

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUMP SAN DIEGO, LLC,

12 Plaintiff,

13 v.

14 JANAY KRUGER, as an individual, and
15 KRUGER DEVELOPMENT
16 COMPANY, a California Corporation,

17 Defendants.

Case No.: 3:14-cv-1533-CAB-(BLM)

ORDER ON MOTION TO DISMISS
[Doc. No. 25]

18 This matter comes before the Court on Defendants Janay Kruger and Kruger
19 Development Company's (collectively "Defendants") motion to dismiss [Doc No. 25.]
20 The motions have been fully briefed, and the Court finds them suitable for submission
21 without oral arguments. For the following reasons, Defendants' motion is **DENIED**.

22 **I. Procedural Background**

23 On June 25, 2014, Plaintiff filed a complaint against Defendants asserting three
24 claims: (1) negligence; (2) negligent Misrepresentation; and (3) breach of contract. [Doc.
25 No. 1.] Defendants moved to dismiss the complaint in its entirety. [Doc. Nos. 4, 6.] The
26 Court granted the motions, primarily on statute of limitations grounds. [Doc. No. 10.]
27
28

1 On appeal, the Court of Appeals reversed and remanded, stating that Plaintiff should
2 be allowed an opportunity to file an amended complaint because it was not certain that
3 Plaintiff “could prove no set of facts that would establish the timeliness of the claim[s].”
4 [Doc. No. 16.]

5 On January 10, 2017, Plaintiff filed its first amended complaint (“FAC”) asserting a
6 claim of negligence and a claim of breach of contract. [Doc. No. 22.] On January 24,
7 2017, Defendants filed their motion seeking to dismiss under the Federal Rules of Civil
8 Procedure. [Doc. No. 25.] Plaintiff filed its opposition to the motion [Doc. No. 26] and
9 Defendants filed their reply [Doc. No. 27].

10 **II. The Allegations in the FAC**

11 In March 2011, Plaintiff retained Defendants to provide land-use consulting advice
12 concerning the appropriateness of a San Diego property (the “Property”) for an indoor
13 trampoline business. The complaint alleges “Defendants advised Plaintiff that the Property
14 was properly zoned for Plaintiff’s business. Defendants confirmed this advice in writing
15 on or about December 16, 2011.” [Doc. No. 22 at ¶ 14.]

16 On January 13, 2012, Plaintiff executed a ten-year lease on the Property that required
17 a security deposit of approximately \$77,000. [*Id.* at ¶ 15.] After executing the lease,
18 Plaintiff was informed that the Property “was actually not properly zoned for Plaintiff’s
19 business.” [*Id.* at ¶ 16.] Thereafter, Plaintiff was informed that a Conditional Use Permit
20 (“CUP”) “may be required” and that “Plaintiff may not be required to pay any additional
21 costs related to zoning variance over and above what Plaintiff anticipated to pay in
22 construction and development costs.” [*Id.* at ¶ 17.] Plaintiff was “informed that deposits
23 Plaintiff made in connection with the [CUP] application would be similar to fees required
24 by the City of San Diego in any event to construct the contemplated improvements,” but
25 “was not aware that the Defendants’ land-use advice had caused Plaintiff any damage.”
26 [*Id.*]

27 Plaintiff filed its CUP application on July 2, 2012. [*Id.* at ¶ 18.] After July 2, 2012,
28 Plaintiff was required to pay the costs associated with the attorneys and consultants needed

1 to prepare draft permit findings, attend meetings with City staffers and go through the CUP
2 hearing process with the Planning Commission. [*Id.* at ¶ 20.]

3 In the Fall of 2012, Plaintiff received a cycles report from the City, but prior to
4 obtaining this report Plaintiff could not calculate whether it had been damaged by
5 Defendants' erroneous advice "[b]ecause of Plaintiff's substantial planned investment into
6 the Property." [*Id.* at 21.] After receiving the cycles report from the City "it became
7 apparent that Plaintiff would be forced to incur significant construction and development
8 costs above and beyond the improvements it already intended to undertake." [*Id.*]

9 Plaintiff also alleges that it would not have executed the lease but for Defendants'
10 consulting advice. [*Id.* at 23.] Plaintiff's business was delayed in opening because of
11 Defendants erroneous advice and if not for the delay resulting from the CUP process,
12 "Plaintiff could have been the first-to-market indoor trampoline business . . . would have
13 not lost significant revenue . . . [or] incurred additional construction costs and post-CUP
14 application fees in excess of \$300,000. [*Id.*]

15 Based on these allegations, Plaintiff asserted negligence and breach of contract
16 claims against Defendants.

17 **III. Legal Standard**

18 Under Rule 12(b)(6), a party may bring a motion to dismiss based on the failure to
19 state a claim upon which relief may be granted. A Rule 12(b)(6) motion challenges the
20 sufficiency of a complaint as failing to allege "enough facts to state a claim to relief that is
21 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For purposes
22 of ruling on a Rule 12(b)(6) motion, the court "accept[s] factual allegations in the complaint
23 as true and construe[s] the pleadings in the light most favorable to the non-moving party."
24 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But, a
25 "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of
26 a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
27 *Twombly*, 550 U.S. at 555).

1 “When ruling on a motion to dismiss, [the court] may ‘generally consider only
2 allegations contained in the pleadings, exhibits attached to the complaint, and matters
3 properly subject to judicial notice.’” *Outdoor Media Grp., Inc. v. City of Beaumont*, 506
4 F.3d 895, 899 (9th Cir. 2007) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.
5 2007)). Matters of public record are properly subject to judicial notice. *Lee v. City of L.A.*,
6 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted); *see also* Fed. R. Evid. 201.

7 **IV. Defendants’ Request for Judicial Notice**

8 Defendants request that the Court take judicial notice of three documents: (1) a
9 certified copy of a CUP application signed on June 19, 2012 and filed by Plaintiff with the
10 City of San Diego Development Services Department; (2) a certified copy of a City of San
11 Diego invoice dated May 17, 2012, for “Multi Prelim” and reflecting payment by Plaintiff;
12 and (3) a certified copy of a City of San Diego invoice dated June 20, 2012, for “CUP” and
13 reflecting payment by Plaintiff. [Doc. No. 25-2.]

14 Defendants argue that the three documents are judicially noticeable as public record
15 and are available through a public records request to the City of San Diego Office of the
16 City Clerk. Defendants assert that the Exhibits 1-3 are copies of documents that were
17 previously submitted to this Court as part of their earlier requests for judicial notice and
18 have been resubmitted here out of an abundance of caution. [Doc. Nos. 6-1, 8-1.] The
19 Court granted the prior request for judicial notice covering the same matters. [Doc. No. 10
20 at 3-4.¹] Plaintiff does not dispute that the documents are public records.

21 Accordingly, the Court takes judicial notice of the following facts, which are matters
22 of public record not subject to reasonable dispute or disputed by Plaintiff: (1) on June 19,
23 2012, Plaintiff applied for a CUP for the Property and that the project number listed on the
24 application is 286180; (2) on May 17, 2012, Plaintiff made a \$5,000 payment to the City
25 of San Diego Development Services office related to project number 282339; and (3) on
26

27
28 ¹ Document numbers and page references are to those assigned by CM/ECF for the docket entry.

1 June 20, 2012, Plaintiff made a \$8,618 payment to the City of San Diego Development
2 Services office related to project number 286180.

3 **V. Discussion**

4 Defendants assert two arguments in support of dismissal of the negligence and
5 breach of contract claims. First, Defendants contends that the claims are time-barred by
6 the applicable statute of limitations. Second, Defendants assert that the claims contain
7 substantive flaws in that they do not allege the requisite facts necessary to state either claim.

8 **A. Statute of Limitations**

9 Defendants first argue that Plaintiff’s breach of contract and negligence claims are
10 time-barred under California Civil Code sections 335.1, 339.² Plaintiff’s counter that the
11 doctrine of law of the case and issue preclusion preclude Defendants’ statute of limitation
12 argument and, in the alternative, Plaintiff’s FAC alleges sufficient additional facts showing
13 the it was not aware that it was damaged until the Fall of 2012.

14 “For the sake of efficiency and consistency, a decision of an appellate court on a
15 legal issue must be followed in all subsequent proceedings in the same case.... [f]or the
16 law of the case doctrine to apply, we must have actually have decided the matter, explicitly
17 or by necessary implication, in our previous disposition.” *Snow-Erlin v. U.S.*, 470 F.3d
18 804, 807 (2006) (internal quotations and citations omitted).

19 In the case at bar, the Court of Appeals focused on whether the record before it
20 “conclusively establish[ed] when Jump first sustained damages” to warrant dismissing the
21 complaint without affording Plaintiff leave to amend. [Doc. No. 16 at 4.] The Ninth Circuit
22

23
24 ² Section 335.1 sets a two year statute of limitations for “an action for assault, battery, or injury to, or for
25 death of, individual caused by wrongful act or neglect, is two years.” CAL CIV. PROC. CODE § 335.1. It
26 is applicable to personal injury actions. *Buschman v. Anesthesia Bus. Consultants LLC*, 42 F. Supp. 2d
27 1244, 1253 n. 7 (N.D. Cal. 2014); cf. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 956
28 (9th Cir. 2011) (“In California, personal injury claims that accrued after January 1, 2003, are subject to
a two-year statute of limitations.”).

Similarly, Section 339 set a two year statute of limitations for “an action upon a contract, obligation or
liability not founded upon an instrument of writing . . .” CAL CIV. PROC. CODE § 339.

1 found that it could not “conclude at this motion to dismiss stage that the two-year statute
2 of limitations had run before Jump filed its complaint on June 25, 2014.” [*Id.* at 5.] The
3 case was remanded to this Court so that Plaintiff “be allowed an opportunity to file an
4 amended complaint because it is not certain that Jump ‘can prove no set of facts that could
5 establish the timeliness of the claim[s].’” [*Id.* at 5] (citation omitted). Since the complaint
6 has been amended with additional averments, Defendants are not barred from raising a
7 statute of limitations argument. However, to the extent that Defendants rely on facts
8 previously determined by the Court of Appeals insufficient to conclusively establish when
9 Plaintiff first sustained damages³, the Court will defer to the Ninth Circuit’s judgment.

10 The gravamen of this lawsuit continues to be that Defendants allegedly failed to
11 correctly execute their professional obligations as land use and zoning consultants,
12 therefore “[Plaintiff’s] cause of action, regardless of appellation, amount to a claim of
13 professional negligence.” *Hydro-Mill Co., Inc. v. Hayward Tilton and Rolapp Ins. Assocs.,*
14 *Inc.*, 115 Cal. App. 4th 1145, 1159 (Cal. Ct. App. 2004). Neither party disputes that the
15 two year statute of limitations applies.⁴

16 As the Court’s earlier order explained “[g]enerally speaking, a cause of action
17 accrues at the time when the cause of action is complete with all of its elements.” *E-Fab,*
18 *Inc. v. Accountants, Inc. Servs.*, 153 Cal. App. 4th 1308, 1317 (Cal. Ct. Ap. 2007) (internal
19 quotations omitted). However, “[t]he discovery rule postpones accrual of a cause of action
20 until the plaintiff discovers, or has reason to discover, the cause of action.” *Id.* at 1318.
21 This means that Plaintiff’s claim for “professional negligence does not accrue until the
22 plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence.” *Roger*

23
24
25 ³ The Appellate Court found that the lease, delay in opening, and fee associated with the CUP
26 application, and professional fees incurred in conjunction with the CUP were not facts that conclusively
27 established when Plaintiff first sustained damages.

28 ⁴ Because this Court’s jurisdiction rests on diversity of citizenship and all of Plaintiff’s claims are under
California law, California’s statute of limitations law applies here. *See Bancorp Leasing & Fin. Corp. v.*
Agusta Aviation Corp., 813 F.2d 272, 274 (9th Cir. 1987) (“in a federal diversity action brought under
state law, the state statute of limitations controls.”).

1 *E. Smith, Inc. v. SHN Consulting Eng'rs & Geologists, Inc.*, 89 Cal. App. 4th 638, 650-51
2 (Cal. Ct. App. 2001).

3 Here, Plaintiff had discovered all of the elements of Kruger's alleged negligence,
4 except damages, by the time Plaintiff signed the CUP application on June 19, 2012.
5 Therefore, the focus of the Court's inquiry is whether the FAC sufficiently alleges when
6 Plaintiff first sustained damages. In so doing, the Court is mindful of the Court of Appeals
7 finding that the allegations in the complaint related to the lease payments, lost profits
8 associated with delay, expenses incurred in conjunction with the CUP, and the June 20,
9 2012 payment associated with the CUP, did not conclusively establish when Plaintiff first
10 sustained damage.

11 Unlike the original complaint the FAC specifically avers that before filing the CUP
12 application "Plaintiff was aware that the land-use advice was incorrect at this point,
13 Plaintiff was not aware that the Defendants' land-use advice had caused Plaintiff any
14 damage. Plaintiff first needed to determine what the City would require." [Doc. No. 22 at
15 5:15-18.] Further, the FAC alleges that:

16 Plaintiff was not aware it was damaged by the Defendants' erroneous advice,
17 until, at the earliest, Plaintiff's receipt of the cycles report from the City of
18 San Diego, which was received in the Fall of 2012. At this time it became
19 apparent that Plaintiff would be forced to incur significant construction and
20 developmental costs above and beyond the improvements it already intended
21 to undertake. Because of Plaintiff's substantial planned investment into the
22 Property, Plaintiff could not calculate whether it had been damaged by
23 Defendants' erroneous advice until the City of San Diego provided the cycles
24 report after submission of the CUP application, and ultimately its
25 recommendations for the project in a draft CUP, culminating in an approved
26 CUP on January 17, 2013.

27 [Id. at ¶ 21.]

28 Defendants argue that Plaintiff's assertions regarding when it became aware that it
had suffered damage are contradicted by controlling facts that conclusively establish that
Plaintiff learned of the harm prior to June 25, 2012. In sum, Defendants assert that Plaintiff

1 was damaged through the delay, the initial CUP expenses, and by entering into the lease
2 based on false advice.

3 In support of its position, Defendants point to the fact the Plaintiff applied for a CUP
4 with the City on June 19, 2012 and paid an \$8,618.00 deposit and close out fee to the City
5 on June 20, 2012. Defendants argue that “Plaintiff’s reliance on the later determination of
6 the ultimate cost of the CUP process is a red-herring – again, the ultimate extent of damage
7 is not what is at issue when this Court looks to whether Plaintiff was aware of the fact of
8 any damage (including the delay itself).” [Doc. No. 25-1 at 11:19-23.] But, the Court of
9 Appeals directly addressed whether the June 20 payment conclusively established that
10 Plaintiff had sustained damage on June 20, 2012, finding that “it is not certain that the June
11 20, 2102 payment put Jump on notice that its total start-up costs would exceed the total
12 Jump anticipated.” [Doc. No. 16 at 4.] What is more, the FAC now specifically addresses
13 the CUP process and alleges that upon commencing it, “Plaintiff was also informed that
14 Plaintiff may not be required to pay any additional costs related to the zoning variance over
15 and above what Plaintiff anticipated to pay in construction and development costs. . . .
16 According to professionals advising Plaintiff, the City of San Diego could authorize the
17 Conditional Use Permit, while only requiring Plaintiff to undertake construction and
18 improvements Plaintiff intended to do anyway.” [Doc. No. 22 at ¶ 17.] Additionally, the
19 FAC also claims that the June 20, 2012 payment to the City “was subject to refund” and
20 therefore “there was not necessarily an immediate, tangible effect” on its financial affairs
21 and likens it to a security deposit that “could be drawn on by the City upon the occurrence
22 of certain events, whether that be an ultimate CUP or a building permit.” [Id at ¶ 22.]

23 Next, Defendants point to the CUP process itself, and the delay and expense
24 associated with it, as evidence that Plaintiff knew it was damaged by June 19, 2012.
25 Defendants posit that by having to go through the CUP process Plaintiff was necessarily
26 damaged because, if Defendants purported advice was correct, the whole administrative
27 process would have been avoided. While it seems to this Court that having to go through
28 an unplanned permitting process would undoubtedly cause a postponement in the opening

1 of Plaintiff's business and generate additional expenses not previously planned for thereby
2 putting Plaintiff on notice that it was damaged, the Appeals Court found differently.

3 In addressing whether the delay conclusively established the date of damage, the
4 Ninth Circuit explained "we cannot determine from the complaint when Jump intended to
5 open its facility and so cannot determine when Jump began to accrue damages in the form
6 of lost profits." [Doc. No. 16 at 4.] Although the FAC is still silent regarding when
7 Plaintiff intended to open its facility, it now affirmatively asserts that "Plaintiff was not
8 aware of the length of delay until after receipt of the cycles report." [Doc. No. 22 at ¶ 23.]
9 As to the expenses associated with the CUP process the Court of Appeals found that
10 "although Jump's complaint asserted that Jump also incurred professional fees in
11 conjunction with the CUP, it does not establish whether those expenses were incurred
12 before the CUP application was filed or after the City responded to the application." [Doc.
13 No. 16 at 4.] In the same vein as the delay allegation, the FAC now specifically avers that
14 it was only upon receipt of the cycles report that Plaintiff was required to "prepare draft
15 permit findings, meet with City staffers and go through the CUP hearing process with the
16 Planning Commission, which involved costs associated with attorneys and consultants, all
17 of which were incurred after July 2, 2012." [Doc. No. 22 at ¶ 20.]

18 Finally, Defendants assert that Plaintiff's own averments regarding the lease
19 establish that Plaintiff knew it was damaged prior to submitting the CUP application
20 because by that time it was aware that the purported land use advice was incorrect and but
21 for Defendants' erroneous advice, it would not have executed the very costly Lease.
22 Specifically, Defendants contend that the "application represents the latest date that
23 Plaintiff was at least aware that it had taken detrimental, costly actions in reliance on
24 purported advice that no additional permits were necessary." [Doc. No. 25-1 at 12:17-20.]
25 But, the Ninth Circuit addressed whether the lease payments established when Plaintiff
26 first sustained damage concluding "because the lease payments were part of the bargain
27 Jump struck with the lessor, the lease payments cannot be claimed as damage proximately
28 caused by Kruger's alleged professional negligence." [Doc. No. 16 at 4.]

1 In short, Defendants point to no other facts, other than those previously considered
2 by the Court of Appeals that Plaintiff knew it had been caused harm prior to June 25, 2012.
3 Additionally, for purposes of this motion to dismiss the Court accepts as true the factual
4 allegations that Plaintiff did not know it had sustained damage until the Fall of 2012.
5 Accordingly, the Court cannot conclude at the motion to dismiss stage that Plaintiff's
6 claims are time-barred.

7 **B. Failure to Allege the Elements of the Claims**

8 Defendants also argue that Plaintiff fails to plead the elements of each cause of action
9 and that the complaint offers nothing more than a formulaic recitation of the elements of a
10 cause of action.

11 **1. Negligence**

12 The elements of a cause of action for negligence are: "(a) a legal duty to use due
13 care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause
14 of the resulting injury." *Ladd v. Cnty. of San Mateo*, 12 Cal. 4th 913, 917 (1996). Under
15 California law, "a person may not ordinarily recover in tort for breaches of duties that
16 merely restate contractual obligations." *Aas v. Superior Court*, 24 Cal. 4th 627, 643 (2000)
17 (superseded by statute on another ground as stated in *Rosen v. State Farm General Ins.*
18 *Co.*, 30 Cal. 4th 1070, 1079-1080 (2000)). "[C]onduct amounting to a breach of contract
19 becomes tortious only when it also violates a duty independent of the contract arising from
20 principles of tort law." *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999) (internal citations
21 omitted).

22 But, California courts, in cases decided subsequent to *Aas* and [Erlich] "continue to
23 apply a rule that negligent failure to exercise reasonable care and skill in undertaking to
24 perform a professional services contract is a tort as well as a breach of contract." *City and*
25 *Cnty. of S. F. v. Cambridge Integrated Servs. Grp., Inc.*, No. C 04-1523 VRW, 2007 WL
26 1970092, at *4 (N.D. Cal. July 2, 2007) (discussing California cases). *See also Land*
27 *O'Lakes v. Dairyamerica, Inc.*, No. 1:15-Ccv-01937-DAD-MJS, 2017 WL 495644, at * 3
28 (E.D. Cal. Feb 6, 2017) ("While the California Supreme Court has not explicitly addressed

1 the issue of professional services contracts as opposed to services contracts in general, the
2 California Court of Appeals has construed professional services contracts as also giving
3 rise to independent tort duties.”) (collecting cases).

4 When applying California law federal courts within this circuit have found that a
5 breach of a professional services contract gives rise to a cognizable tort claim. *See Id.* at
6 *4 (denying motion to dismiss professional negligence claim, finding defendants argument
7 “unconvincing in light of the numerous federal and California court decisions . . . indicating
8 to the contrary.); *Corelogic, Inc. v. Zurich Am. Ins. Co.*, No. 15-cv-03081-RS, 2016 WL
9 4698902, at *5 (N.D. Cal. Sept. 8, 2016) (denying a motion to dismiss a negligence claim
10 based on a breach of contract, noting that Plaintiff’s alleged that “defendants negligently
11 performed an attendant professional service.); *Architectural Resources Grp., Inc. v. HKS,*
12 *Inc.*, No. C 12-5787 SI, 2013 WL 568921, at *4-5 (N.D. Cal. Feb 13, 2013) (denying a
13 motion to dismiss a tort claim based on breach of a services contract, because plaintiff “has
14 alleged the elements of a professional negligence claim.”); *Music Grp. Macao Commercial*
15 *Offshore Ltd. v. Foote*, No. 14-cv-03078, 2015 WL 3882448, at 16 (N.D. Cal. June 23,
16 2015) (“It has been recognized that an action for professional negligence constitutes both
17 a tort and a breach of contract”).⁵

18 Defendants move to dismiss Plaintiff’s negligence claim for failure to identify a duty
19 owed by defendants independent of the parties’ alleged contract. However, the FAC
20 alleges a professional negligence claim in that “Defendants owed Plaintiff a duty of care
21 to perform the professional services contract with the reasonable care, skill and knowledge
22 of similar professionals; in this instance, to provide land-use consultancy advice regarding
23 the appropriateness of the Property for Plaintiff’s indoor trampoline business prior to the
24 _____

25 ⁵ *See also Barrett v. JP Morgan Chase Bank*, Case NO. 14CV2976 DMS (WVG), 2016 WL 3523046, at
26 *3 (S.D. Cal. June 27, 2016) (quoting *Flowers v. Torrance Memorial Hosp. Med. Ctr.*, 8 Cal 4th 992,
27 997-98 (1994) (“due to professionals’ training and skills in a given field, they are required to act with
28 ordinary prudence under the circumstances as measured by ‘the knowledge, skill and care ordinarily
possessed and employed by members of the profession in good standing’”) (internal citation
omitted.)

1 execution of the Lease.”⁶ [Doc. No. 22 at ¶ 27.] These allegations of professional
2 negligence are sufficiently to plead an independent tort law duty and support a negligence
3 cause of action. *See Cambridge Integrated*, 2007 WL 1970092, at *3-5 (observing that
4 California courts “continue to apply a rule that negligent failure to exercise reasonable care
5 and skill in undertaking to perform a professional services contract is a tort as well as a
6 breach of contract.”). Accordingly, the Court **DENIES** Defendants’ motion to dismiss the
7 negligence claim.

8 **2. Breach of Contract**

9 “A breach of contract claim under California law requires the plaintiff to establish
10 four elements: (1) the existence of a contract; (2) plaintiff’s performance of excuse for
11 nonperformance of the contract; (3) defendant’s breach of the contract; and (4) damages
12 resulting from defendant’s breach of the contract. *McAdam v. State Nat. Ins. Co., Inc.*, 28
13 F. Supp. 3d 1110, 1116 (S.D. Cal. 2014).

14 Defendants offer the same arguments in favor of dismissal of the breach of contract
15 claim they made in their earlier motion to dismiss. As previously explained, the Court
16 remains “unaware of any binding federal authority requiring dismissal of a breach of
17 contract claim solely for failure to allege the form of contract simply because California’s
18 procedural rule allow a demurrer on such ground.” [Doc. No. 10 at 16:24-17:1.]

19 Moreover, the Court finds that the complaint adequately alleges the elements of a
20 breach of oral or implied contract claim sufficient to survive the motion to dismiss.
21 Accordingly, Defendants’ motion to dismiss the breach of contract claim is **DENIED**.

22 ///

23 ///

24 _____

25
26 ⁶ In support, Plaintiff relies on *Moreno v. Sanchez*, 106 Cal. App. 4th 1415 (2003) for the proposition
27 that “negligent failure to exercise reasonable care and skill in undertaking to perform a professional
28 services contract is a tort as well as a breach of contract.” [Doc. No. 22 ¶ 25] In *Moreno*, the court
looked at the duties owed by a housing inspector and found that “under common law the established rule
is the negligent failure to exercise reasonable care and skill in undertaking to perform a service contract
of this type is a tort, as well as a breach of contract.” *Moreno*, 106 Cal. App. 4th at 1435.

