*, 519 F.3d 909, 913–14 (9th Cir. 2008) (Section 455(a) is "limited by the 'extrajudicial source' factor which generally requires as the basis for recusal something other than rulings, opinions formed[,] or statements made by the judge during the course of [proceedings]."). Plaintiff's request that I recuse myself from this action is based in his disagreement with my rulings in this case. This is an insufficient basis for recusal. Mehta's request for recusal is denied.

a request to revoke his bar license, for not waiving service of process, filing motions to dismiss, filing responses to plaintiff's motions, and other allegations. *See generally* ECF Nos. 95, 97. As I previously noted (*see* ECF No. 61 at 17-18), an attorney is subject to Rule 11 sanctions, among other reasons, when he presents to the court "claims, defenses, and other legal contentions ... [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" Fed. R. Civ. P. 11(b)(2). The Ninth Circuit has established that the word "frivolous" "to denote a filing that is both baseless and made without a reasonable and competent inquiry." *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co., Sec. Litig.)*, 78 F.3d 431, 434 (9th Cir. 1996). Plaintiff's motion is comprised of unsupported allegations, and further Mehta fails to demonstrate that defendants' filings were unwarranted or frivolous. Accordingly, plaintiff's motions for sanctions (ECF Nos. 95, 97) are DENIED.

II. Conclusion

IT IS HEREBY ORDERED that this action is dismissed, with prejudice, against all unserved defendants.

IT IS FURTHER ORDERED that plaintiff's motion to vacate (ECF No. 93) is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for sanctions (ECF Nos. 95, 97) are DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for leave to file a second amended complaint (ECF No. 94) is DENIED.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

DATED: February 6, 2023

Cristina D. Silva
United States District Judge

APPENDIX C (iii)

Amended ~~Two~~ Complaint is Granted by Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

KIRTI A. MEHTA.,

Plaintiff,

vs.

VICTORIA PARTNERS, *et al*,

Defendants.

2:21-cv-01493-CDS-VCF

ORDER

Plaintiff's Motion for Leave to Amend Complaint [ECF No. 62]

Judge Silva previously granted the defendant's motion to dismiss. ECF No. 61 at 16. Judge Silva dismissed all of plaintiff's claims without prejudice and with leave to amend, except she dismissed his Fourteenth Amendment claim with prejudice. *Id.* Judge Silva ordered that, "[l]eave to amend the complaint is granted as set forth in this Order." *Id.* Judge Silva also ordered that, "Mehta has twentyone (21) days from the date of this Order to file a motion to amend his Complaint containing an attachment of his proposed amended Complaint." *Id.*

Plaintiff timely filed his motion for leave to amend and attached a copy of his amended complaint. ECF No. 62. I grant plaintiff's motion. Plaintiff has seven days to file the proposed amended complaint.

I. Background

Plaintiff seeks leave to file a first amended complaint. Although he did not specify what types of amendments he wanted to make in his motion, he did attach a copy of his proposed amended complaint.

ECF No. 62. The proposed amended complaint brings claims for (1) negligence; (2) fraud; (3) discrimination; (4) "disclosure violation"; (5) retaliation; and (6) emotional distress. ECF No. 62-1. The defendants argue in their opposition that plaintiff's claims in the amended complaint are meritless and "futile." ECF No. 63. Plaintiff argues in his reply that his claims comply with Judge Silva's order. ECF No. 64.

II. Discussion

"[A] party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). "Denial of leave to amend on this ground [futility] is rare. Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003). "Deferring ruling on the sufficiency of the allegations is preferred in light of the more liberal standards applicable to motions to amend and the fact that the parties' arguments are better developed through a motion to dismiss or motion for summary judgment." *Steward v. CMRE Fin'l Servs., Inc.*, 2015 U.S. Dist. LEXIS 141867, 2015 WL 6123202, at 2 (D. Nev. Oct. 16, 2015); citing to *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1135-36 (N.D. Cal. 2008).

Plaintiff's proposed amendment is not made in bad faith or for the purpose of undue delay because it is still early in the case. Also Judge Silva already specifically granted plaintiff leave to amend his claims. See generally Judge Silva's Order. The defendants will not be prejudiced by the amendment because the factual allegations are closely related to the claims in the original complaint. Defendant argues that "disclosure violation" claim is a rehash of his Fourteenth Amendment claim that Judge Silva

dismissed with prejudice. Reading his complaint liberally however, plaintiff may be attempting to bring a misrepresentation claim. Although plaintiff mentions the Fourteen Amendment in his recitation of the allegations, he does not bring it as a separate claim as he did in his previous complaint. Judge Silva also noted in her order that, "[l]iberally construing the pleading, the Court finds the claim could sound in fraud or it could sound in negligent misrepresentation." ECF No. 61 at 14. The defendants' futility arguments would be better addressed through a motion to dismiss or for summary judgment, given that the new claims and allegations reasonably related to plaintiff's original claims. Plaintiff has shown good cause to amend the complaint.

Accordingly,

I ORDER that plaintiff 's motion for leave to amend its complaint (ECF No. 62) is GRANTED.

I FURTHER ORDER that plaintiff Mehta has until October 13, 2022, to file his amended complaint on the docket.

IT IS SO ORDERED.

DATED this 6th day of October 2022.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE