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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Joel Silver; Silver Pictures, Inc.; and Silver Slate, LLC,

Plaintiffs,

v.

The Goldman Sachs Group, Inc.; Alliance Films Inc.; and Momentum Pictures USA, Inc.,

Defendants.

CV 10-4961 RSWL (AJWx)

ORDER

On May 10, 2011, Defendants The Goldman Sachs Group, Inc., Alliance Films Inc. and Momentum Pictures USA, Inc.'s Motion to Dismiss the First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) came on for regular calendar before this Court [23]. The Court, having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

1 The Court hereby **DENIES** Defendants' Motion to
2 Dismiss the First Amended Complaint.

3 In a Rule 12(b)(6) motion to dismiss, the Court
4 must presume all factual allegations of the complaint
5 to be true and draw all reasonable inferences in favor
6 of the non-moving party. Klarfeld v. United States, 944
7 F.2d 583, 585 (9th Cir. 1991). A dismissal can be
8 based on the lack of cognizable legal theory or the
9 lack of sufficient facts alleged under a cognizable
10 legal theory. Balistreri v. Pacifica Police Dep't, 901
11 F.2d 696, 699 (9th Cir. 1988). However, a party need
12 not state the legal basis for his claim, only the facts
13 underlying it. McCalden v. California Library Ass'n,
14 955 F.2d 1214, 1223 (9th Cir. 1990).

15 Federal Rule of Civil Procedure 9(b) demands that,
16 when averments of fraud are made, the circumstances
17 constituting the alleged fraud be specific enough to
18 give defendants notice of the particular misconduct,
19 such that they can defend against the charge and not
20 just deny having done anything wrong. See Vess v. Ciba-
21 Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).
22 As such, averments of fraud must be accompanied by "the
23 who, what, when, where, and how" of the misconduct
24 charged. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.
25 1997).

26 Defendants The Goldman Sachs Group, Inc., Alliance
27 Films Inc. and Momentum Pictures USA, Inc.
28 (collectively, "Defendants") move to dismiss Plaintiffs

1 Joel Silver, Silver Pictures, Inc., and Silver Slate,
2 LLC's (collectively, "Plaintiffs") First Amended
3 Complaint in its entirety pursuant to Federal Rule of
4 Civil Procedure 12(b)(6).

5 Specifically, Defendants argue that Plaintiffs have
6 failed to allege plausible claims with regard to the
7 seven causes of action asserted by Plaintiffs in the
8 First Amended Complaint: (1) Breach of Written Contract
9 against Defendants Alliance Films Inc. ("Alliance") and
10 Momentum Pictures USA, Inc. ("Momentum"); (2) Breach of
11 Oral Contract against Defendant The Goldman Sachs
12 Group, Inc. ("Goldman"); (3) Breach of Oral Contracts
13 against Defendant Goldman; (4) Breach of Fee Agreement
14 against Defendants Goldman and Alliance; (5) Quantum
15 Meruit against Defendants Goldman and Alliance; (6)
16 Promissory Fraud against Defendants Goldman and
17 Alliance; and (7) Negligent Misrepresentation against
18 Defendants Goldman and Alliance.

19 As a preliminary matter, the Court hereby **DENIES**
20 Defendants' Request for Judicial Notice. Fed. R. Evid.
21 201.

22 A. Defendants' Motion To Dismiss As To The First
23 Cause Of Action For Breach Of Written Contract

24 The Court **DENIES** Defendants' Motion to Dismiss as
25 to Plaintiffs' claims for Breach of Written Contract
26 against Defendants Alliance and Momentum.

27 To withstand a Motion to Dismiss under Rule
28 12(b)(6), Plaintiffs need only plead the underlying

1 facts to support a claim upon which relief may be
2 granted. See McCalden v. California Library Ass'n, 955
3 F.2d 1214, 1223 (9th Cir. 1990). In California, in
4 order to state a claim for breach of contract a
5 plaintiff must plead: (1) the existence of the
6 contract; (2) performance by the plaintiff or excuse
7 for nonperformance; (3) breach by the defendant; and
8 (4) damages. First Commercial Mortgage Co. v. Reece, 89
9 Cal. App. 4th 731, 745 (2001).

10 The Court finds that Plaintiffs have plead
11 sufficient facts here to state a claim for Breach of
12 Written Contract against Defendants Alliance and
13 Momentum. Plaintiffs adequately set forth facts
14 alleging the existence of a contract between Plaintiffs
15 Silver Pictures, Inc. ("Silver Pictures") and Silver
16 Slate, LLC ("Silver Slate") and these two Defendants,
17 the Written Agreement, that Plaintiffs Silver Pictures
18 and Silver Slate performed said Agreement, that
19 Defendants Alliance and Momentum breached this
20 Agreement due to the failure to use "commercially
21 reasonable efforts" to arrange for the funds necessary
22 to make the payment due pursuant to this Agreement, and
23 that Plaintiffs have suffered damages resulting from
24 this breach. See id.

25 As the Court must presume all factual allegations
26 to be true and draw all reasonable inferences in favor
27 of the non-moving party, Klarfeld, 944 F.2d at 585, the
28 Court finds that Plaintiffs have pled sufficient facts

1 to support this claim for Breach of Written Contract.

2 B. Defendants' Motion To Dismiss As To The Second
3 And Third Causes Of Action For Breach Of
4 Oral Contracts

5 The Court **DENIES** Defendants' Motion to Dismiss
6 Plaintiffs' Second and Third Causes of Action for
7 Breach of Oral Contracts against Defendant Goldman.

8 The Court finds that Plaintiffs have plead
9 sufficient facts here to state claims for Breach of
10 Oral Contracts against Defendant Goldman. Plaintiffs
11 adequately set forth facts alleging the existence of
12 these oral contracts, the Silver Deal, the Forbearance
13 Agreement and the Performance Agreement, as the First
14 Amended Complaint sufficiently sets forth that the
15 Parties entered into these agreements and that
16 Defendant Goldman manifested an intent to be bound. In
17 addition, the Court finds that the First Amended
18 Complaint sufficiently pleads that Plaintiffs performed
19 these oral contracts, that Defendant Goldman breached
20 these contracts, and that Plaintiffs have suffered
21 damages resulting from this breach. See First
22 Commercial Mortgage Co., 89 Cal. App. 4th at 745.

23 Defendants argue Plaintiffs' claims here should be
24 dismissed due to the presence of the Written Agreement.
25 Specifically, Defendants cite to the parol evidence
26 rule, and argue that because Plaintiffs' Breach of Oral
27 Contracts claims arise from previous oral agreements
28 that concern the same subject matter as that of the

1 final, integrated Written Agreement, these claims
2 effectively contradict the terms of the Written
3 Agreement and should therefore be dismissed.

4 California law presumes that a written contract
5 supersedes all prior or contemporaneous oral
6 agreements. See Cal. Civ. Code §§ 1625, 1856. As such,
7 the parol evidence rule prevents parties from
8 presenting evidence of "previous negotiations and
9 agreements" between the parties that would contradict,
10 defeat, modify or otherwise vary the meaning or legal
11 effect of an integrated, written agreement. Cal. Civ.
12 Code § 1856(a). See Kett v. Graeser, 241 Cal. App. 2d
13 571, 574 (1966).

14 The Court finds that Plaintiffs' sufficiently
15 allege claims for Breach of Oral Contracts at this
16 motion to dismiss stage. While the Written Agreement
17 does contain an express integration clause,¹ this clause
18 specifically refers solely to prior agreements between
19 the parties to the Written Agreement: Plaintiffs Silver
20 Pictures and Silver Slate, and Defendants Alliance and
21 Momentum. Here, Plaintiffs bring these claims for

22
23 ¹ Specifically, the Written Agreement contains the
24 recital that "[t]his Agreement constitutes the entire
25 agreement of the parties with respect to the subject
26 matter hereof, and to the extent that this agreement is
27 inconsistent with any prior agreement(s) between the
28 parties hereto, the terms of this agreement are to
control. There are no agreements, representations or
warranties between or among the parties other than
those set forth in this Agreement...." [Decl. Charles
Layton, Ex. B at 21.]

1 Breach of Oral Contracts against Defendant Goldman
2 based on prior oral agreements between Plaintiffs and
3 this Defendant, who is not a party to the Written
4 Agreement. As such, taking the allegations in the
5 First Amended Complaint as true, the Court finds that
6 Plaintiffs' claims here are not based on prior oral
7 negotiations and agreements between the collective
8 parties to the Written Agreement, and therefore
9 Defendants have not met their burden to show that these
10 claims should be dismissed because they are based on
11 oral agreements that contradict the terms of the
12 Written Agreement. Cal. Civ. Code § 1856(a).

13 Therefore, the Court finds that Plaintiffs' claims
14 for Breach of Oral Contracts are sufficient to
15 withstand a Rule 12(b)(6) Motion at this time.

16 C. Defendants' Motion To Dismiss As To The Fourth
17 Cause Of Action For Breach Of Fee Agreement

18 The Court **DENIES** Defendants' Motion to Dismiss the
19 Fourth Cause of Action for Breach of Fee Agreement.

20 In order to state a claim for breach of contract,
21 Plaintiffs must allege the existence of a valid
22 contract, that is, a contract supported by proper
23 consideration. See Jinsoo Kim v. Son, 2009 WL 597232,
24 at *2 (Cal. App. March 9, 2009). The general rule is
25 that past consideration cannot support a contract. See
26 Passante v. McWilliam, 53 Cal. App. 4th 1240, 1247
27 (1997).

28 The Court finds that Plaintiffs plead sufficient

1 facts here to state a claim for Breach of Fee
2 Agreement. Specifically, the Court finds that the
3 First Amended Complaint sufficiently sets forth facts
4 to support the Plaintiffs' claim that there was a valid
5 contract here between the Parties, the Fee Agreement,
6 as the First Amended Complaint sufficiently sets forth
7 that the Fee Agreement is supported by proper
8 consideration. The Court also finds that Defendants
9 have not met their burden to establish that the Fee
10 Agreement is an improper and unenforceable modification
11 of the Written Agreement, as the First Amended
12 Complaint states the Fee Agreement involves different
13 parties than those party to the Written Agreement and
14 concerns a different subject matter than that
15 encompassed by the Written Agreement.

16 As such, taking the allegations in the First
17 Amended Complaint as true, the Court finds that
18 Plaintiffs have sufficiently alleged facts here to
19 state a claim for Breach of Fee Agreement.

20 D. Defendants' Motion To Dismiss As To The Fifth
21 Cause Of Action For Quantum Meruit

22 The Court **DENIES** Defendants' Motion to Dismiss as
23 to Plaintiffs' Fifth Cause of Action for Quantum
24 Meruit.

25 Defendants argue this claim is barred under
26 California law because of the Written Agreement, and
27 that it is also time-barred under California's two-year
28 statute of limitations for obligations not founded upon

1 a writing. Cal. Code Civ. Proc. § 339.

2 The Court finds that Plaintiffs sufficiently state
3 a claim for Quantum Meruit. In the First Amended
4 Complaint, Plaintiffs allege that this claim for
5 quantum meruit is based on the alleged breach of the
6 Fee Agreement, not the Written Agreement. As noted
7 above, the First Amended Complaint adequately sets
8 forth facts that the Fee Agreement involves different
9 parties than those involved in the Written Agreement,
10 and concerns a different subject matter than that
11 encompassed by the Written Agreement. As such, when
12 taking the allegations in the First Amended Complaint
13 as true, Defendants' have not met their burden to
14 establish that this claim is barred here by the Written
15 Agreement. See Hedging Concepts, Inc. v. First Alliance
16 Mortgage Co., 41 Cal. App. 4th 1410, 1419 (1996).

17 The Court also finds that this claim is not time-
18 barred. California Code of Civil Procedure § 339
19 provides that the period for commencement of an action
20 based on a contract "not founded upon an instrument of
21 writing" is two years. Cal. Code Civ. Proc. § 339.
22 Both Parties concede that generally, when a quantum
23 meruit claim is based upon the defendant's alleged
24 unjust enrichment from plaintiff's services, the two-
25 year statute of limitations for a quantum meruit claim
26 commences when those services are fully rendered. See
27 Ough v. Ansonia Oil Co., 99 Cal. App. 769, 772 (1929).
28 The First Amended Complaint states that Plaintiff Joel

1 Silver ("Silver") provided valuable services to
2 Defendants pursuant to the terms of the Fee Agreement
3 by the fall of 2007, but Plaintiffs did not file the
4 Complaint in this Action until May, 2010, more than
5 two-years after the services were allegedly rendered.

6 The Court finds that the statute of limitations on
7 this claim did not begin to run until Defendants
8 allegedly breached the Fee Agreement in 2009.
9 Specifically, Defendants were not unjustly enriched by
10 Plaintiff Silver's services until they allegedly
11 breached this Fee Agreement, informing Plaintiffs they
12 would not pay the previously agreed upon compensation
13 for his services. See Maddox v. Rainoldi, 163 Cal. App.
14 2d 384, 392 (1958) (holding that the statute of
15 limitations on the cause of action for unjust
16 enrichment, arising out of a breach of oral trust, did
17 not commence until the oral promise was repudiated).
18 As such, no claim for quantum meruit could have been
19 maintained until this point in time, and therefore the
20 Court finds that this claim accrued at the time when
21 Defendants allegedly breached the Fee Agreement. See
22 Haynes v. Lemann, 53 F.3d 338, at *2 (9th Cir.
23 1995)(holding that plaintiff's claim for quantum meruit
24 accrued at the date that Defendant allegedly breached
25 the implied contract to pay plaintiff for an
26 interview).

27 Therefore, the Court finds that the First Amended
28 Complaint sufficiently states a claim for Quantum

1 Meruit.

2 E. Defendants' Motion To Dismiss As To The Sixth
3 And Seventh Causes Of Action For Promissory
4 Fraud And Negligent Misrepresentation

5 The Court **DENIES** Defendants' Motion to Dismiss as
6 to Plaintiffs' Sixth Cause of Action for Promissory
7 Fraud and Plaintiffs' Seventh Cause of Action for
8 Negligent Misrepresentation.

9 Defendants argue these claims should be dismissed
10 because they are not plead with particularity pursuant
11 to Federal Rule of Civil Procedure 9(b) and because
12 they are barred by the economic loss rule.

13 The Court finds that the requirements of Federal
14 Rule of Civil Procedure 9(b) have been met.
15 Specifically, when the First Amended Complaint is read
16 as a whole, the circumstances constituting the alleged
17 fraud are plead with sufficient particularity and are
18 specific enough to give Defendants notice of the
19 particular misconduct, such that they can defend
20 against the charge. See Vess v. Ciba-Geigy Corp. USA,
21 317 F.3d 1097, 1106 (9th Cir. 2003).

22 The Court finds that these two claims are not
23 barred by the economic loss rule. The economic loss
24 rule requires a party to a contract to recover in
25 contract for a purely economic loss, unless he or she
26 can demonstrate harm above and beyond a contractual
27 promise. Robinson Helicopter Co., Inc. v. Dana Corp.,
28 34 Cal. 4th 979, 988 (2004). However, courts in

1 California have held that a claim for promissory fraud
2 is a "viable cause of action under California law where
3 a defendant fraudulently induces the plaintiff to enter
4 into a contract," and therefore can lie where the
5 plaintiff alleges that the defendant has entered into a
6 contract without intending to be bound by the terms of
7 that agreement. Mat-Van, Inc. v. Sheldon Good & Co.
8 Auctions, LLC, 2007 WL 2206946, *5 (S.D. Cal., July 27,
9 2007). See Lazar v. Super. Court, 12 Cal. 4th 631, 638
10 (1996). Moreover, a plaintiff can separately allege a
11 claim for negligent misrepresentation stemming from a
12 contract, as courts have held that the claim for
13 negligent misrepresentation is a "traditional common
14 law tort claim," and that by alleging this tort, a
15 plaintiff "allege[s] [a] violation[] of duties
16 independent of the contract." Rejects Skate Magazine,
17 Inc. v. Acutrack, Inc., 2006 WL 2458759, *5 (N.D. Cal.
18 Aug. 22, 2006).

19 The Court finds that the First Amended Complaint
20 sufficiently pleads that Defendants fraudulently
21 induced Plaintiffs to enter into the alleged contracts
22 at issue in this Action. Therefore, Plaintiffs plead
23 sufficient facts to state a claim for Promissory Fraud
24 at the motion to dismiss stage. The Court also finds
25 that Plaintiffs have sufficiently alleged a claim for
26 Negligent Misrepresentation, as the First Amended
27 Complaint adequately alleges that Defendants have
28 violated duties independent of the contracts at issue

1 here. See Bains v. Moores, 172 Cal. App. 4th 445, 454
2 (2009).

3 For the reasons heretofore stated, the Court **DENIES**
4 Defendants' Motion to Dismiss the First Amended
5 Complaint pursuant to Rule 12(b)(6).

6
7 DATED: May 19, 2011

8 **IT IS SO ORDERED.**

9
10 RONALD S.W. LEW

11 **HONORABLE RONALD S.W. LEW**

12 Senior, U.S. District Court Judge
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