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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

J2 CLOUD SERVICES, INC., et al.,	)	Case No. 13-05353 DDP (AJWx)
	)	
Plaintiff,	)	<b>ORDER DENYING DEFENDANT</b>
	)	<b>FANI'S MOTION TO DISMISS</b>
v.	)	<b>PLAINTIFFS' CLAIM FOR</b>
	)	<b>PROMISSORY FRAUD</b>
FAX87, et al.,	)	
	)	[Dkt. 114]
Defendants.	)	
	)	
	)	

Presently before the court is Defendant Farjad Fani's Motion to Dismiss Plaintiffs' Claim for Promissory Fraud for failure to state a claim. (Dkt. 114.) After considering the parties' submissions, the court denies the motion and adopts the following Order.

**I. BACKGROUND**

This case arises out of a dispute between Plaintiffs j2 Cloud Services ("j2") and Advanced Messaging Technologies, Inc. ("AMT") and Defendants Farjad Fani, Matt Johnson Finance, Inc. ("MJF"), and Fax87.com ("Fax87") over the use of patents for methods of conveying messages and communications electronically. (First Amended

1 Complaint (“FAC”) ¶ 45.) An earlier version of this case dates back to 2011 when  
2 Plaintiffs first sued Defendants for operating an Internet-based fax service, which  
3 allegedly infringed upon Plaintiffs’ patents. (*Id.*) According to Plaintiffs, Defendant Fani  
4 was offering online fax services at the time under the Fax87 brand. (*Id.* ¶ 88.) In 2011, Fani  
5 transferred the Fax87 operation to MJF, which was a company controlled by Fani. During  
6 this period, Plaintiffs allege that both Fax87 and MJF were alter egos of Defendant Fani.  
7 (*Id.* ¶¶ 90-99.) On April 10, 2012, the parties entered into two agreements to resolve their  
8 disputes. (*See* Dkts. 43-15; 43-16.) The first was a settlement agreement signed by Fani,  
9 MJF, and Plaintiffs where each party agreed to release and dismiss all claims that had  
10 accrued to date with prejudice. (Dkt. 43-15.) The second was a licensing agreement  
11 signed by MJF d/b/a Fax87 and Plaintiffs, which established a worldwide, non-exclusive,  
12 non-divisible license to certain patents owned by Plaintiffs. (Dkt. 43-16.)<sup>1</sup> In exchange,  
13 MJF agreed, *inter alia*, to make a lump sum payment, provide regular royalty reports,  
14 make regular royalty payments, permit Plaintiffs to conduct audits, and notify Plaintiffs  
15 of any changes in ownership or control. (*See* Dkt. 43-16.)

16 From July 2012 until January 2013, MJF provided royalty reports and paid royalty  
17 fees in accordance with the agreement. (FAC ¶¶ 61-63.) Plaintiffs allege, however, that  
18 MJF did not permit audits to verify the royalty amounts. (*Id.* ¶¶ 76-77.) In January 2013,  
19 Plaintiffs allege that they stopped receiving any royalty payments. (*Id.* ¶ 63, 65.) In May  
20 2013, Plaintiffs were informed by Fani that he sold the Fax87 business but allegedly  
21 refused to disclose the new owner. (*Id.* ¶¶ 70-73.) Since then, Plaintiffs assert that the  
22 website continues to operate and offer Internet fax services and that Plaintiffs still have  
23 not received any additional royalty reports or payments. (*Id.* ¶¶ 64, 74, 80, 102.)

24 On July 24, 2013, Plaintiffs filed a complaint against Fani, MJF, and Fax87 for  
25 breach of the licensing agreement and patent infringement (Dkt. 1.) MJF and Fax87 have  
26 failed to respond and the Clerk has entered a default against them in this action. (Dkt.

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27  
28 <sup>1</sup> Although MJF is the only Defendant that was a listed party to the licensing agreement,  
the actual document was signed by Fani in his capacity as an MJF officer. (*See* Dkt. 43-16.)

1 76.) The court dismissed the action against Fani, however, for improper service. (Dkt. 32.)  
2 Plaintiffs then attempted to locate and reserve Fani. During that time, Plaintiffs allege  
3 that MJF was dissolved and Fani transferred the online fax operation to various other  
4 companies, also named as Defendants in this action. (FAC ¶ 101.) On April 15, 2016,  
5 Plaintiffs filed their First Amended and Supplemental Complaint, which added both new  
6 defendants and additional causes of action, including a claim for promissory fraud. (FAC  
7 ¶¶ 220-244.) The court again dismissed the claims against Fani for improper service.  
8 (Dkt. 103.) However, Fani has since agreed to waive service and now moves to dismiss  
9 the claim for promissory fraud. (See Dkts 111; 114.)

## 10 **II. LEGAL STANDARD**

11 A complaint will survive a motion to dismiss when it contains “sufficient factual  
12 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*  
13 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
14 (2007)). When considering a Rule 12(b)(6) motion, a court must “accept as true all  
15 allegations of material fact and must construe those facts in the light most favorable to  
16 the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
17 need not include “detailed factual allegations,” it must offer “more than an unadorned,  
18 the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Conclusory  
19 allegations or allegations that are no more than a statement of a legal conclusion “are not  
20 entitled to the assumption of truth.” *Id.* at 679. In other words, a pleading that merely  
21 offers “labels and conclusions,” a “formulaic recitation of the elements,” or “naked  
22 assertions” will not be sufficient to state a claim upon which relief can be granted. *Id.* at  
23 678 (citations and internal quotation marks omitted).

24 “When there are well-pleaded factual allegations, a court should assume their  
25 veracity and then determine whether they plausibly give rise to an entitlement of relief.”  
26 *Id.* at 679. Plaintiff must allege “plausible grounds to infer” that their claims rise “above  
27 the speculative level.” *Twombly*, 550 U.S. at 555. “Determining whether a complaint states  
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1 a plausible claim for relief” is a “context-specific task that requires the reviewing court to  
2 draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

### 3 **III. DISCUSSION**

4 Count 3 of Plaintiffs’ Complaint asserts a cause of action for promissory fraud.  
5 (FAC ¶¶ 220-244.) The basis of this claim is that “[o]n or about April 10, 2012, Defendants  
6 Mr. Fani, MJF and Fax87 promised to perform their obligations and abide by the terms of  
7 the Settlement Agreement and License Agreement.” (*Id.* ¶ 221.) The Complaint then  
8 specifies that Defendants promised:

9 to make quarterly royalty payments for their Internet fax products and  
10 services, to submit quarterly royalty reports for their Internet fax products  
11 services, to make late-payment fees if their payments are late, to  
12 permanently mark with the licensed patent numbers, to notify j2 of any  
13 “Change of Control” event within 14 days, to allow j2 to conduct an audit of  
14 their records, to notify j2 of any change of address related to MJF’s or  
Fax87’s business location, to do any and all acts and things reasonably  
necessary in connection with the performance of their obligations, to refrain  
from selling the licensed services to third party re-sellers, and to refraining  
from using the eFax® mark in connection with their products and services.

15 (*Id.* ¶ 222.) Plaintiffs further allege that Defendants did not intend to perform these  
16 promises and made them “with the intention of inducing reliance by Plaintiffs j2 and  
17 AMT for the purposes of obtaining a dismissal and settlement of the previous litigation.”

18 (*Id.* ¶ 225.) Plaintiffs state that they “reasonably relied on each of the promises . . . to  
19 [their] detriment” because they “released their earlier claims for patent infringement and  
20 willful patent infringement against Defendants . . . , dismissed the earlier litigation and  
21 granted a license.” (*Id.* ¶¶ 228, 234.) Plaintiffs also claim additional harms, including  
22 having “to spend additional time, money and effort filing a new litigation, tracking down  
23 Defendants and their various alter egos, and identifying and locating their new  
24 accomplices.” (*Id.* ¶ 234.) Fani contends that these allegations fail to state a claim for  
25 promissory fraud and are barred by the economic loss rule.

#### 26 **A. Promissory Fraud Claim**

27 “‘Promissory fraud’ is a subspecies of fraud and deceit. A promise to do  
28 something necessarily implies the intention to perform; hence, where a promise is made

1 without such intention, there is an implied misrepresentation of fact that may be  
2 actionable fraud." *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). "An action for  
3 promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter  
4 into a contract." *Id.* The elements that give rise to the tort of promissory fraud are: "(1) a  
5 promise made regarding a material fact without any intention of performing it; (2) the  
6 existence of the intent not to perform at the time the promise was made; (3) intent to  
7 deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the  
8 promisee; (5) nonperformance by the party making the promise; and (6) resulting  
9 damage to the promise[e]." *Behnke v. State Farm General Ins. Co.*, 196 Cal. App. 4th 1443,  
10 1453 (Cal. App. 2011).

11 Fani raises three arguments in support of his contention that Plaintiffs have failed  
12 to state a claim for promissory fraud against him. First, Fani contends that all the  
13 promises Plaintiffs rely on are representations made in a license agreement to which Fani  
14 was not a party. (Mot. 10.) While Fani acknowledges that he signed the licensing  
15 agreement, he contends that he did so only as a representative of MJF, and thus any  
16 purported statements cannot be attributed to him personally. (*Id.*)

17 This argument is unconvincing for at least two reasons. First, Plaintiffs have  
18 alleged that MJF is an alter ego of Fani. (FAC ¶¶ 82-102.) Specifically, Plaintiffs contend  
19 that Fani did not maintain any practical or legal separation between himself and his  
20 corporate form and commingled finances. (*Id.* ¶¶ 90, 98.) Plaintiffs further allege that MJF  
21 and Fax87 did not file proper corporate records, pay corporate taxes, or have directors,  
22 board members or shareholders. (*Id.* ¶¶ 90, 91, 93, 95, 98.) If these allegations are borne  
23 out, Fani will not be able to maintain his claim that the corporation, rather than Fani, is  
24 responsible for the representations in the license agreement. Moreover, even if veil  
25 piercing and alter ego theories are proven to be inappropriate in this case, an agent can  
26 be personally liable for fraudulent statements. *See* Cal. Civ. Code § 2343 ("One who  
27 assumes to act as an agent is responsible to third persons as a principal for his acts in the  
28 course of his agency . . . [w]hen his acts are wrongful in their nature"); *see also Oncology*

1 *Therapeutics Network Connection v. Va. Hematology Oncology PLLC*, No. C 05-3033 WDB,  
2 2006 WL 334532, at \*10 (N.D. Cal. Feb. 10, 2006) (“If an entity’s representative committed  
3 a tort, such as fraud, in connection with the contract, plaintiff could sue the signatory as  
4 an individual for his tort.”). Given that Plaintiffs allege Fani made these representations  
5 with fraudulent intent, the statements can be attributed to Fani personally.

6 Second, Fani contends that the promissory fraud claim fails because the Complaint  
7 does not plausibly allege that Fani had any fraudulent intent at the time he made the  
8 alleged promises. (Mot. 11.) As Fani correctly notes, a claim for promissory fraud  
9 “requires pleading facts from which it can be inferred that the promisor had no intention  
10 of performing at the time the promise was made.” *UMG Recordings, Inc. v. Glob. Eagle*  
11 *Entm’t, Inc.*, 117 F. Supp. 3d 1092, 1108 (C.D. Cal. 2015). Moreover, mere nonperformance  
12 of a promise is typically inadequate to demonstrate fraudulent intent. *See Tenzer v.*  
13 *Superscope, Inc.*, 39 Cal. 3d 18, 30–31 (1985). According to Fani, the allegations in the  
14 Complaint concerning fraudulent intent are conclusory and unsupported by adequate  
15 factual allegations. (Mot. 12-13.) Moreover, Fani notes that Complaint acknowledges  
16 MJF’s compliance with a number of terms including making an initial lump sum  
17 payment to Plaintiffs and providing royalty reports and payments for several months.  
18 (See FAC ¶¶ 61-63, 70, 73.)

19 Although Federal Rule of Civil Procedure 9 requires that “a party must state with  
20 particularity the circumstances constituting fraud or mistake,” the rule also provides that  
21 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged  
22 generally.” Fed. R. Civ. P. 9(b). Here, Plaintiffs have met their burden of adequately  
23 alleging intent. The Complaint does not only rely on Fani’s nonperformance but also  
24 alleges that Fani did not intend to comply with the terms of the parties’ agreement from  
25 the outset. (Compl. ¶¶ 221, 224.) Specifically, Plaintiffs allege that Fani made false  
26 representations as part of a scheme to induce Plaintiffs to dismiss their prior action  
27 against Fani before he left the jurisdiction and transferred his online fax business. (*Id.* ¶¶  
28 224-226.) Plaintiffs also supplement the plausibility of their allegations by pointing to

1 Fani's actions after he entered into the licensing agreement which include allowing MJF  
2 to dissolve, leaving the country, operating Fax87 abroad, and operating the same service  
3 through alter ego entities. (*Id.* ¶¶ 101, 106, 226, 226, 334.) *See generally Lee v. Fed. St. L.A.,*  
4 *LLC, No. 2:14-CV-06264-CAS (SSx), 2016 WL 2354835, at \*9 (C.D. Cal. May 3, 2016)*  
5 (noting that defendant's actions after entering into contract support conclusion that  
6 promissory fraud claim survived a motion to dismiss). While Fani and MJF's initial  
7 compliance may cut against an ultimate finding of fraudulent intent, that issue is not  
8 suitable for resolution at the motion to dismiss stage.

9 Finally, Fani contends that the promissory fraud claim cannot survive because  
10 Plaintiffs cannot plausibly allege reliance on any of Fani's alleged promises. Fani's  
11 argument on this point turns on the fact that Plaintiffs signed the Licensing Agreement  
12 on April 9, 2012 and Fani did not sign the agreement until the next day. Thus, Fani states  
13 that Plaintiffs could not have relied on any promises made by Fani. This argument,  
14 however, takes far too narrow a view of the concept of reliance. In the context of fraud or  
15 promissory fraud, "reliance means that plaintiff acted or refrained from acting as a result  
16 of the promise." *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1272 (C.D. Cal.  
17 2010) (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 976 (1997), as modified  
18 (July 30, 1997)). In this case, the relevant question is not when Plaintiffs executed the  
19 agreement but why. Here, Plaintiffs have alleged that their assent to the licensing  
20 agreement was induced by Fani's representation that he would comply with the terms of  
21 the agreement. Plaintiffs further allege that they released existing claims against Fani in  
22 reliance on his representations. Thus, Plaintiffs have met their burden by plausibly  
23 alleging at least two separate instances of reliance on Fani's promises.

#### 24 **B. Economic Loss Rule**

25 Fani's alternate argument in support of the instant motion to dismiss is that the  
26 promissory fraud claim is barred by the economic loss rule. "The economic loss doctrine  
27 provides that certain economic losses are properly remediable only in contract" and  
28 serves to "maintain a distinction between damage remedies for breach of contract and for

1 tort." *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092, 1103-06 (C.D.  
2 Cal. 2015) (internal quotation omitted). As one court has explained, "the fundamental  
3 rule in California is that no tort cause of action will lie where the breach of duty is  
4 nothing more than a violation of a promise which undermines the expectations of the  
5 parties to an agreement." *Oracle USA, Inc. v. XL Glob. Servs., Inc.*, No. C 09-00537 MHP,  
6 2009 WL 2084154, at \*4 (N.D. Cal. July 13, 2009). Courts have applied the economic loss  
7 rule to bar promissory fraud claims. *See, e.g., UMG Recordings*, 117 F. Supp. 3d at 1106-06;  
8 *Oracle*, 2009 WL 2084154, at \*6-\*7. However, there are several exceptions to the economic  
9 loss rule. *See Oracle*, 2009 WL 2084154, at \*4 ("Exceptions have been permitted only  
10 where: a breach of duty causes a physical injury; the covenant of good faith and fair  
11 dealing is breached in an insurance contract; an employee was wrongfully discharged in  
12 violation of a fundamental public policy; or a contract was fraudulently induced.")

13 In this case, Plaintiffs invoke the exception for fraudulent inducement. *See NuCal*  
14 *Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1033 ("In short, the 'economic loss  
15 rule is designed to limit liability in commercial activities that negligently or inadvertently  
16 go awry, not to reward malefactors who affirmatively misrepresent and put people at  
17 risk.") (quoting *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 991 n.7); *Lazar*, 12  
18 Cal. 4th at 638 ("An action for promissory fraud may lie where a defendant fraudulently  
19 induces the plaintiff to enter into a contract."). Having concluded that Plaintiffs plausibly  
20 allege they were induced to enter the licensing agreement on the basis of fraudulent  
21 statements, the economic loss rule cannot preclude Plaintiffs' promissory fraud claim at  
22 this stage of the litigation.

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**IV. CONCLUSION**

For the reasons stated above, the court DENIES Defendant Farjad Fani's Motion to Dismiss Plaintiffs' Claim for Promissory Fraud.

**IT IS SO ORDERED.**

Dated: November 18, 2016



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DEAN D. PREGERSON  
UNITED STATES DISTRICT JUDGE