

1 Defendant moved to dismiss Plaintiff's causes of action, excluding the breach of contract claim,
2 on April 10, 2012. Plaintiff did not file a response.
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4 **II. Legal Standard**

5 Under Federal Rule of Civil Procedure 12(b)(6), a claim must be dismissed if a
6 plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A
7 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the
8 absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside*
9 *Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th
10 Cir. 2001).

11 In reviewing a complaint under Rule 12(b)(6), all of the complaint's material
12 allegations of fact are taken as true, and the facts are construed in the light most favorable to the
13 non-moving party. *Marceau v. Balckfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008);
14 *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1999). The court must also assume that general
15 allegations embrace the necessary, specific facts to support the claim. *Smith v. Pac. Prop. and*
16 *Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004). However, the court is not required "to accept
17 as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
18 inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1056-57 (9th Cir. 2008); *Sprewell v.*
19 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Although they may provide the
20 framework of a complaint, legal conclusions are not accepted as true and "[t]hreadbare recitals of
21 elements of a cause of action, supported by mere conclusory statements, do not suffice."
22 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009). *See also Warren v. Fox Family Worldwide,*
23 *Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). As the Supreme Court has recently explained:

24 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
25 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of
26 his 'entitlement to relief' requires more than labels and conclusions, and a
27 formulaic recitation of the elements of a cause of action will not do. Factual
28 allegations must be enough to raise a right to relief above the speculative level,
on the assumption that all the allegations in the complaint are true (even if

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2 doubtful in fact).

3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, “a complaint must contain sufficient
4 factual matter, accepted as true, to state a claim for relief that is plausible on its face.” *Iqbal*, 129
5 S.Ct. at 1949. “A claim has facial plausibility when the plaintiff pleads factual content that
6 allows the court draw the reasonable inference that the defendant is liable for the misconduct
7 alleged.” *Iqbal*, 129 S.Ct. at 1949.

8 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual
9 content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim
10 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

11 III. DISCUSSION

12 The issue before the court is whether Plaintiff adequately states claims for conversion,
13 defamation, negligence, fraud, unfair competition and loss of opportunity. Defendant contends
14 that all of Plaintiff’s allegations are unclear and insufficient. Plaintiff did not respond.

15 A. Conversion Claim

16 The complaint alleges that Defendant refused to pay Plaintiff \$40,000 that she earned
17 on January 1, 2011, and instead Defendant used the funds as its own. Defendant contends that
18 Plaintiff’s allegations are unintelligible, rendering a response virtually impossible. Under
19 California law, to sufficiently state a claim for conversion, the plaintiff must establish: (1)
20 plaintiff’s ownership or right to possession of the property at the time of the conversion; (2)
21 defendant’s conversion by wrongful act; and (3) damages. *Haro v. Ibarra*, 180 Cal. App. 4th 823,
22 835 (2009). A cause of action for conversion of money may be stated where a defendant
23 interferes with a plaintiff’s possessory interest in a specific, identifiable sum. *Kim v. Westmoore*
24 *Partners, Inc.*, 201 Cal. App. 4th 267, 284 (2011).

25 To sustain her conversion action, Plaintiff need not establish absolute ownership over
26 the funds, rather she need only to show that she was entitled to possession at time of the
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1 conversion. *Irving Nelking & Co. v. South Beverly Hills Wilshire Jewelry & Loan*, 129 Cal. App.
2 4th 692, 699 (2005) . Plaintiff’s only support for her right to possession of the funds is her
3 assertions that she earned the \$40,000 on January 1, 2011, and that “United States Medicare paid
4 the funds to be transferred immediately to Plaintiff.” Plaintiff refers to the funds as an override
5 commission, but does not clarify whether she earned the \$40,000 as an override or commission.
6 Plaintiff fails to sufficiently explain why she was entitled to possession of the \$40,000 and the
7 Court is not required to accept her conclusory allegations as true. *In re Gilead*, 536 F.3d at 1056-
8 57. Since Plaintiff does not sufficiently allege an essential element of her conversion claim, she
9 cannot maintain this cause of action against Defendant.
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11 **B. Defamation Claim**

12 Defamation is considered an “invasion of reputation” and involves (1) a publication
13 that is (2) false, (3) unprivileged, (4) defamatory and (5) has a natural tendency to injure or cause
14 special damage. *Price v. Operating Engineers Local Union No. 3*, 195 Cal. App. 4th 962, 970
15 (2011); *Gilbert v. Sykes*, 143 Cal. App. 4th 13, 27 (2007). Plaintiff alleges that Defendant,
16 through Director Jerry Adams and Manager Tim Jeans, verbally and electronically communicated
17 to Plaintiff’s agents that they remained unpaid due to Plaintiff’s incompetence, mismanagement
18 and dishonesty. Defendant argues that Plaintiff’s allegations are not sufficiently specific to
19 support a defamation claim.
20

21 **1. Defendants Published False Statements**

22 Liability for defamation requires defamatory matter that is “published” or
23 communicated to a third party who understands its defamatory meaning and applicability to the
24 plaintiff. *Martinelli v. International House USA*, 161 Cal. App. 4th 1332, 1337 (2008);
25 *Raghavan v. Boeing, Co.*, 133 Cal. App. 4th 1120, 1132 (2005). Plaintiff alleges that Defendant
26 communicated the defamatory matter to ten of Plaintiff’s agents, each of whom are named in the
27 complaint. Accepting this as true, it is reasonable to infer that Plaintiff’s agents, as third parties,
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1 understood the allegations as defamatory and applicable to Plaintiff. Additionally, Plaintiff can
2 only recover for defamation if the information is false. *Gilbert*, 147 Cal. App. 4th at 27. Plaintiff
3 stated that she is neither incompetent nor dishonest, and was unable to pay her agents because
4 Defendant did not pay her. Thus, Plaintiff has sufficiently alleged that Defendants published false
5 statements.

6 ***2. The Statements Were Unprivileged***

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8 California law recognizes two types of privileges for communications: an absolute
9 privilege that precludes liability regardless of any malice, and a conditional, qualified privilege
10 that is precluded by a finding of malice. *Hassan v. Mercy Am. River Hosp.*, 31 Cal. App. 4th 709,
11 730 (2003); *Kashian v. Harmian*, 98 Cal. App. 4th 892, 912 (2002). The absolute privilege
12 generally involves communications regarding litigation proceedings, or any other official
13 proceeding authorized by law. *See* Cal. Civ. Code § 47(b); *Kachlon v. Markowitz*, 168 Cal. App.
14 4th 316, 335 (2008). The defendant has the initial burden of showing the statement was
15 privileged. *Kashian*, 98 Cal. App. 4th at 915. If it is determined that the privilege is conditional,
16 the burden shifts to the plaintiff to show that the defendant made the statement with malice. *Id.*

17 Primarily, nothing in the facts suggests Defendant's statements concerned litigation or
18 official proceedings, so the communications are likely not protected by an absolute privilege.
19 Next, both Plaintiff and Defendant are silent as to any conditional privilege. Since Defendant did
20 not attempt to invoke a privilege, the Court will infer that the communications were unprivileged
21 and the element is satisfied.

22 ***3. Defendant's Statements Constitute Slander Per Se***

23 Whether the false statements were actually defamatory depends on whether the
24 statements constitute libel or slander. *See* Cal. Civ. Code §§ 45, 46. The complaint alleges that
25 the statements were slanderous per se. If the statements are determined to constitute slander per
26 se, Plaintiff no longer has to prove actual damage. *Regalia v. Nethercutt Collection*, 127 Cal.

1 App. 4th 361, 365 (2009) (quoting *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th
2 90, 107 (2004)). Under California Civil Code section 46, a false statement is considered
3 slanderous per se if it
4

5 3.Tends directly to injure him in respect to his office, profession, trade or
6 business, either by imputing to him general disqualification in those respects
7 which the office or other occupation peculiarly requires, or by imputing
8 something with reference to his office, profession, trade, or business that has
9 a natural tendency to lessen its profits

10 The *Nethercutt* court noted that category three of section 46 is particularly indeterminate, and is
11 defined as cases arise. *Id.* “It is not sufficient that the words be merely injurious but they must
12 prejudice him in his special profession or business.” *Id.* (citing *Correia v. Santos*, 191 Cal. App.
13 2d 844, 853 (1961)). *Nethercutt* also commented that the majority of cases invoking category
14 three involved statements that reflect on the integrity and competence of the plaintiff. *Id.*
15 Ultimately, whether the statements are slanderous per se is a question of law for the court to
16 determine. *Id.* at 368.

17 Even in light of the *Nethercutt* considerations, Plaintiff’s claim still sufficiently alleges
18 slander per se. Plaintiff alleges that Defendant attempted to persuade her agents that Plaintiff’s
19 dishonesty, mismanagement and incompetence explained why Plaintiff did not pay her agents.
20 Thus, Defendant’s alleged false statements attempted to directly injure Plaintiff’s business by
21 attacking her reputation, integrity and ability to manage her business. As such, Defendant’s
22 alleged false statements would constitute slander per se.

23 **4. Plaintiff Adequately Stated a Cognizable Defamation Claim**

24 In sum, Plaintiff has sufficiently alleged that Defendant published false, unprivileged,
25 defamatory statements. The statements alleged constitute slander per se, so Plaintiff is not
26 required to prove actual damage. Thus, Plaintiff has adequately stated a cognizable claim for
27 defamation.

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2 **C. Negligence Claim**

3 The complaint alleges that Defendant negligently handled Plaintiff's commission
4 statements, causing multiple inaccuracies. Plaintiff alleges that she filed 10 audit trails to which
5 Defendant negligently neglected to respond or conduct a reasonable investigation. Defendant
6 contends that Plaintiff did not allege that Defendant owed a duty to Plaintiff independent of their
7 contract, and Plaintiff cannot recover in tort for a breach of contract.

8 To establish a prima facie case of negligence, Plaintiff must establish that Defendant
9 owed a duty to her, breached that duty and the breach actually caused Plaintiff's injury. *Walker v.*
10 *Sonora Reg'l Med. Ctr.*, 202 Cal. App. 4th 948, 958 (2012). The complaint is unclear as to
11 whether Plaintiff is attempting to state a cause of action against Defendant's mishandling of the
12 commission statements, or Defendant's lack of response to the audit trails. In addition, neither
13 potential claim establishes that Defendants owed a legal duty to Plaintiff. Plaintiff does not allege
14 that her contract with Defendant creates a legal duty of care¹, and in fact the complaint is silent as
15 to the duty element. Plaintiff only asserts that Defendant's conduct was negligent in several
16 instances and does not elaborate further. As noted above, a complaint need not contain detailed
17 factual information, but legal conclusions supported by mere conclusory statements do not
18 suffice. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009) Thus, Plaintiff fails to establish an
19 essential element and cannot maintain a claim for negligence.

20 **D. Fraud**

21 Plaintiff alleges that Defendant worked with other (unnamed) defendants to coerce
22 Plaintiff's agents to work directly with Defendant, and that Defendant did not request nor obtain
23 a proper release from Plaintiff. Plaintiff entitled the action "Fraud and Deceit by Intentional

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25 ¹ A duty may arise through a contract, but only where a defendant fails to perform the contract with care,
26 skill, reasonable expedience or faithfulness. *Tucker v. CBS Radio Stations Inc.*, 194 Cal. App. 4th 1246, 1253 (2011)
27 (citing *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 803 (1979)); *N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764,
28 774 (1997).

1 Conversion.” Although Plaintiff does not cite any authority for the existence of this cause of
2 action, she seems to suggest that Defendant fraudulently induced Plaintiff’s agents to contract
3 directly with Defendant. As such, the Court will assume that Plaintiff is attempting to state a
4 claim for fraud by a party to a contract. *See* Cal. Civ. Code § 1572. Defendant contends that
5 Plaintiff’s allegations do not comply with the strict pleading requirements for a fraud cause of
6 action. The Court agrees.

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8 To establish a prima facie case for fraud, a plaintiff must show (1) a misrepresentation;
9 (2) knowledge of the falsity; (3) the intent to defraud; (4) justifiable reliance and (5) resulting
10 damage. *Phillipson & Simon v. Gulsvig*, 154 Cal. App. 4th 347, 363 (2007). Both Federal Rule of
11 Civil Procedure 9(b) and California law require each element to be specifically and factually
12 pleaded. *Gulsvig*, 154 Cal. App. 4th at 363; *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513,
13 520 (2004); Fed. R. Civ. Proc. 9(b). Particularly, Plaintiff must plead that she actually relied on
14 the misrepresentation. *Cadlo*, 125 Cal. App. 4th at 520.

15 The complaint does not allege any of the elements of fraud. Plaintiff asserts that
16 Defendant “lured all Plaintiff’s agents to work directly with Defendant,” but does not specifically
17 explain what Defendant communicated to her agents. Nor does the complaint allege that Plaintiff
18 actually relied on any sort of misrepresentation, or that Defendant intended to defraud Plaintiff.
19 Because Plaintiff fails to properly plead essential elements of a claim for fraud, she cannot
20 maintain this cause of action against Defendant.

21 **E. Unfair Competition**

22 Plaintiff asserts that Defendant “attempted and succeeded in luring more than 30 [of]
23 [P]laintiff’s agents through a deceptive and wrongful business practice.” The complaint also
24 alleges that Defendant lured Plaintiff’s agents by spreading rumors, lies, unfounded allegations
25 and outright threats with the intent of obtaining Plaintiff’s “Book of Business.” Defendant argues
26 that Plaintiff’s allegations fall short of pleading an actionable claim for unfair competition.

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2 Plaintiff titled the claim “Unfair Competition” but did not specify if the claim is based
3 on the common law cause of action² or California Business and Professional Code § 17200,
4 which defines unfair competition as any unlawful, unfair or fraudulent business practice. Because
5 the scope of section 17200 is unquestionably broad, the Court will assume that Plaintiff bases her
6 claim on this statute. To state an unfair competition claim under § 17200, Plaintiff must
7 establish that Defendant’s conduct was unfair, unlawful, or fraudulent. *South Bay Chevrolet v.*
8 *General Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 877 (1999). Each term provides an
9 independent basis for relief. *Id.* The Court will infer from the title that Plaintiff alleges Defendant
10 engaged in unfair business practices, rather than unlawful or fraudulent conduct. An unfair
11 business practice claim uses a balancing test that weighs the utility of a defendant’s conduct
12 against the gravity of the harm to the alleged victim. *State Farm Fire & Casualty Co. v. Super.*
13 *Ct.*, 45 Cal. App. 4th 1093, 1104 (1996).

14 Plaintiff does not clarify whether the resulting harm was the loss of her agents, or the
15 loss of her Book of Business. Plaintiff also fails to articulate the unfair business practice that
16 caused either loss. The standard for what constitutes unfair business practice is intentionally
17 broad to allow courts discretion to prohibit new schemes to defraud. *Cel-Tech Commc’n, Inc. v.*
18 *L.A. Cellular Te. Co.*, 20 Cal. 4th 163, 181 (1999). Even so, Plaintiff did not specify *any* business
19 practice or scheme. Plaintiff only asserts that Defendant lured her agents by engaging in wrongful
20 and deceptive business practice and by spreading rumors, lies and unfounded allegations. While a
21 business practice that is deceptive is necessarily unfair, Plaintiff does not elaborate as to how
22 Defendant’s conduct was deceptive nor how the rumors and lies affected competition. *Blakemore*
23 *v. Super. Ct.*, 129 Cal. App. 4th 36, 49 (2005). As noted, threadbare recitals of the elements of a
24 cause of action do not defeat a 12(b)(6) motion to dismiss. *Ashcroft v. Iqbal*, 129 S.Ct. 1937,

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26 _____
27 ² The common law cause of action involves a defendant passing off a plaintiff’s goods as those of another,
28 which is not suggested by the facts. *Sybersound Records Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2003).

1 1949-50 (2009). Plaintiff fails to properly allege that Defendant engaged in unlawful, unfair or
2 fraudulent business practices and therefore does not state a cognizable claim of unfair
3 competition.
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5 **F. Loss of Opportunity**

6 The complaint alleges a cause of action for “loss of opportunity” for earnings Plaintiff
7 anticipated but did not receive because her contract with Defendant was terminated. Loss of
8 opportunity may be claimed as compensatory damages, but Plaintiff has not referred to any
9 authority which establishes that loss of opportunity exists as a separate cause of action. *See*
10 *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 19 (2009)
11 (“Damages are monetary compensation for loss or harm suffered by a person, or certain to be
12 suffered in the future, as a result of the unlawful act or omission by another”). Thus, Plaintiff has
13 not stated a cognizable claim for relief.

14 **IV. DISPOSITION**

15 Based on the foregoing, IT IS HEREBY ORDERED that:

- 16 1. Defendant’s motion to dismiss the Second and Fourth through Seventh
17 Causes of Actions is GRANTED with leave to amend. Plaintiff shall have
18 leave to amend within 30 days of entry of this order.
19 2. Defendant’s motion to dismiss the Third cause of action is DENIED.

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21 IT IS SO ORDERED.

22 Dated: June 21, 2012

23 
24 CHIEF UNITED STATES DISTRICT JUDGE