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18 **UNITED STATES DISTRICT COURT**

19 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

20 ALCON ENTERTAINMENT, LLC,
21 a Delaware limited company,

22 Plaintiff,

23 v.

24 AUTOMOBILES PEUGEOT SA, a
25 France société anonyme; et al.

26 Defendants.

CASE NO. 2:19-cv-00245 CJC (AFMx)

Honorable Cormac J. Carney

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PUBLICIS MEDIA FRANCE, S.A.'S
FED. R. CIV. P. 12(B)(6) MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM**

Date: March 2, 2020

Time: 1:30 p.m.

Courtroom: 7C

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Cases

Ashcroft v. Iqbal,
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Balistreri v. Pacifica Police Dep’t,
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Celador Int’l Ltd. v. Walt Disney Co.,
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City Solutions, Inc. v. Clear Channel Commc’ns, Inc.,
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CLM Properties, Inc. v. SimmonsCooper LLC,
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1 *Copeland v. Baskin Robbins U.S.A.*,
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3 *E.O.C. Ord, Inc. v. Kovakovich*,
 4 200 Cal. App. 3d 1194, 246 Cal. Rptr. 456 (Ct. App. 1988).....8

5 *EduMoz, LLC v. Republic of Mozambique*,
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11 *Graham-Sult v. Clainos*,
 12 756 F.3d 724 (9th Cir. 2014)15

13 *Gresham Savage Nolan & Tilden v. Am. Int’l Grp., Inc.*,
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 17 2013)14

18 *Hujazi v. Bank of Am., Nat’l. Assoc.*,
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22 *Knutson v. Sirius XM Radio Inc.*,
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24 *Lamle v. Mattel, Inc.*,
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26 *Lorenz v. E. W. Bancorp, Inc.*,
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1 *Merced Cty. Sheriff’s Employee’s Assn. v. Cty. of Merced*,
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3 *Miranda v. SCME Mortg. Bankers, Inc.*,
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5 *Naidong Chen v. Fleetcor Techs., Inc.*,
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10 *Pension Trust Fund v. Federal Ins. Co.*,
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15 *Reichert v. General Ins. Co. of Am.*,
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17 *Safeco Ins. Co. of Am. v. Steadfast Ins. Co.*,
 18 No. EDCV14615GHKJEMX, 2014 WL 12586253 (C.D. Cal. Sept.
 19 29, 2014)6, 20

20 *Schulz v. Cisco Webex, LLC.*,
 21 2014 WL 2115168, at *5 (N.D. Cal. May 20, 2014).....22

22 *Singh v. Amguard Ins. Co.*,
 23 No. CV 16-618 PSG, 2016 WL 7469641 (C.D. Cal. Apr. 1, 2016).....21

24 *Small v. Fritz Cos., Inc.*,
 25 30 Cal.4th 167, 173 (2003)19

26 *Smith v. City & Cty. of San Francisco*,
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28 *Smyth v. Berman*,
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1 *Spencer v. DHI Mortg. Co.*,
 2 642 F. Supp. 2d 1153 (E.D. Cal. 2009)15

3 *Starr v. Baca*,
 4 652 F.3d 1202 (9th Cir. 2011)6

5 *Sterling v. Taylor*,
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7 *Stoiber v. Honeychuck*
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9 *Swartz v. KPMG LLP*,
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10 *Toneman v. U.S. Bank, Nat’l Ass’n for Bear Stearns Asset Backed Sec.*
 11 *Tr. 2004-AC7*,
 12 2013 WL 12132049 (C.D. Cal. Oct. 21, 2013)19

13 *U. S. for Use & Benefit of Union Bldg. Materials Corp. v. Haas &*
 14 *Haynie Corp.*,
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15 **Statutes**

16 Cal. Civ. Code § 1624.....12

17 Cal. Civ. Code § 2343.....7, 8, 9, 15, 16

18

19 **Other Authorities**

20 Jonathan Gardner, *Getting the Measure of Earned Media Value*,
 21 Advertising Week 360 (Dec. 18, 2019 10:23 AM),
 22 [https://www.advertisingweek360.com/getting-measure-earned-
 media-value](https://www.advertisingweek360.com/getting-measure-earned-media-value).....11

23 Restatement (Second) of Contracts § 20 (1981).....11

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1 I. INTRODUCTION

2 Publicis Media France, S.A. (“Publicis Media France” as successor to
3 “Casablanca”), pursuant to Federal Rule of Civil Procedure 12(b)(6), has moved to dismiss
4 Claims I-V and VII-IX of Plaintiff Alcon Entertainment, LLC’s (“Alcon”) First Amended
5 Complaint (Dkt. 8, the “Amended Complaint”). The underlying dispute between Alcon
6 and defendant Automobiles Peugeot, S.A., (“Peugeot”), is described in the Court’s Order
7 Denying Defendants Automobiles Peugeot SA and Isabel Salas Mendez’s Motion to
8 Dismiss (Dkt. 22) and Denying Defendant Publicis Media France SA’s Motion to Dismiss
9 (Dkt. 56) (the “Jurisdictional Order”). (Dkt. 133.) It arises from a proposed product
10 placement and co-promotional campaign for the feature film, *Blade Runner 2049*
11 (“BR2049” or “the Film”).

12 Alcon, the co-producer of the film, brought this action against Peugeot and Isabel
13 Salas Mendez, an employee of Peugeot (together, the “Peugeot Defendants”). Alcon
14 alleged, *inter alia*, breach of contract and fraud because Peugeot did not make payment for
15 placing a futuristic Peugeot flying concept car—the “Spinner”—in the film as the vehicle
16 assigned to the film’s star, Ryan Gosling. Alcon alleged that Peugeot also refused to run a
17 co-promotional campaign outside North America to promote the Spinner as well as the
18 film. Alcon filed an Amended Complaint to add Peugeot’s French promotion agency,
19 Casablanca (“Casablanca”), to which Publicis Media France is a successor in interest.¹
20 (Dkt. 8.) Alcon alleges that Casablanca operated as an agent for Peugeot in negotiating the
21 placement and co-promotion. (*Id.*, ¶¶ 142-46.)

22 The essence of the dispute is the branding and promotion of the flying vehicle driven
23 by the Film’s star, Ryan Gosling, called a “Spinner.” Alcon and its distribution partner,
24 Sony Pictures Entertainment, Inc., sought an automotive sponsor who would brand the
25 Spinner and promote the Film in a series of promotions of its automobiles that would be
26 tied to the Film during the first month of the Film’s distribution in 2017. In return, Alcon

27 _____
28 ¹ Alcon previously dismissed defendants Publicis Groupe, S.A., Hervé Montron, and Mamou Sissoko from the case. (Dkt. 53.)

1 Alcon alleges that it began looking for automotive product placement and co-promotional
2 partners by January 2016. (*Id.* ¶ 95.) By May 2016, this search for an automotive partner
3 who would do both a placement and a co-promotion was allegedly down to two bidders:
4 Peugeot and what Alcon refers to as “Automotive Brand Z.” (*Id.* ¶ 97.)

5 Initially, Alcon communicated with Peugeot through a separate agency called BEN
6 (“Branded Entertainment Network”), that Alcon had contacted in its search for an
7 automotive sponsor. (*Id.* ¶ 117.) BEN represented both Peugeot and Automotive Brand Z.
8 As negotiations progressed in May 2016, Alcon alleges the parties began communicating
9 about potential terms and eventually, Alcon alleges, it began to communicate directly with
10 Casablanca as Peugeot’s agent. (*Id.* ¶¶ 116, 123.) Regarding the negotiations, Alcon asserts
11 multiple factual alternatives as to the intentions and good (or bad) faith of Peugeot,
12 Casablanca, and Publicis’s employees Hervé Montron, and Mamou Sissoko. (*Id.* ¶¶ 132-
13 39, 147-49.)

14 Ultimately, these negotiations resulted in a document drafted on July 12, 2016
15 referred to as the “July 12, 2016 Letter of Intent” or the “July 12, 2016 LOI.” (*Id.* ¶ 150.)²
16 The LOI contained proposed terms regarding the product placement with Peugeot branding
17 on the Spinner vehicle in the Film, and for a co-promotional campaign of “at least 30
18 million” dollars to run with the opening of the film fifteen months later if Alcon satisfied
19 criteria around the product placement. (*Id.* ¶¶ 153-54.) Alcon alleges the LOI specifically
20 called for Peugeot visibility to occur across three scenes of four seconds each for a total of
21 12 seconds, with two scenes showing Peugeot badging on the Spinner and a third scene
22 showing a Peugeot logo on a wall (the “Visibility Criteria”). (*Id.* ¶ 153(c).) Alcon does

23
24 ² Although the LOI was not attached to the complaint, Casablanca attaches it to this
25 memorandum as Exhibit A. “Documents whose contents are alleged in a complaint
26 and whose authenticity no party questions, but which are not physically attached to
27 the pleading, may be considered in ruling *on* a Rule 12(b)(6) motion to dismiss. Such
28 consideration does not convert the motion to dismiss into a motion for summary
judgment.” *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (internal
quotation marks omitted), overruled on other grounds by *Galbraith v. Cty. of Santa
Clara*, 307 F.3d 1119 (9th Cir. 2002).

1 not—and cannot—allege that the final version of the Film satisfies these Visibility Criteria
2 and Alcon pleads, but then ignores, that satisfaction of the Visibility Criteria was a
3 precondition to any co-promotional campaign. (*See* ¶ 153(i).) Alcon also does not allege
4 that the LOI or any subsequent writing was a final, binding, agreement among the parties
5 regarding the Peugeot product placement and co-promotion for the Film.

6 On January 24, 2017, Alcon, Casablanca, Peugeot, Mendez, and Sissoko (among
7 others) met at Alcon’s offices in Los Angeles. (*Id.* ¶ 200.) The parties had not signed a
8 definitive agreement for the placement and co-promotion before the meeting, although
9 several drafts had been exchanged and Casablanca had signed one of the drafts, (the “Draft
10 PLA”) as a gesture of good faith before the meeting. (*Id.* ¶ 201.)³ The Draft PLA, upon
11 which Alcon relies as evidence of the “partially written, partially oral contract” on which
12 it seeks relief, contains the following provision:

13 Licensee agrees that, in the event that the full ten seconds (:10) of aggregate onscreen
14 time of the Licensee Products in the Gosling Product Placement set forth in Section
15 8.III.a(i) does not appear in the initial U.S. theatrical version of the Property,
16 Licensor will not be in breach of this Agreement; *provided, however*, (i) the portion
17 of the “Placement Fee” (defined below) attributable to the Gosling Product
18 Placement (i.e., U.S. \$400,000) shall be reduced by the Assigned Value of the
19 Gosling Product Placement on a per second basis (i.e., U.S.\$40,000 for each second),
20 for each second of on-screen time of the Gosling Product Placement that was not
21 depicted in the Initial U.S. theatrical version of the Property and (ii) Licensee’s
22 obligations set forth in Section 9 below [the co-promotion] shall no longer be
23 required by Licensor.

24
25 ³ Although the Draft PLA—the version signed by Montron in January 2017—was
26 not attached to the complaint, it was previously filed by Alcon as Exhibit 3 to the
27 Declaration of Brandy Carrillo. (Dkt. 31 at 77-93.) Casablanca now attaches that
28 same draft version of the PLA to this memorandum as Exhibit B. Casablanca’s legal
basis for attaching the Draft PLA is the same as its reasons for attaching the LOI.
See Branch, 14 F.3d at 453-54.

1 (Exhibit B at 4.)

2 Alcon alleges that following the meeting, between February and May 2017,
3 Casablanca and Sony representatives continued negotiating a long form agreement. (*Id.*
4 ¶¶ 211, 219, 225.) Mendez had signed a Delegation of Signature Authority that was
5 provided to Alcon giving Casablanca (and specifically, Montron and Sissoko) the authority
6 to sign “any document” related to the BR2049 project on behalf of Peugeot. (*Id.* ¶¶ 212-
7 215.) The Delegation gave Casablanca signature authority dating back to August 16, 2016.
8 (*Id.* ¶ 214.) Alcon does not allege that any long form agreement had been entered into prior
9 to Casablanca leaving the project, but instead that the operative “agreement” is a “partially
10 written, partially oral contract.” (*Id.* ¶ 322.)

11 Alcon alleges that, on May 4, 2017, Mendez emailed Sony denying knowledge of
12 the July 12, 2016 LOI and denying that it had granted Casablanca negotiating and
13 contracting authority for the Film. (*Id.* ¶ 247.) Alcon acknowledges that through this email
14 Mendez made clear to Alcon that Casablanca had no further authority to act on Peugeot’s
15 behalf (*id.* ¶ 247(b) (“MENDEZ denied that [Casablanca] had any authority to make any
16 commitments for PEUGEOT on any subject”)) and denied that Peugeot was bound by
17 anything that Casablanca had done (*id.* ¶ 247(b) (denying Casablanca had authority to
18 “bind Peugeot to anything”)). Yet, Alcon alleges Mendez admitted paying Casablanca a
19 partial fee for its services. (*Id.* ¶ 247.) Alcon says that Mendez again denied giving
20 Casablanca authority to negotiate on May 17, 2017. (*Id.* ¶ 262.) Following these denials of
21 authority, Alcon makes no allegations that Casablanca negotiated on behalf of Peugeot
22 after May 18, 2017. (*Id.* ¶ 264.) Instead, after May 18, 2017 (*id.* ¶ 264), Alcon asserts that
23 Peugeot began negotiating directly with Sony and Alcon (*id.* ¶¶ 265-288).

24 On June 9, 2017, Alcon alleges Peugeot disapproved of the placement and asked
25 Alcon to “re-do it.” (*Id.* ¶ 281.) Only then, after Peugeot had denied and/or revoked
26 Casablanca’s authority to sign documents on Peugeot’s behalf, did Alcon and Sony sign a
27 version of the PLA and claim that Peugeot was bound by it. (*Id.* ¶ 287.) Peugeot abandoned
28 negotiations with Alcon and Sony on June 21, 2017. (*Id.* ¶ 293.) Knowing that Peugeot had

1 repudiated any agreement with Alcon or Sony, the producers nevertheless released the Film
2 featuring a Peugeot logo and Peugeot branding on the Spinner. (*Id.* ¶ 297-98.) As noted
3 above, Alcon does not allege—because it cannot—that the Film met the Visibility Criteria
4 in the LOI. For its part, Peugeot did not pay Alcon any amount for a placement in the film
5 and never spent any money on a promotional campaign. (*Id.* ¶ 315.)

6 III. LEGAL STANDARD

7 Under Fed. R. Civ. P. 8(a), a complaint must contain a short and plain statement of
8 the claim that shows the plaintiff is entitled to relief. To survive a motion to dismiss, Fed.
9 R. Civ. P. 12(b)(6) requires that a plaintiff allege “enough facts to state a claim to relief
10 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft*
11 *v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). “[A]llegations in a complaint or
12 counterclaim may not simply recite the elements of a cause of action, but must contain
13 sufficient allegations of underlying facts to give fair notice and to enable the opposing party
14 to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). “A Rule
15 12(b)(6) dismissal is proper where there is either a ‘lack of a cognizable legal theory’ or
16 ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *EduMoz, LLC v.*
17 *Republic of Mozambique*, 2015 WL 13697385, at *4 (C.D. Cal. Apr. 20, 2015) (citing
18 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988)).

19 Furthermore, where claims sound in fraud (as they do here), the plaintiff also must
20 satisfy Federal Rule of Civil Procedure 9(b)’s heightened pleading standard, which requires
21 fraud allegations to be pled with particularity. See Fed. R. Civ. P. 9(b); *Kearns v. Ford*
22 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). This standard applies to both Alcon’s
23 fraud and negligent misrepresentation claims. See *Safeco Ins. Co. of Am. v. Steadfast Ins.*
24 *Co.*, No. EDCV14615GHKJEMX, 2014 WL 12586253, at *4 (C.D. Cal. Sept. 29, 2014).

25 IV. ARGUMENT

26 A. Alcon Fails to State a Claim for Breach of Contract Against 27 Casablanca.

28 Alcon’s first claim for relief is for breach of contract against Peugeot, Casablanca,

1 and Does 1 through 10. (Dkt. 8 at 113.) Alcon seeks recovery of both the product placement
2 fees totaling \$500,000 and an unspecified amount in damages because Peugeot did not run
3 a co-promotion even though Alcon did not satisfy the Visibility Criteria. “In order to
4 establish breach of contract under California law, a plaintiff must establish four elements:
5 (1) an existing contract, (2) plaintiff’s performance of that contract or excuse for
6 nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” *Hujazi*
7 *v. Bank of Am., Nat’l. Assoc.*, 2011 WL 672526, at *2 (C.D. Cal. Feb. 15, 2011); *see*
8 *Reichert v. General Ins. Co. of Am.*, 69 Cal. Rptr. 321, 325 (Cal.1968). For the following
9 reasons, Alcon fails to state this claim as to Casablanca.

10 ***1. Casablanca, as an Agent of a Disclosed Principal, Is Not Liable to***
11 ***Alcon.***

12 Alcon fails to establish as existing contract to satisfy the first element of its breach
13 of contract claim.

14 *(a). The operative contract was between Alcon and Peugeot, not*
15 *Casablanca.*

16 The “contract” described in the Amended Complaint was entered into between
17 Alcon and Peugeot—not Casablanca: “Plaintiff and defendant Peugeot entered into a valid
18 and enforceable partially written, partially oral contract...” (Dkt. 8 ¶ 322.) For this partially
19 written, partially oral contract, Casablanca acted not as a principal but solely as Peugeot’s
20 agent. (*Id.* ¶ 21.) At all times, Alcon knew that Casablanca was acting only as Peugeot’s
21 agent. (*Id.* ¶ 165.) Under California law, absent some exception not applicable here, an
22 agent acting within its authority on behalf of a disclosed principal cannot be liable for
23 breach of contract. *Filippo Indus. Inc. v. Sun Ins. Co. of New York*, 74 Cal. App. 4th 1429,
24 1442 (1999) as modified (Oct. 20, 1999).

25 *(b). Casablanca is not liable under Cal. Civ. Code § 2343*

26 Because Casablanca was Peugeot’s disclosed agent—meaning it cannot generally be
27 held liable for breach of Peugeot’s contract—Alcon relies on a statutory exception in
28 California Civil Code § 2343 as its basis for Casablanca’s liability for breach of contract.

1 (See Dkt. 8 ¶ 322.) According to that statute, an agent *may* be found liable to third parties
2 in three scenarios: “1. When, with his consent, credit is given to him personally in a
3 transaction; 2. When he enters into a written contract in the name of his principal, without
4 believing, in good faith, that he has authority to do so; or, 3. When his acts are wrongful in
5 their nature.” Cal. Civ. Code § 2343. Alcon argues that both scenarios 2 and 3 apply to
6 Casablanca. (Dkt. 8 ¶ 322.) Neither, however, supports the argument that Casablanca is
7 liable for Peugeot’s breach of its contract.

8 Although an agent may be held liable when it enters into a written contract in the
9 name of the principal without believing it has the authority to do so, Alcon does not make
10 that argument here. Instead, Alcon relies upon the Delegation of Signature Authority
11 signed by Mendez appointing Casablanca to sign “any document” in connection with the
12 Film, affirming that Casablanca had a written foundation for its belief that it could enter
13 into a written contract regarding BR2049 for Peugeot. (See *id.* ¶ 212.) But, more
14 importantly, Alcon does not allege that there was a written contract binding Peugeot. When
15 Alcon alleges that the enforceable contract is “partially written, partially oral,” (*id.* ¶ 322),
16 the writing alone does not contain all the terms of the contract and it is therefore not a valid
17 written contract. *Cf. E.O.C. Ord, Inc. v. Kovakovich*, 200 Cal. App. 3d 1194, 1199–200,
18 246 Cal. Rptr. 456 (Ct. App. 1988) (quoting *Benard v. Walkup*, 272 Cal.App. 595, 77
19 Cal.Rptr. 544 (1969)) (“It is well established that the receipt and acceptance by one party
20 of a writing signed by the other party, and purporting to embody all the terms of a contract
21 between the two, binds the acceptor as well as the signer, to the terms of the writing.”).⁴
22 There is, therefore, no written contract that brings this within § 2343.

23 Casablanca, on behalf of Peugeot, did enter into the LOI on July 12, 2016. (Dkt. 8
24 ¶ 150.) But the LOI does not purport to *be* a contract, let alone embody all the terms of a
25 contract between Peugeot and Alcon. As do most letters of intent, the LOI makes clear that
26

27 ⁴ Alcon’s failure in this regard is distinct from its failure to allege a valid “writing” under
28 the Statute of Frauds, a distinct and sufficient additional reason to dismiss Alcon’s claims.
See Section 3, *infra*.

1 it is *not* the parties’ written contract: “WARNING: This agreement is not a contract. It only
2 intends to establish a tangible partnership between Peugeot and the Blade Runner II
3 movie.” (Exhibit A at 2.) Casablanca also signed the Draft PLA on January 18, 2017, but
4 Alcon alleges that this was a “draft” that also is not a written contract between the parties.
5 (Dkt. 8 ¶ 259.) Without a written contract, Alcon cannot invoke the exception of § 2343 to
6 bring a breach of contract claim against Casablanca has Peugeot’s agent.

7 Alcon also says that Casablanca can be held liable because Casablanca’s acts as
8 Peugeot’s agent were wrongful in their nature. For purposes of this statute, acts are
9 “wrongful in their nature” when they constitute an independent tort. *Peredia v. HR Mobile*
10 *Servs., Inc.*, 25 Cal. App. 5th 680, 693, 236 Cal. Rptr. 3d 157, 167 (Ct. App. 2018). Case
11 law makes clear, however, that this provision, Cal. Civ. Code § 2343(3), “means that and
12 no more.” *Peredia*, 236 Cal. Rptr. 3d at 168. In other words, Casablanca can only be held
13 liable *for torts* against Alcon and not for breach of a contract. *See Stoiber v. Honeychuck*
14 101 Cal. App. 3d 903, 929 (Ct. App. 1980) (“While Civil Code section 2343 and *Bayuk* [*v.*
15 *Edson* 236 Cal.App.2d 309 (1965)] indicate that the agent will be held liable for his torts
16 despite the fact that he acts for a principal, nothing in *Bayuk* suggests that the agent should
17 be held liable under contractual theories.”). Accordingly, Cal. Civ. Code § 2343 does not
18 provide a basis for holding Casablanca liable for breach of the contract between Peugeot
19 and Alcon.

20 **2. *Even If Casablanca Could Be Contractually Liable to Alcon, There***
21 ***Was No Meeting of the Minds on the Terms of a Contract.***

22 It is undisputed that, under California law, mutual assent is a required element of
23 contract formation. *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014).
24 Here, Alcon never intended to contract with Casablanca—it had no cars to place in the
25 Film or to promote—and based on the allegations of the Amended Complaint, Peugeot and
26 Alcon never formed a valid contract; in the “partially written, partially oral” contract
27 described by Alcon, it is evident that Alcon and Peugeot did not mutually assent to a key
28 term of the supposed contract: the terms of the co-promotion.

1 Both sides admittedly were discussing \$30 million as the relevant numerical amount
2 for the co-promotion, but there is an unresolved question about whether that was \$30
3 million to be *spent* on the promotion of Peugeot products or if the co-promotion would
4 have a *value* of \$30 million. Alcon takes the position that it thought Peugeot was
5 committing to *spend* \$30 million on the promotion (if Alcon did what was required of it)
6 while Peugeot thought it would be obligated to provide a promotion *valued* at \$30 million,
7 with a guaranteed spend of only \$3 million. That difference in understanding leads to the
8 inevitable conclusion that there was never a meeting of the minds between Alcon and
9 Peugeot on the parties' obligations for BR2049.

10 This misunderstanding is evident throughout the correspondence and exchange of
11 documents between the parties described in the Amended Complaint. That difference on
12 this essential term of the supposed agreement carries through into the allegations of the
13 Amended Complaint: at paragraph 154 Alcon alleges that the LOI and its attachment
14 committed to a “media *spend* of at least \$30 million.” (Dkt. 8 ¶ 154.) At paragraph 360,
15 Alcon alleges that by the date of the LOI, Peugeot had agreed to “guarantee a co-
16 promotional media campaign with a minimum guaranteed paid media *value* of \$30
17 million.” (*Id.* ¶ 360.) In truth, neither the LOI nor its attachment use the terms “spend” or
18 “value.” (*See* Exhibit A.)

19 The difference between “spend” and “value” is critical to any campaign. Take, for
20 example, the prospect of Ryan Gosling appearing on The Tonight Show in connection with
21 the opening of BR2049 with a clip of him driving the Spinner and compare that to Mr.
22 Gosling driving onto the stage in a model of the Spinner and doing his interview from the
23 from seat of the car. Peugeot could *spend* a set amount to arrange such an appearance but
24 the *value* of a guest appearance with Ryan Gosling and Jimmy Fallon sitting in the Spinner
25 for a 5-minute segment is far greater. The concept of media value, sometimes referred to
26 in the film industry as earned media value, is well-accepted. *See, e.g.,* Jonathan Gardner,
27 *Getting the Measure of Earned Media Value*, Advertising Week 360 (Dec. 18, 2019 10:23
28 AM), <https://www.advertisingweek360.com/getting-measure-earned-media-value>.

1 And it is understandable that the producers might have had “spend” in mind while
2 the sponsor of the promotion had “value” in mind. Alcon does not make this clear in the
3 Amended Complaint and the lack of specification whether Peugeot was committing to
4 spend or value makes the clause ambiguous. Whether the amount is media spend or media
5 value is an essential term of the contract, and without that, there is no meeting of the minds.
6 *See Sterling v. Taylor*, 40 Cal. 4th 757, 775, 152 P.3d 420, 431 (2007) (even a writing was
7 insufficient to make a written contract where there were two competing interpretations of
8 the price term).

9 “A threshold question where the parties attached different meanings to an ambiguous
10 clause is whether the parties have made a binding contract on this issue at all.” *U. S. for*
11 *Use & Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568, 573
12 (9th Cir. 1978). According to the Second Restatement of Contracts: “There is no
13 manifestation of mutual assent to an exchange if the parties attach materially different
14 meanings to their manifestations and (a) neither party knows or has reason to know the
15 meaning attached by the other; or (b) each party knows or each party has reason to know
16 the meaning attached by the other.” Restatement (Second) of Contracts § 20 (1981). “The
17 basic principle governing material misunderstanding is thus: no contract is formed if
18 neither party is at fault or if both parties are equally at fault.” *Merced Cty. Sheriff’s*
19 *Employee’s Assn. v. Cty. of Merced*, 188 Cal. App. 3d 662, 676, 233 Cal. Rptr. 519, 528
20 (Ct. App. 1987).

21 Alcon’s Amended Complaint does not take a position on what the “partially written,
22 partially oral contract” required, suggesting that much of the difficulty is that neither
23 Peugeot nor Alcon would have any reason to know the meaning attached to the \$30 million
24 amount by the other party. This lack of mutual assent by the parties – a principal reason
25 that the law favors written contracts that set out the full understanding reached by the
26 parties in order to enforce contracts – is fatal to Alcon’s contract claims because there is
27 no true contract between Peugeot (let alone Casablanca) and Alcon.

28

1 **3. *There Is No Definitive Writing that Survives the Statute of Frauds.***

2 Alcon alleges a “partially written, partially oral contract.” (Dkt. 8 ¶ 322.) To the
3 extent Alcon relies on the oral portions of that contract, those portions are subject to, and
4 barred by, the Statute of Frauds. Alcon’s failure to allege a written agreement, or an oral
5 agreement to be performed in one year, is fatal to its contract claims.

6 Under the California Statute of Frauds, any “agreement that by its terms is not to be
7 performed within a year” is “invalid, unless [it is] . . . in writing.” Cal. Civ. Code § 1624.
8 BR2049 was released on October 6, 2017. (Dkt. 8 ¶ 27.) According to Alcon, the “co-
9 promotion media campaign” described in the “partially oral contract” reflected in part in
10 the July 12, 2016 LOI, (*Id.* ¶¶ 150-154), was intended “to support the October 6, 2017 day-
11 and-date global theatrical release.” (*Id.* ¶ 153.) The “agreed co-promotional period (the
12 time during which the co-promotion would actually be licensed to run) would be from
13 September 1, 2017 to November 30, 2017.” (*Id.*, ¶ 217(r).) Therefore, without a writing,
14 the agreement Alcon alleges was made as of July 12, 2016, to run through November 30,
15 2017, violates the Statute of Frauds and cannot serve as a basis for Alcon’s breach of
16 contract claims.

17 To satisfy the Statute of Frauds, a writing must contain all the material terms of the
18 contract. *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1361 (Fed. Cir. 2005) (interpreting
19 California law). The writing must also be signed by the party against whom enforcement
20 is sought. *Id.* “[T]he writing may be cobbled together from various documents, but must
21 still identify the subject of the parties’ agreement, show that they made a contract, and state
22 the essential contract terms with reasonable certainty.” *Smyth v. Berman*, 31 Cal. App. 5th
23 183, 197, 242 Cal. Rptr. 3d 336, 348 (Ct. App. 2019), review denied (Mar. 20, 2019)
24 (internal quotation marks, punctuation, and citations omitted). Alcon has not alleged which
25 document—or set of documents—sets out the essential terms of the contract to constitute
26 a writing in satisfaction the Statute of Frauds. At best, Alcon alleges that by July 12, 2016,
27 Peugeot (through its authorized agent Casablanca) had agreed “to negotiate for a binding
28 contract...” (*Id.* ¶ 153.) Agreements to agree are not contracts under California law.

1 *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 213 (2006); *Naidong Chen v. Fleetcor*
2 *Techs., Inc.*, No. 16-CV-00135-LHK, 2017 WL 1092342, at *7 (N.D. Cal. Mar. 23, 2017)
3 (“It is a fundamental principle of California contracts law that no contract is formed where
4 essential elements are reserved for future agreements.” (quoting *City Solutions, Inc. v.*
5 *Clear Channel Commc’ns, Inc.*, 201 F. Supp. 2d 1035, 1040–41 (N.D. Cal. 2001))).

6 To the extent that Alcon urges that the LOI is a written document signed by the party
7 against whom enforcement is sought that therefore satisfies the Statute of Frauds, the LOI
8 explicitly warns that “[t]his agreement is not a contract.” (Exhibit A at 2.) As explained
9 above in the discussion about media value, the LOI also does not contain all the material
10 terms of the contract, equally fatal to Alcon’s contract claim under the Statute of Frauds.
11 *Sterling v. Taylor*, 40 Cal. 4th 757, 775, 152 P.3d 420, 431 (2007) (writing was insufficient
12 to satisfy the Statute of Frauds where there were two competing interpretations of the price
13 term). In short, the LOI does not solve Alcon’s pleading problem. Having failed to allege
14 a writing that contains all of the material terms and is not an unenforceable “agreement to
15 agree,” the “partially written, partially oral contract” as of July 12, 2016, could not be
16 performed fully before the Film’s premiere 15 months later and therefore fails the Statute
17 of Frauds.

18 **4. *Alcon Has Not Sufficiently Pled Its Own Performance***

19 A plaintiff must establish his own performance in order to make a valid claim for
20 breach of contract. *Hujazi*, 2011 WL 672526, at *2. Alcon describes its performance on
21 the placement in two short paragraphs (Dkt. 8 ¶¶ 297-298), stating that the Film contains a
22 total of twelve seconds of Peugeot visibility. These allegations do not establish that the
23 placement meets the terms of the agreed LOI, which calls for a more specific division of
24 three scenes of at least four seconds each. (*Id.* ¶ 153.) Alcon also alleges that the contract
25 requires “more of the time [to] go to the K spinner badging sequences” as opposed to the
26 outdoor/wall ad sequences. (*Id.* ¶ 322.) Yet, Alcon does not allege anything as to the timing
27 breakdown of the scenes featuring the Peugeot vehicle and wall logo. (*See id.* ¶ 297.)
28 Alcon’s failure to allege that it included three scenes of Peugeot branding lasting at least

1 four seconds each also is fatal to the co-promotion claim because Peugeot was required to
2 run the campaign only “If ALCON delivered satisfactory placement footage.” (*Id.*
3 ¶ 217(n).)

4 Additionally, to the extent Alcon alleges it performed by providing a placement
5 other than that required by the alleged contract, Alcon is acting merely as a volunteer. (*See*
6 *id.* ¶¶ 253 (“ALCON was no longer bound to include any PEUGEOT branding visibility
7 sequences at all.”), 275 (Alcon’s contention that it was “ready, able and willing if necessary
8 to deliver as many as sixteen (16) seconds.”).) In fact, Alcon did not deliver 16 seconds, or
9 even 10 seconds under the Visibility Criteria, of clear Peugeot branding; Alcon’s decision
10 to include *any* branding short of the Visibility Criteria was its own voluntary exploitation
11 of the Peugeot name and not a basis for holding Peugeot, let alone Casablanca, liable for a
12 breach because Alcon took actions different from those required under the “contract.”⁵

13 For all these reasons, plaintiff fails to state a claim for breach of contract against
14 Casablanca and the claim should be dismissed.

15 **B. Alcon Fails To State a Claim for Breach of the Implied Covenant of**
16 **Good Faith and Fair Dealing.**

17 Alcon’s second claim for relief is for breach of the implied covenant of good faith
18 and fair dealing. “Where one party unfairly frustrates another party’s right to receive the
19 benefits of a contract, the frustrating party has breached the implied covenant of good faith
20 and fair dealing.” *Hibu Inc. v. Lawrence*, No. SACV 13-0333-DOC, 2013 WL 6190538, at
21 *4 (C.D. Cal. Nov. 25, 2013). Accordingly, “[i]n order for a breach of implied covenant of
22

23 ⁵ The confusing story told by Alcon contains repeated contradictions about the so-called
24 agreement on both product placement and promotion. *Compare, e.g.*, ¶ 153 with ¶ 217.
25 Alcon’s inability to choose a story, throwing claims that more closely resemble a plate of
26 spaghetti than the “short and plain statement of the claim showing that the pleader is entitled
27 to relief” required by Rule 8 underscores the importance of adhering to California’s
28 requirements for stating contract claims: an oral or written agreement containing all material
terms and, if the former, an agreement that can be performed within one year. Alcon’s
Amended Complaint fails on both scores, especially as to Casablanca when Alcon clearly
knew and expected its automotive partner to be Peugeot, not Peugeot’s agent.

1 good faith and fair dealing claim to survive, there must be an underlying contract.” *Id.*
2 Additionally, the defendant must be one of the parties to the contract. *Smith v. City & Cty.*
3 *of San Francisco*, 225 Cal. App. 3d 38, 48–49 (Ct. App. 1990) (“The prerequisite for any
4 action for breach of the implied covenant of good faith and fair dealing is the existence of
5 a contractual relationship between the parties, since the covenant is an implied term in the
6 contract.”).

7 Again, Casablanca itself was not a party to any contract with Alcon, and therefore
8 cannot be held liable under this theory of recovery. Alcon itself alleges that the relevant
9 implied covenant comes from the contract between Alcon *and Peugeot*, not Casablanca.
10 (Dkt. 8 ¶ 335.) Therefore, Alcon’s only asserted basis for bringing this claim against
11 Casablanca is, again, Cal. Civ. Code § 2343, and that approach fails for the reasons in
12 Section IV.A.2 above, including any implied covenant term contained in that contract. To
13 the extent § 2343 allows Casablanca to be held liable for its tortious conduct, there is no
14 cause of action for the tortious breach of the implied covenant of good faith and fair dealing
15 unless the parties are in a “special relationship with ‘fiduciary characteristics.’” *Spencer v.*
16 *DHI Mortg. Co.*, 642 F. Supp. 2d 1153, 1165 (E.D. Cal. 2009) (quoting *Pension Trust Fund*
17 *v. Federal Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002) (applying California law)). Alcon
18 has alleged no such special relationship, and the implied covenant tort is “not available to
19 parties of an ordinary commercial transaction where the parties deal at arms’ length.” *Id.*

20 **C. Alcon Fails To State a Claim for Promissory Estoppel.**

21 Alcon’s fourth claim for relief is for breach of the duty to negotiate in good faith
22 against Peugeot, Casablanca, and Does 1 through 10. (Dkt. 8 at 129.) Under California law,
23 there are four elements of promissory estoppel: (1) a promise (clear and unambiguous in
24 its terms), (2) reasonable and (3) foreseeable reliance by the promisee, and (4) injury to the
25 promisee. *Graham-Sult v. Clainos*, 756 F.3d 724, 749 (9th Cir. 2014).

26 Alcon does not allege that Casablanca made any promises to Alcon, at all. (Dkt. 8 at
27 129-138.) Rather, Alcon specifically alleges that it relied on *Peugeot’s* promises. (*Id.*
28 ¶¶ 349-350.) Alcon therefore argues again that, under § 2343, Casablanca “is liable as a

1 principal . . . for PEUGEOT’s . . . promissory estoppel as set forth in this claim for relief.”
2 (*Id.* ¶ 355.) And, again, for the reasons stated in Section IV.A.2 above, Casablanca can
3 only be held liable under § 2343(3) for its torts. Promissory estoppel is a contract doctrine,
4 not a tort claim, and therefore not a valid basis for Alcon’s estoppel claim.

5 Additionally, the facts of the case demonstrate that Alcon did not actually rely on
6 Peugeot’s alleged promises. In the briefing on defendants’ Rule 12(b)(2) motions, Alcon
7 obtained documents from BEN showing that, far from Alcon foregoing a \$16+ million bid
8 from Automotive Brand Z (Dkt. 8 ¶ 350), it was Automotive Brand Z that chose to pass on
9 the BR2049 deal before July 12, 2016 (Dkt. No. 108 at 110 (citing Exhibit D at Dkt. No.
10 111-5 (unredacted) and Dkt. No. 128-4 (redacted))). With no reliance, Alcon cannot
11 succeed on a promissory estoppel claim.

12 **D. Alcon Fails To State a Claim for Breach of Duty To Negotiate in Good**
13 **Faith Because Casablanca Had No Such Duty.**

14 Alcon’s fourth claim for relief is for breach of the duty to negotiate in good faith
15 against Peugeot, Casablanca, and Does 1 through 10. (Dkt. 8 ¶ 358 *et seq.*) Alcon declares
16 that “[b]y no later than July 12, 2016, all defendants . . . had engaged in communications
17 and conduct with ALCON such that all said defendants [] were under a duty to negotiate
18 in good faith.” (*Id.* ¶ 360.) However, under California law, Casablanca did not have such a
19 duty.

20 “When two parties, under no compulsion to do so, engage in negotiations to form
21 or modify a contract neither party has any obligation to continue negotiating or to negotiate
22 in good faith.” *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 1260, 117 Cal.
23 Rptr. 2d 875 (Ct. App. 2002). Such a duty attaches “[o]nly when the parties are under a
24 contractual compulsion to negotiate.” *Id.* Under a “contract to negotiate,” “[a] party will
25 be liable only if a failure to reach ultimate agreement resulted from a breach of that party’s
26 obligation to negotiate or to negotiate in good faith.” *Id.* at 1257.

27 Alcon does not allege that Casablanca was a party to any *contract* to negotiate, which
28 is why Alcon carefully describes a “duty” instead of a contract in a clever effort to avoid

1 the California rule. To the extent that Alcon alleges the July 12, 2016 LOI constituted a
2 contract to negotiate, Casablanca is not a party to the LOI; it signed “on behalf of Peugeot”
3 to whom Alcon looked for automotive badging and from whom Alcon sought a co-
4 promotion. (*See* Dkt. 8 ¶ 150.) Indeed, a contract with Casablanca accomplished none of
5 Alcon’s goals: Casablanca could not promote the Film at its car dealerships or at its booths
6 at auto shows; Casablanca made no products to which a promotion could attach. With no
7 contract between them requiring Casablanca to negotiate for itself, Alcon has no claim for
8 breach of a duty to negotiate against Casablanca.

9 **E. Alcon Fails To Meet the Heightened Pleading Standard for Fraud**
10 **Claims.**

11 Alcon brings two fraud claims against Casablanca. Those claims face a heightened
12 pleading standard under Rule 9(b), which requires that a fraud claim be stated with
13 particularity. *Miranda v. SCME Mortg. Bankers, Inc.*, 2017 WL 3131965, at *7 (C.D. Cal.
14 July 24, 2017). An allegation of fraud must include “an account of the time, place, and
15 specific content of the false representations as well as the identities of the parties to the
16 misrepresentations.” *Id.* (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
17 (internal quotation marks omitted)). “To satisfy Rule 9(b), a pleading must identify the
18 who, what, when, where, and how of the misconduct charged, as well as what is false or
19 misleading about [the purportedly fraudulent] statement, and why it is false.” *United States*
20 *ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)
21 (internal quotation marks and citations omitted). Allegations must be “specific enough to
22 give defendants notice of the particular misconduct which is alleged to constitute the fraud
23 charged so that they can defend against the charge and not just deny that they have done
24 anything wrong.” *Miranda*, 2017 WL 3131965, at *7 (quoting *Swartz*, 476 F.3d at 764).

25 Alcon fails to meet this heightened pleading standard on both of its fraud claims
26 against Casablanca.

27 **1. The Claim for Aiding and Abetting Fraud Fails**

28 Alcon’s fifth claim for relief is for fraud against all defendants. (Dkt. 8 at 142.) As

1 to Casablanca, Alcon specifically alleges that it “aided and abetted” the Peugeot
2 Defendants’ fraud “by carrying out the affirmative false representations and omissions.”
3 (*Id.* ¶ 369.)

4 In order to state a claim for aiding and abetting fraud, there must be an underlying
5 fraud, pled pursuant to Rule 9(b). *Lorenz v. E. W. Bancorp, Inc.*, No.
6 215CV06336CASFFMX, 2016 WL 199392, at *6 (C.D. Cal. Jan. 14, 2016). Here, Alcon
7 does not specifically allege which false representations and omissions were aided and
8 abetted by Casablanca. Alcon says, vaguely, that Casablanca knew of “some or all” of the
9 underlying fraud. (*See id.* ¶ 369.) Alcon also does not specify which individuals
10 participated in each of the underling fraudulent misrepresentations, and when or where they
11 occurred. Both failures are fatal to this fraud claim.

12 The closest Alcon comes to providing specifics comes in the allegation “for
13 example, that PUBLICIS knew that in the parties’ deal negotiations MENDEZ and/or
14 PEUGEOT had intentionally instructed PUBLICIS to conduct the negotiations for the long
15 form agreement in a way designed to cause them to take as long as possible; and that
16 MONTRON and SISSOKO knew that MENDEZ and/or PEUGEOT intended intentionally
17 to conceal from ALCON that PEUGEOT would never commit to a guaranteed media
18 spend, and indeed could not do so.” (*Id.* ¶ 369.) However, this allegation merely states that
19 Casablanca *knew* about Peugeot’s intent to defraud, not that Casablanca assisted in the
20 underlying fraud in any way. A claim for aiding and abetting fraud, under California law,
21 requires not only (1) “actual knowledge” of the fraud, but also (2) “substantial assistance
22 in support of [the] alleged fraud.” *Lorenz*, 2016 WL 199392, at *7. Indeed, the Amended
23 Complaint makes clear that Alcon looked directly to Peugeot from the moment that Alcon
24 invited Peugeot to Budapest: Alcon wanted Peugeot’s design drawings (Dkt. 8 ¶¶ 166,
25 169), worked with Peugeot’s design engineer Yang Cai (*id.* ¶ 173), met with Peugeot’s
26 promotion agency BETC (*id.* ¶ 190), invited Peugeot and BETC to Los Angeles and
27 worked directly with them (*id.* ¶¶ 200, 205), and when Peugeot disavowed Casablanca as
28 its agent Alcon continued to work directly with Peugeot from April 2017 until things fell

1 apart in June of that year (*id.* ¶¶ 265-293). In short, by its own allegations, Alcon fails the
2 substantial assistance prong of this standard and the fifth claim for relief should be
3 dismissed.

4 **2. The Fraud Claim Fails**

5 Alcon's eighth claim for relief is for fraud against Casablanca and Does 6 through
6 10. (Dkt. 8 at 150.) Under California law, the five elements for fraud are: "(a)
7 misrepresentation []; (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to
8 induce reliance; (d) justifiable reliance; and (e) resulting damage." *Toneman v. U.S. Bank,*
9 *Nat'l Ass'n for Bear Stearns Asset Backed Sec. Tr. 2004-AC7*, 2013 WL 12132049, at *16
10 (C.D. Cal. Oct. 21, 2013) (citing *Small v. Fritz Cos., Inc.*, 30 Cal.4th 167, 173 (2003)).
11 Alcon lists three alleged misrepresentations in support of its fraud claim against
12 Casablanca. (*Id.* ¶ 396.)

13 a. From at least as early as July 12, 2016 through and until at least May 4,
14 2017, PUBLICIS's employees and representatives, including MONTRON,
15 SISSOKO and Anne Platon, all by their statements, conduct and material
16 omissions effectively communicated to ALCON that PUBLICIS was fully
17 authorized to negotiate for and bind PEUGEOT regarding a BR2049 deal
18 that specifically would include a \$30 million media spend commitment from
PEUGEOT, and that PUBLICIS had signature authority for PEUGEOT with
respect to it.

19 b. PUBLICIS, including through MONTRON and SISSOKO, communicated
20 to PLAINTIFF to the effect that PUBLICIS was accurately communicating to
21 PLAINTIFF the deal terms requested and desired by PEUGEOT, when in fact
22 PUBLICIS, MONTRON and SISSOKO were instead intentionally
23 withholding and/or otherwise misrepresenting to PLAINTIFF the deal terms
24 actually desired and requested by PEUGEOT, for the purpose of PUBLICIS,
25 MONTRON and SISSOKO trying to avoid or otherwise improperly mitigate
risk of a deal between PLAINTIFF and PEUGEOT not going forward which
would cause them to lose a large expected fee.

26 c. During April 2017, PUBLICIS (including through Anne Platon) by her
27 affirmative statements, conduct and material omissions intentionally caused
28 ALCON to believe that PEUGEOT and MENDEZ had reviewed and were
reviewing all draft versions of the proposed long form agreement sent by

1 Platon to ALCON and/or CTMG, when in fact that was false, and PEUGEOT
2 and MENDEZ continued to be unaware of the drafts or their content.

3 (*Id.* ¶ 396.)

4 None of these alleged misrepresentations are pled with sufficient particularity as to
5 time, place, persons, and statements to meet the Rule 9(b) standard. Casablanca is entitled
6 to know when and where each statement was made, by which person it was made and to
7 which person it was communicated, and exactly what was said in each instance. Alcon
8 must “allege the ‘who, what, when, where and how’ supporting their . . . allegations.”
9 *Safeco, supra*, 2014 WL 12586253, at *4.

10 Alcon fails every element except naming the two Casablanca employees and Ms.
11 Platon; Alcon does not say with whom they communicated, where and when they said it,
12 and what exactly each said in each misrepresentation, let alone how Alcon relied upon
13 these unspecified representations to its detriment. As the quoted language above makes
14 clear, Paragraph (a) only sets out a broad time-frame without distinguishing among the
15 three speakers, vaguely concluding that they committed a fraud through unspecified
16 statements and conduct and material omissions. Paragraph (b) similarly includes no time-
17 frame, and does not specify how Messrs. Montron and Sissoko communicated the alleged
18 fraud or to whom their unspecified fraudulent statements were communicated. Paragraph
19 (c) is not specific as to how Platon communicated the alleged fraud, when she did so or to
20 whom it was communicated.

21 A properly alleged fraud claim, under California law, requires far more particularity.
22 *See Celador Int’l Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 855 (C.D. Cal. 2004) (to
23 allege fraud, “[p]laintiffs must identify who made the statements and to whom they were
24 made”); *see also Barkett v. Sentosa Properties LLC*, No. 1:14-CV-01698-LJO, 2015 WL
25 3756348, at *6 (E.D. Cal. June 16, 2015), *aff’d*, 692 F. App’x 411 (9th Cir. 2017)
26 (“Plaintiffs fail to identify where these assurances occurred (over the phone, in person, by
27 correspondence.”). Rather than make specific allegations, Alcon is either vague (e.g.
28 “through and until at least May 4, 2017”) or overly broad and inclusive (e.g., listing

1 “affirmative statements, conduct, and material omissions” without specifying the content
2 of the alleged statements or what the alleged conduct was). “Such general allegations
3 against Defendants fail to provide Defendants with sufficient notice of the particular
4 misconduct to prepare an adequate answer and accordingly do not satisfy the pleading
5 standard of Rule 9(b).” *CLM Properties, Inc. v. SimmonsCooper LLC*, No.
6 SACV07848AHSANX, 2008 WL 11422124, at *6 (C.D. Cal. Jan. 8, 2008).

7 Alcon’s attempts to allege knowledge of falsity are at Paragraph 398: “PUBLICIS,
8 MONTRON and SISSOKO knew at the time that they made the affirmative
9 misrepresentations and false promises that they were false.” (Dkt. 8 ¶ 398.) Such
10 boilerplate statements applying to all alleged statements and speakers are insufficient to
11 state a claim under Rule 9(b). *Singh v. Amguard Ins. Co.*, No. CV 16-618 PSG (AJWX),
12 2016 WL 7469641, at *3 (C.D. Cal. Apr. 1, 2016) (dismissing a fraud claim under Rule
13 9(b) where the plaintiff’s allegations addressing promissory fraud were “merely
14 boilerplate, conclusory statements”).

15 Alcon may assert that Casablanca misrepresented that it had signature authority for
16 Peugeot and thereby misled Alcon regarding the extent of its authority to act for Peugeot.
17 But the allegations of the Amended Complaint are that Casablanca was given that signature
18 authority. (*See id.* ¶ 212 (“Indeed, MENDEZ signed and transmitted the “Delegation of
19 Signature Authority” document twice.”).)

20 And, for the reasons stated in Section C above, Alcon’s conclusory assertion that it
21 relied on Casablanca’s alleged misrepresentations (*id.* ¶ 402), is both too vague and
22 contrary to the documents produced in the jurisdictional fight. There, Automotive Brand Z
23 decided not to participate in a co-promotion on its own before Alcon claims it reached an
24 agreement with Peugeot through Casablanca. (*See* Dkt. No. 108 at 110 (citing Exhibit D at
25 Dkt. No. 111-5 (unredacted) and Dkt. No. 128-4 (redacted)).) In short, Alcon did not
26 choose to do business with Peugeot because it was relying upon Casablanca’s or Peugeot’s
27 representations, but because Peugeot was the only automobile company willing to do a
28 product placement in BR2049. Alcon’s fraud claim must be dismissed.

1 **F. Alcon Fails To State a Claim for Quantum Meruit.**

2 Alcon’s seventh claim for relief is for *quantum meruit* against Peugeot, Casablanca,
3 and Does 1 through 10. (Dkt. 8 at 150.) As to Casablanca, Alcon alleges that it is entitled
4 to damages or restitution equivalent to the amount in fees Casablanca received from
5 Peugeot for the placement, which it alleges to be at least \$250,000. (*Id.* ¶¶ 391-393.) That
6 claim fails for the following reasons.

7 **1. Alcon Has Not Pled Facts Suggesting the Contract at Issue in this**
8 **Case May Be Unenforceable.**

9 California law does not allow a party to maintain actions for breach of contract and
10 *quantum meruit* simultaneously, “unless the plaintiff has pled facts suggesting that the
11 contract may be unenforceable or invalid.” *Gresham Savage Nolan & Tilden v. Am. Int’l*
12 *Grp., Inc.*, 2014 WL 12558248, at *6 (C.D. Cal. Sept. 8, 2014) (quoting *Schulz v. Cisco*
13 *Webex, LLC*, 2014 WL 2115168, at *5 (N.D. Cal. May 20, 2014) (internal citations
14 omitted)). Here, Alcon contends only that the contract with Peugeot is fully enforceable.
15 (*See e.g.*, Dkt. 8 ¶ 322 (stating Alcon and Peugeot “entered into a valid and enforceable
16 partially written, partially oral contract”).) Accordingly, the Court should dismiss Alcon’s
17 *quantum meruit* claim. *See Gresham Savage*, 2014 WL 12558248, at *6 (granting motion
18 to dismiss quantum meruit claim where plaintiff makes no alternative allegation that the
19 contract may be unenforceable or invalid).

20 **2. Casablanca Received No Benefit from Alcon.**

21 Even had Alcon properly alleged that its contract with Peugeot may be
22 unenforceable, its *quantum meruit* claim would fail because Alcon did not provide
23 Casablanca with any benefit. A “prerequisite to recovery” for *quantum meruit* is that “the
24 plaintiff ha[s] bestowed some benefit on the defendant.” *Maglica v. Maglica*, 66 Cal. App.
25 4th 442, 449–50, 78 Cal. Rptr. 2d 101, 104–05 (Ct. App. 1998), as modified on denial of
26 reh’g (Sept. 28, 1998). Alcon tries to skate around this requirement by asserting that
27 Casablanca “received a benefit provided by [Alcon] . . . in the form of [Casablanca’s] fees
28 from [Peugeot].” (Dkt. 8 ¶ 391.) But this payment came from Peugeot, not Alcon. The

1 California Supreme Court has said that Alcon may succeed on a claim for *quantum meruit*
2 only if the plaintiff's services "were of *direct* benefit to the defendant." *Palmer v. Gregg*,
3 65 Cal. 2d 657, 660, 422 P.2d 985, 986 (1967) (emphasis added). Alcon does not make
4 such an assertion.

5 On the other hand, the service allegedly provided by Alcon to Peugeot – Alcon's
6 placement of the Peugeot vehicle in the Film – did provide a direct benefit to Peugeot. (*See*
7 Dkt. 8 at 107 ("Peugeot Receives the Benefit of the Placement.") Having chosen to style
8 the seventh claim against both Peugeot and Casablanca, however, does not relieve Alcon
9 of its pleading obligations to each defendant. Here, Alcon has not made out a *quantum*
10 *meruit* claim against Casablanca and the seventh cause of action should be dismissed.

11 **G. Alcon Fails To State a Claim for Negligent Misrepresentation against**
12 **Publicis Media France.**

13 Alcon's ninth claim for relief is for negligent misrepresentation against Publicis
14 Groupe, S.A., and Does 6 through 10, but not against Publicis Media France. (Dkt. 8 at
15 154.) Publicis Groupe, S.A., has been dismissed from this case, so Publicis Media
16 France/Casablanca need not address this claim. (Dkt. 53.)

17 **V. CONCLUSION**

18 Alcon fails to state any claim against Casablanca, in contract, quasi-contract or tort,
19 on which relief can be granted on the allegations of the First Amended Complaint. The
20 bottom line is that Casablanca was a disclosed agent acting on behalf of Peugeot – with
21 whom Alcon dealt directly and to whose automotive business Alcon looked for the product
22 placement and co-promotion it sought. Under the general rule, agents are not liable for the
23 agreements of their principals and this case is no exception; the Amended Complaint fails
24 to demonstrate that any exception to this general rule applies. All the rest of Alcon's claims
25 about misrepresentations, fraud and reliance are misplaced because Alcon never says who
26 said what to whom, when and where they said it, why Alcon believed it and how Alcon
27 relied upon it. Alcon's parade of alternative claims, facts, inferences and conclusions are
28 so contradictory that they fail to apprise Casablanca of the bases on which it could be held

1 liable. Finally, Alcon fails to allege its own performance so as to entitle it to any recovery:
2 if Alcon failed to meet the Visibility Criteria, it has no claim, and Alcon does not allege
3 that it met the Visibility Criteria. Instead, having fallen out with Peugeot, Alcon decided to
4 put some of the Peugeot branding in the film for its own purposes without bothering to
5 meet the criteria to which Alcon says it agreed with Peugeot. Casablanca has no part in that
6 fight and, for all of the reasons set out above, Publicis Media France respectfully requests
7 that all claims against it be dismissed.

8 Respectfully submitted,

9
10 Dated: December 23, 2019

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11
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