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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

LL B SHEET 1, LLC,  
Plaintiff,  
v.  
MICHAEL J. LOSKUTOFF,  
Defendant.

Case No. 16-cv-02349-BLF

**ORDER GRANTING IN PART AND  
DEFERRING RULING ON IN PART  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

[Re: ECF 92]

This case involves a deal between Plaintiff LL B Sheet 1, LLC and Defendant Michael J. Loskutoff, in which Defendant sold Plaintiff the rights to a lease of a cell phone tower. At the time of the deal, Plaintiff says it believed that the lease had two streams of rental income. In fact, at the time of the purchase, the lease had only one stream of rental income. Plaintiff alleges that Defendant knew that the second stream of rental income had been terminated and fraudulently misrepresented and concealed this information from Plaintiff in order to close the deal. In his answer, Defendant asserted fourteen affirmative defenses and a counterclaim for rescission of the agreement.

Before the Court is Plaintiff’s motion for summary judgment of Defendant’s affirmative defenses and his counterclaim. ECF 92. The Court heard oral argument on January 7, 2019. For the reasons that follow, the Court DEFERS RULING ON Plaintiff’s motion for summary judgment as to Defendant’s fourth affirmative defense and GRANTS the motion as to the remainder of Defendant’s affirmative defenses and his counterclaim for rescission.

**I. BACKGROUND**

**A. Undisputed Facts**

Defendant Michael Loskutoff is the sole trustee of the Michael John Loskutoff Trust dated

1 November 20, 1992 (the “Trust”). Saba Decl. ISO Mot., Ex. C, ECF 92-4. The Trust owns a  
2 parcel of land at 1391 Geneva Dr. in Sunnyvale, California (“the Property”). *Id.*, Ex. B at 19:1–  
3 13, ECF 92-3. On July 1, 1996, Defendant leased a portion of the land to Spring Spectrum, L.P.  
4 (“Sprint”) for Sprint to construct a cell phone tower on the Property, which remains on the  
5 Property today. *Id.*, Ex. D, ECF 92-5; *id.*, Ex. B at 19:1–13, ECF 92-3. The tower is  
6 approximately 100 feet tall, located on the back of the property, and enclosed by a locked fence to  
7 which Defendant does not have a key. *Id.*, Ex. B at 22:10–23:9.

8 Several changes were made that affected the rents paid under the lease over the next fifteen  
9 years. In September 2002, Defendant and Sprint amended the lease to allow Sprint to enter into a  
10 sublease (or co-location agreement) with AT&T Wireless (“AT&T”), which would allow AT&T  
11 to use the cell tower, and to increase Sprint’s rents by \$2,000 monthly. Saba Decl. Ex. F, ECF 92-  
12 7. Under the terms of the amended lease, Sprint entered into a sublease with AT&T. The  
13 amended lease did not require Sprint to inform Defendant if AT&T terminated its sublease with  
14 Sprint, and Defendant never had any interaction with or received any rents directly from AT&T.  
15 *Id.*; Loskutoff Decl. ISO Opp. ¶ 4, ECF 93-2. In February 2007, CCGS Holdings, LLC (“Crown  
16 Castle”) informed Defendant that due to a merger, it would begin managing the cell phone tower  
17 for Sprint, though the lease agreement remained unchanged. *Id.*, Ex. G. In March 2011, Sprint  
18 paid Defendant \$10,000 to again amend the agreement, this time to extend the lease duration,  
19 increase the rent, and provide Sprint an option to obtain a \$1.2 million easement or to match a  
20 purchase offer from any other interested party—*i.e.*, a right of first refusal. *Id.*, Ex. J at 2–4.

21 By October 2007, Defendant was receiving an annual rent of \$48,374.10 for the lease  
22 from Sprint, with \$21,342.80 attributable to Sprint and \$27,031.30 attributable to AT&T. *Id.*, Ex.  
23 H, ECF 92-9. On April 1, 2010, Defendant received an annual rent check of \$54,742.63 for the  
24 lease. *Id.*, Ex. I, ECF 92-10. On April 1, 2011, he received annual rents of \$56,942.73. *Id.*, Ex.  
25 K, ECF 92-12. On April 1, 2012, he received \$59,220.44. *Id.*, Ex. L, ECF 92-13. In April 2013,  
26 he received \$61,589.26. *Id.*, Ex. M, ECF 92-14. But, in April 2014, he received only \$28,260.30,  
27 less than half the amount received in 2013. *Id.*, Ex. P, ECF 92-17.

28 The 2014 rent was significantly lower because on October 25, 2013, AT&T had notified

1 Crown Castle that it would be terminating its sublease of the tower on December 31, 2013. *Id.*,  
 2 Exs. N & O, ECF 92-15, 92-16. Sprint, however, did not terminate its lease with Defendant; the  
 3 lease remains in effect today. Loskutoff Decl. ¶ 11; Ballesteros Decl. ISO Opp. ¶ 3, Ex. 2, ECF  
 4 93-1. On April 23, 2014, after receiving this reduced check, Defendant contacted Crown Castle’s  
 5 Landowners Help Desk, which is a resource for landowners to receive help from Crown Castle  
 6 and allows Crown Castle to log the interaction. *Id.*, Ex. Q at 9:14–10:4, ECF 92-18; *id.*, Ex. R  
 7 (“Egercic Decl.”) at 6:5–8, ECF 92-19. Crown Castle employee Denise Egercic spoke to  
 8 Defendant and created the following log after the call ended: “Received a call from LL [Landlord]  
 9 Mike . . . . He was inquiring why his check . . . was so much less than normal. It appears that  
 10 AT&T terminated and was discovered through a rent recon. It appears that we received notice  
 11 from AT&T however the LL indicated that he was not notified. Forward to James Laque for  
 12 assistance.” *Id.*, Ex. S, ECF 92-20.

13 On May 5, 2014, Defendant emailed Crown Castle employee Ryan Hull asking him to  
 14 “verify who is on the Sprint poll for this site [at 1391 Geneva Drive]. My records show Sprint,  
 15 Clear Wire and AT&T.” *Id.*, Ex. T, ECF 92-21. Mr. Hull responded with “I show Sprint and  
 16 Clearwire on the tower. I don’t show AT&T as being installed on the tower any longer.” *Id.*  
 17 Defendant responded on May 16, 2014 by asking “When did AT&T came [sic] off the tower?” *Id.*

18 Later in May 2014, Defendant began the process of selling the Sprint lease to Plaintiff. A  
 19 separate company, Telecom Lease Advisors, LLC (“TLA”) performed the due diligence process  
 20 for Plaintiff.<sup>1</sup> Compl. ¶ 13. Sometime before May 28, 2014, Defendant spoke to John  
 21 Mondragon, the broker for the eventual lease sale between Plaintiff and Defendant, about the  
 22 possibility of Plaintiff purchasing the lease. *Id.*, Ex. B at 100:1–102:25. During that conversation,  
 23 Defendant did not mention that there was an issue receiving the 2014 AT&T rent, and he told Mr.  
 24 Mondragon that he was receiving money from both Sprint and AT&T. *Id.* at 102:14–25; 103:7–  
 25 12.

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 28 <sup>1</sup> Following Plaintiff’s lead, *see, e.g.*, Mot. at 7, the Court refers to actions taken by TLA as if they  
 were taken by Plaintiff. Plaintiff is an entity owned by Insite Wireless Group, a partner of TLA.  
*See Saba Decl.*, Ex. V., at 10:18–12:11.

1           On May 28, 2014, Mr. Mondragon sent Defendant a lease-purchase application to fill out.  
2 *Id.*, Ex. X, ECF 92-25; *id.*, Ex. Y at 33:4–35:10, ECF 92-26. Defendant filled out the application.  
3 *Id.*, Ex. W, ECF 92-24; *id.*, Ex. B at 90:12–21. The application stated that Crown Castle was the  
4 tenant and the other carriers on the site were Sprint, Clearwire & AT&T. *Id.*, Ex. W at 3. It also  
5 stated that the lease was in full force and effect. *Id.* In the application, Defendant certified that the  
6 information in the application was true and agreed to provide any later-received information that  
7 might change any of his answers. *Id.* The application did not indicate that AT&T either actually  
8 or potentially was no longer on the lease. In the same email, Mr. Mondragon also sent a proposed  
9 term sheet for a sale of the lease for \$925,000. *Id.*, Ex. X; *id.*, Ex. Y at 33:4–35:10. The schedule  
10 to the term sheet indicated that the Property had two rental income streams of \$27,173 and  
11 \$34,416, respectively. *Id.*, Ex. X. Defendant provided these numbers to Mr. Mondragon in  
12 advance of receiving the term sheet.

13           On June 4, 2014, Plaintiff and Defendant signed the final term sheet, which indicated the  
14 two rental streams. *Id.*, Ex. Z, ECF 92-27. When the final term sheet was executed, Defendant  
15 did not advise Plaintiff that there might be a potential issue with the AT&T rent. *Id.*, Ex. B at  
16 106:17–20. Crown Castle does not provide third parties with information about the properties  
17 they manage; it is the obligation of the landlord to provide any such details. Saba Decl., Ex. Q at  
18 51:6–52:4.

19           In late July 2014, Defendant emailed his attorney Frank Maiorana about the agreement,  
20 saying, in part, “I have an agreement with AT&T but I can not honestly tell you they are on the  
21 cell tower or off the cell tower. They do not give me notice as to who is on or off the tower.”  
22 Loskutoff Decl., Ex. 6. Defendant indicated Plaintiff had told him AT&T was on the tower, but  
23 he was unsure whether AT&T would need to notify him if they had terminated, so he sought  
24 guidance from Mr. Maiorana on whether he needed indemnification for who was on the site or to  
25 have Plaintiff do due diligence to determine AT&T’s status. *Id.* Mr. Maiorana responded with  
26 “You make no representations or warranties in the agreements about AT&T or that they are on the  
27 space.” *Id.* Defendant again followed up saying he was “still concerned about AT&T” and asking  
28 Mr. Maiorana if AT&T’s status on the site would be subject to Plaintiff’s due diligence. *Id.*, Ex.

1 7. Mr. Maiorana assured him that Plaintiff was conducting its own due diligence and Plaintiff did  
2 not make any representations or warranties to Plaintiff concerning AT&T. *Id.*

3 On August 7, 2014, Crown Castle sent Defendant a letter that stated “[d]uring the period of  
4 December 1, 2013 to March 21, 2014, payments were inconsistent with the lease due to license  
5 termination” and sought \$11,471.97 from Defendant for Crown Castle’s overpayment of rents.  
6 *Id.*, Ex. AA, ECF 92-28. An exhibit to the letter shows that Crown Castle paid lump sums for two  
7 rent streams on April 2013 (for the year between April 2013 and April 2014), but that the charges  
8 for one of those streams ended on December 1, 2013. *Id.* Defendant never provided Plaintiff with  
9 a copy of the letter. *Id.*, Ex. B at 117:12–119:7. Defendant did not otherwise inform Plaintiff  
10 prior to the closing that AT&T had not paid its 2014 rent or that he owed money to Crown Castle.  
11 *Id.* at 114:1–8. Also, prior to closing, Defendant provided Plaintiff with copies of the 2012 and  
12 2013 rent checks but did not provide Plaintiff with a copy of the reduced 2014 rent check. *Id.* at  
13 115:13–25; *id.*, Ex. V at 18:2–23.

14 On August 14, 2014, Defendant and Plaintiff signed a final purchase agreement, in which  
15 Plaintiff acquired the lease and Defendant received \$925,000. *Id.*, Ex. BB, ECF 92-29. The sale  
16 closed on August 15, 2014. *Id.*, Ex. CC, ECF 92-30. The final purchase agreement included a  
17 “Mutual Indemnification Provision” and a “Dispute Resolution” provision whereby the parties  
18 agreed to waive the right to a jury trial. *Id.*, Ex. BB ¶¶ 9, 12.

19 Sometime after closing, Plaintiff discovered that no rent was being paid on the AT&T  
20 sublease. *Id.*, Ex. Y at 35:11–35:20. On March 14, 2016, Defendant received a letter from  
21 Plaintiff seeking rescission of the contract. The letter stated that Plaintiff planned to take legal  
22 action for the above-described events and detailed that AT&T was no longer on the lease as of  
23 November 30, 2013. Loskutoff Decl. ¶ 17, Ex. 9. In early April 2016, Defendant reached out to  
24 the Crown Castle Help Desk about AT&T’s termination of its sublease, and a Crown Castle  
25 employee responded saying he didn’t “see anything in the lease which required Crown to provide  
26 notice of ATT’s decommission from the site,” but he was following up with others to see if  
27 notification was sent. *Id.* ¶ 18, Ex. 10. Defendant responded asking when AT&T was removed  
28 from the site, and after being told AT&T had been removed on November 30, 2013, he asked

1 whether AT&T was discontinued the same day. *Id.* The record does not reflect that he received a  
2 response. Plaintiff filed this suit on April 29, 2016. ECF 1.

3 Defendant never received a notice of termination from AT&T. Ballesteros Decl., Ex. 1 at  
4 83:10–84:10. Likewise, Crown Castle never provided written confirmation to Defendant that  
5 AT&T had terminated the sublease, though it customarily confirmed with its clients when there  
6 was a termination. *Id.*, Ex. 10 at 17:8–12; *id.*, Ex. 1 at 83:17–19; Loskutoff Decl. ¶ 7.

7 Throughout the transaction, Plaintiff conducted due diligence for the transaction.  
8 Ballesteros Decl., Ex. 3 at 17:16–18:4. Plaintiff is in the business of purchasing leases like the one  
9 at issue here. Compl. ¶¶ 1, 7. As part of this due diligence, the due diligence checklist on the  
10 transaction term sheet included “Proof of Payments (last 3 months)” and “Confirmation of Lease  
11 Economics.” Saba Decl., Ex. X. An email between Plaintiff’s employees in early June 2014  
12 indicates that getting a copy of the 2014 rent check for the lease was a “first priority.” Ballesteros  
13 Decl., Ex. 4. However, Plaintiff never received a copy of the 2014 rent check before closing. *Id.*,  
14 Ex. 1 at 115:13–17, Ex. 6 at 18:12–23; Loskutoff Decl. ¶ 15.

15 **B. Procedural History**

16 Plaintiff filed its Complaint on April 29, 2016, alleging four causes of action: intentional  
17 misrepresentation, negligent misrepresentation, fraud by concealment, and breach of contract.  
18 Compl., ECF 1. On June 22, 2016, the case was reassigned to this Court. ECF 15. On July 5,  
19 2016, Defendant answered the Complaint, asserting fourteen affirmative defenses and a  
20 counterclaim for rescission based on mutual mistake. Defendant asserted the following  
21 affirmative defenses (as interpreted by the Court):

- 22 1. Failure to state a claim
- 23 2. Assumption of risk
- 24 3. Failure to mitigate (failure to conduct due diligence prior to closing)
- 25 4. Failure to mitigate (after closing)
- 26 5. Unclean hands
- 27 6. Estoppel (Plaintiff knew the relevant facts)
- 28 7. Waiver
8. Comparative Fault (fault of others)
9. Failure to perform contractual duties
10. Laches
11. Estoppel (Plaintiff is estopped by its own conduct)

- 1 12. Failure to conduct due diligence
- 2 13. Rescission (by Plaintiff)
- 3 14. Comparative fault (fault of Plaintiff)

4 Answer at 7–9, ECF 17. On July 26, 2016, Plaintiff answered the counterclaim. ECF 24.

5 On July 19, 2016, Defendant filed a third-party Complaint against then-Defendants STC  
6 Five LLC and Crown Castle International Corp. (“Crown Castle”) for breach of contract, breach of  
7 the implied covenant of good faith and fair dealing, and implied contractual indemnity. ECF 19.  
8 On October 27, 2016, Tower Company Five LLC (“Sprint”), by its attorney in fact Global Signal  
9 Acquisitions II LLC (which Defendant had misidentified as Crown Castle) and STC Five LLC,  
10 answered the third-party Complaint and asserted three counterclaims for breach of contract,  
11 mistaken receipt, and breach of the covenant of good faith and fair dealing. ECF 53. On  
12 November 28, 2016, Defendant answered Sprint’s counterclaim. ECF 57. On April 27, 2017, the  
13 parties stipulated to dismissal of Defendant’s third-party Complaint and the associated  
14 counterclaim, leaving just Plaintiff and Defendant in the case. ECF 61.

15 On November 29, 2018, Plaintiff filed a motion for summary judgment, seeking summary  
16 adjudication of Defendant’s affirmative defenses and his counterclaim for rescission. *See*  
17 *generally* Mot. The Court heard oral argument on January 7, 2019.

## 18 **II. EVIDENTIARY OBJECTIONS**

19 Each party objects to certain evidence used or statements made by the other party in their  
20 respective briefs. The Court does not consider objections to attorney argument, as opposed to  
21 objections to evidence submitted by the opposing party. Defendant almost exclusively objects to  
22 attorney argument that the Court declines to rule on individually. However, the Court will not  
23 consider arguments that misstate the underlying evidence and will consider only the evidence  
24 itself. The Court resolves objections to evidence in the table below, with citations to the evidence  
25 supplied by the Court where not otherwise supplied by the objecting party.

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**Defendant’s Objections**

<b><u>Citation (in Mot. Decls.)</u></b>	<b><u>Objection</u></b>	<b><u>Ruling</u></b>
Saba Decl., Ex. R at 7:25–8:3: “Q. So you told Michael Loskutoff on April 23, 2014 that AT&T had terminated its co-location agreement on that tower; is that correct? A. Correct, sir.	Lacks Foundation; Speculative; Misstates Testimony	OVERRULED. Ms. Egercic has personal knowledge of the phone call, as she was a participant, and she answered “correct” when asked if she told Defendant that AT&T had terminated. <i>See</i> Saba. Decl. , Ex. R at 10:21–24. The Court recognizes that Ms. Egercic also testified that she had no independent recollection of the phone call, <i>id.</i> at 8:11–13, and takes this fact into account in the analysis below.

**Plaintiff’s Objections**

<b><u>Citation (in Opp. or Decls.)</u></b>	<b><u>Reason for Objection</u></b>	<b><u>Ruling</u></b>
Declaration of Michael J. Loskutoff (“Loskutoff Decl.”) ¶ 6 (2:14–16) – “The amount of payment confused me at the time, and I made several attempts to contact Crown Castle to determine the mix-up.”	Lack of foundation, speculative, lack of personal knowledge (FRE 602); Best Evidence Rule (FRE 1002).	OVERRULED. Defendant has personal knowledge of his own state of mind and any attempts he made to contact Crown Castle.
Loskutoff Decl. ¶¶ 19–23, Exs. 11–14. (Pre-litigation communications exchanged between Plaintiff and Defendant’s counsel regarding possible settlement.)	Improper hearsay evidence (FRE 801, 802); Improper evidence of compromise offers and negotiations (FRE 408)	SUSTAINED, under Rule 408, to the extent the evidence is offered to prove or disprove the validity or amount of a disputed claim.  OVERRULED otherwise. The statements do not constitute hearsay because they are statements by an opposing party. F.R.E. 801(d)(2).
Declaration of Dan Ballesteros (“Ballesteros Decl.”) ¶ 2, Ex. 1 (116:11–13) – “Even John Mondragon I asked him one time on a phone call, ‘Is AT&T on the site?’ He goes, ‘Yeah. Sure.’ So one of those things.”	Improper hearsay evidence (FRE 801, 802); Lack of foundation, speculative, lack of personal knowledge (FRE 602)	OVERRULED. The evidence is not introduced to prove the truth of the matter asserted, but rather is introduced for relevant, nonhearsay purposes.
Ballesteros Decl. ¶ 13, Ex. 12 (127:2–16) – “The structure of the transaction was the transaction was structured in such a way at Telecom Lease Advisors’ request	Lack of foundation, speculative, lack of personal knowledge (FRE 602); Improper lay	SUSTAINED. Mr. Maiarano cannot speculate as to Plaintiff’s belief or intent with respect to the structure of the transaction. He also states that



<p>1 that Telecom Lease Advisors 2 believed it would not trigger any 3 Crown Castle right of first refusal. 4 They convinced Mike not to go to 5 Crown Castle to -- with the right 6 of first refusal -- with the notice 7 required by the right of first 8 refusal, and Mike agreed to do that 9 only if he were indemnified by 10 Telecom Lease Advisors for any 11 potential liability should Crown 12 Castle claim he breached the right 13 of first refusal provision and seek 14 recourse.”</p>	<p>witness testimony (FRE 701–703)</p>	<p>Plaintiff convinced Defendant not to do something, but he does not say which of Plaintiff’s employees instructed Defendant in this way. And the Court does not have enough information about Mr. Maiarano’s qualifications to say that he can speak to the structure and outcomes of the transaction.</p>
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9 **III. LEGAL STANDARD**

10 Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary  
11 judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions  
12 on file, together with the affidavits, if any, show that there is no genuine issue as to any material  
13 fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v.*  
14 *Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)). The Court draws all reasonable  
15 inferences in favor of the party against whom summary judgment is sought. *See, e.g., Matsushita*  
16 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “Partial summary judgment  
17 that falls short of a final determination, even of a single claim, is authorized by Rule 56 in order to  
18 limit the issues to be tried.” *State Farm Fire & Cas. Co. v. Geary*, 699 F. Supp. 756, 759 (N.D.  
19 Cal. 1987) (citing *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981).

20 The moving party “bears the burden of showing there is no material factual dispute,” *Hill*  
21 *v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1004 (N.D. Cal. 2010), by “identifying for the court  
22 the portions of the materials on file that it believes demonstrate the absence of any genuine issue  
23 of material fact.” *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th  
24 Cir. 1987). In order to meet its burden, the moving party must “either produce evidence negating  
25 an essential element of the nonmoving party’s claim or show that the nonmoving party does not  
26 have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.”  
27 *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). In  
28 judging evidence at the summary judgment stage, “the Court does not make credibility

1 determinations or weigh conflicting evidence, and is required to draw all inferences in a light most  
2 favorable to the nonmoving party.” *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 891 F. Supp.  
3 510, 513–14 (N.D. Cal. 1995) (citing *T.W. Elec. Serv., Inc.*, 809 F.2d 626, 630).

4 A material fact is one that could affect the outcome of suit under the governing substantive  
5 law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For a court to find that a  
6 genuine dispute of material fact exists, “there must be enough doubt for a reasonable trier of fact  
7 to find for the [non-moving party].” *Corales v. Bennett*, 567 F.3d 554, 562 (9th Cir. 2009). The  
8 court “determines whether the non-moving party’s specific facts, coupled with disputed  
9 background or contextual facts, are such that a reasonable jury might return a verdict for the non-  
10 moving party.” *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.*, 590 F. Supp. 2d 1244, 1250  
11 (N.D. Cal. 2008) (citing *T.W. Elec. Serv., Inc.*, 809 F.2d 626, 631). If the Court finds that a  
12 reasonable jury could find for the non-moving party, summary judgment is inappropriate. *See,*  
13 *e.g., Anderson*, 477 U.S. at 248. Conclusory and speculative testimony, however, is insufficient to  
14 defeat summary judgment. *See, e.g., Soremekum v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th  
15 Cir. 2007); *see also Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) (“[M]ere  
16 allegation and speculation do not create a factual dispute for purposes of summary judgment.”).

#### 17 **IV. DISCUSSION**

18 Plaintiff seeks summary judgment of all of Defendant’s affirmative defenses and his  
19 counterclaim for rescission. *See generally* Mot. The Court first holds that there are two key  
20 genuine issues of material fact relevant to the present motion: (1) whether Defendant knew that  
21 AT&T had terminated its sublease prior to closing the deal with Plaintiff; and (2) whether Plaintiff  
22 was negligent in conducting its due diligence. The Court then turns to each of Defendant’s  
23 affirmative defenses and his counterclaim and GRANTS IN PART AND DEFERS RULING ON  
24 IN PART Plaintiff’s motion for summary judgment.

##### 25 **A. Genuine Issues of Material Fact**

##### 26 **1. Whether Defendant Knew that AT&T Had Terminated Its Sublease Is a 27 Disputed Issue of Material Fact**

28 Plaintiff argues that several of Defendant’s affirmative defenses are barred because

1 Defendant knew that AT&T had terminated its sublease and fraudulently withheld that  
2 information from Plaintiff. *See, e.g.*, Mot. at 11–12. Thus, whether Defendant knew that AT&T  
3 had terminated its sublease at the time the deal with Plaintiff closed is an important question of  
4 fact here. At bottom, Plaintiff argues that Defendant knew that AT&T was no longer on the lease  
5 based on his actions between April 2014 (when he received the reduced check) and August 14,  
6 2014 (when the deal closed). The Court disagrees and holds that whether Defendant knew that  
7 AT&T had terminated its sublease is a genuine issue of material fact that cannot be resolved on  
8 summary judgment.

9 As an initial matter, Defendant did not have any agreement with AT&T directly, the lease  
10 did not require Sprint to inform Defendant if AT&T terminated its lease, and Sprint never sent a  
11 written termination letter to Defendant. *See* Saba Decl., Ex. F; Loskutoff Decl. ¶¶ 4, 7; Ballesteros  
12 Decl., Ex. 1 at 83:17–19. Defendant also testifies that he was never told that AT&T was off the  
13 lease until March 2016. *See, e.g.*, Saba Decl., Ex. B at 58:17–59:20; 71:15–72:15, 73:13–77:15;  
14 93:18–94:3.

15 In April 2014, Defendant received a rent check that was approximately half as large as the  
16 checks he had received in the previous four years. *See* Saba Decl., Exs. I–P. After receiving this  
17 check, Defendant called the Crown Castle Help Desk to ask about the discrepancy, at which time  
18 he spoke with Ms. Egercic. Ms. Egercic logged the call, saying “it appears AT&T terminated”  
19 and “it appears that we received notice from AT&T however LL [Defendant] indicated he was not  
20 notified.” *Id.*, Ex. S. Plaintiff asserts that Ms. Egercic testified at her deposition that she told  
21 Defendant on this call that AT&T was no longer on the tower. *See id.*, Ex. R at 7:25–8:3. But Ms.  
22 Egercic also testified that she did not have any independent recollection of the phone call and was  
23 instead answering based solely on the text of the log. *See* Ballesteros Decl., Ex. 10 at 8:11–13;  
24 14:12–15:5. The log itself does not actually state that she told Defendant that AT&T was not on  
25 the lease. And, as discussed more below, over the course of the next several months (and indeed  
26 years) on several occasions Defendant made several communications regarding whether AT&T  
27 was still on the lease, from which the Court may infer in favor of the nonmovant that Defendant  
28 was uncertain of AT&T’s status. Given these facts, the Court finds there is a genuine issue of

1 material fact as to whether Ms. Egercic told Defendant that AT&T had terminated its sublease.

2 Defendant then emailed with Ryan Hull of Crown Castle on May 5, 2014 to verify who  
3 was using the cell tower. Saba Decl., Ex. T. As with Ms. Egercic, there is no definitive evidence  
4 that Mr. Hull told Defendant that AT&T had terminated its sublease. What Mr. Hull said was, “I  
5 don’t show AT&T as being installed on the tower any longer,” *id.*, to which Defendant responded  
6 questioning when AT&T came off the tower. *Id.* Mr. Hull never responded to this email. A  
7 reasonable jury could infer that Defendant did not know that AT&T terminated its sublease  
8 because Mr. Hull never said so definitively and never responded to Defendant’s follow-up.

9 Throughout the next several months, Defendant interacted with Plaintiff’s employee, Mr.  
10 Mondragon, through at least one phone call, the application for the lease sale with Plaintiff, and  
11 the signing of the final term sheet. *Id.*, Ex. X–Z. There is no evidence that Defendant somehow  
12 learned of AT&T’s status throughout that time. In fact, Defendant testified that Mr. Mondragon  
13 told him that AT&T *was* still on the tower. *See* Ballesteros Decl., Ex. 1 at 116:11–13. And in  
14 late-July 2014, Defendant had conversations with his attorney, Mr. Maiorana, in which he  
15 expressed his concern that AT&T was not on the lease, stating, in part, “I have an agreement with  
16 AT&T but I can not honestly tell you they are on the cell tower or off the cell tower. They do not  
17 give me notice as to who is on or off the tower.” Loskutoff Decl., Ex. 6; *see also id.*, Ex. 7. Thus,  
18 a genuine issue of material fact exists as to whether Defendant knew by this point that AT&T had  
19 terminated its sublease.

20 Finally, on August 7, 2014, Crown Castle sent Defendant a letter describing that it had  
21 overpaid Defendant for the previous year’s rent and showing that one of the two rent streams for  
22 the lease had ended in November 2013. Saba Decl., Ex. AA. However, the letter did not  
23 explicitly state that AT&T had terminated its sublease. Defendant also testified that he thinks he  
24 received this letter after the closing on August 14, 2014. *Id.*, Ex. B at 114:10–115:3. Thus, there  
25 are disputed issues of material fact as to whether this letter informed Defendant before the closing  
26 that AT&T had terminated its sublease. This conclusion is further supported by the fact that in  
27 April 2016, after receiving Plaintiff’s notice of litigation, Defendant followed up with Crown  
28 Castle to determine when AT&T had terminated its sublease. *See* Loskutoff Decl. ¶ 18, Ex. 10.

1 Finally, the Court cannot infer that Defendant knew that AT&T had terminated the  
2 sublease merely because (1) he may have told Mr. Mondragon that AT&T was on the lease; (2) he  
3 signed the purchase application saying AT&T was on the lease; (3) he failed to provide the 2014  
4 rent check to Plaintiff; or (4) he otherwise did not inform Plaintiff that AT&T had terminated the  
5 lease. *See* Mot. at 11–12. Whether any of these actions indicate that Defendant knew about  
6 AT&T’s status is a genuine issue of material fact. *See, e.g.,* Ballesteros Decl., Ex. 1 at 116:1–10.

7 Thus, there are disputed issues of material facts as to whether Defendant knew before the  
8 closing that AT&T had terminated its sublease. Given the above facts, a reasonable jury could  
9 conclude that Defendant did not know.

10 **2. Whether Plaintiff Was Negligent in Conducting Its Due Diligence Is a**  
11 **Disputed Issue of Material Fact**

12 Defendant argues that a genuine issue of material fact exists as to whether Plaintiff  
13 (through its agent TLA) negligently conducted its due diligence, such that it should have  
14 discovered that AT&T was no longer on the lease. Defendant submits expert testimony stating  
15 that Plaintiff’s due diligence “fell below the standard of care because they failed to obtain a copy  
16 of the 2014 rent stream or an estoppel confirming the rent payment.” *Opp.* at 9 (citing Ballesteros  
17 Decl., Ex. 7 at 57:22–58:22, 72:15–21, 74:1–18, 75:19–76:8, 76:24–77:9, 101:19–102:1).  
18 Defendant argues that TLA is in the business of purchasing these types of leases, such that it has  
19 vast experience in closings such as these. *Compl.* ¶¶ 1, 7. Indeed, the due diligence checklist on  
20 the transaction term sheet included “Proof of Payments (last 3 months)” and “Confirmation of  
21 Lease Economics,” indicating that TLA contemplated securing the 2014 rent check. *Saba Decl.*,  
22 Ex. X. Likewise, Defendant references the email between Plaintiff’s employees in early June  
23 2014 that indicated that getting a copy of the 2014 rent check for the lease was a “first priority.”  
24 *Ballesteros Decl.*, Ex. 4. However, Plaintiff never received a copy of the 2014 rent check before  
25 closing. *See id.*, Ex. 1 at 115:13–17, Ex. 6 at 18:12–23; *Loskutoff Decl.* ¶ 15.

26 Plaintiff counters that it did not have access to the tower to confirm whether AT&T was  
27 still on it. *Reply* at 6 (citing *Saba Decl.*, Ex. B, at 22:10–23:9; 55:7–55:12; 142:19–144:13).  
28 Plaintiff also avers that it is common practice not to receive all pay stubs in a transaction and

1 instead to rely on representations and warranties in the agreement. *See* Saba Decl., Ex. V at 18:2–  
2 19:25, ECF 92-23. According to Plaintiff, that is why it reasonably relied on the 2013 pay check  
3 and Defendant’s representations and warranties in the agreement, as well as Defendant’s  
4 statements to Mr. Mondragon that AT&T was still on the tower. *See* Mot. at 11; Reply at 7.  
5 Plaintiff also reiterates that it believes Defendant intentionally withheld the 2014 check. *Id.* And  
6 Defendant failed to inform Plaintiff at any time that AT&T was no longer on the tower. Mot. at  
7 11–12.

8           Given this conflicting evidence, the Court finds that there is a genuine issue of material  
9 fact as to whether Plaintiff conducted its due diligence negligently. While Plaintiff says it is  
10 common practice not to receive all pay stubs, Defendant’s expert says such a practice would be  
11 wholly insufficient. The express provisions of the term sheet contemplated Plaintiff confirming  
12 the lease payments, and Plaintiff’s employees called getting the 2014 check a first priority.  
13 Plaintiff also did not get an estoppel from Defendant to mitigate any issues that might result from  
14 not receiving the 2014 rent check. Even in light of any alleged misrepresentation by Defendant, a  
15 reasonable jury could find on this evidence that Plaintiff was negligent in conducting its due  
16 diligence. As such, a genuine issue of material facts exists.

17           **B. Defendant’s Affirmative Defenses and Counterclaim**

18                   **1. Affirmative Defense No. 1: Failure to State a Claim**

19           Defendant’s first affirmative defense alleges “[t]hat plaintiff does not state facts sufficient  
20 to constitute a cause of action against this Defendant.” Ans. at 7. Defendant does not oppose  
21 summary judgment on this defense. *See generally* Opp.

22           “A defense which demonstrates that plaintiff has not met its burden of proof as to an  
23 element plaintiff is required to prove is not an affirmative defense.” *Zivkovic v. S. Cal. Edison*  
24 *Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). “Such a defense is merely rebuttal against the evidence  
25 presented by the plaintiff.” *Id.* Several judges in this district have held that “[f]ailure to state a  
26 claim is not a proper affirmative defense but, rather, asserts a defect in [the plaintiff’s] prima facie  
27 case.” *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174  
28 (N.D. Cal. 2010); *accord Espitia v. Mezzetti Financial Svcs., Inc.*, No. 18-CV-02480-VKD, 2019

1 WL 359422, at \*5 (N.D. Cal. Jan. 29, 2019). This Court agrees. The defense of failure to state a  
2 claim is, in essence, an argument that the plaintiff has not met its burden of alleging the elements  
3 of its claims.

4 As such, the Court GRANTS summary judgment on Defendant’s first affirmative defense.

5 **2. Affirmative Defense No. 2: Assumption of the Risk**

6 Defendant’s second affirmative defense alleges “[t]hat plaintiff voluntarily and with full  
7 knowledge of the matters referred to in said Complaint assumed any and all of the risks, hazards,  
8 and perils of the circumstances referred to in said Complaint and therefore assumed the risks of  
9 any injuries or damages sustained by said plaintiffs, if any at all.” Ans. at 7. “This defense stands  
10 for the principle that one who takes on the risk of loss, injury, or damage cannot maintain an  
11 action against a party that causes the loss, injury, or damage.” *Quintana v. Baca*, 233 F.R.D. 562,  
12 566 (C.D. Cal. 2005).

13 Though the parties dispute the application of this defense based on the disputed issues of  
14 Defendant’s knowledge of AT&T’s status and Plaintiff’s negligence in conducting due diligence,  
15 the Court finds this affirmative defense is an ill fit for this case based on the claims alleged. Other  
16 affirmative defenses that Defendant asserts more appropriately cover the same defenses.

17 “[T]he assumption of risk doctrine long has caused confusion both in definition and  
18 application, because the phrase ‘assumption of risk’ traditionally has been used in a number of  
19 very different factual settings involving analytically distinct legal concepts.” *Knight v. Jewett*, 3  
20 Cal. 4th 296, 303 (1992). It is a defense applied in various types of tort cases, such as in cases  
21 “concerned with defining the contours of the legal duty that a given class of defendants—for  
22 example, owners of baseball stadiums or ice hockey rinks—owed to an injured plaintiff” and in  
23 cases in which “the defendant had breached a legal duty of care to the plaintiff, and the inquiry  
24 focused on whether the plaintiff knowingly and voluntarily had chosen to encounter the specific  
25 risk of harm posed by the defendant’s breach of duty.” *Id.* at 303–04. These types of cases are not  
26 readily comparable to what is essentially a contract dispute here.

27 In any event, the California Supreme Court has held that the assumption of the risk  
28 doctrine has merged into the comparative negligence scheme, except where “the defendant’s

1 conduct did not breach a legal duty of care to the plaintiff.” *Id.* at 306; *see also* Assumption of the  
2 Risk, *Black’s Law Dictionary* (10th ed. 2014) (“Assumption of the risk was originally an  
3 affirmative defense, but in most jurisdictions it has now been wholly or largely subsumed by the  
4 doctrines of contributory or comparative negligence.”). In this respect, Defendant’s assumption of  
5 the risk affirmative defense is more appropriately considered as part of his comparative fault  
6 affirmative defenses.

7 Likewise, the parties’ own cases demonstrate that this is not the appropriate affirmative  
8 defense here, but instead is more appropriately considered as part of the element of justifiable  
9 reliance for the misrepresentation and fraud claims. The only case Plaintiff cites discusses the  
10 parties’ states of mind as being relevant to the element of justifiable reliance in an intentional  
11 misrepresentation claim, not as an affirmative defense to such a claim. *See Manderville v.*  
12 *PCG&S Grp., Inc.*, 146 Cal. App. 4th 1486, 1502 (2007). Though Defendant does not cite a  
13 single case in support of its argument, at oral argument his attorney cited a California Supreme  
14 Court case that similarly analyzed the argument with respect to the element of justifiable reliance  
15 for a fraud claim. *See Jue v. Smiser*, 23 Cal. App. 4th 312, 316–19 (1994), *as modified on denial*  
16 *of reh’g* (Apr. 15, 1994). As discussed above, a defense that “demonstrates that [a] plaintiff has  
17 not met its burden of proof as to an element plaintiff is required to prove” is not an affirmative  
18 defense. *Zivkovic*, 302 F.3d at 1088.

19 Because the underlying arguments of this affirmative defense are more appropriately  
20 considered with respect to other affirmative defenses or the element of justifiable reliance in  
21 Plaintiff’s claims, the Court GRANTS summary judgment on Defendant’s second affirmative  
22 defense.

23 **3. Affirmative Defense No. 3: Failure to Mitigate (Failure to Perform Due**  
24 **Diligence Before Closing)**

25 Defendant’s third affirmative defense alleges “[t]hat plaintiff, with the exercise of  
26 reasonable diligence and effort, would have and could have mitigated the damages alleged in the  
27 Complaint, if indeed any there are; that the resultant damages, if any, complained of in said  
28 Complaint were directly and proximately caused by the failure, negligence and refusal of Plaintiff



1 to exercise reasonable diligence in an effort to mitigate the damages alleged.” Ans. at 7.

2 Plaintiff argues that any negligence during due diligence on its part cannot negate a claim  
3 for fraud against Defendant. *See* Mot. at 13. Defendant responds by arguing that “comparative  
4 fault principles do apply to negligent misrepresentation claims” and that “triable issues of fact  
5 exist as to whether Plaintiff’s reliance on Loskutoff’s ‘representations’ was justifiable.” Opp. at  
6 20.

7 As with the assumption of the risk defense, the Court finds this “failure to mitigate”  
8 affirmative defense is more appropriately considered with respect to other asserted defenses  
9 requiring the same proof and providing the same remedy. Defendant’s arguments and Plaintiff’s  
10 opposition thereto make clear that this is really a dispute over the comparative fault affirmative  
11 defenses, discussed below. Likewise, to the extent Defendant argues that the defense is  
12 appropriate because Plaintiff’s reliance on Defendant’s alleged misrepresentations was not  
13 justifiable, the defense is simply a guise for Defendant’s argument that Plaintiff has failed to prove  
14 an element of its claim. *See Zivkovic*, 302 F.3d at 1088. Indeed, Defendant does not cite a single  
15 case allowing a “failure to mitigate” claim for failure to conduct due diligence *before* closing a  
16 contract. *See* Mitigation-of-Damages Doctrine, *Black’s Law Dictionary* (10th ed. 2014) (“The  
17 principle inducing a plaintiff, *after an injury or breach of contract*, to make reasonable efforts to  
18 alleviate the effects of the injury or breach.” (emphasis added)).

19 Because the underlying arguments of this affirmative defense are more appropriately  
20 considered with respect to other affirmative defenses, the Court GRANTS summary judgment on  
21 Defendant’s third affirmative defense.

22 **4. Affirmative Defense No. 4: Failure to Mitigate (After Closing)**

23 Defendant’s fourth affirmative defense alleges “[t]hat plaintiff failed subsequent to the  
24 occurrence described in their Complaint to properly mitigate the damages and thereby are  
25 precluded from recovering those damages that could have reasonably been avoided by the exercise  
26 of due care on the plaintiff’s part.” Ans. at 7.

27 Defendant argues that Plaintiff failed to mitigate its damages after closing the transaction  
28 by “failing to engage in good faith settlement discussions.” Opp. at 20 (citing *Emelianko v.*

1 *Affliction Clothing*, No. 09-07865-MMM, 2011 WL 13176755 (C.D. Cal. July 28, 2011)).  
 2 Defendant cites a series of communications between Defense counsel and Plaintiff’s counsel in  
 3 which Defendant alleges he offered to rescind the contract, and Plaintiff’s counsel agreed but then  
 4 changed the demanded amount Defendant would have to pay. *See* Loskutoff Decl. ¶¶ 19–23, Exs.  
 5 11–14. Plaintiff objected to this evidence, as set forth above, and also argues that these  
 6 discussions do not demonstrate a failure to mitigate, but instead show only that the parties could  
 7 not reach a satisfactory compromise. Defendant did not have an opportunity to substantively  
 8 respond to these objections.

9       Based on the limited briefing on this issue, the Court cannot say for certain whether  
 10 Defendant’s intended use of this evidence runs afoul of Federal Rule of Evidence 408. The Court  
 11 recognizes that various courts have held that statements during settlement discussions may be  
 12 admissible for the purpose of demonstrating a failure to mitigate. *See, e.g., Emelianenko*, 2011  
 13 WL 13176755, at \*15; *Hutton v. City of Fairbanks*, No. 4:08-CV-00029 RRB, 2012 WL  
 14 13032925, at \*1 (D. Alaska Oct. 16, 2012); *Thomas v. Resort Health Related Facility*, 539 F.  
 15 Supp. 630, 638 (E.D.N.Y. 1982). However, it seems that Defendant intends to use this evidence  
 16 to prove that Plaintiff should have rescinded the agreement—a use that appears distinguishable  
 17 from other cases admitting such evidence and that appears to contravene the purposes of Rule 408.  
 18 Because this is the only evidence Defendant submits in support of this defense, resolution of the  
 19 defense turns on this evidentiary dispute. As such, this issue is more appropriately considered  
 20 through a motion in limine. *See Mastec N. Am., Inc. v. Coos Cty.*, No. CIV 04-278-AA, 2007 WL  
 21 2027011, at \*8 (D. Or. July 6, 2007) (“Ultimately, whether plaintiffs can introduce their May 24  
 22 offer to show Coos County’s failure to mitigate damages is an evidentiary issue properly raised in  
 23 a motion in limine rather than a motion for summary judgment.”)

24       Because the arguments on this affirmative defense would be more appropriately presented  
 25 in a motion in limine, the Court DEFERS RULING ON Defendant’s fourth affirmative defense. It  
 26 will be Defendant’s responsibility to submit a motion in limine to obtain admission of the  
 27 settlement discussions, which must include a more developed discussion of his theory of a failure  
 28 to mitigate that is in line with an exception to FRE 408. If the Court rules that this evidence is

1 inadmissible on a motion in limine, Defendant’s failure-to-mitigate defense will have no  
2 supporting evidence, and the Court will summarily dismiss the affirmative defense at that time.

3 **5. Affirmative Defense No. 5: Unclean Hands**

4 Defendant’s fifth affirmative defense alleges “[t]hat plaintiffs’ claims herein are barred by  
5 the equitable doctrine of unclean hands.” Ans. at 8. The doctrine of unclean hands is a “maxim  
6 that ‘he who comes into equity must come with clean hands.’” *Precision Instrument Mfg. Co. v.*  
7 *Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). The doctrine “closes the doors of a court of  
8 equity to one tainted with inequity or bad faith relative to the matter in which he seeks  
9 relief, however improper may have been the behavior of the defendant.” *Id.* Though the party  
10 against whom unclean hands is enforced need not have acted unlawfully, the court may only apply  
11 the doctrine where the party committed a “willful act concerning the cause of action which  
12 rightfully can be said to transgress equitable standards of conduct.” *Id.* at 815. “Any conduct that  
13 violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to  
14 invoke the doctrine.” *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 979  
15 (1999), *as modified on denial of reh’g* (Jan. 3, 2000).

16 Defendant asserts two theories as to why Plaintiff has unclean hands: (1) Plaintiff failed to  
17 perform sufficient due diligence; and (2) Plaintiff attempted to circumvent the lease’s  
18 requirements that Defendant notify Crown Castle of its right of first refusal. *See* Opp. at 21.

19 These theories are easily disposed of. As to the first, the evidence supports, at most, a  
20 finding of negligence by Plaintiff in its due diligence. Defendant cites no evidence supporting the  
21 argument that this failure was somehow made in bad faith. As to the latter, the Court has excluded  
22 Defendant’s only evidence to support this argument—testimony from Defendant’s attorney that  
23 Plaintiff structured the transaction to avoid triggering the notice requirement, Ballesteros Decl.  
24 ¶ 13, Ex. 12 at 127:2–16. Defendant presents no other evidence that Plaintiff acted with unclean  
25 hands in the way in which it conducted the transaction, and no reasonable juror could find that  
26 Plaintiff acted with unclean hands.

27 As such, the Court GRANTS summary judgment on Defendant’s fifth affirmative defense.

28 ///

**6. Affirmative Defense No. 6: Estoppel (Plaintiff Knew the Relevant Facts)**

1 Defendant's sixth affirmative defense alleges "[t]hat plaintiff is barred in whole or in part  
2 by the doctrine of estoppel in that plaintiff closed escrow on the subject property with knowledge  
3 of the facts and circumstances alleged." Ans. at 8. Equitable estoppel requires: "(1) the party to  
4 be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon,  
5 or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the  
6 other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his  
7 injury." *Schafer v. City of Los Angeles*, 237 Cal. App. 4th 1250, 1261 (2015) (citation omitted).

8 Defendant argues that Plaintiff is equitably estopped from bringing its claims here because  
9 "Plaintiff executed the purchase agreement knowing that AT&T might not be on the cellular  
10 tower." Opp. at 22. To support this assertion, Defendant asserts that (1) Plaintiff "knew it did not  
11 have the 2014 rent payment check" and (2) Plaintiff's agent, TLA, "informed Loskutoff that  
12 AT&T was still on the cellular tower." *Id.*

13 Put simply, there is no evidence that Plaintiff "was apprised of the fact[]" that AT&T was  
14 not on the tower before the closing. At most, the evidence supports a finding that Plaintiff was  
15 negligent in not receiving the 2014 rent check, not that Plaintiff knew about AT&T's status simply  
16 because it had not received the check. Indeed, the fact that Mr. Mondragon told Defendant that  
17 AT&T was still on the tower is evidence that Plaintiff believed AT&T was on the tower, not that  
18 Plaintiff knew AT&T had terminated its sublease. Perhaps if additional evidence existed to  
19 support the notion that Plaintiff knew of AT&T's status, then Mr. Mondragon's statement might  
20 indicate that Plaintiff was trying to mislead Defendant, but absent any such evidence, no  
21 reasonable jury could find that Plaintiff knew of AT&T's status before closing and attempted to  
22 mislead Defendant as to that status. Moreover, even if Defendant had submitted evidence to  
23 support the argument that Plaintiff acted knowingly and that he was misled, Defendant has failed  
24 to demonstrate that he was injured by the transaction, as discussed in more detail with respect to  
25 Defendant's rescission claim. Finally, Defendant's contentions more properly relate to the issue  
26 of reasonable reliance, which is an element of Plaintiff's case in chief and not an affirmative  
27 defense.  
28

1 As such, the Court GRANTS summary judgment on Defendant’s sixth affirmative defense.

2 **7. Affirmative Defense No. 7: Waiver**

3 Defendant’s seventh affirmative defense alleges “[t]hat plaintiffs’ claims are barred in  
4 whole or in part by the doctrine of waiver in that plaintiffs closed escrow on the subject property  
5 with full knowledge of the condition of the property and all material facts pertaining thereto.”  
6 Ans. at 8. Waiver is “the intentional relinquishment or abandonment of a known right.” *Lynch v.*  
7 *California Coastal Com.*, 3 Cal. 5th 470, 475 (2017), *reh’g denied* (Aug. 9, 2017) (citation  
8 omitted). For a court to hold that a party has waived its rights, the court must find “an existing  
9 right, the waiving party’s knowledge of that right, and the party’s ‘actual intention to relinquish  
10 the right.’” *Id.* (quoting *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1053 (1997)). “Waiver  
11 always rests upon intent.” *Id.* (quoting *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107 (1966)).

12 Defendant’s arguments as to waiver are identical to his estoppel arguments. *See* Opp. at  
13 22. As the Court discussed with respect to the estoppel defense, Defendant has provided no  
14 evidence that Plaintiff knew of AT&T’s termination, much less that it intentionally and knowingly  
15 abandoned any rights under the contract because of such knowledge.

16 For this reason, the Court GRANTS summary judgment on Defendant’s seventh  
17 affirmative defense.

18 **8. Affirmative Defense No. 8: Comparative Fault: Fault of Others**

19 Defendant’s eighth affirmative defense alleges “[t]hat plaintiff’s damages, if any exist,  
20 were caused by the negligence and/or fault of other persons, corporations, and entities including  
21 both parties and non-parties to this action whether named or not named and that Defendant’s  
22 liability, if any, should be reduced accordingly.” Ans. at 8. Defendant raises a similar affirmative  
23 defense in his fourteenth affirmative defense, which alleges, in part, that plaintiff was  
24 contributorily negligent. To avoid duplication of the defenses, the Court interprets Defendant’s  
25 eight affirmative defense to apply only to non-parties—that is, that Defendant’s liability should be  
26 reduced due to the fault of others (*i.e.*, non-parties).

27 The problem here is that there is no “other” against whom comparative fault may operate.  
28 The only relevant party would be Plaintiff’s due diligence agent TLA. The parties implicitly and

1 explicitly recognize that TLA conducted its due diligence as Plaintiff’s agent. *See, e.g.*, Opp. at 8,  
2 15, 22 (referring to Plaintiff’s agents); Mot. at 13, 14 (stating that Plaintiff conducted due  
3 diligence without referring to TLA). Under California law, the comparative fault of an agent is  
4 imputed to the principal. *See* Council of Cal. Advisory Comm. Civil Jury Instruction No. 3702  
5 (setting forth the elements for “Affirmative Defense – Comparative Fault of Plaintiff’s Agent,”  
6 and requiring that if the defendant can prove the agent was negligent and acted within the scope of  
7 its duties, the plaintiff’s claim is reduced by the percentage of the agent’s responsibility). Thus,  
8 because Plaintiff does not dispute that TLA acted as its agent, any negligence on the part of TLA  
9 is more appropriately considered as negligence by Plaintiff. The Court discusses the comparative  
10 fault standards as to Plaintiff below with respect to Defendant’s fourteenth affirmative defense.

11 Defendant does not argue that TLA is more appropriately considered a “joint tortfeasor”  
12 (or co-defendant, in a sense). As such, his cites to *Kohn v. Superior Court*, 142 Cal.App.3d 323,  
13 330 (1983) and *Baird v. Jones*, 21 Cal. App. 4th 684, 690 are inapposite. Opp. at 16–17. Those  
14 cases concern the actions of joint tortfeasor defendants, not plaintiffs or their agents.

15 Thus, the Court finds that Defendant has not submitted any evidence of fault by another  
16 that is not contributable to Plaintiff, which he raises independently in his fourteenth affirmative  
17 defense. Accordingly, the Court GRANTS summary judgment on Defendant’s eight affirmative  
18 defense.

19 **9. Affirmative Defense No. 9: Failure to Perform Contractual Duties**

20 Defendant’s ninth affirmative defense alleges “[t]hat plaintiff failed to perform their [sic]  
21 duties under the contract.” Ans. at 7. Defendant argues that Plaintiff breached its contractual  
22 duties because the purchase agreement stated that each party waived its right to a jury trial, *see*  
23 Saba Decl., Ex. BB ¶¶ 9, 12, but Plaintiff seeks a jury trial here, *see* Compl. ¶ 66. *See* Opp. at 22–  
24 23.

25 The purchase agreement states in its Dispute Resolution provision that “[t]his agreement  
26 shall be governed and construed in accordance with the laws of the State where the Parent Parcel  
27 is located.” Saba Decl., Ex. BB ¶ 12. The “Parent Parcel” is defined as the Property at 1391  
28 Geneva Dr., Sunnyvale, CA 94089. *Id.* at 1. Thus, California law applies. *See also*, Mot. at 12–

1 13 (making arguments under California law); Opp. at 16–17 (same).

2 Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in diversity  
3 applies state law to determine the validity of a pre-dispute jury trial waiver contained in a contract  
4 governed by California law. See *In re Cty. of Orange*, 784 F.3d 520, 523 (9th Cir. 2015). “Under  
5 California . . . law, parties to a contract cannot waive their right to a jury trial before a dispute  
6 commences, and any contract provision seeking to effect such a waiver is unenforceable unless  
7 expressly authorized by statute.” *Id.* (citing *Grafton Partners, L.P. v. Superior Court*, 36 Cal. 4th  
8 944 (2005)). The relevant statute, Cal. Civ. Proc. Code § 631, delineates “six means by which the  
9 right to jury trial may be forfeited or waived, including failure to appear at trial, failure to demand  
10 jury trial within a specified period after the case is set for trial, failure to pay required fees in  
11 advance or during trial, oral consent in open court, or written consent filed with the clerk or the  
12 court.” *Grafton*, 36 Cal. 4th at 951. Defendant does not argue that any of these means is at issue  
13 here, nor could he, since the *Grafton* Court explicitly held that pre-dispute jury trial waivers are  
14 unenforceable.

15 As such, the Court GRANTS summary judgment on Defendant’s ninth affirmative  
16 defense.

17 **10. Affirmative Defense No. 10: Laches**

18 Defendant’s tenth affirmative defense alleges “[t]hat plaintiffs’ claims herein are barred by  
19 the equitable doctrine of laches.” Ans. at 7. Defendant does not oppose summary judgment on  
20 this defense. See generally Opp.

21 Laches is the “unreasonable, prejudicial delay in commencing suit.” *Petrella v. Metro-*  
22 *Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014). “A party asserting laches must show that it  
23 suffered prejudice as a result of the plaintiff’s unreasonable delay in filing suit.” *Id.* Put simply,  
24 Defendant has not submitted any evidence demonstrating that Plaintiff unreasonably delayed in  
25 bringing this suit or that Defendant was prejudiced by any such delay. Plaintiff brought this suit in  
26 April 2016, less than two years after the transaction was completed. Such a delay was not  
27 unreasonable. And Plaintiff does not argue how this delay may have prejudiced him.

28 As such, the Court GRANTS summary judgment on Defendant’s tenth affirmative defense.

1                                   **11. Affirmative Defense No. 11: Estoppel (Plaintiff Is Estopped by Its Own**  
2                                   **Conduct)**

3                                   Defendant’s eleventh affirmative defense alleges “[t]hat plaintiffs [sic] are estopped by  
4 their own conduct from pursuing their claims set forth herein.” Ans. at 9.

5                                   This estoppel defense is barred for the same reasons as Defendant’s previous estoppel  
6 defense (No. 5) and his unclean hands defense (No. 4). Defendant fails to marshal any evidence  
7 that Plaintiff acted knowingly in any failures it may have made in conducting due diligence,  
8 making representations to Plaintiff, or structuring or closing the deal.

9                                   As such, the Court GRANTS summary judgment on Defendant’s eleventh affirmative  
10 defense.

11                                   **12. Affirmative Defense No. 12: Failure to Conduct Due Diligence**

12                                   Defendant’s twelfth affirmative defense alleges “[t]hat plaintiff failed to properly conduct  
13 due diligence and therefore could not have reasonably relied on defendant’s statements or  
14 representations, if any.” Ans. at 9.

15                                   Defendant argues that this defense “seeks a complete bar on Plaintiff’s claims on the  
16 grounds that Plaintiff cannot prove ‘justifiable reliance’ on Loskutoff’s alleged misrepresentation.  
17 Reliance is a key element that Plaintiff must prove to prevail on both its fraud and negligent  
18 misrepresentation causes of action.” Opp. at 19.

19                                   Thus, as with his defenses for assumption of the risk and failure to mitigate before  
20 contracting, this defense is not appropriate because it is simply a guise for Defendant’s argument  
21 that Plaintiff has failed to prove an element of its claim. *See Zivkovic*, 302 F.3d at 1088.  
22 Accordingly, the Court GRANTS summary judgment on Defendant’s twelfth affirmative defense.

23                                   **13. Affirmative Defense No. 13: Rescission (by Plaintiff)**

24                                   Defendant’s thirteenth affirmative defense alleges “[t]hat plaintiff rescinded the  
25 agreement.” Ans. at 9. In his opposition, Defendant does not cite any evidence to support this  
26 defense, but he states that “[t]he record establishes that upon Plaintiff learning of the fact that  
27 AT&T was no longer on the cellular tower, it demanded rescission of the Purchase Agreement”  
28 and that “Loskutoff agreed to rescind the Purchase Agreement.” The Court can only assume  
Defendant is referring to Plaintiff’s March 14, 2016 notice of litigation letter. On March 14, 2016,



1 Plaintiff sent the following letter to Defendant, in which Plaintiff stated: “LLB is hereby  
2 demanding a return of the total acquisition cost in the amount of Nine Hundred Eighty-Four  
3 Thousand Four Hundred Three Dollars (\$984,403.00) to unwind the sale of the Lease. In  
4 exchange for immediate repayment of the total acquisition cost, LLB will assign you its interest in  
5 the Lease and will execute a settlement agreement, releasing all claims.” Loskutoff Decl., Ex. 9;  
6 Ans. at 12, ¶ 24. In the ensuing settlement discussions, Defendant never offered to refund the total  
7 acquisition cost of \$984,403.00. *Id.*, Exs. 11–14.

8 “A party to a contract has two different remedies when it has been injured by a breach of  
9 contract or fraud and lacks the ability or desire to keep the contract alive. The party may disaffirm  
10 the contract, treating it as rescinded, and recover damages resulting from the rescission” or “affirm  
11 the contract, treating it as repudiated, and recover damages for breach of contract or fraud.” *Wong*  
12 *v. Stoler*, 237 Cal. App. 4th 1375, 1384 (2015), *as modified on denial of reh’g* (June 23, 2015). To  
13 disaffirm the contract, the rescinding party must follow the procedure set forth in California Civil  
14 Code § 1691. *See id.* Specifically, the rescinding party must “(a) [g]ive notice of rescission to the  
15 party as to whom he rescinds; and (b) [r]estore to the other party everything of value which he has  
16 received from him under the contract or offer to restore the same upon condition that the other  
17 party do likewise . . . .” Cal. Civil Code § 1691. Notice of rescission need not “be formal and  
18 explicit” but it must “clearly show[] the intention of the person rescinding to consider the contract  
19 at an end.” *Wilson v. Lewis*, 106 Cal. App. 3d 802, 809 (1980).

20 The Court holds that Defendant has not provided sufficient evidence for a reasonable jury  
21 to conclude that Plaintiff rescinded the contract. Defendant’s only evidence (which he does not  
22 cite) appears to be the March 14, 2016 letter. But this letter does not “clearly show [an] intention”  
23 to rescind. First, Plaintiff never says it wishes to “rescind” or “repudiate” the contract. *Cf.*  
24 *Wilson*, 106 Cal. App. 3d at 809 (using term “repudiate” was sufficient notice of rescission).  
25 Second, Plaintiff sought \$984,403.00 from Defendant in March 2016, but the purchase price was  
26 \$925,000. *See Saba Decl.*, Ex. BB. Thus, Plaintiff sought damages beyond mere rescission of the  
27 purchase price. Third, Plaintiff listed the claims it would bring against Defendant, which did not  
28 include a claim for rescission. *Id.* Indeed, Plaintiff’s complaint, filed less than 2 months later,

1 does not seek rescission of the contract. *See generally* Compl. Moreover, Plaintiff engaged in  
2 negotiations with Defendant just ten days after it sent this letter in which Plaintiff offered  
3 Defendant \$550,000 and noted that “a full rescission would be difficult to accomplish.” Loskutoff  
4 Decl., Ex. 12. Given these facts, no reasonable jury could find that Plaintiff intended to and did  
5 rescind the contract in March 2016. Other courts have held that letters threatening to file a legal  
6 action absent additional evidence does not constitute notice of rescission. *See Mathew v. Walt*  
7 *Disney Co.*, No. 14-CV-07832-RGK, 2015 WL 12830442, at \*3 (C.D. Cal. Apr. 20, 2015), *aff’d*,  
8 690 F. App’x 509 (9th Cir. 2017).

9 Because Defendant has not provided sufficient facts from which a reasonable jury could  
10 conclude the Plaintiff rescinded the contract, the Court GRANTS summary judgment on  
11 Defendant’s thirteenth affirmative defense.

12 **14. Affirmative Defense No. 14: Comparative Fault**

13 Defendant’s fourteenth affirmative defense alleges “[t]hat plaintiff was contributorily  
14 negligent and that such negligence contributed to its injuries and damages, if any, and that  
15 plaintiff’s recovery should therefore either be barred or reduced to the extent of said negligence.”  
16 Ans. at 9. In *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 813 (1975), the California Supreme Court  
17 rejected (for almost all purposes) a contributory negligence scheme in California and adopted a  
18 comparative fault scheme, whereby “liability for damage [is] borne by those whose negligence  
19 caused it in direct proportion to their respective fault.”

20 Plaintiff argues that comparative fault based on Plaintiff’s alleged negligence is not a  
21 defense to any of Plaintiff’s four causes of action: intentional misrepresentation, negligent  
22 misrepresentation, fraud by concealment, or breach of contract, Compl., ECF 1. First, as to the  
23 intentional misrepresentation and fraudulent concealment claims, Plaintiff argues that “[u]nder  
24 California law, negligence is not a defense to deceit.” Mot. at 12–13 (citing *Manderville*, 146 Cal.  
25 App. 4th at 1502; *Seeger v. Odell*, 18 Cal. 2d 409, 414–15 (1941)). Second, Plaintiff cites case  
26 law demonstrating that comparative fault is not a defense to a breach of contract claim. *Id.* at 13  
27 (citing *Kransco v. Am. Empire Surplus Lines Inc. Co.*, 23 Cal.4th 390, 402–03 (2000), *as modified*  
28 (July 26, 2000)). And third, Plaintiff argues that comparative fault is not a defense to negligent

1 misrepresentation because “the tort of negligent misrepresentation is a species of deceit,” such that  
2 when the allegation of negligent misrepresentation is an allegation of deceit, “the question of  
3 whether the Defendant’s behavior is intentional or negligent is subsumed under the element of  
4 reliance.” *Id.* (citing *Bily v. Young*, 3 Cal.4th 370, 407 (1992); *Van Meter v. Bent Const. Co.*, 46  
5 Cal.2d 588, 594–95 (1956)).

6 Defendant does not meaningfully dispute that comparative fault principles do not apply to  
7 torts of deceit. *Cf.* Opp. at 18 (arguing *Manderville* and *Seeger* hold only that comparative fault is  
8 not a defense to *intentional* misrepresentation, as opposed to *negligent* misrepresentation).

9 Defendant argues instead that Plaintiff fails to demonstrate that comparative fault is not a defense  
10 to negligent misrepresentation. Specifically, Defendant argues that California has recognized the  
11 authority of Section 552 of the Restatement of Torts, which states that ordinary negligence rules  
12 apply to claims of negligent misrepresentation. Opp. at 17 (citing *Illinois Nat. Ins. Co. v. Nordic*  
13 *PCL Const., Inc.*, 2013 WL 5739639, \*12 (D. Haw. Oct. 22, 2013)). Defendant recognizes that  
14 there is no California Supreme Court ruling on the issue, and that “California Courts of Appeal  
15 have come to varying conclusions.” *Id.* Finally, Defendant argues that comparative fault may be  
16 a defense to contract claims, Opp. at 19 (citing *F.D.I.C. v. Warren*, 2011 WL 5079504, \*1 (N.D.  
17 Cal. Oct. 25, 2011)), though he does not elaborate on the circumstances in which such a defense  
18 would be appropriate.

19 In reply, Plaintiff argues that *Kransco* controls, such that comparative fault is not a defense  
20 to a breach of contract claim. Reply at 9. Plaintiff also argues that the holding in *Carroll v. Gava*,  
21 98 Cal. App. 3d 892 (1979) is the definitive authority on the issue of whether comparative fault is  
22 a defense to negligent misrepresentation and holds that it is not. Plaintiff points to West’s  
23 Committee’s California Civil Jury Instruction, *see* BAJI 12.45, which precludes an instruction of  
24 the affirmative defense in negligent misrepresentation claims. Reply at 8.

25 The Court holds that Plaintiff is correct: comparative fault is not a defense to any of  
26 Plaintiff’s causes of action.

27 First, as to intentional misrepresentation and fraudulent concealment, California courts  
28 have definitively held that negligence is not a defense to claims based on intentional deception. In

1 *Manderville*, the defendants argued that the plaintiffs could not prove justifiable reliance (an  
 2 element of intentional misrepresentation) as a matter of law because they had failed to conduct a  
 3 more diligent investigation—precisely, Defendant’s claim here. 146 Cal. App. 4th at 1502. The  
 4 court rejected this argument, stating that “[i]t is well established in California that in an action for  
 5 fraud or deceit, negligence on the part of the plaintiff in failing to discover the falsity of the  
 6 defendant’s statement is no defense when the misrepresentation was intentional.” *Id. Manderville*  
 7 relied on the California Supreme Court’s decision in *Seeger v. Odell*, which conclusively held,  
 8 again in the context of discussing justifiable reliance, that “[n]egligence on the part of the plaintiff  
 9 in failing to discover the falsity of a statement is no defense when the misrepresentation was  
 10 intentional rather than negligent.” 18 Cal. 2d 409, 414–416; accord *Alliance Mortg. Co. v.*  
 11 *Rothwell*, 10 Cal. 4th 1226, 1239 (1995); see also *Onions Etc., Inc. v. Z & S Fresh, Inc.*, 603 F.  
 12 App’x 567, 570 (9th Cir. 2015) (“[A] a finding of negligence is not fatal to their fraudulent  
 13 misrepresentation claim.”). The same rule applies to fraudulent concealment claims. See *Am.*  
 14 *Gen. Life & Acc. Ins. Co. v. Findley*, No. CV 12-01753 MMM PSWX, 2013 WL 1120662, at \*9  
 15 (C.D. Cal. Mar. 15, 2013) (“A plaintiff’s contributory negligence is no defense to an intentional  
 16 tort like fraud, however.”) (citing *Godfrey v. Steinpress*, 128 Cal. App. 3d 154, 176 (1982);  
 17 *Anderson v. Tacher*, 76 Cal.App.2d 50, 70, 172 P.2d 533 (1946)). Put simply, there is “an  
 18 unbroken line of authority barring apportionment where . . . the defendant has committed an  
 19 intentional tort and the injured plaintiff was merely negligent.” *Heiner v. Kmart Corp.*, 84 Cal.  
 20 App. 4th 335, 350 (2000).<sup>2</sup>

21 As to breach of contract claims, the California Supreme Court held in *Kransco* that an  
 22 insurer could not invoke comparative fault principles against an insured where the insured had  
 23 allegedly breached only its contractual covenant of good faith and fair dealing, whereas the insurer  
 24 had allegedly breached its independent, non-contractual duty of good faith and fair dealing. 23  
 25 Cal. 4th at 402–03. In so holding, the Supreme Court recognized that “contractual breaches are

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 28 <sup>2</sup> Also, these cases often deal with this issue in the context of the justifiable reliance element of the  
 misrepresentation claim, demonstrating that Defendant can still raise the same evidence to argue  
 that Plaintiff did not justifiably rely on Defendant’s alleged misrepresentations.

1 generally excluded from comparative fault allocations.” *Id.* at 403; *see id.* at 413 (Mosk, J.,  
 2 concurring) (“Actions in contract do not allow an affirmative defense of comparative fault.”).  
 3 Though the Supreme Court noted that contractual claims are only “generally excluded,” courts in  
 4 this circuit have relied on this dicta, as well as other California cases, to exclude affirmative  
 5 defenses of comparative fault to breach of contract claims. *See F.D.I.C. v. Mahan*, No. 11-cv-  
 6 05414-MMM, 2011 WL 13220717, at \*5 (C.D. Cal. Nov. 22, 2011) (citing California cases  
 7 supporting holding that comparative fault affirmative defense does not apply to contract claims);  
 8 *see also F.D.I.C. v. Varrasso*, No. CIV. 2:11-2628 WBS, 2012 WL 1197712, at \*3 (E.D. Cal. Apr.  
 9 10, 2012) (“It is well established that comparative fault is not a defense to a breach of contract  
 10 claim.”); *F.D.I.C. v. JSA Appraisal Serv.*, No. 5:10-CV-02077-LHK, 2010 WL 3910173, at \*3  
 11 (N.D. Cal. Oct. 5, 2010). Though Plaintiff is correct that the court in *Warren*, 2011 WL 5079504,  
 12 declined to strike this affirmative defense as superfluous at the pleading stage given *Kransco’s*  
 13 generalized language, the *Warren* court (and the *Kransco* court) gave no indication of the  
 14 scenarios in which the general rule might give way, such that the affirmative defense would be  
 15 allowed.

16 The Ninth Circuit in *Trishan Air, Inc. v. Dassault Falcon Jet Corp.* provided some  
 17 guidance on this issue, holding that comparative fault applies to a contract-based claim for breach  
 18 of express warranty where “the contract-based claim” is “essentially an equivalent, alternative  
 19 method of pleading the same basic theory of liability as the tort claim[.]” for strict products  
 20 liability. *See* 532 F. App’x 784, 789 (9th Cir. 2013). There, the Ninth Circuit cited California  
 21 case law holding that breach of express warranty claims and strict products liability claims rely on  
 22 the same theories of liability, such that where one fails so too does the other. *See id.* By contrast,  
 23 this Court is not aware of (and Defendant does not cite) any case law holding that claims for  
 24 breach of contract and misrepresentation are simply “alternative method[s] of pleading the same  
 25 basic theory of liability.” And even if the Court could conclude that such a result is possible, the  
 26 claims in the instant case are not merely two sides of the same coin. Plaintiff’s breach of contract  
 27 claim includes an allegation that Defendant breached the purchase agreement by failing to notify  
 28 Plaintiff of “any communications regarding the AT&T Rent Stream,” which Defendant allegedly

1 did not do. Compl. ¶ 62. His other three claims do not include this allegation. As such, the  
2 claims do not rely on the same basic theory of liability, and thus the affirmative defense of  
3 comparative fault does not apply. Finally, the Court holds that comparative fault does not apply to  
4 any of Plaintiff’s three other claims, rendering the “alternative theory of liability” argument moot.

5 Finally, as to negligent misrepresentation, the Court agrees with Plaintiff that comparative  
6 fault is not a defense to negligent misrepresentation on the facts of this case. The California  
7 Supreme Court has recognized that “[n]egligent misrepresentation is a separate and distinct tort  
8 [from negligence], a species of the tort of deceit.” *Bily*, 3 Cal. 4th at 407; *see also Garcia v.*  
9 *Superior Court*, 50 Cal. 3d 728, 751 n.7 (1990) (“Negligent misrepresentation is a form of deceit  
10 without . . . the element of scienter.”). The California Supreme Court in *Van Meter* held that a  
11 plaintiff is generally not barred from raising a claim for negligent misrepresentation “where his  
12 negligence is due in part to his reliance in good faith upon the false representations of a defendant,  
13 although the statements were not made with intent to deceive.” *Van Meter v. Bent Const. Co.*, 46  
14 Cal. 2d 588, 595 (1956). However, where the plaintiff’s reliance is “preposterous or irrational,”  
15 his own actions may bar the claim. *See, e.g., F.D.I.C. v. Straub*, No. 11-03295 SBA, 2012 WL  
16 1965621, at \*3 (N.D. Cal. May 31, 2012) (declining to strike affirmative defense of comparative  
17 fault because the court could not hold at the pleading stage that the plaintiff’s reliance was not  
18 preposterous or irrational). Courts in this district have read *Van Meter* for the proposition that  
19 “[i]n cases . . . which arise from an allegation of deceit, the question of whether the plaintiff’s  
20 behavior is intentional or negligent is subsumed under the element of reliance.” *F.D.I.C. v.*  
21 *Luping Lai*, No. 5:11-CV-03313 EJD, 2012 WL 50370, at \*2 (N.D. Cal. Jan. 9, 2012).

22 Moreover, nearly fifty years ago in *Carroll*, the California Court of Appeal held that “the  
23 concept [of comparative fault] has no place in the context of ordinary business transactions,” as  
24 opposed to simple negligence cases, because “[t]he modern law of misrepresentation evolved from  
25 the action on the case of deceit in business transactions,” wherein “[b]usiness ethics justify  
26 reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is  
27 on the one who makes a representation.” 98 Cal. App. 3d at 897 (citation omitted); *accord*  
28 *Godfrey*, 128 Cal. App. 3d at 176. In that case, as in *Godfrey*, the court rejected the defendants’

1 argument that comparative negligence should apply because the plaintiffs negligently relied on the  
2 defendants' misrepresentations. *Id.*

3 Based on these cases, this Court concludes that the affirmative defense of comparative  
4 fault is not appropriate here. First, just as with Plaintiff's other claims for deceit, the affirmative  
5 defense of comparative fault appears to be merely duplicative of Defendant's argument that  
6 Plaintiff fails to satisfy its burden of proving the element of reasonable reliance. Second, as  
7 discussed, Defendant's evidence demonstrates, at most, that Plaintiff was negligent in conducting  
8 its due diligence; he does not sufficiently prove that Plaintiff's reliance was "preposterous or  
9 irrational." As such, even if the affirmative defense were appropriate here under *Van Meter*,  
10 Plaintiff has shown that Defendant cannot satisfy *Van Meter*'s requirements.

11 Defendant's attempts to argue to the contrary are unavailing. The Court of Appeal in *Kohn*  
12 held that *Carroll*'s rejection of comparative fault in business transaction cases applies only  
13 between the plaintiff and the defendant, not between multiple defendant tortfeasors. *Kohn*  
14 recognized that *Carroll* applies when the comparative fault is meted between a plaintiff and a  
15 defendant, stating "[a]t most, *Carroll* stands for the proposition that as long as the plaintiff is not  
16 aware of the true state of facts his negligence in not ascertaining them will not be compared with  
17 the negligence of the defendant in making the misrepresentation." 142 Cal. App. 3d at 331. But it  
18 declined to apply the rule to "defendants jointly charged with misrepresenting to the plaintiff."  
19 *Id.*; accord *Considine Co. v. Shadle, Hunt & Hagar*, 187 Cal. App. 3d 760, 769 (1986). Here,  
20 Defendant seeks to use the affirmative defense against a plaintiff, not a joint tortfeasor, so *Carroll*  
21 applies.

22 Likewise, Section 552A of the Restatement (Second) of Torts does not dictate a contrary  
23 result. First, it relates to contributory negligence, not comparative fault. Second, Defendants do  
24 not cite any California cases adopting Section 552A, as opposed to Section 552. And third,  
25 subsuming an affirmative defense of comparative fault into a claim that a plaintiff has not proven  
26 the element of justifiable reliance appears to comport with "ordinary rules of negligence"  
27 contemplated by Section 552A—that is, when a plaintiff is negligent, he may not be able to prove  
28 that he reasonably relied on the misrepresentation.

1           Accordingly, the Court holds that Defendant’s affirmative defense of comparative fault  
2 cannot be raised as to any of Plaintiff’s four causes of action. Thus, the Court GRANTS summary  
3 judgment on Defendant’s fourteenth affirmative defense.

4                           **15. Counterclaim: Rescission (Mutual Mistake)**

5           Defendant also asserts a counterclaim for rescission, in which he alleges that “LLB and  
6 Loskutoff, through no fault of their own, were both mistaken as to the status of the ATT rent  
7 stream during the due diligence period and at the time of execution of the Purchase Agreement.”  
8 Ans. at 12, ¶ 24. California Civil Code § 1689 allows a party to rescind a contract “[i]f the  
9 consent of the party rescinding, or of any party jointly contracting with him, was given by  
10 mistake.” A mistake of fact is “a mistake, not caused by the neglect of a legal duty on the part of  
11 the person making the mistake, and consisting in: [(1)] An unconscious ignorance or forgetfulness  
12 of a fact past or present, material to the contract; or, [(2)] Belief in the present existence of a thing  
13 material to the contract, which does not exist, or in the past existence of such a thing, which has  
14 not existed.” *Id.* § 1577.

15           Here, the purported fact about which the parties were mistaken is AT&T’s termination of  
16 the sublease. The Court has already determined that there is no evidence that Plaintiff knew that  
17 AT&T had terminated the sublease. Where the mistake is mutual (*i.e.* both parties are mistaken),  
18 the defendant must prove “that both parties were mistaken” and that the defendant “would not  
19 have agreed to enter into the contract if [he] had known about the mistake.” Council of Cal.  
20 Advisory Comm. Civil Jury Instruction No. 331. The latter element, put differently, requires “[a]  
21 party seeking to rescind a contract [to] show that he has suffered material injury or prejudice  
22 although he need not show pecuniary loss.” *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879,  
23 886 (1975)

24           Plaintiff argues that Defendant’s counterclaim must fail for the following reasons<sup>3</sup>: (1) he  
25 knew about AT&T’s status, and thus he did not make a material mistake; (2) he was not adversely

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27 <sup>3</sup> Plaintiff argues that Defendant’s counterclaim fails under either a mutual mistake or unilateral  
28 mistake theory; hence, its brief argues Defendant fails to satisfy the elements of unilateral mistake,  
which overlap, in part, with the mutual mistake elements. However, Defendant only claimed  
mutual mistake in his counterclaim. *See* Answer at 12, ¶ 24.



1 affected by any such mistake because he gained \$925,000 in profits; (3) he bore the risk of the  
2 agreement because he made representations and warranties in the agreement about AT&T's status  
3 and because he withheld information from Plaintiff relevant to AT&T's status on the tower; and  
4 (4) the contract was not unconscionable because Defendant had equal bargaining power and the  
5 results of the bargain were not overly harsh or one-sided. Mot. at 19–21. Plaintiff also argues that  
6 Defendant waived his right to rescind because he knew in 2014 about AT&T's termination but he  
7 waited until 2016 to bring this claim. Mot. at 21–22 (citing *Neet v. Holmes*, 25 Cal. 2d 447, 457–  
8 58).

9 Defendant counters that (1) his knowledge of AT&T's status is a triable issue of fact; (2)  
10 he was harmed because he is now subject to expensive litigation; (3) triable issues of fact exist as  
11 to whether Defendant knowingly made incorrect misrepresentations and whether he made any  
12 representations at all; and (4) the agreement is unconscionable because it has exposed him to this  
13 expensive lawsuit. Opp. at 23–25. At the hearing on the motion, Defendant also argued that the  
14 transaction injured him because he gave up his rights to the lease and the associated future rent  
15 streams. See ECF 100 at 25: 18–19. And he argues he has not waived the right to argue rescission  
16 because he did not know about AT&T's termination until 2016.

17 The Court can summarily reject Plaintiff's arguments that Defendant did not make a  
18 mistake and that he waived his rescission claim because the Court has already determined that  
19 disputed issues of material fact exist as to whether and when Defendant knew about AT&T's  
20 termination status.

21 However, the Court agrees with Plaintiff's argument that Defendant has failed to point to  
22 evidence demonstrating that the transaction injured him in any way or that Defendant would not  
23 have agreed to enter into the contract had he known about the mistake. The Supreme Court in  
24 *Donovan v. RRL Corp.* noted that in order to succeed on a claim of mistake, “[t]he defendant must  
25 show that the resulting imbalance in the agreed exchange is so severe that it would be unfair to  
26 require the defendant to perform.” 26 Cal. 4th 261, 282 (2001), *as modified* (Sept. 12, 2001).  
27 “Ordinarily, a defendant can satisfy this requirement by showing that the exchange not only is less  
28 desirable for the defendant, but also is more advantageous to the other party.” *Id.* Indeed, in

1 *Donovan*, the defendant’s mistake would have caused him to sell his car for \$12,000 less than the  
2 intended price—a 32% reduction in price. *Id.*; *cf. Rios v. Paramo*, No. 13-CV-2455-WQH, 2015  
3 WL 8492500, at \*6 (S.D. Cal. Dec. 10, 2015) (holding plaintiff could not show that settlement  
4 adversely impacted him because he received \$1,000 and could not show that the settlement  
5 unfairly benefitted the defendants).

6 Here, Defendant received \$925,000 from Plaintiff because Plaintiff allegedly believed that  
7 the lease had two rent income streams. Had the parties known at the time of the transaction that  
8 the tower only had one rent income stream, Defendant almost certainly would not have received as  
9 much money in the transaction. Thus, Defendant ostensibly *benefited* from the parties’ mistake,  
10 not suffered from it. It strains credulity to say that Defendant would not have entered into the  
11 agreement had he known AT&T had terminated the sublease.

12 Defendant argues he was injured because he now faces litigation because of the mistake,  
13 and because he lost the opportunity for future rent streams from the transaction. As to the latter,  
14 Defendant entered into an arms’ length transaction with Plaintiff in which he seemingly decided  
15 that the future income from the tower with two rent streams was less valuable than the \$925,000  
16 he received in return. To say that the tower would somehow have been more valuable to him had  
17 he known it had only *one* income stream again is simply not plausible. And Defendant does not  
18 otherwise argue that the transaction was unconscionable. As to the litigation expenses, Defendant  
19 does not cite a single case in which a party demonstrated injury for the purposes of mistake merely  
20 because the mistake subjected him to litigation. Indeed, if litigation expenses alone were  
21 sufficient to constitute injury for this claim, any party to a lawsuit raising a mistake claim would  
22 satisfy this element, rendering the element a nullity.

23 Because Defendant has failed to demonstrate that a reasonable jury could conclude the  
24 transaction injured him, he fails to satisfy an essential element of his rescission counterclaim.  
25 Thus, the Court GRANTS summary judgment on Defendant’s counterclaim for rescission.

26 **V. ORDER**

27 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 28 1. Plaintiff’s Motion for Summary Judgment is GRANTED as to Defendant’s

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counterclaim for rescission and his first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth affirmative defenses.

2. Plaintiff's Motion for Summary Judgment is DEFERRED as to Defendant's fourth affirmative defense for failure to mitigate, pending the Court's decision on the evidentiary dispute at the motion in limine stage.

**IT IS SO ORDERED.**

Dated: February 22, 2019



BETH LABSON FREEMAN  
United States District Judge