UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV20-11234 JAK (PDx)	Date	10/11/2022
Title	The Vanguard Clinic, LLC et al. v. National Billing Institute, LLC et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

H. Crawford	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT RESONANT SPECIFIC TECHNOLOGIES' MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. 53)**

I. Introduction

On December 10, 2020, The Vanguard Clinic, LLC ("Vanguard Clinic"), Nova Integrated Health, PC ("Nova Integrated), Gossettt Global Health Solutions, PC ("Gossettt Clinic"), Michael Glickert, D.C. ("Glickert"), Taylor Vanden Wynboom, D.C. ("Wynboom"), and Tommy Gossettt, D.C. ("Gossettt") (collectively, "Plaintiffs") brought this action against National Billing Institute, LLC ("NBI"), Resonant Specific Technologies, Inc. ("RST"), and Kareo, Inc. ("Kareo") (collectively, "Defendants"). Dkt. 1 (the "Complaint"). The Complaint advances the following causes of action: (i) Breach of Fiduciary Duty, against NBI and Kareo; (ii) Intentional Misrepresentation, against NBI and RST; (iii) Negligent Misrepresentation, against NBI and RST; (iv) Concealment, against NBI and Kareo; (v) Constructive Fraud, against NBI and Kareo; (vi) Recission, against NBI; (vii) Conversion, against Kareo; and (viii) Unlawful Business Practices, in violation of Cal. Bus. & Prof. Code §§ 17200, et seq. (the "UCL"), against all Defendants. *See generally* Dkt 1.

On May 17, 2021, the claims against Kareo were dismissed without prejudice. Dkt. 50.

On June 10, 2021, Defendant RST filed a motion for summary judgment. Dkt. 53 (the "Motion"). On August 20, 2021, Plaintiffs filed an opposition. Dkt. 70 (the "Opposition"). On September 13, 2021, RST filed a reply. Dkt. 75 (the "Reply").

A hearing on the Motion was held on February 7, 2022, and it was taken under submission. For the reasons stated in this Order, the Motion is **GRANTED**.

II. Factual Background

A. The Parties

Vanguard Clinic is a limited liability company organized under the laws of Missouri, whose principal

place of business is there. Dkt. 1 ("Complaint") ¶ 2. Nova Integrated is a corporation organized under the laws of Iowa, whose principal place of business is there. Dkt. 1 ¶ 3. Gossett Clinic is a corporation organized under the laws of Illinois, whose principal place of business is there. *Id.* ¶ 4.

Glickert, Wynboom, and Gossettt are licensed chiropractors and medical providers. Dkt. 53-2 ¶ 87. Glickert is a citizen of Missouri and a managing member of Vanguard Clinic. Dkt. 1 ¶ 5. Wynboom is a citizen of Iowa and president of Nova Integrated. *Id.* ¶ 6. Gossett is a citizen of Arizona and the president of Gossett Clinic. *Id.* 7.

RST is a corporation organized and existing under the laws of the state of Nevada, whose principal place of business is there. RST's Statement of Uncontroverted Facts ("RST SUF"), Dkt. 53-2 ¶ 5. RST developed and manufactures Sanexas neoGEN ("Sanexas"), an FDA-approved medical device for treating pain. RST sells and distributes Sanexas to healthcare providers nationwide. *Id.* RST is not a medical billing authority. *Id.* ¶ 6.

At all relevant times, NBI was allegedly "a medical insurance billing and consulting company offering its services to healthcare providers nationwide, including multiple providers in southern California." Dkt. 1 ¶ 8. Plaintiffs and NBI agree that NBI is a Florida limited liability company, whose principal place of business is there. *Id.* RST and NBI maintained a professional relationship in which RST referred prospective customers to NBI to assist them with their medical bills. *See* Sorgnard Decl., Dkt. 53-3 ¶ 12; Dkt 70-3 at 2.

B. Marketing of Sanexas

In conjunction with the Opposition, Plaintiffs submitted declarations and copies of advertising materials by RST. They state that Sanexas treatments "are reimbursable," and provide estimated reimbursement figures to demonstrate their potential for generating revenue. *See, e.g.*, Dkt. 70-2 at 3; Dkt. 70-4 at 6 (revenue chart estimating "$125 per treatment reimbursement"). Some of the advertisements also state that "RST has entered into a professional affiliation with the National Billing Institute to assist physicians with optimizing third-party insurance reimbursement and Medicare." *See, e.g.*, Dkt. 70-3 at 2.

The Complaint alleges that RST's sales and marketing director, Keith Day ("Day"), RTS's "de facto president," Richard Sorgnard, and "other RST representatives and affiliates, including NBI, represented that Sanexas treatments were . . . covered by Medicare and other insurance plans." Dkt. 1 ¶ 35.

Plaintiffs declare that they relied on these representations when they decided to purchase Sanexas devices and to retain NBI to perform billing services on their behalf. *See* Glickert Decl., Dkt. 70-1 ¶ 8; Wynboom Decl., Dkt. 70-7 ¶ 8.

C. The Sanexas Purchase Contracts

Plaintiffs purchased several Sanexas devices from RST, through written purchase contracts (the "Sanexas Contracts"). RST SUF, Dkt. 53-2 ¶ 1. The Sanexas Contracts include the following choice-of-law clause:
Law provision:

> The volatility, enforceability and interpretation of this Agreement shall be determined in accordance with the laws of the State of Nevada.

Dkt. 53-2 ¶ 3; *see also* Ex. 5, Dkt 53-8 at 4 (copy of Sanexas Contract).

The Sanexas Contracts also include the following provision regarding insurance reimbursements for Sanexas treatments that are filled:

> Purchaser understands and agrees that Resonant Specific Technologies Inc is not a billing authority and has advised the purchaser/customer to contact his/her local carrier for appropriate acceptable billing codes and amount for this treatment. It is also necessary to assure payment that adequate S.O.A.P. notes are made in the patient documentation files, documentation of the medical necessity of the treatment, to assure payment when using Sanexas or any other equipment or procedure to control pain. Also purchaser is advised, it is up to the local insurance carriers to consider what payment amount if any is appropriate for the service provided.

Dkt. 53-2 ¶ 4; *see also* Ex. 5, Dkt 53-8 at 4.

Finally, the Sanexas Contracts include the following provision regarding the role of its salespersons:

> Purchaser understands and agrees that the salespersons are independent contractors, not employees of RST and are not authorized to bind RST or to waive or alter any terms or conditions printed herein or add any provision hereto for this Purchase Order.

Ex. 5, Dkt 53-8 at 4.

D. Billing Practices of NBI and Kareo

The Complaint alleges that NBI improperly submitted insurance reimbursement claims using multiple and incorrect billing codes, and that NBI improperly submitted claims for treatments that were not actually provided. *See* Dkt. 1 ¶¶ 61-65. The Complaint alleges that NBI engaged in improper billing practices that have "exposed Plaintiffs to significant financial and criminal liability." *Id.* ¶ 66. Specifically, Wynboom declares that he has been audited by Blue Cross Blue Shield and Medicare, and so far has been found liable for "over $100,000" of improperly submitted claims. Wynboom Decl., Dkt. 70-7 ¶ 16.

Plaintiffs declare they would not have purchased Sanexas devices or contracted with NBI if they had known that the "representation's about NBI's 'proprietary method' of correctly billing Sanexas to Medicare and other insurers were false." *See* Glickert Decl., Dkt. 70-1 ¶¶ 8, 12; Wynboom Decl., Dkt. 70-7 ¶¶ 8, 14.

The Complaint seeks monetary relief against RST, based on three causes of action: (1) intentional misrepresentation; (2) negligent misrepresentation; and (3) violation of the UCL.

III. Evidentiary Objections

RST has filed extensive evidentiary objections to the declarations and evidence submitted by the opposing party, which include those of Glickert, Gossett, Wynboom and Keith Day. Dkts. 75, 78.

RST argues that the declarations of Day and Gossett are inadmissible because they are not signed under penalty of perjury. 28 U.S.C. § 1746 requires that an unsworn declaration filed in support of a matter before a court in the United States include a statement, "in substantially the following form: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).['']." "[C]ompliance with the requirement of 28 U.S.C. § 1746 is mandatory . . . ." *Link Treasure Ltd. v. Baby Trend, Inc.*, 809 F. Supp. 2d 1191, 1195 (C.D. Cal. 2011).

As to the Day declaration, Plaintiffs filed a signed copy of the declaration on September 17, 2021, 28 days after the deadline for the Opposition, and four days after the Reply was filed. *See* Dkt. 76; Dkt. 6 (the Court's Standing Order setting briefing deadlines). That the declaration was not timely filed in accordance with the Standing Order provides sufficient grounds to exclude it. However, RST had sufficient notice of, and an opportunity to respond to the declaration. The signed declaration is identical to the unsigned Day declaration that was submitted in a timely manner with the Opposition. *Compare* Dkt. 70-19 *with* Dkt. 76. Therefore, RST had an opportunity to address the substance in the Reply and during the hearing on the Motion and did so. For these reasons, RST's objection to the entire Day declaration because it was unsigned and not timely filed, is overruled.

As to the Gossett declaration, it does not comply with 28 U.S.C. § 1746. It is not signed as originally filed and did not subsequently submit a signed copy. Accordingly, the objection to that declaration is sustained.

As to the other objections raised regarding specific statements in the declarations of Glickert, Gossett and Wynboom, most of them are based on the parol evidence rule. For the reasons stated below, those objections are overruled. The proffered evidence does not fall within the scope of the parol evidence rule. None of the paragraphs contradicts the Sanexas Contracts.

IV. Analysis

A. Legal Standards

A motion for summary judgment will be granted where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations[,] . . . admissions, interrogatory answers, or other materials" show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine dispute of material fact exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

At the summary judgment stage, a court is not to weigh the evidence and determine the truth of any disputed matter, but it is simply to determine whether there is a genuine issue for trial. *Id.* at 249. The party seeking summary judgment bears the initial burden to show the basis for its motion and to identify those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 322. Where the moving party will have the burden of

proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Where the nonmoving party will have the burden of proof on an issue, however, the movant need only demonstrate that there is an absence of evidence to support the claims of the nonmoving party. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth "specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex*, 477 U.S. at 324).

Only admissible evidence may be considered in connection with a motion for summary judgment. Fed. R. Civ. P. 56(c)(2). However, in considering such a motion, a court is not to make any credibility determinations or weigh conflicting evidence. All inferences are to be drawn in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). However, conclusory, speculative testimony in declarations or other evidentiary materials is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

B. Application

1. Choice of Law

"A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001). The California Supreme Court has addressed this issue:

> California has two different analyses for selecting which law should be applied in an action. When the parties have an agreement that another jurisdiction's law will govern their disputes, the appropriate analysis for the trial court to undertake is set forth in *Nedlloyd* [*Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (Cal. 1992) (en banc)], . . . which addresses the enforceability of contractual choice-of-law provisions. Alternatively, when there is no advance agreement on applicable law, but the action involves the claims of residents from outside California, the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law.

Wash. Mut. Bank, FA v. Sup. Ct., 24 Cal. 4th 906, 91415 (2001).

a) Whether the Choice-of-Law Provision Applies

RST argues that under the choice-of-law provision in the Sanexas Contracts, Nevada law governs Plaintiffs' claims because they sound in tort and arise from the purchase of Sanexas devices.

Under *Nedlloyd*, "the trial court should first examine the choice-of-law clause and ascertain whether the advocate of the clause has met its burden of establishing that" the claims advanced in the action "fall within its scope." *Id.* at 916.

To determine the scope of the identified choice of law provision, courts look to the law of the forum identified in the agreement. *See id.* at n.3 ("[T]he scope of a choice-of-law clause in a contract is a matter that ordinarily should be determined under the law designated therein ....") (citing *Nedlloyd*, 3

Cal. 4th at n.7); *see also Batchelder v. Kawamoto*, 147 F.3d 915, 918 n.2 (9th Cir. 1998); *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1036 (N.D. Cal. 2012) ("The scope of a contract's choice-of-law clause is determined by the body of law identified in the agreement, unless the agreement specifies a different scope."). As noted, the Sanexas Contracts state that the "enforceability and interpretation of this Agreement shall be determined in accordance with the laws of the State of Nevada." Dkt. 53-8 at 4. Therefore, Nevada law applies to the interpretation of the scope of the choice-of-law provision.

Under Nevada law, "the best approach" for determining whether a forum selection or choice-of-law provision applies to tort claims "arguably related" to the contract is one that:

> focuses first on the intent of the parties regarding a forum selection clause's applicability to contract-related tort claims. If that examination does not resolve the question, however, the district court must determine whether resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract. And if that analysis does not resolve the question, the district court must determine whether the plaintiffs' contract-related tort claims involve the same operative facts as a parallel breach of contract claim.

Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. 11, 12 (2011).

The first step must focus on "the intention of the parties reflected in the wording of particular clauses and the facts of the case." *Id.* at 25 (citation omitted). "Therefore, the initial review must involve a careful and thorough study of the particular clause itself." *Id.* If the "language of the contract is clear and unambiguous . . . the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739 (2015).

The choice-of-law provision in the Sanexas Contracts specifically states that "enforceability and interpretation" of the contracts is pursuant to Nevada law. By its plain terms, the provision does not include related, tortious conduct. *See, e.g., Morgan v. Bash*, No. 219CV00546JADBNW, 2021 WL 601871, at *2 (D. Nev. Feb. 16, 2021) (choice-of-law provision concerning contract's "validity, construction, performance, and effect" does not include tortious conduct). Plaintiffs' claims allege that RST made false statements in order to make sales of Sanexas. They do not challenge the enforceability or interpretation of the Sanexas Contracts, nor do they seek their rescission. *Compare id.* (plaintiff's securities fraud claim did not challenge the contract's validity) *with Hall CA-NV, LLC v. Ladera Dev., LLC*, No. 318CV00124RCJWGC, 2021 WL 4129383, at *1-*3 (D. Nev. Sept. 9, 2021) (choice-of-law provision regarding "interpretation, enforcement" of contract applied to claims seeking rescission of contract due to fraud and misrepresentation).

For the foregoing reasons, the choice-of-law provision does not apply to Plaintiffs' claims alleging tortious conduct by RST.

b) Governmental Interest Test

Deciding the applicability of the choice-of-law provision does not end the choice-of-law analysis. "When there is no advance agreement on applicable law, but the action involves the claims of residents from outside California, the trial court may analyze the governmental interests of the various jurisdictions

involved to select the most appropriate law." *Wash. Mut. Bank, FA v. Sup. Ct.*, 24 Cal. 4th 906, 914–15 (2001). The governmental interest analysis involves three steps:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state" (*Bernhard v. Harrah's Club*, *supra*, 16 Cal.3d 313, 320), and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied." (Ibid.)

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-08 (2006).

Defendant argues there are significant differences between Nevada and California law as to the matters at issue in this action. Defendant argues that Nevada law bars the consideration of any parol evidence regarding RST's alleged fraud because it would contradict the terms of the Sanexas Contracts, while California law would not. Dkt. 75 at 8-9. Defendant also argues that Plaintiffs' UCL claim fails as a matter of law because it is one that does not exist under Nevada law. Dkt. 53-1 at 16.

Although the parties have not provided briefing regarding the application of the governmental interest test, Nevada law governs. RST is a Nevada corporation. Plaintiffs are citizens of Missouri, Iowa, Illinois and Arizona. The Complaint alleges that "all of Plaintiffs' billings for Sanexas treatments are performed . . . in Orange County." Dkt. 1 ¶ 14. However, those billings were conducted by NBI and Kareo. As to conduct attributable to RST, there is no showing that RST made any statements to Plaintiffs in California, or that any aspect of the Sanexas Contracts was executed in California. Under these circumstances, Nevada has a stronger interest in the application of its law to the conduct of its own corporation.

For the foregoing reasons, Nevada law applies.[1]

2. Whether the Parol Evidence Bars Plaintiffs' Claims

RST argues that Nevada law bars the admission of any pre-contractual representations made by RST that contradict the express terms of the Sanexas Contracts. Accordingly, RST objects to portions of the Declarations of Day, Glickert, and Wynboom presented by Plaintiff in support of the Opposition.

[1] The outcome would be the same if California law were applied. As Defendant notes, there are certain differences between Nevada and California law regarding parol evidence; California law "broadly permits evidence relevant to the validity of an agreement." *See Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn.*, 55 Cal. 4th 1169, 1175 (2013). However, for the reasons stated in this Order, Nevada law does not bar the admission of the disputed evidence. Furthermore, because the California UCL claim is derivative of Plaintiff's other claims, and those claims fail for reasons discussed in this Order, the determination to dismiss the UCL claim is not affected by whether California or Nevada law applies.

Under Nevada law, "parol evidence may not be used to contradict the terms of a written contractual agreement." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281 (2001). "The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein." *Id.* (internal citations omitted). Moreover, Nevada law "precludes assertions of fraud when the alleged misrepresentation is contradicted by the parties' bargained-for terms." *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. 384, 389 (2012). This is because fraud may "not be established by showing parol agreements at variance with a written instrument," and no inference may be made "of a fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." *Tallman v. First Nat. Bank*, 208 P.2d 302, 307 (1949). However, the parol evidence rule "does *not* bar extrinsic evidence that is offered to explain matters on which the contract is *silent* 'so long as the evidence does not contradict the [agreement's] terms.'" *In re Cay Clubs*, 340 P.3d 563, 574 (2014) (quoting *Ringle v. Bruton*, 86 P.3d 1032, 1037 (2004)) (alterations in original) (emphasis in original).

As discussed above, the Sanexas Contracts provide that "salespersons are independent contractors, not employees of RST and are not authorized to bind RST or to waive or alter any terms or conditions." Dkt. 53-8 at 4. The Contracts also include the following language as to insurance reimbursements for billed Sanexas treatments:

> Purchaser understands and agrees that Resonant Specific Technologies Inc is not a billing authority and has advised the purchaser/customer to contact his/her local carrier for appropriate acceptable billing codes and amount for this treatment. It is also necessary to assure payment that adequate S.O.A.P. notes are made in the patient documentation files, documentation of the medical necessity of the treatment, to assure payment when using Sanexas or any other equipment or procedure to control pain. Also purchaser is advised, it is up to the local insurance carriers to consider what payment amount if any is appropriate for the service provided.

Id.

Plaintiffs' evidence does not directly contradict these provisions. Therefore, RST's evidentiary objections are unpersuasive.

RST objects to the marketing materials that it generated as well as NBI's marketing materials that have been proffered through Plaintiffs' declarations. *See e.g.*, Dkt. 70-2, 70-3, 70-4, 70-5, 70-20. However, nothing in those advertisements contradicts the language in the Sanexas Contracts. The advertisements only discuss potential reimbursements by Medicare and other insurance companies and "estimated reimbursement" figures. They also include disclaimers that reimbursement amounts shown can vary by region and insurance carrier. *See, e.g.*, Dkt. 70-2 at 2; Dkt. 70-3 at 2; Dkt. 70-20 at 3, 5, 10. None of this evidence contradicts the Sanexas Contracts; it is consistent with them. The marketing materials discuss the potential for insurance reimbursements, but also state that those reimbursements are not guaranteed.

RST also objects to Glickert's statements in his declaration that RST "represented that Sanexas treatment were reimbursable by Medicare and various other insurers," and that RST had a "professional affiliation with defendant NBI which has developed a method for correctly billing

Sanexas treatments to Medicare and other insurers." Dkt. 75 at 12; *see* Dkt. 70-1 ¶ 3. These statements do not contradict the Sanexas Contracts. That RST had an affiliation with NBI does not contradict the Contract provisions stating that RST itself is not a billing authority or that RST advised Glickert to contact his local insurance carriers. RST also objects to Glickert's statements that he relied on representations of RST and NBI in deciding to purchase Sanexas devices, and that if he had known that their representations about NBI's propriety method of billing Sanexas were false, he would not have purchased the devices. Dkt. 75 at 15-17. These statements do not contradict the Contracts. RST objections to the Declaration of Wynboom are as to very similar statements.

Therefore, although RST is correct that the parol evidence rule bars the introduction of extrinsic evidence that contradicts the unambiguous, written terms of the Sanexas Contracts, none of the evidence presented by Plaintiffs is within that rule.

For the foregoing reasons, the Motion is **DENIED** insofar as it seeks summary judgment on these grounds.

3. Whether Plaintiffs' Intentional and Negligent Misrepresentation Claims Fail

Under Nevada law, Plaintiffs must prove the claims for intentional or fraudulent misrepresentation by demonstrating:

> (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

Barmettler v. Reno Air, Inc., 956 P.2d 1382, 1386 (Nev. Sup. Ct. 1998)

As to negligent misrepresentation, Nevada courts have "adopted section 552 of the Second Restatement of Torts":

> "One who, in the course of his business, profession or employment, or in any other [trans] action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Halcrow, Inc. v. Eighth Jud. Dist. Ct., 302 P.3d 1148, 1153 (Nev. Sup. Ct. 2013) (quoting *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 575 P.2d 938, 940 (Nev. Sup. Ct. 1978)). "The difference between fraud and negligent misrepresentation is that a negligent misrepresentation is made without a reasonable basis for believing its truthfulness." *Scaffidi v. United Nissan*, 425 F. Supp. 2d 1159, 1170 (D. Nev. 2005).

a) Representations Regarding Reimbursement

RST argues that there is no question of material fact whether Plaintiffs could have reasonably relied on RST's representations concerning Plaintiffs' ability to be reimbursed for Sanexas treatments through NBI. RST argues that it included disclaimers in the Sanexas Contracts and in its marketing materials stating that RST is not a billing authority and advising Plaintiffs to consult with any insurance carriers, who would ultimately determine the amount of any reimbursement. Plaintiffs argue that there are triable issues of fact as to whether Plaintiffs reasonably relied on RST's representations in light of RST's marketing materials and Keith Day's declaration, which establish that "Plaintiffs were promised they would be paid if they purchased the Sanexas devices and hired NBI to perform billing services." Dkt. 70 at 12.

The evidence presented by Plaintiffs fails to demonstrate that either RST's marketing materials or its sales agents made such promises to Plaintiffs. Glickertand Wynboom declare that RST representatives told them that "Sanexas treatments were reimbursable by Medicare and various other insurers," and that they had entered into a "professional affiliation" with NBI which had "a method for correctly billing Sanexas treatments." Glickert Decl., Dkt. 70-1 ¶ 3; *see also* Wynboom Decl., Dkt. 70-7 ¶ 3.

In conjunction with the declarations, Plaintiffs submitted advertising materials from RST and NBI that, as discussed above, include statements that the costs of Sanexas treatments can be reimbursed by Medicare and other insurance companies, as well as estimated reimbursement figures. Day declares that those marketing materials "expressly promised providers who purchased Sanexas devices returns on investment," and in "all my years of working in medical device sales, I rarely see device manufacturers make financial promises to the extent that RST" did. Dkt. 70-19 ¶¶ 2-3. Plaintiffs argue that, as a result, there are genuine issues of fact as to whether RST's statements were material misrepresentations.

The statements that RST made to Plaintiffs through its sales agents and marketing materials only concerned whether it is possible for the cost of Sanexas treatments to be reimbursed by insurance carriers. Indeed, Plaintiffs do not dispute that "Sanexas treatments can be subject to reimbursement, and they often are," nor do they dispute that such reimbursements are often "around or above $125/treatment" as advertised. Dkt. 70-21 at 21; *see* Sorgnard Decl., Dkt. 53-3 ¶ 11. Moreover, each of the advertisements that Plaintiffs submitted in conjunction with the declarations includes disclaimers that the reimbursements advertised may vary by region and insurance carrier. *See, e.g.*, Dkt. 70-2 at 2; Dkt. 70-3 at 2; Dkt. 70-20 at 3, 5, 10. None of the evidence submitted by Plaintiffs demonstrates that RST made representations guaranteeing that Plaintiffs themselves would be reimbursed.

The evidence presented demonstrates an absence of any genuine factual dispute as to whether Plaintiffs could have justifiably relied on RST's representations that Sanexas treatments *may* be reimbursed by insurance carriers in order to believe that they *would* be reimbursed. RST never represented that reimbursement of the Plaintiffs was guaranteed.

b) Representations Regarding NBI's Billing Methods

In the Opposition, Plaintiffs argue that RST also represented to Plaintiffs that NBI had a lawful, proprietary billing method that would allow Plaintiffs to receive reimbursement payments. Plaintiffs argue that they "were forced to bill through NBI if they wanted to perform Sanexas treatments," and that

NBI required them to sign non-disclosure agreements that forbade access to NBI's billing records. Dkt. 70 at 10-11. Plaintiffs argue that, for these reasons, it was reasonable for Plaintiffs to rely on RST's representations that NBI's billing methods were lawful, because they had no means of verifying that claim or whether NBI's billing practices were appropriate. Dkt. 70 at 10-11.

RST's advertising materials promote its affiliation with NBI. For example, one claims that NBI "has developed the methodology and correct coding for the RST-Sanexas [treatments.]" Dkt. 70-3 at 2. Keith Day declares that RST and NBI "had a contractual relationship where it was a requirement that purchasers of the Sanexas device be referred to NBI for billing consultancy services." Dkt. 70-19 ¶ 4. Day declares that, during his employment with RST, he was required to refer all customers who purchased Sanexas devices to NBI, and that he was once reprimanded for not doing so. *Id.* Glickert and Wynboom declare that they were referred to NBI by RST and they were required by NBI to sign non-disclosure agreements that prohibited access to their billing accounts. *See* Dkt. 70-1 ¶¶ 3-12; Dkt. 70-7 ¶¶ 3-12.

RST's advertising materials featuring NBI also include the following disclaimer: "NBI will advise with coding claims but all coding claims are subject to Medicare and insurance company rules and all codes are assigned and billed by the rendering physician or provider." Dkt. 70-3 at 2. The declarations of Glickert and Wynboom also support the conclusion that the representations made by RST's sales agents, when referring Plaintiffs to NBI, were similar or the same as the content of the advertisements already discussed. Indeed, the declarations include the same pamphlets. Plaintiffs provide no evidence that the representations made by RST's sales agents when referring Plaintiffs to NBI had any material differences from the advertising materials.

Thus, like RST's representations regarding the possibility of reimbursement for Sanexas treatments, RST's representations that NBI had developed a billing methodology similarly were not guarantees that NBI's billing would always be correct. The advertising materials and the Sanexas Contracts contained sufficient disclosures to put Plaintiffs on notice that RST could not and was not making such guarantees.

To the extent that Plaintiffs suggest that RST was negligent in referring Plaintiffs to NBI because RST knew or should have known that NBI was engaged in allegedly wrongful conduct, there is no evidence in the record that demonstrates that RST was aware of NBI's billing practices. Indeed, Lisa Sorgnard declares that RST was not privy to any contracts between its customers and NBI. Dkt. 53-3 ¶ 12. Similarly, to the extent that Plaintiffs seek to hold RST liable for NBI's conduct under an agency theory, there is no evidence of such a relationship. RST has submitted a declaration by Lisa Sorgnard in which she declares that RST and NBI had an arrangement in which RST would refer customers to NBI, but that RST never had a formal contractual or agency relationship with NBI, never received payment from NBI, and was not privy to any contracts between its customers and NBI. *Id.* Moreover, the Complaint does not make any allegations related to negligent entrustment or vicarious liability, and a potential amendment of the Complaint is unwarranted because it would be a response to the Motion. *See Thrune v. Shetler*, 892 F.2d 1046 (9th Cir. 1989) (unpublished table decision) ("A summary judgment is a final judgment. [Plaintiff] now cannot amend her complaint because the case is closed after final judgment and there are no active pleadings to amend.").

For the foregoing reasons, the Motion is **GRANTED** as to Plaintiffs' intentional and negligent

misrepresentation claims.

4. Whether Plaintiffs' UCL Claim Fails

RST argues that Plaintiffs' California UCL claim must fail as a matter of law because Nevada law does not recognize that cause of action. Nevada has its own unfair competition law. *Rimini St., Inc. v. Oracle Int'l Corp.*, 473 F. Supp. 3d 1158, 1226 (D. Nev. 2020) ("Like Nevada's unfair competition law, the UCL prohibits any unfair competition . . . ."); *see* NV Rev Stat § 119A.710 (2013). But it does not recognize California's UCL.

Because Nevada law applies to this matter, the Motion is **GRANTED** as to Plaintiffs' California UCL cause of action against RST.

5. Whether Fraud is Sufficiently Pleaded

RST also argues that the Complaint fails to state a claim upon which relief can be granted, because the claims are insufficiently stated under Rule 9(b).

Fed. R. Civ. P. 9(b) provides that, with respect to claims of fraud, a complaint must state "the circumstances constituting the fraud or mistake ... with particularity." Stating with particularity requires the plaintiff to article "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Under Nevada law, intentional and negligent misrepresentation are based on fraud. *See Scaffidi*, 425 F. Supp. 2d at 1169.

The Complaint fails to meet the pleading standard of Rule 9(b). It only makes general allegations as to statements by Day, the "de facto" president of RST and "other RST representatives and affiliates." *See* Dkt. 1 ¶¶ 35-37. The Complaint fails to allege to whom these statements were made, the particularized, alleged misrepresentations to each Plaintiff, why the representations were false, or when or where the statements were made as to each Plaintiff. The evidence submitted in conjunction with the Opposition fails to clarify any of these points. Instead, Plaintiffs' declarations make general statements that RST representatives made certain misrepresentations to them without further clarifications about their where, when, or how.

Plaintiff argues that RST has waived these arguments because arguments regarding the sufficiency of the Complaint should have been brought in a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). However, Rule 12(b)(h) expressly preserves the defense of failure to state a claim upon which relief can be granted from being waived; such defenses may be raised as late as "trial on the merits." Fed. R. Civ. P. 12(b)(h); *see also* § 1361 Timing of Rule 12(b) Motions, 5C Fed. Prac. & Proc. Civ. § 1361 (3d ed.).

Therefore, the Motion is **GRANTED** for this additional reason.

V. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV20-11234 JAK (PDx)	Date	10/11/2022
Title	The Vanguard Clinic, LLC et al. v. National Billing Institute, LLC et al.		

IT IS SO ORDERED.

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Initials of Preparer hc