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

ROBERT J. OHLWEILER

v.

BANK OF AMERICA
CORPORATION, and DOES 1 to 10,

Plaintiff,

Defendants.

CASE NO. 3:15-cv-2268-GPC-KSC
**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**
[ECF No. 11]

Before the Court is Defendant Bank of America, N.A.’s (“Defendant”) January 22, 2016, Motion to Dismiss for Failure to State a Claim. Def. Mot., ECF No. 11. The Plaintiff submitted a response on Feb. 23, 2016. Pl. Resp., ECF No. 15. Defendant replied on March 4, 2016. Upon consideration of the moving papers and the applicable law, the Court **GRANTS** Defendant’s motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Robert J. Ohlweiler (“Plaintiff”) alleges that around 2002, he opened bank accounts (“ALC accounts”) with Defendant on behalf of an S corporation, “Robert J. Ohlweiler, A Law Corporation” (“ALC”), of which he was the president and sole shareholder. Am. Compl., ECF No. 10 at 3. Plaintiff alleges that at the time, he signed agreements on behalf of ALC with the Defendant whereby the Defendant agreed to hold ALC harmless for any acts of fraud committed against

1 these accounts. Am. Compl., ECF No. 10 at 3. Plaintiff also alleges that Defendant
2 instructed him that he would be the direct beneficiary of the accounts because the
3 accounts were in the name of an S corporation. *Id.*

4 Plaintiff alleges that in July and August of 2013, the entire amount in the
5 ALC accounts was fraudulently withdrawn. *Id.* Plaintiff alleges that “[f]rom the
6 discovery of the fraudulent activity in or about August of 2013 to present Plaintiff
7 has been attempting to negotiate with Defendant to return these funds to Plaintiff,”
8 and that “Plaintiff has on several occasions . . . completed and returned fraud
9 statements as requested by Defendant,” but that “[i]n each such incident Defendant
10 has either told Plaintiff that he had used the wrong forms or completed ignored the
11 documents.” *Id.*

12 On August 31, 2015, Plaintiff, a resident of California, proceeding *pro se*,
13 filed a civil action against Defendant, a national bank with its main office in North
14 Carolina. Notice of Removal 3–4, ECF No. 1. Plaintiff pled two causes of action for
15 (1) breach of third party beneficiary contract; and (2) intentional fraud. Compl. 3–5.
16 On December 9, 2015, the Court **GRANTED** Defendant’s Motion to Dismiss
17 Plaintiff’s Complaint and gave the Plaintiff leave to amend. Ct. Order, ECF No. 9.
18 On January 8, 2016, Plaintiff filed his First Amended Complaint, alleging the same
19 causes of action. ECF No. 10. On January 22, 2016, Defendant filed this motion to
20 dismiss. Def. Mot., ECF No. 11. On February 23, 2016, Plaintiff responded. Pl.
21 Resp., ECF No. 15. On March 4, 2016, Defendant replied. Def. Reply, ECF No. 17.

22 **LEGAL STANDARD**

23 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable
24 legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal
25 theory.’” *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th
26 Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
27 1990)).

28 “To survive a motion to dismiss, a complaint must contain sufficient factual

1 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
3 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
4 factual content that allows the court to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged.” *Id.* at 679 (citing *Twombly*, 550 U.S.
6 at 556). “Threadbare recitals of the elements of a cause of action, supported by mere
7 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at
8 555 (noting that on a motion to dismiss the court is “not bound to accept as true a
9 legal conclusion couched as a factual allegation.”). “The pleading standard . . . does
10 not require ‘detailed factual allegations,’ but it demands more than an unadorned,
11 the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citations
12 omitted). “Review is limited to the complaint, materials incorporated into the
13 complaint by reference, and matters of which the court may take judicial notice.”
14 *See Metlzer Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir.
15 2008).

16 In analyzing a pleading, the Court sets conclusory factual allegations aside,
17 accepts all non-conclusory factual allegations as true, and determines whether those
18 nonconclusory factual allegations accepted as true state a claim for relief that is
19 plausible on its face. *Iqbal*, 556 U.S. at 676–84; *Turner v. City & Cty. of San*
20 *Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (noting that “conclusory allegations
21 of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6)
22 dismissal”) (internal quotation marks and citation omitted). And while “[t]he
23 plausibility standard is not akin to a probability requirement,” it does “ask[] for
24 more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S.
25 at 678 (internal quotation marks and citation omitted). In determining plausibility,
26 the Court is permitted “to draw on its judicial experience and common sense.” *Id.* at
27 679.

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1 **DISCUSSION**

2 Defendant essentially reasserts all of the arguments from its first Motion to
3 Dismiss as to why Plaintiff’s claims should be dismissed. First, Defendant argues
4 that the claim for breach of third party beneficiary contract should be dismissed
5 because (1) the Plaintiff is neither the real party in interest nor a third party
6 beneficiary; and (2) the claim is not sufficiently pled. Def. Mot., ECF No. 11 at
7 4–7. Second, Defendant argues that the fraud claim should be dismissed because (1)
8 the Plaintiff is not the real party in interest; and (2) Plaintiff failed to meet the
9 heightened pleading requirement for fraud. *Id.* at 7-8. The Court will address each
10 argument in turn.

11 **I. Breach of Third Party Beneficiary Contract**

12 **A. Party in Interest or Third Party Beneficiary**

13 Defendant argues that Plaintiff still lacks standing to pursue the case because
14 he failed to plead facts that show he is the real party in interest or a third party
15 beneficiary to the contract. Def. Mot., ECF No. 11. Under Fed. R. Civ. P. Rule
16 17(a), “[a]n action must be prosecuted in the name of the real party in interest.” *See*
17 *also, e.g., Mission Oaks Ranch, Ltd. v. Cty. of Santa Barbara*, 65 Cal. App. 4th
18 713, 724 (1998), *disapproved of on other grounds by Briggs v. Eden Council for*
19 *Hope & Opportunity*, 19 Cal. 4th 1106 (1999) (“One who is not a party to a contract
20 has no right to enforce it unless it is an intended third party beneficiary of the
21 contract.”). Defendant argues that since Defendant’s contract is with ALC, not with
22 Plaintiff, Plaintiff has no right to enforce the contract. Def. Mot., ECF No. 11.

23 Plaintiff, once again, concedes in his response that he opened the bank
24 accounts in the name of his professional corporation, Robert H. Ohlweiler, A.L.C.
25 Plaintiff argues again that he does have standing because he is the intended third
26 party beneficiary of the contract between ALC and Defendant. *See* Pl. Resp., ECF
27 No. 15 at 2. Plaintiff argues that Defendant specifically instructed him that he would
28 be the direct beneficiary of the accounts “because [they] were in the name of an S

1 corporation.” *Id.* Under Civil Code section 1559, “[a] contract, made expressly for
2 the benefit of a third person, may be enforced by him at any time before the parties
3 thereto rescind it.” *Brinton v. Bankers Pension Services, Inc.*, 76 Cal. App. 4th 550,
4 558 (1999). The contract does not need to identify the third party specifically. *Id.*
5 For a third party to qualify as a beneficiary to a contract, “the contracting parties
6 must have intended to benefit that individual, an intent which must appear in the
7 terms of the agreement.” *Id.* (citing *Principal Mutual Life Ins. Co. v. Vars, Pave,*
8 *McCord & Freedman*, 65 Cal. App. 4th 1469, 1485–1486 (1998) and *Harper v.*
9 *Wausau Ins. Co.*, 56 Cal. App. 4th 1079 (1997)).

10 Plaintiff’s assertion that Defendant told him he was the direct beneficiary of
11 the account under the agreement does not prove that he was a third party beneficiary
12 to the contract. Plaintiff’s allegations, taken as true, show that the Defendant
13 verbally expressed an intent that the contract benefit Plaintiff. However, Plaintiff
14 has not pled any facts that show what ALC’s intent was. Additionally, Plaintiff still
15 failed to attach a copy of the contract, and Plaintiff failed to plead any of the
16 contractual terms, which means that Plaintiff failed to show that the contracting
17 parties intent appeared in the terms of the agreement. *See id.*

18 Furthermore, Plaintiff reasserts his “alter ego” argument, but claims he “was
19 not trying to invoke the corporate legal doctrine but was saying that the corporation
20 was a vehicle used by him and only him from its inception.” Pl. Resp., ECF No. 15
21 at 2. He claims that he was clearly “the only beneficiary of these agreements,” since
22 ALC is an S corporation, “[f]or over ten years the only individual that signed checks
23 [and] made deposits and withdrawals was Plaintiff,” and “if the corporation had
24 become liable to the Defendant, the Plaintiff would have been held legally
25 responsible.” *Id.* at 5.

26 However, Plaintiff is still a separate and distinct person from the corporate
27 entity. ALC is still a separate entity capable of entering into its own contracts. Bus.
28 & Prof. Code § 6160; *Toho-Towa Co., Ltd. V. Morgan Creek Productions, Inc.*, 217

1 Cal. App. 4th 1096, 1106 (2013) (stating that “[o]rdinarily, a corporation is regarded
2 as a legal entity separate and distinct from its stockholders, officers and directors”).
3 Thus, it is irrelevant that the Plaintiff signed checks and made withdrawals from
4 ALC because he did so in his capacity as an officer, director, and stockholder of the
5 company. Furthermore, Plaintiff’s argument that he would be personally liable to
6 the Defendant does not allow the Court to find Plaintiff a third party beneficiary to
7 the contract, rather the argument allows a court to “pierce the corporate veil” by
8 disregarding a corporate entity and treating the corporation’s acts as if they were
9 done by individuals where the corporation has been used by those individuals to
10 accomplish a wrongful purpose. *See* Pl. Resp., ECF No. 15 at 2; *Toho-Towa Co. v.*
11 *Morgan Creek Prods., Inc.*, 217 Cal. App. 4th 1096, 1106 (2013). Instead, the
12 relevant inquiry under third party beneficiary doctrine is whether the contracting
13 parties clearly manifested an intent to make the obligation inure to the benefit of the
14 third party. *See City & Cty. of San Francisco v. W. Air Lines, Inc.*, 204 Cal. App. 2d
15 105, 121 (1962); *see also* Restatement (Second) of Contracts § 302, comment a
16 (1981). While Plaintiff did allege in the Amended Complaint that Defendant told
17 him he was a direct beneficiary of these agreements, he did not plead the terms of
18 the contract, or attach a copy of the contract itself. *See* Am. Compl. ECF No. 15.
19 Without establishing that the intent of the parties appeared in the agreement,
20 Plaintiff’s allegation cannot survive Defendant’s motion to dismiss. *Brinton*, 76 Cal.
21 App. 4th 550 at 558.

22 **B. Whether Contract Claim is Sufficiently Pled**

23 Defendant, again, argues that the contract claim is insufficiently pled because
24 in order to plead a contract claim, a contract must be pled by its terms, reciting it
25 verbatim or attaching and incorporating it, or by its legal effect, by alleging the
26 substance of its relevant terms. Def. Mot., EFC No. 11 at 7 (citing *McKell v.*
27 *Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006)). Since Plaintiff still
28 did not recite the contract or include it in the Complaint, Plaintiff was required to

1 plead the contract’s legal effects. “This is more difficult, for it requires a careful
2 analysis of the instrument, comprehensiveness in statement, and avoidance of legal
3 conclusions.” *McKell*, 142 Cal. App. 4th at 1489. The only detail Plaintiff provides
4 as to the nature of the contract between ALC and Defendant was that therein,
5 “Defendant agreed to hold A.L.C. harmless from any and all acts of fraud
6 committed against these accounts,” which is of no relevance to the third party
7 beneficiary claim. *See* Am. Compl., ECF No. 10 at 3. Plaintiff’s allegation that
8 Defendant told Plaintiff he would be a direct beneficiary of the contract, still
9 provides no insight as to what the terms of the contract actually were. *See id.*
10 Ultimately, Plaintiff has failed to demonstrate that the contracting parties clearly
11 manifested an intent to make Plaintiff a third party beneficiary.

12 **II. Intentional Fraud**

13 **A. Party in Interest**

14 Defendant argues that Plaintiff is also not the real party in interest for
15 purposes of the fraud claim. For the same reasons as discussed above in Part I.A, the
16 Court agrees. Plaintiff has not established that he is the real party in interest for
17 purposes of the fraud claim.

18 **B. Whether Fraud Claim is Pled with Sufficient Particularity**

19 Defendant also argues that Plaintiff’s fraud claim is not pled with sufficient
20 particularity. Fed. R. Civ. P. Rule 9(b) requires plaintiffs “state with particularity the
21 circumstances constituting fraud.” A court may dismiss a claim for failing to satisfy
22 Rule 9(b)’s heightened pleading requirements. *See Vess v. Ciba–Geigy Corp. USA*,
23 317 F.3d 1097, 1107 (9th Cir. 2003). To avoid dismissal, the plaintiff must plead
24 facts showing the details of the fraud, including “the who, what, when, where, and
25 how” of the alleged fraud. *Id.* at 1106 (internal quotation marks omitted). The
26 complaint must “be specific enough to give defendants notice of the particular
27 misconduct so that they can defend against the charge and not just deny that they
28 have done anything wrong.” *See id.* (internal quotation marks omitted).

1 To prove fraud, Plaintiff must allege facts that prove: “(1) a knowingly false
2 representation by the defendant; (2) an intent to deceive or induce reliance; (3)
3 justifiable reliance by the plaintiff; and (4) resulting damages.” *Service by*
4 *Medallion, Inc. v. Clorox Co.*, 44 Cal.App.4th 1807, 1816 (1996). Plaintiff alleges
5 that the Defendant (1) never had any “intention of performing its duties under the
6 A.L.C. agreements;” (2) Defendant committed fraud by “beg[inning] a pattern of
7 behavior with the intent to prevent Plaintiff from providing the documents
8 necessary to prove the fraud committed against the A.L.C. accounts” and
9 “perform[ing] acts to prevent paying Plaintiff the money fraudulently taken from the
10 A.L.C. accounts as was agreed to at the time of opening these accounts;” (3)
11 Plaintiff relied on Defendant’s misrepresentations in signing the agreement; and (4)
12 these acts were fraudulent, oppressive, and malicious justifying an award of
13 punitive damages. Am. Compl., ECF No. 10 at 6.

14 Plaintiff fails to plead any elements with the required particularity under
15 Rule 9(b). As to the first element, Plaintiff alleges that Defendant entered into the
16 agreement with no intention to uphold its end of the agreement, but it does not
17 allege any particular misrepresentations that were made by the Defendants. The
18 Amended Complaint does not allege “who, what, when, where, or how” the
19 misrepresentations were made. As to the second element, Plaintiff pleads how the
20 fraud supposedly occurred and when, but Plaintiff fails to explain who engaged in
21 the “pattern of behavior.” As to the third element, Plaintiff generally pleads that he
22 relied on Defendant’s misrepresentations. Once again, this is not specific enough.
23 As to the fourth element, Plaintiff does plead damages, but Plaintiff does not allege
24 any specific acts that resulted in these damages.

25 Thus, Plaintiff’s fraud claim cannot meet the heightened pleading standard
26 for fraud. Plaintiff’s general allegations of fraud are not specific enough to satisfy
27 Rule 9(b)’s particularity requirement.

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1 **III. Leave to Amend**

2 Fed. R. Civ. P. Rule 15 provides that courts should freely grant leave to
3 amend when justice requires it. Accordingly, when a court dismisses a complaint for
4 failure to state a claim, “leave to amend should be granted unless the court
5 determines that the allegation of other facts consistent with the challenged pleading
6 could not possibly cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957
7 F.2d 655, 658 (9th Cir. 1992) (internal quotation marks omitted). Amendment may
8 be denied, however, if amendment would be futile. *See id.*

9 The Court already granted Plaintiff leave to amend in order to cure the
10 deficiencies identified in the complaint. The Plaintiff’s Amended Complaint
11 contains largely the same factual allegations as the Complaint. Furthermore,
12 Plaintiff failed to cure any of the defects in the Complaint. As such, the Court finds
13 that amendment would be futile.

14 **CONCLUSION**

15 For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant Bank
16 of America, N.A.’s motion to dismiss for failure to state a claim, ECF No. 11, is
17 **GRANTED** with prejudice.

18 **IT IS SO ORDERED.**

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20 DATED: March 22, 2016

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22 HON. GONZALO P. CURIEL
23 United States District Judge
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