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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 WYCKOFF FARMS,
8 INCORPORATED, a Washington
corporation,

9 Plaintiff,

10 v.

11 INDUSTRIAL CONTROL
12 CONCEPTS, INC., d/b/a ICC, INC.,
a Missouri corporation, ICC
13 NORTHWEST, INC., an Oregon
corporation, and ICC TURNKEY,
14 INC., a Missouri corporation,

15 Defendants.

NO. 4:20-CV-5095-TOR

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS AND
ALTERNATIVE MOTION FOR A
MORE DEFINITE STATEMENT

16 BEFORE THE COURT is Defendants' Motion to Dismiss for Failure to
17 State a Claim and Alternative Motion for a More Definite Statement (ECF No. 11).
18 These matters were submitted for consideration without oral argument. The Court
19 has reviewed the record and files herein, the completed briefing, and is fully
20 informed. For the reasons discussed below, Defendants' Motion to Dismiss for

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND
ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT ~ 1

1 Failure to State a Claim and Alternative Motion for a More Definite Statement
2 (ECF No. 11) is **DENIED**.

3 **BACKGROUND**

4 This case generally concerns construction contracts related to an extraction
5 facility. ECF No. 1. On June 12, 2020, Plaintiff filed a Complaint against
6 Defendants Industrial Control Concepts Inc. (“ICC”), ICC Northwest, Inc. (“ICC
7 NW”), and ICC Turnkey, Inc. (“ICC Turnkey”). ECF No. 1. On September 10,
8 2020, Defendants filed the instant Motion to Dismiss for Failure to State a Claim
9 and Alternative Motion for a More Definite Statement. ECF No. 11. Plaintiff and
10 Defendants timely filed their respective response and reply. ECF Nos. 12-13. The
11 following facts are drawn from Plaintiff’s Complaint and construed in the light
12 most favorable to Plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir.
13 2000).

14 In May 2019, Plaintiff Wyckoff Farms solicited quotes from Defendants for
15 stainless steel tanks for use in an extraction plant Plaintiff intended to build in
16 Prosser, Washington. ECF No. 1 at 2, ¶ 8. On May 17, 2019, the parties executed
17 an agreement (the “Tank Contract”) for the purchase of 30 stainless steel tanks for
18 \$876,000. ECF No. 1 at 3, ¶ 9.

19 On or about June 14, 2019, the parties executed a second agreement (the
20 “Engineering Contract”) pertaining to the engineering of the extraction plant. ECF

1 No. 1 at 3, ¶ 11. The Engineering Contract required Defendants “to deliver ‘an
2 engineering report, documents, diagrams, and models that integrate and close the
3 gaps between the various components of the Wyckoff Extraction facility...’ and
4 prepare proposals for the piping system, multi zone CIP system, and integrated
5 control and data collection system.” ECF No. 1 at 3, ¶ 12. Defendants represented
6 that the Engineering Contract would “identify the full scope of work and materials
7 required to integrate the various components” needed for the extraction facility.
8 ECF No. 1 at 3, ¶ 13.

9 On or about August 9, 2019, the parties executed a third agreement (the
10 “Piping Contract”) regarding the interconnective piping needed at the extraction
11 facility. ECF No. 1 at 3, ¶ 14. The Piping Contract “required [Defendants] to
12 design, fabricate, and deliver piping needed to connect the various Extraction
13 Project components for a fixed price of \$368,000.” ECF No. 1 at 4, ¶ 15.

14 Defendants also “agreed to install and build the Piping Contract system on a time
15 and material basis plus travel expenses, not to exceed \$135,000. ECF No. 1 at 4,
16 ¶ 16.

17 On or about August 19, 2019, the parties executed a fourth agreement (the
18 “Control System Contract”) regarding the electronic control system needed at the
19 extraction facility. ECF No. 1 at 4, ¶ 17. The Control System Contract “required
20 [Defendants] to design, fabricate, and deliver the electronic system needed to

1 operate the various Extraction Project components at a fixed price of \$801,000.”
2 ECF No. 1 at 4, ¶ 18. Defendants “agreed to install and build the Control System
3 Contract components on a time and materials basis plus travel expenses, not to
4 exceed \$140,000.” ECF No. 1 at 4, ¶ 19. Additionally, under the Control System
5 Contract, commissioning and start up was provided for at an hourly rate for the
6 commissioning and start-up engineer, not to exceed \$54,000. ECF No. 1 at 4, ¶ 20.
7 Finally, “out-of-scope materials necessary to carry the Piping Contract and Control
8 System Contract were to be provided on a cost plus 10% basis.” ECF No. 1 at 4,
9 ¶ 21.

10 Each contract incorporates the same appendix, requiring Defendants to
11 “defend, indemnify, and hold harmless [Plaintiff] from and against all claims,
12 actions, proceedings, liabilities, losses, damages, costs and expenses, arising out of
13 third party actions, including reasonable attorney’s fees and defense costs, which
14 [Plaintiff] may sustain resulting from the acts or omissions of [Defendants].” ECF
15 No. 1 at 7, ¶¶ 39-40.

16 Once the parties executed the four contracts, Defendants notified Plaintiff
17 that it “identified 686 missing pieces of equipment, valves, instruments, and
18 specialty items that [were] currently not supplied by any other vendor under
19 contract. In addition ... substantial amounts of installation, including piping,
20 insulation, structures, and electrical work, is uncovered.” ECF No. 1 at 5, ¶ 22.

1 Defendants informed Plaintiff that an additional agreement (the “Gap Contract”)
2 was needed to address the missing equipment and uncovered work. ECF No. 1 at
3 5, ¶ 24. Plaintiff relied on Defendants’ expertise and representations and executed
4 the Gap Contract, requiring Defendants “to procure and deliver all remaining
5 materials needed to operate the various Extraction Project components at a fixed
6 price of \$1,638,195.” ECF No. 1 at 5, ¶ 25. Defendants “agreed to install the Gap
7 Contract components on a time and materials basis, estimated at \$922,572, plus
8 travel expenses.” ECF No. 1 at 5, ¶ 26. Additional out-of-scope materials
9 necessary for this contract were to be provided on a cost plus 15% basis. ECF No.
10 1 at 6, ¶ 27.

11 In April 2020, Plaintiff discovered Defendants had significantly overbilled
12 on the extraction facility projects by double-billing certain equipment and
13 materials, charging for work not actually performed, and charging for travel
14 expenses not related to the contracts or pre-approved by Plaintiff. ECF No. 1 at 6,
15 ¶¶ 29-31, 33. Plaintiff requested documentation to substantiate the bills, and
16 Defendants submitted falsified time card records. ECF No. 1 at 6, ¶ 32.

17 That same month, Plaintiff discovered that Defendants were not paying their
18 subcontractors. ECF No. 1 at 7, ¶ 35. As a result, Plaintiff sought assurances that
19 Defendants could complete the contract work, which Defendants failed to provide.
20 ECF No. 1 at 7, ¶¶ 36-37. Plaintiff notified Defendants that it believed they

1 anticipatorily repudiated their contracts, and Defendants subsequently discontinued
2 all work on the extraction facility. ECF No. 1 at 7, ¶ 38.

3 On May 27, 2020 one of Defendants’ subcontractors, NIPR, LLP, recorded a
4 Notice of Claim of Lien against Plaintiff’s property. ECF No. 1 at 7-8, ¶¶ 41-42.
5 The lien claims that Defendant “ICC NW owes NIPR the principal amount of
6 \$314,792.15 plus interest at a rate of 12% for work performed on the Extraction
7 Project for which NIPR has not been paid.” ECF No. 1 at 8, ¶ 42.

8 Defendants have refused to defend, indemnify, or hold harmless Plaintiff
9 from the subcontractor’s lien as required under the appendix attached to each
10 contract. ECF No. 1 at 8, ¶ 43. Plaintiff has also overpaid Defendants no less than
11 \$1.3 million. ECF No. 1 at 6, ¶ 34.

12 DISCUSSION

13 A. Motion to Dismiss Standard

14 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may
15 move to dismiss the complaint for “failure to state a claim upon which relief can be
16 granted.” “The burden of demonstrating that no claim has been stated is upon the
17 movant.” *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).
18 A motion to dismiss for failure to state a claim will be denied if the plaintiff alleges
19 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
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1 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
2 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

3 While the plaintiff’s “allegations of material fact are taken as true and
4 construed in the light most favorable to the plaintiff[,]” the plaintiff cannot rely on
5 “conclusory allegations of law and unwarranted inferences [] to defeat a motion to
6 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
7 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must
8 provide “more than labels and conclusions, and a formulaic recitation of the
9 elements.” *Twombly*, 550 U.S. at 555. When deciding, the Court’s review is
10 limited to the complaint, documents incorporated into the complaint by reference,
11 and judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d
12 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551
13 U.S. 308, 322 (2007)).

14 **B. Breach of Contract**

15 Defendants argue Plaintiff has failed to state a claim for breach of contract
16 “[b]ecause Plaintiff fails to allege facts that show how *each* Defendant was a party
17 to each contract, and that each Defendant breached a precise duty under specific
18 contract provision.” ECF No. 11 at 4. Plaintiff argues that the factual
19 representations apply to each Defendant, and Defendants will have to engage in
20 discovery for more specific details. ECF No. 12 at 6.

1 Under Washington law, a plaintiff “must prove a valid contract between the
2 parties, breach, and resulting damage.” *Lehrer v. State, Dep’t of Soc. & Health*
3 *Servs.*, 101 Wash. App. 509, 516 (2000) (internal citation omitted).

4 Here, the essence of Defendants’ argument is that Plaintiff must be more
5 specific by delineating duties as to each separate Defendant. Plaintiff has
6 identified the existence of five contracts. *See* ECF No 1. at 3-6, ¶¶ 9-27. Plaintiff
7 alleges that each Defendant had obligations under these contracts, materially
8 breached these contracts, and Plaintiff suffered harm as a result. ECF No. 1 at 8,
9 ¶¶ 44-48. At this stage, Plaintiff has plausibly alleged a breach of contract claim as
10 to each Defendant.

11 **C. Anticipatory Repudiation**

12 Defendants argue Plaintiff has failed to state a claim for anticipatory
13 repudiation where Plaintiff “fails to plead 1) the contracts and provisions which
14 required Defendants to provide ‘adequate assurances’ to Plaintiff, and 2) what
15 clear and positive statements were made by Defendants which express their intent
16 to repudiate the contracts.” ECF No. 11 at 5-6. Plaintiff argues that Defendants
17 anticipatorily breached the contracts where Defendants failed “to pay
18 subcontractors” ... “coupled with their act of walking off the job once financial
19 assurances were requested.” ECF No. 12 at 8.

1 Under Washington law, an anticipatory breach occurs when a party to a
2 bilateral contract either expressly or impliedly repudiates the contract prior to
3 performance. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wash. 2d 881, 898
4 (1994). Repudiation occurs by a “positive statement or action by the promisor
5 indicating distinctly and unequivocally that he either will not or cannot
6 substantially perform any of his contractual obligations.” *Id.* (internal quotation
7 omitted).

8 Defendants focus on the lack of “clear and positive statements.” ECF No.
9 11 at 6. However, statements are not the only way to anticipatorily breach a
10 contract. Plaintiff’s allegations in the Complaint – that Defendants failed “to pay
11 subcontractors” and walked “off the job once financial assurances were requested”
12 – plausibly states *actions* by Defendants that indicate Defendants would not
13 substantially perform on the remaining contractual obligations. ECF No. 12 at 8.
14 Therefore, Plaintiff has plausibly alleged a claim for anticipatory repudiation as to
15 each Defendant.

16 **D. Unjust Enrichment**

17 Defendants argue Plaintiff has failed to state a claim for unjust enrichment
18 because “Plaintiff already alleged the ‘overcharging’ was a material breach of an
19 express contract.” ECF No. 11 at 7. Plaintiff argues that it may plead theories in
20 the alternative. ECF No. 12 at 9.

1 Under Rule 8(d)(2), a plaintiff “may set out 2 or more statements of a claim
2 or defense alternatively or hypothetically, either in a single count or defense or in
3 separate ones.” Additionally, a plaintiff “may state as many separate claims or
4 defenses as it has, regardless of consistency.” Fed. R. Civ. P. 8(d)(3).

5 Under Washington law, an unjust enrichment claim requires the plaintiff to
6 show “(1) the defendant receives a benefit, (2) the received benefit is at the
7 plaintiff’s expense, and (3) the circumstances make it unjust for the defendant to
8 retain the benefit without payment.” *Young v. Young*, 164 Wash. 2d 477, 484-85
9 (2008). As such, “[u]njust enrichment is the method of recovery for the value of
10 the benefit retained absent any contractual relationship because notions of fairness
11 and justice require it.” *Id.* at 484 (internal citation omitted).

12 Here, Plaintiff alleges Defendants “overcharged and double-charged
13 [Plaintiff] for work that was never performed, materials that were never delivered,
14 and costs that were not incurred on the Wyckoff Extraction Project,” “[Defendants]
15 received in excess of \$1.3 million in unearned funds from [Plaintiff],” and “it is
16 unjust for Defendants to retain the benefit of the funds it received in excess of what
17 it was entitled to for the work actually performed and materials actually supplied.”
18 ECF No. 1 at 9-10, ¶¶ 55-57. As the existence and validity of Plaintiff’s earlier
19 referenced contracts have not been determined as a matter of law, Plaintiff’s
20 alternative theory is plausible. If this Court determines in subsequent proceedings

1 that an enforceable contract exists between the parties, Plaintiff's unjust
2 enrichment claim cannot stand. However, at this stage, Plaintiff has properly
3 alleged an alternative claim for unjust enrichment as to each Defendant.

4 **E. Failure to Defend and Indemnify**

5 Defendants argue Plaintiff has failed to state a claim for failure to defend
6 and indemnify because Plaintiff failed to provide "Defendants with any notice of
7 what contract and term Plaintiff is claiming imposes the duty to defend and
8 indemnify Plaintiff" and Plaintiff "fails to adequately identify the third-party
9 claims which Plaintiff is purportedly alleging that each Defendant has a duty to
10 indemnify and defend Plaintiff against." ECF No. 11 at 8. Plaintiff argues that it
11 adequately pleads the claim by pointing to provisions in the Complaint that
12 identify the contracts, contract term requiring Defendants to defend indemnify, and
13 third-party claims triggering the contract term. ECF No. 12 at 11-12.

14 Under Washington law, the duty to defend "arises when a complaint against
15 the insured, construed liberally, alleges facts which could, if proven, impose
16 liability upon the insured within the policy's coverage." *Mut. of Enumclaw Ins.*
17 *Co. v. USF Ins. Co.*, 164 Wash. 2d 411, 420-421 (2008) (internal citation omitted).
18 However, the duty to defend "is separate from, and broader than, the duty to
19 indemnify." *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wash. 2d 55, 64 (2000).
20 While the duty to defend exists "merely if the complaint contains any factual

1 allegations which could render the insurer liable to the insured under the policy,”
2 the “duty to indemnify hinges on the insured’s actual liability to the claimant and
3 actual coverage under the policy.” *Id.* The “duties to defend and indemnify do not
4 become *legal obligations* until a claim for defense or indemnity is tendered.” *Mut*
5 *of Enumclaw Ins. Co.*, 164 Wash. 2d at 421.

6 Contrary to Defendants’ contentions, Plaintiff identified an indemnity clause
7 that was incorporated by reference into each contract with an appendix, which
8 requires Defendants to “defend, indemnify, and hold harmless [Plaintiff] from and
9 against all claims, actions, proceedings, liabilities, losses, damages, costs and
10 expenses, arising out of third party actions, including reasonable attorney’s fees
11 and defense costs, which [Plaintiff] may sustain resulting from the acts or
12 omissions of [Defendants].” ECF No. 1 at 7, ¶¶ 39-40. Plaintiff also identified the
13 third-party claim triggering the indemnity clause, and Defendants’ refusal to
14 defend and indemnify on the same. ECF No. 1 at 7-8, ¶¶ 41-43. Thus, Plaintiff
15 adequately pleads a claim for failure to defend and indemnify.

16 **F. Unfair and Deceptive Business Practices**

17 Defendants argue Plaintiff has failed to state a claim for unfair and deceptive
18 business practices by failing to plead facts “to indicate: (a) the nature of the unfair
19 or deceptive act or practice; (b) the public interest impact; or (c) the causal link
20 between the alleged deceptive act and each particular Defendant.” ECF No. 11 at

1 9. Defendants requests this claim be dismissed or amended to plead specific facts.
2 *Id.* Plaintiff argues it identified the deceptive acts by alleging Defendants
3 submitted fraudulent records for payment, it shows the public interest impact on “a
4 clear pattern of deceptive billing practices,” and it demonstrates the causation
5 alleged as to each individual Defendant. ECF No. 12 at 13-14.

6 The Washington Consumer Protection Act (“CPA”) prohibits “[u]nfair
7 methods of competition and unfair or deceptive acts or practices in the conduct of
8 any trade or commerce.” RCW 19.86.020. Under RCW 19.86.090, “[a]ny person
9 who is injured in his or her business or property by a violation of RCW 19.86.020
10 ... may bring a civil action” to recover actual damages. To prevail on a CPA
11 claim, “the plaintiff must prove an (1) unfair or deceptive act or practice; (2)
12 occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in
13 his or her business or property; [and] (5) causation.” *Klem v Washington Mut.*
14 *Bank*, 176 Wash. 2d 771, 782 (2013) (quoting *Hangman Ridge Training Stables,*
15 *Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780 (1986)).

16 The Court finds that Plaintiff has sufficiently alleged facts to the first,
17 second, fourth, and fifth elements. Under the first element, Plaintiff’s allegations
18 that Defendants’ overcharged, double billed, and falsified records constitute an
19 unfair or deceptive act or practice. ECF No. 1 at 6-7, ¶¶ 29-33; *see State Farm*
20 *Fire & Cas. Co. v. Huynh*, 92 Wash. App. 454, 459 (1998) (Defendant’s false

1 billings and reports made for the purpose to increase profits subject to the CPA).
2 Under the second element, Plaintiff sufficiently alleges that these contracts were
3 based on the sale of services for the construction of the extraction facility, meeting
4 the definition of “trade and commerce.” *See* RCW 19.86.010(2). Under the fourth
5 and fifth elements, Plaintiff has adequately alleged that Defendant’s overcharging
6 and double billing caused it economic injury in the overpayment of \$1.3 million to
7 Defendants. ECF No. 1 at 6, ¶ 34.

8 Under the third element, “[o]rdinarily, a breach of a private contract
9 affecting no one but the parties to the contract is not an act or practice affecting the
10 public interest.” *Hangman Ridge*, 105 Wash. 2d at 790. However, a plaintiff can
11 establish that the private “lawsuit would serve the public interest by showing a
12 likelihood that other plaintiffs have been or will be injured in the same fashion.”
13 *Trujillo v. Nw. Tr. Servs.*, 183 Wash. 2d 820, 835 (2015) (internal citations
14 omitted). To assess the public interest in a private dispute, courts are guided by
15 “(1) whether the defendant committed the alleged acts in the course of his/her
16 business, (2) whether the defendant advertised to the public in general, (3) whether
17 the defendant actively solicited this particular plaintiff, and (4) whether the
18 plaintiff and defendant have unequal bargaining positions.” *Id.* at 836. No one
19 factor is dispositive. *Id.*

1 Here, even viewed in light most favorable to Plaintiff, Plaintiff has failed to
2 allege the public's interest. Plaintiff summarily alleges that Defendants' conduct
3 affects the public interest. ECF No. 1 at 10, ¶ 63. This conclusory legal assertion
4 is insufficient to plausibly state a claim. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d at
5 1403. Without alleging more facts indicative of public interest, Plaintiff's unfair
6 and deceptive business practices claim cannot survive a motion to dismiss.

7 **G. Leave to Amend Complaint**

8 Defendants argue that the claims against Defendants ICC NW, Inc. and ICC
9 Turnkey, Inc. should be dismissed without leave to amend because "Plaintiff
10 conveniently clusters Defendants together, improperly refers to them collectively,
11 and then fails to identify claims against each individual Defendant as it is legally
12 required to do at this stage." ECF No. 11 at 9. Defendants further argue that "ICC
13 Inc. is the only party named in all of the contracts." ECF No. at 9-10.

14 Rule 15(a)(2) instructs courts to "feely give leave [to amend] when justice so
15 requires." "This policy is to be applied with extreme liberality." *Eminence*
16 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation and
17 citation omitted). However, a court may deny leave to amend "due to undue delay,
18 bad faith or dilatory motive on the part of the movant, repeated failure to cure
19 deficiencies by amendments previously allowed, undue prejudice to the opposing
20

1 party ..., and futility of amendment.” *Zucco Partners, LLC v. Digimarc Ltd.*, 552
2 F.3d 981, 1007 (9th Cir. 2009) (quotations and citation omitted).

3 Finding no basis for the contrary, the Court grants Plaintiff leave to amend
4 its complaint to supplement the public interest element, if any, to the unfair and
5 deceptive debt practices claim. However, finding that Plaintiff has properly made
6 allegations against each Defendant, Plaintiff need not amend to distinguish further
7 among the Defendants. Defendants can individually answer as to each allegation.

8 **H. Motion for a More Definite Statement**

9 In the alternative, much like the argument for denying leave to amend,
10 Defendants move this Court to order Plaintiff to provide a more definite statement,
11 so that specifically “Plaintiff must identify facts and circumstances in its pleading
12 to support *each* claim against *each* identified Defendant such that each ICC, ICC
13 NW, and ICC Turnkey are each able to adequately respond and defend.” ECF No.
14 11 at 10. Plaintiff argues that Defendants “sloppy business practices” are to blame
15 where Defendants were “treating each of these entities interchangeably in the
16 contracting process.” ECF No.12 at 15.

17 Accepting Plaintiff’s allegations as true, the Court has found Plaintiff alleges
18 sufficient factual matter to state claims for relief, with the exception for the unfair
19 and deceptive business practices claim, against each Defendant. Therefore, the
20 Court denies Defendants’ alternative motion for a definite statement. As

1 previously stated, Defendants may individually answer the allegations and engage
2 in discovery to further defend against the claims.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 4 1. Defendants' Motion to Dismiss for Failure to State a Claim and
5 Alternative Motion for a More Definite Statement (ECF No. 11) is
6 **DENIED.**
- 7 2. Plaintiff is granted leave to **AMEND** its complaint **within 21 days** of this
8 Order.

9 The District Court Executive is directed to enter this Order and furnish
10 copies to counsel.

11 **DATED** October 27, 2020.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge