

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GLOBAL PRIVATE FUNDING,  
INC., a California  
corporation,  
  
                                Plaintiff,  
  
          v.  
  
EMPYREAN WEST, LLC, an  
Arizona corporation; JAY L.  
CARTER, individually and as  
managing partner of EMPYREAN  
WEST LLC; DAVID C. KELLER,  
individually and as CEO of  
EMPYREAN WEST LLC; U.S. FUEL  
CORPORATION, a Nevada  
corporation; HARRY BAGOT,  
individually and as  
President/CEO of US FUEL  
CORPORATION; STANLEY N.  
DRINKWATER, III,  
individually and as Chairman  
of the Board; US FUEL  
CORPORATION; WILLIAM CHADY,  
individually and as Chief  
Operating Officer of US FUEL  
CORPORATION; ROBERT  
SCHWARTZ, individually,  
  
                                Defendants.

) Case No. CV 13-04622 DDP (MANx)  
)  
) **ORDER GRANTING IN PART AND**  
) **DENYING IN PART DEFENDANTS'**  
) **MOTIONS TO DISMISS PLAINTIFF'S**  
) **FIRST AMENDED COMPLAINT**  
)  
) [DKT. NOS. 53, 61]

\_\_\_\_\_  
///

1 Presently before the Court are two motions to dismiss  
2 Plaintiff's First Amended Complaint, filed by two different groups  
3 of defendants (the "Motions"). (Docket Nos. 53, 61.) For the  
4 reasons stated in this order, U.S. Fuel's motion is GRANTED and  
5 Empyrean, Carter, and Keller's motion is GRANTED IN PART and DENIED  
6 IN PART.

7 **I. Background**

8 Plaintiff's First Amended Complaint ("FAC") is difficult to  
9 decipher. As best the Court can understand, Plaintiff's allegations  
10 are as follows.

11 Plaintiff Global Private Equity, Inc. ("Plaintiff" or  
12 "Global") is a private, equity-based lender to established  
13 companies, as well as startups, offering business, financial, and  
14 technical services to its clients. (FAC ¶ 2.) Defendant Empyrean  
15 West, LLC ("Empyrean") is engaged in the business of funding United  
16 States businesses which support local economic development through  
17 foreign investments. (Id.) Defendants Jay Carter ("Carter") and  
18 David Keller ("Keller") are, respectively, the managing partner and  
19 CEO of Empyrean. (Id. ¶¶ 7, 8.)

20 On July 30, 2012, Plaintiff executed a confidentiality and  
21 non-disclosure agreement with Empyrean which formed the initial  
22 basis of the business relationship between the two companies. (Id.  
23 ¶ 20.) On August 31, 2012, Plaintiff and Empyrean entered into a  
24 Master Service Agreement ("MSA"), to which the confidentiality  
25 agreement was attached. (Id.) Under the MSA, Plaintiff agreed to  
26 perform various business-related services for Empyrean, including  
27 "business incubation, business sales, merges [sic] and  
28 acquisitions, company formation, restructuring [sic], project

1 funding, financial packaging, real estate sales, financing,  
2 marketing, advertising, online development, technology  
3 applications, infrastructure and telecom services." (Id.) The MSA  
4 also included a Business Incubation Addendum, executed on September  
5 29, 2012. (Id.) Empyrean agreed to furnish foreign investors for  
6 Plaintiff's clients under the EB-5 visa program. (Id.) Empyrean  
7 also agreed to pay Plaintiff 10% of the gross revenue, plus a  
8 deferred percentage of other revenues generated. (Id. ¶ 22.)

9 On July 19, 2012, U.S. Fuel executed a confidentiality and  
10 non-disclosure agreement with Plaintiff defining the business  
11 relationship between the two companies. (Id. ¶ 23.) On August 13,  
12 2012, Plaintiff and U.S. Fuel entered into a Master Service  
13 Agreement ("MSA"), to which the confidentiality agreement was  
14 attached. (Id.)

15 Plaintiff alleges that it provided Empyrean "confidential  
16 information concerning their clients with the intention of  
17 obtaining financing for various projects through the resources of  
18 particular foreign investors through the foreign investment program  
19 management by [Empyrean]." (Id. ¶ 28.) Plaintiff alleges that  
20 although it "provided the projects for [Empyrean] to fund,"  
21 Empyrean "was unable to produce a single investor from any  
22 location, whether in the United States or in any foreign country."  
23 (Id. ¶ 27.) Essentially, Plaintiff alleges that it provided  
24 Empyrean with multiple investment opportunities, each of which  
25 Empyrean found some fault with. (Id. ¶ 37.) Then, after rejecting  
26 the project, Empyrean would work directly with the underlying  
27 company on the project on the very same terms proposed by  
28 Plaintiff, leaving Plaintiff out and thus avoiding payment of any

1 percentages owed to Plaintiff as a result of Plaintiff's services  
2 in finding investment opportunities for Emyrean. (Id. ¶ 36.)  
3 Emyrean commenced one such project with U.S. Fuel, apparently a  
4 client of Plaintiff. (Id. ¶ 35.) Emyrean and U.S. Fuel each told  
5 Plaintiff that they intended to terminate their MSAs with Plaintiff  
6 because of purported breaches by Plaintiff. (Id. ¶¶ 35, 39.)

7 The Court previously dismissed Plaintiff's Complaint without  
8 prejudice. (Docket No. 47.) Plaintiff then filed the FAC, bringing  
9 eighteen causes of action against various defendants. (Docket No.  
10 51.) Defendants have now moved to dismiss the FAC. (Docket Nos. 53,  
11 61.) After the Motions were filed, Plaintiff stipulated to dismiss  
12 certain defendants and withdrew some causes of action. (See Docket  
13 Nos. 38, 83, 84, 85, 86, 87, 88.)

## 14 **II. Legal Standard**

15 A complaint will survive a motion to dismiss when it contains  
16 "sufficient factual matter, accepted as true, to state a claim to  
17 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
18 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
19 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
20 "accept as true all allegations of material fact and must construe  
21 those facts in the light most favorable to the plaintiff." Resnick  
22 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
23 need not include "detailed factual allegations," it must offer  
24 "more than an unadorned, the-defendant-unlawfully-harmed-me  
25 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
26 allegations that are no more than a statement of a legal conclusion  
27 "are not entitled to the assumption of truth." Id. at 679. In other  
28 words, a pleading that merely offers "labels and conclusions," a

1 "formulaic recitation of the elements," or "naked assertions" will  
2 not be sufficient to state a claim upon which relief can be  
3 granted. Id. at 678 (citations and internal quotation marks  
4 omitted).

5 "When there are well-pleaded factual allegations, a court  
6 should assume their veracity and then determine whether they  
7 plausibly give rise to an entitlement of relief." Id. at 679.  
8 Plaintiffs must allege "plausible grounds to infer" that their  
9 claims rise "above the speculative level." Twombly, 550 U.S. at  
10 555. "Determining whether a complaint states a plausible claim for  
11 relief" is a "context-specific task that requires the reviewing  
12 court to draw on its judicial experience and common sense." Iqbal,  
13 556 U.S. at 679.

### 14 **III. Discussion**

#### 15 **A. Dismissed Defendants and Claims**

16 Since Plaintiff's filing of the FAC, Plaintiff has agreed to  
17 dismiss certain defendants entirely and has dismissed some causes  
18 of action as to the remaining defendants. Plaintiff has dismissed  
19 Defendants Harry Bagot, Stanley N. Drinkwater III, William Chady,  
20 Robert Schwartz, and Paul Adams. (See Docket Nos. 38, 83, 84, 85,  
21 86.) Therefore, the Court does not analyze the sufficiency of  
22 Plaintiff's FAC as to causes of action asserted against these  
23 defendants and deems all such causes of action dismissed. The  
24 defendants who remain in this action are U.S. Fuel, Empyrean,  
25 Carter, and Keller (collectively, "Remaining Defendants").<sup>1</sup>

---

26  
27 <sup>1</sup>It is unclear from Plaintiff's FAC whether Plaintiff intended  
28 to name John Fairweather and Steven Luck as additional defendants  
in this action. Fairweather and Luck have yet to appear in this  
(continued...)

1 Plaintiff also concedes dismissal of certain causes of action  
2 against the Remaining Defendants in its oppositions to the Motions.  
3 (See Docket Nos. 87, 88.) Plaintiff "withdraws" its third, fourth,  
4 fifth, sixth, ninth, tenth, twelfth, sixteenth, seventeenth, and  
5 eighteenth causes of action in their entirety. Additionally,  
6 Plaintiff withdraws his eighth and fourteenth causes of action as  
7 to Defendant U.S. Fuel. The remainder of this order, therefore,  
8 addresses the sufficiency of the remaining claims only. The Motions  
9 are GRANTED as to all withdrawn claims and as to the dismissed  
10 defendants.

11 B. First Cause of Action: Breach of Contract

12 Plaintiff brings the first cause of action, for breach of  
13 contract, against all Remaining Defendants. Defendants argue that  
14 this cause of action is insufficiently pled because Plaintiff did  
15 not attach the written contract allegedly breached to the FAC, nor  
16 pled its contents verbatim. Plaintiff contends that it is  
17 sufficient that the contract was included as an attachment to its  
18 original complaint. U.S. Fuel further argues that the allegations  
19 in the FAC do not establish a breach of contract claim as to U.S.  
20 Fuel, since the contract focused on in the FAC is a contract  
21 between Plaintiff and Empyrean.

22 The Court finds that Plaintiff's complaint is deficient  
23 because Plaintiff failed to attach a copy of each contract  
24 allegedly breached to the FAC. See Gilmore v. Lycoming Fire Ins.  
25 Co., 55 Cal. 123, 124 (1880). The original complaint was dismissed

26  
27 <sup>1</sup>(...continued)  
28 action, and it appears that they have not been served. They have  
not filed anything in this action or joined in either of the  
Motions.

1 by the Court, and the attachment of the contracts at issue to the  
2 original complaint is irrelevant for purposes of determining  
3 whether Plaintiff's FAC is sufficient.

4 Further, as to Defendant U.S. Fuel, though Plaintiff alleges  
5 the existence of a contract with U.S. Fuel and includes some detail  
6 regarding the terms of the contract, nowhere does Plaintiff allege  
7 how U.S. Fuel purportedly breached its contract with Plaintiff.  
8 Rule 8 requires more, such that U.S. Fuel is on notice as to the  
9 alleged breach to which it will need to prepare a defense. Both  
10 this deficiency and the failure to attach the contracts at issue  
11 are potentially remediable through amendment. Therefore, the Court  
12 GRANTS the Motions as to this cause of action and DISMISSES  
13 Plaintiff's contract claim WITHOUT PREJUDICE.<sup>2</sup>

14 C. Second Cause of Action: Intentional Interference with  
15 Prospective Economic Advantage

16 Plaintiff brings the second cause of action against Defendant  
17 Emyprean only. Intentional interference with prospective economic  
18 advantage protects against intentional acts designed to harm an  
19 economic relationship which is likely to produce economic benefit.  
20 See Shamblin v. Berge, 166 Cal.App.3d 118, 123 (1985). However,  
21 mere interference is not enough: "The tort of intentional  
22 interference with prospective economic advantage is not intended to  
23

---

24 <sup>2</sup>Plaintiff's FAC purports to bring this cause of action  
25 against all defendants, which would include Remaining Defendants  
26 Carter and Keller. However, whether Plaintiff actually entered into  
27 any contract with Carter or Keller individually, as opposed to with  
28 Emyprean as an entity, is unclear. Though Carter and Keller do not  
argue the sufficiency of the allegations as to them specifically,  
Plaintiff should clarify upon amendment whether its contract claim  
is asserted against these individuals and, if so, the contract  
Plaintiff relies on for that assertion.

1 punish individuals or commercial entities for their choice of  
2 commercial relationships or their pursuit of commercial objectives,  
3 unless their interference amounts to independently actionable  
4 conduct." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th  
5 1134, 1158-59 (2003). "[A]n act is independently wrongful if it is  
6 unlawful," meaning that the act is prohibited "by some  
7 constitutional, statutory, regulatory, common law, or other  
8 determinable legal standard." Id. at 1159.

9 Here, Plaintiff has not alleged sufficient facts to establish  
10 that Emyrean's conduct in pursuing its "projects" with U.S. Fuel  
11 and other entities and bypassing Emyrean's involvement in the  
12 projects is independently unlawful. Although Plaintiff's FAC  
13 suggests a purpose behind Emyrean's actions that might be  
14 considered improper, Plaintiff does not allege how Emyrean  
15 violated another specific law. Therefore, the Court GRANTS the  
16 Motions as to this cause of action and DISMISSES Plaintiff's  
17 intentional interference with prospective economic advantage claim  
18 WITHOUT PREJUDICE.

19 D. Seventh Cause of Action: Commercial Defamation

20 Plaintiff brings the seventh cause of action against Defendant  
21 Emyrean only. The parties agree that this cause of action appears  
22 to be on the grounds of slander. "Slander is a false and  
23 unprivileged publication, orally uttered ... which: (1) Charges any  
24 person with crime, or with having been indicted, convicted, or  
25 punished for crime; ... (3) Tends directly to injure him in respect  
26 to his office, profession, trade or business, either by imputing to  
27 him general disqualification in those respects which the office or  
28 other occupation peculiarly requires, or by imputing something with



1 reference to his office, profession, trade, or business that has a  
2 natural tendency to lessen its profits ... (5) Which, by natural  
3 consequence, causes actual damage." Cal. Civ. Code § 46.

4 Plaintiff's allegations in regard to this cause of action are  
5 insufficient. Plaintiff merely alleges that "Defendant Emyprean's  
6 statements through its officers and employees to the clients of  
7 [specified entities] were slanderous per se in that such statements  
8 imputed to Plaintiff a crime and a lack of professional competence  
9 and integrity." (FAC ¶ 79.) However, Plaintiff includes no  
10 allegations as to the content of the allegedly slanderous  
11 statements, nor how those statement bore on Plaintiff's commission  
12 of a crime or lack of professional competence. Indeed, Plaintiff's  
13 only response in opposition to the Motions is to say that "Global  
14 did not attempt to state each and every slanderous statement  
15 attributed to Emyprean, its officers and employees." (Opp., Docket  
16 No. 88, p.4.) Therefore, the Court would GRANT the Motions as to  
17 this cause of action and DISMISS Plaintiff's commercial defamation  
18 claim WITHOUT PREJUDICE.

19 E. Eighth, Eleventh, Thirteenth, and Fourteenth Causes of  
20 Action: Plaintiff's Fraud and Fraud-Related Claims

21 Several of Plaintiff's remaining claims sound in fraud. Under  
22 California law, "[t]he elements of intentional misrepresentation,  
23 or actual fraud, are: (1) misrepresentation (false representation,  
24 concealment, or nondisclosure); (2) knowledge of falsity  
25 (scienter); (3) intent to defraud (i.e., to induce reliance); (4)  
26 justifiable reliance; and (5) resulting damage." Anderson v.  
27 Deloitte & Touche, 56 Cal.App.4th 1468, 1474 (1997) (internal  
28 quotation marks and citations omitted). A claim for negligent

1 misrepresentation contains the same elements as a fraud claim,  
2 except that instead of knowledge of falsity, the statement must be  
3 made "without reasonable ground for believing it to be true." See,  
4 e.g., Hasso v. Hapke, 227 Cal.App.4th 107, 127 (2014). Claims  
5 sounding in fraud are subject to the heightened pleading standard  
6 of Rule 9(b), requiring a plaintiff to state "'the who, what, when,  
7 where, and how' of the misconduct charged." Vess v. Ciba-Gelgy  
8 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper v.  
9 Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

10       It appears from Plaintiff's FAC that the conduct at the heart  
11 of Plaintiff's fraud claims is Emyrean's representation, in the  
12 course of doing business with Plaintiff, that Emyrean falsely  
13 assured Plaintiff that it could obtain investors under the EB-5  
14 visa program and other investment sources and made false statements  
15 as to the nature and quality of those investors. (FAC ¶¶ 102-104.)  
16 Plaintiff identifies a particular instance in which Keller "stated  
17 that Emyrean had several investors who were willing and able to  
18 act with financial efforts and invest in several projects," a  
19 statement made in January or February 2013 to Sam Senev,  
20 Plaintiff's CEO. (Id. ¶ 33.) Ultimately, Plaintiff alleges that  
21 "Defendants did not produce a single investor or any project for  
22 Plaintiff's clients." (Id. ¶ 104.) Plaintiffs essentially alleges  
23 that the affirmative assurances of Emyrean that investors were  
24 forthcoming and the concealment of the fact that such investors  
25 would not be produced support Plaintiff's fraud-based claims.

26       The Court finds that Plaintiff has alleged sufficient facts to  
27 support his fraud-based claims against Defendants Keller and  
28 Emyrean. Plaintiff provides sufficient details, including who,

1 what, when, and how Keller, speaking on behalf of Empyrean, made an  
2 allegedly fraudulent representation. Further, Plaintiff alleges  
3 that "the foregoing misrepresentations were made with the intention  
4 that Plaintiff rely thereon" and that "Defendants never intended  
5 that the funding to Global's clients would ever go through." (Id.  
6 ¶¶ 105, 109.) Therefore, as to the representation made by Keller  
7 regarding Empyrean's ability and willingness to supply investors to  
8 Plaintiff, the Court finds that the FAC is sufficient and DENIES  
9 the Motions as to Defendants Keller and Empyrean.

10 However, as to Defendants Carter and U.S. Fuel, the  
11 allegations are insufficient. Nowhere does the FAC specify any  
12 specific misrepresentations that may be attributed to either of  
13 these defendants. As a result, the Court GRANTS the Motions as to  
14 Carter and U.S. Fuel and DISMISSES this cause of action as to them  
15 WITHOUT PREJUDICE. Further, to the extent that any  
16 misrepresentations other than the one identified above form the  
17 basis for Plaintiff's fraud-based claims, Plaintiff must amend to  
18 clarify that it bases these claims on those additional  
19 misrepresentations.

20 F. Fifteenth Cause of Action: Breach of Non-Competition  
21 Covenant

22 Plaintiff brings the fifteenth cause of action against all  
23 Remaining Defendants. Plaintiff alleges that "[a]n MSA and Addenda  
24 executed by Defendants U.S. Fuel and Empyrean both contain  
25 provisions for non-circumvention, non-solicitation, and no  
26 disparaging remarks." (FAC ¶ 145.) Plaintiff then alleges that  
27 "Empyrean and U.S. Fuel have systematically breached the MSA and  
28 Addenda." (Id. ¶ 146.) However, as with Plaintiff's contract claim,


1 without the benefit of the language of the covenant Plaintiff  
2 alleges to have been breached, Plaintiff's allegations are  
3 insufficient to establish a plausible claim. Further, as Defendants  
4 point out, California law disfavors covenants not to compete and  
5 only allows them in specific situations. See, e.g., Edwards v.  
6 Arthur Andersen LLP, 44 Cal.4th 937, 945-46 (2008). Plaintiff must  
7 allege more facts regarding the alleged breach and how the  
8 agreement itself is enforceable under California law. The Court  
9 therefore GRANTS the Motions as to this claim and DISMISSES it  
10 WITHOUT PREJUDICE.

11 **IV. Conclusion**

12 For the foregoing reasons, the Court GRANTS U.S. Fuel's motion  
13 to dismiss (Docket No. 61). The Court GRANTS IN PART and DENIES IN  
14 PART Emyrean, Keller, and Carter's motion to dismiss (Docket No.  
15 53). All dismissed claims are dismissed WITHOUT PREJUDICE. Any  
16 amended complaint correcting the deficiencies identified in this  
17 order must be filed on or before September 25, 2014.

18  
19 IT IS SO ORDERED.

20  
21  
22 Dated: September 11, 2014

  
DEAN D. PREGERSON  
United States District Judge

23  
24  
25  
26  
27  
28