

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

R POWER BIOFUELS, LLC,
Plaintiff,
v.
CHEMEX LLC,
Defendant.

Case No. 16-CV-00716-LHK

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

Re: Dkt. No. 73

R Power Biofuels, LLC (“Plaintiff”) brings the instant suit against Chemex LLC (“Defendant”) for contract and tort claims arising from Defendant’s alleged failure to adequately build a biodiesel plant. Before the Court is Defendant’s second motion to dismiss. ECF No. 73 (“Mot.”). Having considered the parties’ briefing, the relevant law, and the record in this case, the Court GRANTS in part and DENIES in part Defendant’s Motion to Dismiss.

I. BACKGROUND

A. Factual Background

The Court accepts the facts alleged in the second amended complaint (“SAC”) as true for the purposes of deciding the instant motion to dismiss. ECF No. 72 (SAC). Plaintiff is a former owner of AGRON Bioenergy LLC, formerly known as North Star Biofuels LLC (hereinafter

1 “North Star”), and brings the instant suit as assignee of North Star’s claims. SAC ¶ 3.

2 In 2012, North Star entered into a written agreement with Defendant, in which Defendant
3 agreed to design, engineer, and build a biodiesel production plant using North Star’s proprietary
4 biodiesel production technology. *Id.* ¶¶ 10–14. The biodiesel plant was to be built at North Star’s
5 facility in Watsonville, California. *Id.* ¶ 11. The written agreement was composed of two written
6 “Services Orders,” one entered on February 14, 2012 for the design of the biodiesel plant, and one
7 entered on May 22, 2012 for the construction of the biodiesel plant.¹ *Id.* ¶¶ 13–14; ECF No. 40-1
8 (“February 14, 2012 Services Order”); ECF No. 40-2 (“May 22, 2012 Services Order”).
9 Defendant refused to build the biodiesel plant unless it was also hired to design the plant. *Id.* ¶ 15.
10 North Star paid Defendant \$3.5 million in total to design and build the plant. *Id.* ¶ 19.

11 The biodiesel plant was based on a “modular” design, that is, the plant was composed of
12 multiple independent “skid-mounted” structures connected to one another to form a fully-
13 functioning biodiesel production plant. *Id.* ¶ 21. Defendant built each skid one at a time and
14 delivered them on a rolling basis, albeit behind schedule and over-budget. *Id.* ¶ 26–27.

15 Between May 2012 and December 2012, Defendant asked North Star for permission to
16 utilize used equipment from Defendant’s storage yard, rather than new equipment, to build the
17 plant. *Id.* ¶ 23. Defendant promised North Star that the used equipment would be suitable and
18 ready to use for the biodiesel plant after Defendant refurbished and retrofitted the equipment to
19 meet the design specifications of North Star’s plant. *Id.* ¶¶ 23–25. Defendant sold this used
20 equipment to North Star at a sizeable profit and charged significant additional fees for the work
21 Defendant did to refurbish and retrofit the equipment. *Id.* ¶ 24.

22 The plant could not be started until all of the skids were delivered, installed, and properly
23 connected. *Id.* ¶ 27. In June 2013, North Star attempted to start the biodiesel plant. *Id.* ¶ 28.

24
25 _____
26 ¹ In this Court’s Prior Order on Defendant’s first motion to dismiss, the Court took judicial notice
27 of the Services Orders. ECF No. 69 (“Prior Order”) at 2 n.2; *see also Knievel v. ESPN*, 393 F.3d
28 1068, 1076 (9th Cir. 2005) (allowing judicial notice of “documents ‘whose contents are alleged in
the [plaintiff’s] pleadings’” (citation omitted)).

1 While the structure housing North Star’s proprietary biodiesel process functioned adequately, the
2 other units performing conventional chemical engineering processes failed to perform. *Id.* After
3 investigating the system, North Star detected performance problems and identified numerous
4 engineering and fabrication errors caused by Defendant, many of which were caused by
5 Defendant’s failure to follow its own engineering and manufacturing designs. *Id.* ¶ 29–30.
6 Specifically, Defendant failed to sufficiently refurbish and retrofit the used equipment it supplied,
7 some of which was filled with dirt and debris and was the incorrect size for the design. *Id.*
8 ¶ 29(b)–(c).

9 Starting in July 2013, North Star repeatedly informed Defendant that the plant was not
10 operational. *Id.* ¶ 33. Defendant promised to repair the plant at first. *Id.* ¶ 34. Defendant
11 accepted responsibility for some errors, but denied responsibility for the majority of the problems.
12 *Id.* ¶ 34. Defendant provided some minor repairs and advice, but Defendant’s actions and advice
13 either did not help or exacerbated the issues. *Id.* ¶ 35.

14 North Star was forced to make repairs itself and incurred \$1.5 million in third-party costs.
15 *Id.* ¶ 36. The plant eventually was able to run, but was never able to produce 1,000 barrels of
16 biodiesel per day, the amount originally contemplated and for which the parties contracted. *Id.*
17 ¶ 37.

18 North Star entered a number of contracts with major oil companies such as Chevron and
19 Tesoro for the sale of biodiesel, locked in at high prices, in reliance on Defendant’s assurances that
20 the plant would be operational. *Id.* ¶ 46. North Star also anticipated that it would expand its
21 business based on its relationships with several oil companies, including Chevron and Tesoro. *Id.*
22 ¶ 47. On May 21, 2015, North Star assigned Plaintiff all claims for monetary losses caused by
23 Defendant’s conduct. *Id.* ¶ 50.

24 **B. Procedural History**

25 On February 11, 2016, Plaintiff filed the instant suit against Defendant. ECF No. 1. On
26 June 24, 2016, after discussions with Defendant, Plaintiff filed a first amended complaint
27 (“FAC”). ECF No. 37. In the FAC, Plaintiff brought claims for (1) breach of contract, (2) breach

1 of the implied covenant of good faith and fair dealing, (3) breach of the implied warranty of fitness
2 for a particular purpose under California Commerce Code § 2315, (4) breach of express warranty,
3 (5) tortious interference with contract, (6) negligent and tortious interference with prospective
4 economic advantage, and (7) negligent and intentional misrepresentation. FAC ¶¶ 50–149.

5 On July 25, 2016, Defendant filed a motion to dismiss the FAC. ECF No. 39. With the
6 exception of Plaintiff’s claims for breach of contract and breach of express warranty, Defendant
7 challenged all of Plaintiff’s claims. *Id.* Defendant also challenged Plaintiff’s prayer for
8 consequential damages, punitive damages, and attorney’s fees. *Id.* On August 8, 2016, Plaintiff
9 filed an opposition, ECF No. 43, and on August 18, 2016, Defendant filed a reply, ECF No. 53.

10 On November 11, 2016, the Court granted in part and denied in part Defendant’s motion to
11 dismiss the FAC (“Prior Order”). ECF No. 69 (Prior Order). Specifically, the Court dismissed
12 with leave to amend Plaintiff’s claims for breach of the implied covenant of good faith and fair
13 dealing, tortious interference with contract, negligent and tortious interference with prospective
14 economic advantage, and negligent and intentional misrepresentation, as well as Plaintiff’s prayer
15 for punitive damages. *Id.* at 19–33. The Court dismissed with prejudice Plaintiff’s claim for
16 breach of the implied warranty of fitness for a particular purpose and Plaintiff’s prayer for
17 attorney’s fees. *Id.* The Court denied Defendant’s motion to dismiss Plaintiff’s prayer for
18 consequential damages. *Id.* at 33–36.

19 On December 12, 2016, Plaintiff filed the SAC. ECF No. 72 (SAC). In the SAC, Plaintiff
20 brings claims for (1) breach of contract, (2) breach of express warranty, (3) intentional
21 misrepresentation, (4) tortious interference with contract, and (5) tortious interference with
22 prospective economic advantage. SAC ¶¶ 51–117. Plaintiff also includes a prayer for
23 consequential damages, punitive damages, and attorney’s fees. *Id.* at 27.

24 On December 27, 2016, Defendant filed the instant motion to dismiss the SAC. ECF No.
25 73 (“Mot.”). On January 24, 2017, Plaintiff filed an opposition, ECF No. 82 (“Opp’n”), and on
26 February 14, 2017, Defendant filed a reply, ECF No. 89 (“Reply”).

27 **II. LEGAL STANDARD**

28

1 1985). Thus, claims sounding in fraud must allege “an account of the time, place, and specific
 2 content of the false representations as well as the identities of the parties to the
 3 misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam)
 4 (internal quotation marks omitted). “The plaintiff must set forth what is false or misleading about
 5 a statement, and why it is false.” *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.
 6 1994) (en banc), *superseded by statute on other grounds as stated in Ronconi v. Larkin*, 253 F.3d
 7 423, 429 n.6 (9th Cir. 2001).

8 **C. Leave to Amend**

9 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely
 10 given when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate
 11 decision on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d
 12 1122, 1127, 1140 (9th Cir. 2000) (en banc) (internal quotation marks and alterations omitted).
 13 When dismissing a complaint for failure to state a claim, “a district court should grant leave to
 14 amend even if no request to amend the pleading was made, unless it determines that the pleading
 15 could not possibly be cured by the allegation of other facts.” *Id.* at 1127 (quoting *Doe v. United*
 16 *States*, 58 F.3d 494, 497 (9th Cir. 1995)). Generally, leave to amend shall be denied only if
 17 allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile,
 18 or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d
 19 522, 532 (9th Cir. 2008).

20 **D. State Law in Diversity Cases**

21 “In determining the law of the state for purposes of diversity, a federal court is bound by
 22 the decisions of the highest state court.” *Albano v. Shea Homes Ltd. P’ship*, 634 F.3d 524, 530
 23 (9th Cir. 2011). If the state’s highest court has not decided an issue, it is the responsibility of the
 24 federal courts sitting in diversity to predict “how the state high court would resolve it.” *Id.*; *Air-*
 25 *Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 186 (9th Cir. 1989) (internal quotation
 26 marks omitted). In the absence of clear authority, the Court looks for guidance from decisions of
 27 the state appellate courts and other persuasive authorities, such as decisions from courts in other

1 jurisdictions and treatises. *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir.
2 1996).

3 **III. DISCUSSION**

4 Defendant moves to dismiss Plaintiff’s three tort claims for (1) intentional
5 misrepresentation, (2) tortious interference with contract, and (3) tortious interference with
6 prospective economic advantage. Defendant also moves to dismiss Plaintiff’s prayer for (1)
7 consequential damages, (2) punitive damages, and (3) attorney’s fees. Defendant does not
8 challenge Plaintiff’s claims for breach of contract or breach of express warranty. The Court first
9 addresses Plaintiff’s intentional misrepresentation claim, then addresses Plaintiff’s tortious
10 interference with contract and tortious interference with prospective economic advantage claims,
11 and finally addresses Plaintiff’s prayer for damages and attorney’s fees.

12 **A. Intentional Misrepresentation**

13 Defendant argues that Plaintiff’s intentional misrepresentation claim fails because (1) it is
14 barred by the economic loss rule, and (2) Plaintiff fails to sufficiently plead Defendant’s intent.
15 The Court addresses each argument in turn.

16 **1. Economic Loss Rule**

17 The Court first discusses whether Plaintiff’s intentional misrepresentation claim is barred
18 by the economic loss rule. Under the economic loss rule, “purely economic losses are not
19 recoverable in tort.” *NuCal Foods, Inc. v. Quality Egg LLC*, 918 F. Supp. 2d 1023, 1028 (E.D.
20 Cal. 2013) (citing *S.M. Wilson & Co. v. Smith Int’l, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978));
21 *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) (“[The economic loss
22 rule] requires a purchaser to recover in contract for purely economic loss due to disappointed
23 expectations, unless he can demonstrate harm above and beyond a broken contractual promise.”).
24 The purpose of the rule is to “prevent[] the law of contract and the law of tort from dissolving one
25 into the other.” *Id.* at 988 (internal quotation marks and citation omitted); *Aas v. Superior Court*,
26 24 Cal. 4th 627, 643 (2000), *superseded by statute on other grounds as recognized in Rosen v.*
27 *State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070 (2003) (“A person may not ordinarily recover in tort

1 for the breach of duties that merely restate contractual obligations.”).

2 However, the economic loss rule does not prevent recovery in tort if (1) a “special
3 relationship” exists between the plaintiff and the defendant, *J’Aire Corp. v. Gregory*, 24 Cal. 3d
4 799, 804 (1979); *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958), or (2) the conduct “violates a
5 duty independent of the contract arising from principles of tort law,” *Erlich v. Menezes*, 21 Cal.
6 4th 543, 551 (1999) (citation omitted).

7 Defendant argues that the economic loss rule bars Plaintiff’s intentional misrepresentation
8 claim, and that neither exception to the economic loss rule applies. With respect to the special
9 relationship exception, the Court agrees with Defendant. In the Court’s Prior Order on
10 Defendant’s first motion to dismiss, this Court held that the special relationship exception does not
11 provide an exception for Plaintiff’s tort claims in the instant case. Prior Order at 7–17. Although
12 Plaintiff preserves an objection to the Court’s prior holding, Opp’n at 11 n.4, Plaintiff does not
13 make any arguments concerning the special relationship exception. Accordingly, the Court finds
14 that, for the reasons discussed in this Court’s Prior Order, the special relationship exception does
15 not provide an exception to the economic loss rule in the instant case.

16 The question then is whether Defendant’s alleged conduct falls into the independent duty
17 exception to the economic loss rule. The independent duty exception to the economic loss rule
18 applies where the defendant’s conduct “violates a duty independent of the contract arising from
19 principles of tort law.” *Erlich*, 21 Cal. 4th at 551. The California Supreme Court has recognized
20 an independent duty outside the insurance context (1) where a defendant’s actions that constituted
21 breach of contract also caused physical injury; (2) for wrongful discharge in violation of
22 fundamental public policy; or (3) where the plaintiff was fraudulently induced to enter a contract.
23 *Erlich*, 21 Cal. 4th at 551–52; *see also Oracle USA, Inc. v. XL Glob. Servs., Inc.*, 2009 WL
24 2084154, at *4 (N.D. Cal. July 13, 2009) (“Exceptions have been permitted only where: a breach
25 of duty causes a physical injury; the covenant of good faith and fair dealing is breached in an
26 insurance contract; an employee was wrongfully discharged in violation of a fundamental public
27 policy; or a contract was fraudulently induced.” (citing *Butler–Rupp v. Lourdeaux*, 134 Cal. App.

1 4th 1220 (2005)). In *Robinson Helicopter*, 34 Cal. 4th 979, the California Supreme Court found
2 an additional “narrow” exception where (1) the defendant committed fraud independent of the
3 contract by falsely representing that the defendant was complying with the contract, and (2) the
4 misrepresentations exposed the plaintiff to personal liability and members of the public to harm.
5 *Id.* at 990.

6 Of the above categories, Plaintiff argues only that Defendant fraudulently induced North
7 Star to enter a contract. “[F]raudulent inducement is a well-recognized exception to the economic
8 loss rule.” *Lee v. Fed. St. L.A.*, 2016 WL 2354835, at *9 (C.D. Cal. May 3, 2016); *United Guar.*
9 *Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1188 (C.D. Cal. 2009) (“[I]t
10 has long been the rule that where a contract is secured by fraudulent representations, the injured
11 party may elect to affirm the contract and sue for fraud.” (quoting *Lazar*, 12 Cal. 4th at 645)).
12 Fraudulent inducement occurs when “the promisor knows what he is signing but his consent is
13 induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud,
14 is voidable.” *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 415 (1996).

15 Moreover, the California Supreme Court has held that fraudulent inducement can exist
16 where a contract is induced through promissory fraud. *See Lazar*, 12 Cal. 4th at 638 (“[T]he
17 plaintiff’s claim [for promissory fraud] does not depend upon whether the defendant’s promise is
18 ultimately enforceable as a contract. ‘If it is enforceable, the [plaintiff] . . . has a cause of action in
19 tort as an alternative at least, and perhaps in some instances in addition to his cause of action on
20 the contract.’”). “‘Promissory fraud’ is a subspecies of the action for [intentional
21 misrepresentation].” *Id.* “Where a promise is made without [the intention to perform], there is an
22 implied misrepresentation of fact that may be actionable fraud.” *Id.*

23 District courts in this circuit are split on whether promissory fraud alone may give rise to
24 the fraudulent inducement exception to the economic loss rule. Some district courts in this circuit
25 have held that promissory fraud is insufficient if the promise becomes part of an enforceable
26 contract. *See, e.g., JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1044
27 (N.D. Cal. 2012) (holding that exceptions to the economic loss doctrine do not apply where the

1 fraudulent misrepresentations are “also alleged to be a stand-alone contract”).

2 In contrast, other district courts have held that an adequately pled promissory fraud claim
3 that induces the formation of a contract is sufficient to trigger the fraudulent inducement exception
4 to the economic loss rule. *See Joli Grace, LLC v. Country Visions, Inc.*, 2016 WL 6996643, at *9
5 n.6 (E.D. Cal. Nov. 30, 2016) (the counter-defendants “argue that the economic loss rule will
6 always preclude recovery of fraud claims when the misrepresentations arose from the underlying
7 contract and caused the injured party to enter into a contract. However, such a view ignores the
8 California Supreme Court’s position that the economic loss rule does not preclude recovery for
9 fraudulent inducement.”); *J2 Cloud Servs., Inc. v. Fax87*, 2016 WL 6833904, at *4 (C.D. Cal.
10 Nov. 18, 2016) (finding claim not barred by the economic loss rule because promissory fraud
11 cause of action was adequately alleged).

12 The Court follows the latter cases, which more closely follow the California Supreme
13 Court’s *Lazar* holding that, if the promise that forms the basis of a promissory fraud cause of
14 action “is enforceable [as a contract], the [plaintiff] . . . has a cause of action in tort as an
15 alternative at least, and perhaps in some instances in addition to his cause of action on the
16 contract.” *Lazar*, 12 Cal. 4th at 645 (citations and internal quotation marks omitted). This Court
17 is bound by the holding in *Lazar*. *See Albano v. Shea Homes Ltd. P’ship*, 634 F.3d 524, 530 (9th
18 Cir. 2011) (“[A] federal court is bound by the decisions of the highest state court.”).

19 However, even if a plaintiff adequately alleges that Defendant committed promissory
20 fraud, that promissory fraud must induce a plaintiff to enter a contract in order for the fraudulent
21 inducement exception to the economic loss rule to apply. *See Rosenthal*, 14 Cal. 4th at 415
22 (requiring a plaintiff to have been “induced by fraud” to enter a contract). A plaintiff fails to
23 allege fraudulent inducement if a plaintiff is not induced to enter a new contractual arrangement,
24 but is induced to continue performing the plaintiff’s existing contractual obligations. *See Foster*
25 *Poultry Farms v. Alkar-Rapidpak-MP Equip., Inc.*, 868 F. Supp. 2d 983, 992–93 (E.D. Cal. 2012)
26 (holding that a promise to comply with the terms of a contract could not fraudulently induce the
27 creation of a contract that had already been entered by the parties). Where the formation of a

1 contract is not induced by allegedly false promises, the economic loss rule prevents plaintiffs from
2 seeking “relief for ‘essentially a fraudulent or bad faith breach of [] existing contractual
3 obligations.’” *Id.* at 994.

4 In summary, to adequately allege the fraudulent inducement exception to the economic
5 loss rule based on promissory fraud, a plaintiff must allege that (1) promissory fraud has occurred,
6 and (2) promissory fraud induced the plaintiff to enter a new or modified contract.

7 Here, Plaintiff argues that it satisfies the requirements of the fraudulent inducement
8 exception to the economic loss rule. Specifically, Plaintiff argues that Defendant fraudulently
9 induced the creation of a new or modified contract—one in which Defendant was to utilize used
10 and refurbished components rather than new components in North Star’s biodiesel plant—by
11 falsely promising that the used components would meet the required specifications of the original
12 contract. Opp’n at 12–13 (arguing that “Defendant’s fraud in inducing [North Star] to agree to
13 purchase used equipment is an independent act that is not barred by the economic loss rule”).²
14 Although Plaintiff has not alleged a separate claim for promissory fraud, Plaintiff’s intentional
15 misrepresentation claim is based on allegations that promissory fraud induced Plaintiff to enter a
16 new or modified contract. Specifically, the intentional misrepresentation claim alleges that
17 “[Defendant] fraudulently induced North Star to agree to the use of used equipment by
18 fraudulently promising that such equipment would be properly refurbished to meet the design

19 _____
20 ² Although the SAC also alleges that Defendant committed fraud by making promises to repair the
21 biodiesel plant, Plaintiff does not argue that the “promise to repair” allegations fall within any
22 exception to the economic loss rule. Therefore, Plaintiff has waived any such allegation. *See*
23 *Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009), *aff’d*, 646 F.3d 1240
24 (9th Cir. 2011) (“Where plaintiffs fail to provide a defense for a claim in opposition, the claim is
25 deemed waived.”). Even if the promise to repair allegation were not waived, there is no allegation
26 that Defendant’s promise to repair falls into an exception to the economic loss rule. No fraudulent
27 inducement has been alleged. Moreover, the independent duty exceptions to the economic loss
28 rule, in the absence of fraudulent inducement, do not apply where a party violates a promise to
comply with already-existing contractual obligations. *See Oracle*, 2009 WL 2084154 at *4
(holding that a fraud claim based on the defendant’s violation of a promise to pay outstanding
invoices already owed under contract could not survive the economic loss rule). Here, the
Services Orders explicitly *required* Defendant to repair the biodiesel plant. Therefore, a tort claim
based on Defendant’s failure to follow through on that contractual requirement—even if done in
bad faith—is barred by the economic loss rule. Accordingly, Plaintiff’s tort claims cannot be
based on Defendant’s allegedly false promises to repair the biodiesel plant.

1 specifications.” SAC ¶ 72. When, as here, an intentional misrepresentation claim is based on an
2 allegedly false promise, an intentional misrepresentation claim is alternatively called a
3 “promissory fraud” claim. *See Lazar*, 12 Cal. 4th at 638 (“‘Promissory fraud’ is a subspecies of
4 the action for [intentional misrepresentation].”). Thus, Plaintiff argues that Defendant committed
5 promissory fraud, and that the promissory fraud induced plaintiff to enter a new or modified
6 contract.

7 In response, Defendant argues that no fraudulent inducement occurred because this Court’s
8 Prior Order precludes any cause of action arising from the parties’ agreement for the use of used
9 and refurbished equipment. Second, Defendant argues that the use of used and refurbished
10 equipment was already contemplated by the original contract for building the biodiesel plant—the
11 Services Orders—and therefore North Star was not induced to enter a new or modified contract by
12 Defendant’s allegedly false promises. Finally, Defendant argues that Plaintiff has failed to
13 adequately allege the intent necessary to satisfy the elements of an intentional misrepresentation
14 claim or of the fraudulent inducement exception to the economic loss rule. The Court addresses
15 each of Defendant’s arguments in turn.

16 **a. Whether this Court’s Prior Order Precludes the Application of**
17 **the Fraudulent Inducement Exception**

18 Defendant first argues that this Court’s Prior Order precludes the application of the
19 fraudulent inducement exception. Specifically, Defendant quotes this Court’s holding that “even
20 assuming the use of refurbished goods was not part of the original agreement, Plaintiff has failed
21 to show how Defendant’s actions ‘violate a duty independent of the contract arising from
22 principles of tort law.’ Defendant’s use of used or refurbished equipment alone simply shows that
23 Defendant breached the original contract or that Plaintiff accepted a modification to the contract.”
24 Prior Order at 18.

25 However, this Court’s prior holding explicitly reserved the question of “whether the
26 intentional conduct or intentional torts alleged by Plaintiff involve an ‘independent duty’ sufficient
27 to satisfy *Erlich*.” Prior Order at 18. “Plaintiff’s sole argument concerning the independent duty

1 exception” on the first round motion to dismiss was that “a duty independent of the contract was
2 created when Defendant offered and Plaintiff accepted satisfaction of the contract with used or
3 refurbished goods.” Prior Order at 18. Indeed, Plaintiff had failed to make *any* argument that
4 Defendant’s intentional or fraudulent conduct constituted one of the recognized independent duty
5 exceptions to the economic loss rule discussed in *Erlich*. In contrast, Plaintiff now argues that
6 Defendant committed fraudulent inducement, one of the recognized exceptions to the economic
7 loss rule. Therefore, this Court’s Prior Order is inapposite here.

8 The Court next turns to Defendant’s argument that Defendant did not induce the creation
9 of a new or modified contract.

10 **b. Whether Defendant Breached an “Existing Contractual**
11 **Obligation” Between the Parties**

12 As noted above, Plaintiff argues that Defendant fraudulently induced North Star to enter a
13 new or modified contract to provide used and refurbished equipment that is different from the
14 Services Orders, which allegedly provided for the use of new equipment. Defendant argues that
15 no fraudulent inducement occurred because the parties’ agreement about used and refurbished
16 equipment was not a “new or modified” contract and made no changes to the obligations of the
17 parties described in the Services Orders. As discussed above, if the parties did not enter a new or
18 modified contract with different obligations, Plaintiff was simply induced to continue performing
19 its then-existing contractual obligations, and the fraudulent inducement exception would not
20 apply. *See Foster*, 868 F. Supp. 2d at 992–93 (holding that a promise to comply with the terms of
21 a contract could not fraudulently induce the creation of a contract that had already been entered by
22 the parties). Therefore, the question then is whether the Services Orders—the original written
23 contracts between North Star and Defendant at the time the allegedly false statements were
24 made—already involved an agreement for Defendant’s use of, and North Star’s payment for, used
25 and refurbished goods for the biodiesel plant.

26 Both parties rely on the May 22, 2012 Services Order. Defendant points to language that
27 states that “Refurbished equipment (“Equipment”) supplied from Contractor’s inventory shall be

1 billed at the as-is sales price plus labor and materials for refurbishment.” May 22, 2012 Services
2 Order at 1. In response, Plaintiff points to language that states that “[a]ll materials, supplies,
3 equipment and other items furnished and incorporated by Contractor into the Services shall be
4 new unless otherwise specified on the face of this Service[s] Order.” May 22, 2012 Services
5 Order ¶ 3. The May 22, 2012 Services Order contains a list of materials that were to be used in
6 the biodiesel plant, none of which are specified as used equipment. *Id.* at 2–5.

7 These provisions of the Services Orders, when read together, “are susceptible of more than
8 one reasonable interpretation and are therefore ambiguous.” *Westlands Water Dist. v. U.S. Dep’t*
9 *of Interior*, 850 F. Supp. 1388, 1408 (E.D. Cal. 1994). On the one hand, the Services Orders could
10 be read to say that although the parties contemplated the use of the refurbished equipment in the
11 Services Orders, the parties had not agreed to the use of used or refurbished equipment because
12 none was specified on the face of the Services Orders. May 22, 2012 Services Order ¶ 3. If this is
13 the correct interpretation of the Services Orders, the parties’ agreement for the use of used and
14 refurbished equipment in the biodiesel plant could constitute a separate standalone agreement or a
15 modification to the Services Orders. A fraudulently induced standalone agreement or a
16 fraudulently induced modification to a contract can satisfy the fraudulent inducement exception to
17 the economic loss rule. *See Lee*, 2016 WL 2354835 at *4 (finding fraudulent inducement
18 exception to economic loss rule applies to the “second addendum” of a sales agreement, a contract
19 modification with new obligations). Thus, if this interpretation were correct, the fraudulent
20 inducement exception to the economic loss rule would apply.

21 If this interpretation of the contract is correct, this case would be analogous to *Lee v.*
22 *Federal Street L.A., LLC*, 2016 WL 2354835. There, the parties had entered an agreement to build
23 condominium units. During the construction of the units, however, the plaintiff sought to
24 terminate the contract due to delays. *Id.* at *8–9. In response, the defendant induced the plaintiff
25 to enter into a second addendum that required the plaintiff to defer terminating the contract for an
26 additional year. *Id.* The *Lee* court held that the economic loss rule did not bar a claim where the
27 “plaintiff claim[ed] that the moving defendants fraudulently induced [the plaintiff] by promising

1 her that they would deliver her condominium units by December 31, 2011 when, in reality, they
2 had no intention of doing so.” *Id.* Similarly here, Plaintiff alleges that Defendant fraudulently
3 induced North Star by promising that the used or refurbished goods would function as adequately
4 as new parts in the biodiesel plant, when in reality, Defendant allegedly knew that the used and
5 refurbished goods would not be adequate. Thus, as in *Lee*, the fraudulent inducement exception to
6 the economic loss rule would apply.

7 On the other hand, the pricing provision of the Services Orders indicates an understanding
8 of the parties that refurbished equipment would be used to complete the biodiesel project. *See*
9 May 22, 2012 Services Order (“Refurbished equipment (“Equipment”) supplied from Contractor’s
10 inventory shall be billed at the as-is sales price plus labor and materials for refurbishment.”).
11 Moreover, Plaintiff’s FAC alleges that on February 15, 2012, before the May 22, 2012 Services
12 Order was signed, Defendant’s representative stated that “[Defendant] shall provide refurbished
13 equipment and new equipment for the project.” FAC ¶ 69(a). Thus, it is possible the parties
14 mutually understood the Services Orders to include an agreement for the supply of used and
15 refurbished equipment. If this is the correct interpretation, the agreements for the use of used and
16 refurbished equipment would be “existing contractual obligations.” *Foster*, 868 F. Supp. 2d at
17 992. That is, because the Services Orders would have already encompassed the duty to provide
18 used and refurbished equipment, the allegedly fraudulent statements made after the May 22, 2012
19 Services Order was signed would not have “induced” the creation of any new or modified
20 contract.

21 As described above, one reasonable interpretation of the Services Orders indicates that the
22 obligation to provide used and refurbished equipment was an existing obligation, and another
23 reasonable interpretation indicates that it was a new obligation induced through Defendant’s
24 fraudulent statements. Where a contract is susceptible to more than one interpretation, “[a] motion
25 to dismiss cannot be granted.” *Westlands*, 850 F. Supp. at 1408 (citing *Consul Ltd. v. Solide*
26 *Enters., Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986)); *see also Manzarek*, 519 F.3d at 1031 (holding
27 that courts must construe the pleadings in the light most favorable to the plaintiff on a motion to
28

1 dismiss). Accordingly, the Court finds that dismissal is not warranted on the grounds that the
2 original Services Orders contained an obligation to use used and refurbished equipment.

3 **2. Allegations of Intent**

4 The Court next turns to Defendant’s argument that Plaintiff has insufficiently alleged the
5 intent element of Plaintiff’s intentional misrepresentation claim and of the fraudulent inducement
6 exception to the economic loss rule. The Court first addresses the intent requirement for
7 intentional misrepresentation and the fraudulent inducement exception, and then discusses whether
8 that intent requirement has been satisfied in this case.

9 “The elements of [intentional misrepresentation] are: (1) a misrepresentation (false
10 representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to
11 defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.” *Robinson*
12 *Helicopter*, 34 Cal. 4th at 990 (citing *Lazar*, 12 Cal. 4th at 638). A promise to do something in the
13 future may constitute intentional misrepresentation if it was made without any intention to
14 perform. *Lazar*, 12 Cal. 4th at 638. Plaintiff’s intentional misrepresentation claim is based on
15 Defendant’s allegedly false promises to utilize used equipment that Defendant had refurbished to
16 meet the design specifications of the biodiesel plant. Therefore, to state a claim, Plaintiff must
17 show that Defendant’s promises were made without any intention to perform. As noted above,
18 because the intentional misrepresentation claim here is based on an allegedly false promise, the
19 intentional misrepresentation claim is also called a “promissory fraud” claim. *See id.*
20 (“‘Promissory fraud’ is a subspecies of the action for [intentional misrepresentation].”).

21 Fraudulent inducement occurs when “the promisor knows what he is signing but his
22 consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of
23 the fraud, is voidable.” *Rosenthal*, 14 Cal. 4th at 415. As discussed above, Plaintiff’s argument
24 that “consent [was] induced by fraud” is based on Defendant’s allegedly false promises to utilize
25 used equipment that Defendant had refurbished to meet the design specifications of the biodiesel
26 plant. That is, the applicability of the fraudulent inducement exception is based on the same
27 actions underlying the intentional misrepresentation (i.e., promissory fraud) claim. *See Lazar*, 12

1 Cal. 4th at 638 (holding that promissory fraud can be the basis of fraudulent inducement). Thus,
2 as with Plaintiff’s intentional misrepresentation (i.e., promissory fraud) claim, Plaintiff’s consent
3 was only “induced by fraud” if Defendant’s promises were made without the intention to perform
4 those promises.

5 In summary, Plaintiff only states a claim for intentional misrepresentation and only
6 satisfies the fraudulent inducement exception to the economic loss rule if Plaintiff adequately
7 alleges that Defendant made false promises to utilize used equipment that Defendant had
8 refurbished to meet the design specifications of the biodiesel plant.

9 The Court next turns to whether Plaintiff has adequately alleged such an intent. Generally,
10 under Federal Rule of Civil Procedure 9(b), a Plaintiff must plead “the factual circumstances of
11 the fraud itself [] with particularity, [but] the state of mind—or scienter—of the defendants may be
12 alleged generally.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 554 (9th Cir. 2007). However,
13 allegations of intent must still satisfy the plausibility requirements of Rule 8(a). *See Eclectic*
14 *Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (“[A]lthough
15 the language of Rule 9 poses no barrier in itself to general pleading of fraudulent intent, *Twombly*
16 and *Iqbal* ‘s pleading standards must still be applied to test complaints that contain claims of
17 fraud.”). Thus, under Rule 8(a), Plaintiff “must point to *facts* which show that defendant harbored
18 an intention not to be bound by terms of the contract at formation.” *UMG Recordings, Inc. v.*
19 *Glob. Eagle Entm’t, Inc.*, 117 F. Supp. 3d 1092, 1109–10 (C.D. Cal. 2015) (emphasis added); *see*
20 *also Sherwin-Williams Co. v. JB Collision Servs., Inc.*, 2014 WL 5112057, at *9 (S.D. Cal. Oct.
21 10, 2014) (“[A]n action for deceit based on a false promise requires a showing of specific intent;
22 as a result, ‘[a] cause of action for a false promise should plead facts to show the existence of two
23 specific intentions of the promisor: an intention to cause the promisee to act by reason of the
24 promise, and an intention at the time of the promise not to keep it.’”)

25 Moreover, it is insufficient to allege intent based purely on Defendant’s failure to perform
26 its promises. The California Supreme Court has held that “something more than nonperformance
27 is required to prove the defendant’s intent not to perform his promise.” *Tenzer v. Superscope*,

1 *Inc.*, 39 Cal. 3d 18, 30 (1985). However, the California Supreme Court has also cited to
2 circumstantial evidence that may create an inference of fraudulent intent not to perform a promise:
3 “fraudulent intent has been inferred from such circumstances as defendant’s insolvency, his hasty
4 repudiation of the promise, his failure even to attempt performance, or his continued assurances
5 after it was clear he would not perform.” *Id.* (citing Prosser, Torts § 109 (5th ed. 1984)). Thus,
6 the question here is whether Plaintiff has alleged sufficient facts to show that Defendant intended
7 to inadequately refurbish the used equipment at the time Defendant promised to provide used and
8 refurbished equipment.

9 In the SAC, Plaintiff alleges that “Chemex did not intend to properly refurbish, and did not
10 properly refurbish, the parts and equipment for use in the biodiesel plant,” and that “Chemex
11 engaged in intentionally fraudulent and deceptive conduct for the purpose of increasing its own
12 profits by promising to refurbish or retrofit used parts already in its inventory, rather than provide
13 new parts, in building the biodiesel plant.” SAC ¶ 70.

14 More specifically, Plaintiff alleges that Defendant provided clearly defective parts, such as
15 “a vacuum pump that was rusted and unable to rotate.” SAC ¶ 29(j). Plaintiff alleges that “[u]pon
16 information and belief, [Defendant] had stored that pump in its open equipment yard without
17 protection from the weather.” *Id.* Plaintiff provides a number of other examples of equipment that
18 was not refurbished properly. See SAC ¶¶ 29(n) (improperly sized equipment), 29(o) (same),
19 29(c) (equipment filled with debris). Additionally, Plaintiff alleges that Defendant “represented to
20 North Star that [Defendant] would repair errors North Star had found,” but “never made the
21 repairs required to make the plant fully functional.” SAC ¶ 34.

22 The Court finds that Plaintiff has adequately alleged Defendant’s intent not to perform
23 Defendant’s promises. Plaintiff has not merely alleged Defendant’s “nonperformance” of its
24 allegedly false promises to utilize used equipment that Defendant had refurbished to meet the
25 design specifications of the biodiesel plant. Instead, despite the fact that some of the equipment
26 allegedly was clearly defective (i.e. rusted out), and Defendant had not refurbished the equipment,
27 Defendant decided to still install that clearly defective equipment in Plaintiff’s biodiesel plant.

1 That action carries an inference that Defendant never actually intended to refurbish the used
2 equipment and instead hoped to cut costs by installing non-refurbished used equipment in the
3 biodiesel plant. *See Lee*, 2016 WL 2354835 at *9 (finding inference of fraudulent intent where
4 actions taken after promise carried an inference that Plaintiff never intended to perform).

5 Moreover, in *Tenzer* the California Supreme Court held that a defendant’s “continued
6 assurances after it was clear [the defendant] would not perform” the defendant’s contractual
7 duties, create an inference of intent. *Tenzer*, 39 Cal. 3d at 30. Similarly here, Plaintiff alleges that
8 Defendant provided multiple assurances that Defendant would repair the problems with the
9 biodiesel plant, but failed to make such repairs.

10 For the foregoing reasons, at least at the motion to dismiss stage, the Court finds that
11 Plaintiff has adequately alleged intent for intentional misrepresentation and promissory fraud,
12 which is a subspecies of intentional misrepresentation. The fraudulent inducement exception to
13 the economic loss rule here is based on Plaintiff’s theory of intentional misrepresentation and
14 promissory fraud, i.e., that Defendant’s fraudulent promises induced Plaintiff to enter or modify a
15 contract. Thus, because Plaintiff has adequately pled intent for intentional misrepresentation and
16 promissory fraud, the Court finds that Plaintiff has properly pled intent for the fraudulent
17 inducement exception to the economic loss rule. Accordingly, Defendant’s motion to dismiss
18 Plaintiff’s intentional misrepresentation claim is DENIED.

19 **B. Tortious Interference with Contract and Tortious Interference with**
20 **Prospective Economic Advantage**

21 Defendant argues that Plaintiff’s tortious interference with contract and tortious
22 interference with prospective economic advantage claims fail because (1) they are barred by the
23 economic loss rule, (2) Plaintiff fails to sufficiently plead Defendant’s intent, and (3) Plaintiff’s
24 claims are barred by the two-year statute of limitations. The Court finds that Plaintiff’s tortious
25 interference claims fail to satisfy the statute of limitations, and therefore the Court need not reach
26 the issue of the economic loss rule or Defendant’s intent as to these claims.

27 Defendant contends that Plaintiff’s claims for tortious interference with prospective
28

1 economic advantage and tortious interference with contract are untimely. Tort claims have a
2 statute of limitations of two years. Cal. Civ. Proc. Code § 339(1). The accrual of the statute of
3 limitations is “postpone[d] . . . until the plaintiff discovers, or has reason to discover, the cause of
4 action.” *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 389 (1999); *DC Comics v. Pac. Pictures Corp.*,
5 938 F. Supp. 2d 941, 951 (C.D. Cal. 2013). California courts “look to whether the plaintiffs have
6 reason to at least suspect that a type of wrongdoing has injured them.” *Fox v. Ethicon Endo-
7 Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005) (emphasis added). “So long as a suspicion exists, it is
8 clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” *Jolly v. Eli
9 Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988).

10 The instant suit was filed on February 11, 2016, ECF No. 37, which means that the tort
11 claims must have accrued no earlier than February 11, 2014 to be timely. In Plaintiff’s SAC,
12 Plaintiff alleges that it first discovered that the biodiesel plant would not start in June 2013. SAC
13 ¶ 28. Moreover, Plaintiff’s SAC alleges that North Star’s contracts with Chevron and Tesoro with
14 which Defendant allegedly interfered were one-month contracts for the delivery of biodiesel for
15 the month of June 2013. SAC ¶¶ 91. Chevron and Tesoro had the option to renew the contract at
16 the end of the first month. Thus, because the biodiesel plant failed to start in June 2013, North
17 Star was unable to meet its obligations under the Chevron and Tesoro contracts. Chevron and
18 Tesoro did not renew the June 2013 contract for the next month as a result. Therefore, the
19 interference with contract and with prospective economic advantage from the renewal of those
20 contracts began at least by the end of June 2013.

21 Although North Star suffered interference with its contracts and prospective economic
22 advantages as of June 2013, Plaintiff argues that North Star had not yet discovered the cause of
23 action because North Star had no knowledge of the alleged intentional acts that caused the
24 interference until years later. Specifically, Plaintiff argues that North Star was only put on notice
25 of the intentional nature of Defendant’s acts by January 2015 when Defendant finally stopped
26 attempting any repairs.

27 First, the Court notes that the inoperability of North Star’s biodiesel plant likely provided

1 North Star “reason to at least suspect that a type of wrongdoing has injured them” when that
2 biodiesel plant would not start up. *Ethicon*, 35 Cal. 4th at 807. However, even assuming that
3 more is required for an intentional interference claim to accrue, Plaintiff’s SAC explicitly alleges
4 that “North Star first began discovering [Defendant’s] errors in July 2013, but did not discover
5 [Defendant’s] fraud (with respect to refurbishment) until [Defendant] began opening closed
6 vessels in late 2013.” SAC ¶ 98. Thus, Plaintiff’s SAC alleges that as of late 2013: (1) North
7 Star had failed to satisfy the contracts with Chevron and Tesoro and had failed to obtain renewal
8 of those contracts, (2) knew that the biodiesel plant was nonfunctional due to Defendant’s
9 mistakes, and (3) knew, or at least suspected, that Defendant had committed fraud. Thus, by
10 Plaintiff’s own allegations, North Star had at least a suspicion of the cause of actions for tortious
11 interference with contract and tortious interference with prospective economic advantage outside
12 the two-year statute of limitations. Therefore, under *Ethicon* and *Jolly*, Plaintiff’s claims are
13 untimely.

14 In Plaintiff’s opposition to the instant motion, Plaintiff argues that “in late 2013 [North
15 Star] still trusted that [Defendant] would rectify the situation” because of Defendant’s promises of
16 repair. Opp’n at 17. However, that argument directly contradicts Plaintiff’s allegation that it had
17 discovered Defendant’s “fraud” by late 2013.

18 Therefore, the Court finds that Plaintiff’s claims for tortious interference with contract and
19 tortious interference with prospective economic advantage are untimely. Accordingly, the Court
20 GRANTS Defendant’s motion to dismiss. The dismissal is with prejudice because this Court
21 previously dismissed the tortious interference with contract and tortious interference with
22 prospective economic advantage claims based on a failure to adequately plead that the claims were
23 timely. In this Court’s Prior Order, the Court stated “failure to cure the deficiencies identified in
24 this Order will result in a dismissal with prejudice of Plaintiff’s deficient claims.” Prior Order at
25 39. Despite this warning, Plaintiff again has failed to adequately allege that the tortious
26 interference with contract and tortious interference with prospective economic advantage claims
27 are timely. Accordingly, the Court finds that further amendment would be futile, and the

1 dismissal is with prejudice. *See Leadsinger*, 512 F.3d at 532 (allowing dismissal with prejudice
2 where amendment would be futile).

3 **C. Prayer for Damages**

4 **1. Attorney's Fees**

5 In Plaintiff's opposition to the instant motion to dismiss, Plaintiff concedes that it
6 erroneously requested attorney's fees in the SAC. Opp'n at 2 ("Plaintiff's request for attorneys'
7 fees in the SAC was made in error. Plaintiff does not seek an award of attorneys' fees at this
8 time."). On November 11, 2016, the Court granted with prejudice Defendant's motion to dismiss
9 Plaintiff's prayer for attorney's fees. Accordingly, for a second time, the Court GRANTS with
10 prejudice Defendant's motion to dismiss Plaintiff's prayer for attorney's fees.

11 **2. Consequential Damages**

12 In this Court's Prior Order, the Court denied Defendant's motion to dismiss Plaintiff's
13 prayer for consequential damages. Defendant previously argued that Plaintiff's prayer for
14 consequential damages should be dismissed because the parties had waived consequential
15 damages in the Services Orders. Prior Order at 34 (citing Services Orders, Terms & Conditions
16 ¶ 13(c)–(d)). However, under § 2719(2), consequential damages are still recoverable despite a
17 waiver "[w]here the circumstances cause an exclusive or limited remedy to fail of its essential
18 purpose." Cal. Com. Code § 2719(2). The Services Orders here provided that "the sole remedy of
19 'any failure of contractor to comply with its obligations' is correction of the non-conformity."
20 Prior Order at 34 (Services Orders, Terms & Conditions ¶ 13(c)–(d)). Thus, because Plaintiff's
21 FAC alleged that Defendant had failed to "correct[] [] the non-conformity" with the biodiesel
22 plant, the remedy provided in the Services Orders potentially failed of its essential purpose, and
23 the the Court could not "find as a matter of law that consequential damages are unavailable."
24 Prior Order at 35 (citing *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1376 (9th Cir.
25 1978), *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 547 (9th Cir. 1985), and *Milgard*
26 *Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553, 556–57 (9th Cir. 1985)).

27 In the instant motion, Defendant argues once again that Plaintiff's prayer for consequential
28

1 damages should be dismissed because the damages were waived in the Services Orders.
2 Defendant argues that “the Court did not consider R Power’s burden to establish that the
3 consequential damages waiver is ‘unconscionable.’” Mot. at 13. However, Defendant attempts to
4 conflate the analysis of § 2719(2), the basis on which this Court denied Defendant’s first motion to
5 dismiss, with California Commercial Code § 2719(3), which provides that “[c]onsequential
6 damages may be limited or excluded unless the limitation or exclusion is unconscionable,” Cal.
7 Com. Code § 2719(3). Section 2719(2) and § 2719(3) provide independent bases for providing
8 consequential damages despite a waiver. *RRX Indus.*, 772 F.2d at 547 (“[Section 2719(2)]
9 provides an independent limit [on waivers of consequential damages] when circumstances render a
10 damages limitation clause oppressive and invalid.”). The Ninth Circuit explicitly held in *RRX*
11 *Industries* that “neither bad faith nor procedural unconscionability is necessary under California
12 Commercial Code § 2719(2),” and that “[u]nconscionability is irrelevant” to the § 2719(2)
13 analysis. *Id.* Therefore, Defendant’s new unconscionability argument provides no reason to
14 disturb this Court’s Prior Order, which was based entirely on § 2719(2).

15 Accordingly, because Plaintiff has adequately alleged that the remedy of the Services
16 Orders failed of their essential purpose, the Court DENIES Defendant’s motion to dismiss
17 Plaintiff’s prayer for consequential damages.

18 **3. Punitive Damages**

19 The Prior Order held that punitive damages “are only available for contract claims if the
20 breaches of contract are also tortious.” Prior Order at 35 (citing *Harris v. Atl. Richfield Co.*, 14
21 Cal. App. 4th 70, 77–78 (1993)). Thus, because the Prior Order dismissed all of Plaintiff’s tort
22 claims, the Prior Order dismissed Plaintiff’s prayer for punitive damages. *Id.* However, in the
23 instant order, because the intentional misrepresentation claim survives, the Court DENIES
24 Defendant’s motion to dismiss Plaintiff’s prayer for punitive damages.

25 **IV. CONCLUSION**

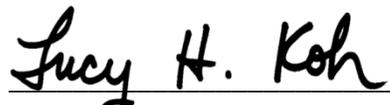
26 For the foregoing reasons, the Court GRANTS with prejudice Defendant’s motion to
27 dismiss Plaintiff’s tortious interference with contract claim, tortious interference with prospective

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

economic advantage claim, and prayer for attorney’s fees, and DENIES Defendant’s motion to dismiss Plaintiff’s intentional misrepresentation claim and prayer for consequential and punitive damages.

IT IS SO ORDERED.

Dated: March 29, 2017



LUCY H. KOH
United States District Judge