IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON JV LLC, a New York limited liability company,

Plaintiff,

v.

ADVANCED INVESTMENT CORP. d/b/a AIC, an Oregon limited liability company; AUSTIN L. WALKER, an individual; JOSEPH RUSSI, an individual; ANTHONY J. FAVREAU and CYNTHIA L. FAVREAU, Trustees of the Favreau Family Trust; JOHN P. RUDE and CHRISTINE ANN SULLIVAN, individuals; DW&S, LLC, an Oregon limited liability company; CLS INVESTMENTS, LLC, an Oregon limited liability company; JOANNA NASSET and STEVEN NASSET, Trustees of the J&S Enterprises; CHARLES D. EVERARD, ADA M. EVERARD, DONNA J. SWANSON, and DIANE M. DUYCK, individuals; ROBBIN DENISE FREEDMAN, Trustee of the Robbin Denise Freedman Revocable Living Trust; SCHULTZ REAL ESTATE INVESTMENTS, LLC, an Oregon

No. 3:22-cv-00337-HZ

OPINION & ORDER

limited liability company, ROBERT EDISON SILVIS and MICHAEL J. SILVIS, Trustees for the Silvis Family Revocable Trust, ROBERT BAYMAN and DELORES BAYMAN, individuals; EUGENE W. GRAMZOW, Trustee for the Eugene W. Gramzow Revocable Trust; JOHN V.K. FEARING and SUSAN L. BAKER, Co-Trustees of the Baker Fearing Trust; EMILY R. COLLINS, NEIL L. WARNE, CHRISTY WARNE, MARK ALLEN DITGEN, LINDA CAROL DITGEN, STEPHEN F. DUFFY, AMY S. LA GRANDER, MARGIE NEMCIK-CRUZ, JONNY B. WATSON, REX B. BALLENGER, BONNIE L. BALLENGER, MICHAEL A. WELT, ROBERT A. ZOLLER, DIANA GREENE, individuals; RH VENTURES, LLC, an Oregon limited liability company; ERVIN WOOD, an individual; J&D OR PROPERTIES, LLC, an Oregon limited liability company; MATTHEW DAVID FREEDMAN, Trustee of the Matthew David Freedman Revocable Trust; CARL M. DUTLI, Trustee of the CMD Retirement Trust; MARGARET J. BROWN OLSON, Trustee of the Margaret J. Brown Trust; JOHN M. COMPTON, BETTY COMPTON, KURT D. CONNELL, ERIN RONNIE CONNELL, individuals; CRAIG ALACANO, CYNTHIA L. ALACANO, Co-Trustees of the Craig and Cynthia Alacano Joint Trust; VIC MITCHELL, ANDREW STRICKLAND, JOSEPH RUSSI, individuals.

Defendants,

v.

MENACHEM SILBER,

Third-Party Defendant.

Joseph M. Mabe
Keith A. Pitt
Slinde Nelson
425 NW 10th Ave, Suite 200
Portland, OR 97209

Daniel H. Roseman
Hinman Howard & Kattell, LLP
707 Westchester Ave, Suite 407
White Plains, NY 10604

Paul T. Sheppard
Hinman Howard & Kattell, LLP
80 Exchange Street, PO Box 5250
Binghamton, NY 13902

Attorneys for Plaintiff and
Third-Party Defendant

David P. Smith
The Smith Firm, PC
1754 Willamette Falls Drive
West Linn, OR 97068

Robert A. Smejkal
800 Willamette Street, Suite 800
PO Box 1758
Eugene, OR 97440

Attorneys for Defendants

HERNÁNDEZ, District Judge:

Plaintiff Oregon JV LLC brings this action against Defendants Advanced Investment Corp. (d/b/a "AIC"), Austin Walker—an AIC employee, Joseph Russi, and fifty-one individual "Defendant Lenders."[1] AIC managed a pool of construction loans to Mr. Russi, each of which was funded by a distinct Defendant Lender. Plaintiff's assumption of those loans form the basis of its claims. Plaintiff brings claims for fraud, unjust enrichment, negligent misrepresentation,

[1] On September 16, 2022, Plaintiff dismissed Defendants Anthony J. Favreau and Cynthia L. Favreau from this action.

and rescission of contract. Defendants AIC, Walker, and all Defendant Lenders except CLS Investments, LLC filed a joint Amended Answer to Plaintiff's Amended Complaint, in which they assert counterclaims as well as third-party claims against Third-Party Defendant Menachem Silber.[2] Plaintiff and Third-Party Defendant move to dismiss all claims against Third-Party Defendant as well as Defendants' counterclaims for fraud and unjust enrichment under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). The Court denies Plaintiff and Third-Party Defendant's motion.

BACKGROUND

Defendant AIC, a construction lender, originated and managed dozens of construction loans to Defendant Russi for the purpose of constructing homes on various real estate parcels in Oregon. Second Am. Compl. ("SAC") ¶¶ 44, 46. Russi held title to the various properties. SAC ¶ 46. Each loan at issue in this case was funded by a distinct individual Defendant Lender. SAC ¶ 49. In late 2019, construction slowed on the various projects, and Russi began to seek additional funding. First Am. Ans. ("FAA") ¶ 149. When construction work shut down in March 2020 due to the COVID-19 pandemic, Russi received a high-interest loan from Third-Party Defendant Silber's company, TopRock Funding, LLC ("TopRock"), which encumbered Russi's entire portfolio. FAA ¶ 152. In Fall 2020, after Russi had filed for bankruptcy, Silber worked with Russi to release his bankruptcy. FAA ¶ 157. Silber obtained information from a local realtor on each of the Russi properties, including the cost to finish construction, the remaining construction loan reserves and loan balances, and the anticipated sales price for each property.

[2] Defendant Russi and Defendant CLS Investment, LLC each separately filed Answers and asserted counterclaims against Plaintiff. Those counterclaims are not addressed in this Opinion and Order. The Defendants whose claims are the subject of this motion to dismiss are collectively referred to as "Defendants" throughout this Opinion and Order.

FAA ¶ 158. In November 2020, Silber sent representatives to Oregon to meet with Russi, Russi's manager, and the realtor. Then, in December 2020, TopRock and Russi entered into a "Transfer Agreement," by which TopRock would waive the amount owed on the high-interest loan and release its lien position in exchange for Russi transferring all of the properties owned by him to TopRock. FAA ¶ 161.

Also in December 2020, Silber began discussions with Defendant Walker, as agent of AIC, about taking over Russi's projects and assuming Defendant Lenders' construction loans. FAA ¶¶ 162-165; In February 2021, after Silber made a visit to Oregon to inspect the properties, he informed Walker that he discovered Russi had more debt than he had anticipated. FAA ¶ 164. At that time, Silber asked Defendant Lenders to waive past accrued interest and legal fees dating back to March 2020 in exchange for paying six months of interest up front and guaranteeing certificates of occupancy for all built homes within six months moving forward, which would allow the homes to be sold. FAA ¶ 165.

On March 17, 2021, Silber registered Oregon JV LLC as a limited liability company in Oregon. FAA ¶ 167. Shortly after, ownership of Russi's properties transferred to Plaintiff Oregon JV LLC. FAA ¶ 169. Then, on April 7, 2021, Silber executed Assumption Agreements on behalf of Plaintiff for all of Defendant Lenders' loans. FAA ¶ 169. According to Defendants, over the next several months, Plaintiff and Silber failed to complete construction on the properties because of mismanagement and could not sell any homes that were ready to be sold because of title issues. FAA ¶¶ 170-176.

Then, in December 2021, Plaintiff stopped paying interest on the assumed loans, and all construction on the properties ceased. FAA ¶ 178. Around that time, Defendants AIC and Walker also learned that Plaintiff had not paid fire insurance premiums, taxes, or utilities on the

properties as required by the terms of the trust deeds, which were obligations Plaintiff assumed under the Assumption Agreements. FAA ¶ 179.

STANDARDS

I. Rule 12(b)(6) – Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). When evaluating the sufficiency of a complaint's factual allegations, the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). A motion to dismiss under Rule 12(b)(6) will be granted if a plaintiff alleges the "grounds" of his "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* (citations and footnote omitted).

To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, a complaint must state a plausible claim for relief and contain "well-pleaded facts" that "permit the court to infer more than the mere possibility of misconduct[.]" *Id.* at 679.

II. Rule 12(b)(2) – Personal Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(2), a defendant may move for dismissal on the grounds that the court lacks personal jurisdiction. The plaintiff has the burden of showing personal jurisdiction. *Will Co. v. Lee*, 47 F.4th 917, 921 (9th Cir. 2022) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)).

> When the Defendant's motion is based on written materials rather than an evidentiary hearing . . . we only inquire into whether [the plaintiff's] pleadings and affidavits make a prima facie showing of personal jurisdiction. Uncontroverted allegations in the complaint must be taken as true, and conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor.

Will, 47 F.4th at 921 (internal quotation marks and citation omitted).

In a diversity case, the federal court looks to the law of the state in which it sits to determine whether it has personal jurisdiction over a non-resident defendant. *W. Helicopters, Inc. v. Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1489 (D. Or. 1989); *see also Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) ("When no federal statute governs personal jurisdiction, the district court applies the law of the forum state.").

Oregon Rule of Civil Procedure 4 governs personal jurisdiction in Oregon courts. Oregon's long-arm statute confers jurisdiction to the extent permitted by due process under the United States Constitution. *Gray & Co. v. Firstenberg Mach. Co., Inc.*, 913 F.2d 758, 760 (9th Cir. 1990) (citing Or. R. Civ. P. 4(L); *Oregon ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 657 P.2d 211 (1982)). Thus, the court may proceed directly to the federal due process analysis. *See Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (when state long-arm statute reaches as far as the Due Process Clause, the court need only analyze whether the exercise of jurisdiction complies with due process); *see also Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 909 (D. Or. 1999) (noting

that because "Oregon's catch-all jurisdictional rule confers personal jurisdiction coextensive with due process . . . the analysis collapses into a single framework and the court proceeds under federal due process standards").

To comport with due process, "the nonresident generally must have 'certain minimum contacts [with the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). The forum state may exercise either general or specific jurisdiction over a non-resident defendant. *Boschetto*, 539 F.3d at 1016.

DISCUSSION

Defendants bring eleven counterclaims/third-party claims against Plaintiff and Third-Party Defendant: (1) Breach of Contract; (2) Rescission & Restitution; (3) Unjust Enrichment; (4) Fraud; (5) Declaratory Judgment; (6) Abuse of Process; (7) Unlawful Trade Practices; (8) Injunctive Relief; (9) Conversion; (10) Financial Elder Abuse under Oregon Revised Statute 124.100 *et seq.*; and (11) Quiet Title.[3] Third-Party Defendant argues that all claims against him should be dismissed because Defendants fail to adequately plead individual liability and the Court lacks personal jurisdiction over him. Plaintiff and Third-Party Defendant also argue that Defendants fail to meet the heightened pleading standard for fraud claims under Federal Rule of Civil Procedure 9(b), and their fraud and unjust enrichment claims are duplicative of their breach of contract claim.

[3] Defendants have agreed to voluntarily dismiss their seventh counterclaim/third-party claim for unlawful trade practices. *See* Mabe Decl. Ex A, ECF 79.

I. Claims Against Third-Party Defendant

Defendants assert all claims jointly against Plaintiff Oregon JV LLC and Third-Party Defendant Silber. In their First Amended Answer, in which they assert the counterclaims and third-party claims, Defendants allege:

> At all times material, Silber held himself out as the principal member of Plaintiff, and all actions taken by Plaintiff in this matter were at his individual direction and control. At all times material hereto, Silber was the alter-ego of Plaintiff and both the written and verbal communications with Defendants were undertaken at his express direction and control. Upon information and belief, Silber operated and exercised control over Plaintiff for his own personal benefit and to the detriment and harm of Defendants. As a result of the conduct alleged in the Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint, Silber is personally liable for the debts, liabilities, and obligations of Plaintiff.

FAA ¶ 146. Third-Party Defendant argues that all claims against him should be dismissed because (1) Defendants do not plead facts sufficient to support that he is personally liable for the claims alleged against Plaintiff, a limited liability company ("LLC"); and (2) Defendants do not state a basis for the Court to have personal jurisdiction over him.

A. Individual Liability

Under Oregon law, "the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise" belong solely to the LLC. Or. Rev. Stat. § ("O.R.S.") 63.165(1). Thus, "[a] member or manager is not personally liable for a debt, obligation or liability of the [LLC] solely by reason of being or acting as a member or manager." *Id.* In other words, for Defendants to state a claim against Third-Party Defendant, they must allege individual wrongful contact by Third-Party Defendant apart from simply being a member or manager of Plaintiff. *See Kinzua Res., LLC v. Or. Dep't of Env't Quality*, 366 Or. 674, 687, 468 P.3d 410, 417 (2020) (internal quotation marks and citation omitted) ("[M]embers and managers of an LLC are not vicariously liable for the LLC's debts, obligations, or liabilities.").

But Members and managers of LLCs may be held liable for their own acts or omissions "to the extent that those acts or omissions would be actionable against the member or manager if that person were acting in an individual capacity." *Cortez v. Nacco Material Handling Grp.*, 356 Or. 254, 268-69, 337 P.3d 111, 119 (2014) (en banc). Claims against individuals acting on behalf of an LLC need not be distinguished from claims against the LLC itself. A member or manager is responsible "even if the allegedly tortious actions were taken in the individual's capacity as member of the LLC in furtherance of the LLC's business." *Nebulae Inc. v. Taylor*, No. 3:20-cv-946-JR, 2020 WL 8474587, at *3 (D. Or. Oct. 19, 2020); *see Cortez*, 356 Or. at 269 (noting that O.R.S. 63.165(1) does not shield the owner/member of an LLC "from responsibility for its own negligent acts in managing [the LLC]"). Thus, "members and managers remain personally liable for the actions that they take on behalf of an LLC to the same extent that they would be liable if they were acting in an individual capacity." *Cortez*, 356 at 268 (internal quotation marks and brackets omitted).

Defendants allege multiple facts to support their claims for individual liability against Third-Party Defendant. Many of the alleged wrongful acts by Third-Party Defendant occurred before the LLC entity was even formed. Defendants claim that in December 2020, Third-Party Defendant executed a transfer agreement with Mr. Russi for TopRock to obtain ownership of all the properties subject to Defendants' loans. Defendants also allege that Third-Party Defendant was negotiating the Assumption Agreements in February 2021, before he registered the LLC in Oregon in March 2021. Defendants' Third-Party Complaint states that shortly after executing the Assumption Agreements on behalf of the Plaintiff LLC, Third-Party Defendant changed the terms of the deal. Lastly, alleging Third-Party Defendant exercised control over Plaintiff, Defendants claim that he stopped paying interest on the loans as well as insurance premiums,

taxes, and utilities on the properties. All these allegations in the Third-Party Complaint adequately state a claim for individual liability on the part of Third-Party Defendant, even if some of the alleged tortious acts were done on behalf of Plaintiff.

Third-Party Defendant argues that Defendants have not adequately alleged facts to "pierce the corporate veil" and show that he is Plaintiff's "alter-ego." "In Oregon, the doctrine of corporate veil piercing applies to LLCs in the same way that it does to corporations." *Sterling Sav. Bank v. Emerald Dev. Co.*, 266 Or. App. 312, 341, 338 P.3d 719, 735 (2014). A party who seeks to pierce a corporate veil must show: "(1) a shareholder actually controlled or shared in the actual control of the corporation; (2) the shareholder engaged in improper conduct in the exercise of control over the corporation; and (3) the shareholder's improper conduct caused the plaintiff's inability to obtain an adequate remedy from the corporation." *Foster v. Beber*, No. 3:16-CV-02294-BR, 2021 WL 3698904, at *7 (D. Or. June 14, 2021) (citing *Salem Tent & Awning Co. v. Schmidt*, 79 Or. App. 475, 481, 719 P.2d 899, 903 (1986)).

Third-Party Defendant contends that Defendants have failed to allege facts showing he exercised control over Plaintiff or directly engaged in improper conduct. This argument is unavailing. As the Court has noted, Defendants adequately allege that Third-Party Defendant formed the Plaintiff LLC for the purpose of assuming Defendants' loans from Mr. Russi, negotiated and executed the Assumption Agreements on behalf of Plaintiff, and completely controlled Plaintiff's performance on the agreements.

However, as to the third element for piercing the corporate veil, nowhere in Defendants' Third-Party Complaint do they allege that they cannot obtain an adequate remedy from the LLC itself. Defendants do not claim that Plaintiff is insolvent or otherwise unable to satisfy any debts it owes or any judgment obtained against it. And although Defendants have adequately alleged

direct misconduct by Third-Party Defendant, they have not alleged any improper conduct, such as inadequate capitalization, milking, or comingling of assets, that would prevent them from collecting on a judgment against Plaintiff.

Third-Party Defendant also asserts that Defendants' "alter-ego" theory of liability fails. "Under some circumstances corporate shareholders who control and dominate a corporation may be held personally liable if the corporation is a mere "instrumentality" or "alter ego" and where fraud or injustice has resulted." *Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 294 Or. 94, 104, 654 P.2d 1092, 1098 (1982). Similar to "piercing the corporate veil," to succeed on an "alter-ego" theory for member or shareholder liability, the party bringing such claims "must allege and prove not only that the debtor corporation was under actual control of the shareholder but also that the plaintiff's inability to collect from the corporation resulted from improper conduct on the part of the shareholder." And as with Defendants' piercing the corporate veil argument, they have alleged no actions by Third-Party Defendant that impede their ability to collect from the LLC if successful on their on their claims against Plaintiff. Thus, Defendants' claim for Third-Party Defendant's liability based on "corporate veil piercing" and "alter-ego" theories fails.

Nevertheless, Defendants allege facts sufficient to show direct conduct by Third-Party Defendant that caused them harm and justify a claim for individual liability. Third-Party Defendant is responsible for his own actions. Accordingly, Third-Party Defendant is not shielded from liability on the claims brought against him simply because he acted, at least in part, on behalf of Plaintiff.

B. Personal Jurisdiction

Third-Party Defendant asserts that because he is a citizen of New York and because he was not an individual party to the transactions in this case, there are no grounds for the Court to have personal jurisdiction over him. Courts may exercise personal jurisdiction over a party in two ways: "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Under general jurisdiction, a court may exercise jurisdiction over "any and all claims" brought against a party who is "essentially at home" in the forum state. *Id.* (quoting *Goodyear Dunlap Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Defendants acknowledge that Third-Party Defendant is not a resident of Oregon. But they argue the Court has general jurisdiction because of Third-Party Defendant's "continuous and systematic general business contacts" with the state. *Schwarzenegger*, 374 F.3d at 801. But Defendants' Third-Party Complaint only alleges facts pertaining to Third-Party Defendants' actions and contracts with Oregon related to this case. Defendants allege no facts showing Third-Party Defendant has conducted any other business in Oregon, let alone "systematic and continuous" business engagement with the state. Thus, the Court has no basis to exert general jurisdiction over Third-Party Defendant.

A court has specific personal jurisdiction where "the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks and citations omitted). For specific jurisdiction, the defendant must have purposely availed itself to the forum state, and "[t]he plaintiff's claims . . . 'must arise out

of or relate to the defendant's contacts with the forum." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *Bristol-Meyers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 262 (2017)).

The Ninth Circuit uses a three-part test to determine whether a party has sufficient minimum contacts to be subject to specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Picot v. Weston, 780 F.3d 1206, 1211 (9th Cir. 2015) (quoting *Schwarzenegger*, 374 F.3d at 802). The plaintiff bears the burden on the first two parts of the test. *Id.* If the plaintiff succeeds, "the burden shifts to the defendant to 'set forth a "compelling case" that the exercise of jurisdiction would not be reasonable.'" *Id.* at 1212 (quoting *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011)).

Plaintiffs allege more than enough facts to show that Third-Party Defendant purposely directed activities and purposely availed himself to the state. Third-Party Defendant connected with a local realtor to assess the value of Mr. Russi's properties in Oregon and the cost to complete construction on those properties. He sent representatives to Oregon to tour the properties. He then executed a transfer agreement with Russi to obtain ownership of the properties. In February 2021, Third-Party Defendant flew to Oregon himself to inspect the properties. He registered Oregon JV LLC as an Oregon limited liability company and executed the Assumption Agreements to assume the construction loans made by Oregon residents to build

homes on Oregon properties. Defendants' claims arise out of this activity in Oregon by Third-Party Defendant. Thus, the first two elements of the Ninth Circuit test are met.

Lastly, Third-Party Defendant makes no argument as to why the exercise of specific jurisdiction, based on his business activity in Oregon that gives rise to Defendants' claims, would be unreasonable or unjust. Accordingly, the Court has personal jurisdiction over Third-Party Defendant as to the claims against him.

II. Fraud

Defendants fraud counterclaim/third-party claim alleges that Plaintiff and Third-Party Defendant knowingly made false material representations to Defendants to induce Defendant Lenders to agree to allow Plaintiff to assume the loans and related obligations from Mr. Russi. Plaintiff and Third-Party Defendant move to dismiss this claim, arguing that Defendants have not met the heightened pleading standard for fraud claims under Federal Rule of Civil Procedure 9(b). Plaintiff and Third-Party Defendant also assert that Defendants' fraud claim is duplicative of their breach of contract claim.

To state a claim for fraud under Oregon law, a plaintiff must allege particular facts showing: "[1] the defendant made a material misrepresentation that was false; [2] the defendant did so knowing that the representation [w]as false; [3] the defendant intended the plaintiff to rely on the misrepresentation; [4] the plaintiff justifiably relied on the misrepresentation; and [5] the plaintiff was damaged as a result of that reliance." *Great Am. Ins. Co. v. Linderman*, 116 F. Supp. 3d 1183, 1192 (D. Or. 2015) (quoting *Strawn v. Farmers Ins. Co.*, 350 Or. 366, 352, 258 P.3d 1199, 1209 (2011)). The federal rules require that a party "state with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b). In the Ninth Circuit, "[a] pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the

defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir. 1993) (internal quotation marks and citation omitted). To survive a motion to dismiss, the party asserting a fraud claim must allege facts showing "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks and citation omitted). But while the conduct constituting fraud must be alleged with particularity, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

In their Amended Answer and Third-Party Complaint, Defendants provide sufficient details about the specific actions by Plaintiff and Third-Party Defendant that they allege constitute fraud. Defendants describe specific material representations made by Third-Party Defendant that he and Plaintiff would complete construction on the properties in a timely manner, pay interest on the loans as required under the Assumption Agreements, and generally maintain the value of the properties. Defendants generally allege that Third-Party Defendant made these representations knowing that they had no intention of completing construction. Under Rule 9(b), Defendants specific allegations of the misrepresentations made and general allegations of Third-Party Defendant's knowledge and intent are sufficient to state a claim for fraud.

In addition, at the pleading stage, Defendants' fraud claim is not duplicative of their breach of contract claim. A general allegation that a party failed to perform on a contract does not state a claim for fraud. *See Sizer v. New England Life Ins. Co.*, 871 F. Supp. 2d 1071 (to show fraud based on failure to perform on a contract, "a plaintiff must do more than show the eventual beach" of that contract); *Hill Meat Co. v. Sioux-Preme Packing Co.*, No. 08-1062-SU, 2009 WL 1346606, at *6 (D. Or. May 13, 2009) ("Oregon courts have been reluctant to convert

a breach of contract claim into a fraud claim without additional allegations and proof of fraudulent intent."). But "a fraud claim based on a promise not performed may be actionable if the party never intended to perform the contract or acted with reckless disregard regarding its ability to perform." *Metropolis Holdings, LLC v. SP Plus Corp.*, No. 3:20-cv-00612-SB, 2020 WL 4506778, at *4 (D. Or. Aug. 5, 2020).

With its fraud claim, Defendants make allegations beyond simple breach of contract. Defendants allege that Plaintiff and Third-Party Defendant represented to them that they would complete construction on the properties even though they never intended to do so. As alleged in Defendants' fraud claim, Plaintiff and Third-Party Defendant knew at the time that their representations were false. At the pleading stage, Defendants have alleged facts that, taken as true, are sufficient for the Court to infer that Plaintiff and Third-Party Defendant either did not intend to perform or acted with reckless disregard as to their ability to perform their end of the bargain when they negotiated and executed the Assumption Agreements. Accordingly, Defendants have stated a claim for fraud that is not duplicative of their breach of contract claim.

III. Unjust Enrichment

Plaintiff and Third-Party Defendant also move to dismiss Defendants' unjust enrichment claim as duplicative of their breach of contract claim. Under Oregon law, a party asserting a claim for unjust enrichment must allege that "(1) [the] party has conferred a benefit on another, (2) the recipient is aware that a benefit has been received, and (3) 'under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it.'" *Confederated Tribes of Warm Springs Rsrv. v. Ambac Assur. Corp.*, Civ. No. 10-130-KI, 2010 WL 4875657, at *6 (D. Or. Nov. 17, 2010) (quoting *Summer Oaks Ltd. P'ship v. McGinley*, 183 Or. App. 645, 654, 55 P.3d 1100, 1104 (2002). Unjust enrichment is a "quasi-contract" claim,

which "presupposes that no enforceable contract exists." *Id.* (quoting *Kashmir v. Patterson*, 43 Or. App. 45, 48, 602 P.2d 294, 296 (1979). Thus, a claim for unjust enrichment fails "when it is undisputed that a valid contract exists." *Harney v. Associated Materials, LLC*, No. 3:16-cv-1587-SI, 2018 WL 468303, at *4 (D. Or. Jan. 18, 2018) (citation and ellipses omitted).

But under Oregon law, "a party may plead alternative claims for breach of both an express contract and an implied contract." *Confederated Tribes*, 2010 WL 4875657, at *7. Thus, a party may bring an unjust enrichment claim in the alternative to a breach of express contract claim when it "is unsure whether it can actually prove the existence of the contract at trial." *Id.* In other words, "Oregon law allows pleading unjust enrichment in the alternative, at least until there is a dispositive determination" that an express contract exists. *Martell v. Gen. Motors LLC*, 492 F. Supp. 3d 1131, 1147 (D. Or. 2020).

Although Defendants have asserted a breach of contract counterclaim/third-party claim, whether an express contract existed is a matter yet to be determined. In fact, in support of its claim for rescission, Plaintiff itself asserts that "the Assumption Agreements with Defendant Lenders are not valid and enforceable contracts because of mutual mistake." SAC ¶ 122. Plaintiff may eventually succeed on its rescission claim, and Defendants may lose on their breach of contract counterclaim/third-party claim. As such, at the pleading stage, Defendants may bring a claim for unjust enrichment in the alternative. Defendants' unjust enrichment claim is not duplicative of their breach of contract claim.

///

///

///

///

CONCLUSION

Plaintiff and Third-Party Defendant's Motion to Dismiss [78] is DENIED.

IT IS SO ORDERED.

DATED: June 7, 2023.

MARCO A. HERNÁNDEZ
United States District Judge