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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NICOLE UHLIG and MICHELLE STOLDT, as Trustees of (1) the Survivor’s Trust Established Under the Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998; (2) the Marital GST Non-Exempt Trust Established Under the Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998, as Amended; (3) the Marital GST Exempt Trust Established Under the Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998, as Amended; and (4) the Bypass Trust Established Under the Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998, as Amended,

Plaintiffs,

v.

FAIRN & SWANSON HOLDINGS, INC., a Delaware corporation; LEON FALIC, an individual; SIMON FALIC, an individual; JEROME FALIC, an individual;

Defendants.

Case No.: 20-cv-00887-DMS-MSB

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

1 Pending before the Court is Defendant Fairn & Swanson Holdings, Inc.’s motion to
2 dismiss Counts III and V of Plaintiffs’ Second Amended Complaint (“SAC”). Plaintiffs
3 filed an opposition to the motion, and Defendant filed a reply. For the reasons discussed
4 below, the motion is granted.

5 **I.**
6 **BACKGROUND**

7 This case arises out of a Letter of Intent (“the LOI”) entered into between Plaintiffs¹
8 and Defendant Fairn & Swanson Holdings, Inc. (“Defendant” or “Holdings”) in March
9 2020. (SAC ¶ 4; Ex. 1 to SAC.) Under the terms of the LOI, Plaintiffs agreed to convey
10 to Holdings 80% of the stock of Fairn & Swanson, Inc. (“F&S”), a closely held California
11 corporation, as well as all right, title, and interest in Plaintiffs’ retail real property located
12 in Imperial County, California (“the Imperial County property”). (SAC ¶ 4.) In return,
13 Holdings agreed to assume specified debts of F&S and to pay Plaintiffs \$5 million. (*Id.*)
14 The LOI provides that the parties will make good faith efforts to negotiate one or more
15 “Definitive Agreements” further detailing the terms of sale of stock and terms of the sale
16 of the real property, but expressly provides the LOI “is intended to be a binding contract”
17 and “is not contingent on the preparation of the Definitive Agreements.” (SAC ¶ 9; Ex. 1
18 to SAC, §§ 3, 7(c).) The transaction was to close before the end of March 2020. (SAC
19 ¶ 4; Ex. 1 to SAC, § 1(c).)

20 During the negotiations between Plaintiffs and Holdings leading up to the signing of
21 the LOI, F&S was in substantial financial distress and Plaintiffs were marketing their 80%

23
24 ¹ The Court refers to Plaintiffs Nicole Uhlig and Michelle Stoldt, as Trustees of (1) the
25 Survivor’s Trust Established Under the Wolfgang and Elke Uhlig Revocable Living Trust
26 U/A/D April 16, 1998; (2) the Marital GST Non-Exempt Trust Established Under the
27 Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998, as Amended; (3)
28 the Marital GST Exempt Trust Established Under the Wolfgang and Elke Uhlig Revocable
Living Trust U/A/D April 16, 1998, as Amended; and (4) the Bypass Trust Established
Under the Wolfgang and Elke Uhlig Revocable Living Trust U/A/D April 16, 1998, as
Amended, as “Plaintiffs” throughout this Order.

1 stock holding interest to third parties. (SAC ¶ 6.) Upon signing the LOI, Plaintiffs
2 terminated all marketing efforts of F&S stock in accordance with the LOI’s terms, which
3 they did with the understanding the LOI transaction would close “in the immediate future.”
4 (*Id.* ¶¶ 6–7.)

5 On or about March 12, 2020, Holdings insisted the purchase price provided in the
6 LOI be substantially reduced. (*Id.* ¶ 8.) On March 16, 2020, Holdings refused to
7 consummate the transaction provided for in the LOI and refused to provide its promised
8 performance, including the purchase of F&S stock and the Imperial County property. (*Id.*
9 ¶¶ 8, 10.)

10 Based on these allegations, Plaintiffs filed this diversity action against Holdings and
11 the Falics on May 12, 2020, and amended the complaint on August 17, 2020. (ECF Nos.
12 1, 17.) On November 23, 2020, the Court dismissed Leon Falic, Jerome Falic, and Simon
13 Falic as defendants. (ECF No. 28.) Defendant subsequently filed an answer to the FAC
14 and a counterclaim, which counterclaim Plaintiffs answered. (ECF Nos. 29, 31.) Plaintiffs
15 filed the SAC on March 10, 2021, alleging claims for (1) breach of contract (specific
16 performance), (2) breach of contract (damages), (3) breach of the covenant of good faith
17 and fair dealing, (4) promissory estoppel, and (5) fraud.² (ECF No. 46.) Defendant now
18 moves to dismiss Counts III and V of Plaintiffs’ SAC for failure to state a claim.

19 II.

20 LEGAL STANDARD

21 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the
22 legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro*
23 *v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material
24 factual allegations of the complaint are accepted as true, as well as all reasonable inferences
25 to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996).
26

27
28 ² The Court has diversity jurisdiction over this action as the parties are citizens of different
states and the amount in controversy exceeds \$75,000. (SAC ¶¶ 1, 3.)

1 A court, however, need not accept all conclusory allegations as true. Rather, it must
2 “examine whether conclusory allegations follow from the description of facts as alleged by
3 the plaintiff.” *Holden v. Hagopian*, 978 F.3d 1115, 1121 (9th Cir. 1992) (citation omitted).
4 A motion to dismiss should be granted if a plaintiff’s complaint fails to contain “enough
5 facts to state a claim to relief that is plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
6 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
7 allows the court to draw the reasonable inference that the defendant is liable for the
8 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550
9 U.S. at 556).

10 **III.**
11 **DISCUSSION**

12 Defendant moves to dismiss Plaintiffs’ claim for breach of the covenant of good
13 faith and fair dealing and Plaintiffs’ claim for fraud. The Court addresses the parties’
14 arguments regarding each claim in turn.

15 **A. Breach of the Covenant of Good Faith and Fair Dealing**

16 Defendant argues Plaintiffs’ claim for breach of the covenant of good faith and fair
17 dealing is barred because it is duplicative of Plaintiff’s breach of contract claim. In
18 California, the covenant of good faith and fair dealing is “implied by law in every contract”
19 and exists “to prevent one contracting party from unfairly frustrating the other party’s right
20 to receive the benefits of the agreement actually made.” *Guz v. Bechtel Nat. Inc.*, 8 P.3d
21 1089, 1110 (2000). Where an implied covenant claim seeks the same relief and relies on
22 the same alleged acts as a breach of contract claim, it may be disregarded as superfluous.
23 *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 725 (N.D. Cal. 2014) (citing *Careau & Co. v.*
24 *Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 400 (Cal. Ct. App. 1990).

25 Here, Plaintiffs have not pled sufficient facts to show their claim for breach of the
26 implied covenant is separate and distinct from their breach of contract claim. The LOI
27 expressly provides the parties “will make a good faith effort to negotiate and enter into
28 definitive agreements.” (Ex. 1 to SAC, § 3.) Under the implied covenant claim, Plaintiffs

1 allege Holdings refused to negotiate in good faith, because it demanded the purchase price
2 in the LOI be reduced, then “refused to consummate the transaction,” thereby unfairly
3 interfering with Plaintiffs’ right to receive the LOI’s benefits. (SAC ¶¶ 24, 25.) These
4 alleged acts are the same acts which Plaintiffs rely upon in support of their breach of
5 contract claim, which is likewise based on Defendant’s “refus[al] to provide its promised
6 performance, including the purchase of F&S stock and the Imperial County property.” (*Id.*
7 ¶ 10.) “A claim for breach of the implied covenant may be made out by allegations that a
8 defendant acted in bad faith to frustrate the agreed common purpose of the contract,”
9 *Svenson*, 65 F. Supp. 3d at 725–26 (citing *Careau & Co.*, 272 Cal. Rptr. at 399–400), but
10 Plaintiffs here fail to allege facts to show Defendant acted in bad faith.

11 Plaintiffs further do not sufficiently allege damages independent from those alleged
12 for breach of contract. Plaintiffs argue Defendant’s refusal to negotiate harmed Plaintiffs
13 because they were no longer able to sell their F&S stock to a third party, which led to F&S
14 filing a Chapter 7 bankruptcy proceeding. (Pls.’ Opp’n 5; SAC ¶ 26.) Plaintiff alleges the
15 same harm—the filing of a Chapter 7 bankruptcy proceeding—resulted from Defendant’s
16 breach of contract. (SAC ¶ 18.) As currently pled, Plaintiffs’ claim for breach of the
17 implied covenant of good faith and fair dealing is superfluous given Plaintiffs’ claim for
18 breach of contract. The Court therefore grants Defendant’s motion to dismiss this claim.

19 **B. Fraud**

20 Defendant contends Plaintiffs’ fraud claim is barred by the economic loss rule. In
21 response, Plaintiffs argue their fraud claim is properly brought because they allege the LOI
22 was fraudulently induced.

23 Generally, purely economic losses are not recoverable in tort. *NuCal Foods, Inc. v.*
24 *Quality Egg LLC*, 918 F. Supp. 2d 1023, 1028 (E.D. Cal. 2013) (citations omitted). The
25 economic loss rule “prevents the law of contract and the law of tort from dissolving one
26 into the other.” *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 273 (Cal. 2004)
27 (internal quotation marks, brackets, and citation omitted). “[T]he fundamental rule in
28 California is that no tort cause of action will lie where the breach of duty is nothing more

1 than a violation of a promise which undermines the expectations of the parties to an
2 agreement.” *Oracle USA, Inc. v. XL Glob. Servs., Inc.*, No. C 09-00537 MHP, 2009 WL
3 2084154, at *4 (N.D. Cal. July 13, 2009) (surveying California cases). However, a fraud
4 claim related to a contract may be brought where the fraud is independent of the breach of
5 contract and “expose[s] a plaintiff to liability for personal damages independent of the
6 plaintiff’s economic loss.” *Robinson Helicopter*, 102 P.3d at 276 (permitting fraud claim
7 in products liability context); *see Erlich v. Menezes*, 981 P.2d 978, 983 (Cal. 1999).

8 Here, Plaintiffs allege Holdings knowingly made false promises to Plaintiffs in order
9 to induce Plaintiffs to remove F&S stock from the market and enter into the LOI. Plaintiffs
10 argue their fraud claim is based on Holdings’ intentional misrepresentation of its intent,
11 not on its breach of the LOI. However, Plaintiffs fail to allege fraud independent of the
12 breach of contract.

13 Plaintiffs’ theory of damages is that once F&S stock was removed from the market,
14 Holdings refused to perform on the contract, and that refusal, combined with “unusual
15 market forces,” forced F&S out of business. (Pls.’ Opp’n 7.) Plaintiffs have not
16 demonstrated how this would entitle Plaintiffs to any additional damages beyond their
17 economic losses from the breach of the LOI. *See Oracle USA*, 2009 WL 2084154, at *6–7
18 (discussing *Robinson Helicopter* and concluding plaintiff failed to state a claim for fraud
19 where defendant “allegedly failed to keep its promise to pay its bills, and the resulting harm
20 to [plaintiff] is economic in nature”); *see Audigier Brand Mgmt. v. Perez*, No. CV 12-5687-
21 CAS RZX, 2012 WL 5470888, at *6 (C.D. Cal. Nov. 5, 2012) (“Without a viable theory
22 of damage apart from plaintiff’s economic losses, plaintiff fails to state an actionable claim
23 for fraud.”). Plaintiffs allege F&S’ bankruptcy constitutes harm independent of the breach
24 of contract. But Plaintiffs do not sufficiently allege how Plaintiffs’ inability to sell the
25 stock and F&S’ resulting bankruptcy stem from anything other than Holdings’ refusal to
26 complete the transaction and purchase the stock.

27 The Court finds Plaintiffs have not alleged conduct “independent from the various
28 promises made by the parties in the course of their contractual relationship.” *Oracle USA*,

1 2009 WL 2084154, at *4. Although Plaintiffs allege they ceased their marketing efforts of
2 F&S stock in reliance on Defendant’s promise to purchase it, this cessation was an express
3 condition of the LOI. (*See* Ex. 1 to SAC, § 5.) The Court is not persuaded that Plaintiffs’
4 own performance under the contract provides a sufficient basis for their fraud claim. *See*
5 *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1043 (N.D. Cal.
6 2012) (dismissing fraud claim where plaintiff’s allegations of reliance were simply “acts
7 constitut[ing] nothing more than [plaintiff’s] usual performance”).

8 The Court accordingly follows other district courts applying California law which
9 have found similar tort claims “barred in cases in which one party breached a purported
10 contract that it allegedly never intended to perform.” *UMG Recordings, Inc. v. Glob. Eagle*
11 *Ent., Inc.*, 117 F. Supp. 3d 1092, 1104 (C.D. Cal. 2015) (citing *JMP Sec.*, 880 F. Supp. 2d
12 at 1042–43; *Oracle USA*, 2009 WL 2084154, at *4). Plaintiffs attempt to distinguish these
13 cases, but point to no case supporting their position in which a similar claim of fraud was
14 permitted to proceed. Rather, Plaintiffs seek to take “allegations underpinning a
15 straightforward claim for breach of a commercial contract and recast them as torts,” but
16 their “claims consist of nothing more than [Defendant’s] alleged failure to make good on
17 its contractual promises.” *JMP Sec.*, 880 F. Supp. 2d at 1043. Accordingly, Plaintiffs’
18 fraud claim must be dismissed under the economic loss rule.

19 Moreover, Defendant argues even if Plaintiffs’ fraud claim were not barred under
20 the economic loss rule, it is not alleged with sufficient particularity as required under
21 Federal Rule of Civil Procedure Rule 9(b). Rule 9(b) imposes a heightened pleading
22 standard on claims alleging fraud, requiring a plaintiff to state with “particularity the
23 circumstances constituting the fraud or mistake.” Fed. R. Civ. P. 9(b); *see Davidson v.*
24 *Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018); *Vess v. Ciba-Geigy Corp. USA*,
25 317 F.3d 1097, 1103 (9th Cir. 2003) (“Rule 9(b)’s particularity requirement applies to
26 state-law causes of action.”).

27 “To comply with Rule 9(b), allegations of fraud must be specific enough to give
28 defendants notice of the particular misconduct which is alleged to constitute the fraud

1 charged so that they can defend against the charge and not just deny that they have done
2 anything wrong.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting *Bly-*
3 *Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal quotation marks
4 omitted). A plaintiff must set forth “the who, what, when, where, and how of the
5 misconduct charged.” *Vess*, 317 F.3d at 1106 (internal quotation marks and citation
6 omitted).

7 Here, although Plaintiffs identify several dates on which Leon Falic, an agent of
8 Holdings, made statements regarding the marketing of F&S stock, Plaintiffs do not
9 adequately allege why Holdings’ promise to purchase the stock was false when made.
10 Plaintiffs’ allegation that Holdings had no intent to actually consummate the transaction at
11 the time it entered into the LOI is conclusory and unsupported by facts. “Although intent
12 can be averred generally under Rule 9(b), a plaintiff must point to facts which show that
13 defendant harbored an intention not to be bound by terms of the contract at formation.”
14 *Mat-Van, Inc. v. Sheldon Good & Co. Auctions, LLC*, No. CV 07-CV-912 IEG-BLM, 2007
15 WL 2206946, at *6 (S.D. Cal. July 27, 2007) (quoting *Hsu v. OZ Optics Ltd.*, 211 F.R.D.
16 615, 620 (N.D. Cal. 2002) (internal quotation marks omitted)). “Mere nonperformance of
17 a promise does not suffice to show the falsity of a promise.” *UMG Recordings, Inc.*, 117
18 F. Supp. 3d at 1108 (citing *Tenzer v. Superscope, Inc.*, 702 P.2d 212, 219 (Cal. 1985)); *see*
19 *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1153 (S.D. Cal. 2001) (merely alleging
20 that defendant breached a contract did not adequately plead that it entered into the
21 agreement with no intent to perform). Thus, Plaintiffs’ fraud claim must also be dismissed
22 as insufficiently pled.

23 **C. Leave to Amend**

24 Generally, when a court dismisses claims, leave to amend is granted “even if no
25 request to amend the pleading was made, unless [the court] determines that the pleading
26 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d
27 1122, 1127 (9th Cir. 2000) (en banc) (internal citation omitted).

1 Here, the deficiencies in Plaintiffs' claims could potentially be cured. Plaintiffs may
2 be able to identify facts that show that Defendant took actions in bad faith distinct from
3 those underlying the breach of contract claim, or to allege facts to support fraud and
4 damages independent of their contract claim. Accordingly, the Court grants leave to
5 amend.

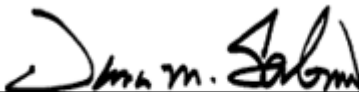
6 **IV.**

7 **CONCLUSION AND ORDER**

8 For the reasons set out above, Defendant's motion to dismiss Counts III and V of the
9 SAC is granted. Plaintiffs may file a Third Amended Complaint within fourteen (14) days
10 of this order.

11 **IT IS SO ORDERED.**

12 Dated: May 22, 2021

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15 Hon. Dana M. Sabraw, Chief Judge
16 United States District Court
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