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| **DISTRICT COURT, RIO GRANDE, COLORADO**<br>925 6th Street, Room 204, Del Norte, CO 81132 | |
| **MTN BOTANICALS, LLC,**<br>a Limited Liability Company,<br>*Plaintiff,*<br><br>v.<br><br>**LONE STAR VALLEY, LLC, d/b/a NATIONAL HEMP EXCHANGE,** a Limited Liability Company,<br>**ROBERT MERTZ,** an individual, and<br>**AUSTIN BUCKINGHAM,** an individual.<br>*Defendants* | ▲COURT USE ONLY▲<br><br>Case No.: 2019CV30019<br><br>Division: 7 |
| **Robinson & Henry, P.C.**<br>David W. Hannum, #48985<br>Kayla A. Banzali, #50294<br>1975 Research Parkway, Suite 100<br>Colorado Springs, CO 80920<br>Phone: 303-688-0944<br>Fax: 719-599-5569<br>kayla@robinsonandhenry.com<br>david@robinsonandhenry.com<br>*Attorneys for Defendants Lone Star Valley and Robert Mertz* | |
| **PARTIAL MOTION TO DISMISS PURSUANT TO C.R.C.P. 9(b) and C.R.C.P. 12(b)(5)** | |

## CERTIFICATE OF CONFERRAL

The undersigned certifies that, pursuant to C.R.C.P. 121 §1-15 ¶ 8, that she conferred with counsel for Plaintiff and he indicated that the Plaintiff is opposed to this motion.

## INTRODUCTION AND BACKGROUND

Plaintiff MTN Botanicals (hereafter "Plaintiff", "MTN") brought an action against Defendants stemming from a contract for the sale of goods formed in April 2019. Specifically, Defendant Lone Star Valley, LLC, d/b/a/ National Hemp Exchange ("National Hemp") is a grower of hemp and specializes in sales of young hemp clones and plants to third party farms for cultivation to maturity. National Hemp maintains a production facility in Rio Grande County.

MTN purports to be a "company engaged in the business of growing agricultural products, including hemp, and producing related products and consumer goods". Complaint at 10. Following negotiations, MTN and National Hemp agreed to contract for the sale of hemp clones in exchange for cash installments, with certain funds to be supplied in advance of delivery, during production and after final delivery. In total, MTN delivered $590,000 in payments. Following complaints concerning the quality of the product, MTN repudiated a portion of the goods delivered and accepted a portion of goods as well. MTN also accepted alternative goods in the form of more mature, gallon bucket plants as well as cash refunds. MTN now claims that over $385,225 worth of product was not delivered. National Hemp denies this assertion.

The Plaintiff has filed a Complaint alleging more than a simple breach of contract concerning the sale of goods. Plaintiff alleges that the Defendant CEO, head grower and marketing director conspired to obtain the funds from the Defendant with no intention of delivering on the contract. The claims advanced are breach of contract against National Hemp only, Civil Theft, Civil Conspiracy, Fraudulent Misrepresentation, Unjust Enrichment, and Negligent Misrepresentation against all defendants. This motion to dismiss seeks dismissal of the Civil Theft, Conspiracy and Misrepresentation Claim under C.R.C.P. 9(b) and all claims, aside from Breach of Contract and Unjust Enrichment (as to Defendant National Hemp only), under C.R.C.P. 12(b)(5). Additionally, this motion seeks dismissal of all claims as to Defendant Robert Mertz, personally.

## LEGAL STANDARD

In evaluating a motion to dismiss, the court must accept all material factual averments as true and view the complaint's allegations in the light most favorable to the plaintiff. *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo.App.2007). Whether a claim is stated must be determined solely from the complaint; the court must consider only those matters stated

within the four corners of the complaint. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo.App. 2007).

**C.R.C.P. 9(b)(5)**

Colorado Rule of Civil Procedure 9(b) requires plaintiffs to plead claims of fraud or mistake with particularity; specifically, C.R.C.P. 9(b) provides:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Colorado courts have consistently held that C.R.C.P. 9(b) and Fed.R.Civ.P. 9(b) are essentially identical. *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994). Case law interpreting the federal rule is therefore persuasive in analyzing the Colorado rule. *Id*., citing *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo.App.1994). To satisfy Rule 9(b)'s 'particularity' requirement, the complaint must sufficiently "specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." 2A Moore's Federal Practice ¶ 9.03[1] (1994); see also 5 C. Wright & A. Miller, Federal Practice & Procedure § 1297 (1990). This requirement of particularity is intended in part to protect defendants from the reputational harm that may result from unsupported allegations of fraud, a charge which involves moral turpitude. See 5 C. Wright & A. Miller, supra, at § 1296; see also *Merrit v. Libby, McNeill & Libby*, 510 F.Supp. 366 (S.D.N.Y.1981).

"Fraud must be pleaded with considerable particularity" *Wiley v. Byrd*, 158 Colo. 479, 408 P.2d 72, 74 (1965) (finding a pleading insufficient where there was no false representation of material existing fact pled and no concealment of material existing fact). (noting that fraud "may of course manifest itself in a multitude of forms"); Although the rule does not require that the party

claiming fraud provide detailed allegations of evidentiary fact, the claimant "must at least state the main facts or incidents which constitute the fraud." *Silver v. Colorado Cas. Ins. Co.*, 219 P.3d 324, 327 (Colo. App. 2009), citing *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 289 (Colo.App.1994).

**C.R.C.P. 12(b)(5)**

The standard of review for Rule 12(b)(5) changed significantly as a result of the Colorado Supreme Court's decision in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). In that case, Colorado has rejected the pleading standards established over 60 years ago by *Conley v. Gibson*, 355 U.S. 41 (1957). *Warne*, 373 P.3d at 595. Under the now outdated *Conley* standard, a motion to dismiss was viewed with disfavor, and a complaint was not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id*. at 591-92 (quoting *Conley*, 355 U.S. at 45-46). Now under the new standard, when evaluating a motion to dismiss under C.R.C.P. 12(b)(5), a claim must be dismissed if, accepting factual allegations in a complaint as true, the complaint does not state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Warne*, 373 P.3d 588 at 595 (adopting the federal pleading standard).

Under the *Iqbal* / *Warne* standard, "plausibility" means that the plaintiff must plead facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Allegations that are legal conclusions, "bare assertions," or merely conclusory statements are not entitled to the assumption of truth. *Id*. at 678–80. Applying this standard, courts must first separate well-pleaded factual allegations from conclusory allegations or statements. *Iqbal*, 556 U.S. at 679. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. When a complaint contains well-pleaded factual allegations, a court should assume their accuracy and then

determine whether they plausibly give rise to a claim for relief. *Id*.

## ARGUMENT

### *The Plaintiff's Claims Sounding in Fraud Were Not Pled with Particularity as Required by C.R.C.P. 9(b)*

In 1994, the Colorado Court of Appeals adopted the federal rule that all claims "sounding in fraud" are subject to the heightened pleading standards of C.R.C.P. 9(b) in *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994). This ruling was made in recognition that C.R.C.P. 9(b) is in essence identical to F.R.C.P. 9(b). *Id*., citing, *Zucker v. Katz*, 708 F.Supp. 525, 530 (S.D.N.Y.1989); Specifically, the Court of Appeals held, "[w]e see no reason to construe C.R.C.P. 9(b) differently [from the Federal case law]. Regardless of the labels that State Farm has attached to the other claims dismissed by the trial court—civil conspiracy, intentional misrepresentation, unjust enrichment, and theft by deception—each incorporates the allegations in the ninth claim for relief. In each claim State Farm has further alleged that defendants have 'participated together' to present fraudulent claims to State Farm". *Id* at 530; see also *Robison v. Caster*, 356 F.2d 924, 925 (7th Cir.1966) ("The plaintiff admits that the breach of fiduciary relationship which he is attempting to assert is a 'scheme to defraud.' [Fed.R.Civ.P.] 9(b) must therefore be followed."); *Avnet, Inc. v. American Motorists Insurance Co*., 684 F.Supp. 814, 815 (S.D.N.Y.1988) ("The particularity requirement of [Fed.R.Civ.P.] 9(b) extends to 'all averments of fraud or mistake.' Thus, the rule extends to averments of fraud or mistake, whatever may be the theory of legal duty—statutory, tort, contractual, or fiduciary.").

In the instant Complaint, Plaintiff's claims for fraudulent misrepresentation, civil conspiracy, and civil theft sound in fraud and thus fall within the purview of C.R.C.P. 9(b). The fraudulent misrepresentation, conspiracy and theft claims all stem from an allegation that the Defendants fraudulently induced the Plaintiff to enter into the contract and have fraudulently

retained the funds obtained from the alleged fraudulent contract. The Colorado Court of Appeals has recognized that the particularity requirements of C.R.C.P. 9(b) extend to all averments of fraud or mistake; therefore, whatever the theory of legal duty, the rule extends to all averments of fraudulent conduct. *Nielson v. Scott*, 53 P.3d 777, 778 (Colo. App. 2002), citing, *Robison v. Caster*, 356 F.2d 924, 925 (7th Cir.1966).

Civil Theft by deception as alleged here sounds in fraud by its very nature. *People v. Collie*, 995 P.2d 765, 774 (Colo. App. 1999). Regardless, the Plaintiff's contention seems to be that the Defendant knowingly obtained and exercised control over funds by conspiring to induce the Plaintiff to provide funds pursuant to a contract they never intended to honor, which is clearly an averment of fraud. However, Plaintiff provides absolutely no factual allegations to support its conclusory contention and in no way provides any particular details to support its averment that fraud of any sort occurred.

Courts have previously dismissed claims pursuant to Rule 9(b)'s heightened pleading standard that have alleged far more facts than those advanced here. (see, *S2 Automation LLC v. Micron Tech., Inc*., 281 F.R.D. 487, 495 (D.N.M. 2012) Complaint was dismissed even though it

indicated when the alleged fraud occurred, who was responsible for the allegedly fraudulent omissions, where the allegedly fraudulent omission occurred—at the meeting between Micron Technology's representatives and S2 Automation's representatives on May 23, 2011 but did not sufficiently plead what conduct was fraudulent and how the conduct was fraudulent in a way that distinguishes Micron Technology's conduct from a negligent misrepresentation or a breach of contract; see also *Koch v. Koch Indus., Inc*., 203 F.3d 1202, 1237 (10th Cir. 2000); The statement that the alleged misrepresentations were made "during 1982 and continuing to the present time" does not alert the Defendants to a sufficiently precise time frame to satisfy Rule 9(b).)

While Rule 9(b) "does not require a plaintiff to plead facts that if true would show that the defendant's alleged misrepresentations were indeed false," it does require the plaintiff to state "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *UniQuality, Inc. v. Infotronx, Inc*., 974 F.2d 918, 923 (7th Cir. 1992) (citing *Bankers Trust Co. v. Old Republic Ins. Co*., 959 F.2d 677, 683 (7th Cir.1992)). "By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a pre-complaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Camaste v. Jos. A. Bank Clothiers, Inc*., 761 F.3d 732, 737 (7th Cir. 2014).

In the matter at hand, the Plaintiff does not allege the who, what, where, and when of this alleged fraud. In particular, Plaintiff alleges "On information and belief, Hemp Exchange and Mertz, Jones and Buckingham gave false information to MTN Botanicals about Hemp Exchange's business and capabilities, as well as their intentions for the money that they were attempting to obtain from MTN Botanicals". Complaint at 16. No description of the "false

information" is provided and no time, place or manner of the alleged communication is provided. Likewise, the "intentions for the money" is never defined and there is never no allegation as to what the Plaintiffs represented that they would do with the funds obtained. Throughout the Complaint, Plaintiff alleges that the funds were "misappropriated" after they were turned over to Plaintiff National Hemp, but there is no allegation of any agreement or representation that the Plaintiff intended to do anything other than retain the funds. The Plaintiff has not alleged that the funds were to be held in trust or escrow pursuant to the contract or pursuant to any promise or representation of the Defendants. Therefore, any allegation that funds were "misappropriated" after they were received by Plaintiffs is lacking in factual support, since the alleged promise to hold the funds in escrow / trust is not alleged.

Likewise, no particulars are provided to support the claim of civil conspiracy. The Plaintiff alleges "On information and belief….Defendants had an agreement amongst themselves to defraud and steal from MTN Botanicals" Complaint at 17. Likewise, Plaintiffs allege "On information and belief, Defendants knew that Hemp Exchange would not produce the clones as agreed, and instead intended to continue their misrepresentations in order to delay MTN Botanicals as long as possible and induce MTN Botanicals to transfer as much money as possible to them" Again, the misrepresentations are not specified as to content, place, time, or manner. Furthermore, the Plaintiffs have not specified any "unlawful act" in furtherance of the alleged conspiracy nor have any particulars been alleged with respect to the "agreement" on a course of action to accomplish the fraud.

Most glaringly, the Plaintiffs have alleged no particular facts in support of the claim for fraudulent misrepresentation. Very few representations are actually alleged in the complaint, and there is no specificity as to what is alleged to be false. Paragraph 19 states that "Jones claimed

that Defendants had a 'one million clone capacity', he claimed to have experience and credentials that would allow him to complete the order that MTN Botanicals was seeking and that producing 470,000 clones on MTN Botanicals desired schedule would be 'no problem.'" However, Plaintiffs fail to state what, if any, of this statement was knowingly false at the time it was made. Additionally, aside from the paragraphs relating to Jones, no statements by other parties are provided. Robert Mertz is not charged with making any type of statement to the defendants, let alone a misrepresentation which meets the time, place, manner requirements of C.R.C.P. 9(b).

Plaintiff's allegations regarding the alleged fraud are simply conclusory statements that are not supported by any particular facts. Each allegation of fraud in the Plaintiffs complaint is based "on information and belief"; yet fail to specify the factual basis for the information and belief. See Complaint at 16, 17, 21, 28, 39, 41, 43, 44, 48, and 50. This improper 'information and belief' pleading is most egregiously displayed in Paragraph 41, where Plaintiffs defamatorily accuse Defendants of having "at least one other site where illicit activities are taking place". No facts are asserted as to the nature of the illicit activities, or the reasons for alleging the same.

Reading the Complaint as a whole, and with regard to legal conclusions that are supported by factual assertions, the Complaint alleges nothing more than a breach of contract for the sale of goods between businesses. Plaintiff alleges a contract was formed at arm's length. Plaintiffs visited the Defendant's farm and negotiated prior to contract formation. See, Complaint at Paragraphs 18, 20, 25, 26, and 27. The Parties entered into an agreement memorialized in a written invoice concerning the basis of their future performance (which Plaintiff failed to attach to its Complaint). The Plaintiff contends that it accepted delivery of some clones and rejected other clones as non-conforming. Complaint at 42, 48, 52, 53, and 55. Plaintiff obtained cover for the allegedly non-conforming goods. Complaint at 58. Defendants made efforts to cure by

providing 3,000 gallon-bucket plants valued at $15 per plant which were accepted by the Plaintiff. Taking away the spurious and unfounded "on information and belief" assertions of the Plaintiffs Complaint and focusing solely on the facts alleged, the claims advanced are merely a breach of contract in the failure to provide conforming goods and unjust enrichment for the failure to provide a refund.

As such, the Plaintiff has fallen far short of the heightened pleading standard of C.R.C.P. 9(b) regarding the allegations of fraud, theft and deception; therefore, the Plaintiff's Second Claim for Relief (Civil Theft), Third Claim for Relief (Conspiracy) and Fourth Claim for Relief (Fraudulent Misrepresentation) should be dismissed as to Defendants National Hemp and Robert Mertz, individually.

***Plaintiff's Claim for Civil Theft Fails to State a Claim Upon Which Relief Can Be Granted***

Not only are the Plaintiff's unsupported conclusory statements violative of C.R.C.P. Rule 9(b)'s particularity standard, these allegations fail to state a claim upon which relief can be granted under the 'plausibility' pleading standard adopted by the Colorado Supreme Court. Until recently, the standard in Colorado on which to judge whether a complaint stated a claim upon which relief could be granted was the "no set of facts" standard: "a complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him [or her] to relief." *Colo. Med. Soc'y v. Hickenlooper*, 353 P.3d 396, aff'd, 2015 CO 41, 349 P.3d 1133.

In June 2016, the Colorado Supreme Court replaced that standard with the federal "plausibility" standard announced in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Under the plausibility standard, "to survive a motion to dismiss for failure to state a claim,

a plaintiff must allege a plausible claim for relief." *N.M. v. Trujillo*, 2017 CO 79, ¶ 20, 397 P.3d 370. The plausibility standard emphasizes that facts pleaded as legal conclusions (i.e., conclusory statements) are not entitled to the assumption that they are true. *Id*. This plausibility standard is predicated on two working principles: First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions and second, only a complaint that states a plausible claim for relief will survive a motion to dismiss. *Warne, supra,* at 591. A Court should only grant such motion if it clearly appears that the factual allegations in the complaint are not enough to raise a right to relief above the speculative level and to provide plausible grounds for relief. *Id.*

In order to prove a Civil Theft claim, the Plaintiff has to establish 1) Defendant knowingly obtained control over the property of another without authorization and 2) Defendant did so with the specific intent to permanently deprive the true owner of the benefit of the property. *Itin v. Ungar*, 17 P.3d 129, 134 (Colo. 2000). In the matter at hand, the Complaint only contains bare accusations of civil theft without providing any justification supporting its assertion. In fact, Plaintiff provides few, if any, factual allegations that support these elements. Instead, Plaintiff relies on conclusory statements. For example, Plaintiff states that Defendant "misappropriate funds" and purchased equipment and goods with funds received by the Plaintiff without providing any factual allegations to support that they no legal right to do the same. Plaintiff's Complaint is very sparse on the terms of the agreement and fails to reference or attach the written document itself. There is no allegation of any legal duty to hold the funds in trust or escrow pending acceptance of the goods. Thus, the Plaintiff has failed to plead a legal duty to hold the funds as well as any facts supporting the claim of a legal duty to hold funds. Therefore, the Plaintiff does not maintain a claim for 'misappropriation'.

Additionally, the Plaintiffs have failed to properly plead the element of "specific intent to permanently deprive the true owner of the benefit of the property". In particular, the Plaintiff complains as follows:

> "61. Since July 23, 2019, MTN Botanicals has made its demands for a refund through legal counsel, and Defendants have been well aware for months that MTN Botanicals has been considering legal action to recover its misappropriated funds.
>
> 62. In spite of Hemp Exchange's utter failure to perform under the contract, Defendants have never returned the money that MTN Botanicals provided as part of the agreement."

What is missing here is the response of Hemp Exchange to the demands for payment. There is no allegation that Hemp Exchange ignored the demand or refused the demand. There is only an assertion that the money has not been returned. More must be pled in order to assert that there is an intent to permanently deprive. Hemp Exchange's response to the demand, *where they offered to pay back what they calculated was rightfully owed and invited MTN to provide their accounting if they came to a different figure*, is very conveniently ignored in this pleading. Without an assertion that Hemp Exchange intended to permanently deprive the MTN Botanicals of the funds when a refund was demanded, and without any factual support for the legal conclusion that they intended to permanently deprive the Plaintiff of the funds, Plaintiff fails to assert an essential element of the Civil Theft claim.

Also lacking is an allegation that Defendant Mertz (as well as Co-Defendants Jones and Buckingham) actually retained any property originating from the Plaintiff. The Plaintiff never make any allegation that Mertz, Jones or Buckingham have held or acquired any of the funds. It is the opposite that is plead: Plaintiffs allege that the funds were spent on farm equipment and other goods to invest back into the business. Thus, it is only alleged that the business entity received or retained a benefit from the funds. Plaintiff does not allege facts to support that the Defendants did

any of this "knowingly" and with a "specific intent" to deprive the Plaintiff of its property. Rather, Plaintiff makes conclusory statements without any factual support and under the recently adopted standard, conclusory statements that are unsupported by factual allegations are not enough to maintain a claim for relief.

Essentially, this is little more than a contract dispute between parties regarding sale of goods with questions regarding whether the goods were conforming and if not how much compensation is due. Plaintiff ultimately provides no factual allegations provided to support a claim for Civil Theft. As such, the Plaintiff's Civil Theft claim should be dismissed as to all Defendants because Plaintiff fails to allege facts sufficient to allege a plausible claim for relief.

***Plaintiff's Claims of Fraudulent Misrepresentation, Negligent Misrepresentation, and Civil Conspiracy Should be Dismissed as the Claims are not Pled with Specificity***

The Plaintiffs have failed to meet the *Warne* standard with regard to the Civil Conspiracy, Negligent Misrepresentation, and Fraudulent Misrepresentation claims. In particular, the Plaintiff relates the elements of the offense of Civil Conspiracy in Paragraphs 72-76 but fail to identify the facts which constitute the alleged claim. The Plaintiff fails to identify any "unlawful acts"; and fail to identify the facts in support of the claim that they conspired to induce MTN to provide funds and then keep the funds for their own use. Plaintiff, as with the civil theft claim, have failed to provide facts in support of the assertion that the Defendants intentionally conspired to permanently deprive the Plaintiff of the funds. Also, there are no facts supporting the claim that there were misrepresentations during contract formation. No material misrepresentations are pled with any factual support aside from the tenuous "information and belief" assertions which amount to no more than legal conclusions. Plaintiffs fail to plead which representations were false. They fail to state which of these false representations were relied upon by Plaintiffs to induce contract

formation. With regard to negligent misrepresentation, this claim is not pled in the alternative, so it can be inferred that the misrepresentations that form the basis of this claim are distinct from the misrepresentations that for the basis of the fraudulent misrepresentation claim. However, these misrepresentations are undefined as well. In reading through the complaint, it is impossible to discern which misrepresentations are alleged to have been negligent and which are intentionally fraudulent. Again, Plaintiffs complain that the negligent misrepresentation induced them to provide funds which were used for "unauthorized purposes". The Complaint fails to explain what "purposes" would be authorized and what would be unauthorized once the funds change hands.

**Plaintiff's Claim for Unjust Enrichment and Negligent Misrepresentation Should be Dismissed as They Fail to State a Claim Against Defendant Robert Mertz**

The Plaintiff's complaint states a claim for unjust enrichment against all defendants to the action, including Defendant Mertz. At the same time, the Complaint alleges a contract only with Plaintiff and National Hemp as parties and payments pursuant to the contract made only between the parties. Likewise, the Complaint alleges only that the "unauthorized use" of the funds were National Hemp expenditures, in the form of farm buildings and equipment. There is no allegation that Robert Mertz himself (or Defendants Jones and Buckingham), received a benefit or made unauthorized use of the funds aside from the blanket legal conclusion of Paragraphs 86 and 88. As such, the Plaintiffs have not sufficiently alleged a claim against Defendant Mertz personally as there is no allegation that he personally benefitted from the unauthorized use of the funds. Because the Plaintiff has not pled the elements of the claim of unjust enrichment with regard to Defendant Mertz, the claim of Unjust Enrichment does not meet the pleading standard and should be dismissed pursuant to C.R.C.P. 12(b)(5).

Likewise, the negligent misrepresentation claim should be dismissed as to Defendant Robert Mertz. Nowhere in the Plaintiffs complaint is there an allegation that Defendant Mertz made any specific misrepresentation to the Defendants. Plaintiffs merely state legal conclusions and provide no factual basis for their assertions that Mertz misrepresented any facts. Because Plaintiffs fail to provide the misrepresentation from Mertz they also fail to state all other elements of the claim as to Mertz, namely, (1) that MTN was induced by the misrepresentation by Mertz, (2) that Mertz negligently communicated the misrepresentation, (3) Mertz knew or intended that the misrepresentation would induce action by or inaction by Plaintiff, (4) that Plaintiff relied in fact on the misrepresentation (5) and such reliance caused damages. Due to Plaintiff's failure in specifying the misrepresentation that Mertz is alleged to have conveyed, the Plaintiff has not stated a claim for which relief can be granted. As such the claim of Negligent Misrepresentation as applied to Defendant Mertz should be dismissed under C.R.C.P. 12(b)5.

## CONCLUSION

The matter at hand is little more than a contract dispute between two sophisticated parties for the sale of goods. Plaintiff ultimately fails to plead with particularity its claims sounding in fraud; therefore, its Second Claim for Relief (Civil Theft), Third Claim for Relief (Civil Conspiracy), and Fourth Claim for Relief (Fraudulent Misrepresentation) should be dismissed pursuant to C.R.C.P. 9(b). Furthermore, Plaintiff fails to meet the heightened pleading standards adopted in Warne v. Hall for its remaining claims (except for Breach of Contract and Unjust Enrichment as to Defendant Hemp Exchange); therefore, the remainder of its claims should be dismissed pursuant to C.R.C.P. 12(b)(5).

DATED this November 13, 2019.

**ROBINSON & HENRY, P.C.**

By: */s/ Kayla A. Banzali*

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Kayla A. Banzali, #50294
*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on November 13, 2019 a copy of the **PARTIAL MOTION TO DISMISS PURSUANT TO C.R.C.P. 9(b) and C.R.C.P. 12(b)(5)** was presented to the Court via Colorado Court E-Filing System, and given to the parties as follows:

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