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3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
5 **SAN JOSE DIVISION**
6

7 PINNACLE VENTURES LLC;
8 PINNACLE VENTURES DEBT FUND III,
9 L.P.; and PINNACLE IV, L.P.,

10 Plaintiffs,

11 v.

12 BERTELSMANN EDUCATION
13 SERVICES LLC,

14 Defendant.

Case No. 18-cv-03412-BLF

**ORDER DENYING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

[Re: ECF 66]

[REDACTED PUBLIC VERSION]

15 This action arises from a dispute between investors in third party HotChalk, Inc.
16 (“HotChalk”), a privately held corporation that provides education technology and services.
17 Plaintiffs are Pinnacle Ventures LLC, a private venture capital firm that provides debt and equity
18 financing to early stage companies, and two of its funds, Pinnacle Ventures Debt Fund III, L.P.
19 and Pinnacle IV, L.P. (collectively, “Pinnacle”). Pinnacle provided debt financing to HotChalk
20 beginning in 2014 and received warrants to purchase HotChalk stock. Defendant Bertelsmann
21 Education Services LLC (“BES”) provided additional financing in 2015 and 2018. Pinnacle
22 alleges that BES took effective control of HotChalk in 2015 and used fraudulent and unlawful
23 means to deprive Pinnacle of the value of its investments, first by preventing Pinnacle from
24 participating in the 2015 financing round and then by diluting the value of Pinnacle’s warrants in
25 the 2018 transaction. Plaintiff sues BES for fraud and related state law claims.

26 BES has filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), seeking
27 dismissal of Claims 1-5 of the first amended complaint (“FAC”) *only* to the extent those claims
28 are based on the 2015 transaction. Pinnacle argues that because Claims 1-5 are based on BES’s
conduct in both 2015 and 2018, BES in essence seeks partial dismissal of each claim. Pinnacle

1 contends that Rule 12(b)(6) does not provide a mechanism for dismissing part of a claim, and that
2 in any event the FAC’s allegations regarding BES’s 2015 conduct are adequate to state a claim.
3 The Court has considered the briefing and the arguments presented at the hearing on August 1,
4 2019. For the reasons discussed below, the motion to dismiss is DENIED.

5 **I. BACKGROUND¹**

6 Pinnacle was introduced to HotChalk in 2014. FAC ¶ 22, ECF 59-4. HotChalk was an
7 established start-up expected to generate nearly \$ ██████████ in revenue in 2014. *Id.* ██████████
8 ██████████ *Id.*

9 *Pinnacle Transactions*

10 Pinnacle and HotChalk entered into two Loan and Security Agreements in 2014 and early
11 2015, under which Pinnacle provided debt financing totaling \$ ██████████. FAC ¶¶ 23, 25, 27.
12 As part of those transactions, Pinnacle obtained warrants giving it the right to purchase more than
13 two million shares of HotChalk at an exercise price of \$ ██████████. FAC ¶¶ 24, 26.

14 *2015 BES Transaction*

15 On August 5, 2015, HotChalk circulated term sheets for an equity deal with BES, a
16 division of a large German conglomerate. FAC ¶ 29. The deal had three primary components:
17 (1) HotChalk would acquire Synergis, a BES subsidiary, through merger; (2) BES would make an
18 \$ ██████████ equity investment in HotChalk; and (3) BES would make a \$ ██████████ secondary
19 purchase of shares from existing HotChalk shareholders to bring its post-acquisition, post-
20 investment stake in HotChalk to a total of ██████████. FAC ¶ 29. Because HotChalk’s share price had
21 increased substantially since Pinnacle obtained its HotChalk warrants, Pinnacle stood to make
22 millions of dollars by selling the HotChalk shares underlying its warrants. FAC ¶ 30.

23 “[O]n or around August 5, 2015, HotChalk’s CFO Toth informed a Pinnacle principal that
24 Pinnacle would be able to sell ‘up to 100%’ of its warrants to BES.” FAC 32. “On August 13,
25

26 ¹ The background facts are drawn from the allegations of the complaint, which are accepted as true
27 for purposes of the motion to dismiss, *see Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681,
28 690 (9th Cir. 2011), and from documents incorporated into the complaint by reference and matters
subject to judicial notice, *see Louisiana Mun. Police Employees’ Ret. Sys. v. Wynn*, 829 F.3d 1048,
1063 (9th Cir. 2016).

1 2015, Toth again confirmed that Pinnacle could sell all of its warrants to BES and that Pinnacle
2 could do so ‘without too much fuss,’ including without first taking the technical step of formally
3 exercising the warrants to purchase the underlying shares before selling them.” *Id.* Mr. Toth’s
4 statements “could only have come on authority of BES given that it was BES that would be
5 purchasing the warrants.” FAC ¶ 33. Because Pinnacle understood that its ability to sell 100% of
6 its warrants as part of BES’s direct purchase of HotChalk shares was secure, Pinnacle did not
7 consider any other opportunities that might have been available with respect to its warrants. *Id.*

8 On Friday, October 16, 2015, “Toth called a Pinnacle principal to inform Pinnacle that it
9 would not be able to sell its warrants (or the underlying shares) to BES *at all*, as Pinnacle had been
10 promised it could do.” FAC ¶ 34. Mr. Toth’s statement “could only have come at the direction of
11 BES – the purchaser of HotChalk shares in the transaction.” *Id.* On Monday, October 19, 2015,
12 Pinnacle emailed HotChalk’s CEO to express both disappointment and hope that a solution could
13 be found. FAC ¶ 35. Nothing came of that email, and BES’s November 9, 2015 Offer to
14 Purchase required that sellers in the tender offer own HotChalk shares as of October 20, 2015.
15 FAC ¶ 36. The Offer to Purchase precluded sale of warrants in lieu of the underlying shares. *Id.*
16 Pinnacle had not been informed that it needed to exercise its warrants by October 20, 2015 to sell
17 to BES in the tender offer. *Id.* Pinnacle therefore was unable to participate in “even the
18 economically inferior, prorated tender offer portion of the transaction.”² *Id.* BES instead acquired
19 HotChalk shares from other large holders, ending up owning approximately █████ of HotChalk’s
20 equity and taking effective control of HotChalk. FAC ¶¶ 37-40.

21 *2018 BES Transaction*

22 Once it had control of HotChalk, BES changed the company’s business strategy. FAC ¶
23 41. Instead of pursuing strong revenue growth, HotChalk focused on aggressive cost reduction.
24 *Id.* When Pinnacle expressed concern, BES assured Pinnacle that HotChalk’s valuation in the
25 next financing round would be higher than in the last financing round. FAC ¶ 42. In reliance on
26

27 _____
28 ² Pinnacle’s counsel explained at the hearing that because BES wished to purchase a set amount of
HotChalk shares, BES would purchase shares from all participating shareholders on a pro rata
basis if the tender offer was oversubscribed.

1 BES’s representations, Pinnacle consented to allow HotChalk to restructure its debt multiple times
2 and amended its own loan agreements to extend the period in which HotChalk had to make
3 payments. FAC ¶ 43. Pinnacle also agreed to fund an additional \$ [REDACTED] loan tranche for the
4 benefit of HotChalk and its controlling shareholder, BES. FAC ¶ 44.

5 Meanwhile, BES deliberately dragged its feet on obtaining additional necessary financing,
6 putting HotChalk in a precarious position. FAC ¶ 46. BES thereafter was able to force a
7 financing transaction which benefitted BES at the expense of Pinnacle and other stakeholders in
8 HotChalk. FAC ¶¶ 47-48. In January 2018, Pinnacle received a term sheet for a new transaction
9 that would increase BES’s equity interest in HotChalk from [REDACTED] FAC ¶ 49.
10 At the same time, Pinnacle’s warrants were converted on a [REDACTED] basis, meaning that one share
11 of HotChalk became [REDACTED] of a share. FAC ¶ 50. Pinnacle’s stake in HotChalk thus was
12 rendered virtually valueless. FAC ¶ 55.

13 *Pinnacle’s Claims Against BES*

14 Pinnacle filed this action in the Santa Clara County Superior Court on June 5, 2018.
15 Notice of Removal Exh. A, ECF 1. BES removed the action to federal district court on the basis
16 of diversity jurisdiction and filed a motion to dismiss pursuant to Rule 12(b)(6). Motion to
17 Dismiss, ECF 22. The Court granted the motion in part and denied it in part, with leave to amend.
18 Order, ECF 52. Pinnacle filed the operative FAC on February 11, 2019, asserting claims for:
19 (1) fraud; (2) negligent misrepresentation; (3) intentional interference with prospective economic
20 advantage; (4) negligent interference with prospective economic advantage; (5) unfair business
21 practices in violation of California Business & Professions Code § 17200 et seq.; and (6) unjust
22 enrichment. FAC, ECF 60.

23 BES moves to dismiss Claims 1-5, but “only challenges the allegations concerning the
24 2015 transaction.” Def.’s Motion at 5 n.3, ECF 65-4. Pinnacle opposes the motion.

25 **II. LEGAL STANDARD**

26 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
27 claim upon which relief can be granted tests the legal sufficiency of a claim.” *Conservation Force*
28 *v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (internal quotation marks and citation omitted).

1 While a complaint need not contain detailed factual allegations, it “must contain sufficient factual
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
4 claim is facially plausible when it “allows the court to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged.” *Id.*

6 **III. DISCUSSION**

7 BES asserts that Claims 1-5 are based in part on alleged misrepresentations made in
8 connection with the 2015 transaction, but that Pinnacle has failed to allege that it reasonably and
9 detrimentally relied on any such misrepresentations. As an initial matter, BES contends that
10 Pinnacle’s current allegations are inconsistent with the allegations in their original complaint, and
11 should be disregarded on that basis. Even if the current allegations are credited, BES asserts, they
12 are insufficient to plead reasonable and detrimental reliance. In opposition, Pinnacle argues that
13 BES’s motion is procedurally improper, as it seeks dismissal of only parts of Claims 1-5. Pinnacle
14 also asserts that the allegations of the FAC do not contradict those of the original complaint, and
15 that even if they do, such contradiction does not provide grounds for dismissal. Finally, Pinnacle
16 contends that it has pled reasonable and detrimental reliance.

17 **A. Motion for Partial Dismissal of Claims**

18 The Court begins by addressing Pinnacle’s assertion that the motion for partial dismissal of
19 Claims 1-5 is procedurally improper. There does not appear to be a Ninth Circuit case on point.
20 However, several district courts within the Ninth Circuit have found that “[b]y its own terms, there
21 does not appear to be any way to grant partial dismissal of a claim under Fed. R. Civ. P. 12(b)(6).”
22 *In re Netopia, Inc., Sec. Litig.*, No. C-04-03364 RMW, 2005 WL 3445631, at *3 (N.D. Cal. Dec.
23 15, 2005); *see also Redwind v. W. Union, LLC*, No. 3:18-CV-02094-SB, 2019 WL 3069864, at *4
24 (D. Or. June 21, 2019), report and recommendation adopted, No. 3:18-CV-2094-SB, 2019 WL
25 3069841 (D. Or. July 12, 2019) (“Although Rule 12(b)(6) is the proper procedural mechanism to
26 dismiss part of a complaint, many courts have recognized that a party may not use Rule 12(b)(6)
27 to dismiss only part of a claim.”); *Doe v. Napa Valley Unified Sch. Dist.*, No. 17-CV-03753-SK,
28 2018 WL 4859978, at *2 (N.D. Cal. Apr. 24, 2018) (“Defendants have not pointed to any

1 authority demonstrating that it may attack portions of a single claim on a motion to dismiss.”).

2 BES has not cited any authority permitting a motion for partial dismissal of claims under
3 Rule 12(b)(6). BES argues in its reply brief that granting its motion would narrow the issues for
4 trial. Def.’s Reply at 10, ECF 71. However, neither of the cases cited by BES addresses the
5 question raised by Pinnacle, whether Rule 12(b)(6) permits dismissal of part of a claim. In *Susilo*
6 *v. Wells Fargo Bank, N.A.*, No. CV 11-1814 CAS PJWX, 2012 WL 5179531, at *2 (C.D. Cal. Oct.
7 16, 2012), the court held that the plaintiff had not shown good cause for leave to amend to add
8 new claims or parties. In *Rambus Inc. v. Samsung Elecs. Co.*, No. C-05-02298 RMW, 2008 WL
9 3875397, at *3 (N.D. Cal. Aug. 18, 2008), the district court cited the text of Rule 56 expressly
10 allowing a party to move for summary judgment of part of a claim. Rule 12(b)(6) does not contain
11 similar language, and neither case applies here.

12 This Court is inclined to follow those decisions holding that Rule 12(b)(6) may not be used
13 to seek partial dismissal of a claim. The Court need not determine the scope of Rule 12(b)(6) at
14 this time, however, because BES’s motion is subject to denial on other grounds as discussed
15 below.

16 **B. Inconsistencies between Complaint and FAC**

17 BES argues that Pinnacle’s current allegations regarding Mr. Toth’s statements and the
18 2015 transaction should be disregarded as contradictory to allegations in original complaint. In
19 particular, BES asserts that while the original complaint alleged that Mr. Toth said Pinnacle could
20 sell in the tender offer transaction without exercising its warrants, the FAC alleges that Mr. Toth
21 said Pinnacle could sell up to 100% of its warrants directly to BES outside of the tender offer
22 transaction. *Compare* Compl. ¶¶ 33-34 *with* FAC ¶¶ 32-33. BES argues that Pinnacle has
23 fundamentally altered its story, and that the Court should simply disregard Pinnacle’s new
24 allegations that are inconsistent with its original allegations.

25 As Pinnacle points out, the Ninth Circuit has made clear that “there is nothing in the
26 Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make
27 inconsistent or even contradictory allegations.” *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d
28 856, 860 (9th Cir. 2007). Consequently, even if the allegations of the complaint and FAC are as

1 contradictory as argued by BES, they do not provide grounds for dismissal under Rule 12(b)(6).
2 *See id.* If BES believes that Pinnacle has pled in bad faith, it can seek other means of redress, such
3 as sanctions. *Id.*

4 BES makes an alternative argument that the FAC’s allegations regarding the 2015
5 transaction simply are not plausible when viewed against the backdrop of the original complaint.
6 BES cites several district court cases holding that inconsistencies between successive pleadings
7 may be considered when assessing the plausibility of the claims. *See Fasugbe v. Willms*, No. CIV.
8 2:10-2320 WBS, 2011 WL 2119128, at *5 (E.D. Cal. May 26, 2011) (“[T]he court need not ignore
9 the prior allegations in determining the plausibility of the current pleadings.”); *Stanislaus Food*
10 *Prod. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1076 (E.D. Cal. 2011) (“[Plaintiff
11 permissibly may alter the challenged conduct in an amended complaint, but the Court finds that in
12 light of the prior allegations, the plaintiff must allege more factual support. . . .”); *McKenna v.*
13 *WhisperText*, No. 5:14-CV-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015)
14 (“[W]hen evaluating an amended complaint, the court may also consider the prior allegations as
15 part of its context-specific inquiry based on its judicial experience and common sense to assess
16 whether” an amended complaint plausibly suggests an entitlement to relief.” (internal quotation
17 marks, citations, and alterations omitted)).

18 As to the plausibility standard itself, BES cites the Ninth Circuit’s decisions in *Eclectic*
19 *Properties* and *In re Century Aluminum* for the proposition that where the alleged facts are equally
20 consistent with conduct giving rise to liability and with benign conduct, the plaintiff must allege
21 additional facts tending to exclude the possibility that the benign explanation is true. *See Eclectic*
22 *Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (“When
23 considering plausibility, courts must also consider an obvious alternative explanation for
24 defendant’s behavior.” (internal quotation marks and citation omitted)); *In re Century Aluminum*
25 *Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (“When faced with two possible explanations,
26 only one of which can be true and only one of which results in liability, plaintiffs cannot offer
27 allegations that are merely consistent with their favored explanation but are also consistent with
28 the alternative explanation.” (internal quotation marks and citation omitted)). BES contends that,

1 applying these standards, Plaintiffs' claims based on the 2015 transaction should be dismissed as
2 implausible.

3 Even considering the discrepancies between the original complaint and the FAC, the Court
4 does not agree with BES that Pinnacle's theory of liability is implausible under the applicable
5 pleading standards. While some details have changed between the two iterations of Pinnacle's
6 complaint, the overall narrative regarding the 2015 transaction has not. *Compare* Compl. ¶¶ 32-37
7 with FAC ¶¶ 31-36. Pinnacle consistently has alleged that Mr. Toth, speaking for BES, told
8 Pinnacle that it could sell up to 100% of its warrants in the 2015 transaction without exercising
9 them to buy shares first. *See* Compl. ¶ 33; FAC ¶ 32. The original complaint was vague as to the
10 type of transaction in which Pinnacle would be able to sell up to 100% of its warrants. The Court,
11 like BES, read the original complaint to allege that Pinnacle was told it could sell its warrants in
12 the prorated tender offer, which is different from the current allegation that Pinnacle was told it
13 could sell its warrants to BES directly outside of the prorated tender offer. However, that
14 discrepancy, and the others highlighted by BES, could be attributable to miscommunication
15 between client and counsel, lack of precision in drafting, or other reasons that do not undermine
16 the current allegations of the FAC.

17 BES argues that “[i]t is simply not plausible that BES would want to buy warrants from
18 Pinnacle, which would merely give BES the right to buy stock, instead of stock itself,” and it
19 urges the Court to find that “the allegations in Pinnacle's Amended Complaint are equally
20 consistent with the notion that BES had no idea what HotChalk was saying to its shareholders and
21 warrant holders about their ability to participate in the transaction and never agreed to buy
22 Pinnacle's warrants at all.” Def.'s Motion at 10, ECF 65-4. The Court cannot determine that BES
23 would not have been amenable to purchasing Pinnacle's warrants or that Mr. Toth was not
24 speaking for BES when it communicated to Pinnacle, because Pinnacle has alleged exactly the
25 opposite in its FAC. In essence, BES is asking the Court to accept its version of events in place of
26 the version pled in the FAC. Doing so would go beyond the plausibility inquiry mandated by the
27 Supreme Court and the Ninth Circuit in the authorities cited above.

28

1 **C. Sufficiency of Pinnacle’s Allegations of Reasonable and Detrimental Reliance**

2 BES’s final argument is that Pinnacle has failed to allege reasonable and detrimental
3 reliance on Mr. Toth’s statements in connection with the 2015 transaction with the specificity
4 required under Federal Rule of Civil Procedure 9(b). *See* Fed. R. Civ. P. 9(b) (“In alleging fraud
5 or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).
6 Reasonable and detrimental reliance must be alleged for Pinnacle to succeed on its claims for
7 fraud (Claim 1), negligent misrepresentation (Claim 2), intentional interference with prospective
8 economic advantage (Claim 3), negligent interference with prospective economic advantage
9 (Claim 4), and unfair business practices (Claim 5). *See Damabeh v. 7-Eleven, Inc.*, No. 5:12-CV-
10 1739-LHK, 2012 WL 4009503, at *5 (N.D. Cal. Sept. 12, 2012) (dismissing fraud claim where
11 plaintiff “fail[ed] to adequately allege detrimental reliance, an essential element in pleading a
12 fraud claim”); *Grant v. Pensco Tr. Co., LLC*, No. 12-CV-06084-WHO, 2013 WL 4772673, at *8
13 (N.D. Cal. Sept. 3, 2013) (dismissing negligent misrepresentation claim where plaintiff “has not
14 adequately pleaded . . . reasonable reliance”); *BioResource, Inc. v. U.S. PharmaCo Distribution,*
15 *Ltd.*, No. C10-1053, 2010 WL 3853025, at *3-4 (N.D. Cal. Sept. 29, 2010) (dismissing claim for
16 intentional interference with prospective economic advantage where plaintiff relied on fraud as
17 independently wrongful act but failed to plead fraud with specificity); *Ixchel Pharma, LLC v.*
18 *Biogen Inc.*, No. 2:17-00715 WBS EFB, 2018 WL 558781, at *3 (E.D. Cal. Jan. 25, 2018)
19 (“[P]laintiff fails to allege independently wrongful conduct, a necessary requirement to sustain its
20 claim[] for . . . negligent interference with prospective economic advantage.”); *Tyler v. PNC Bank,*
21 *Nat. Ass’n*, No. C 10-3415 PJH, 2011 WL 1750798, at *2 (N.D. Cal. Apr. 22, 2011) (dismissing
22 UCL claim “based upon purported fraudulent conduct of [the] defendant” where plaintiff failed to
23 plead detrimental reliance with particularity).

24 BES asserts that based on the allegations of the FAC, it is clear that as of October 16,
25 2015, Pinnacle could not have had a reasonable expectation that it would be able to participate in
26 the financing round except as a shareholder in the tender offer. According to BES, Pinnacle has
27 not alleged any facts explaining why it did not immediately exercise its warrants during the four
28 days between October 16, 2015 and the record date of October 20, 2015. In its order dismissing

1 the original complaint, the Court found that Pinnacle’s alleged reliance of Mr. Toth’s statements
2 was not plausible for the period between October 16, 2015 and October 20, 2015, because
3 Pinnacle had failed to explain why it did not exercise its warrants during that four-day period so
4 that it would be eligible to participate in the tender offer. *See* Order at 5, ECF 52. The Court
5 granted Pinnacle leave to amend to cure that deficiency. *See id.*

6 The Court concludes that Pinnacle has cured the prior pleading deficiency. The FAC
7 alleges as part of the bases for Claims 1-5 that HotChalk CFO John Toth represented “that
8 Pinnacle would be able to sell ‘up to 100%’ of its warrants to BES; the representation was
9 attributable to BES; Pinnacle relied on the representation and therefore did not pursue other
10 opportunities that might have been available with respect to its warrants; and as a result Pinnacle
11 lost the opportunity to participate in the 2015 transaction, because BES reneged on its promise to
12 purchase up to 100% of Pinnacle’s warrants, and it limited participation in the prorated tender
13 offer to sellers who owned HotChalk shares (not warrants) as of October 20, 2015. FAC ¶¶ 31-36.
14 Pinnacle alleges that Mr. Toth stated on October 16, 2015 “that it would not be able to sell its
15 warrants (or the underlying shares) to BES *at all.*” FAC ¶ 34. Pinnacle was still trying to find out
16 why BES had reneged, and to work out a solution, as of October 19, 2015. FAC ¶ 35. Pinnacle
17 had no idea that BES would set the record date – the date by which Pinnacle would have had to
18 exercise its warrants and acquire shares in order to participate in the tender offer – as the very next
19 day, October 20, 2015. FAC ¶ 36.

20 As noted, Pinnacle alleges that it relied on the promise that BES would buy up to 100% of
21 its warrants separately from the tender offer. Pinnacle therefore had no need to inquire what the
22 tender offer record date was until it was too late. Pinnacle perhaps could have inquired about the
23 record date on October 19, 2015, when Pinnacle was still trying to determine why its alleged
24 agreement to sell its warrants to BES had fallen through, or on October 20, 2019, and still had
25 time to exercise its warrants. However, it is not apparent from the face of the FAC or the record
26 which may be considered on a Rule 12(b)(6) motion that Pinnacle could have exercised its
27 warrants so quickly. Moreover, because Pinnacle alleges that Mr. Toth stated on October 16, 2015
28 that Pinnacle would not be able to sell its warrants *or the underlying shares* to BES *at all*, FAC ¶

1 34, it is unclear that Pinnacle would have had any basis to believe that it could sell in the tender
2 offer even if it discovered the record date and exercised its warrants in time. Accordingly, the
3 Court finds Pinnacle's allegations to be sufficient to plead reasonable and detrimental reliance on
4 Mr. Toth's representations.


5 BES argues that Pinnacle has not pled any facts showing that BES had a duty to disclose
6 the record date to Pinnacle. The Court agrees. However, for the reasons discussed above, the
7 Court finds that Pinnacle has alleged facts sufficient to render its reliance on Mr. Toth's statements
8 reasonable at least through the record date of October 20, 2015. Finally, BES argues that Pinnacle
9 could not reasonably have relied on Mr. Toth's statements even before October 16, 2015, because
10 the warrants themselves contained restrictions on sale that could not be orally modified. BES
11 submits copies of the warrants, which may be considered by the Court because they are
12 incorporated by reference into the complaint. *See Louisiana Mun. Police Employees' Ret. Sys. v.*
13 *Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016). While the warrants do contain some restrictions on
14 sale, for example that advance written notice be given to HotChalk, the warrants do not appear to
15 preclude the type of direct sale to BES that Pinnacle alleges was promised by Mr. Toth. *See*
16 *Warrants* ¶ 8(b), Moreno Decl. Exhs. A-C, ECF 66-3. BES does not point to any provision of the
17 warrants that would have rendered Pinnacle's reliance on Mr. Toth's representations unreasonable.

18 In conclusion, the Court concludes that Pinnacle adequately and plausibly has alleged
19 reasonable reliance on Mr. Toth's statements, to its detriment, in connection with the 2015
20 transaction. Accordingly, BES's motion to dismiss is DENIED.

21 **IV. ORDER**

- 22 (1) BES's motion to dismiss is DENIED;
- 23 (2) This order is filed conditionally under seal; and
- 24 (3) The parties shall meet and confer regarding proposed redactions to the order before
25 it is filed in the public docket, and shall submit agreed-upon proposed redactions to
26 the Court on or before August 20, 2019.

27 Dated: August 6, 2019


BETH LABSON FREEMAN
United States District Judge