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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 JOE TSAI,

8 Plaintiff,

9 v.

10 WESLEY WEILI WANG,

11 Defendant.

Case No. [17-cv-00614-DMR](#)

**ORDER ON DEFENDANT'S MOTION
TO DISMISS**

Re: Dkt. No. 20

12 Defendant Wesley Weili Wang moves pursuant to Federal Rule of Civil Procedure
13 12(b)(6) to dismiss Plaintiff Joe Tsai's complaint. [Docket No. 20.] This matter is suitable for
14 resolution without oral argument pursuant to Civil Local Rule 7-1(b). For the following reasons,
15 Defendant's motion is granted in part and denied in part.

16 **I. BACKGROUND**

17 Plaintiff makes the following allegations in his complaint, all of which are taken as true
18 solely for purposes of Defendant's motion to dismiss.¹ Plaintiff is a reseller of fine wines, and
19 alleges upon information and belief that Defendant is "in the business of purchasing, selling, and
20 holding fine wines." Compl. ¶¶ 6, 7. Plaintiff alleges that on April 4, 2011, he and Defendant
21 "entered into an oral agreement wherein Defendant agreed to purchase wines on behalf of Plaintiff
22 and as Plaintiff's agent," and Defendant "agreed to deliver wines to Plaintiff as they were
23 purchased." Id. at ¶ 8. Between April 2011 and April 2012, Plaintiff paid a total of \$3,556,384 to
24 Defendant for the purchase of wines, and "Defendant accepted Plaintiff's payments and orders of
25 wines and agreed to purchase wines on behalf of Plaintiff and as Plaintiff's agent." Id. at ¶ 11.

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27 ¹ When reviewing a motion to dismiss for failure to state a claim, the court must "accept as true
28 all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94
(2007) (per curiam) (citation omitted).

1 However, Defendant only delivered and shipped wines totaling \$2,436,862.58 in purchase price,
2 and “failed to deliver the remainder of wines from numerous sales orders or return Plaintiff’s
3 money, the valued [sic] of which is at least \$1,110,737.42.” Id. at ¶ 12. Plaintiff alleges on
4 information and belief that Defendant used Plaintiff’s money to buy wine but kept it for himself.
5 Id.

6 Plaintiff made numerous demands for the delivery of the remainder of the wines purchased
7 with his money and/or a return of his money. Specifically, Plaintiff spoke with Defendant by
8 telephone in late January 2015, and Defendant told Plaintiff “to follow up with him in three
9 months.” Id. at ¶ 14. In April 2015, Plaintiff sent a representative to meet with Defendant.
10 Plaintiff alleges that during this meeting, Defendant said that the wines he purchased on behalf of
11 Plaintiff were “in proper storage” and promised to “a) deliver the wines and b) return Plaintiff’s
12 money for any unpurchased wines or purchased but undeliverable wines by the end of 2015.” Id.
13 at ¶ 15. Plaintiff alleges upon information and belief that “Defendant made that promise knowing
14 it to be false an[d] intending to deceive Plaintiff and to induce Plaintiff to continue to rely on
15 Defendant to honor their agreement.” Id. At an in-person meeting in September 2015, Defendant
16 admitted that he owed Plaintiff money, and informed Plaintiff that he had sold some of the wines
17 he had purchased on Plaintiff’s behalf but had used the proceeds, as well as other funds from
18 Plaintiff, to pay for his defense in a criminal matter. Id. at ¶ 16. Plaintiff alleges that he “has done
19 everything he was obligated to do, but, to date, Defendant has failed to deliver the wine or issue a
20 refund.” Plaintiff asserts that Defendant owes him at least \$1,110,737.42. Id. at ¶ 18.

21 Plaintiff further alleges that Defendant has delivered counterfeit wines. Plaintiff alleges on
22 information and belief that “Defendant delivered the counterfeit wine intending to deceive
23 Plaintiff into believing that he had purchased rare and valuable wine, when the bottles in fact
24 contained a cheap substitute.” Id. at ¶ 13. In particular, Defendant sent Plaintiff four bottles of
25 wines that were “falsely labeled 1990 Henry Jayer Vosne-Romanee 1st Cru Cros Parantoux.” Id.
26 Plaintiff paid Defendant a total of \$26,600 for fake wine. Id.

27 Plaintiff filed suit against Defendant on February 7, 2017 asserting sixteen claims related
28 to the parties’ alleged oral agreement. Defendant now moves to dismiss all of Plaintiff’s claims.

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II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all of the factual allegations contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss a claim “only where there is no cognizable legal theory” or there is an absence of “sufficient factual matter to state a facially plausible claim to relief.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)) (quotation marks omitted). A claim has facial plausibility when a plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

III. DISCUSSION

A. Fraud

Plaintiff’s first claim is “actual fraud.” Plaintiff alleges that Defendant delivered wines to Plaintiff on September 22, 2015. That delivery included at least four bottles labeled 1990 Henri Jayer Vosne-Romanee 1st Cru Cros Parantoux (the “Jayer wines”) that were fake. Compl. ¶ 20. Plaintiff alleges that Defendant misrepresented to Plaintiff that the wines were authentic and/or concealed from Plaintiff the fact that the wines were fake, and that Defendant knew that the wines were fake. *Id.* at ¶¶ 21, 23. Plaintiff also claims that he reasonably relied on Defendant’s misrepresentation and brought the wines to Acker Merrall & Condit Company (“Acker”) for resale at auction. On August 17, 2016, Acker informed Plaintiff that the four bottles of Jayer wine “were problematic.” *Id.* at ¶ 26.

1 To state a claim for fraud, Plaintiff must allege “(1) misrepresentation (false representation,
2 concealment, or nondisclosure); (2) knowledge of falsity (or ‘scienter’); (3) intent to defraud, i.e.,
3 to induce reliance; (4) justifiable reliance; and (5) resulting damage.” *Kearns v. Ford Motor Co.*,
4 567 F.3d 1120, 1126 (9th Cir. 2009) (quotation omitted). “Each element in a cause of action for
5 fraud . . . must be factually and specifically alleged.” *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App.
6 4th 513, 519 (2004). Allegations of fraud must be stated with “specificity including an account of
7 the ‘time, place, and specific content of the false representations as well as the identities of the
8 parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
9 (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)); see also *Vess v.*
10 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud must include
11 “the who, what, when, where, and how” of the misconduct charged). Vague or conclusory
12 allegations are insufficient to satisfy Rule 9(b)’s particularity requirement. *Moore v. Kayport*
13 *Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). “A party alleging fraud must ‘set forth
14 more than the neutral facts necessary to identify the transaction.” *Kearns*, 567 F.3d at 1124
15 (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

16 Plaintiff does not adequately plead the alleged misrepresentations. Rule 9(b) requires that
17 a party “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P.
18 9(b). Plaintiff’s conclusory allegations fail to convey the “time, place, and specific content” of the
19 misrepresentations made by Defendant about the authenticity of the Jayer wines. As such, they
20 are not “specific enough to give [Defendant] notice of the particular misconduct which is alleged
21 to constitute the fraud charged so that [he] can defend against the charge and not just deny that [he
22 has] done anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir.1993) (quotation
23 omitted).

24 The fraud claim is also insufficiently pleaded as to knowledge of falsity, or scienter.
25 Although Rule 9(b) permits that “[m]alice, intent, knowledge, and other conditions of a person’s
26 mind may be alleged generally,” it does not give license to Plaintiff to rest on conclusory
27 statements. “[N]othing in the Federal Rules of Civil Procedure relieves a plaintiff of the
28 obligation to ‘set forth facts from which an inference of scienter could be drawn.’” *Oestreicher v.*

1 Alienware Corp., 544 F. Supp. 2d 964, 968 (N.D. Cal. 2008) (quoting Cooper v. Pickett, 137 F.3d
2 616, 628 (9th Cir.1997)). Here, Plaintiff does not allege any facts beyond conclusory assertions to
3 support an inference that Defendant knew the Jayer wines were fake.

4 Finally, Plaintiff alleges on information and belief that “Defendant delivered the
5 counterfeit wine intending to deceive Plaintiff into believing that he had purchased rare and
6 valuable wine, when the bottles in fact contained a cheap substitute.” Id. at ¶ 13. Again, the
7 complaint contains no factual allegations to support this statement. This is insufficient, because “a
8 plaintiff who makes allegations on information and belief must state the factual basis for the
9 belief.” Neubronner, 6 F.3d at 672.

10 Plaintiff’s first claim for relief for fraud is dismissed with leave to amend.

11 **B. Concealment Fraud**

12 Plaintiff’s second claim for relief is concealment fraud. Plaintiff alleges that starting on
13 April 4, 2011, Defendant “agreed to undertake on behalf of Plaintiff and for the benefit of Plaintiff
14 in the purchase of wines,” and that Defendant was Plaintiff’s agent for wine purchases and owed
15 Plaintiff a fiduciary duty. Compl. ¶ 30. He further alleges that Defendant had a duty to disclose
16 that the Jayer wines were fake, but instead concealed that fact from Plaintiff. Id. at ¶¶ 33, 34.

17 A claim for fraudulent concealment under California law “requires knowing concealment
18 or non-disclosure by a defendant with the intent to defraud, which induces justifiable reliance and
19 causes injury to the plaintiff.” 625 3rd St. Assocs., L.P. v. Alliant Credit Union, 633 F. Supp. 2d
20 1040, 1050 (N.D. Cal. 2009). “Fraud or deceit may consist of the suppression of a fact by one
21 who is bound to disclose it or who gives information of other facts which are likely to mislead for
22 want of communication of the fact.” Id. Accordingly, in order to state a claim for fraudulent
23 concealment, “there must be allegations demonstrating that the defendant was under a legal duty
24 to disclose those facts.” *Los Angeles Mem’l Coliseum Comm’n v. Insomniac, Inc.*, 233 Cal. App.
25 4th 803, 831 (2015). A plaintiff can make that showing by alleging that (1) the defendant had a
26 fiduciary relationship with the plaintiff; (2) the defendant exclusively knew material facts not
27 known to the plaintiff; (3) the defendant actively concealed a material fact from the plaintiff; or (4)
28 the defendant made partial representations, while also suppressing some material facts. See id. In

1 the absence of a fiduciary relationship, “the duty to disclose generally presupposes a relationship
2 grounded in some sort of transaction between the parties. Thus, a duty to disclose may arise from
3 the relationship between seller and buyer, employer and prospective employee, doctor and patient,
4 or parties entering into any kind of contractual relationship.” *Id.* (internal citations and quotation
5 omitted). “All of these relationships are created by transactions between parties from which a duty
6 to disclose facts material to the transaction arises under certain circumstances.” *LiMandri v.*
7 *Judkins*, 52 Cal. App. 4th 326, 337 (1997).

8 Defendant argues that Plaintiff’s concealment fraud claim is insufficient because the
9 complaint does not allege facts establishing that the Mayer wines were fake or that Defendant knew
10 that they were fake. The court concludes that Plaintiff has sufficiently pleaded that the Mayer
11 wines were fake by alleging that “some of the wines actually delivered by Defendant were
12 counterfeit,” and that “[a]mong the counterfeit wine Defendant sent Plaintiff were [the Mayer
13 wines].” Compl. ¶ 13. However, as discussed above, Plaintiff has not sufficiently pleaded that
14 Defendant knew that the Mayer wines were fake, because Plaintiff’s allegations about such
15 purported knowledge are entirely conclusory.

16 Defendant also argues that Plaintiff does not sufficiently plead that Defendant had a legal
17 duty to disclose to Plaintiff that the Mayer wines were fake. In response, Plaintiff asserts that he
18 has pleaded facts establishing a fiduciary relationship between the parties, which would obligate
19 Defendant to disclose this information to Plaintiff. See *Insomniac*, 233 Cal. App. 4th at 831. “A
20 fiduciary relationship is any relation existing between parties to a transaction wherein one of the
21 parties is . . . duty bound to act with the utmost good faith for the benefit of the other party.”
22 *Gilman v. Dalby*, 176 Cal. App. 4th 606, 613 (2009) (quotation and citation omitted). “A
23 fiduciary’s power to transact business with his beneficiary is severely limited; he must use the
24 utmost good faith and, if he profits from the transaction, the law presumes the agreement was
25 entered into by the beneficiary without sufficient consideration and under undue influence.”
26 *Comm. On Children’s Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 222 (1983)
27 (quotations omitted). “The obligation to put the interests of the other party first is why a fiduciary
28 relationship generally does not arise out of ordinary arms-length business dealings. In a typical

1 business contract or relationship, one party does not commit to act in the other party's best interest
2 rather than in its own." *World Surveillance Grp. Inc. v. La Jolla Cove Investors, Inc.*, 66 F. Supp.
3 3d 1233, 1235 (N.D. Cal. 2014). "In the commercial context, traditional examples of fiduciary
4 relationships include those of trustee/beneficiary, corporate directors and majority shareholders,
5 business partners, joint adventurers, and agent/principal." *Id.* at 614. "Inherent in each of these
6 relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the
7 fiduciary obligations far more stringent than those required of ordinary contractors." *Wolf v.*
8 *Superior Court*, 106 Cal. App. 4th 25, 30 (2003).

9 Here, Plaintiff alleges that the parties "entered into an oral agreement wherein Defendant
10 agreed to purchase wines on behalf of Plaintiff and *as Plaintiff's agent*." Compl. ¶ 8 (emphasis
11 added). Plaintiff further alleges that "Defendant agreed to undertake to act on behalf of Plaintiff
12 and for the benefit of Plaintiff in the purchase of wines." *Id.* at ¶ 30. These conclusory allegations
13 do not plead any facts to support that Defendant agreed to act as Plaintiff's agent. "An agent is
14 one who represents another, called the principal, in dealings with third persons." Cal. Civ. Code §
15 2295. "An agent has such authority as the principal, actually or ostensibly, confers upon him."
16 Cal. Civ. Code § 2315. Plaintiff does not allege any facts about the definite terms and obligations
17 of the parties under an agreement. For example, Plaintiff does not allege whether Defendant had
18 authority to represent Plaintiff in dealings with any third parties under the terms of their
19 agreement. Nor does Plaintiff allege facts to support an inference that Defendant knowingly
20 undertook the duty of putting Plaintiff's interests before his own and acting as Plaintiff's fiduciary.
21 Since the complaint does not sufficiently plead that the parties had a fiduciary relationship or that
22 Defendant knew that the Jayer wines were fake, Plaintiff's second claim for relief for concealment
23 fraud is dismissed with leave to amend.

24 **C. Promissory Fraud**

25 Plaintiff's third claim is for promissory fraud. Plaintiff alleges that starting on April 4,
26 2011, Defendant promised to deliver wines to Plaintiff as they were purchased, and that Defendant
27 made the promises with the intent to deceive Plaintiff and/or induce Plaintiff to give him money.
28 Compl. ¶¶ 42, 43. Plaintiff further alleges that in April 2015, he sent a representative to meet with

1 Defendant, and that Defendant promised to deliver the remaining wines already purchased and
2 return Plaintiff's money for any unpurchased or undeliverable wines by the end of 2015. *Id.* at ¶
3 47. According to Plaintiff, Defendant did not intend to deliver the wines or return Plaintiff's
4 money when he made his promises, and made the promises with the intent to deceive Plaintiff.
5 Defendant instead used Plaintiff's money to pay the legal fees he incurred as a result of his
6 criminal case. *Id.* at ¶ 49.

7 "An action for promissory fraud may lie where a defendant fraudulently induces the
8 plaintiff to enter into a contract." *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996).
9 "'Promissory fraud' is a subspecies of the action for fraud and deceit . . . where a promise is made
10 without [] intention to perform, there is an implied misrepresentation of fact that may be
11 actionable fraud." *Id.* Like all fraud claims, allegations of promissory fraud must be stated with
12 particularity. See *id.* at 645. "A statement is not necessarily fraudulent merely because it is
13 contradicted by later-discovered facts." *Richardson v. Reliance Nat. Indem. Co.*, No. C 99-2952
14 CRB, 2000 WL 284211, at *4-5 (N.D. Cal. Mar. 9, 2000) (citing *In re GlenFed, Inc. Sec. Litig.*,
15 42 F.3d 1541, 1548 (9th Cir. 1994)). Under Rule 9(b), a plaintiff must plead facts establishing the
16 falsity of a statement at the time it is made. See *id.* "The rule therefore precludes plaintiff from
17 simply pointing to a statement by a defendant, noting that the content of the statement 'conflicts
18 with the current state of facts,' and concluding that 'the charged statement must have been false' at
19 the time it was made." *Id.* (citing *GlenFed*, 42 F.3d at 1548). Instead,

20
21 a plaintiff must set forth, as part of the circumstances constituting
22 fraud, an explanation as to why the disputed statement was untrue or
23 misleading when made. This can be done most directly by pointing
to inconsistent contemporaneous statements or information (such as
internal reports) which were made by or available to the defendants.

24 *GlenFed*, 42 F.3d at 1549. Moreover, "a plaintiff must point to facts which show that defendant
25 harbored an intention not to be bound by terms of the contract at formation." *Hsu v. OZ Optics*
26 *Ltd.*, 211 F.R.D. 615, 620 (N.D. Cal. 2002) (emphasis in original).

27 Here, Plaintiff alleges two separate promises by Defendant that he claims were fraudulent
28 when made: Defendant's April 2011 promise "to deliver wines to Plaintiff as they were

1 purchased,” and his April 2015 promise to “deliver the remaining wines already purchased and . . .
2 return Plaintiff’s money” for any unpurchased or undeliverable wines by the end of 2015. See
3 Compl. ¶¶ 42, 47. This claim fails as currently pleaded. Plaintiff’s bare allegations merely state
4 that Defendant had no intention to honor the parties’ agreement by delivering the wines and/or
5 returning the money. See *id.* at ¶ 49 (“Defendant did not intend to deliver wines or return
6 Plaintiff’s money when they made their promises.”). This is inadequate; a plaintiff “fail[s] to
7 plead fraud with specificity as required by Rule 9(b)” by merely alleging that “[defendant] had no
8 intention to be bound by the terms as agreed.” *Nikoonahad v. Rudolph Techs., Inc.*, No. C 08-
9 2290 JF (PVT), 2008 WL 4065831, at *4 (N.D. Cal. Aug. 27, 2008) (citing *Hsu*, 211 F.R.D. at
10 620). Simply pointing to Defendant’s alleged failure to perform under the parties’ agreement is
11 insufficient to establish Defendant’s fraudulent intent. See *Canard v. Bricker*, No. 14-CV-04986-
12 JSC, 2015 WL 846997, at *6 (N.D. Cal. Feb. 25, 2015) (collecting cases).

13 The court also concludes that the allegations in the complaint fail to give rise to a plausible
14 inference that Defendant did not intend to honor his promises to deliver wines to Plaintiff at the
15 time he made them. As to the first promise, Plaintiff asserts that starting on April 4, 2011,
16 Defendant promised to deliver wines to Plaintiff as they were purchased. As to the second,
17 Defendant allegedly promised in April 2015 to deliver the wines purchased on Plaintiff’s behalf
18 by the end of 2015. Compl. ¶¶ 42, 47. Plaintiff alleges that that Defendant actually delivered
19 wines in May 2011 and November 2011, and alleges that Defendant delivered wines again on
20 September 22, 2015, only some of which were fake. *Id.* at ¶¶ 10, 20. Therefore, Plaintiff admits
21 that Defendant delivered wines from May 2011 until at least September 2015, rendering Plaintiff’s
22 promissory fraud claims based on Defendant’s promises to deliver wines implausible.

23 Plaintiff’s promissory fraud claim is dismissed with leave to amend.¹

24 **D. Breach of Contract**

25 Plaintiff’s fifth claim is for breach of contract. He alleges that on April 4, 2011, “Plaintiff

26 _____
27 ¹ Since the court finds that Plaintiff has failed to state a claim for promissory fraud, the court will
28 not address Defendant’s argument that Plaintiff’s fraud-based claims may be barred by the
economic loss rule.

1 and Defendant entered into an oral contract for the purchase of fine wines,” and that he wired a
2 total of \$3,556,384 to Plaintiff for the purchase of wines. Compl. ¶ 71. Further, “Defendant
3 accepted Plaintiff’s payment and order of wines and agreed to purchase on behalf of Plaintiff and
4 as Plaintiff’s agent and deliver wines to Plaintiff as they were purchased.” Id. Plaintiff alleges
5 that although he performed under the contract, Defendant has performed only some of its
6 obligations, since he has delivered and shipped only \$2,436,862.58 worth of wine. Id. at ¶ 73. He
7 has failed to deliver the remainder of wines purchased with Plaintiff’s money or return Plaintiff’s
8 money for unpurchased or undeliverable wines. Id. at ¶ 74. Defendant moves to dismiss
9 Plaintiff’s breach of contract claim, arguing that the complaint does not sufficiently allege the
10 existence of a contract and that the claim is time-barred.

11 The elements of a claim for breach of contract are: “(1) the existence of the contract; (2)
12 performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4)
13 damages.” *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1141–42 (N.D. Cal.
14 2013). “To allege the existence of a contract, a plaintiff must plead [1] mutual assent, [2]
15 sufficiently definite contractual terms, and [3] consideration.” Id. As to the first element,
16 “[c]ontract formation requires mutual consent, which cannot exist unless the parties agree on the
17 same thing in the same sense.” *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 208 (2006)
18 (quotations omitted). Second, a contract must be sufficiently definite, so that the court may
19 “ascertain the parties’ obligations and . . . determine whether those obligations have been
20 performed or breached.” *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 623 (1991). As to
21 the third element, California law defines “good consideration” to support a contract as follows:

22 Any benefit conferred, or agreed to be conferred, upon the promisor,
23 by any other person, to which the promisor is not lawfully entitled,
24 or any prejudice suffered, or agreed to be suffered, by such person,
25 other than such as he is at the time of consent lawfully bound to
suffer, as an inducement to the promisor, is a good consideration for
a promise.

26 Cal. Civ. Code § 1605.

27 Plaintiff’s complaint insufficiently alleges consideration to support the alleged contract.
28 “When a promise is given by one party to another, without anything being bargained for or given

1 in exchange for it, the promise is without consideration.” *Nault v. Smith*, 194 Cal. App. 2d 257,
2 265-66 (1961) (citation omitted). In an oral contract, consideration must be pleaded. *Castro v.*
3 *JPMorgan Chase Bank, N.A.*, No. 14-CV-01539 NC, 2014 WL 2959509, at *2 (N.D. Cal. June 30,
4 2014) (citing *Acheson v. W.U. Tel. Co.*, 96 Cal. 641, 644 (1892)). The complaint alleges that
5 Defendant “agreed to purchase on behalf of Plaintiff and as Plaintiff’s agent and deliver wines to
6 Plaintiff as they were purchased,” (Compl. ¶ 71), but does not allege that Defendant received any
7 bargained-for compensation, benefit, or promise from Plaintiff in exchange for his performance.
8 Accordingly, Plaintiff has failed to allege the existence of a contract between the parties.

9 Defendant also argues that Plaintiff’s breach of contract claim is time-barred. Under
10 California law, oral contracts are subject to a two-year statute of limitations. Cal. Code Civ. Proc.
11 § 339(1); *Boon Rawd Trading Int’l Co., Ltd. v. Paleewong Trading Co., Inc.*, 688 F. Supp. 2d 940,
12 948 (N.D. Cal. 2010). A claim for relief accrues at “the time when the cause of action is complete
13 with all of its elements.” *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999). “An important
14 exception to this rule of accrual, however, is the ‘discovery rule,’ which postpones accrual until
15 the plaintiff discovers, or has reason to discover, the facts underlying the cause of action.” *Boon*
16 *Rawd*, 688 F. Supp. 2d at 948. Here, Plaintiff alleges that Defendant breached the parties’
17 agreement when he “failed to deliver the remainder of wines purchased with Plaintiff’s money or
18 return Plaintiff’s money for any unpurchased wines or wines purchased but undeliverable.”
19 Compl. ¶ 74. Plaintiff also alleges that “he has made numerous demands for the delivery of the
20 remainder of wines purchased with his money, and/or a return of his money that has not been used
21 to purchase wines, including a telephone call in late January of 2015 to Defendant’s cellular
22 phone.” *Id.* at ¶ 14. Based on these facts, Plaintiff’s breach of contract claim may be time-barred,
23 since it appears that Plaintiff knew by January 2015 that Defendant was in breach of their oral
24 agreement by failing to deliver wines purchased with his money and/or return any money that had
25 not been used to purchase wines but did not file the present lawsuit until February 7, 2017, over
26 two years later. However, Plaintiff’s allegations about the parties’ agreement are so sparse that the
27 court cannot say definitively that Plaintiff is unable to allege a breach of contract claim that is not
28 time-barred. Accordingly, the court dismisses this claim with leave to amend.

1 **E. Breach of Implied Covenant of Good Faith and Fair Dealing**

2 Plaintiff’s sixth claim is for breach of the implied covenant of good faith and fair dealing.
3 He alleges that Defendant “breached the implied covenant of good faith and fair dealing by failing
4 and refusing and continuing to refuse to tender their performance as required by the contract.
5 Defendant has failed to deliver the remainder of wines purchased with Plaintiff’s money or return
6 Plaintiff’s money for any unpurchased wines or wines purchased but undeliverable.” Compl. ¶ 80.

7 This claim fails for the same reasons that his breach of contract claim fails. “California
8 law . . . provides that a covenant of good faith and fair dealing is an implied term in every
9 contract.” *Chodos v. W. Publ’g Co.*, 292 F.3d 992, 996 (9th Cir. 2002). Thus, any action for
10 breach of the implied covenant requires the existence of a contract. *Jenkins v. JP Morgan Chase*
11 *Bank, N.A.*, 216 Cal. App. 4th 497, 525 (2013). As discussed above, Plaintiff failed to plead the
12 existence of a contract, since he does not allege any consideration to support the parties’
13 agreement. Accordingly, his claim for breach of implied covenant of good faith and fair dealing
14 also fails. This claim is subject to the same two-year statute of limitations as the breach of
15 contract claim. See *Boon Rawd*, 688 F. Supp. 2d at 953. As discussed above, Plaintiff’s breach of
16 contract claim appears to have accrued in January 2015. His breach of the implied covenant of
17 good faith and fair dealing claim is based upon the same conduct as the breach of contract claim—
18 Defendant’s failure to deliver wines purchased with Plaintiff’s money or return Plaintiff’s money
19 for unpurchased or undeliverable wines. As with Plaintiff’s breach of contract claim, the breach
20 of breach of the implied covenant of good faith and fair dealing claim may also be time barred.
21 This claim is dismissed with leave to amend.

22 **F. Unjust Enrichment**

23 Plaintiff’s seventh claim is unjust enrichment. Plaintiff alleges that he and Defendant
24 entered into a contract. Compl. ¶ 83. He asserts that Defendant received money from Plaintiff for
25 the purchase of wines but did not deliver the wines or return Plaintiff’s money, totaling at least
26 \$1,110,737.42. According to Plaintiff, “Defendant was unjustly enriched by appropriating
27 Plaintiff[’s] money which was paid by Plaintiff to Defendant for the delivery of wines.” *Id.* at ¶¶
28 84-87.

1 “[I]n California, there is not a standalone cause of action for ‘unjust enrichment,’ which is
2 synonymous with ‘restitution.’” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir.
3 2015) (citations omitted). Unjust enrichment and restitution “describe the theory underlying a
4 claim that a defendant has been unjustly conferred a benefit ‘through mistake, fraud, coercion, or
5 request.’” *Id.* “When a plaintiff alleges unjust enrichment, a court may ‘construe the cause of
6 action as a quasi-contract claim seeking restitution.’” *Id.* (citing *Rutherford Holdings, LLC v.*
7 *Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)). However, “an action based on an implied-in-
8 fact or quasi-contract cannot lie where there exists between the parties a valid express contract
9 covering the same subject matter.” *Rutherford*, 223 Cal. App. 4th at 231; see also *Klein v.*
10 *Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388 (2012) (“[a] plaintiff may not . . . pursue or
11 recover on a quasi-contract claim if the parties have an enforceable agreement regarding a
12 particular subject matter.”).

13 Here, Plaintiff expressly alleges the existence of an express oral contract between the
14 parties in connection with his unjust enrichment claim. See Compl. ¶ 83. A plaintiff may assert
15 inconsistent theories of recovery at the pleading stage, including inconsistent claims alleging both
16 the existence and the absence of an enforceable contract. See Fed. R. Civ. P. 8(2)(2), (3); see also
17 *Clear Channel Outdoor, Inc. v. Bently Holdings Cal. LP*, No. C-11-2576 EMC, 2011 WL
18 6099394, at *9 (N.D. Cal. Dec. 7, 2011) (“even though a plaintiff may not ultimately prevail under
19 both unjust enrichment and breach of contract, it may plead both in the alternative.”). However, a
20 plaintiff may not plead the existence of an enforceable contract and simultaneously maintain a
21 quasi-contract claim unless the plaintiff also pleads facts suggesting that the contract may be
22 unenforceable or invalid. See *Klein*, 202 Cal. App. 4th at 1389 (holding that consumers could not
23 maintain unjust enrichment claim based on retail purchases of gasoline, which they alleged were
24 enforceable contractual relationships, where their unjust enrichment claim did not deny the
25 existence or enforceability of the agreements). Here, Plaintiff has not alleged in the alternative
26 that his agreement with Defendant was unenforceable or invalid. Accordingly, he is precluded
27 from asserting a quasi-contract claim under the theory of unjust enrichment. See *id.* at 1389-90;
28 see also *World Surveillance Grp. Inc. v. La Jolla Cove Inv'rs, Inc.*, No. 13-CV-03455-WHO, 2014

1 WL 1411249, at *2 (N.D. Cal. Apr. 11, 2014) (dismissing unjust enrichment claim because
2 plaintiff explicitly pleaded the existence of enforceable agreements between the parties).
3 Plaintiff's unjust enrichment claim is dismissed with leave to amend.

4 **G. Breach of Fiduciary Duty**

5 Plaintiff's eighth claim is for breach of fiduciary duty. Plaintiff alleges that "Defendant
6 agreed to undertake to act on behalf of Plaintiff and for the benefit of Plaintiff in the purchase of
7 wines. Furthermore, Defendant is an agent for the purchase of wines. Thus, Defendant has a
8 fiduciary obligation towards Plaintiff." Compl. ¶ 90. Plaintiff alleges that Defendant "breached
9 [his] fiduciary duty by failing to use reasonable care and by failing to provide undivided loyalty."
10 Id. at ¶ 92.

11 To plead a claim for breach of fiduciary duty, "a plaintiff must show the existence of a
12 fiduciary relationship, its breach, and damage caused by the breach." Apollo Capital Fund, LLC v.
13 Roth Capital Partners, LLC, 158 Cal. App. 4th 226, 243 (2007). As discussed above in
14 connection with Plaintiff's concealment fraud claim, Plaintiff has failed to sufficiently allege the
15 existence of a fiduciary relationship between the parties. His breach of fiduciary duty claim is
16 therefore dismissed with leave to amend.

17 **H. Conversion**

18 Plaintiff's ninth claim for relief is conversion. Plaintiff alleges that he is "the owner of or
19 entitled to immediately possess wines for which he paid Defendant \$1,110,737.42 but did not take
20 delivery of." Compl. ¶ 97. Further, he alleges that "Defendant intentionally, wrongfully, and
21 substantially interfered with Plaintiff's interest in the above-described property by taking
22 possession of the wine, failing to deliver the wines to Plaintiff, and refusing to deliver the wines or
23 refund the money paid to Plaintiff after Plaintiff demanded its return." Id. at ¶ 98.

24 "Conversion is the wrongful exercise of dominion over the property of another. The
25 elements of a conversion are the plaintiff's ownership or right to possession of the property at the
26 time of the conversion; the defendant's conversion by a wrongful act or disposition of property
27 rights; and damages." Farmers Ins. Exchange v. Zerlin, 53 Cal. App. 4th 445, 451 (1997); G.S.
28 Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992).

1 Defendant argues that Plaintiff cannot maintain a conversion claim based on his alleged
 2 breach of the parties' agreement, arguing that California's economic loss rule precludes this claim.
 3 "Conduct amounting to a breach of contract becomes tortious only when it also violates an
 4 independent duty arising from principles of tort law." *Applied Equipment Corp. v. Litton Saudi*
 5 *Arabia Ltd.*, 7 Cal.4th 503, 515 (1994). In other words, "an omission to perform a contract
 6 obligation is never a tort, unless that omission is also an omission to perform a legal duty." *Id.*
 7 "[N]o claim for conversion will lie where the right to payment is a mere contractual one." *La*
 8 *Jolla Cove Investors, Inc. v. Sultan Corp.*, No. 11CV1628 JM RBB, 2011 WL 4916138, at *2
 9 (S.D. Cal. Oct. 17, 2011) (citing *Imperial Valley Co. v. Globe Grain & Milling Co.*, 187 Cal. 352,
 10 354 (1921)).

11 Here, it appears that Plaintiff's conversion claim is based solely on Defendant's alleged
 12 duties under the contract, and the amount of damages he seeks is identical to the amount of wine
 13 to be delivered and/or money to be returned under the parties' agreement. Plaintiff argues that he
 14 has alleged a valid claim for conversion because he alleges that Defendant owed Plaintiff a duty
 15 independent of contract, pointing to his allegations that Defendant owed Plaintiff a fiduciary duty,
 16 which he breached. See Compl. ¶¶ 90-92. However, as discussed above, Plaintiff has not
 17 sufficiently alleged that Defendant owed him a fiduciary duty. Accordingly, Plaintiff's conversion
 18 claim as pleaded appears to be barred by the economic loss rule. See, e.g., *McGehee v. Coe*
 19 *Newnes/McGehee ULC*, No. C 03-5145 MJJ, 2004 WL 2452855, at *2-3 (N.D. Cal. Feb. 10,
 20 2014) (dismissing conversion counterclaim where "the duty Plaintiffs owed Defendant was only a
 21 contractual one"). The claim is dismissed with leave to amend.

22 **I. Intentional Interference with Prospective Economic Relations**

23 Plaintiff's tenth claim is for intentional interference with prospective economic relations.
 24 He alleges that he and "buyers of fine wine from Plaintiff were in an economic relationship that
 25 probably would have resulted in an economic benefit and advantage to Plaintiff when Plaintiff
 26 sells fine wine to such buyers." Compl. ¶ 103. Further, he alleges that Defendant "knew that
 27 Plaintiff purchased wine for the purpose of reselling them" and thus "knew of the relationship
 28 between Plaintiff and buyers of fine wine from Plaintiff." *Id.* at ¶ 104.

1 To state a claim for intentional interference with prospective economic advantage, a
2 plaintiff must allege the following:

- 3 (1) an economic relationship between the plaintiff and another,
4 containing a probable future economic benefit or advantage to
5 plaintiff, (2) defendant's knowledge of the existence of the
6 relationship, (3) that defendant intentionally engaged in acts or
conduct designed to interfere with or disrupt the relationship, (4)
actual disruption, and (5) damage to the plaintiff as a result of
defendant's acts.

7 *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 439 n.1 (1995) (quotations
8 omitted); see *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 233 n.7 (2005).

9 Plaintiff's claim is insufficiently pleaded as to the first element, which applies to "existing
10 noncontractual relations which hold the promise of future economic advantage." *Westside Ctr.*
11 *Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 524 (1996). The relationship must be one
12 that "eventually will yield the desired benefit, not necessarily the more speculative expectation
13 that a potentially beneficial relationship will eventually arise." *Id.* "Courts have held that, in
14 order to state a claim for intentional interference with prospective business advantage, it is
15 essential that the Plaintiff allege facts showing that Defendant interfered with Plaintiff's
16 relationship with a particular individual." *Damabeh v. 7-Eleven, Inc.*, No. 12-CV-01739 LHK,
17 2013 WL 1915867, at *10 (N.D. Cal. May 8, 2013) (citing *Westside*, 42 Cal. App. 4th at 527).
18 "Allegations that a defendant interfered with the plaintiff's relationship with an 'as yet
19 unidentified' customer will not suffice." *Id.* (citing *Westside*, 42 Cal. App. 4th at 527). Here,
20 Plaintiff alleges only that he and unnamed buyers of fine wine were "in an economic relationship
21 that probably would have resulted in an economic benefit and advantage to Plaintiff." Compl. ¶
22 103. This allegation is speculative and insufficient. See *Westside*, 42 Cal. App. 4th at 527
23 (holding that "[w]ithout an existing relationship with an identifiable buyer, [plaintiff's]
24 expectation of a future sale was 'at most a hope for an economic relationship and a desire for
25 future benefit.'" (internal citations omitted)).

26 Plaintiff also does not allege that Defendant intentionally acted to disrupt Plaintiff's
27 relationships with his potential wine buyers. Instead, he alleges that Defendant engaged in the
28 alleged conduct so that he could keep Plaintiff's money to pay his legal bills. *Id.* at ¶ 16. At most,

1 this is merely incidental interference that was not “designed” or intended to disrupt Plaintiff’s
2 relationships.

3 Plaintiff’s intentional interference claim is dismissed with leave to amend.

4 **J. Negligence-Based Claims**

5 Plaintiff’s fourth, eleventh, and thirteenth claims are for negligent misrepresentation,
6 negligent interference with prospective economic relations, and negligence. As to the negligent
7 misrepresentation claim, Plaintiff alleges three misrepresentations by Defendant: 1) Defendant’s
8 representation regarding the authenticity of the Jayer wines; 2) Defendant’s representation in April
9 2011 that he would deliver wines to Plaintiff as they were purchased; and 3) Defendant’s
10 representation in April 2015 that he would deliver the remaining wines already purchased and
11 return Plaintiff’s money for unpurchased or undeliverable wines by the end of 2015. Compl. ¶¶
12 55-56, 61, 62. Plaintiff’s negligent interference claim is based on his allegation that Plaintiff was
13 in economic relationships with “buyers of fine wine . . . that probably would have resulted in an
14 economic benefit and advantage to Plaintiff when Plaintiff sells wine to such buyers,” and that
15 Defendant disrupted those relationships by failing to act with reasonable care. *Id.* at ¶¶ 110-113.
16 With respect to the negligence claim, Plaintiff alleges simply that Defendant was negligent with
17 respect to the conduct as described in the complaint. *Id.* at ¶ 120.

18 Under California law, to state a claim for negligent misrepresentation, Plaintiff must allege
19 that Defendant made: (1) a misrepresentation of a past or existing material fact, (2) without
20 reasonable ground for believing it to be true, (3) with intent to induce another’s reliance on the
21 misrepresentation, (4) ignorance of the truth and justifiable reliance on the misrepresentation by
22 the party to whom it was directed, and (5) resulting damage. *Glenn K. Jackson Inc. v. Roe*, 273
23 F.3d 1192, 1201 n.2 (9th Cir. 2001). “As with any negligence claim, the tort of negligent
24 misrepresentation requires that [a plaintiff] allege a duty of care.” *Plastino v. Wells Fargo Bank*,
25 873 F. Supp. 2d 1179, 1190 (N.D. Cal. 2012).

26 To state a claim for negligent interference, Plaintiff must allege that “(1) an economic
27 relationship existed between the plaintiff and a third party which contained a reasonably probable
28 future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the

1 relationship and was aware or should have been aware that if it did not act with due care its actions
2 would interfere with this relationship and cause plaintiff to lose in whole or in part the probable
3 future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4)
4 such negligence caused damage to plaintiff in that the relationship was actually interfered with or
5 disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably
6 expected from the relationship.” UMG Recordings, Inc. v. Global Eagle Entertainment, Inc., 117
7 F. Supp. 3d 1092, 1118 (C.D. Cal. 2015) (quotation omitted). “The tort of negligent interference
8 with economic relationship arises only when the defendant owes the plaintiff a duty of care.”
9 Lange v. TIG Ins. Co., 68 Cal.App.4th 1179, 1187 (1998).

10 The elements of a negligence claim are (1) existence of duty to exercise due care, (2)
11 breach of duty, (3) causation, and (4) damages. *Id.* A negligent misrepresentation claim is subject
12 to Rule 9(b)’s particularity requirements. See *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d
13 1101, 1141 (C.D. Cal. 2003) (noting that “[i]t is well-established in the Ninth Circuit that both
14 claims for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity
15 requirements.”).

16 Here, all three negligence claims must be dismissed because Plaintiff has not alleged that
17 Defendant owed him a duty of care. The negligent misrepresentation and negligent interference
18 claims suffer from additional shortcomings. As to the negligent misrepresentation claim, as noted
19 above, the allegations must be specific enough to give Defendant notice of the particular
20 misconduct that is alleged to constitute the fraud so that it can defend against the claim. See *Bly-*
21 *McGee*, 236 F.3d at 1019. Defendant challenges only the sufficiency of the alleged
22 misrepresentation regarding the authenticity of the Jayer wines. As discussed above, the
23 complaint fails to allege facts establishing that Defendant actually made a false statement
24 regarding the authenticity of the allegedly fake Jayer wines. Plaintiff does not specify the “time,
25 place, and specific content” of the alleged misrepresentations by Defendant that the Jayer wines
26 were authentic.

27 Regarding the negligent interference claim, Plaintiff has not sufficiently alleged the
28 existence of an economic relationship between Plaintiff and a third party which contained a

1 reasonably probable future economic benefit or advantage to Plaintiff, as discussed above in
2 connection with the intentional interference claim.

3 Accordingly, Plaintiff’s negligent misrepresentation, negligent interference with
4 prospective economic relations, and negligence claims are dismissed with leave to amend.

5 **K. Unfair Competition**

6 Plaintiff’s twelfth claim is for violation of California’s Unfair Competition Law, California
7 Business and Professions Code section 17200 (“UCL”). He alleges that “by engaging in the
8 conduct described [in the complaint], [Defendant] has engaged in ‘unfair, unlawful and fraudulent
9 business act or practice and unfair, deceptive untrue or misleading advertising’ in violation” of the
10 UCL. Compl. ¶ 116.

11 Under Section 17200, unfair competition is defined as “any unlawful, unfair or fraudulent
12 business act or practice” and “unfair, deceptive, untrue or misleading advertising.” See Cal. Bus.
13 & Prof. Code § 17200. A business practice is “unlawful” under section 17200 if it violates an
14 underlying state or federal statute or common law. See *Cal-Tech Commc’ns, Inc. v. Los Angeles*
15 *Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). An act is “unfair” if the act “threatens an incipient
16 violation of a [competition law], or violates the policy or spirit of one of those laws because its
17 effects are comparable to or the same as a violation of the law.” *Id.* at 187. To the extent the
18 claims sound in fraud, they are subject to the heightened pleading standards of Rule 9(b). See
19 *Kearns*, 567 F.3d at 1125. Additionally, “[a] plaintiff alleging unfair business practices under the
20 unfair competition statutes ‘must state with reasonable particularity the facts supporting the
21 statutory elements of the violation.’” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp.
22 1303, 1316 (N.D. Cal. 1997) (quoting *Khoury v. Maly's of California*, 14 Cal. App. 4th 612, 619
23 (1993)).

24 Here, Plaintiff has failed to state “with reasonable particularity” the facts supporting this
25 claim. Plaintiff does not specifically identify any conduct that he alleges is unfair, unlawful, or
26 fraudulent for the purposes of the UCL, and as discussed above, Plaintiff has not adequately stated
27 any fraud-based claims. Further, “the central issue presented under [the UCL] is whether the
28 public at large, or consumers generally, are affected by the alleged . . . business practice of

1 defendants.” In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 998-99 (N.D. Cal. 2010).
2 Plaintiff does not allege that Defendant’s actions “state a connection to the protection of the
3 general public.” See id. Instead, Plaintiff alleges only harm to himself based on Defendant’s
4 alleged breach of their agreement. He has accordingly failed to state a UCL claim. The UCL
5 claim is dismissed with leave to amend.

6 **L. Common Count**

7 Plaintiff’s fourteenth claim for relief is common count. Common count is a “simplified
8 form[s] of pleading normally used to aver the existence of various forms of monetary
9 indebtedness.” McBride v. Boughton, 123 Cal. App. 4th 379, 394 (2004). “‘When a common
10 count is used as an alternative way of seeking the same recovery demanded in a specific [claim],
11 and is based on the same facts,’ it does not survive if the underlying claim does not survive.”
12 McAfee v. Francis, No. 5:11-CV-00821-LHK, 2011 WL 3293759, at *2 (N.D. Cal. Aug. 1, 2011)
13 (citing McBride, 123 Cal. App. 4th at 394 (“[The Plaintiff’s] common count must stand or fall with
14 his first cause of action.”)). Since Plaintiff’s common count claim is derivative of his breach of
15 contract claim, the common count is also dismissed with leave to amend.

16 **M. Account Stated**

17 Plaintiff’s fifteenth claim is account stated. “An account stated is ‘an agreement, based on
18 the prior transactions between the parties, that the items of the account are true and that the
19 balance struck is due and owing from one party to another.’” Nat’l Ins. Co. of Hartford v. Expert
20 Auto. Reconditioning, Inc., No. SACV 13-0873-DOC, 2013 WL 6190591, at *3 (C.D. Cal. Nov.
21 24, 2013) (quoting Gleason v. Klammer, 103 Cal. App. 3d 782, 786 (1980)). “An account stated
22 constitutes a new contract which supersedes and extinguishes the original obligation.” Zinn v.
23 Fred R. Bright Co., 271 Cal. App. 2d 597, 600 (1969) (citations omitted). Thus, an “action upon
24 an account stated is not upon the original dealings and transactions of the parties,” rather it is
25 “upon the new contract by and under which the parties have adjusted their differences and reached
26 an agreement.” Martini E Ricci Iamino S.P.A.--Consortile Societa Agricola v. Trinity Fruit Sales
27 Co., 30 F. Supp. 3d 954, 976 (E.D. Cal. 2014) (citations omitted).

28 To establish an account stated claim, a plaintiff must show: “(1) previous transactions

1 between the parties establishing the relationship of debtor and creditor; (2) an agreement between
2 the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by
3 the debtor, express or implied, to pay the amount due.” Zinn, 271 Cal. App. 2d at 600 (citations
4 omitted). The agreement necessary to establish an account stated need not be express and may be
5 implied from the circumstances. Martini E Ricci, 30 F. Supp. 3d at 976 (citations omitted). Here,
6 Plaintiff has sufficiently alleged the elements of an account stated claim. He alleges that
7 Defendant owes him \$1,110,737.42 based on their prior dealings and that “Defendant admitted
8 that he owed Plaintiff money.” Compl. ¶¶ 16, 128. He also alleges that Defendant, “by words or
9 conduct, agreed that the amount stated . . . was the correct amount owed to Plaintiff,” and that
10 “Defendant, by words or conduct, promised to pay the stated amount.” Compl. ¶¶ 129-30.

11 Defendant argues that in order to allege account stated, Plaintiff must allege the existence
12 of a writing that sets forth the state of the parties “account,” and the balance owed by one to the
13 other. Reply 9 (quoting Coffee v. Williams, 103 Cal. 550, 556 (1894)). However, more recent
14 cases indicate that that is no longer the rule. See Truestone, Inc. v. Simi West Industrial Park II,
15 163 Cal. App. 3d 715, 726 (1984) (“an account stated . . . need not be in writing” (citing Fogarty
16 v. McGuire, 170 Cal. App. 2d 405, 409 (1959); Mitchell v. Fleming, 77 Cal. App. 241, 245
17 (1926)); see also Boehmke v. Westfall, 106 Cal. App. 754, 757 (1930) (stating it is settled “that a
18 writing is not essential to the creation of an account stated.”). Indeed, Judicial Council of
19 California Civil Jury Instruction 373 provides that an agreement may be formed “by words or
20 conduct.” CACI 373. Accordingly, Defendant’s motion to dismiss Plaintiff’s account stated
21 claim is denied.

22 **N. Claim and Delivery**

23 Plaintiff’s sixteenth claim is claim and delivery. Claim and delivery is not a separate
24 action but a remedy to return specific property and to award incidental damages. Adler v. Taylor,
25 No. 04-8472-RGK(FMOX), 2005 WL 4658511, at *3 (C.D. Cal. Feb. 2, 2005). In California,
26 courts use claim and delivery which is identical to the federal remedy of replevin. Id. An action
27 for claim and delivery requires a plaintiff to show a right to possession and the defendant’s
28 wrongful possession of the property at issue. Id; see Stalcup v. Liu, No. 11-00002-JSW, 2011 WL

1 1753493, at *6 (N.D. Cal. April 22, 2011); Cal. Civ. Code § 3379; Cal. Civ. Proc. Code §
2 512.010.

3 Plaintiff's claim and delivery action is based on Defendant's allegedly wrongful possession
4 of \$1,110,737.42 belonging to Plaintiff. Compl. ¶ 134. However, for claim and delivery, "it is
5 essential that the specific personal property claimed should be described with a reasonable degree
6 of certainty; and, as a rule, money is not the subject of such an action unless it be marked or
7 designated in some manner so as to make it specific as regards its capability of identification."
8 *Hillyer v. Eggers*, 32 Cal. App. 764, 766 (1917) (citations omitted). Here, Plaintiff does not allege
9 that the money allegedly owed by Defendant is "marked or designated in some manner" that
10 makes it capable of specific identification. See *id.*; see also *Sharon v. Nunan*, 63 Cal. 234, 234-35
11 (1883) (holding that replevin was a proper remedy for recovery of money in "gold and silver
12 coins, sealed up in a canvas bag, marked with a tag" and held in a vault). Accordingly, he has
13 failed to state a claim for claim and delivery. This claim is dismissed with leave to amend.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Defendant's motion to dismiss is granted in part and denied in
16 part. All claims except the fifteenth claim for account stated are dismissed with leave to amend.
17 Any amended complaint must be filed within two weeks of the date of this order. The initial case
18 management conference is set for August 16, 2017 at 1:30. The parties' joint case management
19 conference statement must be submitted by August 9, 2017.

20
21 **IT IS SO ORDERED.**

22 Dated: June 14, 2017

