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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAM RUBIN ENTERTAINMENT, INC.)	CV 16-6431-RSWL-SSx
)	
Plaintiff,)	ORDER re: DEFENDANT
)	AARP, INC.'S MOTION TO
v.)	DISMISS FIRST AMENDED
)	COMPLAINT [21]
)	
AARP, INC., and DOES 1-10,)	
)	
Defendants.)	
)	
)	
)	

Currently before the Court is a Motion by Defendant AARP, Inc. ("AARP") to Dismiss Plaintiff Sam Rubin Entertainment, Inc.'s ("Plaintiff") First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion" or "Motion to Dismiss"). ECF No. 21. For the reasons set forth below, the Court **GRANTS in part** and **DENIES in part** AARP's Motion.

///

1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff is a California corporation that serves
4 as a full-time production company. First Am. Compl.
5 ("FAC") ¶¶ 1, 9, ECF No. 18. Sam Rubin ("Rubin"), a
6 television producer and entertainment reporter for the
7 KTLA morning news, is Plaintiff's founder and owner.
8 Id. at ¶¶ 7, 9. AARP is a Washington, D.C. corporation
9 that has sponsored the "Movies for Grown-Ups Awards"
10 ("MFGAs") since 2002. Id. at ¶¶ 2, 10.¹ The MFGAs are
11 a ceremony recognizing films geared towards moviegoers
12 over 50 years old. Id. at ¶ 10.

13 Sometime in 2014, Rubin met with AARP's
14 representative Bill Newcott ("Newcott") and offered to
15 joint venture with AARP to produce the MFGAs for
16 television on KTLA. Id. at ¶¶ 11, 13. During
17 negotiations, Rubin wanted a long-term production
18 commitment. Id. at ¶ 16. Rubin produced the 2015
19 MFGAs for KTLA, incurring all costs and securing
20 sponsors, among other things. Id. at ¶ 18.

21 Around March 2015, Rubin and another entertainment
22 producer, Robb Weller ("Weller") met with several AARP
23 representatives in Washington, D.C. Id. at ¶ 23. The
24

25 ¹ Plaintiff has also included Does 1 through 10 in its First
26 Amended Complaint ("FAC"), whose "true names and capacities . . .
27 are presently unknown to Plaintiff." FAC ¶ 3. Plaintiff
28 believes that the Doe Defendants are "in some way responsible for
the damages herein alleged," and thus will seek leave of Court to
amend the FAC when Doe Defendants' true names and capacities are
discerned. Id.

1 following individuals were present: Martha Boudreau
2 ("Boudreau"), Chief Communications and Marketing
3 Officer; and Myrna Blyth ("Blyth"), Senior Vice
4 President and Editorial Director of Media. Id. at ¶
5 23. Meg Grant ("Grant"), a former AARP representative,
6 was present by telephone. Id. At the meeting, Rubin
7 and Weller pitched their long-term vision for
8 televising the MFGAs ("the Project"). Id. at ¶ 24.
9 They allegedly emphasized that a "long-term
10 arrangement" was necessary to ensure the MFGA's
11 continued success. Id.

12 Although AARP was initially reluctant to expend
13 money on the television production, Boudreau and other
14 representatives purportedly expressed enthusiasm for
15 the Project and moving forward with negotiations. Id.
16 at ¶ 26. Per Plaintiff, "[t]hey never mentioned that
17 they intended for the [P]roject to be a one-year deal
18 only." Id. Plaintiff also alleges that the AARP
19 representatives at the March 2015 meeting never
20 mentioned the following: a multi-year deal was a non-
21 starter, and on multiple occasions, they had previously
22 rejected offers for a multi-year production deal for
23 the MFGAs. Id. at ¶ 26. Nevertheless, AARP led
24 Plaintiff to believe it would negotiate a long-term
25 production deal. Id.

26 The parties continued to negotiate a long-term
27 agreement after the March 2015 meeting. Id. at ¶ 27.
28 By June 2015, the parties realized that they would not

1 conclude negotiations in time to produce the 2016
2 MFGAs. Id. at ¶ 29. Accordingly, they entered into a
3 one-page stop-gap agreement (the "Agreement") to
4 continue engaging in good-faith negotiations regarding
5 a production deal. Id. at ¶ 30. The portion giving
6 rise to the breach of contract claim provides:

7 If and when [Plaintiff] obtains guaranteed
8 distribution commitments from television and/or
9 cable stations to exhibit the First Program in
10 no less than 50% of the United States Markets,
11 then the parties shall attempt in good faith to
12 complete negotiation of their agreement
13 concerning the Programs . . . [i]f, however, by
14 September 30, 2015 [Plaintiff] fails to obtain
15 guaranteed distribution commitments from
16 television and/or cable stations to exhibit the
17 First Program in not less than 50% of the United
18 states Markets, or if the parties fail to reach
19 agreement as to the production and distribution
20 of the Programs, then . . . the parties shall
21 have no further obligation to each other . . .
22 and the Proposal shall otherwise be deemed null
23 and void.

24 FAC Ex. A., ECF No. 18-1.

25 After entering into the Agreement, Rubin secured a
26 meeting with WGN-America, a national broadcaster. Id.
27 at ¶ 35. WGN-America purportedly enthusiastically
28 expressed its commitment to televise the MFGAs
29 nationwide. Id. Per Plaintiff, it secured the
30 "requisite guaranteed distribution in over 50% of the
31 country." Id.

32 Sometime after this meeting, AARP allegedly
33 breached the Agreement. Blyth called Rubin and Weller,
34 subjected them to verbal abuse, and then AARP emailed
35 Plaintiff that it was no longer interested in a
36 possible deal with WGN-America. Id. at ¶ 36. In so

1 doing, AARP allegedly harmed Plaintiff's reputation and
2 goodwill in the entertainment industry. Id. at ¶ 38.

3 **B. Procedural Background**

4 Plaintiff filed its First Amended Complaint ("FAC")
5 on September 23, 2016 [18], and AARP filed a Motion to
6 Dismiss the First Amended Complaint on October 11, 2016
7 [21]. The Opposition and Reply timely followed on
8 November 1, 2016 and November 8, 2016 [22, 23].

9 **II. DISCUSSION**

10 **A. Legal Standard**

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

23 In ruling on a 12(b)(6) motion, a court may
24 generally consider only allegations contained in the
25 pleadings, exhibits attached to the complaint, and
26 matters properly subject to judicial notice. Swartz v.
27 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court
28 must presume all factual allegations of the complaint

1 to be true and draw all reasonable inferences in favor
2 of the non-moving party. Klarfeld v. United States,
3 944 F.2d 583, 585 (9th Cir. 1991). The question
4 presented by a motion to dismiss is not whether the
5 plaintiff will ultimately prevail, but whether the
6 plaintiff has alleged sufficient factual grounds to
7 support a plausible claim to relief, thereby entitling
8 the plaintiff to offer evidence in support of its
9 claim. Iqbal, 556 U.S. at 678; Swierkiewicz v. Sorema
10 N.A., 534 U.S. 506, 511 (2002). While a complaint need
11 not contain detailed factual allegations, a plaintiff
12 must provide more than "labels and conclusions" or "a
13 formulaic recitation of a cause of action's elements."
14 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)
15 (internal citation omitted).

16 **B. Discussion**

17 1. Fraudulent Inducement

18 Plaintiff alleges that AARP and its representatives
19 fraudulently induced it to enter into the Agreement by
20 (1) misrepresenting that it would engage in good-faith
21 negotiations regarding a long-term production deal; and
22 (2) failing to disclose that it never intended to
23 undertake a multi-year deal. FAC ¶¶ 26, 46.

24 To state a claim for fraudulent inducement, a party
25 must allege the following: (1) misrepresentation or
26 omission; (2) knowledge of falsity; (3) intent to
27 defraud; (4) justifiable reliance; and (5) resulting
28 damage. See Stewart v. Ragland, 934 F.2d 1033, 1043

1 (9th Cir. 1991).

2 If a claim sounds in fraud, it must comply with the
3 heightened pleading requirements in Federal Rule of
4 Civil Procedure 9(b). See UMG Recordings, Inc. v.
5 Global Eagle Entm't, Inc., 117 F. Supp. 3d 1092, 1106
6 (C.D. Cal. 2015). Plaintiff must provide "an account
7 of the time, place, and specific content of the false
8 representations as well as the identities of the
9 parties to the misrepresentations." Swartz v. KPMG
10 LLP, 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b) asks
11 for an identification of the parties to the alleged
12 misrepresentations, putting defendant "on notice of the
13 specific conduct that forms the basis of the claim
14 against them." Chronic Tacos Enters., Inc. v. Chronic
15 Tacos Huntington Beach, Inc., No. SACV-10-1414 DOC
16 (RNBx), 2011 WL 1585594, at * 2 (C.D. Cal. April 26,
17 2011). "Averments of fraud must be accompanied by 'the
18 who, what, when, where, and how' of the misconduct
19 charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
20 1106 (9th Cir. 2003).

21 The Court now turns to whether Plaintiff has
22 adequately pled the elements of its fraudulent
23 inducement claim under Rule 9(b)'s more exacting
24 standards.

25 a. *Misrepresentation or Omission*

26 The Court must decide whether AARP's omissions and
27 misrepresentations satisfy Rule 9(b). Plaintiff
28 alleges that at the March 2015 meeting in Washington,

1 D.C., AARP representatives Boudreau, Blythe, and Grant
2 "failed to disclose" that they only intended the
3 televised production of the MFGAs to be a one-year deal
4 and that they had repeatedly rejected previous offers
5 for a multi-year production deal for the MFGAs. FAC ¶¶
6 26, 46. They also actively misrepresented their
7 willingness to engage in a long-term production deal.
8 Id. at ¶ 46.

9 "Where a fraudulent omission is at issue, the
10 requirements of Rule 9(b) are relaxed, but not
11 eliminated." UMG Recordings, 117 F. Supp. 3d at 1107.
12 This is because a plaintiff is unable to plead the
13 specific time, place, and content of an omission. See
14 Huntair, Inc. v. Gladstone, 774 F. Supp. 2d 1035, 1044
15 (N.D. Cal. 2011).

16 Recently, in Romero v. Securus Techs., Inc., ---F.
17 Supp. 3d--- 2016 WL 6157953, at *9 (S.D. Cal. Oct. 24,
18 2016), plaintiff stated a claim for fraudulent
19 concealment under Rule 9(b). Plaintiffs alleged that
20 between April 2014 and August 2014 in San Diego,
21 defendant's employee knew that the securities-company
22 defendant was recording attorney-client calls but
23 omitted this information, sidestepping its duty to
24 disclose this information to victims and general
25 public. Id. The allegations passed muster, as they
26 pinpointed the "who, what, where, when, and how"
27 required by Rule 9(b). Id.

28 Plaintiff alleges that at the March 2015

1 Washington, D.C. meeting, Boudreau, Blyth, and Grant
2 failed to mention the Project was only a one-year deal
3 and that they had fielded and rejected multi-year
4 offers for the Project. Id. This evinces the "when,
5 where, and who." And Plaintiff does aver—albeit in a
6 convoluted way—that the omission is material because
7 AARP knew that "if [p]laintiff knew that (a) the best
8 AARP would ever consider doing was a single-year deal .
9 . . then Plaintiff would not have expended its time and
10 effort on the project." FAC ¶ 48; Romero, 2016 WL
11 6157953, at *9 (defendant's duty to disclose the
12 recording of phone calls, and plaintiffs' allegation
13 that they would not have used defendants' services had
14 the omitted facts been disclosed, satisfied Rule 9(b))
15 (citation omitted).

16 While the purported omissions could possibly
17 satisfy Rule 9(b), Plaintiff's allegations are
18 railroaded by other deficiencies. It bears repeating
19 that an omission does not obviate Rule 9(b), but rather
20 relaxes its standards. UMG Recordings, 117 F. Supp. 3d
21 at 1107. In Romero, the omission was material because
22 defendants gleaned private information about
23 plaintiffs—violating attorney-client privacy—that would
24 be material to plaintiffs and potentially the public.
25 By contrast, AARP's failure to disclose its stance on a
26 long-term deal strikes more at AARP's purported
27 nonperformance of its promise to enter into a multi-
28 year deal. UMG Recordings, 117 F. Supp. 3d at 1108

1 ("Mere nonperformance of a promise does not suffice to
2 show the falsity of the promise.") (citations omitted).
3 Plaintiff has not pled the "how/why" specificity; if
4 anything, AARP's failure to disclose its intentions is
5 more of a vehicle for Plaintiff to grouse about the
6 ultimate failure of the Project and the Agreement.

7 Even if the alleged omissions satisfy Rule 9(b),
8 AARP's spoken misrepresentations do not. Plaintiff
9 avers that AARP misrepresented its willingness to
10 "engage in good-faith negotiations regarding a long-
11 term production deal." FAC ¶ 46.

12 AARP argues that Plaintiff cannot identify any
13 specific false statement, let alone the speaker making
14 the statement. Def.'s Mot. to Dismiss ("Mot.") 10:1-9.
15 The Court agrees. When a corporation has committed a
16 fraud, Rule 9(b) requires the plaintiff to "allege the
17 names of the employees or agents who purportedly made
18 the fraudulent representations or omissions, or at a
19 minimum identify them by their titles and/or job
20 responsibilities." UMG Recordings, 117 F. Supp. 3d at
21 1108 (citing U.S. ex rel. Lee v. SmithKline Beecham,
22 Inc., 245 F.3d 1048, 1051 (9th Cir. 2001)). The
23 plaintiff should also allege the individuals'
24 "authority to speak, to whom they spoke, what they said
25 or wrote, and when it was said or written." Id. at
26 1107.

27 At first glance, Plaintiff's allegations are
28 adequate. Plaintiff generally identifies that

1 Boudreau, Blyth, and Grant were present at the March
2 2015 Washington, D.C. meeting, and sets forth their job
3 titles (e.g., Chief Communications and Marketing
4 Officer). FAC ¶¶ 22-23. But cracks begin to show in
5 Plaintiff's allegations when it uses the collective
6 "they" or "AARP" to state that the corporation
7 generally, or its representatives, failed to disclose
8 their disinterest in a long-term deal. Not only does
9 Plaintiff fail to indicate who—among Boudreau, Blythe,
10 and Grant—communicated what, but also Plaintiff fails
11 to specify what was said, instead generally averring
12 that "AARP [represented] it would engage in good faith
13 negotiations regarding a long-term production deal."
14 FAC ¶ 46. Were the Court to sign on to Plaintiff's
15 reasoning, any plaintiff could generally mention
16 employees/representatives present at a meeting, specify
17 their job titles, and then vaguely mention a
18 misrepresentation. This is simply not enough under
19 Rule 9(b). Moreover, the Rule 9(b) specificity
20 framework is in place to prevent this kind of unchecked
21 fact pleading from happening.

22 Plaintiff's allegations also fail under Rule 9(b)
23 because they lack the specific content of the
24 fraudulent representations or why the statements were
25 false when made. In UMG Recordings, defendant
26 fraudulently promised to continue distributing
27 plaintiff's recordings for in-flight entertainment use,
28 and the parties concurred that an "agreement" would

1 follow. Id. at 1107. These representations were not
2 sufficiently specific in content. Plaintiff did not
3 provide details about the terms of this hazy
4 "agreement," and only vaguely asserted that "the
5 parties agreed [to] continued use of the sound records
6 for an indefinite period." 117 F. Supp 3d at 1107.
7 Like the vague "agreement" defendant conceded to in
8 UMG, AARP agreed to engage in future "good-faith
9 negotiations" with Plaintiff. FAC ¶ 46. And
10 similarly, Plaintiff does not detail the contours of
11 these good-faith negotiations that AARP allegedly
12 promised to undertake.²

13 b. *Knowledge of Falsity and Intent to Defraud*

14 Plaintiff avers that AARP knew it had no intention
15 to enter into a multi-year deal to produce the MFGAs,
16 FAC ¶ 47. Plaintiff also avers the following
17 circumstantial evidence of AARP's knowledge and intent:
18 (1) AARP knew at least in March 2015 that Plaintiff was
19 only interested in a long-term deal; (2) AARP actively
20 engaged Plaintiff after the March 2015 meeting, leading
21 it to believe in its commitment to a long-term deal;
22 (3) AARP later breached the Agreement; (4) Blyth
23 verbally berated Plaintiff to inform it that AARP would
24

25
26 ² To be fair, the parties here had an Agreement detailing
27 contingencies should Plaintiff secure national broadcasting,
28 unlike the lack of an agreement altogether in UMG. But a
substantive agreement does not fix the lack of detail inherent in
the allegation that AARP would engage in "good-faith
negotiations."

1 no longer negotiate; (5) and AARP explored alternative
2 production arrangements after breaching the Agreement.
3 FAC ¶ 49.

4 Knowledge and intent can be averred generally under
5 Rule 9(b). Fed. R. Civ. P. 9(b) ("Malice, intent,
6 knowledge, and other conditions of a person's mind may
7 be alleged generally.") Effectively, the plaintiff
8 should explain why the disputed statement was false
9 when it was made, see UMG Recordings, 117 F. Supp. 3d
10 at 1107, and "point to facts which show that defendant
11 harbored an intention not to be bound by the terms of
12 the contract at formation." Nikoonahad v. Rudolph
13 Techs., Inc., C 08-2290 JF (PVT), 2008 WL 4065831, at
14 *4 (N.D. Cal. Aug. 27, 2008) (citation omitted).

15 It is unclear how AARP harbored the requisite
16 intent and knowledge at the time of contract formation,
17 anywhere between June and July 2015.³ Plaintiff's focus
18 on the March 2015 meeting in Washington D.C. is
19 specious and distracting. Even accepting March 2015 as
20 the key time window for AARP's purportedly nefarious
21 conduct, it is difficult to reconcile AARP's March 2015
22 intent not to enter into a long-term agreement with its
23 contradictory "earnest" efforts to negotiate a long-
24 term agreement from March 2015 to June 2015, when the

26 ³ Because the contract at issue was formed between June
27 2015—the date of the proposal—or even as late as July 2015, FAC
28 ¶¶ 28-31, when the parties reviewed their "AARP Awards
Preliminary Deal Memo," the Court focuses its attention on AARP's
intent and knowledge at that time.

1 parties continued negotiations. FAC ¶¶ 27-28, 30, 49
2 (“[T]he negotiation of a long-term agreement commenced
3 in earnest . . . AARP actively and continuously engaged
4 with Plaintiff, both during the [March 2015] meeting
5 and after.”). The link between these allegations is
6 tenuous at best. Plaintiff needs at least some
7 specific indication that AARP never intended to
8 engineer a long-term deal; for instance, a statement
9 from AARP that they “knew it all along.” In re
10 Glenfed, Inc. Sec. Litig., 42 F.3d 1541, n.9 (9th Cir.
11 1994), superseded by statute on other grounds by,
12 Johnson v. Wal-Mart Stores, Inc., 544 F. App’x 696 (9th
13 Cir. 2013).⁴

14 The Court is cognizant that weighing contradictions
15 between Plaintiff’s allegations treads into summary
16 judgment territory; as such, these contradictions do
17 not carry the day in the Court’s analysis.
18 Nevertheless, internal inconsistencies between
19 Plaintiff’s allegations places them in tension with the
20 facial plausibility required in Twombly/Iqbal and

22 ⁴ Plaintiff’s theory is that AARP kept up a “ruse, since the
23 March 2015 meeting, of pretending it was interested in a long-
24 term deal . . . to induce [Plaintiff to sign the July 2015
25 Agreement].” Opp’n 10:8-10. But various inconsistencies
26 undermine this theory. Plaintiff argues that AARP did not
27 disclose its unwillingness to strike a long-term deal, yet in the
28 same breath alleges that as early as late 2014, before the
February 2015 MFGAs, AARP was “initially uncertain” and
“reluctant” to commit to a multi-year deal. FAC ¶¶ 16, 25. If
anything, this inconsistency shows that Plaintiff was perhaps on
some notice that AARP was not fully on board with a long-term
deal.

1 jettisons them more into the realm of speculative
2 allegations. And the inconsistencies undercut
3 Plaintiff's insistence that AARP knew and intended all
4 along to fraudulently induce Plaintiff into the
5 Agreement.

6 The most compelling reason why Plaintiff fails to
7 state a claim under the "knowledge/intent to induce"
8 elements is because Plaintiff attempts to recast its
9 breach of contract claim as a fraudulent inducement
10 claim. "Something more than nonperformance is required
11 to prove the defendant's intent not to perform his
12 promise." Tanedo v. East Baton Rouge Parish School
13 Bd., No. SA CV10-01172 JAK, 2012 WL 5447949, at *7
14 (C.D. Cal. Oct. 4, 2012). "[M]ere failure to perform a
15 contract does not constitute fraud." Richardson v.
16 Reliance Nat'l. Indem. Co., No. C 99-2952 CRB, 2000 WL
17 284211, at *4 (N.D. Cal. Mar. 9, 2000). Otherwise,
18 "every breach of contract claim would support a claim
19 of fraud so long as the [plaintiff] adds to his
20 complaint a general allegation that the defendant never
21 intended to keep her promise." Tanedo, 2012 WL
22 5447959, at *8 (citations, internal quotation marks,
23 and alterations omitted).

24 For instance, AARP's "complete disregard[]" for the
25 Agreement, Blyth's verbal tirade against Plaintiff
26 before truncating the contract, and AARP's later
27 alleged pursuit of alternative production arrangements
28 are all part and parcel of AARP's non-performance of

1 the Agreement. The center of gravity should be AARP's
2 intent at the time of contract formation, not
3 allegations of AARP's breach after the fact. Plaintiff
4 channels its disappointment over the failed Project to
5 retroactively accuse AARP of fraudulent inducement in
6 the most general of averments. This is insufficient to
7 plead knowledge and intent.

8 c. *Justifiable Reliance and Resulting Damage*

9 "Reliance exists when the misrepresentation or non-
10 disclosure was an immediate cause of the plaintiff's
11 conduct which altered his or her legal relations, and
12 when without such misrepresentation or non-disclosure
13 he or she would not, in all reasonable probability,
14 have entered into the contract or other transaction."

15 City Solutions, Inc. v. Clear Channel Commc'ns., 365
16 F.3d 835, 840 (9th Cir. 2004) (citation omitted).

17 Plaintiff argues that he has expended a "substantial
18 amount of time" discussing the Project with AARP and
19 its representatives, flying to D.C. for a lengthy
20 meeting, and entering into the Agreement. FAC ¶ 50.

21 Plaintiff's alleged reliance is specific enough and
22 justifiable under Twombly/Iqbal's general averments,
23 but the Court has difficulty discerning whether the
24 allegedly fraudulent misrepresentations and omissions
25 were the "sole or even the predominant or decisive
26 factor in influencing [Plaintiff's] conduct." City
27 Solutions, 365 F.3d at 840 (citation omitted).

28 Assuming for the moment that AARP indeed made

1 misrepresentations, Plaintiff's reliance in the form of
2 investing time and effort may nevertheless have been
3 influenced in part by AARP's initial "hesitation" to
4 negotiate, rather than its misrepresentations. See FAC
5 ¶ 25 ("Recognizing AARP's reluctance to spend
6 substantial funds on the television production,
7 [Plaintiff] presented a budget [at the March 2015
8 meeting].") Nonetheless, Plaintiff has at least
9 facially demonstrated the plausibility of its
10 justifiable reliance.⁵

11 d. *Economic Loss Doctrine*

12 Aside from failing under the Rule 9(b) specific
13 pleading standards, Plaintiff's fraudulent inducement
14 claim is barred by the economic loss doctrine. The
15 economic loss doctrine provides that "no tort cause of
16 action will lie where the breach of duty is nothing
17 more than a violation of a promise which undermines the
18 expectations of the parties to an agreement." JMP
19 Secs. LLP v. Altair Nanotechs. Inc., 880 F. Supp. 2d
20 1029, 1042 (N.D. Cal. 2012). The policy behind the
21 rule is to "prevent every breach of contract from
22 giving rise to tort liability and the threat of
23

24 ⁵ The "resulting damages" element is on shakier ground.
25 Plaintiff allegedly has lost goodwill "generated over decades in
26 Hollywood" and has also suffered "severe[] harm[] to [its]
27 reputation," detrimentally affecting its ability to get future
28 projects. FAC ¶¶ 33, 38. While Plaintiff plausibly alleges
damages, the resulting damages are problematically intertwined
with the contract claim damages, and likely barred under the
economic loss doctrine, as discussed in infra Part II.B.1.d.

1 punitive damages." Id. at 1042.

2 In Altair, defendant hired JMP as its financial
3 advisor, but allegedly did not "make good on its
4 promise to pay JMP its contingent fee" after JMP
5 facilitated a transaction. Id. at 1033. JMP sued for
6 fraud, claiming Altair misrepresented it would pay
7 certain fees, but knowing full well that it would not.
8 Id. The court applied the economic loss doctrine,
9 explaining that JMP took its allegations for a
10 "straightforward claim for breach of commercial
11 contract" and "recast them as torts." Id. at 1043.
12 Altair's alleged conduct was not sufficiently deviant
13 to warrant tort remedies. Instead, the parties'
14 dispute was whether JMP was owed 1.5% commission or a
15 4% commission; effectively, a claim that Altair broke
16 its promises in bad faith. Id. at 1044.

17 Plaintiff's fraudulent inducement claim fails under
18 the economic loss doctrine. Plaintiff has not
19 identified any independent duty AARP had to furnish it
20 with a long-term production deal. Hannibal Pictures,
21 Inc. v. Sonja Prods. LLC, 432 F. App'x 700, 702 (9th
22 Cir. 2011)("Purported tort claims related to the
23 performance of a contract are viable only where the
24 duty that gives rise to tort liability is either
25 *completely independent* of the contract or arises from
26 conduct which is both intentional and intended to
27 harm")(emphasis in original).

28 Moreover, Plaintiff has not established that AARP's

1 conduct was intentional or intentionally harmful, as
2 discussed in supra Part II.B.1.b. On its face, the
3 Agreement shows that the allegedly fraudulent
4 claims—that AARP would good-faith negotiate a possible
5 long-term deal—are intertwined with the substance of
6 the Agreement. FAC Ex. A (“If and when [Plaintiff]
7 obtains guaranteed distribution commitments from
8 television and/or cable stations to exhibit the First
9 Program . . . then the parties shall attempt in good
10 faith to complete negotiation of their agreement
11 concerning the Programs.”) Plaintiff also collapses
12 the remedies sought under both the contract and tort
13 claims; for both, Plaintiff claims that it has suffered
14 reputational harm and lost goodwill in its industry.
15 FAC ¶¶ 38, 39 (“Plaintiff never would have incurred
16 those costs and would not have lost those opportunities
17 had it known that AARP did not intend to negotiate in
18 good faith and abide by its promises.”) As in Altair,
19 Plaintiff’s fraudulent inducement claim is a thinly
20 veiled attempt to seek the same remedies for the
21 contract claim and to punish AARP for its
22 nonperformance under the contract.

23 Based on the above, the Court **GRANTS** AARP’s Motion
24 to Dismiss as to the fraudulent inducement claim.

25 2. Breach of Contract

26 Plaintiff argues that it has satisfied the

27 ///

28 ///

1 condition precedent⁶ under the Agreement by meeting with
2 WGN-America, who "enthusiastically expressed its
3 commitment to televise the show nationwide . . .
4 Plaintiff had secured from WGN-America the requisite
5 guaranteed distribution in over 50% of the country."
6 Id. at ¶ 35. Plaintiff alleges that AARP breached the
7 Agreement by failing to complete negotiations after the
8 successful meeting. FAC ¶ 42.

9 The key inquiry for the Court is whether Plaintiff
10 has pled performance or occurrence of a condition
11 precedent. Per Federal Rule of Civil Procedure 9(c),
12 "it is sufficient to aver generally that all conditions
13 precedent have been performed or have occurred." But
14 "denial of performance or occurrence shall be made
15 specifically and with particularity." Fed. R. Civ. P.
16 9(c).

17 Plaintiff relies on Kieran v. Zurich Cos., 150 F.3d
18 1120, 1123-24 (9th Cir. 1998), where a plaintiff did
19 not specifically allege that he signed a waiver, which
20 was a condition precedent to the "Parasailing
21 Warranties" provision. Nonetheless, he alleged that
22

23 ⁶ As previously mentioned, the Agreement provided that once
24 Plaintiff obtained "guaranteed distribution commitments from
25 television and/or cable stations to exhibit the First Program in
26 no less than 50% of the United States Markets," then the parties
27 would attempt in good faith to complete negotiations. FAC Ex. A.
28 But if Plaintiff was unable to garner distribution commitments
"in not less than 50% of the United states Markets, or if the
parties fail to reach agreement as to the production and
distribution of the Programs" by September 30, 2015, then the
parties would "have no further obligation to each other." Id.

1 the parasailing accident took place "while the policy
2 was in full force and effect," indicating to the Court
3 that he must have satisfied all the conditions
4 precedent. Id. at 1124. The court concluded that
5 "[t]his general statement is an adequate averment under
6 the loose guidelines of Rule 9(c)." Id.

7 The standards for pleading a condition precedent
8 are lax. As such, the Court is persuaded that
9 Plaintiff's FAC can survive at least as to this claim.
10 Ruiz Food Prods. v. Catlin Underwriting U.S., Inc., No.
11 1:11-cv-00889 OWW DLB, 2011 WL 3323046, at *4 (E.D.
12 Cal. Aug. 2, 2011) (motion to dismiss denied for
13 allegation that "[p]laintiff has performed all
14 obligations required of it to be performed under the
15 terms of the Policy" was a general allegation of full
16 performance). Even though Plaintiff could have
17 generally alleged it satisfied the condition precedent,
18 it pled that "it secured from [WGN] the requisite
19 guaranteed distribution in over 50% of the country.
20 Now the good-faith negotiations should have begun in
21 earnest." FAC ¶ 35. Under the relaxed pleading
22 standards of Rule 9(c), and in light of Kieran, this
23 allegation is enough to show that Plaintiff performed
24 the condition precedent of obtaining guaranteed
25 distribution commitments in at least 50% of the U.S.
26 Markets. FAC Ex. A.

27 AARP's argument that "[WGN's] [e]nthusiastic
28 expression of commitment is not a guarantee," and its

1 focus on the lack of facts showing guaranteed
2 distribution by the September 30 deadline, Mot. 20:8-
3 10, does not convince the Court that Plaintiff's
4 allegations are defective. Effectively, AARP tries to
5 import Rule 9(b)'s heightened pleading requirements
6 onto the contract claim and extract meaning from
7 Plaintiff's allegations; this demands "a factual
8 analysis that is not appropriate at the motion to
9 dismiss stage." City & Cnty. Of S.F. v. Tutor-Saliba
10 Corporation, No. C 02-5286 CW, 2005 WL 645389, at *19
11 (N.D. Cal. Mar. 17, 2005). A motion to dismiss does
12 not ask whether Plaintiff will prevail in the action,
13 but whether Plaintiff is entitled to offer evidence in
14 support of its claim. Swierkiewicz v. Sorema N.A., 534
15 U.S. 506, 511 (2002). Plaintiff's allegations of a
16 satisfied condition precedent are sufficient to survive
17 a motion to dismiss, and the issue of breach of
18 contract shall be further explored in discovery.

19 Therefore, the Court **DENIES** AARP's Motion to
20 Dismiss for the breach of contract claim.

21 3. Whether the Doe Defendants Should be Dismissed

22 AARP argues that the claims against the Doe
23 Defendants should be dismissed as the FAC fails to
24 allege facts or specific claims regarding any unknown
25 individuals. Mot. 22:9-10. And it is unlikely that
26 discovery will reveal Doe Defendant identities. Reply
27 14:6-7. Plaintiff counters that the Doe Defendants are
28 relevant and create a substantive right under

1 California Code of Civil Procedure §§ 474, 583.210 to
2 "substitute real defendants for Does for three years
3 after filing the complaint" Opp'n 13:5-14.

4 As "a general rule, the use of John Doe to identify
5 a defendant is not favored in federal court." Gillespie
6 v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980).

7 Unlike under California law, there is no provision in
8 the Federal Rules permitting the use of fictitious
9 defendants.⁷ Id. Pleading Doe Defendants is disfavored,
10 as the court cannot determine that it is a real person
11 or entity that can be sued in federal court, or
12 determine if plaintiff's suit could survive a Doe
13 Defendant's motion to dismiss. Lee v. Plummer, No.
14 C-04-2636 VRW, 2005 WL 91380, at *5 (N.D. Cal. Jan. 17,
15 2005).

16 Plaintiff has not pled enough facts to maintain its
17 unnamed Doe Defendants. Galindo v. City of San Mateo,
18 No. 16-cv-03651-EMC, 2016 WL 7116927, at *10 (N.D. Cal.
19 Dec. 7, 2016) (allegation that one or more Doe
20 Defendants was responsible for the hiring and
21 supervising other defendants was not enough, nor was
22 only mentioning Doe Defendants in headings or after
23 other defendants' names). Plaintiff's allegation is
24 even more conclusory than in Galindo; it only alleges
25

26 ⁷ Pleading Doe Defendants is not *per se* prohibited in
27 federal court. L.R. 19-1 (limiting parties from pleading no more
28 than ten "Doe or fictitiously named parties.") Rather, there is
no affirmative substantive right to plead Doe Defendants, as in
California law.

1 that the "true names and capacities" of Does 1-10 are
2 "presently unknown to Plaintiff . . . [but] each of the
3 Doe defendants is in some way responsible for the
4 damages herein alleged." The Court agrees with AARP
5 that Plaintiff has likely adduced all individuals
6 allegedly responsible for the fraudulent inducement
7 claims at the March 2015 meeting. Mot. 13:22-27. And
8 it is unlikely that Plaintiff can allege any new,
9 unknown individual engaging in independent misconduct
10 at the meeting. Thus, the Court **GRANTS** the Motion to
11 Dismiss as to all claims against the Doe Defendants.

12 4. Leave to Amend

13 Federal Rule of Civil Procedure 15(a) provides that
14 a party may amend their complaint once "as a matter of
15 course" before a responsive pleading is served. Fed.
16 R. Civ. P. 15(a). After that, the "party may amend the
17 party's pleading only by leave of court or by written
18 consent of the adverse party and leave shall be freely
19 given when justice so requires." Id. "Rule 15's
20 policy of favoring amendments to pleadings should be
21 applied with extreme liberality." United States v.
22 Webb, 655 F.2d 977, 979 (9th Cir. 1981) (internal
23 quotations omitted). But if in a motion to dismiss,
24 any amendment to the pleadings would be futile, leave
25 to amend should not be granted. Bush v. Liberty Life
26 Assurance Co. of Boston, 77 F. Supp. 3d 900, 906-07
27 (N.D. Cal. 2015).

28 Plaintiff should have leave to amend its fraudulent

1 inducement claim, to flesh out which AARP employees
2 induced it to enter the contract and what, precisely,
3 they said that was misleading. Plaintiff may also
4 distinguish the remedies for its tort claim from its
5 contract claim, to shore up the economic loss doctrine
6 problem. The Court also gives Plaintiff leave to
7 provide the court with the identities of the Doe
8 defendants, or with specific factual information
9 identifying them.

10 **III. CONCLUSION**

11 Based on the foregoing, the Court grants in part
12 and denies in part AARP's Motion to Dismiss. The
13 Motion to Dismiss is **GRANTED** as to the fraudulent
14 inducement claim and as to Doe Defendants 1-10 **WITH 14**
15 **21 DAYS LEAVE TO AMEND.** The Court **DENIES** AARP's Motion
16 to Dismiss as to the breach of contract claim.

17 **IT IS SO ORDERED.**

18
19 DATED: December 16, 2016

s/ RONALD S.W. LEW

20 **HONORABLE RONALD S.W. LEW**
21 Senior U.S. District Judge
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