

1 **WO**

2

3

4

5

**NOT FOR PUBLICATION**

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Teleplus Consulting, Inc.,

No. CV-09-0472-PHX-FJM

10

Plaintiff,

**ORDER**

11

vs.

12

13

JLS Marketing, LLC; Joseph Sampley;  
Susan Sampley,

14

Defendants.

15

16

17

18

19

20

21

22

The court has before it defendants JLS Marketing, LLC, and Joseph and Susan Sampley’s (collectively, “JLS”) motion to dismiss Counts I, III, and V through X (doc. 9), plaintiff Teleplus Consulting, Inc.’s (“Teleplus”) response (doc. 17), and JLS’s reply (doc. 21); and JLS’s motion for summary disposition (doc. 14), Teleplus’s response (doc. 15), and JLS’s reply (doc. 19).

23

**I. Background**

24

25

26

27

28

Plaintiff Teleplus Consulting, Inc., is a Minnesota corporation with its principal place of business in Minnesota. Teleplus negotiates the pricing of voice, data, and wireless service contracts on behalf of large users of telecommunications services throughout the United States. It receives a commission based on a percentage of the total savings realized by its clients. Complaint ¶ 7. Defendant JLS Marketing is a Minnesota limited liability company

1 with its principal place of business in Avondale, Arizona. On April 6, 2003, Teleplus entered  
2 into an independent contractor agreement (the “Contractor Agreement”) with JLS, pursuant  
3 to which Teleplus agreed to market and sell JLS’s consulting services to new customers. Id.  
4 ¶ 8. JLS’s compensation under the agreement was based in part on the parties’ respective  
5 efforts in negotiating and securing a new customer. Id. ¶ 10.

6 Teleplus alleges that in 2003, it agreed to “participate in a sales effort involving  
7 Apollo [Group, Inc.] under the terms of the Contractor Agreement.” Id. ¶ 13. It claims that,  
8 due to its effort, Apollo eventually agreed to purchase telecommunications consulting  
9 services. Id. ¶¶ 13-14. On April 8, 2003, JLS entered into a consulting services agreement  
10 with Apollo. Id. ¶ 17. Teleplus initially invoiced Apollo for services rendered and Apollo  
11 paid Teleplus directly. Id. ¶ 24. Teleplus retained its share of the compensation as described  
12 by the Agreement, and remitted the balance to JLS. Id. ¶ 25. Then, in December 2004, JLS  
13 insisted on sending the monthly invoices to Apollo and receiving the remittances. Id. ¶¶ 26-  
14 27. Teleplus alleges that beginning in January 2005, once JLS began receiving Apollo’s  
15 payments directly, JLS failed to remit to Teleplus its commissions due under the Agreement.  
16 Id. ¶¶ 28-33. Teleplus also alleges that in 2007, Apollo hired JLS directly for its  
17 telecommunications consulting work, in violation of the Agreement’s non-compete clause.  
18 Id. ¶ 35.

19 On June 24, 2008, Teleplus filed an action against JLS in the United States District  
20 Court for the District of Minnesota, alleging various state law causes of action. The court  
21 adopted the report and recommendation of the United States magistrate judge and granted  
22 JLS’ motion to dismiss for lack of personal jurisdiction.<sup>1</sup> Teleplus then filed this action  
23 alleging that JLS breached the Contractor Agreement by failing to pay the amounts due,  
24 (Counts I and II), quantum meruit (Count III), unjust enrichment (Count IV), fraud (Count  
25

---

26 <sup>1</sup>We may take judicial notice of matters of public record, including court records,  
27 without converting a Rule 12(b)(6) motion into one for summary judgment. Mack v. South  
28 Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) (overruled on other grounds).

1 V), reckless misrepresentation (Count VI), breach of non-compete agreement (Count VII),  
2 misappropriation of business (Count VIII), violation of Minn. Stat. § 325F.69 (Count IX),  
3 and unfair competition (Count X). JLS now moves to dismiss Counts I, III, and V through  
4 X.<sup>2</sup>

## 5 **II. Motion for Summary Disposition**

6 JLS filed its motion to dismiss on April 24, 2009. When Teleplus failed to respond  
7 to the motion within the ten-day deadline set by LRCiv 7.2(c), JLS filed a motion for  
8 summary disposition (doc. 14). Teleplus now argues that the motion to dismiss was  
9 automatically converted into a motion for summary judgment because it involves “matters  
10 outside the pleadings.” Response to Motion for Summary Disposition at 1-2. Therefore,  
11 Teleplus contends that it is entitled to the thirty-day response time applicable to a motion for  
12 summary judgment. See LRCiv 56.1(b).

13 Teleplus’s argument evidences a fundamental misunderstanding of Rule 12(d), Fed.  
14 R. Civ. P. It is within the province of the court, not the party, to convert a motion to dismiss  
15 into a motion for summary judgment. See Swedberg v. Marotzke, 339 F.3d 1139, 1144 (9th  
16 Cir. 2003) (holding that a motion to dismiss supported by extraneous materials “cannot be  
17 regarded as one for summary judgment until the district court acts to convert the motion”).  
18 We have not converted the motion to dismiss into one for summary judgment, and therefore  
19 Teleplus’s response is untimely. Nevertheless, because JLS does not allege that it is  
20 prejudiced by the delay, because the delay will not affect the timely disposition of this case,  
21 and in the interest of deciding cases on their merit, we deny the motion for summary  
22 disposition (doc. 14).

## 23 **III. Motion to Dismiss**

### 24 **A. Counts I and VII – Breach of Contract**

25 JLS moves to dismiss Count I (breach of contract) and Count VII (breach of non-  
26 compete agreement), arguing that these breach of contract claims have already been  
27

---

28 <sup>2</sup>Teleplus voluntarily dismisses Counts III and X. Response at 2 n.1.

1 determined by the federal district court in Minnesota. The United States magistrate judge  
2 stated in his October 2008 report and recommendation that “[n]o written contract controls  
3 the dispute between JLS and Teleplus.” Motion to Dismiss, exhibit C at 6. Therefore, JLS  
4 contends that, because there was no contract, the breach of contract claims fail. We disagree.

5 First, the parties’ arguments are based on the presumption that the report and  
6 recommendation is itself an order of the district court. It is not. While the record in this case  
7 includes a docket report from District of Minnesota containing an entry entitled “Order  
8 Adopting Report and Recommendations,” (doc. 9, exhibit A), the parties have not submitted  
9 the district court order. Without the order, we do not know the extent to which the district  
10 court adopted the report and recommendation, and therefore we cannot conclude that a  
11 specific finding by the magistrate judge has any preclusive effect.

12 Even assuming the report and recommendation was adopted in its entirety, however,  
13 JLS’s collateral estoppel argument fails. The issue of whether a written contract controls the  
14 dispute between JLS and Teleplus was not actually and necessarily litigated in the Minnesota  
15 action. The issue before the Minnesota district court was whether there were sufficient  
16 minimum contacts to support personal jurisdiction over JLS. Resolution of whether the  
17 Contractor Agreement applied to the services provided to Apollo was not necessary to decide  
18 this jurisdictional issue. The magistrate judge’s statement that “[n]o written contract controls  
19 the dispute between JLS and Teleplus,” was supported only by a reference to JLS’s reply  
20 brief. Motion to Dismiss, exhibit C at 6. The magistrate judge noted that no written  
21 agreement between JLS and Teleplus was contained in the record. Id. at 3 n.2. Because the  
22 issue of whether a written contract controls the parties’ dispute was not actually and  
23 necessarily litigated in the prior action, collateral estoppel does not apply.<sup>3</sup>

---

24  
25  
26 <sup>3</sup>We also reject JLS’s contention that Teleplus is precluded from relitigating this issue  
27 based on the full faith and credit statute, 28 U.S.C. § 1738. That statute governs only  
28 judgments rendered by state courts, not other federal district courts. Semtek Int’l Inc. v.  
Lockheed Martin Corp., 531 U.S. 497, 506-07, 121 S. Ct. 1021, 1027 (2001).

1 Finally, we reject JLS’s argument that the Contractor Agreement itself demonstrates  
2 that it does not apply to the services provided to Apollo.<sup>4</sup> Although JLS alleges that the  
3 Contractor Agreement was signed on April 7, 2003, two weeks after JLS entered into a  
4 separate services agreement with Apollo, the Contractor Agreement between JLS and  
5 Teleplus was made effective as of January 6, 2003—three months before the Apollo contract  
6 was signed. These are sufficient facts to support a breach of contract claim that is “plausible  
7 on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974  
8 (2007).

9 Without deciding whether the Contractor Agreement governs the services arrangement  
10 with Apollo, we conclude that the complaint sufficiently states breach of contract claims in  
11 Counts I and VII. The interpretation of the contract language and the intent of the parties is  
12 better left to a motion for summary judgment.

13 **B. Counts VI (Reckless Misappropriation) and IX (Minn. Stat. § 325F.69)**

14 The Contractor Agreement contains a choice of law provision stating that questions  
15 concerning its validity, interpretation, performance, and enforcement will be governed by  
16 Minnesota law. Complaint ¶9. In keeping with its argument that the Contractor Agreement,  
17 including its choice of law provision, does not apply to the instant dispute, JLS argues that  
18 the claims based on Minnesota law—Count VI (reckless misappropriation), and Count IX  
19 (violation of Minn. Stat. § 325F.69)—should be dismissed because they are not cognizable  
20 under Arizona law. However, we have rejected the argument, at this stage of the litigation,  
21 that the Contractor Agreement does not apply to the parties’ dispute. Moreover, we will not  
22 consider JLS’s argument, raised for the first time in its reply brief, that even if the Contractor  
23 Agreement does apply, the choice of law provision does not encompass the Minnesota  
24

---

25  
26 <sup>4</sup>We may also consider the Contractor Agreement in deciding this motion to dismiss  
27 without converting it into a Rule 56 motion for summary judgment. See Marder v. Lopez,  
28 450 F.3d 445, 448 (9th Cir. 2006) (holding that a court may consider evidence on which the  
complaint “necessarily relies” if the complaint refers to the document, the document is  
central to the plaintiff’s claim, and no party questions its authenticity).

1 claims. See Gadda v. State Bar. of Calif., 511 F.3d 933, 937 n.2 (9th Cir. 2007). JLS's  
2 motion to dismiss Counts VI and IX is denied.

### 3 **C. Count VIII – Misappropriation of Business**

4 JLS contends that Count VIII must be dismissed because there is no cognizable claim  
5 for “misappropriation of business” under either Minnesota or Arizona law. Teleplus  
6 responds that its claim is actually one for breach of fiduciary duty. Response at 14.  
7 Teleplus’s allegation that JLS acted as its “agent,” however, is an unsupported legal  
8 conclusion belied by the fact that the parties’ relationship is governed by an “independent  
9 contractor” agreement. Teleplus has failed to state a claim for relief under Count VIII and  
10 it is therefore dismissed.

### 11 **D. Count V – Fraud**

12 Finally, JLS argues that Teleplus has failed to adequately plead fraud in Count V.  
13 Teleplus alleges in its complaint that JLS fraudulently represented that “if Teleplus  
14 performed the services of negotiating on behalf of Apollo . . . , JLS would share with  
15 Teleplus all monies received from Apollo in the manner agreed to by the parties.” Complaint  
16 ¶ 61. JLS contends that this allegation of unkept promises relating to future events is merely  
17 a breach of contract claim, not fraud.

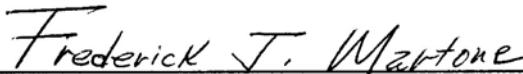
18 In order for a representation to constitute actionable fraud, “it must relate to either a  
19 past or existing fact. It cannot be predicated on unfulfilled promises, expression of intention  
20 or statements concerning future events unless such were made with the present intention not  
21 to perform.” Staheli v. Kauffman, 122 Ariz. 380, 383, 595 P.2d 172, 175 (1979). Teleplus  
22 generally avers that the “representations made by JLS were false when made and JLS knew  
23 that the representations were false at that time.” Complaint ¶ 66. General averments of  
24 intent, knowledge, and other conditions of a person’s mind are sufficient even under the  
25 heightened pleading standard of Rule 9(b), Fed. R. Civ. P. See Zucco Partners, LLC v.  
26 Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009). However, Rule 9(b) requires a pleader  
27 of fraud to “detail with particularity” the remaining elements of fraud, including “the time,  
28 place, and manner of each act of fraud.” Lancaster Cmty. Hosp. v. Antelope Valley Hosp.

1 Dist., 940 F.2d 397, 405 (9th Cir. 1991). Teleplus’s complaint alleges only that “JLS agreed  
2 to . . . additional compensation for Teleplus.” Complaint ¶ 22. It does not specify who made  
3 the agreement, when it was made, how it was made, or whether it was made orally or in  
4 writing. The Complaint does not describe with any particularity the circumstances of the  
5 purported agreement. We conclude that Teleplus has failed to allege its fraud claim with  
6 particularity, and accordingly we dismiss Count V.

7 **IV. Conclusion**

8 **IT IS ORDERED DENYING** JLS’s motion for summary disposition (doc. 14), and  
9 **GRANTING IN PART AND DENYING IN PART** JLS’s motion to dismiss (doc. 9).  
10 Counts III, V, VIII, and X are dismissed.

11 DATED this 11<sup>th</sup> day of August, 2009.

12  
13  
14  
15   
16 

---

 Frederick J. Martone  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28