

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BLACK & VEATCH CORPORATION, Plaintiff, v. MODESTO IRRIGATION DISTRICT, Defendants.
MODESTO IRRIGATION DISTRICT, Counter-Claimant, v. BLACK & VEATCH CORPORATION, Counter-Defendant.
MODESTO IRRIGATION DISTRICT, Third-Party Plaintiff, v. WESTERN SUMMIT CONSTRUCTORS, INC., et al., Third-Party Defendants.

1:11-cv-0695 LJO SKO

ORDER ON MOTION TO DISMISS OR
IN THE ALTERNATIVE MOTION TO
STRIKE THIRD PARTY PLAINTIFF
COMPLAINT (DOCS 38, 40)

1 I. INTRODUCTION.

2 Counter-Claimant and Third-Party Plaintiff, Modesto Irrigation District (“MID”) filed its
3 Third-Party Complaint in Interpleader (“Interpleader Complaint”), naming as Defendants,
4 Western Summit Constructors, Inc. (“Western”), Big B Construction, Inc. (“BBC”) and three
5 surety companies. Western and BBC bring this motion to dismiss MID’s Interpleader Complaint.
6 Both Western and BBC make similar arguments, contending that many of the claims in the
7 Complaint are not properly pled, not based on a cognizable legal theory and/or are redundant of
8 other claims.
9

10 II. PROCEDURAL HISTORY.

11 On April 29, 2011, plaintiff, Black & Veatch Corporation (“B&V”) filed its complaint
12 against MID for claims relating to additional services that B&V provided as a result of MID’s,
13 Western's and/or BBC's allegedly deficient work and delay. ECF No. 1. MID counter-claimed on
14 July 25, 2011. ECF No. 17.
15

16 On August 8, 2011, MID filed its Interpleader Complaint against, *inter alia*, Western and
17 BBC. The relevant causes of action against Western and BBC are: (1) express contractual
18 indemnity; (2) total equitable indemnity; (3) comparative equitable indemnity; (4) breach of
19 contract against Western; (5) breach of express warranty against Western; (6) negligence against
20 Western; (7) negligence against BBC; (8) breach of implied warranty of merchantability against
21 BBC; (9) breach of implied warranty of fitness against BBC; (10) breach of implied warranty of
22 workmanship against BBC; and (11) negligent misrepresentation against Western. ECF No. 22.
23 The Interpleader Complaint also includes an at-issue request for declaratory relief. *Id.*
24

25 On September 9, 2011, Western filed a motion to dismiss, or in the alternative, motion to
26 strike portions of MID's Interpleader Complaint. ECF No. 38. On September 16, 2011, BBC filed
27 its own motion to dismiss, or in the alternative, motion to strike portions of MID's Interpleader
28

1 Complaint. ECF No. 40.
2

3 **III. BACKGROUND.**

4 MID sought to expand its existing water treatment plant through construction of a
5 36,000,000 gallon per day water treatment plant, located in Stanislaus County, California (the
6 "Project"). Interpleader Complaint ¶ 9.
7

8 In 2007, MID entered into a written agreement with B&V in which B&V agreed to
9 perform various construction-related services for the Project, including construction management
10 services. *Id.* ¶ 11-13. On or about June 8, 2007, Western, as prime contractor, and MID, as owner,
11 entered into a written public works contract (the "Contract"). *Id.* ¶ 17. After June 8, 2007,
12 Western hired BBC as a subcontractor and entered into a written subcontract agreement (the
13 "Subcontract") in which BBC agreed to perform concrete work on the Project. *Id.* ¶ 20.
14

15 During construction of the Project, MID discovered numerous alleged defects with
16 Western's work. *Id.* ¶ 23. Due to these construction defects and deficiencies, the Project was
17 delayed past the contract deadline and has not yet been completed. *Id.* at ¶ 24.
18

19 **IV. STANDARD OF DECISION.**

20 A. **Motion to Dismiss.**

21 A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) "tests the
22 legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). In deciding
23 whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint
24 as true and draw[s] all reasonable inferences" in the light most favorable to the nonmoving party.
25 *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir.2002). To survive a motion to dismiss, a
26 complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that
27 is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp.*
28

1 v. *Twombly*, 550 U.S. 544, 570 (2007)).

2 A claim has facial plausibility when the plaintiff pleads factual content that allows the
3 court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The
4 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer
5 possibility that defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely
6 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
7 plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. 556-57).

8
9 Nevertheless, the court “need not assume the truth of legal conclusions cast in the form of
10 factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.
11 1986). While the standard does not require detailed factual allegations, “it demands more than an
12 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949. A
13 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
14 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1950 (“Threadbare
15 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
16 suffice.”). A court need not permit an attempt to amend a complaint if “it determines that the
17 pleading could not possibly be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc.*
18 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir.1990).

19
20
21 In ruling upon a motion to dismiss, the court may consider only the complaint, any
22 exhibits thereto, and matters which may be judicially noticed pursuant to Fed. R. Evid. 201. *See*
23 *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

24 B. Motion to Strike.

25 Federal Rule of Civil Procedure 12(f) permits the Court to “[strike] from any pleading any
26 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
27 Civ. Pro. 12(f).
28

1 Redundant matter “consists of allegations that constitute a needless repetition of other
2 averments in the pleading.” 5 Charles A. Wright & Arthur R. Miller, Federal Practice and
3 Procedure § 1382 (1990). Immaterial matter is “that which has no essential or important
4 relationship to the claim for relief or the defenses being pleaded.” *Id.* Impertinent matter “consists
5 of statements that do not pertain, and are not necessary, to the issues in question.” *Id.* Scandalous
6 matter is “that which improperly casts a derogatory light on someone, most typically on a party to
7 the action.” *Id.*

10 V. DISCUSSION.¹

11 A. BBC’s and Western’s Objections.

12 Both Western and BBC object to the use of attorney at record, Mr. Klotsche’s, declaration
13 in support of the Opposition. The objections to Mr. Klotsche’s declaration are moot as the court
14 did not consider the declaration in its decision.

15 Western further objects to various material in MID’s Opposition. Western states that it is
16 “improper material outside of the pleadings” and also that the material assumes facts not in
17 evidence. These objections are moot as the court only considered MID’s arguments which were
18 based on material plead in the Interpleader Complaint.

20 B. Total Equitable Indemnity (Second claim).

21 Both BBC and Western argue that MID’s total equitable indemnity claim is not based on a
22 cognizable legal theory and is redundant of MID’s third claim for comparative equitable
23 indemnity. Specifically, both movants assert that “while the doctrine of equitable indemnity is
24 recognized in California, it is not divisible into causes of action that seek differing **degrees** of
25 indemnity.” Western’s Mot. Dismiss (“Western MTD”), ECF No. 38, 3:26-28 (emphasis in
26 _____
27

28 ¹ Neither Western nor BBC takes issue with MID’s first, third, fourth, fifth, or twelfth claims. Each of these claims remains.

1 original). MID rejoins that although its “comparative equitable indemnity claim may incorporate
2 its total equitable indemnity claim. . . MID is unaware of any California case that bars a plaintiff
3 from separately pleading a claim for total equitable indemnity.” Opp’n to BBC, ECF No. 48, 5:7-
4 8.

5
6 “There are not two separate equitable indemnity doctrines in California but a single
7 ‘comparative indemnity’ doctrine which permits partial indemnification on a comparative fault
8 basis in appropriate cases.” *Far West Financial Corp. v. D & S Co.*, 46 Cal. 3d 796, 808 (1988).
9 For example, it would be “[p]roper, in a comparative indemnity action, for a trier of fact to
10 determine that the facts and equities in a particular case support a complete shifting of a loss from
11 one tortfeasor to another, rather than, for example, a 60 percent/40 percent or 95 percent/5 percent
12 division of the loss. *Id.*; see also *E. L. White, Inc. v. City of Huntington Beach*, 138 Cal. App. 3d
13 366, 375-377 (1982). “Comparative equitable indemnity includes the entire range of possible
14 apportionments, from no right to any indemnity to a right of complete indemnity. Total
15 indemnification is just one end of the spectrum of comparative equitable indemnification.” *Far*
16 *West Financial Corp.*, 46 Cal. 3d at 808 (citing *Standard Pacific of San Diego v. A. A. Baxter*
17 *Corp.*, 176 Cal. App. 3d 577, 587-588 (1986). Tortfeasors “are not entitled to any species of
18 indemnity other than [] comparative indemnity.” *Gentry Construction Co. v. Superior Court*, 212
19 Cal.App.3d 177, 183 (1989).

20
21
22 MID asserts a claim for both “total equitable indemnity” (second claim) and comparative
23 indemnity (third claim), but under California law “total equitable indemnity” is part of, and
24 included in, a claim for comparative indemnity; i.e., a claim for “total equitable indemnity” does
25 not exist. Western’s and BBC’s motion to dismiss MID’s second claim for relief is GRANTED
26 WITHOUT LEAVE TO AMEND.²

27
28

² Because Western’s and BBC’s motion is granted without leave to amend, their motions to strike MID’s second

1 C. Negligence and Property Damage Against Western (Sixth Claim).

2 Western asserts that MID's sixth claim is an "untenable restatement" of its fourth and fifth
3 contractual claims. Western further asserts that MID does not plead a duty independent of the
4 contract because MID fails to properly assert property damage. Western MTD, 6:2-5. MID
5 rejoins that it properly alleged property damage. Opp'n to Western's MTD, ECF No. 47, 6:5-6.
6

7 Both parties agree that "negligent performance of a construction contract, without more,
8 [does not] justif[y] an award of tort damages." *Erlich v. Menezes*, 21 Cal. 4th 543, 551, 550-554
9 (1999). "[C]onduct amounting to a breach of contract [only] becomes tortious when it also
10 violates a duty independent of the contract arising from principles of tort law. *Aas v. Superior*
11 *Court of San Diego*, 24 Cal. 4th 627, 636 (2000) (superseded by statute on other grounds). Tort
12 damages were initially permitted in contract cases where a breach of duty directly caused physical
13 injury. *Erlich*, 21 Cal. 4th at 552-552 (citing *Fuentes v. Perez*, 66 Cal.App.3d 163, 168, fn. 2
14 (1977)). Recovery for negligence has since been expanded to include construction defects that
15 cause property damage. *Aas*, 24 Cal. 4th at 637 (citing *Stewart v. Cox*, 55 Cal. 2d 857 (1961) as
16 the first case to allow recovery in negligence for construction defects which caused property
17 damage, and extensively analyzing cases which have allowed recovery for property damage since
18 *Stewart*).

19
20 Property damage does not include mere economic loss, such as repair and replacement
21 costs. *Aas*, 24 Cal.4th at 635-636. "[T]he difference between price paid and value received, and
22 deviations from standards of quality that have not resulted in property damage or personal injury,
23 are primarily the domain of contract and warranty law or the law of fraud, rather than of
24 negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical
25 injuries; no recovery is allowed for economic loss alone." *Id.* (quoting *Seely v. White Motor Co.*,

1 63 Cal.2d 9, 18 (1965). This principle is known as the economic loss rule. *Aas*, 24 Cal.4th at 635-
2 636; *see e.g., Zamora v. Shell Oil Co.* 55 Cal.App.4th 204, 208-211 (1997) (finding homeowners
3 were not allowed to recover in negligence for the cost of replacing water pipes known to be
4 defective, but which had not yet leaked); *Fieldstone v. Briggs Plumbing Products, Inc.* 54
5 Cal.App.4th 357, 363-367 (1997) (finding that a general contractor could not be awarded the cost
6 of replacing installed sinks that rusted and chipped prematurely, because no other property had
7 been damaged); *San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal.App.4th 1318,
8 1327-1330 (1995) (finding that a public school district could not state a cause of action in
9 negligence or strict liability based on the presence of asbestos products in its buildings, when the
10 products had not contaminated the buildings by releasing friable asbestos).

11
12
13 Accordingly, if a complainant alleges property damage, i.e., a defect which causes harm to
14 other portions of the property, as a result of a contractor's negligence, the complainant has alleged
15 a duty independent of the contract. *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 989
16 (2004) (*citing Jimenez v. Superior Court*, 29 Cal.4th 473, 482-483 (2002)).

17
18 1. Duty Independent of The Contract.

19 a. Similarity of MID's Contractual Claims and Negligence Claim.

20 Western incorrectly argues that MID does not properly assert an independent duty because
21 the allegations are the same or similar in MID's contractual and negligence claims. Under
22 California law "*the same wrongful act* may constitute both a breach of contract and an invasion
23 of an interest protected by the law of torts." *Erlich*, 21 Cal.4th at 551 (emphasis added). A
24 plaintiff is permitted to pursue remedies in both contract and tort law provided that the actions
25 that constitute the breach "violate a duty independent of the contract arising from principles in
26 tort law." *Id.* (conduct amounting to a breach of contract becomes tortious when "it also violates a
27 duty independent of the contract."); *Aas*, 24 Cal.4th at 643; *see also Robinson Helicopter Co.*,

1 *Inc.*, 34 Cal.4th at 990. Accordingly, the same conduct alleged in a contractual claim may be
2 alleged to constitute a negligence claim so long as the conduct also violates a tortious duty.
3

4 b. Property Damage.

5 Western asserts that “MID does not allege. . . damage to anything other than the property
6 under construction itself. . . . [which] is fatal to MID’s negligence claim for relief because in the
7 absence of. . . damage to property other than the Project work itself, MID cannot avoid
8 application of the economic loss rule.” Western MTD, 10:9-11. MID rejoins that “property
9 damage can be shown if defective portions of a construction project damage other portions of that
10 same project,” and the Interpleader Complaint pleads as such. Opp’n to Western MTD, 9:25-26.
11

12 “[T]he economic loss rule allows a plaintiff to recover in. . . tort when a product defect
13 causes damage to ‘other property,’ that is, property other than the product itself.” *Robinson*
14 *Helicopter Co.*, 34 Cal. 4th at 989 (*citing Jimenez*, 29 Cal.4th at 482–483). Several California
15 courts have found that a defectively constructed building is not a single defective product, but is
16 comprised of multiple products. *See, e.g., Stearmen v. Centex Homes*, 78 Cal. App. 4th 611, 613
17 (2000) (plaintiff suffered property damage when defective foundations damaged walls and
18 ceilings of newly constructed home); *Jimenez*, 29 Cal.4th at 483 (“the economic loss rule does
19 not necessarily bar recovery in tort for damage that a defective product (e.g., a window) causes to
20 other portions of a larger product (e.g., a house) into which the former has been incorporated”);
21 *Huang v. Garner*, 157 Cal.App.3d 404, 411 (1984) (allowing a negligence claim based on
22 physical damage to the structure of the plaintiffs property caused by “defected and cracked beams
23 and dry rot damages.”) (disapproved on other grounds). “[P]hysical damage to plaintiffs’ real
24 property caused by defective construction. . . is [not solely] ‘an injury to the product itself,’ and
25 [not] barred by the economic loss rule.” *Stearmen*, 78 Cal. App. 4th at 617.
26
27

28 MID asserts that three allegations in the Interpleader Complaint demonstrate property

1 damage. First, the Interpleader Complaint alleges that “as a proximate result of [BBC’s]
2 negligence, MID has sustained ... property damages.” Interpleader Complaint ¶ 7. MID asserts
3 that this allegation, in and of itself, is enough to allege property damage. This is incorrect. The
4 standard on a motion to dismiss “demands more than an unadorned, the defendant-unlawfully-
5 harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949. Merely stating that property damage was
6 suffered without any factual support is exactly the kind of bare legal conclusion the court cannot
7 accept. *Id.* (“a complaint must contain sufficient *factual matter*, accepted as true, to ‘state a claim
8 to relief that is plausible on its face.’”) (emphasis added.)
9

10 Second, MID points to a single example in paragraph 23 of Interpleader Complaint which
11 states, in part: “improperly cured membrane filter basin walls. . . have been declared defective,
12 deficient and not in compliance with the Project documents and will, in all probability, have to be
13 demolished and replaced along with the membrane basin floors.” Based on this, MID asserts it
14 has properly alleged that “as a result of [BBC’s] defectively constructed basin walls, the Project’s
15 basin floors were damaged to the point where those floors will likely need to be demolished.” *See*
16 *Opp’n to Western*, 8:2-3. However, MID’s Opposition overstates its pleading and inserts an
17 allegation of property damage where none exists. *In re Daou*, 411 F.3d 1006, 1013 (2005)
18 (“unwarranted inferences are insufficient to defeat a motion to dismiss.”) There is nothing in the
19 actual complaint regarding what, if any, damage the membrane basin floors suffered, if the floors
20 were even damaged by the basin walls – which is the key requirement of the claim – or why the
21 floors purportedly have to be removed. MID’s cited language is not sufficient to plead property
22 damage.
23
24

25 Last, MID’s Opposition alleges that defective pipes caused property damage through the
26 loss and contamination of water – the product MID sells. *Opp’n to Western*, 11:8-10. This
27 allegation, however, is not stated anywhere in the Interpleader Complaint. It is not “proper to
28

1 assume that [a plaintiff] can prove facts that it has not alleged. *Associated General California,*
2 *Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also* Fed. R. Civ.
3 Pro. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are
4 presented. . . the motion must be treated as one for summary judgment under Rule 56.”) Because
5 these allegations are not included in the Interpleader Complaint, the court may not consider the
6 Opposition’s property damage argument regarding water loss and contamination. MID does not
7 properly plead property damage as a result.

8
9 Western’s motion to dismiss this claim is GRANTED WITH LEAVE TO AMEND.³

10
11 D. Negligence and Property Damage Against BBC (Seventh Claim).

12 MID first asserts a nearly identical claim for negligent construction against BBC; namely,
13 that BBC’s negligent construction of the basin walls damaged the basin floors. Second, although
14 neither specifically named or articulated, MID appears to assert another negligence claim against
15 BBC for interference with prospective economic interest (“lost economic advantage claim”),
16 which MID claims, does not require an allegation of property damage.⁴

17
18 BBC rejoins that MID must allege property damage in order to bring any negligence
19 claim(s), as such, MID’s claim(s) fail because MID does not properly assert property damage.

20 1. Duty Owed Through A Special Relationship.

21 MID and BBC have not directly contracted with one another and are not in privity of
22 contract. However a contractor owes a duty to avoid injury to the person, property, or prospective
23 economic advantage of third parties when the contractor and third party are in a “special
24 relationship.” *J’Aire Corp. v. Gregory*, 24 Cal.3d 799, 808 (1979). The court weighs the following

25
26 _____
27 ³ Because the court grants this claim with leave to amend, Western’s motion to strike this claim is moot.

28 ⁴ MID does not assert a lost economic advantage claim against Western, despite that a negligent interference claim is available even when parties are in privity of contract. *See Aas*, 24 Cal. 4th at 645 (citing cases in which the *J’Aire* special relationship factors were applied despite that the parties were in privity of contract.).

1 factors (the “*J’Aire* factors”) to determine whether a special relationship exists: (1) the extent to
2 which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the
3 plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the
4 connection between the defendant's conduct and the injury suffered, (5) the moral blame attached
5 to the defendant's conduct and (6) the policy of preventing future harm. *Id.* at 804.

7 BBC concedes that the first factor is met,⁵ but takes issue with the remaining factors,
8 predominantly as to factor three (injury) which directly affects factors two and four. *See e.g., Aas*,
9 24 Cal.4th at 646 (“[When injury] is lacking – to ask. . . whether the harm to plaintiffs was
10 “foreseeab[le]. . . simply begs the question: What harm?”)

11
12 2. Must Property Damage be Pled In Order To Allege A “Special Relationship?”

13 The parties have a significant disagreement regarding whether the law requires an
14 allegation of property damage in order to assert a special relationship. MID argues that if the six
15 special relationship factors are met, it is entitled to recover economic loss damages without the
16 need to allege property damage, citing *J’Aire*. *Id.* at 804 (“Where a special relationship exists
17 between the parties, a plaintiff may recover for loss of expected *economic advantage* through the
18 negligent performance of a contract.”) (emphasis added.) BBC asserts that *Aas*, a more recent
19 case, states that property damage is a required element and as such MID’s claim must be
20 dismissed.
21

22 The apparent contradiction between the two cases is eradicated once the causes of action
23 in each case are examined. That is, the key difference between *J’Aire* and *Aas* is that the plaintiff
24 in each alleged different construction negligence theories which required a different “injury” to
25 satisfy the third *J’Aire* factor. The *J’Aire* plaintiff brought a cause of action for negligent
26

27 ⁵ BBC concedes that if parties are designated as third party beneficiaries, they are deemed in privity and that the
28 Interpleader Complaint properly alleges third-party beneficiary status. According to the seminal case on the subject,
however, third party beneficiary status is just one of six factors which establishes a special relationship and thus a
duty. *J’Aire*, 24 Cal. 3d. at 805.

1 *interference with prospective economic advantage* for lost profits because the plaintiff's
2 restaurant could not operate during the alleged negligent delay in construction. *J'Aire*, 24 Cal. 3d
3 at 803 ("The only question before this court is whether a cause of action for negligent loss of
4 expected economic advantage may be maintained under these facts.") The *Aas* plaintiff brought a
5 *defective construction* negligence claim, which is a claim based on injury to property. *See Aas*,
6 24 Cal. 4th at 633 ("Plaintiffs in each case allege their dwellings suffer[ed damage] from a variety
7 of construction defects.")

8
9 In the former, lost economic advantage of servicing customers is the injury; in the latter
10 property damage from defective construction is the injury. The two cases discuss two different
11 negligence theories and cannot be applied as espousing one rule. Accordingly, under a defective
12 construction claim the plaintiff must allege property damage as his/her injury. Under a lost
13 economic advantage claim the plaintiff must allege a loss of prospective economic advantage as
14 his/her injury, but the plaintiff is not required to allege property damage.

15
16
17 3. Defective Construction Claim.

18 MID again cites paragraph 23 of the Interpleader Complaint as the allegations which
19 demonstrate property damage. As previously found, paragraph 23 is insufficient to assert property
20 damage. MID does not satisfy the third *J'Aire* factor and does not sufficiently allege that a special
21 relationship pursuant to a construction defect claim exists between itself and BBC.

22
23 4. Lost Economic Advantage Claim.

24 MID's Opposition to BBC appears to allege that its seventh claim is a dual negligence
25 cause of action which asserts defective construction as well as lost economic advantage.

26 Where a special relationship exists between the parties, a plaintiff may recover for loss of
27 expected economic advantage through the negligent performance of a contract *J'Aire*, 24 Cal. 3d
28

1 at 804. An expected economic advantage is not replacement or repair costs. *Aas*, 24 Cal.4th at
2 635-636. It is an economic relationship which existed between the plaintiff and a third party that
3 contained a reasonably probable future economic benefit or advantage to plaintiff. *North*
4 *American Chemical Co. v. Superior Court*, 59 Cal.App.4th 764, 786 (1997). In order to allege
5 duty, that economic advantage must have been “lost” as a result of a defendant’s negligent delay
6 in construction and this loss must have been foreseeable. *J’Aire*, 24 Cal. 3d at 804.

8 MID asserts that it meets the pleading requirement because the Interpleader Complaint
9 asserts that construction on the Project was negligently delayed by BBC and caused MID to incur
10 “substantial damages.” *See* Opp’n to BBC at 15:26-16:1. This unadorned and conclusory
11 allegation is far from satisfactory. For example, in *J’Aire* the “complaint [left] no doubt that
12 appellant suffered harm since it was unable to operate its business for one month and suffered
13 additional loss of business while the premises were without heat and air conditioning” (factor
14 three). *J’Aire*, 24 Cal. at 805. The defendants were renovating the plaintiff’s restaurant and the
15 “the contract could not have been performed without impinging on that business,” making it
16 “clearly foreseeable that any significant delay in completing the construction would adversely
17 affect appellant’s business” (factor two). *Id.* “Appellant has also alleged that delays. . . directly
18 caused its [month-long loss of business]” (factor four). *Id.* Here, the Interpleader Complaint does
19 not allege what economic advantage was lost (factor three); how the economic loss was
20 foreseeable (factor two); or (factor four) how BBC’s alleged delay caused the economic harm,
21 i.e., what does “substantial damages” mean? Does it mean lost business/profits, or simply costs of
22 repair? MID’s Interpleader Complaint is completely devoid facts constituting duty pursuant to a
23 lost economic advantage claim and thus does not properly allege the claim.⁶

24
25
26
27 ⁶ When alleging the *J’Aire* duty factors for a lost economic advantage claim, MID is wise to keep in mind the specific
28 elements of the claim since they are more particular than the *J’Aire* factors. To state this claim, a plaintiff must
demonstrate: “(1) an economic relationship existed between the plaintiff and a third party which contained a

1 a. Conclusion Re: Special Duty.

2 MID has not properly alleged an injury of property damage or loss of economic
3 advantage. MID, accordingly, does not satisfy *J'Aire* factor two, three or four under a claim for
4 negligent construction defect or lost economic advantage and does not sufficiently plead a special
5 relationship. BBC's motion to dismiss MID's seventh claim for negligence is GRANTED WITH
6 LEAVE TO AMEND.⁷

8 E. Breach of Implied Warranty of Merchantability, Fitness and Workmanship Against BBC
9 (Eight, Ninth & Tenth Claims).

10 As to MID's eighth and ninth claims, BBC asserts that common law claims for breach of
11 implied warranty of merchantability (eight claim) and breach of implied warranty of fitness (ninth
12 claim) were replaced or superseded in 1970 by the Song-Beverly Consumer Warranty Act
13 ("Song-Beverly Act") and/or California Commercial Code, section 2314 ("Section 2314"). BBC
14 Reply, 8:14-18. BBC further argues that MID's tenth claim is redundant of its eighth and ninth
15 claims. *Id.* at 9:29-10:3.

16
17 1. Song-Beverly Act and Section 2314.

18 BBC asserts that MID has no remedy in common law implied warranty claims because
19 "case law since the adoption of [Section 2314 and the Song-Beverly Act] has ruled that the
20 legislation governs [] consumer protection." BBC Reply, 8:14-18. BBC erroneously cites a non-
21 existent case for this proposition.⁸ An independent review of case law confirms this statement is

22
23
24 reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the
25 relationship and was aware or should have been aware that if it did not act with due care its actions would interfere
26 with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage
27 of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the
28 relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or
29 advantage reasonably expected from the relationship. *North American Chemical Co.*, 59 Cal. App. 4th at 786.

⁷ Because MID does not satisfy the second, third or fourth factors of a special relationship, it is not necessary to
address whether MID has sufficiently satisfied the fifth and sixth factors.

⁸ As found through independent research, *Aced's* determination regarding the duration of the implied warranty of
merchantability was superseded by the duration provision in the Song-Beverly Act. *Atkinson v. Elk Corp. of Texas*

1 incorrect, particularly in light of the following: In 1974, *subsequent* to the adoption of both
2 Section 2314 and the Song–Beverly Act, the California Supreme Court extended the theory of
3 implied warranties to contracts for construction. *Pollard v. Saxe & Yolles Dev. Co.* 12 Cal.3d 374
4 (1974) (*citing Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal.2d 573, 580-583 (1961) which
5 rejected the view that implied warranties were limited to contracts within the Uniform Sales Act,
6 and held that an implied warranty of merchantability arises from a construction contract because
7 the contract is one for material and labor.)
8

9 *Siders v. Schloo*, 188 Cal.App.3d 1217, 1221 (1987) explains:

10 After *Pollard* not[ed] both the general rule of caveat emptor applicable in land and
11 building sales and the related rule that implied warranties are not generally applicable to
12 sales of land and buildings, the court explained that exceptions to those rules had
13 developed with regard to some construction contracts because they were essentially
14 contracts for labor and materials. [Citation]. The court also observed that purchasers of
15 new construction usually rely upon the expertise of the builder, being without such
16 expertise themselves and being unable to examine the finished product without disturbing
17 it. Accordingly, the court held that builders and sellers of ‘new construction’ were subject
18 to the implied warranty that such structures have been designed and built in a reasonably
19 workmanlike manner.

20 *See also Mills v. Forestex Co.* 108 Cal.App.4th 625, 636 fn. 4 (2003) (“The theory of an implied
21 warranty of quality and fitness has been extended by the courts beyond contracts for the sale of
22 goods to contracts for the construction of a new home, and contracts for the sale of a newly
23 constructed home.”); *Windham at Carmel Mountain Ranch Assn. v. Superior Court*, 109
24 Cal.App.4th 1162, 1170 (2003).

25 Accordingly, the Song-Beverly Act and Section 2314 do not govern all claims for implied
26 warranties; common law claims for implied warranties in construction contracts may be asserted.⁹

27 142 Cal. App .4th 212, 231(2006). Since timeliness is not at issue here, this has no bearing on the court’s analysis.
28 ⁹ Although not argued by BBC, the court notes that many of the cases which allow breach of implied warranties in
construction defect cases are limited to “new home” construction or “mass home” construction.

1 2. Redundancy of Claims.

2 MID asserts three implied warranties: merchantability, fitness and workmanship. BBC
3 argues that MID’s warranty claims are redundant and at least one should be stricken.

4 An implied warranty of fitness encompasses both workmanship and materials.
5 “[C]onstruction contracts. . . give rise to *an* implied warranty that the product will be fit for its
6 intended use both as to workmanship and materials.” *Aced*, 55 Cal.2d at 577 (emphasis added);
7 *see Gilbert Financial Corp. v. Steel Form Contracting Co.*, 82 Cal.App.3d 65 (1978) (finding
8 privity existed therefore the plaintiff could sue for breach of the implied warranty of fitness based
9 on the defendant’s failure to furnish proper materials and workmanship.)
10

11 The fitness warranty regarding workmanship ensures that the contract’s work will be
12 performed “with care, skill, reasonable expedience, and faithfulness.” *See Kuitems v. Covell*, 104
13 Cal. App. 2d 482, 485 (1951). The fitness warranty regarding materials ensures that the materials
14 supplied by the contractor will be fit for the project. *Aced* at 583 (finding that a steel pipe supplied
15 by the contractor which had inadequate coating was sufficient evidence for a jury to find a breach
16 of the implied warranty that materials would be fit for their intended use.)
17

18 The warranty of fitness can be applied solely as a warranty for workmanship when the
19 contractor is supplied materials and/or plans by an owner or third party. *Sunbeam Construction*
20 *Co. v. Fisci*, 2 Cal.App.3d 181, 186 (“no warranty *other than that of good workmanship* can be
21 implied where the contractor faithfully complies with plans and specifications supplied by the
22 owner.”) (emphasis added).
23

24 Accordingly, the warranty of fitness guarantees two separate responsibilities of
25 contractors: (1) that they follow plans and specifications in a “workmanlike” manner, and (2) they
26 use materials that are fit for the project. The two responsibilities are not redundant and may be
27 asserted as two separate causes of action.
28

1 MID argues that a third warranty for merchantability is recognized in *Aced*, citing the
2 following language:

3 [F]or historical reasons warranties have become identified primarily with transactions
4 involving the sale or furnishing of tangible chattels but that they are not confined to such
5 transactions. Several cases dealing with construction contracts and other contracts for
6 labor and material show that ordinarily such contracts give rise to an implied warranty that
the product will be *fit for its intended use* both *as to* workmanship and *materials*. [Internal
citations omitted]. . . .

7 As we have seen, [the plaintiff] stipulated that in his action against [the defendant] he was
8 relying solely on breach of an implied warranty of merchantability. The reference in the
9 stipulation to merchantability, a term generally used in connection with sales, does not
10 preclude reliance on breach of warranty although the contract is one for labor and
11 material. With respect to sales, merchantability requires among other things that the
substance sold be reasonably suitable for the ordinary uses it was manufactured to meet.
[Internal citations omitted]. The defect of which [the plaintiff] complains is that the tubing
12 was not reasonably suitable for its ordinary use, and his cause of action may properly be
considered as one for breach of a warranty of merchantability.

13 *Aced*, 55 Cal. 2d 573, 582-583 (1961).

14 A close reading of *Aced* demonstrates that there is no distinction between “fitness of
15 materials” and “merchantability.” Immediately after explaining that construction contracts may
16 give rise to an implied warranty that material used will be “*fit for its intended use*,” *Aced* found
17 that the plaintiff could bring a claim for breach of the implied warranty of merchantability because
18 the material used by the defendant was not “*suitable for its ordinary use*.” Although *Aced* uses
19 both the terms “merchantability” and “fit,” they derive from identical logic and have no
20 describable difference nor does MID attempt to explain any difference. Merchantability and
21 fitness are not two separate warranties in the context of a construction contract.
22

23 MID’s eighth claim for breach of the implied warranty of merchantability is STRICKEN
24 as redundant.
25

26 3. Facts Alleged to Meet the Implied Warranty of Fitness for Workmanship and
27 Materials.

28 No party addresses whether the Interpleader Complaint properly alleges facts to support

1 the implied warranty claims. However, a district court may review and “dismiss a claim *sua*
2 *sponte* under Fed.R.Civ.P. 12(b)(6).” *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir.
3 1987).

4
5 a. Materials.

6 When there are no plans or specifications which direct a contractor as to what materials
7 should be used, the contractor assumes the responsibility that the project will be constructed
8 properly for the owner's purposes. In such cases the contractor impliedly warrants that the
9 materials he/she chooses will be fit for their intended use. *See Aced*, 55 Cal. 2d at 582-583
10 (finding breach of implied warranty for contractor's use of a defective pipe when there were no
11 plans or specifications for the particular materials to be used and contractor supplied the pipe); *cf.*
12 *Sunbeam*, 2 Cal. App. 3d at 186 (finding contractor cannot be held liable for breach of implied
13 warranty where the materials used complied with plans and specifications).

14
15 The Interpleader Complaint alleges: “As a concrete contractor and to the extent that
16 [BBC] chose the manner of construction and materials for its concrete work, [BBC] impliedly
17 warranted to MID, as a third party beneficiary of [BBC's] Subcontract, that its work was of
18 merchantable quality and reasonably fit and suitable for its general purpose and ordinary use.”
19 Interpleader Compl. ¶ 63.¹⁰ This, in and of itself, is not sufficient to allege the claim. A complaint
20 must “contain sufficient *factual* matter, accepted as true, to ‘state a claim to relief that is plausible
21 on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasis added).

22
23 Further, MID does not allege that a breach actually took place. Paragraph 63 states: “*to the*
24 *extent*. . . BBC chose. . . materials for its concrete work, [BBC] impliedly warranted” that those
25 materials would be fit for their intended use. The phrase “to the extent” demonstrates that MID is

26
27 ¹⁰ MID explains that *Western* “agreed to ‘furnish all labor, material, tools, apparatus, equipment, insurance, bonds,
28 special services and skill to construct and complete [the Project] in good workmanlike and substantial manner.”
Interpleader Complaint 5:13-13. However, MID does not do the same as to BBC, the party this claim is alleged
against.

1 unaware whether BBC used its own materials and therefore unaware whether a breach of the
2 implied warranty of fitness occurred. “[A] complaint ... must contain either direct or inferential
3 allegations respecting *all the material elements* necessary to sustain recovery under some viable
4 legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d
5 1101, 1106 (7th Cir.1984) (emphasis added).
6

7 To state a claim properly, MID must allege facts that demonstrate BBC used its own
8 materials and that those materials were defective. BBC’s motion to dismiss MID’s ninth claim for
9 relief is GRANTED WITH LEAVE TO AMEND.

10
11 b. Workmanship.

12 “Accompanying every contract is a common-law duty to perform with care, skill,
13 reasonable expedience, and faithfulness the thing agreed to be done.” *Kuitems v. Covell*, 104 Cal.
14 App. 2d 482, 485 (1951).

15 The Interpleader Complaint lists numerous defects in paragraph 23, but does not delineate
16 which defects are attributable to BBC’s work as opposed to Western’s, state that any of BBC’s
17 defects were the result poor workmanship, or that state BBC’s defects caused delay. This makes
18 the claim insufficient. Fed. R. Civ. Pro. 8 requires a short and plain statement of the claim that
19 will give BBC fair notice of what MID’s claim is and the grounds upon which it rests.
20

21 Paragraphs 67 and 68 state that BBC breached the implied warranty because the Project
22 was not free from defects and deficiencies, but this, in and of itself, is not sufficient to allege the
23 claim. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (A complaint must “contain sufficient *factual* matter,
24 accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (emphasis added).
25

26 MID must assert some facts which demonstrate that BBC’s poor workmanship caused
27 certain defects and/or unreasonable delay.

28 BBC’s motion to dismiss MID’s tenth claim for relief is GRANTED WITH LEAVE TO

1 AMEND.

2
3 F. Negligent Misrepresentation Against Western (Eleventh Claim.)

4 Western argues that MID's claim for negligent misrepresentation fails because MID does
5 not "state with particularity the circumstances constituting fraud" as mandated by Fed. R. Civ.
6 Pro. 9(b). MID rejoins that its claim meets the Rule 9(b) standard.

7 Fed. R. Civ. Pro. 9(b) requires a party to "state with particularity the circumstances
8 constituting fraud."¹¹ In the Ninth Circuit, "claims for fraud and negligent misrepresentation must
9 meet Rule 9(b)'s particularity requirements." *Neilson v. Union Bank of California, N.A.*, 290 F.
10 Supp. 2d 1101, 1141 (C.D. Cal. 2003). A court may dismiss a claim grounded in fraud when its
11 allegations fail to satisfy Rule 9(b)'s heightened pleading requirements. *Vess v. Ciba-Geigy Corp.*
12 *USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). A motion to dismiss a claim "grounded in fraud"
13 under Rule 9(b) for failure to plead with particularity is the "functional equivalent" of a Fed. R.
14 Civ. Pro. 12(b)(6) motion to dismiss for failure to state a claim. *Id.* at 1107.

15
16 Rule 9(b) requires "specific" allegations of fraud "to give defendants notice of the
17 particular misconduct which is alleged to constitute the fraud charged so that they can defend
18 against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*,
19 780 F.2d 727,731 (9th Cir. 1985). "A pleading is sufficient under Rule 9(b) if it identifies the
20 circumstances constituting fraud so that the defendant can prepare an adequate answer from the
21 allegations." *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir. 1993) (citing *Gottreich v. San*
22 *Francisco Investment Corp.*, 552 F.2d 866, 866 (9th Cir. 1997)) (internal quotations omitted). The
23 Ninth Circuit has explained:
24
25

26
27
28 ¹¹ F.R.Civ.P. 9(b)'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1995)).

1 Rule 9(b) requires particularized allegations of the circumstances constituting fraud. The
2 time, place and content of an alleged misrepresentation may identify the statement or the
3 omission complained of, but these circumstances do not “constitute” fraud. The statement
4 in question must be false to be fraudulent. Accordingly, our cases have consistently
5 required that circumstances indicating falseness be set forth.... [W]e [have] observed that
6 plaintiff must include statements regarding the time, place, and nature of the alleged
7 fraudulent activities, and that “mere conclusory allegations of fraud are insufficient.” ...
8 The plaintiff must set forth what is false or misleading about a statement, and why it is
9 false. In other words, the plaintiff must set forth an explanation as to why the statement or
10 omission complained of was false or misleading.

11 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc)
12
13 (*superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal Pharm.*
14 *Corp.*, 927 F. Supp. 1297 (C.D. Cal. 1996)) (italics in original).

15 The Interpleader Complaint states:

16 71. During [Western’s] performance of the Contract, [Western] submitted numerous
17 payment applications that represented that 'all Work covered by this Application for
18 Payment is in accordance with the Contract Documents and not defective.' [Western] also
19 represented that its work was proceeding in accordance with the Project schedule and
20 represented the percentage and value of completed work billed in each Application for
21 Payment was accurate.

22 72. These representations were false because [Western’s] work was not in accordance
23 with the Contract Documents, its work was defective and deficient, its work was not
24 proceeding according to the Project schedule and the value of work billed was overstated
25 for the value of actual work completed.

26 Interpleader Complaint at 18:25-19:6.

27 Western asserts that MID “fails to identify which of the ‘numerous payment applications’
28 it contends include misrepresentations, when the specific payment applications at issue were
submitted, which specific work it contends was not in accordance with Contract Documents, or
how the work identified in the payment application was defective.” Western MTD, 11:24-27.
MID rejoins that it has alleged the “*general* time frame for when the misrepresentations occurred”
and that it is not required to plead the payment applications which contains misrepresentations.
Opp’n to Western at 16:17-24. However, Rule 9(b) requires “specific” and “particularized”
allegations of fraud. *Semegen*, 780 F.2d at 731. MID’s negligent misrepresentation allegations do

1 not meet the pleading standard.

2 MID responds, however, that its misrepresentation claim meets the relaxed standard set
3 out in *In re Equity Funding Corp. of America Securities Litig.*, 416 F.Supp. 161 (C.D. Cal. 1976).
4 The district court in *Equity Funding* allowed a more general pleading to survive a motion to
5 dismiss because: (1) it was multidistrict litigation; (2) it involved several class actions; (3) the
6 fraud took place over a period of eight years; and (4) the complaint broke the defendants down
7 into groups of primary offenders and aiders and abettors and pled with particularity the basis of
8 liability of each group and its relation to the other group. 416 F. Supp. at 171–72. The case at
9 hand is not so complex as to justify a similar relaxation of Rule 9(b). This is not a multi-district
10 action, no class actions are involved, the alleged action took place over only two years, and
11 substantially less defendants are involved. Further, MID’s complaint does not reach even *Equity*
12 *Funding*’s level of particularity. MID’s cursory reference to misrepresentations in “numerous”
13 payment applications does not meet Rule 9(b)’s standard requiring particularized allegations of
14 the circumstances constituting fraud.
15
16

17 Western’s motion to dismiss MID’s negligent misrepresentation claim is GRANTED
18 WITH LEAVE TO AMEND.

19
20 G. Declaratory Relief (“Claim” Thirteen).¹²

21 Western argues that MID’s request for declaratory relief relating to Western’s alleged
22 breach of contract, indemnity and “remaining obligations” should be dismissed or stricken.

23 “It is elementary that questions relating to the formation of a contract, its validity, its
24 construction and effect, excuses for nonperformance, and termination are proper subjects for
25 declaratory relief.” *Caira v. Offner*, 126 Cal. App. 4th 12, 24 (quoting *Fowler v. Ross*, 142 Cal.
26

27
28 ¹² Declaratory relief is not an independent claim, rather it is a form of relief. *Lane v. Vitek Real Estate Indus. Group*,
713 F. Supp. 2d 1092, 1104 (E.D. Cal. 2010) (citing *McDowell v. Watson*, 59 Cal.App.4th 1155, 1159 (1997)

1 App. 3d 472, 478 (1983)). “Declaratory relief enables a party to a contract to determine his or her
2 rights and liabilities before incurring costs and risks the party would not incur if the party's view
3 of his or her rights and liabilities under the contract is erroneous.” *Rubin v. Toberman*, 226
4 Cal.App.2d 319, 326 (1964).

5 “Complaint for declaratory relief is legally sufficient if it sets forth facts showing
6 existence of actual controversy relating to parties' legal rights and duties under a written
7 instrument and requests that rights and duties be adjudged.” *Fowler v. Ross*, 142 Cal. App. 3d
8 472, 478 (1983).

9
10 The Interpleader Complaint meets these requirements as to MID’s causes of action for
11 breach and indemnity:

12 An actual controversy has arisen and now exists between MIC, [Western] and [BBC]
13 concerning their respective rights, duties and obligations, in that B&V contends it is
14 entitled to additional compensation under its Complaint and MID contends it is entitled to
15 express indemnity, equitable indemnity, or partial equitable indemnity from [Western] and
[BBC].

16 Interpleader Complaint at 22:7-11.

17 Pursuant to the Contract, [Western] must defend and indemnify MID with regard to
18 B&V’s claims against MID and MID is entitled to full indemnification from [Western] for
any losses and/or damages that MID may sustain by reason of [B&V’s] Complaint.

19 Pursuant to the Subcontract, and because MID is one of [Western’s] ‘indemnities’ and
20 third-party beneficiary of [BBC’s] defense and indemnity obligations, [BBC] must defend
21 and indemnify MID with regard to B&V’s claims against MID and MID is entitled to full
22 indemnification from [BBC] for any losses and/or damages that MID may sustain by
reason of [B&V’s] Complaint.

23 Interpleader Complaint at 8:22-9:2.

24 MID is informed and believes, and on that basis alleges, [Western] will deny any
25 indemnity obligations. Disputes have also arisen and now exist between MID and
26 [Western] concerning their respective rights, duties and obligations, in that MID contends
27 that [Western] breached the contract [though defective construction as alleged in the
incorporated ¶¶ 22-25]. MID is informed and believes, and on that basis alleges, that
[Western] will deny they breached any terms or provisions of the respective agreements.

28 MID desires a judicial determination of the respective rights and duties of MID,

1 [Western] and [BBC], with respect to the damages claimed in the Complaint. In particular,
2 MID desires a declaration of responsibility of [Western] and [BBC] to completely and
3 totally defend and indemnify MID against any alleged damages, or partially indemnify
4 MID for any alleged sums. . . MID also desires a judicial determination of the respective
5 rights and duties of MID, and [Western] with respect to the alleged breaches of contract.

6 Interpleader Complaint at 22:11-20.

7 Further MID has asserted that adequate relief does not exist pursuant to its other claims.

8 MID asserts that “no other adequate remedy at law” exist under the breach of contract and
9 indemnification claims because “[t]he defective basin walls and floors [as alleged in paragraph
10 23] is a significant issue that requires an immediate judicial determination of the parties
11 prospective conduct with respect to demolishing and replacing that work. More specifically, if
12 [Western] and/or [BBC] is deemed contractually liable for the defective work, MID requires a
13 determination as to whether it can require [Western] and/or [BBC] to demolish and replace those
14 basins without violating the doctrine of economic waste.” Opp’n to Western at 18:25- 19:2.

15 Accordingly, MID properly asserts declaratory relief for its breach of contract and
16 indemnity claims. Western’s motion to dismiss MID’s request for relief on this basis is DENIED.

17 As to MID’s request for a judicial determination with respect to “the remaining [contract]
18 obligations, if any,” MID may only request declaratory relief to the extent that a controversy is
19 alleged. MID does not allege a controversy exists as to the “remaining obligations” and as such it
20 cannot be granted relief on this basis. Any relief requested for the determination of legal rights
21 not in controversy is DISMISSED WITHOUT LEAVE TO AMEND.

22 VI. CONCLUSION.

23 For the reasons set forth above:

- 24 1. BBC and Western’s motions to dismiss MID’s second claim for total equitable indemnity
25 is GRANTED WITHOUT LEAVE TO AMEND.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Western’s motion to dismiss MID’s sixth claim for negligence and property damage is GRANTED WITH LEAVE TO AMEND.
3. BBC’s motion to dismiss MID’s seventh claim for negligence and property damage is GRANTED WITH LEAVE TO AMEND.
4. BBC’s motion to strike MID’s eighth claim for breach of the implied warranty of merchantability is GRANTED.
5. BBC’s motion to dismiss MID’s ninth claim for breach of the implied warranty of fitness is GRANTED WITH LEAVE TO AMEND.
6. BBC’s motion to dismiss MID’s tenth claim for breach of the implied warranty of workmanship is GRANTED WITH LEAVE TO AMEND.
7. Western’s motion to dismiss MID’s eleventh claim for negligent misrepresentation is GRANTED WITH LEAVE TO AMEND.
8. Western’s motion to dismiss MID’s request for declaration relief is DENIED as to MID’s claims regarding breach of contract and indemnity.
9. Western’s motion to dismiss MID’s request for declaration relief is GRANTED WITHOUT LEAVE TO AMEND as to any claims which do not allege a controversy.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MID's uncontested claims (the first, third, fourth, fifth and twelfth claim) remain.

This Court orders MID, no later than November 24, 2011, to file and serve either: (a) its First Amended Third-Party Complaint in Interpleader in compliance with this order; or (b) a statement that MID elects not to attempt to amend claims dismissed without prejudice and to proceed on the Interpleader Complaint's remaining claims.

This Court orders the third-party defendants, no later than December 15, 2011, to file and serve an answer to the Interpleader Complaint, or a response to the First Amended Third-Party Complaint, as applicable.

All parties need to understand that this District does not have the resources to involve itself in a pleadings war. MID has one chance to amend pursuant to the detailed discussion in this order. That said, Western and BBC need not file a subsequent motion to amend or strike unless the motion is strong and substantive.

IT IS ORDERED.

Dated: October 27, 2011

/s/ Lawrence J. O'Neill
United States District Judge