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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 Nocher Enterprises, Inc. a) CV 18-3897-RSWL (JEMx)
13 California corporation,)

14 Plaintiff,) ORDER re: Defendants'
15 v.) Motion to Dismiss [44]
16)

17 AVENTUS OUTREACH, LLC, a)
18 Florida limited liability)
19 company; OLIVER DAWOUD, an)
20 individual; AVENTUS BIO)
21 LABS, INC., a Florida)
22 corporation; and AVENTUS)
23 HEALTH, LLC, a Florida)
24 limited liability company,)

25 Defendants.
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Plaintiff Nocher Enterprises, Inc. ("Plaintiff")
filed a Second Amended Complaint ("SAC") against
Defendants Aventus Outreach, LLC ("Outreach"); Aventus
Health, LLC ("Health"); and Aventus Bio Labs, Inc.
("Bio Labs") (collectively, "Defendants"), for damages
arising from an alleged breach of contract and

1 negligent misrepresentation. Before the Court is
2 Defendants' Motion to Dismiss Plaintiff's claims for
3 negligent misrepresentation and unjust enrichment
4 ("Motion"). Having reviewed all papers submitted
5 pertaining to this Motion, the Court **NOW FINDS AND**
6 **RULES AS FOLLOWS:** the Court **GRANTS in Part** and **DENIES**
7 **in Part** Defendants' Motion.

8 I. BACKGROUND

9 A. Factual Background

10 Plaintiff is a California corporation doing
11 business in California. SAC ¶ 1, EFC No. 39.
12 Defendants Outreach and Health are Florida limited
13 liability companies, and Bio Labs was a Florida
14 corporation. Id. ¶¶ 2-4. Oliver Dawoud ("Dawoud") is
15 the principal/owner of Outreach, and the operator,
16 manager, agent and authorized representative of
17 Outreach, Health, and Bio Labs.¹ Id. ¶ 5. Plaintiff
18 avers that Defendants were "separately organized," but
19 that at all times relevant hereto, Defendants "held
20 themselves out as one and [the] same entity" and under
21 the "same banner and trade name of Aventus Biolabs
22 a/k/a AventusBiolabs.com." Id. ¶ 7.

23 Defendants are in the business of testing medical
24 specimens. Order re Defs.' Mot. to Dismiss ("Order")
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26 ¹ Plaintiff initially included Dawoud as a Defendant in
27 this Action, but dropped Dawoud as a Defendant in its SAC after
28 this Court ruled on November 16, 2018 that it lacked personal
jurisdiction over him. See Order re Defs.' Mot. to Dismiss
("Order") 18:9-11, ECF No. 38.

1 2:14-17, ECF No. 38. Plaintiff alleges that on April
2 19, 2017, Defendants invited Plaintiff to "enroll its
3 accounts" with Defendants for the sale and service of
4 specimens to Defendants. Id. ¶ 12. In exchange,
5 Defendants promised to pay Plaintiff a specified
6 percentage of the net payments Defendants would receive
7 from using Plaintiff's provided specimens. Id.
8 Defendants also promised to account for their
9 collections by providing Plaintiff with summarized
10 reports, and access to an online portal to verify
11 collection data. Id.

12 Plaintiff delivered 11,000 specimens to Defendants.
13 Id. As of August 2017, Defendants paid Plaintiff
14 \$170,000 for approximately 600 specimens. Id. ¶ 17.
15 Plaintiff alleges the Defendants refused to pay
16 Plaintiff for the remaining 10,400 specimens, despite
17 collecting millions of dollars from them. Id. ¶ 24.
18 Plaintiff further alleges that Defendants did not
19 provide Plaintiff with reports on their collections and
20 denied Plaintiff access to the online portal. Id.

21 On November 27, 2017, Dawoud emailed Plaintiff's
22 representative, Jamie Nocher, spreadsheets and reports
23 reflecting the amount of collections allegedly made by
24 Defendants for the months of September and October 2017
25 (the "November 27 Email"). Id. ¶ 18. Plaintiff
26 alleges that at about the same time that it received
27 the November 27 Email, "[D]efendants' representatives"
28 sent the same spreadsheet (listing the same providers

1 and samples) but bearing differing numerical collection
2 and other data.² Id. ¶ 20. From these conflicting
3 spreadsheets, and other "independent investigations,"
4 Plaintiff deduced that Defendants had materially
5 falsified the November 27 Email to justify not paying
6 Plaintiff for the remaining 10,400 specimens. Id.

7 As a result, Plaintiff filed this Action against
8 Defendants, alleging negligent misrepresentation,
9 breach of implied contract, and unjust enrichment. See
10 generally id.

11 **B. Procedural Background**

12 This case was removed from Superior Court [1] to
13 this Court on May 9, 2018. Plaintiff filed its First
14 Amended Complaint ("FAC") [13] on July 9, 2018.
15 Defendants filed a Motion to Dismiss for lack of
16 personal jurisdiction [17] and a Motion to Dismiss for
17 failure to state a cause of action [18] on August 13,
18 2018. On November 16, 2018 the Court: (1) granted
19 Defendants' Motion to Dismiss for lack of jurisdiction
20 as to Dawoud; (2) denied Defendants' Motion to Dismiss
21 for failure to state a claim as to Plaintiff's breach
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23 ² For example, Plaintiff alleges that throughout the
24 reports, identical claim ID numbers and claim dates were listed
25 but had two drastically different reimbursements. Id. ¶ 21. In
26 some cases a \$19,000 payment turned into a 0 or \$5,000 turned
27 into \$500, and based on Plaintiff's "independent investigations"
28 there were many payments of \$20,000 gross per specimen paid to
Defendants that were never accounted for. Id. Plaintiff does
not attach the conflicting reports to its SAC or Opposition, but
notes that disclosure of specific claim numbers and claims will
be made subject to a HIPAA-compliant protective order. Id. at
n.1.

1 of implied contract claim; and (3) granted with leave
2 to amend Defendants' Motion to Dismiss for failure to
3 state a claim as to Plaintiff's claims for
4 deceit/negligent misrepresentation, breach of oral
5 contract, common counts, unjust enrichment, and
6 accounting. See ECF No. 38.

7 Plaintiff filed its SAC [39] on December 7, 2018.
8 Defendants filed the instant Motion [44] on December
9 28, 2018, arguing that Plaintiff once again did not
10 plead with sufficient particularity for negligent
11 misrepresentation and once again failed to state a
12 claim for unjust enrichment. Plaintiff filed its
13 Opposition [46] on January 7, 2019. Defendants filed
14 their Reply [47] on January 15, 2019.

15 II. DISCUSSION

16 A. Legal Standard

17 Federal Rule of Civil Procedure 12(b)(6) allows a
18 party to move for dismissal of one or more claims if
19 the pleading fails to state a claim upon which relief
20 can be granted. A complaint must contain sufficient
21 facts, accepted as true, to state a plausible claim for
22 relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
23 Dismissal is warranted for a "lack of cognizable legal
24 theory or the absence of sufficient facts alleged under
25 a cognizable legal theory." Balistreri v. Pacifica
26 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)
27 (citation omitted).

28 "In ruling on a 12(b)(6) motion, a court may

generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007) (citation omitted). A court must presume all factual allegations to be true and draw all reasonable inferences in favor of the non-moving party. Klarfeld v. United States, 944 F.2d 583, 585 (9th Cir. 1991). The question is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence to support the claims. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184 (2005)(quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). While a complaint need not contain detailed factual allegations, a plaintiff must provide more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atl. Corp. V. Twombly, 550 U.S. 544, 555 (2007). However, a complaint "should not be dismissed under Rule 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Balistreri, 901 F.2d at 699,(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1975)).

B. Discussion

1. Negligent Misrepresentation

Plaintiff bases its negligent misrepresentation claim on the following: (1) the November 27 Email; (2)

1 Defendants' "false representations concerning payment
2 for the specimens," and (3) Defendants' "false
3 representations of account in order to deny payment."
4 SAC ¶ 26. Because the second and third categories of
5 alleged misrepresentations are mere duplications of the
6 statements contained in the November 27 Email,³ the
7 question is whether the November 27 Email is sufficient
8 to create a negligent misrepresentation cause of action
9 against all three Defendants. The Court concludes that
10 it is not.

11 Plaintiff's claim for negligent misrepresentation
12 is governed by Federal Rule of Civil Procedure ("FRCP")
13 9(b).⁴ FRCP 9(b) requires that when "alleging fraud or
14 mistake, a party must state with particularity the
15 circumstances constituting a fraud or mistake." Fed.
16 R. Civ. Proc. 9(b). In cases involving multiple
17 defendants, FRCP 9(b) "does not allow a complaint to
18 merely lump multiple defendants together but
19 'require[s] plaintiffs to differentiate their
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22 ³ To the extent that Plaintiff alleges that these statements
23 were made separately from the November 27 Email and should
24 independently support its claim for negligent misrepresentation,
25 the Court finds that they are insufficient as they are wholly
26 unsupported in the SAC. Specifically, Plaintiff fails to
identify what the statements consist of, who made the statements,
who received the statements, whether the statement were made by
representatives of Defendants, or when the statements were made.

27 ⁴ The Court's prior Order ruled that regardless of whether
28 California or Florida substantive law applies, FRCP 9(b) governs
Plaintiff's negligent misrepresentation claim because it sounds
in fraud. Order at 23:4-10 n.13.

1 allegations . . . and inform each defendant separately
2 of the allegations surrounding his alleged
3 participation in the fraud.'" Swartz, 476 F.3d at 765
4 (citations omitted). Here, Plaintiff fails to provide
5 facts showing how the November 27 Email and its
6 purported attachments are connected to each Defendant.
7 Plaintiff indicates that the email was sent by Dawoud
8 at oliver@aventusbiolabs.com to Jamie Nocher at
9 jamie@pushstartllc.com.⁵ SAC ¶ 18. Plaintiff alleges
10 that Dawoud sent the email on behalf of all Defendants,
11 who are alter egos of one another and "held themselves
12 out as one and [the] same entity acting in concert with
13 each other." Id. ¶¶ 7, 18. However, Plaintiff
14 provides no facts supporting these conclusory
15 allegations. Nor does Plaintiff provide any details
16 regarding the purported attachments to the November 27
17 Email. Without information regarding how each
18 Defendant was involved with the misrepresentations,
19 Plaintiff's allegations fail to pass muster under FRCP
20 9(b). See Almont Ambulatory Surgery Ctr., LLC v.
21 UnitedHealth Grp., Inc., No. CV 14-3053-MWF (VBKx),
22 2015 WL 12777091, at *9 (C.D. Cal. Feb. 12, 2015)
23 (quoting Destfino v. Reiswig, 630 F.3d 952, 958 (9th
24 Cir. 2011)) ("Allegations that 'everyone did

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26 ⁵ Plaintiff alleges that this email address belongs to Jamie
27 Nocher, but provides no information regarding what "pushstartllc"
28 is or how it is relevant to this Action. Nonetheless, the Court
accepts that the email address is associated with Plaintiff for
purposes of deciding Defendants' Motion.

1 everything' are insufficient.").

2 Even if Plaintiff adequately alleged facts
3 involving each Defendant, Plaintiff fails to provide
4 facts supporting its assertion that the contents of the
5 November 27 Email were falsified. Plaintiff did not
6 attach the November 27 Email or its attachments to the
7 SAC, but states that its contents consisted of the
8 following:

9 Here is all the reports. The most accurate with
10 up to date claim overpayments and any claw backs
11 by insurances. I have included the missing
12 doctor reports and the September as well [sic]
13 the total commission is still under the amount
14 that was spent on cogs. It has all been broken-
15 down in each report. These once again are the
16 most accurate reports if there are any claims in
17 question please provide the EOB and I will
investigate. You need to understand that there
are claw backs and over payments that are
updated and if you provide me with specific ones
that you are in question I can provide you with
the information of either overpayment or claw
back. Which 99 percent of the time is the case
because they don't update that. Once again
these are the most accurate report. Thank you.

18 SAC ¶ 19. Plaintiff alleges that it realized the
19 November 27 Email was falsified when it reviewed the
20 email and another spreadsheet that was sent by
21 Defendants' representatives and that listed the same
22 providers and samples but bore differing numerical
23 collection and other data. Id. ¶ 20. However, the
24 other spreadsheet was neither attached to the SAC nor
25 described in detail. Aside from the general allegation
26 that the spreadsheet was sent by "Defendants'
27 representatives," Plaintiff fails to indicate who
28 specifically sent the spreadsheet, on whose behalf the

1 spreadsheet was sent, or how the spreadsheet was sent.
2 Moreover, the November 27 Email acknowledges that
3 certain claims may be updated due to "claw backs" and
4 "over payments," and invites Plaintiff to provide any
5 claims in question so that Dawoud could investigate
6 whether there was an "over payment" or a "claw back."
7 Plaintiff does not indicate that it ever followed up
8 with Dawoud or requested an investigation on the claims
9 in question, and fails to refute the plausible
10 explanation that any discrepancies between the
11 spreadsheets were due to the changes in "claw backs"
12 and "over payments" explicitly flagged by Dawoud. Such
13 lack of information surrounding the alleged
14 misrepresentation falls short of stating a plausible
15 claim to relief under Iqbal and Twombly, let alone a
16 claim to relief under Rule 9(b).⁶ See Eclectic
17 Properties East, LLC v. Marcus & Millichap Co., 751
18 F.3d 990, 996 (9th Cir. 2014) (quoting Iqbal, 556 U.S.
19 at 678, 682) ("Where a complaint pleads facts that are
20 merely consistent with a defendant's liability, it
21 stops short of the line between possibility and
22 plausibility of entitlement to relief. . . . When
23 considering plausibility, courts must also consider an

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25 ⁶ Plaintiff's suggestion that it also learned Defendants
26 were lying through its "independent investigations," in which it
27 discovered that there were payments of \$20,000 per specimen paid
28 to Defendants which had not been accounted for or paid to
Plaintiff, is equally insufficient. Plaintiff provides no
details regarding the circumstances of the investigations, or the
veracity of the discoveries made therefrom.

1 'obvious alternative explanation' for defendant's
2 behavior.").

3 In sum, Plaintiff's allegations regarding
4 Defendants' negligent representations fail to
5 adequately state a claim under Rule 9(b). Plaintiff
6 has had several opportunities to amend its Complaint,
7 yet has still not provided the Court with enough
8 information to state a plausible claim against all
9 Defendants. See Destfino v. Reiswig, 630 F.3d 952, 959
10 (9th Cir. 2011) (quoting Neubronner v. Milken, 6 F.3d
11 666, 672 (9th Cir.1993)) ("It is well-established that
12 a court may dismiss an entire complaint with prejudice
13 where plaintiffs have failed to plead properly after
14 'repeated opportunities.'"). Plaintiff's failure to
15 add the requisite particularity to its negligent
16 misrepresentation claim, even after the Court
17 previously held that it was governed by the heightened
18 pleading requirements of Rule 9(b), leaves the Court to
19 surmise that granting Plaintiff another chance to amend
20 its Complaint would be futile and prejudicial to
21 Defendants. As such, the Court **GRANTS WITHOUT LEAVE TO**
22 **AMEND** Defendants' Motion as to Plaintiff's negligent
23 misrepresentation claim.

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1 2. Unjust Enrichment

2 The Court ruled in its prior Order that Florida law
3 applies to Plaintiff's claim for unjust enrichment.
4 Order at 22:6-12. Under Florida law, the elements of
5 unjust enrichment include: "[1] a benefit conferred
6 upon a defendant by the plaintiff, [2] the defendant's
7 appreciation of the benefit, [3] the defendant's
8 acceptance, and [4] retention of the benefit under the
9 circumstances make it inequitable for [defendant] to
10 retain it without paying the value thereof." Fla.
11 Power Corp. v. City of Winter Park, 887 So.2d 1237,
12 1242 (Fla. 2004) (citations omitted).

13 First, Defendants argue that Plaintiff fails to
14 state a claim for unjust enrichment, because it fails
15 to allege that Plaintiff conferred a benefit upon
16 Defendants as required by the first element of an
17 unjust enrichment claim. However, Plaintiff
18 incorporates into its claim for unjust enrichment its
19 allegations that it enrolled its accounts with
20 Defendants for the sale of specimens, and in fact
21 delivered 11,000 specimens to Defendants. SAC ¶¶ 12,
22 24. A direct benefit in unjust enrichment is a benefit
23 that is conferred from the plaintiff to the defendant.
24 See Fito v. Atty's Title Ins. Funds, Inc., 83 So.3d
25 755, 758 (Fla. Dist. Ct. App. 2012). Thus, Plaintiff
26 satisfactorily alleges that it conferred a benefit upon
27 Defendants.

28 Second, Defendants argue that Plaintiff fails to

1 adequately allege the fourth element of an unjust
2 enrichment claim because Plaintiff does not allege that
3 the \$170,000 Defendants paid Plaintiff was
4 unreasonable. See Wiand v. Wells Fargo Bank, N.A., 86
5 F. Supp. 3d 1316, 1332 (M.D. Fla. 2015) (citations
6 omitted) ("[I]t is settled law in Florida that 'when a
7 defendant has given adequate consideration to someone
8 for the benefit conferred, a claim of unjust enrichment
9 fails.'"). However, whether the payment was reasonable
10 is irrelevant here because the heart of Plaintiff's
11 unjust enrichment claim concerns the specimens for
12 which Plaintiff has not been paid. Specifically,
13 Plaintiff alleges that Defendants paid \$170,000 for 600
14 specimens, and refused to pay for the remaining 10,400
15 specimens. SAC ¶ 17. Plaintiff further alleges that
16 Defendants made millions of dollars off of the 10,400
17 unpaid specimens. Id. ¶ 37. While Defendants may
18 ultimately produce evidence establishing that the
19 \$170,000 payment was intended to cover all 11,000
20 specimens (at which point the question of whether this
21 payment was reasonable will be at issue), at this
22 juncture, the Court must accept Plaintiff's allegations
23 that Defendants failed to pay for 10,400 specimens as
24 true. Thus, Plaintiff adequately pled the fourth
25 element of its claim for unjust enrichment.

26 Because Plaintiff adequately alleges the requisite
27 elements for unjust enrichment, the Court **DENIES**
28 Defendants' Motion to Dismiss as to this claim.

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