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

SCRIPPS HEALTH, a California corporation,

Plaintiff,

v.

NTHRIVE REVENUE SYSTEMS, LLC, formerly known as Medassets Analytical Systems, LLC, a Delaware limited liability company; NTHRIVE, INC., doing business as nThrive Revenue Systems, LLC, a Delaware corporation; FORMATIV HEALTH, a Delaware limited liability company,

Defendants.

Case No.: 19-cv-00760-H-BLM

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S MOTION TO DISMISS DEFENDANTS’ COUNTERCLAIMS WITH LEAVE TO AMEND

[Doc. No. 23.]

On July 22, 2019, Plaintiff Scripps Health filed a motion to dismiss Defendants nThrive Revenue Systems, LLC and nThrive, Inc.’s counterclaims. (Doc. No. 23.) On August 20, 2019, the Court took the motion to dismiss under submission. (Doc. No. 29.) On August 26, 2019, nThrive filed its response in opposition to Scripps’s motion to dismiss. (Doc. No. 31.) On August 30, 2019, Scripps filed its reply. (Doc. No. 34.) For the reasons below, the Court grants in part and denies in part Scripps’s motion to dismiss.

1 **Background**

2 The following facts are taken from the allegations in Plaintiff’s complaint. Plaintiff
3 Scripps is a nonprofit health care system with four hospitals and twenty-eight outpatient
4 facilities. (Doc. No. 1, Compl. ¶ 5.) Scripps entered in an agreement with Defendant
5 nThrive, effective September 25, 2017, for the management, recovery, and collection of
6 Scripps’s legacy accounts receivables. (Id. ¶¶ 19, 31.)

7 Scripps alleges that nThrive did not perform the services required under the
8 agreement in accord with contractual or industry standards. (Id. ¶ 39.) Scripps further
9 alleges, among other things, that nThrive “secretly and surreptitiously assigned,
10 subcontract, and/or delegated” some or all of its obligations under the agreement to third-
11 party Formativ Health, despite the inclusion of an anti-assignment clause in the agreement.
12 (Id. ¶¶ 42-44.)

13 On April 24, 2019, Scripps filed a complaint against nThrive and Formativ Health,
14 alleging claims for: (1) fraud and deceit; (2) negligent misrepresentation; (3) aiding and
15 abetting fraud; (4) conspiracy to commit fraud; (5) intentional interference with contractual
16 relations; (6) intentional interference with prospective economic advantage; (7) breach of
17 contract; (8) breach of the covenant of good faith and fair dealing; (9) negligence; (10)
18 unjust enrichment; (11) demand for accounting; and (12) unfair business practices in
19 violation of California Business and Professions Code § 17200 *et seq.* (Doc. No. 1.)

20 On June 28, 2019, Formativ Health filed an answer to the complaint. (Doc. No. 8.)
21 On July 1, 2019, nThrive filed an answer to the complaint and counterclaims against
22 Scripps, alleging counterclaims for: (1) breach of contract; (2) breach of the implied
23 covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) unjust
24 enrichment. (Doc. Nos. 11, 12.) By the present motion, Scripps moves pursuant to Federal
25 Rule of Civil Procedure 12(b)(6) to dismiss nThrive’s counterclaims for breach of the
26 implied covenant of good faith and fair dealing, negligent misrepresentation, and unjust
27 enrichment. (Doc. No. 23.)

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Discussion

I. Legal Standards

A. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under 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. See Conservation Force v. Salazar, 646 F.3d 1240, 1241 (9th Cir. 2011). Federal Rule of Civil Procedure 8(a)(2) requires that a pleading stating a claim for relief containing “a short and plain statement of the claim showing that the pleader is entitled to relief.” The function of this pleading requirement is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A complaint will survive a Rule 12(b)(6) 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). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Id. (quoting Twombly, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 557). Accordingly, dismissal for failure to state a claim is proper where the claim “lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

In reviewing a Rule 12(b)(6) 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 claimant. See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014). But, a court need not accept “legal conclusions” as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Further, it is improper for a court to assume the

1 claimant “can prove facts which it has not alleged or that the defendants have violated the
2 . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v.
3 Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

4 **II. Analysis**

5 A. nThrive’s Counterclaim for Breach of the Implied Covenant of Good Faith 6 and Fair Dealing

7 In its counterclaims, nThrive alleges a claim for breach of the implied covenant of
8 good faith and fair dealing. (Doc. No. 12 ¶¶ 38-43.) Scripps argues that this counterclaim
9 should be dismissed because it is duplicative of nThrive’s breach of contract counterclaim.
10 (Doc. No. 23-1 at 3.) Scripps also argues that this counterclaim should be dismissed
11 because nThrive has failed to allege any bad faith conduct by Scripps. (Id.)

12 Under California law, every contract “imposes upon each party a duty of good faith
13 and fair dealing in its performance and its enforcement.” McClain v. Octagon Plaza, LLC,
14 159 Cal. App. 4th 784, 796 (2008) (quoting Carma Developers, Inc. v. Marathon Dev. Cal.,
15 Inc., 2 Cal. 4th 342, 371–72 (1992)). This “covenant is implied as a supplement to the
16 express contractual covenants, to prevent a contracting party from engaging in conduct that
17 frustrates the other party’s rights to the benefits of the agreement.” Waller v. Truck Ins.
18 Exch., Inc., 11 Cal. 4th 1, 36 (1995), as modified on denial of reh’g (Oct. 26, 1995). “Or,
19 to put it another way, the ‘implied covenant imposes upon each party the obligation to do
20 everything that the contract presupposes they will do to accomplish its purpose.’” Chateau
21 Chamberay Homeowners Ass’n v. Associated Int’l Ins. Co., 90 Cal. App. 4th 335, 345
22 (2001), as modified on denial of reh’g (July 30, 2001) (quoting Schoolcraft v. Ross, 81
23 Cal. App. 3d 75, 80 (1978)).

24 “[A]llegations which assert such a claim must show that the conduct of the
25 defendant, whether or not it also constitutes a breach of a consensual contract term,
26 demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by
27 an honest mistake, bad judgment or negligence but rather by a conscious and deliberate
28 act, which unfairly frustrates the agreed common purposes and disappoints the reasonable

1 expectations of the other party thereby depriving that party of the benefits of the
2 agreement.” Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395
3 (1990), as modified on denial of reh’g (Oct. 31, 2001); accord Wilson v. 21st Century Ins.
4 Co., 42 Cal. 4th 713, 726 (2007), as modified (Dec. 19, 2007). “Just what conduct will
5 meet these criteria must be determined on a case by case basis and will depend on the
6 contractual purposes and reasonably justified expectations of the parties.” Careau & Co.,
7 222 Cal. App. 3d at 1395. “If the allegations do not go beyond the statement of a mere
8 contract breach and, relying on the same alleged acts, simply seek the same damages or
9 other relief already claimed in a companion contract cause of action, they may be
10 disregarded as superfluous as no additional claim is actually stated.” Id.; see also Chateau
11 Chamberay Homeowners Ass’n, 90 Cal. App. 4th at 345 (“A breach of the implied
12 covenant of good faith and fair dealing involves something beyond breach of the
13 contractual duty itself” (internal quotation marks omitted)).

14 In its counterclaims, nThrive alleges that after the effective date of the agreement at
15 issue, Scripps failed or refused to provide user names and passwords to the personnel
16 assigned to perform the services, leaving the personnel unable to access certain claims.
17 (Doc. No. 12 ¶ 26.) nThrive also alleges that Scripps failed to adjust certain security setting
18 in order to permit the claims processors to print paper versions of the bills to submit to the
19 payors, some of whom will only accept paper bills. (Id. ¶ 27.) In addition, nThrive alleges
20 that Scripps failed to make timely corrections to claim defects that were brought to its
21 attention. (Id. ¶ 28.) nThrive alleges that Scripps’s failure or refusal to timely address and
22 correct these issues impeded nThrive’s services and resulted in claims aging past
23 collectability. (Id. ¶¶ 26-28.)

24 These allegations are sufficient to allege that Scripps engaged in deliberate conduct
25 that demonstrated a failure or refusal to discharge certain contractual responsibilities,
26 which unfairly frustrated the agreed purpose of the contract, thereby satisfying that element
27 of nThrive’s claim for breach of the implied covenant of good faith and fair dealing at the
28 pleading stage. See Careau & Co., 222 Cal. App. 3d at 1395. Further, these allegations

1 are sufficient to allege something beyond a statement of a mere contract breach. As such,
2 the Court declines to dismiss nThrive’s counterclaim for breach of the implied covenant of
3 good faith and fair dealing.

4 B. nThrive’s Counterclaim for Negligent Misrepresentation

5 In its counterclaims, nThrive alleges a claim for negligent misrepresentation. (Doc.
6 No. 12 ¶¶ 44-49.) Scripps argues that this counterclaim should be dismissed because
7 nThrive has failed to satisfy the heightened pleading requirements of Rule 9(b). (Doc. No.
8 23-1 at 6-7.). Scripps also argues that this counterclaim should be dismissed because (Id.
9 at 8-10.)

10 Under California law, “[t]he elements of negligent misrepresentation are ‘(1) the
11 misrepresentation of a past or existing material fact, (2) without reasonable ground for
12 believing it to be true, (3) with intent to induce another’s reliance on the fact
13 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting
14 damage.’” Nat’l Union Fire Ins. Co. v. Cambridge Integrated Servs. Group, Inc., 171 Cal.
15 App. 4th 35, 50 (2009) (citation omitted).

16 Under Federal Rule of Civil Procedure 9, a plaintiff must plead fraud with
17 particularity. “Averments of fraud must be accompanied by ‘the who, what, when, where,
18 and how’ of the misconduct charged.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
19 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). “[A]
20 plaintiff must set forth more than the neutral facts necessary to identify the transaction.
21 The plaintiff must set forth what is false or misleading about a statement, and why it is
22 false.” Id. at 1106 (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir.
23 1994)). “While statements of the time, place and nature of the alleged fraudulent activities
24 are sufficient, mere conclusory allegations of fraud” are not. Moore v. Kayport Package
25 Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Further, “Rule 9(b)’s particularity
26 requirement applies to state-law causes of action.” Vess, 317 F.3d at 1103.

27 In its opposition, nThrive argues that Rule 9(b)’s heightened pleading standards do
28 not apply to its negligent misrepresentation counterclaim, asserting that its negligent

1 misrepresentation claim does not sound in fraud. (Doc. No. 31 at 7-8.) The Court
2 disagrees. “Under California law, negligent misrepresentation is a species of actual fraud
3 and a form of deceit.” Wong v. Stoler, 237 Cal. App. 4th 1375, 1388 (2015), as modified
4 on denial of reh’g (June 23, 2015); see Furla v. Jon Douglas Co., 65 Cal. App. 4th 1069,
5 1077 (1998); Ventura Cty. Nat. Bank v. Macker, 49 Cal. App. 4th 1528, 1530 (1996).
6 Thus, “[i]t is well-established in the Ninth Circuit that both claims for fraud and negligent
7 misrepresentation must meet Rule 9(b)’s particularity requirements.” Neilson v. Union
8 Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); see Hofer v. Wright
9 Med. Tech., Inc., No. 18CV01991 AJB (BLM), 2019 WL 3936130, at *2 (S.D. Cal. Aug.
10 20, 2019); Giglio v. Monsanto Co., No. 15CV2279 BTM(NLS), 2016 WL 1722859, at *4
11 (S.D. Cal. Apr. 29, 2016) (“This court falls within the majority of the district courts in
12 California that consider negligent misrepresentation a species of fraud and apply Rule
13 9(b).”); see, e.g., Kelley v. Rambus, Inc., 384 Fed. Appx. 570, 573 (9th Cir. 2010)
14 (dismissing a negligent misrepresentation claim for failure to meet the “heightened
15 pleading standards of Rule 9(b)”); but see Petersen v. Allstate Indem. Co., 281 F.R.D. 413,
16 418 (C.D. Cal. 2012) (holding that Rule 9(b) does not apply to negligent misrepresentation
17 claims).

18 In its counterclaims, nThrive broadly alleges that Scripps “misrepresented the
19 collectability of its claims to nThrive during the RFP process,” and Scripps “repeatedly
20 represented throughout the bidding process the nature of its claims and that the bulk of the
21 claims had value and were not stale.” (Doc. No. 12 ¶ 45.) These broad conclusory
22 allegations fall well short of satisfying Rule 9(b)’s heightened pleading standards and fail
23 to provide the necessary who, what, when, where, and how of the misconduct charged.
24 nThrive fails to identify the specific representations made by Scripps during the RFP
25 process that provide the basis for nThrive’s negligent misrepresentation counterclaim.
26 Further, nThrive fails to allege whom from Scripps made these alleged representations, and
27 when, where, and how were they made. In addition, the Court agrees with Scripps that
28 nThrive fails to adequately allege what damages it purportedly suffered as a result of

1 Scripps’s representations. As such, the Court grants Scripps’s motion to dismiss this
2 counterclaim, and the Court dismisses nThrive’s counterclaim for negligent
3 misrepresentation without prejudice.

4 C. nThrive’s Counterclaim for Unjust Enrichment

5 In its counterclaims, nThrive alleges a claim for unjust enrichment. (Doc. No. 12 ¶¶
6 50-54.) Scripps argues that this counterclaim should be dismissed for failure to adequately
7 allege the benefit element of a claim for unjust enrichment. (Doc. No. 23-1 at 10-11.)

8 “The elements of an unjust enrichment claim are the ‘receipt of a benefit and [the]
9 unjust retention of the benefit at the expense of another.’” Peterson v. Cellco P’ship, 164
10 Cal. App. 4th 1583, 1593 (2008) (quoting Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723,
11 726 (2000)). Scripps argues that nThrive’s counterclaim for unjust enrichment should be
12 dismissed because nThrive has failed to identify or sufficient articulate any benefit that it
13 provided to Scripps. (Doc. No. 23-1 at 10-11.)

14 In its counterclaims, nThrive alleges that it has provided Scripps with over \$300,000
15 in invoiced services and an additional \$100,000 to \$200,000 in services, and it alleges that
16 Scripps has refused to pay for these services. (Doc. No. 12 ¶¶ 29-31.) These allegations
17 are sufficient to satisfy the benefits element of nThrive’s unjust enrichment counterclaim
18 at the pleading stage. As such, the Court declines to dismiss nThrive’s unjust enrichment
19 counterclaim.

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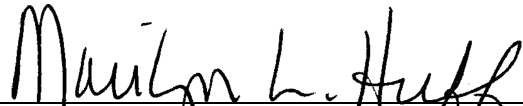
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1 **Conclusion**

2 For the reasons above, the Court grants in part and denies in part Plaintiff Scripps's
3 motion to dismiss nThrive's counterclaims. Specifically, the Court dismisses nThrive's
4 counterclaim for negligent misrepresentation without prejudice, and the Court declines to
5 dismiss nThrive's counterclaims for breach of the implied covenant of good faith and fair
6 dealing and unjust enrichment. In addition, the Court grants nThrive leave to file an
7 amended counterclaims on or before **October 3, 2019**. Any amended counterclaims must
8 cure the deficiencies noted in this order and must comply with Federal Rules of Civil
9 Procedure 8 and 9.

10 **IT IS SO ORDERED.**

11 DATED: September 3, 2019

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14 MARILYN L. HUFF, District Judge
15 UNITED STATES DISTRICT COURT
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