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

LBF TRAVEL MANAGEMENT CORP.
and MICHAEL THOMAS,

Plaintiffs,

v.

THOMAS DEROSA,

Defendant.

Case No.: 20-cv-2404-MMA (AGS)

**ORDER GRANTING THIRD PARTY
DEFENDANTS' MOTION TO
DISMISS**

[Doc. No. 25]

THOMAS DEROSA,

Counter Claimant,

v.

LBF TRAVEL MANAGEMENT CORP.
and MICHAEL THOMAS,

Counter Defendants.

THOMAS DEROSA,

Third-party Plaintiff,

v.

LBF TRAVEL, INC.; MONDEE
HOLDINGS, LLC; MONDEE, INC.; and
PRASAD GUNDUMOGULA

Third-party Defendants.

1 Defendant, Counter Claimant, and Third-party Plaintiff Thomas DeRosa
2 (“DeRosa”) brings this contract dispute—arising from an employment relationship—
3 against Plaintiffs and Counter Defendants LBF Travel Management Corp. (“LBF
4 Management”) and Michael Thomas (“Thomas”) (collectively “Counter Defendants”)
5 and Third-party Defendants LBF Travel, Inc. (“LBF Inc.”), Mondee Holdings, LLC
6 (“Mondee Holdings”), Mondee, Inc., and Prasad Gundumogula (“Gundumogula”)
7 (collectively, “Third-party Defendants”). *See* Doc. No. 13 ¶ 1 (“TP Compl.”). Third-
8 party Defendants Mondee Holdings, LLC, Mondee, Inc., and Gundumogula (collectively,
9 the “Mondee Defendants”) move to dismiss the sixth and seventh causes of actions
10 alleged against them in Third-party Plaintiff DeRosa’s Third-party Complaint. *See* Doc.
11 No. 25 at 2.¹ DeRosa filed an opposition to Mondee Defendants’ motion, and Mondee
12 Defendants replied. *See* Doc. Nos. 26, 28. The Court found the matter suitable for
13 determination on the papers and without oral argument pursuant to Federal Rule of Civil
14 Procedure 78(b) and Civil Local Rule 7.1.d.1. *See* Doc. No. 29. For the reasons set forth
15 below, the Court **GRANTS** Mondee Defendants’ motion to dismiss.

16 **I. BACKGROUND**²

17 Mondee Defendants’ motion originates from an employment relationship between
18 DeRosa, Thomas, and LBF Inc. *See* TP Compl. ¶¶ 1, 2. Mondee Defendants inserted
19 themselves into the relationship by purchasing LBF Inc. *See id.* ¶¶ 4, 17.

20 Thomas is LBF Inc.’s Chief Executive Officer and majority shareholder. *Id.* ¶¶ 8,
21 17. DeRosa is a computer programmer. *Id.* ¶ 6. DeRosa “developed the code that is the
22 backbone for travel amalgamation websites, like Travelocity and Expedia.” *Id.* In 2010,
23 DeRosa sold the code to LBF Inc. *Id.* In exchange, DeRosa was supposed to receive
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26 ¹ All citations to electronically filed documents refer to the pagination assigned by the CM/ECF system.

27 ² Because this matter is before the Court on a motion to dismiss, the Court must accept as true the
28 allegations set forth in the Third-party Complaint. *See Hosp. Bldg. Co. v. Trs. Of Rex Hosp.*, 425 U.S.
738, 740 (1976).

1 guaranteed monthly payments, contingent quarterly payments, and a 10% ownership
2 interest in LBF Inc. *Id.* ¶ 7. An asset purchase agreement (“APA”) commemorated the
3 exchange. *See id.* ¶¶ 6, 7. DeRosa alleges Thomas “missed monthly payments.” *Id.* ¶ 8.
4 Even though Thomas “made myriad promises to Mr. DeRosa to rectify the unpaid money
5 . . . it became apparent that Mr. Thomas would not [follow through].” *Id.* ¶ 9.

6 Contemporaneous to the APA, DeRosa and LBF Inc. executed a consulting
7 agreement (“Consulting Agreement”). *Id.* ¶ 10. Under the Consulting Agreement,
8 DeRosa became LBF Inc.’s Chief Technology Officer. *Id.* In exchange, DeRosa was
9 supposed to receive payments “in addition to any money owed . . . under the APA.” *Id.*
10 DeRosa alleges, “[l]ike the payments owed under the APA, Mr. Thomas would routinely
11 promise to make up for missed payments.” *Id.* ¶ 12. Yet, “Thomas [has] never made
12 good on any payments under the Consulting Agreement.” *Id.*

13 Several years later, Thomas began shopping LBF Inc. to potential buyers. *See id.*
14 ¶¶ 17, 18. DeRosa alleges, “[i]n 2018 . . . Thomas had represented or caused to be
15 represented to others in writing that LBF [Inc.] possessed a fair market value of \$80 to
16 \$100 million.” *Id.* ¶ 17. DeRosa further alleges that at the end of 2018 or in early 2019,
17 Thomas negotiated a potential merger that valued LBF Inc. over \$250 million. *Id.* ¶ 18.

18 In the summer 2019, DeRosa learned that Thomas intended to sell LBF Inc. to
19 Mondee Defendants. *Id.* ¶ 17. In late 2019, Thomas, Mondee Defendants, and DeRosa
20 began to meet with each other. *Id.* ¶ 23. The meetings focused on “paying Mr. DeRosa
21 for the value of his LBF [Inc.] shares.” *Id.* DeRosa alleges that, in at least one of the
22 meetings, “[a]ll Defendants falsely represented to Mr. DeRosa the sale price of LBF
23 [Inc.’s] assets to Mondee [Defendants],” and, “[a]ll Defendants engaged in a cover up of
24 [the true sale price].” *Id.* ¶¶ 86, 87. DeRosa also alleges, “Thomas received more payout
25 for the sale of LBF [Inc.’s] assets than reported,” yet admits he “does not know the terms
26 of the de facto merger of LBF [Inc.] into Mondee [Defendants], or any statement of
27 price.” *Id.* ¶¶ 74, 182.

28

1 DeRosa alleges that the misrepresentation was intended “to deceive” and “to force
2 [him] to sign a settlement agreement that would give him far less than he was owed.” *Id.*
3 ¶¶ 24, 91. Nonetheless, DeRosa declined to sign any agreement. *Id.* ¶ 24.

4 On December 13, 2019, Thomas terminated DeRosa from LBF Inc. *Id.* ¶ 25.
5 DeRosa alleges his termination was “[i]n response to [his] inquiries, whistleblowing, and
6 uncovering of Mr. Thomas’s and LBF[Inc.’s] defrauding of its shareholders.” *Id.*
7 Despite the alleged fraud, “[o]n January 10, 2020, Mr. DeRosa . . . purchas[ed] an
8 additional 200,000 shares of LBF [Inc.] stock,” which increased DeRosa’s interest in
9 LBF Inc. from 10% to 30%. *Id.* ¶ 20.

10 On December 9, 2020, Thomas and LBF Management brought eleven causes of
11 action against DeRosa. *See* Doc. No. 1. In response, DeRosa filed a Counterclaim and
12 Third-party Complaint against Thomas, LBF Management, LBF Inc., and Mondee
13 Defendants. *See* TP Compl.

14 DeRosa brings twenty causes of action in his Counterclaim and Third-party
15 Complaint: (1) breach of contract against Thomas and LBF Inc.; (2) breach of contract
16 against Thomas and LBF Inc.; (3) breach of oral contract against Thomas and LBF Inc.;
17 (4) breach of fiduciary duties against “all defendants”; (5) conversion against “all
18 defendants”; (6) negligent misrepresentation against “all defendants”; (7) intentional
19 misrepresentation against “all defendants”; (8) failure to pay wages against Thomas and
20 LBF Inc.; (9) failure to pay all wages due at termination against Thomas and LBF Inc.;
21 (10) failure to pay overtime against Thomas and LBF Inc.; (11) failure to provide breaks
22 against Thomas and LBF Inc.; (12) failure to provide wage statements against Thomas
23 and LBF Inc.; (13) failure to allow inspection of records against Thomas and LBF Inc.;
24 (14) unfair business practices against “all defendants”; (15) retaliation in violation of
25 public policy against LBF Inc.; (16) harassment against Thomas and LBF Inc.; (17)
26 retaliation against LBF Inc.; (18) discrimination against Thomas and LBF Inc.; (19)
27 accounting against Thomas and LBF Inc.; and (20) “violation of Cal. Corp. Code
28 §§ 1300, et seq.” against “defendants.” *See* TP Compl. ¶¶ 45–187. Third-party Mondee

1 Defendants move to dismiss the sixth and seventh causes of action under Rule 12(b)(6)
2 and Rule 9(b). *See* Doc. No. 25 at 2; Doc. No. 25-1 at 7, 17.

3 **II. LEGAL STANDARD**

4 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*
5 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and plain
6 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
7 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is
8 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also*
9 Fed. R. Civ. P. 12(b)(6). The plausibility standard demands more than a “formulaic
10 recitation of the elements of a cause of action,” or “‘naked assertions’ devoid of ‘further
11 factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
12 550 U.S. at 555, 557). Instead, the complaint “must contain sufficient allegations of
13 underlying facts to give fair notice and to enable the opposing party to defend itself
14 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

15 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth
16 of all factual allegations and must construe them in the light most favorable to the
17 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996)
18 (citing *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)). The court need
19 not take legal conclusions as true merely because they are cast in the form of factual
20 allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *W. Min.*
21 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Similarly, “conclusory allegations
22 of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.”
23 *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

24 In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not
25 look beyond the complaint for additional facts. *See United States v. Ritchie*, 342 F.3d
26 903, 907–08 (9th Cir. 2003). “A court may, however, consider certain materials—
27 documents attached to the complaint, documents incorporated by reference in the
28 complaint, or matters of judicial notice—without converting the motion to dismiss into a

1 motion for summary judgment.” *Id.* at 908; *see also Lee v. City of Los Angeles*, 250 F.3d
2 668, 688 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa*
3 *Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002). “However, [courts] are not required to
4 accept as true conclusory allegations which are contradicted by documents referred to in
5 the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96 (9th Cir. 1998)
6 (citing *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1403 (9th Cir. 1996)).

7 Additionally, allegations of fraud or mistake require the pleading party to “state
8 with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).
9 The context surrounding the fraud must “be ‘specific enough to give defendants notice of
10 the particular misconduct . . . so that they can defend against the charge and not just deny
11 that they have done anything wrong.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124
12 (9th Cir. 2009) (quoting *Bly–Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).
13 “‘Averments of fraud must be accompanied by “the who, what, when, where, and how”
14 of the misconduct charged.’ A party alleging fraud must ‘set forth more than the neutral
15 facts necessary to identify the transaction.’” *Kearns*, 567 F.3d at 1124 (citation omitted)
16 (first quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); and
17 then quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994),
18 *superseded by statute on other grounds*).

19 Where dismissal is appropriate, a court should grant leave to amend unless the
20 plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of*
21 *Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127
22 (9th Cir. 2000)).

23 **III. DISCUSSION**

24 Mondee Defendants challenge DeRosa’s sixth and seventh causes of action. *See*
25 Doc. No. 25 at 2. The Court assesses whether DeRosa satisfies Rule 9(b)’s particularity
26 requirement and whether DeRosa states viable claims for relief.

27 **A. The Rule 9(b) Heightened Pleading Standard**

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1 Mondee Defendants argue that DeRosa fails to plead with particularity as required
2 by Rule 9(b). *See* Doc. No. 25-1 at 15–17; *see also* Doc. No. 28 at 12. Specifically,
3 Mondee Defendants contend that DeRosa’s pleadings are “conclusory” and
4 “impermissibly lump[] all of the Defendants together.” *See* Doc. No. 25-1 at 15, 16; *see*
5 *also* Doc. No. 28 at 12. DeRosa does not specifically address Mondee Defendants’
6 argument.

7 The Ninth Circuit has not clarified whether Rule 9(b) applies to negligent
8 misrepresentation claims. *Compare Kelley v. Rambus, Inc.*, 384 F. App’x 570, 573 (9th
9 Cir. 2010) (affirming a dismissal of a negligent misrepresentation claim because it failed
10 to meet Rule 9(b) requirements), *with Miller v. Int’l Bus. Mach. Corp.*, 138 F. App’x 12,
11 17 (9th Cir. 2005) (reversing a district court’s dismissal of a negligent misrepresentation
12 claim because it satisfied Rule 8(a) and was “not a fraud claim.”). However, this Court
13 has consistently applied Rule 9(b) to negligent misrepresentation claims. *See City of*
14 *Escondido v. Gen. Reinsurance Corp.*, No. 19-cv-868-MMA (BGS), 2019 WL 6917983,
15 at *10 (S.D. Cal. Dec. 18, 2019); *Bell v. Fed. Home Loan Mortg. Corp.*, No. 11-cv-2514-
16 MMA (RBB), 2012 WL 1581075, at *4 n.5 (S.D. Cal. May 4, 2012). More importantly,
17 however, the Court finds Rule 9(b) applies because DeRosa alleges that Mondee
18 Defendants engaged in a “a unified course of fraudulent conduct.” *Vess*, 317 F.3d at
19 1103; *see also Stewart v. Kodiak Cakes, LLC*, No. 19-cv-2454-MMA (MSB), 2021 WL
20 1698695, at *13 (S.D. Cal. Apr. 29, 2021) (stating that where fraud is not a necessary
21 element of a claim, a plaintiff may still opt to allege fraudulent conduct). Regardless of
22 whether a negligent misrepresentation claim must meet Rule 9(b)’s requirement, DeRosa
23 weaves fraud allegations throughout his Third-party Complaint, including his negligent
24 misrepresentation claim. *See* ¶¶ 88, 93; *see also* ¶¶ 72, 78, 81, 95, 101. Therefore, the
25 Court applies Rule 9(b) to the negligent misrepresentation claim as well as the intentional
26 misrepresentation claim.

27 DeRosa alleges that the “who” was “[a]ll Defendants,” which includes Mondee
28 Defendants. *See id.* ¶¶ 86, 87, 95, 96. Mondee Defendants argue, “DeRosa has

1 impermissibly lumped all of the Defendants together without identifying the role of each
2 defendant . . . in the alleged fraudulent scheme.” Doc. No. 25-1 at 16. However, “[a]ll
3 Defendants falsely represented . . . the sale price” means that Mondee Defendants,
4 Thomas, LBF Inc., and LBF Management each misrepresented the sale price; thus,
5 DeRosa identifies Mondee Defendants’ role in the alleged fraud. TP Compl. ¶ 86.
6 Further, “[w]here fraud has allegedly been perpetrated by a corporation . . . plaintiffs
7 must allege the names of the employees or agents who purportedly made the fraudulent
8 representations.” *UMG Recordings, Inc. v. Global Eagle Ent., Inc.*, 117 F. Supp. 3d
9 1092, 1108 (C.D. Cal. June 22, 2015). DeRosa alleges Gundumogula was present and
10 participating when the alleged misrepresentation took place. *See* TP Compl. ¶¶ 23, 86,
11 95. Moreover, DeRosa alleges Gundumogula was either an employee or agent of both
12 Mondee, Inc. and Mondee Holdings. *See id.* ¶¶ 40, 41, 43. Such allegations sufficiently
13 identify Gundumogula was acting on each corporations’ behalf.

14 DeRosa fails to allege the “what.” In *Swartz*, the plaintiff’s complaint was
15 sufficient because it “included several allegations *detailing the . . . content of*
16 *representations.*” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (emphasis
17 added). *Kearns* demonstrates the opposite. *See* 567 F.3d at 1126. In *Kearns*, the
18 plaintiff alleged that a defendant’s television ads and other sales material misrepresented
19 the value of their Certified Pre-Owned vehicles. *Id.* at 1125–26. The plaintiff’s
20 complaint was insufficient because it did not “specify what the television advertisements
21 or other sales material specifically stated.” *Id.* at 1126. Here, DeRosa alleges,
22 “Defendants falsely represented . . . the sale price,” but DeRosa does not specify the
23 represented sale price. TP Compl. ¶ 86. DeRosa’s complaint is analogous to *Kearns* and
24 lacks the representation’s specific content. *See* 567 F.3d at 1126. Consequently, DeRosa
25 does not allege the “what.”³

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28 ³ DeRosa appears to argue that he pleads an omission by alleging that Thomas and Mondee Defendants failed to disclose the actual sale price. *See* Doc. No. 26 at 8. Some cases suggest, “[w]here a fraudulent

1 DeRosa alleges that the “when” is December 2019. *See* TP Compl. ¶¶ 86. DeRosa
2 further avers the “where” is “the December 2019 meeting” with Mondee Defendants and
3 Thomas. *See id.* ¶¶ 23, 86. The Third-party Complaint explains “how” the
4 representation was false: the represented sale price was lower than the actual sale price.
5 *See id.* ¶¶ 24, 74, 86, 87, 95, 96.

6 In sum, the Court finds that DeRosa has failed to meet the particularity
7 requirement of Rule 9(b). Accordingly, the Court **GRANTS** Mondee Defendants’
8 motion and dismisses both claims. The Court now turns to whether DeRosa states viable
9 claims for relief regardless of the Third-party Complaint’s defects under Rule 9(b).

10 **B. Negligent & Intentional Misrepresentation – Sixth & Seventh Causes of Action**

11 Mondee Defendants argue that DeRosa’s negligent and intentional
12 misrepresentation claims are not plausible and DeRosa fails to plead the requisite
13 elements. *See* Doc. No. 25-1 at 10–11; *see also* Doc. No. 28 at 7, 8. Specifically,
14 Mondee Defendants attack three elements common to both claims: false representation or
15 omission, actual reliance, and damages. *See* Doc. No. 25-1 at 12–15; *see also* Doc. No.
16 28 at 7–12. DeRosa generally argues that the Third-party Complaint contains plausible
17 grounds for relief. *See* Doc. No. 26 at 4–9.⁴ DeRosa attaches a proposed amended
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20 omission is at issue, the requirements of Rule 9(b) are relaxed, but not eliminated.” *UMG Recordings,*
21 *Inc.*, 117 F. Supp. 3d at 1107 (citing *Waldrup v. Countrywide Fin. Corp.*, No. 2:13-cv-08833-CAS
(CWx), 2014 WL 3715131, at *5 (C.D. Cal. July 23, 2014)). Rule 9(b) is relaxed for omissions because
22 a plaintiff pleading a fraudulent omission cannot meet Rule 9(b)’s “specific content” requirement. *See*
23 *In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1310 (N.D. Cal. 2008) (quoting *Falk v.*
24 *Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007)). Here, DeRosa can meet Rule 9(b)’s
25 “specific content” requirement because he alleges the sale price was misrepresented directly to him in
the December 2019 meeting. *See* TP Compl. ¶¶ 86, 95. Thus, the Court does not relax Rule 9(b)’s
requirements.

26 ⁴ The Court declines to apply the outdated and abrogated *Conley* “no set of facts” pleading standard
27 relied upon by DeRosa. *Compare* Doc. No. 26 at 3, *with Twombly*, 550 U.S. at 562–53, *Henry v.*
28 *Adventist Health Castle Med. Ctr.*, 970 F.3d 1126, 1132 (9th Cir. 2020), *and Cafasso, U.S. ex rel. v.*
Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 n.6 (9th Cir. 2011).

1 counterclaim and third-party complaint to his opposition brief. *See* Doc. No. 26-2 at 2–
2 42.⁵

3 Under California law, the elements required to prove negligent misrepresentation
4 are “(1) the misrepresentation of a past or existing material fact, (2) without reasonable
5 ground for believing it to be true, (3) with intent to induce another’s reliance on the fact
6 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting
7 damage.” *Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC*, 70 Cal. Rptr. 3d 199, 213
8 (Cal. Ct. App. 2007) (citing *Shamsian v. Atl. Richfield Co.*, 132 Cal. Rptr. 2d 635, 647
9 (Cal. Ct. App. 2003)). The elements required to prove intentional misrepresentation are
10 “(1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual
11 and justifiable reliance, and (5) resulting damage.” *Chapman v. Skype Inc.*, 162 Cal.
12 Rptr. 3d 864, 875 (Cal. Ct. App. 2013) (first citing *Lazar v. Superior Ct.*, 909 P.2d 981,
13 984 (Cal. 1996); and then citing *Mirkin v. Wasserman*, 858 P.2d 568, 570 & 570 n.2 (Cal.
14 1993)).

15 The elements required for each claim significantly overlap. In challenging the
16 misrepresentation, reliance, and damage elements, Mondee Defendants apparently
17 concede that the second and third elements of each claim are adequately pleaded. *See*
18 Doc. No. 25-1 at 13–15. The Court agrees that these elements have been adequately
19 pleaded. Therefore, the Court is left to analyze whether DeRosa has adequately pleaded a
20 misrepresentation, justified reliance, and damages.

21 DeRosa alleges, in conclusory fashion, “[a]ll Defendants falsely misrepresented to
22 Mr. DeRosa the sale price of LBF[Inc.’s] assets.” TP Compl. ¶ 86. However, DeRosa
23 pleads additional factual content. First, DeRosa alleges Thomas and Mondee Defendants
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25 ⁵ DeRosa has attached the proposed pleading to address any deficiencies in his operative Third-party
26 Complaint. *See* Resendes Decl., Doc. No. 26-1 ¶ 2. The Court does not and cannot consider this
27 proposed pleading on ruling on the instant motion to dismiss because the Court is limited to the
28 allegations of the operative pleading. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th
Cir. 2018) (citing *Lee*, 250 F.3d at 688).

1 were trying to buy DeRosa’s ownership interest in LBF Inc. *See id.* ¶ 23. Second,
2 Thomas and Mondee Defendants “tried to force Mr. DeRosa to sign a settlement
3 agreement that would give him far less than he was owed.” *Id.* ¶ 24. Third, “Thomas
4 received more payout for the sale of LBF[Inc.’s] assets than reported.” *Id.* ¶ 74.
5 DeRosa’s statements describe a scenario where LBF Inc.’s sale price would certainly be
6 discussed. DeRosa continues by illustrating Thomas’s and Mondee Defendants’ coercive
7 and deceptive business practices. Thomas and Mondee Defendants wanted to buy
8 DeRosa’s interest in LBF Inc. at the lowest possible price. To do so, DeRosa alleges that
9 Thomas and Mondee Defendants represented LBF Inc.’s sale price as lower than the
10 actual price. *See id.* ¶¶ 17, 24, 95. Assuming the truth of all factual allegations in the
11 light most favorable to the nonmoving party, *Cahill*, 80 F.3d at 337–38 (citing *Nat’l*
12 *Wildlife Fed’n*, 45 F.3d at 1340), the Court finds DeRosa pleads a plausible
13 misrepresentation.

14 Attacking the plausibility of the alleged misrepresentation, Mondee Defendants
15 point to an undercutting allegation: “DeRosa does not know the terms of the de facto
16 merger . . . or any statement of price.” Doc. No. 25-1 at 11, 13 (quoting TP Compl.
17 ¶ 182). Mondee Defendants argue that if DeRosa does not know the actual sale price, it
18 is implausible that there was a misrepresentation. *See* Doc. No. 25-1 at 11–12, 13; *see*
19 *also* Doc. No. 28 at 7. Mondee Defendants’ argument is unavailing. Mondee
20 Defendants’ argument would prevail if DeRosa were completely clueless as to the actual
21 sale price; however, DeRosa alleges that Thomas valued LBF Inc. at no less than \$80
22 million. *See* TP Compl. ¶¶ 17, 18, 185. Taking his allegations in the light most favorable
23 to him, the Court infers that DeRosa knew LBF Inc.’s minimum sale price. DeRosa had
24 a baseline to compare the represented sale price: he does not blindly allege
25 misrepresentation. *See id.* ¶ 17 (stating that DeRosa was “working off of” the minimum
26 sale price). DeRosa does not know the exact truth, but he has enough information to
27 assess whether he was being misled. DeRosa’s knowledge nudges his allegation from
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1 possible to plausible—even if he did not know the actual terms of the merger. Therefore,
2 DeRosa sufficiently pleads misrepresentation.⁶

3 Nonetheless, DeRosa fails to allege justified reliance and damages. “Reliance
4 exists when the misrepresentation . . . was an immediate cause of the plaintiff’s
5 conduct . . . and when without such misrepresentation . . . he or she would not, in all
6 reasonable probability, have entered into the contract or other transaction.” *Alliance*
7 *Mortg. Co. v. Rothwell*, 900 P.2d 601, 608–09 (Cal. 1995) (citing *Spinks v. Clark*, 82 P.
8 45, 47 (Cal. 1905)). In conclusory fashion, DeRosa alleges, he “justifiably relied on
9 those false statements.” TP Compl. ¶¶ 91, 99. DeRosa fails to show how the
10 misrepresentation influenced his conduct. DeRosa alleges the misrepresentation was
11 intended to induce him to sell his interest in LBF Inc. *See id.* ¶ 86. However, “DeRosa
12 refused to sign.” *Id.* ¶ 24. Thus, DeRosa alleges that he did not rely upon the alleged
13 misrepresentation. DeRosa argues that the alleged misrepresentation caused him to hire
14 counsel. *See* Doc. No. 26 at 6. Hiring counsel cannot demonstrate reliance. *Robinson v.*
15 *Wells Fargo Home Mortg.*, No. 16-CV-01619-YGR, 2016 WL 6524403, at *7 (N.D. Cal.
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19 ⁶ DeRosa appears to argue that he pleads an omission by alleging that Thomas and Mondee Defendants
20 failed to disclose the actual sale price. *See* Doc. No. 26 at 8. This argument is unavailing. An
21 actionable omission is “[t]he suppression of a fact, by one who is bound to disclose it, or who gives
22 *information of other facts* which are likely to mislead for want of communication of that fact.” Cal. Civ.
23 Code § 1710(3) (emphasis added). Mondee Defendants were not bound to disclose the actual sale price
24 because DeRosa did not sign the agreement. *See* TP Compl. ¶ 24. Additionally, Mondee Defendants
25 allegedly told an outright misrepresentation; they did not provide “information of other facts.” Cal. Civ.
26 Code § 1710(3). Thus, DeRosa failed to allege an actionable omission. Even if DeRosa did allege an
27 actionable omission, he fails to state the correct claim against Mondee Defendants. The
28 misrepresentation element in negligent and intentional misrepresentation is not satisfied by an omission.
See Apollo Cap. Fund, LLC, 70 Cal. Rptr. 3d at 213 (first citing *Residential Capital v. Cal–Western*
Reconveyance Corp., 134 Cal. Rptr. 2d 162, 178 (Cal. Ct. App 2003); and then citing *Shamsian*, 132
Cal. Rptr. 2d at 648). An omission is better suited for a concealment claim. *See* 5 *Witkin Torts* § 883
(11th ed. 2021).

1 Nov. 3, 2016) (“If the hiring of an attorney and the filing of a lawsuit were sufficient to
2 demonstrate reliance in an action for fraud, then any plaintiff could readily meet such
3 requirement simply by initiating litigation.”). Lastly, “[o]n January 10, 2020, Mr.
4 DeRosa exercised his option rights . . . purchasing an additional 200,000 shares of LBF
5 [Inc.] stock.” TP Compl. ¶ 20. DeRosa fails to explain how the misrepresentation
6 influenced his decision to purchase additional stock. Accordingly, DeRosa fails to show
7 justified reliance.

8 As to the damages element, damages are present only if reliance causes the
9 damage. *Hill v. Wrather*, 323 P.2d 567, 570 (Cal. Ct. App. 1958) (“A pleading setting up
10 fraud must show . . . damage to the [plaintiff] resulting from such reliance.”); 5 Witkin
11 *Torts* § 938 (11th ed. 2021) (“The final element in actionable fraud is damage resulting
12 from reliance on the misrepresentation.”). DeRosa argues he was damaged in several
13 ways: paying his attorney, losing his job, and failing to receive payment from Mondee
14 Defendants. *See* Doc. No. 26 at 7. The Court has already explained that DeRosa failed
15 to show reliance. Therefore, DeRosa cannot show damages either. DeRosa’s attorneys’
16 fees argument remains unavailing. *See Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F.
17 Supp. 2d 1084, 1099 (N.D. Cal. 2007) (finding that attorneys’ fees are not recoverable as
18 compensatory damages in a fraud claim). Consequently, DeRosa has failed to show
19 damages stemming from the price misrepresentation.

20 In sum, the Court finds that DeRosa fails to state his negligent misrepresentation
21 and intentional misrepresentation claims. Accordingly, the Court **GRANTS** Mondee
22 Defendants’ motion and dismisses both claims.

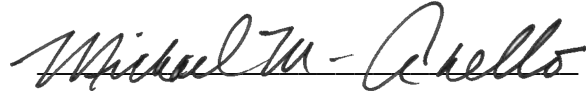
23 **IV. CONCLUSION**

24 For the foregoing reasons, the Court **GRANTS** Mondee Defendants’ motion to
25 dismiss. Although DeRosa has failed to adequately plead his claims against Mondee
26 Defendants, it is not clear that he would be unable to do so if given leave to amend.
27 Accordingly, dismissal is without prejudice and with leave to amend. *See*
28

1 *Knappenberger*, 566 F.3d at 942. Third-party Plaintiff DeRosa must file an amended
2 third-party complaint curing the deficiencies noted herein on or before **July 12, 2021**.

3 **IT IS SO ORDERED.**

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5 Dated: June 25, 2021

6 

7 Hon. Michael M. Anello

8 United States District Judge

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