

Celestial Mechanix, Inc. v. Susquehanna Radio Corp.

United States District Court for the Central District of California

March 17, 2004, Decided

Case No.: CV 03-5834-GHK(VBKx)

Reporter

2004 U.S. Dist. LEXIS 26987 *; 73 U.S.P.Q.2D (BNA) 1300 **

Celestial Mechanix, Inc. v. Susquehanna Radio Corporation, et al.

Subsequent History: Reprinted as amended at [Celestial Mechanix v. Susquehanna Radio Corp., 2005 U.S. Dist. LEXIS 7920 \(C.D. Cal., Apr. 28, 2005\)](#)

Disposition: Defendant's request to dismiss Plaintiff's Fraud claim granted. Defendant's motion to dismiss Plaintiff's remaining state law claims is denied.

Core Terms

script, covenant, preempted, convenience, radio, implied-in-fact, advertisements, preemption, confidence, television, Venue, stations, implied-in-law, qualitatively, inconvenience, confidential, congestion, e-mail

Case Summary

Procedural Posture

Plaintiff, producer and syndicator of advertisements, sued defendants, owner and operator of a radio station and a competing television producer, for breach of contract and related claims for their use of a commercial. The station owner moved to transfer venue to the Northern District of Georgia, or in the alternative to dismiss the state law claims under [Fed. R. Civ. P. 12\(b\)\(6\)](#), as preempted by the Copyright Act, [17 U.S.C.S. § 101 et seq.](#)

Overview

The syndicator, a California corporation, alleged that the radio station owner wrongfully disclosed the syndicator's script for a commercial to the competitor. The station owner asserted that Georgia was a more convenient forum. The syndicator argued that the owner operated three radio stations in California, while the syndicator was basically a one man operation. The station owner failed to show why production of documents would be burdensome, and failed to provide specific information about the identity of focus group witnesses who would be inconvenienced or the nature and materiality of their testimony. Its corporate witnesses could be compelled to appear in California. The venue factors thus favored leaving the suit in California. The court ruled that the commercial fell within the subject matter of copyright, and contract-oriented state law claims for good faith and an implied in law contract, that did not contain an extra element of proof, such as an express promise to pay for the commercial, were preempted. Otherwise, the claims sought to protect rights that were equivalent to those exclusively protected by copyright. A fraud claim was not pled with sufficient particularity.

Outcome

The motion to transfer venue was denied. The claims for breach of oral contract, breach of implied contract, and breach of the covenant of good faith and fair dealing were dismissed with leave to amend. The claim for fraud was dismissed as inadequately pled, with leave to amend. The motion to dismiss was denied as to claims for interference with contract and prospective business advantage, breach of confidence, and unfair business practices.

LexisNexis® Headnotes

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HNI [blue icon] **Federal Venue Transfers, Convenience Transfers**

See [28 U.S.C.S. § 1404\(a\)](#).

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN2[**Federal Venue Transfers, Convenience Transfers**

In evaluating whether transfer is appropriate under [28 U.S.C.S. § 1404 \(a\)](#), a court must balance the preference accorded to a plaintiff's choice of forum with the burden of litigating in an inconvenient forum. In conducting that inquiry, the court should consider private and public factors including, (1) convenience of the parties; (2) convenience of the witnesses; (3) access to proof; (4) location of underlying conduct; (5) availability of compulsory process; (6) judicial economy/relative docket congestion; and (7) jury service burden.

Civil Procedure > ... > Venue > Motions to Transfer > Choice of Forum

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN3[**Motions to Transfer, Choice of Forum**

As a general matter, the district court is not required to determine the best venue, and transfer under [28 U.S.C.S. § 1404\(a\)](#) should not be freely granted. [Section 1404\(a\)](#) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient, and a transfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer. Finally, there is a strong presumption in favor of the plaintiff's choice of forum. As such, the defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN4[**Venue, Motions to Transfer**

A party seeking a transfer of venue must clearly specify the essential witnesses to be called and must make a general statement of what their testimony will cover. In determining the convenience of the witnesses, the court must examine the materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience in the forum.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN5[**Discovery, Subpoenas**

See [Fed. R. Civ. P. 45\(b\)\(2\)](#).

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN6[] **Venue, Federal Venue Transfers**

The location of employees of a corporate witness are not properly considered when a court analyzes the availability of compulsory process under [28 U.S.C.S. § 1404\(a\)](#), since their presence at trial can be compelled.

Copyright Law > Constitutional Copyright Protections > Federal & State Law
Interrelationships > Federal Preemption

Copyright Law > Constitutional Copyright Protections > Federal & State Law
Interrelationships > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > General Overview

Copyright Law > ... > Statutory Copyright & Fixation > Fixation Requirement > General Overview

HN7[] **Federal & State Law Interrelationships, Federal Preemption**

See [17 U.S.C.S. § 301\(a\)](#).

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

HN8[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#) tests the legal sufficiency of the claims asserted in the complaint. A court may not dismiss a complaint for failure to state a claim 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. In other words, a [Rule 12\(b\)\(6\)](#) dismissal is proper only where there is either a lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN9[] Motions to Dismiss, Failure to State Claim

In deciding a motion to dismiss for failure to state a claim, a court's review is limited to the contents of the complaint. The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. It need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN10[] Federal & State Law Interrelationships, Federal Preemption

The United States Court of Appeals for the Ninth Circuit employs a two-part test to determine whether the Copyright Act, [17 U.S.C.S. § 101 et seq.](#), preempts a particular state law claim. Preemption occurs when (1) the work at issue comes within the subject matter of the copyright; and (2) the rights granted under state law are equivalent to those protected by the Copyright Act.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

HN11[] Federal & State Law Interrelationships, Federal Preemption

The first prong of the preemption test under the Copyright Act (Act), [17 U.S.C.S. § 101 et seq.](#), is satisfied where the works at issue come within the subject matter of copyright as defined by [17 U.S.C.S. § 102](#). The scope of the Act's subject matter, and thus the scope of preemption, is broader than the scope of the Act's protections.

Copyright Law > ... > Protected Subject Matter > Limited Protection for Ideas > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > General Overview

Copyright Law > ... > Statutory Copyright & Fixation > Fixation Requirement > General Overview

Copyright Law > ... > Statutory Copyright & Fixation > Fixation Requirement > Perceptibility Requirement

Copyright Law > ... > Subject Matter > Statutory Copyright & Fixation > Original Works of Authorship

HN12 [down arrow] Protected Subject Matter, Limited Protection for Ideas

See [17 U.S.C.S. § 102](#).

Copyright Law > ... > Protected Subject Matter > Limited Protection for Ideas > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

HN13 [down arrow] Protected Subject Matter, Limited Protection for Ideas

Although "ideas" are excluded from coverage of the Copyright Act, [17 U.S.C.S. § 101 et seq.](#), ideas nevertheless fall within the Act's subject matter as defined by [17 U.S.C.S. § 102](#).

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN14 [down arrow] Federal & State Law Interrelationships, Federal Preemption

The second prong of the preemption test under the Copyright Act (Act), [17 U.S.C.S. § 101 et seq.](#), is satisfied where the rights protected by state law are equivalent to those protected by the Act. To avoid preemption, a state cause of action must protect rights which are qualitatively different from the copyright rights. The critical inquiry is whether the state law claim contains an extra element that changes the nature of the action. In conducting its evaluation, a court should engage in a fact specific inquiry into the actual allegations underlying the claims at issue in the case, to determine whether the gravamen of the state law claim asserted is the same as the rights protected by the Act.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Implied in Fact

Contracts Law > Breach > General Overview

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

Contracts Law > Types of Contracts > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN15 [down arrow] Types of Contracts, Contracts Implied in Fact

While an implied in fact contract contains the element of a promise to pay, an implied in law contract requires no extra element in addition to an act of reproduction, performance, distribution or display. A plaintiff seeking to establish that a defendant breached an implied in fact contract has to prove elements beyond unauthorized use, including that the defendant made an enforceable promise to pay and breached that promise.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Copyright Law > Constitutional Copyright Protections > Federal & State Law
Interrelationships > Federal Preemption

HN16 [] **Types of Contracts, Quasi Contracts**

A state law cause of action for quasi contract is regarded as an equivalent right and hence, preempted insofar as it applies to copyright subject matter.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN17 [] **Types of Contracts, Covenants**

A claim for breach of the implied covenant of good faith and fair dealing is an outgrowth of alleged improper conduct by a defendant under a contract between the parties, and is designed to prevent a party from acting in bad faith to, frustrate the contract's actual benefits.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN18 [] **Breach, Breach of Contract Actions**

Where a plaintiff's allegations do not go beyond a statement of a mere breach of contract and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN19 [] **Types of Contracts, Covenants**

The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose. The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN20 [] Civil Procedure, Attorneys

See [Fed. R. Civ. P. 11\(b\)](#).

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN21 [] Heightened Pleading Requirements, Fraud Claims

[Fed. R. Civ. P. 9 \(b\)](#) requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. To avoid dismissal for inadequacy under [Rule 9\(b\)](#), a complaint must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.

Copyright Law > Constitutional Copyright Protections > Federal & State Law
Interrelationships > Federal Preemption

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN22 [] Federal & State Law Interrelationships, Federal Preemption

A claim of interference with prospective business advantage is qualitatively different from a copyright claim, and thus not preempted under the Copyright Act, [17 U.S.C.S. § 101 et seq.](#), because a plaintiff must demonstrate some prospective business advantage relationship and that defendants' conduct deprived him of it.

Counsel: [*1] For Celestial Mechanix Inc, a California corporation doing business as CMI, Plaintiff: Cheryl D Chadwick, Gradstein Luskin & Van Dalsem, Los Angeles, CA.

For Susquehanna Radio Corporation, a Pennsylvania corporation, Defendant: Daniel C DeCarlo, Scott Russell Maynard, Lewis Brisbois Bisgaard & Smith, Los Angeles, CA.

For Peter Rosler, an individual doing business as Rosler Creative, Defendant: Lawrence J Siskind, Nishan S Kottahachchi, Harvey Siskind Jacobs, San Francisco, CA.

Judges: Honorable George H. King, United States District Judge.

Opinion by: George H. King

Opinion

[1301] PROCEEDINGS: Defendant's Motion for a Change of Venue or, in the Alternative, to Dismiss State Law Claims**

This matter is before the Court on the above-titled motion. This motion is appropriate for resolution without oral argument. *Fed. R. Civ. P. 78*; Local Rule 7-15. After fully considering the briefs and papers pertaining to this matter, we rule as follows:

I. Introduction

Plaintiff Celestial Mechanix, Inc. ("Plaintiff") filed this action on August 15, 2003, against Defendants Susquehanna Radio Corporation ("Defendant") and Peter Rosler.¹ Plaintiff asserted a federal claim for Copyright Infringement [*2] and state law claims for Breach of Oral Contract; Breach of Implied Contract; Breach of the Covenant of Good Faith and Fair Dealing; Fraud; Breach of Confidence; Interference with Contract; Interference with Prospective Business Advantage; and Unfair Competition.

On November 3, 2003, Judge Harry Hupp stayed Defendant's original Motion to Dismiss to allow Plaintiff an opportunity to demonstrate that its copyright had been registered by the United States Copyright Office, such that the court could determine whether subject matter jurisdiction existed. On January 21, 2004, Plaintiff filed a First Amended Complaint ("FAC") setting [*3] forth the registration of Plaintiff's copyright, and asserting the same claims against the same defendants as in the original complaint. Defendant subsequently filed the present motion on February 12, 2004, seeking to transfer this action to the United States District Court for the Northern District [**1302] of Georgia pursuant to *28 U.S.C. § 1404 (a)* or, in the alternative, to dismiss Plaintiff's state law claims under *Fed. R. Civ. P. 12 (b)*.

¹ Defendant Rosler filed a Notice of Joinder in this motion on March 4, 2004. However, for sake of clarity, we analyze this motion as if Defendant Susquehanna brought it alone, as this is the manner in which the parties' arguments are structured. We refer to Defendant Susquehanna as "Defendant" throughout this order. Our disposition, however, shall apply to Defendant Rosler where applicable.

(6) on grounds that they are preempted by the federal Copyright Act, [17 U.S.C. § 301\(a\)](#). Defendant also moves to dismiss Plaintiff's Fraud claim for inadequacy under [Fed. R. Civ. P. 9 \(b\)](#).

II. Relevant Factual Background

Plaintiff is a Los Angeles-based corporation in the business of writing, producing and syndicating television advertisements for, among other things, radio stations across the country. FAC P 10. After producing the advertisement, Plaintiff "syndicates" it by replacing the name and logo of the radio station for which the commercial was originally produced with the name and logo of other stations in exchange for a licensing fee. *Id.* Defendant is a Pennsylvania corporation in the business [*4] of radio, broadcasting. Defendant owns and operates WWWQ-FM radio station which broadcasts in and around Atlanta, Georgia.

In February 2003, WWWQ-FM viewed a promotional reel containing several television advertisements that Plaintiff had produced. *Id.* After viewing this reel, WWWQ-FM requested Plaintiff to develop and produce a television advertisement for the WWWQ-FM morning radio show. *Id.* On February 26, 2003, Plaintiff sent WWWQ-FM an e-mail conveying a proposed script for a television commercial. FAC P 11. WWWQ-FM responded to Plaintiff in an e-mail on February 27, 2003, stating that it was "excited" about the script and planned to use it to advertise the morning program. FAC P 12. On March 3, 2003, Plaintiff provided "preliminary budgets" to WWWQ-FM. FAC P 13. Following this communication, Plaintiff did not hear from WWWQ-FM for over two weeks, when WWWQ-FM contacted Plaintiff to advise Plaintiff that it "could not afford" Plaintiff's quoted price. *Id.*

At this point, Plaintiff alleges that WWWQ-FM "unilaterally revealed and disclosed" the script to Defendant Rosler, a California-based producer of television advertisements for radio stations who is one of Plaintiff's [*5] competitors. *Id.* Thereafter, Defendant Rosler allegedly produced a commercial for WWWQ-FM that utilized Plaintiff's script without authorization or compensation to Plaintiff and without preserving Plaintiff's syndication rights. *Id.* Plaintiff brought the present action based on this alleged unauthorized use of the script.

III. Motion to Transfer Venue

A. Legal Standard

Defendant moves to transfer this action to the Northern District of Georgia pursuant to [28 U.S.C. § 1404\(a\)](#). [Section 1404\(a\)](#) provides: [HN1](#) [↑] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought." [28 U.S.C. § 1404\(a\)](#).²

[HN2](#) [↑] In evaluating whether transfer is appropriate under [§ 1404\(a\)](#), a court must "balance the preference accorded [*6] to the Plaintiff's choice of forum with the burden of litigating in an inconvenient forum." [Gherebi v. Bush](#), 352 F.3d 1278, 1302 (9th Cir. 2003) (citing [Gulf Oil Corp. v. Gilbert](#), 330 U.S. 501, 508, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)). In conducting this inquiry, the court should consider "private and public factors" including, (1) convenience of the parties; (2) convenience of the witnesses; (3) access to proof; (4) location of underlying conduct; (5) availability of compulsory

² There is no dispute that the Northern District of Georgia is a District where this action "might have been brought."

process; (6) judicial economy/relative docket congestion; and (7) jury service burden. See id.; The Rutter Group, California Practice Guide: Federal Civil Procedure Before Trial § 4:269-281 (2003).

HN3[] As a general matter, the district court is not required to determine the "best venue," and transfer under § 1404(a) should not be freely granted. Gherebi, 352 F.3d at 1303. Moreover, § 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove equally convenient or inconvenient, and a transfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer. Id. Finally, there is a "strong presumption" in [*7] favor of the plaintiff's choice of forum. Id. As such, the "defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." See Decker Coal Company v. Commonwealth Edison Company, 805 F.2d 834, 843 (9th Cir. 1986). After considering the parties' arguments in light of this guidance, we conclude that transfer is not appropriate under § 1404(a). [**1303]

B. Analysis of relevant factors

1. Convenience of the parties

As the key parties in this action (CMI and WWWQ-FM) are located in Los Angeles, California, and Atlanta, Georgia, respectively, one party will have to travel cross-country for trial regardless of whether this case is venued in the Central District of California or the Northern District of Georgia. While this factor is seemingly "neutral," the relative ability of the parties to absorb the costs associated with litigating in a distant forum is a valid consideration. See Miracle v. NYP Holdings, Inc., 87 F. Supp. 2d 1060, 1073-74 (D. Haw. 2000) (rejecting transfer where defendant was a "large corporation that could more easily travel to Hawaii to litigate than could Plaintiff travel to New York").

[*8] Plaintiff has provided evidence showing that Defendant is the eleventh largest radio corporation in America, with revenues and operating income in the "hundreds of millions" of dollars and that it operates three radio stations in California. On the other hand, Plaintiff claims to be somewhat of a "Mom and Pop" outfit, as it repeatedly refers to its "sole owner-operator," Bob Benderson. Defendant does not contest Plaintiff's characterization of its size and finances in its Reply brief. Accordingly, it appears that considerations of the expense and difficulty of litigating in a distant forum counsel against transfer, as Defendant would be better able to absorb such costs. As such, this factor does not favor transfer.

2. Convenience of the witnesses

Defendant argues that this factor tips in its favor because all of its potential witnesses are located in Georgia, including its employees and members of "focus groups" who apparently were "involved with the [process of creating the script] and provide part of the factual background needed to understand the entire creative process undertaken by the employees of [Defendant]." Reply, p.5. In contrast, Defendant argues that Plaintiff's [*9] primary, and perhaps sole witness, is Bob Benderson, the owner-operator of CMI.

HN4[] The Ninth Circuit explained in Gherebi that the "party seeking the transfer must clearly specify the essential witnesses to be called and must make a general statement of what their testimony will cover. In determining the convenience of the witnesses, the court must examine the materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience in the forum." Gherebi, 352 F.3d at 1304 n.33; see also A.J. Industries, Inc. v. United States Dist. Ct., 503 F.2d 384, 389 (9th Cir. 1974) (in considering convenience of witnesses, the court will want to know who the

witnesses are, where they are located, what their testimony will be and why such testimony is relevant or necessary).

Defendant has failed to meet its burden of providing specific information about the identity of its witnesses or the nature and materiality of their testimony. While we can speculate about the content and materiality of the testimony of the employee and focus group witnesses, Defendant has not set forth this information in any detail. [*10] See *Gherebi, 352 F.3d at 1304* ("In any event, the government has not . . . put forth the appropriate evidence to support its case" with respect to convenience of the witnesses). Accordingly, we conclude that Defendant has failed to show that considerations of convenience of the witnesses favor transfer.

3. Access to proof

Defendant argues that "all of the documentation related to the creation of the commercial [by WWWQ-FM personnel] is located at the WWWQ-FM offices in Atlanta. Motion, p.7. However, Defendant makes no showing why production of these documents in California would be burdensome, or that the documentation is so voluminous that transporting it would be difficult. Moreover, while Defendant argues that "electronic discovery is going to be necessary," it fails to elaborate on the nature of this "electronic discovery" or explain why it would be burdensome. In addition, Plaintiff's computers would likely be subject to the same discovery as would Defendant's, such that transferring venue would do no more than shift the burden, if such burden exists, from Defendant to Plaintiff. As such, this factor does not favor transfer.

4. Location of underlying conduct

[*11] Defendant contends that although there was no written agreement between the parties, preliminary negotiations "were directed to WWWQ-FM at its Atlanta offices by CMI, generally through" e-mail. Motion, p.9. Although the communications may have been [*1304] directed to Atlanta, they came from Los Angeles. Moreover, Plaintiff alleges that WWWQ-FM sent communications to it (presumably at its Los Angeles office) at least twice, and that the script that is the subject of this litigation was created in Los Angeles. We therefore conclude that the relevant underlying conduct occurred in both Atlanta and Los Angeles, such that this factor does not favor transfer.

5. Availability of compulsory process

Defendant asserts that the Northern District of Georgia is the more appropriate forum because under *Fed. R. Civ. P. 45*, Defendant could subpoena members of the "focus groups" to testify at trial if necessary, while it would be unable to do so if the trial were conducted in the Central District of California. See *Fed. R. Civ. P. 45(b)(2) HN5[]* ("a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 [*12] miles of the place of the . . . trial"). However, Defendant has again failed to provide specific information about the identity of these focus-group witnesses or the nature and materiality of their testimony. Thus, although the fact that compulsory process is unavailable to Defendant in California serves to favor transfer, we conclude that

this factor is of marginal significance in light of Defendant's failure to provide specific information about the identity of these witnesses or their testimony.³

6. Judicial economy/relative docket congestion

While considerations of judicial economy include whether [*13] transfer will avoid duplicative litigation and prevent waste of time and money, Defendant limits its arguments to the relative "court congestion" in the Central District of California compared to the Northern District of Georgia. Defendant relies on statistics from 2002 showing that this District had 13,230 case filings while the Northern District of Georgia had only 3,808 case filings. While we are sympathetic to Defendant's arguments, the evidence on which it relies does not present a fair picture. Defendant fails to mention that there are currently 28 active District Judges in this District, with 20 Magistrate Judges, but only 11 active District Judges in the Northern District of Georgia, and 9 Magistrate Judges. As such, the raw number of case filings in each District does not present an accurate assessment of the level of "congestion."

In any event, Defendant has made no showing that due to the purported congestion in this District, resolution of this action would be less efficient or more expensive than in the Northern District of Georgia. Accordingly, Defendant has failed to show that this factor favors transfer.

7. Jury service burden

Finally, Defendant argues that trying [*14] this case in California would impose an undue burden on jurors from this District who have "no connection to the events giving rise to the cause of action, which all occurred nearly 3,000 miles away in Atlanta." Motion, p.11. We have already rejected Defendant's premise that "all" of the events giving rise to this action occurred in Atlanta. Moreover, we find no reason to conclude that local jurors have less interest in judging the facts of this case, which involves a Los Angeles-based Plaintiff suing an Atlanta-based Defendant, than do jurors in Georgia. This factor does not favor transfer.

C. Motion for Change of Venue Summary

Based on the foregoing, we conclude that Defendant has failed to make a sufficient showing of inconvenience to upset the "strong presumption" in favor of Plaintiff's forum choice. Defendant's Motion for a Change of Venue is therefore denied.

IV. Motion to Dismiss Plaintiff's State Law Claims

Defendant moves to dismiss Plaintiff's state law claims under [Fed. R. Civ. P. 12\(b\)\(6\)](#) on grounds that they are preempted by the Copyright Act, [17 U.S.C. § 301\(a\)](#).⁴ In the alternative, [**1305] Defendant

³ We note that Defendant's purported "key" witnesses, four employees of WWWQ-FM, are not a consideration in this factor, as [HN6](#) [↑] "employees of a corporate witness are not properly considered in [Section 1404\(a\)](#) [availability of compulsory process] analysis since their presence can be compelled." [See Ashmore v. Northeast Petroleum Division of Cargill, Inc.](#), 925 F. Supp., 36, 38 (D. Maine 1996).

⁴ [Section 301\(a\)](#) provides: [HN7](#) [↑] "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State. [17 U.S.C. § 301 \(a\)](#)."

moves to dismiss Plaintiff's claim for [*15] Fraud on the ground that it was not pleaded with particularity as required by [Fed. R. Civ. P. 9\(b\)](#).

A. [Rule 12\(b\)\(6\)](#) Legal Standard

HN8[] A [Rule 12\(b\)\(6\)](#) motion tests the legal sufficiency of the claims asserted in the complaint. [Fed. R. Civ. P. 12\(b\)\(6\)](#). A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that [*16] the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#); [Moore v. City of Costa Mesa, 886 F.2d 260, 262 \(9th Cir. 1989\)](#). In other words, a [Rule 12\(b\)\(6\)](#) dismissal is proper only where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." [Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 \(9th Cir. 1988\)](#).

HN9[] In deciding a motion to dismiss for failure to state a claim, the court's review, is limited to the contents of the complaint. [Campanelli v. Bockrath, 100 F.3d 1476, 1479 \(9th Cir. 1996\)](#). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. [Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 \(9th Cir. 1996\)](#). It need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. [Western Mining Council v. Watt, 643 F.2d 618, 624 \(9th Cir. 1981\)](#). [*17]

B. Preemption Analysis

HN10[] The Ninth Circuit employs a two-part test to determine whether the [Copyright Act](#) preempts a particular state law claim. Preemption occurs when (1) the work at issue comes within the subject matter of the copyright; and (2) the rights granted under state law are equivalent to those protected by the Act. See [Del Madera Properties v. Rhodes and Gardner, Inc., 820 F.2d 973, 977 \(9th Cir. 1987\)](#).

1. Subject matter of copyright

HN11[] The first prong of the preemption test is satisfied where the works at issue come within the "subject matter of copyright" as defined by [17 U.S.C. § 102](#).⁵ The scope of the Copyright Act's "subject matter," and thus the scope of preemption, is broader than the scope of the Act's protections. See [Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1124 \(N.D. Cal. 2001\)](#) (the work at issue "does not necessarily have to be actually protected by a specific copyright or even itself copyrightable; it just has to be within the subject matter' of the Act").

[*18] The "subject matter" of Plaintiff's state law claims are the "ideas and concepts" contained in the script. **HN13**[] Although "ideas" are excluded from coverage of the Copyright Act, they nevertheless fall within the Act's "subject matter." See [U.S. ex rel. Berge v. Trustees of the University of Alabama, 104 F.3d 1453, 1463 \(4th Cir. 1997\)](#) ("ideas" that formed basis of Plaintiff's dissertation fall within subject matter of copyright law). Moreover, Plaintiff is the owner of a registered copyright in the script, demonstrating that the ideas and concepts contained therein as fixed in a tangible medium of expression are within the subject matter of copyright. See FAC Exh. A. Accordingly, we conclude that the work at

⁵ [Section 102](#) defines the **HN12**[] "subject matter" of copyright to include "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." [17 U.S.C. § 102](#).

issue in this case falls within the "subject matter of copyright," and the first prong of the preemption test is satisfied.

2. Equivalent rights

HN14 [↑] The second prong of the preemption test is satisfied where the rights protected by state law are "equivalent" to those protected by the Copyright Act. In order to avoid preemption, "the state cause of action must protect rights which are qualitatively different from the copyright rights." *Del Madera, 820 F.2d at 977.* [*19] The critical inquiry is whether the state law claim contains an "extra element" that [**1306] changes the nature of the action. See *Selby v. New Line Cinema Corp., 96 F. Supp. 2d 1053, 1059 (C.D. Cal. 2000)*. In conducting this evaluation, "the court should engage in a fact-specific inquiry into the actual allegations underlying the claims at issue in the case, so as to determine whether the gravamen' of the state law claim asserted is the same as the rights protected by the Copyright Act." *Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129, 1190 (C.D. Cal. 2001)*.

We now assess each of Plaintiff's state law claims under the second prong of the preemption analysis to gauge whether it seeks to protect rights that are "equivalent" to those exclusively protected by copyright. We begin by addressing Plaintiff's three claims based on breach of contract together, as these claims present common analytical issues distinct from the other claims.

a. Breach of contract claims

Plaintiff asserts three claims based on breach of contract: Breach of Implied-in-Fact Contract; Breach of Oral Contract; and Breach of the Covenant of Good Faith and Fair Dealing. Following are the [*20] "common factual allegations" that are relevant to these three claims:

- (1) In February 2003, Defendant viewed a promotional reel containing several television advertisements Plaintiff had conceived and produced. After viewing the reel, Defendant contacted Plaintiff and requested Plaintiff to develop and produce a television advertisement for Defendant's morning radio show.
- (2) Later in February 2003, Plaintiff sent Defendant an e-mail conveying a script for the television commercial.
- (3) Following receipt of the script, Defendant e-mailed Plaintiff a message stating that it was "excited" about the script and planned to use it to advertise its morning show.
- (4) On March 3, 2003, Plaintiff provided Defendant with "preliminary budgets." Plaintiff did not hear from Defendant for over two weeks.

- (5) On March 18, 2003, Plaintiff contacted Defendant again. Defendant stated that it could not afford Plaintiff's quoted price. Thereafter, Defendant unilaterally revealed and disclosed Plaintiff's script to Defendant Rosler in order to produce a commercial utilizing Defendant's ideas without authorization from or compensation to Plaintiff. See FAC PP 10-13.

i. [*21] Breach of implied-in-fact contract

In addition to incorporating the common factual allegations into this claim, Plaintiff alleges that, at Defendant's request, it submitted the script to Defendant with the expectation, of which Defendant was aware, that it would be compensated and attributed credit and would retain all syndication rights. FAC P 29. Based on these allegations, Plaintiff argues that it has pled a claim for breach of "implied-in-fact" contract, and that such claim contains the "extra element" of Defendant's implied promise to compensate

Plaintiff for the use of the script or the ideas contained therein. See *Firoozye, 153 F. Supp. 2d at 1127* ("A promise to pay for work constitutes an extra element such that a breach of contract claim is not preempted by [the Copyright Act].").

For purposes of preemption analysis, there is a "crucial difference" between a claim based on a contract implied-in-fact and a contract implied-in-law (or "quasi contract"). See id. [HN15](#)[] While an implied-in-fact contract contains the "extra element" of a promise to pay, an implied-in-law contract requires no extra element in addition to an act of reproduction, performance, distribution [*22] or display. See id. ("[A] plaintiff seeking to establish that a defendant breached an implied-in-fact contract [has to] prove elements beyond unauthorized use, including that the defendant made an enforceable promise to pay and breached that promise."); see also *Hercules Inc. v. United States, 516 U.S. 417, 423-24, 134 L. Ed. 2d 47, 116 S. Ct. 981 (1996)* (explaining that an agreement implied in fact is founded upon a meeting of the minds as inferred from conduct of the parties showing a tacit understanding; by contrast, an agreement implied in law is a "fiction of law" where a promise is imputed to perform a legal duty) (citations omitted); *Maglica v. Maglica, 66 Cal. App. 4th 442, 456, 78 Cal. Rptr. 2d 101 (1998)* (noting that quasi contractual "quantum meruit" theory implies a "promise to pay for services as a *matter of law for reasons of justice* while implied-in-fact contracts are predicated on actual [*^{**}1307] agreements, albeit not ones expressed in words") (emphasis in original).

Here, despite Plaintiff's characterization of the facts as showing a contract implied-in-fact, the facts as alleged fail to show the "extra element" of an actual promise to pay. Rather, the facts explicitly show that the [*23] parties did not reach an agreement with respect to payment, and that there was no meeting of the minds or tacit understanding in this respect. With no actual agreement to pay, Plaintiff has failed to plead a claim for breach of implied-in-fact contract. To the extent that Plaintiff has pled any claim for breach of contract, such claim is for implied-in-law contract, and recovery is based on the theory of quantum meruit. As a claim based on implied-in-law contract includes no "extra element" in addition to the defendant's unauthorized use of the work, it is equivalent to the rights protected by the Copyright Act. See 1 *Nimmer on Copyright* (2002) § 1.01 [B] /11 /gl, p.1-41 [HN16](#)[] ("[A] state law cause of action for . . . quasi contract should be regarded as an equivalent right' and hence, pre-empted insofar as it applies to copyright subject matter."). Accordingly, we conclude that Plaintiff's claim for breach of implied contract is preempted.:.

ii. Breach of oral contract

In this claim, Plaintiff incorporates the common factual allegations and alleges; additionally, that Plaintiff and Defendant "entered into an oral contract pursuant to which" Defendant requested, and Plaintiff [*24] agreed, to convey to Defendant the script "in exchange for compensation, credits and syndication rights, among other things." FAC P 24. Plaintiff further alleges that Defendant breached this contract by failing to compensate and attribute credit to it and by depriving it of syndication rights. FAC P 26. Plaintiff argues that this claim adequately alleges the "extra element" of a promise to pay, such that it is qualitatively different from a copyright claim.

As discussed above, we reject Plaintiff's attempt to characterize the facts that he has alleged as showing a "promise to pay." To the contrary, the facts as alleged show that Defendant expressly denied that it would pay Plaintiff for the script, because it "could not afford CMI's quoted price." FAC P 13. With no actual agreement to pay, Plaintiff has failed to allege an essential element of its purported oral contract with Defendant. See 4 Nimmer on Copyright (2002) § 16.04 p. 16-17 ("Under the prevailing view, an

enforceable express contract arises if the person to whom an idea is submitted has expressly promised to pay for it in the event of its use."). At best, Plaintiff has alleged nothing more than an implied-in-law agreement [*25] to not unfairly benefit from Plaintiff's ideas. Such allegation does not include the "extra element" of an agreement to pay, and is therefore not qualitatively different from a copyright infringement claim. Thus, Plaintiff's breach of oral contract claim is inadequate and/or preempted by [§ 301\(a\)](#).

iii. Breach of implied covenant of good-faith and fair dealing

In addition to incorporating the common factual allegations, Plaintiff alleges that "the oral contract described above . . . includes an implied covenant of good faith and fair dealing" pursuant to which "the parties mutually agreed not to do anything that would deprive the other party of the benefits of the contract, to deal with each other fairly and in good faith, and to do everything the contract presupposes a party will do to accomplish the purpose of the contract." FAC P 34. Plaintiff alleges that Defendant breached this implied covenant by revealing the script to Defendant Rosler and thereafter "engaging and allowing" Defendant Rosler to produce the commercial based on the script without compensation or attribution of credit to Plaintiff. FAC P 35.

[HN17](#) A claim for breach of the implied covenant of good faith and fair dealing [*26] is an outgrowth of alleged improper conduct by a defendant under a contract between the parties, and is designed to prevent a party from acting in bad faith to, frustrate the contract's actual benefits. See [Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 349, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 \(2000\)](#). We conclude that Plaintiff has failed to state a claim for breach of the implied covenant for two reasons. First, as the same factual allegations form the basis of this claim and Plaintiff's claims for breach of contract, Plaintiff has failed to state an additional claim for breach of the implied covenant. See [Careau & Co. v. Security Pacific Business Credit, Inc., 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387 \(1990\)](#) **[HN18](#)** ("If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, [**1308] they may be disregarded as superfluous as no additional claim is actually stated.").

Here, Plaintiff alleges in both of his breach of contract claims and in this claim that Defendant breached its obligations by utilizing Plaintiff's ideas to create a commercial without compensating [*27] or attributing credit to Plaintiff. Accordingly, Plaintiff has failed to allege an additional claim for relief for breach of the implied covenant of good faith and fair dealing, and we dismiss this claim. See [Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., 155 F. Supp. 2d 1, 17 \(S.D.N.Y. 2001\)](#) (applying California law to dismiss claim for breach of implied covenant of good faith and fair dealing in copyright infringement action for being merely duplicative of breach of contract claim).

Second, as Plaintiff has failed to allege any express promise to pay, an essential prerequisite to the existence of the implied covenant of good faith and fair dealing is lacking. See [Racine v. Laramie, Ltd., Inc. v. Dep't of Parks and Recreation, 11 Cal. App. 4th 1026, 1031, 14 Cal. Rptr. 2d 335 \(1992\)](#) **[HN19](#)** ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.") (citations omitted); see also 1 Witkin, Summary of California Law (2003 Suppl.) § 745A ("The implied covenant of good faith and fair dealing is limited [*28] to assuring compliance with the express terms of the contract. . . ."). As we have concluded that Plaintiff has, at best, alleged an implied-in-law or quasi-contract with Defendant, which is not based on the Defendant's express promise to pay but is rather

created by law for reasons of justice, there are no express covenants' or promises that the implied covenant can serve to buttress, and Plaintiff has therefore failed to state a claim.

iv. Breach of contract summary

In sum, we conclude that Plaintiff's breach of contract claims are preempted by the Copyright Act and that Plaintiff has failed to state a claim for breach of the covenant of good faith and fair dealing. We therefore dismiss these claims under [Fed. R. Civ. P. 12\(b\)\(6\)](#). In light of the allegations contained in the FAC, we find it highly unlikely that Plaintiff can plead additional facts that would enable him to state a claim for breach of contract or breach of the implied covenant that could survive scrutiny under [Rule 12\(b\)\(6\)](#). To do so, Plaintiff must plead facts showing that the parties entered into an "actual agreement" with respect to payment. However, inasmuch as we cannot conclude that it "appears beyond doubt" [*29] that Plaintiff "can prove no set of facts" which would enable him to adequately state a claim based on breach of contract, we dismiss these claims without prejudice,' and we allow Plaintiff 14 days to file a Second Amended Complaint ("SAC"), that corrects the defects in these claims as pleaded in the FAC.

If counsel chooses to file a SAC, we caution him to be mindful of his obligations under [Fed. R. Civ. P. 11](#), including its requirements that [HN20](#)[] all claims be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law," and that "the allegations and other factual contentions have . . . or . . . are likely to have evidentiary support. . ." [Fed. R. Civ. P. 11\(b\)](#).

b. Fraud

Plaintiff alleges in his Fraud claim that Defendant "represented to Plaintiff that if Plaintiff conveyed and disclosed its" script and the ideas therein, that Defendant "would compensate Plaintiff if it utilized" the script or ideas. FAC P 38. However, Plaintiff alleges that Defendant made this representation because it wanted to utilize the script to its commercial advantage without compensating or accrediting Plaintiff. [See id.](#) Although Defendant [*30] contends that this, claim is preempted by the Copyright Act, we need not reach this issue inasmuch as we agree with Defendant's alternative argument that Plaintiff has failed to set forth the facts of this claim with sufficient particularity, as required by [Fed. R. Civ. P. 9\(b\)](#).

[HN21](#)[] [Rule 9\(b\)](#) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." [Fed. R. Civ. P. 9\(b\)](#). To avoid dismissal for inadequacy under [Rule 9\(b\)](#), Plaintiff's complaint must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. [See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 \(9th Cir. 2004\)](#). Plaintiff has stated none of this information here. Accordingly, we dismiss Plaintiff's Fraud' claim for inadequacy under [Fed. R. Civ. P. 9 \(b\)](#). However, we allow Plaintiff 14 days leave to file a SAC that pleads a claim for [**1309] fraud in accordance with the requirements of [Rule 9 \(b\)](#). If counsel chooses to do so, we again remind him of his obligations under [Fed. R. Civ. P. 11](#), as discussed above.

c. Breach of confidence

Plaintiff alleges [*31] that it disclosed its script to Defendant "in confidence and in the context of a confidential relationship." FAC P 43. Moreover, "the disclosures were made with the understanding that the [script] was being disclosed in confidence, that [it] would be kept in confidence and would not be disclosed or used beyond the limits of the confidence without [Plaintiff's] consent, the attribution of credit and compensation to Plaintiff and the preservation of Plaintiff's syndication rights." [Id.](#) Plaintiff alleges

that Defendant breached this confidence by disclosing the script to Defendant Rosler. FAC P 44. Plaintiff argues that this "confidential relationship" is an "extra element" beyond the rights enumerated in the Copyright Act.

We agree that this claim has an "extra element" that renders it qualitatively different from the rights protected in the Copyright Act. Indeed, the conduct of which Plaintiff complains in this claim -- Defendant's disclosure of the script to Defendant Rosler -- is not conduct that would infringe upon Plaintiff's copyright in the script. See [*Groubert v. Spyglass Entertainment Group, 2002 U.S. Dist. LEXIS 17769 at *14 \(C.D. Cal. July 22, 2002\)*](#) [*32] ("Were Plaintiff to demonstrate that a confidential relationship existed between the parties, then Defendants could potentially have disclosed Plaintiff's confidential idea and breached their duty without ever having published Plaintiff's work in a manner that is protected under copyright law. Thus, the rights are not necessarily equivalent."). Accordingly, this claim is not preempted.

d. Interference with contract

Plaintiff asserts this claim only against Defendant Rosler, alleging that he intentionally caused and persuaded Defendant to breach the contract by causing Defendant to disclose, reveal, transfer and utilize Plaintiff's confidential script. FAC P 48. The gravamen of this claim is therefore Defendant Rosler's alleged tortious conduct in wrongfully inducing Defendant to breach the contract -- and not Defendant Rosler's unauthorized use of the script and benefit therefrom. As such, this claim is qualitatively different from a copyright claim, and it is not preempted.

e. Interference with prospective business advantage

In this claim, Plaintiff alleges' that when Defendant utilized the script without compensating it, it deprived "Plaintiff of the opportunity to customize" [*33] and syndicate the resulting commercial and to derive licensing fees from other stations for use of the commercial version thereof." FAC P 52. While neither party addresses this claim with any specificity, we conclude that this claim contains the "extra element" of Defendant's alleged disruption of Plaintiff's potential opportunities to exploit the script, and is therefore not preempted. See [*Lattie v. Murdach, 1997 U.S. Dist. LEXIS 3558 at *15-16 \(C.D. Cal. January 8, 1997\)*](#) (finding [HN22](#)[] claim for interference with prospective business advantage to be qualitatively different from copyright, and thus not preempted, because "in order to state [a claim], plaintiff must show some prospective business advantage relationship and that defendants' conduct deprived him of it").

f. Unfair competition

Plaintiff alleges that the conduct of which he complains in his previous claims "constitutes unlawful, unfair, or fraudulent business practices in violation of [*California Business and Professions Code sections 17200 et seq.*](#)" FAC P 57. We conclude that this claim is not preempted to the extent that it is based upon claims that are likewise not preempted or otherwise dismissed. Thus, [*34] to the extent that this claim is based on Plaintiff's claims for Breach of Confidence, Interference with Contract, or Interference with Prospective Business Advantage, it survives this motion to dismiss.⁶

V. Disposition

⁶Inasmuch as Plaintiff's claim for Interference with Contract is asserted only against Defendant Rosler, to the extent that Plaintiff's Unfair Competition claim is based on the Interference with Contract claim, it supports liability only against Defendant Rosler.

Based on the foregoing, Defendant's request for a change of venue is hereby denied. Defendant's motion to dismiss Plaintiff's state law claims is granted in part, and Plaintiff's claims for Breach of Oral Contract, Breach of Implied Contract, and Breach of the Covenant [**1310] of Good Faith and Fair Dealing are hereby dismissed with leave to amend. Defendant's request to dismiss Plaintiff's Fraud claim for inadequacy under Fed. R. Civ. P. 9(b) is hereby **granted** with leave to amend. Defendant's motion to dismiss Plaintiff's remaining [*35] state law claims is **denied**.

IT IS SO ORDERED.

End of Document