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

8
9 Advanced Reimbursement Solutions LLC,
10 Plaintiff,

No. CV-17-01688-PHX-DWL

11 v.

ORDER

12 Spring Excellence Surgical Hospital LLC, et
13 al.,

14 Defendants.

15 **INTRODUCTION**

16 Defendant Spring Excellence Surgical Hospital LLC (“SESH”) contends it is not
17 bound by the contract at issue in this lawsuit, the “Exclusive Healthcare ‘Out of Network’
18 Claims Billing Agreement” (the “Billing Agreement”), because the manager who executed
19 the Billing Agreement on SESH’s behalf, Joanna Davis (“Davis”), lacked authority to do
20 so. SESH also claims that even if the Billing Agreement were a valid contract, it is not
21 liable because Plaintiff Advanced Reimbursement Solutions LLC (“ARS”) breached the
22 Billing Agreement first.

23 ARS has moved for partial summary judgment on the issue of liability, contending
24 that SESH is bound by the Billing Agreement for three reasons: (1) Davis had actual
25 authority to enter into the Billing Agreement on SESH’s behalf under Arizona agency law;
26 (2) Davis executed the Billing Agreement as a manager of an LLC in the ordinary course
27 of business, rendering SESH liable for its breach under Texas LLC law; and (3) SESH
28 subsequently ratified the Billing Agreement. (Doc. 97.) ARS also disputes SESH’s

1 argument that it breached the Billing Agreement. Alternatively, ARS seeks summary
2 judgment on its unjust enrichment claim.¹

3 For the following reasons, the Court grants partial summary judgment to ARS
4 concerning its breach of contract claim and denies as moot ARS's motion for partial
5 summary judgment concerning its claim for unjust enrichment.

6 **BACKGROUND**

7 **A. The Parties**

8 ARS is a medical billing service that contracts with medical providers to process
9 and bill out-of-network health insurance claims. (Doc. 98 ¶ 5; Doc. 98-2 at 49.)

10 SESH, a surgical hospital, is an LLC formed pursuant to the Texas Business
11 Organizations Code. (Doc. 98 ¶ 6; Doc. 98-2 at 52.) SESH is a manager-managed LLC.
12 (Doc. 98 ¶ 7; Doc. 98-2 at 52.) When it was formed, SESH's sole manager was Excellence
13 Medical Group, LLC ("EMG"). (Doc. 98 ¶ 8; Doc. 98-2 at 55.)

14 SESH's Company Agreement, which became effective in June 2016, provided that
15 SESH would have up to three managers. (Doc. 98 ¶ 9; Doc. 98-1 at 18.) In August and
16 September 2016, these managers were Davis, Devorshia Janell Russell ("Russell"), and
17 Dr. Richard Francis ("Francis"). (Doc. 98 ¶ 11; Doc. 98-2 at 56.)

18 SESH's Company Agreement provides that "the business and affairs of the
19 Company shall be managed by the managers of the Company" and requires that all
20 decisions required or permitted to be made by the managers "be agreed upon by a Majority
21 vote of the Managers." (Doc. 98 ¶ 12; Doc. 98-1 at 17.)

22 **B. The Negotiation And Execution Of The Billing Agreement**

23 In or around July or August 2016, Jeffrey Webb ("Webb"), ARS's National Director
24 of Sales, learned that SESH might be interested in ARS's billing services and was referred
25 to Davis. (Doc. 98 ¶¶ 13-14; Doc. 98-3 at 11-12.) During Webb's initial phone call with
26 Davis, Davis represented that she had an ownership interest in SESH and that she handled

27
28 ¹ ARS has requested oral argument, but the Court will deny the request because the
issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed.
R. Civ. P. 78(b); LRCiv. 7.2(f).

1 SESH's day-to-day management. (Doc. 98 ¶ 15; Doc. 98-3 at 12.)

2 Webb requested that SESH execute a Mutual Non-Disclosure Agreement and
3 Business Associates Agreement. (Doc. 98 ¶ 16; Doc. 98-3 at 12.) Davis executed the
4 former as CEO on behalf of EMG and the latter as CEO on behalf of SESH. (Doc. 98
5 ¶¶ 17-18; Doc. 98-2 at 61; Doc. 98-3 at 15-29.)

6 Webb later made a presentation to SESH's management team during which Davis,
7 Russell, and Francis were present. (Doc. 98 ¶¶ 19-20, Doc. 98-2 at 61.) Following Webb's
8 presentation, Webb communicated with Davis to negotiate the terms of the Billing
9 Agreement. (Doc. 98 ¶ 21; Doc. 98-2 at 61.)

10 On or about August 31, 2016, SESH's governing board held a board meeting at
11 which Davis, Russell, Francis, and two other SESH affiliates were present. (Doc. 98 ¶ 22;
12 Doc. 98-2 at 61; Doc. 98-3 at 31-34.) The minutes of the meeting indicate that SESH was
13 in the process of searching for a full-time CEO and that the attendees unanimously
14 approved that Russell and Davis would "work together to handle the day-to-day operations,
15 functions, and administrative oversight of the CEO for SESH." (Doc. 98-3 at 31.)

16 The August meeting minutes do not mention the Billing Agreement. However,
17 Davis states in her affidavit that, during the August 31, 2016 meeting, "SESH's board
18 members . . . unanimously agreed to proceed moving forward with the Billing Agreement
19 with no additions or deletions." (Doc. 98-2 at 62.) Russell similarly states in her affidavit
20 that she and Francis authorized Davis to execute the Billing Agreement. (Doc. 98-3 at 9.)

21 Dr. Yueh Bryan Lee ("Lee") and Dr. Sherman Nagler ("Nagler"), who were
22 affiliated with EMG members, have indicated in affidavits that they do not recall ever
23 seeing, discussing, or voting on a copy of any billing agreement between ARS and SESH.
24 (Doc. 211 at 22, 26-27.) Although these individuals indicated in their affidavits that they
25 "attended scheduled meetings of EMG which included reviewing SESH business," they
26 did not specify which meetings they attended. (*Id.* at 22, 26.)

27 The Billing Agreement indicates that it was signed by Davis as CEO of SESH on
28 September 1, 2016 and by ARS's president on September 6, 2016. (Doc. 98-4 at 15-26;

1 *see also* Doc. 98-2 at 62.) The Billing Agreement includes a provision in which the
2 signatories represent and warrant that they have authority to execute the agreement on
3 behalf of their respective companies. (Doc. 98-4 at 23.)

4 The Billing Agreement provides that ARS will bill SESH monthly and that payment
5 will be due from SESH no later than 10 business days after the date of invoice. (Doc. 98-
6 4 at 18.) Additionally, it provides that if SESH fails to remit payment within the specified
7 time limits, ARS is permitted to “immediately suspend provision of all Services” and SESH
8 will be charged a late fee. (*Id.* at 18-19.) Substantively, the Billing Agreement grants ARS
9 exclusive collection rights for out-of-network billings. (*Id.* at 15.) ARS is not obligated to
10 verify that invoices submitted for collection reflect services performed at SESH.

11 C. The September 2016 Board Meeting

12 SESH’s governing board held another meeting on September 26, 2016 at which
13 Davis, Russell, and Francis were present. (Doc. 98 ¶ 31; Doc. 98-2 at 62; Doc. 98-3 at 36-
14 38.) The minutes from the September meeting indicate that the governing board
15 unanimously approved Russell and Davis to continue working together as SESH’s CEO to
16 handle the day-to-day management and operations. (Doc. 98-3 at 36.) Additionally, in the
17 row for “Review of Current Contract & Agreements,” the September minutes note: “See
18 Manual/Binder -for New Contracts and agreement for SESH/SEM Agreements. *All*
19 *contracts initiated on behalf of SEM/SESH approved.*” (*Id.* at 38, emphasis added.)

20 The September minutes do not indicate whether the Billing Agreement was among
21 the contracts falling within this “approved” category. Dr. Mirza Baig (“Baig”), who is now
22 a manager of and the custodian of records for SESH, states in an affidavit that he is “not
23 aware of there ever being a vote of managers that approved any billing agreement between
24 ARS and SESH.” (Doc. 211 at 30.) However, Russell specifically states in her affidavit
25 that the Billing Agreement was one of the contracts that was approved. (Doc. 98-3 at 8-9
26 [“During the September Meeting, . . . [t]he attendees also approved all contracts initiated
27 on behalf of SESH, including ARS’s Billing Agreement.”]).

28 ...

1 D. ARS's Performance Under The Billing Agreement

2 Following execution of the Billing Agreement, ARS began performing under the
3 contract by collecting patient and medical services information from SESH via a secure
4 computer system connection and preparing and filing medical claims for reimbursement
5 with health insurance payers. (Doc. 98-2 at 49.) SESH began using ARS forms in
6 September 2016. (Doc. 98 ¶ 45; Doc. 98-5 at 41-49.)

7 Between approximately December 1, 2016 and December 1, 2017, ARS sent
8 invoices to ARS seeking a total of over \$700,000 in compensation. (Doc. 98 ¶ 46; Doc.
9 98-6 at 2-15.) These invoices included EMG's address, not SESH's address. (Doc. 98-6
10 at 2-15.) SESH has never sent any money to ARS in response to these invoices. (Doc. 98
11 ¶ 47; Doc. 98-2 at 49.)

12 E. The Audit And Letters Concerning The Billing Agreement

13 Baig was involved in a due diligence review that was conducted when ABCD
14 Technology, Inc. ("ABCD") was considering investing in SESH. (Doc. 211 at 30.) As
15 part of that review, Baig reviewed numerous SESH documents, including SESH's accrual
16 log. (*Id.*) SESH's accrual log did not include any invoices or amounts due to ARS before
17 February 2017. (Doc. 211 at 30.)

18 After ABCD purchased an ownership stake in SESH, it conducted an audit of all
19 claims processed by SESH. (*Id.*) Baig states in his affidavit: "The result of this audit found
20 that in over 95% of the claims processed for SESH, ARS had performed them in a negligent
21 and incompetent manner which resulted in inaccurate and incomplete claims." (*Id.*)

22 On February 23, 2017, Baig, SESH's then-interim CEO, sent a letter requesting that
23 ARS "immediately cease and desist providing all billing and collections services for
24 [SESH]." (Doc. 98-6 at 17-18.) The letter begins by noting that "[b]y way of background,
25 ARS entered into an Exclusive Healthcare Out-Of-Network Claims Billing Agreement
26 with SESH dated August 16, 2016." (*Id.* at 17.) The letter next asserts that "ARS began
27 materially breaching the Agreement as early as the first month of the term of the
28 Agreement," as "an independent audit of the claims processed by ARS under the

1 Agreement from the beginning of the Agreement through February 17, 2017
2 demonstrate[d] that ARS has failed to perform under its primary obligation under the
3 Agreement at Section 1 in at least 95% of the claims it agreed to properly process under
4 the Agreement.” (*Id.*) The letter thus contends that the “ongoing material breach by ARS
5 excuses SESH’s performance under the agreement.” (*Id.* at 18.)

6 On February 27, 2017, ARS sent a response letter demanding that SESH remit
7 payment of the past-due amounts (at the time, over \$125,000) by no later than March 10,
8 2017. (Doc. 98-6 at 20-22.) In this letter, ARS also disputed SESH’s claim that it had
9 breached the Billing Agreement and asserted that SESH’s attempt to terminate the Billing
10 Agreement did not comply with the Billing Agreement’s termination provision. (*Id.*)

11 On March 23, 2017, SESH’s counsel responded to ARS’s letter by proposing a
12 settlement offer and noting that the Billing Agreement “was executed and agreed to by the
13 CEO of [EMG] without any agency or corporate authority to bind SESH to the terms of
14 the agreement in question.” (Doc. 98-6 at 24.)

15 LEGAL STANDARD

16 A party moving for summary judgment “bears the initial responsibility of informing
17 the district court of the basis for its motion, and identifying those portions of ‘the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the affidavits,
19 if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”
20 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “Summary judgment is appropriate
21 when ‘there is no genuine dispute as to any material fact and the movant is entitled to
22 judgment as a matter of law.’” *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir.
23 2018) (quoting Fed. R. Civ. P. 56(a)). “A genuine dispute of material fact exists if ‘there
24 is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that
25 party.’” *United States v. JP Morgan Chase Bank Account No. Ending 8215 in Name of*
26 *Ladislao V. Samaniego*, VL: \$446,377.36, 835 F.3d 1159, 1162 (9th Cir. 2016) (quoting
27 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). The court “must view the
28 evidence in the light most favorable to the nonmoving party and draw all reasonable

1 inference in the nonmoving party’s favor.” *Rookaird*, 908 F.3d at 459. Summary judgment
2 is also appropriate against a party who “fails to make a showing sufficient to establish the
3 existence of an element essential to that party’s case, and on which that party will bear the
4 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

5 ANALYSIS

6 A. Breach of Contract

7 1. **Whether SESH Was Bound by the Billing Agreement**

8 In a breach of contract action, “the plaintiff has the burden of proving the existence
9 of the contract, its breach and the resulting damages.” *Thomas v. Montelucia Villas, LLC*,
10 302 P.3d 617, 621 (Ariz. 2013) (citation omitted). Here, the parties begin by disputing
11 whether the Billing Agreement was a valid contract. ARS argues the Billing Agreement
12 should be deemed valid for three reasons: (1) Davis had actual authority to execute the
13 Billing Agreement on SESH’s behalf under Arizona agency law; (2) Davis executed the
14 Billing Agreement as a manager of an LLC in the ordinary course of business, rendering
15 SESH liable for its breach under Texas LLC law; and (3) SESH subsequently ratified the
16 Billing Agreement. (Doc. 97 at 10-16.) In response, SESH contends there was no valid
17 contract because Davis lacked actual or apparent authority to bind SESH. (Doc. 211 at 6-
18 12.)

19 The Court finds it unnecessary to resolve ARS’s first and second arguments because
20 it agrees with ARS’s third argument. Even assuming, for the sake of argument, that Davis
21 lacked the unilateral authority to bind SESH when she signed the Billing Agreement on
22 September 1, 2016 and that Texas LLC law doesn’t apply in the manner suggested by ARS,
23 the undisputed evidence shows that SESH ratified the Billing Agreement during a board
24 meeting on September 26, 2016.

25 “Ratification is the affirmance by a person of a prior act which did not bind him but
26 which was done or professedly done on his account, whereby the act, as to some or all
27 persons, is given effect as if originally authorized by him.” *Fid. & Deposit Co. of Maryland*
28 *v. Bondwriter Sw., Inc.*, 263 P.3d 633, 639 (Ariz. Ct. App. 2011) (quoting Restatement

1 (Second) of Agency § 82 (1958)). “Ratification recasts the legal relations between the
2 principal and agent as they would have been had the agent acted with actual authority.” *Id.*
3 Thus, “[r]atification of a contract does not depend on the existence of an actual agency
4 relationship at the time the contract is accepted.” *Edwards v. Vemma Nutrition*, 2018 WL
5 637382, *3 (D. Ariz. 2018). Instead, “[r]atification requires intent to ratify plus full
6 knowledge of all the material facts.” *United Bank v. Mesa N. O. Nelson Co.*, 590 P.2d
7 1384, 1386 (Ariz. 1979). “Ratification may be express or implied, and intent may be
8 inferred from the failure to repudiate an unauthorized act, from inaction, or from conduct
9 on the part of the principal which is inconsistent with any other position than intent to adopt
10 the act.” *Id.* (citations omitted).

11 Here, ARS has presented uncontroverted evidence of express ratification of the
12 Billing Agreement.² Russell states in her affidavit that the attendees at the September 26,
13 2016 meeting, who included all three of SESH’s managers at the time (Davis, Russell, and
14 Francis), approved all contracts initiated on behalf of SESH, including the Billing
15 Agreement. (Doc. 98-3 at 9.) Such approval constitutes express ratification, given that
16 SESH’s Company Agreement required that all decisions required or permitted to be made
17 by the managers “be agreed upon by a Majority vote of the Managers.” (Doc. 98-1 at 17.)
18 Although SESH is correct that the minutes from the September 26, 2016 meeting do not
19 explicitly state whether the Billing Agreement was among the group of contracts that was
20 approved (Doc. 211 at 8), the minutes also don’t contradict Russell’s affidavit. The
21 minutes simply provide that “[a]ll contracts initiated on behalf of SEM/SESH [were]
22 approved,” which is consistent with Russell’s testimony that the Billing Agreement was
23 one of those contracts (Doc. 98-3 at 38).

24 SESH seeks to dispute Russell’s affidavit by deriding it as “self-serving.” (Doc.

25
26 ² In its motion, ARS argues that “Davis had actual authority to execute the Billing
27 Agreement on SESH’s behalf because all of SESH’s managers approved the Billing
28 Agreement.” (Doc. 97 at 10.) ARS similarly argues in its reply that “[d]uring the
September 26, 2016 meeting, the board approved all contracts that had been initiated on
behalf of SESH, including the Billing Agreement.” (Doc. 212 at 3.) Although ARS offers
these arguments in the portions of its briefs addressing the issue of “actual authority,” they
are more properly understood as arguments concerning ratification.

1 211 at 8.) However, this isn't a valid objection when, as here, the affiant has personal
2 knowledge of the matters at issue and describes them in a non-conclusory manner. *See,*
3 *e.g., Rodriguez v. Airborne Express*, 265 F.3d 890, 902 (9th Cir. 2001) (“[S]elf-serving
4 affidavits are cognizable to establish a genuine issue of material fact so long as they state
5 facts based on personal knowledge and are not too conclusory.”); *Cadle Co. v Hayes*, 116
6 F.3d 957, 961 n.5 (1st Cir. 1997) (“[T]he appellee’s attempt to discount Hayes’ affidavits
7 as ‘self-serving’ misses the mark. A party’s own affidavit, containing relevant information
8 of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent
9 to support or defeat summary judgment.”).

10 Finally, none of the other evidence submitted by SESH contradicts Russell’s
11 affidavit. The affidavits from Baig, Lee, and Nagler indicate only that these witnesses do
12 not remember or were not aware of the Billing Agreement or voting on the Billing
13 Agreement. It is unclear from their affidavits whether they even attended the September
14 26, 2016 meeting, and none of them affirmatively disputes Russell’s claim that the Billing
15 Agreement was approved during that meeting. *Cf. Posey v. Skyline Corp.*, 702 F.2d 102,
16 106 (7th Cir. 1983) (“Posey’s affidavit merely indicates that Posey never saw the ADEA
17 notice, which is not the same as an averment that the notice was not in fact conspicuously
18 posted. . . . Although it is true that a court should give to the party opposing a summary
19 judgment motion the benefit of all reasonably drawn inferences, the mere possibility that a
20 factual dispute may exist, without more, is an insufficient basis upon which to justify denial
21 of a motion for summary judgment.”) (citation omitted); *Chandler v. James*, 985 F. Supp.
22 1094, 1097 (M.D. Ala. 1997) (“[T]he court does not believe that it is under an obligation
23 to assume for purposes of summary judgment that an event did not occur, when, in response
24 to the allegations of the Plaintiff, the Defendants’ witness states that he or she does not
25 remember whether the event took place or not. The court does not believe that this is a
26 showing sufficient to ‘negate [the plaintiff’s] claims’ and demonstrate the existence of a
27 material issue of fact.”) (citation omitted); *Jones v. Fujitsu Network Commc’ns, Inc.*, 81 F.
28 Supp. 2d 688, 692 (N.D. Tex. 1999) (finding that plaintiff attended meeting when “Plaintiff

1 state[d] in his affidavit that he d[id] not remember attending any such meeting, but offer[ed]
2 no sworn statement that he did not attend a training session on October 7, 1994, or that the
3 signature on the sign-in sheet was not his”).³

4 **2. Whether SESH Can Avoid Liability Because ARS Breached First**

5 SESH alternatively argues that, even assuming the existence of a valid contract,
6 “SESH would not be liable for a claim of breach of contract because ARS committed a
7 first material breach. ARS failed to perform the billing services as soon as the first month
8 of service.” (Doc. 211 at 12.)

9 In Arizona, “a defendant who refuses to perform and is sued for breach of contract
10 should be excused from liability if the plaintiff has personally failed in a material particular
11 to perform the contract, although the defendant, at the time of his or her refusal to perform
12 or continue performance, was ignorant of the plaintiff’s prior breach.” *QC Const. Prod.,*
13 *LLC v. Cohill’s Bldg. Specialties, Inc.*, 423 F. Supp. 2d 1008, 1013 (D. Ariz. 2006) (citing
14 *Williston on Contracts* § 43:12).

15 “Under Arizona law, a material breach occurs when (1) a party fails to perform a
16 substantial part of the contract or one or more of its essential terms or conditions or (2)
17 fails to do something required by the contract which is so important to the contract that the
18 breach defeats the very purpose of the contract.” *Biltmore Bank of Arizona v. First Nat.*
19 *Mortg. Sources, L.L.C.*, 2008 WL 564833, *6 (D. Ariz. 2008); *see also Snow v. W. Sav. &*

20
21 ³ In contrast, the Court disagrees with ARS’s contention that SESH necessarily
22 ratified the Billing Agreement through its conduct between September 2016 and March
23 2017—specifically, its decision to begin using of ARS’s forms during this period, its
24 receipt of over \$4 million in claims reimbursements during this period, and its transmission
25 of a letter to ARS in February 2017 that seemed to acknowledge the validity of the Billing
26 Agreement. (Doc. 97 at 14-16.) Although a jury could view this evidence as proof of
27 ratification, a jury would not be compelled to do so. An Arizona court has held that a
28 party’s acceptance of proceeds obtained via a contract is “not dispositive” of that party’s
intent to ratify the contract, particularly where the party “consistently protested the
[contract] once he learned of the details.” *Leroy v. Seattle Funding Grp. of Ariz., LLC*,
2012 WL 75644, *4-5 (Ariz. Ct. App. 2012). Here, although SESH seemed to
acknowledge in Baig’s February 2017 letter that the Billing Agreement was valid (Doc.
98-6 at 17 [“ARS entered into an Exclusive Healthcare Out-Of-Network Claims Billing
Agreement with SESH dated August 16, 2016.”]), that letter was sent around the same time
that Baig was pursuing an audit of the ARS/SESH relationship. Thus, a jury could view
that letter as an uninformed statement made without “full knowledge of all the material
facts.” *United Bank*, 590 P.2d at 1386.

1 *Loan Ass'n*, 730 P.2d 204, 210 (Ariz. 1986) (“[A] breach of contract is a failure, without
2 legal excuse, to perform any promise which forms the whole or part of a contract.”)
3 (citation omitted).

4 Here, the only evidence SESH proffers on this issue is Baig’s statement in his
5 affidavit that an audit conducted by ABCD “found that in over 95% of the claims processed
6 for SESH, ARS had performed them in a negligent and incompetent manner which resulted
7 in inaccurate and incomplete claims.” (Doc. 211 at 30). Notably, SESH does not argue
8 this alleged negligence constituted a breach of any express provision of the Billing
9 Agreement. Instead, SESH contends it violated the contract’s implied covenant of good
10 faith and fair dealing. (Doc. 211 at 13-14.)

11 This argument is unavailing. As an initial matter, it is unclear whether, under
12 Arizona law, a party to a contract may be excused from liability if the other party breaches
13 the implied covenant of good faith and fair dealing. Nevertheless, even assuming so, SESH
14 has not presented enough evidence of such a breach.

15 “Arizona law implies a covenant of good faith and fair dealing in every contract.”
16 *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395*
17 *Pension Tr. Fund*, 38 P.3d 12, 28 (Ariz. 2002). “The implied covenant of good faith and
18 fair dealing prohibits a party from doing anything to prevent other parties to the contract
19 from receiving the benefits and entitlements of the agreement.” *Id.* A party may also
20 breach the implied covenant if it “exercises discretion retained or unforeclosed under a
21 contract in such a way as to deny the other a reasonably expected benefit of the bargain.”
22 *Beaudry v. Ins. Co. of the W.*, 50 P.3d 836, 841 (Ariz. Ct. App. 2002) (citation omitted).

23 The single relevant line from Baig’s affidavit is far too conclusory to create an issue
24 of fact as to whether ARS breached the implied covenant of good faith and fair dealing.
25 *See, e.g., F.T.C. v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (“A
26 conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is
27 insufficient to create a genuine issue of material fact.”); *Marks v. United States (Dept. of*
28 *Justice)*, 578 F.2d 261, 263 (9th Cir. 1978) (“Conclusory allegations unsupported by

1 factual data will not create a triable issue of fact.”); *Phillippi v. Kelso*, 2017 WL 3314934,
2 *16 (N.D. Cal. 2017) (for summary judgment purposes, “[c]onclusions masquerading as
3 facts are insufficient”). Baig states only that 95 percent of the claims were processed “in a
4 negligent and incompetent manner” and this “resulted in inaccurate and incomplete
5 claims.” (Doc. 211 at 30). This statement does not make clear what exact benefits SESH
6 did not receive under the contract, *Wells Fargo*, 38 P.3d at 28, or how SESH was denied
7 the “reasonably expected benefit of the bargain.” *Beaudry*, 40 P.3d at 841.

8 3. Whether SESH Is Liable for Damages After April 23, 2017

9 Finally, SESH argues that, assuming the existence of a valid contract, “SESH is not
10 liable for any services provided by ARS after April 23, 2017” because it notified ARS of a
11 material breach on February 23, 2017 and ARS failed to cure that breach within 60 days,
12 which was the cure period specified in the Billing Agreement. (Doc. 211 at 14-15.)

13 This argument fails for two reasons. First, it is not properly before the Court. The
14 only party that filed a motion for summary judgment is ARS. That motion, moreover, is a
15 “partial” motion for summary judgment that seeks a determination that SESH is liable for
16 breaching the Billing Agreement, not a determination as to the resulting amount of
17 damages ARS is entitled to recover.⁴ Thus, if SESH wished to use the summary judgment
18 procedure to address a different issue—*i.e.*, the extent to which its damages should be
19 capped—it should have filed its own motion.

20 Second, putting aside this procedural infirmity, the Court has already determined,
21 in Section 2 above, that SESH failed to proffer sufficient evidence establishing that ARS
22 materially breached the Billing Agreement. This determination undermines SESH’s
23 request for an April 23, 2017 damages cutoff, because the 60-day cure period in the Billing
24 Agreement is only triggered by the presence of a material breach. Although SESH is free

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26 ⁴ The caption of ARS’s motion is “Motion For Partial Summary Judgment *Re:*
27 *Liability For Breach Of Contract Or, In The Alternative, Unjust Enrichment.*” (Doc. 97 at
28 1, emphasis added.) In its reply, ARS again asserts that it is seeking “summary judgment
concerning SESH’s *liability* for Count 1 (Breach of Contract)” and further explains that
“[t]he Court should solely focus on the issue of liability because ARS only seeks summary
judgment on SESH’s liability for unjust enrichment. If SESH is found liable on Count 3,
then ARS will establish its damages later.” (Doc. 212 at 9-10, emphasis added.)


1 to attempt to establish its material breach theory at trial, and thereby attempt to limit the
2 damages it owes, it is not entitled to such a ruling at the summary-judgment stage.

3 B. Unjust Enrichment

4 Because the Court grants partial summary judgment to ARS on the issue of liability
5 concerning its breach of contract claim, the Court denies as moot ARS's alternative motion
6 for partial summary judgment on the issue of liability concerning its claim for unjust
7 enrichment.

8 Accordingly, **IT IS ORDERED** that ARS's motion for partial summary judgment
9 (Doc. 97) is granted as to liability on the breach of contract claim and denied as moot as to
10 liability on the unjust enrichment claim.

11 Dated this 10th day of May, 2019.

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14 
15 _____
16 Dominic W. Lanza
17 United States District Judge
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