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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

COSMO SPECIALTY FIBERS, INC., et  
al.,

Plaintiffs,

v.

RICHARD BASSETT, et al.,

Defendants.

CASE NO. C15-5485 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS AND GRANTING  
PLAINTIFFS' LEAVE TO  
AMEND

This matter comes before the Court on Defendants Richard Bassett ("Bassett") and Charlestown Investments Holdings, Ltd.'s ("Charlestown") (collectively "Defendants") motion to dismiss. (Dkt. 14). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part the motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On July 14, 2015, Plaintiffs Cosmo Specialty Fibers, Inc. ("Cosmo"), Cosmopolis Holdings, L.L.C., and Gores Capital Partners II, L.P., and Gores Co-Invest II Partnership

1 (collectively “Plaintiffs”) filed a complaint against Defendants asserting claims for  
2 misrepresentation or fraud in the inducement, fraudulent concealment, negligent  
3 misrepresentation, breach of contract, and a violation of Washington’s Consumer  
4 Protection Act (“CPA”), RCW Chapter 19.86. Dkt. 1.

5 On August 5, 2015, Defendants filed a motion to dismiss. Dkt. 14. Defendants  
6 argue that Plaintiffs’ claims are compulsory counterclaims that should have been brought  
7 in *Cato Sales and Trading v. Cosmo Specialty Fibers, Inc.*, No. C14-5549BHS (W.D.  
8 Wash.) (“*Cato v. Cosmo*”) and, in the alternative, Plaintiffs fail to state a claim for relief.  
9 *Id.* On August 24, 2015, Plaintiffs responded. Dkt. 16. On August 28, 2015, Defendants  
10 replied. Dkt. 19.

## 11 **II. FACTUAL BACKGROUND**

12 In this case, Plaintiffs’ allegations and claims revolve around Defendants’  
13 “misrepresentations and breaches of contract relating to the purchase and re-start of the  
14 Mill for the production and sale of dissolving wood pulp that consists of high purity  
15 cellulose.” Dkt. 1, ¶ 13. The contract in question is a consulting agreement between  
16 Cosmo and Charlestown in which Cosmo alleges that “Charlestown agreed to provide  
17 expert consulting services to ensure Cosmo had all the requisite information to  
18 successfully re-start and operate the Mill.” *Id.* ¶ 97.

19 In contrast, the other case before the Court stems from a contract between Cosmo  
20 and Cato Sales and Trading (“Cato”) “in which Cosmo appointed Cato as its exclusive  
21 sales agent for the mill’s product . . . .” Cause No. 14-5549, Dkt. 1, ¶ 12. Cato is a  
22

1 “limited liability company incorporated under the laws of Switzerland” with members  
2 Richard Bassett and Benno Hafner. *Id.* ¶ 1.

### 3 III. DISCUSSION

#### 4 A. Rule 13

5 Under the sub-heading “Compulsory Counterclaim,” Rule 13(a) of the Federal  
6 Rules of Civil Procedure provides in part as follows:

7 a pleading shall state as a counterclaim any claim . . . the pleader has  
8 against any opposing party if it arises out of the same transaction or  
occurrence that is the subject matter of the opposing party’s claim . . . .

9 *Id.* A claim “arises out of the same transaction or occurrence,” if “the essential facts of  
10 the various claims are so logically connected that considerations of judicial economy and  
11 fairness dictate that all of the issues be resolved in one lawsuit.” *Pochiro v. Prudential*  
12 *Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987); *see also, Hydranautics v.*  
13 *Filmtec Corp.*, 70 F.3d 533, 536 (9th Cir. 1995) (“We determine whether a claim arises  
14 out of the same transaction or occurrence by analyzing ‘whether the essential facts of the  
15 various claims are so logically connected that considerations of judicial economy and  
16 fairness dictate that all the issues be resolved in one lawsuit.’”). *See also, Albright v.*  
17 *Gates*, 362 F.2d 928, 929 (9th Cir. 1966) (Noting that we have given Rule 13 an  
18 “increasingly liberal construction”). “Thus, courts should consider whether the facts  
19 necessary to prove the claim and counterclaim substantially overlap.” *Hart v. Clayton–*  
20 *Parker and Associates, Inc.*, 869 F. Supp. 774, 776 (D. Ariz. 1994).

21 In this case, Defendants argue that Plaintiffs’ claims are compulsory counterclaims  
22 that should have been brought in *Cato v. Cosmo*. Although Defendants have a plausible

1 argument that the claims may be considered part of the same transaction or occurrence,  
2 Defendants fail to show that Plaintiffs can be considered opposing parties in the other  
3 matter. Basset is a member of Cato, but these are separate legal entities and Defendants  
4 have failed to provide any reason for the Court to disregard the corporate form in this  
5 case. At most, the instant claims are related crossclaims that could have been brought in  
6 or consolidated with the other matter. However, even if these claims could be related  
7 crossclaims of Cosmo, Defendants fail to provide persuasive authority that the other  
8 plaintiffs in the case could somehow be freed to intervene in *Cato v. Cosmo*. Therefore,  
9 the Court denies Defendants' motion to dismiss Plaintiffs' claims as compulsive  
10 counterclaims.

11 **B. Rule 12(b)(6)**

12 Motions to dismiss brought under Rule 12(b)(6) may be based on either the lack of  
13 a cognizable legal theory or the absence of sufficient facts alleged under such a theory.  
14 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material  
15 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.  
16 *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to  
17 dismiss, the complaint does not require detailed factual allegations but must provide the  
18 grounds for entitlement to relief and not merely a "formulaic recitation" of the elements  
19 of a cause of action. *Twombly*, 127 S. Ct. at 1965. Plaintiffs must allege "enough facts to  
20 state a claim to relief that is plausible on its face." *Id.* at 1974.

21 The parties' initially dispute what materials the Court may consider. Generally,  
22 the scope of review on a motion to dismiss is limited to the contents of the complaint.

1 | *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court, however, may  
2 | consider documents that are not attached to the complaint “if the documents’  
3 | authenticity . . . is not contested and the plaintiff’s complaint necessarily relies on them.”  
4 | *Id.* (internal quotation marks omitted).

5 |         In this case, Defendants submitted 133 pages of supplemental material for the  
6 | Court to consider. While some of the material is acceptable, most is beyond the scope of  
7 | review. For example, Defendants submit the complaint and answer from *Cato v. Cosmo*.  
8 | The Court may take judicial notice of these documents, but may not consider the veracity  
9 | of the allegations contained therein. On the other hand, the Court has never accepted  
10 | deposition testimony when considering a motion to dismiss because “factual challenges  
11 | to a plaintiff’s complaint have no bearing on the legal sufficiency of the allegations . . . .”  
12 | *Lee*, 250 F.3d at 688. Relying on Plaintiffs’ allegedly inconsistent factual contentions in  
13 | concurrent litigation sounds more in judicial estoppel than failure to state a plausible  
14 | claim for relief. *See, e.g., Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782  
15 | (9th Cir. 2001) (“Judicial estoppel is an equitable doctrine that precludes a party from  
16 | gaining an advantage by asserting one position, and then later seeking an advantage by  
17 | taking a clearly inconsistent position.”). Therefore, the Court declines to consider any of  
18 | these additional materials because, at most, they merely contain factual allegations.

19 |         With regard to the arguments of Defendants’ motion, they attack the reliance  
20 | elements of Plaintiffs’ claims based on fraud and misrepresentation, Plaintiffs’ alleged  
21 | internally inconsistent positions on the contract claim, and the elements of Plaintiffs’  
22 | CPA claim. First, the majority of Defendants’ arguments on the elements of reliance use

1 deposition testimony to attack the factual allegations supporting Plaintiffs’ claims. The  
2 Court declines to consider these improper arguments. Based on a review of the  
3 complaint, Plaintiffs have stated claims for relief and, therefore, the Court denies  
4 Defendants’ motion on this issue.

5         Second, Defendants argue that Plaintiffs have pled themselves out of court by  
6 asserting internally inconsistent positions in their claim for breach of contract. While  
7 Defendants focus on one factual allegation supporting Plaintiffs’ claim, Plaintiffs assert at  
8 least four other ways in which Charleston breached the agreement in question. Dkt. 1, ¶  
9 99(a)-(e). A possible factual inconsistency in one of five factual predicates does not  
10 show that Plaintiffs failed to state a plausible claim for relief. Therefore, the Court denies  
11 Defendants’ motion on this issue.

12         Third, Defendants argue that Plaintiffs fail to plead sufficient facts in support of all  
13 five elements of the CPA claim. Although Defendants attack the veracity of the factual  
14 allegations instead of the existence of factual allegations, the Court agrees with  
15 Defendants that Plaintiffs have failed to state a claim for relief. Upon review of the  
16 complaint, Plaintiffs’ cause of action is “merely a ‘formulaic recitation’ of the elements  
17 of a cause of action.” *Twombly*, 127 S. Ct. at 1965. Plaintiffs simply conclude that  
18 Defendants’ “conduct described above” meets every independent element of a CPA claim  
19 without elaboration. Dkt. 1, ¶¶ 102–106. In other words, Plaintiffs state no facts in  
20 support of this claim and force both Defendants and the Court to guess what conduct  
21 described in the preceding paragraphs supports the elements of the asserted claim.  
22 Therefore, the Court grants Defendants’ motion on Plaintiffs’ CPA claim. Because the

1 Court is not convinced that any amendment would be futile, the Court grants Plaintiffs  
2 leave to amend their CPA claim. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
3 1048, 1052 (9th Cir. 2003).

4 **IV. ORDER**

5 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 14) is  
6 **GRANTED in part** and **DENIED in part** as set forth herein. Plaintiffs are **GRANTED**  
7 leave to file an amended complaint consistent with this order.

8 Dated this 5th day of October, 2015.

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BENJAMIN H. SETTLE  
11 United States District Judge