

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FAIRHAVEN HEALTH, LLC,

Plaintiff,

v.

BIOORIGYN, LLC, JOANNA
ELLINGTON, AKA JOANNA CLIFTON,
AND DENNIS CLIFTON,

Defendants.

Case No. 2:19-cv-01860-RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Defendant’s Motion to Dismiss Plaintiff’s Complaint. Dkt. # 18. Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons below, the motion is **GRANTED in part** and **DENIED in part**.

II. BACKGROUND

The parties are former business partners who entered a series of contracts that they now disagree on. Plaintiff Fairhaven Health LLC (“Fairhaven”) offers “natural, doctor-designed products” to support fertility, pregnancy, breastfeeding, and overall women’s health. Dkt. # 1 ¶ 17. To bring new products to market, Fairhaven consults research scientists and physicians; one consultant was Defendant BioOrigyn LLC (“BioOrigyn”).

1 *Id.* ¶ 18.

2 In or around 2003, Fairhaven became aware of BioOrigyn¹ and its principals,
3 Defendants Dennis Clifton and Joanna Clifton (together with BioOrigyn, “Defendants”).
4 *Id.* ¶¶ 20-21. BioOrigyn offered a fertility lubricant product known as Pre-Seed, which
5 Fairhaven bought wholesale and distributed through online retail channels. *Id.* ¶ 22.
6 Years later, in October 2012, BioOrigyn sold Pre-Seed to another company. *Id.* ¶ 25.
7 But the relationship between Fairhaven and BioOrigyn continued, Fairhaven hoping that
8 BioOrigyn would help it develop a “Fairhaven Health branded version of Pre-Seed.” *Id.*
9 ¶ 26. Nearly two years later, BioOrigyn reached out to Fairhaven, seeking to help
10 Fairhaven develop new Fairhaven products. *Id.* ¶¶ 33-36. In August 2014, the parties
11 met to discuss that possibility. *Id.* The parties had several discussions, in which
12 Fairhaven stressed that it was seeking a “paraben-free, arabinogalactan-free fertility
13 lubricant.” *Id.* ¶¶ 36, 39.

14 Then, from 2014 to 2019, Fairhaven alleges that “BioOrigyn proceeded to
15 improperly extract and attempted to further improperly extract greater sums of money
16 from Fairhaven.” *Id.* ¶ 44. According to Fairhaven, BioOrigyn and the Cliftons
17 accomplished this fraud by “creating a confounding web of agreements.” *Id.* ¶¶ 45-46.
18 Three agreements are at issue here: the 2014 Consulting Agreement, the 2014 License
19 Agreement, and the 2015 License Agreement. *Id.* ¶¶ 40, 41, 47-50, 56-57, 80.

20 Shortly after their August 2014 discussions, the parties executed the 2014
21 Consulting Agreement, *Id.* ¶ 40, and weeks later, the 2014 License Agreement, *Id.* ¶ 47.
22 By way of background, BioOrigyn owned a host of patents that it referred to collectively
23 as the “401 patents.” *Id.* ¶¶ 10, 48; Dkt. # 3-3 at 13, 19. According to Fairhaven,
24 BioOrigyn represented that some of the new products that it would be creating for
25

26 ¹ At the time, BioOrigyn was allegedly doing business as ING Fertility. Dkt. # 1 ¶ 21.
27 For purposes of this order, the Court will not distinguish between the entities and will
28 refer to either as BioOrigyn.

1 Fairhaven would practice the 401 patents, which would expire in 2020. Dkt. # 1 ¶ 48.
2 Relying on those representations, Fairhaven executed the 2014 License Agreement,
3 which granted it a license to use the 401 patents. *Id.*

4 Less than two months after executing the 2014 Consulting Agreement, as part of
5 its consulting work for Fairhaven, BioOrigyn created an invention disclosure form. *Id.*
6 ¶ 70. Under the invention disclosure form, BioOrigyn notified Fairhaven that it invented
7 a new product. *Id.* ¶ 71. But it would not disclose the precise details of that invention
8 without having a further license agreement in place. *Id.* Ms. Clifton told Fairhaven that
9 “the best way to construct [a] new partnering activity” would be to license the patent for
10 BioOrigyn’s new invention, a “family of unique Novel Isotonic Gel recipes and
11 formulas.” *See id.* ¶ 72. Ms. Clifton further conveyed that she wanted to “wait to send
12 the new Invention Disclosure for Novel Non-Tox[ic] Isotonic Gels until [the parties] have
13 agreed to final License Language, because it contains very novel recipes and
14 formulation.” *Id.* ¶ 73. In January 2015, BioOrigyn licensed the new product to
15 Fairhaven under the 2015 License Agreement. *See id.* ¶ 80.

16 In short, Fairhaven alleges that BioOrigyn breached the 2014 Consulting
17 Agreement and that it was fraudulently induced into entering the 2014 and 2015 License
18 Agreements, which are thereby void. As to their fraud claims, Fairhaven alleges that
19 BioOrigyn made several false representations to lure Fairhaven into executing the two
20 license agreements.

21 For the 2014 License Agreement, Fairhaven alleges that BioOrigyn’s statements—
22 that the new product it would be creating for Fairhaven under the consulting agreement
23 (which came to be known as BabyIt) would practice the 401 patents and that the 401
24 patents would expire in 2020—were untrue. Dkt. # 1 ¶¶ 48, 51, 102. According to
25 Fairhaven, BabyIt did not practice the claims of the 401 patents, *id.* ¶ 51, and all but one
26 patent in the 401 patent family expired four years before 2020, *id.* ¶ 102. Specifically,
27 Fairhaven alleges that, before and after executing the 2014 License Agreement,

1 Defendants made several fraudulent representations, which fall into the following
2 categories: (1) “the products, including the perineal massage gel, that BioOrigyn would
3 be developing for Fairhaven would use the 401 patent technology and would have patent
4 protection”; (2) “the 401 patents would expire in 2020”; and (3) “a product, such as the
5 perineal massage lubricant (which became known as BabyIt), could be made and
6 marketed quickly using the 401 patents.” *Id.* ¶¶ 47-48,128.

7 For the 2015 License Agreement, Fairhaven alleges that BioOrigyn deceived it
8 into licensing intellectual property that Fairhaven already owned. *Id.* ¶ 80. When
9 creating the invention disclosure form, BioOrigyn represented that its new invention of
10 Novel Non-Toxic Isotonic Gels was not Fairhaven’s property, but BioOrigyn’s. *Id.*
11 ¶¶ 70-74. But Fairhaven alleges that the gels were invented under the terms of the 2014
12 Consulting Agreement, which made Fairhaven the exclusive owner of that invention to
13 begin with. *Id.* ¶¶ 62, 70.

14 On November 15, 2019, Fairhaven sued BioOrigyn, Ms. Clifton, and Mr. Clifton
15 in this Court. Dkt. # 1; Dkt. # 3. Since then, Defendants moved to dismiss the complaint.
16 Dkt. # 18. The motion to dismiss is now before this Court.

17 **III. LEGAL STANDARD**

18 Under Fed. R. Civ. P. 12(b)(6), a court may dismiss a complaint for failure to state
19 a claim. The court must assume the truth of the complaint’s factual allegations and credit
20 all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903,
21 910 (9th Cir. 2007). The court “need not accept as true conclusory allegations that are
22 contradicted by documents referred to in the complaint.” *Manzarek v. St. Paul Fire &*
23 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the plaintiff must point to
24 factual allegations that “state a claim to relief that is plausible on its face.” *Bell Atl.*
25 *Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint
26 avoids dismissal if there is “any set of facts consistent with the allegations in the
27

1 complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.
2 662, 678 (2009).

3 On a motion to dismiss, a court typically considers only the contents of the
4 complaint. However, a court is permitted to take judicial notice of facts that are
5 incorporated by reference in the complaint. *United States v. Ritchie*, 342 F.3d 903, 908
6 (9th Cir. 2003) (“A court may . . . consider certain materials documents attached to the
7 complaint, documents incorporated by reference in the complaint.”); *Mir v. Little Co. of*
8 *Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (“[I]t is proper for the district court to
9 ‘take judicial notice of matters of public record outside the pleadings’ and consider them
10 for purposes of the motion to dismiss.”) (quoting *MGIC Indem. Corp. v. Weisman*, 803
11 F.2d 500, 504 (9th Cir. 1986)).

12 IV. DISCUSSION

13 BioOrigyn moves to dismiss all but one of Fairhaven’s 13 claims. According to
14 BioOrigyn, other than Fairhaven’s claim for Declaratory Judgment for Noninfringement
15 of the ’509 Patent (Count 2), the remaining claims are untimely, barred by the express
16 terms of the parties’ contracts, or deficiently pleaded.

17 A. Voluntary Dismissal

18 Fairhaven agrees to dismiss two claims: tortious interference with prospective
19 business (Count 9) and promissory estoppel (Count 12). Dkt. # 31 at 8 n.1. Fairhaven
20 requests that these claims be dismissed without prejudice, *id.*, which BioOrigyn has not
21 objected to, *see* Dkt. # 32. The Court thus **DISMISSES** these two claims without
22 prejudice.

23 Though it does not voluntarily dismiss the claim, Fairhaven does not defend its
24 claim for injunctive relief (Count 14) and concedes that it pleaded the claim only “for
25 notice purposes.” Dkt. # 31 at 8 n.1. The Court agrees with BioOrigyn that injunctive
26 relief is not a standalone claim. *See Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d
27 1111, 1136 (N.D. Cal. 2009); *see also Kwai Ling Chan v. Chase Home Loans Inc.*, No.

1 2:12-cv-00273-JLR, 2012 WL 1252649, at *3 (W.D. Wash. Apr. 13, 2012). Fairhaven
2 may, by motion, seek injunctive relief as a remedy for another claim. But it may not
3 assert injunctive relief as an independent cause of action. Accordingly, the Court
4 **DISMISSES** Count 14 with prejudice.

5 **B. Timeliness**

6 “A claim may be dismissed as untimely pursuant to a [Federal Rules of Civil
7 Procedure] 12(b)(6) motion ‘only when the running of the statute [of limitations] is
8 apparent on the face of the complaint.’” *United States ex rel. Air Control Techs., Inc. v.*
9 *Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013) (second alteration in original)
10 (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th
11 Cir. 2010)). “[A] complaint cannot be dismissed unless it appears beyond doubt that the
12 plaintiff can prove no set of facts that would establish the timeliness of the claim.”
13 *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

14 BioOrigyn argues that the following claims are barred by their respective statutes
15 of limitations: breach contract (Count 1), fraudulent inducement and negligent
16 misrepresentation (Counts 3, 5-7), unjust enrichment (Count 8), breach of the implied
17 covenant of good faith and fair dealing (Count 10), civil conspiracy (Count 11), and
18 declaratory judgment (Count 13).

19 **i. Statutes of Limitations**

20 **(1) Three Years**

21 The following claims are subject to a three-year statute of limitations:

- 22 • Fraudulent inducement, RCW 4.16.080(4);
- 23 • Negligent misrepresentation, *Davidheiser v. Pierce Cty.*, 960 P.2d 998,
24 1003 n.5 (Wash. Ct. App. 1998) (citing *Western Lumber, Inc. v. City of*
25 *Aberdeen*, 518 P.2d 745 (Wash. Ct. App. 1973));
- 26 • Breach of good faith and fair dealing, *Steinberg v. Seattle-First Nat. Bank*,
27 832 P.2d 124, 125 n.4 (1992);

- Civil conspiracy, *Delashaw v. Seattle Times Co.*, No. 2:18-cv-00537-JLR, 2018 WL 4027078, at *16 (W.D. Wash. Aug. 23, 2018) (collecting cases and citing RCW 4.16.080(2));
- Unjust enrichment, *Davenport v. Washington Educ. Ass’n*, 197 P.3d 686, 704 (Wash. Ct. App. 2008); and
- Declaratory judgment as to the validity and enforceability of the 2014 and 2015 License Agreements.

Fairhaven believes that its unjust enrichment claim is subject to RCW 4.16.040’s six-year limitation period. RCW 4.16.040 (requiring an action “upon a contract in writing, or liability express or implied arising out of a written agreement” to commence within six years of accrual). It reasons that, because its unjust enrichment claim is based on the 2014 and 2015 License Agreements, the claim falls under the statute. Dkt. # 31 at 27.

But Fairhaven’s interpretation of the statute lacks support. The Court has found no case applying RCW 4.16.040 to an unjust enrichment claim. And BioOrigyn has failed to provide one. On the other hand, the authority applying a three-year statute of limitations to unjust enrichment claims is unequivocal. *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 991 P.2d 1126, 1134 (Wash. 2000) (“[Plaintiffs] are in essence seeking recovery . . . for [defendant]’s unjust enrichment As such, [plaintiff]’s claims are subject to the three-year statute of limitations applicable to implied contracts, as provided under RCW 4.16.080(3).”); *Davenport*, 197 P.3d at 737 & n.110 (“[T]he statute of limitations applicable to a common law cause of action for unjust enrichment (which . . . is equivalent to a cause of action for restitution or implied in law contract) is three years.”). Thus, unjust enrichment claims are subject to a three-year statute of limitations.

(2) Six Years

The parties disagree over whether a three-year or six-year statute of limitations

1 applies to Fairhaven’s breach of contract claim. BioOrigyn argues that because
2 Fairhaven’s “breach of the 2014 Consulting Agreement (Count 1) . . . allegations [are]
3 rooted in fraud,” the claim sounds in tort, not contract. Dkt. # 18 at 13-14. Given that,
4 BioOrigyn says, the breach of contract claim is subject to RCW 4.16.080’s three-year
5 statute of limitations. *Id.* Fairhaven disagrees, arguing that the claim is based on
6 violations of the notice and disclosure provisions of the 2014 Consulting Agreement and
7 therefore subject to RCW 4.16.040’s six-year statute of limitations. Dkt. # 31 at 27.

8 The Court agrees with Fairhaven; its breach of contract claim is subject to a six-
9 year statute of limitations. To determine which statute of limitations applies, a court must
10 “first decide whether [an] action sounds in contract or in tort.” *G.W. Const. Corp. v.*
11 *Prof’l Serv. Indus., Inc.*, 853 P.2d 484, 486 (Wash. Ct. App. 1993). “An action sounds in
12 contract when the act complained of is a breach of a specific term of the contract, without
13 reference to the legal duties imposed by law on that relationship.” *Id.* (citing *Yeager v.*
14 *Dunnavan*, 174 P.2d 755 (Wash. 1946)). Fairhaven alleges that BioOrigyn breached
15 several specific terms of the 2014 Consulting Agreement. According to Fairhaven,
16 BioOrigyn breached Sections 5(b) and 5(c) by “failing to properly comport with the
17 notice requirement” under the agreement and by “holding itself out as the owner of the
18 subject matter of the [invention disclosure form].” Dkt. # 1 ¶ 93. Fairhaven also alleges
19 that BioOrigyn breached Section 6(b) by inducing Fairhaven to execute the 2015 License
20 Agreement and causing Fairhaven to pay fees to license its own intellectual property. *Id.*
21 ¶ 94. To be sure, Fairhaven’s complaint is replete with allegations of fraud. Still,
22 though, its breach of contract claim rests on specific contract terms, not general legal
23 duties imposed by law. The claim thus sounds in contract, not tort, and is subject to a
24 six-year statute of limitations.

25 The parties also disagree about which statute of limitations applies to Fairhaven’s
26 declaratory judgment claim. In Count 13, Fairhaven seeks declaratory judgment to
27 determine its rights under the 2014 Consulting Agreement and to invalidate the 2014 and

1 2015 License Agreements and the Modified Combined Payment Structure of the 2014
2 and 2015 License Agreements. Dkt. # 1 ¶¶ 189-95. BioOrigyn argues that a three-year
3 statute of limitations applies because the declaratory judgment allegations sound in fraud.
4 Dkt. # 18 at 14. Fairhaven, on the other hand, says that a six-year statute of limitations
5 applies to all declarations sought, except for the declaration relating to the 2014 License
6 Agreement. Dkt. # 31 at 28.

7 “The [Uniform Declaratory Judgment Act] does not have an explicit statute of
8 limitations, but lawsuits under the UDJA must be brought within a ‘reasonable time.’”
9 *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 293 P.3d 407, 410 (Wash. Ct. App. 2013)
10 (quoting *Auto. United Trades Org. v. State*, 286 P.3d 377, 379 (Wash. 2012)). What time
11 is “reasonable” is determined by looking to the time allowed for a “similar action as
12 prescribed by statute, rule of court, or other provision.” *Id.* (internal quotation marks and
13 alterations omitted) (quoting *Cary v. Mason Cty.*, 132 P.3d 157, 159 (Wash. Ct. App.
14 2006)).

15 To the extent Fairhaven’s declaratory judgment claim seeks to define rights under
16 the 2014 Consulting Agreement, a six-year statute of limitations applies. For declaratory
17 judgment purposes, the analogous claim is breach of contract, which, as explained above,
18 has a six-year statute of limitations.

19 To the extent Fairhaven’s declaratory judgment claim seeks to invalidate the other
20 agreements, a three-year statute of limitations applies. Fairhaven argues that the 2014
21 and 2015 License Agreements were procured through BioOrigyn’s fraudulent
22 misrepresentations and are thereby void. For declaratory judgment purposes, the
23 analogous claim is one for fraudulent inducement or negligent misrepresentation, which
24 has a three-year statute of limitations.

25 **ii. Accrual**

26 BioOrigyn assumes that the accrual analysis is identical for each claim. It believes
27 that all statutes of limitations began to run at the same time—that is, when Fairhaven

1 knew or should have known about BioOrigyn’s alleged fraud. *See* Dkt. # 18 at 14-17.
2 Fairhaven, apparently, does not disagree. Dkt. # 31 at 24-27. Instead, it argues that when
3 it should have known about BioOrigyn’s alleged fraud is a question of fact. *Id.* at 26.

4 But the accrual analysis is not the same for each claim. For example, the
5 discovery rule, which holds that a statute of limitations begins to run when a plaintiff
6 knows or should know about a wrong, applies to some claims and not others. It applies
7 to fraud claims but not to contract claims. *Compare Hudson v. Condon*, 6 P.3d 615, 620
8 (Wash. Ct. App. 2000) (“Under the express terms of RCW 4.16.080(4), a cause of action
9 for fraud does not accrue until the aggrieved party discovers the facts constituting the
10 fraud.”), *with 1000 Virginia Ltd. P’ship v. Vertex Corp.*, 146 P.3d 423, 430 (Wash.
11 2006) (“[C]ontrolling precedent [has] held that a claim arising out of a contract accrued
12 on breach and *not on discovery* . . .”) (emphasis added). Whether the discovery rule
13 applies to the remaining claims here is not clear. And the parties provide no guidance. In
14 any event, the Court need not resolve that issue or determine when each statute of
15 limitations began to run. In the end, BioOrigyn’s one-size-fits-all accrual analysis poses
16 questions of fact unfit for a motion to dismiss.

17 Under RCW 4.16.005, actions may “only be commenced within the periods
18 provided in th[e] chapter after the cause of action has accrued.” Under Washington’s
19 discovery rule, “a cause of action does not accrue until a party knew or should have
20 known the essential elements of the cause of action.” *Green v. A.P.C. (Am. Pharm. Co.)*,
21 960 P.2d 912, 915 (Wash. 1998). When a party *should have* discovered the elements of a
22 cause of action is ordinarily a question of fact. *Id.* at 918.

23 Each party offers dates for when it would have been reasonable for Fairhaven to
24 discover BioOrigyn’s alleged fraud. Fairhaven argues that it had no reason to know of
25 BioOrigyn’s alleged fraud until after July 2019, when BioOrigyn sent Fairhaven two
26 proposed agreements that would significantly change the business relationship between
27 the parties. Dkt. # 31 at 24-25; *see also* Dkt. # 1 ¶¶ 84-86. This caused Fairhaven to

1 investigate its past dealings with BioOrigyn. Dkt. # 1 ¶ 86. BioOrigyn, however, argues
2 that the clock started as early as November 25, 2014, when Fairhaven executed the 2014
3 License Agreement. Dkt. # 18 at 15. At that time, BioOrigyn argues, Fairhaven was
4 aware of the expiration dates of the patents it was licensing. *Id.* Alternatively,
5 BioOrigyn argues that Fairhaven should have known by at least March 10, 2016, when
6 BabyIt was manufactured to perform testing. *Id.* at 16. As for the 2015 License
7 Agreement, BioOrigyn argues that Fairhaven should have learned of the alleged fraud
8 when BioOrigyn notified Fairhaven of its new inventions in 2014. *Id.* at 17.

9 Fairhaven says the clock started on one day; BioOrigyn says it started on another.
10 This presents issues of fact that cannot be resolved on a motion to dismiss. Reasonable
11 minds could disagree on the earliest date a reasonable person would have discovered
12 BioOrigyn's alleged fraud, whether that be the date BioOrigyn proposed a significant
13 rearrangement of the parties' business relationship or the date Fairhaven first entered the
14 contract or some other date. The Court cannot resolve this looking only at the face of the
15 complaint. At this stage, the Court need not determine which claims the discovery rule
16 applies to. It also need not determine whether the accrual analysis is uniform across all
17 claims. If BioOrigyn chooses to re-assert its timeliness defense on summary judgment, it
18 is free to do so. But it should address these issues.

19 In conclusion, BioOrigyn has failed to show that Fairhaven's claims are untimely.

20 **C. No-Reliance Clause**

21 BioOrigyn argues not only that Fairhaven's claims are untimely but also that they
22 are barred by the express terms of the 2014 and 2015 License Agreements. Dkt. # 18 at
23 18. According to BioOrigyn, the agreements contain "no-reliance clauses," which
24 Washington courts have often enforced to dismiss complaints based on fraud. *Id.* at 18-
25 20.

26 To establish fraud or misrepresentation, a plaintiff must show that it "*reasonably*
27 *or justifiably* relied on the truth of [a defendant's] representations, if any." *Kwiatkowski*

1 *v. Drews*, 176 P.3d 510, 519 (Wash. Ct. App. 2008) (emphasis in original) (collecting
2 cases). In the contract context, parties sometimes agree that they are entering a contract
3 without relying on the other’s representations. *See, e.g., id.* at 515 (“Each party
4 acknowledges that it has . . . made an independent decision to enter this AGREEMENT,
5 *without relying on representations of any other party.* Each party assumes the risk that
6 the facts or evidence may turn out to be different than it now understands them to
7 be . . .”) (emphasis added); *FMC Techs., Inc. v. Edwards*, No.2:05-cv-00946-JCC, 2007
8 WL 1725098, at *2 (W.D. Wash. June 12, 2007), *aff’d*, 302 F. App’x 577 (9th Cir. 2008)
9 (“The parties acknowledge that they have not relied on any promise, representation, or
10 warranty, express or implied, not contained in this Agreement.”) (emphasis omitted).
11 *Insitu, Inc. v. Kent*, No. 2:08-cv-03067-EFS, 2009 WL 2160690, at *1 (E.D. Wash. July
12 17, 2009), *aff’d*, 388 F. App’x 745 (9th Cir. 2010) (“Employee acknowledges that in
13 executing this Agreement, *Employee does not rely upon any representation or statement*
14 *by any representative of Employer concerning the subject matter of this Agreement,*
15 *except as expressly set forth in the text of the Agreement.*”) (emphasis added).

16 These are often called “no-reliance” clauses. Many courts have held that they, as a
17 matter of law, make it unreasonable for a party to rely on allegedly fraudulent statements.

18 BioOrigyn claims that certain provisions of the 2014 and 2015 License
19 Agreements, taken together, amount to a “no-reliance” clause. Dkt. # 18 at 18-20. Given
20 that, it concludes, Fairhaven’s claims must be dismissed. *Id.* Fairhaven says that no “no-
21 reliance” exists here for the agreements lack the “talismanic language” required for such
22 a clause. Dkt. # 31 at 21-23. Fundamentally, Fairhaven says, the agreements “contain no
23 representation by [Fairhaven] that in executing the agreement, it did not rely on
24 BioOrigyn’s, [Ms. Clifton]’s or [Mr. Clifton]’s extracontractual statements.” *Id.* at 21.

25 The Court agrees with Fairhaven: neither the 2014 or 2015 License Agreement
26 contains a “no-reliance” clause. The agreements contain no provision in which the
27 parties expressly agreed to rely only on the representations in the agreement, and no

1 others. Indeed, the agreements do not address “reliance” at all. As Fairhaven observes,
2 each case that BioOrigyn cites was centered on a contract that contained no-reliance
3 language. Dkt. # 31 at 21-22. That is simply not the case for the licensing agreements
4 here. For that reason, BioOrigyn’s argument fails.

5 The three provisions that BioOrigyn cites² as a “no-reliance clause”—Sections
6 7.4, 8.7, and 8.9—do not contain no-reliance language. In Section 7.4, the parties agreed
7 that “except as otherwise expressly set forth in this
8 agreement . . . [BioOrigyn] . . . make[s] no representations and extend[s] no warranties of
9 any kind.” Dkt. # 3-1 at 11; Dkt. # 3-3 at 13. Put differently, BioOrigyn made no
10 representations other than what was contained in the agreement. But the section does not
11 say that Fairhaven relied only on those representations, and no others. In Section 8.7, the
12 parties agreed that the agreement constituted the entire agreement between the parties.
13 Dkt. # 3-1 at 13-14; Dkt. # 3-3 at 15. Yet this is a standard integration clause, devoid of
14 any reliance language. *FMC Techs.*, 2007 WL 1725098, at *4 (“All an integration clause
15 does is limit the evidence available to the parties should a dispute arise over the meaning
16 of the contract. . . . An integration clause that contains no reference to reliance is nothing
17 more than an integration clause.”) (internal quotation marks and citations omitted).
18 Lastly, Section 8.9 says nothing of reliance.³ Dkt. # 3-1 at 14; Dkt. # 3-3 at 16.

19 In sum, Fairhaven’s claims are not barred by the express terms of the 2014 and
20 2015 License Agreements.

21
22 ² The three sections of each of the 2014 and 2015 License Agreements, Sections 7.4, 8.7
and 8.9, are identical.

23
24 ³ Though it does not contain no-reliance language, Section 8.9 maintains that the parties
25 had the opportunity to be represented by counsel during negotiations and that the parties
26 executed the agreement “after independent investigation and without fraud, duress or
27 undue influence.” Dkt. # 3-1 at 14; Dkt. # 3-3 at 16. BioOrigyn does not argue that this
28 section, alone, precludes Fairhaven from bringing its fraud claims, nor could it. As
described below, fraud is a multi-factor inquiry, in which this provision would be a
relevant, but not dispositive, part of the analysis.

1 **D. Sufficiency of the Allegations**

2 Statutes of limitations and no-reliance clauses aside, BioOrigyn also moves to
3 dismiss each claim because each is deficiently pleaded. The Court addresses the
4 sufficiency of each claim in turn.

5 **i. Breach of Contract (Count 1)**

6 In Washington, to establish a breach of contract claim, a plaintiff must prove
7 (1) the existence of a contract, (2) a material breach of that contract, and (3) resulting
8 damage. *St. John Med. Ctr. v. State ex rel. Dep't of Soc. & Health Servs.*, 38 P.3d 383,
9 390 (Wash. Ct. App. 2002). A breach of contract claim must point to a provision of the
10 contract that was breached. *See, e.g., Elliot Bay Seafoods, Inc. v. Port of Seattle*, 98 P.3d
11 491 (Wash. Ct. App. 2004); *BP W. Coast Prod., LLC v. Shalabi*, No. 2:11-cv-01341-
12 MJP, 2012 WL 441155, at *4 (W.D. Wash. Feb. 10, 2012).

13 Fairhaven's breach of contract allegations are sufficient to state a claim.
14 Fairhaven identifies three specific provisions of the 2014 Consulting Agreement and
15 alleges that BioOrigyn breached each.

16 First, Fairhaven alleges that BioOrigyn breached Section 5(b), which required
17 BioOrigyn to "notify" and "fully disclose to" Fairhaven "any and all . . . inventions that
18 [BioOrigyn] has conceived" during the term of the agreement. Dkt. # 1 ¶¶ 71-73; Dkt.
19 # 3-2 at 3. Fairhaven alleges that BioOrigyn, under the agreement, invented "Novel Non-
20 Tox[ic] Isotonic Gels" and breached Section 5(b)'s notice requirement by refusing to
21 "disclose the precise details of that invention without having a license agreement in
22 place." Dkt. # 1 ¶¶ 70-73.

23 Next, Fairhaven alleges that BioOrigyn breached Section 5(c). That section made
24 Fairhaven the "sole and exclusive" owner of inventions created under the agreement.
25 Dkt. # 1 ¶¶ 62, 70, 75; Dkt. # 3-2 at 3-4. BioOrigyn violated the section, Fairhaven
26 alleges, by "holding itself out as the owner" of the Novel Non-Toxic Isotonic Gels. Dkt.
27 # 1 ¶ 93.

1 Finally, Fairhaven alleges that BioOrigyn breached Section 6(b), which assigned
2 to Fairhaven all know-how and trade secret information arising out of the agreement.
3 Dkt. # 1 ¶¶ 69, 94. According to Fairhaven, BioOrigyn breached that section when it
4 forced Fairhaven to pay a license fee to use the know-how that Fairhaven already owned
5 under the agreement. *Id.*

6 BioOrigyn offers several reasons why the allegations fail to state a claim; none are
7 persuasive. Without explanation, BioOrigyn concludes that it had no obligation to notify
8 Fairhaven of the Novel Non-Toxic Isotonic Gels because that invention and
9 accompanying know-how was developed outside the 2014 Consulting Agreement. Dkt.
10 # 18 at 21. At this stage, the Court has no reason to believe that is true. Nothing in the
11 complaint or the documents attached to it explains why the isotonic gels would fall
12 outside the agreement. In fact, BioOrigyn’s conclusion contradicts the allegations in the
13 complaint, which the Court must take as true. The complaint alleges that BioOrigyn
14 created an invention “in the course of BioOrigyn’s consulting work for Fairhaven,” using
15 “consulting time” and “supplies purchased by Fairhaven.” Dkt. # 1 ¶ 70.

16 BioOrigyn next argues that it indeed satisfied Section 5(b)’s notice requirement
17 when it created an invention disclosure form. Dkt. # 18 at 21-22. Yet Fairhaven alleges
18 that the details BioOrigyn provided were insufficient and untimely for although
19 BioOrigyn did create an invention disclosure form, “it would not disclose the precise
20 details . . . without having a license agreement in place.” Dkt. # 1 ¶¶ 70-71.

21 Lastly, BioOrigyn argues that Section 6(b), which assigned Fairhaven know-how
22 and trade secrets produced under the agreement, imposed no affirmative obligation on
23 BioOrigyn. Dkt. # 18 at 22. Therefore, BioOrigyn says, it could not have breached the
24 section. *Id.* But Fairhaven does not allege that BioOrigyn failed to meet an affirmative
25 obligation under Section 6(b). Rather, it alleges that BioOrigyn violated Section 6(b) by
26 forcing Fairhaven to pay a license fee to use the intellectual property Fairhaven was
27 already assigned. Dkt. # 1 ¶ 94.

1 Accordingly, Fairhaven’s breach of contract claim is adequately pleaded and
2 survives the motion to dismiss.

3 **ii. Fraudulent Inducement and Negligent Misrepresentation**
4 **(Counts 3, 5-7)**

5 Fraud claims are subject to the heightened pleading standard of Federal Rule of
6 Civil Procedure 9(b). *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir.
7 2018), *cert. denied*, No. 18-304, 2018 WL 4350853 (U.S. Dec. 10, 2018); *Vess v. Ciba-*
8 *Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (“It is established law, in this
9 circuit and elsewhere, that Rule 9(b)’s particularity requirement applies to state-law
10 causes of action.”); Fed. R. Civ. P. 9(b). Rule 9(b) requires that the plaintiff, “state with
11 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). “To properly
12 plead fraud with particularity under Rule 9(b), ‘a pleading must identify the who, what,
13 when, where, and how of the misconduct charged, as well as what is false or misleading
14 about the purportedly fraudulent statement, and why it is false.’” *Davidson*, 889 F.3d at
15 964 (quoting *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055
16 (9th Cir. 2011)). While Rule 9(b) may be relaxed with respect to matters within the
17 opposing party’s knowledge, “this exception does not nullify Rule 9(b); a plaintiff who
18 makes allegations on information and belief must state the factual basis for the belief.”
19 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

20 BioOrigyn’s argument is not that Fairhaven fails to allege the specific elements of
21 common law fraudulent inducement and negligent misrepresentation. Dkt. # 18 at 23-24.
22 Its argument is that both claims fail to meet Rule 9(b)’s heightened pleading standards.
23 BioOrigyn does not attack each claim individually. For both claims, BioOrigyn argues
24 that Fairhaven’s allegations are conclusory and fail to “identify how the mechanics of the
25 supposed scheme operated, what specific statements were fraudulent or misrepresented,
26 and the reason why it allegedly constituted a failure to comply with the terms of the 2014
27 and 2015 License Agreements.” *Id.*

28 Because Fairhaven pleads the who, what, when, and how of BioOrigyn’s alleged

1 fraud, it meets its heightened burden under Rule 9(b). The who: Joanna Clifton and
2 Dennis Clifton, individually, and BioOrigyn. Dkt. # 1 ¶¶ 42-44. The when: Fairhaven
3 alleges that the fraudulent actions took place from 2014 to 2019. *Id.* ¶ 44. The what and
4 how: through a “confounding web of agreements” with Fairhaven, Defendants
5 “improperly extract[ed] and attempted to further improperly extract greater sums of
6 money from Fairhaven from.” *Id.* ¶¶ 44, 46. According to Fairhaven, BioOrigyn
7 accomplished this by duping Fairhaven, through fraudulent misstatements, into entering
8 the 2014 and 2015 License Agreements. *Id.* ¶¶ 46-55, 70-80. Fairhaven alleges several
9 specific and fraudulent representations. For example, as to the 2014 License Agreement,
10 Fairhaven alleges that on several occasions BioOrigyn represented that the 401 patent
11 family would expire in 2020, when that was only true for one patent within the family.
12 *Id.* ¶¶ 49, 102, 128, 134. And, as to the 2015 License Agreement, Fairhaven alleges that
13 BioOrigyn misrepresented that the Novel Non-Toxic Isotonic Gels were BioOrigyn’s and
14 that Fairhaven needed to take a license before BioOrigyn disclosed any more detail. *Id.*
15 ¶¶ 70-73, 81-82. Fairhaven alleges that this was false as under the 2014 Consulting
16 Agreement, it had owned the gels from the start. *Id.* The 55-page complaint amply
17 describes the fraud and puts Defendants on notice of Fairhaven’s claims. Thus, the Court
18 will not dismiss Fairhaven’s claims for fraudulent inducement or negligent
19 misrepresentation.

20 BioOrigyn also argues that all fraud-related claims fail because the representations
21 it made were “promise[s] of future conduct related to the BabyIt product” rather than a
22 representation of a “presently existing fact.” Dkt. # 32 at 13. It is true, to state a claim
23 for fraud under Washington law, a plaintiff must plead a “representation of an *existing*
24 *fact.*” *Shook v. Scott*, 353 P.2d 431, 433 (Wash. 1960) (emphasis in original). The
25 Washington Supreme Court explained that a representation is of existing fact if it exists
26 “independently of future acts or performance of the one making the representation,
27 independently of other particular occurrences in the future, and independently of

1 particular future uses.” *Id.* at 434. Here, for each license agreement, Fairhaven alleges
2 that BioOrigyn made at least one, fraudulent representation of a presently existing fact.
3 Fairhaven alleges that, before entering the 2014 License Agreement, BioOrigyn
4 represented that the 401 patents would expire in 2020, when in fact all but one would
5 expire in 2016. *Id.* ¶¶ 49, 102, 128, 134. Fairhaven also alleges that, before entering the
6 2015 License Agreement, BioOrigyn represented that it owned the Novel Non-Toxic
7 Isotonic Gels, which Fairhaven alleges it did not. *Id.* ¶¶ 70-73, 81-82. When BioOrigyn
8 made these statements, they statements were representations of a presently existing fact
9 that were independent of future acts or occurrences.

10 In sum, Fairhaven’s claims of fraudulent inducement and negligent
11 misrepresentation survive the motion to dismiss.

12 **iii. Unjust Enrichment (Count 8)**

13 As a result of BioOrigyn’s fraud, Fairhaven alleges that the 2014 and 2015
14 License Agreements are void and that BioOrigyn has been unjustly enriched by the
15 payments it received under those agreements. Dkt. # 1 ¶ 164.

16 BioOrigyn moves to dismiss this claim on two grounds. First, BioOrigyn argues
17 that the payments it received were paid under the agreements and thus “those express
18 contracts govern the subject matter of this quasi-contractual claim.” Dkt. # 18 at 24. The
19 case that BioOrigyn relies on, however, clearly states that “courts will not allow a claim
20 for unjust enrichment in contravention of a provision in a *valid express contract*.”
21 *MacDonaldv. Hayner*, 715 P.2d 519, 523 (Wash. Ct. App. 1986) (emphasis added).
22 Here, Fairhaven alleges that the 2014 and 2015 License Agreements were void. Dkt. # 1
23 ¶ 164. Absent valid agreements, Fairhaven hopes to recover the payments it made per the
24 license agreements under a theory of unjust enrichment. *Id.* ¶¶ 167-68.

25 Second, BioOrigyn argues that the unjust enrichment claim sounds in fraud and
26 that Fairhaven failed to meet the heightened Rule 9(b) pleading standard. The Court
27 agrees that this claim sounds in fraud. The basis of this claim is that BioOrigyn was

1 enriched by duping Fairhaven into fraudulent contracts. *Id.* ¶¶ 164-68. Yet the Court
2 does not agree that Fairhaven failed to meet its burden under Rule 9(b). As the Court
3 explained above, Fairhaven’s allegations of fraud describe the who, what, when, and how
4 of BioOrigyn’s alleged fraud. Thus, Fairhaven successfully states a claim for unjust
5 enrichment.

6 **iv. Breach of Implied Covenant of Good Faith and Fair Dealing**
7 **(Count 10)**

8 “There is in every contract an implied duty of good faith and fair dealing,” which
9 “obligates the parties to cooperate with each other so that each may obtain the full benefit
10 of performance.” *Badgett v. Sec. State Bank*, 807 P.2d 356 (Wash. 1991). “[T]he duty
11 arises only in connection with terms agreed to by the parties.” *Id.*; *see also Donald B.*
12 *Murphy Contractors, Inc. v. King Cty.*, 49 P.3d 912 (Wash. Ct. App. 2002) (“A duty of
13 good faith and fair dealing is deemed to exist in every contract, but it arises only in
14 connection with the performance of specific contract obligations. If no contractual duty
15 exists, there is nothing that must be performed in good faith.”).

16 Fairhaven’s allegations under this claim fall short. As BioOrigyn observes, the
17 complaint fails to connect the implied duty of good faith and fair dealing to specific terms
18 agreed upon by the parties. Also, as BioOrigyn notes, Fairhaven’s claim that Defendants
19 “frustrated the purpose of the [2014 Consulting] Agreement” is contained only in
20 Fairhaven’s response brief, Dkt. # 31 at 20, not the complaint, *see* Dkt. # 1 ¶¶ 175-79.
21 Fairhaven may not amend its pleading via its response brief. *Frenzel v. AliphCom*, 76 F.
22 Supp.3d 999, 1009 (N.D. Cal. 2014) (“It is axiomatic that the complaint may not be
23 amended by the briefs in opposition to a motion to dismiss.”) (alteration omitted). For
24 these two reasons, Fairhaven’s claim for breach of the implied covenant of good faith and
25 fair dealing must be dismissed.

26 **v. Civil Conspiracy (Count 11)**

27 “Under Washington law, a plaintiff proves a civil conspiracy by showing ‘by
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1 clear, cogent and convincing evidence that (1) two or more people contributed to
2 accomplish an unlawful purpose, or combined to accomplish a lawful purpose by
3 unlawful means; and (2) the conspirators entered into an agreement to accomplish the
4 object of the conspiracy.” *Gossen v. JPMorgan Chase Bank*, 819 F.Supp.2d 1162, 1171
5 (W.D. Wash. 2011) (quoting *Wilson v. State of Wash.*, 929 P.2d 448, 459 (Wash. Ct.
6 App. 1996)). Moreover, “civil conspiracy does not exist independently—its viability
7 hinges on the existence of a cognizable and separate underlying claim.” *Id.* (citing *Nw.*
8 *Laborers–Employers Health & Sec. Trust Fund v. Philip Morris, Inc.*, 58 F. Supp. 2d
9 1211, 1216 (W.D. Wash. 1999)).

10 BioOrigyn moves to dismiss this claim on two grounds. It argues that because the
11 tort claims are barred, there is no underlying tort for Fairhaven to base its civil conspiracy
12 claim on. Dkt. # 18 at 27. But, as discussed above, Fairhaven adequately pleaded its
13 fraudulent inducement and negligent misrepresentation claims. There is, then, a separate
14 and underlying claim to support a civil conspiracy claim.

15 Next, BioOrigyn argues that Fairhaven failed to plead that there was an
16 “agreement” between Ms. Clifton and Mr. Clifton to accomplish the alleged conspiracy.
17 The Court agrees. Fairhaven does not allege that an agreement between the individual
18 defendants existed. Rather, it asks the Court to infer an agreement because the individual
19 defendants were married and the sole Governors of BioOrigyn and “acted together with
20 respect to the communication of false representations.” Dkt. # 31 at 16. Without more,
21 the Court is left with only conclusory allegations that the individual defendants
22 “knowingly and intentionally conspired, joined and participated in an unlawful civil
23 conspiracy against Fairhaven.” Dkt. # 1 ¶ 181. These allegations are insufficient and do
24 not survive a motion to dismiss.

25 Given that Fairhaven has failed to state a civil conspiracy claim against Ms.
26 Clifton and Mr. Clifton, BioOrigyn asks the Court to dismiss them from this case
27 altogether. Dkt. # 18 at 28. BioOrigyn says they must also be dismissed because, as

1 members of a limited liability company (“LLC”), they are shielded from individual
2 liability arising from the LLC’s torts. *Id.*

3 BioOrigyn’s reading of Washington’s LLC statutes is incorrect. RCW
4 25.15.126(1) states that “no member of manager of a limited liability company is
5 obligated personally for any . . . liability of the limited liability company *solely by reason*
6 *of being or acting as a member or manager.*” RCW 25.15.126 (emphasis added). But
7 the statute states that a “member or manager of a limited liability company is *personally*
8 *liable for such person’s own torts.*” *Id.* (emphasis added). Fairhaven does not allege that
9 Ms. Clifton and Mr. Clifton are liable solely because they are members of BioOrigyn
10 LLC. Instead, Fairhaven alleges that they committed torts in their individual capacity.
11 *See, e.g.*, Dkt. # 1 ¶¶ 47-49, 58-59, 81-82, 128, 133-34, 164. Thus, although Fairhaven
12 has failed to state a claim of civil conspiracy, at this stage the Court will not dismiss Ms.
13 Clifton and Mr. Clifton from this case.

14 **vi. Declaratory Judgment (Count 13)**

15 Under Washington’s Declaratory Judgment Act, courts may “declare rights, status
16 and other legal relations.” *Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1206
17 (W.D. Wash. 2013) (quoting *Nollette v. Christianson*, 800 P.2d 359 (Wash. 1990)).
18 Specifically, under RCW 7.24.020, a “person interested under a . . . written
19 contract . . . may have determined any question of construction or validity arising under
20 the . . . contract.” “[A]bsent issues of major public importance, a justiciable controversy
21 must exist before a court’s jurisdiction may be invoked under the act.” *Nollette*, 800 P.2d
22 at 362.

23 The parties fundamentally disagree about how the contracts here should be
24 interpreted and whether they are even valid at all. Given that, Fairhaven asks the Court to
25 determine the intellectual property rights under the 2014 Consulting Agreement (Dkt. # 1
26 ¶¶ 192-93) and the validity and enforceability of the 2015 License Agreement (*id.* ¶¶ 190-
27 91), the 2014 License Agreement (*id.* ¶ 194), and the Modified Combined Payment

1 Structure of the 2014 and 2015 License Agreements (*id.* ¶ 195). The parties’ dispute over
2 these contracts has been copiously alleged in the complaint and explained above.
3 Reading the complaint as a whole, the Court finds that there is a justiciable controversy
4 here and that Fairhaven states an adequate claim for declaratory relief.

5 **V. CONCLUSION**

6 For the reasons stated above, the Court **GRANTS in part** and **DENIES in part**
7 Defendant’s Motion to Dismiss Plaintiff’s Complaint. Dkt. # 18. The Court grants
8 Fairhaven leave to file an amended complaint **within thirty days** of the entry of this
9 Order.

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11 DATED this 21st day of September, 2020.

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14 The Honorable Richard A. Jones
15 United States District Judge
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