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Attorneys for Defendant and Counterclaimant
NEUDESIC, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ONEAZ CREDIT UNION, an Arizona credit union,

Plaintiff,

vs.

NEUDESIC, LLC, a California limited liability company,

Defendant.

NEUDESIC, LLC, a California limited liability company,

Counterclaimant,

vs.

ONEAZ CREDIT UNION, an Arizona credit union,

Counter-defendant.

CASE 2:17-CV-00745-ROS

NEUDESIC, LLC'S MOTION TO DISMISS COUNTS II THROUGH V OF ONEAZ'S AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Oral argument requested

Pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), Neudesic, LLC ("Neudesic") hereby moves to dismiss Counts II through V of OneAZ Credit Union's ("OneAZ") Amended Complaint, with counts III, IV and V being dismissed with prejudice. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

OneAZ's Amended Complaint alleges nothing more than a garden variety breach of contract. The Amended Complaint tells the story of a contractual relationship between two companies where, for thirteen months, Neudesic provided services to OneAZ, OneAZ approved and accepted Neudesic's work product, and OneAZ paid for those services. Now, OneAZ is seemingly unhappy with those services.

Instead of filing a single breach of contract claim against Neudesic, however, OneAZ filed a five-count complaint—for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, breach of fiduciary duty, and money had and received—hoping for a windfall, or at least to force Neudesic to expend significant time and resources fighting baseless claims instead of resolving the parties' garden variety contract dispute. Each of these claims simply incorporates the allegations of OneAZ's mere breach of contract dispute, recast to superficially list the required elements as conclusory allegations, without asserting any facts to support each claim. Not only do these claims serve as a distraction, thereby frustrating a speedy resolution of the parties' dispute, but also each of Counts II through V fail as a matter of law, requiring their dismissal.

STATEMENT OF FACTUAL ALLEGATIONS

According to its Amended Complaint, OneAZ hired Neudesic in July 2015 to perform the data-integration component of a larger project, wherein OneAZ was building and implementing a comprehensive customer relationship management ("CRM") system. (See Am. Cmplt. ¶¶9, 15-16.) OneAZ had already hired Hitachi Solutions America, Ltd.

("Hitachi") to perform the principal job of building and implementing the CRM. (See id. at ¶14.)

For thirteen months, Neudesic worked on its portion of the project, with the parties regularly entering into at least five separate Statements of Work ("SOWs") for specific deliverables and two change orders, all of which were governed by the parties' Master Services Agreement ("MSA"). (See id. at ¶¶16, 18, 31, 45, 51, 53, 64.) OneAZ paid Neudesic for its services pursuant to the first four Statements of Work and both change orders and Microsoft and Neudesic paid for Neudesic's services under the fifth Statement of Work. (See id. at ¶¶ 17, 34, 45, 51, 53, 54, 67.)

According to the Amended Complaint, Neudesic made representations to OneAZ about the services provided pursuant to the MSA and SOWs, specifically concerning Neudesic's "capabilities, the quality and magnitude of work it would perform on the integration project, and the status of the project as it went forward." (See id. at ¶105.) These alleged representations relate to and were governed by the parties' contracts. (See id. at ¶¶20-23, 36; see also id. at Exs. 2 and 3.) OneAZ now alleges that Neudesic did not comply with such representations. (See, generally, id.)

The MSA set forth the procedure for accepting or rejecting Neudesic's work product, expressly allowing OneAZ a period of ten days to reject Neudesic's work. (See id. at Ex. 2, §6, p. 3.) Work not rejected was deemed accepted. (See id. at Ex. 2, §6.2, p.3.) After accepting and paying for Neudesic's services for over a year, OneAZ allegedly rejected Neudesic's work product pursuant to the MSA by written letter on July 22, 2016. (See id. at ¶72 and Ex. 10.) In response to this letter, Neudesic formulated a Remediation Plan, requesting three weeks to address the issues in OneAZ's letter. (See id. at Ex. 11.) OneAZ allegedly terminated Neudesic on September 26, 2016. (See id. at ¶80.)

OneAZ now seeks recovery on its economic damages arising out of the parties' contractual relationship.

LEGAL STANDARDS

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a party's "[f]actual allegations must be enough to raise a right to belief above the speculative level" and must have "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. A pleading that merely offers "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or contains "naked assertion[s] devoid of further factual enhancement" is defective and must be dismissed. Id. (quoting Twombly, 550 U.S. at 557).

ARGUMENT

I. CHOICE OF LAW

OneAZ alleges that this dispute is subject to MSA, which contains a choice-of-law provision providing that "[t]his Agreement shall be governed by the laws of the State of California." (See MSA ¶19.5, attached as Ex. 2 to the Am. Cmplt.)

Under Arizona's choice of law policies, Arizona law applies to OneAZ's tort claims that do not require contract interpretation to adjudicate. Winsor v. Glasswerks PHX, L.L.C., 204 Ariz. 303, 307, 63 P.3d 1040, 1044 (Ct. App. 2003) ("Whether a [choice of law provision] applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract.") (citing Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988)). That is because "[c]laims arising in tort are not ordinarily controlled by a contractual choice of law provision. Rather, they are decided according to the law of the forum state." Sutter Home Winery, Inc. v. Vintage Selections, Ltd., 971 F.2d 401, 407 (9th Cir. 1992) (citing Consol. Data Terminals v. Applied Digital Data Sys., 708 F.2d 385, 390 n.3 (9th Cir. 1983)).

Regardless of whether Arizona or California law is applied, however, each of OneAZ's Counts II through V fail to state a claim for relief and must be dismissed.

II. ONEAZ'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS DUPLICATIVE AND DOES NOT ALLEGE BAD FAITH (COUNT II)

OneAZ's claim for breach of the implied covenant of good faith and fair dealing fails under Fed. R. Civ. P. 12(b)(6) because it is duplicative of OneAZ's breach of contract claim and does not allege Neudesic acted in bad faith. As discussed above, OneAZ's contract-based claims are governed by California law pursuant to the MSA.

The allegations in support of a claim for breach of the implied covenant of good faith and fair dealing must go beyond a mere contract breach. Hougue v. City of Holtville, 2008 U.S. Dist. LEXIS 35258, *11, 2008 WL 1925249 (S.D. Cal. Apr. 30, 2008) (holding that because the allegations supporting good faith and fair dealing "did not go beyond the statement of a mere contract breach," the claim was not properly pleaded) (citing Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393, 272 Cal. Rptr. 387 (1990) (sustaining demurrer on a breach of the implied covenant of good faith and fair dealing claim). As explained in Diaz v. Federal Express, "[i]f the allegations in a claim for breach of the implied covenant of good faith and fair dealing 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, they may be disregarded as superfluous as no additional claim is actually stated." Diaz v. Fed. Express Corp., 373 F. Supp. 2d 1034, 1066 (C.D. Cal. 2005) (citing Careau, 222 Cal. App. 3d at 1393); see also Env't Furniture, Inc. v. Bina, 2010 U.S. Dist. LEXIS 133272, at *7-8 (C.D. Cal. Dec. 6, 2010) (granting motion to dismiss breach of implied covenant of good faith and fair dealing) (also citing Careau, 222 Cal. App. 3d at 1393)); Essex Marina City Club, L.P. v. Cont'l Cas. Co., No. 11-408 SC, 2011 U.S. Dist. LEXIS 49512, at *10-11 (N.D. Cal. May 9, 2011) (granting motion to dismiss, explaining, "a breach of

the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment.").

Further, "plaintiffs must plead facts showing bad faith and demonstrating 'a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence, but rather by a conscious and deliberate act.'" Env't Furniture, Inc., 2010 U.S. Dist. LEXIS 133272, at *8 (quoting Careau, 222 Cal. App. 3d at 1395).

Here, OneAZ makes no factual allegations for breach of the implied covenant of good faith and fair dealing beyond its breach of contract claim. Indeed, it is unclear **what** Neudesic allegedly did that OneAZ believes was a breach of the implied covenant of good faith and fair dealing: nowhere does the Amended Complaint allege OneAZ acted in bad faith and nowhere is wrongful conduct alleged that is distinct from breaches of the MSA. All the Amended Complaint provides on this claim is the threadbare, "formulaic recitation of the elements" that is insufficient under Twombly. 550 U.S. at 555. Accordingly, Count II of the Amended Complaint, for breach of the implied covenant of good faith and fair dealing, must be dismissed under Fed. R. Civ. P. 12(b)(6).

III. ONEAZ'S FRAUD CLAIM SHOULD BE DISMISSED WITH PREJUDICE (COUNT III)

OneAZ's fraud claim fails for three separate reasons: it is barred by the economic loss rule ("ELR"), it does not meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), and it fails to allege all required elements beyond the "threadbare conclusions" rejected under Twombly.

a. OneAZ's Fraud Claim is Barred by the Economic Loss Rule

OneAZ's fraud claim is based on allegations that Neudesic made misrepresentations about its capabilities and future performance of services under the MSA. But the ELR "limits a party to its 'contractual remedies for purely economic loss' arising from the other party's 'alleged failure to adequately perform its promises under' a contract." Maricopa Cty. v. Office Depot, Inc., No. 2:14-cv-1372-HRH, 2014 U.S. Dist.

LEXIS 164331, at *21 (D. Ariz. Nov. 21, 2014) (citing Cook v. Orkin Exterminating Co., 227 Ariz. 331, 258 P.3d 149, 153 (Ariz. Ct. App. 2011)); see also Sterling Cross Def. Sys., Inc v. Dolarian Capital, Inc., No. 1:13-CV-01773-AWI-GSA, 2014 U.S. Dist. LEXIS 83528, at *7-10 (E.D. Cal. June 18, 2014).

The defendants in Sterling Cross had contractually agreed to deliver various military assets to the plaintiff, but failed to comply with the contract. The plaintiff then brought suit for breach of contract and fraud. The Sterling Cross court dismissed plaintiff's fraud claim as barred by the ELR where "the pleading does not contain any allegations of 'harm above and beyond a contractual promise.'" Sterling Cross Def. Sys., Inc, 2014 U.S. Dist. LEXIS at *8-9 (citing Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988 (2004) (barring a claim for fraud where the purchaser sought to recover for purely economic loss due to disappointed expectations, without more).

In Cook v. Orkin, defendant Orkin, a pest exterminating company, contracted to provide extermination services to the Cooks, who had a termite problem in their home. 227 Ariz. 331. After years of suffering through recurring termite invasions, the Cooks sued Orkin for breach of contract and various tort claims. Id. at 333. After analyzing two Arizona Supreme Court decisions applying the ELR, the Cook court held that the ELR barred the Cooks' tort claims for negligence, negligent misrepresentation, intentional misrepresentation, and fraud, explaining that the Cooks were "limited to their contractual remedies for purely economic loss from Orkin's alleged failure to adequately perform its promises under the Agreement." Id. at 335.

The Oddo court, sitting in diversity jurisdiction and deciding a motion to dismiss based on the ELR, acknowledged there was some disagreement among Arizona courts regarding the ELR's application, however, the court ultimately decided it was "bound by the Ninth Circuit's conclusion that, 'although Arizona has yet to decide this issue, . . . negligent misrepresentation . . . would not be excepted from the economic loss rule by the Arizona Supreme Court.'" Oddo v. Arcoaire Air Conditioning & Heating, No. 8:15-cv-01985-CAS(Ex), 2017 U.S. Dist. LEXIS 10507, at *65 (C.D. Cal. Jan. 24, 2017) (citing

Apollo Grp., Inc. v. Avnet, Inc., 58 F.3d 477, 480 (9th Cir. 1995), Int'l Franchise Sols. LLC v. BizCard Xpress LLC, No. 13-cv-0086-PHX-DGC, 2013 U.S. Dist. LEXIS 69600, at *8 (D. Ariz. May 16, 2013) (applying the ELR to bar tort claims alleging negligence and negligent misrepresentation because "the subject of the alleged misrepresentation relate[d] to the … services that [defendant] was to provide under the Agreement") and Office Depot, Inc., No. 2:14-cv-1372-HRH, 2014 U.S. Dist. LEXIS 164331, at *21 (D. Ariz. Nov. 21, 2014) ("Because plaintiff's common law fraud claims are based on the same alleged conduct as its contract claims, these claims are barred by the economic loss rule.")). The Oddo plaintiff's negligent misrepresentation and fraudulent omission claims were thus barred by the economic loss rule. Id.

Here, OneAZ's fraud claim is predicated solely on misrepresentations Neudesic allegedly made about the services it would provide pursuant to the parties' contract. (See, e.g., Am. Cmplt. ¶36 ("From the outset, Neudesic made misrepresentations to OneAZ concerning the MSA, the SOWs and Neudesic's capabilities and performance thereunder.")). Specifically, OneAZ alleges Neudesic made misrepresentations about: (i) the staff it would use on OneAZ's data integration project, (ii) the status of OneAZ's project, and (iii) that the project would be "turn-key." (See generally Am. Cmplt.) But the Amended Complaint also concedes that each of these items is covered in the MSA or the SOWs governed by it. (See id. at ¶¶20-23 (alleging Neudesic's staff, the manner of Neudesic's work, and the timely communication of issues with the status of the project were promised "under the MSA") and ¶36 (alleged representation of a self-service data warehouse was "outlined in SOW ARI092215")).

Moreover, the only injury alleged is merely economic and arises out of the services Neudesic provided under the MSA. (See, e.g., Am. Cmplt. ¶82 (amounts allegedly paid to Neudesic for services under the contract), ¶83 (amounts allegedly expended to a different firm to integrate OneAZ's data), and ¶84 (amounts allegedly expended for software related to Neudesic's services)). There are no allegations of physical injury or property damage required to overcome the ELR.

Following Oddo, Sterling Cross and Cook, OneAZ's fraud claim is exactly the type of claim the ELR was created to bar. OneAZ alleges no conduct beyond breach of the MSA and alleges no harm or injury beyond purely economic loss. Accordingly, OneAZ's fraud claim is barred by the ELR and must be dismissed with prejudice.

b. OneAZ's Fraud Claim Fails to Meet Rule 9(b)'s Heightened Pleading Requirements

OneAZ's fraud claim also fails because it does not meet the heightened pleading standard of Fed. R. Civ. P. 9(b). "Under Rule 9(b), fraud allegations must include the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" Bullard v. Wastequip, Inc., 2014 U.S. Dist. LEXIS 185182, *10-11, (C.D. Cal. Sept. 11, 2014) (citing Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) and Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)); see also Schreiber Distrib. Co. v. Serv—Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986) ("[T]he pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation."); Miscellaneous Serv. Workers Local # 427 v. Philco—Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981) (same); Office Depot, Inc., 2014 U.S. Dist. LEXIS 164331, at *19 (dismissing fraud claims under Rule 9(b), holding, "Plaintiff makes only vague allegations that defendant marketed the Master Agreement as having the lowest government pricing. But, plaintiff does not allege specifically when these representations were made, who at defendant made these representations, or that anyone working for plaintiff actually heard or read these representations.").

OneAZ alleges Neudesic made fraudulent statements concerning Neudesic's capabilities, the quality and magnitude of work it would perform, and the status of the project. (See Am. Cmplt at ¶105.) OneAZ does not allege the time, place, specific content of the alleged fraudulent statement(s), the person(s) who made the fraudulent statement(s) or the person(s) who heard the fraudulent statement(s). Indeed, if OneAZ cannot name the speaker of any alleged misrepresentation, or the exact content of the misrepresentation, it

cannot in good faith allege that its speaker knew of its falsity or that it was reasonable for the hearer to rely on it, both of which are required to plead fraud. See, e.g., Dawson v. Withycombe, 216 Ariz. 84, 97, 163 P.3d 1034, 1047 (Ariz. Ct. App. 2007) (claim for fraud must demonstrate the speaker's knowledge of the statement's falsity). OneAZ's fraud claim is so vague, it is impossible for Neudesic to defend against it, let alone conduct relevant discovery efforts related to it. Accordingly, the claim for fraud fails to meet the heightened pleading standard required under Fed. R. Civ. P. 9(b) and must be dismissed.

c. OneAZ's Fraud Claim Fails to Adequately Allege All Elements Under Twombly

To state its fraud claim, OneAZ simply recasts its breach of contract claim as one for fraud. The claim is predicated solely on allegations that Neudesic made promises related to its performance under the MSA, but always intended not to honor those promises and to instead breach the MSA. However, when the only allegations supporting a plaintiff's averment that defendant intended not to perform a contract is the fact that defendant ultimately did not perform, no claim for fraud has been stated. Arnold & Assocs., Inc. v. Misys Healthcare Sys., 275 F. Supp. 2d 1013, 1027 (D. Ariz. 2003) ("In this case, the only averment that Defendant intended not to perform at the time it made the statements alleged by Plaintiff is that it subsequently failed to perform."). This is because "breach of contract is not fraud." Id. (citing Trollope v. Koerner, 106 Ariz. 10 at 19, 470 P.2d 91 at 100 (1970)); see also Abdollahi v. Watson Law Group, 2015 Cal. Super. LEXIS 568, *3 (Super. Ct. Cal. May 22, 2015) ("[C]onduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law.") "Were the general rule otherwise, every breach of contract could be made the basis of an action in tort for fraud." Staheli v. Kauffman, 122 Ariz. 380, 383, 595 P.2d 172, 175 (1979).

As explained in more detail in Section II(a) above, every alleged misrepresentation by Neudesic relates to a promise to perform under the MSA. However, OneAZ fails to

plead any facts raising a plausible inference that Neudesic had a present intention not to perform at the time it entered into the MSA. The facts alleged show the parties had a three-year relationship, during which they executed the MSA and many subsequent Statements of Work and change orders (see, e.g., Am. Cmplt. ¶¶16, 18, 31, 45, 51, 53, 55, 64) and that, when OneAZ first notified Neudesic of a breach of the MSA, Neudesic offered a written Remediation Plan and attempted to cure the alleged problems (¶76). There is absolutely no plausible inference that Neudesic always intended to breach the MSA besides the bare, conclusory allegations simply saying it was so. As in Arnold & Assocs., this is insufficient to state a cause of action for fraud. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Because OneAZ has not adequately pleaded the necessary element of intent, its fraud claim must be dismissed.

IV. ONEAZ FAILS TO ALLEGE A FIDUCIARY RELATIONSHIP (COUNT IV)

OneAZ fails to state a claim for breach of fiduciary duty because the facts alleged in the First Amended Complaint do not give rise to a fiduciary relationship.

The Amended Complaint alleges OneAZ and Neudesic had a contractual relationship where Neudesic agreed to provide data integration services and OneAZ agreed to pay for those services. OneAZ does not contend that Neudesic contractually agreed to act as a fiduciary for OneAZ, indeed, the MSA contains no such provision. Instead, OneAZ claims that its trust in Neudesic's "specialized knowledge, skill and integrity" impliedly created the fiduciary relationship. (See Am. Cmplt. at ¶116.) But neither Arizona nor California law provides for the creation of a fiduciary relationship in such circumstances.

"A fiduciary relationship has been described as 'something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise.'" Taeger v. Catholic Family & Cmty. Servs., 196 Ariz. 285, 290, 995 P.2d 721, 726 (Ariz. Ct. App. 1999) (quoting In re

McDonnell's Estate, 65 Ariz. 248, 252-53, 179 P.2d 238, 241 (1947)); see also Wolf v. Superior Court, 107 Cal. App. 4th 25, 30, 130 Cal. Rptr. 2d 860, 864 (2003) ("Inherent in [a fiduciary relationship] is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors.").

"'[M]ere trust in another's competence or integrity does not suffice' to create a fiduciary relationship." Cook v. Orkin Exterminating Co., 227 Ariz. 331, 334, 258 P.3d 149, (Ariz. Ct. App. May 19, 2011) (quoting Standard Chtd. PLC v. Price Waterhouse, 190 Ariz. 6, 24, 945 P.2d 317 (Ariz. Ct. App. Nov. 7, 1996)); Cavan v. Maron, No. CV-15-02586-PHX-PGR, 2016 U.S. Dist. LEXIS 112299, *14-18 (D. Ariz. Aug. 22, 2016); Wolf, 107 Cal. App. 4th at 31 (sustaining a demurrer to a breach of fiduciary duty claim, stating "[e]qually without merit is Wolf's contention that a fiduciary relationship exists because he necessarily reposed 'trust and confidence' in Disney to perform its contractual obligation…."); see also Rickel v. Schwinn Bicycle Co., 144 Cal. App. 3d 648, 654, 192 Cal. Rptr. 732, 735 (1983) (A fiduciary relationship "precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed.").

As discussed in Section II above, in Cook v. Orkin, defendant Orkin agreed to provide extermination services to the Cooks, whose home was infested by termites. 227 Ariz. 331. The Cooks' contract with Orkin did not provide for a fiduciary relationship, but the Cooks argued that a fiduciary relationship was created because their relationship with Orkin was not a traditional, arms' length commercial services contract due to Orkin's specialized knowledge about termites that the Cooks did not possess. Id. at 334.

The court rejected the Cooks' argument, stating, "[a]lthough Orkin may have had more specialized knowledge about termite extermination than the Cooks, such is often the case with service providers. The law does not create a fiduciary relation in every business transaction involving one party with greater knowledge, skill, or training, but requires peculiar intimacy or an express agreement to serve as a fiduciary…. The Cooks' trust in

Orkin's expertise did not alter this arms-length commercial transaction to create a fiduciary relation and oblige Orkin to act for the Cooks' benefit." Id.

Likewise, in Cavan v. Maron, plaintiff claimed defendants, who were rare watch collectors, had "many years of experience buying and selling rare watches with significant watch expertise and knowledge," that was "of a kind and nature beyond the fair and reasonable reach of Plaintiff Cavan who, as a non-professional watch collector, did not and could not obtain such expertise and knowledge through the exercise of reasonable diligence." 2016 U.S. Dist. LEXIS 112299, at *16. The Cavan court rejected plaintiff's argument, and granted defendants' motion to dismiss, explaining that the fact that defendants had more specialized knowledge about rare watches than the plaintiff was irrelevant. It added that "the particular circumstances that [plaintiff] has alleged, including his trust in [defendants'] expertise, is not sufficient to change this arms-length commercial transaction into a fiduciary relationship." Id. at *17-18 (internal quotations omitted) (citing Iqbal, 556 U.S. at 678, Cook, 258 P.3d at 152; and Silaev v. Swiss-America Trading Corp., 2015 U.S. Dist. LEXIS 41879, at *7-9 (D. Ariz. March 31, 2015) (dismissing breach of fiduciary duty claim for failure to state a claim because the parties had an arm's length commercial contract and not a fiduciary relationship, notwithstanding plaintiff's significant trust and confidence in defendant due to its expertise)).

Standard Chartered is also instructive here. In Standard Chartered, Union Bank ("Union"), an Arizona bank, hired Price Waterhouse ("PW") to perform audit services in connection with the purchase of another bank, United. Standard Chtd. PLC, 190 Ariz. at 24. Plaintiff Standard Chartered[1] argued PW owed Union a fiduciary duty because, among other things, PW encouraged Union to trust in PW's auditing expertise and knowledge. Id. The court disagreed, holding:

> PW may have pitched hard for Union/United's post-acquisition business, stressing its general auditing expertise, its reputation, and

[1] Union had assigned its claims to Standard Chartered PLC.

> its detailed knowledge of United. But Union was clearly standing at arm's length when it received the pitch. Indeed, though Union chose to rely on PW in evaluating United's financial soundness as an acquisition prospect, Union reserved judgment on the selection of a post-acquisition auditor and ultimately engaged a different firm.… None of [the] evidence establishes that PW had a means of knowledge about United to which Union could not reasonably have obtained access through internal auditors or another accounting firm.

Id. at 25.

OneAZ's claims are indistinguishable from the claims in Cook, Cavan, and Standard Chartered, which were insufficient to allege a fiduciary relationship. Here, too, OneAZ makes irrelevant and insufficient arguments that Neudesic had greater knowledge than OneAZ regarding its data integration and that Neudesic made representations of its expertise. These same arguments were rejected in Cook and Cavan.

Like Standard Chartered, OneAZ further claims that because it gave Neudesic access to its data systems and resources, Neudesic had greater knowledge of OneAZ's data integration project and that OneAZ relied on that superior knowledge. (See Am. Cmplt. ¶29.) But the Amended Complaint also states OneAZ ultimately hired another company, Unifi Software, Inc., to integrate its data. (See id. at ¶83.) Accordingly, OneAZ admits on the face of the Amended Complaint that Neudesic did not have such a level of uniquely specialized skills that could not reasonably have been obtained through hiring another data integration firm with similar skills—as was the case in Standard Chartered.

At bottom, the relationship between Neudesic and OneAZ was a garden variety commercial relationship, whereby OneAZ contracted for Neudesic to provide services. OneAZ's allegations of Neudesic's specialized knowledge in data integration, and OneAZ's placement of trust in Neudesic, cannot, and does not, transform an arms' length, commercial relationship into a fiduciary relationship. Accordingly, no claim for breach of fiduciary duty has been stated and Count IV must be dismissed with prejudice.

V. ONEAZ'S COMMON COUNT FOR MONEY HAD AND RECEIVED FAILS TO STATE A CLAIM (COUNT V)

OneAZ's last claim is for money had and received again contains only the factual allegations that comprise a breach of contract claim coupled with the bare recitation of elements deemed insufficient under Twombly. There are no factual allegations supporting the money had and received claim beyond breach of contract.

In California, when two parties execute a legally binding contract, a claim for money had and received is improper. Haskins v. Symantec Corp., No. 13-cv-01834-JST, 2014 U.S. Dist. LEXIS 75348, at *11 (N.D. Cal. June 2, 2014) ("[T]he parties do have a binding legal agreement with regard to the software Plaintiff purchased. Generally, an action in quasi-contract does not lie when an enforceable, binding agreement exists defining the rights of the parties.") (internal quotations omitted) (quoting Mar Partners 1, LLC v. Am. Home Mortgage Servicing, Inc., No. 10-cv-02906 WHA, 2011 U.S. Dist. LEXIS 336, at *11 (N.D. Cal. Jan. 4, 2011) (in turn, quoting Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)).

Likewise, under Arizona law, money had and received is an equitable claim akin to that of "debt based on an implied contract." McCarrell v. Turbeville, 51 Ariz. 166, 172, 75 P.2d 361, 364 (1938). Yet, "[t]here can be no implied contract where there is an express contract between the parties in reference to the same subject matter." Chanay v. Chittenden, 115 Ariz. 32, 35, 563 P.2d 287, 290 (1977).

The Amended Complaint is replete with allegations that the parties had a legally binding contract (i.e., the MSA), whereby Neudesic was to provide data integration services to OneAZ, and that the parties executed many subsequent SOWs and change orders that were governed by the MSA. (See, e.g., Am. Cmplt. ¶¶ 5, 8, 16, 18, 31, 45, 51, 53, 55, 64.) Because OneAZ concedes that the parties had a legally binding contract concerning the very services for which OneAZ paid money to Neudesic, OneAZ has not stated a proper claim for money had and received and it must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, defendant and cross-claimant Neudesic, LLC respectfully requests that the Court grant its Motion in its entirety and dismiss Counts II through V of the Amended Complaint.

Dated: September 15, 2017

TROUTMAN SANDERS LLP

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Notice of Certification of Conferral

Pursuant to the Court's Order of March 24, 2017 (Dkt. 12), Defendant and Counterclaimant Neudesic, LLC and Plaintiff and Counter-defendant OneAZ Credit Union have conferred to determine whether an amendment could cure a deficient pleading and have been unable to agree that the pleading is curable by a permissible amendment.

Dated: September 15, 2017

TROUTMAN SANDERS LLP

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NEUDESIC, LLC

32783947v1

Certificate of Filing and Service

Pursuant to the Case Management/Electronic Case Filing Administrative Policies and Procedures Manual ("CM/ECF Manual") of the United States District Court for the District of Arizona, I hereby certify that on September 15, 2017, my office electronically transmitted the foregoing Neudesic, LLC's Motion to Dismiss Counts II Through V of OneAZ's Amended Complaint and Memorandum of Points and Authorities in Support Thereof to the U.S. District Court clerk's office for filing.

Pursuant to Section D(2) of the CM/ECF Manual, a Notice of Electronic Filing should be sent to the assigned judge and:

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