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**United States District Court
Central District of California**

CORNERSTONE CONSTRUCTION
MATERIAL, LLC,

Plaintiff,

v.

FEC FUTURE CONTRACTORS AND
ENGINEERS, INC. et al.,

Defendants.

Case No. 2:23-cv-00955-ODW (AJRx)

**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS [62]**

I. INTRODUCTION

Plaintiff Cornerstone Construction Material, LLC brings this action against Defendants FEC Future Contractors and Engineers, Inc. (“FEC”) and Old Republic Surety Company (“ORSC”) (collectively “Defendants”) for the alleged breach of construction materials supply contracts. (Fourth Am. Compl. (“FoAC”), ECF No. 59.) FEC now moves under Federal Rule of Civil Procedure (“Rule”) 12(b)(6) to dismiss Plaintiff’s first through sixth causes of action. (Mot. Dismiss (“Motion” or “Mot.”), ECF No. 62.) For the following reasons, the Court **DENIES** Defendant’s Motion.¹

¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 **II. BACKGROUND**

2 The following facts are taken from Plaintiffs’ Fourth Amended Complaint. *See*
3 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that well-pleaded factual allegations
4 are accepted as true for purposes of a motion to dismiss).

5 Plaintiff Cornerstone is a construction materials supplier organized as a Missouri
6 limited liability company. (FoAC ¶ 1.) Defendant FEC is a construction company
7 incorporated and operating in California. (*Id.* ¶ 3.) Defendant ORSC is an insurance
8 provider incorporated in Wisconsin. (*Id.* ¶ 4.)

9 Cornerstone supplied materials to FEC for a public works construction project on
10 bridges in California (the “Project”). (*Id.* ¶¶ 9, 11.) Cornerstone contracted with FEC
11 directly and the parties entered into a purchase order and multiple change orders. (*Id.*
12 ¶¶ 10, 13; FoAC Ex. 1 (“Agreements”), ECF No. 59-1.) The written agreements
13 between the parties included the General Terms and Conditions, the Purchase Order,
14 Change Orders, and Section 60 of the Caltrans 2018 Standard Plans and Specifications.
15 (*See* Agreements). FEC in turn contracted with the California Department of
16 Transportation (“Caltrans”) on the Project. (FoAC ¶ 10.) As the Project was a public
17 works project, FEC was required to procure a payment bond for Cornerstone, and FEC
18 obtained one from ORSC.² (*Id.* ¶ 12.)

19 Cornerstone alleges that FEC mismanaged the Project, did not correctly use the
20 materials Cornerstone supplied, and did not understand the Caltrans testing
21 requirements. (*Id.* ¶ 16.) As a result, “Cornerstone’s employees were required to be on
22 the project for longer periods of time,” and had to “provide additional materials, incur
23 additional freight charges,” secure testing on FEC’s behalf, and perform additional
24 labor on the project. (*Id.* ¶ 17.) Cornerstone invoiced FEC for all the work performed,
25 but only received partial payment. (*Id.* ¶¶ 21, 22; FoAC Ex. 2 (“Invoices”), ECF

26 _____
27 ² California Civil Code section 3247 requires that every contractor that receives a public works project
28 must contract to file a payment bond with an awarding agency, for review and approval before work
on the project begins. Cal. Civ. Code § 3247.

1 No. 59-2.) Furthermore, Cornerstone “made a claim on ORSC’s bond in compliance
2 with the terms of the bond and California law”, but ORSC denied Cornerstone’s claim.
3 (*Id.* ¶ 26.)

4 Based on these allegations, Cornerstone asserts the following causes of action
5 against FEC: (1) breach of contracts; (2) violation of the California Prompt Payment
6 Act; (3) breach of the implied covenant of good faith and fair dealing; (4) unjust
7 enrichment; and (5) quantum meruit. (*Id.* ¶¶ 28–42, 53–73.) Cornerstone also asserts
8 an action on payment bond against ORSC. (*Id.* ¶¶ 43–52.) Now, under Rule 12(b)(6),
9 FEC moves to dismiss the causes of action that Cornerstone asserts against it. (*See*
10 *generally* Mot.)

11 III. LEGAL STANDARD

12 A. Federal Rule of Civil Procedure Rule 12(b)(6)

13 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
14 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
15 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To
16 survive a dismissal motion, a complaint need only satisfy the “minimal notice pleading
17 requirements” of Rule 8(a)(2). *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003).
18 Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader
19 is entitled to relief.” The factual “allegations must be enough to raise a right to relief
20 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007);
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a claim must be “plausible on
22 its face” to avoid dismissal).

23 The determination of whether a complaint satisfies the plausibility standard is a
24 “context-specific task that requires the reviewing court to draw on its judicial
25 experience and common sense.” *Iqbal*, 556 U.S. at 679. A court is generally limited to
26 the pleadings and must construe all “factual allegations set forth in the complaint . . . as
27 true and . . . in the light most favorable” to the plaintiff. *Lee v. City of Los Angeles*,
28 250 F.3d 668, 679 (9th Cir. 2001). However, a court need not blindly accept conclusory

1 allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v.*
2 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Ultimately, there must be
3 sufficient factual allegations “to give fair notice and to enable the opposing party to
4 defend itself effectively,” and the “allegations that are taken as true must plausibly
5 suggest an entitlement to relief, such that it is not unfair to require the opposing party
6 to be subjected to the expense of discovery and continued litigation.” *Starr v. Baca*,
7 652 F.3d 1202, 1216 (9th Cir. 2011).

8 IV. REQUEST FOR JUDICIAL NOTICE

9 Concurrently with its motion, FEC requests that the Court take judicial notice of
10 Section 60 of the 2018 Caltrans Specifications. (FEC Req. Judicial Notice (“FEC
11 RJN”), ECF No. 63.)

12 Although district courts generally may not consider evidence outside of the
13 pleadings when ruling on a motion to dismiss under Rule 12(b)(6), *see United States v.*
14 *Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003), a court may properly consider evidence
15 outside of the pleadings if it is properly subject to judicial notice or is incorporated by
16 reference into the pleadings. *Lee*, 250 F.3d at 689.

17 Furthermore, where the plaintiff refers to the material extensively or it forms the
18 basis of the plaintiff’s claims, Courts may consider the material incorporated by
19 reference into the complaint as true for purposes of a motion to dismiss under
20 Rule 12(b)(6). *Ritchie*, 342 F.3d at 908; *see In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp.
21 2d 1148, 1159 (C.D. Cal. 2007) (taking judicial notice of a document where plaintiffs’
22 claims were “predicated upon” the document); *In re Copper Mountain Sec. Litig.*,
23 311 F. Supp. 2d 857, 864 (N.D. Cal. 2004) (recognizing press releases submitted in
24 opposition to a motion to dismiss under Rule 12(b)(6) via both judicial notice and
25 incorporation by reference). The court generally takes notice of exhibits attached to the
26 Plaintiff’s complaint, and if the facts appearing in those exhibits contradict those
27 alleged, the facts in the exhibits take precedence. *Holland v. Morse Diesel Int’l, Inc.*,
28 86 Cal. App. 4th 1443, 1447 (2001).

1 Here, FEC requests that the Court take judicial notice of the five-page excerpt of
2 Section 60 of the 2018 Caltrans Standard Plans and Specifications, of which both an
3 annotated and unannotated version was attached to Cornerstone’s Fourth Amended
4 Complaint. (Agreements 6–10.) As Cornerstone included the five-page excerpt of
5 Section 60 in its Fourth Amended Complaint, Section 60 is expressly incorporated into
6 the agreement as a part of the purchase orders that form the basis of Cornerstone’s
7 contract claim. (*Id.*) This incorporation allows the Court to take judicial notice of
8 Section 60, as per FEC’s request. Therefore, the Court **GRANTS** FEC’s Request for
9 Judicial Notice and considers the materials appended thereto for the purposes of these
10 motions.

11 V. DISCUSSION

12 The Court first addresses FEC’s argument that Cornerstone acted as an unlicensed
13 contractor in the agreements, as it applies to all causes of action Cornerstone asserts
14 against Defendants.

15 B. California Business & Professional Code 7031(a)

16 “Business and Professions Code section 7031, subdivision (a) precludes an
17 unlicensed contractor from filing suit for the collection of compensation for the
18 performance of any act or contract where a license is required.” *Banis Rest. Design,*
19 *Inc. v. Serrano*, 134 Cal. App. 4th 1035, 1038 (2005) (internal quotation marks omitted).

20 “Business and Professions Code section 7031 bars unlicensed contractors from
21 bringing suit to recover compensation for work requiring a license.” *Holland*, 86 Cal.
22 App. 4th at 1445. Specifically, “section 7031(a) bars a person from suing to recover
23 compensation for any work he or she did under an agreement for services requiring a
24 contractor’s license unless proper licensure was in place at all times during such
25 contractual performance.” *MW Erectors, Inc. v. Niederhauser Ornamental & Metal*
26 *Works Co., Inc.*, 36 Cal. 4th 412, 419 (2005). “Section 7031 advances the policies
27 behind the Contractors’ State License Law by withholding judicial aid from those who
28

1 seek compensation for unlicensed contract work.” *Banis*, 134 Cal. App. 4th at 1043
2 (internal quotation marks omitted).

3 The initial question before the court is whether Plaintiff “engaged in the business
4 or acted in the capacity of a contractor,” thereby triggering section 7031. *Id.* The term
5 “contractor” for purposes of [s]ection 7026 is synonymous with the term “builder” and,
6 within the meaning of section 7026, “a contractor is any person who undertakes to or
7 offers to undertake to . . . construct, alter, repair, add to, subtract from, improve, move,
8 wreck or demolish any building . . . or other structure, project, development or
9 improvement, or to do any part thereof.” Cal. Bus. & Prof. Code § 7026. The term
10 “[c]ontractor’ includes subcontractor and specialty contractor.” *Id.*

11 The essential feature that constitutes one as a subcontractor is that, in the course
12 of the performance of the prime contract, they “construct a definite, substantial part of
13 the work of improvement in accordance with the plans and specifications of such
14 contract, not that they enter upon the job site and do the construction there.” *Theisen v.*
15 *Los Angeles County*, 54 Cal. 2d 170, 183 (1960). Whether a person seeking to recover
16 for their labor is functioning as an employee or an independent contractor has been
17 characterized as a question of fact. *Pickens v. Am. Mortg. Exch.*, 269 Cal. App. 2d 299,
18 305 (1969); *see also Denton v. Wiese*, 144 Cal. App. 2d 175, 180 (1956). Specifically,
19 if the plaintiff’s involvement as an unlicensed contractor was incidental to the overall
20 agreement or transaction between the parties, it was thus unrelated to any protective
21 concern of the licensing law. *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988,
22 1001 (1991).

23 **A. Cornerstone’s Rendition of Services Was Incidental To The Overall**
24 **Agreement For Supplies Between the Parties.**

25 Like the courts in *Pickens* and *Denton*, this Court will also consider the specific
26 facts of the case to ascertain whether Cornerstone entered into the agreement as a
27 contractor or a supplier. *Pickens*, 269 Cal. App. 2d at 305; *Denton*, 144 Cal. App. 2d
28 at 180. The Court first looks at the language and content of the agreement, then

1 considers whether the rendition of services was incidental to the overall agreement
2 between the parties. *See, e.g., Banis*, 134 Cal. App. 4th at 1046.

3 1. *The content and language of the contract support that Cornerstone*
4 *entered into the agreement as a supplier of goods.*

5 First, the Court addresses the written agreements³ between the parties.
6 (Agreements 1–10.) Cornerstone’s Fourth Amended Complaint and Agreements do not
7 describe work that comes within the statutory definition of a contractor. (*See generally*
8 *FoAC; Agreements.*) Indeed, there is no direct reference in these written agreements to
9 the intended performance of any services by Cornerstone, or any intended duties that
10 go beyond the scope of duties normally performed by a supplier. (Agreements 1–10.)
11 Instead, the written agreements specifically discuss dates and terms for the purchase
12 and delivery of materials. (*Id.*) Thus, based on the written agreements, it appears the
13 parties intended Cornerstone to act as a supplier of goods to FEC and not as a contractor.

14 Furthermore, the language used in the written agreements reflects that of an
15 agreement between a purchaser and a supplier. (*Id.*) For instance, in the General Terms
16 and Conditions, the second and third sections refer to the “goods” to be supplied by
17 Cornerstone. (Agreements 3.) Sections ten and eleven refer to the “delivery of
18 materials” by the “supplier.” (*Id.*) Sections five, six, and fourteen refer to Cornerstone
19 as the “seller.” (*Id.*) Lastly, the final paragraph refers to the agreement as a “Purchase
20 Order,” which demonstrates that the parties intended the agreement to serve as a
21 purchase of goods rather than the rendition of services. (*Id.*) Moreover, there is no
22 reference to any rendition of services by Cornerstone in any of the Terms and
23 Conditions. (*See Agreements 3.*)

24 Next, the Purchase Order includes the word “seller” next to Cornerstone’s
25 signature line and refers to FEC as “[p]urchaser” in the bottom paragraph. (*Id.*) The
26 price of the contract is attached to the quantity of goods received, showing that the

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28 ³Here, the term “written agreements” includes the General Terms and Conditions, the Purchase Order,
Change Orders, and Section 60 of the Caltrans 2018 Standard Plans and Specifications.

1 payment was only for the goods and nothing else. (*Id.*) Moreover, the only reference
2 to services in the contract is Cornerstones actual delivery of the materials. (*Id.*)

3 Lastly, Section 60 of the Caltrans 2018 Standard Plans and Specifications is
4 referenced and included in its entirety in the agreement. (Agreements 6–10.) Although
5 this includes Sections 60-3.04B(3)(b) and 60-3.04B(3)(c), which outline instructions on
6 “construction” and “placing” of materials, these services are not mentioned anywhere
7 else in the agreement as a responsibility of Cornerstone. (*Id.* at 9; *see generally*
8 Agreements.) Rather, the quantity of items to be provided by Cornerstone, and its
9 clearly identified role as a supplier/seller, are both mentioned multiple times in the other
10 sections of the agreement. (Agreements 3–4.) Thus, the parties’ inclusion of those
11 instructions does not demonstrate an intent for Cornerstone to render those services.

12 Accordingly, the Court finds that the content and language of the contracts
13 support that Cornerstone contracted in their capacity as a supplier, not as a contractor.

14 2. *The work Cornerstone did on the project was incidental to the*
15 *overall agreement.*

16 As the court held in *Theisen*, it is not enough for this Court to consider
17 Cornerstone a contractor simply because it entered the job site and performed work
18 there. *Theisen*, 54 Cal. 2d at 183. As discussed in the Court’s analysis above, it is clear
19 from the language and content of the contract that the parties did not intend for
20 Cornerstone to take on the role of a contractor or perform any work in such a capacity.
21 (Agreements 1–10.) As the facts indicate, any services Cornerstone may have
22 performed were a result of FEC’s mismanagement of the materials it supplied, including
23 not following the instructions for the use of the supplies and acquiring the mandated
24 testing. (FoAC ¶¶ 16, 17.) Although Cornerstone may have performed some labor on
25 the project, Cornerstone and FEC did not agree upon this work being done beforehand.
26 (*Id.*; Agreements 1–10.) Therefore, the work Cornerstone did on the project was
27 incidental to the overall agreement. *Hydrotech Sys.*, 52 Cal. 3d at 1001.

28 **B. Overall Denial of Dismissal**

