IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CALNET, Inc.,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
	)	**1:14-cv-401 LOG/JFA**
CloudSilver Consulting LLC, *et al*.,	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS CLOUDSILVER CONSULTING LLC, ANTHONY SCOLARO AND KRIS MENON

CloudSilver Consulting LLC, ("CloudSilver"), Anthony F. Scolaro ("Scolaro"), and Kris Menon ("Menon") (collectively, "Defendants"), by counsel, hereby submit their brief in support of their Motion to Dismiss the Complaint in its entirety, and state as follows:

INTRODUCTION

This case involves Plaintiff's claims that the individual Defendants Scolaro and Menon, who were employed by CALNET at the time, schemed with another former CALNET employee (Mohideen) to breach their fiduciary duties and divert business opportunities to Defendant CloudSilver. (Compl. at ¶ 48). The complaint, filed on April 15, 2014 (the "Complaint"), consists of thirteen causes of action, eleven of which are directed at Scolaro, Menon and/or CloudSilver, and two of which are directed solely at Defendant Mohideen (Counts Nine and Ten). This Motion arises from (1) Plaintiff's transparent attempt to manufacture federal jurisdiction using RICO[1] in Counts 12 and 13 and clear failure to state a viable claim thereunder; and (2) Plaintiff's failure to state a claim as to these Defendants under Fed. R. Civ. P. 12(b) for

[1] The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1961, et seq.

Counts Two (breach of implied duty of fair dealing), Three (conversion), Five (common law fraud), Six (negligent misrepresentation), Seven (common law conspiracy), Eight (unjust enrichment), Nine (unfair competition under California law), Twelve (conspiracy to violate RICO) and Thirteen (RICO violation).

ARGUMENT

Standard on Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Conclusory allegations will not survive a motion to dismiss. *Id.* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *citing Bell Atlantic. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Vitol, S.A. v. Primerose Shipping Co*., 708 F.3d 527, 543 (4th Cir. 2013) (no presumption of truth for "naked assertions" and "unadorned conclusory allegations" devoid of "factual enhancement.") (citations omitted).

The complaint must set forth sufficient factual allegations, taken as true, "to raise a right to relief above the speculative level" and "nudge [the] claims across the line from conceivable to plausible." *Vitol,* 708 F.3d at 543 (quoting *Twombly,* 550 U.S. at 555, 570). Additionally, allegations that are made upon "information and belief," without factual support, do not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009); *Skillstorm, Inc. v. Electronic Data Systems, LLC*, 666 F. Supp. 2d 610, 619 (E.D. Va. 2009).

In cases involving fraud, plaintiffs "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Among other things, a plaintiff must plead

"the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby'." *Arnlund v. Smith*, 210 F. Supp.2d 755, 760 (E.D. Va. 2002) (citing and quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989). Moreover, the complaint "must identify, with particularity, each individual defendant's culpable conduct; defendants cannot be grouped "together without specif[ication of] which defendant committed which wrong." *Arnlund*, 210 F.Supp.2d at 760 (internal citations omitted). This need for detailed allegations applies especially to cases alleging violation of RICO based on fraud. *See Menasco,* 886 F.2d at 684.

I. THE FAILURE TO PLEAD RICO SUFFICIENTLY ELIMINATES THE ONLY ALLEGED JURISDICTIONAL BASIS, WARRANTING DISMISSAL.

This case exemplifies the efforts of an aggressive plaintiff seeking—but not finding—a basis for federal jurisdiction. The federal courts are "properly wary" of permitting plaintiffs to turn garden variety cases into RICO claims. *See Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106, 119 fn. 12 (2nd Cir. 2013) (citing *Vandermark v. City of New York*, 615 F. Supp. 2d 196, 209-10 (S.D.N.Y. 2009) ("Racketeering is far more than simple illegality. Alleged civil violations of the FLSA do not amount to racketeering.").

Plaintiff's jurisdictional grounds for its 13-count suit hinge entirely on RICO (Counts 12 and 13). (Compl. at ¶ 9). A cursory review demonstrates that the RICO counts fail as a matter of law, eliminating any toe-hold for jurisdiction, because Plaintiff has failed to (1) Plead the basic "who, what, when, where" as to what was false or what was obtained; (2) Identify how any of the alleged uses of the wires caused any injury; and (3) Identify a pattern of racketeering. Plaintiff has also pled conspiracy based only on "information and belief." (Compl. at ¶¶ 40-43).

Taking the allegations as true, the entire facts as alleged demonstrate that the so-called scheme to divert was restricted and short-lived—that two CALNET employees worked with another former CALNET employee to divert business from CALNET, were discovered and were fired. (Compl. at ¶¶ 48; 49; 51; 57; 78; 96). Such facts may constitute an employment or business dispute; however, they do not approach racketeering.

A. The RICO Counts Fail Because the Complaint Does Not Set Forth Basic Allegations for Wire Fraud.

To state a claim under RICO, a plaintiff must allege all the requisite elements of the underlying predicate offenses. *Menasco, Inc. v. Wasserman,* 886 F.2d 681, 684 (4th Cir. 1989) (where RICO claims are based upon fraud, Rule 9(b) applies, and the predicate acts must be pled with particularity); *Binder v. Washington Gas*, 1995 U.S. Dist. LEXIS 21386 at *18 (E.D. Va. Oct. 6, 1995) (dismissing claim where plaintiff failed to allege elements of criminal extortion). Plaintiff unsuccessfully relies upon wire fraud for its RICO counts. (Compl. at ¶ 180).

A defendant is guilty of wire fraud where he:

> …having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice….

18 U.S.C. § 1343. Wire fraud and mail fraud both consist of the same basic elements, namely that: (1) the defendant devised and participated in a scheme to defraud; and (2) the mails or interstate wire facilities were used in furtherance of the scheme. *See* 18 U.S.C. §§ 1343, 1341; *Pereira v. United States*, 347 U.S. 1, 8 (1954). Again, allegations for these acts must meet 9(b)'s particularity requirement. *See also Menasco*, 886 F.2d at 684.

Additionally, where a suit names multiple defendants, a complaint must "contain specific allegations with respect to each defendant; generalized allegations 'lumping' multiple defendants together are insufficient." *West Coast Roofing & Waterproofing, Inc.*, 287 F. App'x 81, 86 (11th Cir. July 24, 2008) (citation omitted); *Arnlund v. Smith*, 210 F. Supp.2d 755, 760 (E.D. Va. 2002) (under 9(b), the complaint "must identify, with particularity, each individual defendant's culpable conduct; defendants cannot be grouped "together without specif[ication of] which defendant committed which wrong."); *DiVittorio v. Equidyne Extractive Indus. Inc.,* 822 F.2d 1242, 1247 (2d Cir. 1987); *see also Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants'"); *Balabanos* v. *North Am. Inv. Group, Ltd.,* 708 F. Supp. 1488, 1493 (N.D. Ill. 1988) (with multiple defendants, "'the complaint should inform each defendant of the specific fraudulent acts that constitute the basis of the action against the particular defendant.")

The Complaint here conspicuously omits any allegation as to how any alleged use of the wires (or mail) furthered any purported scheme:

- Plaintiff's Complaint alleges in Paragraph 74 that the three individual defendants (Menon, Scolaro and Mohideen) "did regularly communicate by interstate telephone calls for the purpose of diverting business opportunities from CALNET, identifying business opportunities for CloudSilver and preparing and submitting bid proposals to obtain money by means of materially false and fraudulent pretenses."
- Paragraph 83 sets out a list of 21 dates and alleges that on those dates, "Defendants did knowingly transmit and caused to be transmitted by means of wire and radio transmissions in interstate commerce . . . telephone calls, facsimile messages, and emails" on those dates.

- Paragraph 84 states in conclusory fashion that "these transmissions were in furtherance of and for the purpose of executing the CloudSilver Scheme to obtain money by means of false representations and omissions."

Nowhere in the Complaint does Plaintiff identify any allegedly false statement (or omission) in any wire transmission, state who said it and/or why it furthered the purported scheme.[2] Similarly, the Complaint fails to allege what any particular Defendant did to advance the RICO scheme. Nor have they otherwise pled particular details regarding the alleged fraudulent mailings. These omissions render the RICO counts fatally defective.

B. The Complaint Fails to Plead a "Pattern of Racketeering."

Plaintiff has failed to allege that there is some pattern of racketeering or that there is any risk posed by Defendants. In *Menasco,* the Fourth Circuit, applying Supreme Court precedent, emphasized that there must be a threat of "continued" criminal activity:

> The Supreme Court recently visited RICO's pattern requirement. H.J. Inc. v. Northwestern Bell Telephone Co., --- U.S. ----, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). The H.J. Inc. Court reaffirmed that "to prove a pattern of racketeering activity a plaintiff ... must show that the racketeering predicates are related, and that they amount to or **pose a threat of continued criminal activity." Id. 109 S.Ct. at 2900 (emphasis in original)…Thus, predicate acts must be part of a prolonged criminal endeavor.**

Menasco, 886 F.2d at 683-84 (emphasis added).

As shown above, Plaintiff has failed to plead the elements for a single act of racketeering. Moreover, even the conclusory allegations demonstrate the utter lack of any pattern of racketeering.

In *Menasco*, the Fourth Circuit underscored the need for a threat of continuing unlawful activity, and like the facts of that case "these acts do not constitute 'ongoing unlawful activities

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[2] Plaintiff makes some vague allegation regarding the filing of the articles of incorporation and the omission of ownership information relating to Scolaro and Menon. (See Compl. at 54 and 55). However, they cannot identify any legal obligation and have not alleged that the filing was false.

whose scope and persistence pose a special threat to social well-being'." *Id.* at 684 (citing *Zepkin*, 812 F.2d at 155)). "If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim." *Id.* at 685 (citing *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1074 (4th Cir.1987)). Plaintiff is clearly trying to transform a common employment dispute arising under Virginia state law into a federal racketeering case.

C. The Complaint Fails to Allege that the Purported Wire Fraud Caused the Purported Injury.

The RICO counts fail also because there is no allegation anywhere that the purported fraudulent use of the wires caused any injury, thus depriving Plaintiff of standing. "To make out a civil action for damages under the RICO statute a private plaintiff must demonstrate not only that the defendants have violated Sec. 1962, but also that he has been 'injured' in his business or property by reason of [the alleged] violation of section 1962." *Brandenburg v. Maryland Savings & Loan Depositors Committee*, 859 F.2d 1179, 1187 (4th Cir. 1988) (Md.) (citing 18 U.S.C. Sec. 1964(c)), overruled on other grounds, *Quackenbush v. Allstate Ins. Co.*, 571 U.S. 706 (1996); *Taylor v. Betts, 2013 WL 5460755 (E.D.N.C. 2013)(*citing *Regions Bank v. J.R. Oil Co., LLC,* 387 F.3d 721, 730 (8th Cir.2004)). Proximate causation is required as a matter of legal standing to pursue a RICO claim. *Id.*

Both the Fourth Circuit and the Supreme Court have held that the injury must emanate from the mail or wire fraud. *United States v. Maze*, 414 U.S. 395, 403 (1974); *Brandenburg*, 859 F.2d at 1187. Here, that causal connection is lacking as the allegations of the Complaint make clear that any emails or other correspondence regarding CloudSilver would necessarily have revealed the alleged scheme.

Recently rejecting similar efforts to turn a FLSA claim into a RICO case, the Second Circuit, relying on Supreme Court precedent, stated: "[T]he mailing of pay stubs cannot further the fraudulent scheme because the pay stubs would have revealed (not concealed) that plaintiffs were not being paid for all of their alleged compensable overtime. See Special App. 16-17. Mailings that thus 'increase[] the probability that [the mailer] would be detected and apprehended' do not constitute mail fraud." *Lundy v. Catholic Health System of Long Island*, 2103 U.S.App. LEXIS 4316 (2d Cir. Mar. 1, 2013) (quoting *United States v. Maze*, 414 U.S. 395, 403 (1974)); *see also Cavallaro v. UMass Mem'l Health Care Inc.*, 2010 WL 3609535, at *3 (D. Mass. July 2, 2010) (ruling that the mailings "made the scheme's discovery more likely").

D. Plaintiff Improperly Bases its Conspiracy Allegations on "Information and Belief."

The Complaint lacks well-pled factual allegations that any conspiracy ever existed. Allegations made upon information and belief, without factual support, do not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d at 1268. *See also Skillstorm, Inc. v. Electronic Data Systems, LLC*, 666 F. Supp. 2d at 619 (dismissing defamation claim made "on information and belief" under *Iqbal* and *Twombly*).

The entire "conspiracy" at issue in this case is alleged upon information and belief. By way of example, Paragraph 40 states: "Upon information and belief, during the telephone call on March 27, 2013, Mr. Mohideen did propose to Mr. Menon a scheme to divert business opportunities from CALNET. Paragraph 43 states: "Upon information and belief, prior to July 29, 2013, Mr. Menon and/or Mr. Mohideen contacted Mr. Scolaro and proposed a scheme to divert business opportunities from CALNET."

At most, Plaintiff has suggested that there may be a claim. The fact that it has pled on information and belief core allegations demonstrates it does not state a "plausible" claim under *Twombly*. *Wright v. Lehigh Valley Hosp. & Health Network, Inc.*, 2011 WL 2550361, at *3 (E.D. Pa. June 23, 2011). These clear deficiencies require dismissal of all conspiracy related claims, including Counts Seven, Nine, Twelve and Thirteen.

E. No Basis for Jurisdiction Exists.

The fact that the RICO claims purporting to establish jurisdiction appear at the very end of the Complaint underscores Plaintiff's obvious concerns about the weakness of those claims. The first eleven counts are all state law claims. The exercise of supplemental jurisdiction lies within the sound discretion of the district court. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988). 28 U.S.C. § 1367(c) provides that: "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if …(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Once all federal claims have been dismissed, however, the balance of factors will "usual[ly]" point toward a declination. *Id.* at 350, n.7; *Hinson v. Norwest Financial South Carolina*, 239 F.3d 611, 616 (4th Cir. 2001) (*Gibbs* and its progeny "continue[ ] to inform" a district court's discretion to dismiss pendent state claims now that the doctrine of pendent jurisdiction has been codified in 28 U.S.C. § 1367). Here, state law claims permeate the entire complaint. 11 of 13 counts are state-law based with the RICO counts appearing at the end. There is no federal interest in this matter, and the case, if anywhere, belongs in state court.

II. PLAINTIFF HAS FAILED TO STATE VIABLE CLAIMS IN COUNTS TWO, THREE, FIVE, SIX, SEVEN, EIGHT AND NINE.[3]

A. Count Two Fails Because There is No Separate Cause of Action for Breach of the Implied Duty of Good Faith and Fair Dealing.

Plaintiff cannot maintain a cause of action for breach of implied duty of faith and fair dealing. Virginia law provides that every contract contains an implied covenant of good faith and fair dealing; however, the law clearly holds that a breach of those duties gives rise to a breach of contract claim, not some separate cause of action. *See e.g.*, *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33 (1996) (holding that "the failure to act in good faith . . . does not amount to an independent tort" and "breach of the implied duty . . . gives rise only to a cause of action for breach of contract"); *see also L&E Corp. v. Days Inns of America, Inc.*, 992 F.2d 55, 59 n.2 (4th Cir. 1993) (noting that Virginia does not recognize an independent claim for breach of implied covenant of good faith and fair dealing).[4]

B. Count Three Fails Because (1) Plaintiff's Entire Claim is Based upon "Information and Belief;" and (2) Plaintiff Fails to Adequately Identify What Items Were Allegedly Converted and by Which Defendant.

In Virginia, "(a) person is liable for conversion for the wrongful exercise or assumption of authority over another's goods, depriving the owner of possession, or any act of dominion wrongfully exerted over the property in denial of, or inconsistent with, the owner's rights." *Simmons v. Miller*, 261 Va. 561 (2001). Plaintiff has failed to adequately plead a claim for conversion, because each allegation is conclusory and supported merely by Plaintiff's "information and belief." (Complaint at ¶¶ 110-112). Because Plaintiff's entire claim is conclusory, it is not entitled to deference under *Iqbal* and *Twombly*. *See*, *e.g.*, *Skillstorm, Inc.*,

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[3] Counts 10 and 11 name only Defendant Mohideen.

[4] As discussed below, the lack of any duty existing outside the employment relationship means that CALNET cannot pursue its claims for fraud (Count Five) or negligent misrepresentation (Count Six). *Id.*

666 F. Supp. at 619 (dismissing defamation claim made "on information and belief" under *Iqbal* and *Twombly*); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d at 1268.

Plaintiff's claim for conversion also fails to identify what was converted and by whom. Count Three merely states that Defendants Menon and Scolaro converted Plaintiff's "intellectual property and documents." Complaint at ¶ 110-112. The Complaint fails to identify the specific items of intellectual property – including what type and form of intellectual property – as well as the specific documents that were allegedly converted. Moreover, the Complaint fails to identify which item of property was allegedly converted by which defendant. Without the requisite factual support, Defendants are not in a position to evaluate what other defenses to this claim are available, including claim preemption with regard to intellectual property and whether the property claimed to be converted is legally able to be converted.

In *James River Mgmt Co., Inc. v. Kehoe*, 3:09cv387, 2009 U.S. Dist. LEXIS 107847 (E.D. Va. Nov. 18, 2009), this Court dismissed a conversion claim where the pleadings failed to "specify who converted what." 2009 U.S. Dist. LEXIS 107847 at *22. Similarly, the same defects requires dismissal of the instant conversion claim.

C. Count Five Fails Because the Allegations Stem from a Contract Breach, Not Tort, and it Fails to Comply with Rule 9(b).

To state a claim for fraud in Virginia, a plaintiff must demonstrate "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Brunckhorst Co. v. Coastal Atl., Inc.*, 542 F. Supp. 2d 452, 460 (E.D. Va. 2008) (*quoting Winn v. Aleda Constr. Co.*, 227 Va. 304, 308, 315 S.E.2d 193 (1984)).

1. Plaintiff has not alleged that Defendants owed it any duty apart from the employment contract.

Plaintiff's fraud allegations arise out of its alleged employment contracts with Defendants Scolaro and Menon. As such, Plaintiff's fraud claim does not sound in tort and therefore must be dismissed. The court looks at the source of the duty to determine if the claim is properly framed as a breach of contract or as a tort. *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 558 (1998) ("the source of the duty violated must be ascertained"). Claims are grounded in contract if a duty does not exist apart from the pertinent contract; they sound in tort if the duty stems from the relationship between the plaintiff and defendant, "irrespective of the contract, to take due care and the defendants are negligent." *Oleyar v. Kerr*, 217 Va. 88, 90 (1976).

This Court has found that "[w]here the duty that gives rise to the alleged misrepresentation is one that is required by contract, there can be no recovery in tort." *Brunckhorst Co., L.L.C. v. Coastal Atl., Inc.*, 542 F. Supp. 2d 452, 460-61 (E.D. Va. 2008). *See also Gen. Assur. of Am., Inc. v. Overby-Seawell Co*., 893 F. Supp. 2d 761, 780 n.30 (E.D. Va. 2012), *aff'd* 553 Fed. App'x 200 (4th Cir. 2013). "To avoid turning every breach of contract into a tort," the Economic Loss Rule provides that, "in order to recover in tort, 'the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract'." *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 205 (2007).

The Complaint is replete with references to Defendants' employment agreements with Plaintiff and allegations that Defendants breached their contractually-imposed duties to Plaintiff. Nowhere, however, does Plaintiff allege Defendants owed Plaintiff any duty arising independent of the alleged employment contracts. This omission is fatally defective to Plaintiff's fraud claim. *See Station #2, LLC v. Lynch*, 280 Va. 166, 177 (2010).

While it is generally true that an employee has the duty not to act adversely to the employer's interest, this duty still arises out of the contractual employer-employee relationship. *See Augusta Mut. Ins. Co.*, 274 Va. 199, *supra* (insurance agent's breach of fiduciary duty to principal was not an independent tort that would allow a fraud claim since the fiduciary duty arose *ex contractu*). In short, any duty owed by Defendants is rooted in contract, not tort.

2. Plaintiff's conclusory allegations cannot sustain a claim for common law fraud in Count Five.

The fraud count also fails in the exact same fashion as the RICO counts; that is, the Complaint fails to plead each element with the requisite specificity required by Rule 9(b). *See* Section I above. The only allegations offered to support Plaintiff's fraud claim are conclusory allegations lacking the specificity required by Rule 9(b). Plaintiff does not identify the specific misrepresentations or omissions allegedly made, as required by *Harrison*, *supra*. Plaintiff also does not identify which of the Defendants allegedly made the specific misrepresentations or omissions or what was obtained. This cannot constitute pleading "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d at 784.

Further, Plaintiff does not allege, other than in conclusory fashion, that CALNET relied specifically on any alleged misrepresentations or omissions, much less that such reliance resulted in damage to CALNET other than payment of Defendants' salaries. CALNET is required to describe its "actual and justifiable reliance" on Defendants' alleged misrepresentations. *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999). CALNET fails to meet this standard. For example, the Complaint fails to describe how CALNET actually relied upon the alleged misrepresentations or omissions and suffered damages by paying Defendants' salaries. It simply concludes that it did. The elements are not well-pled and the claim should be dismissed.

D. Count Six Fails Because (i) Virginia Does Not Recognize the Tort of Negligent Misrepresentation; and (ii) Even treating it as Constructive Fraud, it Fails for the Same Reasons as Count Five.

The purported claim in Count Six for negligent misrepresentation does not exist in Virginia. *Haigh v. Matsushita Elec. Corp.*, 676 F. Supp. 1332, 1349-50 (E.D. Va. 1987) ("Virginia does not recognize any tort of negligent misrepresentation."); *Bentley v. Legent Corp.*, 849 F. Supp. 429, 434 (E.D. Va. 1994), *aff'd* 1995 U.S. App. LEXIS 5568 (4th Cir. 1995). Were Count Six treated as a claim for constructive fraud, it still would fail for the same reasons as the fraud count, because the elements are identical, absent intent. "In Virginia, the elements of a claim for constructive fraud are identical to those for actual fraud, except for the intent element. To plead a claim for constructive fraud, a plaintiff must show "that a false representation of a material fact was made innocently or negligently . . . ." *Carlucci v. Han*, 907 F. Supp. 2d 709, 742 (E.D. Va. 2012). As demonstrated above, two independent bases exist to dismiss: (i) The claims sound in contract, not tort; and (ii) Plaintiff has failed to comply with Rule 9(b).

E. The Conspiracy Count Fails in Count Seven Because the Entire Count is Impermissibly Alleged on Information and Belief.

The Complaint lacks well-pled factual allegations that any conspiracy ever existed. Again, allegations made upon information and belief, without providing factual support, do not allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009); s*ee also Skillstorm, Inc. v. Electronic Data Systems, LLC*, 666 F. Supp. at 619.

As demonstrated in Section I above, the entire "conspiracy" at issue in this case is alleged upon information and belief. (*e.g.*, Compl. at ¶¶ 40 to 43). By way of example, Paragraph 40 states: "Upon information and belief, during the telephone call on March 27, 2013, Mr. Mohideen did propose to Mr. Menon a scheme to divert business opportunities from CALNET.

Paragraph 43 states: "Upon information and belief, prior to July 29, 2013, Mr. Menon and/or Mr. Mohideen contacted Mr. Scolaro and proposed a scheme to divert business opportunities from CALNET." These deficiencies require dismissal of all conspiracy related claims, including Counts Seven, Nine, Twelve and Thirteen.

F. The Unjust Enrichment Count (Eight) Fails, Because There is an Underlying Contract and Plaintiff has not Identified a Benefit.

CALNET cannot maintain a claim for unjust enrichment, because (i) Plaintiff has alleged that there is an underlying contract; and (ii) Plaintiff has not identified retention of any cognizable benefit for which return should be required. To state a claim of unjust enrichment, a plaintiff must show: "(1) a benefit conferred on the defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value." *Firestone v. Wiley*, 485 F. Supp. 2d 694, 704 (E.D. Va. 2007*)* (quoting *Nossen v. Hoy*, 750 F. Supp. 740, 744-45 (E.D. Va. 1990)).

As a threshold matter, Plaintiff cannot bring a claim for unjust enrichment, while suing on allegations of a valid existing contract. "Where a contract governs the relationship of the parties, the equitable remedy of restitution grounded in quasi-contract or unjust enrichment does not lie." *WRH* Mortg., Inc.v. S.A. S. Associates, 214 F. 3d 528, 534 (4th Cir. 2000)

Moreover, Plaintiff' allegations do not satisfy the required elements. Plaintiff's claim consists of payment of salary and benefits paid for seven months. ¶ 184. The gist of CALNET's claim is that Defendants were unjustly enriched, because CALNET did not discover CloudSilver or that Defendants were allegedly bidding on projects for seven months and therefore continued to pay them salaries and benefits. (Compl. at ¶ 78). Paragraph 184 makes clear that the only item

of damage complained of is the salary and benefits.[5] It does not complain that they stopped working, doing their jobs or that they performed poorly. CALNET has alleged no causal connection between Defendants' receipt of compensation for their work and the alleged bidding on projects that occurred over seven months.

Other plaintiffs have attempted this route without success. *See e,g.*, *In re Capital One*, 952 F. Supp. 2d 770 (E.D. Va. 2013); *In re Pfizer Inc. Shareholder Derivative Litigation*, 722 F. Supp. 2d 453, 465-66 (S.D.N.Y. 2010). The *Pfizer* Court dismissed an identical claim of unjust enrichment based upon retention of salaries, benefits and "unspecified bonuses," and stated:

> Plaintiffs have not pleaded that defendants' compensation during this period was of extraordinary magnitude and have not cited any legal authority supporting the proposition that the mere retention of directors' and officers' ordinary compensation can sustain an unjust enrichment claim predicated on allegations that these defendants breached their fiduciary duties.

Pfizer, 722 F. Supp. 2d at 465-66.

G. Count Nine Fails Because Plaintiff Lacks Standing to Assert a Claim Under the California Unfair Competition Law.

CALNET alleges that Defendants Menon, Scolaro, and Mohideen violated the California Unfair Competition Law ("UCL"), § 17200 of the California Business and Professions Code. However, CALNET is not a California resident, has not identified any wrongful conduct occurring in California and thus does not have standing to bring a claim under the UCL.

In California, it is "ordinarily presume[d] the Legislature did not intend the statutes of this state to have force or operation beyond the boundaries of the state." *Norwest Mortgage, Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 224-25 (1999). Accordingly, § 17200 does not allow claims to be brought by nonresident plaintiffs against nonresident defendants for conduct

[5] Paragraph 184 for actual damages provides: "As a result of the CloudSilver Scheme, CALNET suffered a loss equal to the amount of wages and benefits paid to Messrs. Menon and Scolaro since their breach of contract and breach of duty, through February 19, 2014, which is equal to an amount in excess of $400,000.00."

occurring outside of California. *See In re Nat'l. Western Life Ins. Deferred Annuities Litigation*, 467 F. Supp. 2d 1071, 1089 (S.D. Cal. 2006) (Pennsylvania resident could not state claims under § 17200 against Colorado corporation headquartered in Texas for purchases in Pennsylvania); *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig*., 588 F. Supp. 2d 1111, 1119 (C.D. Cal. 2008) ("statutory remedies may be invoked by out-of-state parties [only] when they are harmed by wrongful conduct occurring in California.").

Plaintiff's conclusory allegations – again, "on information and belief" – that Defendant Mohideen placed telephone calls from California to Virginia to allegedly conspire with Defendant Menon (Complaint at ¶¶ 39-42) simply do not give CALNET standing under the UCL. First, Plaintiff has failed to adequately plead Defendant Mohideen's alleged wrongful acts. Second, the actual alleged wrongful conduct relied upon by Plaintiff consisted exclusively of the actions of Defendants Menon and Scolaro – all of which took place in Virginia. In *Mattel*, *supra*, non-California plaintiffs "adequately alleged that [defendants] Mattel and Fisher-Price's conduct occurred, if at all, in—or had strong connections to—California." *Mattel*, 588 F. Supp. 2d at 1119. This is not the case here. Mere telephone calls from Defendant Mohideen, "on information and belief" and with no attendant action, do not constitute the requisite wrongful conduct with strong connections to California to grant Plaintiff standing under the UCL.

WHEREFORE, Defendants CloudSilver, Scolaro and Menon respectfully request that the Court enter an order (1) dismissing the Complaint in its entirety and (2) awarding the fees and costs associated with this Motion.

Dated: May 7, 2014

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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