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

EDU-SCIENCE (USA) INC.,	
	Plaintiff,
v.	
INTUBRITE LLC,	
	Defendant.
AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS	

Case No. 12cv1078 BTM(WVG)

**ORDER GRANTING MOTION TO
DISMISS CROSS-COMPLAINT**

Intubrite LLC (“Intubrite”) has filed a motion to dismiss the First Amended Cross-Complaint (“FACC”) filed by Edu-Science (HK) Ltd. (“Edu-HK”). For the reasons discussed below, Intubrite’s motion to dismiss is **GRANTED**.

I. BACKGROUND

On February 16, 2013, Edu-Science (USA) Inc. (“Edu-USA”) commenced this action against Intubrite. In its Complaint, Edu-USA alleges that Intubrite breached contracts to purchase stylettes and laryngoscopes with pouches (“blades”), used for tracheal intubation. According to Edu-USA, although Intubrite paid for some of the product, Intubrite did not fulfill its obligations

1 under the contracts (purchase orders issued by Intubrite).

2 In its counterclaim/cross-claim, Intubrite alleges, "On information and
3 belief, EDU-USA and EDU-HK have an agency or joint venture relationship with
4 EDU-USA essentially acting as the United States office of EDU-HK."
5 (Counterclaim ¶ 5.) Intubrite alleges that there were defects in delivered
6 product as well as untimely delivery. (Counterclaim ¶¶ 11-14.) According to
7 Intubrite, it has paid for all of the product that it has actually received, and was
8 forced to terminate its business relationship with Edu-USA and Edu-HK after
9 they refused to continue deliverng product and demanded that Intubrite pay in
10 advance for all of its purchase orders. (Counterclaim ¶¶ 15-16.) Intubrite
11 asserts the following claims against Edu-USA and Edu-HK: (1) breach of
12 contract; (2) breach of the implied warranty of merchantability; (3) negligence;
13 (4) intentional interference with prospective economic advantage; (5) negligent
14 interference with prospective economic advantage; (6) intentional
15 misrepresentation of fact; and (7) negligent misrepresentation of fact.

16 In the FACC, Edu-HK alleges that Intubrite and Robert Hicks, Intubrite's
17 principal, induced Edu-HK into manufacturing the goods at issue and incurring
18 substantial costs and expenses by making false representations that Intubrite
19 had the financial resources to enter into a transaction of the size and cost
20 under discussion. (FACC ¶¶ 21, 26, 33, 45.) Edu-HK alleges that Intubrite did
21 not actually have the financial resources to perform under the purchase orders,
22 resulting in Intubrite's breach of contract. (FACC ¶¶ 61-63.) The FACC
23 asserts the following claims against Intubrite and Hicks: (1) fraud - intentional
24 misrepresentation; (2) fraud - nondisclosure; (3) negligent misrepresentation.

25 26 **II. STANDARD**

27 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)
28 should be granted only where a plaintiff's complaint lacks a "cognizable legal

1 theory" or sufficient facts to support a cognizable legal theory. Balistreri v.
2 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a
3 motion to dismiss, the allegations of material fact in plaintiff's complaint are
4 taken as true and construed in the light most favorable to the plaintiff. See
5 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).
6 Although detailed factual allegations are not required, factual allegations "must
7 be enough to raise a right to relief above the speculative level." Bell Atlantic v.
8 Twombly, 550 U.S. 544, 555 (2007). "A plaintiff's obligation to prove the
9 'grounds' of his 'entitle[ment] to relief' requires more than labels and
10 conclusions, and a formulaic recitation of the elements of a cause of action will
11 not do." Id. "[W]here the well-pleaded facts do not permit the court to infer
12 more than the mere possibility of misconduct, the complaint has alleged - but
13 it has not show[n] that the pleader is entitled to relief." Ashcroft v. Iqbal, 565
14 U.S. 662, 679 (2009) (internal quotation marks omitted). Only a complaint that
15 states a plausible claim for relief will survive a motion to dismiss. Id.

17 **III. DISCUSSION**

18 Intubrite moves to dismiss the FACC for failure to state a claim. As
19 discussed below, the Court agrees that dismissal is warranted.

20 A court may dismiss a claim of fraud when its allegations fail to satisfy
21 Rule 9(b)'s heightened pleading requirements. Vess v. Ciba-Geigy Corp.
22 U.S.A., 317 F.3d 1097, 1107 (9th Cir. 2003).¹ Averments of fraud must be
23 accompanied by the "who, what, when, where, and how" of the misconduct
24 charged. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).

25 The first problem with Edu-HK's fraud claims is that Edu-HK fails to set
26 forth facts regarding why the statements at issue were false at the time they

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28 ¹ Claims of negligent misrepresentation "sound in fraud" and are therefore subject
to Rule 9(b)'s heightened pleading standard. Errico v. Pacific Capital Bank, N.A., 753 F.
Supp. 2d 1034, 1049 (N.D. Cal. 2010).

1 were made. Under Rule 9(b), a plaintiff must “set forth what is false or
2 misleading about a statement, and why it is false.” Yourish v. California
3 Amplifier, 191 F.3d 983, 993 (9th Cir. 1999). Accordingly, the plaintiff must “set
4 forth, as part of the circumstances constituting fraud, an explanation as to why
5 the disputed statement was untrue or misleading when made.” Id. (quoting In
6 re GlefFed Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)).

7 Here, the FACC alleges that on several occasions, Hicks and William
8 Goodrich, an agent for Intubrite,² made false representations to Edu-USA and
9 Edu-HK that Intubrite was “well-funded” and had the financial resources to
10 allow Intubrite to make the financial commitment to go forward with the
11 transaction being discussed. (FACC ¶¶ 21, 26, 33, 45.) The FACC further
12 alleges that “[d]iscovery obtained in the present case confirmed that Intubrite’s
13 representations about its financial condition and resources were false.” (FACC
14 ¶ 63.) However, Edu-HK does not specify what the discovery was and what it
15 revealed about Intubrite’s financial condition and resources at the time Hicks
16 and Goodrich made the statements at issue. Additionally, the allegations in
17 paragraphs 50 and 51 are Edu-HK’s conclusions and not facts. Edu-HK must
18 allege actual evidentiary facts demonstrating that it has a plausible claim. Edu-
19 HK’s vague allegations regarding falsity are insufficient to satisfy Rule 9(b)’s or
20 lqbal’s requirements.

21 The second problem with Edu-HK’s fraud claims is that it is unclear
22 whether Edu-HK was even in a position to rely on Intubrite’s representations.
23 Edu-HK alleges that Hicks and Goodrich made the misrepresentations
24 regarding Intubrite’s financial condition to induce Edu-HK to agree to

26 ² Intubrite argues that Edu-HK has failed to allege sufficient facts showing that
27 Goodrich was in fact an agent for Intubrite. However, any shortcoming in this regard is of
28 little significance because Goodrich is not named as a defendant, and Edu-HK alleges that
Hicks made the same representations. At any rate, it can be inferred from the circumstances
that Goodrich, who was sent to meetings by Intubrite, was acting in a representative
capacity.

1 manufacture the goods ordered by Intubrite and to commit its own resources
2 and incur expenses and costs to commence manufacturing goods for Intubrite.
3 (FACC ¶ 53.) However, the purchase orders were placed with Edu-USA, not
4 Edu-HK. (FACC ¶ 1.)

5 Edu-HK was not a contracting party, but, rather, a manufacturer of the
6 products. It is unclear whether Edu-HK could refuse to manufacture goods that
7 Edu-USA contracted to provide or had any input into what contracts Edu-USA
8 entered into. Accordingly, Edu-HK has not pled sufficient facts establishing
9 actual reliance on the representations at issue.³

10 Edu-HK has also failed to allege sufficient facts regarding the damages
11 it suffered as a result of the alleged fraud. Although Rule 9(b) may not require
12 more particular pleading for the element of damages, see In re GlenFed, Inc.,
13 42 F.3d at 1548, even under ordinary pleading standards, sufficient facts must
14 be alleged to support a claim for damages. See, e.g., Zierolf v. Wachovia
15 Mortgage, 2012 WL 616352 (N.D. Cal. Dec. 11, 2012) (dismissing promissory
16 estoppel claim for failure to allege sufficient facts linking the defendants'
17 alleged wrongdoing to any damages suffered by plaintiff). Edu-HK alleges that
18 it was damaged because it incurred expenses and costs to commence
19 manufacturing goods for Intubrite, including tooling, machinery and equipment,
20 engineering and personnel resources, warehouse space, production line
21 resources, and other overhead and administrative expenses. (FACC ¶ 44.)

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23 ³ Edu-HK's claim for fraudulent nondisclosure fails for the same reason. Under
24 California law, the circumstances in which nondisclosure or concealment may constitute
25 actionable fraud include (1) when the defendant is in a fiduciary relationship with the plaintiff;
26 (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff;
27 (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the
28 defendant makes partial representations but also suppresses some material facts. LiMandri
v. Judkins, 52 Cal. App. 4th 326, 336 (1997). The last three circumstances presuppose the
existence of some other relationship between the plaintiff and defendant in which a duty to
disclose can arise. Id. "As a matter of common sense, such a relationship can only come
into being as a result of some sort of *transaction* between the parties." Id. at 337. As
currently pled, the FACC does not allege facts establishing any kind of transactional
relationship between the parties that would give rise to a situation where Edu-HK might rely
on representations by Intubrite.

1 But there are insufficient facts to conclude that Edu-HK, as opposed to
2 Edu-USA, will bear the brunt of any loss. As already discussed, Intubrite
3 contracted with Edu-USA. Edu-USA had some sort of arrangement with Edu-
4 HK whereby Edu-HK would manufacture the products (FACC ¶ 2), but the
5 terms of that arrangement are unknown. It is possible that Edu-USA was liable
6 for any expenses incurred by Edu-HK, regardless of whether Intubrite paid Edu-
7 USA. Indeed, the Court notes that in its Complaint, Edu-USA alleges that it
8 purchased capital equipment in the amount of \$200,000 that can only be used
9 for producing the blades ordered by Intubrite. (Compl. ¶ 14.) Edu-USA also
10 seeks damages for, among other things, costs and expenses for unused
11 factory capacity reserved for products ordered by Defendant, demurrage and
12 storage charges, materials acquired and held for products, and disruption
13 caused to Edu-USA's ongoing production and distribution schedules. (Compl.,
14 Prayer for Relief.) Exactly how or if Edu-HK was damaged remains unclear.

15 Intubrite also moves for dismissal on the ground that Edu-HK's claims are
16 time-barred. In California, fraud claims have a three-year statute of limitations.
17 Cal. Code Civ. Proc. § 338(d). However, a claim for fraud is "not deemed to
18 have accrued until the discovery, by the aggrieved party, of the facts
19 constituting the fraud of mistake." *Id.* Edu-HK claims that it did not discover
20 that Intubrite had made false representations until 2011, after Intubrite tried to
21 cancel the contract between itself and Edu-USA. As discussed above, Edu-HK
22 has not sufficiently alleged what facts it discovered to make it realize that the
23 representations about Intubrite's financial condition were false when made.
24 However, if Edu-HK can successfully amend its complaint to remedy this defect
25 as well as the other defects identified above, Edu-HK's claim will not
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1 necessarily be barred by the statute of limitations.⁴

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IV. CONCLUSION

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For the reasons discussed above, Intubrite's Motion to Dismiss Amended Cross-Complaint is **GRANTED**. Edu-HK's First Amended Cross-Complaint is **DISMISSED** for failure to state a claim. The Court grants leave for Edu-HK to file a Second Amended Cross-Complaint addressing the deficiencies identified above. If Edu-HK chooses to amend, Edu-HK must file the Second Amended Cross-Complaint within 30 days of the entry of this Order.

IT IS SO ORDERED.

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DATED: February 27, 2014

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BARRY TED MOSKOWITZ, Chief Judge
United States District Court

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⁴ Intubrite argues that Edu-HK was not reasonably diligent in discovering the alleged fraud because it could have asked for financial documentation previously and seemed to be suspicious about Intubrite's financial resources from the beginning. However, the Court would not hold, based on pleadings alone, that Edu-HK had a duty to investigate Intubrite's finances despite Intubrite's repeated assurances that it had sufficient financial resources.