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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BOOKIT OPERATING, LLC d/b/a)
BOOKIT.COM, a Florida)
limited liability company,)

Plaintiff,)

v.)

WF MEDIA SERVICES, INC., a)
California corporation,)
KIMBERLY FLETCHER, a/k/a)
Kimberly Sperling,)
individually, and STEVEN)
WEXLER, individually)

Defendants.)

CV 14-05946 (RZx)

**ORDER Re: DEFENDANT
KIMBERLY FLETCHER'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT [17];
DEFENDANT WF MEDIA
SERVICES, INC.'S MOTION
FOR JOINDER IN MOTION TO
DISMISS [19]**

The Court is in receipt of Defendant Kimberly
Fletcher's ("Defendant Fletcher") Motion to Dismiss
Plaintiff's First Amended Complaint [17] and Defendant
WF Media Services, Inc.'s Motion for Joinder in
Defendant Fletcher's Motion to Dismiss [19]. Having
considered all the arguments presented, the Court now

1 **FINDS AND RULES AS FOLLOWS:**

2 The Court **GRANTS** Defendant WF Media Services, Inc.'s
3 Motion for Joinder. The Court **DENIES** Defendant
4 Fletcher's Motion to Dismiss in its entirety.

5 **DISCUSSION**

6 **A. Legal Standard**

7 Motion to Dismiss

8 Federal Rule of Civil Procedure 12(b)(6) allows a
9 party to move for dismissal of one or more claims if
10 the pleading fails to state a claim upon which relief
11 can be granted. Dismissal can be based on a lack of
12 cognizable legal theory or lack of sufficient facts
13 alleged under a cognizable legal theory. Balistreri v.
14 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
15 1990). However, a party is not required to state the
16 legal basis for its claim, only the facts underlying
17 it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214,
18 1223 (9th Cir. 1990). In a Rule 12(b)(6) motion to
19 dismiss, a court must presume all factual allegations
20 of the complaint to be true and draw all reasonable
21 inferences in favor of the non-moving party. Klarfeld
22 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

23 The question presented by a motion to dismiss is
24 not whether the plaintiff will prevail in the action,
25 but whether the plaintiff is entitled to offer evidence
26 in support of its claim. Swierkiewica v. Sorema N.A.,
27 534 U.S. 506, 511 (2002). "While a complaint attacked
28 by a Rule 12(b)(6) motion to dismiss does not need

1 detailed factual allegations, a plaintiff's obligation
2 to provide the 'grounds' of his 'entitle[ment] to
3 relief' requires more than labels and conclusions, and
4 a formulaic recitation of a cause of action's elements
5 will not do." Bell Atl. Corp. v. Twombly, 550 U.S.
6 544, 555 (2007) (internal citation omitted). Although
7 specific facts are not necessary if the complaint gives
8 the defendant fair notice of the claim and the grounds
9 upon which the claim rests, a complaint must
10 nevertheless "contain sufficient factual matter,
11 accepted as true, to state a claim to relief that is
12 plausible on its face." Ashcroft v. Iqbal, 556 U.S.
13 662, 678 (2009) (internal quotation marks omitted).

14 Rule 9 specifies a heightened pleading standard
15 for fraud claims, requiring a party to "state with
16 particularity the circumstances constituting fraud or
17 mistake." Fed. R. Civ. P. 9(b).

18 If dismissed, a court must then decide whether to
19 grant leave to amend. The Ninth Circuit has repeatedly
20 held that a district court should grant leave to amend
21 even if no request to amend the pleadings was made,
22 unless it determines that the pleading could not
23 possibly be cured by the allegation of other facts.
24 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

25 **B. Analysis**

26 1. The Fraud Claim

27 In California, a claim for fraud requires a
28 plaintiff to prove (a) a misrepresentation; (b)

1 knowledge of falsity; (c) intent to defraud, i.e. to
2 induce reliance; (d) justifiable reliance; and (e)
3 resulting damage. Lazar v. Superior Court, 12 Cal. 4th
4 631, 638, 909 P.2d 981 (1996). Therefore, Plaintiff
5 must allege sufficient facts, that taken as true with
6 all reasonable inferences, state a claim for fraud.

7 While Defendant Fletcher contends that Plaintiff
8 has failed to state with particularity the claims
9 against her specifically, Plaintiff alleges several
10 specific misstatements and omissions with knowledge of
11 falsity made by Defendant Fletcher, including: a
12 February 2012 e-mail regarding commission rates, Compl.
13 Ex. B; an October 14, 2012 e-mail from Fletcher to
14 Plaintiff indicating she would clearly articulate all
15 new financial information for future campaigns; e-mails
16 regarding fraudulent invoices, Compl. Exs. G, H, in
17 which Defendant Fletcher was copied; and other
18 communications throughout the duration of the
19 relationship. Accordingly, Plaintiff has sufficiently
20 alleged with particularity the circumstances
21 constituting fraud or mistake. Plaintiff must also
22 allege intent to defraud. Here, Plaintiff has alleged
23 a multi-year initiative by Defendants, including
24 Defendant Fletcher, to defraud Plaintiff by
25 overcharging it for services rendered. See, e.g.,
26 Compl. ¶¶ 92, 98, 99-108, 110-114. With respect to
27 justifiable reliance, Plaintiff has alleged throughout
28 the complaint that its close and longstanding

1 relationship with Defendants led it to rely on their
2 cost estimations and billing practices. See, e.g., ¶¶
3 72-88, 99-114. Finally, Plaintiff has alleged damages.
4 Accordingly, Defendant Fletcher's Motion to Dismiss the
5 claim for fraud is denied.

6 2. The Breach of Fiduciary Duty Claim

7 A claim for breach of fiduciary duty requires a
8 plaintiff to plead: (1) the existence of a fiduciary
9 duty; (2) breach of that duty; and (3) damages
10 resulting from the breach. Defendant Fletcher disputes
11 that she had a fiduciary relationship with Plaintiff,
12 instead contending that "WF Media functioned as
13 BookIt's advertising company and would buy media on
14 behalf of BookIt . . . WF Media was BookIt's
15 vendor-nothing more." Mot. 7:15-18. Plaintiff claims,
16 to the contrary, that WF Media and Fletcher were
17 Plaintiff's agent, which provides "one of the
18 traditional bases for imposing fiduciary duties."
19 Opp'n 4:21-25 (citing Michelson v. Hamada, 29 Cal. App.
20 4th 1566, 1580 (1994)).

21 An agent is "one who represents another, called the
22 principal, in dealings with third persons . . . Whether
23 a person performing work for another is an agent
24 depends primarily upon whether the one for whom the
25 work is done has the legal right to control the
26 activities of the alleged agent." Michelson v. Hamada,
27 29 Cal. App. 4th 1566, 1579 (1994) (citing Cal. Civ.
28 Code § 2295 and Malloy v. Fong, 37 Cal.2d 356, 370

1 (1951). Thus, the question of whether Defendant
2 Fletcher was an agent or merely a vendor is a factual
3 one. See Rookard v. Mexicoach, 680 F.2d 1257 (9th Cir.
4 1982). Only if Plaintiff fails to allege sufficient
5 facts taken as true that Defendant Fletcher was an
6 agent should this claim be dismissed. Plaintiff claims
7 that Defendant Fletcher was appointed the position of
8 "Director of Media Solutions" in order "to oversee the
9 selling of off-line media campaigns." Compl. ¶ 169.
10 Plaintiff alleges that Defendant Fletcher "was given
11 her own BookIt business cards and her own BookIt email
12 address" and that she "used her position within BookIt
13 to represent herself to third party media companies as
14 both an agent and officer of BookIt." Id. ¶¶ 170-71.
15 Plaintiff then alleges that this created a fiduciary
16 duty that Defendant Fletcher then breached, resulting
17 in damages. Id. ¶¶ 173-175. These allegations could
18 give rise to a reasonable inference that Defendant
19 Fletcher was performing work for Plaintiff such that an
20 agent-principal relationship was created. Accordingly,
21 Defendant Fletcher's Motion to Dismiss the claim for
22 breach of fiduciary duty is denied.

23 *c. Alter Ego Liability*

24 Plaintiff also seeks to impose alter ego liability
25 to pierce the corporate veil of Defendant WF Media
26 Services. Compl. ¶ 183. Alter ego liability permits a
27 court to disregard the corporate entity and to hold the
28 individual shareholders liable for the actions of the

1 corporation. Alter ego liability is not a separate
2 cause of action in and of itself, but "is only a means
3 of imposing liability for an underlying cause of action
4 and is not a cause of action in itself." Local 159 v.
5 Norcal Plumbing, Inc., 185 F.3d 978, 985 (9th Cir.
6 1999). Despite being stated as the fifth "count,"
7 Plaintiff is asserting alter ego liability in this
8 manner: "BookIt seeks to hold Defendant [Fletcher] and
9 Defendant Wexler jointly and severally liable for the
10 claims against WF." Compl. ¶ 192; see also Opp'n 7:11-
11 13 ("With the last count of its Complaint, BookIt seeks
12 to pierce the corporate veil and hold Fletcher and
13 Wexler personally liable for the claims against WF
14 Media for fraud, breach of fiduciary duty, and breach
15 of contract.") Accordingly, the Court analyzes this
16 theory not as a stand-alone claim, but to determine
17 whether alter ego liability may present an alternate
18 means of accessing Claims 1 (Fraud), 2 (Breach of
19 Fiduciary Duty), and 4 (Breach of Contract).

20 In order to assert alter ego liability, Plaintiff
21 must allege sufficient facts to demonstrate such "unity
22 of interest and ownership that the separate
23 personalities of the corporation and the individual no
24 longer exist" and that "if the acts are treated as
25 those of the corporation alone, an inequitable result
26 will follow." Mesler v. Bragg Mgmt. Co., 39 Cal. 3d
27 290, 300, 702 P.2d 601 (1985). To satisfy the second
28 requirement, California courts typically require

1 evidence of bad faith conduct. Mid-Century Ins. Co. v.
2 Gardner, 9 Cal.App.4th 1205, 1213 (1992). Plaintiff
3 alleges a series of actions in bad faith "including
4 misrepresentation and willful breach," Pac. Mar.
5 Freight, Inc. v. Foster, No. 10-CV-0578-BTM-BLM, 2010
6 WL 3339432, at *7 (S.D. Cal. Aug. 24, 2010), for its
7 claims. See Compl. ¶¶ 186 ("Wexler and [Fletcher] used
8 the corporate fiction of WF to advance their
9 interests"), 187 (WF disbursed all of its proceeds to
10 [Fletcher] and Wexler"), 189 ("SF made payments to
11 Sperling and Wexler of monies so as to make it
12 difficult for WF's creditors, such as BookIt"), 190
13 ("Wexler's and [Fletcher's] use of WF for the
14 fraudulent purpose of shielding Wexler and [Fletcher]
15 from personal liability from their fraudulent
16 activities was an improper and abusive use of WF's
17 corporate form"). Accordingly, the Court declines to
18 dismiss alter ego liability as an alternate form of
19 liability for the Fraud, Breach of Fiduciary Duty, and
20 Breach of Contract claims.

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1 **CONCLUSION**

2 For the reasons discussed above, Defendant
3 Fletcher's Motion to Dismiss is **DENIED** in its entirety.

4 **IT IS SO ORDERED.**

5 DATED: May 7, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge

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