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

6 ANA LUCIA MEDINA CORDOVA,
7
8 Plaintiff,

CASE NO. 15-CV-00155-WQH
(MDD)

ORDER

9 vs.

10 R & R FRESH FRUITS AND
11 VEGETABLES OF CALIFORNIA,
INC.; and CHRIS LIZAOLA,

12 Defendants.

13 HAYES, Judge:

14 The matter before the Court is the motion to dismiss pursuant to Federal Rule of
15 Civil Procedure 12(b)(6) filed by Defendants R & R Fruits and Vegetables of
16 California, Inc. and Chris Lizaola. (ECF No. 8).

17 **I. Background**

18 On January 22, 2015, Plaintiff Ana Lucia Medina Cordova commenced this
19 action by filing the Complaint in this Court. (ECF No. 1). On February 13, 2015,
20 Defendants R & R Fresh Fruits and Vegetables of California, Inc. ("R & R") and Chris
21 Lizaola filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).
22 (ECF No. 3). On March 2, 2015, Plaintiff filed the First Amended Complaint ("FAC")
23 pursuant to Federal Rule of Civil Procedure 15(a)(1), which is the operative pleading
24 in this case. (ECF No. 6). On March 3, 2015, the Court issued an order denying the
25 motion to dismiss as moot. (ECF No. 7).

26 On March 11, 2015, Defendants filed the motion to dismiss pursuant to Federal
27 Rule of Civil Procedure 12(b)(6). (ECF No. 8). On March 30, 2015, Plaintiff filed an
28 opposition. (ECF No. 9). On April 1, 2015, Defendants filed a reply. (ECF No. 11).

1 **II. Allegations of the FAC**

2 Plaintiff shipped tomatoes with a principal value of \$167,083.10 to Defendant R
3 & R from Mexico. Defendant R & R has failed to promptly pay for the tomatoes and
4 has an outstanding balance of \$110,351.36. “On or about March 21, 2014, R&R, by
5 and through Lizaola, its authorized representative, began its fraudulent scheme to order
6 and receive Tomatoes from Plaintiff while R&R concealed its intent to later falsely
7 argue that the Tomatoes were not acceptable in order to try and avoid payment to
8 Plaintiff from R&R.” (ECF No. 5 at 5). Plaintiff made twenty shipments of tomatoes
9 to Defendant R & R. Defendant R & R received these shipments but paid only part of
10 the invoice amount on thirteen invoices from March 21, 2014, until May 1, 2014. From
11 May 12, 2014, until May 21, 2014, Defendant R & R received seven shipments of
12 tomatoes but failed to pay any of the invoiced amounts and “falsely argue[d] that the
13 tomatoes were not acceptable.” *Id.* at 6. “If the Tomatoes were truly not acceptable
14 R&R would not have continued to order and receive Tomatoes from Plaintiff.” *Id.* “As
15 a [Perishable Agricultural Commodities Act] dealer, R&R knew or should have known
16 that it had to have the Tomatoes federally inspected within 8 hours of receipt in order
17 to reject the Tomatoes.” *Id.*

18 Plaintiff asserts the following claims for relief: (1) violation of the Perishable
19 Agricultural Commodities Act (“PACA”), 7 U.S.C. section 499a *et seq.* against
20 Defendant R & R; (2) breach of contract against Defendant R & R; (3) fraud against
21 Defendant R & R; (4) negligent misrepresentation against Defendant R & R; (5) goods
22 sold and delivered against Defendant R & R; and (6) breach of fiduciary duty against
23 Defendant Lizaola. Plaintiff requests damages in the amount of \$110,351.36, punitive
24 damages, interest, costs, and reasonable attorneys’ fees.

25 **III. 12(b)(6) Standard**

26 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state
27 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of
28 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must

1 contain ... a short and plain statement of the claim showing that the pleader is entitled
2 to relief.” Fed. R. Civ. P. 8(a)(2). “A district court’s dismissal for failure to state a
3 claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of a
4 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
5 legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)
6 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

7 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
8 requires more than labels and conclusions, and a formulaic recitation of the elements
9 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
10 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must
11 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
12 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
13 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
14 content that allows the court to draw the reasonable inference that the defendant is liable
15 for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must
16 accept as true all of the allegations contained in a complaint is inapplicable to legal
17 conclusions. Threadbare recitals of the elements of a cause of action, supported by
18 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “When there are
19 well-pleaded factual allegations, a court should assume their veracity and then
20 determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679. “In
21 sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content,
22 and reasonable inferences from that content, must be plausibly suggestive of a claim
23 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
24 2009) (quotations and citation omitted).

25 Claims sounding in fraud or mistake must additionally comply with the
26 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which
27 requires that a complaint “must state with particularity the circumstances constituting
28 fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) “requires ... an account of the time,

1 place, and specific content of the false representations as well as the identities of the
2 parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.
3 2007) (quotation omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
4 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who, what,
5 when, where, and how of the misconduct charged”) (quotation omitted).

6 **IV. Discussion**

7 Defendants move to dismiss Plaintiff’s first claim for violation of PACA, third
8 claim for fraud, fourth claim for negligent misrepresentation, and sixth claim for breach
9 of fiduciary duty. “Defendants R&R Fresh Fruits and Vegetables of California, Inc. and
10 Chris Lizaola hereby incorporate their Memorandum in Support of Motion to Dismiss
11 etc. filed herein on February 13, 2015 in order to avoid repetition and this Supplemental
12 Memorandum will only address the differences in the first amended complaint as
13 opposed to the original complaint.” (ECF No. 8-1 at 2). Plaintiff objects to Defendants
14 incorporating by reference the prior motion to dismiss in the pending motion to dismiss.
15 Plaintiff requests leave to amend should the Court grant Defendants’ motion to dismiss.

16 Because the Court dismissed Defendants’ first motion to dismiss as moot, and the
17 FAC is now the operative pleading, the Court will only consider the pleadings
18 addressing the pending motion to dismiss.

19 **A. Violation of PACA (First Claim)**

20 Defendant R & R contends that Plaintiff has failed to allege an “essential
21 element” of a PACA claim. (ECF No. 8-1 at 2). Defendant R & R contends that
22 Plaintiff has failed to allege that the invoices submitted to Defendant R & R contained
23 PACA notices that state an intent to enforce PACA rights. Plaintiff contends that notice
24 of intent to enforce PACA is only required in order to assert PACA trust rights.
25 Plaintiff contends that notice of intent to enforce PACA is not required in order to assert
26 a claim for failure to make full and prompt payment in violation of PACA.

27 7 U.S.C. section 499b provides, in relevant part: “It shall be unlawful in or in
28 connection with any transaction in interstate or foreign commerce ... to fail or refuse

1 truly and correctly to account and make full payment promptly in respect of any
2 transaction in any such commodity to the person with whom such transaction is had....”

3 7 U.S.C. § 499b(4). “If any commission merchant, dealer, or broker violates any
4 provision of section 499b of this title he shall be liable to the person or persons injured
5 thereby for the full amount of damages ... sustained in consequence of such violation.”

6 7 U.S.C. § 499e(a). “Such liability may be enforced either (1) by complaint to the
7 Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction;
8 but this section shall not in any way abridge or alter the remedies now existing at
9 common law or by statute, and the provisions of this chapter are in addition to such
10 remedies.” 7 U.S.C. § 499e(b). “Full payment promptly” is defined by the regulations
11 of the United States Department of Agriculture. *See* 7 C.F.R. § 46.2(aa).

12 “Congress amended the statute in 1984 to add an additional remedy: the
13 perishable commodities or proceeds from the sale of those commodities are held in trust
14 by the dealer for the benefit of the unpaid seller until full payment is made.” *Sunkist*
15 *Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir. 1997). “Perishable agricultural
16 commodities received by a commission merchant, dealer, or broker in all transactions,
17 and all inventories of food or other products derived from perishable agricultural
18 commodities, and any receivables or proceeds from the sale of such commodities or
19 products, shall be held by such commission merchant, dealer, or broker in trust for the
20 benefit of all unpaid suppliers or sellers of such commodities or agents involved in the
21 transaction, until full payment of the sums owing in connection with such transactions
22 has been received by such unpaid suppliers, sellers, or agents.” 7 U.S.C. § 499e(2).

23 PACA’s trust remedy provision further provides, in relevant part:

24 The unpaid supplier, seller, or agent shall lose the benefits of such trust
25 unless such person has given written notice of intent to preserve the
26 benefits of the trust to the commission merchant, dealer, or broker within
27 thirty calendar days.... The written notice to the commission merchant,
28 dealer, or broker shall set forth information in sufficient detail to identify
the transaction subject to the trust. When the parties expressly agree to a
payment time period different from that established by the Secretary, a
copy of any such agreement shall be filed in the records of each party to
the transaction and the terms of payment shall be disclosed on invoices,
accountings, and other documents relating to the transaction.

1 7 U.S.C. § 499e(c)(3). The trust remedy provision further provides that notice may be
2 provided on billing or invoice statements with the following language:

3 The perishable agricultural commodities listed on this invoice are sold
4 subject to the statutory trust authorized by section 5(c) of the Perishable
5 Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of
6 these commodities retains a trust claim over these commodities, all
inventories of food or other products derived from these commodities, and
any receivables or proceeds from the sale of these commodities until full
payment is received.

7 7 U.S.C. § 499e(c)(4).

8 In this case, Plaintiff alleges that Defendant R & R violated PACA “by failing
9 to pay Plaintiff promptly and in full for the Tomatoes.” (ECF No. 5 at 3) (citing 7
10 U.S.C. § 499b(4)). Plaintiff’s prayer for relief includes a request for damages, and does
11 not include a request for any remedy related to a trust. Plaintiff’s first claim does not
12 allege that Defendants violated PACA’s trust provisions.

13 Defendant R & R has cited no authority for the proposition that a plaintiff must
14 provide notice in order to recover damages under PACA for failure to “make full
15 payment promptly.” 7 U.S.C. § 499b(4); *see also C & G Farms, Inc. v. Capstone Bus.*
16 *Credit, LLC*, No. CV F 09-0032, 2011 WL 677487, at *11 (E.D. Cal. Feb. 17, 2011)
17 (“[T]he statutory scheme for the damages remedy and the statutory scheme for the trust
18 remedy are distinct.”). Defendants’ motion to dismiss Plaintiff’s first claim for
19 violation of PACA is denied.

20 **B. Fraud and Negligent Misrepresentation (Third and Fourth Claims)**

21 Defendant R & R contends that it has not committed fraud because Plaintiff
22 alleges that Defendant R & R informed Plaintiff that the tomatoes were defective.
23 Defendant R & R contends that it is not fraud to fail to pay in full for a product.

24 Plaintiff contends that tort damages may be awarded in contract cases where a
25 contract is fraudulently induced. Plaintiff contends that she has adequately alleged that
26 Defendant R & R fraudulently induced “Plaintiff to sell Defendant produce over a series
27 of transactions, with Defendant’s undisclosed full intent to never fully pay for it and
28 later fabricate that the produce was not acceptable.” (ECF No. 9 at 5).

1 “The elements of fraud, which give rise to the tort action for deceit, are (a)
2 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge
3 of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable
4 reliance; and (e) resulting damage.” *Lazar v. Superior Court*, 12 Cal. 4th 631, 638
5 (1996) (citations and internal quotations omitted). “Negligent misrepresentation is a
6 form of deceit, the elements of which consist of (1) a misrepresentation of a past or
7 existing material fact, (2) without reasonable grounds for believing it to be true, (3) with
8 intent to induce another’s reliance on the fact misrepresented, (4) ignorance of the truth
9 and justifiable reliance thereon by the party to whom the misrepresentation was
10 directed, and (5) damages.” *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986).

11 The FAC’s fraud claim alleges that Plaintiff made twenty shipments of tomatoes
12 to Defendant R & R. The FAC’s fraud claim alleges:

13 On or about March 21, 2014, R&R, by and through Lizaola, its
14 authorized representative, began its fraudulent scheme to order and receive
15 Tomatoes from Plaintiff while R&R concealed its intent to later falsely
16 argue that the Tomatoes were not acceptable in order to try and avoid
17 payment to Plaintiff from R&R. On or about March 21, 2014, R&R
18 received tomatoes from Plaintiff totaling the sum of \$7,140 which were
19 invoiced to R&R on March 21, 2014 as set forth in Plaintiff’s invoice
20 number 1801 (the “1801 Tomatoes”). Despite accepting the 1801
21 Tomatoes, R&R failed to fully pay for the 1801 Tomatoes, and did the
22 same with regard to the following [twelve invoices]....

23 On or about May 12, 2014, R&R received tomatoes from Plaintiff
24 totaling the sum of \$6,706.80 which were invoiced to R&R on May 12,
25 2014 as set forth in Plaintiff’s invoice number 2668 (the “2668
26 Tomatoes”). Despite accepting the 2668 Tomatoes, R&R fraudulently
27 schemed to continue ordering and receiving Tomatoes from Plaintiff and
28 later falsely argue that the Tomatoes were not acceptable. If the Tomatoes
were truly not acceptable, R&R would not have continued to order and
receive Tomatoes from Plaintiff. In reality, R&R ordered and received the
following Tomatoes, while R&R concealed its intent to later falsely argue
that the Tomatoes were not acceptable in order to try and avoid payment
to Plaintiff from R&R [on the following six invoices]....

(ECF No. 5 at 5-6). The FAC’s fraud claim alleges that Defendant R & R “falsely
represented to Plaintiff that R&R would pay for the Tomatoes within 30 days of the sale
of the Tomatoes to R&R.” *Id.* at 7. The FAC’s negligent misrepresentation claim
repeats these same allegations.

The Court finds that Plaintiff’s third and fourth claims for fraud and negligent

1 misrepresentation sound in fraud. The Court finds that the FAC fails to allege fraud
2 with the particularity required by Rule 9(b) or sufficient facts to state a fraud claim that
3 is “plausible on its face.” *Iqbal*, 556 U.S. at 678; *Swartz*, 476 F.3d at 764 (stating that
4 Rule 9(b) requires an “account of the time, place, and specific content of the false
5 representations”). The FAC fails to allege the date on which the alleged
6 misrepresentation was made, the date on which Defendant R & R first informed
7 Plaintiff that the tomatoes were unacceptable, or the date(s) on which Defendant
8 partially paid the first thirteen invoices. Defendant R & R’s motion to dismiss
9 Plaintiff’s third and fourth claims for fraud and negligent misrepresentation is granted.

10 **C. Breach of Fiduciary Duty (Sixth Claim)**

11 Defendant Lizaola contends that Plaintiff’s sixth claim seeks to impose a PACA
12 trust. Defendant Lizaola contends that Plaintiff cannot impose a PACA trust without
13 complying with PACA’s notice provisions. Plaintiff contends that Defendant Lizaola
14 can be personally liable pursuant to PACA because “he was in the position to control
15 the trust assets of R&R and did not preserve those assets....” (ECF No. 9 at 8). Plaintiff
16 contends that a breach of fiduciary duty claim has been recognized by the Ninth Circuit
17 Court of Appeals in these circumstances. Plaintiff contends that it need not comply
18 with PACA’s notice requirements in order to assert claims against Defendant Lizaola.

19
20 The FAC alleges that Defendant Lizaola “was in the position to control the trust
21 assets of R&R pursuant to PACA.” (ECF No. 5 at 11). The FAC alleges that
22 Defendant Lizaola “had fiduciary duties to preserve the trust assets of R&R pursuant
23 to PACA.” *Id.* The FAC alleges that, “[b]ecause Plaintiff’s invoices have not been paid
24 in full as the bills come due, Plaintiff has reason to believe Lizaola dissipated the PACA
25 trust or transferred trust assets to entities having claims were are [sic] subordinate to the
26 Plaintiff’s claims to the detriment [sic] of Plaintiff.” *Id.*

27 Plaintiff’s breach of fiduciary duty claim is premised on the creation of a trust
28 pursuant to PACA, and the breach of duties arising from that trust. Plaintiff has failed

1 to allege that it has complied with PACA's trust remedy notice provision. *See* 7 U.S.C.
2 § 499e(c)(3)-(4); *see also Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir.
3 1997) (noting that a PACA trust action may be brought in federal court once PACA's
4 notice provisions are complied with); *C & G Farms, Inc.*, 2011 WL 677487, at *5 ("A
5 PACA claimant ... must establish the following three elements in order to become a
6 valid PACA trust beneficiary: (1) the produce in question must be 'perishable
7 agricultural commodities'; (2) the commodities must have been received by a
8 commission merchant, a dealer, or broker; and (3) the claimant must have provided
9 written notice of its intent to preserve its rights under PACA within 30 days after
10 payment became due."). Defendant Lizaola's motion to dismiss Plaintiff's sixth claim
11 for breach of fiduciary duty is granted.

12 **V. Conclusion**

13 IT IS HEREBY ORDERED that the motion to dismiss (ECF No. 8) is
14 GRANTED in part and DENIED in part. Plaintiff's third, fourth, and sixth claims are
15 dismissed without prejudice. No later than **twenty (20) days** from the date this Order
16 is filed, Plaintiff may file a motion for leave to amend, accompanied by a proposed
17 second amended complaint.

18 DATED: April 16, 2015

19 
20 **WILLIAM Q. HAYES**
United States District Judge

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