UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CYCALONA GOWEN, Plaintiff, vs. TILTWARE LLC; FULL TILT POKER; POCKET KINGS LIMITED; POCKET KINGS CONSULTING, LIMITED; KOLYMA CORPORATION; TILTPROOF, INC.; RAYMOND BITAR, an individual; HOWARD LEDERER, an individual; ANDREW BLOCH, an individual; PHILLIP IVEY, an individual; CHRISTOPHER FERGUSON, an individual; JOHN JUANDA, an individual; PHILLIP GORDON, an individual; ERICK LINDGREN, an individual; ERIK SEIDEL, an individual; JENNIFER HARMAN-TRANIELLO, an individual; MICHAEL MATUSOW, an individual; ALLEN CUNNINGHAM, an individual; GUS HANSEN, an individual; and PATRICK ANTONIOUS, an individual, Defendants.	2:08-cv-01581-RCJ-RJJ **ORDER**

The present cause of action arises out of an alleged oral agreement between Plaintiff Cycalona Gowen and Defendant Tiltware LLC, its affiliates, and alleged shareholders or officers. Gowen claims she kept her end of the bargain, but that Tiltware and the other Defendants did not. As a result, Gowen claims she is owed $40 million in damages. Now before the Court is a Motion to Dismiss filed by Tiltware and the other Defendants. (#72). The Court has considered the

motions, briefs, pleadings, and oral argument on behalf of all parties and grants the Defendants' Motion to Dismiss.

I. FACTS

Plaintiff Cycalona Gowen is a professional poker player and television celebrity. Defendant Tiltware LLC, a California limited liability company, develops software for and consults Full Tilt Poker ("FTP), a separate legal entity that is well known in the poker industry. Defendant Raymond Bitar is Titlware's chief executive officer, chief financial officer, and director.

In April 2004, Gowen alleges that Bitar, acting on behalf of Tiltware, had a telephone conversation with Gowen during which Bitar offered Gowen a 1% ownership interest in Tiltware and its affiliated companies (the "Agreement"). In exchange, Gowen agreed to become a "celebrity representative" for FTP to promote the FTP brand name. Their Agreement also allegedly required Gowen to join "Team Full Tilt" with several other poker players, including Defendants Lederer, Bloch, Ivey, Ferguson, Juanda, Gordon, Lindgren, and Seidel.

According to Gowen, in April 2004, she and the other Team Full Tilt members attended a meeting at the Golden Nugget Casino in Las Vegas, Nevada. At that meeting, Lederer, who conducted the meeting, allegedly informed all individuals who were present that they would receive a 1% ownership interest in Tiltware, FTP and all of their affiliated companies, including Pocket Kings, Consulting, Kolyma, and Tiltproof (collectively, "the Companies"), in return for their participation on Team Full Tilt and their promotion of the FTP brand. Gowen alleges that the Team Full Tilt members ratified the statements made by Bitar during the Golden Nugget meeting and that she relied upon the representations made at that meeting that she had an agreement with Tiltware.

For the following five years, Gowen alleges that she complied with the Agreement between herself and Tiltware. Her compliance included actions such as wearing FTP merchandise to all poker tournaments, permitting FTP to customize her website to reflect her membership in Team Full Tilt, allowing herself to be publicly featured as a member of Team Full Tilt, and not pursuing other

opportunities during the period of the alleged Agreement. Despite her alleged compliance with the Agreement, Gowen alleges she has not received any payment for the performance of her obligations under the Agreement.

Gowen alleges that beginning in May 2007, all members of Team Full Tilt except for herself began receiving payments under the Agreement. Upon learning of such payments, she began to demand payment for what she was owed under the Agreement, but to no avail. In November 2007, she alleges that Lederer offered to pay her $250,000 for her past performance, which she refused. A year later, Gowen was informed that she was no longer a member of Team Full Tilt.

In November 2008, Gowen filed the present cause of action. (Docket Entry #1). She has since amended the original Complaint. (#56). The First Amended Complaint ("FAC") alleges twelve causes of action against nineteen defendants, including FTP, Tiltware, Tiltware's alleged affiliated entities, and the individual members of Team Full Tilt (collectively, "the Tiltware Defendants"). Gowen is asking the Court to award her $40 million in damages, a figure based upon 1% of the approximate value of Tiltware and its alleged affiliated entities. The Tiltware Defendants have now filed a Motion to Dismiss the First Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (#72).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See North Star Int'l. v. Arizona Corp. Comm'n*., 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally

cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1964 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion . . . However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment . . . ." Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies

of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. BREACH OF CONTRACT

A. Sufficiency of Pleading

Gowen alleges that the Tiltware Defendants breached the oral Agreement that she made with Bitar during their April 2004 telephone conversation. "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, n. 6, 11 Cal.Rptr.3d 412 (2004) (citation omitted).[1]

The Tiltware Defendants argue that Gowen has failed to sufficiently allege the required elements of her breach of contract claim. Specifically, they argue that Gowen has failed to allege the specific terms of the Agreement, namely the obligations that she was required to perform under the Agreement in return for her 1% ownership interest in the Companies. California law may control this Court's decisions as to the substance of the alleged contract, but federal law controls the procedure governing this litigation. *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1064 (9th Cir. 2003) (citing *Hanna v. Plumer*, 380 U.S. 460, 473, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)).

Fed. R. Civ. Pro. 8(a) sets forth the procedures for pleading in a complaint, which require that a plaintiff give the defendant fair notice of the grounds for the claim. Gowen has alleged the existence of an oral contract between herself and Tiltware. She alleges that in April 2004, the CEO of Tiltware promised her a 1% ownership interest in the Companies if she agreed to be a celebrity representative for FTP and help promote its brand name. (#56, ¶¶ 61, 65). Gowen alleges that for

[1] The Tiltware Defendants have suggested that the alleged oral Agreement at issue in this case is to be construed under California law, perhaps because Tiltware is a California LLC. Gowen has not argued to the contrary. The Court has no reason to believe that the Agreement should be construed under any other state's laws. Therefore, for purposes of this Motion, the Court will construe the Agreement in accordance with California law.

the following four or five years, she performed her obligations under the Agreement. (*Id.* at ¶¶ 74, 84, 91). Gowen alleges that Tiltware breached the Agreement by failing to pay her the compensation that she was due. (*Id.* at ¶¶ 79, 84, 92).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp*., 127 S.Ct. at 1964–65. "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974.

Gowen has only alleged that the Agreement required Tiltware to pay her a 1% ownership interest in the Companies and that the Agreement required her to be a celebrity representative for the FTP brand. Gowen must allege the terms of the Agreement with more specificity. She does not allege what actions she was required to perform to successfully function as a celebrity representative. She does not adequately allege the nature of the 1% ownership interest owed to her, namely in which exact companies or affiliates she would have a 1% ownership interest, whether the 1% ownership interest reached other entities that were to be formed at a future date, or how or when Tiltware would be required to pay her the 1% ownership interest. To put Tiltware on notice of her breach of contract claim against Tiltware, Gowen needs to amend the First Amended Complaint and allege more facts as to the nature and terms of the Agreement or confess that there were no such further terms.

B. Alter Ego Theory

As to the other Defendants, Gowen's breach of contract claim is problematic in its breadth. She is not simply asserting breach of contract against Tiltware, but against all nineteen Defendants, which includes all of Tiltware's affiliated companies and the individuals who played on Team Full Tilt with Gowen. But her allegations do not justify such a wide-reaching claim. She alleges that

Bitar made the Agreement with her, in his capacity as CEO of Tiltware. (*Id.* at ¶ 61). Gowen does not allege that the other defendants were on the phone with Bitar and Gowen negotiating the Agreement, or that the Agreement represented that the other defendants were entering into the Agreement with Gowen, in partnership with Bitar and Tiltware. To the contrary, as to the individual Defendants, her allegations suggest that they were in the same position as she was, entering into an agreement with Bitar and Tiltware to participate on Team Full Tilt.

Gowen responds that the other Defendants are liable for breach of contract based upon an alter ego theory. Gowen does not address the basis for liability of the other Companies, but focuses her attention on the liability of the individual Defendants. Gowen contends that, as to the individual Defendants, they were all present at the Golden Nugget meeting where they ratified the Agreement and thereby "participated in and agreed to breach Gowen's ownership contract, and intended to cause her injuries." (#83 at 7). Because they were officers, members, directors, or owners of Tiltware, Gowen argues they should be liable for participating with Tiltware in the wrongful breach of contract.[2]

Usually, the members of a California limited liability company cannot be personally liable on a contract signed on behalf of the limited liability company. *See* Cal. Corp.Code § 17101(a) (stating "no member of a limited liability company shall be personally liable under any judgment of a court for any . . . liability of the limited liability company, whether that liability or obligation arises in contract, tort, or otherwise, solely by reason of being a member of the limited liability company"). This rule, however, is not absolute.

[2] The Tilteware Defendants have not presented any authority stating that an alter ego theory cannot be based on contractual liability. Some jurisdictions expressly recognize that contractual liability can be grounded in an alter ego theory. *See Southeast Texas Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 679 n. 16 (6th Cir. 2006) ("[t]he alter ego doctrine and its criteria are applicable to impose substantive liability whether that liability is in causes of action in tort, in contract, or both . . . .").

> While generally members of a limited liability company are not personally liable for judgments, debts, obligations, or liabilities of the company "solely by reason of being a member" (Corp.Code. § 17101, subd. (a)), they are subject to liability under the same circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability and are personally liable under the same circumstances and extent as corporate shareholders.

People v. Pac. Landmark, 129 Cal.App.4th 1203, 1212, 29 Cal.Rptr.3d 193 (Cal. Ct. App. 2005) (internal alterations omitted).

Thus, "[o]rdinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors. Under the alter ego doctrine, however, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation." *Robbins v. Blecher*, 52 Cal.App.4th 886, 892, 60 Cal.Rptr.2d 815 (Cal. Ct. App. 1997). "Shareholders of a corporation are not normally liable for its torts, but personal liability may attach to them through application of the 'alter ego' doctrine . . ., or when the shareholder specifically directed or authorized the wrongful acts." *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 785, 157 Cal.Rptr. 392, 598 P.2d 45 (1979). California recognizes alter ego relationships, permitting a corporation's liabilities to be imposed on an individual or entity, when two conditions are satisfied: (1) "there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased," and (2) "an adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or promote injustice." *Wood v. Elling Corp*., 20 Cal.3d 353, 365 n. 9, 142 Cal.Rptr. 696, 572 P.2d 755 (1977).

In *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101 (C.D. Cal. 2003), the court explained, however, that "[c]onclusory allegations of 'alter ego' status are insufficient to state a claim. Rather, a plaintiff must allege specifically both of the elements of alter ego liability, as well as facts supporting each." *Id*. at 1116. Gowen does not even make a conclusory recitation of the

elements of alter ego liability. She does not allege that treating the individual defendants separate from Tiltware and the Companies would perpetrate fraud or injustice. She merely alleges that they had the same agreement with Tiltware, they were present at the Golden Nugget meeting where the Agreement was discussed, and that they participated with her on Team Full Tilt. Under such facts, Gowen cannot state an alter ego claim in order to overcome a motion to dismiss. In its present form, the First Amended Complaint only pleads a cognizable breach of contract claim against Tiltware.

In addition to the individual defendants, she is pursuing her breach of contract claim against any company that is affiliated with Tiltware or FTP, such as Pocket Kings, Consulting, Kolyma, and Tiltproof. (#56, ¶ 32). A parent or affiliated corporation cannot be liable for the contractual obligation of a subsidiary or affiliate, unless it is exercising complete domination and control in the matter. *Computersearch Corp. v. ECL Industries, Inc.*, 142 A.D.2d 961, 530 N.Y.S.2d 386 (N.Y. App. Div. 1988). As with the individual Defendants, Gowen has not alleged an alter ego theory as to each of the other named affiliates and certainly cannot do so for every possible affiliate of Tiltware. She has not alleged that there is a unity of interest or control between all of the Companies. She makes no factual allegations why these other affiliated companies would be liable under the Agreement.

In sum, Gowen appears to be reaching too far in alleging who can be held liable under the Agreement. For these reasons, the Court will allow Gowen to amend the First Amended Complaint to state a breach of contract claim against Tiltware, but will not allow her to amend the First Amended Complaint to state a breach of contract claim against the other Tiltware Defendants. Under the facts, she is not in a position to allege that Tiltware's affiliates or the other individual Defendants exercised a unity of interest with Tiltware to an extent that would result in fraud or injustice.

C. Statute of Frauds

The Tiltware Defendants argue that even if there is a valid oral agreement alleged between Gowen and the Tiltware Defendants, the Agreement is invalid under California's statute of frauds. The statute of frauds in California bars relief where the duration of a contract exceeds one year. *See* Cal. Civ.Code § 1624 (A contract is invalid if by "agreement that by its terms is not to be performed within a year from the making thereof."). The California statute of frauds has been narrowly construed; it only prohibits enforcement of contracts that cannot under any circumstances be performed within one year. *Foley v. Interactive Data Corp*., 47 Cal.3d 654, 671 (1988). The statute of frauds does not apply, for example, to an employment agreement of indefinite duration because the employment could be completed within one year. *Id.*

Gowen alleges that the Agreement granted her a 1% interest in Tiltware, FTP, Pocket Kings, Consulting, Kolyma, Tiltproof, and all of their parent companies, subsidiaries, unincorporated divisions, and affiliated corporations. (#56, ¶ 28). She also alleges that one of these companies, Pocket Kings, was not formed until 2007. (*Id.* at ¶ 32). Because she entered into the Agreement with Tiltware in April 2004, Tiltware's end of the bargain to grant her a 1% ownership interest in a company that would not even be formed for several years could not have under any circumstances been performed within one year of executing the Agreement.

Because the First Amended Complaint is ambiguous as to the nature of the promised 1% ownership interest, namely as to which companies that ownership interest was intended to reach, the Court draws no legal conclusion as to the validity of the Agreement under the statute of frauds at this stage. Nevertheless, if Gowen chooses to amend the First Amended Complaint and allege that she was promised a 1% ownership interest in entities that were yet to be formed for years into the future, then her amended breach of contract claim will be vulnerable under the statute of frauds. In her response brief, Gowen raises equitable estoppel and part or full performance, which doctrines can

preclude the applicability of the statute of frauds, but until and unless Gowen amends the First Amended Complaint, the Court reserves discussion on these issues.

For the foregoing reasons, the Motion to Dismiss Gowen's breach of contract claim is GRANTED with leave to amend as to Tiltware only. As to the other Tiltware Defendants, the Motion to Dismiss Gowen's breach of contract claim is GRANTED without leave to amend.

IV. BREACH OF FIDUCIARY DUTY

The Tiltware Defendants argue that Gowen fails to sufficiently plead a claim for breach of fiduciary duty. Gowen has pled this cause of action against the individual Defendants only. The elements for this cause of action require (1) the existence of a fiduciary relationship; (2) a breach of that duty; and (3) damages proximately caused by such a breach. *See Cascade Investments, Inc. v. Bank of America*, N.A., S.A., No. CV-N-99-559, 2000 WL 1842945, at *3 (D.Nev. Sept. 29, 2000) (citing *Fidelity & Deposit Co. v. Curtis Day*, 1993 WL 128073 (N.D. Cal. 1993).

Gowen alleges that the individual Defendants are majority shareholders in the Companies and that they violated their fiduciary duty to Gowen, as a minority shareholder. Certain jurisdictions have recognized a fiduciary duty owed by majority to minority shareholders. *See, e.g.*, *Matter of Reading Co.*, 711 F.2d 509, 517 (3rd Cir. 1983) (concluding that under Delaware law, not only do directors and officers "stand in a fiduciary relationship to their corporation and stockholders[,]" but "a majority shareholder, or a group of shareholders who combine to form a majority, has a fiduciary duty to the corporation and to its minority shareholders if the majority shareholder dominates the board of directors and controls the corporation."); *Stephenson v. Drever*, 16 Cal.4th 1167, 1178, 69 Cal.Rptr.2d 764, 947 P.2d 1301 (Cal. 1997) (recognizing fiduciary duty under California law); *Noakes v. Schoenborn*, 116 Or.App. 464, 471–72, 841 P.2d 682, 686-87 (Or. 1992) (recognizing fiduciary duty under Oregon law). At least one federal district judge in this District has held that the Nevada Supreme Court would find a fiduciary duty owed by majority to minority shareholders in certain limited circumstances. *See Simon v. Mann*, 373 F.Supp.2d 1196, 1199–1200 (D. Nev. 2005).

Nevertheless, there are a variety of fiduciary duties that a majority shareholder might owe to a minority shareholder. For example, a majority shareholder may owe a fiduciary duty "not to misuse his power by promoting his personal interests at the expense of corporate interests." *U. S. v. Byrum*, 408 U.S. 125, 137, 92 S.Ct. 2382 (1972). Majority shareholders may owe fiduciary duties to minority shareholders to use their ability "to control the corporation in a fair, just and equitable manner." *Jones v. H.F. Ahmanson & Co.*, 1 Cal.3d 93, 108, 81 Cal.Rptr. 592, 460 P.2d 464 (1969). A majority shareholder may owe a fiduciary duty to other shareholders to not trade securities on the basis of material nonpublic information. *S.E.C. v. Clark*, 915 F.2d 439, 443 (9th Cir. 1990) (citing *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980). "Under common law, majority shareholders owe a fiduciary duty to minority shareholders who are squeezed out in a transaction." *Lewis v. Chiles*, 719 F.2d 1044, 1051 (9th Cir. 1983).

Gowen does not allege the nature of the fiduciary duty that the individual Defendants owed her or how they breached that duty. The individual Defendants cannot be on notice of the claim against them if they are not even apprised of what duty they owed Gowen. For the foregoing reasons, the Court holds that Gowen has not sufficiently pled a cause of action for breach of fiduciary duty. The Motion to Dismiss Gowen's breach of fiduciary duty claim is GRANTED without leave to amend as the opposition to this Motion advances no plausible theory of such a duty.

V. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

A cause of action for breach of the covenant of good faith and fair dealing can lie in contract or tort. "It is well established that all contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 123 Nev. 26, 163 P.3d 420, 426–27 (2007). Where one party to a contract "deliberately countravenes the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 808 P.2d 919, 922–23 (1991).

Gowen's cause of action against the Tiltware Defendants for breach of covenant of good faith and fair dealing, as currently pled, arises out of the Agreement. For the reasons explained above, however, Gowen cannot pursue a breach of contract claim against any of the Defendants except Tiltware. She has not adequately alleged that any of the Defendants other than Tiltware were parties to the Agreement. Even as to Tiltware, she still needs to amend the First Amended Complaint. As a result, there is no valid Agreement as currently pled in the First Amended Complaint and thus no claim for a breach of the covenant of good faith and fair dealing arising out of the Agreement.

For these reasons, the Motion to Dismiss Gowen's breach of covenant of good faith and fair dealing claim is GRANTED with leave to amend as to Tiltware. If Gowen does amend, she must allege with more specificity how Tiltware breached its covenant of good faith and fair dealing. As to the other Tiltware Defendants, the Motion to Dismiss Gowen's breach of contract claim is GRANTED without leave to amend.

VI. FRAUD/NEGLIGENT REPRESENTATION

Gowen's fourth and twelfth causes of action are for fraud and negligent representation, respectively. Under Nevada law, "a claim for negligent misrepresentation requires a plaintiff to plead: 1) a representation that is false; 2) that the representation was made in the course of the defendant's business or in any action in which he has a pecuniary interest; 3) the representation was for the guidance of others in their business transactions; 4) the representation was justifiably relied upon; 5) that such reliance resulted in pecuniary loss to the relying party; and 6) that the defendant failed to exercise reasonable care or competence in obtaining or communicating the information." *G.K. Las Vegas Limited Partnership v. Simon Property Group, Inc.*, 460 F.Supp.2d 1246, 1262 (D.Nev. 2006). Intentional misrepresentation or fraud is established by three factors: "(1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *Nelson*, 163 P.3d at 426. Both causes of action are grounded in fraud.

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations. *See Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). In addition, allegations of fraud must be accompanied by "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). *See also*, *Lancaster Cmty. Hosp. v. Antelope Valley Dist*., 940 F.2d 397, 405 (9th Cir. 1991) (Rule 9(b) "requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme."). Rule 9(b)'s heightened pleading requirements indisputably apply to an intentional misrepresentation claim, but even as to a negligent misrepresentation claim, the majority of the district courts in this Circuit who have addressed this issue have held that negligent misrepresentation claims are in fact subject to Rule 9(b)'s heightened pleading requirements. *See Deitz v. Comcast Corp*., No. 06-6352, 2006 WL 3782902, at *6 (N.D. Cal. Dec. 21, 2006) (collecting cases); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 404 F.Supp.2d 1214, 1219 (E.D. Cal. 2005) (stating that "[i]t is well-settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement").

The First Amended Complaint is fatally deficient under Rule 9(b)'s standards for the negligent and intentional misrepresentation claims. Gowen alleges the same facts as to both claims. She alleges that during the April 2004 telephone conversation, Bitar promised to pay her 1% ownership interest in the Companies knowing all the time that he would not carry out that promise. She also alleges that he told her that he would memorialize the Agreement in writing, which she alleges he never did. As a result of her reliance upon Bitar's false representations, she alleges that she was injured. Alternatively, she alleges that Bitar was negligent in making this false representation, which was made in the course of his business.

Gowen does present some factual allegations as to Bitar, but still falls short of Rule 9(b)'s heightened bar. Gowen needs to provide more specifics as to the misrepresentations that Bitar allegedly made to her. She alleges he promised a 1% ownership interest in the Companies. But for reasons explained above, the alleged Agreement is vulnerable if she is alleging that Bitar promised her a 1% ownership interest in Tiltware as well as all of its future affiliated companies. She also does not allege what representations that he made to her as to what Bitar expected in return for the 1% ownership interest or whether there was a present agreement even without the further writing.

As to the other defendants, Gowen has also failed to comply with Rule 9(b)'s heightened pleading requirements. Other than Lederer, she does not identify any other Defendants by name, allege the content of any false representations, or in what context they made them. The only other individual defendant she identifies is Lederer but her allegations as to him are still incomplete. Rule 9(b) does not allow a fraud plaintiff to make general allegations of misrepresentation applicable to all. Rule 9(b) "require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007). Although the complaint need not identify false statements made by each and every individual, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to . . . inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)).

Based upon the foregoing, the Court concludes that Gowen has not satisfied the heightened pleading requirements of Rule 9(b). The Motion to Dismiss Gowen's fourth and twelfth causes of action for fraud and negligent representation is GRANTED with leave to amend as to Bitar and Lederer, and GRANTED without leave to amend as to the remaining Tiltware Defendants.

VII. ACCOUNTING

An accounting is an action in equity. "An accounting cause of action is equitable in nature, and may be sought where . . . the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal.App.3d 1, 14 (1977) (citation and quotation marks omitted). "A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law. An accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain." *Id.*

The Tiltware Defendants move to dismiss the fifth cause of action for an accounting against all Defendants aside from Tiltware. If Gowen is entitled to 1% of the ownership interest of the Companies, Gowen's request for an accounting should be directed at Tiltware. Tiltware should be responsible for evaluating its worth and that of the Companies. It makes no sense to have the individual Defendants, simply because they are alleged shareholders in the Companies, to each produce an accounting of the Companies' or their own value. Therefore, the Motion to Dismiss Gowen's accounting claim against all Tiltware Defendants except Tiltware is GRANTED without leave to amend.

VIII. PROMISSORY ESTOPPEL

Gowen's sixth cause of action is for promissory estoppel. Promissory estoppel holds that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal.4th 305, 96 Cal.Rptr.2d 747, 1 P.3d 63, 66 (2000) (quoting Restatement (Second) of Contracts § 90). *See also*, *American Sav. & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, 85 Nev. 350, 455 P.2d 39 (Nev. 1969) (relying upon Restatement of Contracts § 90).

In the First Amended Complaint, Gowen alleges that Bitar made an oral promise to pay her a 1% ownership interest to induce her to agree to act as a celebrity representative, that she relied on that promise to her detriment, and that she has suffered damage. For the reasons explained above, however, she still needs to make more specific factual allegations as to Bitar's representations and the alleged Agreement that was made over the telephone. In the First Amended Complaint's current form, the Court cannot properly evaluate the nature of the promise that Bitar made to Gowen. Gowen may also have a promissory estoppel claim as to Lederer upon amendment, but she needs to allege more specifically the nature of the promise and misrepresentations made by Lederer before this Court can decide if she has a promissory estoppel claim against Lederer. For these reasons, the Motion to Dismiss Gowen's promissory estoppel cause of action is GRANTED with leave to amend as to Tiltware, Bitar, and Lederer and GRANTED without leave to amend as to the remaining Tiltware Defendants.

IX. SPECIFIC PERFORMANCE

Specific performance is an equitable remedy. Action for damages for breach is an action at law. "Ordinarily, of course, equitable relief will not be awarded where complete relief by an action at law is available." *United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting*, 76 Nev. 189, 211, 351 P.2d 965 (Nev. 1960). "[W]here, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice." *Morrison v. Land*, 169 Cal. 580, 147 P. 259 (1915); 5 Witkin, Cal. Procedure, Pleading, § 759 at 215 (4th ed. 1997).

Gowen is principally seeking a legal remedy for $40 million in damages. She may have a remedy at law for breach of contract if the First Amended Complaint is properly amended. Of course, if the Court holds that she cannot plead a breach of contract claim, then her relief would

principally rely on equity. Specific performance is within the discretion of the district court. *Cohen v. Rasner*, 97 Nev. 118, 624 P.2d 1006 (Nev. 1981). Nevertheless, Gowen needs to properly plead a specific performance cause of action. Specific performance is a valid claim where a plaintiff alleges the following:

> (1) A specifically enforceable type of contract, sufficiently certain in its terms. (2) Adequate consideration, and a just and reasonable contract. (3) The plaintiff's performance, tender, or excuse for nonperformance. (4) The defendant's breach. (5) Inadequacy of the remedy at law.

5 Witkin, Cal. Proc., Pleading § 784, at 203–204 (5th ed.2008).

Gowen has not properly pled a specific performance claim. She merely alleges that the Tiltware Defendants failed to comply with the Agreement. Even if properly pled, she would only be able to plead this cause of action against Tiltware. For these reasons, the Motion to Dismiss Gowen's specific performance claim is GRANTED as to Tiltware with leave to amend and GRANTED as to the other Tiltware Defendants without leave to amend.

X. DECLARATORY RELIEF

Gowen seeks declaratory relief, asking the Court to determine the rights of the parties vis-a-vis the Agreement. Declaratory judgments generally serve to resolve uncertainty faced by potential defendants who face threats of litigation and who may accrue legal liability while waiting for potential plaintiffs to initiate a suit. *See Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th Cir. 1981). The decision whether or not to hear a declaratory judgment action is left to the discretion of the federal court. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 533 (9th Cir. 2008). Relief may be granted so long as there is "a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617 (1937). In order for there to exist an actual case or controversy under the Declaratory Judgment Act, the plaintiff must

assert a real and reasonable apprehension that he will be subject to liability as a result of defendant's actions. *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992).

Here, Gowen has not alleged any ground for the Court to find any basis for a real and reasonable apprehension of a lawsuit by the Tiltware Defendants. There is no indication that the Tiltware Defendants intend to sue Gowen for any claims arising out of the Agreement. In reality, the claim appears to be fundamentally one for breach of contract, despite the fact that it is styled as one for declaratory relief. A genuine declaratory judgment claim anticipates a future lawsuit brought by the defendant against the plaintiff. The purpose of allowing this anticipatory type of litigation is to permit the plaintiff to demonstrate that his or her present actions do not give rise to liability. If the plaintiff is successful, he or she can proceed with that conduct without apprehension of a future lawsuit from the defendant. This is not the case here. Gowen is not trying to fend off a future lawsuit by the Tiltware Defendants. To the contrary, Gowen claims that the Tiltware Defendants are presently in breach of their contractual obligation to compensate her with the 1% ownership interest in the Companies.

For these reasons, the Motion to Dismiss the declaratory relief claim is GRANTED without leave to amend.

XI. RIGHT OF PUBLICITY

Gowen's tenth cause of action alleges that the Tiltware Defendants violated her right of publicity under NRS 597.810. NRS 597.810 prohibits "[a]ny commercial use of the name, voice, signature, photograph or likeness of another by a person, firm or corporation *without first having obtained written consent* for the use . . . ." NRS 597.810 (emphasis added). In her First Amended Complaint, however, Gowen admits that she authorized the Tiltware Defendants to use her likeness. (#56 at ¶ 74(c) ("Plaintiff permitted Defendants to use her likeness . . . ."). Based upon this admission, Gowen cannot plead a right of publicity claim because that claim requires that the Tiltware Defendants used her likeness *without* Gowen's consent. *See American Title Ins. Co. v.*

Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.").

For this reason, the Motion to Dismiss Gowen's right of publicity cause of action is GRANTED without leave to amend.

XII. UNJUST ENRICHMENT/QUANTUM MERUIT

Gowen's tenth and eleventh causes of action are for unjust enrichment and quantum meruit. Although Gowen has pled these claims separately, they are essentially the same claim. *See Asphalt Products Corp. v. All Star Ready Mix, Inc*., 111 Nev. 799, 802, 898 P.2d 699 (1995) (treating unjust enrichment and quanrum meruit interchangeably). "Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 363 n. 2, 741 P.2d 802, 804 n. 2 (1987). The essential elements of unjust enrichment "are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit." *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). An unjust enrichment claim cannot be predicated upon an express agreement. *See Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement."). The proper measure of damages in unjust enrichment or quantum meruit suits is the "reasonable value of [the] services." *Flamingo Realty v. Midwest Development*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994) (quoting *Morrow v. Barger*, 103 Nev. 247, 252, 737 P.2d 1153, 1156 (1987)).

Gowen alleges that she rendered valuable services to the Companies by participating on the Team Full Tilt and promoting the FTP brand. Of course, these services were for the benefit of

Tiltware and the Companies, not the individual Defendants. Furthermore, in the First Amended Complaint's current form, it is unclear what benefits she was expected to confer upon Tiltware. She alleges certain actions she took that may have benefitted Tiltware, but what is more important is what she was expected to do, under the terms of the Agreement, in return for the 1% ownership interest. Therefore, Gowen cannot pursue this cause of action until she amends the First Amended Complaint. Even as amended, she can only allege a cause of action for unjust enrichment or quantum meruit against Tiltware. She does not need to also bring the cause of action against Tiltware's shareholders or affiliates. Therefore, the Motion to Dismiss Gowen's tenth and eleventh causes of action for unjust enrichment and quantum meruit is GRANTED with leave to amend as to Tiltware and GRANTED without leave to amend as to the remaining Tiltware Defendants.

CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED with and without leave to amend, as outlined above in the Court's opinion. (#72). Plaintiff Gowen shall have fifteen (15) days from the date of this Order to file a Second Amended Complaint.

DATED: May 18, 2009

Robert C. Jones
United States District Judge