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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLINT STEVEN MILLER,
Plaintiff,

v.

UNI-PIXEL INC., UNI-PIXEL
DISPLAYS, INC.,
Defendants.

Case No. 17-cv-02187 NC

**ORDER GRANTING
DEFENDANTS' MOTIONS TO
DISMISS, AND GRANTING
DEFENDANTS' MOTION TO
STRIKE**

Re: Dkt. Nos. 8, 12, 26

This case arises from defendants Uni-Pixel, Inc.'s (Uni-Pixel) and Uni-Pixel Displays, Inc.'s (Displays) alleged breaches of contract and misrepresentations to plaintiff Clint Steven Miller. Uni-Pixel and Displays separately bring two motions to dismiss plaintiff Miller's complaint, and a joint motion to strike an attachment to Miller's complaint. Because the Court finds (1) Miller is not a proper plaintiff; (2) Uni-Pixel is not a proper defendant; and (3) Miller fails to state a claim as to any of his claims, the Court GRANTS the motion to dismiss WITH LEAVE TO AMEND as to all claims except the negligence claim. The Court also GRANTS the motion to strike.

I. BACKGROUND

This case arises from alleged "breached written and verbal contracts" and various alleged misrepresentations made by Uni-Pixel and Displays. Dkt. No. 1 at 4. According to Miller, in February 2011, Ni Ne Trading Company, of which Miller is sole proprietor, Case No. 17-cv-02187 NC

1 and defendants “mutually agreed to a binding contract,” “whereby Ni Ne would provide
2 sales and business development services for compensation and Ni Ne would incur its own
3 significant costs and expenses related to such service.” *Id.* at 4-5. Miller was not a party
4 to the contract between Displays and Ni Ne in his personal capacity. He signed the
5 contract in his capacity as the CEO of Ni Ne. Dkt. No. 1-1 at 7. Defendants allegedly “did
6 not terminate the contract per the terms of the contract,” and the termination date was
7 January 31, 2016. *Id.* at 5. The complaint does not specify how the defendants terminated
8 the contract. In addition, Miller alleges that Uni-Pixel and Display moved customer
9 accounts in Ni Ne’s territory to another company. *Id.*

10 Miller brings this case for unpaid compensation and compensatory and punitive
11 damages against Uni-Pixel and Displays. *Id.* at 4. According to Miller, the amount
12 currently owed to Ni Ne is \$ 750,506.35. Dkt. No. 1-1 at 1 (Exhibit A to the Complaint).
13 Defendants move to dismiss Miller’s complaint in separate motions to dismiss, and filed a
14 joint motion to strike Exhibit C to the complaint. Dkt. Nos. 8, 12, 26. All parties
15 consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 4,
16 16.

17 **II. LEGAL STANDARD**

18 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
19 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
20 motion to dismiss, all allegations of material fact are taken as true and construed in the
21 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
22 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
23 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
24 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
25 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
26 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
27 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
28 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*

1 *v. Iqbal*, 556 U.S. 662, 678 (2009).

2 If a court grants a motion to dismiss, leave to amend should be granted unless the
3 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203
4 F.3d 1122, 1127 (9th Cir. 2000).

5 **III. DISCUSSION**

6 Both defendants argue in their respective motions that Miller fails to state a claim
7 for any of his claims for relief. However, the defendants also have arguments specific to
8 them. The Court will first address the arguments that are specific to either defendant, and
9 then address the issues that are common to both motions. The Court will also address the
10 motion to strike.

11 **A. Choice of Law**

12 A choice of law issue exists in this case. “Federal courts sitting in diversity must
13 apply the forum state’s choice of law rules to determine the controlling substantive law.”
14 *Fields v. Legacy Health Sys.*, 413 F.3d 943, 950 (9th Cir. 2005) (internal citations and
15 quotations marks omitted); *Hoffman v. Citibank (S. Dakota), N.A.*, 546 F.3d 1078, 1082
16 (9th Cir. 2008). The forum state is California. “[U]nder California’s choice of law
17 analysis, a court must determine as a threshold matter ‘whether the chosen state has a
18 substantial relationship to the parties or their transaction, or . . . whether there is any other
19 reasonable basis for the parties’ choice of law.’” *Hoffman*, 546 F.3d at 1082 (quoting
20 *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992)).

21 The substantial relationship test may be satisfied where one of the parties is a
22 citizen of, or has its principal place of business in the state whose substantive law was
23 chosen. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1323 (9th Cir. 2012). If either test
24 is satisfied, the Court next considers “whether the ‘chosen state’s law is contrary to a
25 fundamental policy of California.’ If such a conflict with California law is found, ‘the
26 court must then determine whether California has a materially greater interest than the
27 chosen state in the determination of the particular issue.’” *Hoffman*, 546 F.3d at 1082
28 (citing *Nedlloyd*, 3 Cal. 4th 459). Where the proponent of the choice of law clause shows a

1 substantial relationship or a reasonable basis for the choice of law, “the parties’ choice
2 generally will be enforced unless *the other side* can establish both that the chosen law is
3 contrary to a fundamental policy of California and that California has a materially greater
4 interest in the determination of the particular issue.” *Washington Mut. Bank, FA v.*
5 *Superior Court*, 24 Cal. 4th 906, 917 (2001) (emphasis added). In addition, the Court must
6 consider which state’s substantive law applies to each claim under California law. *JMP*
7 *Sec. LLP v. Altair Nanotechnologies Inc.*, No. 11-cv-04498 SC, 2012 WL 892157, at *4
8 (N.D. Cal. Mar. 14, 2012).

9 The applicable substantive law under the contract is Texas state law, because the
10 contract here contains a choice of law clause specifying Texas law as governing. Dkt. No.
11 1-1 at 7.¹ Miller provides in the complaint that Uni-Pixel is a “citizen” of California and is
12 a Delaware corporation, and that Displays “conducts business in California” and is a Texas
13 corporation. Dkt. No. 1 at 2, 3. These states of incorporation are consistent with the
14 Statements of Designation provided by defendants. Dkt. No. 11-1. Thus, Texas has a
15 substantial relationship with defendant Displays. *Ruiz*, 667 F.3d at 1323. Further, because
16 all of the claims in this case—negligence, fraud, breach of fiduciary duty, and breach of
17 contract—arise from the February 2011 contract, Texas law applies to each claim.
18 *Nedlloyd*, 3 Cal. 4th at 470 (“a valid choice-of-law clause, which provides that a specified
19 body of law ‘governs’ the ‘agreement’ between the parties, encompasses all causes of
20 action arising from or related to that agreement, regardless of how they are characterized”);
21 *JMP*, 2012 WL 892157, at *6 (finding that the law of the chosen state in the contract
22 applied not only to the breach of contract claim, but also claims for promissory estoppel,
23 fraud, and negligent misrepresentation).

24 Next, the Court considers whether Texas law is contrary to a fundamental
25 California policy. *Hoffman*, 546 F.3d at 1082. There is no apparent conflict between
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27 ¹ That clause states: “This Agreement will be governed by and construed in accordance
28 with the laws of the State of Texas and the federal laws of the United States of America
applicable in the State and each of the Parties agrees irrevocably to conform to the
nonexclusive jurisdiction of the Courts of Texas.”

1 California and Texas breach of contract law. *Compare Velvet Snout, LLC v. Sharp*, 441
 2 S.W.3d 448, 451 (2014) with *Buschman v. Anesthesia Bus. Consultants LLC*, 42 F. Supp.
 3 3d 1244, 1250 (N.D. Cal. 2014). Nor is there an apparent conflict between California and
 4 Texas law regarding breach of fiduciary duty. *Compare Jones v. Blume*, 196 S.W.3d 440,
 5 447 (2006) with *Tribeca Companies, LLC v. First Am. Title Ins. Co.*, 239 Cal. App. 4th
 6 1088, 1114 (2015). As to fraud, there is also no apparent conflict between California and
 7 Texas law, though the Texas test for fraud includes the California test for both fraud and
 8 negligent misrepresentation. *Compare In Interest of C.M.V.*, 479 S.W.3d 352, 361 (2015)
 9 with *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (fraud) and *Apollo Capital*
 10 *Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007) (negligent
 11 misrepresentation).

12 However, there is a conflict between California and Texas law as it concerns
 13 negligence arising from contracts. Under Texas law, if the alleged negligence arises from
 14 a contract, to bring a claim for negligence, the defendant must also have breached a duty
 15 imposed by law. *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (1991). Yet under
 16 California law, a plaintiff’s contractual negligence claim may sound in contract or tort.
 17 *Eads v. Marks*, 39 Cal. 2d 807, 811 (1952). Here, the Court has found no evidence—and
 18 Miller has presented no argument—that this difference between Texas and California law
 19 violates a “fundamental policy” or that California has “a materially greater interest in the
 20 determination of the particular issue” in this case. *Washington Mut.*, 24 Cal. 4th at 917.
 21 The Court will therefore apply Texas law.

22 **B. Miller Lacks Standing to Bring Claims Regarding the 2011 Contract.**

23 Under Texas law, “to establish standing to maintain a breach of contract action, a
 24 plaintiff must show either third-party beneficiary status or privity. For purposes of
 25 standing, a plaintiff can establish privity by proving the plaintiff was assigned a cause of
 26 action under a contract to which the defendant was a party.” *Sharifi v. Steen Auto., LLC*,
 27 370 S.W.3d 126, 141-42 (2012) (citing *OAIC Commercial Assets, L.L.C. v. Stonegate Vill.,*
 28 *L.P.*, 234 S.W.3d 726, 738 (2007)).

1 Miller lacks standing to sue on the contract because he was not a party to the
2 contract between Ni Ne and Displays. There is also no indication that Miller, in his
3 personal capacity, was a third-party beneficiary of the contract or otherwise in privity with
4 defendants. *Id.* Miller signed the contract between Ni Ne and Displays in his capacity as
5 CEO of the company. Dkt. No. 1-1 at 7. Furthermore, all of the claims in the complaint
6 arise from contractual duties contained in the 2011 complaint. The negligence claim is for
7 negligent performance of a duty under the contract; the fraud claim is for alleged
8 misrepresentations made by defendants to Ni Ne so that Ni Ne would perform services
9 under the contract; and the purported fiduciary duty owed to Ni Ne under the breach of
10 fiduciary duty claim arose directly from the contract between Ni Ne and the defendants.
11 Dkt. No. 1 at 8, 10. Thus, Miller cannot bring any of the claims arising from defendants’
12 allegedly faulty performance of the 2011 contract, because if the allegations in the
13 complaint are true, it was Ni Ne that was harmed, not Miller. *Shiple v. Unifund CCR*
14 *Partners*, 331 S.W.3d 27, 28 (2010) (“Only the party whose primary legal right has been
15 breached may seek redress for an injury”).

16 The Court knows that the original plaintiff in this case was Ni Ne, but once the
17 Court informed Miller that he could not represent the company personally, and needed to
18 retain an attorney, Miller made himself the plaintiff. Dkt. Nos. 6, 15. The Court informs
19 Miller that if he wants the Court to consider the merits of this complaint, he must substitute
20 Ni Ne as the plaintiff and retain an attorney to represent Ni Ne.

21 **C. Uni-Pixel Was Not a Party to the Contract, And Is Not a Proper Defendant.**

22 Uni-Pixel argues Miller cannot state a claim for breach of contract against it
23 because he cannot allege that a contract existed between the parties. Per Uni-Pixel, it is a
24 separate entity from Displays. This is reflected in the Texas Statements of Designation
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1 by Foreign Corporation. Dkt. No. 11-1.² In opposition, Miller seemingly concedes that
2 Uni-Pixel was not party to the contract, but argues the Court should find that Displays is an
3 alter ego of Uni-Pixel, meaning that they are the same entity. Dkt. No. 18 at 3.

4 Under Texas law, “[a] subsidiary corporation will not be regarded as the alter ego of
5 its parent corporation merely because of: (1) stock ownership; (2) a duplication of some or
6 all of the directors or officers; or (3) an exercise of the control that stock ownership gives
7 to stockholders.” *Capital Tech. Info. Servs., Inc. v. Arias & Arias Consultores*, 270
8 S.W.3d 741, 749 (2008) (citations omitted). However, alter ego may be found “where
9 management and operations are assimilated to the extent that the subsidiary is simply a
10 name or conduit through which the parent conducts its business, the corporate fiction may
11 be disregarded to prevent fraud or injustice.” *Gentry v. Credit Plan Corp. of Houston*, 528
12 S.W.2d 571, 573 (1975).

13 To support Miller’s argument that alter ego exists, Miller states: “The source of most
14 communications to the Plaintiff could not be segregated between Uni-Pixel, Inc. and Uni-
15 Pixel Displays, Inc. The identical individuals and products were driving those written and
16 verbal communications.” Dkt. No. 18 at 3. As a matter of law, the vague and inadequately
17 detailed allegations in the complaint are insufficient to make a showing that Uni-Pixel and
18 Displays are one and the same. Thus, the Court finds Uni-Pixel is not a proper defendant
19 in this case. However, because Miller could plausibly amend his complaint to impose

21 ² Defendants request, and Miller does not oppose, that the Court take judicial notice of the
22 2016 Texas Statements of Designation by Foreign Corporation filed with the Texas
23 Secretary of State for Uni-Pixel and Displays. Dkt. No. 11. The Court GRANTS
24 defendants’ request for judicial notice, observing that all of the documents requested to be
25 noticed are undisputed and in the public record. *Lee v. City of Los Angeles*, 250 F.3d 668,
26 689 (9th Cir. 2001) (citing Fed. R. Evid. 201). However, the Court does not take judicial
27 notice of the veracity of the *facts* contained in those documents, meaning that the Court
28 does not, by virtue of those filings alone, accept that Uni-Pixel and Displays are separate
entities, merely that they are *reported* to be separate entities. *Farina Focaccia & Cucina
Italiana, LLC v. 700 Valencia St. LLC*, No. 15-cv-02286 JCS, 2015 WL 4932640, at *6
(N.D. Cal. Aug. 18, 2015) (“The Court does not take judicial notice of Plaintiff’s *actual*
legal status as of any particular date in either Delaware or California, which is a legal
conclusion that may conflict with Plaintiff’s reported status, not a fact that can be
‘accurately and readily determined from sources whose accuracy cannot reasonably be
questioned.’” (citing Fed. R. Evid. 201(b)) (italics in original)).

1 liability on Uni-Pixel, he is granted leave to amend his allegations against Uni-Pixel.

2 **D. The Merits of the Claims**

3 **1. Miller Has Not Stated a Claim For Negligence.**

4 Both defendants move to dismiss Miller’s negligence claim.

5 Under Texas law, the elements of negligence “are the existence of a legal duty, a
6 breach of that duty, and damages proximately caused by the breach.” *IHS Cedars*
7 *Treatment Ctr. of DeSoto, Texas, Inc. v. Mason*, 143 S.W.3d 794, 798 (2004) (citation
8 omitted). “The two elements of proximate cause are cause in fact (or substantial factor)
9 and foreseeability.” *Id.* Yet if the alleged negligence arises from a contract, in order to
10 bring a claim for negligence, the defendant must also have breached a duty imposed by
11 law. *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (1991).³

12 Here, the Court need not get into the elements of the claim because Miller’s
13 complaint demonstrates that he cannot state a claim for negligence. This is because in his
14 own words, Miller provided that the legal duty from which the alleged negligence
15 stemmed is a clause in the contract, which defendants allegedly failed to fulfill. Dkt. No. 1
16 at 8 (“Defendants had a duty, as defined in the contract, to provide information and
17 training regarding the ongoing status of their capabilities and products.”). There are no
18 allegations in the complaint that defendants breached some other duty imposed by law.
19 *DeLanney*, 809 S.W.2d at 494. Further, Miller is not a party to the contract. Neither
20 defendant has a contractual duty to a party who was not a party to the contract. This claim
21 is DISMISSED WITH PREJUDICE.

22 **2. Miller Has Not Stated a Claim For Fraud.**

23 Both defendants move to dismiss Miller’s fraud claim.

24 Under Texas law, “[t]he elements of fraud are: (1) a material misrepresentation was
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26 ³ *DeLanney* discusses that where a defendant breaches a contract and, for example, also
27 burns down the plaintiff’s home, the defendant is liable in contract and tort. Defendant
28 had a common-law duty not to burn the house. “When the only loss or damage is to the
subject matter of the contract, the plaintiff’s action is ordinarily on the contract.”
DeLanney, 809 S.W.2d at 494.

1 made; (2) the representation was false; (3) when the representation was made, the speaker
2 knew it was false or made the statement recklessly without any knowledge of the truth; (4)
3 the speaker made the representation with the intent that the other party should act on it; (5)
4 the party acted in reliance on the representation; and (6) the party thereby suffered injury.”
5 *In Interest of C.M.V.*, 479 S.W.3d at 361. A plaintiff bringing a claim for fraud must plead
6 “with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).
7 The pleading must “be specific enough to give defendants notice of the particular
8 misconduct . . . so that they can defend against the charge and not just deny that they have
9 done anything wrong.” *Sanford v. Memberworks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010).
10 To avoid dismissal, “the complaint must describe the time, place, and specific content of
11 the false representations and identify the parties to the misrepresentations.” *NavCom*
12 *Tech., Inc. v. Oki Elec. Indus. Co., Ltd.*, No. 12-cv-04175 EJD, 2014 WL 991102, at *4
13 (N.D. Cal. Mar. 11, 2014).

14 Miller has not stated a claim for fraud with the requisite particularity. The allegedly
15 fraudulent representations giving rise to this claim are “the false and misleading
16 communications directly to Plaintiff about their capabilities from the Defendants during
17 the period of December 2012 through February 2014.” Dkt. No. 1 at 10. However, those
18 communications would have been to Ni Ne, the company, not Miller, the individual.
19 Further, neither the Court nor the defendants are on notice of the time, place, parties, or the
20 content of the alleged misrepresentations. *NavCom*, 2014 WL 991102, at *4. This claim
21 is DISMISSED WITH LEAVE TO AMEND.

22 **3. Miller Fails to State a Claim For Breach of Fiduciary Duty.**

23 Both defendants move to dismiss Miller’s breach of fiduciary duty claim.

24 Under Texas law, “[t]he elements of a breach of fiduciary duty claim are: (1) a
25 fiduciary relationship between the plaintiff and defendant; (2) the defendant must have
26 breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in
27 injury to the plaintiff or benefit to the defendant.” *Jones*, 196 S.W.3d at 447. “Texas does
28 not recognize a fiduciary duty or a duty of good faith and fair dealing owed by an

1 employer to an employee.” *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 153 (2005).⁴
2 There is no fiduciary duty between Miller and defendants, and based on the allegations,
3 there is also not one between Ni Ne (the employee) and defendants (the alleged
4 employers). *Id.* Ni Ne must provide facts showing some other way in which a fiduciary
5 duty could exist between itself and defendants. Thus, the Court DISMISSES this claim
6 WITH LEAVE TO AMEND.

7 **4. Miller Fails to State a Claim for Breach of Contract.**

8 Both defendants move to dismiss Miller’s breach of contract claim.

9 Texas law provides that “[t]he four elements of a breach of contract claim are: (1)
10 the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract
11 by the defendant; and (4) damages to the plaintiff resulting from that breach.” *Velvet*
12 *Snout*, 441 S.W.3d at 451.⁵

13 Here, Miller has sufficiently alleged there exists a written contract between Ni Ne and
14 Displays, and that Displays breached it by not paying Ni Ne Trading Company the money
15 owed to it. However, Miller is not a party to the contract between Ni Ne Trading
16 Company and Displays, and so lacks standing to bring this claim on behalf of Ni Ne.
17 *Sharifi, LLC*, 370 S.W.3d 126, 141-42.

18 **E. The Court Grants the Motion to Strike Exhibit C to the Complaint.**

19 Defendants also filed a motion to strike Exhibit C to the complaint, which is a
20 complaint by the Securities and Exchange Commission against Reed Killion, Jeffrey
21 Tomz, and Uni-Pixel, Inc. Dkt. Nos. 1-2, 12.

23 ⁴ California law is not to the contrary. *O’Byrne v. Santa Monica-UCLA Med. Ctr.*, 94 Cal.
24 App. 4th 797, 811 (2001); *Arakelian v. Conquest*, No. B161037, 2003 WL 22847091, at
*12 (Cal. Ct. App. Dec. 2, 2003).

25 ⁵ To the extent Miller seeks to allege the existence and breach of a verbal contract, he has
26 failed to do so. The only allegation in his complaint regarding a verbal contract is:
27 “Defendants failed to compensate the Plaintiff in accordance with the written and verbal
28 contract commitments as defined in Exhibit A.” Dkt. No. 1 at 4, 12 (there is passing
reference to breach of a verbal contract in the introduction to the complaint). Exhibit A
provides no clarity as to any alleged verbal contract. This purported claim fails to meet the
pleading standards of Federal Rule of Civil Procedure 8(a)(2), because it does not present
“a short and plain statement of the claim showing that the pleader is entitled to relief.” The
Court will not further consider such a claim in this order.

1 A court may strike from a pleading “any insufficient defense or any redundant,
2 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Immaterial matter
3 “is that which has no essential or important relationship to the claim for relief or the
4 defenses being pleaded.” *Fantasy Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993),
5 *rev’d on other grounds by, Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (internal citations
6 and quotation marks omitted). Impertinent material “consists of statements that do not
7 pertain, and are not necessary, to the issues in question.” *Id.* However, motions to strike
8 are disfavored “because the motions may be used as delaying tactics and because of the
9 strong policy favoring resolution on the merits.” *Barnes v. AT & T Pension Ben. Plan-
10 Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010). Further, such
11 motions “are generally not granted unless it is clear that the matter to be stricken could
12 have no possible bearing on the subject matter of the litigation.” *LeDuc v. Kentucky Cent.
13 Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992).

14 Here, the Court has reviewed Exhibit C, and STRIKES Exhibit C to the complaint.
15 The Court is *not* striking Exhibit C because it is impertinent, redundant, or scandalous.
16 The Court strikes Exhibit C because it is immaterial. The allegations in Exhibit C are
17 voluminous, and are allegations regarding malfeasance by Mr. Killion and Tomz, as well
18 as Uni-Pixel, but there are no allegations regarding Displays. Displays, not Uni-Pixel, nor
19 Killion and Tomz in their personal capacities contracted with Ni Ne. Based on the
20 complaint in its current form, Exhibit C has no possible bearing on this case. *LeDuc*, 814
21 F. Supp. at 830; *Fantasy Inc.*, 984 F.2d at 1527.

22 Further, in the complaint, Miller did not refer to any specific portion of the SEC
23 complaint as supporting his allegations. Neither the Court nor defendants are on notice of
24 what specific allegedly false and misleading communications were made to Miller based
25 on a highly detailed 19-page complaint. *See* Dkt. No. 1 at 9 (“Defendants supplied false
26 information for the guidance of Ni Ne. This included, but is not limited to, the false and
27 misleading communications directly to Plaintiff about their capabilities from the
28 Defendants during the period of December 2012 through February 2014. Additional

1 examples of these false and misleading communications can be found in Exhibit C . . .
2 which were also communicated to Plaintiff during the same period”), 10 (nearly identical
3 allegations and reference to Exhibit C regarding fraud claim). Miller must specifically
4 write the relevant allegations as to “false and misleading communications” in his
5 complaint if they exist against the right defendant. Attachment of a complaint in a
6 different case without reference to the parts Miller wants the Court to consider is
7 unacceptable.

8 The motion to strike is GRANTED.

9 **IV. CONCLUSION**

10 Because Miller lacks standing to bring a claim arising from the 2011 contract, and
11 because he fails to state a claim, the Court DISMISSES the complaint. The claim for
12 negligence is DISMISSED WITH PREJUDICE, and the other claims are DISMISSED
13 WITH LEAVE TO AMEND, contingent on (1) the substitution of Ni Ne as plaintiff; and
14 (2) Ni Ne retaining an attorney. Further, defendants’ motion to strike is GRANTED.
15 Plaintiff must move for leave to file an amended complaint, with the amended complaint
16 attached, by August 18, 2017.

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18 **IT IS SO ORDERED.**

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20 Dated: July 14, 2017



NATHANAEL M. COUSINS
United States Magistrate Judge