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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GEMCAP LENDING I, LLC,)	2:14-cv-07937-RSWL-E
)	
Plaintiff,)	
)	
v.)	ORDER re: Defendants'
)	Motion to Dismiss [25]
)	
QUARLES & BRADY, LLP; JAMES)	
GATZIOLIS, and DOES 1 to)	
10, inclusive,)	
)	
Defendants.)	
)	
)	
)	

INTRODUCTION

Currently before the Court is Defendants Quarles & Brady, LLP ("Q&B") and James Gatziolis's ("Gatziolis") (collectively, "Defendants") Motion to Dismiss [25] Plaintiff GemCap Lending I, LLC's ("GemCap" or "Plaintiff") Second Amended Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) and to dismiss Defendant Gatziolis for lack of personal

1 jurisdiction pursuant to Federal Rule of Civil
2 Procedure 12(b)(2). Defs.' Mot. Dismiss ("Mot.") 1:1-
3 12. Defendants' Motion to Dismiss [25] arises out of
4 Plaintiff's action against Defendants for professional
5 malpractice, intentional misrepresentation, negligent
6 misrepresentation, and concealment under California
7 law. Second Amend. Compl. ("SAC"), ECF No. 24.

8 The Court, having reviewed all papers submitted and
9 pertaining to this Motion [25], **NOW FINDS AND RULES AS**
10 **FOLLOWS:** The Court **DENIES** Defendants' Motion to Dismiss
11 [25] in its entirety.

12 I. BACKGROUND

13 A. Factual Background

14 1. Parties

15 Plaintiff GemCap is incorporated in Delaware and
16 has its principal place of business in Malibu,
17 California. SAC ¶ 1. Defendant Q&B is a limited legal
18 partnership based in Milwaukee, Wisconsin. SAC ¶ 2.
19 Defendant Gatziolis is a partner at Q&B and resides in
20 Illinois. SAC ¶ 3.

21 2. Plaintiff's Allegations in SAC

22 Plaintiff's claims against Defendants arise out of
23 a 2011 loan agreement that Plaintiff entered into with
24 a third-party borrower. On November 23, 2011,
25 Plaintiff entered into a Loan and Security Agreement
26 ("Loan Agreement") with borrowers Crop USA Insurance
27 Agency, Inc. and Crop USA Insurance Services, Inc.
28 (collectively, "CropUSA") for a revolving \$5,000,000

1 loan. SAC ¶ 13. Defendants served as CropUSA's legal
2 counsel for the Loan Agreement transaction. See SAC ¶¶
3 20-21, 32, 34, 36-37. The Loan Agreement required
4 CropUSA to supply Plaintiff with a Legal Opinion and
5 certain disclosures set forth in a Borrower's
6 Disclosure Schedule. SAC ¶¶ 13-15, 20-21, 31-32.
7 Plaintiff alleges that Defendants prepared the Legal
8 Opinion Letter ("Opinion Letter") and Borrower's
9 Disclosure Schedule ("Disclosure Schedule") and made
10 fraudulent statements or concealments in both
11 documents, which induced Plaintiff to agree to the
12 CropUSA loan ("Loan") to Plaintiff's injury when
13 CropUSA defaulted on the Loan in 2013. SAC ¶¶ 13-43,
14 46-75. Plaintiff alleges that CropUSA owes Plaintiff
15 over \$12,000,000 on the Loan. SAC ¶ 39.

16 *a. Disclosure Schedule Allegations*

17 The Loan Agreement required CropUSA to disclose in
18 writing "certain material facts concerning [CropUSA's]
19 business operations, assets and contractual
20 obligations" in a "concurrently submitted Borrower's
21 Disclosure Schedule." SAC ¶ 31. The Loan Agreement
22 and Disclosure Schedule required CropUSA to disclose
23 any "material contracts" that "could have a Material
24 Adverse Effect on CropUSA's "[b]usiness, assets,
25 liabilities, financial condition, results of
26 operations[,] or business prospects" and also required
27 CropUSA to disclose all "payments of cash or other
28 property" CropUSA would be making to any

1 "[a]ffiliates." Id.

2 Plaintiff alleges that on November 22, 2011,
3 Defendants prepared and submitted to Plaintiff the
4 Disclosure Schedule on CropUSA's behalf. Id. ¶ 32.
5 Plaintiff alleges that Defendants "concealed material
6 information" that was required to be disclosed,
7 including the fact that in January 2009, Crop USA
8 entered into an agreement with its affiliate, AIA, that
9 obligated CropUSA to pay all of AIA's defense costs in
10 certain lawsuits against AIA. Id. Plaintiff alleges
11 that such information fell within the scope of the
12 Disclosure Schedule's required disclosures because the
13 agreement was for "payment" to an "affiliate," and the
14 agreement was a "material contract" because it "could
15 have [had] a Material Adverse Effect" on CropUSA's
16 "[b]usiness, assets, liabilities, financial condition,
17 results of operations or business prospects" because
18 the defense costs were "several million dollars" and
19 "provided Crop USA with no actual benefit." Id. ¶¶ 31-
20 32. Plaintiff alleges that Defendants were aware of
21 the AIA contract when Defendants submitted the
22 Disclosure Schedule and intentionally concealed the AIA
23 contract from Plaintiff. Id. ¶ 32, 70-72.

24 *b. Opinion Letter Allegations*

25 Plaintiff alleges that the Loan Agreement required,
26 as an express condition precedent to GemCap's approval
27 of the loan, a Legal Opinion from CropUSA's counsel.
28 SAC ¶ 20. On November 23, 2011, Defendants prepared

1 and delivered the Opinion Letter to GemCap in Santa
2 Monica, California. SAC ¶ 21, Ex. 3. Plaintiff
3 alleges that Defendant Gatziolis wrote the Opinion
4 Letter and that the Opinion Letter made material
5 assumptions, representations, and opinions that were
6 false. SAC ¶¶ 24-25, 46-75.

7 Plaintiff alleges that the following express
8 representation,¹ among others, made by Defendants in the
9 Opinion Letter was false:

10 [W]e wish to advise that, to our knowledge,
11 there are no actions, suits, proceedings or
12 investigations pending or threatened against the
13 Borrower, or in which the Borrower is a party,
14 before any court or governmental authority that
15 . . . (c) by its pleadings or allegations seeks
16 any determination or ruling that might . . .
17 (ii) result in the termination, revocation,
18 suspension or other material impairment of any
19 license or permit required by any applicable
20 federal law, statute, or regulation or
21

22 ¹ Plaintiff also notes the following "assumption," among
23 others, stated in the Opinion Letter:

24 c) "As to questions of fact material to the opinions
25 expressed herein, all statements, representations and
26 warranties made in the Loan Documents, in any certificate
27 provided to us by the Borrower and in any other materials
28 delivered to us with this opinion . . . are true and
correct";

d) "All parties have complied with any requirement of good
faith, fair dealing and conscionability."

SAC ¶ 25, Ex. 3 at 2 ¶¶ E, G.

1 governmental authority for the operation of the
2 Borrower in the business in which the Borrower
3 is currently engaged and as contemplated in the
4 Loan Documents.

5 SAC ¶ 25, Ex. 3 at 4. Plaintiff alleges that when
6 Defendants represented that there was no pending
7 actions against CropUSA that "might" threaten CropUSA's
8 business license, Defendants were aware of "multiple
9 pending and/or threatened lawsuits" ("The Litigation")
10 against CropUSA that likely could have threatened
11 CropUSA's business license status because the
12 allegations against CropUSA included fraud, commingling
13 assets, and breach of fiduciary duties. SAC ¶¶ 27-29.

14 Plaintiff alleges that it relied upon Defendants'
15 representations in both the Borrower's Disclosure and
16 the Opinion Letter and proceeded with the Loan, to
17 Plaintiff's injury, because Plaintiff thought
18 Defendants' statements were true.² SAC ¶ 26. Plaintiff
19 alleges it would not have proceeded with the CropUSA
20 loan if Plaintiff had known about the AIA contract or
21 The Litigation. SAC ¶¶ 48-51, 70-73.

22
23 ² Defendants also state in the Opinion Letter, as a
24 qualification or limitation, that:

25 Wherever we indicate that our opinion with respect to the
26 existence or absence of facts is based on our knowledge,
27 our opinion is based solely on . . . (ii) the
28 representations and warranties of said parties contained
in the Loan Documents; we have made no independent
investigation as to such factual matters. However, we
know of no facts which lead us to believe such factual
matters are untrue or inaccurate.

SAC, Ex. 3, at 4 ¶ A.

1 **B. Procedural Background**

2 Plaintiff filed its initial Complaint on October
3 14, 2014 [1]. On January 16, 2015, Plaintiff filed its
4 First Amended Complaint [18]. On March 17, 2015,
5 Plaintiff was granted leave to file a Second Amended
6 Complaint [23]. On March 18, 2015, Plaintiff filed its
7 Second Amended Complaint [24]. On April 17, 2015
8 Defendant filed the present Motion to Dismiss [25].
9 The Opposition [30] and Reply [32] were timely filed.
10 The Motion was set for hearing on May 26, 2015, and was
11 taken under submission [33] on May 21, 2015.

12 **II. LEGAL STANDARD**

13 Federal Rule of Civil Procedure 12(b)(6) allows a
14 party to move for dismissal of one or more claims if
15 the pleading fails to state a claim upon which relief
16 can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal
17 can be based on a "lack of a cognizable legal theory or
18 the absence of sufficient facts alleged under a
19 cognizable legal theory." Balistreri v. Pacifica
20 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). A
21 complaint must "contain sufficient factual matter,
22 accepted as true, to state a claim to relief that is
23 plausible on its face." Ashcroft v. Iqbal, 556 U.S.
24 662, 678 (2009) (internal quotation marks omitted);
25 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

26 In a Rule 12(b)(6) motion to dismiss, a court must
27 presume all factual allegations of the complaint to be
28 true and draw all reasonable inferences in favor of the

1 non-moving party. Klarfeld v. United States, 944 F.2d
2 583, 585 (9th Cir. 1991). The question presented by a
3 motion to dismiss is not whether the plaintiff will
4 ultimately prevail, but whether the plaintiff has
5 alleged sufficient factual grounds to support a
6 plausible claim to relief such that plaintiff is
7 entitled to offer evidence in support of its claim.
8 Iqbal, 556 U.S. at 678; Swierkiewicz v. Sorema N.A.,
9 534 U.S. 506, 511 (2002).

10 III. ANALYSIS

11 A. Defendants' Motion to Dismiss SAC Pursuant to Fed. 12 R. Civ. P. 12(b)(6)

13 1. Plaintiff's Request for Judicial Notice

14 Plaintiff requests that the Court take judicial
15 notice of five documents, all of which are filings or
16 opinions in two Idaho cases that relate to allegations
17 in Plaintiff's SAC. See Pl.'s Request for Judicial
18 Notice 2:1-3:3, Exs. 1-7.

19 Rule 201 of the Federal Rules of Evidence³ states
20 that the court "may judicially notice a fact that is
21 not subject to reasonable dispute because it: (1) is
22 generally known . . .; or (2) can be accurately and
23 readily determined from sources whose accuracy cannot
24 reasonably be questioned." Fed. R. Evid. 201(b).

25 Because the existence and content of the five

26
27 ³ In diversity cases, judicial notice is governed by the
28 Federal Rules of Evidence. Alimena v. Vericrest Fin., Inc., No.
S-12-0901, 2012 WL 66512001, at *4 n.8 (E.D. Cal. Dec. 20, 2012);
Wray v. Gregory, 61 F.3d 1414, 1417 (9th Cir. 1995).

1 public documents are facts that "can be readily
2 determined from sources whose accuracy cannot
3 reasonably be questioned," the Court **GRANTS** Plaintiff's
4 Request for Judicial Notice [31].

5 2. Professional Malpractice Claim

6 The elements of a cause of action for professional
7 malpractice are: "(1) the duty of the professional to
8 use such skill, prudence, and diligence as other
9 members of his profession commonly possess and
10 exercise; (2) a breach of that duty; (3) a proximate
11 causal connection between the negligent conduct and the
12 resulting injury; and (4) actual loss or damage
13 resulting from the professional's negligence.'" "

14 Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP, 593
15 F. Supp. 2d 1153, 1165 (S.D. Cal. 2008) (quoting
16 Osornio v. Weingarten, 124 Cal. App. 4th 304, 319, 53
17 Cal. Rptr. 3d 700 (2007)).

18 a. *Duty*

19 "While other elements of a legal malpractice claim
20 are generally factual . . . , the existence of the
21 attorney's duty of care owing to the plaintiff is
22 generally a question of law" Osornio v.
23 Weingarten, 21 Cal. Rptr. 3d 246, 251 (Ct. App. 2004).
24 An attorney who issues "a legal opinion intended to
25 secure benefit for the client . . . must be issued with
26 due care, or the attorneys who do not act carefully
27 will have breached a duty owed to those they attempted
28 or expected to influence on behalf of their clients."

1 Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal.
2 Rptr. 901, 906 (Ct. App. 1976); see Osornio, 21 Cal.
3 Rptr. at 259-60.

4 Here, Plaintiff's SAC alleges that Defendants,
5 representing CropUSA, issued to Plaintiff a Legal
6 Opinion Letter that was intended to benefit CropUSA.
7 SAC ¶¶ 19-21, 34, 36-37, 46. As such, pursuant to
8 Roberts, Defendants owed Plaintiff a duty of care.
9 Roberts, 128 Cal. Rptr. at 906.

10 Additionally, a defendant, professional or
11 otherwise, always has a duty not to defraud others.
12 Jackson v. Rogers & Wells, 258 Cal. Rptr. 454, 459 (Ct.
13 App. 1989) (stating that if an attorney "commits fraud
14 in his dealings with a third party, the fact he did so
15 in the capacity of attorney for a client does not
16 relieve him of liability"). Though an attorney may not
17 owe a duty to a non-client to disclose information
18 protected by the attorney-client relationship, "the
19 rule has long been settled in [California] that
20 although one may be under no duty to speak as to a
21 matter, 'if he undertakes to do so, . . . he is bound
22 not only to state truly what he tells, but also not to
23 suppress or conceal any facts within his knowledge
24 which materially qualify those stated[;] [i]f he speaks
25 at all, he must make a full and fair disclosure."
26 Rogers v. Warden, 125 P.2d 7, 9 (Cal. 1942). As such,
27 a duty of disclosure exists if "the defendant makes
28 representations but does not disclose facts which

1 materially qualify the facts disclosed, or which render
2 his disclosure likely to mislead." Linear Tech. Corp.
3 v. Applied Materials, Inc., 61 Cal. Rptr. 3d 221, 234
4 (Ct. App. 2007); see also Goodman, 556 P.2d at 745;
5 Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491
6 P.2d 421, 429 (Cal. 1971) (in bank). In sum, if
7 Plaintiff's SAC alleges fraud, including a failure to
8 disclose facts that "materially qualify" facts already
9 disclosed, Plaintiff's SAC sufficiently alleges duty.

10 The Court finds that Plaintiff's SAC alleges
11 fraud,⁴ including an intentional failure to disclose
12 facts that "materially qualify" facts disclosed.

13 First, Plaintiff's SAC specifically⁵ alleges that
14 Defendants made affirmative statements in the Opinion
15 Letter that Defendants knew at the time were false.
16 See SAC ¶¶ 25, 46-61, Ex. 3 at 4. Plaintiff's SAC also
17 alleges that Defendants concealed facts that materially
18 qualified statements in the Opinion Letter and
19 Borrower's Disclosure. See SAC ¶¶ 16-30, 40-41, 69-75.

20 Second, the SAC alleges that Defendants intended to
21 induce Plaintiff's reliance; that Plaintiff reasonably
22

23 ⁴ The elements of fraud are: (1) a misrepresentation; (2)
24 knowledge of falsity; (3) intent to induce reliance; (4) actual
25 and justifiable reliance; and (5) resulting damage." Cicso Sys.,
26 Inc. v. STMicroelectronics, Inc., No. C-14-03236-RMW, 2014 WL
7387962, at *4 (N.D. Cal. Dec. 29, 2014) (citing Lazar v. Sup.
Ct., 909 P.2d 981 (Cal. 1996)).

27 ⁵ Upon review of Plaintiff's SAC, the specificity of
28 Plaintiff's SAC satisfies the heightened pleading standard for
fraud under Fed. R. Civ. P. 9(b). See Vess v. Ciba-Geigy Corp.
USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

1 relied on the misrepresentations to Plaintiff's injury;
2 and that if Plaintiff had known the truth, Plaintiff
3 would not have agreed to the CropUSA loan. See id. ¶¶
4 25(f)-27, 40(c), 49-52. Because Plaintiff's SAC
5 alleges actual fraud, the SAC sufficiently pleads duty.
6 See Rogers, 125 P.2d at 9.

7 b. *Breach*

8 As discussed above, Plaintiff's SAC alleges that
9 Defendants breached their duty of care to Plaintiff by
10 making fraudulent statements or concealments. See SAC
11 ¶¶ 25(f)-27, 40(c), 47.

12 c. *Injury & Causation*

13 As discussed above, Plaintiff's SAC alleges "a
14 proximate causal connection between the negligent
15 conduct and the resulting injury" because the SAC
16 alleges that Plaintiff's reliance on Defendants'
17 misrepresentations in the Opinion Letter and Borrower's
18 Disclosure resulted in an injury to Plaintiff of
19 \$12,000,000. SAC ¶¶ 35-39, 51-52. Plaintiff alleges
20 that, "[h]ad GemCap known of the true facts regarding
21 Crop USA, . . . [Plaintiff] would not have entered into
22 the Loan with Crop USA." SAC ¶¶ 50-51.

23 Defendants argue that Plaintiff's alleged injury is
24 not valid because Plaintiff has, in a separate action
25 against CropUSA, already obtained a judgment against
26 CropUSA for \$12,126,534.61, which is greater than the
27 \$12,000,000 injury Plaintiff alleges in this action.
28 Mot. 18:6-17. Though Defendants do not cite any case

1 law, they seem to be arguing that Plaintiff cannot
2 obtain a double recovery for the same injury. See,
3 e.g., Lovejoy v. Murray, 70 U.S. 1, 17 (1865) ("When
4 the plaintiff has accepted satisfaction in full for the
5 injury done him, from whatever source it may come, he
6 is so far affected in equity and good conscience, that
7 the law will not permit him to recover again for the
8 same damages.").

9 Though Plaintiff does not respond directly to
10 Defendants' argument,⁶ Defendant does not meet its
11 burden of establishing Plaintiff's lack of injury
12 because Defendant does not show that Plaintiff has
13 *received* any money from CropUSA to remedy Plaintiff's
14 alleged \$12,000,000 injury. Ash v. Mortensen, 150 P.2d
15 876, 878 (Cal. 1944) (stating that "[u]ntil plaintiff
16 has *received* full compensation for both injuries," the
17 different defendant cannot claim "full compensation")
18 (internal quotation marks omitted) (emphasis added)).⁷

19
20 ⁶ Plaintiff does respond to the extent Plaintiff insists it
21 has sufficiently alleged injury, but does not mention Defendants'
22 argument relating to Plaintiff's judgment against CropUSA. See
23 Opp'n 20:11-12.

24 ⁷ See also Ash, 150 P.2d at 879 (stating that a plaintiff
25 "ha[s] the right to show what damage, if any, was actually
26 suffered by reason of malpractice and to have the jury's award in
27 this action restricted to the difference between such damage and
28 any sum already received by plaintiff as compensation therefor");
Dawson v. Schloss, 29 P. 31, 31-32 (Cal. 1892) (noting that the
"prevailing rule in the United States" is that "the party injured
may bring separate suits against the wrong-doers, and proceed to
judgment in each, and that no bar arises to any of them until
satisfaction is received")(internal quotation marks omitted));
Carr v. Cove, 109 Cal. Rptr. 449, 453 (Ct. App. 1973) ("When the
plaintiff has accepted satisfaction in full for the injury done

1 Because Defendant has not met its burden of showing a
2 lack of injury, and because Plaintiff has pled an
3 otherwise valid and plausible injury of \$12,000,000,
4 Plaintiff's SAC sufficiently pleads injury.

5 Because Plaintiff's SAC pleads all of the elements
6 of a professional malpractice claim, Defendant's Motion
7 to Dismiss Plaintiff's first claim for professional
8 malpractice is **DENIED**.

9 3. Intentional Misrepresentation Claim

10 "The elements of a claim for intentional
11 misrepresentation are (1) a misrepresentation; (2)
12 knowledge of falsity; (3) intent to induce reliance;
13 (4) actual and justifiable reliance; and (5) resulting
14 damage." Cisco Sys., Inc. v. STMicroelectronics, Inc.,
15 No. C-14-03236-RMW, 2014 WL 7387962, at *4 (N.D. Cal.
16 Dec. 29, 2014) (citing Lazar v. Sup. Ct., 909 P.2d 981
17 (Cal. 1996)). Because Plaintiff's SAC sufficiently
18 alleges intentional misrepresentation, as discussed
19 above, Defendants' Motion to Dismiss Plaintiff's claim
20 for intentional misrepresentation is **DENIED**.

21 4. Negligent Misrepresentation Claim

22 The elements of negligent misrepresentation are:
23 (1) the defendant must have made a representation as to
24 _____
25 him, from whatever source it may come, he is so far affected in
26 equity and good conscience, that the law will not permit him to
27 recover again for the same damages.") (internal quotation marks
28 [her] award[] . . . that an impermissible double recovery
occurs.").

1 a past or existing material fact;
2 (2) the representation must have been untrue;
3 (3) regardless of his actual belief, the defendant must
4 have made the representation without any reasonable
5 ground for believing it to be true;
6 (4) the representation must have been made with the
7 intent to induce plaintiff to rely upon it;
8 (5) the plaintiff must have been unaware of the falsity
9 of the representation; he must have acted in reliance
10 upon the truth of the representation and he must have
11 been justified in relying upon the representation; and
12 (6) as a result of plaintiff's reliance upon the truth
13 of the representation, the plaintiff must have
14 sustained damage.

15 Christiansen v. Roddy, 213 Cal. Rptr. 72, 75 (Ct. App.
16 1986); see Cal. Bagel Co. v. Am. Bagel Co., No. CV 97-
17 8863 MMM (MANx), 2000 WL 35798199, at *7 (C.D. Cal.
18 2000). "The essential elements of a claim for
19 negligent misrepresentation are the same as for
20 intentional misrepresentations, except that it does not
21 require knowledge of falsity, but instead requires a
22 misrepresentation of fact by a person who has no
23 reasonable grounds for believing it to be true."⁸ Cisco
24 Sys., Inc. v. STMicroelectronics, Inc., No. C-14-03236-
25 RMW, 2014 WL 7387962, at *4 (N.D. Cal. Dec. 29, 2014).

26
27
28 ⁸ "In California, 'omissions' or nondisclosures cannot give rise to liability for negligent misrepresentation." Cisco Sys., 2014 WL 7387962, at *5.

1 As discussed above, Plaintiff's SAC sufficiently
2 alleges that Defendants made false representations of
3 fact with the intent to induce Plaintiff's reliance and
4 that Plaintiff justifiably relied on those
5 misrepresentations to Plaintiff's injury. Because
6 Plaintiff's SAC alleges that Defendants made
7 affirmative misrepresentations of fact with knowledge
8 of their falsity, Plaintiff sufficiently alleges that
9 Defendants "made the representation without any
10 reasonable ground for believing it to be true."
11 Christiansen, 213 Cal. Rptr. at 75; see SAC ¶¶ 40, 55-
12 56. Plaintiff's SAC also sufficiently pleads that
13 Plaintiff was "unaware of the falsity of the
14 representation." See SAC ¶ 65.

15 Because Plaintiff sufficiently alleges the elements
16 of negligent misrepresentation, Defendants' Motion to
17 Dismiss this claim is **DENIED**.

18 5. Concealment Claim

19 "To state a claim for active concealment, a
20 plaintiff must plead the following five elements: '(1)
21 the defendant must have concealed or suppressed a
22 material fact, (2) the defendant must have been under a
23 duty to disclose the fact to the plaintiff, (3) the
24 defendant must have intentionally concealed or
25 suppressed the fact with the intent to defraud the
26 plaintiff, (4) the plaintiff must have been unaware of
27 the fact and would not have acted as he did if he had
28 known of the concealed or suppressed fact, and (5) as a

1 result of the concealment or suppression of the fact,
2 the plaintiff must have sustained damage.'" Falk v.
3 Gen. Motors Corp., 496 F. Supp. 2d 1088, 1097 (N.D.
4 Cal. 2007) (quoting Lovejoy v. AT&T Corp., 14 Cal.
5 Rptr. 3d 117 (Ct. App. 2004)).

6 a. *Concealment of Material Fact*

7 Plaintiff sufficiently pleads concealment of a
8 material fact by alleging that Defendants (1) concealed
9 the fact that there were multiple pending/threatened
10 lawsuits against CropUSA that could have threatened
11 CropUSA's business license when Defendants represented
12 that there were no such pending actions against CropUSA
13 and (2) concealed the AIA agreement in the Disclosure
14 Schedule, which Plaintiff alleges was an agreement
15 within the scope of the Disclosure Schedule's required
16 disclosures. SAC ¶¶ 25(f)-27, 40(c), 50-52.

17 b. *Duty to Disclose*

18 As discussed above, Plaintiff sufficiently alleges
19 Defendants' duty to disclose the fact that there was
20 pending/threatened litigation against CropUSA that
21 might threaten CropUSA's business license because
22 Defendants affirmatively represented that no such
23 litigation existed. See Rogers, 125 P.2d at 9 (stating
24 that "although one may be under no duty to speak as to
25 a matter, 'if he undertakes to do so, . . . he is bound
26 not only to state truly what he tells, but also not to
27 suppress or conceal any facts within his knowledge
28 which materially qualify those stated[;] [i]f he speaks

1 at all, he must make a full and fair disclosure"); see
2 also Linear Tech. Corp., 61 Cal. Rptr. at 234.

3 Regarding the Disclosure Schedule, Defendants' choice
4 to prepare the Disclosure Scheduled triggered
5 Defendants duty to "make a full and fair disclosure" in
6 the Disclosure Schedule. Rogers, 125 P.2d at 9.

7 *c. Intent to Defraud*

8 Plaintiff's SAC expressly alleges that Defendants
9 "intended to deceive GemCap by concealing" material
10 facts regarding pending/threatened litigation against
11 CropUSA or the AIA agreement. SAC ¶ 70-71; see
12 Pedrotti v. Am. Nat'l Fire Ins. Co. of Columbus, Ohio,
13 266 P. 376, 90 Cal. App. 668, 671 (1928) (stating that
14 whether a false statement is made with intent to
15 deceive is "a question of fact").

16 *d. Plaintiff Unaware of Fact and Would Not*
17 *Have Acted If Fact Was Known*

18 Plaintiff's SAC alleges that Plaintiff "was unaware
19 of the material facts that Defendants suppressed" and
20 that Plaintiff "would not have entered into the Loan
21 with Crop USA" had Plaintiff been aware of the
22 concealed facts. SAC ¶¶ 71-73.

23 *e. Injury Resulting from Concealment*

24 Plaintiff's SAC alleges that as a proximate result
25 of Defendants' concealment, Plaintiff agreed to the
26 CropUSA loan and thereby suffered \$12,000,000 in injury
27 when CropUSA defaulted on the Loan. SAC ¶ 74.

28 Because Plaintiff sufficiently alleges each element

1 of a concealment claim, Defendants' Motion to Dismiss
2 Plaintiff's concealment claim is **DENIED**.

3 **B. Defendants' Motion to Dismiss Defendant Gatziolis**
4 **for Lack of Personal Jurisdiction Pursuant to Fed.**
5 **R. Civ. P. 12(b)(2)**

6 1. Legal Standard

7 A party may move for dismissal of an action for
8 lack of personal jurisdiction under Federal Rule of
9 Civil Procedure 12(b)(2). Fed. R. Civ. P. 12(b)(2).

10 a. *Plaintiff's Burden of Proof at Motion to*
11 *Dismiss Stage*

12 "It is the plaintiff's burden to establish the
13 court's personal jurisdiction over a defendant." Doe
14 v. Unocal Corp., 248 F.3d 915, 921-22 (9th Cir. 2001).
15 But when a court determines a defendant's Rule 12(b)(2)
16 motion to dismiss on the papers without holding an
17 evidentiary hearing, "the plaintiff need make only a
18 prima facie showing of jurisdictional facts to
19 withstand the motion to dismiss." Id. at 922 (internal
20 quotation marks and alterations omitted). To make a
21 prima facie showing, the plaintiff need only allege
22 facts that, if true, would support a finding of
23 jurisdiction. Ballard v. Savage, 65 F.3d 1495, 1498
24 (9th Cir. 1995).

25 "Where not directly controverted," the plaintiff's
26 version of the facts is "taken as true," and "conflicts
27 between the facts in the parties' affidavits must be
28 resolved in [the plaintiff's] favor." Unocal Corp.,

1 248 F.3d at 921-22 (internal quotation marks omitted).
2 But "mere allegations . . . , when contradicted by
3 affidavits, are not enough to confer personal
4 jurisdiction of a nonresident defendant," and, "in such
5 a case, facts, not mere allegations, must be the
6 touchstone"⁹ of the court's decision. VBCConversions LLC
7 v. New Solutions, Inc., No. CV 13-00853 RSWL (ANx), 2013
8 WL 2370723, at *3 (C.D. Cal. May 20, 2013).

9 b. *Personal Jurisdiction over Non-Resident*

10 Where there is no applicable federal statute
11 governing jurisdiction, the exercise of personal
12 jurisdiction over a nonresident defendant requires two
13 findings: 1) the forum state's laws provide a basis for
14 exercising personal jurisdiction, and 2) the assertion
15 of personal jurisdiction comports with due process.
16 Adv. Skin & Hair, Inc. v. Bancroft, 858 F. Supp. 2d
17 1084, 1087 (C.D. Cal. 2012). "California's long-arm
18 statute extends jurisdiction to the limits of due
19 process." Unocal Corp., 248 F.2d at 923 (citing Cal.
20 Code Civ. P. § 410.10). "Due process requires that a
21 defendant have 'certain minimum contacts with the forum
22 such that the maintenance of the suit does not offend
23 traditional notions of fair play and substantial
24 justice.'" Id. (internal alterations omitted). The
25 defendant's contacts "must be 'such that the defendant

26
27 ⁹ "Parties may go beyond the pleadings and support their
28 positions with discovery materials, affidavits, or declarations."
VBCConversions, 2013 WL 2370723, at *3; see Data Disc, Inc. v.
Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977).

1 should reasonably anticipate being haled into court' "
2 in the forum. Id. at 1088 (internal alterations
3 omitted). Personal jurisdiction over a nonresident
4 defendant can be "general" or "specific." Id.

5 Defendants challenge the Court's personal
6 jurisdiction over Defendant James Gatziolis, an
7 individual residing in Illinois and a partner at Q&B,
8 which is a limited legal partnership in Wisconsin.
9 Mot. 21:6-18; see SAC ¶¶ 2-3. Plaintiff does not
10 allege general personal jurisdiction over Defendant
11 Gatziolis, but asserts that the Court has specific
12 personal jurisdiction over him. See Opp'n 21:18-28.

13 *c. Specific Personal Jurisdiction*

14 "Specific jurisdiction exists where the cause of
15 action arises out of the defendant's [purposeful]
16 contacts with the forum state, even if those contacts
17 are isolated and sporadic." Google Inc. v. Rockstar
18 Consortium U.S. LP, No. C 13-5933 CW, 2014 WL 1571807,
19 at *6 (N.D. Cal. Apr. 17, 2014); see Goodyear, 131 S.
20 Ct. at 2853; Lake v. Lake, 817 F.2d 1416, 1421 (9th
21 Cir. 1987).

22 The Ninth Circuit applies a three-prong test to
23 determine whether the exercise of specific jurisdiction
24 comports with due process: "1) the defendant must
25 purposefully avail herself of . . . the forum by some
26 affirmative act or conduct; 2) the plaintiff's claim
27 must arise out of, or result from, the defendant's
28 forum-related contacts; and 3) the extension of

1 jurisdiction must be 'reasonable.'" Adv. Skin & Hair,
2 Inc. v. Bancroft, 858 F. Supp. 2d 1084, 1089 (C.D. Cal.
3 2012) (citing Roth v. Garcia Marquez, 942 F.2d 617,
4 620-21 (9th Cir. 1991)). The plaintiff bears the burden
5 of satisfying the first two prongs, and if the
6 plaintiff succeeds, "the burden then shifts to the
7 defendant to present a compelling case that the
8 exercise of jurisdiction would not be reasonable." Id.
9 (internal quotation marks omitted).

10 2. Analysis

11 a. *Purposeful Availment/Direction*

12 Under the first prong of specific jurisdiction, the
13 Ninth Circuit considers the "two distinct concepts" of
14 "purposeful availment" and "purposeful direction,"
15 where purposeful availment is "most often used in suits
16 sounding in contract," and purposeful direction is
17 "most often used in suits sounding in tort." Brayton
18 Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128
19 (9th Cir. 2010). Because Plaintiff alleges two
20 intentional torts, the Court will apply the "purposeful
21 direction" standard. See id.

22 The Ninth Circuit evaluates "purposeful direction"
23 for an intentional tort using the three-part
24 "Calder-effects" test. Holland Am., 485 F.3d at 459.
25 Under the "effects test," "the defendant allegedly
26 must have (1) committed an intentional act, (2)
27 expressly aimed at the forum state, (3) causing harm
28 that the defendant knows is likely to be suffered in

1 the forum state.'" Brayton, 606 F.3d at 1128. The
2 defendant need not have any physical contact with the
3 forum. Id.

4 i. *Intentional Act*

5 Because Plaintiff sufficiently alleges that
6 Defendant Gatziolis is liable for intentional torts by
7 Gatziolis's intentional act of drafting the Opinion
8 Letter, Plaintiff sufficiently alleges an "intentional
9 act" by Gatziolis. See Wa. Shoe Co. v. A-Z Sporting
10 Goods Inc., 704 F.3d 668, 673-74 (9th Cir. 2012);
11 Harris Rutsky & Co. Ins. Serv., Inc. v. Bell & Clements
12 Ltd., 328 F.3d 1122, 1131 (9th Cir. 2003).

13 ii. *Expressly Aimed at Forum*

14 Regarding whether the intentional act is "expressly
15 aimed" at the forum, the Ninth Circuit has found this
16 prong satisfied when the defendant knew the plaintiff
17 was in the forum when the defendant committed the
18 intentional tort against the plaintiff. See Harris
19 Rutsky, 328 F.3d at 1131. Here, Plaintiff has alleged
20 that Gatziolis knew Plaintiff had its principal place
21 of business in California when Gatziolis committed the
22 alleged intentional tort because Gatziolis researched
23 California law for the Opinion Letter and sent the
24 Opinion Letter to Plaintiff in California. See SAC ¶¶
25 23-24; Opp'n 22:6-22. Plaintiff also alleges that
26 Gatziolis "communicated with GemCap . . . in writing,
27 by telephone, and in person in California concerning
28 the Legal Opinion Letter and the Loan." SAC ¶ 24.

1 Plaintiff has made a prima facie showing that Gatziolis
2 expressly aimed his intentional tortious act at
3 California. See Harris Rutsky, 328 F.3d at 1131.

4 *iii. Knowledge Harm Will Likely Occur*
5 *in Forum*

6 Because Plaintiff's "principal place of business is
7 in California, and the burnt of the harm was . . . felt
8 in California," and because Plaintiff has sufficiently
9 alleged that Gatziolis knew that Plaintiff was a
10 California resident, Plaintiff has made a prima facie
11 showing of this final prong of purposeful direction.
12 Harris Rutsky, 328 F.3d at 1131; see SAC ¶¶ 23-24.

13 Plaintiff sufficiently alleges purposeful direction
14 by Defendant Gatziolis.

15 *b. Claims Arise Out of Contacts*

16 "A lawsuit arises out of a defendant's contacts
17 with a forum state if there is a direct nexus between
18 the claims being asserted and the defendant's
19 activities in the forum." Adv. Skin & Hair, 858 F.
20 Supp. 2d at 1090. The Ninth Circuit applies a "but
21 for" test to determine whether an action arises out of
22 the defendant's contacts with the forum. Id.

23 Here, Plaintiff has alleged facts showing that "but
24 for" Gatziolis alleged intentional fraud in the Opinion
25 Letter and Borrower's Disclosure, Plaintiff would not
26 have agreed to loan CropUSA money and thus would not
27 have been injured. SAC ¶¶ 32-34, 49. As such,
28 Plaintiff makes a prima facie showing that its claims

1 arise out of Gatziolis's intentional tortious contacts
2 with California. See Harris, 328 F.3d at 1131-32.

3 c. *Reasonableness*

4 "If the plaintiff succeeds in satisfying both of
5 the first two prongs, the burden then shifts to the
6 defendant to present a compelling case that the
7 exercise of jurisdiction would not be reasonable,"
8 meaning that it comports with "fair play and
9 substantial justice." Adv. Skin & Hair, 858 F. Supp.
10 2d at 1091 (internal quotation marks omitted); see
11 Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.,
12 784 F.2d 1392, 1400 (9th Cir. 1986). The Ninth Circuit
13 assesses reasonableness by considering the following
14 factors:

15 (1) the extent of the defendant's purposeful
16 interjection into the forum;

17 (2) the burden on the defendant in litigating in the
18 forum;

19 (3) the extent of conflict with the sovereignty of the
20 defendant's state;

21 (4) the forum state's interest in adjudicating the
22 dispute;

23 (5) the most efficient judicial resolution of the
24 controversy;

25 (6) the importance of the forum to the plaintiff's
26 interest in convenient and effective relief; and

27 (7) the existence of an alternative forum.

28 Adv. Skin & Hair, 858 F. Supp. 2d at 1091.

1 i. *Purposeful Interjection*

2 The first factor, "the extent of the defendant's
3 purposeful interjection into the forum," "parallels
4 the question of minimum contacts," *id.*, but still must
5 be considered apart from the purposeful direction test,
6 for "the smaller the element of purposeful
7 interjection, the less is jurisdiction to be
8 anticipated and the less reasonable is its exercise."
9 Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488
10 (9th Cir. 1993) (internal quotation marks and
11 alterations omitted). Again, Defendant bear the burden
12 of making a "compelling case that the presence of some
13 other considerations would render jurisdiction
14 unreasonable." Haisten, 784 F.2d at 1400 (internal
15 quotation marks omitted).

16 Plaintiff has provided evidence via declarations
17 and exhibits showing that Gatziolis traveled to
18 California several times and engaged in phone calls,
19 mail, and email directed to California over several
20 years. Specifically, the Gilbert Declaration states
21 that Mr. Gilbert visited California "various times in
22 connection with client transactions" and that Mr.
23 Gilbert has "had numerous contacts with Mr. Gatziolis
24 from [Mr. Gilbert's] office in California in connection
25 with other . . . transactions, including numerous
26 telephone conversations and email communications."
27 Gilbert Decl. Supp'g Pl.'s Opp'n ¶¶ 3-4. Mr. Ellis
28 declares that Gatziolis met with him personally in

1 California in 2013 with regard to CropUSA's default on
2 the loan. Ellis Decl. Supp'g Pl.'s Opp'n ¶ 4.
3 Plaintiff also argues that because Gatziolis
4 specifically researched California law for the Opinion
5 Letter, which Gatziolis sent to a California company,
6 Gatziolis purposefully interjected himself by those
7 actions into California. Opp'n 24:1-25:14.

8 Though Gatziolis's contacts with California are not
9 extensive, Plaintiff's declarations show that Gatziolis
10 has had multiple contacts with California over several
11 years. This factor weighs in favor of reasonableness.

12 ii. *Burden on Defendant*

13 The second factor, which considers the burden that
14 litigating in the forum imposes on the defendant, "must
15 be examined in light of the corresponding burden on the
16 plaintiff." Adv. Skin & Hair, 858 F. Supp. 2d at 1091.
17 Defendants, who bear the burden, assert that Gatziolis
18 would suffer a "substantial burden" if he had to
19 litigate in California, but do not explain how or why
20 such a burden would exist. Mot. 25:12-13. Plaintiff,
21 on the other hand, provides evidence that Gatziolis has
22 made several trips to California for business. See
23 Gilbert Decl.; Ellis Decl. Plaintiff also points out
24 that Gatziolis's law firm, Defendant Q&B, does not
25 contest the Court's personal jurisdiction and thus will
26 already be litigating this action here in California,
27 which makes it convenient for Gatziolis to litigate in
28 California and inconvenient for Plaintiff to have to

1 litigate this Action in two separate forums. Opp'n
2 23:19-28. Additionally, modern air travel, as well as
3 electronic forms of communication, make litigating in
4 another state less burdensome. This factor weighs in
5 favor of reasonableness.

6 *iii. Conflict with Sovereignty*

7 The third factor evaluates "the extent of any
8 conflict with the sovereignty" of the defendant's home
9 country or state. Adv. Skin & Hair, 858 F. Supp. 2d at
10 1091. Because Defendants have not provided any
11 evidence of a conflict with any sovereignty, this
12 factor weighs in favor of reasonableness. See id.
13 (because defendant was a resident of another state,
14 "[a]ny conflicting sovereignty interests [can be]
15 accommodated through choice-of-law rules").

16 *iv. California's Interest*

17 The fourth factor "considers California's interest
18 in adjudicating the controversy." Adv. Skin & Hair,
19 858 F. Supp. 2d at 1091. California has a strong
20 interest adjudicating this controversy because
21 Plaintiff is a resident of California and the alleged
22 injury occurred in California. See id. This factor
23 weighs in favor of reasonableness.

24 *v. Efficient Judicial Resolution*

25 The fifth factor, the most efficient judicial
26 resolution of the controversy, "primarily focuses on
27 the location of the evidence and the witnesses." Adv.
28 Skin & Hair, 858 F. Supp. 2d at 1092. Defendants argue

1 that "because Gatziolis' relevant alleged activities"
2 did not occur in California, "the evidence regarding
3 Gatziolis is expected to be located outside
4 California." Mot.25:8-17. Plaintiff asserts that
5 "most of the relevant documents are located in
6 California, where the loan was made and administered,"
7 and most of Plaintiff's witnesses are located in
8 California. Opp'n 25:3-14; see Gilbert Decl.; Ellis
9 Decl. Because evidence and witnesses are likely
10 located both in and outside of California, this factor
11 is neutral.

12 *vi. Plaintiff's Interest in Relief*

13 The sixth factor is the importance of the forum to
14 the plaintiff's interest in convenient and effective
15 relief. Litigating this action outside of California
16 would obviously inconvenience Plaintiff, but "neither
17 the Supreme Court nor [the Ninth Circuit] has given
18 much weight to inconvenience to the Plaintiff." Adv.
19 Skin & Hair, 858 F. Supp. 2d at 1092; Ziegler v. Indian
20 River Cnty., 64 F.3d 470, 476 (9th Cir. 1995). Because
21 Plaintiff would likely be able to obtain convenient and
22 effective relief in a district court of another state,
23 this factor weighs slightly in favor of Defendants.

24 *vii. Alternative Forum*

25 The final factor, the availability of an
26 alternative forum, weighs in favor of Defendants
27 because Plaintiff does not show that it cannot bring
28 its claims in an alternative forum, including in

1 Illinois or Wisconsin. See Core-Vent, 11 F.3d at 1490
2 ("The plaintiff bears the burden of proving the
3 unavailability of an alternative forum").

4 On the whole, the factors favor reasonableness, and
5 Defendants fail to make a "compelling case" that the
6 exercise of personal jurisdiction over Gatziolis would
7 be unreasonable.

8 In light of the above, Plaintiff has made a prima
9 facie showing of specific personal jurisdiction over
10 Defendant Gatziolis. Defendants' Motion to Dismiss
11 Gatziolis for lack of personal jurisdiction is **DENIED**.

12 **VI. CONCLUSION**

13 For the foregoing reasons, Defendants' Motion to
14 Dismiss [25] is **HEREBY DENIED**.

15 **IT IS SO ORDERED.**

16 DATED: August 14, 2014

s/ RONALD S.W. LEW

17 **HONORABLE RONALD S.W. LEW**
18 Senior U.S. District Judge
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