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FIRST ACCESS ENTERTAINMENT, LLC and
FIRST ACCESS ENTERTAINMENT LIMITED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LIZA KATHRYN WOMACK, individually, and as Administrator of THE ESTATE OF GUSTAV ELIJAH AHR,

Plaintiff,

v.

FIRST ACCESS ENTERTAINMENT, LLC; FIRST ACCESS ENTERTAINMENT LIMITED; THE HYV, LLC; HYV ACCESS, LLC; BRYANT "CHASE" ORTEGA; BELINDA MERCER; and DOES 1 THROUGH 100, INCLUSIVE,

Defendants.

Case No. 19STCV35837

Honorable Jon Takasugi

NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S COMPLAINT BY DEFENDANTS FIRST ACCESS ENTERTAINMENT, LLC AND FIRST ACCESS ENTERTAINMENT LIMITED

[Filed Concurrently with Declaration of Linda C. Hsu in Support; [Proposed] Order Sustaining Demurrer; Motion to File Under Seal and Supporting Declaration; [Proposed] Order Granting Motion to File Under Seal; Request For Judicial Notice; Notice of Motion and Motion to Strike; and [Proposed] Order Granting Motion to Strike]

RESERVATION ID: 045489479717

Date: January 21, 2020
Time: 1:30 p.m.
Dept.: 3

Complaint Filed: October 7, 2019
Trial Date: April 5, 2021

****PUBLIC — REDACTS MATERIALS FROM CONDITIONALLY SEALED RECORD****

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 21, 2020, at 1:30 p.m. or as soon thereafter as the matter may be heard in Department 3 of the above-captioned courthouse, located at 312 North Spring Street, Los Angeles, California 90012, defendants First Access Entertainment Limited and First Access Entertainment, LLC (collectively, "FAE entities"), will, and hereby do, jointly and severally generally demur to the Complaint for Damages filed in the above-captioned action by plaintiff Liza Kathryn Womack, individually, and as Administrator of The Estate of Gustav Elijah Ahr ("Plaintiff").

This Demurrer is made pursuant to California Code of Civil Procedure Section 430.10(e) on the following grounds:

1. The purported First Cause of Action for Negligence fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

2. The purported Second Cause of Action for Negligent Hiring / Retention fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

3. The purported Third Cause of Action for Negligent Supervision / Failure to Warn fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

4. The purported Fourth Cause of Action for Negligent Undertaking fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

5. The purported Fifth Cause of Action for Breach of Contract fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

6. The purported Sixth Cause of Action for Breach of Fiduciary Duty fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

7. The purported Seventh Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

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8. The purported Eighth Cause of Action for Violation of Business and Professions Code § 17200 fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

9. The purported Ninth Cause of Action for Wrongful Death fails to state facts sufficient to constitute a cause of action against the FAE entities. Code Civ. Proc. § 430.10(e).

The Demurrer is based on this Notice of Demurrer and Demurrer, the attached Memorandum of Points and Authorities, the Request for Judicial Notice, the Declaration of Linda C. Hsu, records and pleadings on file in this case, and any other matters the Court may consider, including oral arguments of counsel.

Dated: December 23, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: */s/ Linda C. Hsu*
John W. Amberg
Robert E. Boone III
Linda C. Hsu

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GENERAL DEMURRER

The FAE entities generally demur pursuant to Code of Civil Procedure § 430.10(e) to each of the purported causes of action alleged in the Complaint as follows:

DEMURRER TO FIRST CAUSE OF ACTION

The FAE entities demur to the First Cause of Action for Negligence because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO SECOND CAUSE OF ACTION

The FAE entities demur to the Second Cause of Action for Negligent Hiring / Retention because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO THIRD CAUSE OF ACTION

The FAE entities demur to the Third Cause of Action for Negligent Supervision / Failure to Warn because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO FOURTH CAUSE OF ACTION

The FAE entities demur to the Fourth Cause of Action for Negligent Undertaking because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO FIFTH CAUSE OF ACTION

The FAE entities demur to the Fifth Cause of Action for Breach of Contract because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO SIXTH CAUSE OF ACTION

The FAE entities demur to the Sixth Cause of Action for Breach of Fiduciary Duty because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO SEVENTH CAUSE OF ACTION

The FAE entities demur to the Seventh Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

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DEMURRER TO EIGHTH CAUSE OF ACTION

The FAE entities demur to the Eighth Cause of Action for Violation of Business and Professions Code § 17200 because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

DEMURRER TO NINTH CAUSE OF ACTION

The FAE entities demur to the Ninth Cause of Action for Wrongful Death because it fails to state facts sufficient to constitute a cause of action. Code of Civil Procedure § 430.10(e).

Dated: December 23, 2019

Respectfully submitted,

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By: */s/ Linda C. Hsu*
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Non-party Sarah Stennett, CEO of entertainment company First Access Entertainment Limited ("FAE Ltd.") believed in musician Gustav "Lil Peep" Ahr ("Mr. Ahr") so much that FAE Ltd. contracted with Mr. Ahr to finance and develop his career. When Mr. Ahr was introduced to FAE Ltd., he was adamant that he would not enter into a traditional recording contract and wished to have control over his career and an ownership interest in his music. FAE Ltd. shared this philosophy as it advocated for co-ownership of music rights with artists. Unlike traditional music industry contracts under which a record company owns the master recordings and receives financial benefits before the artist, Mr. Ahr's contract with FAE Ltd. gave him co-ownership and co-control over his music, while FAE Ltd. paid all costs of the contract and did not receive financial benefits until Mr. Ahr also did. Mr. Ahr often expressed his gratitude in texts to Ms. Stennett for the opportunity she had afforded him:

> "Sarah. Bless your heart for giving me a chance it means so much to me I can't put it into words. But it feels great to be able to express myself the way I always dreamed. Just a thank u. I'm very blessed :)" (Mr. Ahr text on Feb. 17, 2017.)
>
> "Thank u Sarah you're a blessing" (Mr. Ahr text on Nov. 4, 2017.)
>
> "Thank u so much Sarah ! We just got to Miami. I'm great my friends are great and it's very hot and sunny. Hope everything is well ♥ thank you so much for this again" (Mr. Ahr text on Nov. 5, 2017.)

Tragically, just days later, on November 15, 2017, Mr. Ahr accidently died of a self-inflicted drug overdose from an unknown source.

This lawsuit seeks to sow liability for this tragedy on a disparate set of defendants: FAE Ltd. and its related company, First Access Entertainment, LLC ("FAE LLC"); a merchandising company, THE HYV, LLC, and its president, Bryant "Chase" Ortega, and a sister company HYV ACCESS, LLC not even in existence when Mr. Ahr died; and Mr. Ahr's tour manager and sometime lover, Belinda Mercer. The Complaint's tort claims against the FAE entities fail as a matter of law because Mr. Ahr's relationship with them was a business relationship governed by a contract that barred tort claims, and because these Defendants did not owe an independent duty of

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care to Mr. Ahr, breach such a duty, or cause his death. The Complaint's contract claims likewise fail as a matter of law. This demurrer should be sustained with prejudice.

II. FACTUAL BACKGROUND

The Contract. On August 11, 2016, Mr. Ahr and FAE Ltd. entered into a fully integrated, written contract, titled "Joint Venture Agreement" (the "JVA"). *See* Exh. 1 to FAE Defendants' Request for Judicial Notice. Mr. Ahr was represented by counsel. (JVA at p. 1.) The JVA's purpose was to "put in place a basis for the Parties to work together to develop [Mr. Ahr's] career across the entertainment industries and primarily to help [Mr. Ahr] develop further [his] musical style, record music and develop and enhance his wider brand pka Lil Peep." (*Id.*, § 1.1.) FAE Ltd. agreed to "use all reasonable commercial endeavours and shall work with [Mr. Ahr], such as by providing advice and support to help this development." (*Id.*)

To accomplish this purpose, the parties formed a so-called "joint venture" (the "Joint Venture"). (*Id.*, § 1.2.) Section 14.3 of the JVA provides that the Joint Venture is purely "contractual" and "will not constitute a partnership"; it further provides:

> The Parties will provide services to one another on an arms' length basis while remaining independent business entities. Each Party is responsible for its own actions and will not be jointly and severally liable for the actions of the other Party. (*Id.* § 14.3.)[1/]

Section 1.3 of the JVA states: "The purpose of the Joint Venture shall be to manage and exploit the Activities and Products and all income arising from the exercise and/or exploitation of the Activities and Products."[2/] The "Activities" consist of Mr. Ahr's professional entertainment activities, such as recording, mixing, arranging, and performing his musical works through various

---

[1/] Neither FAE entity concedes that its respective relationship with Mr. Ahr, including the JVA between FAE Ltd. and Mr. Ahr, legally constitutes a joint venture. For purposes of this demurrer only, they assume that FAE Ltd. and Mr. Ahr formed a joint venture, as alleged in the Complaint, but not one that includes fiduciary duties between the parties.

[2/] The Parties also agreed to form a limited liability company "as a vehicle for the business of the Joint Venture" – and, upon its formation, to assign their respective obligations under the JVA to the LLC, subject to the JVA provisions governing the split of ownership and profits of the Joint Venture. (*Id.*, § 1.4.) The Complaint does not allege that the parties formed that dedicated LLC, and in fact, they did not. FAE LLC is not that LLC; it conducts significant other business unrelated to Mr. Ahr. (*See* Complaint, ¶ 32.)

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media (e.g., live, TV, internet, radio, etc.); music-related acting on stage or TV; modeling or activities in the fashion industry; literary and writing activities; endorsements for branding or merchandising; and promotional appearances. (*Id.*, § 1.5.1.) "Products" are "all products and rights," including "recordings, copyrights, literary rights, trade marks, designs, image rights, any name(s), all intellectual property rights of any nature[] created and/or arising from [the] Activities and the exercise and/or exploitation of the Activities before or during the Term." (*Id.*, § 1.5.2 (emphasis added).)

The initial term of the JVA was for three years, i.e., from August 11, 2016 to August 10, 2019. (*Id.*, § 3.1.) Its term was automatically extended twice, to August 10, 2023, upon the Parties' attainment of specified financial goals, including Mr. Ahr's share of net profits reaching [redacted]. (*Id.* §§ 3.1-3.3.)

FAE Ltd. and Mr. Ahr were each obligated to provide services to the Joint Venture. Section 5.1 of the JVA provides: "The Artist hereby acknowledges that FAE [Ltd.] has specialist internal resources and personnel necessary to manage the Activities and/or Products including without limitation music branding acting and general entertainment activities, and FAE [Ltd.] shall provide such management services (collectively, the 'Services') to the Joint Venture and by extension to the Artist at no additional cost to the Joint Venture unless it is mutually agreed otherwise." Section § 5.2 states, in part: "FAE [Ltd.] shall carry out the Services to the best of its abilities on behalf of the Joint Venture." FAE Ltd. thus provided financial support for Mr. Ahr's professional music career, including (among other things) paying for recording and promoting his music, arranging performances/ tours, and providing financial advances that could not be recouped if there were no profits.

The JVA details the Parties' respective rights of ownership in Mr. Ahr's creative works and the split of net profits. Under §§ 1.5.1, 1.5.2, 4.1, and 4.3 of the JVA, FAE Ltd. owns [redacted].

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The Parties also agreed to use [redacted]. (*Id.*, § 4.2.) FAE Ltd. and Mr. Ahr [redacted]. (*Id.*, §§ 4.1.1, 4.2.)

FAE Ltd. agreed to "[redacted]." (*Id.*, § 5.5.) The Parties agreed that [redacted]. (*Id.*)

The Parties also agreed that "neither Party shall be liable for any failure or default by any person firm or company with whom such Party and/or the Joint Venture negotiate in good faith any contract or other agreement relating to the Activities and/or Products nor shall such Party be liable for the fraudulent or negligent activities (or lack of activities) of its personnel." (*Id.*, § 6.1.6.) The Parties agreed that each Party "shall not incur any liability on behalf of the other Party." (*Id.*, § 6.1.13.)

Mr. Ahr's Death. On November 15, 2017, Mr. Ahr was found dead in his tour bus near a concert venue in Tucson, Arizona. (Complaint, ¶ 28.) The coroner determined, based on toxicology tests, that the cause of death was "the combined toxic effects of fentanyl and alprazolam." (*Id.*) Mr. Ahr overdosed on drugs from an unknown source.

According to the National Institute on Drug Abuse:

> Fentanyl is a powerful synthetic opioid analgesic that is similar to morphine but is 50 to 100 times more potent. It is a schedule II prescription drug, and it is typically used to treat patients with severe pain or to manage pain after surgery. It is also sometimes used to treat patients with chronic pain who are physically tolerant to other opioids. In its prescription form, fentanyl is known by such names as Actiq®, Duragesic®, and Sublimaze®. Street names for fentanyl or for fentanyl-laced heroin include Apache, China Girl, China White, Dance Fever, Friend, Goodfella, Jackpot, Murder 8, TNT, and Tango and Cash.

(https://www.drugabuse.gov/drugs-abuse/fentanyl.)

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Alprazolam is a benzodiazepine, part of the group of medicines called central nervous system (CNS) depressants, which slow the nervous system. Alprazolam is used to relieve symptoms of anxiety, including anxiety caused by depression. It is also used to treat panic disorder in some patients. Alprazolam is sold under the brand name Xanax, as well as other brand names. (https://www.mayoclinic.org/drugs-supplements/alprazolam-oral-route/description/drg-20061040.)

The Complaint. Plaintiff Liza Kathryn Womack, Mr. Ahr's mother, filed this lawsuit on October 7, 2019. The Complaint alleges that Mr. Ahr and FAE Ltd. entered into the JVA in August 2016 "to form a joint venture business enterprise for the purpose of managing [Mr. Ahr's] musical career and performances, including tours." (Complaint, ¶ 12.)

The Complaint further alleges that, in early 2017, FAE Ltd. and FAE LLC arranged for Mr. Ahr to headline a concert tour in the U.S., Canada, Europe, and Russia. (*Id.*, ¶ 17.) Throughout this tour ("The Peep Show Tour"), Mr. Ahr and "certain Defendants" (who are not identified) used controlled substances and illegal drugs. (*Id.*) "[O]thers involved in the tour" (who are not identified) and the tour manager (who also is not identified) also used drugs. (*Id.*) This drug use was "allowed, normalized, and even encouraged and promoted by Defendants" – but again, the Complaint fails to identify anyone by name. (*Id.*) "Defendants knew that the continued use of dangerous drugs on this tour by many, including [Mr. Ahr], allowed Defendants to maintain a certain degree of control over the tour and its artists." (*Id.*) Defendants allowed Mr. Ahr to perform in Los Angeles in May 2017 even though he was "barely able to communicate, let alone perform, due to his use of drugs." (*Id.*, ¶ 18.) In early 2017, Ms. Stennett allegedly gifted Mr. Ahr a bottle of "pills" at a group dinner. (*Id.*, ¶ 20.) On August 16, 2017, Mr. Ortega allegedly texted Mr. Ahr that Ms. Stennett was about to arrive in New York City and had Xanax pills for him. (*Id.*, ¶ 21.) Later in 2017, Mr. Mercer, acting as the tour manager, allegedly supplied Mr. Ahr and others on the tour bus with Xanax and ketamine, a known anesthetic/tranquilizer. (*Id.*, ¶ 22.) Mr. Ahr asked Ms. Mercer for ketamine and Percocet. (*Id.*) Mr. Ahr told "Defendants" on many occasions that he wanted to leave the tour and end his relationship with "Defendants," and that he was "anxious, stressed, overwhelmed, burnt out, exhausted and physically unwell," but

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"Defendants" ignored "these cries for help" and, instead, "pushed [Mr. Ahr] onto stage after stage in city after city, plying and propping [Mr. Ahr] up with illegal drugs and unprescribed controlled substances all along the way." (*Id.*, ¶ 24.)

FAE Ltd. and FAE LLC vehemently deny these allegations; but even accepting them as true, as we must for purposes of this demurrer, the Complaint fails to allege facts showing that:

- FAE Ltd. or FAE LLC contracted with Mr. Ahr to manage or control any aspect of his personal life, including his eating, drinking, sleeping, exercise, social or drug use activities, regimens or habits, or ensure his personal safety or well-being;
- FAE Ltd. or FAE LLC undertook the task of managing or controlling Mr. Ahr's personal life, or the task of ensuring his personal safety or well-being;
- FAE Ltd. or FAE LLC provided Mr. Ahr with the fatal dose of those drugs (or, indeed, who provided Mr. Ahr with that fatal dose);
- FAE Ltd. or FAE LLC knew when, where, or how Mr. Ahr obtained those drugs;
- FAE Ltd. or FAE LLC controlled when, where, or how Mr. Ahr obtained those drugs;
- FAE Ltd. or FAE LLC saw Mr. Ahr take the fatal dose of drugs;
- Mr. Ahr had ever taken fentanyl before;
- FAE Ltd. or FAE LLC ever provided Mr. Ahr with fentanyl;
- FAE Ltd. or FAE LLC knew Mr. Ahr had ever taken fentanyl before; or
- Any of the specific drugs Defendants allegedly supplied to Mr. Ahr actually killed him.

Because Plaintiff cannot plead facts establishing that the FAE entities caused Mr. Ahr's death, she alleges in conclusory, shotgun fashion that all "Defendants" are responsible because they "encouraged and facilitated" a "drug-laden environment" while Mr. Ahr was on tour. Specifically, Plaintiff alleges that Mr. Ahr openly used illicit drugs while on tour in early 2017, "Defendants" knew Mr. Ahr used drugs, and "Defendants" encouraged and promoted such drug use. (Complaint, ¶ 17.) Based on this theme, the Complaint purports to allege nine causes of action:

(1) Negligence – Plaintiff asserts that the FAE entities breached their duties to, among other things, perform their obligations under the JVA to "ensure that [Mr. Ahr's] tour was

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conducted and managed in such a manner so as to safeguard the safety and well-being of [Mr. Ahr] and others"; ensure that Mr. Ahr's living arrangements were drug-free, and not supply Mr. Ahr with drugs; and by negligently hiring and managing tour personnel, failing to keep Mr. Ahr's living arrangements drug-free, supplying Mr. Ahr with drugs, and pushing him to remain on tour. (Complaint, ¶¶ 35-36.)

(2) Negligent Hiring/Retention – Plaintiff asserts that FAE Ltd. and FAE LLC "had a duty not to hire and/or retain ORTEGA, MERCER, Daisy Quin and Steve Paul, given their unfitness and propensity to create a hostile, unsafe, and toxic environment" for Mr. Ahr. (*Id.*, ¶ 44.)

(3) Negligent Supervision/Failure to Warn – Plaintiff asserts that the FAE entities breached their duty to supervise their purported employees Mr. Ortega, Ms. Mercer, Ms. Quin, and Mr. Paul; failed to properly investigate complaints of inappropriate behavior by them; and failed to warn Mr. Ahr and others of their alleged unfitness and dangerous propensities. (*Id.*, ¶ 54.)

(4) Negligent Undertaking – Plaintiff asserts that the FAE entities undertook to provide services "for the benefit and protection of [Mr. Ahr]" but failed to exercise reasonable care in rendering those services "either expressly, by way of the JVA, or impliedly, through their actions." (*Id.*, ¶¶ 64-66.)

(5) Breach of Contract – Plaintiff claims that the FAE entities breached the JVA by "failing to act in good faith; exercising sole and exclusive management and control over the joint venture, and usurping the direction of [Mr. Ahr's] musical career, recordings, and live performances for the purpose of maximizing Defendants' profits of the joint venture; and failing to account and distribute to [Mr. Ahr] his share of the total joint venture profits." (*Id.*, ¶ 77.)

(6) Breach of Fiduciary Duty – Plaintiff asserts that the FAE entities, as purported parties to the JVA, owed Mr. Ahr a fiduciary duty but breached that duty by failing to disclose to Mr. Ahr the relationship between FAE Ltd./FAE LLC, on the one hand, and Mr. Ortega, The HYV, and HYV Access, on the other hand; failing to fulfill their contractual obligations under the JVA with regard to accounting for Mr. Ahr's proper share of the net profits; exploiting Mr. Ahr's person and services for their own gains rather than that of the Joint Venture; furnishing Mr. Ahr with drugs; pushing Mr. Ahr to perform on tour despite his alleged disabilities and exhaustion; and controlling

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and operating a tour in such a fashion so as to jeopardize Mr. Ahr's safety, security, and well-being. (*Id.*, ¶¶ 81-83.)

(7) Breach of Implied Covenant – Plaintiff claims that the FAE entities breached their duty of good faith and fair dealing to Mr. Ahr arising from the JVA, by advancing their own interests rather than that of the Joint Venture; concealing material information about the relationship between FAE Ltd./FAE LLC, on the one hand, and Mr. Ortega, The HYV and HYV Access, on the other hand; and interfering with Mr. Ahr's right to receive the benefits of the JVA. (*Id.*, ¶ 90.)

(8) Violation of Business and Professions Code § 17200 – Plaintiff claims that the FAE entities "utilized and exploited [Mr. Ahr's] skills and services for their own benefit and profit" (*id.*, ¶ 96), and seeks restitution for additional profits Mr. Ahr would have received under the JVA had Defendants not breached the JVA, because Defendants were unjustly enriched (*id.*, ¶¶ 98-100).

(9) Wrongful Death – This claim is based on all of the conduct alleged in the Complaint.

III. CONFLICT OF LAW ANALYSIS – CALIFORNIA LAW APPLIES

Section 14.11 of the JVA – whose sole parties are FAE Ltd. and Mr. Ahr – provides: "This Agreement, and any dispute, proceeding or claim of whatever nature arising out of or in any way relating to this Agreement (including any non-contractual disputes or claims), shall be governed by and construed in accordance with the laws of the state of New York and the courts of the state of California shall have jurisdiction."

The Complaint invokes California law, and the FAE entities agree that California law applies. California courts enforce choice-of-law provisions only when the chosen state has a substantial relationship to the parties to the agreement or their transaction, or there is some other reasonable basis for their choice. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992). If either test is satisfied, the opposing party must show (1) the chosen law is contrary to a fundamental policy of California and (2) California has a materially greater interest in determination of the particular issue. *Washington Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 917 (2001).

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No Substantial Relationship or Reasonable Basis to Apply New York Law. New York has no relationship, let alone a substantial one, to the parties or the transaction. FAE Ltd. is incorporated in the United Kingdom; Mr. Ahr was a resident of California. (Complaint, ¶¶ 1-4.) Plaintiff does not allege the contract was executed or performed in New York. Even Plaintiff asserts California law applies by alleging a 17200 claim. (*Id*., ¶ 97.)

New York Law Is Contrary to Fundamental California Policies. Even if Plaintiff could establish a reasonable basis for applying New York law, that law contravenes fundamental policies of California, which has the materially greater interest determining the issues. The California Supreme Court recently listed three factors defining fundamental public policies: when they (1) cannot be contractually waived; (2) protect against otherwise inequitable results; and (3) promote the public interest. *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 103 (2019).

Here, the crux of the claims involves negligence and breach of duties. New York and California laws on these issues are not identical. California's negligence liability is fundamental, as evidenced by the legislature's decision to codify this policy. Cal. Civ. Code § 1431. Joint and several liability protects against inequitable results and promotes public interest by balancing defendants' interest in not paying the entire cost of a tort regardless of their culpability against plaintiffs' interest in recovery. The same is true with fiduciary duties, which may be modified. Cal. Corp. Code § 16103. This protects against inequitable results and promotes public interest by protecting and promoting business relationships. Thus, California negligence and duties rules are fundamental policies.

California Has a Materially Greater Interest in Determining These Issues. Several factors determine which state has a materially greater interest. *Discover Bank v. Superior Court*, 134 Cal. App. 4th 866, 895 (2006) (Delaware had a greater interest because it was home to defendant, demonstrated its concern over the issues through statute, and plaintiff asserted claims under Delaware law alone). Here, five of the six named Defendants are California businesses or residents. (Complaint, ¶ 1-8.) The Complaint alleges violation of California law. (*Id*., ¶ 97.) No Defendant is a New York resident or is alleged to have violated New York law.

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IV. PLAINTIFF'S NEGLIGENCE CLAIMS FAIL

A. The Claims Are Contract-Based; No Tort Claims Lie

The tort claims are based on FAE Ltd. and FAE LLC's alleged breach of their purported contractual obligations to Mr. Ahr under the JVA. "Conduct amounting to a breach of contract becomes tortious only when it also violates an *independent* duty arising from principles of tort law." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 (1994) (emphasis added). "An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." *Id.* (quoting *Jones v. Kelly*, 208 Cal. 251, 255 (1929)). The FAE entities did not owe any independent duty to Mr. Ahr. The only possible claim Mr. Ahr's estate could assert is breach of contract, and that claim fails, as explained below in Section V.

The terms of the JVA also bar Plaintiff's tort claims. The JVA provides that neither party is liable for any failure or default by anyone retained to carry out any obligations under the JVA, "nor shall such Party be liable for the fraudulent or negligent activities (or lack of activities) of its personnel." (JVA, § 6.1.6.)

B. The Complaint Fails to State a Claim for Negligence

The elements of a cause of action for negligence are duty, breach, causation, and damages. *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 594 (1970). Here, the Complaint fails to allege duty and causation.

1. The Law Regarding Duty

Under California law, a duty may be (1) imposed by law, (2) assumed by defendant, or (3) arise out of a special relationship between plaintiff and defendant. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 985 (1993). The question of duty is one of law. *Ballard v. Uribe*, 41 Cal. 3d 564, 572 (1986). In determining the existence of duty, the court's task is "not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party." *Id.* at 572, n.6.

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In *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), the California Supreme Court established several factors to consider in determining whether a duty exists:

[1] the foreseeability of harm to plaintiff,

[2] the degree of certainty that plaintiff suffered injury,

[3] the closeness of the connection between defendant's conduct and the injury suffered,

[4] the moral blame attached to defendant's conduct,

[5] the policy of preventing future harm,

[6] the extent of the burden to defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and

[7] the availability, cost, and prevalence of insurance for the risk involved.

Foreseeability and extent of burden to defendant have evolved into the primary factors to be considered. *Vasquez v. Residential Investments, Inc.*, 118 Cal. App. 4th 269, 280, n.5 (2004). If the alleged act is misfeasance, *i.e.*, defendant created a risk, standards of ordinary care govern the question of duty. *Jackson v. AEG Live, LLC*, 233 Cal. App. 4th 1156, 1173-74 (2015).

"As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203 (1982). "Courts have recognized exceptions to the general rule of no duty with respect to third party conduct where a 'special relationship' exists and where the defendant engages in a 'negligent undertaking.'" *Univ. of S. California v. Superior Court*, 30 Cal. App. 5th 429, 440 (2018). "[S]pecial relationships typically are characterized by the plaintiff's dependence on the defendant for protection and the defendant's superior control over the means of protection." *Id.* at 441.

2. <u>Neither FAE Ltd. Nor FAE LLC Owed Mr. Ahr a Duty of Care</u>

No Duty Imposed by Law. In a negligence action, a plaintiff may secure a rebuttable presumption of the failure to exercise due care only if it can prove: (1) defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering death or

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injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. Cal. Evid. Code § 669.

The Complaint fails to identify any statute, ordinance, or regulation that imposes a duty of care on the FAE entities to prevent Mr. Ahr from overdosing on drugs. Indeed, the Complaint does not even purport to assert that the FAE entities owed any such duty imposed by law. The reason for this is simple: there is no such statute, ordinance, or regulation.

No Duty Under the *Rowland* Factors. Analysis of relevant cases and the *Rowland* factors likewise demonstrates that the FAE entities had no legal duty to prevent Mr. Ahr from choosing to self-medicate with fentanyl and alprazolam.

In *Jackson v. AEG Live*, the estate and heirs of pop star Michael Jackson alleged that entertainment company AEG Live breached its duty to not increase the risk of harm to Jackson's health by pressuring a doctor to protect their interests over the artist's health and safety. The court held AEG Live did not have a duty to refrain from pressuring the doctor. 233 Cal. App. 4th at 1175. "It is not foreseeable that pressuring a doctor to keep his patient healthy in order to meet his contractual obligations would result in the doctor supplying the patient with an unusual, powerful, and dangerous sedative." *Id*. at 1174. The company did not direct the doctor to use any means necessary to ensure the artist attended rehearsals. *Id*. at 1175. "[The company's] knowledge of [the artist's] deteriorating health and any drug dependency issues did not increase the foreseeability that his doctor would take extreme and dangerous measures." *Id*.

In *Sakiyama v. AMF Bowling Centers*, plaintiffs alleged that a company breached its duty of care by allowing its facilities to be used for an all-night rave party involving drugs. But "[the company] did not have a duty not to allow its facility to be used for such a party, even if it knew or could assume that drugs would be used by some of the attendees." 110 Cal. App. 4th 398, 402 (2003). "To impose ordinary negligence liability on a business owner that has done nothing more than allow its facility to be used for an all-night party, even if we assume [the company] knew that drugs would be used at the party, would expand the concept of duty far beyond any current models." *Id*. at 406.

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In *Klean W. Hollywood, LLC v. Superior Court*, plaintiff alleged that a drug rehabilitation center negligently created an environment that led to his possession of illegal drugs and overdose. 230 Cal. Rptr. 3d 168, 172 (Ct. App. 2018), *reh'g denied* (Apr. 5, 2018), *review denied and ordered not to be officially published* (June 13, 2018). The rehabilitation center could not be held liable for failing to stop plaintiff from obtaining and using drugs. *Id*. at 182. "Our research has revealed no case . . . suggesting that liability could be predicated on the mere failure to undertake affirmative efforts to stop [a] user from ingesting drugs." *Id*. at 181.

In *Univ. of S. California v. Superior Court*, a college student injured at a fraternity party, where she consumed drugs and alcohol, sued the school for negligence. 30 Cal. App. 5th 429, 436-37 (2018). The party violated multiple university policies, including prohibitions on alcohol and illicit drugs. USC knew of prior violations by the fraternity involving alcohol. University police visited the party several times due to complaints and witnessed illicit alcohol use but did not shut down the party. Although the court found that the first two and final *Rowland* factors favored finding a duty because (1) injury to students resulting from alcohol consumption is foreseeable; (2) plaintiff suffered definite physical harm; and (3) the court did not see why universities would have difficulty getting insurance, the court concluded that the university had no duty to protect plaintiff. *Id.* at 451–56.

The court explained that USC's conduct in relation to plaintiff's injury was attenuated because the university had done nothing to increase the risks associated with attending a fraternity party. USC's conduct was not morally blameworthy "[b]ecause adult students . . . cannot be considered particularly powerless or unsophisticated and because universities have little control over students' off-campus social activities . . . ." *Id.* at 454. The policy of preventing future harm weighed against finding a duty "[b]ecause[, since] colleges' control of off-campus social activities is limited, their ability to reduce the risk of injury in those settings is limited." *Id.* Finally, "[t]he burden on the university and the restrictions on the independence of students engaging in noncurricular activities off campus would be great." *Id.* at 455. Thus, on balance, the *Rowland* factors weighed against imposing a duty.

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Here, the *Rowland* factors weigh heavily against imposing a duty on the FAE entities. First, Mr. Ahr's overdose from drugs no defendant is accused of providing to him was not foreseeable. Nor was it foreseeable that Mr. Ahr would overdose from drugs supplied from an unknown source. The Complaint does not allege that Mr. Ahr ever used fentanyl, with or without alprazolam or any other drug; or that he ever took street drugs or drugs from unknown sources. And Mr. Ahr was an adult and responsible for his own actions. This factor weighs heavily against imposing a duty.

Second, although Plaintiff certainly alleges an injury, this is the only factor that weighs in her favor. As *Univ. of S. California* evidences, it is not enough to create tort liability.

Third, there is no close connection between the FAE entities' alleged conduct and Mr. Ahr's death. The Complaint does not allege that the FAE entities supplied the drugs that killed Mr. Ahr, or ever supplied Mr. Ahr with fentanyl. The JVA makes it clear that Mr. Ahr did not contract with FAE Ltd. (or any other defendant) to manage or control his personal life or protect his personal safety. No term in the JVA even comes close to obligating FAE Ltd. to provide such personal services. In fact the JVA makes it clear that Mr. Ahr did not want that. He wanted (and contracted for) a purely business relationship. The JVA plainly states: "The Parties [Mr. Ahr and FAE Ltd.] will provide services to one another on an arms' length basis while remaining independent business entities. Each Party is responsible for its own actions and will not be jointly and severally liable for the actions of the other Party." (JVA, § 14.3 (emphasis added).) Other provisions underscore that business relationship and show that FAE Ltd. was not responsible for managing Mr. Ahr's personal life or protecting his safety. (*See, e.g., id.*, §§ 1.3 – 1.5; *see also* Complaint, ¶¶ 7, 12-13.) Because the FAE entities' alleged conduct is greatly attenuated from Mr. Ahr's death, this factor weighs against imposing a duty.

The moral blame factor also weighs against a finding of duty. Just as *Univ. of S. California* determined that college students cannot be considered powerless and unsophisticated, Mr. Ahr cannot be deemed a helpless child in the eyes of the law. He was an adult. He co-owned the Joint Venture. This included his tour. Just as universities have little control over off-campus

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social activities, the FAE entities did not control or have the right to control Mr. Ahr's personal life, including his drug use.

The policy of preventing future harm factor weighs against imposing a duty, too. Again, Mr. Ahr was an adult. His death was self-inflicted – he chose to take the drugs that killed him. Arm's length business associates should not be strapped with a duty to protect each other from self-inflicted harm.

If such a duty was imposed, the burden on investors and providers of services to talent, including record companies, agents, promoters, and management companies would be great and unjustified, and have adverse consequences in the industry. It would create a legal precedent requiring all entertainment companies and talent managers to act essentially as nannies for their artists, policing virtually all aspects of their personal lives, including their exposure to any potentially harmful things – not just drugs, but also cigarettes, alcohol, muscle cars, motorcycles, and even choices of friends. That result would be unrealistic, unworkable, and unreasonable. Given the free-spirited nature and independence of many artists, companies like FAE Ltd. and FAE LLC would not be able to protect themselves, contractually or non-contractually, from liability, and would simply opt not to engage in the business. Artists would be left without professional resources necessary to succeed.

Likewise, a finding that the FAE entities owed a duty to Mr. Ahr to protect him from the self-inflicted dangers of his own recreational drug use would create significant consequences for the entertainment industry. Insurance for alleged liability against injury and death would be difficult to procure and, if available, exorbitantly expensive. The greater risk and added cost of insurance would have the chilling effects of driving smaller entertainment companies out of the business and deterring larger firms from assisting the higher profile clientele they typically represent.

It is also important to remember that "[a]n analysis of the *Rowland* factors may be unnecessary if the court determines as a matter of law based on other policy considerations that no duty exists in a category of cases" – and that, in considering the *Rowland* factors, courts determine "not whether they support an exception to the general duty of reasonable care on the facts of the

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particular case before [the court], but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." *Univ. of S. California*, 30 Cal. App. 5th at 451-52. In other words, the duty analysis is categorical, not case-specific. Here the policy implications of finding that the FAE entities owed Mr. Ahr a duty are so absurd that a full *Rowland* analysis is not necessary.

No Special Relationship Existed. Finally, the Complaint fails to allege a special relationship between the FAE entities and Mr. Ahr that would give rise to a duty. Only the following special relationships may create a duty of care: doctor-patient; law enforcement officials (in limited circumstances); parent-child; school-student; possessor of premises and personal property; relationship of dependency for personal protection; common carriers; and fiduciary relationship. *See generally Tresemer v. Barke*, 86 Cal. App. 3d 656, 672 (1978) (physician); *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703, 707 (2001) (law officer); *Costello v. Hart*, 23 Cal. App. 3d 898, 901 (1972) (child caretaker); *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 513 (1978) (school); *Isaacs v. Huntington Mem'l Hosp.*, 38 Cal. 3d 112, 123 (1985) (landowner); *Williams v. State of California*, 34 Cal. 3d 18, 25 (1983) (dependency for protection); *Lopez v. S. Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 798 (1985) (common carriers); *McCollum v. Friendly Hills Travel Center*, 172 Cal. App. 3d 83, 92 (1985) (agents/fiduciaries).

None of these special relationships exists here. FAE Ltd.'s relationship with Mr. Ahr, as demonstrated by the JVA, is purely an arm's length contractual business relationship and did not involve managing Mr. Ahr's personal life or protecting his personal safety. (*See, e.g., id.*, §§ 1.3 – 1.5, 14.3; *see also* Complaint, ¶¶ 7, 12-13.)

The Complaint incorrectly alleges that FAE LLC is a party to the JVA (Complaint, ¶ 12); it is not (*see* JVA, cover page and p. 1). But even if it was, its alleged relationship with Mr. Ahr was also purely business. Indeed, the Complaint alleges that FAE LLC is an entertainment company that, together with FAE Ltd., entered into the Joint Venture with Mr. Ahr and agreed to provide "support for the recording of [Mr. Ahr's] music, promotion, management of his musical tours, marketing and development of [Mr. Ahr's] brand." (Complaint, ¶ 12.)

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In fact, the Complaint repeatedly admits that Mr. Ahr's relationship with the FAE entities was purely business, and nothing more. (See, e.g., Complaint, ¶ 7 ("ORTEGA connected [Mr. Ahr] with [FAE Ltd. and FAE LLC] and encouraged [Mr. Ahr] to enter into a **business relationship** with [FAE Ltd. and FAE LLC] …") (emphasis added), ¶ 12 ("Pursuant to this JVA, [Mr. Ahr] and [FAE Ltd. and FAE LLC] agreed to form a joint venture **business enterprise** for the purpose of managing [Mr. Ahr's] musical career and performances, including tours.") (emphasis added), and ¶ 13 ("Pursuant to the JVA, [FAE Ltd. and FAE LLC] had a joint ownership interest in **the business undertaking**; control over **the business**, as well as the direction of **the business**; and shares profits and losses of **the business**.") (emphasis added).

Other allegations also clearly show that these relationships were purely of a business nature and not the type of special relationship giving rise to an independent duty of care for one's safety and/or well-being. FAE Ltd. provided financial support for Mr. Ahr's professional music career, including paying for recording and promoting Mr. Ahr's music, and arranging performances/ tours. FAE Ltd. and Mr. Ahr agreed to split the net profits (and losses) of that business venture. FAE LLC assisted FAE Ltd. in carrying out the business of the Joint Venture, whose purpose was to develop and exploit Mr. Ahr's entertainment career and brand. Mr. Ortega, an alleged agent or employee of the FAE entities (which he was not), provided creative and career consultation and guidance services, and artist-associated merchandise, to the Joint Venture. Ms. Mercer, another alleged agent or employee of the FAE entities (she, too, was not), managed the latter part of Mr. Ahr's concert tour.

The Complaint does not allege anything to suggest that either of the FAE entities was obligated to provide, or provided, overall supervision of Mr. Ahr's personal activities, safety-related services to Mr. Ahr, or protection services to Mr. Ahr. The JVA says nothing about controlling or managing Mr. Ahr's personal life, including his medical care, drug use (prescription or otherwise), diet, exercise or sleep regimens, or any aspect of his social life. The Complaint does not allege that Defendants controlled or had an obligation to control who Mr. Ahr allowed on the tour bus, had the ability to override Mr. Ahr's decisions about conduct on the tour bus, or set policies about conduct on the tour bus or who had access to it. Mr. Ahr was a legal adult, not a

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minor. He was free to carry on all aspects of his personal life as he wished, including on the tour bus, so long as he upheld his contractual obligations under the JVA. Mr. Ahr's choice to use drugs was his, and his alone.

Though courts have found special relationships to exist between universities and their students in certain circumstances, they have been loath to do so in cases involving alcohol use. *Regents of Univ. of California v. Superior Court*, 4 Cal. 5th 607, 622–23 (2018). "'Given [the] realities of modern college life, the university does not undertake a duty of care to safeguard its student from the risks of harm flowing from the use of alcoholic beverages.' . . . [A] duty to prevent alcohol-related crimes would require universities to 'impose onerous conditions on the freedom and privacy of resident students—which restrictions are incompatible with a recognition that students are now generally responsible for their own actions and welfare.'" *Univ. of S. California*, 30 Cal. App. 5th at 442 (first quoting *Crow v. State of California*, 222 Cal. App. 3d 192, 209 (1990), *disapproved of on other grounds by Regents*, 4 Cal. 5th 607; and then quoting *Tanja H. v. Regents of Univ. of California*, 228 Cal. App. 3d 434 (1991), *disapproved of on other grounds by Regents*, 4 Cal. 5th 607).

The same rationale applies here. Imposing a duty on FAE Ltd. or FAE LLC to prevent Mr. Ahr's drug overdose would extend the boundaries of legal obligations far beyond any precedent, and far beyond the contractual obligations and reasonable expectations of parties doing business. It would convert businesses engaged in the music and entertainment industries into full time baby-sitters for artists. That clearly was not the parties' intent upon entering the JVA.

Neither FAE Entity Assumed a Duty to Protect Mr. Ahr's Safety. The Complaint fails to allege facts demonstrating that the FAE entities assumed a duty to provide personal services to Mr. Ahr, including protecting him from a drug overdose. Defendants' alleged services were purely for business. The Complaint does not allege, and cannot plausibly allege, that FAE Ltd. or FAE LLC undertook to supervise Mr. Ahr's personal life, to protect him, or to ensure his health and safety. Nothing in the JVA states that the Joint Venture was for any such purpose, and there was no undertaking outside the terms of the JVA.

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Plaintiff's claim that Defendants undertook "to render services for the benefit and protection of [Mr. Ahr]" (Complaint, ¶ 64) is contrary to the JVA, and simply too vague and broad to give rise to a duty. The doctrine of negligent undertaking is not favored in the law. *Jackson v. AEG Live, LLC,* 233 Cal. App. 4th 1156, 1176 (2015). For liability to be imposed under this theory, the actor must have specifically undertaken to perform the particular task said to have been performed negligently. *Id.* Here, the Complaint fails to allege that the FAE entities undertook the task of managing or controlling Mr. Ahr's drug use, in particular his use of fentanyl and alprazolam. The FAE entities did not assume any duty to protect Mr. Ahr from his self-inflicted overdose.

3. <u>The Complaint Fails to Allege Causation</u>

The Complaint also fails to allege facts establishing causation. Mr. Ahr died from the "combined toxic effects of fentanyl and alprazolam." (Complaint, ¶ 28 (quoting from the coroner's autopsy report). The Complaint does not allege that Mr. Ahr obtained either, let alone both, of these drugs on the day he died from the FAE entities or any other defendant. Indeed, the Complaint does not allege that any Defendant ever supplied Mr. Ahr with fentanyl. Nor does the Complaint allege the FAE entities ever supplied Mr. Ahr with alprazolam.

The Complaint's references to Ms. Mercer's text messages about Ketamine and Percocet and Mr. Ortega and Ms. Stennett's text messages about Xanax weeks and months before Mr. Ahr's death do not and cannot establish that Mr. Ahr received these drugs from those persons or took them, let alone that he died from them. (And there is no allegation that the FAE entities saw or knew about Ms. Mercer and Mr. Ortega's messages.) The allegations about Ms. Mercer's detainment at the Canadian border in October 2017, weeks before Mr. Ahr died, also does not establish causation. The Complaint does not allege why Ms. Mercer was detained or that drugs were involved. And even if her detainment involved drugs, the Complaint still fails to allege what drugs, whose drugs they were, who supplied them, and who had been using them. And, of course, if the Canadian authorities confiscated any drugs, those drugs could not have caused Mr. Ahr's death. The Complaint is likewise devoid of facts about the bottle of unidentified "pills" Ms. Stennett allegedly gave Mr. Ahr in early 2017, months before Mr. Ahr died. Nor does the

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Complaint allege that Defendants introduced Mr. Ahr to drugs in general; any of the drugs they allegedly supplied (Xanax, Percocet, and ketamine); or fentanyl, which, when combined with alprazolam, killed Mr. Ahr. And, as the unfortunate events in Tucson show, Mr. Ahr could and did obtain illicit medications on his own, from sources unknown.

C. The Complaint Fails to Allege a Claim for Negligent Hiring/Retention

An employer may be liable to a third person for negligence in hiring or retaining an incompetent employee. *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1055 (1996) (employer's knowledge that employee personally used drugs did not equate with knowledge that employee would secretly use drugs to place a prospective employee into a situation of helplessness before violently assaulting him). Liability is only imposed if an employer "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." *Id.* "Liability under this rule is limited by basic principles of tort law, including requirements of causation and duty . . . [and] requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, the actor's employment or work, and the harm suffered by the third party." *Phillips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 1140 (2009) (quoting Rest. 3d Agency, § 7.05).

1. The FAE Entities Did Not Owe a Duty

For the reasons stated in the negligence analysis, the FAE entities did not owe Mr. Ahr a duty not to hire or retain Mr. Ortega, Ms. Mercer, Ms. Quin, and/or Mr. Paul. Furthermore, the JVA specifically contemplates retaining Mr. Ortega (§§ 4.2, 5.5 and 5.7), so Plaintiff cannot complain about Mr. Ortega's engagement.

FAE Ltd. was only contractually obligated to perform the terms of the JVA. As the JVA states, the Joint Venture was strictly an arm's length business arrangement. It was not a contract for personal services to Mr. Ahr or for Mr. Ahr's personal protection. The JVA also provides that neither party is "liable for the fraudulent or negligent activities (or lack of activities) of its personnel." (JVA, § 6.1.6.) This clause precludes imposing a duty on FAE Ltd. (or FAE LLC) not to hire or retain Mr. Ortega, Ms. Mercer, Ms. Quin, and/or Mr. Paul. Neither FAE Ltd. nor FAE LLC had such a duty – contractual or not.

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But even if the JVA did not preclude finding a non-contractual duty not to hire or retain these individuals, the Complaint still fails to allege facts creating any such duty. The Complaint fails to allege facts demonstrating how these individuals were unfit to carry out their job duties, or that FAE Ltd. and FAE LLC had prior knowledge of any such unfitness. For instance, the Complaint does not explain how Mr. Ortega was unfit or failed to provide "creative and career consultation and guidance" to Mr. Ahr under the terms of the JVA. Nowhere does the Complaint allege that Mr. Ortega supplied Mr. Ahr with drugs. The Complaint also fails to allege any misconduct by Ms. Quin or Mr. Paul, let alone facts establishing their alleged unfitness for their jobs. All the Complaint says is that each was an employee or agent of FAE Ltd. and/or FAE LLC. (Complaint, ¶¶ 22, 45.) And while the Complaint does allege that Ms. Mercer had a sexual relationship with Mr. Ahr and "routinely supplied [Mr. Ahr] and others on the tour bus with drugs including Xanax and ketamine" "in the latter half of 2017" (Complaint, ¶ 22), the Complaint does not allege any facts demonstrating that Ms. Mercer was hired to supervise, control, or manage – or in fact ever supervised, controlled or, managed – Mr. Ahr's personal life, including his use of drugs. Nor does the Complaint allege that Ms. Mercer supplied the fentanyl and alprazolam that killed Mr. Ahr. At best, the Complaint alleges that Ms. Mercer was stopped at the Canadian border and fined for unknown reasons, and the FAE entities were aware of it. But nowhere does the Complaint allege the actual reason Ms. Mercer was detained, or that it was because of drugs, let alone the drugs that killed Mr. Ahr.

2. <u>The Complaint Fails to Allege Causation</u>

The Complaint fails to allege facts establishing the requisite causation for this claim, for the reasons stated above in Section IV.B.3.

D. <u>The Complaint Fails to Allege a Claim for Negligent Supervision</u>

"To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889, 902 (2015) (citing *Margaret W. v. Kelley R.*, 139 Cal. App. 4th 141, 156-57 (2006)); *see Romero v. Superior Court*, 89 Cal. App. 4th 1068, 1080 (2001) ("notwithstanding the special relationship between the Romeros and the teenage invitees, the

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Romeros did not owe a duty of care to supervise Ryan at all times during her visit, to warn her, or to protect her against Joseph's sexual assault, because there is no evidence from which the trier of fact could find that the Romeros had prior actual knowledge of Joseph's propensity to sexually assault female minors").

Here, the Complaint fails to allege (1) a duty, (2) a breach of duty, or (3) causation.

1. The FAE Entities Did Not Owe Mr. Ahr a Duty to Supervise

For the reasons stated above, the FAE entities did not owe Mr. Ahr an independent duty to supervise Mr. Ortega, Ms. Mercer, Ms. Quin, and/or Mr. Paul. FAE Ltd. was only contractually obligated to perform the terms of the JVA. The Joint Venture was strictly an arm's length business arrangement. It was not a contract for personal services to Mr. Ahr or for Mr. Ahr's personal protection. The JVA also provides that neither party is "liable for the fraudulent or negligent activities (or lack of activities) of its personnel." (JVA, § 6.1.6.) This clause precludes finding that FAE Ltd. (or FAE LLC) had a duty to supervise Mr. Ortega, Ms. Mercer, Ms. Quin, and/or Mr. Paul.

2. The Complaint Fails to Allege a Breach of Duty

The Complaint alleges nothing to show that the FAE entities breached any duty to supervise Mr. Ortega, Ms. Mercer, Ms. Quin, or Mr. Paul. The Complaint does not allege any facts demonstrating that Mr. Ahr or anyone else complained to the FAE entities about any misconduct, or that they failed to properly investigate complaints of inappropriate behavior by employees.

3. The Complaint Fails to Allege Causation

The Complaint fails to allege facts establishing the requisite causation for this claim, for the reasons stated in Section IV.B.3.

E. The Complaint Fails to Allege a Claim for Negligent Undertaking

"[A] volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (1) the volunteer's failure to exercise such care increases the risk of harm to the other person, or (2) the other person reasonably relies upon the

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volunteer's undertaking and suffers injury as a result." *Jackson*, 233 Cal. App. 4th at 1175 (quoting *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 249 (2005)). Even if a duty is found, foreseeability remains a "highly relevant" factor in this disfavored doctrine. *Id*. at 1176.

Here, the Complaint fails to allege (1) a duty and (2) causation.

1. The FAE Entities Did Not Undertake to Protect Mr. Ahr's Personal Safety

This theory does not apply because the FAE entities did not undertake to provide personal services to Mr. Ahr, including any undertaking to safeguard his personal well-being at all times. FAE Ltd.'s relationship with Mr. Ahr was purely contractual and purely business. The JVA controls that relationship. The JVA does not cover personal or protection services to Mr. Ahr, nor does it cover managing or controlling his personal life, including his use of drugs. Nothing in the JVA states that the Joint Venture was for Mr. Ahr's "benefit and protection" or that it pertained to his personal life. FAE LLC was not a party to the JVA and thus did not undertake any contractual obligations to Mr. Ahr. The Complaint does not allege, and cannot plausibly allege, that either FAE entity undertook to supervise Mr. Ahr's personal life, to protect him or ensure his health and safety, or to manage or control his recreational drug use.

In any event, as explained above in Section IV.B.2, Plaintiff's claim that Defendants undertook "to render services for the benefit and protection of [Mr. Ahr]" (Complaint, ¶ 64) is too vague and broad to give rise to a duty under this disfavored doctrine. *Jackson*, 233 Cal. App. 4th at 1176. The Complaint fails to allege facts showing that the FAE entities undertook the task of managing Mr. Ahr's recreational drug use, including his use of fentanyl. *See* Section IV.B, *supra*.

2. The Complaint Fails to Allege Causation

The Complaint fails to allege facts establishing the requisite causation for this claim, for the reasons stated above in Section IV.B.3.

V. THE CONTRACT-BASED CLAIMS FAIL

A. The Complaint Fails to Allege a Claim for Breach of Contract

The elements of a cause of action for breach of written contract are: (1) the existence of an enforceable contract in writing; (2) plaintiff's performance of the contract or excuse for

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nonperformance; (3) defendant's breach; and (4) resulting damages. *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968). Specific facts alleging a breach must be pleaded; mere conclusions of law are insufficient. *Bentley v. Mountain*, 51 Cal. App. 2d 95, 98 (1942). The Complaint fails to allege any of these elements.

There Is No Contract Between FAE LLC and Mr. Ahr. FAE LLC was not a party to the JVA which is the only contract at issue. The breach of contract claim fails as to FAE LLC.

The Complaint Does Not Allege Mr. Ahr's Performance of the JVA. The Complaint does not allege that Mr. Ahr performed his contractual duties or had an excuse for nonperformance. In fact, the Complaint concedes that Mr. Ahr at times failed to uphold his contractual obligations under §§ 5.2 and 6.2.1 of the JVA.

The Complaint Does Not Allege Facts to Support a Breach of the JVA. The Complaint does not identify any specific JVA provision FAE Ltd. failed to perform. Rather, Plaintiff's premise is that the parties, by entering into the JVA, formed an "asymmetrical" Joint Venture in favor of FAE Ltd., giving it "control over the business, as well as the direction of the business." (Complaint, ¶ 76.) The Complaint then goes on to allege that FAE Ltd. (and non-parties to the JVA, like FAE LLC) breached the JVA by exercising such control. Assuming the JVA contained such asymmetrical terms, FAE Ltd.'s exercise of such control would not constitute a breach.

But contrary to the Complaint, the JVA did not form an "asymmetrical" joint venture. Rather, it was at least a [redacted] business arrangement between the parties, and Mr. Ahr was represented by able counsel in negotiating it. (JVA, at p. 1 and § 6.1.14.) In fact, Mr. Ahr negotiated terms [redacted]. (*Id.*, § 4.)

And the Complaint fails to allege facts showing that or how FAE Ltd. exercised sole and exclusive management and control over the Joint Venture, or usurped the direction of Mr. Ahr's musical career, recordings, or live performances. Nor does the Complaint allege specifically how FAE Ltd. failed to account for and distribute to Mr. Ahr his share of the net profits of the Joint Venture. All of these allegations are conclusory.

Instead, the Complaint concedes that FAE Ltd. provided the financial support for Mr. Ahr's professional career, and assisted in developing and promoting his music. (Complaint, ¶ 14.)

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The Complaint further admits that FAE Ltd. performed under the JVA and succeeded in increasing Mr. Ahr's popularity in the music world, so much that Mr. Ahr also had opportunities as a fashion model. (*Id.*, ¶¶ 25-26.)

The Complaint Fails to Allege Causation. The Complaint fails to allege facts showing that FAE Ltd.'s alleged breach of the JVA caused Mr. Ahr's death or his estate any damages. The same causal link missing from Plaintiff's tort claims is missing from the contract claim. There simply is no connection between Mr. Ahr's overdose from the combined toxic effects of fentanyl and alprazolam – drugs that Plaintiff does not and cannot allege FAE Ltd. supplied to Mr. Ahr on the day he died – and the Complaint's bare allegations that FAE Ltd. exerted "exclusive control" over the Joint Venture, usurped the direction of Mr. Ahr's musical career to maximize the profits of the Joint Venture, and/or failed to properly account for and distribute Mr. Ahr's share of the net profits. There are no facts alleged in the Complaint that establish that these purported breaches in fact caused Mr. Ahr to take fentanyl and alprazolam from an unknown source (or sources), let alone in sufficient quantities to kill him.

The Complaint Fails to Allege Damages. The Complaint fails to allege facts showing contractual damages. While the Complaint asserts that FAE Ltd. failed to properly account for and distribute Mr. Ahr's share of net profits, those allegations are purely conclusory. There are no allegations of what was improperly accounted for or what net profits were not distributed.

B. <u>The Complaint Fails to State a Claim for Breach of Implied Covenant</u>

To assert a claim for breach of the implied covenant of good faith and fair dealing, plaintiff must show defendant failed or refused to discharge contractual responsibilities by a conscious and deliberate act. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). A breach prompted by an honest mistake, bad judgment, or negligence is not enough. *Id.* "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous. . . ." *Id.*

For the reasons stated above, the Complaint fails to allege (1) a contract between Mr. Ahr and FAE LLC, (2) a conscious and deliberate breach of the JVA, (3) causation, and (4) damages.

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VI. THE BREACH OF FIDUCIARY DUTY CLAIM FAILS

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages." *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820 (2011) (citing *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1509 (2008)). The Complaint fails to allege any of these elements.

A. There Was No Fiduciary Relationship

"A joint venture exists when there is 'an agreement between the parties under which they have a . . . joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control.'" *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 863 (1968) (no evidence of a community or joint interest in a development although the parties combined their property, skill, and knowledge to carry out the development, shared in control of the development, anticipated receiving substantial profits, and cooperated in the development) (citing *Holtz v. United Plumbing & Heating Co.*, 49 Cal. 2d 501, 506-07 (1957)).

The JVA is the sole basis for the alleged fiduciary relationship. (Complaint, ¶ 81.) But FAE LLC was not a party to that agreement, and the JVA did not create a fiduciary relationship between FAE Ltd. and Mr. Ahr. They had an arm's length business arrangement, but they were not partners. (JVA, § 14.3.) Neither party had the exclusive ability to manage the activities envisioned by the JVA; each needed the express consent of the other party. (JVA, § 6.2.3.) [redacted]. (*See generally* JVA). The parties agreed that each would not incur any liability on behalf of the other, and that each party was responsible for his/its own actions. (JVA, § § 6.1.13; 14.3.)

Indeed, the JVA does not contain the words "fiduciary," "fiduciary duty," or "undivided loyalty," indicating the parties' clear intent not to create a fiduciary relationship.

B. The Complaint Fails to Allege a Breach

Even if a fiduciary duty existed, the Complaint fails to allege a breach of such a duty. The Complaint alleges in only conclusory terms that FAE Ltd. failed to "fully disclose all facts and information material to the joint venture and [Mr. Ahr's] joint venture interest, including but not

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limited to the relationship between FAE on the one hand and ORTEGA and HYV on the other hand." (Complaint, ¶ 83.) But Mr. Ahr knew – from the terms of the JVA – of the relationship between FAE Ltd. (and FAE LLC and Mr. Ortega and The HYV). (JVA, §§ 5.5 and 5.7.) Mr. Ahr knew Mr. Ortega before the JVA, and Mr. Ortega introduced Mr. Ahr to the FAE entities. (Complaint, ¶ 7.)

The Complaint alleges nothing to show that FAE Ltd. failed to fulfill its contractual obligations under the JVA in accounting for Mr. Ahr's share of net profits. The Complaint contains no facts demonstrating that FAE Ltd. exploited Mr. Ahr's person and services for its own gains rather than that of the Joint Venture. In fact, the allegations are to the contrary. FAE Ltd. upheld its obligations under the JVA by financing, developing, and managing Mr. Ahr's musical career with success. FAE Ltd.'s alleged "plying" Mr. Ahr with drugs is not a breach of any fiduciary duty because the management and control of Mr. Ahr's personal life, including his recreational use of drugs, was not within the scope of FAE Ltd.'s obligations under the JVA. Finally, FAE Ltd.'s purported "pushing" Mr. Ahr to perform on tour does not constitute a breach because it was FAE Ltd.'s contractual obligation to develop, manage, and exploit Mr. Ahr's musical talents, and it was Mr. Ahr's obligation to perform.

C. The Complaint Fails to Allege Damages

For the reasons discussed above, the Complaint fails to allege facts showing that Mr. Ahr's estate suffered any damages. *See* Section V.A, *supra*.

VII. THE COMPLAINT FAILS TO STATE A 17200 CLAIM

California's unfair competition law prohibits any unlawful, unfair, or fraudulent business act or practice. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). A "violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007). A business practice is "unfair" if it violates a public policy that is "tethered" to specific constitutional, statutory, or regulatory provisions. *Scripps Clinic v. Superior Court,* 108 Cal. App. 4th 917, 940 (2003). A claim for fraudulent business practices generally requires (1) a showing that members of the public are likely to be deceived and (2) actual reliance on the misconduct if

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plaintiff is a private party. *Moran v. Prime Healthcare Management, Inc.*, 3 Cal. App. 5th 1131, 1149-50 (2016) (quoting *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 81 (2013); *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)).

In addition to an unlawful, unfair, or fraudulent business practice, plaintiff must show an injury in fact and resulting damages. *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 228 (2006). Not any injury will suffice. Plaintiff must have suffered a "distinct and palpable injury" that is "concrete and particularized" and "not conjectural or hypothetical." *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1590 (2008).

The Complaint fails to allege an unlawful business practice. The mere breach of a contract cannot serve as the basis for such a claim. The Complaint does not assert that the FAE entities violated any law, statute, or regulation. The Complaint does not allege the violation of a public policy that is "tethered" to specific constitutional, statutory, or regulatory provisions. And the Complaint does not allege facts showing any fraudulent business practice. The Complaint alleges, in conclusory fashion, that Mr. Ahr "reasonably relied upon Defendants' willful and deceitful conduct that he would receive financial return from the services and benefits he provided pursuant to the terms of the JVA, that the parties would contribute equally to the joint venture business, and that the parties would jointly share the profits of their joint venture." (Complaint, ¶ 96.) But this allegation is contrary to the express terms of the JVA, which does not promise a "financial return" for either party. In fact, Mr. Ahr and FAE Ltd. expressly conceded that the Joint Venture might not provide a positive return on investment by acknowledging, in § 6.1.6, "that the entertainment industry is highly speculative…" (JVA, § 6.1.6.) Nor does or could the Complaint allege that either of the FAE entities ever promised a net profit.

Plaintiff's UCL claim also fails to allege facts demonstrating that Mr. Ahr's death was caused by any unlawful, unfair, or fraudulent business practice. There is no causal link between the FAE entities' conduct and Mr. Ahr's overdose.

Finally, Plaintiff's alleged damages in the form of Mr. Ahr's share of "additional profits that he would have achieved had Defendants not breached the JVA" (Complaint, ¶ 99) are not recoverable under the UCL. Under the UCL, a plaintiff can recover only restitution, not damages.

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In re Tobacco II Cases, 46 Cal. 4th at 312 (prevailing plaintiffs are generally limited to injunctive relief and restitution).

VIII. THE WRONGFUL DEATH CLAIM FAILS AS A MATTER OF LAW

"The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the *pecuniary loss* suffered by the *heirs*." *Moxon v. Kern County*, 233 Cal. App. 2d 393, 398-99 (2006) (emphasis original).

Here, the Complaint fails to allege a claim for wrongful death because, as explained above, Plaintiff's predicate tort claims fail as a matter of law.

IX. CONCLUSION

For these reasons, this Court should sustain the demurrer without leave to amend.

Dated: December 23, 2019

Respectfully submitted,

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