

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10
11 KINZIE ADVANCED POLYMERS LLC,
doing business as GROVE BAGS,

12 Plaintiff,

13 v.

14 HIGHOPES LLC,

15 Defendant.

CASE NO. 2:24-cv-00388-LK

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S SECOND
MOTION TO DISMISS

16
17 This matter comes before the Court on Defendant Highopes LLC's Second Motion to
18 Dismiss Plaintiff Kinzie Advanced Polymers LLC's Amended Complaint. Dkt. No. 41. For the
19 reasons below, the Court grants in part and denies in part the motion.

20 **I. BACKGROUND**

21 **A. Factual Background**

22 Kinzie operates in the cannabis industry, doing business as Grove Bags. Dkt. No. 28 at 2.
23 Looking to improve its website and online search rankings, Kinzie entered into discussions with
24 Highopes, a digital agency. *Id.* at 2–3. Contract negotiations began in late January 2022 and

1 continued for about 15 days. *Id.* at 3. The parties formally executed the contract, named the
2 “Project Proposal,” on February 8, 2022. *Id.*; Dkt. No. 32-1 at 24. Under the contract:

- 3 • Highopes was to “[d]esign and develop a scalable [and] conversion optimized e-commerce
4 website” and “begin utilizing [search engine optimization] marketing to regain and exceed
5 past search rankings,” Dkt. No. 32-1 at 2;
- 6 • The work would take Highopes nine to twelve weeks from the project kickoff date to
7 complete, depending on when Highopes received feedback at each milestone, *id.* at 12;
- 8 • The total project cost for Kinzie was \$23,000, plus an additional recurring monthly fee of
9 \$2,250 for the “SEO+ Program” and “Webcare Program,” *id.* at 13; and
- 10 • The Limitation of Liability provision limits Kinzie’s “maximum remedy” for “damages
11 for any and all causes whatsoever” to “the total Project fee,” and expressly excludes “lost
12 profits, business interruption,” and “any indirect, incidental, special, consequential,
13 exemplary or punitive damages arising out of or relating to the materials or the services
14 provided” by Highopes, *id.* at 20.

15 Kinzie alleges that Highopes failed to complete the work outlined in the contract. Dkt. No.
16 28 at 4. According to Kinzie, the work became so delayed that its own employees had to assist
17 Highopes with the project completion, resulting in additional costs. *Id.* In the end, the website was
18 delivered eight to nine months late, and when it launched, it crashed and was down for about 10
19 days. *Id.* After the website crashed, the keyword search for Kinzie dropped by over 50 percent. *Id.*
20 It took Kinzie over three months to recover its keyword search position, which required paying
21 third party companies such as Google for search engine optimization services. *Id.*

22 Kinzie filed suit, alleging breach of contract (Count 1) and fraudulent misrepresentation
23 (Count 2). Dkt. No. 1-1 at 6–7.

1 **B. Procedural Background**

2 Kinzie filed its initial complaint on July 6, 2023 in the Cuyahoga County Court of Common
3 Pleas. Dkt. No. 1-1. On August 4, 2023, Highopes removed the case to the United States District
4 Court for the Northern District of Ohio, Eastern Division. Dkt. No. 1. The proffered basis for
5 subject matter jurisdiction was diversity jurisdiction. *Id.* at 2 (federal jurisdiction exists over this
6 action “because it is between citizens of different states, and the amount in controversy is greater
7 than \$75,000, exclusive of interest and costs.”). Highopes then successfully moved to transfer the
8 case to this district based on the contract’s forum selection clause. Dkt. No. 4 at 2–3 (motion to
9 transfer); Dkt. No. 13 (order granting transfer).

10 After transfer, Highopes filed a motion to dismiss, Dkt. No. 26, prompting Kinzie to amend its
11 complaint, Dkt. No. 28. Highopes then moved to dismiss the amended complaint. Dkt. No. 41. In
12 its motion, Highopes challenges subject matter jurisdiction, specifically targeting the amount in
13 controversy. *Id.* at 6. It also seeks dismissal for failure to state a claim under Federal Rule of Civil
14 Procedure 12(b)(6), *id.* at 6–7, and appears to move for judgment on the pleadings under Rule
15 12(c), *id.* at 6.

16 **II. DISCUSSION**

17 As explained below, the Court finds it has subject matter jurisdiction over this action
18 because diversity jurisdiction existed at the time of removal. The Court then grants in part and
19 denies in part Highopes’ motion under Rule 12(b)(6), finding that the amended complaint states a
20 claim for breach of contract (Count 1), but not for fraudulent misrepresentation (Count 2). Finally,
21 the Court denies Highopes’ Rule 12(c) motion as premature.

22 **A. The Court Has Subject Matter Jurisdiction Over This Case**

23 Diversity jurisdiction exists over all civil actions where the matter in controversy exceeds
24 \$75,000 and the action is between citizens of different states. 28 U.S.C. § 1332(a)(1). Whenever a

1 removing defendant invokes diversity jurisdiction, the district court strictly construes the general
2 removal statute against removal. *See Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056–57 (9th
3 Cir. 2018). The presumption against removal based on diversity jurisdiction “means that the
4 defendant always has the burden of establishing that removal is proper.” *Gaus v. Miles, Inc.*, 980
5 F.2d 564, 566 (9th Cir. 1992) (per curiam).

6 1. Complete Diversity Exists

7 The first step in the analysis is to determine the parties’ citizenship. Section 1332(a)(1)
8 requires complete diversity; that is, each plaintiff must be a citizen of a different state than each of
9 the defendants. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1095 (9th Cir. 2004). Here, both parties
10 are limited liability companies, which “have the citizenship of all of their owners/members[.]”
11 *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 902 (9th Cir. 2006).

12 Kinzie and Highopes have four members between them, all of whom are natural persons.
13 Dkt. Nos. 35 at 1; 36 at 1–2. Natural persons are deemed to be citizens of the state where they are
14 domiciled. *Ehrman v. Cox Commc’ns, Inc.*, 932 F.3d 1223, 1227 (9th Cir. 2019). Highopes’
15 removal petition alleges diversity jurisdiction based on each member’s residency. Dkt. No. 1 at 2.
16 However, that is insufficient for the Court to conclusively determine each member’s domicile, and
17 therefore citizenship. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (“A
18 person residing in a given state is not necessarily domiciled there, and thus is not necessarily a
19 citizen of that state.”). Kinzie’s amended complaint fares no better in alleging sufficient
20 jurisdictional facts; it does not identify either its or Highopes’ members or their domiciles. *See*
21 Dkt. No. 28 at 1–2. The corporate disclosure statements also do not identify the members’
22 domiciles, Dkt. Nos. 35, 36, containing only conclusory descriptions of each member’s citizenship.
23 *See Faris v. Petit Pot, Inc.*, No. CV 23-1955-JFW(PDX), 2023 WL 6192703, at *2 (C.D. Cal. Aug.
24 18, 2023) (conclusory allegations regarding citizenship are insufficient to plead diversity).

1 It was only through supplemental briefing that the parties adequately established their
2 citizenship. Dkt. Nos. 45–47. Kinzie has one member, Jacob Grover, who is domiciled in Ohio.
3 Dkt. No. 46 at 1; Dkt. No. 47 at 2. Highopes has three members: Mina Johnson, Patrick Toste, and
4 Thomas Warinner. Dkt. No. 45 at 1. Johnson is domiciled in Woodinville, Washington. Dkt. No.
5 45-6 at 1–2. Toste and Warriner are each domiciled in California. Dkt. No. 45-4 at 1; Dkt. No. 45-
6 5 at 1. Because Kinzie is a citizen of Ohio for purposes of diversity jurisdiction, while Highopes
7 is a citizen of California and Washington, complete diversity exists.

8 2. The Amount in Controversy Requirement is Met

9 The amount in controversy is an “estimate of the entire potential amount at stake in the
10 litigation[.]” *Jauregui v. Roadrunner Transp. Servs., Inc.*, 28 F.4th 989, 994 (9th Cir. 2022)
11 (emphasis omitted); *see also Greene v. Harley-Davidson, Inc.*, 965 F.3d 767, 772 (9th Cir. 2020)
12 (“‘Amount at stake’ does not mean likely or probable liability; rather, it refers to possible
13 liability.”). This includes “any result of the litigation, excluding interests and costs, that entails a
14 payment by the defendant.” *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 648 (9th
15 Cir. 2016) (cleaned up). It encompasses, among other things, “damages (compensatory, punitive,
16 or otherwise) as well as attorneys’ fees awarded under fee shifting statutes,” *id.* at 648–49, or
17 provided by contract, *Simmons v. PCR Tech.*, 209 F. Supp. 2d 1029, 1034 (N.D. Cal. 2002).

18 In the removal context, to determine whether the jurisdictional amount in controversy has
19 been satisfied, courts may consider “facts presented in the removal petition as well as any
20 summary-judgment-type evidence relevant to the amount in controversy at the time of removal.”
21 *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam)
22 (cleaned up). A defendant who removes a case thus “may point to many different types of
23 evidence” to establish the amount in controversy, and “[a] particularly powerful form of evidence
24 is the plaintiff’s own statements about the damages they seek.” *Flores v. Safeway, Inc.*, No. C19-

1 0825-JCC, 2019 WL 4849488, at *3 (W.D. Wash. Oct. 1, 2019). Such statements can include
2 settlement demands. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (per curiam).

3 Despite asserting in its notice of removal that “[t]he amount in controversy requirement is
4 satisfied,” Dkt. No. 1 at 3, Highopes argues in its motion to dismiss that “[t]he amount in
5 controversy does not meet the diversity jurisdiction threshold,” Dkt. No. 41 at 14. Specifically,
6 Highopes contends that the limitation of liability provision in the parties’ contract limits Kinzie’s
7 “maximum remedy” to \$23,000. *Id.* at 14–15.

8 Highopes cites the wrong legal standard for determining whether the amount in controversy
9 requirement is met. *Id.* at 14. When a case is removed, the burden is on the removing defendant to
10 prove by a preponderance of the evidence that the amount in controversy requirement is met,
11 *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 690 (9th Cir. 2006), and “the amount in
12 controversy is determined by the complaint operative at the time of removal,” *Chavez v. JPMorgan*
13 *Chase & Co.*, 888 F.3d 413, 414–15, 417 (9th Cir. 2018). “[W]hen the amount in controversy is
14 satisfied at removal, any subsequent amendment to the complaint or partial dismissal that
15 decreases the amount in controversy below the jurisdictional threshold does not oust the federal
16 court of jurisdiction.” *Id.*; see also 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice*
17 *and Procedure* § 3706 (5th ed. 2024) (“Under an easily stated, well-settled principle, reflected in
18 cases throughout the federal courts, the existence or nonexistence of the amount in controversy
19 required for subject matter jurisdiction is determined on the basis of the facts and circumstances
20 as of the time that an action . . . arrives [in federal court] from a state court by way of removal,”
21 and subsequent events such as a pleading amendment “cannot destroy the district court’s
22 jurisdiction once it has been acquired . . . by way of removal.”). Highopes’ argument in its motion
23 to dismiss that “Plaintiff’s claim does not meet the amount in controversy requirement,” Dkt. No.
24 41 at 15, thus appears at first blush to “demonstrate[] that [Highopes] is completely unprepared to

1 support its claim of the sufficiency of the amount in controversy,” *Wyomissing Pro. Clinic of*
2 *Physical Therapy v. State Farm Ins. Companies*, No. 92-1837, 1992 WL 122837, at *3 (E.D. Pa.
3 May 28, 1992), warranting remand to state court.

4 However, the Ninth Circuit has made clear that a “potential defense to [a] state court action
5 that [a] damages limitation restricts recovery to less than \$75,000 . . . does not preclude federal
6 jurisdiction.” *Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1108
7 (9th Cir. 2010); *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289–90
8 (1938). This rule applies even where a defendant “is asserting the potential defense, and at the
9 same time seeking a federal forum based on diversity jurisdiction.” *Geographic Expeditions*, 599
10 F.3d at 1108. Here, Highopes’ notice of removal proves by a preponderance of the evidence that
11 the amount in controversy is met. The state court complaint seeks \$70,000 in damages plus an
12 unspecified amount in punitive damages and attorney’s fees. Dkt. No. 1-1 at 7–8. Attorney’s fees
13 and costs are expressly provided by the parties’ contract, Dkt. No. 1-2 at 3, and it is reasonable to
14 assume that fees in this matter will exceed \$5,000. Moreover, in a pre-litigation demand, Kinzie’s
15 counsel characterized the “close to \$70,000” in damages sought as being a conservative estimate.
16 *Id.* at 2–3. Considered together, these facts make it more likely than not that the jurisdictional
17 minimum is met here.¹

18 To the extent Highopes contends that the limitation of liability provision makes it facially
19 evident that Kinzie’s claims are actually for less than the jurisdictional amount, this argument fails.
20 First, it is self-defeating; if Kinzie’s complaint on its face claimed less than the jurisdictional
21 amount, Highopes had no basis to remove the case. Second, Kinzie indicates that it will argue that

23 ¹ The state court complaint also seeks punitive damages; however, “Washington, unlike other states, employs a very
24 restrictive approach to punitive damages” and only permits their recovery when authorized by statute. *Broughton*
Lumber Co. v. BNSF Ry. Co., 278 P.3d 173, 183 n.14 (Wash. 2012). Neither the complaint nor the removal petition
identifies a statute that would permit an award of punitive damages here.

1 the limitation of liability provision is unenforceable, Dkt. No. 42 at 8–9, and “just because
2 [Highopes] might have a valid defense that will reduce recovery to below the jurisdictional amount
3 does not mean [it] will ultimately prevail on that defense.” *Geographic Expeditions*, 599 F.3d at
4 1108 (9th Cir. 2010). “[I]f a district court had to evaluate every possible defense that could reduce
5 recovery below the jurisdictional amount the district court would essentially have to decide the
6 merits of the case before it could determine if it had subject matter jurisdiction.” *Id.*; *see also Leo*
7 *India Films Ltd. v. GoDaddy.com, LLC*, 840 F. App’x 227, 228 (9th Cir. 2021) (district court’s
8 conclusion that it was a legal certainty the amount in controversy did not exceed \$75,000 because
9 a limitation of liability clause capped damages at \$10,000 was foreclosed by *Geographic*
10 *Expeditions*).

11 Although the Court ultimately dismisses Kinzie’s fraud claim as failing to meet the
12 heightened federal pleading standard, the narrowing of claims in this manner does not affect
13 jurisdiction. And in any case, the Court finds that the damages pleaded in the amended complaint
14 based on the breach of contract claim alone were made in good faith and exceed the jurisdictional
15 minimum. *See* Dkt. No. 28 at 4 (seeking \$75,000 for lost sales while website was down); *id.* at 5
16 (seeking \$10,000 and \$23,000 for loss of employee manpower and for services not received,
17 respectively). Highopes’ motion to dismiss based on subject matter jurisdiction is denied.

18 **B. Highopes’ Rule 12(b)(6) Motion is Granted in Part and Denied in Part**

19 When deciding a motion under the Rule 12(b)(6) standard, a court must assume the truth
20 of the complaint’s factual allegations and credit all reasonable inferences arising from those
21 allegations. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). The court “need not accept as
22 true conclusory allegations that are contradicted by documents referred to in the complaint.”
23 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the
24 plaintiff must point to factual allegations that “state a claim to relief that is plausible on its face.”

1 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible “when the
2 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
3 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
4 Although “detailed factual allegations” are not required, a complaint must include “more than an
5 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* A complaint “that offers ‘labels
6 and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.*
7 (quoting *Twombly*, 550 U.S. at 555).

8 1. Kinzie States a Breach of Contract Claim (Count 1)

9 Highopes asks the Court to dismiss Kinzie’s breach of contract claim as conclusory and a
10 bare recitation of the elements of the claim. *See* Dkt. No. 41 at 9. The Court denies Highopes’
11 motion as to this claim.

12 As an initial matter, Highopes’ own version of the facts—which it spends several pages
13 describing—is irrelevant at this stage of proceedings. *Id.* at 2–6; *see also* Dkt. No. 42 at 2–4.
14 Highopes avers that it “completed the website timely” and that Kinzie “became uncooperative with
15 Highopes, crashed its own website, feigned damages, and ultimately refused to pay.” Dkt. No. 41
16 at 2; *see also id.* at 4 5 (asserting that “[t]he evidence will show that Highopes had the expertise
17 and capacity” and that Kinzie “caused the very problems about which it now complains”). At this
18 stage, the Court must assume the truth of the complaint’s factual allegations and credit all
19 reasonable inferences arising from those allegations. *Sanders*, 504 F.3d at 910. Contrary to what
20 Highopes argues, these additional facts—including those in exhibits two through four
21 accompanying the motion to dismiss, Dkt. Nos. 41-3, 41-4, 41-5—are not subject to judicial notice
22 and there is no proper basis to consider them at this time. Dkt. No.43 at 8–9; *see also Khoja v.*
23 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (“If defendants are permitted to
24 present their own version of the facts at the pleading stage . . . it becomes near impossible for even

1 the most aggrieved plaintiff to demonstrate a sufficiently ‘plausible’ claim for relief.”). The Court
2 therefore disregards any factual statements other than those alleged in the complaint.

3 Moving on, the Court finds that the amended complaint states a sufficiently plausible claim
4 for breach of contract. To state a claim under Washington law,² Kinzie must allege the existence
5 of a contract, a duty imposed by that contract, breach of that duty, and that the breach proximately
6 caused it damages. *Nw. Indep. Forest Mfrs. v. Dep’t of Lab. & Indus.*, 899 P.2d 6, 9 (Wash. Ct.
7 App. 1995). The amended complaint does this: it alleges that the parties entered into an enforceable
8 contract, under which Highopes assumed a duty to design and develop an “optimized e-commerce
9 website” within nine to 12 weeks, and to improve the website’s search rankings. Dkt. No. 28 at 1–
10 2, 4; Dkt. No. 29-1 at 2. It also alleges that the Highopes breached those duties by delivering a
11 website “8-9 months later than Defendant had promised” that crashed upon arrival, resulting in a
12 precipitous drop in the website’s search rankings. Dkt. No. 28 at 4–5. Kinzie further alleges that
13 the breach of those duties proximately harmed it: Kinzie paid Highopes for services that were not
14 delivered, and the breach resulted in a prolonged decrease in sales and depressed search rankings,
15 among other alleged harms. *See id.* Contrary to Highopes’ contentions, the amended complaint
16 does not leave it “in the dark about how the contract was breached or how [Kinzie] has been
17 harmed” and without “fair notice to defend itself effectively[.]” Dkt. No. 41 at 9–10.

18 As for Highopes’ argument about the limitation of liability clause, the fact that the parties’
19 contract may limit the amount Kinzie might recover on its breach of contract claim does not mean
20 Kinzie has not stated a claim. Moreover, Rule 12(b)(6) is not a vehicle to dismiss a portion of a
21 claim, or to strike certain damages. *See Hernandez v. Path, Inc.*, No. 12-CV-01515-YGR, 2012
22 WL 5194120, at *6 n.7 (N.D. Cal. Oct. 19, 2012) (“Federal Rule of Civil Procedure 12(b)(6) is
23

24 ² Neither party argues that any other state’s law should govern this dispute; instead, each party cites Washington law
in its arguments. *See generally* Dkt. Nos. 41–43.

1 not an appropriate device to eliminate a portion of a claim.”); *see also Walker v. Brooks Pub. Safety*
2 *LLC*, No. 7:23-CV-00568, 2023 WL 8676226, at *5 n.5 (W.D. Va. Dec. 15, 2023) (“[I]nsofar as
3 Defendants seek to strike a claimed element of damages . . . its efforts fail: a plain reading of Rule
4 12(b)(6) indicates that the rule may be used only to dismiss a claim in its entirety.”) (cleaned up;
5 citing cases).

6 Because the Court finds that the amended complaint plausibly states a breach of contract
7 claim, the motion to dismiss is denied as to Count 1.

8 2. Kinzie Fails to State a Fraudulent Misrepresentation Claim (Count 2)

9 The Court does, however, grant Highopes’ motion as to Kinzie’s fraud claim because it
10 fails to meet the heightened pleading standard.

11 To state a fraudulent misrepresentation claim under Washington law, Kinzie must allege
12 “(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of
13 its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s
14 ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right
15 to rely upon it; and (9) damages suffered by the plaintiff.” *Kaspers v. Howmedica Osteonics Corp.*,
16 No. C15-0053JLR, 2015 WL 12085853, at *9 (W.D. Wash. Oct. 23, 2015) (quoting *Stiley v. Block*,
17 925 P.2d 194, 204 (Wash. 1996)). Federal Rule of Civil Procedure 9(b) “demands that, when
18 averments of fraud are made, the circumstances constituting the alleged fraud be specific enough
19 to give defendants notice of the particular misconduct so that they can defend against the charge
20 and not just deny that they have done anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
21 1097, 1106 (9th Cir. 2003) (cleaned up). To meet the heightened pleading standard, a plaintiff
22 must allege “the who, what, when, where, and how” of the misconduct charged. *Id.*

23 Kinzie alleges that, during the parties’ discussions between January 24, 2022 and February
24 8, 2022, Highopes (through its Creative Director) falsely represented that it had the expertise to

1 provide a scalable and conversion optimized website, along with search engine optimization and
2 marketing. Dkt. No. 28 ¶¶ 13, 16–17, 53. Highopes also represented that it had specific knowledge
3 of the cannabis industry that would be of “great value” to Kinzie. *Id.* ¶ 17. And finally, it falsely
4 represented that it could timely complete the project. *Id.* ¶¶ 18–19, 53. These allegations lack
5 specificity, and the remainder of Kinzie’s allegations are the sort of threadbare recitals and
6 conclusory assertions proscribed under *Iqbal* and Rule 9(b). *Ashcroft v. Iqbal*, 556 U.S. 662, 678
7 (2009). For example, with respect to falsity and the speaker’s knowledge thereof, Kinzie fails to
8 explain “why the disputed statement was untrue or misleading when made.” *In re GlenFed Inc.*
9 *Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (emphasis added), *superseded by statute on other*
10 *grounds*, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u–4(b)(1); *see also* Dkt.
11 No. 28 ¶¶ 34–35, 53. Kinzie’s fraud-by-hindsight allegations—i.e., that Highopes’ deception was
12 shown through its later deficient performance on the project—do not suffice. As for elements five
13 through seven, Kinzie fails to offer more than conclusory allegations. Dkt. No. 28 ¶¶ 23, 38, 52,
14 55–56; *In re GlenFed*, 42 F.3d at 1548 (“[M]ere conclusory allegations of fraud are insufficient.”).
15 The complaint does not address Kinzie’s right to rely on the allegedly false representations, nor
16 does it explain how its reliance on each misrepresentation resulted in damages suffered by it. Count
17 2 is therefore dismissed without prejudice and with leave to amend.

18 **C. Highopes’ Rule 12(c) Motion is Denied as Premature**

19 Highopes’ Rule 12(c) motion, Dkt. No. 41 at 6, is procedurally premature because
20 Highopes has not yet answered the amended complaint. Rule 12(c) provides: “*After the pleadings*
21 *are closed*—but early enough not to delay trial—a party may move for judgment on the pleadings.”
22 Fed. R. Civ. P. 12(c) (emphasis added). “[T]he pleadings are closed for the purposes of Rule 12(c)
23 once a complaint and answer have been filed.” *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir.
24 2005); *see also* Fed. R. Civ. P. 7(a) (defining what filings are considered pleadings). Because the

1 pleadings are not closed, the Rule 12(c) motion is denied without prejudice.

2 **III. CONCLUSION**

3 For the reasons explained above, Highopes’ Second Motion to Dismiss is GRANTED IN
4 PART and DENIED IN PART. Dkt. No. 41. Count 2 of the amended complaint is dismissed
5 without prejudice and with leave to amend, and Count 1 survives. Any amended complaint must
6 be filed within 21 days and must adequately set forth the parties’ citizenship for diversity
7 jurisdiction purposes. Kinzie must also file a redlined version of its complaint reflecting all
8 changes made to the first amended complaint by this deadline.

9 Finally, the Court DISCHARGES its Order to Show Cause, Dkt. No. 44, based on the
10 parties’ responses to the same, Dkt. Nos. 45–47.

11 Dated this 15th day of November, 2024.

12 

13

14 Lauren King
15 United States District Judge
16
17
18
19
20
21
22
23
24