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

CHARBEL MAKSOUD, an individual,
Plaintiff,
v.
PHILIPPE GUELTON, an individual; et
al.,
Defendants.

Case No.: 3:17-cv-00362-H-WVG

ORDER:

**(1) GRANTING DEFENDANT
SOLUTIONS IQ, INC.’S MOTION
TO DISMISS**

[Doc. No. 19]

**(2) GRANTING DEFENDANT
PILLSBURY WINTHROP SHAW
PITTMANN, LLP AND CHRISTIAN
SALAMAN’S MOTION TO DISMISS**

[Doc. No. 20]

**(3) GRANTING, IN PART, AND
DENYING, IN PART, DEFENDANT
TIRRELL PAYTON’S MOTION TO
DISMISS**

[Doc. No. 22]

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1 On February 23, 2017, Plaintiff Charbel Maksoud (“Plaintiff”) filed a complaint
2 asserting various causes of action relating to Plaintiff’s investment in BT Software and
3 Research, Inc. (Doc. No. 1.) On April 28, 2017, Plaintiff filed a First Amended
4 Complaint (“FAC”). (Doc. No. 16.) The FAC contains nineteen causes of action against
5 eleven named defendants. (Id.) On May 10, 2017, Defendant Solutions IQ, Inc. filed a
6 motion to dismiss the FAC for failure to state a claim. (Doc. No. 19.) On May 10, 2017,
7 Defendants Pillsbury Winthrop Shaw Pittman, LLP and Christian Salaman filed a motion
8 to dismiss for failure to state a claim. (Doc. No. 20.) On May 12, 2017, Defendant
9 Tirrell Payton filed a motion to dismiss for failure to state a claim and failure to join an
10 indispensable party. (Doc. No. 22.) On May 22, 2017, Plaintiff filed responses in
11 opposition to defendants’ motions to dismiss. (Doc. Nos. 25-27.) On June 1, 2017,
12 Defendants Pillsbury Winthrop Shaw Pitman, LLP and Christian Salaman filed a reply.
13 (Doc. No. 29.) On June 2, 2017, Defendant Solutions IQ, Inc. filed a reply. (Doc. No.
14 31.) On June 5, 2017, Defendant Tirrell Payton filed a reply. (Doc. No. 32.)

15 **BACKGROUND**

16 These facts are taken from Plaintiff’s complaint. (Doc. No. 16.) During the
17 relevant times, Plaintiff resided in Joplin, Missouri. (Id. ¶ 14.) Through his neighbors,
18 Bruce and Schrell Hopkins (“the Hopkins”), Plaintiff was introduced to Defendant Tirrell
19 Payton (“Payton”). Plaintiff was also introduced to Defendant Philippe Guelton
20 (“Guelton”) who owned a marketing company, SheKnows Media, (id. ¶ 15), and
21 Defendant Paul Woodhull (“Woodhull”) and Defendant Shawn Smith (“Smith”) who
22 worked for Momentum Marketing, (id. ¶ 16).

23 Payton and the Hopkins were in the process of starting a company named BT
24 Software and Research, Inc. (“BT”). (Id.) Following the incorporation of BT, Plaintiff
25 understood that Bruce Hopkins was the president and Payton was the Chief Executive
26 Officer. (Id. ¶14.) Plaintiff also understood that Guelton was a principal of BT. (Id. at
27 15.)
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1 After meeting defendants, Plaintiff alleges he was convinced to invest \$250,000 in
2 BT to help develop an application called “Kaliki,” intended to be a media platform. (Id.
3 ¶ 19.) Plaintiff was told that Kaliki already had major contacts with automobile
4 manufactures, as well as media conglomerates. (Id. ¶ 20.) In exchange for his \$250,000,
5 Plaintiff was to receive an upfront 2.5% equity interest in BT, which would mature to
6 7.5% after two years. (Id. ¶ 21.) This amount was based on representations by Bruce
7 Hopkins, Guelton, and Payton that BT had a valuation of \$10,000,000. (Id. ¶ 21.) Bruce
8 Hopkins and Payton also gave Plaintiff a document showing that a company, AdLarge,
9 had invested additional monies in BT. (Id. ¶¶ 24, 25.) In consummating his investment,
10 Plaintiff signed a Common Stock Purchase Agreement in May 2014. (Id. ¶ 34.)

11 Following the investment, Plaintiff worked to create relationships with media
12 companies in an attempt to market and advance Kaliki. Plaintiff also recruited his now
13 deceased brother-in-law, Nadeem Baaklini, to develop a software search engine, OnSay.
14 (Id. ¶ 27.) Plaintiff claims Defendants promised Baaklini would receive a 4% equity in
15 BT and a lifelong salary of \$200,000 per year for the development of OnSay. (Id. ¶ 138.)
16 After Baaklini died, the OnSay project was near completion and Plaintiff is the assignee
17 of all of Baaklini’s claims. (Id. ¶ 28-29.)

18 Plaintiff alleges that, following his investment, defendants failed to complete their
19 side of the bargain and misused his \$250,000. Plaintiff alleges that, as part of his
20 investment, he was to receive his stock certificates but never did. Plaintiff understood
21 that Defendant Christian Salaman (“Salaman”) and his law firm, Pillsbury Winthrop
22 Shaw Pittman, LLP (“Pillsbury”), were responsible for drafting the documents but never
23 did so. (Id. ¶ 23.) Plaintiff also claims that Payton and his wife, Defendant Susan
24 Payton, misappropriated money from BT and used that money to further Payton’s career
25 with Solutions IQ, Inc. (Id. ¶ 31.)

26 As of the date of his complaint, Plaintiff claims he never received his shares of BT
27 and BT was ultimately forfeited. (Id. ¶¶ 6, 33.)

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ANALYSIS

I. LEGAL STANDARD FOR MOTION TO DISMISS

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the pleadings and allows a court to dismiss a complaint if the plaintiff has failed to state a claim upon which relief can be granted. Conservation Force v. Salazar, 646 F.3d 1240, 1241 (9th Cir. 2011). A complaint will survive a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The pleadings must go beyond “labels and conclusions” and the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555. A “formulaic recitation of the elements” is not enough. Id.; accord Iqbal, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

When reviewing a motion to dismiss, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the plaintiff. Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014). The court need not, however, accept “legal conclusions” as true. Iqbal, 556 U.S. at 678. Thus, pleadings unsupported by factual allegations are not entitled to a presumption of truth. Id. (“It is the conclusory nature of respondent’s allegations . . . that disentitles them to the presumption of truth.”).

II. PLEADING STANDARD FOR FRAUD

“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Federal courts apply this standard regardless of whether the substantive law is state or federal. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). To satisfy the heightened standard of Rule 9(b), the pleadings must be “specific enough to give defendants notice

1 of the particular misconduct . . . so they can defend against the charge and not just deny
2 that they have done anything wrong.” Bly-Magee v. California, 236 F.3d 1014, 1019
3 (9th Cir. 2001) (quoting Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)). Put
4 another way, the pleadings must provide “‘the who, what, when, where, and how’ of the
5 misconduct charged.” Vess, 317 F.3d at 1106 (quoting Cooper v. Pickett, 137 F.3d 616,
6 627 (9th Cir. 1997)).

7 The heightened pleading standard of Rule 9(b) applies to all claims “grounded in
8 fraud” and may include claims where fraud is not a required element. Id. at 1103-1104.
9 “Where fraud is not an essential element of a claim, only those allegations of the
10 complaint which aver fraud are subject to Rule 9(b)’s heightened pleading standard.”
11 Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). If the averment fails to
12 meet the heightened standard, then the Court should disregard the fraud allegations and
13 analyze the sufficiency of the claim only as to the non-fraudulent conduct. Id.

14 **III. SOLUTIONS IQ, INC.’S MOTION TO DISMISS**

15 Plaintiff names Defendant Solutions IQ, Inc. (“Solutions”) in four of his claims:
16 (1) unjust enrichment, (Doc. No. 16 at 7), (2) restitution, (id. at 9), (3) constructive trust
17 (id. at 20), and (4) declaratory relief, (id. at 25). Solutions argues that all of the claims
18 against it should be dismissed because Plaintiff has not met his burden at the pleading
19 stage. (Doc. No. 19-2 at 2.) The Court agrees with Solutions.

20 Plaintiff has failed to offer sufficient facts to establish a plausible claim against
21 Solutions. Twombly, 550 U.S. at 570. The FAC provides only one allegation of
22 wrongdoing against Solutions: that Solutions “knowingly and/or negligently accepted
23 funds from [Defendant] Tirrell.” (Doc. No. 16 ¶ 31.) This bare assertion, based solely on
24 Plaintiff’s information and belief, is precisely the type of legal conclusion that is not
25 entitled to a presumption of truth. Iqbal, 556 U.S. at 678. And because the FAC provides
26 no other facts to support Plaintiff’s claims against Solutions, it does not provide “fair
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1 notice of what [Plaintiff’s] claim is and the grounds upon which it rests. Conley v.
2 Gibson, 355 U.S. 41, 47 (1957). As such, the Court grants Solutions’ motion to dismiss.¹

3 When dismissing a complaint, “leave to amend should be granted unless the
4 district court determines the pleading could not possibly be cured by the allegation of
5 other facts.” Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting
6 Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)). In his opposition brief, Plaintiff
7 argues he is able to assert additional facts to cure any deficiency against Solutions. (Doc.
8 No. 26 at 13-14.) Thus, the Court dismisses Plaintiff’s claims against Solutions with
9 leave to amend.

10 **IV. PILLSBURY MOTION TO DISMISS**

11 Plaintiff named Defendants Pillsbury Winthrop Shaw Pittman LLP and Christian
12 Salaman (together the “Pillsbury Defendants”) in two of his claims: (1) breach of
13 fiduciary duties of care and loyalty, (Doc. No. 16 at 12), and (2) professional negligence,
14 (id. at 19). The Pillsbury Defendants represented BT as legal counsel during the relevant
15 times. (Id. ¶ 22; see also Doc. No. 20-1 at 4.) As counsel for BT, Plaintiff alleges the
16 Pillsbury Defendants violated their duties to Plaintiff. The Pillsbury Defendants move to
17 dismiss, arguing they never owed Plaintiff any duties because there was no attorney-
18 client relationship. (Doc. No. 20-1 at 7.)

19 To plead a breach of fiduciary duties, Plaintiff must allege facts showing “the
20 existence of a fiduciary relationship, its breach, and damage proximately caused by that
21 breach.” Pierce v. Lyman, 1 Cal.App.4th 1093, 1101 (1991). To plead the tort of
22 professional negligence, Plaintiff must allege facts showing the Pillsbury Defendants
23 owed him a duty “to use such skill, prudence and diligence as other members of his
24 profession commonly possess and exercise,” a breach of that duty, and causation. Turpin

27 ¹ Because Plaintiff’s claim against Solutions fails to meet the pleading standard under Fed. R. Civ. P. 8,
28 the Court does not address whether Plaintiff’s claims against Solutions must meet the higher pleading
standard of Rule 9.

1 v. Sortini, 31 Cal.3d 220, 229-30 (1982). Because these two claims overlap substantially,
2 the Court analyzes them together.

3 “A key element of any action for professional malpractice is the establishment of a
4 duty by the professional to the claimant.” Moore v. Anderson Zeigler Disharoon
5 Gallagher & Gray, 109 Cal.App.4th 1287, 1294 (2003); accord Navellier v. Sletten, 262
6 F.3d 923, 234 (9th Cir. 2001). “An attorney-client relationship normally is essential to
7 the existence of an attorney’s duty toward others.” Berg & Berg Enters., LLC v.
8 Sherwood Partners, Inc., 131 Cal.App.4th 802, 826 (2005). This is especially true when
9 “the attorney’s client and the third party are adverse, as the attorney’s duty of loyalty to
10 his or her client cannot be divided or diluted by a duty owed to a third party.” Id.

11 Under the general rule, Plaintiff has not established a basis for liability against the
12 Pillsbury Defendants. Plaintiff does not allege that the Pillsbury Defendants ever
13 represented him. (See generally Doc. No. 16.) Indeed, the Purchase Agreement Plaintiff
14 included in the Complaint states that “[Plaintiff] agrees that Pillsbury Winthrop Shaw
15 Pittman LLP has acted as counsel for [BT] and no other Person in connection with this
16 Agreement and the Pillsbury Winthrop Shaw Pittman LLP has not previously had, and
17 will not have by virtue of this Agreement, any attorney-client relationship with
18 [Plaintiff].” (Doc. No. 16-1 at 28.) Furthermore, because BT and Plaintiff were
19 counterparties to the agreement, the Pillsbury Defendants’ duties to their client, BT,
20 cannot be divided or diluted to include obligations to Plaintiff. Berg & Berg Enters.,
21 LLC, 131 Cal.App.4th at 826.

22 Neither has Plaintiff established liability under the intended beneficiary doctrine.
23 As an exception to the general rule, “an attorney may be liable to nonclients in limited
24 circumstances where the nonclient was the intended beneficiary of the attorney’s
25 service.” Moore, 109 Cal.App.4th at 1294-95; accord Schick v. Lerner, 193 Cal.App.3d
26 1321, 1330 (1987). This exception, however, does not apply to adverse parties. Id. As
27 the Court in Schick explained, an adverse party cannot be an intended beneficiary of an
28 attorney’s services because it would divide the attorney’s loyalty and “impermissibly

1 intrude upon the attorney-client relationship.” Id.; accord Goodman v. Kennedy, 18
2 Cal.3d 335, 344 (1976) (“To make an attorney liable for negligent confidential advice not
3 only to the client who enters into a transaction in reliance upon the advice but also to the
4 other parties to the transaction with whom the client deals at arm’s length would inject
5 undesirable self-protective reservations into the attorney’s counselling role.”); Omega
6 Video Inc. v. Superior Court, 146 Cal.App.3d 470, 480 (1983) (“[A]n attorney may not
7 be sued for negligent representation of a client by an adverse party in an action who
8 claims to have suffered resulting injury from such negligence.”). When Plaintiff entered
9 into the stock purchase agreement with BT, Plaintiff and BT were adverse parties. Thus,
10 Plaintiff cannot show he was the intended beneficiary of the Pillsbury Defendants’
11 services.

12 Plaintiff argues the Pillsbury Defendants owed it “an independent legal duty not to
13 defraud individuals engaged in business transactions with his or her client.” Favila v.
14 Katten Munchin Rosenman LLP, 188 Cal.App.4th 189, 210 (2010). The Court need not
15 decide, at this time, whether Plaintiff can state a claim under Favila because, even if he
16 could, Plaintiff has failed to specifically plead fraud against the Pillsbury Defendants.

17 To bring a claim under Favila, Plaintiff needs to allege fraud with specificity.
18 Vess, 317 F.3d at 1103-04. Plaintiff has not done so. Plaintiff’s allegations against the
19 Pillsbury Defendants are mere conclusory recitations of the elements of a claim. For
20 example, with regards to the Breach of Fiduciary Duties claim, Plaintiff states that
21 “Pillsbury knew or at a minimum should have known that its clients were absconding
22 Plaintiff’s funds and using those funds for an improper purpose.” (Doc. No. 16 ¶ 71.)
23 Similarly, Plaintiff claims the Pillsbury Defendants breached its duties by (1)
24 “misrepresenting the nature of Plaintiff’s equity interest in BT”, (2) “acquiescing to, or at
25 a minimum negligently allowing, the misappropriation of Plaintiff’s \$250,000
26 investment,” and (3) “negligently failing to oversee and properly counsel BT’s corporate
27 governance.” (Id. ¶ 72.) None of these allegations address the who, what, when, where,
28 and how. Instead, they simply provide conclusory recitations of the elements of a claim.

1 Plaintiff has not described the Pillsbury Defendants’ specific misrepresentations, when
2 those misrepresentations were made, who made them, how the Pillsbury Defendants
3 would have known they were incorrect, how Plaintiff relied on them, or whether the
4 Pillsbury Defendants benefited from them in any way. At bottom, Plaintiffs allegations
5 are not “specific enough to give defendants notice of the particular misconduct . . . so
6 they can defend against the charge and not just deny that they have done anything
7 wrong.” Bly-Magee, 236 F.3d at 1019. Thus, the Court grants the Pillsbury Defendants’
8 motion to dismiss. However, because Plaintiff claims, in his opposition brief, to be able
9 to assert additional facts, the Court grants leave to amend. Bly-Magee, 236 F.3d at 1019.
10 If Plaintiff choses to amend their claims against the Pillsbury Defendants, he must also
11 plead facts sufficient to establish their citizenship and why diversity jurisdiction is
12 proper. See, e.g., Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990).

13 **V. PAYTON MOTION TO DISMISS**

14 Plaintiff named Defendant Payton (“Payton”) in fourteen claims. (Doc. No. 16.)
15 Payton moves to dismiss all of Plaintiff’s claims because (1) Plaintiff has failed to join an
16 indispensable party and (2) fails to state a claim. The Court first addresses the
17 indispensable party argument, and then address each of the fourteen claims in turn.

18 **A. Indispensable Party**

19 Plaintiff’s original complaint included Bruce Hopkins as a defendant. (Doc. No.
20 1.) On April 7, 2017, the Pillsbury Defendants filed a motion to dismiss, arguing, among
21 other things, that the presence of Bruce Hopkins destroyed diversity jurisdiction. (Doc.
22 No. 3.) On April 12, 2017, Plaintiff filed a notice of dismissal as to Bruce Hopkins and
23 his wife, Schrell Hopkins. (Doc. No. 7.) Plaintiff then filed the First Amended
24 Complaint that does not include claims against Bruce or Schrell Hopkins. (Doc. No. 16.)
25 Payton argues that Bruce Hopkins is an indispensable party and that Plaintiff’s action
26 must be dismissed because it fails to join him. (Doc. No. 22-1 at 24-25.)

27 “A party is indispensable if his interest is such that a decree cannot be rendered
28 that will not affect his interest, or if such party’s absence leaves the controversy in such a

1 condition that its final determination is wholly inconsistent with equity and good
2 conscience.” Trans Pac. Corp. v. South Seas Enters., Ltd., 291 F.2d 435, 436 (9th Cir.
3 1961). “A nonparty to a commercial contract ordinarily is not a necessary party to an
4 adjudication of rights under the contract.” Northrop Corp. v. McDonnell Douglas Corp.,
5 705 F.2d 1030, 1044 (9th Cir. 1983). Similarly, “it is not necessary for all joint
6 tortfeasors to be named as defendants in a single lawsuit.” Temple v. Synthes Corp.,
7 Ltd., 498 U.S. 5, 7 (1990). Here, Plaintiff does not allege that Bruce Hopkins was a party
8 to the Stock Purchase Agreement. (See Doc. No. 16-1 at 29.) Thus Bruce Hopkins is not
9 indispensable to the claims arising from the breach of that agreement. Similarly, Bruce
10 Hopkins is not an indispensable party to any of the claims sounding in fraud because,
11 even if the torts were committed jointly, joint tortfeasors are not indispensable. Temple,
12 498 U.S. at 7. Payton has offered no other reasons why Plaintiff is indispensable and
13 cites no cases in support of such a conclusion. (Doc. No. 22-1 at 24-25.) As such, the
14 Court denies Payton’s motion to dismiss for failure to join an indispensable party.

15 **B. Intentional Misrepresentation**

16 To plead a claim of intentional misrepresentation, Plaintiff must allege “(1) a
17 misrepresentation; (2) knowledge of falsity; (3) intent to induce reliance; (4) actual and
18 justifiable reliance, and (5) resulting damages.” Cisco Systems, Inc. v.
19 STMicroelectronics, Inc., 77 F.Supp.3d 887, 897 (N.D. Cal. 2014). Because a claim of
20 intentional misrepresentation simply restates the elements of fraud, each element must be
21 pleaded with particularity. Id.; Fed. R. Civ. P. 9(b). Plaintiff must specifically indicate
22 the “time, place, and specific content of the false representations as well as the identities
23 of the parties to the misrepresentation.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th
24 Cir. 2007). Plaintiff’s FAC fails to satisfy the heightened pleading standard of Rule 9(b).

25 In the intentional misrepresentation section of the FAC, Plaintiff entirely fails to
26 indicate which defendant engaged in misrepresentation. (Doc. No. 16.) Instead, the FAC
27 talks generally about what “Defendants” did. For example, “Defendants conspired with
28 one another to induce Plaintiff into investing,” “Defendants purposefully misinformed

1 Plaintiff about the existence of other ‘investors,’” and “Defendants purposefully and
2 knowingly concealed the facts from Plaintiff.” (Id. ¶ 37.) Similarly, Plaintiff’s
3 allegations in the general background section of the FAC improperly lump together
4 defendants. For example, Plaintiff alleges “Defendants PHILIPPE GUELTON,
5 TIRRELL PAYON (sic), SUSAN PAYTON, SHAWN SMITH, PAUL WOODHULL,
6 BT SOFTWARE & RESEARCH, INC., SHEKNOWS MEDIA, MOMENTUM
7 MARKETING, and Does 1-100, inclusive, convinced Plaintiff to invest \$250,000.00 into
8 BT.” (Doc. No. 16 ¶ 19.) This is not specific. Swartz, 476 F.3d at 764-65 (“Rule 9(b)
9 does not allow a complaint to merely lump multiple defendants together.”)

10 Furthermore, the few allegations of misrepresentation that identify a specific
11 defendant fail to satisfy the heightened pleading standards of Rule 9(b) for other reasons.
12 For example, Plaintiff alleges that “BRUCEPHILIPPE (sic) AND TIRELL (sic)
13 misrepresented that Kaliki already had major contacts with major automobile
14 manufacturers like General Motors and Ford, and had consummated strategic
15 relationships with media conglomerates like the New York Times. In actuality no such
16 contacts ever existed.” (Doc. No. 16 ¶ 20.) Although it mentions specific defendants, it
17 fails other reasons. First, it fails to identify the specific time and content of the
18 misrepresentations. Vess, 317 F.3d at 1106. Second, it fails to provide any facts
19 supporting the conclusion that Kaliki never had the promised contacts. Finally, it entirely
20 fails to allege, much less provide facts showing, that Defendants knew these
21 representations were false at the time they were made. Cisco Systems, Inc., 77 F.Supp.3d
22 at 897.

23 In light of these deficiencies, the Court grants Payton’s motion to dismiss
24 Plaintiff’s intentional misrepresentation claim with leave to amend.

25 **C. Unjust Enrichment**

26 “The elements of an unjust enrichment claim are ‘the receipt of a benefit and [the]
27 unjust retention of the benefit at the expense of another.’” Peterson v. Cellco P’ship, 164
28 Cal.App.4th 1583, 1593 (2008). There can be no unjust enrichment where a plaintiff

1 receives “the benefit of the bargain.” *Id.* Plaintiff alleges that he did not receive the
2 benefit of the bargain because he was misled by defendants’ representations—i.e., that he
3 was defrauded. For example, Plaintiff claims that “Defendants misrepresented that
4 Plaintiff’s investment would be used to further the development of Kaliki . . . and Plaintiff
5 reasonably relied on these representations in good faith in deciding to invest in BT.”
6 (Doc. No. 16 ¶ 45.) Similarly, “Defendants further represented that Plaintiff would
7 receive, in consideration for his investment an upfront 2.5% equity in BT . . . and
8 Plaintiff reasonably relied on this misrepresentation.” (*Id.* ¶ 46.)

9 These allegations in support of a claim of unjust enrichment are grounded in fraud
10 and, thus, are subject to the heightened pleading standard of Rule 9(b). *Vess*, 317 F.3d at
11 1106 (“Fraud can be averred by specifically alleging fraud, or by alleging facts that
12 necessarily constitute fraud.”). And like the underlying fraud claim, Plaintiff has not
13 alleged sufficiently specific facts to survive the heightened pleading standard.
14 Accordingly, Plaintiff’s claim for unjust enrichment is dismissed with leave to amend.

15 **D. Restitution**

16 “A person who has been unjustly enriched at the expense of another is required to
17 make restitution to the other. A person is enriched if he receives a benefit at another’s
18 expense.” *Troyk v. Farmers Grp., Inc.*, 171 Cal.App.4th 1305, 1339 (2009) (quoting
19 *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262 (1999)).
20 Thus the elements of a restitution claim are identical to those of an unjust enrichment
21 claim. *See Bowler v. Home Depot USA Inc.*, 2010 WL 3619850, *4 (N.D. Cal. Sept. 13,
22 2010) (“Restitution is defined by the element of “unjust enrichment”). As such, the
23 analysis is identical: Plaintiff’s restitution claim is grounded in fraud and he has failed to
24 plead the facts with sufficient particularity. Thus, the restitution claim is dismissed with
25 leave to amend.

26 **E. Breach of Fiduciary Duties**

27 To plead a breach of fiduciary duties, Plaintiff must allege facts showing “the
28 existence of a fiduciary relationship, its breach, and damage proximately caused by that

1 breach.” Pierce, 1 Cal.App.4th at 1101. Plaintiff alleges that Payton owed him fiduciary
2 duties as a shareholder of BT. (Doc. No. 16 ¶ 65.) Plaintiff further alleges that Payton
3 breached his duties by misrepresenting the nature of Plaintiff’s equity interest, the nature
4 of BT’s business, and misappropriating corporate funds. (Id. ¶ 66.) Finally, Plaintiff
5 alleges that Payton’s breach was the proximate cause of Plaintiff’s injury because
6 Plaintiff would not have invested otherwise. (Id. ¶ 67, 48.) These facts are sufficient.
7 Because a defendant can breach their fiduciary duties through negligence, the heightened
8 pleading standard of fraud is not required. Ash v. North Am. Title Co., 223 Cal.App.4th
9 1258, 1276 (2014) (“The breach of fiduciary duty can be based upon either negligence or
10 fraud depending on the circumstances.”) Thus, the Court denies Payton’s motion to
11 dismiss Plaintiff’s claim for breach of fiduciary duty.

12 **F. Common Count**

13 “The common count is a general pleading which seeks recovery of money without
14 specifying the nature of the claim.” Title Ins. Co. v. State Bd. Of Equalization, 4 Cal.4th
15 715, 731 (1992). To plead a claim of common count, Plaintiff must allege “(1) the
16 statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work
17 done, etc., and (3) nonpayment.” Id. “A cause of action for money had and received is
18 stated if it is alleged the defendant ‘is indebted to the plaintiff in a certain sum for money
19 had and received by the defendant for the use of the plaintiff.’” Id.

20 Plaintiff has failed to allege sufficient facts to state a claim of common count.
21 Plaintiff’s common count claim names eight defendants: Philippe Guelton, Tirell Payton,
22 Susan Payton, Shawn Smith, Paul Woodhull, BT Software and Research, Inc., SheKnows
23 Media, and Momentum Marketing. (Doc. No. 16 at 13.) However, Plaintiff fails to
24 identify the “indebtedness in a certain sum” of each defendant. See Farmers Ins. Exch.,
25 53 Cal.App.4th at 460. Furthermore, Plaintiff fails to provide facts supporting
26 defendants’ indebtedness. Plaintiff claims he is owed \$250,000 but does not provide any
27 factual basis for the indebtedness—contractual or otherwise.
28

1 In light of these deficiencies, the Court grants Payton’s motion to dismiss the
2 common count claim with leave to amend. Plaintiff must identify the particular
3 individuals from whom he seeks recovery, as well as their individual indebtedness and
4 the basis for such indebtedness.

5 **G. Intentional Interference with Prospective Economic Relations**

6 To plead a claim of intentional interference with prospective economic relations,
7 Plaintiff must offer facts showing “(1) an economic relationship between the plaintiff and
8 a third party with the probability of future economic benefit to plaintiff, (2) defendant's
9 knowledge of the relationship, (3) intentional wrongful acts by defendant intended to
10 disrupt the relationship, (4) actual disruption, and (5) economic harm to
11 plaintiff.” Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151 (9th Cir. 2008);
12 Green Hills Software, Inc. v. Safeguard Scientifics and SPC Private Equity Partners, 33
13 Fed.Appx. 893, 894 (9th Cir. 2002) (citing Della Penna v. Toyota Motor Sales, U.S.A.
14 Inc., 11 Cal.4th 376, 389 (1995)). Plaintiff must “identify with particularity the
15 relationships or opportunities with which [d]efendant is alleged to have
16 interfered.” UMG Recording, Inc. v. Global Eagle Entm’t, Inc., 117 F.Supp.3d 1092,
17 1118 (C.D. Cal. 2015). “Allegations that a defendant interfered with a relationship with
18 an ‘as yet unidentified’ customer will not suffice.” Id. at 1117 (citing Westside Ctr.
19 Assocs. v. Safeway Stores 23, Inc., 42 Cal.App.4th 507, 527 (1996)).

20 Plaintiff’s claim for intentional interference with prospective economic relations
21 fails because he has not identified a particular relationship affected by defendants. In his
22 opposition brief, Plaintiff argues he has satisfied the pleading requirements by alleging
23 that defendants’ actions prevented him from “using his investment for other
24 endeavors.” (Doc. No. 32 at 10.) However, this is precisely the type of ambiguous, as-
25 yet-identified-customer that does not suffice. UMG Recording, Inc., 117 F.Supp.3d at
26 1118. To survive a motion to dismiss, Plaintiff must identify an actual relationship that
27 was harmed by defendants’ conduct. Green Hills Software, Inc., 33 Fed.Appx. at
28 894. Plaintiff has not done so and, thus, the Court grants Payton’s motion to dismiss

1 Plaintiff's intentional interference with prospective economic relations claim with leave
2 to amend.

3 **H. Negligent Interference with Prospective Economic Relations**

4 As with a claim for intentional interference with prospective economic relations, a
5 claim for negligent interference requires Plaintiff plead with particularity "the
6 relationships or opportunities with which [d]efendant is alleged to have
7 interfered." UMG Recording, Inc., 117 F.Supp.3d at 1118. Plaintiff has not identified a
8 particular relationship affected by defendants and, thus, the Court grants Payton's motion
9 to dismiss Plaintiff's negligent interference with prospective economic relations claim
10 with leave to amend.

11 **I. Unfair Business Practices**

12 California Business and Professional Code § 17200, also known as the Unfair
13 Competition Law ("UCL"), generally prohibits "any unlawful, unfair or fraudulent
14 business act or practice and unfair, deceptive, untrue or misleading advertising." Bus. &
15 Prof. Code § 17200. To successfully plead a UCL claim, plaintiff must allege (1) an
16 economic injury, (2) resulting from an unfair business practice. Kwikset Corp. v.
17 Superior Court, 51 Cal.4th 310, 322 (2011). "[A] plaintiff may proceed under the UCL
18 on three possible theories. First, 'unlawful' conduct that violates another law is
19 independently actionable under Section 17200. Alternatively, a plaintiff may plead the
20 defendants' conduct is "unfair" within the meaning of the several standards developed by
21 the courts. Finally, a plaintiff may challenge "fraudulent" conduct by showing that
22 "members of the public are likely to be deceived" by the challenged business acts or
23 practices." Stewart v. Screen Gems-EMI Music, Inc., 81 F.Supp.3d 938 (N.D. Cal.
24 2015). "A business practice is unfair within the meaning of the UCL if it violates
25 established public policy or if it is immoral, unethical, oppressive or unscrupulous and
26 causes injury to consumers which outweighs its benefits." McKell v. Washington Mut.,
27 Inc., 142 Cal.App.4th 1457, 1473 (2006). Determining whether a practice was unfair "is
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1 one of fact which requires a review of the evidence from both parties. It thus cannot
2 usually be made on demurrer.” Id.

3 Plaintiff has provided facts that could be considered unfair practices under the
4 broad meaning of the UCL. For example, Plaintiff alleges he was deprived of the benefit
5 of his \$250,000 investment because he never received documentation of his investment.
6 Similarly, Plaintiff alleges that defendants improperly used his investment. As a result of
7 these arguably unfair practices, Plaintiff claims he suffered direct economic injury, as he
8 was deprived of his \$250,000. In response, Payton has not raised any arguments why
9 Plaintiff’s UCL claim fails as a matter of law. As such, the Court denies Payton’s motion
10 to dismiss Plaintiff’s UCL claim.

11 **J. Negligence**

12 “The elements of a negligence cause of action are the existence of a legal duty of
13 care, breach of that duty, and proximate cause resulting in injury.” McIntyre v. Colonies-
14 Pac., LLC, 228 Cal.App.4th 664, 671 (2014). In California, officers and directors “have
15 an obligation to shareholders individually not to profit from their official position at the
16 shareholders’ expense.” Jones v. H. F. Ahmanson & Co., 1 Cal.3d 93, 110 (1969).
17 Plaintiff alleges that Payton was the Chief Executive Officer of BT, thus owing him a
18 duty of care as a shareholder of BT. (Doc. No. 16 ¶ 14.) Plaintiff alleges that Payton
19 breached that duty by, for example, making false statements regarding the valuation of
20 the company and misappropriating his investment. (Id. ¶¶ 17, 19-21.) Finally, Plaintiff
21 alleges his injury, the loss of his \$250,000 investment, was proximately caused by these
22 misrepresentations.

23 Payton’s only argument that Plaintiff’s negligence claim should fail is that it is
24 grounded in fraud and fails to meet the heightened pleading standard of Rule 9(b). (Doc.
25 No. 22-1 at 12, n. 1.) But this heightened standard is unnecessary. “The breach of
26 fiduciary duty can be based upon either negligence or fraud depending on the
27 circumstances.” Ash v. North Am. Title Company, 223 Cal.App.4th 1258, 1276 (2014).
28 Although many of Plaintiff’s allegations recite misrepresentations, and thus sound in

1 fraud, that is not the case for all of them. For example, taking the alleged facts as true,
2 and drawing the inferences in favor of Plaintiff, Plaintiff has alleged that Payton breached
3 his duty of care by misappropriating or otherwise misusing Plaintiff’s \$250,000
4 investment. This allegation does not sound in fraud and would be a violation of Payton’s
5 duties. Thus the Court denies Payton’s motion to dismiss Plaintiff’s negligence claim.

6 **K. Constructive Trust**

7 “[T]hree conditions are necessary for a plaintiff to establish a constructive trust for
8 its benefit: the existence of a res (some property or some interest in property), the
9 plaintiff’s right to that res, and the defendant’s gain of the res by fraud, accident,
10 mistake, undue influence or other wrongful act.” U.S. v. Pegg, 782 F.2d 1498, 1500 (9th
11 Cir. 1986). “Under California law, a constructive trust is an equitable remedy, not a
12 substantive claim. In order to establish a constructive trust, the purported beneficiary of
13 the trust must have a substantive right to receive the property.” Fourth Investment LP v.
14 U.S., 2010 WL 3069685, *8 (S.D. Cal. Aug. 4, 2010) (citations omitted). Because at
15 least some of Plaintiff’s claims will survive defendants’ motions to dismiss, it is possible
16 that Plaintiff will establish a substantive right to some property held by defendants. As
17 such, the Court denies Payton’s motion as to the constructive trust.

18 **L. False Promise**

19 A false promise claim is simply a particular species of fraud. See Beckwith v.
20 Dahl, 205 Cal.App.4th 1039, 1060 (2012) (referring to the action as “deceit by false
21 promise” or “fraudulent deceit”); Bernstein v. Vocus, Inc., 2014 WL 3673307, *5 (N.D.
22 Cal. July 23, 2014) referring to the action as “a false promise fraud theory”). As such,
23 the necessary elements include (1) a promise of future performance; (2) made without
24 actual intent to perform; (3) intent to induce reliance; (4) actual reliance; (5) a failure to
25 perform the promised act; and (6) resulting injury. Id. Because a false promise claim is
26 simply a variant of a fraud claim, the heightened pleading standards of Rule 9(b) apply.
27 As previously explained, Plaintiff’s complaint fails to satisfy the specificity required of
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1 fraud claims, thus the Court grant's Payton's motion to dismiss as to the false promise
2 claim with leave to amend.

3 **M. Accounting**

4 "An accounting cause of action is equitable and may be sought where the accounts
5 are so complicated that an ordinary legal action demanding a fixed sum is impracticable."
6 Hamilton v. Bank of Blue Valley, 746 F.Supp.2d 1160, 1175 (E.D. Cal. 2010). To plead
7 a claim of accounting, Plaintiff must allege (1) a fiduciary relationship and (2) "an
8 unknown balance due from the Defendants that cannot be ascertained without an
9 accounting." Baker v. Varitalk, Inc., 2008 WL 11319707, *4 (C.D. Cal. Feb. 6, 2008);
10 see also Kritzer v. Lancaster, 96 Cal.App.2d 1, 6-7 (1950). Plaintiff has alleged sufficient
11 facts to plead an accounting. Plaintiff alleges that Payton owed him fiduciary duties as
12 Chief Executive Officer of BT. (Doc. No. 16 ¶ 14.) Similarly, Plaintiff has alleged facts
13 showing there is some unknown balance possibly due to him resulting from complicated
14 transactions involving misappropriation and possible embezzlement. (E.g., Doc. No. 16
15 ¶¶ 17, 19-21.) Thus, the Court denies Payton's motion to dismiss Plaintiff's accounting
16 claim.

17 **N. Declaratory Relief – Count 1**

18 Federal courts have the power to grant declaratory relief pursuant to the
19 Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. This power is discretionary, and
20 courts consider various factors in deciding whether the relief is appropriate. 28 U.S.C. §
21 2201(a) ("[courts] may declare the rights and other legal relations of any interested
22 party"); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007) ("[we] vest
23 district courts with discretion in the first instance, because facts bearing on the usefulness
24 of the declaratory judgment remedy, and the fitness of the case for resolution, are
25 peculiarly within their grasp"); Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1107 (9th Cir.
26 2011) (listing factors). A cause of action for declaratory relief does not state an
27 independent action, but rather "merely seeks relief." Audette v. Int'l Longshoremen's
28 and Warehousemen's Union, 195 F.3d 1107, 1111 n.2 (9th Cir. 1999).

1 Plaintiff's first count of declaratory relief is grounded in fraud. Vess, 317 F.3d at
2 1103-04. Plaintiff alleges that defendants misrepresented that Plaintiff's investment
3 would be used for the benefit of BT and also misrepresented that Baaklini would be
4 compensated for his work on behalf of BT. (Doc. No. 16 ¶¶ 152-53.) As a result,
5 Plaintiff claims he invested \$250,000 in BT and recruited Baaklini to develop OnStay.
6 (Id. ¶ 150.) These allegations merely repeat the allegations of Plaintiff's False Promise
7 claim. (Compare id. ¶ 138 with id. ¶¶ 152-53.) As such, the Court finds the heightened
8 pleading standards of Rule 9(b) apply to Plaintiff's first count of declaratory relief—
9 which Plaintiff has not met—and dismisses the claim with leave to amend.

10 **O. Declaratory Relief – Count 2**

11 Courts have discretionary power to grant declaratory relief. 28 U.S.C. § 2201(a);
12 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007). In exercising this
13 power, district courts consider various factors including, whether the declaratory
14 judgment will “resolve all aspects of the controversy in a single proceeding” or “serve a
15 useful purpose in clarifying the legal relations at issue.” Allstate Ins. Co. v. Herron, 634
16 F.3d 1101, 1107 (9th Cir. 2011).

17 The Court declines to exercise jurisdiction over Plaintiff's second claim of
18 declaratory relief. As a threshold matter, Plaintiff's allegations fail to meet even the
19 pleading standards of Rule 8. The entirety of the allegations are set forth in Paragraph
20 157: “There is an actual controversy between Plaintiff and Defendant SOLUTIONS IQ,
21 INC. regarding whether Defendant SOLUTIONS IQ, INC. purposefully and knowingly,
22 or at a minimum, negligently accepted funds from TIRRELL that were misappropriated,
23 concealed and/or absconded with.” (Doc. No. 16 ¶ 157.) This allegation contains
24 nothing more than conclusory remarks, devoid of specific, supporting facts. Iqbal, 556
25 U.S. at 678. Second, Plaintiff cannot seek a declaratory judgment against Solutions
26 because it has not asserted any valid claim against it. As the Court previously noted, the
27 claims against Solutions are dismissed with leave to amend. Thus, any declaratory relief
28 against Solutions is also dismissed. Audette, 195 F.3d at 1111 n.2 (a cause of action for

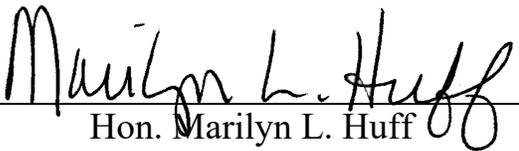
1 declaratory relief does not state an independent action). Finally, the Court declines to
2 entertain declaratory relief against Payton alone. Plaintiff seeks a declaration of the
3 rights to money presumably held by Solutions. Thus declaratory relief against Payton
4 alone would not “resolve all aspects of the controversy” because Plaintiff would still need
5 to sue Solutions to recover. Allstate Ins. Co., 634 F.3d at 1107. Similarly, any
6 declaratory relief against Payton would not “serve a useful purpose in clarifying the legal
7 relations at issue” because the lawfulness of Solution’s possession of the money in
8 question is still unknown. Id. Thus the Court grants Payton’s motion to dismiss the
9 second count of declaratory relief with leave to amend.

10 **CONCLUSION**

11 For the foregoing reasons, the Court grants Defendant Solutions IQ, Inc.’s motion
12 to dismiss with leave to amend. (Doc. No. 19.) The Court also grants the Pillsbury
13 Defendants’ motion to dismiss with leave to amend. (Doc. No. 20.) Finally, the Court
14 grants, in part, and denies, in part, Defendant Payton’s motion to dismiss with leave to
15 amend as previously noted. (Doc. No. 22.) If Plaintiff seeks to amend his complaint to
16 cure the deficiencies noted, Plaintiff must file a new complaint as to all defendants and all
17 claims within 30 days of this order. This second amended complaint will then be the
18 single operative complaint in this matter.

19 **IT IS SO ORDERED.**

20 DATED: June 9, 2017

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23 Hon. Marilyn L. Huff
24 United States District Judge
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