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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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The Frank Lloyd Wright Foundation, an  
Arizona non-profit corporation,

Nos. CV-08-1112-PHX-DGC  
CV-08-1125-PHX-FJM

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Plaintiff,

**ORDER**

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vs.

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Steven W. Kroeter, an individual;  
Archetype Associates, Inc., a New York  
corporation; Archetype Associates, a  
New York general partnership; Steven  
Fields Design Associates, a New York  
general partnership,

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Defendants.

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Defendant Gerald Morosco has filed a motion to dismiss the claims asserted against  
him by Plaintiff Archetype Associates, Inc. Dkt. #25.<sup>1</sup> Archetype has responded to the  
motion and Morosco has replied. Dkt. ## 36, 40. The Court will dismiss the claim for  
negligent misrepresentation, but not the claim for fraud.

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**I. Background.**

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The facts in this order are taken from Archetype’s First Amended Complaint against  
Morosco. Dkt. #2 (CV 08-1125). For purposes of this motion, the Court must accept the  
facts as true. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996).

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<sup>1</sup>Unless otherwise specified, citations in this order are to the docket in CV 08-1112.

1           On November 1, 1983, the Frank Lloyd Wright Foundation (“Foundation”) entered  
2 into an agreement with Steven Fields Design Associates (“SFDA”), a New York general  
3 partnership wholly-owned by Steven W. Kroeter and his wife. Dkt. #2 ¶¶ 9, 16. The  
4 agreement designated SFDA as the Foundation’s exclusive licensing agent of intellectual  
5 property associated with Frank Lloyd Wright. *Id.* ¶ 16. In 1990, Kroeter began to operate  
6 this licensing business as a sole proprietorship under the name “Archetype Associates.” *Id.*  
7 ¶ 21. In 1992, Kroeter incorporated Archetype Associates as a New York Corporation. *Id.*  
8 ¶ 22.

9           In 1998, Archetype attempted to terminate its relationship with the Foundation, but  
10 agreed to continue the relationship after negotiating with the Foundation and agreeing to an  
11 amendment of the initial agreement. *Id.* ¶ 23. The amendment provided for automatic one-  
12 year renewals of the agreement unless either party elected not to extend the agreement and  
13 provided notice to the other party. *Id.* ¶ 24. The amendment also specified that when the  
14 agreement expired, Archetype would receive payments of 25% of the gross licensing fees  
15 and royalties received by the Foundation for the first five years following expiration, 20%  
16 for the next five years, and 15% for the five years after that. *Id.* ¶ 25. The agreement  
17 required the Foundation to make these payments to Archetype within thirty days after the  
18 Foundation received payment from its licensees. *Id.* ¶ 26.

19           Shortly after the amendment was executed, the Foundation hired new officers who  
20 chose not to implement the strategic licensing plan previously proposed by Archetype and  
21 approved by the Foundation’s Board of Directors. *Id.* ¶ 27. The new officers also declined  
22 to develop a new strategic plan. *Id.* As a result, in May 2002, Archetype terminated the  
23 agreement. *Id.* The Foundation then established specific accounting procedures to ensure  
24 that Archetype received its share of the licensing program revenue as required by the  
25 amended agreement. *Id.* ¶ 34.

26           In 2005, Morosco became chairman of the Foundation’s Board of Directors. *Id.* ¶ 31.  
27 During 2006, Archetype expressed concern about the Foundation’s failure to make timely  
28 payments and to provide accurate information regarding licensing program revenue. *Id.* ¶ 36.

1 On September 21, 2006, the Foundation's CEO, Phillip Allsopp, told Archetype that the  
2 Foundation was having serious financial problems. *Id.* ¶¶ 32, 37. Allsopp requested that  
3 Archetype donate its share of licensing program revenue to the Foundation, but Archetype  
4 declined. *Id.* ¶¶ 37, 38.

5 On October 17, 2006, Kroeter met with Allsopp and Morosco in New York. *Id.* ¶ 39.  
6 Allsopp and Morosco acknowledged that the Foundation's obligations to Archetype were  
7 legitimate and binding contractual commitments. *Id.* They also assured Kroeter that the  
8 Foundation would honor these commitments. *Id.*

9 On November 2, 2006, Archetype sent a letter to the Foundation demanding payment  
10 for all outstanding amounts as well as accurate documentation for all licensing revenues paid  
11 to Archetype. *Id.* ¶ 40. The Foundation did not comply. *Id.* In February and May of 2007,  
12 the Foundation and Allsopp again acknowledged that the Foundation's obligations under the  
13 amendment were legitimate and binding contractual commitments and assured Archetype and  
14 Kroeter that the Foundation would honor these commitments. *Id.* ¶ 41. Despite these  
15 assurances, the Foundation has not made payments to Archetype since March 31, 2007, and  
16 has not provided an accounting of the licensing program revenue. *Id.* ¶¶ 42, 45.

17 On June 13, 2008, the Foundation filed a complaint against Kroeter, Archetype  
18 Associates, Archetype Associates, Inc., and SFDA. Dkt. #1. The Foundation asserts claims  
19 for breach of the covenant of good faith and fair dealing, breach of contract, unjust  
20 enrichment, breach of fiduciary duty, and declaratory judgment. *Id.*

21 Shortly thereafter, on June 17, 2008, Archetype filed a separate complaint against the  
22 Foundation, Allsopp, and Morosco. Dkt. #2 (CV 08-1125). Against the Foundation,  
23 Archetype alleges breach of contract, breach of the implied covenant of good faith and fair  
24 dealing, fraud, and negligent misrepresentation and asks for an accounting, treble damages  
25 pursuant to A.R.S. § 44-1798.02, and a declaratory judgment. *Id.* Archetype asserts claims  
26 of fraud and negligent misrepresentation against Allsopp and Morosco. *Id.* at 22-25. The  
27 cases were consolidated on August 7, 2008. Dkt. #20.

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1 Morosco asks the Court to dismiss the negligent misrepresentation and fraud claims.  
2 Dkt. #25. Morosco bases his motion on four grounds: (1) the economic loss rule bars both  
3 claims because Archetype has only suffered economic loss, (2) neither claim is cognizable  
4 under Arizona law because a misrepresentation cannot be based on a promise of future  
5 performance, (3) Archetype has not sufficiently pled detrimental reliance, and (4) Morosco  
6 has a qualified privilege, as a director, to act on behalf of the Foundation. Dkt. #2 at 7-16.

7 **II. Standard of Review.**

8 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
9 allegations of material fact are taken as true and construed in the light most favorable to the  
10 non-moving party.” *Smith*, 84 F.3d at 1217. “To avoid a Rule 12(b)(6) dismissal, a  
11 complaint need not contain detailed factual allegations; rather, it must plead ‘enough facts  
12 to state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,  
13 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955,  
14 1974 (2007)). The Court may not assume the plaintiff can prove facts different from those  
15 alleged in the complaint. *See Associated Gen. Contractors of Cal. v. Cal. State Council of*  
16 *Carpenters*, 459 U.S. 519, 526 (1983).

17 **III. Promise of future performance.**

18 Morosco asserts that Arizona law does not provide a claim for misrepresentation  
19 based on a promise of future performance. Although both claims against Morosco are based  
20 on the same alleged misrepresentations, different standards apply to the claims of negligent  
21 misrepresentation and fraudulent misrepresentation.

22 **A. Negligent misrepresentation.**

23 Archetype claims that Morosco negligently misrepresented that the Foundation would  
24 honor its commitments under the agreement and that Archetype would receive its share of  
25 the licensing program revenue. Dkt. #2 ¶ 83. To establish a claim for negligent  
26 misrepresentation in Arizona, Archetype must prove Morosco provided false information  
27 intended to guide Archetype, that Archetype justifiably relied on the false information and  
28 sustained damages, and that Morosco failed to exercise reasonable care or competence in

1 obtaining or communicating the false information. *See St. Joseph's Hosp. & Med. Ctr v.*  
2 *Reserve Life Ins. Co.*, 742 P.2d 804 (Ariz. Ct. App. 1986), *rev'd in part on other grounds,*  
3 *St. Joseph's Hosp. & Med. Ctr v. Reserve Life Ins. Co.*, 742 P.2d 808; Restatement (2d) of  
4 Torts § 552 (1977).

5 Citing *McAlister v. Citibank*, 829 P.2d 1253, 1261 (Ariz. Ct. App. 1992), Morosco  
6 asserts that negligent misrepresentation requires a misrepresentation or omission of a fact,  
7 and that a promise of future conduct is not a statement of fact. In response, Archetype  
8 concedes that there is no exception to the general rule that a promise of future conduct is not  
9 capable of supporting a claim for negligent misrepresentation. Dkt. #36 at 7 n.2. Because  
10 the alleged promise made by Morosco that the Foundation would honor its contractual  
11 commitments is clearly a promise of future conduct, the Court will grant the motion to  
12 dismiss the negligent misrepresentation claim.

13 **B. Fraud.**

14 A claim for fraud can be based on unfulfilled promises of future performance so long  
15 as the statements “were made with the present intent not to perform.” *McAlister*, 829 P.2d  
16 at 1260 (quoting *Spudnuts v. Lane*, 641 P.2d 912, 914 (Ariz. Ct. App. 1982)). Morosco  
17 argues that Archetype cannot prove fraud because Arizona courts have applied the present  
18 intent exception only where the promise of future performance was made by a party to the  
19 underlying the contract. Dkt. #25 at 11. Morosco asserts that because he was not a party to  
20 the agreement between Archetype and the Foundation, any reliance by Archetype on his  
21 representations would be *per se* unreasonable. *Id.* at 12. Morosco fails to cite any legal  
22 authority for his assertion that this reliance is unreasonable as a matter of law.

23 Archetype alleges that Morosco made representations that the Foundation would  
24 honor its contractual commitments and pay Archetype its share of the licensing program  
25 revenue. Dkt. #2 ¶ 79. Archetype alleges that these statements were false, that Morosco  
26 knew they were false, and that Archetype rightfully and detrimentally relied on them. *Id.*  
27 ¶ 80. The Court must assume that these statements are true. *Smith*, 84 F.3d at 1217; *see*  
28 *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977). The Court must also assume that all

1 general allegations “embrace whatever specific facts might be necessary to support them.”  
2 *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (citations omitted).

3 Morosco was chairman of the Foundation’s board of directors when the alleged  
4 misrepresentations were made. The Court cannot say at this stage of the litigation that  
5 Archetype’s reliance on the board chairman’s promises was *per se* unreasonable, even if the  
6 chairman was not personally a party to the contract. More must be known about the  
7 representations before the Court can conclude whether they induced reasonable reliance,  
8 whether they were made solely on behalf of the Foundation, and whether they can give rise  
9 to a fraud claim against Morosco personally.

#### 10 **IV. Economic loss rule.**

11 Morosco asserts that the economic loss rule bars Archetype’s fraud claim. Dkt. #25  
12 at 10-11. According to Morosco, the economic loss rule precludes the recovery of purely  
13 economic damages in tort unless accompanied by personal injury or property damage. *Id.*  
14 at 7 (citing *Carstens v. City of Phoenix*, 75 P.3d 1081, 1083 (Ariz. Ct. App. 2004)).

15 Morosco’s argument is incorrect. “Tort law has traditionally protected individuals  
16 from a host of wrongs that cause only monetary damage[,]” including the torts of fraud and  
17 conversion which remedy purely economic losses. *Giles v. Gen. Motors Acceptance Corp.*,  
18 494 F.3d 865, 874 (9th Cir. 2007). This Court has held that “the economic loss rule has no  
19 application to the tort of fraud under Arizona law.” *Moshir v. Patchlink Corp.*, No. CV-06-  
20 1052-PHX-FJM, 2007 WL 505344 (D. Ariz., Feb. 12, 2007); see also *Evans v. Singer*, 518  
21 F. Supp. 2d 1134, 1138-47 (D. Ariz. 2007); *KD & KD Enter., LLC, v. Touch Automation,*  
22 *LLC*, No. CV-06-2083-PHX-FJM, 2006 WL 3808257 (D. Ariz., Dec. 27, 2006) (explaining  
23 that such an extension would compromise both the principles underlying the economic loss  
24 rule and public policy).

#### 25 **V. Plaintiff sufficiently pled detrimental reliance.**

26 Morosco contends that the claim for fraud must be dismissed because Archetype has  
27 failed to plead reliance sufficiently. Dkt. #25 at 13. Morosco asserts that Archetype has not  
28 suffered any independent harm from its reliance on the alleged misrepresentation. *Id.* at 14.

1 Morosco claims that any harm suffered by Archetype is the same harm that would have  
2 resulted from breach of the agreement.

3 This is a factual argument not suitable for a motion to dismiss. Archetype has pled  
4 that Morosco's alleged misrepresentations induced it to continue negotiations and thereby  
5 incur substantial attorneys' fees. Whether Archetype can prove this allegation, and whether  
6 the fees truly resulted from Morosco's alleged misrepresentations, are matters to be decided  
7 after discovery.

8 **VI. There is no privilege to commit fraud.**

9 In the interest of allowing directors to work effectively on behalf of a corporation  
10 without fear of personal tort liability, the acts of a director are privileged so long as the  
11 director acts in good faith and with the belief that his acts were for the lawful interests of the  
12 company. *See Ong Hing v. Arizona Harness Raceway, Inc.*, 459 P.2d 107, 115 (Ariz. Ct.  
13 App. 1969); *see also Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821, 826 (Ariz. App. Ct.  
14 2001). While it is true that "directors are generally shielded from liability for acts done in  
15 good faith on behalf of the corporation, their status does not shield them from personal  
16 liability to those harmed as a result of intentionally harmful or fraudulent conduct." *Albers*,  
17 31 P.3d at 826. Accepting as true Archetype's allegations that Morosco knowingly made  
18 false representations, the director's privilege does not at this stage protect him from liability  
19 as a matter of law.

20 **IT IS ORDERED** that Defendant Morosco's motion to dismiss (Dkt. #25) is **granted**  
21 with respect to negligent misrepresentation and **denied** with respect to fraud.

22 DATED this 3rd day of December, 2008.

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David G. Campbell  
United States District Judge