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**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

<b>BRUCE SONS, an individual,</b>	)	<b>CIV F 08 - 0840 AWI TAG</b>
	)	
<b>Plaintiff,</b>	)	<b>ORDER ON MOTIONS TO</b>
	)	<b>PURSUANT TO F.R.C.P.</b>
<b>v.</b>	)	<b>12(b)(6)</b>
	)	
<b>JIM MCMANIS,</b>	)	
	)	
<b>Defendant.</b>	)	Doc. # 12
	)	

This is an action in diversity by plaintiff Bruce Sons (“Plaintiff”) against defendant Jim McManus (“Defendant”). The complaint alleges four untitled claims for relief under California common law. The claims arise out of an alleged agreement wherein about 10 acres of land was conveyed from Plaintiff to Defendant for the purpose of development with the expectation that a 2.5 acre portion of the land would be reconveyed from Defendant to Plaintiff. The reconveyance did not occur. In the instant motion, Defendant seeks to dismiss all or portions of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Diversity jurisdiction exists pursuant to 28 U.S.C. 1332. Venue is proper in this court.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

The facts of this case are simply stated and are largely undisputed. In 1994 Plaintiff owned a parcel of land in Kern County consisting of approximately ten acres. Although the complaint sets forth no dates for the transfer, quitclaim deeds submitted by Plaintiff as attachments to his opposition to defendant’s motion to dismiss indicate the transfer occurred on

1 or about May 10, 1994, and the transfer was subsequently corrected by a reconveyance of a  
2 portion of the property by quitclaim deed on or about June 29, 1994. The complaint alleges the  
3 transfer was subject to an agreement between the parties that Defendant would hold two and one-  
4 half acres of the land “in trust” for Plaintiff’s benefit and, after subdividing and developing the  
5 land, Defendant would reconvey the 2.5 acres back to Plaintiff. The reconveyance never  
6 occurred.

7 The complaint alleges four claims for relief that are untitled but generally track the  
8 elements of claims under California common law for breach of fiduciary duty, breach of contract,  
9 unjust enrichment, and fraud. In the instant motion, Defendant moves to dismiss Plaintiff’s  
10 fourth claim for relief for fraud on the ground Plaintiff’s complaint fails to plead the elements of  
11 fraud and on the ground the complaint fails to plead the elements of fraud with particularity as  
12 required by Rule 9(b) of the Federal Rules of Civil Procedure.<sup>1</sup> Defendant also moves to dismiss  
13 Plaintiff’s first claim for relief for breach of fiduciary duty for failure to allege facts to support  
14 the existence of a fiduciary relationship. Plaintiff also moves to dismiss the complaint in its  
15 entirety on the ground Plaintiff has not sufficiently alleged facts to support the existence of an  
16 agreement to hold property in trust – an allegation that underlies each of Plaintiff’s claims for  
17 relief – because there is no allegation of a writing sufficient to satisfy the statute of frauds. In the  
18 alternative, Defendant moves for a more definite statement.

19 Defendants motion to dismiss or for a more definite statement was filed on October 15,  
20 2008. Plaintiff’s opposition was filed on November 14, 2008, and Defendant’s reply was filed  
21 on November 20, 2008. The matter was taken under submission as of November 25, 2008

## 22 LEGAL STANDARD

23 A complaint may be dismissed under Rule 12(b)(6) if it appears beyond doubt that the  
24 plaintiff can prove no set of facts in support of the claim that would entitle him to relief. Hishon

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26 <sup>1</sup> Any references to “Rules” hereinafter are to the Federal Rules of Civil Procedure  
27 unless otherwise specified.

1 v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46  
2 (1957)); Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990). A Rule  
3 12(b)(6) dismissal can be based on the failure to allege a cognizable legal theory or the failure to  
4 allege sufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc.,  
5 749 F.2d 530, 533-34 (9th Cir.1984). In considering a motion to dismiss, the court must accept  
6 as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees,  
7 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing  
8 the motion, and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411,  
9 421, reh'g denied, 396 U.S. 869 (1969). In deciding a Rule 12(b)(6) motion, courts do not  
10 "assume the truth of legal conclusions merely because they are cast in the form of factual  
11 allegations." Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981).

12 "As a general rule, 'a district court may not consider any material beyond the pleadings in  
13 ruling on a Rule 12(b)(6) motion.' [Citation.]" Lee v. City of Los Angeles, 250 F.3d 668, 688  
14 (9th Cir. 2001). However, a district court may consider materials in a 12(b)(6) motion to  
15 dismiss that are not part of the pleadings but that are 'matters of public record' of which the court  
16 may take judicial notice pursuant to Federal Rule of Evidence 201. Id. Specifically, a district  
17 court may take judicial notice of public records related to legal proceedings in both state courts  
18 and in the district court. See Miles v. State of California, 320 F.3d 986, 987 (9th Cir. 2003)  
19 (district court taking judicial notice of related state court proceedings); Scott v. Kuhlmann, 746  
20 F.2d 1377, 1378 (9th Cir. 1894) (district court takes notice of prior related proceedings in the  
21 same court).

## 22 **DISCUSSION**

### 23 **I. Plaintiff's Claim for Fraud**

24 Defendant alleges two grounds for dismissal of Plaintiff's fourth claim for relief for  
25 fraud. First, Defendant alleges Plaintiff has failed to allege all the elements of fraud; specifically,  
26 that Plaintiff failed to allege intent to defraud (that is, to induce reliance) and justifiable reliance.  
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1 Second, Defendant alleges Plaintiff's claim for fraud must be dismissed for failure to plead the  
2 elements of fraud with particularity as required by Rule 9(b).

3 The elements of fraud are ““(a) misrepresentation (false representation, concealment, or  
4 non-disclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e. to induce  
5 reliance; (d) justifiable reliance; and (e) resulting damage.” Lazar v. Superior Court, 12 Cal.4th  
6 631, 638 (1996). Promissory fraud, which Plaintiff alleges is the claim he asserts, is a subspecies  
7 of the action for fraud and deceit wherein the misrepresentation is the promise to do something  
8 with no present intent to perform. Id. Thus, where promissory fraud is alleged, the elements of  
9 misrepresentation and knowledge of falsity merge into a single statement – a promise of future  
10 performance – which is made false because there is no intent to perform at the time the promise is  
11 made.

12 With respect to Plaintiff's claim for fraud, the complaint alleges:

13 ¶ 21. Plaintiff, in reliance upon [D]efendant's representation that [Defendant] would reconvey  
14 to Plaintiff 2.5 acres of land, conveyed ten acres of said property to Defendant.

15 ¶ 22. Plaintiff would not have conveyed said property to Defendant without said reliance.

16 ¶ 23. At the time Plaintiff conveyed the subject ten acres to Defendant, Defendant had no  
17 present intent to reconvey the 2.5 acres to Plaintiff.

18 ¶ 24. Plaintiff's reliance upon the false representation of Defendant was the proximate cause of  
19 damages to Plaintiff in excess of \$75,000.

20 Doc. # 1 at 3.

21 Here, Plaintiff has alleged, albeit in minimalist style, the elements of fraud. Plaintiff  
22 alleges the elements of falsity and scienter by alleging Defendant promised to reconvey 2.5 acres,  
23 a promise Defendant had no intent to perform at the time the promise was made. The intent to  
24 induce reliance may be inferred from Plaintiff's allegation that he would not have transferred the  
25 property had Defendant not promised to reconvey 2.5 acres. Logically, the only reason for  
26 Defendant to promise the reconveyance of the 2.5 acres would be as an inducement for Plaintiff to  
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1 convey the ten acres of property to defendant. Without such a promise, Plaintiff would have no  
2 reason to convey the property in the first instance. See id. at 639 (inferring intent from the nature  
3 of the promise made under the circumstances).

4 Plaintiff alleges he reasonably relied on Defendant's promise to reconvey. Defendant  
5 contends there can be no reasonable reliance where there was no writing sufficient to constitute a  
6 valid agreement. Defendant's argument is not persuasive. An action for promissory fraud is an  
7 action in tort, not in contract, and does not require the breach of a contractual agreement. Id. at  
8 638. Thus, to reasonably rely, Plaintiff need not have had a basis for believing he was entering  
9 into an enforceable contract, he merely needed to have had a reason to believe Defendant would  
10 reconvey the 2.5 acre parcel of land. For purposes of a motion to dismiss, it is sufficient that  
11 Plaintiff alleges that Defendant made the promise to reconvey the 2.5 acres and that Plaintiff took  
12 Defendant at his word. Absent a showing that Plaintiff had a reason to believe that Defendant  
13 would not reconvey the land at the time the promise was made, the court cannot find that the  
14 reliance was unreasonable as a matter of law. For present purposes, it is sufficient that Defendant  
15 made a promise to reconvey and Plaintiff relied upon that promise. Whether the reliance was  
16 unreasonable under these circumstances is a matter for the trier of fact.

17 The court concludes that Plaintiff's complaint minimally, but adequately, alleges the  
18 elements of fraud.

19 With respect to the requirements of Rule 9(b), Defendant alleges Plaintiff has not plead the  
20 elements of fraud with sufficient particularity. "In all averments of fraud or mistake, the  
21 circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent,  
22 knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. Proc.  
23 9(b). "A pleading 'is sufficient under Rule 9(b) if it identifies the circumstances constituting  
24 fraud so that the defendant can prepare an adequate answer from the allegations.'" Neubronner v.  
25 Milken, 6 F. 3d 666, 671 (9th Cir. 1993), quoting Gottreich v. San Francisco Investment Corp.,  
26 552 F. 2d 866, 866 (9th Cir. 1977). A complaint alleging fraud meets the standard if it alleges the

1 time, place, and content of the fraudulent statements, including reasons why the statements are  
2 false. Decker v. GlenFed, Inc., 42 F.3d 1541, 1547-48 (9th Cir. 1994), en banc.

3 Defendant alleges that the particular facts that are missing from Plaintiff's claim for fraud  
4 are the relevant dates. The court, having reviewed Plaintiff's allegations as set forth in the  
5 complaint, agrees. There are two dates that may be critical to Defendant's ability to adequately  
6 respond to Plaintiff's claim of fraud; the date on which the promise to reconvey was made, and  
7 the date that Defendant was bound by his promise to reconvey. Plaintiff contends the date  
8 Defendant made the promise to reconvey can be adequately inferred from the date of the quitclaim  
9 deeds. While the court does not agree that the date of the quitclaim deeds gives rise to a legally  
10 compelling inference of when the promise to reconvey was made, the real point to Rule 9(b) is  
11 that the parties and the court are relieved of the need to make any inferences as to particular dates;  
12 the plaintiff is required to plead them. Further, the date upon which Defendant's duty to reconvey  
13 the 2.5 acres accrued cannot be inferred from any facts in the complaint. For a variety of reasons,  
14 the date Defendant's duty to reconvey accrued may be crucial to Defendant's response to  
15 Plaintiff's allegation of fraud. Plaintiff's claim for fraud is therefore insufficiently pled in light of  
16 the requirements of Rule 9(b).

## 17 **II. Breach of Fiduciary Duty**

18 Defendant moves to dismiss Plaintiff's first claim for relief on the ground Plaintiff failed  
19 to allege facts sufficient to show that a trust relationship existed between Plaintiff and Defendant.  
20 Plaintiff's first claim for relief alleges breach of fiduciary duty as follows, in pertinent part:

21 ¶8. Defendant owed fiduciary duties to Plaintiff due to parties' positions and the trust placed  
22 in Defendant by Plaintiff.

23 ¶9. Defendant breached said fiduciary duties by failing to reconvey the 2.5 acres of the  
24 property to Plaintiff.

25 Doc. # 1 at 2.

26 The court agrees that Plaintiff's complaint does not adequately allege the existence of a  
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1 trust or fiduciary duty. Plaintiff's claim that "Defendant owed fiduciary duty to Plaintiff due to  
2 parties' positions and the trust placed in Defendant by Plaintiff" is a legal conclusion set forth as a  
3 fact. As such, it is not sufficient to show that a fiduciary duty was owed. Western Mining  
4 Council, 643 F.2d at 624. Plaintiff's opposition to Defendant's motion to dismiss the breach of  
5 fiduciary duty claim illustrates both the ambiguity of Plaintiff's claim and its insufficiency.  
6 Plaintiff relies primarily on California Civil Code section 2224 for the proposition that the fact  
7 that the 2.5 acres was held "in trust" for Plaintiff gives rise to a constructive trust that need not be  
8 in writing and that creates the fiduciary obligations that Defendant is alleged to have breached.

9 Plaintiff's reliance on section 2224 is misplaced. As Defendant correctly notes, section  
10 2224 is the statute that authorizes the *court-ordered, involuntary* imposition of a constructive trust  
11 as an equitable remedy. Cal. Civ. Code § 2224; See Kraus v. Willow Park Pub. Golf Course, 73  
12 Cal.App.3d 354, 373 (1st Dist. 1977) ("constructive trust is an equitable remedy imposed where  
13 the defendant holds title or some interest in certain property which it is inequitable for him to  
14 enjoy as against the plaintiff"). The fiduciary duty that Defendant is alleged to have breached  
15 cannot have arisen in the first instance as a result of a constructive trust because no court had  
16 imposed such a trust as of the date the complaint was filed.

17 Plaintiff argues in the alternative that, even without a trust or agency relationship between  
18 Plaintiff and Defendant, the circumstances of the case give rise to a confidential relationship that  
19 creates a fiduciary duty that Defendant allegedly breached. Plaintiff's argument offers the best  
20 illustration of why Plaintiff's claim for breach of fiduciary duty is subject to dismissal.

21 Plaintiff presents a number of facts – facts not set forth in the complaint – that could show  
22 the existence of a confidential relationship between Plaintiff and Defendant. Plaintiff's contention  
23 in this regard is that he is not required under Rule 8 to prove his claim, only to provide notice as to  
24 the basis for his claim. Under Rule 8, Plaintiff is required to provide fair notice of Plaintiff's  
25 claim; that is, notice sufficiently specific to allow a response. See Jones v. Community Redev.  
26 Agency, 733 F.2d 646, 649 (9th Cir. 1984) (although the Federal Rules have adopted a flexible  
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1 pleading policy, a complaint must still give fair notice and state the elements of the claim plainly  
2 and succinctly). Plaintiff's proffer of facts not set forth in the complaint to support alternative  
3 theories for the imposition of a fiduciary duty illustrates how Plaintiff has failed to provide notice  
4 adequate to allow a response. Plaintiff's complaint violates Rule 8 because the complaint leaves  
5 it to Defendant and the court to guess what legal theory Plaintiff is using to support his claim of  
6 breach of fiduciary duty.

7 "A complaint may be dismissed [pursuant to Rule 12(b)(6)] as a matter of law for one of two  
8 reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal  
9 claim." Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Plaintiff's  
10 claim for breach of fiduciary duty fails on both counts; first, because it does not provide adequate  
11 notice of an applicable legal theory that gives rise to a fiduciary duty, and second, because it sets  
12 forth no facts that would support the application of the theory. Plaintiff's claim for relief on the  
13 ground of breach of fiduciary duty must therefore be dismissed.

### 14 **III. Defendant's General Defense – Statute of Frauds**

15 Defendant moves for dismissal of all claims for relief on the ground each of the claims is  
16 predicated on the existence of an agreement to transfer real property but there is no allegation that  
17 a writing sufficient to satisfy the statute of frauds exists. Generally, "[t]he doctrine of estoppel to  
18 plead the statute of frauds may be applied where necessary to prevent either unconscionable injury  
19 or unjust enrichment." Tenzer v. Superscope, Inc., 39 Cal.3d 18, 27 (1985). Thus, with respect to  
20 Plaintiff's claims for various species of breach as alleged in his first and second claims for relief,  
21 Defendant may be estopped from asserting the defense of statute of frauds where Plaintiff can  
22 show unjust enrichment. What this means in a practical sense is that Plaintiff's third claim for  
23 unjust enrichment becomes the vehicle for satisfaction of Plaintiff's claims for breach in the  
24 absence of a writing sufficient to satisfy the statute of frauds.

25 In a similar vein, the statute of frauds does not, as a matter of law, afford Defendant a  
26 defense to Plaintiff's fourth claim for relief for fraud. Where the fraud is alleged to have induced  
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1 the plaintiff to perform his part of a bargain where the defendant had no present intent to perform  
2 his part, an action in tort will lie for fraud where an action in contract is not available because an  
3 enforceable contract is lacking. Lazar, 12 Cal.4th at 638.

4 The gravamen of Plaintiff's complaint is that Defendant was unjustly enriched when he  
5 did not reconvey the 2.5 acres to Plaintiff. The lack of an enforceable contract or the lack of a  
6 writing sufficient to satisfy the statute of frauds will not prevent Plaintiff's recovery if he can  
7 show unjust enrichment. Defendant's motion to dismiss the complaint as to all claims will  
8 therefore be denied.

#### 9 **IV. Motion for a More Definite Statement**

10 Defendant moves in the alternative for a more definite statement pursuant to Rule 12(e).  
11 A Rule 12(e) motion is proper only if the complaint is so indefinite that the defendant cannot  
12 ascertain the nature of the claim being asserted. See Federal Sav. and Loan Ins. Corp. v.  
13 Musacchio, 695 F.Supp. 1053, 1060 (N.D.Cal.1988); Famolare, Inc. v. Edison Bros. Stores, Inc.,  
14 525 F.Supp. 940, 949 (E.D.Cal.1981). The court must deny the motion if the complaint is  
15 specific enough to apprise defendant of the substance of the claim being asserted. See Bureerong  
16 v. Uyawas, 922 F.Supp. 1450, 1461 (C.D.Cal.1996); FRA S.P.A. v. Surg- O-Flex of America, 415  
17 F. Supp. 421, 427 (S.D.N.Y. 1976). The court should also deny the motion if the detail sought by  
18 a motion for more definite statement is obtainable through discovery. See Beery v. Hitachi Home  
19 Electronics (America), Inc., 157 F.R.D. 477, 480 (C.D.Cal.1993).

20 Plaintiff's claims for breach of fiduciary duty and fraud have been dismissed and the  
21 request for a more definite statement is moot with respect to them. With regard to the remaining  
22 claims, Defendant's main concern in requesting a more definite statement is that the court should  
23 require pleadings sufficient to address threshold defenses, such as the statute of limitations and  
24 statute of frauds. Because the court has determined that a statute of frauds defense may not be  
25 available to Defendant under the claims pled, the court will not require a more definite statement  
26 that addresses the statute of frauds defense. While the court tends to agree that Plaintiff's  
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1 complaint might be improved if the time of accrual of Plaintiff's claims were set forth, the court  
2 finds that Plaintiff's remaining claims for breach and unjust enrichment are not so inadequately  
3 pled as to prevent Defendant from understanding the basic nature of the claim. As a practical  
4 matter, the dismissal of Plaintiff's fraud claim for failure to meet the heightened pleading  
5 standards of Rule 9(b) means that Plaintiff will be required to supply at least some of the dates,  
6 such as the date of accrual of Plaintiff's claim, that are pertinent to Defendant's request for a more  
7 definite statement. The court is of the opinion that the remainder of the information that may be  
8 pertinent to Defendant's threshold defenses will likely be available through discovery and  
9 dispositive motions based on these threshold defenses are more properly presented in the context  
10 of motions for summary judgment. The court will therefore deny Defendant's request for a more  
11 definite statement.

12  
13 THEREFORE, pursuant to the foregoing discussion it is hereby ORDERED that:

- 14 1. Defendant's motion to dismiss Plaintiff's fourth claim for relief for fraud is GRANTED.  
15 Plaintiff's fourth claim for relief is hereby DISMISSED with leave to amend.
- 16 2. Defendant's motion to dismiss Plaintiff's first claim for relief for breach of fiduciary duty  
17 is GRANTED. Plaintiff's first claim for relief is hereby DISMISSED with leave to  
18 amend.
- 19 3. Defendant's motion to dismiss Plaintiff's complaint in its entirety is DENIED.
- 20 4. Defendant's motion for a more definite statement is DENIED.

21  
22 IT IS SO ORDERED.

23 **Dated:** January 2, 2009

/s/ Anthony W. Ishii  
CHIEF UNITED STATES DISTRICT JUDGE