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6 LLC, and PERFECTED CLAIMS, LLC

7
8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

10
11 ORIGINATE, INC., a Delaware corporation,

12 Plaintiff,

13 v.

14 MAURO ARCHER & O'NEILL LLP, a D.C.
limited liability partnership; FLETCHER
15 STRATEGIES LLC, a Texas corporation;
PERFECTED CLAIMS, LLC, a U.S. Virgin
16 Islands limited liability company; and DOES 1
through 20,

17 Defendants.

Case No. 4:22-cv-07461-KAW

Assigned to Magistrate
Judge Kandis A. Westmore
Courtroom: 4

**DEFENDANTS MAURO ARCHER &
O'NEILL, FLETCHER STRATEGIES,
LLC, AND PERFECTED CLAIMS, LLC'S
NOTICE AND MOTION TO DISMISS
COMPLAINT PURSUANT TO FED. R.
CIV. P. 9(B) and 12(B)(6)**

[Filed concurrently with [Proposed] Order]

DATE: January 19, 2023
TIME: 1:30 P.M.
COURTROOM: 4

State Action Filed: September 26, 2022
Notice of Removal: November 23, 2022
Trial Date: None

24
25 **TO THIS COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

26 **PLEASE TAKE NOTICE** that on January 19, 2023 at 1:30 p.m. or as soon as the matter
27 may be heard by the Honorable Magistrate Judge Kandis A. Westmore in Courtroom 4 of the
28 United States District Court for the Northern District of California, located at 1301 Clay Street,

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1 Oakland, CA 94612, Defendants Mauro Archer & O’Neill (“Mauro Archer”), Fletcher Strategies,
2 LLC (“Fletcher”), and Perfected Claims, LLC (“Perfected Claims”) (collectively, “Defendants”)
3 will, and do, move this Court for an Order dismissing Plaintiff’s Complaint under Fed. R. Civ. P.
4 9(b) and 12(b)(6) on the following grounds, as explained in the accompanying Memorandum of
5 Points and Authorities:

6 1. Plaintiff’s causes of action for Breach of the Implied Covenant of Good Faith and
7 Fair Dealings (Count 2) and Quantum Meruit (Count 3) fail as a matter of law against all
8 Defendants;

9 2. Plaintiff’s cause of action for Negligent Misrepresentation (Count 5) fails, against
10 all Defendants, because Plaintiff did not provide the requisite particularity required by Fed. R.
11 Civ. P. 9(b); and

12 3. Plaintiff’s cause of action for Breach of Contract (Count 1) fails as a matter of law
13 as to Mauro Archer and Perfected Claims.

14 Defendants respectfully request that this Court issue an order granting their Motion to
15 Dismiss Plaintiff’s Complaint as to Counts 2-3 and 5, with respect to all Defendants, and Count 1,
16 with respect to defendants Mauro Archer and Perfected Claims. Defendants’ request is based on
17 this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and
18 such argument as may be presented to the Court at the time of the hearing.

19

20 DATED: November 30, 2022

DYKEMA GOSSETT LLP

21

22

By: 

23

ABIRAMI GNANADESIGAN
Attorneys for Defendants
MAURO ARCHER & O’NEILL, LLP,
FLETCHER STRATEGIES, LLC, and
PERFECTED CLAIMS, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Originate Inc. (“Plaintiff” or “Originate”) asserts causes of action against Defendants¹ for: breach of contract (Count 1); breach of the implied covenant of good faith and fair dealing (Count 2); quantum meruit (Count 3); promissory estoppel (Count 4), and negligent misrepresentation (Count 5). These causes of action are based primarily on a Consulting Agreement between Originate and Defendant Fletcher. Defendants Mauro Archer and Perfected Claims were never parties to the Consulting Agreement.

The Complaint alleges that Fletcher entered into the Consulting Agreement to have Originate develop a software platform to manage the intake of legal claims by California wildfire victims. The Consulting Agreement provided that the Fletcher and Originate would agree upon an initial Statement of Work (“SOW”), and additional SOWs down the road, which would define Originate’s services to be performed during a certain time period. Originate would be compensated for its services at the rates provided in each SOW

Originate alleges that Defendants failed to pay for its services as required by the Consulting Agreement and SOWs. On the contrary, Fletcher contends that Originate failed to develop any working software for Fletcher, despite Fletcher’s repeated representations that it had done so. Fletcher also contends that Originate failed to meet the various phase deadlines defined in the SOWs.

The “agreement” to have Originate develop a software platform to manage claims was fully encompassed by the Consulting Agreement and subsequent SOWs. Since Originate’s claims against Defendants for breach of the implied covenant of good faith and fair dealing and quantum meruit are based on the alleged breach of the Consulting Agreement, they fail as a matter of law and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Moreover, Originate’s claim of negligent misrepresentation fails to meet the particularity requirements of Fed. R. Civ. P. 9(b). In addition, because Defendants Mauro Archer and Perfected Claims were not parties to the

¹ Originate also asserts these causes of action against DOE Defendants 1-20.

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1 Consulting Agreement or any of the SOWs, Originate’s breach of contract claim against these
2 defendants should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

3 For the reasons discussed below, Plaintiff’s Complaint against Defendants should be
4 dismissed as to Counts 2-3 and 5, with respect to all Defendants, and Count 1, with respect to
5 defendants Mauro Archer and Perfected Claims.

6 **II. PLAINTIFF’S ALLEGATIONS**

7 Fletcher was started by Mauro Archer to manage the development of a new case
8 management system to assist with client intake of California wildfire claims. Dkt. #1 (Compl.)
9 ¶¶ 11, 16. In or about August 2020, Fletcher began discussions with Originate for the
10 development of such an intake system. *Id.* at ¶ 16. On September 15, 2020, Fletcher and Originate
11 entered into a Consulting Agreement for the development of the intake system. *Id.* at ¶ 17. The
12 project was defined through a series of a total of six SOWs.² *Id.* at ¶¶ 20, 23, 24, 27, 35, 36. Each
13 SOW defined Originate’s service obligations and time period for completing the services. *Id.* at
14 ¶ 20. Originate alleges that Fletcher created Perfected Claims to use the system created by
15 Originate. *Id.* at ¶ 25. Originate further alleges that Fletcher began defaulting on the Agreement
16 by not paying the full amounts due under SOW Nos. 4-6. *Id.* at ¶¶ 33-38.

17 Originate filed its state court complaint on September 26, 2022, and Defendants filed
18 their Notice of Removal on November 23, 2022.

19 **III. LEGAL STANDARD**

20 To survive a motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6), a
21 plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative
22 level” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations must “plausibly
23 suggest[],” and not merely be consistent with the claimed wrongful conduct. *Id.* at 557. The Court
24 may dismiss a complaint as a matter of law for: “(1) lack of a cognizable legal theory or (2)
25 insufficient facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of*
26 *Cal. Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted).

27 _____
28 ² The Consulting Agreement and SOWs are collectively referred to as the “Agreement.”

1 While factual allegations are assumed true, the plaintiff must provide more than mere
 2 speculation of a right to relief. *Twombly*, 550 U.S. at 555. Courts are “not bound to accept as true a
 3 legal conclusion couched as a factual allegation,” and “[t]hreadbare recitals of the elements of a
 4 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556
 5 U.S. 556 U.S. 662, 678 (2009). It is improper to assume “the [plaintiff] can prove facts that it has
 6 not alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459
 7 U.S. 519, 526 (1983). Finally, a complaint may be dismissed without leave to amend where the
 8 “proposed amendment is futile.” *Ultrasystems Envtl., Inc. v. STV, Inc.*, 674 F. App’x 645, 650 (9th
 9 Cir. 2017).

10 IV. ARGUMENT

11 A. Plaintiff’s Cause of Action for Breach of the Implied Covenant of Good Faith (Count 12 2) Fail as a Matter of Law.

13 “California law³ implies a covenant of good faith and fair dealing in every contract.”
 14 *Integrated Storage Consulting Servs. v. NetApp, Inc.*, No. 5:12-CV-06209-EJD, 2013 U.S. Dist.
 15 LEXIS 107705, at *23 (N.D. Cal. July 31, 2013) (quoting *Mundy v. Household Fin. Corp.*, 885
 16 F.2d 542, 544 (9th Cir. 1989)). Broadly speaking and under certain circumstances, California law
 17 allows a party to plead both a breach of contract claim and a breach of implied duties claim. *See*
 18 *id.* However, when a claim for breach of implied duties cites the same alleged breach and is based
 19 on the same facts as a claim for breach of contract, the implied duties claim is duplicative and
 20 superfluous with the cause of action for breach of contract. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.
 21 4th 317, 327 (2000).

23 “If the allegations in a breach of implied covenant claim do not go beyond the statement of
 24 a mere contract breach and, relying on the same alleged acts, simply seek the same damages or
 25 other relief already claimed in a companion contract cause of action, they may be disregarded as
 26 _____

27 ³ Pursuant to section 10.3 of the Agreement, the Parties agreed that the laws of the State of
 28 California would apply.

1 superfluous as no additional claim is actually stated.” *Malcolm v. JPMorgan Chase Bank, N.A.*,
 2 No. 09-CV-4496-JF (PVT), 2010 U.S. Dist. LEXIS 23770, at *6 (N.D. Cal. Mar. 15, 2010)
 3 (quoting *Schulken v. Wash. Mut. Bank*, No. 09-CV-02708-JW, 2009 U.S. Dist. LEXIS 114030,
 4 (N.D. Cal. Nov. 19, 2009)). In those circumstances, a court can properly dismiss the implied
 5 duties claim in favor of proceeding with the express written contract claim. *Integrated Storage*
 6 *Consulting Services*, 2013 U.S. Dist. LEXIS 107705, at *28 (dismissing implied duties claim that
 7 merely duplicated the breach of contract claim, where both were premised upon an allegedly
 8 wrongful “dual [registration] with other resellers.”); *Williams v. Wells Fargo Bank, N.A.*, No.
 9 5:13-cv-03387-EJD, 2017 U.S. Dist. LEXIS 58519, at *11-12 (N.D. Cal. Apr. 14, 2017) (finding
 10 the claim for breach of implied duties merely duplicated the contract claim and that a plaintiff may
 11 not impose new obligations through an implied duties claim).

12 Here, Count 2 is duplicative of the breach of contract claim (Count 1). Compare Compl. ¶¶
 13 45-51 with ¶¶ 52-61. Both counts are premised upon the same alleged breach by Fletcher: failure
 14 to pay Originate in accordance with the Agreement. As a matter of law, Count 2 is duplicative and
 15 superfluous and should be dismissed.

16 **B. Plaintiff’s Cause of Action for Breach of Quantum Meruit (Count 3) Fails as a Matter**
 17 **of Law Because there was a Contract that Governed the Relationship.**

18 “To recover on a claim for the reasonable value of services under a quantum meruit theory,
 19 a plaintiff must establish both that he or she was acting pursuant to either an express or implied
 20 request for services from the defendant and that the services rendered were intended to and did
 21 benefit the defendant.” *Ochs v. PacifiCare of California*, 115 Cal.App.4th 782, 794 (2004)
 22 (internal citation omitted). “However, it is well settled that there is no equitable basis for an
 23 implied-in-law promise to pay reasonable value when the parties have an actual agreement
 24 covering compensation.” *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal.App.4th
 25 1410, 1419 (1996). “There cannot be a valid, express contract and an implied contract, each
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1 embracing the same subject matter, existing at the same time.” *Wal-Noon Corp. v. Hill*, 45
 2 Cal.App.3d 605, 613 (1975); *see also Roots Ready Made Garments v. Gap Inc.*, 2008 U.S. Dist.
 3 LEXIS 67669 *27 (N.D. Cal. Aug. 29, 2008) (“an action based on an implied-in-fact or quasi
 4 contract cannot lie where there exists between the parties a valid express contract covering the
 5 same subject matter.”) “A ‘quantum meruit claim fails’ where ‘the parties’ Contract sets forth
 6 terms governing the subject matter for which Plaintiff now seeks equitable recovery.’” *Advsr, LLC*
 7 *v. Magisto Ltd.*, No. 19-cv-02670-JCS, 2021 U.S. Dist. LEXIS 153030, at *66 (N.D. Cal. Aug. 13,
 8 2021) (citing *DPR Constr. v. Shire Regenerative Med., Inc.*, 204 F. Supp. 3d 1118, 1131 (S.D.
 9 Cal. 2016)).

10
 11 The crux of Originate’s quantum meruit claim is based on a breach of obligations in the
 12 Agreement (i.e., Defendants’ alleged failure to pay for services provided pursuant to the
 13 Agreement). *See* Compl. ¶¶ 63 and 65. Since there was an express written contract covering the
 14 parties’ contractual obligations regarding the providing of and payment for services, Originate
 15 cannot maintain a quantum meruit claim as a matter of law. Therefore, this claim should be
 16 dismissed as to all Defendants.

17
 18 **C. Plaintiff’s Cause of Action (Count 5) for Negligent Misrepresentation Fails as to all**
 19 **Defendants because Plaintiff did not Meet the Requisite Particularity Requirements**
 20 **of Rule 9(B).**

21 A claim for fraud or misrepresentation requires a false representation of a material fact
 22 upon which the plaintiff relied, made with knowledge of its falsity, with the intent to defraud the
 23 plaintiff, resulting in damages. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 974
 24 (1997). The elements must be pled in full, factually, and specifically because fraud allegations are
 25 a serious attack on the defendant and must meet the particularity requirements of Rule 9(b).
 26 *Wilhelm v. Pray, Price, Williams & Rossell*, 186 Cal.App.3d 1824, 1331 (1986); *Neilson v. Union*
 27 *Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). “To satisfy Rule 9(b),
 28

1 claims sounding in fraud must be ‘specific enough to give defendants notice of the particular
2 misconduct which is alleged to constitute the fraud charged so that they can defend against the
3 charge and not just deny that they have done anything wrong.’” *Trombley Enters., LLC v. Sauer,*
4 *Inc.*, No. 5:17-cv-04568-EJD, 2019 U.S. Dist. LEXIS 18511, at *10-11 (N.D. Cal. Feb. 5, 2019)
5 (quoting *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)). “In other words, ‘[a]verments
6 of fraud must be accompanied by ‘the who, what, when, where, and ‘how’ of the misconduct
7 charged.’” *Id.* (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).

9 Rule 9(b) applies to fraud claims and claims grounded in fraud, including negligent
10 misrepresentation. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d. 1097, 1103-04 (9th Cir. 2003).
11 Where a complaint includes allegations of fraud, Rule 9(b) requires more specificity, including an
12 account of the time, place, and specific content of the false representations as well as the identities
13 of the parties to the misrepresentations. *Edwards v. Marin Park, Inc.*, 356 F.3d. 1058, 1066 (9th
14 Cir. 2004).

16 The defendant must be able to prepare an adequate answer to the allegations of fraud.
17 *Odom v. Microsoft Corp.*, 486 F.3d. 541, 553 (9th Cir. 2007). The rationale for the heightened
18 pleading requirements for fraud is because the allegation of fraud involves a serious attack on the
19 character, and fairness to the defendant demands that he should receive the fullest possible details
20 of the charge in order to prepare his defense. “To comply with Rule 9(b), allegations of fraud must
21 be specific enough to give defendants notice of the particular misconduct which is alleged to
22 constitute the fraud charged so that they can defend against the charge and not just deny that they
23 have done anything wrong.” *Bly- Magee v. California*, 236 F.3d. 1014, 1017 (9th Cir. 2001). Rule
24 9(b) requires a plaintiff to “identify the who, what, when, where and how of the misconduct
25 charged as well as what is false or misleading about [the purportedly fraudulent conduct], and why
26 it is false.” *Cafasso ex rel. United States v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-
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1 1055 (9th Cir. 2011) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.
2 2010).

3 Where fraud has allegedly been perpetrated by a corporation, the plaintiff must identify
4 “the names of the employees or agents who purportedly made the fraudulent representations or
5 omissions, or at a minimum identify them by their titles and/or job responsibilities.” *Griffin v.*
6 *Green Tree Servicing, LLC*, 166 F. Supp. 3d 1030, 1057 (C.D. Cal. 2015), (citing *U.S. ex rel. Lee*
7 *v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir.2001) (holding that Rule 9(b) was not
8 satisfied, inter alia, because plaintiff did not “identify the [defendant’s] employees who performed
9 the tests, or provide any dates, times, or places the tests were conducted”); *Arch Ins. Co. v.*
10 *Allegiant Prof'l Bus. Servs.*, No. CV 11-1675 CAS (PJWx), 2012 U.S. Dist. LEXIS 56605, at *7
11 (C.D. Cal. Apr. 23, 2012) (“The requirement of specificity in a fraud action against a corporation
12 requires the plaintiff to allege the names of the persons who made the allegedly fraudulent
13 representations, their authority to speak, to whom they spoke, what they said or wrote, and when it
14 was said or written”); *See also Dooms v. Fed. Home Loan Mortg. Corp.*, No. CV F 11-0352 LJO
15 DLB, 2011 U.S. Dist. LEXIS 38550, at *33 (E.D. Cal. Mar. 30, 2011).

18 Here, the Complaint pleads only general conclusory allegations based on alleged
19 representations made by Mr. Christian Archer and Mr. Bill Samson that Defendants would partner
20 with Plaintiff in a joint venture. Compl., ¶ 73. The Complaint fails to meet the particularity
21 requirement of Rule 9(b) because it fails to identify: (a) the specific content of the alleged false
22 representations made by Mr. Archer and Mr. Samson; (b) their authority to make such
23 representations as to one or more of the Defendants; (c) what was false or misleading about the
24 representations; (d) why they were false or misleading; (e) the dates, times, and places of the
25 representations; and (f) to whom the representations were made. *See* Compl., ¶¶ 73-76. Plaintiff
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1 simply makes conclusory allegations involving all the Defendants and fails to specify which
2 Defendant(s) made each statement. *Id.*

3 Accordingly, Plaintiff's negligent misrepresentation claim fails to meet the particularity
4 requirements of Rule 9(b) and should be dismissed as to all Defendants.

5
6 **D. Plaintiff's Cause of Action for Breach of Contract (Count 1) Fails as a Matter of Law
as to Defendants Mauro Archer and Perfected Claims.**

7 Originate alleges that the Defendants, including Mauro Archer and Perfected Claims,
8 breached the contract with Originate. Dkt. #1-1 (Compl.) ¶¶45-51. However, since neither Mauro
9 Archer nor Perfected Claims were parties or signatories to the Agreement with Originate, this
10 count should be dismissed as to them. Originate admits in the Complaint that Fletcher was the
11 signatory to the Agreement (i.e., not Mauro Archer or Perfected Claims). *See* Compl ¶ 25. "Under
12 California law, only a signatory to a contract may be liable for any breach." *Clemens v. Am.*
13 *Warranty Corp.*, 193 Cal.App.3d 444, 452 (1987); *Tri-Continent Internat. Corp. v. Paris Sav. &*
14 *Loan Assn.*, 12 Cal.App.4th 1354, 1359 (1993) ("[Plaintiff] cannot assert a claim for breach of
15 contract against one who is not a party to the contract."); *United States v. Hall Family Trust Dated*
16 *June 8, 2001*, No. 16-CV-0538-AJB-BGS, 2019 WL 1429572, at *2 (S.D. Cal., Mar. 29, 2019)
17 (subjecting non-signatories to a breach of contract claim where "[t]here simply is no privity of
18 contract....would unduly expand contract law."). Because neither Mauro Archer nor Perfected
19 claims are a party or signatory to the Agreement, Originate cannot maintain a breach of contract
20 claim against them as a matter of law, and such claim should be dismissed accordingly.


21 **V. CONCLUSION**

22 For all these reasons, Defendants respectfully request that this Court issue an order
23 granting their Motion to Dismiss Plaintiff's Complaint as to Counts 2-3 and 5, with respect to all
24 Defendants, and Count 1, with respect to defendants Mauro Archer and Perfected Claims.

1 DATED: November 30, 2022

DYKEMA GOSSETT LLP

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