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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

GROUSE RIVER OUTFITTERS LTD,  
Plaintiff,  
v.  
NETSUITE, INC.,  
Defendant.

Case No. 16-cv-02954-LB

**ORDER ON MOTION TO DISMISS**  
Re: ECF No. 25

**INTRODUCTION**

This is a commercial contract dispute. Plaintiff Grouse River Outfitters, Ltd. is an outdoor-equipment retailer; defendant NetSuite, Inc. provides commercial software systems that integrate various aspects of retailers’ businesses. The parties entered a series of written agreements under which NetSuite would install a comprehensive software system to coordinate Grouse River’s business. This system would, for example, run transactions at the point of sale, track inventory, and maintain customer records. Grouse River alleges that NetSuite breached its contractual commitments. According to Grouse River, the software was not installed on time, costs overran substantially, and the system never became fully capable of performing even the “core” functions described in the contracts. Finding more in this than a breach of contract, Grouse River also alleges that, in advertisements and pre-contract discussions, NetSuite misrepresented the

1 capabilities of its software, its experience in installing such a system, and ultimately its ability to  
2 provide a system that could perform as promised.

3 For these failings, Grouse River brings seven claims: (1) fraudulent misrepresentation; (2)  
4 negligent misrepresentation; (3) fraud in the inducement; (4) violation of California’s Unfair  
5 Competition Law (Cal. Bus. & Profs. Code § 17200); (5) breach of contract; (6) violation of  
6 California Penal Code § 496; and (7) punitive damages.

7 The defendant moves to dismiss all claims under Rule 12(b)(6) and to dismiss the fraud claims  
8 for failing to plead fraud sufficiently under Rule 9(b).<sup>1</sup> This court has jurisdiction of this diversity  
9 suit under 28 U.S.C. § 1332. The parties have consented to magistrate jurisdiction. (ECF Nos. 7,  
10 20.) The court previously found that this motion can be decided without oral argument. (ECF No.  
11 38); *see* Civil L.R. 7-1(b). The court dismisses the fraud claims with leave to amend because  
12 Grouse River did not plead fraud with particularity. It dismisses the claim under California Penal  
13 Code § 496 with prejudice. The court denies NetSuite’s motion to dismiss the non-fraud claims.

## 14 STATEMENT<sup>2</sup>

### 15 1. Pre-Contract Representations

16 In 2012, Grouse River began searching for an “integrated software system” that would help its  
17 (apparently thriving) retail operations grow.<sup>3</sup> It was then using separate systems (such as for  
18 inventory, sales transactions, and accounting); these systems “were hitting limitations in order-  
19 processing efficiency, website presentation and speed, . . . lacked an integrated shipping and  
20 warehousing component, as well as lacking a single view of each customer’s transactions and  
21 preferences between various sales channels . . . .”<sup>4</sup>

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25 <sup>1</sup> Motion — ECF No. 25. Citations are to material in the Electronic Case File (“ECF”); pinpoint  
26 citations are to the ECF-generated page numbers at the top of documents.

27 <sup>2</sup> The following fact statement reflects the allegations of the operative First Amended Complaint  
28 (“FAC”). ECF No. 9; *see e.g., LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n. 2 (9th Cir. 2000) (Rule  
12(b)(6) analysis takes as true complaint’s factual allegations and reasonable inferences therefrom).

<sup>3</sup> *See* FAC – ECF No. 9 at 2 (¶¶ 8-9).

<sup>4</sup> *Id.* at 2-3 (¶ 10).

1 Grouse River began looking into NetSuite’s offerings. According to Grouse River, it read (and  
2 later relied upon) statements made in NetSuite’s advertising material. This material stated, for  
3 example, that NetSuite’s software “enables multi-channel retail companies like Grouse River to  
4 manage all key business operations in a single hosted system, including customer relationship  
5 management . . . , order fulfillment, inventory, procurement, accounting and finance, point-of-sale  
6 . . . , e-commerce, and web site management.”<sup>5</sup> And, more broadly, “that NetSuite had the  
7 capability to meet Grouse River’s requirements.”<sup>6</sup> Grouse River further alleges, in sum, that  
8 NetSuite later confirmed or repeated such representations in in-person meetings.<sup>7</sup> Finally, NetSuite  
9 also represented that “average implementation time” for the system that Grouse River wanted was  
10 120 days.<sup>8</sup>

11 These are not all the representations that Grouse River claims that NetSuite made, but they are  
12 among the central ones. The alleged representations are further discussed in the Rule 9(b) analysis,  
13 below.

14 **2. The Contracts and Installing the System**

15 The parties’ discussions culminated in a pair of written contracts in March 2014.<sup>9</sup> According to  
16 the complaint — and, again, taking only what appear to be some principal examples — the  
17 contracts committed NetSuite to the following promises:

- 18 • “To deliver an updated website for GrouseRiver.com that improved search, speed,  
19 and presentation of the company’s [inventory] . . . . This included extending this  
20 functionality to a ‘responsive’ mobile website to meet the growing demand among  
21 Grouse River customers to shop on phones and other mobile devices.”

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23 <sup>5</sup> *Id.* at 3 (¶ 13).

24 <sup>6</sup> *Id.* at 3 (¶ 14).

25 <sup>7</sup> *Id.* at 10 (¶¶ 49, 51).

26 <sup>8</sup> *Id.* at 10 (¶ 49).

27 <sup>9</sup> *See* ECF No. 25-1 at 5-55. The parties’ relationship comprised a handful of agreements related to the  
28 retail software system. After the initial contracts of March 2014, these seem to have consisted of  
project extensions and refinements. *See id.* at 20-65. Because this analysis does not require parsing the  
individual agreements, throughout this discussion the court mostly refers to a single “contract”  
between the parties.

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- “To deliver an integrated point-of-sale system that interacted with the company’s inventory in real-time and provided the ability to fulfill in-store pickup, . . . integrate promotions, and provide full-visibility of customer purchase history at the retail level.”
- “To . . . provid[e] a single unified view of each customer’s interactions and purchases while tailoring promotions and a website shopping experience to preferences identified through their interactions with the company.”
- “To . . . track[] core inventory on a serialized item basis, enhance the accuracy of receiving and shipping functions, and allow for the segregation of inventory into multiple stores and warehouses providing a unified overview of inventory for purchasing and business management decisions.”<sup>10</sup>

The contracts contained integration clauses. The integration clause in the contract of March 30, 2014 is typical:

This Agreement . . . shall constitute the entire understanding between Customer and NetSuite and is intended to be the final and entire expression of their agreement. The parties expressly disclaim reliance on any and all prior discussions, emails, RFP’s and/or agreements between the parties. There are no other verbal agreements, representations, warranties[,] undertakings or other agreements between the parties.<sup>11</sup>

Other contracts in issue had nearly identical integration clauses.<sup>12</sup>

The project faltered from the start. The NetSuite system was not installed and operational by its original deadline of September 12, 2014.<sup>13</sup> The system appears never to have met some or most of its promised capabilities.<sup>14</sup>

### 3. This Lawsuit

Grouse River eventually filed this lawsuit. It alleges that it has been damaged by the failure of NetSuite’s software to live up both to the company’s representations, and to the promises of the

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<sup>10</sup> ECF No. 9 at 8 (¶¶ 32-36); *see also id.* at 9 (¶¶ 37-40) (additional promised capabilities).

<sup>11</sup> ECF No. 25-1 at 12 (¶ 13).

<sup>12</sup> *See id.* at 22 (¶ 11), 5 (¶ 6).

<sup>13</sup> *Id.* at 13 (¶ 73).

<sup>14</sup> *See, e.g.,* (ECF No. 9 at 13 [¶ 77]) (“As of April 2016, . . . NetSuite has still not provided the promised level of performance and integration, and the [point-of-sale] errors . . . continue to saddle Grouse River with significant costs and lost business opportunities.”); *id.* at 23-27 (¶¶ 129-51) (enumerating system’s functional failures).

1 contract.<sup>15</sup> It brings the seven claims listed at the outset of this order: three for fraud; one under  
2 California’s Unfair Competition Law (Cal. Bus. & Profs. Code § 17200); one for breach of  
3 contract; one under California Penal Code § 496; and one for punitive damages.<sup>16</sup>

4  
5 **ANALYSIS**

6 **1. Rules 12(b)(6) and 9(b)**

7 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to test the legal  
8 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim will  
9 normally survive a motion to dismiss if it offers a “short and plain statement . . . showing that the  
10 pleader is entitled to relief.” *See* Fed. R. Civ. P. 8(a)(2). This statement “must contain sufficient  
11 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*  
12 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
13 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
14 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The  
15 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a mere  
16 possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where  
17 a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of  
18 the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550  
19 U.S. at 557).

20 When considering a Rule 12(b)(6) motion, the court must accept as true all factual allegations  
21 in the complaint as well as all reasonable inferences that may be drawn from such  
22 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n. 2 (9th Cir. 2000). Such allegations must be  
23 construed in the light most favorable to the nonmoving party. *Shwarz v. United States*, 234 F.3d  
24 428, 435 (9th Cir. 2000).

25 Fraud allegations elicit a more demanding standard. Rule 9(b) provides: “In alleging fraud . . . ,  
26 a party must state with particularity the circumstances constituting fraud . . . . Malice, intent,

27 <sup>15</sup> *Id.* at 29-30 (¶¶ 157-65).

28 <sup>16</sup> *Id.* at 34-41 (¶¶ 185-244).

1 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P.  
2 9(b). This means that “[a]llegations of fraud must be accompanied by the ‘who, what, when,  
3 where, and how’ of the misconduct charged.” *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106  
4 (9th Cir. 2003). Like the basic “notice pleading” demands of Rule 8, a driving concern of Rule  
5 9(b) is that defendants be given fair notice of the charges against them. *See, e.g., In re Lui*, 2016  
6 WL 1212113, \*1 (9th Cir. Mar. 29, 2016) (“Rule 9(b) demands that allegations of fraud be specific  
7 enough to give defendants notice of the particular misconduct . . . so that they can defend against  
8 the charge and not just deny that they have done anything wrong.”) (quotation omitted); *Odom v.*  
9 *Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (Rule 9(b) requires particularity “so that the  
10 defendant can prepare an adequate answer”).

11 **2. Request for Judicial Notice**

12 NetSuite asks the court to judicially notice the several written contracts that constitute the  
13 parties’ agreement.<sup>17</sup> The court can consider them on a Rule 12(b)(6) motion because they are  
14 referenced throughout, and are integral to, the challenged complaint, and because Grouse River  
15 has not disputed their authenticity. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005);  
16 *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449, 453-54  
17 (9th Cir. 1994).

18 **3. The Parol Evidence Rule and the Fraud Exception**

19 **3.1 Section 1856 and Riverisland**

20 NetSuite argues that the contracts are integrated agreements and that the parol-evidence rule  
21 thus bars Grouse River’s fraud claims.<sup>18</sup> The parol-evidence rule does not bar the fraud claims.  
22 This is conclusively established by the Supreme Court of California’s decision in *Riverisland Cold*  
23 *Storage, Inc. v. Fresno–Madera Prod. Credit Ass’n*, 55 Cal. 4th 1169 (2013). The *Riverisland*  
24 court restored California’s commitment to the “longstanding,” and traditionally “broad,” “fraud  
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<sup>17</sup> ECF No. 25-1.

28 <sup>18</sup> Motion — ECF No. 25 at 15-18.

1 exception” to the parol-evidence rule. *Id.* at 1171. Grouse River’s fraud claims come within that  
2 exception. The parol-evidence rule thus does not bar them.

3 The parol-evidence rule in California appears primarily in § 1856 of the California Code of  
4 Civil Procedure. Section 1856(a) states the basic rule: “Terms set forth in a writing intended by the  
5 parties as a final expression of their agreement with respect to the terms included therein may not  
6 be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.” Cal.  
7 Code Civ. P. § 1856(a). Section 1856(f) then “establishes a broad exception to . . . the parol  
8 evidence rule.” *Riverisland*, 55 Cal. 4th at 1174. That subsection provides: “Where the validity of  
9 the agreement is the fact in dispute, this section [§ 1856] does not exclude evidence relevant to  
10 that issue.” Cal. Code Civ. P. § 1856(f). This exception “rests on the principle that the parol  
11 evidence rule, intended to protect the *terms* of a valid written contract, should not bar evidence  
12 challenging the *validity* of the agreement itself.” *Riverisland*, 55 Cal. 4th at 1174 (emphases in  
13 original). The principle extends to validity challenges that allege fraud: “Evidence to prove that  
14 the instrument is void or voidable for . . . fraud . . . is admissible. This evidence does not  
15 contradict the terms of an effective integration, because it shows that the purported instrument has  
16 no legal effect.” *Id.* at 1174-75 (quoting 2 B. Witkin, *California Evidence* § 97 at 242 (5th ed.  
17 2012)). Section 1856(g) “expressly state[s]” this “fraud exception” to the parol-evidence rule:  
18 “This section [§ 1856] does not exclude other evidence . . . to establish . . . fraud.” Cal. Code Civ.  
19 P. § 1856(g) (quoted in *Riverisland*, 55 Cal. 4th at 1175). It is therefore permissible — it does not  
20 infract the parol-evidence rule — to charge that a fully integrated contract is invalid because it was  
21 “procured by means of oral promises fraudulent” in the way alleged, “however variant” the  
22 alleged representations may be “from the terms of the written engagement.” *Riverisland*, 55 Cal.  
23 4th at 1181 (quoting *Langley v. Rodriguez*, 122 Cal. 580, 581-82 (1898)).<sup>19</sup>

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25 \_\_\_\_\_  
26 <sup>19</sup> The basic parol-evidence rule also appears in § 1625 of the California Civil Code, which states:  
27 “The execution of a contract in writing, whether the law requires it to be written or not, supersedes all  
28 the negotiations or stipulations concerning its matter which preceded or accompanied the execution of  
the instrument.” This civil-code version does not elaborate on the core rule as does § 1856 in the  
procedural code.

1           Though “broad,” this fraud exception allows only claims that challenge a contract’s validity.  
2 Claims that merely restate broken promises (read: contractual breaches) as fraud are not within the  
3 exception; these remain barred by the parol-evidence rule. As the *Riverisland* court wrote: “The  
4 [parol-evidence] rule cannot be avoided by showing that the promise outside the writing has been  
5 broken; such breach in itself does not constitute fraud.” *Riverisland*, 55 Cal. 4th at 1181 (quotation  
6 omitted).

7           Grouse River’s three fraud claims all come within the fraud exception of § 1856(g). The claim  
8 for “fraud in the inducement” may be the paradigmatic “fraud exception” claim. *See Riverisland*,  
9 55 Cal. 4th at 1173 n. 3 (“An action for promissory fraud may lie where a defendant fraudulently  
10 induces the plaintiff to enter into a contract[.]”) (quoting *Lazar v. Sup. Ct.*, 12 Cal. 4th 631, 638  
11 (1996)); *id.* at 1181 (“Historically, this unconditional rule [*i.e.*, the fraud exception] was applied in  
12 cases of promissory fraud.”). With that claim, Grouse River alleges that NetSuite “intended to  
13 deceive Grouse River in order to induce [it] to enter into its agreements with NetSuite.”<sup>20</sup> The  
14 remaining two fraud claims, one for fraudulent and one for negligent misrepresentation, similarly  
15 allege that NetSuite knew that the challenged statements were false and intended to induce Grouse  
16 River to rely upon them — meaning, to enter the contract.<sup>21</sup>

17           Read most favorably to the plaintiff, *e.g.*, *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249  
18 (9th Cir. 2007), these claims all charge that the contracts were “procured by means of [fraudulent]  
19 oral promises.” *See Riverisland*, 55 Cal. 4th at 1181. They do not merely recast broken promises,  
20 which is to say contractual breaches, as fraud. The parol-evidence rule thus does not bar Grouse  
21 River’s fraud claims.

22           **3.2 Analogy — Thrifty Payless**

23           The decisions in *Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal. App. 4th 1230  
24 (2013), and *Kentwool Co. v. NetSuite, Inc.*, 2015 WL 693552 (N.D. Cal. Feb. 18, 2015), confirm  
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26 \_\_\_\_\_  
27 <sup>20</sup> FAC — ECF No. 9 at 38 (¶ 218).

28 <sup>21</sup> *See id.* at 34, 36 (¶¶ 188, 201).

1 this conclusion. Those decisions both followed *Riverisland* to hold that contract-related fraud  
2 claims were viable, and that extrinsic evidence could be admitted to prove those claims, even in  
3 the face of fully integrated agreements. In other words, the parol-evidence rule did not bar the  
4 fraud claims.

5 In *Thrifty Payless*, the California Court of Appeal reversed a demurrer (equivalent to a granted  
6 Rule 12(b)(6) motion) on fraud claims arising out of a commercial real-estate lease. *See Thrifty*  
7 *Payless*, 218 Cal. App. 4th at 1233-34. The parties’ dispute was over the tenant Thrifty’s share of  
8 taxes and other costs. *See id.* at 1234. Pre-lease negotiations between Thrifty and the defendant  
9 landlord “contained . . . [the landlord’s] estimates” of “Thrifty’s probable *pro rata* share of” such  
10 costs. *Id.* “The final lease stated that Thrifty would pay its *pro rata* share of such expenses [but]  
11 did not contain any formulas, figures or percentages regarding Thrifty’s share of such expenses.”  
12 *Id.* “After Thrifty moved into the shopping center, its share of these expenses substantially  
13 exceeded [the landlord’s] estimates . . . .” *Id.* Thrifty sued for (among other things) fraud and  
14 breach of contract. *See id.* The landlord demurred to (moved to dismiss) the fraud claims under the  
15 parol-evidence rule. The fraud claims were barred, the landlord argued, because, under the  
16 contract’s integration clause, “prior negotiations and discussions . . . were no more than  
17 ‘estimates,’ [that] were merged into the lease.” *Id.* at 1237.

18 The California Court of Appeal disagreed, holding that the parol-evidence rule did not bar the  
19 fraud claims. The court wrote: “[U]nder *Riverisland*, . . . extrinsic evidence is admissible to  
20 establish fraud or negligent misrepresentation in the face of the lease’s integration clause. Thus,  
21 Thrifty can allege both intentional and negligent misrepresentations based upon [the defendant’s]  
22 grossly inaccurate estimates.” *Id.* at 1241-42. (And, in an observation that resonates with the  
23 allegations here, the *Thrifty Payless* court added: “[T]he huge disparity between the estimates and  
24 the ultimate costs supports an inference of misrepresentation.” *Id.* at 1242 n. 7.) The appeals court  
25 reversed the demurrer and revived the fraud claims. *Id.* at 1243.

26 **3.3 Analogy — *Kentwool***

27 Last year’s decision in *Kentwool*, from this district, is to the same effect. The district court  
28 there held that California’s parol-evidence rule did not bar fraud claims almost identical to those

1 involved here. For purposes of this Rule 12(b)(6) analysis, in fact, on operative points *Kentwool*  
2 cannot be distinguished from this case. This court agrees with *Kentwool's* reasoning and reaches  
3 the same conclusion.

4 In *Kentwool*, a NetSuite customer sued over the functioning of NetSuite's Enterprise Resource  
5 Planning ("ERP") system. *Kentwool*, 2015 WL 693552 at \*1. In addition to contract claims, the  
6 *Kentwool* plaintiff sued for "fraud by misrepresentation, negligent misrepresentation, and fraud in  
7 the inducement." *Id.* at \*1, \*5. These claims "involve[d] statements [allegedly] made by NetSuite,  
8 both before and after the" relevant contract "was signed, concerning NetSuite's experience and the  
9 capabilities of its software." *Id.* at \*5. The *Kentwool* contract had an integration clause identical to  
10 those involved here. *Compare id. with* ECF No. 25-1 at 12 (¶ 13). As in this case, NetSuite moved  
11 in *Kentwool* to dismiss the fraud claims under the parol-evidence rule, arguing that "fraud cannot  
12 consist of promises contrary to those contained in the parties' integrated written contract."  
13 *Kentwool*, 2015 WL 693552 at \*5.

14 The district court disagreed. It first noted that *Riverisland* had "reaffirmed" the "venerable"  
15 fraud exception to the parol-evidence rule. *See id.* "This exception," the court continued, "has been  
16 interpreted to permit both fraud and negligent misrepresentation claims to go forward, even in the  
17 face of an integration clause." *Id.* (citing *Thrifty Payless*, 218 Cal. App. 4th at 1241). The court  
18 then confirmed that the *Kentwool* plaintiff's challenge was to the "validity of the [ERP] contract"  
19 and held that the parol-evidence rule did not bar the fraud claims. *Id.* at \*5-6.

20 This court agrees with *Kentwool's* analysis. The *Kentwool* court's correct parol-evidence ruling  
21 applies with equal force to Grouse River's nearly identical fraud claims. The court highlights two  
22 additional points from *Kentwool*. NetSuite makes in this case the same arguments that it made in  
23 *Kentwool*; the responses here are the same as the ones that *Kentwool* correctly gave; so it is worth  
24 pointing these out.

25 First, NetSuite repeatedly insists that Grouse River's fraud claims contradict the terms of the  
26 parties' contracts.<sup>22</sup> This seems true mainly in the sense that, by alleging fraud at all, Grouse River

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<sup>22</sup> *E.g.*, Motion — ECF No. 25 at 7, 15.

1 has transgressed its averment, embodied in the contracts’ respective integration terms, that *there*  
 2 *were no representations* outside those reduced to contract, and has reneged on its promise to  
 3 “disclaim reliance” on any such representations.<sup>23</sup> But invoking that particular contradiction to  
 4 raise a parol-evidence bar smacks of circularity. Beyond that, to a crucial degree, NetSuite’s  
 5 contention is inaccurate: At least conceptually, the alleged representations that underlie Grouse  
 6 River’s fraud claims — NetSuite’s substantive assurances about how the ERP system would  
 7 function, how much it would cost, the date by which it would be operational — do not contradict  
 8 but *parallel* commitments made in the parties’ contracts. The same issue arose in *Kentwool*. There,  
 9 too, NetSuite argued that the fraud claims were barred because they alleged promises “contrary to  
 10 those contained in the parties’ integrated written contract.” *Kentwool*, 2015 WL 693552 at \*5. But,  
 11 as the *Kentwool* court rightly observed,

[The plaintiff] does not seek to enforce promises that run counter to the terms of the  
 written contract . . . . Rather, [the plaintiff’s] claims involve misrepresentations  
 concerning the functionality of the ERP software NetSuite agreed to provide and  
 NetSuite’s ability to implement the software and correct problems as they arose —  
 statements that are consistent with the agreements contained in the contract.

15 *Id.* at \*6. The same is true here. Moreover, even if the alleged representations contradicted the  
 16 terms of the contract — and to the extent that they do — under the fraud exception, it would not  
 17 matter. Again, that exception permits fraud claims challenging a contract’s validity, “however  
 18 variant” the alleged representations may be “from the terms of the written engagement.”  
 19 *Riverisland*, 55 Cal. 4th at 1181.

20 Second, NetSuite cites “two key cases” — *Groth–Hill Land Co. v. Gen. Motors LLC*, 2013 WL  
 21 3853160 (N.D. Cal. July 23, 2013), and *Crane v. Wells Fargo*, 2014 WL 1285177 (N.D. Cal. Mar.  
 22 24, 2014) — to support the argument that the parol-evidence rule bars Grouse River’s fraud claims  
 23 even after *Riverisland*.<sup>24</sup> But the plaintiff in *Groth–Hill* did “not attack the validity of the written  
 24 agreement.” *Groth–Hill*, 2013 WL 3853160 at \*15. For that reason, the parol-evidence rule barred  
 25 the plaintiff’s fraud claims. *Id.* (This, incidentally, is the same reading of *Groth–Hill* that *Kentwool*  
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27 <sup>23</sup> *See id.* at 7-12.

28 <sup>24</sup> Motion — ECF No. 25 at 17-18; Reply — ECF No. 31 at 7.

1 reached. *See Kentwool*, 2015 WL 693552 at \*5-6.) In *Crane*, in working through a *pro se*  
 2 plaintiff’s fraud claims, the district court offered this one sentence on the relevant doctrine:  
 3 “Moreover, a fraud claim may not consist of promises that run counter to the written contract.”  
 4 *Crane*, 2014 WL at 1285177 at \*6. The *Crane* court cited *Groth–Hill* and a California state case  
 5 decided before *Riverisland*. *Crane*, 2014 WL at 1285177 at \*6. The court does not read *Crane* as  
 6 misstating California’s fraud exception to the parol-evidence rule. At this point in its analysis,  
 7 *Crane* was moving through almost a laundry list of the failings that beset the subject fraud claims.  
 8 *See id.* Moreover, in the sentence just quoted, *Crane* merely left out the significant degree to  
 9 which, under § 1856(g) and *Riverisland*, fraud claims can rest on promises that are “variant” from  
 10 a contract’s terms. To the extent that *Crane* does state a rule, or reach a conclusion, that contradicts  
 11 *Riverisland*, however, this court must follow *Riverisland*.

12 Finally in this area, NetSuite has expressed concern that *Kentwool* is being invoked as if it had  
 13 some sort of *res judicata* effect.<sup>25</sup> This is not so. The court does not suggest that *Kentwool* operates  
 14 in this way. Nor does Grouse River seem to believe that it does. The role that *Kentwool* plays here  
 15 is the usual one of precedential analogy: It is a case that involves similar claims, arising from  
 16 similar facts, that in consequence evokes the same legal rules operating to the same effect. The  
 17 court does not see *Kentwool* as compelling any particular conclusion going forward.

18 **4. The Plaintiff Has Adequately Pleaded Justifiable Reliance**

19 Justifiable reliance on the challenged representations is a necessary element of the plaintiff’s  
 20 fraud claims. *E.g.*, *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (fraud; fraudulent  
 21 inducement); *Cadlo v. Owens–Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004) (negligent  
 22 misrepresentation). Grouse River has adequately pleaded such reliance. In this vein Grouse River  
 23 alleges:

24 NetSuite . . . represented to Grouse River that NetSuite had the capability to  
 25 design, implement and deliver a fully integrated ERP, e-commerce, and POS  
 26 software solution with the specific capability and functionality to meet Grouse  
 27 River’s defined needs and to do so within four months of the start of the project.

28 <sup>25</sup> Reply — ECF No. 31 at 2, 8.

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Based on NetSuite’s superior knowledge of its software and its ability to customize, configure, and implement the software for Grouse River’s specific needs and uses, Grouse River, which had no actual knowledge of the software’s capabilities, justifiably relied on NetSuite’s representations by entering into its agreements with NetSuite and continuing the relationship with NetSuite.<sup>26</sup>

Grouse River repeats the “superior knowledge” and reliance allegations throughout its fraud claims.<sup>27</sup>

This adequately pleads justifiable reliance for purposes of Rule 12(b)(6). Because NetSuite (allegedly) had superior knowledge about its products and services — what they could achieve and by when they could be installed and functioning — Grouse River has adequately pleaded that it was justified in relying upon the defendant’s representations on those topics. *See Thrifty Payless*, 218 Cal. App. 4th at 1242; *Kentwool*, 2015 WL 693552 at \*6. The pertinent information in this case was even less available to Grouse River than was the relevant information to the plaintiff in *Thrifty Payless*, so that if reliance was adequately pleaded there, then even more so is it sufficiently alleged here.

There remains, however, the question of the contractual reliance disclaimers. In its reliance argument, NetSuite points to the “fully integrated contract”<sup>28</sup> and, in reproducing the operative contract terms, emphasizes that in that contract NetSuite “expressly disclaim[ed] any reliance” on prior representations.<sup>29</sup> This raises a more nuanced problem. The reliance disclaimers may defeat one or more of the fraud claims, or they may not. There are limits, under California law, on the ability to contractually insulate oneself from liability for one’s own fraud — including, specifically, by using reliance disclaimers. *Compare, e.g., Manderville v. PCG & S Grp., Inc.*, 146 Cal. App. 4th 1486, 1489, 1499-1502 (2007) (reversing summary judgment for defendant; “[E]xculpatory clauses [which included a reliance disclaimer] do not preclude, as a matter of law, the [plaintiffs’] . . . justifiable reliance, and thus . . . do not bar the . . . claim for intentional

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<sup>26</sup> FAC – ECF No. 9 at 34-35 (¶¶ 186, 189).  
<sup>27</sup> *See id.* at 36-38 (¶¶ 202, 215-16, 218).  
<sup>28</sup> Motion — ECF No. 25 at 19.  
<sup>29</sup> *See id.* at 7-8.

1 misrepresentation . . . .”) with *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 303-04  
 2 (2005) (affirming summary judgment against fraudulent-inducement claim; plaintiff could not  
 3 justifiably rely on pre-contract representations in face of reliance disclaimer) (“[A] *per se* rule that  
 4 an integration . . . clause establishes, as a matter of law, that a party claiming fraud did not  
 5 reasonably rely on representations not contained in the contract is inconsistent with California law.  
 6 . . . However, . . . this . . . does not mean [that] the contract provision [*i.e.*, the reliance disclaimer]  
 7 is in every case irrelevant.”). The question may also be more appropriately raised under Rules 50  
 8 or 56. *See id.* at 297-303 (discussing effect of reliance disclaimer on fraudulent-inducement  
 9 theory).

10 The parties have not explored this issue, but it jumped out from the contract, and from  
 11 NetSuite’s insistence on the effect of the integration terms. Definitively resolving this point may  
 12 require fuller factual development, and certainly will need the parties’ fuller analyses. As matters  
 13 stand, on this Rule 12(b)(6) motion, the court holds that Grouse River has sufficiently alleged  
 14 justifiable reliance.

15 The court finds inapposite three cases that NetSuite cites in this area: *Rosenthal v. Great W.*  
 16 *Fin. Secs. Corp.*, 14 Cal. 4th 394 (1996); *Sterling Sav. Bank v. Poulsen*, 2013 WL 3945989 (N.D.  
 17 Cal. July 29, 2013); and *Crane v. Wells Fargo*, 2014 WL 1285177 (N.D. Cal. Mar. 24, 2014). None  
 18 of these cases speaks usefully to the present reliance issue. The decisions in *Rosenthal* and  
 19 *Poulsen* ask whether a plaintiff can justifiably rely on representations outside the contract when he  
 20 has not read the contract. *See Rosenthal*, 14 Cal. 4th at 419-23; *Poulsen*, 2013 WL 3945989 at \*5,  
 21 \*10-13. (Though, strictly speaking, *Poulsen* is discussing not fraud but contract formation; it asks  
 22 whether failing to read a contract precludes mutual assent. *Poulsen*, 2013 WL 3945989 at \*10-13.)  
 23 This case presents no similar fact: NetSuite itself suggests that Grouse River *did* read the subject  
 24 contracts: “[Grouse River’s] CEO concedes [that] he read and understood” the contracts.<sup>30</sup> Nor  
 25 does anything in the loan-modification case of *Crane* suggest that Grouse River’s reliance  
 26 allegations are deficient. *See Crane*, 2014 WL 1285177 at \*5-6. These cases discuss reliance, but  
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28 <sup>30</sup> *See Reply* — ECF No. 31 at 8-9.

1 they are factually and legally different from this case, and offer nothing that is particularly helpful  
2 in addressing the situation or Rule 12(b)(6) question that is before this court. Grouse River has  
3 sufficiently pleaded justifiable reliance.

4 **5. The Fraud Claims Are Not Pleaded With Sufficient Particularity**

5 NetSuite argues that Grouse River has not pleaded its three fraud claims with the particularity  
6 that Rule 9(b) requires.<sup>31</sup> While acknowledging the fullness of Grouse River’s 41-page, 244-  
7 paragraph complaint, NetSuite contends that the plaintiff has nonetheless mostly failed to specify  
8 the “who, what, when, where, and how” of the alleged misrepresentations and has similarly failed  
9 to say, with particularity, how those representations proved to be false.

10 The court agrees. The court recognizes that Grouse River has put in a large effort to state in  
11 detail the parties’ experience in trying to bring off this project. Though long in detail, the  
12 complaint nonetheless fails to describe with useful specificity the required aspects of the alleged  
13 representations, and does not ultimately give NetSuite fair notice of how it supposed to have  
14 defrauded Grouse River, specifically, so that the defendant can usefully prepare a defense to these  
15 claims. *See Lui*, 2016 WL1212113 at \*1 (9th Cir. Mar. 29, 2016) (notice); *Odom*, 486 F.3d at 553  
16 (Rule 9(b) requires particularity “so that the defendant can prepare an adequate answer”).

17 The complaint is prolix, and the court does not undertake an article-length dissection of the  
18 pleading to show the failure to plead fraud particularly. Three examples show the problem and are  
19 Rule 9(b) failings in their own right.

20 First, paragraphs 11 to 27 of the complaint lay out a small host of “NetSuite’s representations  
21 to Grouse River.”<sup>32</sup> Paragraph 28 then states: “[M]ost if not all of these representations were and  
22 are false and fraudulent.”<sup>33</sup> This key allegation does not specify which of the preceding  
23 representations were false; and nothing in the complaint returns to do so (as paragraph 28 suggests  
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26 \_\_\_\_\_  
27 <sup>31</sup> Motion —ECF No. 25 at 13-15; Reply — ECF No. 31 at 3-6.

28 <sup>32</sup> FAC —ECF No. 9 (¶¶ 11-27).

<sup>33</sup> *Id.* at 7 (¶ 28) (emphasis added).

1 that it might). To wave at “most if not all of” a raft of statements is almost the exact opposite of  
2 what Rule 9(b) demands.

3 Second, Grouse River points to “NetSuite’s promises that its platform was ‘world-class’ and  
4 ‘[enabling] companies of all sizes to deliver . . . rich, touch-point agnostic experience to their  
5 customers,”<sup>34</sup> and it then identifies the many deficiencies in Grouse River’s NetSuite system and  
6 the GrouseRiver.com website that show NetSuite’s failure to deliver on its promises.<sup>35</sup> But it does  
7 not point to any misrepresentations and identifies only examples of how the product does not  
8 work.

9 Third, the fraudulent-misrepresentation claim first “incorporates” into itself the preceding 184  
10 paragraphs of the complaint.<sup>36</sup> It then alleges: “NetSuite . . . represented . . . that [it] had the  
11 capability to design, implement and deliver a fully integrated . . . software solution with the  
12 specific capability and functionality to meet Grouse River’s defined needs and to do so within four  
13 months of the start of the project. . . . At the time [that] . . . NetSuite made these representations,  
14 they knew they were false.”<sup>37</sup> Nowhere does the fraudulent-misrepresentation claim either lay out  
15 the specific representations on which it is based, or cite these by paragraph number back to the  
16 preceding segments of the complaint. The court went through each allegation in the complaint.  
17 The fact allegations are about deficiencies in the product. The global representation that can be  
18 discerned is only “the product did not work as promised.”<sup>38</sup> This is not pleading fraud with  
19 particularity.

20 An aspect of Rule 8 is instructive here. Rule 8, the basic notice-pleading rule, demands that  
21 every claim for relief be embodied in “a short and plain statement.” Fed. R. Civ. P. 8(a)(2). The  
22 same rule requires that, “Each allegation must be simple, concise, and direct.” Fed. R. Civ. P. 8(d).  
23 It is possible to violate Rule 8, not only by saying too little — by insufficiently alleging one’s  
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25 <sup>34</sup> *Id.* at 12 (¶ 129) (alteration in FAC).

26 <sup>35</sup> *Id.* at 12-27 (¶¶ 129-52).

27 <sup>36</sup> *Id.* at 34 (¶ 185).

27 <sup>37</sup> *Id.* at 34 (¶¶ 185-86).

28 <sup>38</sup> *See, e.g.*, FAC — ECF No. 9 at 23-27 (¶¶ 129-52).

1 claim, which is surely the more common defect — but also by saying too much. *See, e.g., Pickard*  
 2 *v. WMC Mortgage Corp.*, 2009 WL 3416134, \*3 (E.D. Cal. Oct. 21, 2009) (quoting *McHenry v.*  
 3 *Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996)) (“Something labeled a complaint but written more  
 4 as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to  
 5 whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a  
 6 complaint.”). In a similar way, under Rule 9(b), it is possible to recount so much “evidentiary  
 7 detail,” and to arrange it in such a way, that you *fail* to describe with particularity the specific  
 8 misrepresentations you are suing over. This is not too surprising a possibility when we recall,  
 9 again, that the purpose of Rule 9(b) is to promote rather than defeat the clear statement of fraud  
 10 claims. An avalanche of detail, though “particular” in a sense, can nevertheless overwhelm clarity  
 11 and so fail to be “particular” in the way that Rule 9(b) contemplates.

12 The court dismisses the fraud claims with leave to amend. The plaintiff is free to allege as  
 13 many actionable representations as it think exists. But, for each one alleged, the plaintiff must  
 14 simply and clearly state the ““who, what, when, where, and how” of the misconduct charged in the  
 15 manner contemplated by Rule 9(b).

16 **6. Punitive Damages**

17 A request for punitive damages is not a claim in its own right, as NetSuite correctly writes, but  
 18 is instead a request for relief. *See Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365,  
 19 379 n. 3 (1975) (in partial concurrence). Grouse River acknowledges this and responds that it is  
 20 willing to convert its punitive-damages request from a claim into a demand for relief.<sup>39</sup> The court  
 21 thus deems Count Seven converted from a standalone claim into a request for punitive damages.  
 22 But Grouse River’s request for punitive damages is predicated on fraud under California Civil  
 23 Code § 3294 and so falls with the court’s dismissal of the fraud claims.<sup>40</sup>

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<sup>39</sup> Opposition — ECF No. 29 at 10.

28 <sup>40</sup> FAC — ECF No. 9 at 41 (¶¶ 242, 244).

1 **7. Economic Loss Rule & Negligent Misrepresentation**

2 NetSuite argues that the “economic loss rule” bars Grouse River’s negligent-misrepresentation  
 3 claim.<sup>41</sup> It does not. The economic-loss rule bars tort claims for losses arising out of a contract,  
 4 where a failed product has caused only economic loss, but has not injured anyone or damaged  
 5 other property. As the Supreme Court of California has stated it: “The economic loss rule requires  
 6 a purchaser to recover in contract for purely economic loss due to disappointed expectations,  
 7 unless he can demonstrate harm above and beyond a broken contractual promise.” *Robinson*  
 8 *Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) (quoted in *Frye v. Wine Library, Inc.*,  
 9 2006 WL 3500605, \*2 (N.D. Cal. Dec. 4, 2006)). Economic loss consists of “damages for  
 10 inadequate value, costs of repair and replacement of the defective product or consequent loss of  
 11 profits — without any claim of personal injury or damages to other property.” *Robinson*  
 12 *Helicopter*, 34 Cal. 4th at 988 (quoting *Jimenez v. Superior Court*, 29 Cal. 4th 473, 482 2002)).

13 Excepted from this rule are (among other things) claims that a “contract was fraudulently  
 14 induced.” *Robinson Helicopter*, 34 Cal. 4th at 989-90; *Frye*, 2006 WL 3500605 at \*2 (citing  
 15 *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999)); see *Las Palmas Assocs. v. Las Palmas Ctr.*  
 16 *Assocs.*, 235 Cal. App. 3d 1220, 1238-39 (1991); *Krzyzanowski v. Orkin Exterminating Co.*, 2009  
 17 WL 481267, \*11-12 (N.D. Cal. Feb. 24, 2009). This includes inducement claims stated in  
 18 negligent misrepresentation. See *Frye*, 2006 WL 3500605 at \*3 (“As Plaintiff’s negligent  
 19 misrepresentation claim can be characterized as relating to Defendant’s inducement of Plaintiff to  
 20 contract, there is also no question of it being barred by the economic loss rule.”) (citing *Robinson*  
 21 *Helicopter*, 34 Cal. 4th at 989).

22 All three of Grouse River’s fraud claims allege that NetSuite’s misrepresentations induced it to  
 23 enter the subject contracts.<sup>42</sup> (NetSuite recognizes this, writing, “[T]he allegations Plaintiff seeks  
 24 to advance are related to ‘Defendant’s inducement of Plaintiff to enter the contract.’”<sup>43</sup>) The court  
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 27 <sup>41</sup> Motion — ECF No. 25 at 15; Reply — ECF No. 31 at 6.

28 <sup>42</sup> FAC — ECF No. 9 at 34-38 (¶¶ 188, 201, 213, 218-19).

<sup>43</sup> Reply — ECF No. 31 at 6.

1 has already decided, moreover, in the context of the parol-evidence rule, that Grouse River’s fraud  
2 claims are critically “independent of” the contract claim; they assert something “above and  
3 beyond” just a failure to keep promises; they do not merely recast a claimed breach of contract as  
4 fraud. The economic-loss rule thus does not bar Grouse River’s negligent-misrepresentation claim.  
5 *See Robinson Helicopter*, 34 Cal. 4th at 988-89 (“independent”; “above and beyond”).<sup>44</sup>

6 **8. Breach of Contract**

7 NetSuite next argues that Grouse River has not adequately pleaded its breach-of-contract  
8 claim. Specifically, NetSuite argues that Grouse River has not alleged its own performance under  
9 the contract, and has not sufficiently identified the contract terms that NetSuite supposedly  
10 breached.<sup>45</sup> The court thinks that Grouse River has done enough in this respect to satisfy Rules 8  
11 and 12(b)(6).

12 “A cause of action for breach of contract requires pleading of a contract, plaintiff’s  
13 performance or excuse for failure to perform, defendant’s breach and damage to plaintiff resulting  
14 therefrom.” *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006). “A written contract  
15 may be pleaded either by its terms — set out verbatim in the complaint or a copy of the contract  
16 attached to the complaint and incorporated therein by reference — or by its legal effect.” *Haskins*  
17 *v. Symantec Corp.*, 2013 WL 6234610, \*10 (N.D. Cal. Dec. 2, 2013). “[T]o plead a contract by its  
18 legal effect, plaintiff must allege the substance of its relevant terms.” *Id.* (quotation omitted). A  
19 plaintiff need not plead the contract terms with unusual specificity. Allegations that meet the  
20 notice-pleading standards of Rule 8 will suffice. *See, e.g., James River Ins. Co. v. DCMI, Inc.*,  
21 2012 WL 2873763, \*3 (N.D. Cal. July 12, 2012). Put differently, “it is unnecessary for a plaintiff  
22 to allege the terms of the alleged contract with precision,” but “the Court must be able generally to  
23

24 <sup>44</sup> To support its argument that the economic-loss rule bars the negligent-misrepresentation claim,  
25 NetSuite cites *Tasion Commc ’ns, Inc. v. Ubiquiti Networks, Inc.*, 2013 WL 5430470 (N.D. Cal.  
26 Aug. 26, 2013). (Motion — ECF No. 25 at 15; Reply — ECF No. 31 at 6.) In that case, however,  
27 “the complaint [did] not adequately allege fraud in the inducement.” *Tasion Communications*,  
28 2013 WL 4530470 at \*11 n. 6. The Ninth Circuit’s unpublished decision in *Astrium S.A.S. v. TRW,*  
*Inc.*, 197 F. App’x 575 (9th Cir. 2006) — which NetSuite cites (ECF No. 31 at 6) — is “not  
precedent” and cannot be cited to or by this court. *See* Fed. R. App. P. 32.1(a); 9th Cir. R. 36-3(a),  
(c) (“not precedent”).

<sup>45</sup> Motion — ECF No. 25 at 20.

1 discern at least what material obligation of the contract the defendant allegedly breached.” *Langan*  
2 *v. United Servs. Auto. Ass’n*, 2014 WL 4744790, \*7 (N.D. Cal. Sept. 23, 2014); *see Sierra View*  
3 *Local Health Care Dist. v. Influence Health, Inc.*, 2016 WL 2346799, \*5 (E.D. Cal. May 4, 2016)  
4 (holding that fairly rudimentary contract allegations satisfied Rule 8); *Kentwool*, 2015 WL 693552  
5 at \*7-8 (rejecting NetSuite’s similar argument).

6 The plaintiff has done enough to meet this demand. The operative complaint alleges that  
7 NetSuite “promised to meet” a number of Grouse River’s “core objectives for the new system.”<sup>46</sup>  
8 For example, according to the complaint, NetSuite promised:

- 9 • “To deliver an updated website . . . that improved search, speed, and presentation of  
10 the company’s [inventory] . . . . This included . . . a ‘responsive’ mobile website . . .  
11 .”<sup>47</sup>
- 12 • “To deliver an integrated point-of-sale system that interacted with the company’s  
13 inventory in real-time and provided the ability to fulfill in-store pickup, handle  
14 serialized items, integrate promotions, and provide full-visibility of customer  
15 purchase history at the retail level.”<sup>48</sup>
- 16 • “To improve the efficiency of the company’s inventory functions by tracking core  
17 inventory on a serialized item basis, enhance the accuracy of receiving and  
18 shipping functions, and allow for the segregation of inventory into multiple stores  
and warehouses providing a unified overview of inventory for purchasing and  
business management decisions.”<sup>49</sup>
- 19 • “[To] [p]rovide integration of all core data into a single system so that a ‘single view  
20 of the truth’ existed for customer records, sales, accounting and any related  
21 transactions.”<sup>50</sup>

22 But, Grouse River alleges, NetSuite “failed to deliver the functional software it promised.”<sup>51</sup>  
23 More exactly, the plaintiff alleges, “NetSuite did not deliver a functional system by the Fall of  
24 2014 as it committed to do, and did not provide a system for production use until March 2015,  
25 nearly a full year after the initial contract.”<sup>52</sup> Furthermore, “NetSuite did not perform the system  
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27 <sup>46</sup> FAC – ECF No. 9 at 8 (¶¶ 31-32).

28 <sup>47</sup> *Id.* at 8 (¶ 33).

<sup>48</sup> *Id.* at 8 (¶ 34).

<sup>49</sup> *Id.* at 8 (¶ 36).

<sup>50</sup> *Id.* at 9 (¶ 40).

<sup>51</sup> *Id.* at 22 (¶ 117).

<sup>52</sup> *Id.* at 22 (¶ 120).

1 refinement services it contractually promised it would deliver . . . .”<sup>53</sup> A further example:  
2 “Contrary to its promises, NetSuite did not provision the GrouseRiver.com website to offer sub-  
3 second page load times, instead taking on average more than five seconds to load content and  
4 checkout pages.”<sup>54</sup> And, most broadly, “None of NetSuite’s promised functions has worked  
5 properly in the software solution NetSuite designed.”<sup>55</sup>

6 Grouse River alleges that it paid NetSuite.<sup>56</sup> And it alleges that it was damaged by NetSuite’s  
7 failure to meet its contractual commitments.<sup>57</sup> (NetSuite does not appear to contest that Grouse  
8 River has pleaded damage from the alleged contractual breach.) All this taken together sufficiently  
9 pleads breach of contract. Requiring more than this would be to demand of contract allegations a  
10 specificity like that imposed on fraud claims by Rule 9(b).

11 NetSuite points to *Haskins, supra*, as a case in which the court dismissed a contract claim that  
12 did “not clearly allege the substance of the relevant [contract] terms,” and so did not put the  
13 defendant “reasonably on notice of the claims against it.”<sup>58</sup> *See Haskins*, 2013 WL 6234610 at  
14 \*10.

15 This case does not present the same situation as *Haskins*. The plaintiff there tried to “cobble  
16 together the terms of an implied contract” from the defendant’s “advertising campaign,” language  
17 from the defendant’s website describing its corporate “goals,” and “even [from] the name of the  
18 [challenged] product itself.” *Id.* The *Haskins* defendant submitted the license agreement that  
19 accompanied the product, but the plaintiff did “not point to any terms” of that agreement that the  
20 defendant had supposedly breached. *Id.* It was not even clear to the court that a contract could in  
21 principle be built from this hodgepodge. *See id.* “Putting aside” that more conceptual question,  
22 though, the plaintiff had still “fail[ed] to paint a clear picture of the alleged contract’s terms.” *Id.*

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24 \_\_\_\_\_  
<sup>53</sup> *Id.* at 23 (¶ 122).

25 <sup>54</sup> *Id.* at 23 (¶ 125).

26 <sup>55</sup> *Id.* at 39 (¶ 228).

27 <sup>56</sup> *See id.* at 21-22 (¶¶ 113, 120).

28 <sup>57</sup> *Id.* at 29-30, 39-40 (¶¶ 158-60, 163-65, 240-42).

<sup>58</sup> Motion — ECF No. 25 at 20.

1 This case is different. There is no dispute here over the express contracts in question or their  
 2 terms. The plaintiff has identified the “substance of [the] relevant terms,” and the “material  
 3 obligation[s]” that it believes were breached. *See id.* (“substance”); *Langan*, 2014 WL 4744790 at  
 4 \*7 (“material obligation”). These have to do with the timeliness of the NetSuite software  
 5 installation and (at least) its chief capabilities. For purposes of Rules 8 and 12(b)(6), the complaint  
 6 gives the defendant reasonable notice of the nature of the contract claim against it.

7 Grouse River could have done more, in responding to NetSuite’s motion, to show how specific  
 8 items in its complaint indeed suffice to establish the elements of its *prima facie* contract claim.  
 9 The plaintiff offers a block quote to *Kentwool*, cites two paragraphs from the complaint to show  
 10 that it paid NetSuite, and then waves a “*passim*” cite toward the whole 41-page, 244-paragraph  
 11 complaint, which it says “alleg[es] how NetSuite breached the contract.”<sup>59</sup> That is not  
 12 tremendously helpful. The complaint is sprawling. The several contracts, too, are complicated.<sup>60</sup>  
 13 Reading the whole complaint in the light most favorable to Grouse River, and under the contract  
 14 law set out above, Grouse River has done enough to get by Rules 8 and 12(b)(6). Needless to say,  
 15 however, the contract claim cannot ultimately succeed on alleged “representations” or “promises”  
 16 that did not get reduced to contract terms. Though it does not warrant dismissal under Rule  
 17 12(b)(6), NetSuite is accurate in saying that the complaint does not precisely name the contract  
 18 terms that were allegedly breached. That specificity will at some point be necessary. The contract  
 19 claim cannot remain forever untethered to the actual terms of the parties’ agreements. For present  
 20 purposes, though, under Rules 8 and 12(b)(6), Grouse River has adequately pleaded breach of  
 21 contract.

22 **9. California Penal Code § 496**

23 Grouse River’s final claim is for treble damages under California Penal Code § 496. Or, more  
 24 exactly, under § 496(a) and (c). This claim fails as a matter of law and will be dismissed with  
 25 prejudice.

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 27 \_\_\_\_\_  
 28 <sup>59</sup> Opposition — ECF No. 29 at 8.

<sup>60</sup> *See* ECF No. 251 at 5-65.

1 Section 496 outlaws the receiving of stolen property and provides for triple damages to anyone  
2 injured by a statutory violation. *See* Cal. Penal Code § 496(a)-(c).<sup>61</sup> The statute (in part) provides:

3 (a) Every person who buys or receives any property that has been stolen or that has  
4 been obtained in any manner constituting theft or extortion, knowing the property  
5 to be so stolen or obtained, . . . shall be punished by imprisonment in a county jail  
6 for not more than one year, or imprisonment pursuant to subdivision (h) of Section  
7 1170.

8 . . . .  
9 (c) Any person who has been injured by a violation of subdivision (a) or (b) may  
10 bring an action for three times the amount of actual damages, if any, sustained by  
11 the plaintiff, costs of suit, and reasonable attorney’s fees.

12 § 496(a), (c).

13 Grouse River begins by noticing that § 496(a) outlaws receiving property that has been  
14 “stolen” or obtained “in any manner constituting theft.”<sup>62</sup> The crime of theft by false pretense  
15 under § 484(a), Grouse River then notes, includes “defraud[ing] any other person of money” by  
16 “any false or fraudulent representation or pretense.”<sup>63</sup> The elements of theft by false pretense  
17 under § 484(a), and those of civil fraud, are in fact “substantially similar.”<sup>64</sup> Thus, in Grouse  
18 River’s view, by civilly defrauding Grouse River, NetSuite committed theft by false pretense,  
19 thereby receiving stolen property within the meaning of § 496(a), and can thus be liable under  
20 § 496(c) for triple damages.<sup>65</sup>

21 This claim fails. Four points can be made here.

22 First, as with the other fraud claims, Grouse River did not identify false representations or  
23 plead fraud with particularity.

24 Second, the property in question (Grouse River’s money) was not “stolen” when NetSuite  
25 allegedly defrauded Grouse River of it. Section 496(a) aims at the receipt of stolen goods: “The  
26 Legislature’s goal in enacting Section 496 was to ‘eliminat[e] markets for stolen property.’”

27 \_\_\_\_\_  
28 <sup>61</sup> Statutory citations in this Part 9 are to the California Penal Code.

<sup>62</sup> Opposition — ECF No. 29 at 8-9.

<sup>63</sup> *Id.* at 9 (quoting § 484(a)).

<sup>64</sup> *Id.* (quoting *Worldwide Travel, Inc. v. Travelmate US, Inc.*, 2016 WL 1241026, \*8 (S.D. Cal. Mar. 30, 2016)).

<sup>65</sup> *See id.* at \*9-10.

1 *Worldwide Travel*, 2016 WL 1241026 at \*6 (quoting *Citizens of Humanity, LLC v. Costco*  
 2 *Wholesale Corp.*, 171 Cal. App. 4th 1, 18 (2009)). Which is to say, when the property in question  
 3 comes into the defendant’s hands, *it must already have the character of having been stolen*. See  
 4 *Worldwide Travel*, 2016 WL 1241026 at \*6 (“Proving a Section 496 violation generally requires  
 5 establishing that (a) *the property was stolen*, and (b) the defendant was in possession of it, (c)  
 6 *knowing it was stolen*.”) (emphases added). The first sentence of § 496 thus refers to “property that  
 7 *has been stolen* or that *has been obtained* in any manner constituting theft.” § 496(a) (emphases  
 8 added).

9 The problem is thus plain enough. The property in question is Grouse River’s money. NetSuite  
 10 allegedly defrauded Grouse River of that money. By extension, maybe it can be said that NetSuite  
 11 committed theft by false pretense. But it cannot be said that NetSuite thereby received stolen  
 12 goods in violation of § 496(a).

13 This raises and overlaps with the more complicated third point. We may call this the question  
 14 of dual liability. Can a person be guilty both of stealing property and, by that same act of theft, of  
 15 receiving (from himself) the now stolen goods? In language that was added to the statute in 1992,  
 16 § 496(a) provides an answer: “A principal in the actual theft of the property may be convicted  
 17 pursuant to this section. However, *no person may be convicted both pursuant to this section and of*  
 18 *the theft of the same property*.” § 496(a) (emphasis added). The second sentence here reflects the  
 19 longstanding and “fundamental” common-law “principle” (which California has observed) “that  
 20 one may not be convicted of stealing and of receiving the same property.” *People v. Allen*, 21 Cal.  
 21 4th 846, 851 (1999) (quoting *People v. Jaramillo*, 16 Cal. 3d 752, 757 (1976)). The Supreme  
 22 Court of California has given this dual-liability bar a “narrow” scope. See *Allen*, 21 Cal. 4th at  
 23 853, 857. According to the state’s high court:

24 The [second] sentence [quoted above] thus prohibits, as the “narrow” common law  
 25 rule also prohibited, dual *convictions* of any person of both an offense “pursuant to  
 26 this section [§ 496]” — viz., buying, receiving, concealing, withholding, or selling  
 stolen property — and the offense of stealing the same property.

27 The first sentence . . . authorizes a conviction for receiving stolen property *even*  
 28 *though the defendant also stole the property*, provided he has not actually been  
 convicted of the theft. After the 1992 amendment, “the fact that the defendant stole

1 the property no longer bars a conviction for receiving, concealing or withholding  
2 the same property.” [*People v. Strong*, 30 Cal. App. 4th 366, 373 (1994).]

3 *Allen*, 21 Cal. 4th at 857 (emphases in original). The bar, then, is against dual criminal *convictions*.  
4 *See id.* at 851-57.

5 In the civil context (and in the criminal) one can plead theories of liability in the alternative.  
6 But here, the facts alleged are fraud in the taking of money and cannot amount to receipt of stolen  
7 property. As more than one California court has observed: “If this principle [*i.e.*, the § 496(a) dual-  
8 liability bar] were applied to the defendant’s civil liability under section 496(c), . . . the defendant  
9 ‘would not be liable for damages under the . . . fraud causes of action *and* treble damages under  
10 [Section 496].” *Worldwide Travel*, 2016 WL 1241026 at \*7 (quoting *Bell v. Feibush*, 212 Cal.  
11 App. 4th 1041, 1049 (2013) (citing in turn *Allen*, 21 Cal. 4th at 857-61)) (emphasis in *Worldwide*  
12 *Travel*).

13 On the other hand, as Grouse River points out, in *Worldwide Travel* the federal district court  
14 allowed a § 496(c) claim premised solely on civil fraud. *See* (ECF No. 29 at 9-10) (citing  
15 *Worldwide Travel*, 2016 WL 1241026 at \*8).<sup>66</sup> The *Worldwide Travel* court thus approved what we  
16 have been calling dual (civil) liability. *See Worldwide Travel*, 2016 WL 1241026 at \*6-8. The  
17 *Worldwide Travel* court relied in crucial part on *Bell, supra*. *See Worldwide Travel*, 2016 WL  
18 1241026 at \*7-8. But, in *Bell*, the defendant had engaged in additional conduct beyond the  
19 underlying theft. *See Bell*, 212 Cal. App. 4th at 1049. The apparently decisive ground for  
20 permitting a § 496(c) claim in *Bell* was that the defendant “had violated section 496(a) not only by  
21 receiving property from Bell by false pretense, but also by withholding that property when she  
22 asked for it back.” *Id.* That small additional conduct was enough, in *Bell’s* view, to avoid  
23 § 496(a)’s dual-liability bar. *See id.* For purposes of this case, it is enough to notice that there is no  
24 similar “extra conduct” here. Grouse River does not allege that it asked for its property back but  
25 that NetSuite refused. Grouse River alleges only that NetSuite is guilty of the primary, underlying  
26 fraud. The plain language of § 496(a) prevents Grouse River from leveraging that alleged fraud

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27 <sup>66</sup> The plaintiff “quotes” a sentence from *Worldwide Travel* that does not appear in that opinion. *See*  
28 *Opposition* — ECF No. 29 at 10 (“For the same reasons . . . under that section.”) The sentence is not  
critical to the analysis, and the court is confident that the mistake is inadvertent.

1 into a damages-trebling § 496(a) violation. *See Worldwide Travel*, 2016 WL 1241026 at \*7 (citing  
2 *Allen*, 21 Cal. 4th at 857-61).

3 The fourth point to be made here is dispositive of Grouse River’s treble-damages claim. The  
4 fourth point is that Grouse River has failed to allege an essential element of a § 496 violation. One  
5 element of a § 496(a) violation is the defendant’s knowledge that the goods were stolen. (ECF No.  
6 31 at 9 n. 7); *see Worldwide Travel*, 2016 WL 1241026 at \*6 (citing cases). But Grouse River has  
7 not alleged that NetSuite knew that the property in question was stolen.<sup>67</sup> Given that the property  
8 is Grouse River’s money, moreover, Grouse River *could not* make that allegation. (This also  
9 marks out a substantive difference between this case and *Worldwide Travel*. In the latter case, the  
10 plaintiff did allege that the defendant knew that the property was stolen. *Worldwide Travel*, 2016  
11 WL 1241026 at \*8.) For this specific reason, too, the § 496(c) claim fails.

12 Because the funds of which NetSuite allegedly defrauded Grouse River were not stolen  
13 property and because Grouse River cannot allege that NetSuite knew that the property was stolen,  
14 the § 496(c) claim fails as a matter of law and will be dismissed with prejudice.

15  
16 **CONCLUSION**

17 The court dismisses the claim under California Penal Code § 496 with prejudice, dismisses the  
18 fraud claims with leave to amend (and the UCL claim to the extent that it is predicated on fraud),  
19 and otherwise denies the motion to dismiss. The plaintiff must file and amended complaint within  
20 three weeks from the date of this order.

21 This disposes of ECF No. 25.

22 **IT IS SO ORDERED.**

23 Dated: October 12, 2016



24 \_\_\_\_\_  
25 LAUREL BEELER  
26 United States Magistrate Judge

27  
28 <sup>67</sup> *See* FAC — ECF No. 9 at 40-41 (¶¶ 234-40).