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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ARENA RESTAURANT AND LOUNGE
LLC, et al.,

Plaintiffs,

v.

SOUTHERN GLAZER'S WINE AND
SPIRITS, LLC, et al.,

Defendants.

Case No. 17-CV-03805-LHK

**AMENDED ORDER GRANTING
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Re: Dkt. No. 36

This order supersedes the order filed on April 9, 2018, ECF No. 52 (“April 9 Order”), which is hereby vacated. This order corrects one sentence on page 23 of the April 9 Order that misstates the requirements for stating a claim under the fraudulent prong of California’s Unfair Competition Law. This change does not affect the substance of the April 9 Order, which in all other respects remains the same.

Plaintiffs Arena Restaurant and Lounge LLC, Pacifica Restaurants, LLC, Vine and Barrel LLC, and Daniel Flores (“Plaintiffs”) filed this putative class action against Southern Glazer’s Wine and Spirits, LLC and Southern Glazer Wine & Spirits of America, Inc. (“Defendants”). Before the Court is Defendants’ motion to dismiss the second amended complaint. Having

1 considered the parties’ briefs, the relevant law, and the record in this case, the Court GRANTS the
2 motion to dismiss.¹

3 **I. BACKGROUND**

4 **A. Factual Background**

5 Plaintiffs accuse Defendants, which are liquor wholesalers, of a range of anticompetitive
6 behavior. As context for their claims, Plaintiffs explain that the Federal Alcohol Administration
7 Act (27 U.S.C. § 201, *et seq.*) was enacted in 1935 to establish a regulatory scheme for the liquor
8 industry. ECF No. 30 (“SAC”) ¶ 36. This regulatory scheme created a three-tiered system that
9 distinguishes between alcohol producers, wholesalers, and retailers. *Id.* ¶ 39 (referencing 27
10 U.S.C. § 205)). According to Plaintiffs, “the three-tier system provides that (1) producers cannot
11 either wholesale or retail alcohol, (2) wholesalers cannot be producers or retailers, and (3) retailers
12 cannot wholesale or produce alcohol.” *Id.* Instead, “manufacturers (tier 1) sell to licensed
13 importers, distributors and control boards.” *Id.* “Licensed importers and distributors (tier 2) act in
14 cooperation with the federal and state governments; they help ensure that alcohol beverage taxes
15 are reliably collected. The prohibition against tier 2 entities owning or operating retailers (those at
16 tier 3) ensures that suppliers cannot coerce retailers to favor their brands.” *Id.* “Licensed outlets
17 like liquor stores, bars or restaurants (tier 3) ensure that alcohol is sold to those who are of legal
18 age to purchase it.” *Id.* Plaintiffs explain that “this three-tier regulatory system provides for
19 ‘checks and balances’ to the way alcohol is distributed and sold throughout the system, from one
20 licensed tier to another. These . . . rules dictate that no individual or entity (except the state
21 regulator itself) is allowed to own and operate more than one tier of the system.” *Id.*

22 Glazer’s Wholesale Distributors, a predecessor to Glazer’s, Inc., was founded in 1933,
23 about the time of the repeal of Prohibition, and has, in various corporate forms, distributed food,
24 drink, and tobacco products on a wholesale basis in various states throughout the country. SAC

26 ¹ The Court files this amended order to correct one sentence on page 23 of the order issued on
27 April 9, 2018 containing a misstatement with respect to the requirements for stating a claim under
28 the fraudulent prong of California’s Unfair Competition Law. This change does not affect the
substance of the Court’s order, which in all other respects remains the same.

1 ¶ 18. In 1968, Southern Wine and Spirits of America, Inc.² began distributing and selling food,
2 drink, and tobacco products on a wholesale basis. *Id.* ¶ 19. In 2016, Defendant Southern Wine &
3 Spirits of America, Inc. merged with Glazer’s, Inc. to form Defendant Southern Glazer’s Wine &
4 Spirits, LLC, which is a wholesaler of food, drink, and tobacco products. *Id.* ¶ 20. Plaintiffs refer
5 to Southern Wine & Spirits of America, Inc. and Southern Glazer’s Wine & Spirits, LLC
6 collectively as “Southern Glazer.” *Id.* ¶ 1. Plaintiffs allege that Southern Glazer is the largest
7 wine and spirits distributor in the United States, with more than 20,000 employees. *Id.* ¶ 23.
8 Plaintiffs allege that Southern Glazer distributes more than 150 million cases of wine and spirits
9 annually to 350,000 retail and restaurant accounts across 44 states, the District of Columbia,
10 Canada, and the Caribbean. *Id.*

11 Plaintiffs are California-based businesses that “had accounts with Southern Glazer,
12 wherein they and authorized agents thereof were permitted to purchase liquor from Southern
13 Glazer using [Plaintiffs’] respective liquor licenses (issued by the California Department of
14 Alcoholic Beverage Control) and/or [their] Southern Glazer-issued account numbers.” *Id.* ¶ 14.
15 Plaintiffs seek to represent two putative classes, a California class and a national class. *Id.* ¶ 32.
16 The California class is composed of “[a]ll persons/entities, within the State of California, who had
17 an account with Southern Glazer Glazer’s Wine & Spirits, LLC [*sic*] and/or Southern Glazer Wine
18 & Spirits of America, Inc. within the applicable time period.” *Id.* The national class is similarly
19 defined, except that the geographical scope encompasses the United States rather than only
20 California. *Id.* Plaintiffs do not define “the applicable time period.”

21 Plaintiffs allege that applying for a California liquor license “includes submission of
22 documentation of business status, an individual financial affidavit, totals of investments in the
23 business, banking information, and undergoing a background check.” *Id.* ¶ 49. If the application
24 is granted, a “unique liquor license number is then issued for the particular bar/restaurant/liquor
25

26 ² The case caption in this case names “Southern Glazer Wine & Spirits of America, Inc.” as a
27 defendant, but the text of the SAC refers to “Southern Wine & Spirits of America, Inc.” *See, e.g.,*
28 SAC ¶¶ 19-20. The Court assumes that these names refer to the same corporate entity.

1 store. In California this number is registered with the State Board of Equalization, so that the
2 Board can collect taxes on retail sales of alcohol.” *Id.* To become a Southern Glazer customer, a
3 liquor license holder was “required to submit evidence of [its] liquor license[],” as well as a credit
4 application, personal guarantee, “Appendix A California resale certificate,” “optional e-check
5 authorization/autopay and proof of deliver forms,” a “Direct Warehouse Sales Authorization form,
6 which lists the authorized purchases for the retailer,” and “[c]opies of state-issued beverage
7 licenses and Certificates of Resale.” *Id.* ¶ 51. “Once these papers were approved, each class
8 member was given a unique account number which the class members could then use to purchase
9 liquor from Southern Glazer.” *Id.* ¶ 52. Plaintiffs allege that Southern Glazer agreed in writing
10 that “[e]xcept as agreed herein, Southern Glazer will not disclose your private information unless
11 it is required to do so by law, to verify your continuing financial stability or in an effort or action
12 to collect your unpaid debt to Southern Glazer.” *Id.* ¶ 55. Plaintiffs also identify eleven other
13 “additional express and/or implied promises by Southern Glazer upon which class members
14 reasonably relied,” such as “Southern Glazer would not add so-called authorized purchasers to
15 class members’ Direct Warehouse Sales Authorization to Purchase Forms, without class members’
16 knowledge and consent.” *Id.* ¶ 57. Plaintiffs do not specify which of these eleven other promises
17 were express and which were implied.

18 Citing various court filings and press releases, Plaintiffs allege that Southern Glazer has
19 been fined, “punished [for,] and/or charged” with various misdeeds, including racial
20 discrimination, illegal kickbacks, unlawful carrying charges, and anti-competitive conduct. *Id.*
21 ¶¶ 61-63.

22 With respect to Plaintiffs and the putative class, Plaintiffs allege that “Southern Glazer
23 committed various unlawful and/or unfair business practices, including, but not necessarily limited
24 to” the following list, which Plaintiffs offer without elaboration:

- 25 a. Adding so-called authorized purchasers on Representative Plaintiffs’ and class
26 members’ Direct Warehouse Sales Authorization to Purchase Forms, without
27 their knowledge or consent;

- 1 b. Leading Representative Plaintiffs and members of both classes to misreport
2 their tax obligations to state and/or federal taxing authorities;
- 3 c. Compelling Representative Plaintiffs and members of both classes to restate
4 their tax obligations for prior tax cycles to state and/or federal taxing
5 authorities, and to incur time and expense in retaining legal and financial
6 professionals therefor;
- 7 d. Selling liquor to bars/restaurants/clubs that do not possess liquor licenses
8 using Representative Plaintiffs' and class members' liquor license numbers
9 and/or their Southern Glazer account numbers;
- 10 e. Singling out customers who pay C.O.D. and/or are known to maintain poor
11 accounting practices (e.g., for "ghost shipping" and/or "phantom invoicing"
12 practices), causing them monetary damages and/or tax liabilities;
- 13 f. Selling liquor to third-parties on Representative Plaintiffs' and class members'
14 accounts at lower prices than to legitimate/licensed purchasers;
- 15 g. Selling liquor to different parties at different prices, in violation of federal
16 alcohol regulations and state and/or federal law;
- 17 h. Permitting its officers, managers, agents and/or other employees to purchase
18 liquor on Representative Plaintiffs' and class members' licenses/accounts,
19 using cash and/or charging class members for the liquor, then storing (i.e., not
20 delivering it) in order to meet quotas (and in violation of 4 CCR § 76);
- 21 i. Permitting its officers, managers, agents and/or other employees to give away
22 liquor, by pricing such at \$.01;
- 23 j. Permitting its officers, managers, agents and/or other employees to give away
24 liquor by printing sample labels for full regular-sized bottles;
- 25 k. Permitting its officers, managers, agents and/or other employees to purchase
26 liquor using class members' liquor license numbers and/or their Southern
27 Glazer account numbers, temporarily store the liquor (in violation of 4 CCR
28 § 76), then returning the liquor later, in order to meet quotas, oftentimes
without refunding the money;
- l. Using so-called "A Forms" (which lack bar codes and invoice numbers and
are, thus, nearly impossible to locate) to facilitate liquor transactions, in
violation of 4 CCR § 17;
- m. Not providing annual invoices, unless requested, in order to conceal the
practices cited herein;
- n. Permitting its officers, managers, agents and/or other employees to purchase

1 liquor “off-invoice”;

- 2 o. Permitting its officers, managers, agents and/or other employees to sell “off-
3 invoice” liquor to retailers without licenses, or to retailers who will then resell
4 the liquor to other retailers, in violation of state and/or federal law;
- 5 p. Permitting its officers, managers, agents and/or other employees to sell “off-
6 invoice” liquor to private individuals, in violation of state and/or federal law;
- 7 q. Threatening to cut off supplies to customers who do not buy a sufficient
8 quantity of liquor, or liquor of select varieties;
- 9 r. Refusing to sell products to class members without them purchasing “tie-ins”
10 (other types of liquor than those the customer wishes to purchase);
- 11 s. Giving kickbacks, free samples and other unlawful incentives to
12 restaurants/retailers (in violation of, *inter alia*, 4 CCR § 106), in order to keep
13 them from reporting the violations specified above;
- 14 t. Working and/or conspiring with third-parties to allow for the unfair/unlawful
15 practices above and below;
- 16 u. Ignoring complaints from sales representatives and/or retailers about the
17 unfair and unlawful business practices detailed herein[;]
- 18 v. Unlawfully manipulating a “will call” system to effectuate unauthorized
19 purchases and deliveries, collecting money from retailers vis-à-vis an
20 automatic payment system.

21 *Id.* ¶ 65(a)-(v).

22 Plaintiff Arena alleges that it “found that it had been assessed thousands of dollars in taxes
23 for liquor supposedly purchased, but not actually purchased, from Southern Glazer.” *Id.* ¶ 25.

24 Plaintiff Vine and Barrel alleges that it received “falsified sales invoices” from Southern Glazer.

25 *Id.* Neither Plaintiff offers any other details related to these allegations.

26 **B. Procedural History**

27 James Nguyen originally filed this case on July 5, 2017. ECF No. 1. Nguyen alleged that
28 he was the liquor license holder on behalf of Arena Restaurant and Lounge. *Id.* at 4. On August
22, 2017, Defendants filed a motion to dismiss. ECF No. 13. On September 5, 2017, Nguyen
filed a first amended complaint as of right. ECF No. 16. Accordingly, the Court denied
Defendants’ motion to dismiss the original complaint as moot on September 6, 2017. ECF No. 17.

1 On September 19, 2017, Defendants filed a motion to dismiss the first amended complaint.
2 ECF No. 19. Nguyen opposed the motion to dismiss on October 3, 2017. ECF No. 22.
3 Defendants filed a reply on October 9, 2017. ECF No. 25. On December 19, 2017, the parties
4 filed a stipulation to allow Nguyen to file a second amended complaint to change and add
5 plaintiffs. ECF No. 28. The Court granted the stipulation that same day. ECF No. 29.

6 Accordingly, the second amended complaint was filed on December 19, 2017. ECF No.
7 30 (“SAC”). On December 20, 2017, the Court denied as moot the motion to dismiss the first
8 amended complaint. ECF No. 31. Defendants filed a motion to dismiss the SAC on January 3,
9 2018. ECF No. 32. Plaintiffs filed an opposition on January 17, 2018, in which Plaintiffs pointed
10 out that Defendants’ motion failed to comply with Civil Local Rule 7-4(a)(2), which requires
11 briefs longer than ten pages to include tables of contents and authorities. ECF No. 35 (“Opp’n”).
12 On January 18, 2018, Defendants filed the instant amended motion to dismiss the SAC, in which
13 Defendants added tables of contents and authorities in order to comply with the Civil Local Rule
14 7-4(a)(2). ECF No. 36 (“Mot.”); ECF No. 37 (Declaration of Daniel Purcell stating that the only
15 difference between the original motion and the amended motion is the addition of the tables of
16 contents and authorities). Accordingly, the Court DENIES AS MOOT the motion to dismiss at
17 ECF No. 32. On January 24, 2018, Defendants filed a reply. ECF No. 38 (“Reply”).

18 **II. LEGAL STANDARD**

19 **A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)**

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a
21 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint
22 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
23 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead
24 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
25 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
26 content that allows the court to draw the reasonable inference that the defendant is liable for the
27 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is

1 not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant
2 has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule
3 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and construe [s]
4 the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire &*
5 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

6 The Court, however, need not accept as true allegations contradicted by judicially
7 noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
8 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
9 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
10 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
11 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
12 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
13 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
14 (9th Cir. 2004).

15 **B. Motion to Dismiss Under Federal Rule of Civil Procedure 9(b)**

16 Federal Rule of Civil Procedure 9(b) requires that allegations of fraud be stated with
17 particularity. Specifically, the Ninth Circuit has held that averments of fraud “be accompanied by
18 ‘the who, what, when, where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp.*
19 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
20 1997)). When an “entire claim within a complaint[] is grounded in fraud and its allegations fail to
21 satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the . . .
22 claim.” *Id.* at 1107. The Ninth Circuit has recognized that “it is established law in this and other
23 circuits that such dismissals are appropriate,” even though “there is no explicit basis in the text of
24 the federal rules for the dismissal of a complaint for failure to satisfy 9(b).” *Id.* A motion to
25 dismiss a complaint “under Rule 9(b) for failure to plead with particularity is the functional
26 equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim.” *Id.*

27 **C. Leave to Amend**

28

1 to sufficiently plead the details of the relevant contract. Finally, Defendants assert that the
2 eleventh claim for breach of the implied covenant should be dismissed as entirely redundant of the
3 contract claim. The Court addresses these arguments in turn.

4 **A. Fraud-Related Claims (Claims One and Eight)**

5 Two of Plaintiffs' claims involve fraud: the first claim for promissory fraud and the eighth
6 claim for common law fraud. Fraud-based claims sound in tort. *JMP Securities LLP v. Altair*
7 *Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1042 (N.D. Cal. 2012). Defendants argue that
8 Plaintiffs fraud-based claims are barred by the economic loss rule and are not alleged with
9 sufficient particularity under Rule 9(b). Mot. at 7-10.

10 Under the economic loss rule, a plaintiff suffering only economic damages "may not
11 ordinarily recover in tort for the breach of duties that merely restate contractual obligations." *Aas*
12 *v. Superior Court*, 24 Cal. 4th 627, 643 (2000), *superseded by statute on other grounds as*
13 *recognized in Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070 (2003); *Robinson Helicopter*
14 *Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) ("[The economic loss rule] requires a
15 purchaser to recover in contract for purely economic loss due to disappointed expectations, unless
16 he can demonstrate harm above and beyond a broken contractual promise."). The purpose of the
17 rule is to "prevent[] the law of contract and the law of tort from dissolving one into the other."
18 *Robinson Helicopter Co.*, 34 Cal. 4th at 988 (internal quotation marks and citation omitted).
19 "Courts have applied the economic loss rule to bar fraud claims where the damages plaintiffs seek
20 are the same economic losses arising from the alleged breach of contract." *Foster Poultry Farms*
21 *v. Alkar-Rapidpak-MP Equip., Inc.*, 868 F. Supp. 2d 983, 991 (E.D. Cal. 2012) (internal quotation
22 marks omitted).

23 Courts have recognized exceptions to the economic loss rule where (1) a "special
24 relationship" exists between the plaintiff and the defendant, *J'Aire Corp. v. Gregory*, 24 Cal. 3d
25 799, 804 (1979); *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958), or (2) the conduct "violates a
26 duty independent of the contract arising from principles of tort law," *Erlich v. Menezes*, 21 Cal.
27 4th 543, 551 (1999) (citation omitted). Neither party contends that the special relationship

1 exception applies. Thus, only the independent duty exception is at issue here. The independent
 2 duty exception to the economic loss rule applies where the defendant’s conduct “violates a duty
 3 independent of the contract arising from principles of tort law.” *Erlich*, 21 Cal. 4th at 551. The
 4 California Supreme Court has recognized an independent duty outside the insurance context (1)
 5 where a defendant’s actions that constituted breach of contract also caused physical injury; (2) for
 6 wrongful discharge in violation of fundamental public policy; or (3) where the plaintiff was
 7 fraudulently induced to enter a contract. *Erlich*, 21 Cal. 4th at 551-52; *see also Oracle USA, Inc.*
 8 *v. XL Glob. Servs., Inc.*, No. C 09-537 MHP, 2009 WL 2084154, at *4 (N.D. Cal. July 13, 2009)
 9 (“Exceptions have been permitted only where: a breach of duty causes a physical injury; the
 10 covenant of good faith and fair dealing is breached in an insurance contract; an employee was
 11 wrongfully discharged in violation of a fundamental public policy; or a contract was fraudulently
 12 induced.” (citing *Butler-Rupp v. Lourdeaux*, 134 Cal. App. 4th 1220 (2005)).

13 “[F]raudulent inducement is a well-recognized exception to the economic loss rule.” *Lee*
 14 *v. Fed. St. L.A.*, No. 2:14-cv-6264-CAS(SSx), 2016 WL 2354835, at *9 (C.D. Cal. May 3, 2016);
 15 *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1188 (C.D.
 16 Cal. 2009) (“[I]t has long been the rule that where a contract is secured by fraudulent
 17 representations, the injured party may elect to affirm the contract and sue for fraud.” (quoting
 18 *Lazar v. Superior Court*, 12 Cal. 4th 631, 645 (1996))). Fraudulent inducement occurs when “the
 19 promisor knows what he is signing but his consent is induced by fraud, mutual assent is present
 20 and a contract is formed, which, by reason of the fraud, is voidable.” *Rosenthal v. Great W. Fin.*
 21 *Sec. Corp.*, 14 Cal. 4th 394, 415 (1996).

22 Here, Plaintiffs clearly frame both their promissory fraud and common law fraud claims as
 23 arising from a breach of express contract terms. Specifically, Plaintiffs allege that “Southern
 24 Glazer agreed in writing to every class member that “[e]xcept as agreed herein, Southern Glazer
 25 will not disclose your private information unless it is required to do so by law, to verify your
 26 continuing financial stability or in an effort or action to collect your unpaid debt to Southern
 27 Glazer.” SAC ¶ 55. Plaintiffs allege that notwithstanding this promise, Defendants used

1 Plaintiffs’ private account information to sell liquor to unlicensed third parties. *Id.* ¶¶ 69, 75, 122.
 2 Plaintiffs allege that Defendants’ conduct caused Plaintiffs “to suffer economic losses and other
 3 general and specific damages.” *Id.* ¶¶ 75 (promissory fraud claim), 127 (common law fraud
 4 claim). Plaintiffs assert the same underlying facts and the same damages in their breach of
 5 contract claim. *See id.* ¶¶ 137-41. Thus, Plaintiffs’ promissory fraud and common law fraud
 6 claims are barred by the economic loss doctrine unless an exception applies. *See Foster Poultry*
 7 *Farms*, 868 F. Supp. 2d at 992.

8 Plaintiffs contend that the fraudulent inducement exception to the economic loss rule
 9 applies here based on their promissory fraud allegations. Opp’n at 13-14. The California
 10 Supreme Court has held that fraudulent inducement can exist where a contract is induced through
 11 promissory fraud. *See Lazar*, 12 Cal. 4th at 638. However, district courts in this circuit are split
 12 on whether promissory fraud alone may give rise to the fraudulent inducement exception to the
 13 economic loss rule. Some district courts in this circuit have held that promissory fraud is
 14 insufficient if the promise becomes part of an enforceable contract. *See, e.g., JMP Sec.*, 880 F.
 15 Supp. 2d at 1044 (holding that exceptions to the economic loss doctrine do not apply where the
 16 fraudulent misrepresentations are “also alleged to be a stand-alone contract”).

17 In contrast, other district courts have held that an adequately pled promissory fraud claim
 18 that induces the formation of a contract is sufficient to trigger the fraudulent inducement exception
 19 to the economic loss rule. *See Joli Grace, LLC v. Country Visions, Inc.*, No. 2:16-1138 WBS
 20 EFB, 2016 WL 6996643, at *9 n.6 (E.D. Cal. Nov. 30, 2016) (rejecting argument “that the
 21 economic loss rule will always preclude recovery of fraud claims when the misrepresentations
 22 arose from the underlying contract and caused the injured party to enter into a contract” because
 23 “such a view ignores the California Supreme Court’s position that the economic loss rule does not
 24 preclude recovery for fraudulent inducement”); *J2 Cloud Servs., Inc. v. Fax87*, No. 13-5353 DDP
 25 (AJWx), 2016 WL 6833904, at *4 (C.D. Cal. Nov. 18, 2016) (finding claim not barred by the
 26 economic loss rule because promissory fraud cause of action was adequately alleged).

27 “Th[is] Court follows the latter cases, which more closely follow the California Supreme

1 Court’s *Lazar* holding that, if the promise that forms the basis of a promissory fraud cause of
2 action ‘is enforceable [as a contract], the [plaintiff] . . . has a cause of action in tort as an
3 alternative at least, and perhaps in some instances in addition to his cause of action on the
4 contract.’” *R Power Biofuels, LLC v. Chemex LLC*, No. 16-CV-716-LHK, 2017 WL 1164296, at
5 *6 (N.D. Cal. Mar. 29, 2017) (quoting *Lazar*, 12 Cal. 4th at 645 (citations and internal quotation
6 marks omitted)). Thus, the economic loss doctrine will not bar Plaintiffs’ fraud-based claims if
7 Plaintiffs’ promissory fraud claim is adequately pled. *Cf. Robinson Helicopter*, 34 Cal. 4th at 993
8 (recognizing that heightened pleading standard for fraud applies to exception to economic loss
9 rule). The Court turns now to whether Plaintiffs’ fraud-based claims are adequately pled.

10 Federal courts deciding state law fraud claims look to state law for the elements of a fraud
11 claim but also apply Rule 9(b)’s heightened pleading standard.³ *Kearns v. Ford Motor Co.*, 567
12 F.3d 1120, 1125 (9th Cir. 2009). “This means that allegations of fraud must be stated with
13 ‘specificity including an account of the time, place, and specific content of the false
14 representations as well as the identities of the parties to the misrepresentations.’” *SVGRP LLC v.*
15 *Sowell Financial Servs., LLC*, No. 5:16-cv-7302-HRL, 2017 WL 1383735, at *4 (N.D. Cal. Apr.
16 18, 2017) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)). To survive a
17 motion to dismiss, “allegations of fraud must be specific enough to give defendants notice of the
18 particular misconduct which is alleged to constitute the fraud charged so that they can defend
19 against the charge and not just deny that they have done anything wrong.” *Swartz*, 476 F.3d at
20 764 (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

21 To state a claim for fraud under California law, a plaintiff must allege: (1) a
22 misrepresentation (false representation, concealment, or non-disclosure); (2) knowledge of falsity
23 (or scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5)
24 resulting damage. *Lazar*, 12 Cal. 4th at 638. “Promissory fraud is a subspecies of fraud. A
25

26 ³ Even if Federal Rule of Civil Procedure 9(b) did not apply to state law claims, California law
27 requires that “fraud must be pled specifically; general and conclusory allegations do not suffice.”
28 *Robinson Helicopter*, 34 Cal. 4th at 993.

1 plaintiff asserting a promissory fraud claim must plead and prove that the defendant made a
2 promise to him that it had no intention of performing.” *SVGRP*, 2017 WL 1383735 at *4 (quoting
3 *UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*, 117 F. Supp. 2d 1092, 1109 (C.D. Cal. 2015));
4 *see also Fleet v. Bank of Am. N.A.*, 229 Cal. App. 4th 1403, 1411 (2014) (explaining that to state a
5 claim for promissory fraud under California law, a plaintiff must plead “that the promissor did not
6 intend to perform at the time the promise was made, that the promise was intended to deceive and
7 induce reliance, that it did induce reliance, and that this reliance resulted in damages”).

8 Plaintiffs’ promissory fraud and common law fraud claims fall far short of Rule 9(b)’s
9 requirement to plead fraud with specificity. The theory of falsity underlying both claims is that
10 Defendants promised to keep Plaintiffs’ account information confidential, but despite this promise
11 Defendants allegedly used Plaintiffs’ account information to make sales to third parties. *See* SAC
12 ¶¶ 65, 69, 74-75, 122. However, Plaintiffs fail to plead any specific facts about these alleged
13 third-party sales. The only facts in the SAC are the conclusory allegations that Defendants used
14 Plaintiffs’ liquor license numbers and/or their Southern Glazer account numbers to sell liquor to
15 “bars/restaurants/clubs that do not possess liquor licenses.” *Id.* ¶ 65(d). Plaintiffs do not allege
16 who made the alleged third-party sales, when the sales were made, or what was sold. Nor do
17 Plaintiffs identify the third parties. Plaintiffs argue that they will require discovery to specifically
18 plead the facts of such fraudulent behavior. Opp’n at 7. However, Plaintiffs do not even allege
19 any specific details about information that would already be under Plaintiffs’ control, such as
20 alleging that they had been billed or had paid for products that they did not order or receive.

21 Vague allegations that unspecified Southern Glazer employees used Plaintiffs’ account
22 numbers to sell an unspecified amount of liquor to unspecified parties during an unspecified time
23 period are nowhere near “specific enough to give defendants notice of the particular misconduct
24 which is alleged to constitute the fraud charged so that they can defend against the charge and not
25 just deny that they have done anything wrong.” *Swartz*, 476 F.3d at 764 (quoting *Bly-Magee*, 236
26 F.3d at 1019).

27 Perhaps attempting to avoid dismissal under Rule 9(b), Plaintiffs attach a number of

28

1 declarations to their opposition. In these declarations, Plaintiffs offer more specific allegations
2 about being billed for products they neither ordered nor received. *See, e.g.*, Declaration of Jason
3 Jenkins, ECF No. 35-2; Declaration of Daniel Flores, ECF No. 35-3. However, the relevant
4 question is whether Plaintiffs’ SAC pleads with the particularity that Rule 9(b) requires. *See*
5 *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining the
6 propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff’s
7 moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”).

8 Because the SAC fails to allege with specificity the conduct underlying Plaintiffs’ theory
9 of falsity, Plaintiffs’ claim for promissory fraud fails because Plaintiffs have not adequately
10 alleged that Defendants failed to perform the promise to keep Plaintiffs’ account information
11 confidential. Similarly, Plaintiffs’ common law fraud claim fails because Plaintiffs have not
12 adequately alleged a misrepresentation. The Court GRANTS Defendants’ motion to dismiss the
13 first and eighth claims for promissory fraud and common law fraud. Moreover, because Plaintiffs
14 have not adequately pled their promissory fraud claim, Plaintiffs do not qualify for the fraudulent
15 inducement exception to the economic loss rule. Thus, the Court also dismisses Plaintiffs’ first
16 and eighth claims because they are barred by the economic loss rule. However, because the Court
17 finds that Plaintiffs may be able to amend their complaint to adequately plead these claims and,
18 relatedly, to establish that they qualify for the fraudulent inducement exception to the economic
19 loss rule, the Court grants Plaintiffs leave to amend.

20 **B. Unfair Practices Act Claims (Claims Two, Three, Four, and Five)**

21 Defendants argue that Plaintiffs lack statutory standing to bring their second claim for
22 below-cost sales and third claim for loss-leader sales and that Plaintiffs have not adequately pled
23 their second, third, fourth (secret rebates), and fifth (unlawful intimidation) claims. The Court
24 addresses these arguments in turn.

25 **1. Plaintiffs Are Not Barred as a Matter of Law From Bringing Claims Two and**
26 **Three**

27 Plaintiffs’ second and third claims arise under California’s Unfair Practices Act (“UPA”),

1 California Business and Professions Code §§ 17000 *et seq.* Specifically, Plaintiffs’ second claim
 2 is for below-cost sales in violation of § 17043, which makes it “unlawful for any person . . . to sell
 3 any article or product at less than the cost thereof to such vendor, or to give away any article or
 4 product, for the purpose of injuring competitors or destroying competition.” Cal. Bus. & Prof.
 5 Code § 17043. Plaintiffs’ third claim is for loss-leader sales in violation of § 17044, which
 6 prohibits the sale or use of any article or product as a “loss leader” as defined in § 17030. *Id.*
 7 § 17044. In turn, § 17030 defines “loss leader” as any article or product sold at less than cost
 8 where “the purpose is to induce, promote or encourage the purchase of other merchandise,” “the
 9 effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers,” or
 10 “the effect is to divert trade from or otherwise injure competitors.” *Id.* § 17030.

11 Defendants argue that Plaintiffs lack statutory standing to bring their second and third
 12 claims because “[c]ourts consistently have limited standing to assert section 17043 [and 17044]
 13 claims to competitors of the defendant” and the facts of the SAC make clear that Plaintiffs and
 14 Defendants are not competitors. Mot. at 11. In support of their assertion that only competitors
 15 have standing to bring claims under §§ 17043 and 17044, Defendants cite a handful of cases that
 16 describe these statutes as focused on preventing unfair competition among competitors. *See* Mot.
 17 at 10-11 (citing *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1154 (9th Cir. 2008);
 18 *Eastman v. Quest Diagnostics Inc.*, 108 F. Supp. 3d 827, 838 (N.D. Cal. 2015); *Fisherman’s*
 19 *Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 322 (2003); *W. Union Fin.*
 20 *Servs., Inc. v. First Data Corp.*, 20 Cal. App. 4th 1530, 1539-40 (1993)). To be sure, an intent to
 21 cause injury to competitors is an element of §§ 17043 and 17044 claims. *See Cal-Tech*
 22 *Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 174-75, 178 (1999).

23 However, Defendants overstate the support that these cases provide for their standing
 24 argument. The question of non-competitor standing was not presented in *Sybersound*,
 25 *Fisherman’s Wharf*, or *Western Union*, all of which were competitor cases. *See Sybersound*, 517
 26 F.3d at 1140; *Fisherman’s Wharf*, 114 Cal. App. 4th at 314; *W. Union*, 20 Cal. App. 4th at 1532.
 27 Unlike these cases, the defendant in *Eastman* made the same standing argument that Defendants
 28

1 assert here. *Eastman*, 108 F. Supp. 3d at 838 (“Quest contends that th[e] §§ 17043 and 17044]
2 claim[s] fail[] because the UPA protects competitors, not consumers.”). However, the court in
3 *Eastman* did not take a position on that argument. Instead, the court “assum[ed] that injury to
4 consumers (as opposed to injury to competitors) is actionable under the UPA” and proceeded to
5 dismiss the UPA causes of action on another ground. *Id.* Thus, none of the cases that Defendants
6 cite support their position.

7 Defendants’ argument also ignores § 17070, which provides that “[a]ny person or trade
8 association may bring an action to enjoin and restrain any violation of this chapter and, in addition
9 thereto, for the recovery of damages.” Cal. Bus. & Prof. Code § 17070. “Person,” in turn, is
10 defined as “any person, firm, association, organization, partnership, business trust, company,
11 corporation or municipal or other public corporation.” *Id.* §§ 17020-21. Thus, § 17070
12 undermines Defendants’ contention that only competitors have standing to bring §§ 17043 or
13 17044 claims, because § 17070 plainly states that “any person” may bring such claims. Indeed,
14 this Court is aware of only one other court to have addressed this specific standing question, and
15 the court in that case rejected the argument that Defendants make here. Specifically, in *O’Shea v.*
16 *Epson America, Inc.*, No. CV 09-8063 PSG, 2010 WL 11459911 (C.D. Cal. Mar. 5, 2010), several
17 consumers brought a § 17044 claim against Epson, which makes printers and ink cartridges. *Id.* at
18 *1. Epson argued that the plaintiffs lacked prudential standing to bring a § 17044 claim “because
19 the interests protected by § 17044 are those of competitors.” *Id.* at *7. In rejecting this argument,
20 the court reasoned “that Cal. Bus. & Prof. Code § 17070 provides that ‘[a]ny person or trade
21 association may bring an action to enjoin and restrain any violation of this chapter [which includes
22 § 17044] and, in addition thereto, for the recovery of damages.’” *Id.* (emphasis and alterations in
23 original). The court went on, “since Plaintiffs are ‘persons’ who claim to have been injured as a
24 result of Epson’s alleged misconduct, the Court finds that Plaintiffs have standing to sue under the
25 loss leader statute.” *Id.* (citation omitted). This Court agrees. As such, the Court finds that
26 Plaintiffs are not barred as a matter of law from bringing §§ 17043 and 17044 claims. The Court
27 next addresses Defendants’ argument that none of Plaintiffs’ UPA claims are adequately pled
28

1 under *Iqbal*.

2 **2. Plaintiffs’ UPA Claims Are Not Adequately Pled**

3 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and plain
4 statement of the claim showing that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 677-78
5 (quoting Fed. R. Civ. P. 8(a)(2)). As the U.S. Supreme Court has explained, “the pleading
6 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more
7 than unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678 (citing *Twombly*,
8 550 U.S. at 555. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
9 elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). “Nor does a
10 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*
11 (quoting *Twombly*, 550 U.S. at 557). In other words, “[t]hreadbare recitals of the elements of a
12 cause of action, supported by mere conclusory statements, do not suffice.” *Id.* The “[f]actual
13 allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550
14 U.S. at 555.

15 For example, in *Twombly*, an antitrust case, the plaintiffs alleged that telephone carriers
16 made an agreement to refrain from competing against one another. 550 U.S. at 551. Specifically,
17 the plaintiffs pled that the carriers failed to pursue attractive business opportunities in competitors’
18 markets and highlighted one carrier’s CEO’s statement that competing in the territory of another
19 carrier “might be a good way to turn a quick dollar but that doesn’t make it right.” *Id.* Based on
20 this statement and inferences from the carriers’ behavior, the plaintiffs alleged on information and
21 believe that the carriers had agreed not to compete with one another. *Id.* The U.S. Supreme Court
22 held that the plaintiffs had not pled “enough factual matter (taken as true) to suggest that an
23 agreement was made.” *Id.* at 557.

24 Similarly, in *Iqbal*, the plaintiff alleged that Attorney General John Ashcroft and FBI
25 Director Robert Mueller “knew of, condoned, and willfully and maliciously agreed to subject
26 [him] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion,
27 race, and/or national origin and for not legitimate penological interest.” 556 U.S. at 680 (internal

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1 quotation marks omitted) (alterations in original). The plaintiff alleged that Ashcroft was the
 2 “principal architect” of this policy and that Mueller was “instrumental” in adopting and executing
 3 it. *Id.* at 680-81. The U.S. Supreme Court held that these allegations “amount to nothing more
 4 than a formulaic recitation of the elements of a constitutional discrimination claim.” *Id.* at 681.
 5 “As such, the allegations are conclusory and not entitled to be assumed true.” *Id.* The U.S.
 6 Supreme Court explained that it “d[id] not reject these bald allegations on the ground that they are
 7 unrealistic or nonsensical.” *Id.* Rather, “[i]t [was] the conclusory nature of respondent’s
 8 allegations, rather than their extravagantly fanciful nature, that disentitle[d] them to the
 9 presumption of truth.” *Id.*

10 Plaintiffs’ UPA claims fare no better. The factual allegations underpinning each of
 11 Plaintiffs’ UPA claims are contained in a list in paragraph 65 of Plaintiffs’ SAC, in which
 12 Plaintiffs set forth twenty-two ways in which Defendants have allegedly violated the law. As a
 13 general matter, Plaintiffs’ list is exactly the sort of “the-defendant-unlawfully-harmed-me
 14 accusation” that the U.S. Supreme Court ruled was insufficient in *Iqbal*. 556 U.S. at 678. Some
 15 of the assertions in this list are plainly legal conclusions, and as such are not entitled to the
 16 presumption of truth. *See Fayer*, 649 F.3d at 1064; SAC ¶ 65(s) (alleging that Defendants gave
 17 “kickbacks, free samples and other unlawful incentives to restaurants/retailers” to prevent them
 18 from reporting violations); SAC ¶ 65(t) (alleging that Defendants worked and/or conspired with
 19 third-parties to allow for the unfair/unlawful practices described elsewhere in the SAC).

20 Other allegations are conclusory factual assertions that are “‘naked assertion[s]’ devoid of
 21 ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). For
 22 example, related to the below-cost and loss-leader sales claims, Plaintiffs allege that Defendants
 23 sold liquor to different parties at different prices and allowed Defendants’ employees to give away
 24 liquor by pricing it at \$.01. SAC ¶ 65(f), (i). Plaintiffs also allege that Defendants permitted
 25 Defendants’ employees to buy liquor “off-invoice,” although Plaintiffs do not explain what
 26 exactly “off-invoice” means. *Id.* ¶ 65(n). Related to the secret rebates claim, Plaintiffs allege that
 27 Defendants gave kickbacks, free samples, and other unlawful incentives to customers. *Id.* ¶ 65(s).

1 With respect to the unlawful intimidation claim, Plaintiffs allege that Defendants threatened to cut
2 off supplies to customers who did not buy enough liquor or liquor of specific varieties. *Id.*
3 ¶ 65(q). However, Plaintiffs do not allege any specific instance of any of these practices
4 occurring, nor do Plaintiffs explain their basis for believing that Defendants engaged in these
5 practices. The conclusory allegations of a range of malfeasance are not “enough to raise a right to
6 relief above the speculative level.” *Twombly*, 550 U.S. at 555. Accordingly, the Court GRANTS
7 Defendants’ motion to dismiss the second, third, fourth, and fifth claims for failure to plead
8 adequate factual support under *Iqbal*. Because Plaintiffs may be able to amend their complaint to
9 fix this deficiency, the Court affords Plaintiffs leave to amend. However, the Court cautions
10 Plaintiffs that any amendment must also address other deficiencies identified in Defendants’
11 motion that the Court does not reach here. *See, e.g.*, Mot. at 12 (arguing that to state a claim for
12 below-cost sales, a plaintiff must plead the cost of the product at issue to the defendant and the
13 defendant’s sales prices).

14 **C. Sixth Claim for Constructive Trust**

15 Plaintiffs’ sixth claim is for constructive trust. SAC ¶¶ 108-10. Defendants argue that this
16 claim should be dismissed because a constructive trust is a remedy and not a claim for relief. Mot.
17 at 13-14. Defendants are correct that California law treats a constructive trust “not [as] a
18 substantive device but merely [as] a remedy.” *Embarcadero Mun. Improvement Dist. v. County of*
19 *Santa Barbara*, 88 Cal. App. 4th 781, 793 (2001); *see also Stansfield v. Starkey*, 220 Cal. App. 3d
20 59, 76 (1990) (stating that a constructive trust is not a cause of action, only a remedy). California
21 courts dismiss counts that plead a constructive trust as a cause of action rather than a remedy. *See*
22 *Stansfield*, 220 Cal. App. 3d at 76.

23 Moreover, even if a constructive trust were available as a cause of action, Plaintiffs have
24 not adequately alleged what specific property Defendants are alleged to possess. *See id.*
25 (“[S]pecific identifiable property is a prerequisite for [a constructive] trust and none was
26 alleged.”). Specifically, Defendants argue that the only specific allegation of harm in the SAC is
27 that Plaintiffs overreported their tax liabilities to the State of California as a result of Defendants’

1 conduct. Mot. at 14. Plaintiffs do not allege that Defendants wrongfully obtained any of
2 Plaintiffs’ property. Plaintiffs do not respond to Defendants’ arguments about the constructive
3 trust claim in their opposition. As such, Plaintiffs have abandoned their constructive trust claim.
4 *See Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014) (stating that a failure in an
5 opposition to address arguments raised in a motion to dismiss constitutes abandonment of the
6 claim, which results in dismissal with prejudice). Accordingly, the Court GRANTS Defendants’
7 motion to dismiss the constructive trust claim with prejudice.

8 **D. Seventh Claim for Breach of Fiduciary Duty**

9 Plaintiffs’ seventh claim, for breach of fiduciary duty, is premised on its constructive trust
10 claim. Specifically, Plaintiffs allege that Southern Glazer was a constructive trustee for Plaintiffs
11 but “failed to act [as] a reasonably careful trustee/partner would have under similar
12 circumstances.” SAC ¶¶ 112, 114. Defendants argue that the breach of fiduciary duty claim
13 should be dismissed because there is generally no fiduciary duty between a buyer and a seller in an
14 arm’s length transaction. Mot. at 14-15. Plaintiffs respond that Defendants were constructive
15 trustees and breached their fiduciary duties by misusing Plaintiffs’ liquor licenses to sell liquor to
16 third parties. Opp’n at 20. Plaintiffs analogize to the intellectual property context, where
17 California courts have allowed fiduciary duty claims to proceed where one party is entrusted with
18 confidential material and misuses that material. Plaintiffs argue that Plaintiffs entrusted sensitive
19 information (here, their financial and liquor license information) to Defendants for a particular
20 use, but Defendants breached their duties by misusing the information. *Id.* at 21-22 (analogizing
21 to *Ojala v. Bohlin*, 178 Cal. App. 2d 292 (1960), a case concerning a party’s misuse of proprietary
22 designs for a holster). Defendants reply that Plaintiffs’ analogy is misplaced because liquor
23 license numbers are public information and the “extension of credit by a vendor to a customer is a
24 routine feature of commercial transactions in California and does not imply a ‘special relationship’
25 akin to the ‘trustee and beneficiary, agent and principal, guardian and ward, and attorney and
26 client’ relationships that California courts have held impose fiduciary duties.” Reply at 12-13.

27 The California Supreme Court has explained that “before a person can be charged with a
28

1 fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of
2 another, or must enter into a relationship which imposes that undertaking as a matter of law.”
3 *Comm. On Children’s Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 221 (1983). “The
4 relationship of seller to buyer is not one ordinarily vested with fiduciary obligation, even though
5 sellers routinely make representations concerning their product, often on the basis of a claimed
6 expert knowledge about its utility and value.” *Id.* at 222. “In such transactions, the seller is held
7 to the mores of the marketplace. A fiduciary, by contrast, assumes duties beyond those of mere
8 fairness and honesty in marketing its product—he must undertake to act on behalf of the
9 beneficiary, giving priority to the best interest of the beneficiary.” *Id.* Moreover, in *City of Hope*
10 *National Medical Center v. Genentech, Inc.*, 181 P.3d 142, 151-52 (Cal. 2008), the California
11 Supreme Court rejected the contention that a fiduciary relationship necessarily exists whenever
12 “(1) one party entrusts its affairs, interests or property to another; (2) there is a grant of broad
13 discretion to another, generally because of a disparity in expertise or knowledge; (3) the two
14 parties have an ‘asymmetrical access to information,’ meaning one party has little ability to
15 monitor the other and must rely on the truth of the other party’s representations; and (4) one party
16 is vulnerable and dependent upon the other.” Such characteristics, the California Supreme Court
17 explained, “are common in many a contractual arrangement, yet do not necessarily give rise to a
18 fiduciary relationship.” *Id.* at 152.

19 Here, Plaintiffs’ allegation that Defendants owed Plaintiffs a fiduciary duty fails as a
20 matter of law. Specifically, California law is clear that an arm’s length commercial transaction
21 does not give rise to a fiduciary relationship. *See Comm. On Children’s Television*, 35 Cal. 3d at
22 222; *McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1398 (2005) (“Generally, there is no
23 fiduciary owed duty in a purely commercial situation.”). Plaintiffs have not alleged that anything
24 about their relationship with Defendants created an obligation for Defendants to act in Plaintiffs’
25 best interests. At most, Plaintiffs have alleged that Defendants misused Plaintiffs’ liquor license
26 and financial information by using it to sell liquor to third parties. However, unlike the
27 intellectual property context cited by Plaintiffs, a buyer’s entrusting basic financial information to
28

1 a seller does not create a fiduciary relationship. If it did, nearly every arm’s length commercial
2 transaction would create fiduciary duties, but this clearly is not the law. *See McCann*, 129 Cal.
3 App. 4th at 1398; *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 30-34 (2003) (rejecting argument
4 that a “contractual right to contingent compensation in the control of another” creates a fiduciary
5 relationship). Moreover, because the Court has dismissed Plaintiffs’ constructive trust claim with
6 prejudice, *see supra*, Plaintiffs cannot base their breach of fiduciary duty claim on the alleged
7 constructive trust. Thus, because Plaintiffs’ breach of fiduciary duty claim fails as a matter of law,
8 the Court GRANTS Defendants’ motion to dismiss the breach of fiduciary claim with prejudice.

9 **E. Ninth Claim for Unfair Business Practices**

10 Plaintiffs’ ninth claim is for unfair business practices in violation of California’s Unfair
11 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.* *See* SAC ¶¶ 129-35. The
12 UCL creates a cause of action for business practices that are (1) unlawful, (2) unfair, or (3)
13 fraudulent. Each “prong” of the UCL provides a separate and distinct theory of liability. *Lozano*
14 *v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). Plaintiffs title their ninth claim
15 “unfair business practices,” which suggests that Plaintiffs do not assert claims under the unlawful
16 or fraudulent prongs of the UCL. However, paragraphs 131 and 132 of the SAC reference
17 allegedly unlawful and fraudulent business practices. As such, the Court construes Plaintiffs’
18 SAC as invoking all three prongs of the UCL.

19 The unlawful prong of the UCL prohibits “anything that can properly be called a business
20 practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns.*, 20 Cal.4th at 180,
21 (quotation marks and citations omitted). “A business practice is unfair within the meaning of the
22 UCL if it violates established public policy or if it is immoral, unethical, oppressive or
23 unscrupulous and causes injury to consumers which outweighs its benefits.” *McKell v. Wash.*
24 *Mut., Inc.*, 142 Cal.App.4th 1457, 1473 (2006). In determining whether a practice is unfair,
25 California courts examine the practice’s impact on its alleged victim and balance that impact
26 against the reasons, justifications, and motives of the alleged wrongdoer. *Id.* To state a claim
27 under the fraudulent prong of the UCL, plaintiffs must prove “actual reliance on the allegedly

1 deceptive or misleading statements,” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326
 2 (2011), and that “the misrepresentation was an immediate cause of the injury-producing conduct,”
 3 *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). In addition, to have statutory standing under
 4 any prong of the UCL, a plaintiff must demonstrate that it “suffered injury in fact and [] lost
 5 money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204.

6 Plaintiffs’ UCL claim fails for three reasons. First, to the extent that Plaintiffs’ UCL claim
 7 is derivative of the other claims in the SAC that the Court dismisses in this order, the derivative
 8 UCL claim must also be dismissed. *See Avila v. Bank of Am.*, No. 17-cv-222-HSG, 2017 WL
 9 4168534, at *5 (N.D. Cal. Sept. 20, 2017) (dismissing UCL claim to the extent it is derivative of
 10 other claim dismissed in same order). Second, to the extent that Plaintiffs’ UCL claim is premised
 11 on allegations that are not derivative of the other dismissed claims, Plaintiffs have failed to plead
 12 sufficient factual support to satisfy Rule 8(a) and *Iqbal*, 556 U.S. at 677-78, (for the unlawful and
 13 unfair prongs) or Rule 9(b) (for the fraudulent prong). *See* Section III.B.2, *supra* (concluding that
 14 ¶ 65 of the SAC does not satisfy Rule 8(a) and *Iqbal*). Finally, Plaintiffs have not adequately
 15 established statutory standing because Plaintiffs have not sufficiently alleged that they suffered
 16 economic harm due to the alleged unfair, unlawful, or fraudulent business practices. Plaintiff
 17 Arena states that it was “assessed thousands of dollars in taxes for liquor supposedly purchased,
 18 but not actually purchased, from Southern Glazer.” *Id.* ¶ 25. However, Arena does not allege that
 19 it actually paid more taxes than it owed. Plaintiff Vine and Barrel alleges that it received “falsified
 20 sales invoices” from Southern Glazer. *Id.* However, Vine and Barrel does not allege that these
 21 “falsified sales invoices” caused Vine and Barrel economic harm. Accordingly, the Court
 22 GRANTS Defendant’s motion to dismiss the ninth claim for unfair business practices. Because
 23 Plaintiffs could conceivably amend their claims to fix these deficiencies, the Court grants
 24 Plaintiffs leave to amend.

25 **F. Tenth Claim for Breach of Contract**

26 Plaintiffs assert a breach of contract claim under the theory that Defendants promised to
 27 keep Plaintiffs’ account and financial information confidential but nevertheless disclosed that

1 information in order to sell liquor to unlicensed third parties. SAC ¶¶ 137, 139. Defendants argue
2 the claim for breach of contract should be dismissed for failure to sufficiently plead the details of
3 the relevant contract. Mot. at 16-17. Defendants also argue that Plaintiffs have failed to
4 sufficiently allege a breach. Reply at 13-14. Plaintiffs respond that they incorporated the contract
5 into their SAC by reference. Opp'n at 22-23.

6 To state a breach of contract claim under California law, a plaintiff must plead “a contract,
7 plaintiff’s performance or excuse for failure to perform, defendant’s breach and damage to
8 plaintiff resulting therefrom.” *McKell*, 142 Cal. App. 4th at 1489. Plaintiffs’ SAC did not recount
9 the relevant contract in detail. *See* SAC ¶¶ 55, 57, 137. Instead, Plaintiffs quoted one term that
10 Defendants allegedly agreed to in writing, but Plaintiffs did not specify in what contract that term
11 was found. *Id.* ¶ 55. Plaintiffs also alleged that unspecified agreements contained a range of
12 “express and/or implied promises,” but did not specify which promises were express and which
13 were implied, nor did Plaintiffs identify the agreements that allegedly contained these promises.
14 *Id.* ¶ 57. After Defendants filed their motion to dismiss the SAC, Plaintiffs filed a notice of errata
15 stating that Plaintiffs inadvertently failed to attach Defendants’ Application and Credit Agreement
16 and other associated documents as an exhibit to the SAC. ECF No. 34. It is not clear whether
17 Plaintiffs premise their breach of contract claim solely on Defendants’ Application and Credit
18 Agreement found at ECF No. 34-1 or whether their breach of contract claim is also based on the
19 other unspecified agreements mentioned in paragraph 57 of the SAC. In any event, the Court need
20 not reach the issue of whether the SAC adequately identifies the relevant contract or contracts
21 because the Court concludes that Plaintiffs have not adequately pled a breach, as discussed below.
22 However, Plaintiffs must specify the contracts upon which their breach of contract claim is based
23 in any amended complaint.

24 As stated above, Plaintiffs’ breach of contract claim must be dismissed for failure to plead
25 sufficient factual support under Rule 8(a) and *Iqbal*, just like Plaintiffs’ UPA and UCL claims.
26 Specifically, Plaintiffs have not adequately alleged Defendants’ breach. Plaintiffs allege that
27 Defendants used their liquor license, Southern Glazer account, and financial information to sell

1 liquor to unlicensed third parties. SAC ¶¶ 65(d), 139. However, Plaintiffs do not allege any
2 specific instance of any of these practices occurring, nor do Plaintiffs explain their basis for
3 believing that Defendants engaged in these practices or provide any other factual support. The
4 conclusory allegation of unauthorized sales to third parties is not “enough to raise a right to relief
5 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, because Plaintiffs have not
6 adequately alleged the breach element of the breach of contract claim, the Court GRANTS
7 Defendants’ motion to dismiss with leave to amend.

8 **G. Eleventh Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**

9 Plaintiffs allege that the implied covenant of good faith and fair dealing “by giving away
10 confidential information, and allowing purchases to be made on class members’ accounts/licenses
11 without the knowledge or consent of class members.” SAC ¶ 146. Defendants argue that because
12 the good faith and fair dealing claim is entirely duplicative of the breach of contract claim, the
13 good faith and fair dealing claim “may be disregarded as superfluous as no additional claim is
14 actually stated.” Mot. at 18 (quoting *Careau & Co. v. Sec. Pac. Business Credit, Inc.*, 222 Cal.
15 App. 3d 1371, 1393 (1990)). Plaintiffs respond that breach of contract and breach of the implied
16 covenant of good faith and fair dealing claims can both survive when the two claims are based on
17 different breaches. Opp’n at 24. Defendants reply that “Plaintiffs fail to identify any way in
18 which the factual basis for their claim for breach of the implied covenant of good faith and fair
19 dealing differs from the basis of their breach of contract claim.” Reply at 15.

20 The Court agrees with Defendants. Where the “claim of breach of the implied covenant
21 relies on the same acts, and seeks the same damages, as [the plaintiff’s] claim for breach of
22 contract,” a court can dismiss the claim for breach of the implied covenant of good faith and fair
23 dealing as duplicative. *Bionghi v. Metro. Water Dist. of S. Cal.*, 70 Cal. App. 4th 1358, 1370
24 (1999). Here, Plaintiffs’ breach of contract and breach of the implied covenant of good faith and
25 fair dealing claims are premised on the same acts, namely, Defendants’ use of Plaintiffs’ liquor
26 license, account, and financial information to sell liquor to third parties. Compare SAC ¶¶ 137-40
27 (breach of contract claim) *with id.* ¶¶ 142-48 (breach of implied covenant of good faith and fair

1 dealing claim). Both claims also seek the same damages. *Compare id.* ¶ 141 (breach of contract
2 claim) *with id.* ¶ 149 (breach of implied covenant of good faith and fair dealing claim). As such,
3 the Court GRANTS Defendants’ motion to dismiss the eleventh claim as duplicative of the breach
4 of contract claim with prejudice.

5 **IV. CONCLUSION**

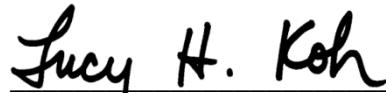
6 For the foregoing reasons, the Court rules as follows:

- 7 • The first claim for promissory fraud is DISMISSED with leave to amend;
- 8 • The second claim for below-cost sales is DISMISSED with leave to amend;
- 9 • The third claim for loss-leader sales is DISMISSED with leave to amend;
- 10 • The fourth claim for secret rebates is DISMISSED with leave to amend;
- 11 • The fifth claim for unlawful threats and intimidation is DISMISSED with leave to
12 amend;
- 13 • The sixth claim for constructive trust is DISMISSED with prejudice;
- 14 • The seventh claim for breach of fiduciary duty is DISMISSED with prejudice;
- 15 • The eighth claim for common law fraud is DISMISSED with leave to amend;
- 16 • The ninth claim for unfair business practices is DISMISSED with leave to amend;
- 17 • The tenth claim for breach of contract is DISMISSED with leave to amend; and
- 18 • The eleventh claim for breach of the implied covenant of good faith and fair
19 dealing is DISMISSED with prejudice.

20 If Plaintiffs fail to file a third amended complaint within 30 days or fail to cure the
21 deficiencies identified in this order or in any of Defendants’ three motions to dismiss, the claims
22 dismissed in this order will be dismissed with prejudice. Plaintiffs may not add new causes of
23 action or new parties without a stipulation or leave of the Court.

24 **IT IS SO ORDERED.**

25 Dated: April 16, 2018



26 LUCY H. KOH
27 United States District Judge