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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TYCE HELDENBRAND,)
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 Plaintiff,)
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 vs.)
)
 MULTIPOINT WIRELESS, LLC et al.,)
)
 Defendants.)
 _____)

2:12-cv-01562-RCJ-PAL

ORDER

This case arises out of the termination of a construction manager. Pending before the Court are Plaintiff’s motion to remand and Defendants’ motion to dismiss. For the reasons given herein, the Court denies the motion to remand and grants the motion to dismiss, with leave to amend.

I. FACTS AND PROCEDURAL HISTORY

Defendants Multipoint Wireless, LLC and Ericsson, Inc. offered Plaintiff Tyce Heldenbrand a position in Las Vegas as a cell tower construction manager at a salary of \$100,000 per year. (Compl. ¶ 10). Plaintiff moved from Kentucky to Las Vegas, Nevada to begin work in the summer of 2011, but upon arriving in Las Vegas, Defendants informed him for the first time that he would be working the “graveyard” shift from 7:00 p.m. to 8:00 a.m. (*Id.* ¶¶ 9–11). Plaintiff complained immediately and was unable to complete night shifts without sleep, but when the “recruiter” notified “upper management” on Plaintiff’s behalf, upper management

1 refused to allow Plaintiff to work days. (*Id.* ¶ 14–15). Plaintiff also discovered violations of local
2 permitting requirements, and the day after he reported some violations, Defendants fired him. (*Id.*
3 ¶¶ 16–19).

4 Plaintiff sued Defendants in state court on six causes of action: (1) violation of NRS
5 section 613.010; (2) promissory estoppel; (3) promissory fraud; (4) negligent misrepresentation;
6 and (5)–(6) retaliatory discharge. Defendants removed based upon diversity. Plaintiff has moved
7 to remand for failure to satisfy the amount-in-controversy requirement.

8 **II. LEGAL STANDARDS**

9 **A. Amount in Controversy**

10 Assuming complete diversity, federal courts have jurisdiction over state law claims
11 where the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332(a). Where a complaint
12 specifies no precise amount of damages, a removing defendant bears the burden of showing by a
13 preponderance of the evidence that the amount in controversy exceeds \$75,000. *See Sanchez v.*
14 *Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996).

15 **B. Dismissal**

16 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
17 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
18 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
19 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
20 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
21 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
22 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
23 failure to state a claim, dismissal is appropriate only when the complaint does not give the
24 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is

1 sufficient to state a claim, the court will take all material allegations as true and construe them in
2 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
3 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
4 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
5 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
6 with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own
7 case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79
8 (2009) (citing *Twombly*, 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff
9 pleads factual content that allows the court to draw the reasonable inference that the defendant is
10 liable for the misconduct alleged.”). In other words, under the modern interpretation of Rule
11 8(a), a plaintiff must do more than specify the legal theory under which he seeks to hold a
12 defendant liable; he also must identify the theory of his own case so that the court can properly
13 determine not only whether any such legal theory exists (*Conley* review), but also whether he has
14 any basis for relief under such a theory even assuming the facts are as he alleges (*Twombly-Iqbal*
15 review).

16 “Generally, a district court may not consider any material beyond the pleadings in ruling
17 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
18 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
19 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
20 whose contents are alleged in a complaint and whose authenticity no party questions, but which
21 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
22 motion to dismiss” without converting the motion to dismiss into a motion for summary
23 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
24 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
25 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court

1 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
2 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
3 2001).

4 **III. ANALYSIS**

5 **A. Motion to Remand**

6 Plaintiff argues that compensatory damages are only \$8333, or one month's pay. He also
7 argues that although he has asked for emotional distress damages, punitive damages, and
8 attorney's fees, there is no evidence as to what these damages should be.¹ Defendants respond
9 that Plaintiff has alleged a salary of over \$100,000 per year and that he was seeking "expectation
10 damages for the loss of the benefit of his bargain, incidental and consequential damages."

11 The Court is convinced by a preponderance of the evidence that the amount in
12 controversy exceeds \$75,000. The question is not answered by the amount prayed for in a
13 complaint. In Nevada, a plaintiff must include in his complaint a recital that he seeks in excess
14 of \$10,000 in order to invoke the general jurisdiction of the district court and avoid the limited
15 jurisdiction of the justice court, whether he in fact seeks \$10,000.01 or \$10,000,000,000. That
16 number is therefore meaningless to the amount-in-controversy for the purposes of a diversity
17 analysis. Here, Plaintiff has asked for all of Defendants' promises to him to be enforced via the
18 promissory estoppel claim and will most certainly ask the jury for the full amount of the contract.
19 If Defendant were to prevail on the theories he has presented, he would be entitled to at least
20 \$100,000 in compensatory damages alone. Also, the Nevada punitive damages statute provides
21 for up to \$300,000 dollars in cases where compensatory damages do not exceed \$100,000. *See*
22 *Nev. Rev. Stat. § 42.(1)(b)*. The Court will not remand.

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25 ¹Plaintiff does not challenge that these measures of relief are all included in an amount-in-controversy calculation.

1 **B. Motion to Dismiss**

2 Defendants ask the Court to dismiss Plaintiff’s first through fourth claims for violation of
3 NRS section 613.010, promissory estoppel, promissory fraud, and negligent misrepresentation.
4 Defendants do not move against the fifth and sixth claims for retaliatory discharge. Defendants
5 argue that the four challenged claims are based upon promissory or fraud theories, but that
6 Plaintiff has admitted in the Complaint that his expectations of working during the daytime under
7 the contract as opposed to during the nighttime were subjective and not based upon any
8 representations by Defendants. Defendants note that the only two representations pled are that
9 Defendants told him he would be employed as a construction manager and that he would be
10 compensated in the amount of \$100,000 per year. (Compl. ¶ 10). The requirement to work at
11 night was omitted from any representations, though Defendants knew of the requirement. (*Id.* ¶
12 13). Defendant notes that Plaintiff never asked about the working hours, but rather assumed they
13 would be during the day, and that he never revealed any inability to work at night or sleep during
14 the day.

15 **1. Section 613.010**

16 Nevada Revised Statutes section 613.010 makes it unlawful for an employer to persuade
17 a worker to change his location through false representations concerning, *inter alia*, the character
18 of the work or conditions of employment. *See Nev. Rev. Stat. § 613.010(1)(a), (c).*² Defendants

19
20 ²Defendants are correct that the time of day of the work is probably irrelevant to the
21 character of the work in most instances. “Character” means, *inter alia*, “main or essential nature
22 especially as strongly marked and serving to distinguish.” Merriam Webster Online Dictionary (5
23 Oct., 2012, 10:45 AM), <http://www.merriam-webster.com/dictionary/character>. It is unlikely that
24 the nature of the task of supervising construction of cell towers is essentially changed during
25 hours of darkness, but the conditions of the work are surely changed during hours of darkness.
The Court rejects Defendants’ argument that day versus night hours does not fall under “sanitary
or other conditions of . . . employment.” Defendants note that the time of work does not relate to
sanitary conditions. This is true, but it does relate to “other” conditions. “Other” cannot be
textually limited to some narrow genus by “sanitary” alone, because there is no second term
listed along with “sanitary” in subsection (1)(c) from which a limiting genus can be reasonably

1 argue Plaintiff has not alleged Defendants made any false representations, but only that they
2 failed to inform him of a condition that he assumed did not apply. The Court finds that Plaintiff
3 has not sufficiently pled a false representation by omission. *See* discussion *infra*, Part III.B.3.

4 The Nevada Supreme Court has not addressed the issue of whether section 613.010
5 claims must be pled with particularity under Rule 9(b), but another court of this District has
6 assumed they must be. *See Cundiff v. Dollar Loan Center, LLC*, 726 F. Supp. 2d 1232, 1240 (D.
7 Nev. 2010) (Pro, J.). In this case, where the alleged misrepresentation consists of an omission,
8 Plaintiff must plead “(1) precisely what was omitted; (2) who should have made a representation;
9 (3) the content of the alleged omission and the manner in which the omission was misleading;
10 and (4) what [the defendant] obtained as a consequence of the alleged fraud.” *Republic Bank &*
11 *Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 256 (6th Cir. 2012). Plaintiff has alleged
12 that the fact of nighttime hours were omitted, that both Defendants should have informed him of
13 this fact during their communications with him, that the omission was misleading because
14 daytime work in this field is the normal practice, and that Defendants gained his work (for a
15 couple days at least) as a consequence (and that he was deprived of the benefit of the bargain,
16 which is likely not an appropriate measure of damages under a fraud claim—Plaintiff’s damages
17 under the fraud claim are more likely measured by his lost opportunities and the price of his
18 inconveniences).

19 The Court will dismiss the claim, with leave to amend, however, because Plaintiff has
20 alleged no duty to disclose. Also, it is consistent with the Complaint that Plaintiff did not ask
21 about the work hours. Nor is it alleged that daytime work hours in this line of work are universal

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23 ascertained. *See* Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal*
24 *Texts* 206 (2012). In circumstances such as these, where “other” follows a single example,
25 “other” should be read as broadly as it reasonably can be. The Court finds that the time of day
that the work is to be performed comfortably fits within “other conditions of . . . employment.”
See Nev. Rev. Stat. § 613.010(1)(c).

1 or nearly so, such that Plaintiff would be justified in presuming daytime work hours in the face of
2 silence on the issue, but only that daytime work hours are more common than nighttime work
3 hours.

4 **2. Promissory Estoppel**

5 To establish promissory estoppel four elements must exist: (1) the party to be
6 estopped must be apprised of the true facts; (2) he must intend that his conduct shall
7 be acted upon, or must so act that the party asserting estoppel has the right to believe
8 it was so intended; (3) the party asserting the estoppel must be ignorant of the true
9 state of facts; (4) he must have relied to his detriment on the conduct of the party to
10 be estopped.

11 *Chequer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 655 P.2d 996, 998–99 (Nev. 1982).

12 promissory estoppel is a substitute for consideration, where a lack of consideration would
13 otherwise prevent the finding of an enforceable contract; it is *not* a substitute for terms in an
14 otherwise enforceable agreement. *See Vancheri v. GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989)
15 (“The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is
16 intended as a substitute for consideration, and not as a substitute for an agreement between the
17 parties.”). Plaintiff argues that the other party failed to inform him of a condition of work under
18 the contract that he assumed did not exist. Although fraud can result from an omission,
19 promissory estoppel will not result from silence. There is such a theory as “estoppel by silence,”
20 but it is a defensive theory, as when a person who has remained silent when another purchases
21 goods to which he has title may not thereafter claim that his title is superior to the purchaser’s.
22 *See* 28 Am. Jur. 2d *Estoppel and Waiver* § 57 (2012). Promissory estoppel requires a “definitive
23 promise.” *See Vancheri*, 777 P.2d at 369. The Court will dismiss this claim, with leave to
24 amend.
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26 **3. Promissory Fraud**

27 “Promissory fraud,” as it is sometimes called, is simply a fraud claim where the fact about
28 which the tortfeasor deceives the victim is the tortfeasor’s intention not to perform from the
29

1 outset. *See Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992) (citing *Webb v. Clark*, 546
2 P.2d 1078 (Or. 1976)). The standard elements of fraud apply: (1) a false representation by the
3 defendant; (2) the defendant’s knowledge or belief that the representation is false (or insufficient
4 basis for making the representation); (3) the defendant’s intention to induce reliance; (4) the
5 plaintiff’s justifiable reliance; and (5) resulting damage. *Id.*

6 Defendant argues that Plaintiff has failed to plead any false representation. “Generally,
7 an action in deceit will not lie for nondisclosure. For a mere omission to constitute actionable
8 fraud, a plaintiff must first demonstrate that the defendant had a duty to disclose the fact at
9 issue.” *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 110 (1998) (citing *Epperson v. Roloff*, 719 P.2d
10 799, 803 (Nev. 1986)) (citation omitted), *overruled on other grounds by GES, Inc. v. Corbitt*, 21
11 P.3d 11 (Nev. 2001). However, such a duty can arise from a fiduciary relationship or a
12 relationship of special confidence. *See id.* “A party’s superior knowledge thus imposes a duty to
13 speak in certain transactions, depending on the parties’ relationship. ‘Nondisclosure will become
14 the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order
15 that the party with whom he is dealing may be placed on an equal footing with him’” *Id.* (quoting
16 *Mackintosh v. Jack Matthews & Co.*, 855 P.2d 549, 553 (Nev. 1993) (quoting *Mancini v. Gorick*,
17 536 N.E.2d 8, 9–10 (Ohio Ct. App. 1987))). Also, “a duty to disclose may arise from ‘the
18 existence of material facts peculiarly within the knowledge of the party sought to be charged and
19 not within the fair and reasonable reach of the other party.’” *Id.* (quoting *Villalon v. Bowen*, 273
20 P.2d 409, 415 (Nev. 1954)). Plaintiff here has not plausibly asserted a fraud by omission claim.
21 Nor has he plausibly alleged that Defendants concealed an intention not to perform (promissory
22 fraud). Plaintiff has alleged that Defendants concealed the known fact of nighttime working
23 hours. But he has not sufficiently pled facts giving rise to a fiduciary relationship or a similar
24 duty to make this disclosure absent an inquiry. The Court will dismiss, with leave to amend.

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1 **4. Negligent Misrepresentation**

2 Under Nevada law, a claim for negligent misrepresentation requires a plaintiff
3 to plead: 1) a representation that is false; 2) that the representation was made in the
4 course of the defendant’s business or in any action in which he has a pecuniary
5 interest; 3) the representation was for the guidance of others in their business
6 transactions; 4) the representation was justifiably relied upon; 5) that such reliance
7 resulted in pecuniary loss to the relying party; and 6) that the defendant failed to
8 exercise reasonable care or competence in obtaining or communicating the
9 information.

10 *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Group, Inc.*, 460 F. Supp. 2d 1246, 1262 (D. Nev.
11 2006) (Ezra, J.). For the same reasons that the fraud (intentional misrepresentation) claim does
12 not survive, the Court will also dismiss this claim, with leave to amend.

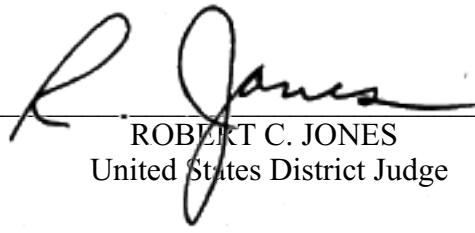
13 **CONCLUSION**

14 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 7) is DENIED.

15 IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 8) is GRANTED,
16 with leave to amend.

17 IT IS SO ORDERED.

18 Dated this 18th day of October, 2012.

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ROBERT C. JONES
United States District Judge