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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER BERNSTEIN,
Plaintiff,
v.
VOCUS, INC., et al.,
Defendants.

Case No. 14-cv-01561-TEH

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

This matter came before the Court on June 30, 2014, on Defendants' motion to dismiss the First Amended Complaint ("FAC") of Plaintiff Alexander Bernstein ("Plaintiff"). After considering the parties' written and oral argument, and relevant law, the Court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss for the reasons discussed below.

BACKGROUND

This case involves an alleged breach of an employment contract, following the acquisition of Plaintiff's company, North Venture Partners, LLC by Defendant Vocus, Inc. ("Defendants" or "Vocus") in February 2011.¹ The following allegations are drawn from

¹ Vocus, Inc. is the sole member of Vocus Social Media, LLC, which is the successor to North Social Apps, LLC. See FAC ¶ 5. Plaintiff also brings suit against North Social Apps, LLC and Vocus Social Media, LLC. Defendants confirm that Defendant Vocus Social Media, LLC previously operated under the name North Social Apps, LLC. See Declaration of Kristie Scott in Support of Defendant's Notice of Removal ("Scott Decl.") ¶¶ 2-3, Docket No. 1-7. For the sake of simplicity, the Court refers to these entities, in

1 Plaintiff's FAC. *See* Docket No. 15. On February 24, 2011, Plaintiff and Vocus executed
2 an asset purchase agreement, along with a corresponding two-year written employment
3 contract. *See* FAC ¶ 7. Plaintiff fully performed under this contract. In March of 2013,
4 Plaintiff entered into an oral agreement with Vocus, Inc. and North Social Apps, LLC to
5 extend the period of Plaintiff's employment "to assist with the transition of North Social
6 software into the Vocus system," the terms of which were confirmed by subsequent email
7 communications. *Id.* ¶ 8. The emails are not attached to the FAC.

8 In exchange for assistance with transitioning customers for a "period of up to seven
9 (7) months," Defendants promised him payment consisting of: (1) base pay of \$275,000,
10 together with all benefits which had been provided under the 2011 written employment
11 contract; (2) an award of restricted Vocus stock (which was represented to provide a
12 "minimum" of \$300,000 in compensation); and (3) sliding scale bonuses based upon
13 certain performance parameters. *See id.* ¶¶ 8-9. All in, Plaintiff alleges that he was to
14 receive "close to" \$1,000,000, although in other portions of the FAC, he maintains he "was
15 promised payment of \$1,000,000." *Id.* ¶¶ 9, 11. Plaintiff fully performed under the oral
16 agreement but Defendants breached by failing to make all payments due thereunder. *See*
17 *id.* ¶ 10. Defendants failed to pay accrued benefits, certain salary and bonuses, and
18 sufficient Vocus stock to reach the promised \$300,000. *See id.* ¶ 11. Moreover,
19 Defendants "manipulated relevant data in an attempt to reduce the amount owing to
20 plaintiff." *Id.* ¶ 12. Consequently, Defendants only paid Plaintiff \$142,636 as salary and
21 \$198,300 in stock. *Id.* ¶ 11. On the basis of these allegations, Plaintiff sued Defendants on
22 February 11, 2014, in California Superior Court, for the County of Alameda. On April 4,
23 2014, Defendants removed the action to this Court on the basis of diversity jurisdiction.

24
25 **LEGAL STANDARD**

26 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a
27
28 addition to Vocus, Inc., as "Defendants" or "Vocus," unless otherwise specified.

1 plaintiff's allegations fail "to state a claim upon which relief can be granted."² Fed. R.
2 Civ. P. 12(b)(6). In ruling on a motion to dismiss, a court must "accept all material
3 allegations of fact as true and construe the complaint in a light most favorable to the non-
4 moving party." *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). On a
5 motion to dismiss, a court evaluates a complaint for: "sufficient factual matter, accepted as
6 true, to state a claim for relief that is plausible on its face. A claim has facial plausibility
7 when the plaintiff pleads factual content that allows the court to draw the reasonable
8 inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556
9 U.S. 662, 678 (2009) (internal citations and quotations omitted). The Court is not "bound
10 to accept as true a legal conclusion couched as a factual allegation." *Id.* (internal quotation
11 marks omitted). A dismissal under Rule 12(b)(6) "can be based on the lack of a
12 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
13 theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

14 To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim
15 to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
16 (2007). This "requires more than labels and conclusions, and a formulaic recitation of the
17 elements of a cause of action will not do." *Id.* at 555. Plausibility does not equate to
18 probability, but it requires "more than a sheer possibility that a defendant has acted
19 unlawfully." *Iqbal*, 556 U.S. at 678. Dismissal of claims that fail to meet this standard
20 should be with leave to amend unless it is clear that amendment could not possibly cure the
21 deficiencies in the complaint. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th
22 Cir. 1998).

23 **DISCUSSION**

24 Defendants move to dismiss all claims under Rule 12(b)(6). For the reasons
25 discussed below, Defendants' motion is GRANTED IN PART and DENIED IN PART.
26

27
28 ² All references to "Rule" hereinafter refer to the Federal Rules of Civil Procedure.

1 **I. Plaintiff States a Claim for Breach of Contract.**

2 Defendants move to dismiss Plaintiff’s First Claim for Relief because, they contend,
3 the FAC does not plausibly allege the existence of a contract. Under California law, to
4 state a claim for breach of contract, the plaintiff must plead: (1) the existence of a contract;
5 (2) the plaintiff’s performance or excuse for nonperformance; (3) the defendant’s breach;
6 and (4) damages to the plaintiff as a result of the breach. *See CDF Firefighters v.*
7 *Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008). Here, Defendants contend that Plaintiff
8 fails to allege facts sufficient to support all four of these elements, although they primarily
9 argue that Plaintiff has not alleged facts sufficient to support the existence of a contract.
10 *See* Defs.’ Mot. at 4-6, Docket No. 18. As a preliminary matter, Plaintiff alleges that (1)
11 there was a contract; that (2) Plaintiff performed from March of 2013 until September 30,
12 2013 under the contract, *see* FAC ¶¶ 8, 18; (3) that Defendants failed to pay as promised,
13 *see id.* ¶¶ 10, 11; and (4) that Plaintiff was damaged by this non-payment, *see id.* ¶ 15.
14 Defendants, however, contend Plaintiff fails to allege facts that establish the first element
15 of his breach of contract cause of action – the existence of a contract itself. Defs.’ Mot. at
16 5-6. Given Rule 8’s liberal pleading standards, the Court disagrees.

17 “A contract of employment is governed by the same rules applicable to other types
18 of contracts” *Reynolds Elec. & Engineering Co. v. Workmen’s Comp. Appeals Bd.*,
19 65 Cal. 2d 429, 433 (1966). To plead the existence of a contract, a plaintiff must allege
20 facts showing: “(1) parties capable of contracting; (2) their consent; (3) a lawful object;
21 and (4) a sufficient cause or consideration.” Cal. Civ. Code § 1550. An employment
22 contract will contain essential terms, such as salary and start date. *See Bradix v. Seton*
23 *Med. Ctr.*, No. C12-2096 SI, 2013 WL 450381, at *3 (N.D. Cal. Feb. 5, 2013). Moreover,
24 the exchange of performance in a position conferring a benefit on the employer in
25 exchange for payment constitutes consideration for the contract. *See id.*; *see also, e.g.*,
26 Cal. Civ. Code § 1605 (“Any benefit conferred, or agreed to be conferred, upon the
27 promisor, by any other person, to which the promisor is not lawfully entitled . . . as an
28 inducement to the promisor, is a good consideration for a promise.”)

1 While Plaintiff’s complaint is far from a model of clarity, drawing all reasonable
 2 inferences in Plaintiff’s favor, the Court finds Plaintiff sufficiently alleges the existence of
 3 an oral employment contract. Plaintiff identifies the essential terms of the alleged contract:
 4 (1) Rick Rudman, as “CEO of Vocus,” was capable of contracting on behalf of
 5 Defendants, *see* FAC ¶ 30; (2) Rudman was the individual who, in March of 2013,
 6 represented that Plaintiff would be compensated for “work undertaken as part of the
 7 transition of North Social software to Defendants,” and Plaintiff continued to work, thus
 8 manifesting the parties’ consent to contract, *see id.*; (3) the object of the contract was
 9 Plaintiff’s employment to aid in this transition following the expiration of his previous
 10 contract; and (4) the consideration consisted of Plaintiff’s continued assistance with the
 11 transition in exchange for payments close to \$1,000,000, including restricted Vocus stock
 12 worth a minimum of \$300,000, a sliding scale bonus, and base pay of \$275,000 during this
 13 period, *see id.* ¶¶ 8, 9.³ Thus, Plaintiff sufficiently pleads the existence of a contract and
 14 its breach through Defendants’ alleged non-performance.

15 Defendants’ arguments to the contrary are unavailing. Defendants argue, without
 16 citation to authority, that Plaintiff is required to attach email communications to his
 17 complaint. *See* Defs.’ Mot. at 11. There is no such requirement. While Defendants assert
 18 confusion as to who is accused of the breach, Plaintiff claims he was employed by Vocus
 19 and North Social Apps, LLC, and Defendants acknowledge that Defendant Vocus Social
 20 Media is the successor to North Social Apps, LLC. *See* FAC ¶ 8; Scott Decl. ¶¶ 2-3.
 21 Plaintiff alleges all Defendants breached the contract. At this procedural stage, the Court
 22 assumes the truth of Plaintiff’s allegations, and observes no confusion about which
 23 employers he alleges breached his contract. Lastly, the Court rejects Defendants’
 24 contention that Plaintiff failed to plead facts alleging a breach “with specificity.” Defs.’
 25 Reply at 4, Docket No. 20. Plaintiff alleges that he was only partially compensated for

26
 27 ³ Plaintiff clarified at oral argument that these were the only forms of compensation,
 28 as opposed to a separate monthly payment of \$142,857. *See* FAC ¶ 8. Plaintiff should
 clarify this portion of his pleading on amendment.

1 work completed – including stock worth less than \$300,000, in addition to an amount less
2 than the promised base compensation. *See* FAC ¶¶ 9, 11. This level of specificity is
3 sufficient. Accordingly, Defendants’ motion to dismiss Plaintiff’s First Claim for Relief
4 for breach of contract is DENIED.⁴

5
6 **II. Plaintiff Fails to State a Claim for a “Statutory Violation.”**

7 Defendants move to dismiss Plaintiff’s Second Claim for Relief, in which Plaintiff
8 alleges an undefined “statutory violation” of California law. Plaintiff alleges he was
9 promised a payment of \$1,000,000, and that Defendants “willfully failed to promptly pay
10 all wages due” to him by paying only \$340,936. FAC ¶¶ 9, 18.

11 Rule 8 requires that “allegations in a complaint . . . may not simply recite the
12 elements of a cause of action, but must contain sufficient allegations of underlying facts to
13 give fair notice and to enable the opposing party to defend itself effectively.” *Starr v.*
14 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *see also* Fed. R. Civ. P. 8(a)(2). Defendants
15 contend that Plaintiff fails to “specially identify on which statute he is suing.” Defs.’ Mot.
16 at 6. However, as “contemplated by the regime of liberal notice pleading,” Plaintiff’s
17 “complaint need not identify the statutory or constitutional source of the claim raised in
18 order to survive a motion to dismiss.” *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008)
19 (citations omitted). Thus, Plaintiff’s Second Claim for Relief is not rendered deficient
20 because he declined to specifically set forth the statute under which he seeks relief.

21 The Second Claim for Relief, however, falls short because Plaintiff fails to set forth
22 the elements of the claim and the facts that support them. “[F]actual allegations plead

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24 ⁴ Plaintiff requests that the Court judicially notice Defendants’ removal petition, the
25 Scott Declaration in support of removal, and Vocus Social Media, LLC’s articles of
26 incorporation. *See* Request for Judicial Notice, Docket No. 19-1. “A court may take
27 judicial notice of summary judgment,” as long as the facts noticed are not “subject to reasonable
28 dispute.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation and
internal quotation marks omitted). The Court GRANTS the request. However, the Court
declines to construe Defendants’ removal petition as an admission by Defendants of the
sufficiency of Plaintiff’s pleading. That Defendants can understand the gist of Plaintiff’s
claims for removal purposes is immaterial to the Court’s inquiry under Rule 12(b)(6).

1 without direct connection to a particular legal theory must still establish a complete cause
2 of action. This is because the court usually begins its dismissal analysis by ‘taking note of
3 the elements a plaintiff must plead to state a claim’ and then examines whether the alleged
4 facts meet these elements.” *Incorp Services, Inc. v. IncSmart.biz, Inc.*, No. 5:11-CV-04660
5 EJD, 2013 WL 394023, at *3 (N.D. Cal. Jan. 30, 2013) (citing *Iqbal*, 556 U.S. at 675).
6 Here, the Court cannot assess whether Plaintiff alleges facts that meet the elements of a
7 cause of action for this undefined statutory violation. Accordingly, the Court GRANTS
8 Defendants’ motion to dismiss the Second Claim for Relief WITH LEAVE TO AMEND.⁵
9

10 **III. Plaintiff States a Claim under California Labor Code Section 203.**

11 Plaintiff alleges in his Third Claim for Relief a violation of California Labor Code
12 section 203, which prohibits the willful failure to pay wages owing after an employee is
13 discharged or quits. California Labor Code section 203 provides that:

14 [i]f an employer willfully fails to pay, without abatement or
15 reduction, in accordance with Sections 201, 201.3, 201.5, 202,
16 and 205.5, any wages of an employee who is discharged or
17 who quits, the wages of the employee shall continue as a
penalty from the due date thereof at the same rate until paid or
until an action therefor is commenced; but the wages shall not
continue for more than 30 days.

18 Cal. Labor Code § 203. Plaintiff alleges that his employment ended September 30, 2013,
19 *see* FAC ¶ 18, and Defendants have failed to pay him salary, bonus, and stock owing.

20 Defendants argue that this claim fails for several reasons, none of which the Court
21 finds persuasive. First, while Defendants suggest that Plaintiff did not specifically allege
22 “which Defendant” failed to pay his wages, Defs.’ Mot. at 6, Plaintiff actually alleges that
23 “Defendants, *and each of them*, have willfully failed to promptly pay all wages to
24 Plaintiff.” FAC ¶ 22 (emphasis added). Assuming the truth of this allegation, as the Court
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26 ⁵ At oral argument, Plaintiff’s counsel suggested that the “statutory violation”
27 referred to in the Second Claim for Relief is California Labor Code section 201. On
28 amendment, Plaintiff should allege the elements and facts that support this claim, and for
the sake of clarity, he should specifically allege which Defendant is liable on each of his
claims for relief.

1 must on a motion to dismiss, Plaintiff alleges that *all* Defendants violated Labor Code
2 section 203. Second, Defendants argue that this claim fails because they cannot discern
3 what portions of Plaintiff’s alleged payments are “wages.” California law, however, views
4 wages broadly. “‘Wages’ includes all amounts for labor performed by employees of every
5 description, whether the amount is fixed or ascertained by the standard of time, task . . . or
6 other method of calculation,” and “labor” includes service rendered under contract. Cal.
7 Labor Code § 200. Thus, Plaintiff’s allegations that Defendants failed to pay him salary,
8 bonus, and stock is sufficient to state a claim under Labor Code section 203. *See, e.g.,*
9 *Schachter v. Citigroup, Inc.* 47 Cal. 4th 610, 618-19 (2009) (noting that “[i]ncentive
10 compensation, such as bonuses and profit-sharing plans, also constitute wages,” as do
11 “shares of restricted stock”). The completion of Plaintiff’s employment obligations under
12 a fixed-term agreement constitutes a discharge within the meaning of Labor Code section
13 203, from which Plaintiff may seek unpaid wages. *See Telles v. Li*, No. 5:11-CV-01470-
14 LHK, 2013 WL 5199811, at *7 (N.D. Cal. Sept. 16, 2013) (quoting *Smith v. Superior Ct.*,
15 39 Cal. 4th 77, 92 (2006)). Thus, Plaintiff pleads sufficient facts to state a claim under
16 Labor Code section 203 – Defendants owed, and did not pay, wages he was entitled to at
17 the time his employment ended. Therefore, the Court DENIES Defendants’ motion to
18 dismiss Plaintiff’s Third Claim for Relief.

19
20 **IV. Plaintiff States a Claim Under California Labor Code Section 227.3.**

21 Plaintiff alleges in his Fourth Claim for Relief that “Defendants, and *each* of them”
22 violated California Labor Code section 227.3 when they failed to pay him all vested
23 vacation time. *See* FAC ¶ 26 (emphasis added). Labor Code section 227.3 provides that:

24 whenever a contract of employment . . . provides for paid
25 vacations, and an employee is terminated without having
26 taken off his vested vacation time, all vested vacation shall be
27 paid to him as wages at his final rate in accordance with such
28 contract of employment or employer policy respecting
eligibility or time served

Cal. Labor Code § 227.3. Vacation is considered “deferred compensation,” and therefore

1 “earning it is not conditioned upon anything other than the employee’s rendering services
2 for the employer.” *Paton v. Advanced Micro Devices, Inc.*, 197 Cal. App. 4th 1505, 1519
3 (2011). Plaintiff alleges that he rendered services to Defendants, in part, on the promise
4 of “paid vacation and floating holiday benefits.” FAC ¶ 30. Plaintiff alleges that when his
5 employment ended without using his vacation time, Defendants were required to pay him
6 “22 days of vested vacation and floating holiday time” as wages, in accordance with Labor
7 Code section 227.3, and that they failed to do so. *Id.* ¶ 26. Therefore, Plaintiff adequately
8 pleads facts sufficient to state a claim for a violation of Labor Code section 227.3.
9 Accordingly, Defendants’ motion to dismiss the Fourth Claim for Relief is DENIED.

10
11 **V. Plaintiff Fails to State a Claim for Fraud.**

12 Plaintiff alleges in his Sixth Claim for Relief that Defendants are liable for fraud.
13 Rule 9(b)’s particularity requirement applies to state-law causes of action for fraud. *See*
14 *Vess v. Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (alteration and emphasis in
15 original) (citation omitted) (“[W]hile a federal court will examine state law to determine
16 whether the elements of fraud have been plead sufficiently to state a cause of action, the
17 Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity
18 is a federally imposed rule.”). To state a claim for fraud under California law, a plaintiff
19 must allege “(a) misrepresentation (false representation, concealment, or nondisclosure);
20 (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d)
21 justifiable reliance; and (e) resulting damage.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
22 1126 (9th Cir. 2009) (emphasis omitted) (quoting *Engalla v. Permanente Medical Group,*
23 *Inc.*, 15 Cal. 4th 951, 974 (1997)).

24 Defendants argue that Plaintiff fails to meet Rule 9(b)’s heightened pleading and
25 particularity requirements with respect to Plaintiff’s Sixth Claim for Relief for fraud. The
26 Court agrees. “Averments of fraud must be accompanied by ‘the who, what, when, where,
27 and how’ of the misconduct charged. [A] plaintiff must set forth *more* than the neutral
28 facts necessary to identify the transaction. The plaintiff must set forth what is false or

1 misleading about a statement, and why it is false.” *Vess*, 317 F.3d at 1106 (emphasis and
 2 alterations in original) (internal quotation marks and citations omitted). While the Ninth
 3 Circuit has held that the Rule 9(b) requirements are relaxed when the matters are within
 4 the opposing party’s knowledge, especially when those defendants are corporate entities,
 5 *see Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989), this does not
 6 relieve Plaintiff of his obligation to identify with particularity the source of information in
 7 this case. *See id.* (noting that in the case of “corporate fraud, the allegations should include
 8 the misrepresentations themselves with particularity and, where possible, the roles of the
 9 individual defendants in the misrepresentations.”)

10 Here, although Plaintiff alleges *when* the alleged fraud took place – October of 2013
 11 – he fails to identify *who* represented to him an “accounting,” which he contends
 12 Defendants knew to be false. He does not identify *what* information the accounting
 13 contained, and what it failed to disclose. He does not state *how* this information was
 14 communicated to him. The Rule 9(b) relaxed-pleading exception from *Moore* “does not
 15 nullify Rule 9(b); a plaintiff who makes allegations on information and belief must state
 16 the factual basis for the belief.” *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).
 17 “A plaintiff must identify the complete facts supporting a fraud claim before alleging fraud
 18 in its complaint: allegations of fraud may not depend on facts to be uncovered in
 19 discovery.” *Foster Poultry Farms v. Alkar-Rapidpak-MP Equip., Inc.*, No. 1:11-CV-
 20 00030-AWI-SMS, 2012 WL 6097105, at *6 (E.D. Cal. Dec. 7, 2012) (citation omitted).
 21 Plaintiff did not meet his Rule 9(b) burden here.

22 Additionally, it is unclear on what theory of fraud Plaintiff seeks relief. To the
 23 extent Plaintiff alleges an action for “fraudulent concealment” based on Defendants’
 24 failure “to disclose certain financial information,” FAC ¶ 36, Plaintiff does not allege *what*
 25 facts were concealed, and critically, what duty obligated Defendants to disclose these facts
 26 to Plaintiff. *See Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011)
 27 (stating that the elements of an action for fraudulent concealment include, *inter alia*, that
 28 the defendant must have been under a duty to disclose the fact to the plaintiff, and that the

1 defendant must have intentionally concealed or suppressed the fact with the intent to
2 defraud the plaintiff). These pleading deficiencies are also fatal to Plaintiff’s fraud claim.
3 The Court GRANTS Defendants’ motion to dismiss the Sixth Claim for Relief WITH
4 LEAVE TO AMEND. Any amendment shall specifically allege on what theory of fraud
5 his Sixth Claim for Relief is based, including the “who, what, where, when and how” of
6 the fraud (e.g. *who* misrepresented *what* data to him, or *what* facts Defendants failed to
7 disclose and *when*, and *what* duty Defendants were under to disclose such facts).

8

9 **VI. Plaintiff Fails to State a False Promise Claim.**

10 Plaintiff alleges in his Fifth Claim for Relief that Defendants are liable under a false
11 promise fraud theory. To plead a false promise fraud claim, Plaintiff must allege (1) a
12 promise of an intent to perform in the future; (2) without an actual intent to perform at the
13 time of the promise; (3) an intention that the plaintiff rely on the promise; (4) actual
14 reliance by the plaintiff; (5) the defendant’s failure to perform the promised act; and (6)
15 resulting harm. *See Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060 (2012). Defendants
16 contend that Plaintiff has not met Rule 9(b)’s requirement of pleading with particularity
17 the circumstances constituting fraud, which applies to a false promise claim. *See Valencia*
18 *v. Sharp Elec. Corp.*, —Fed. Appx.—, No. 12-16044, 2014 WL 878843, at *1 (9th Cir.
19 2014) (applying heightened pleading standard to a false promise claim). As stated above,
20 “[a]verments of fraud must be accompanied by ‘the who, what, when, where, and how’ of
21 the misconduct charged.” *Vess*, 317 F.3d at 1106.

22 Here, Plaintiff alleges (1) that the CEO of Vocus, Inc. (the who) orally promised
23 various forms of compensation to Plaintiff (the how) in March of 2013 (the when),
24 including payment of \$1,000,000 for his services (the what), *see* FAC ¶ 30; (2) that
25 Defendants never intended to be bound by the representation, *see id.* ¶ 31; that Plaintiff
26 continued working for Defendants based upon this misrepresentation, thereby manifesting
27 his (3) intent to rely on the promise, in addition to (4) actual reliance, *see id.* ¶ 32; (5) that
28 Defendants did not follow through with their promise of compensation, *see id.* ¶ 33; and

1 (6) that as a result, Plaintiff was harmed because he was denied the compensation allegedly
2 owed, *see id.* ¶ 34. Because the alleged fraud occurred at the time the contract was entered
3 into, and this information is within Defendants’ knowledge, the “where” requirement of
4 Rule 9(b) can be relaxed with respect to this part of Plaintiff’s allegation for false promise.
5 *See Moore*, 885 F.2d at 540. Thus, Plaintiff argues that he sufficiently alleges a false
6 promise claim against Defendants by virtue of the promise made by the CEO of Vocus,
7 Inc.

8 Defendants nonetheless contend that that under Rule 9(b), the FAC cannot “merely
9 lump multiple defendants together but [the plaintiff must] differentiate their allegations
10 when suing more than one defendant . . . and inform each defendant separately of the
11 allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476
12 F.3d 756, 764-65 (9th Cir. 2007) (citation and internal quotation marks omitted). The
13 Court agrees. Plaintiff urges that a relaxed standard applies because “instances of
14 corporate fraud may also make it difficult to attribute particular fraudulent conduct to each
15 defendant as an individual.” *Moore*, 885 F.2d at 540; *cf. Circle Click Media LLC v. Regus*
16 *Mgmt. Grp.*, No. 12-04000 SC, 2013 WL 57861, at *6 (N.D. Cal. Jan. 30, 2013)
17 (concluding that where plaintiffs allege that defendants are alter egos of one another,
18 defendants’ corporate relationship is in the sole possession of defendants, and plaintiffs are
19 entitled to discovery on this matter, even on fraud claims). Here, however, Plaintiff does
20 not allege that Defendants are alter egos of one another. He does not allege what authority
21 the CEO of Vocus, Inc. had to speak on behalf of each Defendant, nor whether the CEO
22 was speaking within the scope of his authority as CEO when he allegedly made the false
23 promise. As currently pleaded, each Defendant does not have fair notice of their alleged
24 misconduct. Accordingly, Defendants’ motion to dismiss Plaintiff’s Fifth Claim for Relief
25 for false promise fraud is GRANTED WITH LEAVE TO AMEND to cure these pleading
26 deficiencies.

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28

1 **VII. Plaintiff Fails to State a Claim for Negligent Misrepresentation.**

2 Plaintiff alleges in his Seventh Claim for Relief that Defendants are liable for
3 making negligent misrepresentations. Defendants contend that Plaintiff’s claim for
4 negligent misrepresentation is really a fraud claim, subject to Rule 9(b)’s heightened
5 pleading and particularity requirements. The Ninth Circuit “has not yet decided” whether
6 Rule 9(b) applies to negligent misrepresentation claims. *Anschutz Corp. v. Merrill Lynch*
7 *& Co.*, 785 F. Supp. 2d 799, 823 (N.D. Cal. 2011) (assuming Rule 9(b) applies). However,
8 district courts within the Ninth Circuit have recently held that Rule 9(b) is expressly
9 limited to allegations of fraud or mistake, and does not apply to a claim for negligent
10 misrepresentation; this is because negligent misrepresentation requires a showing that a
11 defendant failed to use reasonable care – “an objective standard [that] does not result in the
12 kind of harm that Rule 9(b) was designed to prevent” *Petersen v. Allstate Indem. Co.*,
13 281 F.R.D. 413, 417-18 (C.D. Cal. 2012); *see, e.g., Howard v. First Horizon Home Loan*
14 *Corp.*, No. 12-CV-05735-JST, 2013 WL 6174920, at *5 (N.D. Cal. Nov. 25, 2013) (same).
15 The Court finds the reasoning of these cases persuasive, and joins in their holdings that
16 negligent misrepresentation claims are not subject to the heightened pleading standards of
17 Rule 9(b). Thus, this Court must decide whether Plaintiff has stated a claim upon which
18 relief can be granted under Rule 8(a)’s liberal pleading standards.

19 To plead a claim for negligent misrepresentation, a plaintiff must plead “(1) the
20 misrepresentation of a past or existing material fact, (2) without reasonable ground for
21 believing it to be true, (3) with intent to induce another’s reliance on the fact represented,
22 (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” *Apollo Capital*
23 *Fund, LLC v. Roth Capital Partners, L.L.C.*, 158 Cal. App. 4th 226, 243 (2007). It is
24 unclear to which representations Plaintiff refers in the FAC. Plaintiff alleges that
25 Defendants misrepresented the value of Vocus stock, *see* FAC ¶ 33, as well as their
26 intention of paying him \$1,000,000 for his work for Defendants. *See id.* ¶ 30. Defendants
27 argue that Plaintiff’s negligent misrepresentation claim is little more than disappointment
28 about stock value predictions that did not come to fruition, rather than misrepresentations

1 about facts that support any fraud or misrepresentation claim. Defendants are correct that
2 “[p]redictions as to future events . . . are deemed opinions, and not actionable fraud.”
3 *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 158 (1991). A promise
4 that 20,000 shares of stock would be worth at least \$300,000 in September of 2013 is a
5 prediction, and is therefore not a representation of a “past or existing material fact.” *Id.*

6 Plaintiff alleges actionable representations of existing material facts by Defendants,
7 such as Defendants’ promise to pay him a salary, which they ultimately did not, and the
8 promise to award him “sufficient” stock to reach \$300,000, which Defendants also failed
9 to honor. However, Plaintiff also alleges in other portions of the FAC that when
10 Defendants made these representations, they did not intend to perform at the time and the
11 promises were intended to deceive or induce the promisee to perform. These alleged
12 misrepresentations were thus a type of *intentional* misrepresentation. Plaintiff’s alternative
13 contention that he was promised “sufficient stock” to reach \$300,000 is immaterial
14 because “making a promise with an honest but unreasonable intent to perform is wholly
15 different from making one with no intent to perform.” *Id.* The only basis for Plaintiff’s
16 claim that Defendants had insufficient grounds to believe the above representations is his
17 allegation that “Defendants never intended to be bound.” *See* FAC ¶ 31. Because this is
18 an assertion of an intentional false promise, Plaintiff has not alleged a *negligent*
19 misrepresentation. *See Stevens v. JP Morgan Chase Bank, N.A.*, No. C 09-03116 SI, 2010
20 WL 329963, at *7 (N.D. Cal. Jan. 20, 2010) (“California law distinguishes between
21 negligent misrepresentation, which is based on a statement of past or existing material fact,
22 and fraud, which is based on an intentional false promise. . . . There is thus no cause of
23 action in California for the so-called ‘negligent false promise.’”).

24 Consequently, Plaintiff fails to state a claim for relief for negligent
25 misrepresentation. The Court questions whether granting leave to amend is futile;
26 however, out of an abundance of caution, the Court GRANTS Defendants’ motion to
27 dismiss Plaintiff’s Seventh Claim for Relief WITH LEAVE TO AMEND so as to allege
28 that Defendants made some negligent statement about a past or existing material fact (i.e.

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not an intentional misrepresentation or a prediction).

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants’ motion to dismiss the SECOND, FIFTH, SIXTH and SEVENTH Claims for Relief, WITH LEAVE TO AMEND, and DENIES the motion as to the remaining claims for relief. Plaintiff shall file any amended complaint no later than **August 13, 2014**.

IT IS SO ORDERED.

Dated: 07/23/14



THELTON E. HENDERSON
United States District Judge