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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

NRG ENERGY, INC., a Delaware corporation,  
  
Plaintiff-Counterdefendant,  
  
vs.  
  
JERRY M. FUCHS, an individual,  
  
Defendant-Counterclaimant.

CASE NO. 10-CV-0989-H (WVG)  
  
**ORDER GRANTING MOTION  
TO DISMISS**

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JERRY M. FUCHS, an individual,  
  
Third-Party Plaintiff,  
  
vs.  
  
ENEL NORTH AMERICA, INC., a Delaware Corporation,  
  
Third-Party Defendant.

On March 14, 2011, Plaintiff and Counterdefendant NRG Energy, Inc. (“NRG”) filed a motion to dismiss Defendant and Counterclaimant Jerry M. Fuchs (“Fuchs”)’s counterclaims. (Doc. No. 39.) On April 11, 2011, Fuchs filed a response in opposition to NRG’s motion. (Doc. No 44.) On April 18, 2011, NRG filed its reply. (Doc. No 49.) The Court determined this matter to be appropriate for resolution without oral argument and submitted it on the parties’ papers pursuant to Local Civil Rule 7.1(d)(1). (Doc. No. 51.) For the reasons below, the Court

1 GRANTS NRG's motion to dismiss Fuchs' counterclaims.

2 **Background**

3 On May 7, 2010, NRG filed a complaint against Fuchs alleging claims for: (1) breach  
4 of contract; (2) unjust enrichment; and (3) money had and received. (Doc. No. 1.) NRG alleges  
5 that it entered into a severance and release agreement with Fuchs, and that Fuchs later breached  
6 the agreement by failing to reimburse NRG a portion of his severance payment as required by  
7 the terms of the contract. (Id.) On February 21, 2011, Fuchs filed counterclaims against NRG  
8 alleging claims for: (1) fraud; (2) concealment; and (3) negligent misrepresentation. (Doc. No.  
9 37.)

10 **Discussion**

11 **I. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)**

12 A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the  
13 legal sufficiency of the claims asserted in the complaint. Navarro v. Black, 250 F.3d 729, 732  
14 (9th Cir. 2001). Rule 8(a)(2) requires that a pleading stating a claim for relief contain “a short  
15 and plain statement of the claim showing that the pleader is entitled to relief.” The function of  
16 this pleading requirement is to “give the defendant fair notice of what the . . . claim is and the  
17 grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).  
18 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
19 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires  
20 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
21 will not do.” Id. A complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of  
22 ‘further factual enhancement.’” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting  
23 Twombly, 550 U.S. at 557). “Factual allegations must be enough to raise a right to relief above  
24 the speculative level.” Twombly, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal  
25 Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). “All allegations of material fact are  
26 taken as true and construed in the light most favorable to plaintiff. However, conclusory  
27 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for  
28 failure to state a claim.” Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996); see

1 also Twombly, 550 U.S. at 555.

## 2 **II. Defendant's Counterclaims**

3 NRG argues that Fuchs fails to plead his fraud based claims with particularity as required  
4 by Federal Rule of Civil Procedure 9(b). (Doc. No. 39-1 at 7-9.) NRG also argues that Fuchs's  
5 counterclaims should be dismissed because Fuchs fails to properly plead the damages elements  
6 of his causes of actions. ( at 5-7.) In response, Fuchs argues that he properly plead his  
7 counterclaims. (Doc. No. 44 at 5-9.)

8 Under California law, "[t]he elements of intentional misrepresentation, or actual fraud,  
9 are: '(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge  
10 of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5)  
11 resulting damage.'" Anderson v. Deloitte & Touche, 56 Cal. App. 4th 1468, 1474 (1997).  
12 "[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant  
13 must have concealed or suppressed a material fact, (2) the defendant must have been under a  
14 duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or  
15 suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been  
16 unaware of the fact and would not have acted as he did if he had known of the concealed or  
17 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff  
18 must have sustained damage." Hahn v. Mirda, 147 Cal. App. 4th 740, 748 (2007). "The  
19 elements of negligent misrepresentation are '(1) the misrepresentation of a past or existing  
20 material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce  
21 another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation,  
22 and (5) resulting damage.'" Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs. Group,  
23 Inc., 171 Cal. App. 4th 35, 50 (2009) (citation omitted).

24 Under Federal Rule of Civil Procedure 9, a plaintiff must plead fraud with particularity.  
25 "Rule 9(b)'s particularity requirement applies to state-law causes of action." Vess v. Ciba-Geigy  
26 Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). "Averments of fraud must be accompanied  
27 by 'the who, what, when, where, and how' of the misconduct charged." Id. at 1106 (quoting  
28 Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir.1997)). "[A] plaintiff must set forth more than

1 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false  
2 or misleading about a statement, and why it is false.” Id. at 1106 (quoting Decker v. GlenFed,  
3 Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir.1994)). “While statements of  
4 the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory  
5 allegations of fraud” are not. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th  
6 Cir. 1989).

7 The Court concludes that Fuchs’ fraud based counterclaims fail to meet Rule 9(b)’s  
8 heightened pleading standards. In support of his three counterclaims, Fuchs relies on a statement  
9 that was made in an August 21, 2009 email that was sent to him from Denise Wilson, an  
10 employee of NRG. (Doc. No. 37 ¶ 11.) The email was regarding severance agreements for  
11 Fuchs and three other NRG employees Jan Paulin, Jeff Marks, and Bernie Holst (all four  
12 collectively the “Padoma Principals”). (Id.) Fuchs alleges that the email attached a document  
13 entitled “Proposed Term Sheet Employment Agreement for Pandoma Principals” and indicated  
14 that Ms. Wilson “was awaiting the Padoma Principals’, including FUCHS, acceptance of ‘these  
15 terms.’” (Id.) Fuchs alleges that Ms. Wilson’s use of the phrase, “these terms,” represented to  
16 him that the terms, including the severance amounts, for each of the Padoma Principals were the  
17 same. (Id.) Fuchs goes on to allege that this was untrue because on or about January 29, 2010  
18 he learned that Mr. Paulin and Mr. Marks had received higher severance amounts. (Id. ¶ 12.)

19 The Court concludes that these allegations do not satisfy the “how” requirement of Rule  
20 9(b)’s heightened pleading standard. See Vess, 317 F.3d at 1106. In particular, Fuchs has not  
21 explained how the phrase, “these terms,” was false or misleading at the time Ms. Wilson made  
22 them. See San Francisco Design Ctr. Assocs. v. Portman Co., 41 Cal. App. 29, 43-44 (1995)  
23 (“It is hornbook law that an actionable misrepresentation must be made about past or existing  
24 facts; statements regarding future events are merely deemed opinions.”). Fuchs only alleges that  
25 five months after receiving the email, he found out that he received lower compensation than the  
26 other two employees. (Doc. No. 37 ¶ 12.) Fuchs also has not explained how the phrase “these  
27 terms” meant that all of the terms of the agreement would be the exact same for all the Padoma  
28 Principals, including the severance amount. Absent further factual elaboration, the phrase “these

1 terms” is at best ambiguous and is too vague to support a cause of action for fraud. See Rochlis  
2 v. Walt Disney Co., 19 Cal. App. 4th 201, 216 (1993) (“Promises too vague to be enforced will  
3 not support a fraud claim any more than they will one in contract.”); see also Shroyer v. New  
4 Cingular Wireless Servs., Inc., 606 F.3d 658 (9th Cir. 2010) (affirming dismissal of a fraud claim  
5 based on California law where the statement was too vague and provided “nothing concrete upon  
6 which [Plaintiff] could have reasonably rel[ied]”). Also, with respect to Fuch’s claim for  
7 concealment, Fuch has not alleged that or explained how NRG had a duty to disclose the  
8 allegedly withheld information to him, which is a required element of that claim. See Hahn, 147  
9 Cal. App. 4th at 748.

10 In addition, the Court concludes that Fuchs’ counterclaims fail to properly plead the  
11 damages element of his fraud based claims. Damages is an element of all three of Fuch’s causes  
12 of action. See Anderson, 56 Cal. App. 4th at 1474; Hahn, 147 Cal. App. 4th at 748; Nat’l Union  
13 Fire Ins. Co., 171 Cal. App. 4th at 50. “An action for fraud or deceit demands . . . proof of  
14 damages caused by misrepresentations or concealment of information. ‘Fraudulent  
15 representations which work no damage cannot give rise to an action at law’” Williams v.  
16 Wraxall, 33 Cal. App. 4th 120, 131-32 (1995). If a plaintiff seeks actual damages rather than  
17 rescission for a fraud claim, the plaintiff must have suffered “actual monetary loss to recover on  
18 a fraud claim.” Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1240 (1995); see also  
19 City of Vista v. Robert Thomas Sec., 84 Cal. App. 4th 882, 887 (2000). Actual damages are  
20 to be distinguished from those which are “speculative rather than existing or certain.” Saunders  
21 v. Taylor, 42 Cal. App. 4th 1538, 1544 (1996). “[T]he mere probability that a certain event  
22 would have happened upon which a claim for damages is predicated, will not support the claim  
23 or furnish the foundation of an action for such damages.” Marshak v. Ballesteros, 72 Cal. App.  
24 4th 1514, 1518 (1999).

25 In his counterclaims, Fuch’s seeks actual and compensatory damages. (Doc. No. 37 at  
26 5.) Accordingly, Fuchs is required to show that he suffered actual monetary loss to recover on  
27 his claims. See Alliance Mortgage, 10 Cal. 4th at 1240. In his counterclaims, Fuchs alleges that  
28 he “was harmed in that he unknowingly received less monetary compensation from NRG for his

1 severance amount than Mr. Paulin and Mr. Marks.” (Doc. No. 37 ¶¶ 19, 26, 33.) Fuchs appears  
2 to allege that his harm was lack of information rather than an actual monetary loss. Indeed, any  
3 claim by Fuchs for monetary loss based on the allegations in his counterclaims would be entirely  
4 speculative. Fuchs has provided no allegations showing how if he knew of the allegedly  
5 withheld information, he would have actually been able to receive a higher severance payment  
6 from NRG. In his response to NRG’s motion, Fuchs admits “that [he] cannot conclusively state  
7 that NRG Energy would have provided him with a higher severance compensation.” (Doc. No.  
8 44 at 5.) Accordingly, Fuchs has not plead that he suffered actual monetary loss, and any claim  
9 that he did suffer monetary loss would be entirely speculative. See Marshak, 72 Cal. App. 4th  
10 at 1518.

11 In response to this damages issue, Fuchs makes two arguments. First, Fuchs argues that  
12 argues that Rule 9(b)’s heightened pleadings standards do not apply to the damages elements  
13 of his fraud claims, citing Interserve, Inc. v. Fusion Garage PTE, Ltd., 2011 U.S. Dist LEXIS  
14 12935, at \*7-8 (N.D. Cal. Feb. 9, 2011) (“Rule 9(b) may not apply to the reliance and damages  
15 elements of a fraud claim.). However, in Interserve, the district court noted that there was case  
16 law on both sides of this issue, and that the Ninth Circuit has not directly addressed whether  
17 Rule 9(b) applies to the reliance and damages elements. See id. at \*5-7. Further, it does not  
18 matter which standard this Court applies because Fuchs’ speculative claim of actual damages  
19 fails even Rule 8(a)(2)’s lower pleading standard. See Twombly, 550 U.S. at 555 (“Factual  
20 allegations must be enough to raise a right to relief above the speculative level.”) Accordingly,  
21 under either standard, Fuchs has failed to plead the damages elements of his three fraud based  
22 claims.

23 Second, Fuchs argues that he does not have to allege that he suffered actual monetary  
24 loss to recover on his fraud claims because he can seek rescission of the contract. (Doc. No. 44  
25 at 5-7.) See Alliance Mortgage, 10 Cal. 4th at 1240. While Fuchs’ prayer for relief does ask  
26 for any relief the Court deems proper, Fuchs’ counterclaims do not mention seeking rescission or  
27 even mention the contract that he would be seeking to rescind. (See Doc. No. 44.) In addition,  
28 the remedy of rescission is inconsistent with the remedy of actual and compensatory damages that

1 Fuchs sought in his counterclaims. (Id. at 5.) See Denevi v. LGCC, 121 Cal. App. 4th 1211,  
2 1220 (2004) (“the law requires one who has been defrauded into entering a contract to choose  
3 either to ‘affirm or rescind’ the contract”); Paularena v. Sup. Ct. of San Diego Cnty., 231 Cal.  
4 App. 2d 906, 915 (1965) (“it is wholly inconsistent for [plaintiff] to ask for damages based upon  
5 an affirmance of the contract, and if he cannot have such, for damages or relief based on  
6 disaffirmance.”). Accordingly, Fuchs’ argument fails because he has not plead rescission as a  
7 remedy in his counterclaims or provided factual allegations in his counterclaims showing he is  
8 entitled to rescission. See Twombly, 550 U.S. at 555.

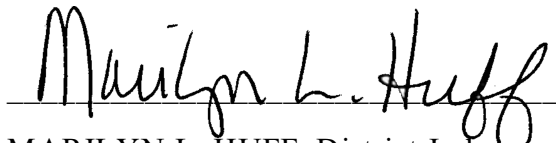
9 In sum, the Court concludes that Fuchs’ fraud based counterclaims fail to meet Rule 9(b)  
10 heightened pleadings standards, and they also fail to properly plead the damages elements of  
11 Fuchs’ claims.

12 **Conclusion**

13 For the reasons above, the Court GRANTS NRG’s motion to dismiss Fuch’s  
14 counterclaims without prejudice. The Court GRANTS Defendant and counterclaimant Fuch 30  
15 days from the date of this order to amend or cure the deficiencies—if he can—in amended  
16 counterclaims.

17 **IT IS SO ORDERED.**

18 DATED: April 28, 2011

19   
20 MARILYN L. HUFF, District Judge  
21 UNITED STATES DISTRICT COURT  
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