

No. 18-

---

---

IN THE  
**Supreme Court of the United States**

---

MOHAMED ABOUELMAGD,

*Petitioner,*

*v.*

DEBRA NEWELL

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE  
DISTRICT, DIVISION THREE**

---

---

**PETITION FOR A WRIT OF CERTIORARI**

---

---

DANIELLE K. LITTLE  
*Counsel of Record*  
ESTELLE & KENNEDY, APLC  
400 North Mountain Avenue, Suite 101  
Upland, California 91786  
(909) 608-0466  
[danielle@estellekennedylaw.com](mailto:danielle@estellekennedylaw.com)

*Counsel for Petitioner*

---

---

282061



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Petitioner Mohamed Abouelmagd, lived in New York. Between 1999 and 2000, Mohamed obtained a series of loans of nearly one million dollars from a California resident, Debra Newell, for the purpose of investing in his New York business, Bary Group International, Inc. Mohamed allegedly ceased repaying these business loans in 2002. Debra filed suit against Mohamed in California state court nearly thirteen years later in 2015 even though California recognizes a 2-year, 3-year and 4-year statute of limitations in actions for breach of oral contract, fraud and breach of written contract/common counts, respectively. However, these and all other state statutes of limitations are tolled in perpetuity for out of state residents pursuant to Code of Civil Procedure Section 351 for any period that a person is “out of the state.” The trial court dismissed Debra’s case because the tolling statute violated the Commerce Clause. The California Court of Appeal disagreed and reversed the judgment in Mohamed’s favor.

The questions presented are:

- 1) Is the California tolling statute that suspends statutes of limitations protection for out-of-state residents, unconstitutional and violative of *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988) as applied to nonresidents who engage in business transactions with California residents by forcing them to forfeit the limitations defense available to California residents?
- 2) Does California fail to properly apply the Commerce Clause by limiting its application to business entities, and not natural persons?

## **PARTIES TO THE PROCEEDING**

Petitioner Mohamed Abouelmagd, the Defendant and Respondent in the state trial and appellate proceedings below, was at all relevant times, an individual and citizen of New York. He is currently a citizen of New Jersey.

Respondent Debra Newell, the Plaintiff and Appellant in the state trial and appellate proceedings below, was at all relevant times, an individual and citizen of California.

## TABLE OF CONTENTS

|  | <i>Page</i> |
|--|-------------|
| QUESTION PRESENTED .....                                 | i           |
| PARTIES TO THE PROCEEDING .....                          | ii          |
| TABLE OF CONTENTS.....                                   | iii         |
| TABLE OF APPENDICES .....                                | vi          |
| TABLE OF CITED AUTHORITIES .....                         | viii        |
| INTRODUCTION.....  | 1           |
| DECISIONS BELOW .....                                    | 8           |
| STATEMENT OF JURISDICTION.....                           | 9           |
| CONSTITUTIONAL AND STATUTORY<br>PROVISIONS INVOLVED..... | 9           |
| STATEMENT OF THE CASE .....                              | 12          |
| I.    Factual Background .....                           | 12          |
| II.    Procedural Background .....                       | 16          |
| REASONS FOR GRANTING THE PETITION.....                   | 17          |

*Table of Contents*

|  | <i>Page</i> |
|--|-------------|
| I. CALIFORNIA LAW CONFLICTS<br>WITH THIS COURT'S PRECEDENT<br>ON STATE TOLLING STATUTES AND<br>RENDERS <i>BENDIX</i> A DEAD LETTER<br>FOR NON-RESIDENTS WHO TRANSACT<br>BUSINESS WITH CALIFORNIA<br>RESIDENTS .....  | 17          |
| II. THE CALIFORNIA COURT OF APPEAL'S<br>DECISION AND OTHER CALIFORNIA<br>APPELLATE CASES GUTS THE CLEAR<br>MANDATE OF THE COMMERCE CLAUSE<br>BY REFUSING TO APPLY ITS PROTECTIONS<br>TO NON-RESIDENT INDIVIDUALS<br>WHO TRANSACT BUSINESS WITH<br>CALIFORNIA RESIDENTS<br>WHICH IN TURN PERMITS AN<br>UNCONSTITUTIONAL BURDEN UPON<br>INTERSTATE COMMERCE..... | 21          |
| A. The Commerce Clause Is Not Limited<br>To Only Three Distinct Categories.....  | 21          |
| B. Debra's Loans Of Nearly A Million<br>Dollars Were Interstate Commerce<br>Notwithstanding Her Sham And Belated<br>Claim That They Were Love Loans .....  | 28          |

*Table of Contents*

|  | <i>Page</i> |
|--|-------------|
| C. The Transportation Of Debra's Loans<br>As Well As The Repayment Of Same<br>By Mohamed Though The Bank, Wire<br>And Mail Systems Of The United States<br>Constitutes Interstate Commerce .....   | 29          |
| III.THE CALIFORNIA COURT OF APPEAL'S<br>RULING THAT CALIFORNIA CODE<br>OF CIVIL PROCEDURE SECTION 351<br>WAS NOT UNCONSTITUTIONAL AS<br>APPLIED CONFLICTS WITH THE<br>RULINGS OF THIS COURT AND<br>THOSE OF THE EIGHTH AND NINTH<br>CIRCUITS ..... | 32          |
| IV.THE QUESTIONS PRESENTED<br>ARE IMPORTANT AND THIS CASE<br>IS AN IDEAL AND CLEAN VEHICLE<br>TO ANSWER THEM.....  | 34          |
| VI.CONCLUSION.....   | 36          |

**TABLE OF APPENDICES**

|   | <i>Page</i> |
|---|-------------|
| APPENDIX A — OPINION OF THE COURT<br>OF APPEAL OF THE STATE OF<br>CALIFORNIA, FOURTH APPELLATE<br>DISTRICT, DIVISION THREE, FILED<br>JANUARY 17, 2018 AS MODIFIED<br>FEBRUARY 15, 2018..... | 1a          |
| APPENDIX B — DENIAL OF REVIEW OF<br>THE SUPREME COURT OF CALIFORNIA,<br>FILED APRIL 18, 2018 .....  | 20a         |
| APPENDIX C — MINUTE ORDER<br>OF THE SUPERIOR COURT OF<br>CALIFORNIA, COUNTY OF ORANGE,<br>FILED MAY 5, 2016 .....   | 21a         |
| APPENDIX D — MINUTE ORDER OF THE<br>SUPERIOR COURT OF CALIFORNIA,<br>COUNTY OF ORANGE FILED<br>JANUARY 21, 2016 .....   | 26a         |
| APPENDIX E — MINUTE ORDER OF THE<br>SUPERIOR COURT OF CALIFORNIA,<br>COUNTY OF ORANGE FILED,<br>SEPTEMBER 17, 2015 .....  | 28a         |
| APPENDIX F — CONSTITUTIONAL<br>PROVISIONS AND STATE STATUTES .....  | 30a         |

*Table of Appendices*

|   | <i>Page</i> |
|---|-------------|
| APPENDIX G — SECOND AMENDED<br>COMPLAINT, FILED FEBRUARY 5, 2016.....                             | 33a         |
| APPENDIX H — FIRST AMENDED<br>COMPLAINT, WITHOUT EXHIBITS<br>FILED OCTOBER 2, 2015.....           | 76a         |
| APPENDIX I — COMPLAINT, FILED<br>MAY 1, 2015.....   | 99a         |
| APPENDIX J — PLAINTIFF'S OPPOSITION<br>TO DEFENDANT'S DEMURRER, FILED<br>SEPTEMBER 17, 2015 ..... | 114a        |
| APPENDIX K—JUDGMENT OF DISMISSAL,<br>FILED JUNE 1, 2016 .....                                     | 134a        |

## TABLE OF CITED AUTHORITIES

|  | <i>Page</i>   |
|--|---------------|
| <b>CASES</b>   |               |
| <i>Abramson v. Brownstein</i> ,<br>897 F.2d 389 (9th Cir. Cal. 1990) . . . . .   | <i>passim</i> |
| <i>Amwest Surety Ins. Co. v. Wilson</i> ,<br>11 Cal.4th 1243 (1995) . . . . .  | 7             |
| <i>Bendix Autolite Corp. v. Midwesco Enterprises</i> ,<br>486 U.S. 888 (1988) . . . . .                                | <i>passim</i> |
| <i>Bernstein v. Federal Trade Com.</i> ,<br>200 F.2d 404 (9 <sup>th</sup> Cir. 1952) . . . . .                         | 30, 31        |
| <i>Best &amp; Co. v. Maxwell</i> ,<br>311 U.S. 454 (1940) . . . . .  | 21            |
| <i>Bibb v. Navajo Freight Lines, Inc.</i> ,<br>359 U.S. 520 (1959) . . . . .   | 22            |
| <i>Bottineau Farmers Elevator v.</i><br><i>Woodward-Clyde Consultants</i> ,<br>963 F.2d 1064 (8th Cir. 1992) . . . . . | 7, 32         |
| <i>Bristol-Myers Squibb Co. v. Superior Court</i> ,<br>137 S. Ct. 1773 (2018) . . . . .                                | 4             |
| <i>Burger King Corp. v. Rudzewicz</i> ,<br>471 U.S. 462 (1985) . . . . .   | 35            |

*Cited Authorities*

|   | <i>Page</i>   |
|---|---------------|
| <i>Burnham v. Superior Court,</i><br>495 U.S. 604 (1990) .....                            | 9             |
| <i>Camps Newfound/Owatonna, Inc. v.<br/>Town of Harrison,</i><br>520 U.S. 564 (1997)..... | 19            |
| <i>Furst &amp; Thomas v. Brewster,</i><br>282 U.S. 493 (1931).....                        | 6, 23, 29, 30 |
| <i>Heart of Atlanta Motel v. United States,</i><br>379 U.S. 241 (1964).....               | 27, 28        |
| <i>Hughes v. Oklahoma,</i><br>441 U.S. 322 (1979).....                                    | 19            |
| <i>International Textbook Co. v. Pigg,</i><br>217 U.S. 91 (1910) .....                    | 31            |
| <i>Kohan v. Cohan</i><br>(1988) 204 Cal. App. 3d 915 .....                                | <i>passim</i> |
| <i>Madruga v. Superior Court,</i><br>346 U.S. 556 (1954).....                             | 9             |
| <i>Mounts v. Uyeda</i><br>(1991) 227 Cal.App.3d 111 .....                                 | 3             |
| <i>New York L. Ins. Co. v. Deer Lodge County,</i><br>(1913)231 U.S. 495 .....             | 29, 30        |

| <i>Cited Authorities</i>   | <i>Page</i> |
|--|-------------|
| <i>Order of Railroad Telegraphers v.<br/>Railway Express Agency, Inc.,<br/>321 U.S. 342 (1944)</i> ..... | 1, 4        |
| <i>Oregon Waste Systems v. Dept. of Env. Quality,<br/>511 U.S. 93 (1994)</i> .....                       | 5, 18, 19   |
| <i>Pike v. Bruce Church, Inc.,<br/>397 U.S. 137 (1970)</i> .....   | 21          |
| <i>Pratali v. Gates<br/>(1992) 4 Cal. App. 4th 632</i> .....   | 3, 17       |
| <i>Rademeyer v. Farris,<br/>284 F.3d 833 (8th Cir. 2002)</i> .....                                       | 7, 32       |
| <i>Reynoldsville Casket Co. v. Hyde,<br/>514 U.S. 749 (1995)</i> .....                                   | 36          |
| <i>South Dakota v. Wayfair, Inc.,<br/>201 L. Ed. 2d 403</i> .....  | 29          |
| <i>Taylor v. United States,<br/>136 S. Ct. 2074 (2016)</i> .....   | 24          |
| <i>U.S. v. Morrison,<br/>529 U.S. 598 (2000)</i> .....   | 6           |
| <i>United States v.<br/>South-Eastern Underwriters Ass'n<br/>322 U.S. 533 (1944)</i> .....               | 7, 26       |

*Cited Authorities*

|   | <i>Page</i> |
|---|-------------|
| <i>United States v. Morrison</i> ,<br>529 U.S. 598 (2000).....              | 23, 24, 25  |
| <i>W. Lynn Creamery, Inc. v. Healy</i> ,<br>512 U.S. 186 (1994).....        | 22          |
| <i>Wickard v. Filburn</i> ,<br>317 U.S. 111 (1942) .....                    | 26          |
| <i>World-Wide Volkswagen Corp. v. Woodson</i> ,<br>444 U.S. 286 (1980)..... | 35          |

**STATUTES AND OTHER AUTHORITIES**

|   |        |
|---|--------|
| Article 1, § 8, Clause 3 of the U.S. Constitution .....     | 10     |
| Fourteenth Amendment, U.S. Constitution                     |        |
| Amendment XIV, Section 1 .....                              | 35     |
| 28 U.S.C. § 1257(a).....                                    | 9      |
| California Code of Civil Procedure § 337.....               | 11, 14 |
| California Code of Civil Procedure § 338(d) .....           | 12     |
| California Code of Civil Procedure § 339.....               | 11, 14 |
| California Code of Civil Procedure § 351..... <i>passim</i> |        |

## INTRODUCTION

This Court has held that [s]tatutes of limitation . . . are designed to promote justice.... 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. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

This matter concerns a California resident, Ms. Debra Newell, who, between 1999 through 2000, loaned nearly a million dollars to a New York resident, Mr. Mohamed Aboeulmagd, to invest in his New York business, Bary Group International, Inc. App. I. Mohamed allegedly ceased repaying the loan in 2002. App. G-H.

California has a statute of limitations for actions sounding in breach of oral contract, fraud and breach of written contract/common counts of two, three and four years respectively. App. F. Despite the clear statutory bar of her claims, Debra nevertheless filed a lawsuit asserting all of these causes of action in 2015, thirteen years after Mohamed ceased repaying her in 2002. App. G-H. In that complaint, Debra expressly alleged that she had loaned Mohamed \$690,662.38 for an investment in Mohamed's New York business. App. G-H.

After Mohamed demurred to Debra's three iteration of pleadings, two separate trial court judges of the Orange County Superior Court correctly found that Debra's claims were woefully time-barred. App. C-E. These courts also rejected Debra's claims that California Code

of Civil Procedure Section 351, the state's tolling statute, tolled her causes of action against Mohamed whom she repeatedly alleged had "never traveled to California, has never owned real or personal property in California and has never conducted business in California... [and] has never been subject to the long-arm jurisdiction of California. *Id.* The trial court repeatedly held that California's tolling statute violated the Commerce Clause, and in its first, as well as its last order finally dismissing Debra's case, relied on the Ninth Circuit's decision in *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389. App. C. The court also noted that Debra tried to plead around her initial and straightforward claim that the loan was for business purposes to get around the Commerce Clause bar, as she amended her complaint stating that she loaned the money to Mohamed solely because the two of them had once had an affair. App. G-H. The court ruled that Debra's "pleadings to get around the applicability of CCP sec. 351 are inadequate..." *Id.* The trial court ultimately sustained Mohamed's demurrer without leave to amend on the ground that the California tolling statute was unconstitutional as applied to this case as an undue burden on interstate commerce and entered judgment in Mohamed's favor. App. C.

This Court's *Bendix* decision, the Supremacy Clause, tenets of equal protection and a proper interpretation of the Commerce Clause should have resolved this case. Yet, California has resolutely resisted this binding authority and precedent. Debra appealed to the California Court of Appeal, insisting that she loaned money to Mohamed purely out of love, indirect contradiction of her initial filed allegations to the contrary in both her complaint and her opposition to Mohamed's first demurrer that the loans

were solely for business purposes. App. J. She argued that these purported love loans of nearly one million dollars made to Mohamed did not implicate the Commerce Clause and that all her causes of action were tolled because of California's tolling statute. App. J. Incredibly, the California Court of Appeal reversed the well-reasoned decisions of two separate and independent judges of the Orange County Superior trial court and agreed with Debra. The Court of Appeal reversed the order sustaining Mohamed's demurrer and the judgment of dismissal in his favor. App. A. The result is that the matter would now be set for trial regarding loans that were made nearly two decades ago!

The Court of Appeal acted in contravention of the Supremacy Clause. App. F. In addition, the California Court of Appeal ignored the clear and binding precedent of *Bendix, Abramson* and its progeny, relied primarily on erroneous state law interpretations of federal law that, unsurprisingly, have upheld California's tolling statute, including *Kohan v. Cohan* (1988) 204 Cal.App.3d 915, 920-921, *Pratali v. Gates* (1992) 4 Cal.App.4th 632, *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111. All of these cases ignored and misapplied *Bendix*, if this seminal United States Supreme Court case was mentioned at all, to declare that California's tolling statute is constitutional.

The Court of Appeal's decision embodies the very parade of horrors that the United States Supreme Court soundly rejected in *Bendix* because it forces a non-resident individual engaged in commerce with a California resident to choose between exposure to the general jurisdiction of California courts by establishing a permanent presence in the state or facing a complete forfeiture of the California

statute of limitations defense and thereby remaining subject to a lawsuit in California *in perpetuity*. The California statute is thus purposefully directed to out-of-state residents engaged in business transactions with California residents to revoke a procedural defense they would normally enjoy and which is available for California residents. Such is unfair and constitutionally infirm. *Bendix* at 893; *Order of Railroad Telegraphers* at 348-49 (1944).

This case also embodies the due process concerns mentioned as recently considered in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2018), where, in an 8 to 1 decision, this Court assailed and rejected “the California Supreme Court’s application of the law as concern nonresidents which the Court explained was “difficult to square with this Court’s precedents.” The California Court of Appeal below, as well as other California state appellate courts, have relied primarily on protectionist California state appellate law pronouncements that California Code of Civil Procedure Section 351 is fair and constitutional, which totally ignore the express holdings of this Court’s binding precedent and well established federal law, including the dormant Commerce Clause itself.

First, the California Court of Appeal determined that Code of Civil Procedure “Section 351 applies equally to resident defendants who leave the state and defendants who have not previously been to California.” *Id.* However, such is not correct comparison because, as this Court has held, the determination of whether a state statute “discriminates against interstate commerce” must evaluate whether “differential treatment of in-state and

out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems v. Dept. of Env. Quality* (1994) 511 U.S. 93, 99. Thus, the proper comparison is not between a California resident defendant who subsequently leaves the state and a nonresident. In order to properly assess whether a state statute discriminates against out of state business defendants, a court must compare a California resident who does not leave the state and an out of state resident that does not leave his state, such as Mohamed. *Bendix* at 894 (1988). Here, since the California tolling statute forever deprives out of state residents who never leave their state of availing themselves of any state statute of limitations defenses while permitting California residents to assert those same defenses so long as they never leave their state, the statute is *per se* discriminatory and facially unconstitutional.

Second, the California Court of Appeal’s Conclusion that the loans that Debra made to Mohamed were not subject to the Commerce Clause was erroneous and not in accordance with this Court’s precedent or well established federal law. Debra clearly alleged in the first iteration of her complaint that the purpose of her loaning Mohamed the money was for an investment in Bary Group International, Inc. a New York corporation, and she double-downed on this claim in her Opposition to Mohamed’s demurrer to that complaint. App. I, J. She also alleged that between 2000 and 2002, Mohamed repaid her \$85,500.00 through United States banking, wire and/or mail systems. App. G-I. While Debra tried to change her reasons for loaning the money to Mohamed (App. D, G-H), as the trial court even noted, the exhibits to her pleadings (love letters notwithstanding) showed that the loans were

for, at least in part, business purposes. App. D. Yet, the Court of Appeal ignored these judicial findings and this Court's long-standing precedent that:

[A]ll interstate commerce is not sales of goods Importation into one State from another is the indispensable element, the test, of interstate commerce; ***and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation***, whether it be of goods, persons, or information, is a transaction of interstate commerce.

*Furst & Thomas v. Brewster*, 282 U.S. 493, 497 (1931) (emphasis added); App. A. Indeed, the cases relied on by the California Court of Appeal essentially limits the application of the dormant Commerce Clause to established businesses, such as corporations, and refuses to apply it when individuals are involved. App. A. That is not how a constitutional analysis under the applicability of the Commerce works because it is well-established that the Commerce Clause is quite expansive in its reach and includes and protects individual persons and businesses alike.

Third, the California Court of Appeal committed grievous constitutional error and interpretation when it relied on a selective quote of *United States v. Morrison*, 529 U.S. 598 and declared that this Court limits Commerce Clause analyses to merely "three categories falling within its scope: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that

“substantially affect” interstate commerce.” App. A. However, as shown by *Furst* and its progeny, those are only three categories of a multitude that the Commerce Clause covers and the federal constitutional amendment is not narrowly circumscribed. *See, United States v South-Eastern Underwriters Ass’n* (1944) 322 U.S. 533, 550-551 (1944), superseded by statute on other grounds, *Amwest Surety Ins. Co. v. Wilson*, 11 Cal.4th 1243 (1995) (“Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.”) (collecting cases) (emphasis added); *Wickard v. Filburn* 317 U.S. 111 (1942).

Fourth, the California Court of Appeal’s decision that California Code of Civil Procedure Section 351 was not unconstitutional as applied conflicts with the decisions of this Court and that of the Eighth and Ninth Circuits. These cases include the Eighth Circuit’s decision regarding the North Dakota tolling statute in *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064 (8<sup>th</sup> Cir. 1992), the Eighth Circuit’s decision regarding the then existing Missouri tolling statute in *Rademeyer v. Farris*, 284 F.3d 833 (8<sup>th</sup> Cir. 2002), and the Ninth Circuit’s decision in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990) regarding the subject California tolling statute.

The Orange County Superior trial courts correctly understood and applied federal law regarding California’s tolling statute as applied to Debra’s lawsuit, only to be reversed by a state appellate court that ignored and rejected the clear precedent that is embodied in the

federal constitution and that has been pronounced by this Court and its progeny. A nonresident who is engaged in commerce, even, an individual, should not have to become a resident of California in order to enjoy the full panoply of legal privileges and benefits afforded California residents when he is sued, which includes being forced to defend a case that is clearly time-barred, when no in state resident would have to do the same. California's continued refusal to properly apply *Bendix* and its progeny has not only resulted in the deprivation of rights for any individual who is not a California resident and is sued by an in state resident, but has also created an unacceptable divide between the state of California and federal courts. This Court's intervention is required to resolve the dispute by granting this writ, and clarifying that protectionist state tolling statutes that deprive nonresident persons as well as established businesses of state limitations defenses are violative of fundamental constitutional principles and strike down the California state statute and reverse the decision below on those bases.

## **DECISIONS BELOW**

The California Court of Appeals decision is not reported but is available at 2018 Cal. App. Unpub. LEXIS 1078 February 15, 2018), and is reprinted at App. A. The Supreme Court of California's *en banc* decision denying the Petition for Review, is not reported but is available at 2018 Cal. LEXIS 2828 (April 18, 2018) and reprinted at App. B.

The Orange County Superior Court's three decisions, made by two different trial court judges that were in Petitioner's favor are not reported and are reprinted at

App. E (September 17, 2015), App. D (January 21, 2016) and at App. C (May 5, 2016). The Orange County Superior Court’s judgment of dismissal in Petitioner’s favor (which was reversed by the California Court of Appeal) is not reported and is reprinted at App. K (June 1, 2016).

### **STATEMENT OF JURISDICTION**

On April 18, 2018, the California Supreme Court issued an *en banc* order denying Petitioner’s Petition for Review (App. B), thus leaving in place the California Court of Appeal’s decision that reversed the judgment of dismissal in Petitioner’s favor and thereby rejecting Petitioner’s (and the Orange County Superior Court’s) claims that the application of California’s tolling statute, codified in California Code of Civil Procedure Section 351, in this case violates the Commerce Clause, this Court’s pronouncement in *Bendix* and the Ninth Circuit’s decision in *Abramson*. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *See generally, Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954) (the California Supreme Court’s disposition of a writ petition is a final judgment under 28 U.S.C. § 1257(a)); *Burnham v. Superior Court*, 495 U.S. 604, 608 (1990) (reviewing a California appellate court’s personal-jurisdiction holding following the court’s denial of a writ of prohibition).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Supremacy Clause is codified in Article VI, Paragraph 2 and provides as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

**The Commerce Clause is codified in Article 1, Section 8, Clause 3 of the U.S. Constitution** and provides, in relevant part, as follows:

The Congress shall have power to...To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Equal Protection and Due Process Clause of the Fourteenth Amendment, U.S. Constitution Amendment XIV, Section 1, provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**California Code of Civil Procedure Section 351** provides:

If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the

cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for commencement of the action.

**California Code of Civil Procedure Section 339** (The Time of Commencing Actions Other Than for the Recovery of Real Property) provides:

Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing...

**California Code of Civil Procedure Section 337** (The Time of Commencing Actions Other Than for the Recovery of Real Property) provides:

Within four years:

1. An action upon any contract, obligation or liability founded upon an instrument in writing,  
...

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

**California Code of Civil Procedure Section 338(d)** provides: Within three years:... (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

## **STATEMENT OF THE CASE**

### **I. Factual Background**

This case arises out of alleged loans of nearly a million dollars purportedly made by Debra Newell, to Mohamed Abouelmagd, between July 9, 1999 and September 18, 2000 that Mohamed allegedly ceased paying on or about April 2, 2002. App. G-I. On May 1, 2015, thirteen years after Mohamed allegedly ceased repaying Debra, she filed her original complaint asserting four causes of action: 1) breach of oral contract; 2) breach of written contract; 3) common counts; and, 4) intentional tort-fraud. App. I. In her complaint, Debra alleged that:

Debra explained that:

Beginning on or about July 9, 1999, and continuing through April 2, 2002, Defendant represented to Plaintiff that he would repay in full any and all sums of money that she invested in his business, Bary Group International, Inc. Defendant personally guaranteed the funds. Defendant further represented to Plaintiff that she would double her money by investing in his business. Defendant further represented that he was single and would give Plaintiff

fifty percent (50%) of his business. *Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant as an investment in his business.* From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.

App. I (emphasis added). Debra also expressly alleged that she “agreed to loan certain sums of money to Defendant which would *be used as an investment in his business..* App. I (emphasis added). Debra further alleged that Mohamed gave her a promissory note on October 14, 2000 stating that he owed Debra the sum of \$490,000.00 and had borrowed the amount for “*business and personal reasons.*” App. I (emphasis added). Debra alleged that Mohamed repaid her for these loans between October 17, 2000 and April 2, 2002, then ceased repaying her. App. I. Debra also alleged that Mohamed “made an oral promise to repay any and all sums of money lent by Plaintiff to him as an *investment in his business.* Defendant had no intention of repaying said sums.” App. I (emphasis added). Debra herself admitted in the original complaint that “*Defendant was residing outside of California when the cause of action accrued.* Defendant *has not and has never been* a resident of California. App. I. Debra further alleged that “[a]t all times herein mentioned, Defendant *never* resided in California and was a resident of Egypt and/or New Jersey and/or New York.” App. I.

Nothing stopped Debra from actually filing her case before thirteen years had elapsed because the federal district courts would have subject matter and personal jurisdiction over her claims and Mohamed, whom she admitted was a nonresident, under its diversity

jurisdiction authority. *See* U.S. Constitution, Article III, §2 (concerning diversity jurisdiction.”). Debra’s own admissions demonstrate that the federal district courts of California, New York and/or New Jersey were judicial forums that were available to her. App. G-J. She also could have timely filed suit in either the New York and New Jersey state courts. Yet, despite having ample time and several courts within which she could have timely filed her claims, Debra sat on her rights for thirteen years, allowing the statute of limitations for breach of written contract, breach of oral contract and fraud, which have a four, two and three year statute of limitations<sup>1</sup> respectively, to lapse. App. K.

Mohamed demurred to all of Debra’s causes of action asserting, *inter alia*, they were barred by the applicable statute of limitations, by *eleven years* (breach of oral contract ), by *nine years* (breach of written contract and common counts); *ten years* (fraud).

When confronted with the fact that all of her claims were woefully beyond the statute of limitations, Debra claimed that the tolling statute set forth in California Code of Civil Procedure Section 351 tolled her legal claims because she had never resided in, nor had been to California. App. J. Debra’s legal position, thus gave her until the literal end of eternity to file suit against Mohamed, at least, unless and until he became a resident of California.

---

1. The statute of limitations for breach of oral contracts is two years. *See California Code of Civil Procedure Section 339*. The statute of limitations for breach of written contracts and common counts is four years. *See California Code of Civil Procedure Section 337*. The statute of limitations for fraud is three years. *See California Code of Civil Procedure Section 338(d)*.

Critically, Debra filed a written opposition to Mohamed's demurrer asserting the California's tolling statute, California Code of Civil Procedure Section 351 saved her claims and she also reaffirmed that the subject loans were an investment in Mohamed's business, that Mohamed represented that she would double her money by making the investment and that he would give her 50% of the business. App. J.

On September 17, 2015, the trial court sustained Mohamed's demurrer to each of Debra's causes of action and ruled that Debra's claims were time-barred and "that given the facts alleged, the tolling provisions of CCP§351 are an unreasonable burden on interstate commerce and thus an unconstitutional violation of the Commerce Clause. App. E.

Thereafter, Debra filed an amended complaint which was a sham pleadings in which she changed her admission that the loans she made to Mohamed were for a business investment in the New York based-business of Bary Group International, Inc. but that she made the loans to Mohamed "because she had a personal, intimate relationship with" him and she only discovered that he would use the money for a business purpose after she gave it to him. App. H. Mohamed successfully demurred again on, *inter alia*, Commerce Clause grounds and a separate and newly assigned trial court judge not only agreed with Mohamed yet again that California Code of Civil Procedure Section 351 was unconstitutional as applied to the case, but also expressed concerns about Debra's obvious sham pleading. App. D.

Debra filed yet another sham pleading, her Second Amended Complaint to plead around her clearly unconstitutional action trying to assert that her motivations for making the loans were love, rather than the business transaction for Bary Group International, Inc., claiming that she did not care what Mohamed ultimately used the nearly one million dollars for. App. G. Debra included a chart showing the alleged monetary exchanges between the parties via the United States banking, wire and mail systems across state lines, including fifty-four (54) separate transactions totaling \$85,500.00 that Mohamed repaid her. App. G. On May 5, 2016, the trial court sustained Mohamed's demurrer to the Debra's pleading without leave to amend. App. E. App. C. The trial court ruled that "CCP Section 351 is unconstitutional as applied in this case because it burdens interstate commerce" and further held:

*Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392, held §351 unconstitutional, stating that 1) commerce is burdened because it requires a defendant to be in California during the entire limitations period in order to assert a statute of limitations defense, and 2) this outweighs the burden on a plaintiff in having to pursue an out-of-state defendant. This Court agrees.

App. C. Debra's case was dismissed and judgment entered on Mohamed's favor. App. K..

## **II. Procedural Background**

Debra appealed the adverse ruling against her to the Court of Appeals, who reversed the trial court's dismissal

of the case and the judgment in Mohamed's favor. App. A. The California Court of Appeal, in contravention of the Supremacy Clause, the dormant Commerce Clause, and ignoring the clear and binding precedent of *Bendix*, *Abramson* and its progeny, relied instead on decisions other California appellate courts, including, *Kohan v. Cohan*(1988) 204 Cal.App.3d 915, 920-921, *Pratali v. Gates* (1992) 4 Cal.App.4th 632, *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111 all of which ignored and misapplied *Bendix*, if this seminal United States Supreme Court case was mentioned at all, to declare that California's tolling statute is constitutional. The California Supreme Court denied Mohamed's petition for review *en banc*. This Petition follows.

## **REASONS FOR GRANTING THE PETITION**

### **I. CALIFORNIA LAW CONFLICTS WITH THIS COURT'S PRECEDENT ON STATE TOLLING STATUTES AND RENDERS *BENDIX* A DEAD LETTER FOR NON-RESIDENTS WHO TRANSACT BUSINESS WITH CALIFORNIA RESIDENTS**

It is axiomatic that California courts must adhere to the express pronouncements of federal and United States Supreme Court precedent when determining whether a state statute is constitutional pursuant to the Supremacy Clause. Sec. Article VI, Paragraph 2. The failure by a state court to do so, including a state's appellate court, violates well-established law and is an affront to the judicial system.

Thirty years ago, in *Bendix*, this Court held that state tolling statutes that treat nonresidents differently than in-

state residents by permanently depriving the nonresidents of the state statute of limitations defenses if they do not volunteer to subject themselves to the jurisdiction of the state are unconstitutional because they violate the Commerce Clause, equal protection and due process. Yet, in California, state appellate courts, including and especially the Court of Appeal below, have repeatedly ignored *Bendix* and its federal progeny, including, *inter alia*, the Ninth Circuit in *Abramson*, by self-servingly applying Code of Civil Procedure Section 351 --- a tolling statute that was virtually, if not actually identical, to the very same tolling statute that this Court struck down in *Bendix* --- to deprive nonresident defendants their constitutional rights of due process and equal protection. Indeed, the Ohio tolling statute at issue in *Bendix* was strikingly similar to the California's tolling statute. *See Bendix* at 890 (1988).

The California Court of Appeal determined that the tolling statute embodied in California Code of Civil Procedure "Section 351 applies equally to resident defendants who leave the state and defendants who have not previously been to California." *Id.* Such a finding is not correct because the determination of whether a state statute "discriminates against interstate commerce" must evaluate whether "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Dept. of Env. Quality*, 511 U.S. 93, 99 (1994).

Indeed in *Bendix*, this Court held:

The Ohio statute before us might have been held to be a discrimination that invalidates without

extended inquiry. We choose, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while.

*Bendix* at 891. Thus, the proper comparison to determine whether California Code of Civil Procedure Section 351 is discriminatory that the California Court of Appeal should have made was not between a hypothetical California resident defendant who subsequently leaves the state and a nonresident defendant who are sued in California. Instead, the correct comparison is between a California resident who does not leave the state and a nonresident who does not leave his. When those two groups are compared, it is clear that California Code of Civil Procedure Section 351 forever deprives out of state residents of California statute of limitations defenses that remain available for California residents unless and until the nonresident leaves his state and becomes a resident of California or engages in activity sufficient enough to establish minimum contacts with California. Such a result makes California Code of Civil Procedure Section 351 *per se* discriminatory and unconstitutional.

It is well established that state statutes that discriminate against interstate commerce will only survive a constitutional challenge if the state can demonstrate that “it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997) (quotations omitted). This Court has “required that justifications for discriminatory restrictions on commerce pass the ‘strictest scrutiny.’” *Or. Waste Sys., Inc.* at 101 (1994), quoting, *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

The California Court of Appeal simply relied on state appellate cases that failed to apply this Court's standard for determining whether the statute meets the strict scrutiny test and therefore, its presumption that the statute was not discriminatory was in error and requires reversal of its decision.

The California tolling statute imposes a cost on traditional interstate business transaction between California residents and residents of other states such as Mohamed. Debra admitted that she made the loan as an investment in Mohamed's business, Bary International Group Inc., which was a New York business. App. G-H. Even when she altered her claims to plead around the fact that her claims were time-barred, her own allegations showed that notwithstanding her newfound subjective belief that she was merely loaning nearly a million dollars to a man just because they were lovers, that the loan proceeds were intended to be used for business and personal reasons. App. G-H. Further, at the time Debra made the loans to Mohamed, Debra was a resident of California and Mohamed was a resident in New York, as was his business. App. G-H. Their love affair occurred in Las Vegas, Nevada. App. G-J. In addition, the repayment of these business loans were and did in fact occur across interstate banking, wire and mail systems. App. G-I. Thus, the application of California Code of Civil Procedure Section 351 to save Debra's claims that, were Mohamed a California resident, would have been time barred for nine years (breach of written contract and common counts claim) and ten years (fraud claim) and eleven years (oral contract claim), leads inexorably to the conclusion that the state tolling statute codifies favoritism toward California residents persons engaged in business transactions with

nonresidents and deprives those out-of-state persons with the same protections. The California tolling statute merely creates a benefit for residents of California to the express detriment of out of state residents who must face a lawsuit in perpetuity. This Court has made repeatedly clear that if the state law regulates in-state and out-of-state interests evenhandedly, the statute will be upheld “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (court’s essential duty is to root out economic protectionism by “determining whether the statute under attack … will in its practical operation work discrimination against interstate commerce.” ).

## **II. THE CALIFORNIA COURT OF APPEAL’S DECISION AND OTHER CALIFORNIA APPELLATE CASES GUTS THE CLEAR MANDATE OF THE COMMERCE CLAUSE BY REFUSING TO APPLY ITS PROTECTIONS TO NON-RESIDENT INDIVIDUALS WHO TRANSACT BUSINESS WITH CALIFORNIA RESIDENTS WHICH IN TURN PERMITS AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE**

### **A. The Commerce Clause Is Not Limited To Only Three Distinct Categories**

The focus of a dormant Commerce Clause challenge is whether a state law improperly interferes with interstate commerce even state laws that are deemed to be nondiscriminatory can also be invalidated when they

impose an undue burden on interstate commerce. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (“Th[e] ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). A state such as California that uses its tolling statute as a sword in cases where California residents under similar statutes would be thrown out of court, such as this case, violates the Commerce Clause. As this Court has explained:

Although statute of limitations defenses are not a fundamental right, it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the *Commerce Clause*. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the *Commerce Clause* to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain.

*Bendix* at 893 (1988) (citations omitted). Moreover, this Court has held thusly:

The burden the tolling statute places on interstate commerce is significant. Midwesco has no corporate office in Ohio, is not registered to do business there, and has not appointed an agent for service of process in the State. To gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts. This jurisdiction would extend to any suit against Midwesco, whether or not the transaction in question had any connection with Ohio. ...The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity.

*Bendix* at 892-893 (1988) (citations omitted).

Despite the aforementioned authority by this Court, the California Court of Appeal committed grievous constitutional error when it relied instead on a selective quote of *United States v. Morrison*, 529 U.S. 598 (2000), and declared that this Court limits Commerce Clause analyses to merely “three categories falling within its scope: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. App. A. *citing, U.S. v. Morrison* 529 U.S. 598, 608-609 (2000). However, as shown by *Furst* and its progeny, those are merely three examples of commerce clause cases, the Commerce Clause is not so narrowly circumscribed. Further, While it may be

so that modern jurisprudence tends to assess Commerce Clause cases that neatly fall within those categories, such does not mean that this Court has made an edict that Commerce Clause cases will only be assessed if the facts can fall into one of those narrow categories. Indeed, the *Morrison* case itself enunciated a fuller context of what the Commerce Clause can regulate, its expansiveness as well as the basis for its existence and its limitations. Specifically the Supreme Court explained as follows:

Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez*, 514 U.S. at 555-556; *id.*, at 573-574 (KENNEDY, J., concurring). *Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

*Morrison*, at 608-609. Thus, read in context, even though the United States Supreme Court described that *generally*, commerce clause cases tend to fall into the three categories summarized by the Court of Appeal, it simultaneously explained the purpose of the limitation of the Commerce Clause and the evils these limitations guard against. Moreover, this Court has recently held that even if Commerce Clause analysis only concerns these three categories, that the categories themselves are broad. *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016). Such concerns are not present here because the facts of this case clearly demonstrate that this matter does not concern an “*indirect and remote*” transaction between the parties. Quite to the contrary, by Debra’s own admission, this was

a series of business loans that at the time they were made and the agreement to repay was made on July 9, 1999 was for a business purpose. App. G-H. Such clearly falls within the purview of the Commerce Clause and the fact that Debra belatedly claimed that these were love loans to Mohamed, such does not change the fact that her own pleadings show that the monies were intended to be used for Bary Group International, Inc., a New York business.

Indeed, by narrowly construing *Morrison*, the California Court of Appeal completely ignores the complex legal underpinnings and the precise text of the Commerce Clause itself to strain to allow the unconstitutional tolling statute to permit this lawsuit against nonresident Mohamed. As Mohamed carefully explained, case law that was totally ignored by the Court of Appeal, the appropriate test to determine the applicability of the Commerce Clause is whether a tolling statute such as Code of Civil Procedure §351 has the effect of discouraging “*negotiation, contract, trade, and dealing between citizens of different States.*” *Furst* at 497-498 (emphasis added). Debra’s loans of nearly a million dollars to Mohamed, and Mohamed’s subsequent repayments of these loans through the U.S. banking, wire and mail systems squarely fall into this category. Yet the Court of Appeal made no mention at all as to the federal doctrinal underpinnings that control every analysis of how Commerce Clause cases must be evaluated and ignored completely the ample United States Supreme Court authority, including:

- *Hoke v. United States*, 227 U.S. 308, 320 (“*Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property.*”) (emphasis added).

- *United States v South-Eastern Underwriters Ass'n* (1944) 322 U.S. 533, 550-551, superseded by statute on other grounds, *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243 (“Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.”) and, *inter alia*;
- *Wickard v. Filburn* (1942) 317 U.S. 111 (the commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce; wheat farmer who grew wheat beyond that permitted by statute, even though wheat was not sold and wheat remained on farm was subject to commerce clause).

The California Court of Appeal also relied primarily on California state cases, which themselves only superficially considered federal law and the precedent set by this Court, to decide an issue of federal constitutionality.

The California Court of Appeal cited the California state appellate case of *Kohan v. Cohan* (1988) 204 Cal. App.3d 915 for the proposition that “section 351 applies equally to resident defendants who leave the state and defendants who have not previously been to California.” App. A. However, such a proposition is, as the trial court found, “superficial” and respectfully, self-servingly serves as a protectionist view by the California appellate courts that contravenes well-established United States Supreme

Court precedent. This case demonstrates that a California resident can rest assured that if she loans a California resident money and he fails to repay her, she has a finite time in which to file a lawsuit regarding this failure or else her claims will be time barred: 4 years to bring a breach of written contract or common counts action; 2 years to bring a breach oral contract action; and 3 years to bring a fraud cause of action. However, if a California resident loans money to an out of state resident, Code of Civil Procedure Section 351 kicks in to deprive that non-resident, such as Mohamed, of the very same right of the aforementioned defendant California resident, by declaring that because the non-resident has never become a California resident or has refused to subject itself to the ongoing jurisdiction of California, the California citizen may now file a lawsuit against the nonresident in state-sanctioned perpetuity. Such clearly violates the Commerce Clause.

Interestingly, even though the California Court of Appeal relied on the state *Kohan* case, the trial court correctly found that the *Kohan* case only superficially addressed the issue of the commerce clause. App. C. Indeed, *Kohan* itself cited to and failed to appreciate *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), a decision by this Court that makes clear that the reach of the Commerce Clause is expansive and rejected a parties' claim that simply because its actions concerned only local activities – racist segregationist business practices for their local motel – that the Commerce Clause did not apply. This Court rejected such a notion and emphasized the federal law's supremacy over local practices that do not seemingly touch on what is traditionally viewed as commerce:

[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

*Heart of Atlanta Motel* at 258. Thus, *Kohan*'s citation to this case to then justify the exercise of jurisdiction over a case that concerned "acts ... [that]occurred in Iran while defendants were residents of that country" on the grounds that such "does not affect either interstate commerce or commerce between the United States and Iran, nor does it establish that defendants were engaged in interstate commerce by any definition of that term" evinces a fundamental misapprehension by the *Kohan* court of long-standing federal law as evidenced by this Court. In any event, the idea that a loan of a million dollars, claimed to be merely a love loan (which the trial court found specious at best, *see* App. C) is somehow a simple local matter that in no way touched upon interstate commerce flies in the face of this Court's well-established precedent.

**B. Debra's Loans Of Nearly A Million Dollars Were Interstate Commerce Notwithstanding Her Sham And Belated Claim That They Were Love Loans**

The California Court of Appeal's conclusion that the loans that Debra made to Mohamed were not subject

to the Commerce Clause was in contravention of well established precedent by this Court, the Commerce Clause itself and other federal law. Indeed, the cases relied on by the California Court of Appeal essentially limits the application of the Commerce Clause to established businesses, such as corporations, and refuses to apply it when individuals are involved. App. A. Yet, that is not how a constitutional analysis under the Commerce Clause works. *Furst*, 282 U.S. 493 (1931).

**C. The Transportation Of Debra's Loans As Well As The Repayment Of Same By Mohamed Through The Bank, Wire And Mail Systems Of The United States Constitutes Interstate Commerce**

The California Court of Appeal held that the alleged “few payments” made by Mohamed were not commerce and relied on *New York L. Ins. Co. v. Deer Lodge County*(1913)231 U.S. 495, 509-510 [“That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another”].) App. A. As a threshold issue, Debra herself makes clear that the repayments totaling \$85,500.00 made to her by Mohamed in 54 (fifty four) separate installments across the United States banking, wire and mail systems were not merely a “few.” App. G. Further, as Mohamed argued, a loan made for the purpose of a business investment, as well as a loan and repayment of same between a California resident and a nonresident that has been transmitted through the banking, wire and mails undoubtedly constitutes commerce within the meaning of the federal Commerce Clause. *Accord, South Dakota v. Wayfair, Inc.*, 201 L. Ed. 2d 403, 412

(discussing Commerce Clause implications for online versus brick and mortar businesses). *See Furst & Thomas v. Brewster*, 282 U.S. 493, 497-498 (1931) (emphasis added). Indeed, such a pronouncement by the United States Supreme Court coming nearly *two decades* after the *New York L. Ins. Co.*, which is a case concerned primarily with whether insurance can be deemed to be in commerce, shows that the case has been overruled. For example, in *Bernstein v. Federal Trade Com.*, 200 F.2d 404, 405 (9<sup>th</sup> Cir. 1952), the Ninth Circuit Court of Appeals explained that a California debt collector who uses the mails for his business is deemed to be in interstate commerce and in reaching this conclusion, cited *Furst* a case cited by Mohamed and ignored for the proposition that the use of the mail and wiring system helped demonstrate that the parties' transaction constituted interstate commerce:

Petitioner secures his business through the mails and carries it forward in the same manner. He receives money from debtors located in states other than California and transmits it, less his commission, to creditors who are also elsewhere than in California. Often he receives money from creditors representing his commission on debts paid direct to the creditor. These creditors, many of them, are located in states other than California. In these ways the petitioner regularly uses the channels of interstate communication. His activities, while not trade in the ordinary sense, are a species of commerce and constitute commerce within the meaning of that term as used in the Constitution.

*Bernstein* at 405 (citations other than the Supreme Court omitted). Indeed in *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), which predates *York L. Ins. Co.*, this Court by, the Honorable Justice Marshall Harlan stated:

It is true that the business in which the International Textbook Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and, practically, *continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States*. That intercourse was conducted by means of correspondence *through the mails with such agents and scholars. .... Importation into one State from another is the indispensable element, the test, of interstate commerce* .... Yet, this case is not merely about monies being transmitted via the mails, but also, via interstate banking and wiring systems for significant amounts. Such, as established by well-established federal law, constitutes interstate commerce. As explained in the use of the wire system is by its very nature interstate, because “[w]ires are channels or instrumentalities of interstate commerce.”

The Court’s intervention is required to resolve the dispute. It should grant the writ, clarify the expansiveness and supremacy of the Commerce Clause and reverse the California Court of Appeals’ decision below.

### **III. THE CALIFORNIA COURT OF APPEAL'S RULING THAT CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 351 WAS NOT UNCONSTITUTIONAL AS APPLIED CONFLICTS WITH THE RULINGS OF THIS COURT AND THOSE OF THE EIGHTH AND NINTH CIRCUITS**

Other federal circuits, when confronted with unconstitutional tolling statutes that seek to deprive out of state residents of statutes of limitations defenses that are available to in state residents, have properly applied *Bendix* and have not narrowly defined the Commerce Clause as the California appellate courts have. For example in, 963 F.2d 1064, the Eighth Circuit found that a North Dakota tolling statute similar to California's was an unconstitutional burden on commerce. *See Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1067, fn. 3 (8<sup>th</sup> Cir. 1992). Similarly, in *Rademeyer v. Farris*, 284 F.3d 833 (8<sup>th</sup> Cir. 2002), a Missouri minority shareholder sued a majority shareholder who had moved out of state to Florida. The Eighth Circuit Court of Appeals found that the Missouri tolling statute, which tolls the statute of limitations when a resident leaves the state, as applied in that case violated the commerce clause.

In the Ninth Circuit, the issue of the constitutionality of California Code of Civil Procedure Section 351 was addressed in *Abramson v. Brownstein*, 897 F.2d 389 (9<sup>th</sup> Cir. Cal. 1990). In that case, the Ninth Circuit Court of Appeals held that Code of Civil Procedure Section 351 is unconstitutional because it imposes a significant burden on interstate commerce. The facts in *Abramson* are similar to the case at bar because it involves a breach of contract between Plaintiffs, who were residents of California, and a defendant, a resident of Massachusetts and then New

York. The *Abramson* Court held that:

On the burden side, the statute requires a person engaged in interstate commerce outside of California to be in California for the appropriate limitations period in order to avoid the application of the tolling statute. This is a different burden from the one imposed by the Ohio statute in *Bendix*, where foreign corporations were required to appoint an agent in Ohio and thereby subject themselves to the general jurisdiction of the Ohio courts in order to avoid the application of the tolling provision. Nevertheless, the California statutory scheme forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity. Section 351 imposes a significant burden.

On the local interest side of the balancing analysis, the California Supreme Court has articulated the state's interest in applying the tolling statute. In *Dew v. Appleberry*, 23 Cal. 3d 630, 153 Cal. Rptr. 219, 591 P.2d 509 (1979), the court held that the statute applies to persons even if they are amenable to service of process. It found: The Legislature may justifiably have concluded that a defendant's physical absence impedes his availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within the limitations period . . . . . Section

351 . . . rationally alleviates any hardship that would result by compelling plaintiff to pursue defendant out of state. 153 Cal. Rptr. at 223. Because this interest did not support the corresponding burden created by the Ohio tolling statute in *Bendix*, it also cannot support the burden created by § 351.

*Abramson* at 392. The Supremacy Clause provides that state appellate courts are duty bound to properly apply federal precedent. California has failed to do so. This Court should grant the writ and rule that California must do so.

#### **IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND THIS CASE IS AN IDEAL AND CLEAN VEHICLE TO ANSWER THEM**

Whether state tolling statutes impermissibly burdens interstate commerce, and whether the commerce clause protects individual persons just as much as established businesses, are important questions that have nationwide import. This is especially so for individuals who decide to engage in economic activity with persons who live in California, the largest economy in the country.<sup>2</sup> Inasmuch as the state of California does not require its residents who conduct business with out of state residents to forewarn the latter that doing so will subject them to a lifetime of lawsuits should something go awry, intervention by this Court is necessary to level the economic playing field to ensure treatment in accordance with fundamental notions of due process and equal protection. *See* Fourteenth

---

2. Bureau of Economic Analysis, U.S. Dep’t of Commerce, California (2018) [www.bea.gov/regional/bearfacts/pdf.cfm?fips=06000&areatype=STATE&geotype=3](http://www.bea.gov/regional/bearfacts/pdf.cfm?fips=06000&areatype=STATE&geotype=3).

Amendment, U.S. Constitution Amendment XIV, Section 1.

Practically speaking, leaving the decision below in place will result in California state courts becoming even more emboldened to continue depriving the rights of nonresident defendants who have the misfortune of conducting business with California residents, leaving such nonresidents exposed to a literal lifetime lawsuits that can be filed in California state courts decades after the statute of limitations has elapsed. This case is an ideal vehicle to address whether such discriminatory treatment and burden upon interstate commerce can stand.

Further, left unchecked, the California's tolling statute will rob such persons of the predictability that the Due Process Clause is supposed to provide them. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) ("[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurances to where that conduct will and will not render them liable to suit.' "), quoting, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

This Court's grant of review would moreover stop California and other state courts from avoiding *Bendix*' clear pronouncement by creating bodies of law that seek to protect their constitutionally prejudicial and infirm statutes without regard to the harm that such statutes inflict on out of state residents. When the Ohio Supreme Court refused to properly apply *Bendix* after this Court found that the Ohio tolling statute was unconstitutional, this Court stepped in to further clarify that the failure of the state to do so violated the Supremacy Clause

and reversed the Ohio Supreme Court's decision. *See Reynoldsburg Casket Co. v. Hyde*, 514 U.S. 749, 750 (1995). The same needs to occur here. Indeed, the holding in *Bendix* will be for naught if only federal courts follow it and state appellate courts in California and elsewhere can continue to ignore it in spirit and letter, hoping that no one will challenge it. Mohamed has challenged it and seeks a ruling that will provide him a measure of justice that the California Court of Appeal has denied him. A definitive ruling by this Court will also by necessity have nationwide impact because it will also benefit all nonresident litigants who find themselves dragged into the California judicial system, decades and into perpetuity after the subject matter of the lawsuit has occurred.

## VI. CONCLUSION

State appellate courts are duty bound to follow this Court's precedent and well established federal law. When they refuse to do so, citizens suffer. For all the reasons stated herein, Mohamed respectfully avers that the writ should be granted.

Respectfully submitted,

DANIELLE K. LITTLE  
*Counsel of Record*  
ESTELLE & KENNEDY, APLC  
400 North Mountain Avenue, Suite 101  
Upland, California 91786  
(909) 608-0466  
[danielle@estellekennedylaw.com](mailto:danielle@estellekennedylaw.com)

*Counsel for Petitioner*

## **APPENDIX**

**APPENDIX A — OPINION OF THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT, DIVISION  
THREE, FILED JANUARY 17, 2018 AS MODIFIED  
FEBRUARY 15, 2018**

**IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA FOURTH APPELLATE DISTRICT  
DIVISION THREE**

G053785

Super. Ct. No. 30-2015-00785669

DEBRA NEWELL,

*Plaintiff and Appellant,*

v.

MOHAMED ABOUELMAGD,

*Defendant and Respondent.*

January 17, 2018, Opinion Filed

**OPINION**

Appeal from a judgment of the Superior Court of Orange County, Theodore R. Howard, Judge. Reversed.

*Appendix A*

Seeking to recover approximately half a million dollars loaned to Defendant Mohamed Abouelmagd, Plaintiff Debra Newell appeals from a judgment dismissing her second amended complaint after the court sustained defendant's demurrer without leave to amend. The court concluded her claims were barred by the applicable statutes of limitation. In doing so, the court rejected plaintiff's assertions that the statutes of limitation had been tolled during defendant's absence from the state, and that defendant should be estopped from asserting the limitation period as a defense.

Plaintiff contends the trial court erred in two respects. First, she claims the court wrongly concluded that tolling under Code of Civil Procedure section 351 would be unconstitutional under the dormant commerce clause of the United States Constitution.<sup>1</sup> (U.S. Const., art. I, § 8, cl. 3.; commerce clause.) Second, she claims the court erroneously concluded she did not plead sufficient facts to estop defendant from asserting a statute of limitation defense. We conclude application of section 351 under the circumstances of this case would not violate the dormant commerce clause, and, thus, we reverse the judgment of dismissal. In light of our disposition, we do not reach the estoppel issue.

---

1. All further statutory references are to the Code of Civil Procedure unless otherwise stated.

*Appendix A***FACTS<sup>2</sup>**

Plaintiff, a California resident, and defendant, a New York and/or New Jersey resident, met in Las Vegas. He represented to her he was not married, which later proved to be false, and they became romantically involved. Because of their intimate relationship, when defendant encountered financial hardship in mid-1999, plaintiff orally agreed to loan him money. Defendant orally agreed to repay plaintiff the amount borrowed, without interest. Over the course of the following year, plaintiff continued periodically to loan defendant additional sums of money. By September 2000, the loans to defendant totaled nearly \$700,000.

Although plaintiff allegedly did not care how defendant would use the money, defendant expressed to her that he intended to use it for a combination of personal and business expenses. In one of the many “love letters” written by defendant to plaintiff after she had loaned him the majority of the money, he indicated one proposal he could offer her was to give her half of the shares he owned in his businesses. He also stated that if he were to be successful in his business, he would “reward” her with the original money borrowed and a high percentage of interest.

After repaying plaintiff a small portion of what was owed, defendant executed a written promissory note in

---

2. The following facts are taken from the allegations and exhibits in the operative complaint at the time of the demurer.

*Appendix A*

plaintiff's favor. In it he acknowledged he had borrowed money from her for personal and business reasons, he indicated the outstanding debt was \$490,000, and he promised he would pay her \$20,000 per month until the remaining debt was paid in full.

Following the terrorist attacks of September 11, 2001, defendant expressed concern he would be subject to harassment and retaliation based on his Egyptian nationality. He told plaintiff he planned to move back to Egypt, permanently, but he would continue to repay her from there. She believed him.

Defendant did not follow through on his promises. After paying back about \$85,000 of the money borrowed, with the last payment having occurred in April 2002, defendant disappeared. Between 2004 and 2008, Plaintiff traveled to New York twice, and Egypt once, to try to locate defendant based on information he had given to her. She was unsuccessful.

In January 2015, plaintiff learned defendant had not permanently moved to Egypt; he was living in New York and/or New Jersey. She filed a lawsuit against him, alleging breach of an oral and a written contract, a common count of indebtedness and fraud.

Defendant demurred to the complaint based, in part, on statute of limitation grounds. Plaintiff opposed the demurrer, arguing the applicable statutes of limitation had been tolled, pursuant to section 351, until defendant appeared in the case because he had never previously

*Appendix A*

been present in California. In response, defendant contended tolling of the statutes of limitation would be unconstitutional under the circumstances. Relying on the United States Supreme Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises* (1988) 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (*Bendix*), and the Ninth Circuit Court of Appeals' decision in *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389 (*Abramson*), defendant argued application of the tolling statute would violate the dormant commerce clause because it would unwarrantedly impede interstate commerce.

The trial court sustained the demurrer and granted plaintiff leave to amend the complaint.

Plaintiff filed a first amended complaint containing modified allegations about the circumstances surrounding the loans. While in the original complaint plaintiff alleged she loaned defendant "certain sums of money . . . which would be used as an investment in his business," the amended allegations stated plaintiff made the loan "because she had a personal, intimate relationship with [d]efendant." It further stated she did not lend the money in order to profit from it, and she "was not in the business of lending money."

Defendant filed a second demurrer based on the same statute of limitation and dormant commerce clause arguments. The trial court once again sustained the demurrer with leave to amend. In doing so, it expressed concern that plaintiff's modified allegations appeared inconsistent with those in the original complaint

*Appendix A*

concerning the “investment” nature of the loan, and plaintiff had provided no explanation for the shift.

After plaintiff filed a second amended complaint, which included more detail and an explanation for the changes made since the original complaint, defendant demurred again based on the same arguments. The trial court sustained the demurrer, but this time without leave to amend. Citing *Dan Clark Family Limited Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, 122 Cal. Rptr. 3d 517 (*Dan Clark*), it concluded application of section 351 in this case would be an unconstitutional burden on interstate commerce irrespective of whether the underlying transaction was “commercial” or “personal” in nature because it would force defendant to be present in California for the statutory period in order to avoid being subjected to potential liability “in perpetuity.” It determined this burden on interstate commerce “outweighs the burden on a plaintiff in having to pursue an out-of-state defendant.” The court also rejected the application of equitable estoppel, noting plaintiff did not identify what defendant did that she reasonably relied upon in deciding to not file a lawsuit sooner.

Plaintiff timely appealed following entry of judgment dismissing the case.

**DISCUSSION**

Plaintiff claims the court erred in finding section 351 unconstitutional as applied to this case and in rejecting the application of equitable estoppel. In making these

*Appendix A*

arguments, she asserts the court erroneously made factual determinations rather than assuming the facts in the complaint were true as it is required to do when ruling on a demurrer. As we shall explain, the trial court incorrectly concluded on demurrer that application of section 351's tolling provision would violate the dormant commerce clause.

“When reviewing a judgment dismissing a complaint after the [sustaining] of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. [Citation.] . . . [Citation.] . . . [W]e give the complaint a reasonable interpretation, and read it in context.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569.) “A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.’ [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense.” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881, 110 Cal. Rptr. 2d 877.)

We apply a de novo standard of review to the question of whether section 351 is unconstitutional as applied in this case (*U.D. Registry, Inc. v. State of California* (2006) 144 Cal.App.4th 405, 418, 50 Cal. Rptr. 3d 647), as well as to the question of whether plaintiff sufficiently pleaded the

### Appendix A

elements of an estoppel. (*Blake v. Wernette* (1976) 57 Cal. App.3d 656, 660, 129 Cal. Rptr. 426 (*Blake*).

“The Commerce Clause dictates that ‘Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.’ [Citation.] ‘Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a “negative” aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.’” (*Pharmaceutical Research & MFRS. v. Alameda County* (2014) 768 F.3d 1037, 1041.) This aspect, which has become commonly known as the dormant commerce clause, ““is driven by concern about economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”” (*Ibid.*)

Analysis under the dormant commerce clause consists of two steps. The first is to determine whether the law at issue ““regulates evenhandedly with only ““incidental” effects on interstate commerce,”” or whether it ““discriminates against interstate commerce.”” (*Oregon Waste Systems v. Dept. of Env. Quality* (1994) 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (*Oregon Waste*).) “[D]iscrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”” (*Ibid.*)

The second step is dependent on the outcome of the first. If the law is discriminatory, it is virtually per se invalid. (*Oregon Waste*, *supra*, 511 U.S. at p. 99.) In order to avoid invalidation, its proponents must ““sho[w]

### *Appendix A*

that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”” (*Jordan v. Dept. of Motor Vehicles* (1999) 75 Cal.App.4th 449, 460, 89 Cal. Rptr. 2d 333, citing *Oregon Waste, supra*, 511 U.S. 93.) If a law is not discriminatory, but instead only has incidental effects on interstate commerce, it is “valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” (*Oregon Waste, supra*, 511 U.S. at p. 99.)

Turning to section 351, it is a tolling statute that extends the time in which to file suit under two circumstances: (1) if the defendant was outside California when the action accrued, or (2) if the defendant left the state, temporarily or permanently, after it accrued.<sup>3</sup> In these two situations, the time during which the defendant is absent from the state is not counted for statute of limitation purposes. (*Green v. Zissis* (1992) 5 Cal.App.4th 1219, 1222, 7 Cal. Rptr. 2d 406.) Section 351 applies equally to resident defendants who leave the state and defendants who have not previously been to California. (*Kohan v. Cohan* (1988) 204 Cal.App.3d 915, 920-921, 251 Cal. Rptr. 570.)

Although section 351 has been constitutionally applied, there are a limited number of cases in which it has been found unconstitutional as applied based on the dormant

---

3. Section 351 provides in full: “If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.”

*Appendix A*

commerce clause. (See, e.g., *Dan Clark, supra*, 193 Cal. App.4th 219; *Heritage Marketing & Ins. Services., Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 73 Cal. Rptr. 3d 126 (*Heritage Marketing*); *Abramson, supra*, 897 F.2d 389.) The reasoning in each case stems from the United States Supreme Court’s decision in *Bendix, supra*, 486 U.S. 888.

In *Bendix*, the court considered whether an Ohio tolling statute similar to section 351 violated the dormant commerce clause. (*Bendix, supra*, 486 U.S. at pp. 889- 890.) The defendant, an out-of-state corporation, had delivered and installed a boiler system at the plaintiff’s facility in Ohio. (*Id.* at p. 890) When the boiler did not perform as expected, the plaintiff filed suit, claiming it had been incorrectly installed and it was not of the quality specified in their contract. (*Ibid.*) The defendant asserted a statute of limitation defense, to which the plaintiff responded by attempting to invoke the tolling statute. (*Ibid.*)

Because the Ohio tolling statute had the effect of denying “ordinary legal defenses . . . to out-of-state persons or corporations engaged in commerce,” the court reviewed the law “under the Commerce Clause to determine whether the denial [was] discriminatory on its face or an impermissible burden on commerce.” (*Bendix, supra*, 486 U.S. at p. 893.) In concluding the latter was true under the facts before it, the court weighed the relative burdens on interstate commerce and on a plaintiff of serving an out- of-state defendant. It recognized foreign defendants may often be more difficult to serve, but also noted all parties had conceded the *Bendix* defendant

*Appendix A*

could have been served throughout the limitation period under Ohio's long-arm statute. (*Id.* at p. 894.) The Court concluded such an inconvenience to the plaintiff was outweighed by the burden on an out-of-state corporation to either somehow become "present" in Ohio or be unable to assert the statute of limitation defense that a resident corporation could. (*Id.* at pp. 894-895.) Accordingly, the law was deemed unconstitutional as applied to the facts of the case. (*Id.* at p. 889.)

A couple of years after *Bendix*, the Ninth Circuit Court employed a similar analysis and held section 351 unconstitutional as applied. (*Abramson, supra*, 897 F.2d at p. 392.) *Abramson* involved two California residents, a partnership and its general partner, who had negotiated over the phone to purchase gold coins and currency from a Massachusetts resident. (*Id.* at p. 390.) Although paid in full, the Massachusetts resident never completely fulfilled his part of the contract. (*Ibid.*) The California residents sued, and the timeliness of the lawsuit hinged on whether section 351 could constitutionally be applied to toll the statute of limitation. (*Id.* at p. 391.)

Because the defendant was "engaged in interstate commerce when . . . he entered into [the] sales transaction with [the California plaintiffs,]" and because the Ninth Circuit found section 351 to be nondiscriminatory,<sup>4</sup> the

---

4. See *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121, 277 Cal. Rptr. 730 ["*Abramson* does not declare . . . section 351 facially unconstitutional. 'On its face, California's tolling statute is non-discriminating because it treats alike residents and nonresidents of California.'"].

*Appendix A*

court “weigh[ed] and assess[ed] the State’s putative interests against the interstate [commerce] restraints to determine if the burden imposed [was] an unreasonable one.” (*Abramson, supra*, 897 F.2d at p. 392.) As in *Bendix*, the facts demonstrated the defendant could have been served under the state’s long-arm statute throughout the limitation period. (*Abramson*, at p. 393.) The court concluded this was outweighed by the “significant burden” section 351 imposed on the defendant who was engaged in interstate commerce—either be present in California for several years or forfeit the statute of limitation defense and be subject to potential liability in perpetuity. (*Id.* at p. 392.)

Application of section 351 in a different factual scenario occurred in *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 84 Cal. Rptr. 2d 384 (*Filet Menu*). Claiming a breach of contract related to the sale of restaurant related items, a California resident plaintiff sued the defendants, one of which was a California resident. (*Id.* at pp. 1278-1279.) The California defendant demurred to the complaint on statute of limitation grounds, and the plaintiff argued section 351 applied to toll the limitation period during times the California defendant was temporarily out of state. (*Id.* at p. 1280.)

Because the underlying transaction involved commerce, the court assessed the as applied constitutionality of section 351 under the dormant commerce clause. (*Filet Menu, supra*, 71 Cal.App.4th at pp. 1281-1283.) It concluded the statute would be unconstitutional if applied to a resident travelling out of state “for the facilitation of interstate

*Appendix A*

commerce" (e.g., in course of employment, to search for a job). (*Id.* at p. 1283.) The court also expressly stated that when out of state travel is for purposes unrelated to interstate commerce, application of the statute would not violate the commerce clause. (*Ibid.*, citing *Pratali v. Gates* (1992) 4 Cal.App.4th 632, 635, 5 Cal. Rptr. 2d 733. (*Pratali*).) However, because the complaint did not allege why the California defendant had been absent from the state, the court concluded the demurrer should not have been sustained. (*Id.* at p. 1284.)

Years later, a different panel of this court considered application of section 351 to California residents who permanently move out of the state. (*Heritage Marketing, supra*, 160 Cal.App.4th at p. 761.) The plaintiff, an insurance company that provided living trust services, sued one former employee and two others for, *inter alia*, breach of contract, conspiracy to defraud, defamation and slander *per se*. (*Id.* at pp. 757-758.) The complaint alleged the defendants had moved to Texas and shortly thereafter opened a business which competed with the plaintiff's. (*Id.* at p. 758.) In answering the key question of "whether the undisputed facts show defendants' conduct sufficiently made an impact on interstate commerce to invoke the commerce clause," (*id.* at p. 761) we explained that the movement of people, like the defendants, across state lines falls within the scope of "interstate commerce." (*Id.* at pp. 761 & 763.) We ultimately concluded section 351's burden on such interstate commerce was impermissible under the facts of the case because the defendants would be forced either to "remain[] residents of California until the limitations period expired or mov[e] out of state and [forfeit] the limitations defense . . ." (*Id.* at p. 764.)

*Appendix A*

A similar conclusion was reached in *Dan Clark*, a case arising from an alleged botched sale of commercial vehicles to the plaintiff, a limited partnership domiciled in Texas. (*Dan Clark, supra*, 193 Cal.App.4th at pp. 222-223.) The complaint alleged the plaintiff purchased and paid for vehicles which were never delivered to him by a California seller, the defendants ended up purchasing the same vehicles from the same seller, the transaction took place in Nevada, the defendants knew at the time of purchase that the seller did not own the vehicles, and the defendants thereafter actively concealed their purchase from the plaintiff. (*Id.* at p. 224.) Because the defendants had allegedly moved to Mexico for personal reasons after purchasing the vehicles, the plaintiff argued section 351 tolled the statute during the time they were absent from the state. (*Id.* at p. 225.)

At the outset, the appellate court explained that an analysis under the dormant commerce clause was necessary because the transaction giving rise to the lawsuit (i.e. purchase and sale of vehicles) was an interstate commercial transaction. (*Dan Clark, supra*, 193 Cal.App.4th at p. 232.) Then, relying on *Bendix* and *Abramson*, the court concluded section 351 was unconstitutional as applied to the facts of the case. It explained that “[a]lthough application of section 351 would not affect the [defendants] in terms of forcing them to choose between *remaining* residents of California or being subject to suit in perpetuity, it would essentially force them to either *become* residents of California or to be subject to suit in California in perpetuity.” (*Id.* at p. 233.) The court found such a burden untenable. (*Ibid.*)

*Appendix A*

Defendant argued below, and continues to urge on appeal, that the facts of this case are similar to those of the cases described above and, therefore, plaintiff should not be permitted to resort to section 351 because its application would be unconstitutional. But, before reaching the two-step dormant commerce clause analysis, we must first determine whether the commerce clause is even implicated by the facts of this case. (*Bendix, supra*, 486 U.S. at p. 893 [“Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations *engaged in commerce*, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce,” italics added]; *Knappenberger v. Davis-Stanton* (Or.Ct.App. 2015) 271 Ore. App. 14, 351 P.3d 54, 62 [“The threshold question to be resolved, however, is whether defendant is an out-of-state person *engaged in commerce* for purposes of the Commerce Clause”]; *Tesar v. Hallas* (N.D. Ohio 1990) 738 F.Supp. 240, 241-242 [“threshold question” is whether person “can be deemed, in commerce clause terms, to be or to have been ‘engaged in commerce’”].) It is on this point we find plaintiff’s argument persuasive.

It is well-established the formation of a contract between persons in different states is not within the protection of the commerce clause unless the performance of the contract falls within its protection. (*Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 253, 58 S. Ct. 546, 82 L. Ed. 823.) To do so, performance of the contract must implicate interstate commerce. Though even the United States Supreme Court acknowledges

*Appendix A*

the lack of a precise definition for “interstate commerce” (*U.S. v. Lopez* (1995) 514 U.S. 549, 552-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 [detailing evolution of commerce clause jurisprudence]), its decisions have articulated three categories falling within its scope: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. (*U.S. v. Morrison* (2000) 529 U.S. 598, 608-609, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (*Morrison*)).

Thus, the critical question is whether performance of the loan contracts alleged in the complaint constitutes or implicates one of the three categories of interstate commerce. We conclude it does not.

*Pratali* is instructive. While in Las Vegas, the plaintiff loaned money to the defendant, who executed a promissory note. (*Pratali, supra*, 4 Cal.App.4th at p. 635.) At the time, both were California residents. (*Id.* at p. 643.) When the note failed to be paid, the plaintiff sued and obtained a monetary judgment against the defendant. (*Id.* at p. 635.) Thereafter, the defendant moved to Idaho, and years later, the plaintiff filed a separate action to collect on the judgment. (*Id.* at pp. 635-636.) The defendant argued the suit was barred by the statute of limitation, to which the plaintiff responded by asserting tolling pursuant to section 351. (*Id.* at p. 638.)

On appeal, the court rejected the defendant’s contention that application of section 351 would violate the dormant commerce clause. (*Pratali, supra*, 4 Cal.

*Appendix A*

App.4th at p. 643.) In doing so, it explained “there [were] insufficient circumstances impacting on interstate commerce to invoke the commerce [clause].” (*Ibid.*) The record lacked evidence the plaintiff “was in the business of making loans or was otherwise engaged in commerce,” and lacked evidence as to how the loaned money was used. (*Ibid.*) As to the latter, the court “question[ed] whether a single amicable loan between California acquaintances while visiting in Las Vegas can rise to the level of interstate commerce within the meaning of the commerce clause—however the proceeds are used.” (*Ibid.*)

Here, the second amended complaint alleges plaintiff loaned defendant money because she “had a personal, intimate relationship with [him].” The letters attached to the complaint, which defendant purportedly wrote, support such an allegation. The complaint further alleges she “was not in the business of lending money,” and she made the loan without any expectation of profiting from it. As in *Pratali*, we are not dealing here with the channels or instrumentalities of interstate commerce, persons or things in interstate commerce, or activities that “substantially affect” interstate commerce. (See *Morrison, supra*, 529 U.S. at pp. 608-609.)

Defendant asserts the complaint’s allegations “make clear” the loan was made, at least in part, for business investment purposes. Although certain allegations in the operative complaint mention use of some of the loaned money for business purposes, those allegations, as well as the letters from defendant attached to the complaint, indicate it was defendant who mentioned he would use

*Appendix A*

some of the money in that manner. Defendant provides no authority such statements, which are alleged to have been made after plaintiff loaned the money, somehow turn the transaction into one involving or substantially affecting interstate commerce.

We are equally unconvinced by defendant's claim that interstate commerce is implicated because plaintiff sent some of the loaned money across state lines to where defendant was located, or because the few repayments defendant made to plaintiff were done via mail or wire transfer. (See *New York L. Ins. Co. v. Deer Lodge County* (1913) 231 U.S. 495, 509-510, 34 S. Ct. 167, 58 L. Ed. 332 [“That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another”].)

Because we conclude the allegations in the operative complaint do not establish defendant was an “out-of-state person . . . engaged in [interstate] commerce” (*Bendix, supra*, 486 U.S. at p. 893), the dormant commerce clause is not implicated and we do not reach the two-step analysis thereunder.<sup>5</sup>

---

5. In a petition for rehearing, defendant asserts for the first time that the trial court lacked personal jurisdiction over him. This argument was never previously made, on appeal or below, and we easily dispose of it. The court obtained personal jurisdiction over defendant when he first demurred to plaintiff's complaint and did not object to personal jurisdiction. (§ 418.10, subd. (e)(3); *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 344-345.)

*Appendix A*

**DISPOSITION**

The judgment of dismissal is reversed. The court is directed to vacate its order sustaining the demurrer to the second amended complaint and to issue a new order overruling defendant's demurrer to the second amended complaint. Plaintiff shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.

**APPENDIX B — DENIAL OF REVIEW OF THE  
SUPREME COURT OF CALIFORNIA, FILED  
APRIL 18, 2018**

COURT OF APPEAL, FOURTH APPELLATE  
DISTRICT, DIVISION THREE

No. G053785

S247254

IN THE SUPREME COURT OF CALIFORNIA

*En Banc*

DEBRA NEWELL,

*Plaintiff and Appellant,*

v.

MOHAMED ABOUELMAGD,

*Defendant and Respondent.*

The petition for review is denied.

CANTIL-SAKAUYE  
Chief Justice

**APPENDIX C — MINUTE ORDER OF THE  
SUPERIOR COURT OF CALIFORNIA, COUNTY  
OF ORANGE, FILED MAY 5, 2016**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

**MINUTE ORDER**

Counsel for defendant submit on the Courts tentative ruling.

The Court hears oral argument and **CONFIRMS** the tentative ruling as follows:

Defendant's demurrer is **SUSTAINED without leave to amend**. Defendant is to give notice and lodge a judgment of dismissal.

*CCP Section 351* is unconstitutional as applied in this case because it burdens interstate commerce. The statute tolls the statute of limitations for the entire time a defendant is out of state. Under *Dan Clark Family Ltd. Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, 233, it is an undue burden on commerce because it forces defendants to choose between staying in California or being subjected to liability “in perpetuity.”

The court did not limit “commerce” to underlying commercial transactions; it was concerned with burdens on any commerce the defendant “might choose to engage in during [its] travels” to the state. *Id.* It found no significant

*Appendix C*

difference between forcing a defendant to remain a California resident and forcing him to become one to obtain repose. *Id.* at 234. It held that discouraging non-residents from engaging in transactions with California residents burdens commerce. *Id.* These concerns exist whether the underlying transaction is “commercial” or “personal.”

Even if this were an issue, whether or not Plaintiff was engaged in “commerce” is irrelevant. In two cases she relies on, *Green v. Zisis* (1992) 5 Cal.App.4th 1219 and *Cvecich v. Giardino* (1940) 37 Cal.App.2d 394, there was no constitutional challenge to §351. “An opinion is not authority for propositions not considered.” *Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195. In the other case, *Kohan v. Cohan* (1988) 204 Cal.App.3d 915, the Court’s discussion of the commerce clause was superficial; it just said the acts occurred in Iran and this did not establish they were engaged in interstate commerce. *Id.* at 924. This Court does not find it persuasive.

Plaintiff relies on *Pratali v. Gates* (1992) 4 Cal.App.4th 632, 643, which held that the commerce clause wasn’t involved in a “single amicable loan” because there was “no competent evidence” that the “loan proceeds were used in a commercial venture.” (Emphasis added) Plaintiff admits, however, that some of the loan proceeds were used in a commercial venture. Also, the loan in *Pratali* was for \$16,500, not over a half million dollars.

*Appendix C*

*Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392, held § 351 unconstitutional, stating that 1) commerce is burdened because it requires a defendant to be in California during the entire limitations period in order to assert a statute of limitations defense, and 2) this outweighs the burden on a plaintiff in having to pursue an out-of-state defendant. This Court agrees.

The Court had limited jurisdiction over the Defendant at all times. Plaintiff claims *Abramson* doesn't apply because it is grounded on an analysis that there was jurisdiction over the defendant whereas Defendant lacks "minimum contacts" with California. This is a requirement of general jurisdiction. *International Shoe Co. v. State of Washington* (1945) 326 US 310, 316-317. But Plaintiff fails entirely to discuss special (limited) jurisdiction.

Limited jurisdiction applied from the outset because 1) the cause of action arose from forum-related contacts with the Plaintiff, 2) it was not burdensome for Defendant to defend in this day of internet communications and travel by airline, and 3) California has an interest in protecting its residents from those who reach out from other jurisdiction to injure them. See statement of factors in *Star Aviation, Inc. v. Superior Court* (1977) 73 Cal.App.3d 807, 811. Thus, lack of jurisdiction did not prevent Plaintiff from suing within the statute of limitations periods.

Plaintiff did not establish that Defendant is estopped from asserting the statute of limitations. Plaintiff claims an estoppel to assert the statute of limitations because Defendant lied when he said he was going to Egypt, he

*Appendix C*

intentionally concealed himself, she believed him because of their special relationship, and she tried to locate him in New York in 2004 and 2005 and in Egypt in 2010 (after all possible statutes of limitation had expired).

Other than these short periods of activity, Plaintiff makes no attempt to explain what she did for the remainder of the 13 years that passed since Defendant's default. She alleges she checked out only information he had given her. She knew his company was Bary Group International, Inc. but does not allege any attempt to locate him through that company.

Under *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, Plaintiff had to show reasonable reliance that induced her to forego some action that she could have pursued to save herself from the loss. *Id.* There is no such showing here.

*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907 is not on point. It involved a continuing nuisance and reliance on continued efforts by a defendant to clean up the subject property. The jury found reliance was reasonable.

Equitable estoppel only applies to a statute of limitations defense if the Defendant's conduct "has induced another into forbearing suit within the applicable limitations period" and the Plaintiff was "directly prevented" from suing on time. *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 745. Neither of these apply. Defendant didn't induce Plaintiff forgo suit; he just told her he was leaving. Nor did he do anything to "directly prevent" her

*Appendix C*

from suing for 13 years, or even from making reasonable efforts to find him.

Plaintiff does not suggest how she could further amend to overcome these defects in her pleading, so further leave to amend is denied under *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.

The motion to strike is off calendar (moot).

**APPENDIX D — MINUTE ORDER OF THE  
SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE, FILED JANUARY 21, 2016**

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER**

**MINUTE ORDER**

**DATE: 01/21/2016**

**JUDICIAL OFFICER PRESIDING: Theodore Howard**

**CASE NO: 30-2015-00785669-CU-BC-CJC**

The Court hears oral argument and **CONFIRMS** the tentative ruling as follows:

Court is concerned about inconsistent allegations from the original to the FAC. If an amended complaint contradicts a prior complaint without an explanation of the inconsistency, the Court can disregard the inconsistent allegations. Holland v. Morse Diesel (2001) 86 CA4th 1443, 1447. The exhibits attached to the FAC do not support the new allegations that the “loan” was not an investment. It also appears that some were written prior to the loan and some after that are presented as a single document without adequate explanation in the FAC. The pleadings to get around the applicability of CCP sec. 351 are inadequate and unclear as to the 2nd prong of the test in Dan Lark Family Ltd. Partnership v. Miramontes (2011) 193 CA4th 219. Plaintiff has pled insufficient facts to support estoppel re the S/L

*Appendix D*

The DEMURRER is **SUSTAINED as to the first 4 causes of action but with further leave to amend within 15 days.**

As to the MOTION TO STRIKE request for attorney fees, **GRANTED without leave to amend.** The Motion to Strike punitive damages is **MOOT.**

**Case Management Conference continued to 04/01/2016 at 09:00 AM in Department C18.**

Parties waive notice.

**APPENDIX E — MINUTE ORDER OF THE  
SUPERIOR COURT OF CALIFORNIA, COUNTY  
OF ORANGE, FILED SEPTEMBER 17, 2015**

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER**

**CASE NO: 30-2015-00785669-CU-BC-CJC**

**MINUTE ORDER**

**DATE: 09/17/2015**

**JUDICIAL OFFICER PRESIDING: William Claster**

The Court hears oral argument and confirms the tentative ruling as follows:

**1) Defendant Mohamed Abouelmago's Demurrer to Complaint**

**2) Defendant Mohamed Abouelmago's Motion to Strike**

The demurrer by defendant Mohamed Abouelmagd to the Complaint, and each cause of action therein, is SUSTAINED with leave to amend on grounds of failure to state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) Each cause of action is barred by the statute of limitations. (CCP §§ 337, 338(d), 339.) The court finds that given the facts alleged, the tolling provisions of CCP § 351 are an unreasonable burden on interstate commerce and thus an unconstitutional violation of the Commerce

*Appendix E*

Clause. (*Abramson v. Brownstein* (9th Cir.1990) 897 F.2d 389, 392-393; *Dan Clark Family Limited Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, 232-34.) The third cause of action for fraud also fails because it is not pled with the specificity required for fraud claims. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Specifically, there are no facts alleged to show defendant's intent to defraud or intent to induce reliance (under a fraud or concealment theory), or that defendant had no intention of performing his alleged promise to repay the loan at the time it was made (under a promissory fraud theory).

Based on the ruling on the demurrer, the motion to strike is moot. Plaintiff Debra Newell will be granted 15 days leave to amend.

Court orders Defendant to give notice.

## **APPENDIX F — CONSTITUTIONAL PROVISIONS AND STATE STATUTES**

The Supremacy Clause is codified in Article VI, Paragraph 2 and provides as follows:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

**The Commerce Clause is codified in Article 1, Section 8, Clause 3 of the U.S. Constitution** and provides, in relevant part, as follows:

The Congress shall have power to...To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Equal Protection and Due Process Clause of the Fourteenth Amendment, U.S. Constitution Amendment XIV, Section 1, provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Appendix F*

**California Code of Civil Procedure Section 351** provides:

If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for commencement of the action.

**California Code of Civil Procedure Section 339** (The Time of Commencing Actions Other Than for the Recovery of Real Property) provides:

Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing...

**California Code of Civil Procedure Section 337** (The Time of Commencing Actions Other Than for the Recovery of Real Property) provides:

Within four years:

1. An action upon any contract, obligation or liability founded upon an instrument in writing,  
...
2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the

*Appendix F*

account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

**California Code of Civil Procedure Section 338(d)** provides: Within three years:...(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

**APPENDIX G — SECOND AMENDED  
COMPLAINT, FILED FEBRUARY 5, 2016**

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, COUNTY OF ORANGE, CENTRAL  
DISTRICT - UNLIMITED JURISDICTION

Case No.: 30-2015-00785669

DEBRA NEWELL, AN INDIVIDUAL:

*Plaintiff,*

VS.

MOHAMED ABOUELMAGD, AN INDIVIDUAL,  
AKA AMED ABOUELMAGD, AKA AMED BARRY,  
AKA AMED BARY, AKA AMED ELBARRY AKA  
AMED ELBARY, AKA IBRAHIM ABDELBARY  
ABOUELMAGD MOHAMED, AKA MOHAMED  
A ABOUELMAGD, AKA MOHAMED ABDEL  
BARRY, AKA MOHAMED ABOU ABOUELMAGD,  
AKA MOHAMED ABOU ELABOUELMAGD, AKA  
MOHAMED ABOU ELMAGD, AKA MOHAMED  
BARRY, AKA MOHAMED BARY, AKA MOHAMED  
ELBARRY, AKA MOHAMED ELBARY, AKA  
MOHAMED I ABOU EL ABOUELMAGD,  
AKA MOHAMED I ABOU EL MAGD, AKA  
MOHAMED I ABOUELMAGD, AKA MOHAMED  
IBRAHIM ABOGELMAGD, AKA MOHAMED  
IBRAHIM ABOUELMAGD, AKA MOHAMED M

*Appendix G*

ABOUELMAGD, AKA MOHAMMED BARRY, AND  
DOES 1-100;

*Defendants.*

**SECOND AMENDED COMPLAINT FOR:**

- 1) BREACH OF ORAL CONTRACT;**
- 2) BREACH OF WRITTEN CONTRACT;**
- 3) COMMON COUNTS; AND**
- 4) FRAUD**

**PARTIES AND VENUE**

- I. Plaintiff DEBRA NEWELL is and at all times relevant hereto was an individual residing in Orange County, California.
2. Plaintiff is informed and believes and thereon alleges that Defendant MOHAMED ABOUELMAGD (“Defendant”), is an individual who at all times relevant hereto resided and at the present time resides outside the State of California.
3. Defendant MOHAMED ABOUELMAGD has at different times used a large number of other names and is also known as AMED ABOUELMAGD, aka AMED BARRY, aka AMED BARY, aka AMED ELBARRY aka AMED ELBARY, aka IBRAHIM ABDELBARY ABOUELMAGD MOHAMED, aka MOHAMED A ABOUELMAGD, aka MOHAMED ABDEL BARRY, aka MOHAMED ABOU ABOUELMAGD, aka MOHAMED

*Appendix G*

ABOU ELABOUELMAGD, aka MOHAMED ABOU ELMAGD, aka MOHAMED BARRY, aka MOHAMED BARY, aka MOHAMED ELBARRY, aka MOHAMED ELBARY, aka MOHAMED I ABOU EL ABOUELMAGD, aka MOHAMED I ABOU EL MAGD, aka MOHAMED I ABOUELMAGD, aka MOHAMED IBRAHIM ABOGELMAGD, aka MOHAMED IBRAHIM ABOUELMAGD, aka MOHAMED M ABOUELMAGD, aka MOHAMMED BARRY (“Defendant”). If other names used by Defendant are ascertained, then Plaintiff shall seek leave to amend this Complaint.

4. The true names and capacities, whether individual, corporate or associate, or otherwise, of the Defendants named herein as DOES 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues said Doe Defendants by such fictitious names pursuant to the Code of Civil Procedure Section 474. Plaintiff will amend this complaint to show their true names and capacities when the same has been ascertained.
5. Plaintiff is informed and believes, and based upon such information and belief, alleges that each of the Defendants sued herein as DOES 1 through 100 is contractually, strictly, negligently, intentionally, vicariously liable and/or otherwise legally responsible in some manner for each and every act, omission, obligation, event or happening set forth in this Complaint, and that each of said fictitiously named defendants is indebted to Plaintiff as hereinafter alleged.

*Appendix G*

6. The use of the term “Defendants” in any of the allegations of this Complaint, unless specifically otherwise set forth, is intended to include and charge both jointly and severally, not only named Defendants, but all Defendants designated as Does 1 through 100 as well.
7. Plaintiff is informed and believes, and based upon such information and belief, alleges that at all times herein stated all defendants were the agents, servants, employees, affiliates, subsidiaries, sister companies, parent companies or otherwise related to and responsible for their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such and with the permission and consent of their codefendants and principals.
8. Venue is proper in this County because the transactions referred to herein were to be performed in Orange County, California, payments made on the obligations referred to herein were in fact paid in Orange County, California, representations made by Defendants were made to Plaintiff while she was in Orange County, California, damages were caused to Plaintiff in Orange County, California and because Defendant is a resident of another Jurisdiction, venue is proper in any county in California including Orange County.

**ALLEGATIONS COMMON TO  
ALL CAUSES OF ACTION**

9. Beginning in or about July 1999, Plaintiff Debra Newell and Defendant entered into an oral contract,

*Appendix G*

whereby Plaintiff agreed to loan certain sums of money to Defendant. At that time Defendant orally promised to Plaintiff to repay all sums of money to Plaintiff in Orange County, California, and Defendant orally personally guaranteed the funds.

10. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38 ("the Loan"). Attached hereto as Exhibit 1 is a schedule showing the dates when Plaintiff advanced the funds to Defendant.
11. Plaintiff is not and was not in the business of lending money and did not lend the money involved in this case for the purpose of profiting from that Loan. Plaintiff made the Loan because she had a personal, intimate relationship with Defendant which motivated her to wish to assist him. Plaintiff had not in the past and has not since the time of the Loan lent any moneys to any person approaching the amounts loaned to Defendant. Plaintiff made the loan because of the personal relationship she had with Defendant and if it were not for that relationship would not have made the Loan. Plaintiff did not request and Defendant did not agree to pay any interest on the Loan which he borrowed from Plaintiff.
12. In the original complaint in this action, Plaintiff alleged that the loan by her to Defendant "would be used as an investment in his business." In so stating, Plaintiff was not alleging that her intention in making the loan was for Plaintiff to have an investment in Defendant's business. Rather, Plaintiff

*Appendix G*

was expressing her understanding that **Defendant** intended to use some of the money for his personal expenses and some of it in his business. Plaintiff did not care how Defendant used the money. All that she was interested in was assisting a man whom she loved.

13. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff that he was not married at the time. Plaintiff subsequently learned that the statements Defendant made about not being married were false, and he was actually married. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff he would repay her all sums loaned. Plaintiff believed all of the representations Defendant made regarding his promises to repay the Loan. Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.
14. Prior to Plaintiff loaning Defendant the money, Defendant represented to Plaintiff that he would repay all of the money she loaned him, and that he would make it worth Plaintiff's while to loan the money to him. *After the money was loaned by Plaintiff* to Defendant and prior to Defendant repaying any of the same, Defendant further represented to Plaintiff, and Defendant made comments to Plaintiff that in addition to repaying the Loan, that Plaintiff would "double her money" by his treatment of the loan as an investment in his business and that Defendant

*Appendix G*

would give Plaintiff fifty percent (50%) of his business. ***Subsequent to the Loan being made***, after receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant, and that he would also treat the Loan as an investment in his business, Bary Group International, Inc. Subsequent to the Loan being made, Defendant personally, orally guaranteed the funds. The foregoing representations relating to investment in his business that were made by Defendant were not solicited by Plaintiff and were not terms of the parties' agreement but were offered freely by Defendant. In making the Loan, Plaintiff was not motivated by a desire to invest in Defendant's business but was motivated by her personal relationship with Defendant. Plaintiff has no knowledge, information or belief as to whether Defendant actually used the Loan proceeds in his business. Defendant has never actually given Plaintiff an interest in his business by issuing her shares or other form of ownership of the business. Plaintiff relied on the aforesaid promise of loan repayment when she decided to loan the money and never waived a right to loan repayment, whether she received an interest in the business or not.

15. While Plaintiff was situated in Orange County, California, Defendant repeatedly acknowledged his debt to Plaintiff in writing and orally. While Plaintiff was situated in Orange County, California, Defendant made repeated promises that he would repay Plaintiff the Loan. Attached hereto and marked as Exhibits

*Appendix G*

2 to 12 are true and correct copies of personal letters written by Defendant to Plaintiff which demonstrate the intimate, personal nature of the parties' relationship and some of which acknowledge Defendant's debt to Plaintiff and promise to repay the Loan. The approximate dates of Exhibits 2 to 12 are as follows:

Exhibit 2 - August 1999

Exhibit 3 - November 1999

Exhibit 4 - Fall of 1999

Exhibit 5 - December 1999

Exhibit 6 - Spring of 2000

Exhibit 7 - Spring of 2000

Exhibit 8 - April 19, 2000

Exhibit 9 - Summer of 2000

Exhibit 10 - Summer of 2000

Exhibit 11 - 2001

Exhibit 12 - 2001

On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.

*Appendix G*

16. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. (A true and correct copy of that promissory note is attached hereto as Exhibit 13 and incorporated herein by this reference.) In such Promissory Note, Defendant acknowledged his understanding that the Loan was a “hybrid” loan for both personal and business reasons. Defendant stated “I have borrowed this money within the last sixteen month for business reasons **and personal reasons.**” (Emphasis added.) (As previously alleged, Plaintiff’s motivations for making the loan was personal. It is only after the Loan was made that Defendant offered an interest in his business to Plaintiff.) At the time the Promissory Note was executed, Defendant actually owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant promised to pay Plaintiff (who was then and still is situated in Orange County, California) \$20,000 per month for 25 months. Defendant did not abide by that payment schedule.
17. Defendant’s statements that he would give Plaintiff an interest in his businesses were made in Exhibit 11 which was a document written by Defendant in 2001. As can be seen from Exhibit 1, at the very least 95% and up to 100% of the Loan had already been completed by that time. (A \$1,000 advance was made in May, 2001 and Plaintiff does not have dates for approximately \$17,000 of the other amounts that were loaned to Defendant.) Whatever motivation Defendant had for making that offer to give Plaintiff an interest in the business, it was not one that motivated Plaintiff’s initial Loan but came subsequent

*Appendix G*

to the loan being made.

18. On October 17, 2000, Defendant paid Plaintiff \$8,000.
19. On May 17, 2001, Defendant paid Plaintiff \$1,000.
20. On June 19, 2001, Defendant paid Plaintiff \$5,000.
21. On July 6, 2001, Defendant paid Plaintiff \$2,500.
22. On October 8, 2001, Defendant paid Plaintiff \$3,000.
23. On December 30, 2001, Defendant paid Plaintiff \$3,000.
24. On April 2, 2002, Defendant paid Plaintiff \$3,000.
25. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is therefore \$25,500.00, as set forth below:

*Appendix G*

| Payment Date      | Payment Amount     |
|-------------------|--------------------|
| October 17, 2000  | 8,000.00           |
| May 17, 2001      | 1,000.00           |
| June 19, 2001     | 5,000.00           |
| July 6, 2001      | 2,500.00           |
| October 8, 2001   | 3,000.00           |
| December 30, 2001 | 3,000.00           |
| April 2, 2002     | 3,000.00           |
| <b>Total:</b>     | <b>\$25,500.00</b> |

26. Defendant paid all said amounts by wiring the funds to Plaintiff's bank in Orange County, California or by mailing a check to Plaintiff's residence in Orange County California.
27. In sum, Plaintiff loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law.
28. All monies were to be paid in Orange County, California.
29. At all times herein mentioned, and at the present time, Plaintiff was and is a resident of Orange County, California. The effect of Defendant's promises

*Appendix G*

impacted Plaintiff in Orange County, California, by causing her to pay money which was situated in Orange County, California.

30. At all times herein mentioned, Defendant never resided in California and was a resident of Egypt and/or New Jersey and/or New York. On information and belief, Defendant has never traveled to California, has never owned real or personal property in California and has never conducted business in California. On information and belief, Defendant has never been subject to the long-arm jurisdiction of California courts because he has not had sufficient minimum contacts with the State of California to allow California to exercise personal jurisdiction over him.
31. Defendant is an Egyptian national. Shortly after the terrorist attack on the World Trade Center in New York on September 11, 2001, Defendant expressed to Plaintiff his fear that he would be subject to harassment and retaliation because of his ethnic origin.
32. Immediately after September 11, 2001 Defendant stated to Plaintiff that he was going to leave the United States permanently and repatriate himself to Egypt as soon as possible. Defendant stated to Plaintiff that he would never return to the United States. Defendant stated to Plaintiff that he feared for his safety and the safety of his family, and intended to move to Egypt, and stated that he intended to repay her the Loan from Egypt.

*Appendix G*

33. Plaintiff believed Defendant when he stated to her that he intended to move to Egypt and would not return, because his statements sounded extremely sincere to Plaintiff when they were made by Defendant.
34. Soon after making the statements, Defendant stopped making any payments to Plaintiff as aforesaid. Plaintiff lost all contact with Defendant and Plaintiff believed that Defendant had actually moved to Egypt. Plaintiff made efforts to contact and locate Plaintiff, but to no avail. In 2004 and 2005, Plaintiff went to New York on two occasions to search for Defendant but was unable to find him using the information she knew about him. In 2008, Plaintiff went to Egypt and looked for Defendant and used the information he had given him relating to his phone numbers, but to no avail and could not find him in Cairo, and Plaintiff had no way of contacting Defendant. From April, 2002 forward until the present date, Plaintiff had no contact whatsoever with Defendant.
35. On or about January 6, 2015 Plaintiff ascertained that Defendant still resided in New York and/or New Jersey and had, in fact, never permanently moved to Egypt.
36. Plaintiff is informed and believes that Defendant knowingly made false statements to Plaintiff about Defendant permanently moving to Egypt in order to trick Plaintiff into not trying to locate him to collect on the Loan. Defendant intentionally lied so that he could secrete himself and insulate himself from efforts by

*Appendix G*

Plaintiff to collect on the Loan. Plaintiff is informed and believes that Defendant was hiding from her to avoid collection efforts and that he concealed from her that he lived in the United States.

37. As a result of the foregoing facts, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California.
38. Since the loan was a personal loan when made, application of California's statute which tolls statutes of limitation when parties are outside of California are not affected by the Commerce Clause of the United States Constitution and such statute is valid and enforceable in this context.
39. Further, Defendant's repeated promises to Plaintiff that he would repay her, coupled with his subsequent lies to Plaintiff that he was permanently moving to Egypt and would never return to the United States, and all of the other misrepresentations Defendant made, set forth in this Complaint, and Defendant's attempts to hide from Plaintiff work and create an estoppel that prevents him from asserting defenses based on the statute of limitations, laches or similar statutes of repose. By virtue of the personal, intimate relationship between Plaintiff and Defendant, Plaintiff was entitled to as a matter of public policy believe and rely on the statements made by Defendant

*Appendix G*

when he made repeated promises to repay her and statements that he was permanently leaving the United States. In fact, Plaintiff did so rely on those statements and once she searched for him and did not find him, did not bring any action against Defendant because she believed he actually had moved back to Egypt consistent with the statements he had made to her.

**FIRST CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**Breach of Oral Contract**

40. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 38 of the within Complaint.
41. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendants the total sum of \$690,662.38 based on oral promises by Defendant that he would repay the same upon demand of Plaintiff.
42. Plaintiff has at all times performed the terms of the parties' oral agreement, except as to such terms the performance of which has been excused by Defendants' breach of contract as is further alleged herein.
43. Defendants and each of them have breached the oral agreement without justification or excuse in that since

*Appendix G*

April 2, 2002 Defendants have not made any payments on the oral agreement.

44. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.
45. As a direct and proximate result of Defendants' breach of the oral contract, Plaintiff has sustained monetary damages subject to proof but in the sum of at least \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**SECOND CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**Breach of Written Contract**

46. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 44 of the within Complaint.
47. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000 (although the balance owing from

*Appendix G*

Defendant to Plaintiff was actually more than said amount at the time). (A true and correct copy of that promissory note is attached hereto as Exhibit 2 and incorporated herein by this reference.) Plaintiff has at all times performed the terms of the Promissory Note in the manner specified by said note, except as to such terms the performance of which has been excused by Defendants' breach of contract as is further alleged herein. Said Promissory Note states that the Loan was for personal and business reasons.

48. The Promissory Note is a written contract in which Defendant promised to pay Plaintiff (who was then and still is situated in Orange County, California) \$20,000 per month for 25 months. Defendant did not abide by that payment schedule.
49. Defendants have breached the Promissory Note without justification or excuse in that they have not made the payments called for in said Promissory Note on the schedule set forth therein. Instead, the only payments made on the Promissory Note since the date of its execution were in the amount of \$25,500 from October, 2000 to April, 2002.
50. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.

*Appendix G*

51. As a direct and proximate result of Defendants' breach of the written contract, Plaintiff has sustained monetary damages subject to proof but in the sum of at least \$464,500, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**THIRD CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**COMMON COUNTS**

52. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 49 of the within Complaint.
53. Plaintiff alleges that Defendants became indebted to Plaintiff on common counts as follows.
54. Within the past sixteen years, on an open book account for money due.
55. Within the past sixteen years, because an account was stated in writing by and between Plaintiff and Defendant in which it was agreed that Defendants were indebted to Plaintiff.
56. Within the past sixteen years for money lent by Plaintiff to Defendant at Defendant's request.

*Appendix G*

57. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.
58. There is now due and owing from Defendants to Plaintiff the sum of \$605,162.38 which is the reasonable value, that is due and unpaid despite Plaintiff's demand, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**FOURTH CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**FRAUD**

59. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 57 of the within Complaint.
60. Beginning on or about July 9, 1999, and continuing through April 2, 2002, Plaintiff loaned certain sums to Defendant based on her personal, intimate relationship with him as previously alleged. Those funds totaled \$690,662.38.

*Appendix G*

61. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff that he was not married at the time. Plaintiff subsequently learned that the statements Defendant made about not being married were false, and he was actually married. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff he would repay her all sums loaned. Plaintiff believed all of the representations Defendant made regarding his promises to repay the Loan. Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.
62. Prior to Plaintiff loaning Defendant the money, Defendant represented to Plaintiff that he would repay all of the money she loaned him, and that he would make it worth Plaintiff's while to loan the money to him. After the money was loaned by Plaintiff to Defendant and prior to Defendant repaying any of the same, Defendant further represented to Plaintiff, and Defendant made comments to Plaintiff, that Plaintiff would "double her money" by his treatment of the loan as an investment in his business and that Defendant would give Plaintiff fifty percent (50%) of his business. Subsequent to the Loan being made, after receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant, and that he would also treat the Loan as an investment in his business, Bary Group

*Appendix G*

International, Inc. Subsequent to the Loan being made, Defendant personally, orally guaranteed the funds. Defendant relied on the aforesaid promise of loan repayment when she decided to loan the money.

63. Defendant repeatedly acknowledged his debt to Plaintiff in writing and made repeated representations that he would repay her in full.
64. On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.
65. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. At the time the Promissory Note was executed, Defendant owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant represented that he would pay Plaintiff \$20,000 per month for 25 months. (See Exhibit 2.)
66. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is \$25,500.00. In sum, Plaintiff loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus interest at the current legal rate.
67. Immediately after the attack on the World Trade Center on September 11, 2001, Defendant told Plaintiff that he was permanently moving back to Egypt as soon as possible, that he would repay her the balance owed, and that he was never returning to the

*Appendix G*

United States. Plaintiff just learned that Defendant resides in the United States. Defendant has ceased making any payments on the balance of his loan.

68. Prior to loaning the money, Defendant represented to Plaintiff that he was not married. The truth is that Defendant was married.
69. The representations made by Defendant were in fact false. The truth was that Defendant had no intention of repaying Plaintiff the full sum of monies lent. Defendant is not, in fact, unmarried and had no intention of giving Plaintiff 50% of his business. Defendant did not permanently leave the country after September 11, 2001 but resides in New York and/or New Jersey.
70. When Defendant made all of the aforesaid representations as set forth in Paragraphs 1 through 67 of the within Complaint, Defendant knew they were false.
71. Defendant made all of the aforesaid representations with the intent to defraud and induce Plaintiff to act in reliance thereon as described herein and to loan him money. At the time Plaintiff acted, Plaintiff did not know Defendant's representations were false and believed them to be true. Plaintiff acted in justifiable reliance upon the truth of Defendant's representations.

*Appendix G*

72. Defendant concealed or suppressed material facts from Plaintiff. Defendant orally represented to Plaintiff that he was not married at the time the Loan was made. Plaintiff subsequently learned that the statements Defendant made about not being married were false, and Defendant was actually married. Defendant further represented to Plaintiff that she would double her money by his treatment of the loan as an investment in his business and that he would give Plaintiff fifty percent (50%) of his business. Defendant had no intention of giving Plaintiff 50% of his business. Defendant had no intention of doubling Plaintiff's money. After receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant. Defendant had no intention of repaying the sums loaned. Defendant stated to Plaintiff that he was leaving the country permanently. Defendant did not permanently leave the country after September 11, 2001 but resides in New York and/or New Jersey.
73. Defendant concealed or suppressed all of the above material facts by telling Plaintiff other facts to mislead Plaintiff and prevent Plaintiff from discovering the concealed or suppressed facts.
74. Defendant concealed or suppressed all of the above material facts from Plaintiff with the intent to defraud and induce Plaintiff to act in reliance thereon and to loan him money. At the time Plaintiff acted, Plaintiff was unaware of the concealed or suppressed facts and

*Appendix G*

would not have taken the action if Plaintiff known the facts.

75. Defendant made a promise about a material matter without any intention of performing in that Defendant made an oral promise to repay any and all sums of money lent by Plaintiff to him and later stating that he would treat it as an investment in his business. At the time Defendant made such promise, including the promise to repay the sum of \$690,662.38 Defendant had no intention of repaying said sums.
76. Defendant executed a Promissory Note to repay the sum of \$490,000 by making monthly payments of \$20,000 for 25 months. At the time Defendant signed the Promissory Note, Defendant had no intention of repaying such sums due on the Promissory Note or making such monthly payments.
77. Defendant's promises as set forth in Paragraphs 1-74 of the within Complaint were issued without any intention of performance and were made with the intent to defraud and induce Plaintiff to act in reliance thereon and to loan him money. At the time Plaintiff acted, Plaintiff was unaware of Defendant's intention not to perform the promise. Plaintiff acted in justifiable reliance upon the promise.
78. Plaintiff acted in justifiable reliance upon Defendant's conduct and statements in that Plaintiff was induced to act and loaned Defendant the total sum of \$690,662.38.

*Appendix G*

79. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.
80. As a direct and proximate result of Plaintiff's reliance upon Defendant's statements and conduct, Plaintiff has been damaged in the amount of \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.
81. Defendants acted with oppression, fraud and malice, warranting an award of exemplary and punitive damages in a sum according to proof at trial.

Wherefore, Plaintiff prays judgment against Defendants and each of them as follows:

1. Monetary damages subject to proof in excess of the minimum jurisdiction of this Court but in an amount of at least \$605,162.38;
2. General damages subject to proof;
3. Exemplary damages according to proof;
4. Attorneys' fees as permitted by law;

*Appendix G*

5. Costs of suit; and
6. Such other and further relief as the Court deems just and proper.

Respectfully submitted:

DATED: February 5, 2016

LAW OFFICE OF DOUGLAS S. HONIG

---

DOUGLAS S. HONIG, Esq.  
Attorney for Plaintiff Debra Newell

| DATE       | PAID          | PAYEE                         | METHOD              | DESCRIPTION                |
|------------|---------------|-------------------------------|---------------------|----------------------------|
| 7/9/1999   | \$ 10,000.00  | BARY, MOHAMAD                 | #2906               | CASH - CHECK FOR CASH)     |
| 8/7/1999   | \$ 1,000.00   | BARY, MOHAMAD                 | COUNTER CHECK       | CASH - CHECK FOR CASH)     |
| 8/13/1999  | \$ 10,000.00  | BARY, MOHAMAD                 | #2929               | CASH - CHECK FOR CASH)     |
| 8/13/1999  | \$ 2,000.00   | BARY, MOHAMAD                 | #2930               | CASH - CHECK FOR CASH)     |
| 8/13/1999  | \$ 7,990.00   | BARY, MOHAMAD                 |                     |                            |
| 8/16/1999  | \$ 5,000.00   | BARY, MOHAMAD                 | #13276              | DN - CHECK                 |
| 10/9/1999  | \$ 3,200.00   | BARY, MOHAMAD                 | #2994               | CASH - CHECK FOR CASH)     |
| 10/11/1999 | \$ 3,000.00   | BARY, MOHAMAD                 | #13856              | DN - CHECK                 |
| 10/14/1999 | \$ 2,000.00   | BARY, MOHAMAD                 | #13920              | DN - CHECK                 |
| 11/1/1999  | \$ 2,000.00   | BARY, MOHAMAD                 | #2342               | DN - CHECK                 |
| 11/1/1999  | \$ 9,990.00   | BARY, MOHAMAD                 | #2340               | DN - CHECK                 |
| 12/2/1999  | \$ 4,000.00   | BARY, MOHAMAD                 | #3064               | CASH - CHECK FOR CASH)     |
| 12/13/1999 | \$ 7,000.00   | BARY, MOHAMAD                 | COUNTER CHECK       | CASH - CHECK FOR CASH)     |
| 1/5/2000   | \$ 100,000.00 | BARY, MOHAMAD                 | #14848              | DN - CHECK                 |
| 1/19/2000  | \$ 1,000.00   | BARY, MOHAMAD                 | #3093               | CASH - CHECK FOR CASH)     |
| 1/20/2000  | \$ 75,000.00  | BARY, MOHAMAD                 | #3094               | CASH - CHECK FOR CASH)     |
| 1/20/2000  | \$ 9,000.00   | BARY, MOHAMAD                 | #3095               | CASH - CHECK FOR CASH)     |
| 2/2/2000   | \$ 2,000.00   | BARY, MOHAMAD                 | #2000               | CASH - CHECK FOR CASH)     |
| 2/27/2000  | \$ 1,000.00   | MIRAGE (MOHAMAD BARY)         | #3142               |                            |
| 2/26/2000  | \$ 1,000.00   | BARY, MOHAMAD                 | #3141               | CASH - CHECK FOR CASH)     |
| 3/6/2000   | \$ 2,500.00   | BARY, MOHAMAD                 | #3153               | CASH - CHECK FOR CASH)     |
| 4/5/2000   | \$ 3,000.00   | BARY, MOHAMAD                 | #3183               | CASH - CHECK FOR CASH)     |
| 6/9/2000   | \$ 1,000.00   | BARY, MOHAMAD                 | #3242               | SANWA BANK                 |
| 7/11/2000  | \$ 2,500.00   | BARY, MOHAMAD                 | #3265               | CASH - CHECK FOR CASH)     |
| 7/10/2000  | \$ 2,045.00   | BARY, MOHAMAD                 | #3285               | CASH - CHECK FOR CASH)     |
| 7/14/2000  | \$ 10,000.00  | BARY, MOHAMAD                 | #370662302          | 7/14/2000 CK# 16431 A      |
| 8/14/2000  | \$ 3,700.00   | BARY, MOHAMAD                 | #3332               | CASH - CHECK FOR CASH)     |
| 8/29/2000  | \$ 8,665.00   | ABOUELMAGD, MOHAMED           | WESTERN UNION       | 19481284-9                 |
| 8/29/2000  | \$ 8,665.00   | ABOUELMAGD, MOHAMED           | WESTERN UNION       | 19481282-7                 |
| 8/29/2000  | \$ 4,175.00   | ABOUELMAGD, MOHAMED           | WESTERN UNION       | 19481283-8                 |
| 8/29/2000  | \$ 21,080.00  |                               | #16816              | CHECK - AMBROSIA INTERIORS |
| 8/30/2000  | \$ 400.00     |                               | #16824              | CHECK                      |
| 9/18/2000  | \$ 250,000.00 | TAREK IBRAHIM ABDELBARY TAREK | SANWA BANK TRANSFER |                            |
| 9/18/2000  | \$ 46,865.38  | TAREK IBRAHIM ABDELBARY TAREK | SANWA BANK TRANSFER | COUNTER CHECK              |
| 11/10/1999 | \$ 3,135.00   | ELBARY, MOHAMED               | WESTERN UNION       | #7028008761                |
| 11/12/1999 | \$ 5,020.00   | ELBARRY, MOHAMED              | WESTERN UNION       | #7021244980                |
| 11/12/1999 | \$ 5,020.00   | ELBARRY, MOHAMED              | WESTERN UNION       | #7021246448                |
| 11/19/1999 | \$ 4,700.00   | ABOUELMAGD, MOHAMED I         | WESTERN UNION       | #7021729375                |
| 11/19/1999 | \$ 4,700.00   | ABOUELMAGD, MOHAMED I         | WESTERN UNION       | #7021727615                |
| 12/2/1999  | \$ 329.00     | ELBARY, MOHAMED               | WESTERN UNION       | #7024206373                |

| DATE           | PAID        | PAYEE                 | METHOD        | DESCRIPTION |
|----------------|-------------|-----------------------|---------------|-------------|
| 1/5/2000       | \$ 5,220.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION | #7029545847 |
| 1/5/2000       | \$ 5,200.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION | #7024466597 |
| 2/29/2000      | \$ 5,220.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #40141403-5 |
| 2/29/2000      | \$ 2,525.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #40141405-7 |
| 2/29/2000      | \$ 2,525.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #40141406-8 |
| 3/6/2000       | \$ 2,633.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION | #40124605-4 |
| 7/1/2000       | \$ 2,115.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #40141573-0 |
| 8/14/2000      | \$ 3,140.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #40141678-5 |
| 8/27/2000      | \$ 1,400.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #99575250-5 |
|                | \$ 5,200.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION |             |
|                | \$ 4,400.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION | #702447     |
|                | \$ 5,220.00 | ABOUELMAGD, MOHAMED I | WESTERN UNION | #7024469365 |
|                | \$ 1,185.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #7024109830 |
| 5/17/2001      | \$ 1,000.00 | ABOUELMAGD, MOHAMED   | WESTERN UNION | #45719284-6 |
| <b>Totals:</b> |             | <b>\$ 690,662.38</b>  |               |             |

*Appendix G***EXHIBIT 2**

To my Sweetheart Debra Dianna Newell,

Honey I've loved you more than life itself. I can't never see my life without you again you are the love of my life you're my lady, Few weeks since we met at the Mandalay Bay and all I see is your smile facing me your vice all over me. It is the greatest feelings a man can ever dream of you have been sent to me by the Lord to show me happiness and lift my spirit up you are the only person at this pint of my life that brings joy and happiness, keeps me a life looking forward to share the rest of my life with you and only you. Few months ago exactly on March 1999 I wanted to sell out all my business and leave enough to my kids and their mom and call it quit. Come to Las Vegas buy a house an live an easy life not to let anyone know where I am what I am doing then this composting project came to life and force the issues on me got me through. Six weeks ago I decided to do the same again then you were there to get me through it one more time. My feelings were shut down, my spirit was no longer the same my heart was bleeding over my brothers and my broken home, then you are here standing like a Giant helping to pull me out of my misfortune, out of my depression putting a big smile on my face, putting my heart back to work stronger than ever, you have been my inspiration through the toughest time my hope when all my hopes are meaningless my goal when I lost mine.

*Appendix G*

Debbie my love,

No one on this earth have made me feel this way I am feeling now, No one have taking control of my heart ever but you that is how much you meant to me actually you mean the whole life for me. At this time we have to unit we have to share our thoughts, our sufferings, our happiness and put behind our past to come through all of this obstacles and misfortune.

At this point of y life I'll be glad to find away where I can survive the next six or seven months waiting that we will be together right after your divorce and having my child only for this Dream I'll be able to make it.

Please sweetheart be sure of your love to me because if I ever fail this time it will be the end of me Just for your information and you only the past eight years I lived only for my son, then for my son and my daughter then for my sister and her kids then for my brothers and their dreams and to thank the Lord for blessing me with all this love and gifts working on helping others to see the light now I am completed I am looking to enjoy life itself with you. I care about every and each second of life now to have all the time to spend with you all my happiness, my goals and my dreams to share it with you. I can only see life one way now with Debra Dianna, so God help me to keep all my strength and power to use towards the future of me and you and build a new family to be the ideal family that the whole world can see our love story as their dreams waiting to come true our love is unique in every aspect is beautiful, is great and also stronger than life itself.

*Appendix G*

Debbie,

I have no guts to say this to you so I will write about it because honesty I can only be the way to life and to live with respect and dignity.

At this moment especially after one month in Las Vegas I have some financial problems. The only way to go through it will be on the end of October when I sell the factory. I will go to Egypt this weekend trying to find sources where I can make it for the next two month without no one to feel I am in a bad spot at the time being, therefore all my next two month will be quite and little pressure so please try to understand I did not lie to you about myself a bit. All what I've told you is nothing but the truth, I just found out today that my financial status are not that great. I will have a little hard time for the next two month than will be back in order. I never wanted to meet you this way full of problems but God is higher and power he wanted us to meet in the middle of all this.

Would you please accept me and deal with it for these Eight or nine weeks coming. I just feel so bad that it has to be a very bad at the moment but I promise you that after this time we will never have to discuss those kinds of situations never again Darling I love you so very very much with all my heart

Love

Mohamed

*Appendix G***EXHIBIT 3**

Honey I love you,

Love Debbie,

Darling I love you more than words can say and I love you more and more day after day every time. I think I can never love anyone more than my love for you I find still there is more love to be discovered in me for you. See the life in you, I feel Happy with you, I appreciate every second we spend together every meal we eat together, every movie we watch together and every conversation that takes place between me and you. You have been the reason for me and the answer for me you are the sun on the rainy day, the light in the dark and my oasis when I am lost. Sometimes I think of you and I can find the words to express how I feel about you exactly but then my heart answers for me with his beats saying all I want to say an my eyes tells me no one is beautiful as you and my body tell me she is the one that makes me relax and dance an my soul refuse to share faith and honor but with you. Than I know it is far away from words and feelings it is a holly thing my love for you. Without you Life can only be success, business, children and party time. But with you life can be love, giving, sharing and happiness, can be dreams to come true, goals to be excuted, life to live and want to be around longer. We were made for each other darling and the Lord have sent us to meet that day only because he knows a lot more than me and you, he knew that on July 10<sup>th</sup>, 1999 we will need each other more than ever we will appreciate this soul reunion only then I think the lord for his gift to me on that day and that day is my real thanks giving day every year. Thanks a million for

*Appendix G*

all your trust, faith and support and I promise you and Nicole, Brandon, Jacquelyn and Terra to be the Good example for them to look up to me and say mom was all right about choosing this man to protect us, guide us and truly love us as father can be then only then I can prove my love for you. I appreciate the trust and confidence you have given to me towards your children and towards the whole world. I will put aside all the obstacles and start from today the fight for our big family. Be next to me like you always do and we will show the world what love can do.

Debbie

YOU ME THE LIFE TO ME you are my life I live for you, I live from you and my life is yours but we have children and major responsibilities and goals that we must deliver to all the children even to the one to come therefore we must be strong from today and do our best very strong more than ever to meet our responsibilities and make a perfect example to all our children to have a better luck in life and see the day to make better choices to their life than we did before.

Happy Holidays and may the Lord send his peace and Glory on all of us this month to answer all our pray and make all our dreams come true. AMen

Love forever

Love

Mohamed Abdelbarry Abouelmagd

Mohamed Bary

*Appendix G*

**EXHIBIT 4**

As Time goes by.....

Love Debra,

Since we met my whole life have changed my whole dreams and goals became for you with you about you and day after day my love to you and for you can never be enough Honey you are all my prayers to be true all my hopes for

..... I love you more.

For love to come through you are my everything and everything is you. I can't wait to be all the time with you because the God have made me and you for each other and no one can be in between my love for you above all the reasons and behind all the logic since we been made for each other I will always belong to you.

Love forever

Mohamed B.

*Appendix G*

**EXHIBIT 5**

Hi Honey,

I just know one thing for sure Is how much I love you and what you mean to me the rest are in god hands to handle just be next to me as you always been and all the bad luck around our life will go away I believe in justice and faithness of God and soon enough our life will turn around for the best. I many need you one more time to stand up strong for me to go through this so please be there for me.

Love forever

Mohamed

I can say that Straight to you since I never broken my word only my stupidity made me to do so for the twenty thousand dollars I took from you to return this week. I have no choice but to ask you to wait till my arrival to Egypt, which is not to long rom today. I do apologize for an inconvenience or trouble caused by that and this letter is considered to be a promissory note to pay it back as soon as I go to Egypt.

Sorry V.V.V. sorry Debbie

Love

Mohamed

*Appendix G*

**EXHIBIT 6**

Honey, Darling, Sweetheart, Baby

Happy birthday to you

I looked deep into my cards and found this the best of all because it says some of my thought and feelings towards you the things we do is what I love, the warm happy feeling which I hold you, it is so wonderful so perfect to be with you and have you the wife for me because it is been made by the lord for me and you that's why my love for you can be there all the life for you because I was chosen to love you Darling I am madly in love with you and I am apart from you but only my body is not there the rest of me lives for you and lives for you my heart, my soul and my spirit all with my mind belong to you .

Happy birthday to you

Love Husband

Mohamed

*Appendix G*

**EXHIBIT 7**

Darling sweetheart Debbie,

Happy Birthday to you and may the lord send peace and happiness on your heart and soul to live all the time in comfort and peace of mind to see the blessing of God all ever you and your children.

On your birthday I wanted to say thank you thanks for All you've done for me and for my children, for our family for your mom for your friends and for all your employees you such a unique person full of honor dignity and values

I will always see you kindness, warm feeling and soft heart as gift from God to you as your design talent its is always nice to thank our Lord for his blessing to us and seek help in our bad time from his glory. We are all made by him and made for him he is the absolute power and we get all our strength through our faith in him again darling thanks a million for all you've done for me and one day I will reward you for all your love an sharing that made me slave of your heart and guard on your soul and king of your Castle

Love forever

Mohamed

My love for you is all I do to go through my love for you is only true.

I love you.

70a

*Appendix G*

**EXHIBIT 8**

Happy birthday to you sweetheart

It is very unusual to be five thousand miles away on the love of your life birthday. But what makes a little bit different is distance was never an issue to feel that you are next to me around me to celebrate your birthday. Honey with all the love in the world I say Happy birthday to you.

Love forever

Mohamed

4/19/2000

.....to soar!

Happy birthday

*Appendix G*

**EXHIBIT 9**

I am unable to function in mind again so I am asking you the love of my life and my life time partner to suggest an answer to able me get all the obstacles a side and get on with the main issues in our life now which is bringing our future plans to reality and start working them on step at the time.

I am really embarrassed and ashamed of myself to go through this again and put you through the same struggle and pressure again but unfortunately our destiny have become one and our life is already one so accept my sincere apology for eve talking about money again and maybe the lord will give me the chance very soon to reward you in everyway and be the power to our family and have you around me and my life all the time.

Honey sorry a million sorry to bring this issue again between us but life is unfair

*Appendix G*

**EXHIBIT 10**

Love Debbie,

Thanks to you for keeping me a live and keeping my sanity even though my life have gone down a lot lately, my fortune in life is you and my children next to my faith to keep going. No one have ever had this impact on me as you do. No one have ever earned the respect and trust I have for you my only goal and target in life is to spend the rest of my life wit you right next to you made me completed happy to look up to you and share everything with you. Not to be embarrassed when I show my downside in front of you I can never be thankfull to the lord more than I am. I am sorry that my problems have been a major issue in our relationship but with the help of God and you I will make it an get over this mess.

Darling I am madly in love with you for you about you and life is only you and no life after or before you.

Love forever

Mohamed

*Appendix G***EXHIBIT 11**

Debbie Sweetheart,

I can not talk to you another time regarding my situation and the things that needs to be done in my business but I can only offer to you one proposal is to share me the Company and be 50% shareholder of Barry Group International Inc. and Enviro-Egypt on my shares 75% since Larry Finn is 25% shareholder. And after the completion of this deal I can reward you a high percentage of interest plus your original money if that's possible to continue my projects and get to where I want to be or another solution is to get a business loan for me with the guarantee to pay the monthly payment an have a promissory note to state the payment of the loan. Again and again it comes to the same ugly situation but remember I am doing this for our future and our life together an your support at this stages of my life and my business beam essential to get these projects to life and produce income. Therefore, I am only steps away from getting rewarded for al four years of hard work and sales results but my courage have failed again to discuss this with you once again. I will rather to die than discuss it again face to face with you but it is foolish to loose everything for my pride and dignity.

*Appendix G***EXHIBIT 12**

Love Debbie,

Honey I love you from the bottom of my heart. I've loved you from the first moment I laid my eyes on you. I will always love you forever leaving you or breaking up with you is the death penalty for me. But to pull you in my misery and misfortune is also killing me slowly. To have a life with you I needed to be back to normal where I had success in my business and lived debts free. I was able to travel, later and host people I was able to buy gifts and surprises parties to people I done business with and to my family now that I am having nothing but troubles, sadness and suffering it is not the best time for us because when you not part of my life anymore I won't expect support or help from you and also I won't be very sensitive to all your behavior, I am so sorry that I am hurting you at the moment but pain for days or month better than pain forever. At least now I don't feel angry towards you or wait for any answers to my suffering related to you. If I ever make it again the first thing I'll be coming to you trying our relationship once again Meanwhile I will start working on paying my debts to you. Once we receive payments from E-Globe I'll forward 90% of my share monthly towards my balance with you and I will survive with 10%. Also I will void the recycling business for now finally please accept my deepest apology to you and God Help us, to live through.

*Appendix G*

**EXHIBIT 13**

Promissory Note

I Mohamed I. Abouelmagd owes Debra Newell the sum of 490,00 US\$ Four hundred Ninety Thousand US Dollars only includes all Western Union, Wire Transfers and Bank Checks. I have borrowed this money within the last sixteen months for business reasons and Personal reasons. I will pay the sum of Twenty Thousand US\$ monthly for total of Twenty Five months to conclude paying back all my debts to Debra Newell in good faith and all good intention to pay my debts as agreed upon. Within this period of twenty five month I will appreciate confidentiality of this agreement to stay confidential for the benefit of both of us and only to be exposed upon my default of payments by my side otherwise it stays very confidential.

In case of death I authorize Debra Newell to put a hold on my payment from E-Globe to pay my debts to her first then to be released for my children.

Signed by

Mohamed I Abouelmagd

Moh Bary

10/14/2000

**APPENDIX H — FIRST AMENDED COMPLAINT,  
WITHOUT EXHIBITS, FILED OCTOBER 2, 2015**

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
COUNTY OF ORANGE, CENTRAL DISTRICT -  
UNLIMITED JURISDICTION

Case No.: 30-2015-00785669

DEBRA NEWELL, AN INDIVIDUAL:

*Plaintiff,*

vs.

MOHAMED ABOUELMAGD, AN INDIVIDUAL,  
AKA AMED ABOUELMAGD, AKA AMED BARRY,  
AKA AMED BARY, AKA AMED ELBARRY AKA  
AMED ELBARY, AKA IBRAHIM ABDELBARY  
ABOUELMAGD MOHAMED, AKA MOHAMED  
A ABOUELMAGD, AKA MOHAMED ABDEL  
BARRY, AKA MOHAMED ABOU ABOUELMAGD,  
AKA MOHAMED ABOU ELABOUELMAGD, AKA  
MOHAMED ABOU ELMAGD, AKA MOHAMED  
BARRY, AKA MOHAMED BARY, AKA MOHAMED  
ELBARRY, AKA MOHAMED ELBARY, AKA  
MOHAMED I ABOU EL ABOUELMAGD,  
AKA MOHAMED I ABOU EL MAGD, AKA  
MOHAMED I ABOUELMAGD, AKA MOHAMED  
IBRAHIM ABOGELMAGD, AKA MOHAMED  
IBRAHIM ABOUELMAGD, AKA MOHAMED M

*Appendix H*

ABOUELMAGD, AKA MOHAMMED BARRY,  
AND DOES 1-100;

*Defendants.*

**FIRST AMENDED COMPLAINT FOR:**

- 1) BREACH OF ORAL CONTRACT;**
- 2) BREACH OF WRITTEN CONTRACT;**
- 3) COMMON COUNTS; AND**
- 4) FRAUD**

**PARTIES AND VENUE**

1. Plaintiff DEBRA NEWELL is and at all times relevant hereto was an individual residing in Orange County, California.
2. Plaintiff is informed and believes and thereon alleges that Defendant MOHAMED ABOUELMAGD (“Defendant”), is an individual who at all times relevant hereto resided and at the present time resides outside the State of California.
3. Defendant MOHAMED ABOUELMAGD has at different times used a large number of other names and is also known as AMED ABOUELMAGD, aka AMED BARRY, aka AMED BARY, aka AMED ELBARRY aka AMED ELBARY, aka IBRAHIM ABDELBARY ABOUELMAGD MOHAMED, aka MOHAMED A ABOUELMAGD, aka MOHAMED ABDEL BARRY, aka MOHAMED ABOU ABOUELMAGD, aka MOHAMED

*Appendix H*

ABOU ELABOUELMAGD, aka MOHAMED ABOU ELMAGD, aka MOHAMED BARRY, aka MOHAMED BARY, aka MOHAMED ELBARRY, aka MOHAMED ELBARY, aka MOHAMED I ABOU EL ABOUELMAGD, aka MOHAMED I ABOU EL MAGD, aka MOHAMED I ABOUELMAGD, aka MOHAMED IBRAHIM ABOGELMAGD, aka MOHAMED IBRAHIM ABOUELMAGD, aka MOHAMED M ABOUELMAGD, aka MOHAMMED BARRY (“Defendant”). If other names used by Defendant are ascertained, then Plaintiff shall seek leave to amend this Complaint.

4. The true names and capacities, whether individual, corporate or associate, or otherwise, of the Defendants named herein as DOES 1 through 100, inclusive, are unknown to Plaintiff, who therefore sues said Doe Defendants by such fictitious names pursuant to the Code of Civil Procedure Section 474. Plaintiff will amend this complaint to show their true names and capacities when the same has been ascertained.
5. Plaintiff is informed and believes, and based upon such information and belief, alleges that each of the Defendants sued herein as DOES 1 through 100 is contractually, strictly, negligently, intentionally, vicariously liable and/or otherwise legally responsible in some manner for each and every act, omission, obligation, event or happening set forth in this Complaint, and that each of said fictitiously named defendants is indebted to Plaintiff as hereinafter alleged.

*Appendix H*

6. The use of the term “Defendants” in any of the allegations of this Complaint, unless specifically otherwise set forth, is intended to include and charge both jointly and severally, not only named Defendants, but all Defendants designated as Does 1 through 100 as well.
7. Plaintiff is informed and believes, and based upon such information and belief, alleges that at all times herein stated all defendants were the agents, servants, employees, affiliates, subsidiaries, sister companies, parent companies or otherwise related to and responsible for their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such and with the permission and consent of their codefendants and principals.
8. Venue is proper in this County because the transactions referred to herein were to be performed in Orange County, California, payments made on the obligations referred to herein were in fact paid in Orange County, California, representations made by Defendants were made to Plaintiff while she was in Orange County, California, damages were caused to Plaintiff in Orange County, California and because Defendant is a resident of another jurisdiction, venue is proper in any county in California including Orange County.

**ALLEGATIONS COMMON TO  
ALL CAUSES OF ACTION**

9. Beginning in or about July 1999, Plaintiff Debra Newell and Defendant entered into an oral contract,

*Appendix H*

whereby Plaintiff agreed to loan certain sums of money to Defendant. At that time Defendant orally promised to Plaintiff to repay all sums of money to Plaintiff in Orange County, California, and Defendant orally, personally guaranteed the funds.

10. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38 ("the Loan").
11. Plaintiff is not and was not in the business of lending money and did not lend the money involved in this case for the purpose of profiting from that Loan. Plaintiff made the Loan because she had a personal, intimate relationship with Defendant. Plaintiff did not request and Defendant did not agree to pay any interest on the Loan which he borrowed from Plaintiff.
12. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff that he was not married at the time. Plaintiff subsequently learned that the statements Defendant made about not being married were false, and he was actually married. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff he would repay her all sums loaned. Plaintiff believed all of the representations Defendant made regarding his promises to repay the Loan. Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.

*Appendix H*

13. Prior to Plaintiff loaning Defendant the money, Defendant represented to Plaintiff that he would repay all of the money she loaned him, and that he would make it worth Plaintiff's while to loan the money to him. After the money was loaned by Plaintiff to Defendant and prior to Defendant repaying any of the same, Defendant further represented to Plaintiff, and Defendant made comments to Plaintiff, that Plaintiff would "double her money" by his treatment of the loan as an investment in his business and that Defendant would give Plaintiff fifty percent (50%) of his business. Subsequent to the Loan being made, after receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant, and that he would also treat the Loan as an investment in his business, Bary Group International, Inc. Subsequent to the Loan being made, Defendant personally, orally guaranteed the funds. Defendant relied on the aforesaid promise of loan repayment when she decided to loan the money.
14. While Plaintiff was situated in Orange County, California, Defendant repeatedly acknowledged his debt to Plaintiff in writing and orally. While Plaintiff was situated in Orange County, California, Defendant made repeated promises that he would repay Plaintiff the Loan. Attached collectively hereto and marked as Exhibit 1 are true and correct copies of personal letters written by Defendant to Plaintiff acknowledging his debt to her and promising to repay the Loan.

*Appendix H*

15. On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.
16. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. (A true and correct copy of that promissory note is attached hereto as Exhibit 2 and incorporated herein by this reference.) In such Promissory Note, Defendant acknowledged that the Loan was for both personal and business reasons. At the time the Promissory Note was executed, Defendant actually owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant promised to pay Plaintiff (who was then and still is situated in Orange County, California) \$20,000 per month for 25 months. Defendant did not abide by that payment schedule.
17. On October 17, 2000, Defendant paid Plaintiff \$8,000.
18. On May 17, 2001, Defendant paid Plaintiff \$1,000.
19. On June 19, 2001, Defendant paid Plaintiff \$5,000.
20. On July 6, 2001, Defendant paid Plaintiff \$2,500.
21. On October 8, 2001, Defendant paid Plaintiff \$3,000.
22. On December 30, 2001, Defendant paid Plaintiff \$3,000.

*Appendix H*

23. On April 2, 2002, Defendant paid Plaintiff \$3,000.
24. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is therefore \$25,500.00, as set forth below:

| Payment Date      | Payment Amount     |
|-------------------|--------------------|
| October 17, 2000  | 8,000.00           |
| May 17, 2001      | 1,000.00           |
| June 19, 2001     | 5,000.00           |
| July 6, 2001      | 2,500.00           |
| October 8, 2001   | 3,000.00           |
| December 30, 2001 | 3,000.00           |
| April 2, 2002     | 3,000.00           |
| <b>Total:</b>     | <b>\$25,500.00</b> |
25. Defendant paid all said amounts by wiring the funds to Plaintiff's bank in Orange County, California or by mailing a check to Plaintiff's residence in Orange County California.
26. In sum, Plaintiff loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law.
27. All monies were to be paid in Orange County, California.

*Appendix H*

28. At all times herein mentioned, and at the present time, Plaintiff was and is a resident of Orange County, California. The effect of Defendant's promises impacted Plaintiff in Orange County, California, by causing her to pay money which was situated in Orange County, California.
29. At all times herein mentioned, Defendant never resided in California and was a resident of Egypt and/or New Jersey and/or New York. On information and belief, Defendant has never traveled to California, has never owned real or personal property in California and has never conducted business in California.
30. Defendant is an Egyptian national. Shortly after the terrorist attack on the World Trade Center in New York on September 11, 2001, Defendant expressed to Plaintiff his fear that he would be subject to harassment and retaliation because of his ethnic origin.
31. Immediately after September 11, 2001 Defendant stated to Plaintiff that he was going to leave the United States permanently and repatriate himself to Egypt as soon as possible. Defendant stated to Plaintiff that he would never return to the United States. Defendant stated to Plaintiff that he feared for his safety and the safety of his family, and intended to move to Egypt, and stated that he intended to repay her the Loan from Egypt.
32. Plaintiff believed Defendant when he stated to her that he intended to move to Egypt and would not return,

*Appendix H*

because his statements sounded extremely sincere to Plaintiff when they were made by Defendant.

33. Soon after making the statements, Defendant stopped making any payments to Plaintiff as aforesaid. Plaintiff lost all contact with Defendant and Plaintiff believed that Defendant had actually moved to Egypt. Plaintiff made efforts to contact and locate Plaintiff, but to no avail. Plaintiff went to Egypt and looked for Defendant, but to no avail, and Plaintiff had no way of contacting Defendant. From April, 2002 forward until the present date, Plaintiff had no contact whatsoever with Defendant.
34. On or about January 6, 2015 Plaintiff ascertained that Defendant resided in New York and/or New Jersey had, in fact, never permanently moved to Egypt.
35. Plaintiff is informed and believes that Defendant knowingly made false statements to Plaintiff about Defendant permanently moving to Egypt in order to trick Plaintiff into not trying to locate him to collect on the Loan. Defendant intentionally lied so that he could secrete himself and insulate himself from efforts by Plaintiff to collect on the Loan. Plaintiff is informed and believes that Defendant was hiding from her to avoid collection efforts and that he concealed from her that he lived in the United States.
36. As a result of the foregoing facts, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the

*Appendix H*

Courts of the State of California, and outside of California.

37. Since the loan was a personal loan when made, application of California's statute which tolls statutes of limitation when parties are outside of California are not affected by the Commerce Clause of the United States Constitution and such statute is valid and enforceable in this context.
38. Further, Defendant's repeated promises to Plaintiff that he would repay her, coupled with his subsequent lies to Plaintiff that he was permanently moving to Egypt and would never return to the United States, and all of the other misrepresentations Defendant made, set forth in this Complaint, and Defendant's attempts to hide from Plaintiff work and create an estoppel that prevents him from asserting defenses based on the statute of limitations, laches or similar statutes of repose. By virtue of the personal, intimate relationship between Plaintiff and Defendant, Plaintiff believed Defendant when he made repeated promises to repay her and statements that he was permanently leaving the United States, and did not bring any action against Defendant.

*Appendix H*

**FIRST CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**Breach of Oral Contract**

39. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 38 of the within Complaint.
40. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendants the total sum of \$690,662.38 based on oral promises by Defendant that he would repay the same upon demand of Plaintiff.
41. Plaintiff has at all times performed the terms of the parties' oral agreement, except as to such terms the performance of which has been excused by Defendants' breach of contract as is further alleged herein.
42. Defendants and each of them have breached the oral agreement without justification or excuse in that since April 2, 2002 Defendants have not made any payments on the oral agreement.

*Appendix H*

43. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.
44. As a direct and proximate result of Defendants' breach of the oral contract, Plaintiff has sustained monetary damages subject to proof but in the sum of at least \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**SECOND CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**Breach of Written Contract**

45. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 44 of the within Complaint.
46. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000 (although the balance owing from Defendant to Plaintiff was actually more than said amount at the time). (A true and correct copy of that promissory note is attached hereto as Exhibit 2 and

*Appendix H*

incorporated herein by this reference.) Plaintiff has at all times performed the terms of the Promissory Note in the manner specified by said note, except as to such terms the performance of which has been excused by Defendants' breach of contract as is further alleged herein. Said Promissory Note states that the Loan was for personal and business reasons.

47. The Promissory Note is a written contract in which Defendant promised to pay Plaintiff (who was then and still is situated in Orange County, California) \$20,000 per month for 25 months. Defendant did not abide by that payment schedule.
48. Defendants have breached the Promissory Note without justification or excuse in that they have not made the payments called for in said Promissory Note on the schedule set forth therein. Instead, the only payments made on the Promissory Note since the date of its execution were in the amount of \$25,500 from October, 2000 to April, 2002.
49. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.
50. As a direct and proximate result of Defendants' breach of the written contract, Plaintiff has sustained

*Appendix H*

monetary damages subject to proof but in the sum of at least \$464,500, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**THIRD CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**COMMON COUNTS**

51. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 49 of the within Complaint.
52. Plaintiff alleges that Defendants became indebted to Plaintiff on common counts as follows.
53. Within the past sixteen years, on an open book account for money due.
54. Within the past sixteen years, because an account was stated in writing by and between Plaintiff and Defendant in which it was agreed that Defendants were indebted to Plaintiff.
55. Within the past sixteen years for money lent by Plaintiff to Defendant at Defendant's request.
56. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled

*Appendix H*

during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of California and/or Defendants are equitably estopped from raising any such defenses.

57. There is now due and owing from Defendants to Plaintiff the sum of \$605,162.38 which is the reasonable value, that is due and unpaid despite Plaintiff's demand, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.

**FOURTH CAUSE OF ACTION**

**(By Plaintiff against All Defendants)**

**FRAUD**

58. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 57 of the within Complaint.
59. Beginning on or about July 9, 1999, and continuing through April 2, 2002, Plaintiff loaned certain sums to Defendant based on her personal, intimate relationship with him as previously alleged. Those funds totaled \$690,662.38.
60. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff that he

*Appendix H*

was not married at the time. Plaintiff subsequently learned that the statements Defendant made about not being married were false, and he was actually married. Before Plaintiff loaned Defendant the funds, Defendant orally represented to Plaintiff he would repay her all sums loaned. Plaintiff believed all of the representations Defendant made regarding his promises to repay the Loan. Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.

61. Prior to Plaintiff loaning Defendant the money, Defendant represented to Plaintiff that he would repay all of the money she loaned him, and that he would make it worth Plaintiff's while to loan the money to him. After the money was loaned by Plaintiff to Defendant and prior to Defendant repaying any of the same, Defendant further represented to Plaintiff, and Defendant made comments to Plaintiff, that Plaintiff would "double her money" by his treatment of the loan as an investment in his business and that Defendant would give Plaintiff fifty percent (50%) of his business. Subsequent to the Loan being made, after receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant, and that he would also treat the Loan as an investment in his business, Bary Group International, Inc. Subsequent to the Loan being made, Defendant personally, orally guaranteed the

*Appendix H*

funds. Defendant relied on the aforesaid promise of loan repayment when she decided to loan the money.

62. Defendant repeatedly acknowledged his debt to Plaintiff in writing and made repeated representations that he would repay her in full.
63. On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.
64. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. At the time the Promissory Note was executed, Defendant owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant represented that he would pay Plaintiff \$20,000 per month for 25 months. (See Exhibit 2.)
65. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is \$25,500.00. In sum, Plaintiff loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus interest at the current legal rate.
66. Immediately after the attack on the World Trade Center on September 11, 2001, Defendant told Plaintiff that he was permanently moving back to Egypt as soon as possible, that he would repay her the balance owed, and that he was never returning to the United States. Plaintiff just learned that Defendant resides in the United States. Defendant has ceased making any payments on the balance of his loan.

*Appendix H*

67. Prior to loaning the money, Defendant represented to Plaintiff that he was not married. The truth is that Defendant was married.
68. The representations made by Defendant were in fact false. The truth was that Defendant had no intention of repaying Plaintiff the full sum of monies lent. Defendant is not, in fact, unmarried and had no intention of giving Plaintiff 50% of his business. Defendant did not permanently leave the country after September 11, 2001 but resides in New York and/or New Jersey.
69. When Defendant made all of the aforesaid representations as set forth in Paragraphs 1 through 67 of the within Complaint, Defendant knew they were false.
70. Defendant made all of the aforesaid representations with the intent to defraud and induce Plaintiff to act in reliance thereon as described herein and to loan him money. At the time Plaintiff acted, Plaintiff did not know Defendant's representations were false and believed them to be true. Plaintiff acted in justifiable reliance upon the truth of Defendant's representations.
71. Defendant concealed or suppressed material facts from Plaintiff. Defendant orally represented to Plaintiff that he was not married at the time the Loan was made. Plaintiff subsequently learned that the statements Defendant made about not being married

*Appendix H*

were false, and Defendant was actually married. Defendant further represented to Plaintiff that she would double her money by his treatment of the loan as an investment in his business and that he would give Plaintiff fifty percent (50%) of his business. Defendant had no intention of giving Plaintiff 50% of his business. Defendant had no intention of doubling Plaintiff's money. After receiving all of the aforesaid funds of \$690,662.38, Defendant represented to Plaintiff orally that he would repay in full any and all sums of money that Plaintiff had loaned to Defendant. Defendant had no intention of repaying the sums loaned. Defendant stated to Plaintiff that he was leaving the country permanently. Defendant did not permanently leave the country after September 11, 2001 but resides in New York and/or New Jersey.

72. Defendant concealed or suppressed all of the above material facts by telling Plaintiff other facts to mislead Plaintiff and prevent Plaintiff from discovering the concealed or suppressed facts.
73. Defendant concealed or suppressed all of the above material facts from Plaintiff with the intent to defraud and induce Plaintiff to act in reliance thereon and to loan him money. At the time Plaintiff acted, Plaintiff was unaware of the concealed or suppressed facts and would not have taken the action if Plaintiff known the facts.
74. Defendant made a promise about a material matter without any intention of performing in that Defendant

*Appendix H*

made an oral promise to repay any and all sums of money lent by Plaintiff to him and later stating that he would treat it as an investment in his business. At the time Defendant made such promise, including the promise to repay the sum of \$690,662.38 Defendant had no intention of repaying said sums.

75. Defendant executed a Promissory Note to repay the sum of \$490,000 by making monthly payments of \$20,000 for 25 months. At the time Defendant signed the Promissory Note, Defendant had no intention of repaying such sums due on the Promissory Note or making such monthly payments.
76. Defendant's promises as set forth in Paragraphs 1-74 of the within Complaint were issued without any intention of performance and were made with the intent to defraud and induce Plaintiff to act in reliance thereon and to loan him money. At the time Plaintiff acted, Plaintiff was unaware of Defendant's intention not to perform the promise. Plaintiff acted in justifiable reliance upon the promise.
77. Plaintiff acted in justifiable reliance upon Defendant's conduct and statements in that Plaintiff was induced to act and loaned Defendant the total sum of \$690,662.38.
78. As a result of the facts previously alleged, all statutes of repose, limitations and laches should be tolled during the period when Defendant was avoiding service of process, outside the personal jurisdiction of the Courts of the State of California, and outside of

*Appendix H*

California and/or Defendants are equitably estopped from raising any such defenses.

79. As a direct and proximate result of Plaintiff's reliance upon Defendant's statements and conduct, Plaintiff has been damaged in the amount of \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law, plus attorneys' fees if allowed by law, costs and expenses.
80. Defendants acted with oppression, fraud and malice, warranting an award of exemplary and punitive damages in a sum according to proof at trial.

Wherefore, Plaintiff prays judgment against Defendants and each of them as follows:

1. Monetary damages subject to proof in excess of the minimum jurisdiction of this Court but in an amount of at least \$605,162.38;
2. General damages subject to proof;
3. Exemplary damages according to proof;
4. Attorneys' fees as permitted by law;
5. Costs of suit; and
6. Such other and further relief as the Court deems just and proper.

98a

*Appendix H*

Respectfully submitted:

LAW OFFICES OF DOUGLAS S. HONIG  
/s/  
DOUGLAS S. HONIG, ESQ.  
Attorney for Plaintiff Debra Newell

DATED: October 2, 2015

**APPENDIX I — COMPLAINT, FILED  
MAY 1, 2015**

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE

30-2015-00785669-CU-BC-CJC

Filed May 1, 2015

PLAINTIFF: Debra Newell

DEFENDANT: Mohamed Abouelmagd

DOES 1 TO 100

COMPLAINT

Jurisdiction

ACTION IS AN UNLIMITED CIVIL CASE (exceeds  
\$25,000)

1. Plaintiff: Debra Newell

alleges causes of action against defendant: Mohamed  
Abouelmagd and Does 1-100

4. a. Each defendant named above is a natural person

except defendant

(5)  Unknown Does

*Appendix I*

4.

b. The true names of defendants sued as Does are unknown to plaintiff.

(1)  Doe defendants 1-100 were the agents or employees of the named defendants and acted within the scope of that agency or employment.

(2)  Doe defendants 1-100 are persons whose capacities are unknown to plaintiff.

7. This court is the proper court because

d.  the contract was to be performed here.

g.  The contract was to be, and was in fact, paid in California; representations by Defendant were made to Plaintiff while Plaintiff was in California; damages were caused to Plaintiff in California.

8. The following causes of action are attached and the statements above apply to each

Breach of Contract (Two)

Common Counts

Intentional Tort - Fraud

10. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

a.  damages of: \$605,162.38

b.  interest on the damages

101a

*Appendix I*

(1)  according to proof (Pre-judgment and post-judgment interest)

(2)  at the rate of: 10 percent per year from (*date*):  
July 9, 1999 (or less, according to law)

c.  attorney's fees

(2)  according to proof.

d.  Exemplary damages in an amount according to  
proof for Fraud.

Date May 1, 2015

Douglas S. Honig

*Appendix I*

**FLRST Cause Of Action—Breach of Contract**

ATTACHMENT TO  Complaint

BC-1. Plaintiff: Debra Newell

alleges that on or about (*date*): July 9, 1999

oral

agreement was made between

Plaintiff Debra Newell and Defendant Mohamed Abouelmagd

The essential terms of the agreement  are stated in Attachment BC-1

BC-2. On or about: May 2002

defendant breached the agreement by  the following acts:

Failing to make further payments on balance of loaned money in accordance with oral contract.

BC-3. Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement

as follows: \$605,162.38 plus interest

*Appendix I*

BC-5.  Plaintiff is entitled to attorney fees by an agreement or a statute  
 according to proof.

BC-6.  Defendant was residing outside of California when the cause of action accrued. Defendant is not and has never been a resident of California.

**ATTACHMENT BC-1 First (Cause of Action)**

BC-7. Beginning in or about July 1999, Plaintiff Debra Newell and Defendant Mohamed Abouelmagd. (also known by the first name Amed and the last names Barry, Bary, ElBarry and ElBary) entered into an oral contract, whereby Plaintiff agreed to loan certain sums of money to Defendant which would be used as an investment in his business. Defendant promised to repay all sums of money to Plaintiff in Orange County, California, and personally guaranteed the funds.

BC-8. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.

BC-9. While Plaintiff was situated in Orange County, California, Defendant repeatedly acknowledged his debt to Plaintiff in writing and made repeated promises that he would repay her. Attached collectively hereto and marked as Exhibit 1 are true and correct copies of personal letters written by Defendant to Plaintiff acknowledging his debt to her and promising to repay it.

*Appendix I*

BC-10. On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.

BC-11. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. At the time the Promissory Note was executed, Defendant owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant promised to pay Plaintiff (who was situated in Orange County, California) \$20,000 per month for 25 months.

BC-12. On October 17, 2000, Defendant paid Plaintiff \$8,000. On May 17, 2001, Defendant paid Plaintiff \$1,000. On June 19, 2001, Defendant paid Plaintiff \$5,000. On July 6, 2001, Defendant paid Plaintiff \$2,500. On October 8, 2001, Defendant paid Plaintiff \$3,000. On December 30, 2001, Defendant paid Plaintiff \$3,000. And on April 2, 2002, Defendant paid Plaintiff \$3,000. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is \$25,500. Defendant paid all said amounts by wiring the funds to Plaintiff's bank in Orange County, California or by mailing a check to Plaintiff's residence in Orange County California.

BC-13. In sum, Plaintiff loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law.

*Appendix I*

BC-14. At all times herein mentioned, Defendant never resided in California and was a resident of Egypt and/or New Jersey and/or New York.

BC-15. All monies were to be paid in Orange County, California.

BC-16. At all times herein mentioned, Plaintiff was and is a resident of Orange County, California. The effect of Defendant's promises impacted Plaintiff in Orange County, California, by causing her to pay money which was situated in Orange County, California

**SECOND Cause Of Action—Breach of Contract**

ATTACHMENT TO  Complaint

BC-1. Plaintiff: Debra Newell

alleges that on or about: October 14, 2000

a  written

agreement was made between (*name parties to agreement*):

Plaintiff Debra Newell and Defendant Mohamed Abouelmagd

A copy of the agreement is attached as Exhibit A

BC-2. On or about: April 2, 2002

defendant breached the agreement by

*Appendix I*

the following acts:

Defendant failed to make a single monthly payment of \$20,000 as required by the Promissory Note. Defendant instead made sporadic payments of much smaller amounts. Since executing the Promissory Note, Defendant has paid a total of \$25,000. Defendant has failed to make further payments toward balance of Promissory Note since April 2, 2002.

BC-3. Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement

as follows:

\$465,000 plus interest

BC-5.  Plaintiff is entitled to attorney fees by an agreement or a statute

according to proof.

**THIRD CAUSE OF ACTION - Common Counts**

ATTACHMENT TO  Complaint

CC-1. Plaintiff: Debra Newell

alleges that defendant: Mohamed Abouelmagd

*Appendix I*

became indebted to  plaintiff:

a.  within the last four years - date according to proof

(1)  on an open book account for money due.

(2)  because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b.  within the last  four years - date according to proof

(4)  for money lent by plaintiff to defendant at defendant's request.

CC-2. \$ 605,162.38, which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest  according to proof

CC-3.  Plaintiff is entitled to attorney fees by an agreement or a statute

according to proof.

**FOURTH CAUSE OF ACTION – Fraud**

ATTACHMENT TO  Complaint

FR-1. Plaintiff: Debra Newell

alleges that defendant: Mohamed Abouelmagd

on or about: July 9, 1999 thru April, 2002 defrauded plaintiff as follows:

*Appendix I*

**FR-2.  Intentional or Negligent Misrepresentation**

- a. Defendant made representations of material fact  
 as stated in Attachment FR-2.a
- b. These representations were in fact false. The truth was  as follows:

Defendant had no intention of repaying Petitioner the full sum of monies lent. Defendant is not single and had no intention of giving Plaintiff 50% of his business. Defendant did not leave the country after 9/11/2001, but continued to reside in New York.

- c. When defendant made the representations,  
 defendant knew they were false
- d. Defendant made the representations with the intent to defraud and induce plaintiff to act as described in item FIR-5. At the time plaintiff acted, plaintiff did not know the representations were false and believed they were true. Plaintiff acted in justifiable reliance upon the truth of the representations.

**FR-3.  Concealment**

- a. Defendant concealed or suppressed material facts  
 as follows:

Defendant had no intention of repaying Petitioner the full sum of monies lent. Defendant did not leave the county after 9/11/2001, but continued to reside in New York.

*Appendix I*

- b. Defendant concealed or suppressed material facts
  - by telling plaintiff other facts to mislead plaintiff and prevent plaintiff from discovering the concealed or suppressed facts.
  - c. Defendant concealed or suppressed these facts with the intent to defraud and induce plaintiff to act as described in item IFIR-5. At the time plaintiff acted, plaintiff was unaware of the concealed or suppressed facts and would not have taken the action if plaintiff had known the facts.

**FOURTH CAUSE OF ACTION – Fraud****FR-4.  Promise Without Intent to Perform**

- a. Defendant made a promise about a material matter without any intention of performing it
  - as follows:

Defendant made an oral promise to repay any and all sums of money lent by Plaintiff to him as an investment in his business. Defendant had no intention of repaying said sums.

Defendant executed a Promissory Note to repay the sum of \$490,000 by making monthly payments of \$20,000 for 25 months. Defendant had no intention of paying said sums or making such monthly payments.

- b. Defendant's promise without any intention of performance was made with the intent to defraud and induce plaintiff to rely upon it and to act as described in item FR-5. At the time plaintiff acted, plaintiff was unaware of defendant's intention not

*Appendix I*

to perform the promise. Plaintiff acted in justifiable reliance upon the promise.

FR-5. In justifiable reliance upon defendant's conduct, plaintiff was induced to act

as follows:

Plaintiff loaned Defendant the total sum of \$690,662.38.

FR-6. Because of plaintiff's reliance upon defendant's conduct, plaintiff has been damaged

as follows:

\$605,162.38

FR-7.

Plaintiff is entitled to exemplary damages in an amount according to proof for Defendant's intentional fraud.

FR-8. Plaintiff refers to and incorporates herein by this reference each and every allegation contained in the First Cause of Action, Breach of Contract, Paragraphs BC-1 through BC-16, inclusive, and each and every allegation contained in the Second Cause of Action, Breach of Contract, Paragraphs BC-1 through BC-6, inclusive, and each and every allegation contained in the Third Cause of Action, Common Counts, of this Complaint as though fully set forth herein.

FR-9. Beginning on or about July 9, 1999, and continuing through April 2, 2002, Defendant represented to Plaintiff that he would repay in full any and all sums of money that she invested in his business, Bary Group

*Appendix I*

International, Inc. Defendant personally guaranteed the funds. Defendant further represented to Plaintiff that she would double her money by investing in his business. Defendant further represented that he was single and would give Plaintiff fifty percent (50%) of his business.

FR-10. Based on said representations, Plaintiff agreed to loan, and did in fact loan, certain sums of money to Defendant as an investment in his business. From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total sum of \$690,662.38.

FR-11. Defendant repeatedly acknowledged his debt to Plaintiff in writing and made repeated representations that he would repay her in full.

FR-12. On September 22, 2000, Defendant paid Plaintiff the sum of \$60,000.00 by wiring said funds to Plaintiff's bank in Orange County, California.

FR-13. On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000. At the time the Promissory Note was executed, Defendant owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant represented that he would pay Plaintiff \$20,000 per month for 25 months. (See Exhibit A.)

FR-14. The total sum paid by Defendant from October 17, 2000 to April 2, 2002 is \$25,500. In sum, Plaintiff

*Appendix I*

loaned Defendant a total of \$690,662.38. Defendant has repaid \$85,500. Defendant owes Plaintiff \$605,162.38, plus interest at the current legal rate.

FR-15. Immediately after the attack on the World Trade Center on September 11, 2001, Defendant told Plaintiff that he was moving back to Egypt and that he would repay her the balance owed and that he was never returning to the United States. In fact, Plaintiff has learned that Defendant never moved from the United States. Defendant has ceased making any payments on the balance of his loan.

*Appendix I*

**EXHIBIT 1**

Debbie Sweetheart,

I can not talk to you another time regarding my situation and the things that needs to be done in my business but I can only offer to you one proposal is to share me the Company and be 50% shareholder of Barry Group International Inc. and Enviro-Egypt on my shares 75% since Larry Finn is 25% shareholder. And after the completion of this deal I can reward you a high percentage of interest plus your original money if that's possible to continue my projects and get to where I want to be or another solution is to get a business loan for me with the guarantee to pay the monthly payment an have a promissory note to state the payment of the loan. Again and again it comes to the same ugly situation but remember I am doing this for our future and our life together an your support at this stages of my life and my business beam essential to get these projects to life and produce income. Therefore, I am only steps away from getting rewarded for al four years of hard work and sales results but my courage have failed again to discuss this with you once again. I will rather to die than discuss it again face to face with you but it is foolish to loose everything for my pride and dignity.

*Appendix I*

Love Debbie,

Honey I love you from the bottom of my heart. I've loved you from the first moment I laid my eyes on you. I will always love you forever leaving you or breaking up with you is the death penalty for me. But to pull you in my misery and misfortune is also killing me slowly. To have a life with you I needed to be back to normal where I had success in my business and lived debts free. I was able to travel, later and host people I was able to buy gifts and surprises parties to people I done business with and to my family now that I am having nothing but troubles, sadness and suffering it is not the best time for us because when you not part of my life anymore I won't expect support or help from you and also I won't be very sensitive to all your behavior, I am so sorry that I am hurting you at the moment but pain for days or month better than pain forever. At least now I don't feel angry towards you or wait for any answers to my suffering related to you. If I ever make it again the first thing I'll be coming to you trying our relationship once again Meanwhile I will start working on paying my debts to you. Once we receive payments from EGlobe I'll forward 90% of my share monthly towards my balance with you and I will survive with 10%. Also I will void the recycling business for now finally please accept my deepest apology.

*Appendix I*

**EXHIBIT A**

Promissory Note

I Mohamed I. Abouelmagd owes Debra Newell the sum of 490,00 US\$ four hundred ninety thousand US Dollars only includes all Western Union, Wire Transfers and Bank Checks. I have borrowed this money within the last sixteen months for business reasons and Personal reasons. I will pay the sum of Twenty Thousand US\$ monthly for total of Twenty Five months to conclude paying back all my debts to Debra Newell in good faith and all good intention to pay my debts as agreed upon. Within this period of twenty five month I will apreciate confidentiality of this agreement to stay confidential for the benefit of both of us and only to be exposed upon my default of payments by my side otherwise it stays very confidential.

In case of death I authorize Debra Newell to put a hold on my payment from E-Globe to pay my debts to her first then to be released for my children.

Signed by

Mohamed I Abouelmagd  
*Moh Bary*

10/14/2000

**APPENDIX J — PLAINTIFF'S OPPOSITION  
TO DEFENDANT'S DEMURRER, FILED  
SEPTEMBER 17, 2015**

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
COUNTY OF ORANGE, CENTRAL DISTRICT -  
UNLIMITED JURISDICTION

Case No.: 30-2015-00785669  
Assigned to: Hon. William Claster  
Dept.: C18

DEBRA NEWELL,

*Plaintiff,*

vs.

MOHAMED ABOUELMAGD, AND  
DOES 1 THROUGH 100, INCLUSIVE;

*Defendants.*

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S  
DEMURRER AND MEMORANDUM OF  
POINTS AND AUTHORITIES**

Complaint Filed: 05/01/2015

Date: September 17, 2015  
Time: 1:30 p.m.  
Department: C18

*Appendix J*

COMES NOW Plaintiff, Debra Newell (“Plaintiff”), by and through her attorney, Douglas S. Honig, who hereby opposes the Demurrer to Plaintiff’s Complaint filed by Defendant Mohamed Abouelmagd (“Defendant”).

This opposition is based on the attached Memorandum of Points and Authorities, on the records in this action, and other such oral and/or documentary evidence as may be presented at the hearing on the Demurrer.

**FIRST CAUSE OF ACTION**

Defendant demurs to the First Cause of Action for Breach of Oral Contract, claiming that Plaintiff’s cause of action is time-barred by the Statute of Limitations. However, Plaintiff has filed the cause of action in a timely manner, pursuant to California Code of Civil Procedure Section (“CCP §”) 351. Thus, Defendant’s demurrer as to the First Cause of Action fails because no valid legal basis or argument is provided in the Demurrer or its attached Memorandum.

**SECOND CAUSE OF ACTION**

Defendant demurs to the Second Cause of Action for Breach of Written Contract, claiming that Plaintiff’s cause of action is time-barred by the Statute of Limitations. However, Plaintiff has filed the cause of action in a timely manner, pursuant to CCP § 351. Thus, Defendant’s demurrer as to the Second Cause of Action fails because no valid legal basis or argument is provided in the Demurrer or its attached Memorandum.

*Appendix J*

**THIRD CAUSE OF ACTION**

Defendant demurs to the Third Cause of Action for Common Counts, claiming that Plaintiff's cause of action is time-barred by the Statute of Limitations, fails to state facts sufficient to constitute a cause of action, and is uncertain. However, Plaintiff has filed the cause of action in a timely manner, pursuant to CCP § 351, Plaintiff has plead sufficient facts to constitute a cause of action, and the pleading is unambiguous and intelligible. Thus, Defendant's demurrer as to the Third Cause of Action fails because no valid legal basis or argument is provided in the Demurrer or its attached Memorandum.

**FOURTH CAUSE OF ACTION**

Defendant demurs to the Fourth Cause of Action for Fraud, claiming that Plaintiff's cause of action is time-barred by the Statute of Limitations and failed to plead facts with requisite particularity. However, Plaintiff has filed the cause of action in a timely manner, pursuant to CCP § 351, and Plaintiff has plead the necessary facts with specificity, as evidenced in the Complaint. Thus, Defendant's demurrer as to the Fourth Cause of Action fails because no valid legal basis or argument is provided in the Demurrer or its attached Memorandum.

Respectfully submitted:     LAW OFFICES OF  
DATED: September 3, 2015     DOUGLAS S. HONIG

/s/  
DOUGLAS S. HONIG, ESQ.  
Attorney for Plaintiff  
Debra Newell

*Appendix J***MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiff Debra Newell (“Plaintiff”) submits the following points and authorities in support of her Opposition to Defendant Mohamed Abouelmagd’s Demurrer.

**I. INTRODUCTION**

On May 1, 2015 Plaintiff filed the Complaint in the within matter. The Court is respectfully requested to take judicial notice thereof. Plaintiff’s Complaint sets forth four causes of action against Defendant Mohamed Abouelmagd (“Defendant”), as follows: Breach of Oral Contract, Breach of Written Contract, Common Counts, and Fraud. Defendant has filed a Demurrer to the Complaint, raising four basic arguments as follows: Defendant alleges that Plaintiff’s four causes of action are time-barred under the Statute of Limitations, Defendant alleges that Plaintiff failed to state facts sufficient to constitute a cause of action (“COA”) for common counts or a COA for fraud, Defendant alleges that Plaintiff failed to plead the COA for fraud with particularity, and Defendant alleges that Plaintiff failed to allege facts sufficient to support her prayer for exemplary damages.

Defendant’s demurrer should be overruled. The causes of action in the complaint are not time-barred. The Complaint contains sufficient ultimate facts to constitute a COA for common counts in light of the standard of review. The Complaint states the facts necessary to have been plead with sufficient particularity with regard to the COA

*Appendix J*

for fraud. Plaintiff alleged facts sufficient to support her prayer for exemplary damages.

**II. STATEMENT OF FACTS**

Beginning in or about July 1999, Plaintiff and Defendant entered into an oral contract, whereby Plaintiff agreed to loan certain sums of money to Defendant (Complaint, Page ("P.") 3, BC-1). Defendant promised to repay all of the money and personally guaranteed the funds (Complaint, P. 4, BC-7). From July 9, 1999 through April 2, 2002, Defendant represented to Plaintiff that he would repay in full any and all sums of money that she invested in his business, Bary Group International, Inc. (Complaint, P. 8, FR-1). Defendant represented to Plaintiff that she would double her money by investing in his business. Defendant represented that he was single and would give Plaintiff fifty percent (50%) of his business (Complaint, P. 10, FR-9).

From July 9, 1999 to September 18, 2000, Plaintiff loaned Defendant the total amount of \$690,662.38 (Complaint, P. 4, BC-8). On October 14, 2000, Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000.00. At the time the Promissory Note was executed, Defendant owed Plaintiff the sum of \$630,662.38. In the Promissory Note, Defendant promised to pay Plaintiff (who was situated in Orange County, California) \$20,000 per month for 25 months (Complaint, P. 4, BC-11).

*Appendix J*

Defendant has repaid Plaintiff \$85,500.00. Defendant owes Plaintiff \$605,162.38, plus all pre-judgment interest and post-judgment interest at the current legal rate according to law (Complaint, P. 5, BC-13). Immediately after the attack on the World Trade Center on September 11, 2001, Defendant told Plaintiff that he was moving back to Egypt and that he would repay her the balance owed and that he was never returning to the United States. In fact, Plaintiff has learned that Defendant never moved from the United States. Defendant has ceased making any payments on the balance of his loan (Complaint, P. 11, FR-15).

**III. LEGAL ANALYSIS****A. STANDARD OF REVIEW**

“A demurrer tests the legal sufficiency of factual allegations in a complaint.” *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal. App.4th 1162. In reviewing the sufficiency of a complaint against a general demurrer, the court is guided by long-settled rules and “treats the demurrer as admitting all material facts properly pleaded” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810). “[I]t is legal error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.” (*Aubry*, *supra*; *Fox*, *supra*). The Court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318; *Haggerty v. Warner* (1953) 115

*Appendix J*

Cal.App.2d 468). California only requires, “a statement of the facts constituting the cause of action, in ordinary and concise language.” CCP § 425.10 (a). In California, it is established by statute that, “in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties. CCP § 425.10 (a). Therefore, Plaintiff’s Complaint states valid causes of action, and Defendant’s demurrer should be overruled.

When a court rules on a demurrer:

[t]he allegations of the complaint must be regarded as true. It must be assumed that the plaintiff can prove all of the facts as alleged. The court must, at every stage of an action, disregard any defect in the pleadings that does not affect the substantial rights of the parties. Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. All that is necessary as against a general demurrer is to plead facts showing that the plaintiff may be entitled to some relief. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. [*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955].

*Appendix J*

“A court must not only assume the truth of the facts alleged in the complaint but also the reasonable inferences that may be drawn from those facts.” *Miklosy v. Regents of California* (2008) 44 Cal.4th 876, 883. “If the factual allegations of the complaint are adequate to state a cause of action under any legal theory, the demurrer must be overruled.” *Quelimane Co. v. Stewart Title Guaranty Co* (1998) 19 Cal.4th 26, 38. “The rules of pleading require only general allegations of ultimate fact, not ‘evidentiary facts.’” Id at 47. A court can only uphold a general demurrer sustained without leave to amend if it appears there is no cause of action stated under applicable substantive law. *Vater v. County of Glenn* (1958) 49 Cal.2d 815, 821.

“In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.” Code Civ. Proc., § 452. *Stevens v. Sup. Ct. (API Auto Ins. Services)* (1999) 75 Cal.4th 594, 601. “We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged. [Citation.]” *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 986.

Complaints which show some right to relief are held sufficient against demurrer—even though the facts are not clearly stated; or are intermingled with irrelevant matters; or the plaintiff has demanded relief to which he is not entitled. *Gressley v. Williams* (1961) 193 Cal.2d 636, 639. Ultimately, there is no need to require specificity in the pleadings “because modern discovery procedures necessarily affect the amount of detail that should be required in a pleading.” *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 608.

*Appendix J*

A demurrer looks to the four corners of the complaint and facts that may be judicially noticed therefore a defendant may not inject his/her own facts into the complaint. *Mohlmann v. City of Burbank* (1986) 179 Cal. App.3d 1037, 1041, fn. 2; Code Civ. Proc., § 430.70 [speaking demurrs are improper]. No other extrinsic evidence can be considered (i.e., no “speaking demurrs”). *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—error for court to consider facts asserted in memorandum supporting demurrer; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862, (disapproved on other grounds in *Moradi-Shalal v. Fireman’s Fund Ins. Cos.* (1988) 46 Cal.3d 287)—error for court to consider contents of release which was not part of any court record.

If a demurrer is sustained, leave to amend is liberally allowed as a matter of fairness. *Align Technology, Inc. v. Bao Tran* (2009) 179 Cal.App.4th 949. If the defect can be cured, then a judgment sustaining a demurrer without leave to amend must be reversed to allow the plaintiff an opportunity to amend. *Lazar v. Hertz Corp.* (1999) 69 Cal. App.4th 1494. The California Supreme Court has held that “[g]reat liberality is indulged in matters of amendment to the end that lawsuits may be determined upon their merits.” *Desny v. Wilder*, 46 Cal.2d 715, 751 (1956).

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. *Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 349; *Okun v. Sup. Ct. (Maple Properties)* (1981) 29 Cal. 3d 442, 460.

*Appendix J***B. THE FIRST COA IS TIMELY FILED**

Defendant demurs to the First COA for Breach of Oral Contract claiming that Plaintiff's First COA is time-barred by the Statute of Limitations. Plaintiff has filed the COA in a timely manner pursuant to CCP § 351. Said section reads as follows:

If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

Regarding CCP § 351:

"Omitting all reference to the provision contained in section 351, 'the weight of authority is that the statute of the forum does not begin to run until the defendant comes within the jurisdiction in which suit is brought, and that the time elapsing between the accrual of the right of action in the foreign state and the acquiring of domestic residence forms no part of the statutory period of the forum.' (Annotator's note to *Rutledge v. United States Savings & Loan Co.*, 5 Am. & Eng. Ann. Cas. 542.)" (See, also, *Foster v. Butler*, 164 Cal. 623 [130 P. 6].) fid. at 398-399]

*Appendix J*

[... ]

[S]ection 351, has quite uniformly been interpreted to mean that the section applies so as to toll the statute not only where the defendant was once a resident of the state and leaves it and returns, but also where the defendant has never been in, or resided in, the state until the filing of the complaint. The term as used in statute of limitations has come to have this special meaning. [*Cvevich v. Giardino* (1940) 37 Cal.App.2d 394; emphasis supplied.]

See also *Kohan v. Cohan* (1988) 204 Cal.App.3d 915.

At all times mentioned in the Complaint, Defendant never resided in California and was a resident of Egypt and/or New Jersey and/or New York (Complaint, P. 5, BC-14). Therefore, Defendant's demurrer to the First COA fails because no legal basis or argument is provided in the Demurrer or attached Memorandum.

**C. THE SECOND COA IS TIMELY FILED**

Defendant demurs to the Second COA for Breach of Written Contract, claiming that Plaintiff's Second COA is time-barred by the Statute of Limitations. Plaintiff reiterates and incorporates herein by this reference all facts and law set forth in Plaintiff's response to Defendant's demurrer to the First COA, in Paragraph III.B above. Therefore, Defendant's demurrer to the

*Appendix J*

Second COA fails because no legal basis or argument is provided in the Demurrer or attached Memorandum.

**D. DEFENDANT'S DEMURRER AS TO THE THIRD CAUSE OF ACTION SHOULD BE DENIED BECAUSE PLAINTIFF HAS FILED THE THIRD COA IN A TIMELY MANNER AND THE COMPLAINT STATES SUFFICIENT FACTS TO CONSTITUTE A COA FOR COMMON COUNTS**

**1. THE THIRD COA IS TIMELY FILED**

Defendant demurs to the Third COA for Common Counts, claiming that Plaintiff's Third COA is time-barred by the Statute of Limitations. Plaintiff reiterates and incorporates herein by this reference all facts and law set forth in Plaintiff's response to Defendant's demurrer to the First COA, in Paragraph III.B above as to Defendant's demurrer to the Third COA. Therefore, Defendant's demurrer to the Third COA fails because no legal basis or argument is provided in the Demurrer or attached Memorandum.

**2. THE COMPLAINT STATES SUFFICIENT FACTS TO CONSTITUTE A COA FOR COMMON COUNTS**

"[A]ll that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and

*Appendix J*

with sufficient particularity to acquaint the defendant with the nature, source and extent of her cause of action “ ... “ *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 157.

Defendant has the essential “ultimate” facts to “acquaint” him with the common counts COA. “Fraud allegations must be pled with more detail than other causes of action. The facts constituting the fraud, including every element of the cause of action, must be alleged “factually and specifically.”” *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.... The objectives are to give the defendant notice of ““definite charges which can be intelligently met,”” and to permit the court to determine whether, ““on the facts pleaded, there is any foundation, *prima facie* at least, for the charge of fraud.”” Citations.)’ *Id.* at p. 216-217.” *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 240. There is an exception to the strict pleading standard, however, where it appears that the relevant facts lie within defendant’s knowledge: “Less specificity is required when ‘it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy’ *Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825 (overturned on another ground); “[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party.... ‘ *Turner v. Milstein* (1951) 103 Cal.App.2d 651, 658.” *Committee on Children’s Television, Inc. v. General*

*Appendix J*

*Foods Corp.*, *supra*, 35 Cal.3d at p. 217, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.

Defendant relies on 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.” (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14). The within case is unlike Zumbrun, because the plaintiff there plead in her first of two counts (the other being common counts) general causes of actions without being separately stated. Here, Plaintiff pleads three other distinct causes of action (breach of oral contract, breach of written contract, and fraud). Each of these other causes of action contain facts that are specifically pleaded.

CCP § 430.10 (f) provides grounds to demur to a complaint on the grounds of uncertainty as follows:

The pleading is uncertain. As used in this subdivision, “uncertain” includes ambiguous and unintelligible.

In the Zumbrun matter, the defendant’s argument was that it could not be ascertained whether the contract upon which the plaintiff based her action was written or oral. Here, there is no uncertainty in Plaintiff’s Complaint

*Appendix J*

regarding the facts. Plaintiff's Complaint unambiguously and intelligibly alleges there was an oral contract created on or about July 1999 (Page 3, Item BC-1), and that there was a written contract executed on October 14, 2000 (Page 6, Item BC-1). For these reasons, Defendant's Demurrer fails because there is no legal basis or argument provided in the Demurrer or attached Memorandum.

**E. DEFENDANT'S DEMURRER TO THE FOURTH COA SHOULD BE DENIED BECAUSE PLAINTIFF HAS FILED THE FIRST COA IN A TIMELY MANNER, HAS PLEAD FRAUD WITH PARTICULARITY, AND ALLEGED SUFFICIENT FACTS TO SUPPORT HER PRAYER FOR EXEMPLARY DAMAGES**

**1. THE FOURTH COA IS TIMELY FILED**

Defendant demurs to the Fourth COA for Fraud, claiming that Plaintiff's COA is time-barred by the Statute of Limitations. Plaintiff reiterates and incorporates herein by this reference all facts and law set forth in Plaintiff's response to Defendant's demurrer to the First COA, in Paragraph III.B above as to Defendant's demurrer to the Fourth COA. Therefore, Defendant's demurrer to the Fourth COA fails because no legal basis or argument is provided in the Demurrer or attached Memorandum

*Appendix J*

**2. PLAINTIFF HAS PLEAD THE FOURTH CAUSE OF ACTION FOR FRAUD WITH PARTICULARITY AND HAS ALLEGED SUFFICIENT FACTS TO SUPPORT HER PRAYER FOR EXEMPLARY DAMAGES**

Defendant demurs to the Fourth COA for Fraud claiming that Plaintiff has not plead fraud with particularity. Specifically, Defendant claims that Plaintiff's COA for fraud omits particular allegations as to how and by what means Defendant defrauded Plaintiff.

In fact, Plaintiff's Complaint states with particularity the intentional misrepresentation and concealment by Defendant. Exhibit A to the Complaint is a Promissory Note which exemplifies the means of Defendant's fraud. The Promissory Note was executed by Defendant on October 14, 2000 for the amount of \$490,000.00. Furthermore, Exhibit 1 to the Complaint, a personal written letter from Defendant to Plaintiff also exemplifies the particularity with which the COA for fraud is pled. Defendant stated in writing that he would offer Plaintiff a "50% shareholder" of his company, "reward [Plaintiff] with a high percentage of interest plus [her] original money," a, "guarantee to pay the monthly payment and have a promissory [n]ote to state the payment of the loan," and other acknowledgments of a debt owed by Defendant to Plaintiff and promises of repayment by Defendant to Plaintiff. To date, Defendant has only repaid \$85,000.00 and Plaintiff has not received payment in full of the entire remaining debt amount of \$605,162.38.

*Appendix J*

On Page 2 of Exhibit 1, Defendant concealed his whereabouts to Plaintiff. In the letter written by Defendant (Exhibit 1), Defendant represents that he would be moving back to Egypt, where “[Defendant] had success in business and lived debts free [sic].” In fact, Defendant did not leave the United States after September 11, 2001, but continued to reside in New York (Complaint, Page 8, Item FR-2).

Plaintiff has also plead facts with particularity that her reliance on Defendant’s promised repayment to her was justifiable. Beginning in or about July 1999, the parties entered into an oral contract that was characterized by both parties as a loan (Complaint, Page 4, Item BC-7). Additionally, Exhibit 1 reflects with particularity the relationship between the parties was close. Defendant expresses his “love” for Plaintiff and states that because of Plaintiff’s support he was able to “travel, later and host people. [Defendant] was able to and buy gifts and surprise parties to people [sic].” Defendant ends the letter with a promise to pay his debts, specifically and particularly, “forward 90% of any share monthly toward my balance with you and I will survive with 10%.” To this date, Plaintiff has not received payment in full for the entire remaining debt amount of \$605,162.38. For these reasons, Defendant’s demurrer fails because it contains no legal basis or argument in the Demurrer or attached Memorandum.

Defendant alleges that Plaintiff did not plead fraud with particularity. Civil Code Section 1572 and 1572.4 state as follows:

*Appendix J*

1572. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

[...]

4. A promise made without any intention of performing it[.]

As set forth in the Complaint, Plaintiff alleges that Defendant had no intention of performing the promises set forth in the written and oral contracts between the parties (Complaint, Item FR-4). Immediately after the attack on the World Trade Center on September 11, 2001, Defendant told Plaintiff that he was moving back to Egypt and that he would repay her the balance owed and that he was never returning to the United States. In fact, Plaintiff has learned that Defendant never moved from the United States (Complaint, Item FR-15). Defendant had no reason to believe that his statements were true.

**3. PLAINTIFF HAS ALLEGED  
SUFFICIENT FACTS TO SUPPORT HER  
PRAYER FOR EXEMPLARY DAMAGES**

Defendant alleges that Plaintiff failed to plead facts sufficient to show that Defendant acted with oppression, fraud, or malice pursuant to California Civil Code Section 3294 (a). Specifically, Defendant alleges that Plaintiff's

*Appendix J*

Complaint is devoid of specific facts demonstrating intentional, malicious, fraudulent, oppressive, or despicable conduct that was carried out by Defendant with a willful disregard of Plaintiff's rights.

On the contrary, Plaintiff has alleged such facts. Beginning in or about July 1999, the parties entered into an oral contract that was characterized by both parties as a loan (Complaint, Page 4, Item BC-7). On October 14, 2001 Defendant executed a Promissory Note, whereby he acknowledged that he owed Plaintiff the sum of \$490,000.00 and payments of \$20,000.00 for twenty-five months (Complaint, Exhibit A). Despite Defendant's promises to Plaintiff, Defendant intentionally and fraudulently disregarded Plaintiff's right to collect on Defendant's promises. Defendant's intermittent payments in over the course of two years do not even cover two monthly payments as promised (Complaint, P. 4, BC-12).

Plaintiff's pleading contains facts sufficient to show that Defendant acted despicably and with malice. Defendant expressed that he "love[d Plaintiff] from the bottom of [his] heart. I've loved you from the first moment I laid my eyes on you. I will always love you forever." (Complaint, Exhibit A). Plaintiff is informed and believes that Defendant was married at the time of the issuance of Exhibit A, and at all times mentioned herein, and at the present date. Defendant used these expressions to induce reliance and in order to defraud Plaintiff. For these reasons, Defendant's Demurrer fails because no legal basis or argument is provided in the Demurrer or the attached Memorandum.

*Appendix J*

**IV. CONCLUSION**

Plaintiff respectfully requests that the Court overrule the Demurrer in its entirety. If the Court rules otherwise, Plaintiff seeks leave to amend the Complaint.

Respectfully submitted:     LAW OFFICES OF  
DATED: September 3, 2015     DOUGLAS S. HONIG

/s/  
DOUGLAS S. HONIG, ESQ.  
Attorney for Plaintiff  
Debra Newell

**APPENDIX K — JUDGMENT OF DISMISSAL,  
FILED JUNE 1, 2016**

**SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF ORANGE**

CASE NO.: 30-2015-00785669-CU-BC-CJC

DEBRA NEWELL, AN INDIVIDUAL;

*Plaintiff,*

v.

MOHAMED ABOUELMAGD, AN INDIVIDUAL,  
AKA AMED ABOUELMAGD, AKA AMED BARRY,  
AKA AMED ELBARRY, AKA AMED ELBAR,  
AKA IBRAHIM ABDELBARY ABOUELMAGD  
MOHAMED, AKA MOHAMED A. ABOUELMAGD,  
AKA MOHAMED ABDEL BARRY, AKA MOHAMED  
ABOU ABOUELMAGD, AKA MOHAMED  
ABOU ELABOUELMAGD, AKA MOHAMED  
ABOU ELMAGD, AKA MOHAMED BARRY,  
AKA MOHAMED BARY, AKA MOHAMED  
EL BARY, AKA MOHAMED ELBARY, AKA  
MOHAMED I ABOU EL ABOUELMAGD,  
AKA MOHAMED I ABOU EL MAGD, AKA  
MOHAMED I ABOUELMAGD, AKA MOHAMED  
IBRAHIM ABOGELMAGD, AKA MOHAMED  
IBRAHIM ABOUELMAGD, AKA MOHAMED M  
ABOUELMAGD, AKA MOHAMED BARRY, AND  
DOES 1-100, INCLUSIVE,

*Defendants.*

## Appendix K

Assigned to the Hon. Judge Theodore Howard,  
Dept. C18

DATE: 05/05/2016

## JUDGMENT OF DISMISSAL

On May 5, 2016, the Court sustained Defendant Mohamed Abouelmagd's Demurrer to Plaintiff's Second Amended Complaint without leave to amend after the Court adopted its tentative ruling. A copy of the Notice of Ruling filed with the Court on May 13, 2016 is attached as Exhibit "A" and incorporated by reference.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

Plaintiff, Debra Newell's case against Defendant, Mohamed Abouelmagd, is dismissed.

IT IS SO ORDERED.

Dated: June 1, 2016

---

/s/  
HON. THEODORE HOWARD  
JUDGE OF THE  
SUPERIOR COURT

*Appendix K*

**EXHIBIT “A”**

**SUPERIOR COURT OF THE STATE OF  
CALIFORNIA FOR THE COUNTY OF ORANGE**

CASE NO.: 30-2015-00785669-CU-BC-CJC

DEBRA NEWELL, AN INDIVIDUAL;

*Plaintiff,*

v.

MOHAMED ABOUELMAGD, AN INDIVIDUAL,  
AKA AMED ABOUELMAGD, AKA AMED BARRY,  
AKA AMED ELBARRY, AKA AMED ELBAR,  
AKA IBRAHIM ABDELBARY ABOUELMAGD  
MOHAMED, AKA MOHAMED A. ABOUELMAGD,  
AKA MOHAMED ABDEL BARRY, AKA MOHAMED  
ABOU ABOUELMAGD, AKA MOHAMED  
ABOU ELABOUELMAGD, AKA MOHAMED  
ABOU ELMAGD, AKA MOHAMED BARRY,  
AKA MOHAMED BARY, AKA MOHAMED  
EL BARY, AKA MOHAMED ELBARY, AKA  
MOHAMED I ABOU EL ABOUELMAGD,  
AKA MOHAMED I ABOU EL MAGD, AKA  
MOHAMED I ABOUELMAGD, AKA MOHAMED  
IBRAHIM ABOGELMAGD, AKA MOHAMED  
IBRAHIM ABOUELMAGD, AKA MOHAMED M  
ABOUELMAGD, AKA MOHAMED BARRY, AND  
DOES 1-100, INCLUSIVE,

*Defendants.*

*Appendix K*

Assigned to the Hon. Judge Theodore Howard,  
Dept. C18

**NOTICE OF RULING**

DATE: 05/05/2016

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the above-entitled matter came on for hearing on May 5, 2016 at 1:30 pm in Department C18 of the above-entitled court. Attorney Doug Honig appeared on behalf of Plaintiff, Debra Newell. Attorney Jillian-Leigh Balancio appeared on behalf of Defendant, Mohamed Abouelmagd.

The Court, having read all of the moving papers and any responses, and having heard oral argument, adopted its tentative ruling and ruled as follows:

1. Defendant's demurrer is sustained without leave to amend. Defendant is to give notice and lodge a judgment of dismissal.

2. CCP Section 351 is unconstitutional as applied in this case because it burdens interstate commerce. The statute tolls the statute of limitations for the entire time a defendant is out of state. Under *Dan Clark Family Ltd. Partnership v. Miramontes* (2011) 193 Cal.App.4<sup>th</sup> 219, 233, it is an undue burden on commerce because it forces defendants to choose between staying in California or being subjected to liability "in perpetuity."

*Appendix K*

3. The Court did not limit “commerce” to underlying commercial transactions; it was concerned with burdens on any commerce the defendant “might choose to engage in during [its] travels” to the state. *Id.* It found no significant difference between forcing a defendant to remain a California resident and forcing him to become one to obtain repose. *Id.* at 234. It held that discouraging non-residents from engaging in transactions with California residents burdens commerce. *Id.* These concerns exist whether the underlying transaction is “commercial” or “personal.”

4. Even if this were an issue, whether or not Plaintiff was engaged in “commerce” is irrelevant. In two cases she relies on, *Green v. Zissis* (1992) 5 Cal.App.4th 1219 and *Cvecich v. Giardino* (1940) 37 Cal.App.2d 394, there was no constitutional challenge to Section 351. “An opinion is not authority for propositions not considered.” *Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195. In the other case, *Kohan v. Cohan* (1988) 204 Cal.App.3d 915, the Court’s discussion of the commerce clause was superficial; it just said the acts occurred in Iran and this did not establish they were engaged in interstate commerce, *Id.* at 924. This Court does not find it persuasive.

5. Plaintiff relies on *Pratali v. Gates* (1992) 4 Cal. App.4th 632,643, which held that the commerce clause wasn’t involved in a “single amicable loan” because there was “no competent evidence” that the “*loan proceeds were used in a commercial venture.*” (Emphasis added) Plaintiff admits, however, that some of the loan proceeds

*Appendix K*

were used in a commercial venture. Also, the loan in *Pratali* was for \$16,500, not over a half million dollars.

6. *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392, held Section 351 unconstitutional, stating that 1) commerce is burdened because it requires a defendant to be in California during the entire limitations period in order to assert a statute of limitations defense, and 2) this outweighs the burden on a plaintiff in having to pursue an out-of-state defendant. This Court agrees.

7. The Court had limited jurisdiction over the Defendant at all times. Plaintiff claims Abramson doesn't apply because it is grounded on an analysis that there was jurisdiction over the defendant whereas Defendant lacks "minimum contacts" with California. This is a requirement of general jurisdiction. *International Shoe Co. v. State of Washington* (1945) 326 US 310, 316-317. But Plaintiff fails entirely to discuss special (limited) jurisdiction.

8. Limited jurisdiction applied from the outset because 1) the cause of action arose from forum-related contacts with the Plaintiff, 2) it was not burdensome for Defendant to defend in this day of internet communications and travel by airline, and 3) California has an interest in protecting residents from those who reach out from other jurisdiction to injure them. See statement of factors in *Star Aviation, Inc. v. Superior Court* (1977) 73 Cal.App.3d 807, 811. Thus, lack of jurisdiction did not prevent Plaintiff from suing within the statute of limitations periods.

*Appendix K*

9. Plaintiff did not establish that Defendant is estopped from asserting the statute of limitations. Plaintiff claims an estoppel to assert the statute of limitations because Defendant lied when he said he was going to Egypt, he intentionally concealed himself, she believed him because of their special relationship, and she tried to locate him in New York in 2004 and 2005 and in Egypt in 2010 (after all possible statutes of limitation had expired).

10. Other than these short periods of activity, Plaintiff makes no attempt to explain what she did for the remainder of the 13 years that passed since Defendant's default. She alleges she checked out only information he had given her. She knew his company was Bary Group International, Inc. but does not allege any attempt to locate him through that company.

11. Under *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, Plaintiff had to show reasonable reliance that induced her to forego some action that she could have pursued to save herself from the loss. *Id.* There is no such showing here.

12. *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907 is not on point. It involved a continuing nuisance and reliance on continued efforts by a defendant to clean up the subject property. The jury found reliance was reasonable.

13. Equitable estoppel only applies to a statute of limitations defense if the Defendant's conduct "has induced another into forbearing suit within the applicable limitations period" and the Plaintiff was "directly

*Appendix K*

prevented” from suing on time. *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 745. Neither of these apply. Defendant didn’t induce Plaintiff forgo suit; he just told her he was leaving. Nor did he do anything to “directly prevent” her from suing for 13 years, or even from making reasonable efforts to find him.

14. Plaintiff does not suggest how she could further amend to overcome these defects in her pleading, so further leave to amend is denied under *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.

15. The motion to strike is off calendar (moot).

**NOTICE IS HEREBY GIVEN.**

Dated: May 13, 2016

ESTELLE & KENNEDY, APLC,

BY: \_\_\_\_\_ /s/  
Jillian-Leigh Balancio,  
Attorney for Defendant  
MOHAMED ABOUELMAGD