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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
89 Bridgepoint Construction Services  
10 Incorporated, *et al.*,

11 Plaintiffs,

12 v.

13 James Lassetter,

14 Defendant.

No. CV-16-00078-PHX-JJT

**ORDER**15  
16 At issue is Defendant James Lassetter's Motion to Dismiss (Doc. 14, MTD), to  
17 which Plaintiffs Bridgepoint Construction Services, Inc. and Norm Salter filed a  
18 Response (Doc. 15, Resp.) and Defendants filed a Reply (Doc. 16, Reply). The Court  
19 heard oral argument on the Motion on June 27, 2016. (Doc. 18.) For the reasons that  
20 follow, the Court grants Defendant's Motion to Dismiss.21 **I. BACKGROUND**22 In the Complaint (Doc. 1, Compl.), Plaintiffs allege the following facts. Non-party  
23 Martin Newton formed Vista Oceano La Mesa Venture LLC ("Vista") to develop a real  
24 estate project in Santa Barbara, California. (Compl. ¶ 21.) Newton also formed Plaintiff  
25 Bridgepoint Construction Services, Inc. ("Bridgepoint") with his cousin, Plaintiff Norm  
26 Salter, which provided construction services for the project. (Compl. ¶¶ 15, 21.) In order  
27 to complete the project and qualify for a \$9.45 million bank loan, Newton contacted  
28 Defendant, who agreed to join the project through his entity Tenacious Adventures LLC

1 (“Tenacious”). (Compl. ¶¶ 19, 22.) Tenacious invested \$3 million, and Vista was  
2 restructured with Tenacious as the sole member and Point III Holdings LLC (“Point  
3 III”)—solely owned by Newton—as the manager. (Compl. ¶¶ 22, 23.) Unforeseen  
4 conditions and increased costs caused the project to be over budget and underfunded.  
5 (Compl. ¶¶ 27, 28, 35.) Part of this shortfall was made up by Bridgepoint using its own  
6 funds. (Compl. ¶ 36.) Vista and Bridgepoint drafted an amended development services  
7 agreement, during which time Newton, with the alleged knowledge and approval of  
8 Defendant, represented to Plaintiffs that they would share in the profits of the project by  
9 receiving Point III’s share of the waterfall profit-sharing provision in the Vista operating  
10 agreement. (Compl. ¶¶ 31, 32.) Newton and Defendant also orally promised that  
11 Bridgepoint would be paid first, before any other amounts were paid to anyone except the  
12 bank. (Compl. ¶ 38.)

13 Plaintiffs allege Newton made these representations in the ordinary course of his  
14 responsibilities as manager of Vista, with Defendant’s knowledge, participation,  
15 encouragement, and consent. (Compl. ¶ 57.) Plaintiffs allege that both Newton and  
16 Defendant knew that these representations were false and made them with the intent to  
17 defraud Plaintiffs. (Compl. ¶ 52.) Plaintiffs further allege that Newton and Defendant  
18 knowingly and willfully conspired to cause a breach of fiduciary duties owed by Newton  
19 to Plaintiffs, by requiring and encouraging Plaintiffs to finance the construction project  
20 without any intention of reimbursing them. (Compl. ¶ 70.)

21 In the end, Vista earned a \$7.3 million profit on the project, and Plaintiffs allege  
22 \$6.9 million “was diverted to Defendant in Arizona in order to render Vista judgment  
23 proof.” (Compl. ¶ 45.) Plaintiffs therefore claim Defendant became indebted to Plaintiffs  
24 for money had and received by Defendant for the use and benefit of Plaintiffs. (Compl.  
25 ¶ 85.) Plaintiffs also claim Bridgepoint has not received its orally promised share of the  
26 profits from the project. (Compl. ¶ 43.)

27 Based on the preceding allegations, Plaintiffs bring the following claims against  
28 Defendant: Conspiracy to Commit Fraud (Count I), Conspiracy to Breach a Fiduciary

1 Duty (Count II), Fraudulent Transfer (Count III), and Money Had and Received (Count  
2 IV). (Compl. ¶¶ 48–89.) Defendant now moves to dismiss all of Plaintiffs’ claims against  
3 him.

## 4 **II. LEGAL STANDARD**

5 Rule 12(b)(6) is designed to “test[] the legal sufficiency of a claim.” *Navarro v.*  
6 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim  
7 pursuant to Rule 12(b)(6), a complaint must contain more than “labels and conclusions”  
8 or a “formulaic recitation of the elements of a cause of action”; it must contain factual  
9 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*  
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain  
11 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
12 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.  
13 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the  
14 plaintiff pleads factual content that allows the Court to draw the reasonable inference that  
15 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
16 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a  
17 sheer possibility that a defendant has acted unlawfully.” *Id.*

18 When analyzing a complaint for failure to state a claim for relief under Federal  
19 Rule of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and  
20 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568  
21 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not  
22 entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and  
23 therefore are insufficient to defeat a motion to dismiss for failure to state a claim. *In re*  
24 *Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

## 25 **III. ANALYSIS**

26 As a threshold matter, the Court must decide which state’s substantive law applies  
27 in this dispute. This is a diversity action under 28 U.S.C. § 1332. When a federal court  
28 sits in diversity, it must look to the forum state's choice of law rules to determine the

1 controlling substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496  
2 (1941). Arizona’s choice-of-law test looks for the state with the most significant  
3 relationship to the claim. *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1071 (9th Cir. 2015).

4 The choice of law analysis in this case is straightforward. The underlying  
5 transaction in this dispute is a land development project in California. The alleged  
6 fraudulent misrepresentations took place in California and the potential damage would be  
7 felt by a California corporation and a California citizen. The only connection to Arizona  
8 is Defendant’s Arizona citizenship. Therefore, the Court finds the state of California has  
9 the most significant relationship to this claim and California law applies.

10 **A. Conspiracy to Commit Fraud**

11 Plaintiffs claim that Defendant and Newton conspired to defraud them of their  
12 share of money due from the project. (Compl. ¶¶ 48–63.) Where a plaintiff alleges fraud  
13 or misrepresentation, Federal Rule of Civil Procedure 9(b) imposes heightened pleading  
14 requirements. Specifically, “[a]verments of fraud must be accompanied by ‘the who,  
15 what, when, where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp.*  
16 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627  
17 (9th Cir. 1997)). The heightened pleading requirements of Rule 9(b) apply even where  
18 “fraud is not a necessary element of a claim.” *Vess*, 317 F.3d at 1106. So long as a  
19 plaintiff alleges a claim that “sounds in fraud” or is “grounded in fraud,” Rule 9(b)  
20 applies. *Id.* “While a federal court will examine state law to determine whether the  
21 elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b)  
22 requirement that the *circumstances* of the fraud must be stated with particularity is a  
23 federally imposed rule.” *Id.*

24 Plaintiff’s Complaint does not state the circumstances that constitute the alleged  
25 fraud with the particularity required by Rule 9(b). The majority of the allegations in the  
26 Complaint are directed at conduct by Newton—or Newton and Defendant together—and  
27 the remaining claims against Defendant individually are insufficient. At oral argument,  
28 Plaintiffs cited *Swartz v. KPMG*, 476 F.3d 756 (9th Cir. 2007), to suggest they are not

1 required to allege the particular fraud or false statements made by each and every  
2 defendant or identify every detail in furtherance of the conspiracy. (June 27, 2016 Hr’g  
3 Tr. at 128-29.) However, Plaintiffs must identify, at a minimum, the role of Defendant in  
4 the alleged fraud. *See Swartz*, 476 F.3d at 765. And while Plaintiffs need not identify  
5 every detail, there must be enough detail to plausibly support their allegations against  
6 Defendant. *See Vess*, 317 F.3d at 1106.

7 Here, Plaintiffs’ claim fails to allege enough factual non-conclusory allegations to  
8 support the claim that Defendant conspired to commit fraud. The bulk of the allegations  
9 are against Newton and Defendant together, and the Complaint fails to allege any specific  
10 acts or role by Defendant. This is insufficient under Rule 9(b). Further, the Complaint  
11 fails to allege facts to support an inference that Defendant, and not Tenacious as sole  
12 member of Vista, had a role in the fraud. Without alter ego allegations, the Court cannot  
13 disregard the corporate forms of the parties to the alleged agreement, and the Court does  
14 not find enough facts in the Complaint to state a claim to relief against Defendant that is  
15 plausible on its face. Thus, the Court dismisses Plaintiffs’ claim of Conspiracy to Commit  
16 Fraud (Count I), but grants Plaintiffs leave to amend if they can allege facts to plausibly  
17 support an inference that Defendant is individually liable and had a specific role in the  
18 conspiracy to commit fraud.

19 **B. Conspiracy to Breach Fiduciary Duty**

20 Plaintiffs claim Defendant conspired with Newton to cause a breach of fiduciary  
21 duties owed by Newton to Plaintiffs. (Compl. ¶¶ 64–76.) Liability arising from  
22 conspiracy assumes that the co-conspirator is legally capable of committing the  
23 underlying tort or that he or she owes a duty to plaintiff recognized by law. *Applied*  
24 *Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994). A non-fiduciary  
25 cannot conspire to breach a duty owed only by a fiduciary. *Am. Master Lease LLC v.*  
26 *Idanta Partners, Ltd.*, 171 Cal. Rptr. 3d 548, 566 (Ct. App. 2014) (citing *Everest Inv’rs 8*  
27 *v. Whitehall Real Estate Ltd. P’ship XI*, 123 Cal. Rptr. 2d 297 (Ct. App. 2002)).

28 As a non-fiduciary, Defendant is legally incapable of breaching the fiduciary duty

1 owed to Plaintiffs. The underlying dispute in this Complaint involves a transaction  
2 between Bridgepoint and Vista, and Defendant is at least three levels removed from any  
3 dealings with Plaintiffs. Defendant is the sole member of Tenacious, which in turn is the  
4 sole member of Vista, which was involved in an arm's length transaction with Plaintiff  
5 Bridgepoint, of which Plaintiff Salter is a minority shareholder. Considering the non-  
6 conclusory allegations of the Complaint, it is less than plausible that Defendant had any  
7 individual responsibility or owed any fiduciary duty to Plaintiffs. Because Defendant  
8 cannot commit a breach of fiduciary duty, the underlying tort in the alleged conspiracy,  
9 he cannot be liable for a conspiracy to breach that duty. *See Am. Master*, 171 Cal. Rptr.  
10 3d at 566. Thus, the Court dismisses with prejudice Plaintiffs claim of Conspiracy to  
11 Breach a Fiduciary Duty (Count II).

12 **C. Fraudulent Transfer**

13 Plaintiffs allege that Newton and Defendant “by and through their entities”  
14 conspired to delay, hinder, and defraud a creditor. (Compl. ¶¶ 77–83.) Under California  
15 law, a fraudulent transfer occurs when a debtor makes a transfer with actual intent to  
16 hinder, delay, or defraud any creditor of the debtor. Cal. Civil Code § 3439.04(a)(1).  
17 While Plaintiffs’ allegation mirrors the statutory language, the claim is self-defeating.  
18 Because this claim is against Defendant individually, Plaintiffs’ allegation that he acted  
19 by and through his entity precludes his individual responsibility. Thus, the Court  
20 dismisses Plaintiff’s claim of Fraudulent Transfer (Count III), but grants Plaintiffs leave  
21 to amend.

22 **D. Money Had and Received**

23 Plaintiffs claim Defendant is indebted to Plaintiffs for money intended for their  
24 benefit. (Compl. ¶¶ 84–89.) Under California law, a claim for money had and received  
25 arises when one person receives money which belongs to another. *Avidor v. Sutter’s*  
26 *Place, Inc.*, 151 Cal. Rptr. 3d. 804, 816 (Ct. App. 2013). Plaintiffs further state that under  
27 California law they do not need to plead this claim with any specificity. (Resp. at 10.)  
28 However, while state law may apply to the elements of the claim, the federal pleading

1 rules still control. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996)  
2 (noting federal courts sitting in diversity apply state substantive law and federal  
3 procedural law.)

4 Here, Plaintiffs have failed to allege facts to plausibly show how Defendant has  
5 their money, and more importantly, how he acquired this money in his individual  
6 capacity. As discussed, this dispute involves two entities: Bridgepoint and Vista.  
7 Plaintiffs' allegations are that money or profits from the project were received by Vista  
8 (Compl. ¶ 45), the sole member of which was Tenacious. Without an alter ego claim, or a  
9 plausible fraudulent transfer claim, the Court cannot plausibly infer that Defendant is  
10 individually liable for receiving money Plaintiffs themselves allege was received by Vista  
11 but meant for Plaintiffs.

12 Further, because this claim is grounded in fraud, Plaintiffs must plead with the  
13 particularity required by Rule 9(b). *See Vess*, 317 F.3d at 1106. Plaintiffs allege that  
14 Defendant knew they had a claim to a portion of the funds from the project, and that  
15 Defendant, not Vista or Tenacious, somehow received their money over a two-year  
16 period. This is insufficient under Rule 9(b). As with Plaintiffs' other claims, the Court  
17 cannot plausibly infer from Plaintiffs' non-conclusory allegations that Defendant is  
18 individually liable to the Plaintiffs for Money Had and Received. Thus, the Court  
19 dismisses this claim (Count IV), but grants Plaintiffs leave to amend.

#### 20 **IV. CONCLUSION**

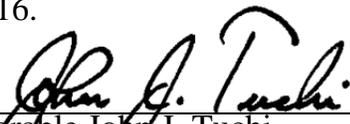
21 The Court finds that Plaintiffs' Complaint fails to meet the pleading requirements  
22 of Rules 8(a) and 9(b). Considering only the non-conclusory, factual allegations,  
23 Plaintiffs' Complaint fails to state a claim under which relief can be granted. Further,  
24 because the allegations in the Complaint relate to a dispute surrounding an arm's length  
25 transaction involving multiple entities, the Complaint fails to state how any of the alleged  
26 actions can be attributed to Defendant in his individual capacity. Therefore, the Court  
27 dismisses without prejudice Counts I, III, and IV. Because it does not appear Plaintiff can  
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1 cure the defects in Count II, Conspiracy to Breach a Fiduciary Duty, the Court dismisses  
2 it with prejudice. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

3 **IT IS THEREFORE ORDERED** granting Defendant's Motion to Dismiss (Doc.  
4 14). Count II of Plaintiffs' Complaint is dismissed with prejudice, and Plaintiffs may  
5 amend Counts I, III, and IV.

6 **IT IS FURTHER ORDERED** that Plaintiffs must file any Amended Complaint  
7 by August 2, 2016. If Plaintiffs fail to timely file an Amended Complaint, the Clerk of  
8 Court shall dismiss this action without further Order of the Court.

9 Dated this 19<sup>th</sup> day of July, 2016.

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12 Honorable John J. Tuchi  
13 United States District Judge  
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