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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 First Power Corporation,

10 Plaintiff,

11 v.

12 S & C Electric Company,

13 Defendant.
14

No. CV-14-02682-PHX-DGC

ORDER

15 Defendant S&C Electric Company (“S&C”) has filed a motion for leave to amend
16 its counterclaim. Doc. 32. Plaintiff First Power Corporation (“First Power”) has filed a
17 motion for leave to file a supplemental response to Defendant’s motion. Doc. 46. The
18 motions are fully briefed. The Court will grant Defendant’s motion and deny Plaintiff’s
19 motion.

20 **I. Legal Standard.**

21 Rule 15 makes clear that the Court “should freely give leave [to amend] when
22 justice so requires.” Fed. R. Civ. P. 15(a)(2). The policy in favor of leave to amend must
23 not only be heeded, *see Foman v. Davis*, 371 U.S. 178, 182 (1962), it must be applied
24 with “extreme liberality,” *see Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,
25 880 (9th Cir. 2001). This liberality “is not dependent on whether the amendment will add
26 causes of action or parties.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th
27 Cir. 1987). The Court may deny a motion to amend if there is a showing of undue delay
28 or bad faith on the part of the moving party, undue prejudice to the opposing party, or

1 futility of the proposed amendment. *See Foman*, 371 U.S. at 182. Generally, however,
2 “this determination should be performed with all inferences in favor of granting the
3 motion.” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999).

4 **II. Analysis.**

5 S&C moves to amend its Answer to include additional counterclaims for fraud and
6 trademark infringement. Doc. 33-1, ¶¶ 36-61. First Power opposes addition of the fraud
7 claim. Doc. 40 at 2. It argues that the claim is futile and that S&C failed to plead it with
8 particularity under Rule 9(b). In its fraud claim, S&C alleges the following:

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- 10 37. First power represented to S&C that it would jointly develop and
11 participate in mutually beneficial opportunities, transactions, and
12 arrangements as set forth in Paragraph 2 of the Agreement.
- 13 38. At the time that First Power made the representation, that
14 representation was material and false and First Power knew it was
15 false at the time it was made.
- 16 39. Indeed, First Power never intended to abide by its commitment.
17 First Power made the representation with the intent and expectation
18 that S&C would rely and act on it in a manner reasonably
19 contemplated.
- 20 40. S&C had a right to rely on First Power’s representation.
- 21 41. S&C in fact relied on First Power’s representation when deciding to
22 enter into the Agreement.
- 23 42. As a result of First Power’s intentional misrepresentation, S&C has
24 been damaged and is entitled to compensation for those damages.

25 Doc. 33-1, ¶¶ 37-42.

26 **A. Motion to Amend.**

27 First Power argues the fraud claim is futile because S&C has admitted that First
28 Power performed at least some of its contractual obligations, and therefore S&C cannot
show that First Power intended to deceive it at the time of the representation. It also
argues S&C failed to plead the claim with particularity under Rule 9(b).

1 In analyzing futility, courts generally look to whether the amendment would be
2 sufficient to withstand a Rule 12(b)(6) motion to dismiss. *See Townsend v. University of*
3 *Alaska*, 543 F.3d 478, 486 n.6 (9th Cir. 2008) (noting that the “basis for futility is more
4 accurately characterized as a failure to state a claim for relief”). In order to prevail on a
5 fraud claim under Arizona law, a claimant must show:

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7 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker’s
8 knowledge of the representation’s falsity or ignorance of its truth; 5) the
9 speaker’s intent that it be acted upon by the recipient in the manner
10 reasonably contemplated; 6) the hearer’s ignorance of its falsity; 7) the
11 hearer’s reliance on its truth; 8) the right to rely on it; and 9) his consequent
12 and proximate injury.

13 *Echols v. Beauty Built Homes*, 647 P.2d 629, 631 (Ariz. 1982); *see Haisch v. Allstate*
14 *Ins. Co.*, 5 P.3d 940, 944 (Ariz. Ct. App. 2000) (citing *Echols*). A plaintiff “must state
15 the time, place, and specific content of the false representations as well as the identities of
16 the parties to the misrepresentation.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,
17 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
18 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by the who, what,
19 when, where, and how of the misconduct charged.”); *Lancaster Cmty. Hosp. v. Antelope*
20 *Valley Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (Rule 9(b) “requires a pleader of fraud to
21 detail with particularity the time, place, and manner of each act of fraud, plus the role of
22 each defendant in each scheme.”).

23 S&C alleges promissory fraud – fraud in which the misrepresentation alleged is
24 “the making of a promise without intent to perform.” *Trollope v. Koerner*, 470 P.2d 91,
25 100 (Ariz. 1970). “Unless the plaintiff can prove that the defendant intended to deceive
26 the plaintiff at the time the representation was made, the claim cannot stand.” *McAlister*
27 *v. Citibank*, 829 P.2d 1253, 1260 (Ariz. Ct. App. 1992).

28 The Court finds S&C sufficiently alleged the elements of a claim for promissory
fraud under Arizona law and Rule 9(b). The amended complaint alleges that on

1 August 12, 2013, First Power made a representation through its Managing Director,
2 Michael Horner, that it would “jointly develop and participate in certain mutually
3 beneficial opportunities,” but that it never actually intended to perform this obligation.
4 Doc. 33-1, ¶¶ 5, 6, 37. S&C alleges that First Power knew the representation was false
5 and that S&C would rely on it. The allegations provide the who, what, when, and how
6 regarding the alleged fraud, which the Court finds “specific enough to give [First Power]
7 notice of the particular misconduct which is alleged to constitute the fraud[.]” *Bly-Magee*
8 *v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). In addition, the fact that S&C has
9 admitted that First Power brought some mutually beneficial opportunities to S&C does
10 not necessarily render the claim futile. This is a factual issue to be addressed at summary
11 judgment or trial. For purposes of a Rule 12(b)(6) motion, which is the effective standard
12 for judging futility of a proposed amendment, *Townsend*, 543 F.3d at 486 n.6, the Court
13 must assume the allegations of S&C’s counterclaim are true. S&C’s motion to amend
14 will be granted.

15 **B. Motion for Leave to File Supplemental Response.**

16 First Power has filed a motion for leave to submit a supplemental response,
17 arguing that S&C improperly raised a new argument in its reply. The Court, however,
18 did not rely on S&C’s reply brief in the above analysis. The motion therefore will be
19 denied as moot.

20 **IT IS ORDERED:**

- 21 1. Defendant’s motion for leave to amend (Doc. 32) is **granted**. Defendant
22 shall file its amended document with the clerk of court on or before
23 **May 20, 2015**.
- 24 2. Plaintiff’s motion for leave to file a supplemental response (Doc. 46) is
25 **denied**.

26 Dated this 15th day of May, 2015.

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David G. Campbell
United States District Judge