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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JAMES FABIAN,
Plaintiff,

vs.

COLIN LEMAHIEU, ET AL.,
Defendants.

CASE NO. 19-cv-00054-YGR

**ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO DISMISS**

Re: Dkt. No. 60

United States District Court
Northern District of California

Plaintiff James Fabian brings this putative class action against defendants Nano f/k/a/RaiBlocks f/k/a Hieusys, LLC (“Nano”), Colin LeMahieu, Mica Busch, Zack Shapiro, and Troy Retzer (collectively, “Nano Defendants” or “Moving Defendants”) as well as B.G. Services SRL f/k/a BitGrail SRL f/k/a ecoin Solutions (“BitGrail”) and Francesco “The Bomber” Firano (collectively “BitGrail Defendants”)¹ for securities fraud and related claims in connection with defendants’ promotion of and statements regarding a cryptocurrency or digital asset referred to as NANO f/k/a RaiBlocks (“XRB” or “Nano Tokens”). (Dkt. No. 58 (“FAC”) at 1.)

Now before the Court is Nano Defendants’ motion to dismiss the FAC.² (Dkt. No. 60

¹ The Court notes that the BitGrail Defendants have not yet responded or otherwise appeared in the action.

² In addition to and in support of their motion to dismiss, Nano Defendants attach four exhibits. (*See* MTD, Exs. 1-4.) Two of the exhibits constitute translations (as certified by the Declaration of Monica Iacoviello, Dkt. No. 64-1) of the decisions of the Italian bankruptcy court overseeing the bankruptcies of BitGrail and its owner, Firano. (MTD, Exs. 1-2 (“Italian Court Documents”).) The other two exhibits represent a post by defendant LeMahieu on “Bitcointalk” and a statement by LeMahieu in a Google Hangout chat, respectively. (*Id.*, Exs. 3-4.) During the September 24 hearing, the Moving Defendants requested, for the first time, that the Court take judicial notice of the Italian Court Documents on the grounds that plaintiff’s FAC incorporated the documents by reference. In support thereof, Moving Defendants relied upon *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) to argue that the Court should take judicial notice of these documents and assume that the facts contained therein are true. The Court agrees that the plaintiff has relied substantially upon the contents of the Italian Court Documents (*see* FAC ¶¶ 6, 22, 160-62, 171), such that he cannot contest the authenticity of these documents. *Doe*

1 (“MTD”).) Having carefully considered the pleadings and the papers submitted, as well as
 2 arguments from counsel during the hearing on September 24, 2019, and for the reasons set forth
 3 more fully below, the Court **GRANTS IN PART** and **DENIES IN PART** the Nano Defendants’ motion.

4 **I. BACKGROUND**

5 **A. Factual Background**

6 Plaintiff alleges as follows:

7 Nano is, according to its own published promotional materials, a “low-latency payment
 8 platform” that “utilizes a novel block-lattice architecture” on which “each account has [its] own
 9 blockchain as part of a larger directed acyclic graph.” (FAC ¶ 32.) Said differently, “Nano
 10 purports to have created a faster, cheaper, and more easily scalable blockchain and cryptocurrency
 11 that improves upon earlier blockchains and cryptocurrencies such as the widely-popular bitcoin.”
 12 (*Id.*) LeMahieu founded Nano in 2014 and serves as the company’s Lead Developer. (*Id.* ¶ 33.)
 13 Busch served, at all relevant times, as a “Control System Developer” for Nano’s “Residential” and
 14 “Enterprise” markets. (*Id.* ¶ 34.) Shapiro ran, at all relevant times, “Mobile, Wallets, and
 15 Product” for Nano and served as the company’s head iOS Developer. (*Id.* ¶ 35) Retzer manages
 16 and directs Nano’s marketing and community and public relations efforts. (*Id.* ¶ 36.)

17 The Nano Defendants developed Nano Tokens, or XRB, which they each promoted,
 18 offered, traded, and sold to the public for their personal financial benefit. (*Id.* ¶ 2.) XRB has
 19 never been registered as a security with the Securities and Exchange Commission and is not
 20 exempt from registration. (*Id.*) The Nano Defendants worked with the BitGrail Defendants to
 21 create BitGrail’s “RaiBlocks dedicated exchange” (the “BitGrail Exchange”) in approximately
 22 December 2016. (*Id.* ¶ 3.) BitGrail was a cryptocurrency exchange operating in Italy that was
 23 primarily focused on creating and sustaining a market for Nano Tokens. (*Id.* ¶ 37.)

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 27 *One v. CVS Pharm.*, 348 F.Supp.3d 967, 993 (N.D. Cal. 2018); *see also* Dkt. No. 64-1. However,
 28 the Court does not agree that *Davis* provides authority for Nano Defendants’ assertion that the
 Court should adopt the factual findings of Italian Court Documents as “true.” Accordingly, the
 Court **GRANTS** Nano Defendants’ request for judicial notice of the Italian Court Documents, but
 affords them only their proper evidentiary weight. *See Davis*, 691 F.3d at 1160. To the extent that
 Nano Defendants intended their attachment of Exhibits 3 and 4 to their motion to dismiss to
 represent a request for judicial notice of those documents, the Court **DENIES** that request.

1 Nano Defendants directed the investing public to purchase XRB through, and store XRB
2 holdings at, the BitGrail Exchange by (i) commissioning, and contributing to the creation of the
3 BitGrail Exchange; (ii) providing specific investment instructions and assurances that the BitGrail
4 Exchange was secure and could be trusted to safeguard investment assets; and (iii) collaborating
5 with the BitGrail Defendants in maintaining the BitGrail Exchange’s XRB-related operations.
6 (*Id.* ¶ 5.) On or about February 8, 2018, over 15 million XRB, bearing a market value of
7 approximately \$170 million and supposedly safely stored on BitGrail, were “lost,” giving rise to
8 the instant action. (*Id.* ¶ 10.)

9 Beginning in early 2016, the Nano Defendants opened a “faucet” for distributing XRB (the
10 “Nano Faucet”), of which they had exclusive control and authority, including how much XRB it
11 distributed. (*Id.* ¶¶ 86, 87.) The Nano Faucet allowed the Nano Defendants to distribute Nano
12 Coins at no cost to those acquiring the coins. (*See id.* ¶¶ 82, 83.) The Nano Faucet operated for
13 approximately one and a half years, before closing on or about October 15, 2017. (*Id.* ¶ 86.) By
14 October 2017, individuals had claimed more than 120 million Nano Coins, or approximately 40
15 percent of the then-existing total supply of XRB. (*Id.* ¶ 90.)

16 The Nano Defendants repeatedly represented to the public that they sought to list XRB on
17 as many exchanges as possible to promote the purchase and adoption of XRB. (*Id.* ¶ 93.) For
18 example, on March 4, 2016, LeMahieu wrote on the Cryptocurrency subreddit – which had over
19 900,000 members – that XRB would be “getting listed” on two popular cryptocurrency exchanges
20 in America and Russia (Bittrex and YoBit). (*Id.* ¶ 94.) In other words, LeMahieu implied that
21 XRB had an international following and demand, and that XRB would soon appreciate in value
22 and grow in adoption by virtue of its listing on online exchanges. (*Id.* ¶ 95; *see also id.* ¶ 98.)

23 After larger exchanges were unwilling to list XRB, the Nano Defendants decided to create
24 a new exchange that would be built from the ground up and dedicated to XRB. (*Id.* ¶ 99.) “[I]n
25 approximately December 2016, the Nano Defendants approached” Firano to create the BitGrail
26 Exchange. (*Id.*) LeMahieu, in particular, worked with Firano to create and launch the BitGrail
27 Exchange. (*Id.* ¶ 106.) The BitGrail Exchange launched in April 2017 and was “far-and-away
28 XRB’s largest marketplace” as a result of Nano Defendant’s strategic positioning and widespread

1 marketing efforts. (*Id.* ¶ 107.)

2 Throughout the Class Period, April 1, 2017 through March 31, 2018, each of the Nano
3 Defendants remained substantially involved in the maintenance of the BitGrail Exchange’s XRB-
4 related operations and retained significant control over Firano’s decision-making concerning the
5 BitGrail Exchange. (*Id.* ¶ 108.) On January 2, 2018, the Nano Defendants posted that Busch and
6 Firano were “[t]wo passionate & hard-working gents” that were “solving the operational
7 challenges at @BitGrail in a high-pressure environment as a game-changing tech matures.” (*Id.*
8 ¶ 109.)

9 The Nano Defendants promoted Nano Coins as having relative advantages over other
10 cryptocurrencies, including that transactions in XRB are “purportedly instant, carry no fees, and
11 have no limit to their scalability.” (*Id.* ¶ 110.) The Nano Defendants focused on promoting and
12 encouraging individuals to purchase, sell, and trade Nano Coins on online exchanges, and in
13 particular, on the BitGrail Exchange. This trading of Nano Coin on the BitGrail Exchange drove
14 up the price of XRB. (*Id.* ¶ 111.) On April 20, 2017, the official Nano Twitter account announced
15 that XRB was available for purchase on “their recently created BitGrail Exchange.” (*Id.* ¶ 112.)
16 The Nano Defendants also released an infographic on how to purchase XRB on the BitGrail
17 Exchange. (*Id.* ¶ 113.) The Nano Defendants recommended BitGrail on XRB/Nano’s Twitter
18 feed, on Reddit, on Slack, on Telegram, on Medium, and on Nano’s official website multiple
19 times.³ (*Id.* ¶ 114.)

20 Prior to the February 2018 loss of 15 million XRB, the Nano Defendants expressly
21 encouraged members of the public, including plaintiff and the class,⁴ to purchase, trade, and hold
22 Nano Coin on the BitGrail Exchange. (*Id.* ¶ 115.) Specifically, the Nano Defendants offered
23 investment advice to XRB holders. (*Id.* ¶ 116.) On January 9, 2018, Shapiro advised one XRB
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25 ³ The screenshots of Twitter incorporated in this paragraph of the FAC show dates of
December 16, 2017 and April 20, 2017. (*See* FAC ¶ 114.)

26 ⁴ Plaintiff’s FAC defines the putative class as: “All BitGrail investors and accountholders
27 who are citizens of the United States and who, between April 1, 2017 and March 31, 2018, and
28 who transferred bitcoins, alternative cryptocurrencies, or any other form of monies or currency to
BitGrail to purchase, invest in, or stake XRB.” (FAC ¶ 41.)

1 holder on Twitter: “I recommend selling your xrb there and withdrawing btc even if it’s at a loss.
2 Thanks[.]” (*Id.*) On November 10, 2017, Shapiro touted: “the faster \$xrb can get in blockfolio,
3 the faster people can see their gains and losses and come to BitGrail to invest more in a coin
4 getting more and more attention.” (*Id.* ¶ 117.) On January 29, 2018, Shapiro promoted coverage
5 of XRB on CNBC’s Fast Money television show. (*Id.* ¶ 118.) Shapiro also created an application
6 specifically designed to monitor the price of Nano Coins.⁵ (*Id.* ¶ 119.)

7 The Nano Defendants also promoted Nano Coins by instructing members of the public,
8 including plaintiff and the class, to tell their friends, family, and acquaintances to purchase and
9 acquire XRB. (*Id.* ¶ 120.) On December 20, 2017, LeMahieu wrote: “I think the best thing an
10 average fan could do is word of mouth and telling people about [XRB]. More people being aware
11 of it means there’s the possibility someone who’s never heard of it before would be interested in
12 contributing as a vendor, developer, exchange, etc. Good advertising or marketing will never be
13 able to reach everyone as well as someone reaching out within their own network.” (*Id.* ¶ 121.)

14 The Nano Defendants promoted XRB on various social-network platforms, including
15 Reddit and Twitter. (*Id.* ¶ 123.) In September 2017, LeMahieu stated on Reddit’s Cryptocurrency
16 subreddit that XRB had “been organically growing and expanding since our launch two years ago
17 and we want to open up discussion of the technology to a broader audience.” (*Id.* ¶ 124.) The
18 Nano Defendants also produced, participated in, and published videos online for members of the
19 public, including plaintiff and the class, that were used to promote the purchase, acquisition, and
20 appreciation of XRB’s value. (*Id.* ¶ 125.)

21 By October 2017, XRB had significant trading volume on the BitGrail Exchange, and the
22 Nano Defendants determined it was time to close the Nano Faucet and profit in the process. (*Id.*
23 ¶ 130.) On October 15, 2017, the Nano Faucet was closed. Contemporaneously, the Nano
24 Defendants: (i) withheld seven million Nano Coins for themselves for their work in conceiving,
25 developing, promoting, and selling Nano Coin to the public; and (ii) “burned” (meaning,
26 purportedly sent to three inaccessible digital wallets) the undistributed 60 percent of XRB that was
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28 ⁵ The FAC does not include a date for this statement. (*See* FAC ¶ 119.)

1 not claimed during the Nano Faucet, therefore condensing the entire value of XRB supply into the
2 remaining 40 percent. (*Id.* ¶ 131.) Accordingly, the price of Nano Coins nearly doubled from
3 \$0.09 per Nano Coin to nearly \$0.17 per Nano Coin. (*Id.* ¶ 132.)

4 The Nano Defendants “made various statements and representations that the Nano
5 Defendants owed various duties of care and loyalty” to plaintiff and the class. (*Id.* ¶ 137.) On
6 March 7, 2016, LeMahieu wrote “We’re investigating creating an irrevocable legal trust to
7 document our commitment to the distribution.” (*Id.* ¶ 138.) On September 18, 2017, LeMahieu
8 “expressly recognized that the Nano Defendants’ behavior, actions, and conduct was informed by
9 their recognition of a correlation between listing XRB on larger exchanges and ensuing damages:
10 ‘For a long time we weren’t actively seeking because we wanted to hammer out node performance
11 and usability issues. Larger exchanges mean more visibility and damage if there had been
12 problems.’” (*Id.* ¶ 139.) In December 2017, LeMahieu responded to a question from a Reddit-
13 user as to whether any security audit to the source code was planned: “We don’t have one
14 contracted though both internally and externally this is an important thing people want
15 completed.” (*Id.* ¶¶ 140, 141.)

16 In or about mid-January 2017, BitGrail Exchange proved itself unable to verify in a timely
17 fashion its new users. (*Id.* ¶ 151.) This left new users unable to engage in anything more than a
18 very meager volume of transactions – a frustrating circumstance that rendered the users’ accounts
19 effectively useless with regard to the purpose for which the users had opened the accounts. (*Id.*)
20 The Nano Defendants and BitGrail had a “public spat” over BitGrail’s verification problem, and
21 some asserted that the problem stemmed from the Nano Defendants’ failure to cooperate with
22 BitGrail’s business model. (*Id.* ¶ 152.)

23 In late 2017, many BitGrail Exchange users reportedly experienced problems with the
24 Nano Protocol and reliability and security of the BitGrail Exchange trading platform. (*Id.* ¶ 146.)
25 For some users, account balances would inexplicably (and inaccurately) slip into negative figures.
26 (*Id.* ¶ 147.) For some users, single account withdrawals were processed twice. (*Id.* ¶ 148.)
27 BitGrail Exchange accountholders took to social media to decry the lack of reliability and
28 trustworthiness of BitGrail Exchange’s operations or the reliability of the Nano Protocol itself.

1 (*Id.* ¶ 149.) Despite the account glitches and functionality concerns that affected so many BitGrail
2 Exchange users, the Nano Defendants did not distance themselves from the BitGrail Defendants.

3 (*Id.* ¶ 150.) Rather, according to Firano, the Nano Defendants “forced” him to keep XRB
4 available on the BitGrail Exchange despite Firano’s warnings. (*Id.*)

5 In early February 2018, BitGrail announced that it had “lost” \$170 million worth of Nano
6 Coins from its exchange due to “unauthorized transactions.” (*Id.* ¶ 154.) The “missing” XRB
7 amounted to approximately eighty percent of the XRB that BitGrail Exchange customers held in
8 their accounts and to nearly fifteen percent of all XRB in existence. (*Id.*) In the aftermath of the
9 purported XRB theft, the Nano Defendants and the BitGrail Defendants engaged in another very
10 public dispute over the cause of the problem and how it should be resolved. (*Id.*)

11 ¶ 155.) The Nano Defendants accused Firano of trying to cover-up the event and of asking Nano
12 to engage in purportedly unethical behavior to solve the problem. (*Id.* ¶ 156.) BitGrail denied all
13 allegations of wrongdoing and alleged that the Nano Defendants were unwilling to cooperate in
14 formulating a solution. (*Id.* ¶ 157.) In the wake of these events, BitGrail made withdrawals from
15 the BitGrail Exchange impossible by suspending all account activity. (*Id.* ¶ 158.) The Nano
16 Defendants “ushered” XRB holders, including plaintiff and the class, to the BitGrail Exchange.
17 (*Id.* ¶ 159.) Those users relied on the Nano Defendants’ representations in investing their assets
18 on the BitGrail Exchange and “have now been burned” by the Nano Defendants and the BitGrail
19 Defendants. (*Id.*)

20 Less than 24 hours after investors learned that the entirety of their XRB holdings were
21 “lost,” the Nano Defendants released their “Official Statement Regarding BitGrail Insolvency” to
22 their XRB investors, denying any responsibility and “pointing the finger” at BitGrail:

23 BitGrail is an independent business and Nano is not responsible for the way
24 Firano or BitGrail conduct their business. We have no visibility into the BitGrail
organization, nor do we have control over how they operate.

25 (*Id.* ¶ 11.) Since that announcement, Nano Defendants have distanced themselves from BitGrail
26 and attempted to erase the fact that both the Nano Defendants and BitGrail were substantially
27 involved with BitGrail’s operations related to XRB. (*Id.* ¶ 12.) On April 9, 2018, “a mere three
28 [3] days” after Nano Defendants were named in a lawsuit filed in the Eastern District of New York

1 “the Nano Defendants announced that [Nano] was ‘sponsoring’ a ‘legal fund’ purportedly
2 designed to ‘provide all victims of the hack of the cryptocurrency exchange BitGrail with equal
3 access to representation’ and enable such investors to seek recourse against the exchange.” (*Id.*)

4 Since plaintiff filed the initial complaint in this action, “numerous additional facts have
5 been revealed by Tribunal of Florence in Italy through its issuance of the BitGrail Decision and
6 the Firano Decision.” (*Id.* ¶ 160.) These “additional facts” include the following:

- 7 • It was “undisputedly ascertained and shared between the parties that the shortfall
8 took place during the exchange’s normal operation”;
- 9 • The court-appointed expert ascertained that the shortfall was caused by multiple
10 withdrawals (“Double Transactions”) that occurred in circumstances which are not
11 clearly proven;
- 12 • Firano discovered the shortfall caused by Double Transactions in mid-July 2017
13 and described the problem in a Telegram group chat with Nano’s development
14 team; and
- 15 • The exchanges for cryptocurrency have always been invited to manage the
16 transactions autonomously, precisely because blindly trusting the node implies a
17 high risk, not only for possible double withdrawals; that is a risk that “in this
18 Court’s view should have been managed by the platform operator, which could and
19 should have limited such risk while providing its services.”

20 (*Id.* ¶ 160.)

21 Despite being aware of the Double Transactions as of July 2017, the Nano Defendants
22 issued “countless statements falsely or negatively assuring” plaintiffs and the class that their funds
23 were safe on the BitGrail Exchange. (*Id.* ¶ 164.) For example, on January 2, 2018, the Nano
24 Twitter account tweeted “We are working closely with @BitGrail on a node issue discovered due
25 to the scale that BitGrail is processing transactions. All funds are safe and we are working closely
26 with them to resume deposits and withdrawals as soon as possible. Thanks for your patience
27 \$xrb[.]” (*Id.* ¶ 165.) On January 12, 2018, Shapiro tweeted twice from his personal account:
28 “Funds are safe on BitGrail. It’s an issue with the node which we are working hard to fix. Again.

1 funds are safe”; “I thought we were all cool a second ago. Funds are safe, we’re testing upgrades.
2 Everyone be excellent to each other. Cool?” (*Id.* ¶ 166 (quoted verbatim).)

3 “The Nano Defendants publicly promoted BitGrail as a safe and reliable place for XRB
4 holders to stake and exchange their XRB, and XRB holders relied on that endorsement by the
5 Nano Defendants in choosing the exchange that would house their valuable assets.” (*Id.* ¶ 167.)
6 For example, on January 12, 2018, when one XRB holder questioned the Nano Defendants about
7 the “sagacity” of relying upon the otherwise unknown BitGrail Exchange and its founder and
8 principal operator Firano, Shapiro “publicly represented on Twitter that he speaks with Mr. Firano
9 every day and that both Mr. Firano and BitGrail can be trusted.” (*Id.* ¶ 168.) Specifically, Shapiro
10 replied “Yes you can. I talk to [Firano] every day and he’s a good guy. We’ll get it all sorted next
11 week. Just hang in there.” (*Id.*) On February 4, 2018, four days before the loss of \$170 million
12 worth of Nano Coins, Shapiro tweeted, “Hey Katherine, we’re not ignoring it but there’s only so
13 much we [c]an do. We’re hoping BitGrail starts rapid verifications as soon as possible and the
14 presence of other exchanges gives people other options for trading. The BG issues are 100% on
15 our radar[.]” (*Id.* ¶ 169.) Plaintiff’s and the class’ detrimental reliance on Nano Defendants’
16 misstatements, misrepresentations, and omissions of material fact, includes but is not limited to,
17 causing plaintiff to purchase, acquire, own, hold, and refrain from selling their respective XRB
18 before suffering their losses on February 8, 2018. (*Id.* ¶ 170.)

19 Plaintiff first learned of Nano Coins/XRB in April or May 2017 through social media posts
20 touting the asset, including but not limited to those published on Twitter. (*Id.* ¶ 183.) To learn
21 more, plaintiff followed the Twitter feeds of LeMahieu, Shapiro, and others related to XRB. (*Id.*
22 ¶ 184.) After months of following the representations published by those people, and relying on
23 their truthfulness, plaintiff began investing in Nano Coins. (*Id.* ¶ 185.) On or about August 16,
24 2017, plaintiff purchased with a credit card on Coinbase’s website 1.62457112 bitcoin for
25 \$7,104.20, with each bitcoin worth \$4,308.83. (*Id.* ¶ 186.) On August 22, 2017, plaintiff
26 transferred his entire bitcoin holding to a cryptocurrency exchange Bittrex. (*Id.* ¶ 187.)

27 In further reliance on the social media representations he had read from LeMahieu,
28 Shapiro, and others related to XRB, including those regarding the safety and security of both the

1 Nano Protocol and the BitGrail Exchange, plaintiff selected the BitGrail Exchange to purchase and
2 stake his Nano Coins. (*Id.* ¶ 188.) On August 31, 2017, plaintiff opened an account on BitGrail
3 and then transferred .66971933 bitcoin, worth \$3,220 at the time, from his Bittrex wallet to
4 BitGrail. (*Id.* ¶ 189.) To open and manage his BitGrail account, plaintiff logged onto BitGrail’s
5 website from his home and followed the instructions provided. (*Id.* ¶ 190.) On September 1,
6 2017, the .66971933 bitcoin became available on BitGrail and plaintiff used that entire sum to
7 purchase approximately 21,143 XRB. (*Id.* ¶ 191.) On December 12, 2017, plaintiff transferred
8 \$2,850 to BitGrail to purchase another 2,000 XRB. (*Id.* ¶ 192.) As of December 12, 2017,
9 plaintiff purchased and held 23,143 XRB with a total purchase price of \$6,070.00. (*Id.* ¶ 193.)

10 In deciding to invest in Nano Coins, open an account on the BitGrail Exchange, and stake
11 his investment holdings in XRB there, plaintiff reviewed and relied upon the Nano Defendants’
12 promotions on social media channels and statements made on the Nano Defendants’ own website
13 representing that the BitGrail Exchange is a safe and reliable exchange on which to purchase and
14 stake XRB. (*Id.* ¶ 194.) Shortly before plaintiff lost control and possession of his 23,143 XRB on
15 BitGrail, he transferred 110 XRB to a separate XRB wallet off of the BitGrail Exchange. Thus, as
16 of February 8, 2018, plaintiff owned and held a total of 23,033 XRB in his BitGrail wallet, worth
17 approximately \$275,000. (*Id.* ¶¶ 195, 196.)

18 **B. Procedural Background**

19 This is the second lawsuit against the Nano Defendants in connection with the XRB asset.
20 The first action was filed on April 6, 2018 by one of the plaintiff’s firms here, Silver Miller of
21 Florida, in the Eastern District of New York. *See Brola v. Nano, et al*, Case No. 1:18-cv-02049-
22 NG-RML (E.D.N.Y.) (the “*Brola Action*”). The complaint in the *Brola Action* articulated
23 allegations filed on behalf of a class that included plaintiff in this action. *See id.* Dkt. No. 1. The
24 *Brola Action* was dismissed pursuant to voluntary dismissal on September 28, 2018. *Id.* Dkt.
25 No. 31. No substantive motion work occurred.

26 Plaintiff filed the initial complaint in this action on January 3, 2019. (Dkt. No. 1.) Nano
27 Defendants filed a motion to dismiss that complaint on March 29, 2019. (Dkt No. 33.) Following
28 a hearing on June 25, 2019 (*see* Dkt. Nos. 53, 57), the Court granted the motion with leave to

1 amend. (Dkt. No. 56.) During the June 25 hearing, the Court went through each of plaintiff's
2 claims and explained why plaintiff's complaint failed to state a claim in each instance. (See Dkt.
3 No. 57 ("Prior Hearing").)

4 II. LEGAL STANDARD

5 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for
6 failure to state a claim upon which relief may be granted. Dismissal for failure to state a claim
7 under Rule 12(b)(6) is proper if there is a "lack of a cognizable legal theory or the absence of
8 sufficient facts alleged under a cognizable legal theory." *Conservation Force v. Salazar*, 646 F.3d
9 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
10 Cir. 1988)).

11 The complaint must plead "enough facts to state a claim [for] relief that is plausible on its
12 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face
13 "when the plaintiff pleads factual content that allows the court to draw the reasonable inference
14 that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009). If the facts alleged do not support a reasonable inference of liability, stronger than a mere
16 possibility, the claim must be dismissed. *Id.* at 678-79; *see also In re Gilead Scis. Sec. Litig.*, 536
17 F.3d 1049, 1055 (9th Cir. 2008) (stating that a court is not required to accept as true "allegations
18 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences").

19 A complaint that falls short of the Rule 8(a) standard may be dismissed if it fails to state a
20 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6)
21 is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to
22 support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,
23 1104 (9th Cir. 2008). For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s]
24 factual allegations in the complaint as true and construe[s] the pleadings in the light most
25 favorable to a nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
26 1031 (9th Cir. 2008). Mere "conclusory allegations of law and unwarranted inferences are
27 insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.
28 2004).

1 If a court dismisses a complaint, it should give leave to amend unless “the pleading could
2 not possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal.*
3 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *see also* Fed. R. Civ. P. 15(a). In making
4 this determination, a court must bear in mind “the underlying purpose of Rule 15 to facilitate
5 decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d
6 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted).

7 **III. ANALYSIS**

8 Of the eleven causes of action articulated in in the FAC, plaintiff asserts ten against the
9 Moving Defendants. (*See* FAC ¶¶ 197-256.) The Court addresses each.

10 **A. Federal Securities Claims (Counts I and II)**

11 Plaintiff brings claims for violations of Sections 12(a)(1) and 15(a) of the 1933 Act. (*See*
12 FAC ¶¶ 197-206.) Section 12(a)(1) provides a private right of action to enforce the registration
13 requirements of Section 5 of the 1933 Act by providing that a seller of an unregistered security
14 will be liable to the buyer for rescission. *See* 15 U.S.C. § 77l(a)(1). Section 15(a) provides
15 liability for persons who control any person or entity liable under other sections of the 1933 Act,
16 including Section 12. *See* 15 U.S.C. § 77o(a). Accordingly, and as parties conceded during the
17 September 24 hearing, plaintiff’s Section 15 claim rises and falls with his Section 12 claim. Thus,
18 the Court addresses only the sufficiency of the later.

19 Pursuant to the relevant statute of limitations, a Section 12(a)(1) claim cannot be
20 maintained “unless brought within one year after the violation upon which it is based.” 15 U.S.C.
21 § 77m. As plaintiff concedes, this one-year period began to run on the date of plaintiff’s last
22 purchase of Nano Coins, or December 12, 2017. *See id.*; *see also* FAC ¶ 193; Dkt. No. 63
23 (“Opp.”) at 7. Therefore, plaintiff’s initial complaint, filed on January 3, 2019, exceeds the one-
24 year statute of limitations.

25 The parties agree that, as a general rule, the statute of limitations for Section 12(a)(1) is not
26 subject to equitable tolling. (MTD at 7; Opp. at 7.) However, plaintiff argues that courts have
27 found that some circumstances exist where equitable tolling is warranted. (Opp. at 7 (citing
28 *Argent Classic Convertible Arbitrage Fund, L.P. v. Amazon.com, Inc.*, No. C01-0640L, 2003 WL

1 26116562, at *4 (W.D. Wash. Jan. 6, 2003) (noting that an exception to the general rule “might
2 [exist] where defendant takes extraordinary steps to convince the offeree that a registration
3 statement has, in fact, been filed or otherwise prevents the offeree from filing suit in a timely
4 manner”).) The Ninth Circuit has not addressed this issue, but the First, Second, Third, Fifth,
5 Sixth, and Eight Circuits have. The weight of the authority supports finding that equitable tolling
6 does not apply to Section 12(a)(1) claims, *regardless of the circumstances*.⁶

7 The Court finds the reasoning of these cases persuasive. *See Nolfi*, 675 F.3d at 553
8 (finding that “the fact that the statute plainly fails to include a discovery rule for § 12(a)(1)—when
9 juxtaposed with a provision within the *same sentence* specifically allowing it for § 12(a)(2)—
10 shows that Congress intended to negate equitable tolling in this context”) (emphasis supplied); *see*
11 *also In re Rexplore, Inc. Sec. Litig.*, 671 F.Supp. 679, 687 (N.D. Cal. 1987) (with respect to the
12 same statutory language, finding that “[a] reasonable construction of this language is that
13 Congress intended the one year limitation period of Section 12(1) to be absolute” and noting that
14 “since the registration, or lack thereof, of securities is a public record and easily discovered, it is
15 inappropriate to apply the equitable tolling doctrine to a claim brought for failure to register
16 securities”). Moreover, and as the Court noted during the September 24 hearing, plaintiff has
17 failed to provide any authority to suggest that the Ninth Circuit would depart from this reasoning.
18 Thus, the Court determines that the statute of limitations for a Section 12(a)(1) claim is not subject

19 _____
20 ⁶ Compare *Cook v. Avien, Inc.*, 573 F.2d 685, 691 (1st Cir.1978) (“We hold that, under the
21 explicit language of [the statute], the limitations period runs from the date of the violation
22 irrespective of whether the plaintiff knew of the violation.”); *Pell v. Weinstein*, 759 F.Supp. 1107,
23 1111 (M.D.Pa.1991), *aff’d without opinion*, 961 F.2d 1568 (3d Cir.1992); *Mason v. Marshall*, 412
24 F.Supp. 294, 299 (N.D.Tex.1974), *aff’d*, 531 F.2d 1274 (5th Cir.1976) (same); *Nolfi v. Ohio*
25 *Kentucky Oil Corp.*, 675 F.3d 538, 553 (6th Cir. 2012) (“Because the statute permits claims under
26 § 12(a)(2) to proceed if brought within one year of discovery of the violation but does not have a
27 similar discovery rule for § 12(a)(1) claims, Congress’s intent on this matter is clear and that the
28 express language of the statute should be applied.”); *Gridley v. Cunningham*, 550 F.2d 551, 552–
53 (8th Cir.1977) (stating that a § 12(a)(1) claim must be brought within one year of the violation,
finding that the statute of limitations period had passed, and not permitting the claim to proceed
under Fed.R.Civ.P. 15(c) as an amendment relating back to an original contract claim); *with Katz*
v. Amos Treat & Co., 411 F.2d 1046, 1055 (2d Cir.1969) (allowing equitable tolling where a party
said it was in the process of registering securities when, in fact, it was not); *Sanderson v.*
Roethenmund, 682 F.Supp. 205, 208 (S.D.N.Y.1988) (same).

1 to equitable tolling and finds that plaintiff's Section 12(a)(1) claim, both on his own behalf and on
2 behalf of the proposed class, are untimely.

3 Moreover, with respect to plaintiff's class claims, even if the Court found that equitable
4 tolling of the Section 12(a)(1) statute of limitations was appropriate under the circumstances
5 articulated in *Argent*, the circumstances at issue here do not rise to that level. *Argent Classic*
6 *Convertible*, 2003 WL 26116562, at *4. In sum, plaintiff argues that because the *Brola* Action
7 asserted his claims, and a reasonable class member would believe that those claims were being
8 litigated on a class-wide basis, rendering the filing of additional claims unnecessary, the Court
9 should apply equitable tolling under the *American Pipe* Rule. *See American Pipe & Construction*
10 *Company v. Utah*, 414 U.S. 538 (1974) (holding that the timely filing of a class action tolls the
11 statute of limitations for a subsequent individual action by a plaintiff-intervenor in the action); *see*
12 *also Crown, Cork & Seal Co. Inc. v. Parker*, 462 U.S. 345 (1983) (extending the *American Pipe*
13 rule to individual actions by absent class members). However, the Supreme Court has recently
14 held that the *American Pipe* Rule does not apply to successive class actions, such as the *Brola*
15 Action and the instant action. *See China Agritech, Inc. v. Resh, et al*, 138 S.Ct. 1800 (2018)
16 (holding that upon denial of class certification, a putative class member, in lieu of promptly
17 joining an existing suit or promptly filing an individual action, may not commence a class action
18 anew beyond the time allowed by the applicable statute of limitations). Therein, the Court
19 observed that allowing for successive class actions based upon the *American Pipe* Rule would
20 "allow the statute of limitations to be extended time and again; as each class is denied
21 certification, a new named plaintiff could file a class complaint that resuscitates the litigation." *Id.*
22 at 1808. Although the *Brola* Action did not reach the class certification stage, the instant action
23 represents an attempt by plaintiff's counsel to resuscitate the litigation. Having failed to bring a
24 successful claim in the Eastern District of New York and settling that action on an individual
25 basis, Silver Miller has found a new plaintiff and attempts to bring a successive class action claim
26 here.⁷

27
28 ⁷ Moreover, the Court finds unpersuasive plaintiff's argument that the statute of
limitations on his individual Section 12(a)(1) claim should be tolled pursuant to the *American Pipe*

1 Therefore, the Court finds that the one-year statute of limitations on plaintiff's Section
 2 12(a)(1) claim is not subject to equitable tolling and thus expired prior to plaintiff's filing of an
 3 initial complaint.⁸ The Court has previously provided plaintiff an opportunity to amend his
 4 complaint to address this deficiency. (*See* Prior Hearing.) Accordingly, the Court **GRANTS** this
 5 portion of Nano Defendants' motion to dismiss the FAC and **DISMISSES WITH PREJUDICE**
 6 plaintiff's Section 12(a)(1) and Section 15(a) claims. *See Foman v. Davis*, 371 U.S. 178, 182
 7 (1962) (identifying factors that may justify denying leave to amend, including failure to cure
 8 deficiencies by amendments previously allowed and futility).

9 **B. State Law Claims**

10 In addition to the federal securities law claims addressed above, plaintiff asserts eight state-
 11 law causes of action against the Moving Defendants.⁹

12 1. Breach of Implied Contract Claim (Count IV)

13 To state a claim for breach of contract, express or implied, under California law, a plaintiff
 14 must allege: "(1) the contract, (2) the plaintiff's performance of the contract or excuse for
 15 nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." *CDF*

16
 17 _____
 18 Rule. Plaintiff argues that he "timely filed this class action upon the settlement and dismissal of
 19 the previously class action to which [sic] [he] was a member." (Opp. at 10.) As plaintiff
 20 elsewhere concedes, "to benefit from equitable tolling, plaintiffs must demonstrate that they have
 21 been diligent in pursuit of their claims." (*Id.* at 9 (citing *China Agritech*, 138 S.Ct. at 1808).)
 22 Here, the parties in the relevant class action, the *Brola* Action, settled on September 28, 2018.
 23 Plaintiff in this action did not file his complaint until January of 2019, more than three months
 24 later. The Court finds that this delay does not reflect diligent pursuit of plaintiff's claims,
 25 especially in light of plaintiff's counsel, Silver Miller's, representation of the plaintiff in the *Brola*
 26 Action. *C.f. American Pipe*, 414 U.S. at 561 (finding tolling of the statute of limitations period
 27 where subsequent motion was filed "only eight days" after the entry of the order denying class
 28 certification).

23 ⁸ As the Court has resolved the timeliness of plaintiff's Section 12(a)(1) claim by
 24 application of the statute of limitations, the Court need not address Moving Defendants' argument
 25 regarding the statute of repose. (*See* MTD at 8-9 (citing 15 U.S.C. § 77m).)

26 ⁹ As defendants conceded during the September 24 hearing, the Court has subject matter
 27 jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(a),
 28 1332(d)(2)(A), based on the allegations in plaintiff's complaint of class claims in which the matter
 in controversy exceeds \$5,000,000 and in which some of the members of the class are citizens of a
 state different from defendants. (*See generally*, FAC; *see also id.* ¶¶ 27, 217, 223, 226, 231, 237,
 244, 250, 255.)

1 *Firefighters v. Maldonado*, 158 Cal.App.4th 1226, 1239 (2008); *see also Otworth v. Southern Pac.*
 2 *Transportation Co.*, 166 Cal.App.3d 452, 458 (1985). With respect to the first element, a contract,
 3 “the vital elements of a cause of action based on contract are mutual assent (usually accomplished
 4 through the medium of an offer and acceptance) and considerations. As to the basic elements,
 5 there is no difference between an express and implied contract.” *Division of Labor Law*
 6 *Enforcement v. Transpacific Transportation Co.*, 69 Cal.App.3d 268, 275 (1977).

7 Here, plaintiff alleges that “[t]he Nano Defendants had a valid, binding and enforceable
 8 contract with Plaintiff and the Class that was not reduced to writing, but was implied based on the
 9 Nano Defendants’ conduct.” (FAC ¶ 213.) “[A]n implied in fact contract may be inferred from
 10 the conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is
 11 an intent to promise[.]” *See Division of Labor*, 69 Cal.App.3d at 275.

12 Plaintiff asserts that the Nano Defendants made a number of implied promises to himself
 13 and the class related to the safety and security of the BitGrail Exchange. (*See* FAC ¶ 214.)
 14 Plaintiff identifies the following actions by Nano Defendants, as conduct giving rise to an implied
 15 contract – (i) “[c]laiming responsibility for creating” Nano Coins, “which stands in stark contrast
 16 to Bitcoin, whose creator(s) remain(s) anonymous[;]” (ii) “[d]eveloping the business and
 17 marketing scheme to distinguish XRB from the vast array of other cryptocurrencies and encourage
 18 the public to purchase it[;]” (iii) “[a]pproaching Defendant Firano for the purpose of creating a
 19 ‘Raiblocks dedicated exchange’[;]” (iv) “[c]ollaborating with Defendant Firano to create and
 20 launch BitGrail, an XRB dedicated exchange[;]” (v) “[r]epresenting to the public that Defendant
 21 Busch was working hard on ‘solving the operational challenges at @Bitgrail’[;]” and
 22 (vi) “[r]ecognizing [the] importance [of] and acknowledging responsibility for choosing the proper
 23 exchanges [to] list XRB, [including] conducting a security audit of XRB’s code[.]” (Opp. at 16
 24 (citing FAC ¶¶ 69, 71-72, 78, 96, 99, 105-07, 109, 139-41).)

25 The alleged actions merely represent the Nano Defendants’ conduct relative to the BitGrail
 26 Exchange. None of this alleged conduct gives rise to an inference of *mutual assent* of any
 27 particular offer and acceptance between plaintiff and the Nano Defendants. *Mulder v. Mendo*
 28 *Wood Products, Inc.*, 225 Cal.App.2d 619, 632 (1964) (“The true implied contract consists of

1 obligations arising from a mutual agreement and intent to promise where the agreement and
 2 promise have not been expressed in words.”). The Court has previously provided plaintiff an
 3 opportunity to amend his complaint to address this deficiency. (*See* Prior Hearing.) Accordingly,
 4 the Court **GRANTS** Nano Defendants’ motion to dismiss and **DISMISSES WITH PREJUDICE**
 5 plaintiff’s claim of breach of implied contract. *See Foman*, 371 U.S. at 182.

6 2. Breach of Fiduciary Duty (Count V)

7 In California, “[t]he elements of a cause of action for breach of fiduciary duty are: (1)
 8 existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused
 9 by the breach.” *Gutierrez v. Girardi*, 194 Cal.App.4th 925, 932 (Cal. Ct. App. 2011). “[B]efore a
 10 person can be charged with a fiduciary obligation, he must either undertake to act on behalf and
 11 for the benefit of another, or must enter into a relationship which imposes that undertaking as a
 12 matter of law.” *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197,
 13 221 (1983). “Such a relation ordinarily arises where a confidence is reposed by one person in the
 14 integrity of another[.]” *Herbert v. Lankershim*, 9 Cal.2d 409, 483 (1937); *see also Wolf v.*
 15 *Superior Court*, 107 Cal.App.4th 25, 29 (2003). “Traditional examples of fiduciary relationships
 16 in the commercial context include trustee/beneficiary, directors and majority shareholders of a
 17 corporation, business partners, joint adventures, and agent/principal.” *Wolf*, 107 Cal.App.4th at
 18 30.

19 Here, plaintiff asserts that Nano Defendants’ “custodianship” over plaintiff’s and the
 20 proposed class’ XRB investments, through their control over BitGrail and absolute control over
 21 essentially every aspect of XRB and its value, including its continued existence, created a special
 22 relationship giving rise to a fiduciary duty to plaintiff and the proposed class. (Opp. at 19 (citing
 23 FAC ¶ 80).) In this regard, the FAC baldly alleges that Nano Defendants’ “significant control
 24 creates a special relationship giving rise to a fiduciary duty[.]” (*See id.*) Such “conclusory
 25 allegations of law . . . are insufficient to defeat a motion to dismiss.” *Adams*, 355 F.3d at 1183.
 26 Plaintiff fails to provide any authority for his assertion that these allegations of custodianship
 27
 28

1 suffice to state a cause of action for breach of fiduciary duty under California law.¹⁰ The Court
 2 has previously provided plaintiff an opportunity to amend his complaint to address this deficiency.
 3 (See Prior Hearing.) Accordingly, the Court **GRANTS** Nano Defendants’ motion to dismiss and
 4 **DISMISSES WITH PREJUDICE** plaintiff’s claims for breach of fiduciary duty. See *Foman*, 371 U.S.
 5 at 182.

6 3. Aiding and Abetting Breach of Fiduciary Duty (Count VI)

7 “The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third
 8 party’s breach of fiduciary duties owed to plaintiff; (2) defendant’s actual knowledge of that
 9 breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third
 10 party’s breach; and (4) defendant’s conduct was a substantial factor in causing harm to plaintiff.”
 11 *Nasrawi v. Buck Consultants LLC*, 231 Cal.App.4th 328, 343 (2014). Plaintiff asserts a theory of
 12 the claim that the Nano Defendants aided and abetted breaches of fiduciary duty by the BitGrail
 13 Defendants. (See FAC ¶ 225.)

14 With respect to the breach of fiduciary duty owed to plaintiff by third-party BitGrail
 15 Defendants, plaintiff again makes the custodianship argument. The FAC alleges that “BitGrail
 16 was an XRB dedicated exchange, built from scratch to serve the buying, selling, and trading of
 17 XRB” and that plaintiff and the class “purchased and staked their XRB on BitGrail’s exchange as
 18 a result of [Nano] Defendants’ extensive promotion and encouragement.” (Opp. at 21 (citing FAC
 19 ¶¶ 3-4, 167-70).) Based thereon, plaintiff avers that “BitGrail had *custody* of Plaintiff’s and the
 20 Class’ XRB that was stored on BitGrail’s exchange” and “[t]here can be no dispute that BitGrail
 21 therefore had a fiduciary duty to Plaintiff and the Class.” (*Id.* (emphasis supplied).) However,
 22 plaintiff again fails to provide any authority for his assertion that his allegations of custodianship
 23 suffice to state a cause of action for breach of fiduciary duty under California law. See *Adams*,

24
 25 _____
 26 ¹⁰ The only case to which plaintiff cites, *In re Bank of New York Mellon Corp. False*
 27 *Claims Act Foreign Exchange Litigation*, is inapposite. (Opp. at 19 (citing 851 F.Supp.2d 1190
 28 (N.D. Cal. 2012)).) Therein, the court found a fiduciary duty where plaintiff funds had *contracted*
 with defendants for custodial services, namely the effectuation of foreign exchange transactions
 pursuant to a “standing-instruction” method, which included incidental transactions to obtain the
 correct currency. *In re Bank of New York Mellon*, 851 F.Supp.2d at 1193-94.

1 355 F.3d at 1183. As noted above, the Court has previously provided plaintiff an opportunity to
 2 amend his complaint to address the deficiency of his argument that custodianship supports finding
 3 a fiduciary duty under California law. (*See* Prior Hearing.) Accordingly, the Court **GRANTS** Nano
 4 Defendants’ motion to dismiss and **DISMISSES WITH PREJUDICE** plaintiff’s claim for aiding and
 5 abetting a breach of fiduciary duty. *See Foman*, 371 U.S. at 182.

6 4. Negligence (Count VII)

7 “In order to establish negligence under California law, a plaintiff must establish four
 8 required elements: (1) duty; (2) breach; (3) causation; and (4) damages.” *Illeto v. Glock Inc.*, 349
 9 F.3d 1191, 1203 (9th Cir. 2003) (citing *Martinez v. Pacific Bell*, 225 Cal.App.3d 1557, 1564
 10 (1990)). Nano Defendants argue that plaintiff’s FAC fails to allege duty, breach, and causation.
 11 (MTD at 22-23.) The Court addresses each.

12 “The threshold element of a cause of action for negligence is the existence of a duty to use
 13 due care toward an interest of another that enjoys legal protection against unintentional invasion.”
 14 *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 397 (1992). Plaintiffs may not simply aver that a
 15 defendant owed them a duty. *See, e.g., Bem v. Stryker Corp.*, No. C 15-2485 MMC, 2015 WL
 16 4573204, at *1 (N.D. Cal. July 29, 2015). In California, “each person has a duty to use ordinary
 17 care and is liable for injuries caused by his [or her] failure to exercise reasonable care in the
 18 circumstances.” *Cabral v. Ralphs Grocery Co.*, 51 Cal.4th 764, 771 (2011) (internal quotation
 19 marks omitted).

20 Here, plaintiff alleges that Nano Defendants had a “legal duty to exercise reasonable care
 21 with respect to the management of XRB[.]” (FAC ¶ 228.) In support of his assertion of a duty,
 22 plaintiff’s FAC includes allegations of Nano Defendants’ actions and statements directed toward
 23 plaintiff and prospective and current XRB customers in support of the BitGrail Exchange. (*See id.*
 24 ¶¶ 110-122.)

25 Next, to determine whether that duty extends to plaintiff, California courts consider:
 26 (i) “the foreseeability of the harm to the plaintiff”; (ii) “the degree of certainty that the plaintiff
 27 suffered injury”; (iii) the closeness of the connection between the defendant’s conduct and the
 28 injury suffered”; (iv) “the moral blame attached to the defendant’s conduct”; (v) “the policy of

1 preventing future harm”; and (vi) “the extent of the burden to the defendant and consequences to
2 the community of imposing a duty to exercise care with resulting liability for breach and the
3 availability, cost, and prevalence of insurance for the risk involved.” *See Rowland v. Christian*, 69
4 Cal.2d 108, 113 (1968).¹¹

5 Here, five of the six factors weigh in favor of finding a duty. It was foreseeable that a lack
6 of security on the primary exchange for Nano Coins would cause harm to individuals who, like
7 plaintiff, deposited their Nano Coins on that exchange and that any security failure on that
8 exchange would result in harm to plaintiff and other similarly situated individuals. Further, it is
9 plausible that Nano Defendants’ alleged conduct, if true, could be viewed as morally reprehensible
10 and this type of action could further the goal of preventing future harm. Imposing a duty to
11 exercise care in this instance will not result in an undue burden on the Nano Defendants or the
12 industry at large. Moreover, Nano Defendants’ conduct was proximately connected to plaintiff’s
13 injury, even if through the actions of the BitGrail Defendants. The *Rowland* factors weigh in
14 favor of finding a duty owed by Nano Defendants to plaintiff. *See Castillo*, 2016 WL 9280242 at
15 *3 (finding a duty owed by employer to spouses of employees to protect their personal
16 information). Accordingly, the Court finds that plaintiff has alleged that Nano Defendants had a
17 duty to exercise reasonable care with respect to their management of XRB. Plaintiff’s FAC also
18 includes sufficient allegations that Nano Defendants breached that duty. (*See* FAC ¶ 229.)

19 With respect to causation, Nano Defendants correctly note that plaintiff’s generic
20 allegation does not suffice, nor did plaintiff refute or otherwise contest the argument. (*See* Opp. at
21 21-23.) During the September 24 hearing, plaintiff relied on paragraphs 160 and 171 of the FAC,
22 which incorporate statements in the Italian Court Documents, as allegations of causation based on
23 “double withdrawals,” which permitted the alleged theft, as the result of an exploited fault in the
24 Nano Protocol developed by Nano Defendants. (*See* FAC ¶¶ 160, 171.) The Court agrees and

25
26 ¹¹ The Court notes that Nano Defendants are incorrect that the factors articulated in
27 *Rowland* “address the propriety of an exception to the premises liability where the plaintiff is a
28 trespasser or licensee[.]” *See* Dkt. No. 64 (“Reply”) at 11 n. 71; *see, e.g. Castillo*, 2016 WL
9280242 at *3 (applying the *Rowland* factors to determine whether a duty of care extended to
plaintiffs in negligence cause of action).

1 declines to adopt the *factual findings* of the Italian bankruptcy court as Moving Defendants
2 suggest. Accordingly, the Court **DENIES** Nano Defendants' motion to dismiss plaintiff's
3 negligence claim.

4 5. Fraud (Count VIII)

5 The elements of a California fraud claim are: (i) misrepresentation of a past or existing
6 material fact; (ii) knowledge of the statement's falsity; (iii) intent to defraud; (iv) justifiable
7 reliance; and (iv) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1966). These
8 elements must be plead with particularity. Fed. R. Civ. P. 9(b); *see Small v. Fritz Companies,*
9 *Inc.*, 30 Cal.4th 167, 184 (2003). Nano Defendants argue that plaintiff has failed to allege reliance
10 because of the thirty-six statements identified in the FAC, only two were made prior to plaintiff's
11 final purchase of Nano Coins. (MTD at 24.) However, this argument ignores plaintiff's allegation
12 that he relied on Nano Defendant's false statements and representations in "staking" or *holding* his
13 XRB on the BitGrail Exchange.¹² (*See* FAC ¶¶ 188, 235.) Accordingly, the Court **DENIES** Nano
14 Defendants' motion to dismiss plaintiff's fraud claim.¹³

15 6. Negligent Misrepresentation (Count IX)

16 "The elements of negligent misrepresentation are similar to intentional fraud except for the
17 requirement of scienter; in a claim for negligent misrepresentation, the plaintiff need not allege the
18 defendant made an intentionally false statement, but simply one as to which he or she lacked any
19 reasonable ground for believing the statement to be true." *Charnay v. Cobert*, 145 Cal.App.4th
20 179, 184 (2006) (citing *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 407-08 (1992)). As noted
21

22 ¹² Nano Defendants' contention that plaintiff's allegation that the other thirty-four
23 statements fraudulently induced him to "maintain" his holdings on BitGrail is "foreclosed by the
24 fact that documents integral to the Amended Complaint show that Firano froze the exchange on
25 January 12, 2018" fails. (MTD at 24-25.) This argument introduces a factual issue not
26 appropriate for a motion to dismiss.

27 ¹³ The Court notes that plaintiff, despite characterizing his fraud claim as one for
28 "fraudulent concealment" in his opposition (*see* Opp. at 23) clarified, during the September 24
hearing, that his fraud claim is one for affirmative fraud. As the Court explained during the
hearing, and plaintiff concedes in his opposition, a claim for fraudulent concealment under
California law requires that "the defendant was under a duty to disclose the fact to the plaintiff[.]"
(*See* Opp. at 23 (citing *Taragan v. Nissan N. Am., Inc.*, No. C 09-3660 SBA, 2013 WL 3157918,
at *5 (N.D. Cal. Jun. 20, 2013)).)

1 above, the elements of a fraud claim are: (i) misrepresentation of a past or existing material fact;
 2 (ii) knowledge of the statement’s falsity; (iii) intent to defraud; (iv) justifiable reliance; and (iv)
 3 resulting damage. *Lazar*, 12 Cal.4th at 638.

4 Like intentional fraud, negligent misrepresentation must be pled with specificity. *See*
 5 *Small.*, 30 Cal.4th at 184. Where a business entity is involved, a “plaintiff [must] allege the names
 6 of the persons who made the allegedly fraudulent representations, their authority to speak, to
 7 whom they spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State*
 8 *Farm Mut. Auto. Ins.*, 2 Cal.App.4th 153, 157 (1991).

9 Nano Defendants’ arguments with respect to plaintiff’s negligent misrepresentation claim
 10 replicate those discussed above regarding fraud and fail for the same reasons. (*See* MTD at 23-
 11 24.) Accordingly, the Court **DENIES** Nano Defendants’ motion to dismiss plaintiff’s negligent
 12 misrepresentation claim.

13 7. Constructive Fraud (Count X)

14 “To state a claim for constructive fraud under California law, a plaintiff must allege: (1) a
 15 fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of
 16 that duty; (3) reliance; and (4) resulting damage.” *Sacramento E.D.M., Inc. v. Hynes Aviation*
 17 *Indus.*, 965 F.Supp.2d 1141, 1152 (E.D. Cal. 2013); Cal. Civ. Code § 1573. As explained above,
 18 plaintiff has failed to allege a fiduciary or confidential relationship. *See supra*, III.B.2. The Court
 19 has previously provided plaintiff an opportunity to amend his complaint to address this deficiency.
 20 (*See* Prior Hearing.) Therefore, his constructive fraud claim fails, and the Court **GRANTS** Nano
 21 Defendants’ motion and **DISMISSES WITH PREJUDICE** the constructive fraud claim. *See Foman*,
 22 371 U.S. at 182.

23 8. Quasi-Contract Claim or Unjust Enrichment (Count XI)

24 Although California does not recognize “a standalone cause of action for ‘unjust
 25 enrichment,” such a claim “describe[s] the theory underlying a claim that a defendant has been
 26 unjustly conferred a benefit through mistake, fraud, coercion, or request [and] [t]he return of that
 27 benefit is the remedy typically sought in a quasi-contract cause of action.” *Asitana v. Hain*
 28 *Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (internal quotations omitted).

1 Here, plaintiff does not allege that he and the purported class purchased Nano Coins from,
 2 or otherwise directly conferred a monetary benefit upon, the Nano Defendants. (*See generally*,
 3 FAC.) Instead, he alleges that the Nano Defendants were unjustly enriched because the value of
 4 their own holdings of Nano Coins appreciated as a result of the purchase of Nano Coins by
 5 plaintiff and the purported class. (*See* FAC ¶ 253 (“Nano Defendants were unjustly enriched by
 6 [his] and [the] Class’[s] purchase and trading of XRB, because XRB’s price appreciated as a result
 7 of [his] and the Class’s purchase and trading of XRB, thereby enriching the Nano Defendants with
 8 large appreciation of value of their own XRB holdings, the ability of a large market to sell and
 9 dump their XRB at a large profit, and potentially obtain fees and payments for directing trading
 10 volume at exchanges like Bit Grail.”).) Plaintiff does not provide any authority for his assertion
 11 that such facts support a claim for restitution, which typically arises where one must return a
 12 benefit to the conveyer. *Munoz v. MacMillan*, 195 Cal.App.4th 648, 661 (2011) (“Common law
 13 principles of restitution require a party to *return* a benefit when the retention of such benefit would
 14 unjustly enrich the recipient[.]”). The Court has previously provided plaintiff an opportunity to
 15 amend his complaint to address this deficiency. (*See* Prior Hearing.) Accordingly, the Court
 16 **GRANTS** Nano Defendants’ motion and **DISMISSES WITH PREJUDICE** plaintiff’s quasi-contract, or
 17 unjust enrichment, claim. *See Foman*, 371 U.S. at 182.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Nano
 20 Defendants’ motion to dismiss. In summary, the following of plaintiff’s claims against Nano
 21 Defendants remain: negligence (Count VII), fraud (Count VIII), and negligent misrepresentation
 22 (Count IX).

23 This Order terminates Docket Number 60.


24 **IT IS SO ORDERED.**

25

26 Dated: October 4, 2019

27

28


 YVONNE GONZALEZ ROGERS
 UNITED STATES DISTRICT COURT JUDGE