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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Southern Union Company, a
Delaware corporation

CV-99-1294-PHX-ROS

Plaintiff,

v.

Amended Order

Southwest Gas Corporation, a
California corporation, et al,

Defendants.

At a hearing held May 11, 2001, the Court indicated that it would issue an Order directing the parties to submit briefing on choice of law issues, in particular with respect to Counts Three, Seven, and Eight in the Second Amended Complaint ("SAC") in CV-99-1294-PHX-ROS. The Court issued an Order on May 18, 2001, directing the parties to simultaneously file their briefs on the choice of law issues on June 8, 2001. The parties were also directed to simultaneously file any responses to those briefs on June 15, 2001. On June 8, 2001, the Court issued a further Order stating that it would rule on the choice of law issues and on the Motions to Dismiss by June 21, 2001. This is that ruling.

Discussion

I. Dioguardi

As a preliminary matter, the Court will address Dioguardi's Motion to Dismiss. Dioguardi is named as a Defendant with respect to Counts Three (Fraudulent Inducement), Seven (Tortious Interference with Business Relationship), and Eight (Tortious Interference

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1 with Contractual Relationship), and though the Court has not yet resolved the complex
2 choice of law issues with respect to these claims, the Court finds that ruling on Dioguardi's
3 Motion to Dismiss does not require a preliminary decision on the choice of law.

4 Dioguardi claims that he cannot be liable on Counts Three, Seven, or Eight, because
5 his only acts were as an attorney for ONEOK, and Southern Union does not specifically
6 allege that Dioguardi personally participated in any fraudulent inducement.¹ Southern Union
7 responds that Dioguardi cannot escape liability simply because he served as ONEOK's
8 counsel and argues that attorneys who engage in fraudulent and intentional misconduct are
9 not shielded from liability. Southern Union also asserts that Dioguardi's "involvement in
10 this conspiracy began no later than the week of February 15, 1999, when Rose recommended
11 that ONEOK retain Dioguardi."

12 Several courts have held that an attorney, as the client's agent, is not distinct from the
13 client and therefore cannot engage in a conspiracy with the client. See Macke Laundry
14 Service Limited Partnership v. Jetz Service Co., Inc., 931 S.W.2d 166, 176 (Mo. App. 1996)
15 ("Macke"); Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 709 (App.
16 1991); Doctors' Co. v. Superior Court of Los Angeles County, 49 Cal. 3d 39, 45 (1989);
17 Salaymeh v. Interqual, Inc., 508 N.E.2d 1155, 1158 (Ill. App. 1987); Fraidin v. Weitzman,
18 611 A.2d 1046, 1079 (Md. App. 1992).² However, an attorney may be liable for conspiracy
19 if the attorney "acts out of a self-interest which goes beyond the agency relationship."
20 Macke, 931 S.W.2d at 176; Skarbrevik, 282 Cal. Rptr. at 709 (conspiracy liability may be
21 imposed on an attorney who acts in furtherance of his own financial gain); Doctors', 49 Cal.

23 ¹ Dioguardi also argues that he cannot be liable on Count Three because he did not
24 serve as ONEOK's counsel until February 25, 1999, four days after Southern Union and
25 Southwest executed the Standstill Agreement ("Agreement") that was allegedly the result
26 of fraudulent inducement. Dioguardi also contends that Southern Union has not alleged any
27 act by Dioguardi which could have fraudulently induced Southern Union to contract with
28 Southwest. Dioguardi further avers that Southern Union has failed to plead fraud with
particularity.

² The parties have not cited any Oklahoma, Nevada, or Arizona cases on this subject.

1 3d at 45 ("[a]gents and employees of a corporation cannot conspire with their corporate
2 principal or employer where they act in their official capacities on behalf of the corporation
3 and not as individuals for their individual advantage") (internal quotes and cite omitted);
4 Fraidin, 611 A.2d at 1079 ("[T]here can be no conspiracy when an attorney acts within the
5 scope of his employment."). Likewise, "an attorney may be liable to a third person for acts
6 arising out of the attorney's representation of a client, if the attorney is guilty of 'fraud,
7 collusion, or a malicious or [intentionally] tortious act.'" Macke, 931 S.W.2d at 177-78
8 (cites omitted); Skarbrevik, 282 Cal. Rptr. at 711; Engel v. CBS Inc., 981 F.2d 1076, 1080
9 (9th Cir. 1992) (applying New York law); Fraidin, 611 A.2d at 1080. If a complaint alleges
10 that an attorney is guilty of fraud or collusion, such fraud or collusion must be pled with
11 particularity. Fed. R. Civ. P. 9(b).

12 A Report and Recommendation issued by Special Master Eino Jacobson on March
13 7, 2001, ("First R&R") concludes that the SAC fails to state any claims for relief against
14 Dioguardi. Specifically, the First R&R finds:

15 The Second Amended Complaint does not allege any personal
16 misrepresentation to Southern Union by Dioguardi, nor does it allege that
17 Dioguardi was acting outside of the scope of his legal employment or for his
18 own, rather than his client's benefit. The counts for fraudulent inducement
and tortious interference rest solely on theories of conspiracies by the
defendants, which would be precluded by Dioguardi's agency with ONEOK.

19 (First R&R at 4-5) (emphasis added). The First R&R also noted that at the hearing before
20 the Special Master on Dioguardi's Motion, "Southern Union conceded that it does not allege
21 that Dioguardi personally benefitted from his actions." (Id. at 5 n.2).

22 In its Objections to the First R&R, Southern Union asserts that the cases relied upon
23 in the First R&R actually support Southern Union's position. Southern Union does not
24 dispute the First R&R's determination that the SAC fails to allege that Dioguardi personally
25 made misrepresentations to Southern Union, but rather, Southern Union contends that the
26 cases "do not require that attorney-defendants be the actual voice for the misrepresentation
27 at issue." (Southern Union's Objections at 3). Southern Union also does not dispute that the
28 SAC fails to allege that Dioguardi was acting outside the scope of his employment or that

1 he was acting for his personal benefit.

2 The Court finds that the First R&R correctly determined that the allegations contained
3 in the SAC are insufficient to state claims for relief against Dioguardi. First, Southern
4 Union failed to allege that Dioguardi was acting outside the scope of his employment as
5 counsel for ONEOK or that he was acting in furtherance of his own financial gain. See
6 Macke, 931 S.W.2d at 176; Skarbrevik, 282 Cal. Rptr. at 709; Doctors', 49 Cal. 3d at 45;
7 Fraidin, 611 A.2d at 1079. Second, Southern Union failed to plead fraud against Dioguardi
8 with sufficient particularity. Fed. R. Civ. P. 9(b). Nowhere in Counts III, VII, or VIII does
9 Southern Union set forth any allegations specifically involving Dioguardi. Moreover, the
10 allegations in the SAC do not support a determination that Dioguardi fraudulently induced
11 Southern Union to enter into the Agreement, because Dioguardi did not allegedly serve as
12 ONEOK's counsel until Gaberino called him four days after the alleged fraudulent
13 inducement was completed.³ (SAC at ¶ 87); see also discussion *infra* at n.19.

14 **II. Count Three in the First Arizona Action (CV-99-1294-PHX-ROS)**

15 In Count Three, Southern Union alleges that "all Defendants"⁴ fraudulently induced
16 Southern Union to enter into the Agreement. Specifically, Southern Union claims that
17 "Southwest, through Maffie and with the knowledge and consent of the other defendants,
18 represented to Southern Union that Southwest intended to negotiate in good faith regarding
19 the Southern Union offer and that it would conduct a good faith evaluation and due
20 diligence regarding Southern Union." (SAC at ¶ 289). Southern Union then claims that
21

22 ³ The Court finds that the fraudulent inducement is "complete" upon the execution
23 of a contract, but the limitations period does not necessarily begin to run at that time. See
24 In re Estate of Blake, 723 N.Y.S.2d 563, 564 (N.Y.A.D. 2001) (cause of action accrued, and
25 the limitations period began to run, when the contract was executed); Coffee v. General
26 Motors Acceptance Corp., 30 F. Supp. 2d 1376, 1380 (S.D. Ga. 1998) (same); Burton v.
27 Terrell, 368 F. Supp. 553, 557 (W.D. Va. 1973) (same); but see A.R.S. § 12-543(3) (adopting
28 discovery rule for fraud claims); Ca. Civ. Pro. § 338(d) (same).

⁴ Count Three is asserted against "all Defendants," namely: Southwest, ONEOK,
Maffie, Hartley, Zub, Dubai, Irvin, Rose, Gaberino, and Dioguardi.

1 Southwest's representations were false and that Southwest entered the Agreement with the
2 fraudulent intent to prevent Southern Union from approaching Southwest's shareholders
3 with its merger offer. (Id.). Southern Union alleges that it relied on Southwest's
4 representations in entering into the Agreement, and as a result, Southern Union was
5 damaged in an amount not less than \$750,000,000. (Id. at ¶¶ 292-93).

6 **A. Fed. R. Civ. P. 9(b)**

7 ONEOK⁵, Southwest, Irvin, Hartley, Maffie, Zub, and Rose contend that Southern
8 Union has failed to plead fraudulent inducement with the particularity required by Fed. R.
9 Civ. P. 9(b). ONEOK specifically asserts that Southern Union has not alleged that someone
10 at ONEOK made fraudulent representations to someone at Southern Union which induced
11 Southern Union to enter into the Agreement. Likewise, Irvin contends that Southern Union
12 has not alleged that Irvin induced Southern Union to enter into the Agreement or that Irvin
13 made any representations to Southern Union concerning that Agreement. Hartley contends
14 that Southern Union "has not alleged a single fact showing that Hartley had anything to do
15 with" the Agreement. (Hartley Motion at 11-12).

16 Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with
17 particularity."⁶ "Rule 9(b) ensures that allegations of fraud are specific enough to give
18 defendants notice of the particular misconduct which is alleged to constitute the fraud
19 charged so that they can defend against the charge and not just deny that they have done
20 anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Conclusory
21 allegations of fraud or conspiracy do not satisfy this rule. Id.; see also Utah State University
22 of Agriculture and Applied Science v. Bear Stearns & Co., 549 F.2d 164, 171 (10th Cir.),
23 cert. denied, 434 U.S. 890 (1977). "The pleadings must state precisely the time, place, and
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25 ⁵ Irvin, Dubay, and Gaberino joined in ONEOK's Motion.

26 ⁶ It is not necessary to resolve the choice of law issue for the purpose of determining
27 whether Southern Union has pled fraud with the degree of particularity required by Fed. R.
28 Civ. P. 9(b), because the law of the Ninth and Tenth Circuits is the same with respect to this
issue.

1 nature of the misleading statements, misrepresentations, and specific acts of fraud." Kaplan
2 v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994), cert. denied sub nom Payne v. Kaplan, 516
3 U.S. 810 (1995); see also Koch v. Koch Industries, Inc., 203 F.3d 1202, 1236 (10th Cir.)
4 (complaint alleging fraud must "set forth the time, place and contents of the false
5 representation, the identity of the party making the false statements and the consequences
6 thereof.") (internal quotes omitted), cert. denied, 121 S. Ct. 302 (2000). "To allege fraud
7 with particularity, a plaintiff must set forth more than the neutral facts necessary to identify
8 the transaction. The plaintiff must set forth what is false or misleading about a statement,
9 and why it is false." In re GlenFed, Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th Cir.
10 1994) (GlenFed); see also Grossman v. Novell, Inc., 120 F.3d 1112, 1124 (10th Cir. 1997)
11 (citing GlenFed).

12 Although allegations of fraud based on "information and belief" typically do not
13 satisfy Rule 9(b), such allegations may suffice if the matters are "peculiarly within the
14 opposing party's knowledge." Wool v. Tandem Computers Inc., 818 F.2d 1433, 1439 (9th
15 Cir. 1987) (internal quotes and cite omitted); see also Koch, 203 F.3d at 1202. "In such
16 cases, the particularity requirement may be satisfied if the allegations are accompanied by
17 a statement of the facts upon which the belief is founded." Id. "In cases of corporate fraud
18 where the false or misleading information is conveyed in prospectuses, registration
19 statements, annual reports, press releases, or other 'group-published information,' it is
20 reasonable to presume that these are the collective actions of the officers." Wool, 818 F.2d
21 at 1440. In such cases, "a plaintiff fulfills the particularity required of Rule 9(b) by pleading
22 the misrepresentations with particularity and where possible the roles of the individual
23 defendants in the misrepresentations." Id.

24 **1. Southwest and Maffie**

25 A second Report and Recommendation ("Second R&R") issued by Special Master
26 Eino Jacobson finds that with respect to Defendants Southwest and Maffie, Count Three is
27 pled with sufficient particularity.

28 The SAC alleges that between February 3 and 21, 1999, Maffie told Southern Union's

1 President "that Southwest was prepared to conduct a thorough evaluation" of Southern
2 Union's offer. (SAC at ¶ 50). It further alleges that "Southwest Director Judd has confirmed
3 that the Southwest Board committed to Southern Union that it would conduct a good faith
4 evaluation of the Southern Union Offer." (*Id.*). The SAC also alleges that based upon those
5 representations, Maffie and Southwest, in complicity with the other defendants, induced
6 Southern Union to enter into the Agreement. (*Id.* at ¶ 51). It then alleges that "Southwest
7 and the other defendants never made or intended to make a good faith evaluation of the
8 Southern Union offer." (*Id.* at 52). Southern Union further alleges that the representations
9 made by Maffie and Southwest were false and were made in order to prevent Southern
10 Union from approaching Southwest's shareholders with Southern Union's merger offer. (*Id.*
11 at ¶¶ 52, 289).

12 The Court finds that the allegations in the SAC support a claim of fraudulent
13 inducement against Maffie and Southwest and satisfy the particularity requirements of Rule
14 9(b). See Lazar v. Superior Court, 49 Cal. Rptr. 2d 377, 381 (1996) ("An action for
15 promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into
16 a contract."); see also Havas v. Alger, 461 P.2d 857, 859 (Nev. 1969) ("Fraud in the
17 inducement renders the contract voidable."); Morris v. Achen Const. Co., Inc., 155 Ariz.
18 512, 514, 747 P.2d 1211, 1212-13 (1987) (discussing the tort of fraudulent inducement and
19 citing the Restatement (Second) of Contracts § 167 (1981)); Holland v. Perrault Bros., Inc.,
20 311 P.2d 795, 798 (Okla. 1957). Accordingly, the Court will adopt the Second R&R insofar
21 as it finds that fraudulent inducement is pled with sufficient particularity against Maffie and
22 Southwest.

23 2. Zub, ONEOK, Dubay, Gaberino, Irvin, Rose, and Hartley

24 It is Southern Union's position that although only Southwest and Maffie made the
25 false representations to Southern Union, the remaining Defendants are liable because they
26 participated in a "conspiracy to defraud Southern Union." (See Southern Union's
27 Supplemental Brief at 8). Southern Union does not allege that Zub, ONEOK, Dubay,
28 Gaberino, Irvin, Rose, or Hartley made any statements, false or otherwise, to Southern Union

1 for the purpose of inducing Southern Union to sign the Agreement.

2 Southern Union contends that California's civil conspiracy law applies, but it also
3 states that if Arizona conspiracy law applies, there is no apparent conflict between Arizona
4 and California law on this issue.⁷ In California, "[c]onspiracy is not a cause of action, but a
5 legal doctrine that imposes liability on persons who, although not actually committing a tort
6 themselves, share with the immediate tortfeasors a common plan or design in its
7 perpetration." Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 28 Cal. Rptr. 2d 475,
8 478 (1994).⁸ To establish a civil conspiracy in California, the following elements must be
9 met: "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance
10 of the conspiracy, and (3) damages arising from the wrongful conduct." Kidron v. Movie
11 Acquisition Corp., 47 Cal. Rptr. 2d 752, 757 (App. 1995); see also 117 Sales Corp. v. Olsen,
12 145 Cal. Rptr. 778, 780 (App. 1978) (a civil conspiracy consists of "a combination of two
13 or more persons to accomplish an evil or unlawful purpose.") (cite omitted).⁹ To be liable

14 _____
15 ⁷ Rose and Irvin both argue that Arizona's civil conspiracy law should apply.
16 ONEOK argues that California's civil conspiracy law applies to Count Three, but Arizona's
17 civil conspiracy law applies to Counts Seven and Eight. However, ONEOK states in its
18 Supplemental Response Brief that Arizona law on civil conspiracy is consistent with
19 California law on civil conspiracy.

20 ⁸ There is also no separate cause of action for conspiracy in Arizona. See Rowland
21 v. Union Hills Country Club, 157 Ariz. 301, 306, 757 P.2d 105, 110 (App. 1988). In Nevada
22 and Oklahoma, however, "civil conspiracy" appears to exist as a separate cause of action.
23 See Siragusa v. Brown, 971 P.2d 801, 807 (Nev. 1998); Roberson v. PaineWebber, Inc., 998
24 P.2d 193, 201 (Okla. App. 1999) (addressing "claim for civil conspiracy," but noting that
25 civil conspiracy alone does not give rise to liability without an unlawful act).

26 ⁹ In Arizona, a civil conspiracy occurs when "two or more persons . . . agree to
27 accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing
28 damages." Rowland, 157 Ariz. at 306, 757 P.2d at 110. Similarly, a civil conspiracy in
Oklahoma "consists of a combination of two or more persons to do an unlawful act, or to do
an unlawful act by lawful means." Roberson, 998 P.2d at 201. The elements of civil
conspiracy in Nevada are nearly identical to those required by Arizona and Oklahoma. See
Sutherland v. Gross, 772 P.2d 1287, 1290 (Nev. 1989) ("An actionable conspiracy consists
of a combination of two or more persons who, by some concerted action, intend to
accomplish an unlawful objective for the purpose of harming another, and damage results

1 for tortious conduct by a coconspirator, "[t]he conspiring defendants must also have actual
2 knowledge that a tort is planned and concur in the tortious scheme with knowledge of its
3 unlawful purpose." Kidron, 47 Cal. Rptr. 2d at 758. "[A]ctual knowledge of the planned
4 tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge
5 of the planned tort must be combined with intent to aid in its commission." Id. "[O]ne
6 cannot be liable as a coconspirator if the crime was committed before he joined the
7 conspiracy." Id. at 765.

8 For purposes of the Motions to Dismiss, the Court will apply California's civil
9 conspiracy law because there are no appreciable and critical differences between California,
10 Arizona, Nevada, and Oklahoma law regarding the elements required to establish a civil
11 conspiracy. All four jurisdictions hold that there is a civil conspiracy where there are two
12 or more persons who agree to engage in an unlawful act. See 117 Sales Corp., 145 Cal. Rptr.
13 at 780; Rowland, 157 Ariz. at 306, 757 P.2d at 110; Roberson, 998 P.2d at 201; Sutherland,
14 772 P.2d at 1290.

15 Where a plaintiff alleges a conspiracy to commit fraud, Rule 9(b) requires more than
16 conclusory allegations of the conspiracy. Semegen, 780 F.2d at 731. Rather, the conspiracy
17 must also be pled with the particularity required by Rule 9(b). Alfus v. Pyramid Technology
18 Corp., 745 F. Supp. 1511, 1521 (N.D. Cal. 1990); see also Wanetick v. Mel's of Modesto,
19 Inc., 811 F. Supp. 1402, 1406 n.3 (N.D. Cal. 1992) ("Rule 9(b) requires that a conspiracy
20 to commit fraud be pleaded with the same particularity as the fraud itself."). To satisfy this
21 requirement, a "plaintiff must allege with sufficient factual particularity that defendants
22 reached some explicit or tacit understanding or agreement." Alfus, 745 F. Supp. at 1521
23 (cites omitted). "It is not enough to show that defendants might have had a common goal
24 unless there is a factually specific allegation that they directed themselves towards this
25 wrongful goal by virtue of a mutual understanding or agreement." Id. (cite omitted); see also
26 In re Sunrise Technologies Sec. Litig., No. C-92-0948TEH, 1992 WL 359636 at *7 (N.D.

27 _____
28 from the act or acts.").

1 Cal. Sept. 22, 1992) (a plaintiff must plead "an agreement among defendants to engage in
2 an unlawful act," as well as "overt acts by the defendants in furtherance of that agreement").

3 "Although an express agreement need not be shown for a plaintiff to prevail on a civil
4 conspiracy claim, there must be at least a tacit understanding." In re Sunset Bay Associates,
5 944 F.2d 1503, 1517 (9th Cir. 1991). "[T]he existence of a conspiracy 'may sometimes be
6 inferred from the nature of the acts done, the relations of the parties, the interests of the
7 alleged conspirators, and other circumstances.'" Id. (cite omitted). However, a plaintiff must
8 allege specific facts which support the inference of an agreement. See id. at 1517-18
9 (finding that the record evidence supported an inference of a conspiracy in multiple ways
10 and was sufficient to preclude summary judgment); Alfus, 745 F. Supp. at 1521; see also
11 Roberts v. Heim, 670 F. Supp. 1466, 1484-85 (N.D. Cal. 1987) (specific facts must be
12 alleged from which an understanding or agreement may be inferred), rev'd in part on other
13 grounds, Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646, 650 (9th Cir. 1988), cert.
14 denied, 493 U.S. 1002 (1989).

15 The alleged conspiracy in this case is a "conspiracy to fraudulently induce[.]"
16 (Southern Union's Response to Motions to Dismiss at 56). Southern Union contends that it
17 "provided significant detail of the defendants' conspiracy and concerted action in furtherance
18 of that fraud." (Id.). Southern Union then asserts that Defendants "were acting in concert
19 to defraud Southern Union and induce it to enter the Agreement." (Id.). Accordingly, the
20 Court concludes that the "goal" of the alleged conspiracy was to defraud Southern Union to
21 enter into the Agreement.

22 As a result, the conspiracy concluded on February 21, 1999, when Southern Union
23 signed the Agreement. See In re Estate of Blake, 723 N.Y.S.2d at 564 (fraudulent
24 inducement completed at the time the contract was executed); Coffee, 30 F. Supp. 2d at 1380
25 (same); Burton, 368 F. Supp. at 557 (same). Thus, any allegations of conduct taken by Zub,
26 ONEOK, Dubay, Gaberino, Irvin, Rose, or Hartley, after February 21, 1999, do not render
27 these Defendants liable if no inference can be drawn from those actions that they were
28 involved in a conspiracy to fraudulently induce Southern Union to enter into the

1 Agreement.¹⁰ See Kidron, 47 Cal. Rptr. 2d at 765 (no coconspirator liability if an individual
2 joins the conspiracy after the wrongful act is completed). However, the Court will consider
3 actions which were allegedly taken after the conclusion of the conspiracy to determine
4 whether to draw any inferences that Defendants were co-conspirators. See In re Sunset Bay
5 Associates, 944 F.2d at 1517.

6 **a. Zub**

7 Regarding Zub, the SAC contains the following pertinent¹¹ allegations:

- 8 (1) Zub is the Senior Vice President/Regulation and Product Pricing of
9 Southwest (SAC at ¶ 13)¹²;
- 10 (2) Pursuant to the Merger Agreement between Southwest and ONEOK,
11 Zub would become a senior officer¹³ of the merged entity (Id. at ¶ 36);
- 12 (3) Southwest management, "i.e., Maffie", expressed a preference for the
13 Southwest-ONEOK deal (Id. at ¶ 45);
- 14 (4) Zub and Maffie met with ONEOK representatives at an Arizona club
15 with Rose and Irvin on January 12, 1999, to discuss "the ONEOK-
16 Southwest merger and strategies for regulatory approval" (Id. at ¶ 76);

17 ¹⁰ Southern Union relies upon DeVries v. Brumback, 2 Cal. Rptr. 764 (1960), for the
18 proposition that actions taken after the Agreement was signed can constitute conspiratorial
19 acts. The Court finds that the decision in DeVries is distinguishable, because that case
20 involved a "continuing conspiracy to convert" in which parties joined the conspiracy after
21 the commission of the robbery but before the property was sold, and conversion "is a
22 continuing tort as long as the person entitled to the use and possession of his property is
23 deprived thereof." Id. at 767. As previously stated in this Order, the alleged fraudulent
24 inducement was complete the moment Southern Union entered into the Agreement.

25 ¹¹ The Court has read the SAC in its entirety. The Court has also given due
26 consideration to those paragraphs in the SAC which Southern Union believes lend the most
27 support to its fraudulent inducement claim. (See Southern Union's Supplemental Brief, Exh.
28 A; see also Southern Union's Response to Motions to Dismiss at 56). The Court has also
29 reviewed every other paragraph in the SAC to ascertain whether the allegations are sufficient
30 to establish a nexus between the Defendants named in Count Three (other than Southwest
31 or Maffie) and the conspiracy.

32 ¹² The SAC does not state the time period during which Zub held this position.

33 ¹³ The SAC does not state whether a position as a "senior officer" with the merged
34 entity would be a promotion, demotion, or equivalent position for Zub.

- 1 (5) On February 10, 1999, Zub met with ACC Commissioner Kunasek and
2 his aide, Jerry Porter, purportedly to provide an "update" to the ACC
3 on an application that had not yet been filed with the ACC (Id. at ¶ 55);
- 4 (6) On February 10, 1999, Zub met with Greg Patterson, the Director of
5 the Arizona Residential Utilities Consumer Office, informed Patterson
6 of Southern Union's offer, "and argued that Southern Union's bid for
7 Southwest would not be good for Arizona" (Id. at ¶¶ 55, 140);
- 8 (7) On February 10, 1999, Zub "falsely stated that if Southern Union's
9 efforts were successful, it would be unable to finance future needs due
10 to a highly leveraged capital structure that would be 88 percent debt"
11 (Id. at ¶ 55); and
- 12 (8) On February 10, 1999, Zub "falsely stated that Southern Union would
13 have difficulty obtaining regulatory approval" (Id.).

14 The Court finds that Southern Union has failed to allege a conspiracy to commit
15 fraudulent inducement against Zub with the degree of particularity required by Rule 9(b).
16 The allegations in the SAC support only the following inferences: that Zub supported a
17 ONEOK-Southwest merger over a Southern Union-Southwest merger; and that Zub made
18 false statements, perhaps with nefarious intent, for the purpose of interfering with Southern
19 Union's chances of obtaining regulatory approval of its merger offer.

20 Zub's meeting with Maffie, ONEOK representatives, Rose, and Irvin on January 12,
21 1999, cannot support an inference that Zub was engaging in a conspiracy to fraudulently
22 induce Southern Union to sign the Agreement, because at that time, Southern Union had not
23 yet offered to merge with Southwest and the Agreement could not have been contemplated.¹⁴
24 (See SAC at ¶ 4). Furthermore, Zub's position as a Vice President for Southwest is not, by

25 ¹⁴ Although in May, 1998, Southern Union (through Donaldson Lufkin & Jenrette)
26 allegedly expressed to Maffie an interest in exploring a merger with Southwest, Southern
27 Union does not allege that anybody apart from Maffie knew about this interest. (SAC at ¶
28 25). Southern Union alleges that Maffie ignored Southern Union's interest in a merger. (Id.
at ¶ 27). Southern Union does not allege that Maffie told anyone about Southern Union's
expressed interest. In fact, Southern Union alleges that Maffie did not disclose this
information to Merrill Lynch & Co., Inc., Southwest's investment advisor, when Maffie
sought advice in connection with a prospective ONEOK merger, nor did Maffie disclose this
information to the Southwest Board of Directors ("Southwest Board") or Southwest
Management before a merger agreement was entered into with ONEOK. (Id. at ¶¶ 27, 29,
34).

1 itself, sufficient to support a reasonable inference that Zub knew about Maffie and
2 Southwest's alleged intentions to fraudulently induce Southern Union to sign the Agreement.
3 The Court cannot discern from the allegations whether Zub's position would have been any
4 better or worse if a merger were consummated between Southwest and ONEOK rather than
5 between Southwest and Southern Union. Finally, the false statements Zub allegedly made
6 do not support an inference that Zub knew about any plans to fraudulently induce Southern
7 Union to sign the Agreement.

8 The Court also finds that the allegations which link Zub and the other Defendants
9 (apart from Southwest and Maffie) to the alleged fraudulent inducement are not sufficiently
10 particular. The primary section of the SAC which deals with the alleged fraudulent
11 inducement is entitled "Defendants' Fraudulent Scheme to Induce Southern Union To
12 Forego A Tender Offer To Southwest's Shareholders[,]" (SAC at 9), and it includes
13 paragraphs 44 to 59 in the SAC. Southern Union attempts to link these Defendants to the
14 alleged fraudulent inducement by using the following language:

- 15 (1) "Maffie and Southwest, in complicity with the other defendants,
16 induced Southern Union to sign the Agreement" (SAC at ¶ 51);
- 17 (2) "Southwest and the other defendants never made or intended to make
18 a good faith evaluation of the Southern Union offer" (*Id.* at ¶ 52; *see*
19 also *id.* at ¶ 2);
- 20 (3) "Southwest management, with the necessary and willing assistance of
21 the other defendants, embarked upon a scheme to manufacture a
22 pretext" (*Id.* at ¶ 53); and
- 23 (4) "By fraudulently inducing Southern Union to sign the Agreement,
24 defendants ensured that a 'proxy fight' would not take place" (*Id.* at ¶
25 56).

26 Merely using the term "complicity" and making general allegations that all Defendants were
27 involved in the fraudulent inducement does not satisfy the particularity requirements of Rule
28 9(b).

Southern Union has not alleged specific facts from which an inference may be drawn
that Zub agreed, implicitly or tacitly, with any of the other Defendants that Southern Union
should be fraudulently induced to enter into the Agreement. *See Alfus*, 745 F. Supp. at

1 1521; In re Sunset Bay Associates, 944 F.2d at 1517; Roberts, 670 F. Supp. at 1484. Nor
2 has Southern Union alleged specific facts from which an inference can be drawn that Zub
3 knew that Southwest and Maffie planned to fraudulently induce Southern Union to sign the
4 Agreement, that Zub concurred in such a plan, or that Zub intended to aid in the commission
5 of the alleged fraudulent inducement. See Kidron, 47 Cal. Rptr. 2d at 758; In re Sunrise
6 Technologies Sec. Litig., No. C-92-0948TEH, 1992 WL 359636 at *7. The Court will
7 therefore dismiss Count Three as to Zub.

8 **b. ONEOK, Dubai, and Gaberino**

9 With respect to ONEOK, Dubai, and Gaberino, the SAC contains the following
10 pertinent allegations:

- 11 (1) On December 3, 1998, "ONEOK and Maffie entered into a 'consulting'
12 agreement whereby Maffie was to be paid \$3 million upon the closing
of a ONEOK-Southwest merger" (SAC at ¶ 31);
- 13 (2) Dubai knew about Southern Union's merger offer in early February,
14 1999 (SAC at ¶ 41);
- 15 (3) "On more than one occasion between February 3, 1999 and February
16 21, 1999, Maffie told Southern Union's President and COO, Peter
Kelley, that Southwest was prepared to conduct a thorough evaluation
of the Southern Union offer" (Id. at ¶ 50);
- 17 (4) On February 11 and 15, 1999, Irvin, Rose, Brummett (of ONEOK) and
18 Maffie engaged in telephone discussions (Id. at ¶ 54);
- 19 (5) During the week of February 16, 1999, representatives of ONEOK
20 participated in meetings with Rose, and subsequently, Rose, Dubai,
Gaberino, and Maffie talked about Irvin's desire to prevent a proxy
21 fight or bidding war between ONEOK and Southern Union (Id. at ¶
56);
- 22 (6) On January 12, 1999, Rose and Irvin met at an Arizona club with
23 Maffie, Zub, and ONEOK representatives Dubai and Brummett, and
at the meeting, they "discussed the ONEOK-Southwest merger and
strategies for regulatory approval" (Id. at ¶ 76);
- 24 (7) Irvin stated to Brummett that it would not be in the shareholders'
25 interest for there to be a bidding war (Id. at ¶ 83);
- 26 (8) "By fraudulently inducing Southern Union to sign the Agreement,
27 defendants ensured that a 'proxy fight' would not take place" (Id. at ¶
56);
- 28 (9) "ONEOK and Rose (and on information and belief, Irvin as well) knew
that Southern Union had been fraudulently induced into signing an

1 Agreement that prevented any proxy fight for Southwest" (Id. at ¶ 84);
2 and

3 (10) "ONEOK saved hundreds [of] millions of dollars in that it did not need
4 to best the higher Southern Union offer" (Id. at ¶ 186).

5 The Court finds that these allegations do not support an inference that ONEOK,
6 Dubai, or Gaberino were engaged in a conspiracy to fraudulently induce Southern Union
7 to enter into the Agreement. Rather, these allegations support the following inferences: that
8 ONEOK wanted to consummate a merger between itself and Southwest; that ONEOK knew
9 it was Irvin's desire to prevent a bidding war; that ONEOK knew (apparently after the fact)
10 that Southern Union "had been fraudulently induced" into signing the Agreement; and that
11 ONEOK stood to gain significantly if a merger were consummated on its terms.

12 Southern Union does not allege any specific facts from which the inference may be
13 drawn that ONEOK, Dubai, or Gaberino implicitly or tacitly agreed that Southern Union
14 should be fraudulently induced to enter into the Agreement. See Alfus, 745 F. Supp. at
15 1521; In re Sunset Bay Associates, 944 F.2d at 1517; Roberts, 670 F. Supp. at 1484.
16 Southern Union has also failed to allege specific facts from which the inference may be
17 drawn that ONEOK, Dubai, or Gaberino knew that Southwest and Maffie planned to
18 fraudulently induce Southern Union to sign the agreement, that they concurred in such a
19 plan, or that they intended to aid in the commission of the alleged fraudulent inducement.
20 See Kidron, 47 Cal. Rptr. 2d at 758; In re Sunrise Technologies Sec. Litig., No. C-92-
21 0948TEH, 1992 WL 359636 at *7. The Court will dismiss Count Three as to ONEOK,
22 Dubai¹⁵, and Gaberino.

23 **c. Irvin and Rose**

24 As to Irvin and Rose, the SAC alleges in pertinent part:

25 (1) "Throughout the first and second quarters of 1999, Rose spoke
26 regularly with ONEOK officials . . . for the purpose of, on information

27 ¹⁵ Still outstanding is Dubai's Motion to Dismiss for lack of personal jurisdiction,
28 which the Second R&R recommends be denied because this issue was previously resolved
by the Court on September 8, 2000, and Dubai was ordered not to renew this argument. The
Court will adopt this aspect of the Second R&R.

- 1 and belief,¹⁶ discussing the ONEOK-Southwest merger" (SAC at ¶ 73);
- 2 (2) On January 12, 1999, Rose and Irvin met at an Arizona club with
- 3 Maffie, Zub, and ONEOK representatives, and at the meeting, they
- 4 "discussed the ONEOK-Southwest merger and strategies for regulatory
- 5 approval" (Id. at ¶ 76);
- 6 (3) At that meeting, Rose advised ONEOK how to obtain regulatory
- 7 approval, and Irvin allegedly "stated that everything Southwest or
- 8 ONEOK wanted from him was to 'go through' Rose" (Id.);
- 9 (4) As of February 15, 1999, Rose was aware of Southern Union's offer
- 10 and advised Dubay of ONEOK to hire Dioguardi (Id. at ¶ 79);
- 11 (5) On February 15, 1999, Rose traveled to Oklahoma to conduct "due
- 12 diligence," but he never produced a due diligence report, and on
- 13 information and belief,¹⁷ Rose was "preparing materials for defendants'
- 14 scheme to corrupt and mislead both regulatory officials and the
- 15 Southwest Board" (Id. at ¶¶ 79-80);
- 16 (6) On February 11 and 15, 1999, Irvin, Rose, Brummett (of ONEOK) and
- 17 Maffie engaged in telephone discussions (Id. at ¶ 54);
- 18 (7) During the week of February 16, 1999, Rose met with Kneale (the
- 19 Vice President-Chief Financial Officer and Treasurer of ONEOK) and
- 20 counsel for ONEOK (Id. at ¶ 56)
- 21 (8) "At or about the time of Southern Union's signing of the Agreement,"
- 22 Rose, Dubay, Gaberino, and Maffie talked about Irvin's desire to
- 23 prevent a proxy fight or bidding war between ONEOK and Southern
- 24 Union (Id.); and
- 25 (9) "ONEOK and Rose (and on information and belief,¹⁸ Irvin as well)
- 26 knew that Southern Union had been fraudulently induced into signing
- 27 an Agreement that prevented any proxy fight for Southwest" (Id. at ¶
- 28 84).

21 ¹⁶ Although allegations based upon information and belief may satisfy Rule 9(b) if

22 they allege matters "peculiarly within the opposing party's knowledge[.]" the allegations

23 must be "accompanied by a statement of the facts upon which the belief is founded." Wool,

24 818 F.2d at 1439. The Court finds that the allegations contained in the SAC support

25 Southern Union's information and belief with respect to this allegation.

26 ¹⁷ This allegation does not satisfy Rule 9(b). See Wool, 818 F.2d at 1439. Southern

27 Union has not alleged sufficient facts from which the Court may infer that the purpose of

28 Rose's trip was iniquitous. See id.

¹⁸ Southern Union fails to proffer specific facts which would support a reasonable

inference that Irvin also knew that Southern Union had been (allegedly) fraudulently induced

to enter into the Agreement. See Wool, 818 F.2d at 1439.

1 The Court finds that these allegations do not support an inference that Irvin or Rose
2 conspired with Southwest and Maffie to fraudulently induce Southern Union to enter into
3 the Agreement. Rather, these allegations support only the following inferences: that Rose
4 and Irvin desired that a merger be consummated between ONEOK and Southwest, not
5 between Southern Union and Southwest; that once Irvin became aware of Southern Union's
6 offer, he wanted to prevent a bidding war; that Rose advised ONEOK to hire Dioguardi after
7 it learned about Southern Union's merger offer; that Rose intended to mislead regulatory
8 officials and the Southwest Board; and that Rose, and perhaps Irvin, knew that Southern
9 Union had been fraudulently induced.

10 Southern Union does not allege specific facts from which the inference may be drawn
11 that either Irvin or Rose agreed, implicitly or tacitly, that Southern Union should be
12 fraudulently induced to sign the Agreement. See Alfus, 745 F. Supp. at 1521; In re Sunset
13 Bay Associates, 944 F.2d at 1517; Roberts, 670 F. Supp. at 1484. Nor do Southern Union's
14 allegations contain specific facts from which the inference may be drawn that Irvin or Rose
15 knew that Southwest and Maffie planned to fraudulently induce Southern Union to sign the
16 agreement, that they concurred in such a plan, and that they intended to aid in the plan's
17 implementation. See Kidron, 47 Cal. Rptr. 2d at 758; See In re Sunrise Technologies Sec.
18 Litig., No. C-92-0948TEH, 1992 WL 359636 at *7. The Court will dismiss Count Three
19 with respect to both Irvin and Rose.

20 **d. Hartley**

21 With respect to Hartley, the Second R&R finds that Count Three fails to state a claim.
22 The Second R&R concludes that the SAC's allegations against Hartley allege conduct which
23 occurred after the execution and alleged breach of the Agreement. Accordingly, it finds that
24 *Hartley cannot be liable for fraudulent inducement*, because Hartley did not allegedly do or
25 say anything to induce Southern Union to enter the Agreement, and because Hartley cannot
26 be liable for torts which occurred before he joined the conspiracy. Southern Union has not
27 filed an objection to this determination, but rather, Southern Union states that it "respectfully
28 disagrees with this portion of the Report[.]" (Southern Union's Consolidated Memorandum

1 of Law in Response to Defendants' Objections to the Second R&R at 2 n.2).

2 The Court finds that the Second R&R has correctly determined that Southern Union
3 has failed to state a claim against Hartley. The alleged fraudulent inducement began and
4 was completed on February 21, 1999, and Hartley's alleged statements were made on April
5 5 and 6, 1999.¹⁹ See In re Estate of Blake, 723 N.Y.S.2d at 564 (fraudulent inducement
6 completed at the time the contract was executed); Coffee, 30 F. Supp. 2d at 1380 (same);
7 Burton, 368 F. Supp. at 557 (same); Kidron, 47 Cal. Rptr. 2d at 765 (no coconspirator
8 liability if an individual joins the conspiracy after the wrongful act is completed). The Court
9 will therefore adopt the Second R&R on this issue.

10 **B. Fed. R. Civ. P. 13(a)**

11 Because the Court finds that Count Three should be dismissed with respect to
12 Dioguardi, Zub, ONEOK, Dubai, Gaberino, Irvin, Rose, and Hartley, the only Defendants
13 remaining with respect to Count Three are Southwest and Maffie. The Court must now
14 determine whether Count Three constitutes a compulsory counterclaim in the Nevada action
15 (CV-00-0452-PHX-ROS). Pursuant to Fed. R. Civ. P. 13(a):

16 (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any
17 claim which at the time of serving the pleading the pleader has against any
18 opposing party, if it arises out of the transaction or occurrence that is the
19 subject matter of the opposing party's claim and does not require for its
20 adjudication the presence of third parties of whom the court cannot acquire
jurisdiction. But the pleader need not state the claim if (1) at the time the
action was commenced the claim was the subject of another pending action,

21 ¹⁹ For these same reasons, the SAC fails to allege a claim of fraudulent inducement
22 against Dioguardi. Although Rose allegedly suggested during the week of February 16,
23 1999, that ONEOK retain Dioguardi, Gaberino is not alleged to have called Dioguardi until
24 February 25, 1999, four days after Southern Union signed the Agreement. (SAC at ¶¶ 56,
25 87). Furthermore, the SAC alleges, upon information and belief, that "Dioguardi was
26 retained for the express purpose of assisting ONEOK and the defendants in editing and
27 presenting the March 8 letter to the Southwest Board." (Id. at ¶ 99). There are no allegations
28 that Dioguardi agreed, implicitly or tacitly, that Southern Union should be fraudulently
induced to sign the Agreement, or that he knew about a plan to fraudulently induce Southern
Union. See Alfus, 745 F. Supp. at 1521; In re Sunset Bay Associates, 944 F.2d at 1517;
Roberts, 670 F. Supp. at 1484; Kidron, 47 Cal. Rptr. 2d at 758; See In re Sunrise
Technologies Sec. Litig., No. C-92-0948TEH, 1992 WL 359636 at *7.

1 or (2) the opposing party brought suit upon the claim by attachment or other
2 process by which the court did not acquire jurisdiction to render a personal
3 judgment on that claim, and the pleader is not stating any counterclaim under
4 this Rule 13.

5 (Emphasis added).

6 Both Southwest and Maffie are domiciled in Nevada, and were domiciled there at the
7 time the Nevada action commenced, and the Nevada court could have exercised general
8 personal jurisdiction over both of them. See Helicopteros Nacionales de Columbia v. Hall,
9 466 U.S. 408, 414-15 (1984) (Helicopteros); Panavision Int'l, L.P. v. Toeppen, 141 F.3d
10 1316, 1320 (9th Cir. 1998) ("General jurisdiction exists when a defendant is domiciled in
11 the forum state or his activities there are 'substantial' or 'continuous and systematic.'") (citing
12 Helicopteros); see also 28 U.S.C. § 1332(c)(1) (corporation is a citizen of any state where
13 it keeps a principal place of business); Maffie's Supplemental Brief at 3 (stating that he
14 resides in Las Vegas, Nevada, and that Southwest's principal place of business is in Nevada).
15 Accordingly, the Court will identify the fraudulent inducement claim asserted in the SAC
16 as a compulsory counterclaim in the Nevada action.²⁰

17 C. Choice of Law

18 Southern Union argues that under Arizona's choice of law principles, California law
19 applies to the fraudulent inducement claim. However, both Southwest and Maffie argue that
20 under Nevada's choice of law principles, Nevada law applies to this claim.

21 Because the Court has determined that the fraudulent inducement claim is a
22 compulsory counterclaim in the Nevada action, and because the Nevada court's jurisdiction
23 is premised upon the diversity of the parties, the Court must apply the choice-of-law rules
24 of Nevada. See Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000) ("court must
25 apply the choice-of-law rules of the state in which it sits."); Van Dusen v. Barrack, 376 U.S.
26 612, 639 (1964)(when a diversity action is transferred under § 1404(a) from one district

27 ²⁰ Because Count Three is a compulsory counterclaim in the Nevada action, it is not
28 a compulsory counterclaim in the Oklahoma action (CV-00-1812-PHX-ROS). See Fed. R.
Civ. P. 13(a)(1).

1 court to another, "the transferee district court must be obligated to apply the state law that
2 would have been applied if there had been no change of venue."); KL Group v. Case, Kay
3 & Lynch, 829 F.2d 909, 915 (9th Cir. 1987) (California choice-of-law rules were applied
4 after case was transferred under § 1404(a) from the Central District of California to the
5 District of Hawaii).

6 Fraudulent inducement is a tort claim. See, e.g. O'Keefe v. Grenke, 170 Ariz. 460,
7 472, 825 P.2d 985, 997 (App. 1992); Southwell-Gray v. Jones, No. CIV. 300CV1539-H,
8 2001 WL 493165 at *3 (N.D. Tex. May 4, 2001) (applying Texas law); In re Naturally
9 Beautiful Nails, Inc., Bankruptcy Nos. 95-321-8P1, 95-802-8P1, Adversary Nos. 98-727,
10 99-160, 2001 WL 455830 at*4 (Bankr. M.D. Fla. Apr. 17, 2001) (applying Florida law);
11 Smith v. Allstate Ins. Co., No. Civ. 01-166, 2001 WL 339442 at *1 (S.D. Cal. Apr. 3, 2001)
12 (applying California law); Holland, 311 P.2d at 797 (applying Oklahoma law). The question
13 thus presented is whether this claim should be governed by the law selected by the parties
14 in their Agreement.²¹

15 Ordinarily, tort claims are not governed by a forum selection clause. Sutter Home
16 Winery, Inc. v. Vintage Selections, Ltd., 971 F.2d 401, 407 (9th Cir. 1992). However, the
17 Restatement (Second) of Conflict of Laws § 201 provides that "[t]he effect of
18 misrepresentation, duress, undue influence and mistake upon a contract is determined by the
19 law selected by application of the rules of §§ 187-188." The courts of Nevada have neither
20 adopted nor rejected § 201, but the Ninth Circuit has held that § 201 provides "the
21 traditional view" and it will apply the choice of law provision in a contract to fraud claims
22 "unless the choice of law provision itself was obtained by a misrepresentation[.]" Sparling
23 v. Hoffman Const. Co., Inc., 864 F.2d 635, 641 (9th Cir. 1988) (giving effect to forum

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26 ²¹ The Agreement contains the following forum selection provision: "The Agreement
27 shall be governed and construed in accordance with the laws of the State of California
28 applicable to contracts made, executed, delivered and performed wholly within the State of
California without regard to the conflict of laws principles thereof." (ONEOK's Motion to
Dismiss, Exh. B).

1 selection clause on claim of fraud even though the Washington courts had not yet adopted
2 or rejected § 201).

3 Citing Motenko v. MGM Dist., Inc., 921 P.2d 933 (Nev. 1996), Southwest argues
4 that the courts of Nevada would not adopt § 201. The Motenko court declined to adopt
5 outright the "significant relationship" approach of § 145 of the Restatement (Second) of
6 Conflict of Laws. 921 P.2d at 934-35. However, it did not address the applicability of §§
7 201 or 187 of the Restatement to tort claims which require an interpretation of a contract for
8 their resolution.

9 Like the Ninth Circuit did in Sparling, this Court assumes that the courts of Nevada
10 would adopt "the traditional view." This result is consistent with Nevada law, because
11 Nevada has previously relied in part upon § 187 of the Restatement (Second) of Conflict of
12 Laws. See Ferdie Sievers and Lake Tahoe Land Co., Inc. v. Diversified Mortgage Investors,
13 603 P.2d 270, 273 (Nev. 1979); see also Insurance Co. of North America v. Hilton Hotels
14 U.S.A., Inc., 908 F. Supp. 809, 814 (D. Nev. 1995) (adopting § 188 of the Restatement
15 (Second) of Conflict of Laws and applying Nevada law where the parties failed to point to
16 an actual conflict between Nevada and California law), aff'd, 110 F.3d 715 (9th Cir. 1997).

17 Accordingly, the Court must apply § 187 of the Restatement (Second) of Conflict of
18 Laws to determine whether the forum selection clause should be enforced with respect to
19 the fraudulent inducement claim. See § 201, Illustration 1 (the choice of law provision must
20 still be effective under § 187 before it is applied). Section 187 provides:

21 (1) The law of the state chosen by the parties to govern their contractual rights
22 and duties will be applied if the particular issue is one which the parties could
have resolved by an explicit provision in their agreement directed to that issue.

23 (2) The law of the state chosen by the parties to govern their contractual rights
24 and duties will be applied, even if the particular issue is one which the parties
25 could not have resolved by an explicit provision in their agreement directed
to that issue, unless either

26 (a) the chosen state has no substantial relationship to the parties or the
27 transaction and there is no other reasonable basis for the parties choice,
or

28 (b) application of the law of the chosen state would be contrary to a
fundamental policy of a state which has a materially greater interest

1 than the chosen state in the determination of the particular issue and
2 which, under the rule of § 188, would be the state of the applicable law
in the absence of an effective choice of law by the parties.

3 (3) In the absence of a contrary indication of intention, the reference is to the
4 local law of the state of the chosen law.

5 (Emphasis added). Southern Union contends that § 187(2) governs the analysis, because
6 fraudulent inducement is not something which could have been resolved by an explicit
7 provision in the contract.²²

8 The Court concludes that § 187(2) governs whether the forum selection clause should
9 be given effect with respect to the fraudulent inducement claim. As Southern Union
10 correctly points out, fraudulent inducement is an issue "which the parties could not have
11 resolved by an explicit provision in their agreement[.]" § 187(2). It is therefore incumbent
12 upon the Court to determine whether California "has no substantial relationship to the parties
13 or the transaction and there is no other reasonable basis for the parties choice," or whether
14 it "would be contrary to a fundamental policy of a state which has a materially greater
15 interest than" California if the Court applies California law in the determination of the
16 fraudulent inducement claim. § 187(2)(a) & (b).

17 Southern Union asserts that there is a substantial relationship between the parties and
18 California, because Southwest is incorporated in California. Southern Union also argues
19 that there are no public policy concerns, because "the law of California on fraudulent
20 inducement and conspiracy is very similar, if not identical, to the law of Arizona."²³
21 (Southern Union's Supplemental Brief at 6).

22 The Court finds that there is a substantial relationship between the parties and
23 California, because Southwest is incorporated in California. See § 187, comment f (the

24 ²² ONEOK, which is no longer a Defendant in Count Three, also submits that §
25 187(2) is the applicable provision.

26 ²³ Southern Union has made the assumption that Arizona's choice of law rules rather
27 than the rules of Nevada will be applied. Nevertheless, the Court will consider the similarity
28 between California and Nevada law on fraudulent inducement when determining whether
there are public policy concerns with the application of California law.

1 substantial relationship requirement is met "where one of the parties is domiciled or has his
2 principal place of business" in the selected state); Consul Limited v. Solide Enterprises, Inc.,
3 802 F.2d 1143, 1147 (9th Cir. 1986) (the substantial relationship test is met if one of the
4 parties resides in the selected state); see also Ciena Corp. v. Jarrard, 203 F.3d 312, 324 (4th
5 Cir. 2000) (substantial relationship test is met where one of the parties is incorporated in the
6 selected state).²⁴ Moreover, the SAC alleges that Southwest is in the business of distributing
7 natural gas to customers in California. (SAC at ¶ 8).

8 The Court also finds that it would not contravene public policy to apply California's
9 fraudulent inducement law, because it is substantially similar to the law of fraudulent
10 inducement in Nevada. See Barnettler v. Reno Air, 956 P.2d 1382, 1386 (Nev. 1998);
11 Lazar, 49 Cal. Rptr. 2d at 381. The elements of a claim of fraudulent inducement in Nevada
12 are as follows:

- 13 (1) A false representation made by the defendant; (2) defendant's knowledge
14 or belief that its representation was false or that defendant has an insufficient
15 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.

16 Barnettler, 956 P.2d at 1386. Likewise, promissory fraud in California, as a "subspecies"
17 of fraud, is composed of the following elements:

- 18 (a) misrepresentation (false representation, concealment, or nondisclosure);
- 19 (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce
reliance; (d) justifiable reliance; and (e) resulting damage.

20 Lazar, 49 Cal. Rptr. 2d at 380-81. Southwest does not argue that there are any differences
21 between California and Nevada law with respect to fraudulent inducement claims.

22 The Court therefore finds that California law applies to the fraudulent inducement
23 claim. This result is also supported by the Ninth Circuit's decision in Manetti-Farrow, Inc.

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25
26 ²⁴ Maffie argues that the place of incorporation alone does not satisfy the "substantial
27 relationship" test. However, Maffie subsequently asserts that for purposes of § 145 of the
28 Restatement (Second) of Conflict of Laws, a court may appropriately consider the place of
incorporation when determining which state has the "most significant relationship to the
occurrence and the parties." (Maffie's Supplemental Response Brief at 5).

1 v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988), which held that a forum selection
2 clause will apply to tort claims if a resolution of the tort claims depends on an interpretation
3 of the contract.²⁵ See also Magellan Real Estate Investment Trust v. Losch, 109 F. Supp.
4 2d 1144, 1160 (D. Ariz. 2000) (a "choice of law provision applies only to the extent that part
5 of the wrongdoing alleged in the tort claims requires construction" of the contract); Fuku-
6 Bonsai, Inc. v. E.I. Du Pont de Nemours and Co., 187 F.3d 1031, 1033 n.3 (9th Cir. 1999)
7 ("Under the Restatement, the law selected by the parties in a choice of law provision governs
8 a claim of fraudulent inducement to contract."). Because the alleged fraudulent inducement
9 is based upon promises Southwest allegedly made with respect to its performance on the
10 Agreement, the fraudulent inducement claim "cannot be adjudicated without analyzing
11 whether the parties were in compliance with the [Agreement]" and the claim is within the
12 scope of the forum selection clause. Manetti-Farrow, Inc., 858 F.2d at 514. Furthermore,
13 Southern Union does not contend that the forum selection clause was obtained by a
14 misrepresentation. See Sparling, 864 F.2d at 641. The Court therefore concludes that
15 California law applies to the fraudulent inducement claim.

16 **D. Parol Evidence Rule**

17 Southwest asserts that the parol evidence rule precludes evidence of the statements
18 made by Southwest to Southern Union.²⁶ Specifically, Southwest contends that the
19 Agreement is fully integrated and it did not impose obligations beyond those stated therein,
20 and in particular, it did not require Southwest to negotiate with Southern Union.

21 Southern Union argues that the Agreement required Southwest to evaluate Southern
22 Union's merger offer, and contends that because information was actually exchanged
23 pursuant to the Agreement, Southwest was obligated to conduct such an evaluation.
24 Southern Union also opines that the parol evidence rule would not bar it from introducing

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26 ²⁵ However, in that diversity action, the Manetti-Farrow court did not address the
applicability of the Restatement (Second) of Conflict of Laws.

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28 ²⁶ This argument was originally raised by ONEOK in its Motion to Dismiss, but it was
subsequently raised by Southwest.

1 evidence that Southwest promised to evaluate the merger offer in good faith.

2 The parol evidence rule is statutorily prescribed by the California Code of Civil
3 Procedure § 1856, which provides:

4 (a) Terms set forth in a writing intended by the parties as a final expression
5 of their agreement with respect to such terms as are included therein may not
6 be contradicted by evidence of any prior agreement or of a contemporaneous
7 oral agreement.

8 (b) The terms set forth in a writing described in subdivision (a) may be
9 explained or supplemented by evidence of consistent additional terms unless
10 the writing is intended also as a complete and exclusive statement of the terms
11 of the agreement.

12 (c) The terms set forth in a writing described in subdivision (a) may be
13 explained or supplemented by course of dealing or usage of trade or by course
14 of performance.

15 (d) The court shall determine whether the writing is intended by the parties
16 as a final expression of their agreement with respect to such terms as are
17 included therein and whether the writing is intended also as a complete and
18 exclusive statement of the terms of the agreement.

19 (e) Where a mistake or imperfection of the writing is put in issue by the
20 pleadings, this section does not exclude evidence relevant to that issue.

21 (f) Where the validity of the agreement is the fact in dispute, this section
22 does not exclude evidence relevant to that issue.

23 (g) This section does not exclude other evidence of the circumstances
24 under which the agreement was made or to which it relates, as defined in
25 Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the
26 terms of the agreement, or to establish illegality or fraud.

27 (h) As used in this section, the term agreement includes deeds and wills,
28 as well as contracts between parties.

(Emphasis added).

The rule is, of course, well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be conclusively presumed that the writing contains the whole of the agreement between the parties, and that it is a complete memorial of the same, and parol evidence of prior, contemporaneous or subsequent conversations or representations or statements will not be received for the purpose of adding to or varying the written instrument.

Ferguson v. Koch, 268 P. 342, 344 (Cal. 1928). According to Ferguson, "Parol evidence is always admissible to prove fraud, and it was never intended that the parol-evidence rule should be used as a shield to prevent the proof of fraud." Id. at 345; but see Continental

1 Airlines, Inc. v. McDonnell Douglas Corp., 264 Cal. Rptr. 779, 796 (1989) (criticizing
2 pronouncement that "parol evidence is always admissible to prove fraud" as incorrect).

3 The fraud exception to the parol evidence rule "is not applicable where 'promissory
4 fraud' is alleged, unless the false promise is independent of or consistent with the written
5 instrument." Id. at 795. The fraud exception "does not apply where . . . parol evidence is
6 offered to show a fraudulent promise directly at variance with the terms of the written
7 agreement." Id. at 796; see also Banco Do Brasil, S.A. v. Latian, Inc., 285 Cal. Rptr. 870,
8 891-92 (1991), cert. denied, 504 U.S. 986 (1992); Alling v. Universal Manufacturing Corp.,
9 7 Cal. Rptr. 2d 718, 734 (1992); Bank of America Nat. Trust & Savings Ass'n v.
10 Pendergrass, 48 P.2d 659, 661 (Cal. 1935) ("[T]he rule which permits parol evidence of
11 fraud to establish the invalidity of the instrument is that it must tend to establish some
12 independent fact or representation, some fraud in the procurement of the instrument, or some
13 breach of confidence concerning its use, and not a promise directly at variance with the
14 promise of the writing."); see also Price v. Wells Fargo Bank, 261 Cal. Rptr. 735, 745-47
15 (1989) (following Pendergrass); Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.,
16 971 F.2d 272, 281 (9th Cir. 1992) (relying on Price and Pendergrass), cert. denied, 507 U.S.
17 914 (1993).

18 In this case, Southern Union alleges that it was fraudulently induced to enter into the
19 Agreement. Accordingly, the question presented is whether Southwest's allegedly fraudulent
20 promise is directly at variance with the terms of the Agreement. See Continental Airlines,
21 Inc., 264 Cal. Rptr. at 796.

22 Southern Union argues that the following promise was made to induce it to enter into
23 the Agreement: Southwest promised to evaluate Southern Union's offer "thoroughly" and
24 in "good faith." (Southern Union's Response at 52). Southern Union contends that the
25 promise made by Southwest is not directly at variance with the terms of the Agreement,
26 because the Agreement provides that Southwest will evaluate Southern Union's offer. The
27 relevant language of the Agreement is as follows:

28 Each of Southwest Gas Corporation, a California corporation ("Southwest")

1 and Southern Union Company, a Delaware corporation ("SUG"), may furnish
2 certain confidential non-public information to the other party hereto in order
3 to assist such other party in making an evaluation of SUG's proposal to
4 Southwest dated February 1, 1999 (the "Proposal"). . . .

5 Each Receiving Party hereby agrees to use the Evaluation Material solely for
6 the purpose of evaluating the Proposal and agrees to keep such information
7 confidential, to treat it with the same degree of care it uses in protecting its
8 own confidential and proprietary data, not to use it in any way detrimental to
9 the Disclosing Party and not to disclose it, directly or indirectly, in any manner
10 whatsoever, provided, however, that (i) any of such information may be
11 disclosed by a Receiving Party to those of its Representatives who need to
12 know such information for the purpose of evaluating the Proposal

13 Each party hereto agrees that unless and until a definitive agreement with
14 respect to the Proposal referred to in the first paragraph of the Agreement has
15 been executed and delivered, neither it nor the other party hereto will be under
16 any legal obligation of any kind whatsoever with respect to such a transaction
17 by virtue of the Agreement or any written or oral expression with respect to
18 such a transaction by any of its Representatives or by any Representatives
19 thereof except, in the case of the Agreement, for the matters specifically
20 agreed to herein.

21 (Emphasis added).

22 The Second R&R finds that no showing was made "to establish how evidence of
23 Southwest's representations that it would negotiate in good faith and evaluate Southern
24 Union's proposal would vary or contradict the obligations of the Agreement to exchange and
25 keep confidential certain information relating to that proposal." (Second R&R at 20).
26 Because the Agreement clearly contemplates by its express terms that Southwest would
27 evaluate Southern Union's proposal,²⁷ and because implicit in every contract is the obligation
28 to perform in good faith,²⁸ see Old Republic Ins. Co. v. FSR Brokerage, Inc., 95 Cal. Rptr.

29 ²⁷ At the hearing on the Motions before the Special Master, counsel for ONEOK
30 conceded that one purpose of the Agreement was to evaluate Southern Union's offer.
31 (Reporter's Transcript of 1/12/01 at 42).

32 ²⁸ In its Objections to the Second R&R, Southwest cites several cases with respect to
33 this issue: Foley v. Interactive Data Corp., 254 Cal. Rptr. 211 (1988); Reid v. State Farm
34 Mut. Auto. Ins. Co., 218 Cal. Rptr. 913 (1985); Racine & Laramie, Ltd., Inc. v. Dept. of
35 Parks and Rec., 14 Cal. Rptr. 2d 335 (1992). None of these cases negate a determination that
36 the covenant of good faith and fair dealing applies to all contracts. See Foley, 254 Cal. Rptr.
37 at 227 (holding that the covenant generally cannot form the basis of an independent tort
38 claim); see Reid, 218 Cal. Rptr. at 920 (court can determine whether the covenant was

1 2d 583, 595-96 (App. 2000), the Court will adopt the Second R&R with respect to the parol
2 evidence argument.²⁹

3 **III. Counts Seven and Eight**

4 **A. Fed. R. Civ. P. 13(a)**

5 On June 5, 2001, the Court held that Counts Seven and Eight³⁰ do not constitute
6 compulsory counterclaims in the Nevada action. The Court also declined to resolve whether
7 these two counts constitute compulsory counterclaims in the first Oklahoma action (CV-00-
8 1812-PHX-ROS), and it directed further briefing on this issue. ONEOK now argues that
9 Counts Seven and Eight are compulsory counterclaims which should have been asserted in
10 the first Oklahoma action pursuant to Fed. R. Civ. P. 13(a).

11 Pursuant to Rule 13(a), Counts Seven and Eight are compulsory counterclaims in the
12 first Oklahoma action if they "[arise] out of the transaction or occurrence that is the subject
13 matter" of ONEOK's claims in the first Oklahoma action, and if they do, if the Oklahoma
14 court could have acquired jurisdiction over third parties who are "required" for the claims'
15 adjudication. See Fed. R. Civ. P. 13(a). As explained below, the Court finds that Count
16 Seven is a compulsory counterclaim in the first Oklahoma action, but only with respect to
17 ONEOK. See id. However, because the Court finds that Count Eight should be dismissed

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19 breached as a matter of law); Racine & Laramie, Ltd., Inc., 14 Cal. Rptr. 2d at 340 (there is
20 no breach of the covenant where a party to a contract declines to renew the contract).

21 ²⁹ The Court does not hereby render any determination regarding whether the duty to
22 conduct a good faith evaluation required Southwest to accept Southern Union's merger offer
23 after conducting such an evaluation. See Vestar Development II, LLC v. General Dynamics
24 Corp., 249 F.3d 958, 962 (9th Cir. 2001) (holding that damages were too speculative where
25 there was a breach of an agreement to negotiate); see also Crane Co. v. Coltec Industries,
26 Inc., 171 F.3d 733, 736 (2d Cir. 1999) (a confidentiality agreement did not constitute an
27 agreement to merge or a commitment to reach such an agreement). However, the fact that
28 regulatory approval was required before a merger could occur does not nullify the tortious
interference claims. See SCEcorp v. Superior Court of San Diego County, 4 Cal. Rptr. 2d
372, 375 (App. 1992).

³⁰ Counts Seven and Eight are asserted against "all Defendants except Southwest,
Hartley, and Zub," namely: ONEOK, Maffie, Dubay, Irvin, Rose, Gaberino, and Dioguardi.

1 as to ONEOK, it cannot constitute a compulsory counterclaim. See id.

2 **1. Count Seven**

3 **a. Same Transaction or Occurrence**

4 As this Court previously held, a "liberal 'logical relationship' test" is applied in order
5 to determine whether a claim "arises out of the same transaction or occurrence" such that it
6 is a compulsory counterclaim. Pochiro v. Prudential Ins. Co. of America, 827 F.2d 1246,
7 1249 (9th Cir. 1987). Under this test, the Court must analyze "whether the essential facts of
8 the various claims are so logically connected that considerations of judicial economy and
9 fairness dictate that all the issues be resolved in one lawsuit." Id. (cite and quotes omitted).
10 The "transaction or occurrence" language is to be read broadly when resolving whether a
11 claim is a compulsory counterclaim. Id. at 1252.

12 Southern Union argues that the decisions in Hydranautics v. FilmTec Corp., 70 F.3d
13 533 (9th Cir. 1995), Hart v. Clayton-Parker and Associates, Inc., 869 F. Supp. 774 (D. Ariz.
14 1994), and Gilldorn Savings Ass'n v. Commerce Savings Ass'n, 804 F.2d 390 (7th Cir.
15 1986), support a determination that Count Seven is not a compulsory counterclaim. The
16 Court finds that all three of those cases are distinguishable from the case at bar. In
17 Hydranautics, 70 F.3d at 536, the Ninth Circuit held that a claim for predatory patent
18 litigation, which it analogized to a claim of malicious prosecution, was not a compulsory
19 counterclaim in an infringement suit. The Ninth Circuit reached this result because claims
20 for predatory patent litigation are often severed and tried after the resolution of infringement
21 issues, the evidence for such claims "may differ considerably," and there are "different
22 appellate paths [which] Congress has provided for those two kinds of claims." Id. In Hart,
23 869 F. Supp. at 777, the district court held that a cause of action for collection on a debt did
24 not constitute a compulsory counterclaim in an action under the Fair Debt Collection
25 Practices Act, because:

26 a cause of action on the debt arises out of events different from the cause of
27 action for abuse in collecting. The former centers on evidence regarding the
28 existence of a contract, the failure to perform on a contract, or other
circumstances leading to the creation of a valid debt. The latter centers on
evidence regarding the improprieties and transgressions, as defined by the

1 FDCPA, in the procedures used to collect the debt, regardless of the debt's
2 validity.

3 Id. (quoting Ayres v. National Credit Management Corp., Civ. A. No. 90-5535, 1991 WL
4 66845 at *4 (E.D. Pa. Apr. 25, 1991)). In Gilldorn Saving Ass'n, 804 F.2d at 396, the
5 Seventh Circuit found that a claim arising out of the exchange of preferred stock, where the
6 exchange occurred one year after a stock purchase agreement was entered into and was
7 "totally unrelated" to that agreement, was not a compulsory counterclaim in an action where
8 the claims arose solely out of the sale of a mortgage company pursuant to the stock purchase
9 agreement.

10 The original complaint filed in the first Oklahoma action asserts four claims for relief
11 against Southern Union: breach of contract, intentional interference with contract,
12 intentional interference with prospective economic advantage, and declaratory judgment.
13 In particular, ONEOK claims that Southern Union breached the Agreement and that
14 ONEOK was a third-party beneficiary of the Agreement. ONEOK's intentional interference
15 claims are based upon Southern Union's alleged interference with the merger agreement and
16 business relationship between ONEOK and Southwest.

17 Whereas ONEOK's claims are premised upon allegations that Southern Union
18 engaged in conduct which prevented a merger between ONEOK and Southwest, Southern
19 Union's claims against ONEOK are premised upon allegations that ONEOK engaged in
20 conduct which prevented a merger between Southern Union and Southwest. Based upon
21 the unequivocal similarities between these claims and the fact that the resolution of either
22 claim necessitates a determination regarding which party would have merged with
23 Southwest, the Court finds that Count Seven arises out of the same transaction or occurrence
24 as ONEOK's claims in the Oklahoma action, because the essential facts underlying Count
25 Seven and ONEOK's claims "are so logically connected that considerations of judicial
26 economy and fairness dictate that all the issues be resolved in one lawsuit." See Pochiro, 827
27 F.2d at 1249.
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b. Parties "Required" for Adjudication

ONEOK avers that the Oklahoma court could not obtain general or specific personal jurisdiction over Zub,³¹ Irvin, or Rose. ONEOK argues, however, that the only party "required" for the adjudication of Count Seven³² is ONEOK, because Southern Union can obtain complete relief on this count from ONEOK alone. Accordingly, ONEOK claims that it is irrelevant whether the Oklahoma court could obtain jurisdiction over the remaining Defendants named in Count Seven.

Some courts have held that a party is not "required for adjudication" for purposes of Rule 13(a) unless that party is a necessary party pursuant to Rule 19(a). See Harley-Davidson Motor Co. v. Chrome Specialties, Inc., 173 F.R.D. 250, 253 (E.D. Wisc. 1997) (finding that co-conspirators were not "required" for adjudication because it is well-established that co-conspirators are not "indispensable" parties under Rule 19(a)); Grumman Systems Support Corp. v. Data General Corp., 125 F.R.D. 160, 165 (N.D. Cal. 1988); see also Asset Allocation and Management Co. v. Western Employers Ins. Co., 892 F.2d 566, 574 (7th Cir. 1989) (counterclaims are permissive as to defendants over whom the court cannot acquire jurisdiction unless their presence is "required"); Owens v. Blue Tee Corp., 177 F.R.D. 673 (M.D. Ala. 1998) (same). "[T]he compulsory counterclaim rule could be easily defeated by the naming of additional counterclaim defendants" who are not required for adjudication. See Asset Allocation and Management Co., 892 F.2d at 574; see also Grumman Systems Support Corp., 125 F.R.D. at 165 (noting that "it would be easy to 'end-run' Rule 13(a)" to find that a counterclaim is not compulsory where additional, unnecessary defendants are added).

Citing only Super Natural Distributors, Inc. v. Muscletech Research and Development, No. 00-C-1361, 2001 WL 561200 (E.D. Wisc. May 22, 2001), and Blue Dane Simmental Corp. v. American Simmental Ass'n, 952 F. Supp. 1399, 1408-09 (D. Neb.

³¹ Zub is not named as a Defendant in Count Seven.

³² ONEOK asserts this same argument with respect to Count Eight.

1 1997), Southern Union urges the Court not to interpret the word "require" in Rule 13(a) as
2 synonymous with Rule 19. Neither of those two cases, however, addresses the meaning that
3 should be ascribed to the word "require" in Rule 13(a). The Court finds the reasoning in
4 Harley-Davidson Motor Co., Grumman Systems Support Corp., Owens, and Asset
5 Allocation and Management Co. persuasive, and concludes that a party is "required" for
6 purposes of Rule 13(a) if the party is an indispensable party pursuant to Rule 19.

7 "To determine whether a party is 'indispensable' under Fed. R. Civ. P. 19, a court
8 must undertake a two-part analysis: it must first determine if an absent party is 'necessary'
9 to the suit; then if, as here, the party cannot be joined, the court must determine whether the
10 party is 'indispensable[.]'" Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).
11 The burden is on the party seeking to establish the indispensability of another party. Id.
12 Under Rule 19(a), a party is necessary if:

- 13 (1) in the person's absence complete relief cannot be accorded among those
- 14 already parties, or (2) the person claims an interest relating to the subject of
- 15 the action and is so situated that the disposition of the action in the person's
- 16 absence may (i) as a practical matter impair or impede the person's ability to
- protect that interest or (ii) leave any of the persons already parties subject to
- a substantial risk of incurring double, multiple, or otherwise inconsistent
- obligations by reason of the claimed interest.

17 If a party satisfies either of the two prongs set forth in Rule 19(a), it is a necessary party.
18 Yellowstone County v. Pease, 96 F.3d 1169, 1172 (9th Cir. 1996), cert. denied, 520 U.S.
19 1209 (1997). The complete relief factor "is concerned with consummate rather than partial
20 or hollow relief as to those already parties, and with precluding multiple lawsuits on the
21 same cause of action." Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043
22 (9th Cir.), cert. denied, 464 U.S. 849 (1983). If meaningful relief can be fashioned in a
23 party's absence, the first prong of Rule 19(a) is not met. Id. The second prong cannot be
24 met unless the party has a "legally protected interest in the suit." Makah Indian Tribe, 910
25 F.2d at 558. "This interest must be more than a financial stake, and more than speculation
26 about a future event." Id. (cites omitted).

27 It is ONEOK's contention that "Southern Union could have obtained complete relief
28 from ONEOK alone in the Oklahoma action[.]" (ONEOK's Supplemental Brief at 14).

1 Southern Union does not address this contention in its Supplemental Response Brief. The
2 Court finds that complete relief can be accorded to Southern Union against ONEOK,
3 because the absence of Irvin or Rose in the Oklahoma action will not "preclude the [Court]
4 from being able to fashion meaningful relief as between the parties[.]" See Northrop Corp.,
5 705 F.2d at 1043.

6 The primary purpose of determining whether Count Seven is a counterclaim in the
7 Oklahoma action is to determine the proper alignment of Southern Union vis-a-vis ONEOK.
8 It will not result in a dismissal of this claim against Irvin or Rose. Assuming that Irvin and
9 Rose can claim a legally protected interest in the subject of this action, there is no "risk of
10 incurring double, multiple, or otherwise inconsistent obligations[.]" because the Court
11 anticipates that the tortious interference with a business relationship claim against Irvin and
12 Rose will be tried together with the tortious interference with a business relationship claim
13 against ONEOK. See Rule 19(a)(2). For this same reason, Irvin and Rose's ability to protect
14 their interests will not be impaired or impeded. See Rule 19(a)(1).

15 The Court therefore finds that Irvin and Rose are not necessary, and thus not
16 indispensable, for the adjudication of Count Seven. Accordingly, Count Seven is a
17 compulsory counterclaim in the Oklahoma action with respect to ONEOK, and it will be
18 identified as such. See Fed. R. Civ. P. 13(a). However, the Court also finds that Count
19 Seven is a direct claim in the Arizona action against Irvin, Rose, Dubay, and Gaberino.

20 **2. Count Eight**

21 The Court further finds, however, that Count Eight is not a compulsory counterclaim
22 because it should be dismissed with respect to ONEOK, and counterclaims are only
23 compulsory against an "opposing party[.]" See Fed. R. Civ. P. 13(a). In its Motion to
24 Dismiss, ONEOK argued for the dismissal of Count Eight because ONEOK was a third-
25 party beneficiary of the Agreement. Southern Union responded that ONEOK is not immune
26 from liability on Count Eight because ONEOK is not a third-party beneficiary to the
27 Agreement, in whole or in part. Southern Union alternatively contends that if ONEOK is
28 a third party beneficiary to certain provisions in the Agreement, it is not a third party

1 beneficiary as to the entire agreement.

2 "The intended third-party beneficiary of a contract, legally authorized to enforce the
3 contract, cannot be held liable for tortious interference since he is not a stranger to the
4 contract." Atlanta Market Center Management Co. v. McLane, 503 S.E.2d 278, 283 (Ga.
5 1998); see also Payne v. Pennzoil Corp., 138 Ariz. 52, 57, 672 P.2d 1322, 1327 (App. 1983)
6 (for a plaintiff to succeed on a claim of intentional interference with contractual relations
7 against a defendant, "[t]he contract must be one between the plaintiff and a third party.");
8 Barrow v. Arizona Board of Regents, 158 Ariz. 71, 78, 761 P.2d 145, 152 (App. 1988)
9 (where a defendant acts "for the company" and the contract is between the company and the
10 plaintiff, the defendant is considered to be the company and thus is not capable of interfering
11 with the contract); but see Butler v. Sears Roebuck & Co., No. C 92-1842 FMS, 1992 WL
12 364779 at *4 (N.D. Cal. Oct. 20, 1992) (where the defendant was acting to protect his own
13 interests rather than those of the company, he may be liable for tortious interference).

14 To support the proposition that ONEOK could be a third-party beneficiary to part,
15 but not all, of the Agreement, Southern Union cites J. Calamari & J. Perillo, The Law of
16 Contracts, 649 (4th Ed. 1998), which states: "It is possible that, in a contract where the
17 promisor makes a number of promises, the third party beneficiary may be the beneficiary of
18 one promise but not of another." Although the Court agrees that with respect to some
19 contracts, a third party may be a beneficiary with respect to only part of a contract, that is not
20 the case here.

21 In an Order filed May 11, 1999, the United States District Court for the Northern
22 District of Oklahoma held that ONEOK is a third-party beneficiary of the Agreement and
23 that ONEOK was entitled to enforce that agreement under California law. (ONEOK's Reply
24 in Support of Motion to Dismiss, Exh. A at 8-9).³³ The Oklahoma court found "that the
25 parties clearly intended to benefit ONEOK at the time the [Agreement] was executed." (Id.

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27 ³³ Southern Union submits, without any legal argument, that the Oklahoma court
28 *erred in rendering that decision*. It is not clear whether Southern Union ever sought
reconsideration of the Oklahoma court's ruling.

1 at 8). It further stated that "it is clear that the parties to the [Agreement] contemplated that
2 participation in the process described in both the [Agreement] and the ONEOK/Southwest
3 Gas Letter Agreement would benefit ONEOK because under certain circumstances future
4 hostile activities would be prohibited." (Id.).

5 The Second R&R finds that though ONEOK was a third-party beneficiary of the
6 Agreement to the extent that ONEOK could enforce an injunction under the Agreement,
7 ONEOK was not a third-party beneficiary with respect to the provisions of the Agreement
8 which required Southwest to evaluate Southern Union's offer, because ONEOK could not
9 secure a benefit from those provisions. The Court declines to adopt this finding. The
10 District of Oklahoma has determined that ONEOK was a third-party beneficiary to the
11 Agreement, and it drew no distinction between aspects of the agreement for which ONEOK
12 was not a third-party beneficiary and those aspects of the agreement for which it was.
13 Moreover, ONEOK benefitted from the Agreement as a whole. Although the Agreement
14 obligated Southwest to evaluate Southern Union's merger offer, ONEOK benefitted from
15 the entire agreement because its terms prevented Southern Union from bringing its merger
16 offer to Southwest's shareholders. In fact, the "no shopping" provision in the merger
17 agreement between ONEOK and Southwest required that such an agreement be entered in
18 the event that other companies offered to merge with Southwest. (ONEOK's Reply, Exh.
19 B at 26, § 5.2(a)). As a result, ONEOK cannot be liable for its alleged intentional
20 interference with the Agreement.³⁴ See McLane, 503 S.E.2d at 283.

21 **B. Maffie**

22 Maffie argues that he cannot be liable for tortious interference under either Count
23 Seven or Eight, because at all times, he was acting as the President, CEO, and a Director on
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26 ³⁴ This determination does not extend to Count Seven. ONEOK's status as a third
27 party beneficiary shields it from liability only with respect to a claim of tortious interference
28 with a contractual relationship, not to a claim of tortious interference with a business
relationship, because the business relationship allegedly interfered with extends far beyond
the Agreement.

1 the Southwest Board. For reasons which follow, the Court agrees.

2 Where an officer is acting on behalf of the corporation, he is for all practical purposes
3 "the corporation." See Payne, 138 Ariz. at 57, 672 P.2d at 1327. As a result, such an officer
4 can no more interfere with the corporation's contracts than he can interfere with the
5 corporation's business relationships — they are his own. See id.; see also King v. Sioux City
6 Radiological Group, P.C., 985 F. Supp. 869, 882 (N.D. Iowa 1997) ("the tort of tortious
7 interference with a business advantage is premised on the acts of a stranger to the
8 relationship interfering with relations between the plaintiff and another"); Salit v. Ruden,
9 McClosky, Smith, Schuster & Russell, P.A., 742 So.2d 381, 386 (Fla. App. 1999) (tortious
10 interference claim requires the interfering party to be a stranger to the business relationship);
11 Hannon v. Avis Rent A Car System, Inc., 107 F. Supp. 2d 1256, 1262 (D. Mont. 2000)
12 (same); First Trust Nat'l Ass'n v. Moses & Singer, No. 99 Civ. 1947 JSM, 2000 WL
13 1093054 at *7 n.5 (S.D.N.Y. Aug. 4, 2000) (same).

14 "However, when a defendant is both an agent of a party to the contract and the person
15 accused of tortious interference, a plaintiff may assert the cause of action by additionally
16 proving the defendant acted so contrary to the principal's interests that his actions could only
17 have been motivated by personal interests." Dalrymple v. University of Texas System, 949
18 S.W.2d 395, 405 (Tex. App. 1997) (emphasis added) (citing Holloway v. Skinner, 898
19 S.W.2d 793, 796 (Tex. 1995)), rev'd in part on other grounds sub nom Brewerton v.
20 Dalrymple, 997 S.W.2d 212 (Tex. 1999); see also Butler, No. C 92-1842 FMS, 1992 WL
21 364779 at *4 (inquiry is whether the employee "was acting to protect his own interests rather
22 than that of the entity"); Murray v. St. Michael's College, 667 A.2d 294, 300 (Vt. 1995)
23 ("[T]he tort is applicable in limited situations against other employees or officers of the
24 plaintiff's employer, the key factor being whether the defendants were acting outside the
25 scope of their employment to further their own interests.") (emphasis added). "Proof of
26 mixed motives is insufficient to create liability." Benningfield v. City of Houston, 157 F.3d
27 369, 379 (5th Cir. 1998) (applying Texas law) (citing Holloway, 898 S.W.2d at 796), cert.
28 denied, 526 U.S. 1065 (1999). Moreover, "the mere existence of a personal stake in the

1 outcome, especially when any personal benefit is derivative of the improved financial
2 condition of the corporation or consists of the continued entitlement to draw a salary, cannot
3 alone constitute proof that the defendant committed an act of willful or intentional
4 interference." Holloway, 898 S.W.2d at 796.

5 The Second R&R finds that even though Maffie was the President, CEO, and a
6 Director on the Southwest Board, Maffie was not a party to the contract because he was
7 allegedly acting in his own interest to protect a \$3 million consulting contract with ONEOK.
8 The Court declines to adopt this finding, because at the hearing before the Special Master,
9 Southern Union conceded that Maffie would have been paid the same \$3 million consulting
10 fee if there had been a merger between Southern Union and Southwest. (Reporter's
11 Transcript of 1/12/01 at 131). The \$3 million therefore could not have motivated Maffie to
12 prefer a ONEOK-Southwest merger over a Southern Union-Southwest merger, see
13 Dalrymple, 949 S.W.2d at 405, and it was not necessary for him to favor a ONEOK-
14 Southwest merger in order to protect his interest in the \$3 million consulting fee, see Butler,
15 No. C 92-1842 FMS, 1992 WL 364779 at *4. Accordingly, because Maffie was the
16 President, CEO, and a Director on the Southwest Board, for all practical purposes he was
17 a party to the contract. See Payne, 138 Ariz. at 57, 672 P.2d at 1327; Barrow, 158 Ariz. at
18 71, 761 P.2d at 152. The Court will therefore dismiss Counts Seven and Eight with respect
19 to Maffie.

20 C. Choice of Law

21 Southern Union, Rose, Irvin, and ONEOK argue that Arizona law applies to Counts
22 Seven and Eight.³⁵ Because there is no disagreement on the applicable law among the
23 parties remaining with respect to these counts, the Court will cede to the parties and find that
24 Arizona law applies to the tortious interference claims.

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28 ³⁵ Dioguardi also argues that Arizona law applies to these claims. Only Maffie, who
is no longer a Defendant with respect to these claims, argues that Nevada law should apply.

1 **D. Failure to Allege Business Relationship or Expectancy**

2 ONEOK argues that Count Seven should be dismissed because Southern Union has
3 failed to allege facts sufficient to establish that a business relationship or expectancy ever
4 existed. Irvin has also moved to dismiss Count Seven on this basis.

5 The elements of a claim of intentional interference with a business relationship are
6 as follows:

- 7 (1) The existence of valid contractual relationship or business expectancy;
- 8 (2) knowledge of the relationship or expectancy on the part of the
9 interferor;
- 10 (3) intentional interference inducing or causing a breach or termination of
11 the relationship or expectancy; and
- 12 (4) resultant damage to the party whose relationship or expectancy has
13 been disrupted.

14 Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau of Maricopa
15 County, Inc., 130 Ariz. 523, 530, 637 P.2d 733, 740 (1981) (internal quotes and cites
16 omitted).³⁶ "In addition to proving the four elements stated in Antwerp, supra, the plaintiff
17 bringing a tortious interference action must show that the defendant acted improperly."
18 Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 388, 710 P.2d 1025, 1043
19 (1985). To determine whether a particular action is improper, seven factors are considered:

- 20 (a) the nature of the actor's conduct,
- 21 (b) the actor's motive,
- 22 (c) the interests of the other with which the actor's conduct interferes,
- 23 (d) the interests sought to be advanced by the actor,
- 24 (e) the social interests in protecting the freedom of action of the actor and
25 the contractual interests of the other,
- 26 (f) the proximity or remoteness of the actor's conduct to the interference
27 and

28 ³⁶ The elements of a claim of tortious interference with contract are virtually identical
to those of tortious interference with a business relationship, but they are separate claims.
See Bruce Church, Inc. v. United Farm Workers of America, AFL-CIO, 169 Ariz. 22, 34,
816 P.2d 919, 931 (App. 1991).

1 (g) the relations between the parties.

2 Id. at 387, 710 P.2d at 1042 (citing the Restatement (2d) of Torts § 767).

3 The Second R&R finds that a business relationship was established by the
4 Agreement. It also finds that the SAC alleges "in great detail" the actions which allegedly
5 thwarted Southern Union's attempts to acquire Southwest. The Second R&R does not
6 contain any specific citations to the SAC to support this finding. However, the Court has
7 thoroughly reviewed the SAC and finds that Southern Union has adequately alleged that a
8 business relationship existed between itself and Southwest. (See SAC at ¶¶ 310-12).

9 **E. Causation**

10 Irvin argues that because Southwest never intended to accept Southern Union's offer,
11 Irvin could not have caused a breach of the Agreement or the termination of any business
12 expectancy. The Second R&R finds that Southern Union has alleged sufficient facts to
13 establish causation.

14 To prevail on a claim of tortious interference with a business relationship "when the
15 relationship is prospective, there must be a reasonable assurance that the contract or
16 relationship would have been entered into[.]" Megawatt Corp. v. Tucson Elec. Power Co.,
17 CIV No. 86-173 PGR TUC, 1989 WL 95602 *8 (D. Ariz. May 26, 1989). In the context
18 of a "bidding war," a plaintiff "must be able to prove with a reasonable assurance that it
19 would have prevailed in the bidding . . . but for the interference[.]" Id. "[T]he existence of
20 regulatory approval as a condition precedent to completion of [a] merger" does not prevent
21 a plaintiff from prevailing on a cause of action for tortious interference. SCEcorp, 4 Cal.
22 Rptr. 2d at 375.

23 In this case, Southern Union alleges that "[w]ithout defendants' wrongful acts . . . the
24 Southwest Board would have had no choice but to accept the financially superior Southern
25 Union offer and Southern Union's offer would have been approved by Southwest's
26 shareholders." (SAC at ¶ 313). Southern Union also alleges that "Southwest Director Judd
27 has testified that all things being equal, the higher offer should have prevailed." (Id.). The
28 Court finds that these allegations are sufficient to support a finding on causation, and the

1 Court will adopt the Second R&R on this issue.

2 **F. Noerr-Pennington**

3 Rose claims immunity under the Noerr-Pennington doctrine on the tort claims.³⁷ In
4 his Motion to Dismiss, Irvin claims he is entitled to immunity under the Noerr-Pennington
5 doctrine with respect to the federal RICO claim. Irvin did not claim he was entitled to
6 immunity under that doctrine with respect to any of the state tort claims. However, in his
7 Objections to the Second R&R, Irvin asserts that he is entitled to immunity under that
8 doctrine to the extent that Southern Union's allegations are based on his lobbying activities.

9 The Noerr-Pennington doctrine is premised upon two separate Supreme Court
10 decisions: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S.
11 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). In
12 Noerr, the Supreme Court held that the Sherman Act was not violated by a railroad's
13 campaign to obtain governmental action in the railroad's favor despite the anticompetitive
14 motivation of the railroad. 365 U.S. at 136-140. Likewise, Pennington held that "Noerr
15 shields from the Sherman Act a concerted effort to influence public officials regardless of
16 intent of purpose." 381 U.S. at 670. The Noerr-Pennington doctrine does not extend to
17 attempts to influence private associations. Allied Tube & Conduit Corp. v. Indian Head,
18 Inc., 486 U.S. 492, 501-02 (1988). However, it does protect government officials acting in
19 their official capacities, and the doctrine has been extended to claims not involving antitrust
20 law. Manistee Town Center v. City of Glendale, 227 F.3d 1090, 1093-94 (9th Cir. 2000).

21 The Noerr Court noted that "[t]here may be situations in which a publicity campaign,
22 ostensibly directed toward influencing governmental action, is a mere sham to cover what
23 is actually nothing more than an attempt to interfere directly with the business relationships
24 of a competitor and the application of the Sherman Act would be justified." Noerr, 365 U.S.
25 at 144. Under the "sham exception" to the doctrine, a plaintiff must allege "the existence of

26
27 ³⁷ Rose did not make Noerr-Pennington arguments of his own, but rather, joined in
28 Dioguardi's Motion to Dismiss the tortious interference claims based on the Noerr-
Pennington doctrine.

1 a publicity campaign" and that the campaigning defendant "was not genuinely seeking
2 official action[.]" Boone v. Redevelopment Agency of the City of San Jose, 841 F.2d 886,
3 895 (9th Cir.), cert. denied, 488 U.S. 965 (1988). A conspiracy to prevent a company from
4 obtaining meaningful access to an adjudicative body falls within the "sham exception." See
5 Hospital Building Co. v. Trustees of Rex Hospital, 691 F.2d 678, 687 (4th Cir. 1982), cert.
6 denied, 464 U.S. 890 (1983). In addition, "illegal or fraudulent lobbying activities that
7 would normally be immunized by Noerr-Pennington lose their protection if they occur in a
8 judicial or quasi-judicial setting[.]" Boone, 841 F.2d at 895-96; see also Rodime PLC v.
9 Seagate Technology, Inc., 174 F.3d 1294, 1307 (Fed. Cir. 1999) ("Noerr-Pennington does
10 not protect conduct which is otherwise unlawful."), cert. denied, 528 U.S. 1115 (2000); In
11 re American Continental Corp./Lincoln Savings and Loan Securities Litigation, 794 F.
12 Supp. 1424, 1448 (D. Ariz. 1992) ("Noerr-Pennington does not . . . protect those who use
13 the legislative or judicial process as an anti-competitive weapon, with no expectation of
14 obtaining legitimate government action.").

15 The Second R&R finds that neither Irvin nor Rose are entitled to immunity under the
16 Noerr-Pennington doctrine. Specifically, it finds that Southern Union's allegations that Irvin
17 and Rose lied to and defrauded regulatory officials in Nevada, California, and Arizona,
18 would constitute unlawful conduct which is not protected by the Noerr-Pennington doctrine.
19 It further finds that the actions allegedly taken by Rose and Irvin would fall within the "sham
20 exception" to the Noerr-Pennington doctrine.³⁸

21 The Court finds that Southern Union's allegations, if true, would not permit Irvin or
22 Rose to be shielded from liability pursuant to the "sham exception." The SAC alleges in
23 pertinent part:

- 24 (1) Defendants arranged for Irvin and Rose "to lobby for the ONEOK-
25 Southwest merger" (SAC at ¶ 63);

26
27 ³⁸ In his Objections to the Second R&R, Rose appears to concede that Southern
28 Union's allegations, if true, support a determination that Rose's conduct falls within the
"sham exception."

- 1 (2) Irvin and Rose met with "utility commissioners from California and
2 Nevada in an attempt to influence their review process against a
3 Southern Union-Southwest merger" (Id.);
- 4 (3) A scheme was developed whereby "Irvin and Rose, putatively
5 representing the interests of the ACC, would contact the relevant
6 regulatory bodies in California and Nevada to lobby for the ONEOK-
7 Southwest deal" (Id. at ¶ 94);
- 8 (4) Irvin and Rose traveled to the San Francisco offices of the CPUC
9 (California Public Utilities Commission) on March 16, 1999, to
10 persuade CPUC officials to favor a ONEOK-Southwest deal (Id. at ¶
11 101);
- 12 (5) Irvin and Rose met with PUCN (Public Utilities Commission of
13 Nevada) officials (Id. at ¶ 125);
- 14 (6) Irvin told PUCN's chairwoman "that California and Nevada should be
15 concerned about the Southwest merger[,] and Rose told the
16 chairwoman that ONEOK was the superior merger candidate (Id. at ¶
17 128);
- 18 (7) Irvin and Rose falsely purported to be representing the ACC's interests
19 (Id. at ¶ 105);
- 20 (8) Irvin and Rose "prepared and presented a letter to the Southwest Board
21 that conveyed the false message that commissioners from all three
22 states had concerns about whether the Southern Union offer could win
23 regulatory approval" (SAC at ¶ 63);
- 24 (9) The letter falsely implied that a merger with Southern Union would be
25 more expensive, more difficult to finance, and less likely to obtain
26 regulatory approval (Id. at ¶ 113);
- 27 (10) The trip to the CPUC was for the purpose of making misleading and
28 false statements to CPUC officials about Southern Union's capital
structure and the potential for higher rates for Southwest customers (Id.
at ¶ 103);
- (11) Irvin and Rose presented the NPUC chairwoman with the March 8
letter and falsely stated that the letter had been approved by the CPUC
President (Id. at ¶ 130); and
- (12) The ACC and the CPUC are "quasi-judicial bodies" (Id. at ¶¶ 66, 109).

This conduct in which Southern Union alleges Rose and Irvin purportedly engaged falls within the "sham exception" to the Noerr-Pennington doctrine, because the allegations would support a finding that Irvin and Rose attempted to prevent Southern Union from obtaining meaningful review by the regulatory bodies of California, Nevada, and Arizona. See Hospital Building Co., 691 F.2d at 687. Moreover, to the extent Southern Union claims

1 that Irvin and Rose attempted to defraud the Southwest Board, a non-governmental entity,
2 such conduct is not protected by the Noerr-Pennington doctrine. See Allied Tube & Conduit
3 Corp., 486 U.S. at 501-02. The Court will therefore adopt the Second R&R's determinations
4 with respect to the Noerr-Pennington doctrine.

5 **IV. Contract Claims Between Southwest and Southern Union**

6 Southwest generally asserts that California law applies to "all contract claims"
7 without specifically identifying the actions containing those claims or the claims themselves.
8 However, Southern Union does not argue that California law should not apply to the
9 contract claims, presumably because it is Southern Union's position that the forum selection
10 clause should be enforced with respect to the fraudulent inducement claim. Accordingly,
11 the Court finds that California law applies to all contract claims between Southwest and
12 Southern Union.³⁹

13 **V. Tort Claims Between Southwest and Southern Union**

14 Southwest generally asserts that Nevada law should apply to all of its tort claims
15 against Southern Union, including tort claims which Southwest is prosecuting in an action
16 it filed in Arizona, CV-00-119-PHX-ROS ("second Arizona action")⁴⁰ nearly nine months
17 after Southwest commenced the Nevada action. Southwest specifically asserts that Nevada
18 law should apply to its claims for misappropriation of trade secrets,⁴¹ intentional interference
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20 ³⁹ Irvin, who is not a party to the Agreement, also contends that California law
21 governs these three claims.

22 ⁴⁰ The only tort claims asserted against Southern Union in the second Arizona action
23 are Counts Eight and Nine. Count Eight alleges intentional interference with contract, and
24 Count Nine alleges misappropriation of trade secrets. Other claims against Southern Union
25 in the second Arizona action are for breach of contract (Count Six), breach of the covenant
26 of good faith and fair dealing (Count Seven), and declaratory relief regarding the rights and
27 liabilities of the parties on the contract (Count Ten). Southwest asserts that Count Seven is
28 a contract claim. The second Arizona action contains claims against both Southern Union
and ONEOK.

⁴¹ Count Three in the Nevada action, and Count Nine in the second Arizona action,
allege misappropriation of trade secrets.

1 with contract,⁴² and intentional interference with prospective economic advantage.⁴³

2 In its Supplemental Response Brief, Southern Union asserts that Southwest's
3 argument that Nevada's choice of law applies to the tort claims asserted in the second
4 Arizona action is "incredible." (Southern Union's Supplemental Response Brief at 3 n.2).
5 However, Southern Union then fails to assert whether Arizona, Nevada, or California law
6 should apply to Southwest's tort claims, and it fails to identify any differences between the
7 law of those states on the alleged torts.⁴⁴ Because Southern Union has not disputed
8 Southwest's assertion that Nevada law should apply to Southwest's tort claims asserted in
9 the Nevada action, the Court will apply Nevada law to those claims.

10 However, to the extent Southwest has asserted tort claims in the second Arizona
11 action which are identical to claims it initially asserted in the Nevada action, the Court
12 questions whether the claims in the second Arizona action are duplicative and should be
13 dismissed.⁴⁵ See Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623-27 (9th Cir.
14 1991) (*duplicative actions may in some cases be dismissed under the "first to file rule"*).
15 Because of this lingering question, the Court will not resolve the choice of law issues with
16 respect to the tort claims asserted by Southwest against Southern Union in the second
17 Arizona action.

18 _____
19 ⁴² Count Four in the Nevada action, and Count Eight in the second Arizona action,
20 allege that Southern Union intentionally interfered with the merger agreement between
ONEOK and Southwest.

21 ⁴³ Count Five in the Nevada action alleges that Southern Union intentionally
22 interfered with Southwest's prospective economic advantage.

23 ⁴⁴ Rather, in the context of Southern Union's own tortious interference claims, it
24 asserts that "neither Southwest nor Maffie has identified any conflict in the laws of Arizona
25 and Nevada with respect to the tortious interference claims." (Southern Union's
Supplemental Response Brief at 7).

26 ⁴⁵ This same question is raised with respect to the contract claims asserted by
27 Southwest against Southern Union in the second Arizona action, but it is not as critical
28 because Southwest and Southern Union agree that the choice of law provision in the
Agreement should be given effect.

1 **VI. Claims Between Southwest and ONEOK**

2 Southwest asserts that ONEOK's claims against Southwest in the second Oklahoma
3 action, CV-00-1775-PHX-ROS, should be considered compulsory counterclaims in the
4 second Arizona action. Although ONEOK was first to file its action, which at that time
5 contained only a claim for declaratory relief, Southwest argues that ONEOK's action was
6 an anticipatory filing aimed at avoiding the Arizona court. Applying Arizona's choice of law
7 principles, Southwest concludes that Oklahoma law applies to the contract claims, based
8 upon a forum selection clause, and Arizona law applies to Southwest's tort claims.

9 ONEOK has moved to strike these arguments because they were not ordered by the
10 Court. Alternatively, it argues that Southwest's claims in the second Arizona action should
11 have been asserted as compulsory counterclaims in the second Oklahoma action, and that
12 all claims between Southwest and ONEOK are governed by Oklahoma law.

13 The Court will deny ONEOK's Motion to Strike. Although the Court did not order
14 that the choice of law issues be briefed with respect to the claims between Southwest and
15 ONEOK, the Court finds that those claims involve critical, complex choice of law issues
16 which must be resolved in order for this consolidated action to proceed in an efficient
17 manner.

18 **A. First to File Rule**

19 The "first to file rule" is a well-established rule "which allows a district court to
20 transfer, stay, or dismiss an action when a similar complaint has already been filed in another
21 federal court[.]" Alltrade, Inc., 946 F.2d at 623. Premised upon the doctrine of federal
22 comity, the rule "was developed to 'serve[] the purpose of promoting efficiency well and
23 should not be disregarded lightly.'" Id. at 625 (quoting Church of Scientology of California
24 v. United States Dept. of the Army, 611 F.2d 738, 750 (9th Cir. 1979)) (alteration in
25 original); Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982).
26 The rule "may be invoked 'when a complaint involving the same parties and issues has
27 already been filed in another district.'" Alltrade, Inc., 946 F.2d at 625 (quoting Pacesetter
28 Systems, Inc., 678 F.2d at 95). The rule "is not a rigid or inflexible rule to be mechanically

1 applied, but rather is to be applied with a view to the dictates of sound judicial
2 administration." Pacesetter Systems, Inc., 678 F.2d at 95.

3 The first to file rule "is usually disregarded where the competing suits were filed
4 merely days apart." Ontel Products, Inc. v. Project Strategies Corp., 899 F. Supp. 1144,
5 1153 (S.D.N.Y. 1995). Where "the difference in time of filing is so close, it is fair to treat
6 the competing actions as contemporaneously filed." Azurix Corp. v. Synagro Technologies,
7 Inc., No. C.A. 17509, 2000 WL 193117 at *3 (Del. Ch. Feb. 3, 2000) (one action filed on
8 Friday and another filed on Monday).

9 The Court concludes that for all practical purposes, the second Arizona action and
10 the second Oklahoma action were filed contemporaneously, and the first to file rule should
11 not be applied in this instance. See Azurix Corp., No. C.A. 17509, 2000 WL 193117 at *3.
12 There is no dispute that the second Oklahoma action was filed on Friday, January 21, 2000,
13 one business day prior to the filing of the second Arizona action on January 24, 2000.
14 Moreover, a primary purpose of the first to file rule, namely efficient judicial administration,
15 will not be served if the Court were to conclude that one action or the other was filed first,
16 because the second Oklahoma action was transferred to this Court pursuant to 28 U.S.C. §
17 1404(a) and consolidated with the second Arizona action. Whether or not there was a "race
18 to the courthouse" as the result of an anticipatory filing, as Southwest contends, matters very
19 little now that the actions have been consolidated.

20 **B. Fed. R. Civ. P. 13(a)**

21 Having determined that the second Arizona action was filed contemporaneously with
22 the second Oklahoma action, the Court must now resolve whether either action contains
23 claims which are compulsory counterclaims in the other. A claim is not a compulsory
24 counterclaim under Rule 13(a) if, "at the time the action was commenced the claim was the
25 subject of another pending action[.]" Fed. R. Civ. P. 13(a). Because the Court finds that the
26 actions were contemporaneously filed, the declaratory judgment claim asserted in the second
27 Oklahoma action was already the subject of the second Oklahoma action at the time the
28 second Arizona action was filed, and it therefore cannot constitute a compulsory

1 counterclaim in the second Arizona action. See id. Likewise, the claims asserted in the
2 second Arizona action were already the subject of the second Arizona action at the time the
3 second Oklahoma action was filed, and they cannot constitute compulsory counterclaims in
4 the second Oklahoma action. See id.

5 However, ONEOK amended its Complaint in the second Oklahoma action on August
6 23, 2000, to include three additional claims: two fraudulent inducement counts, and one
7 breach of contract count.⁴⁶ In these three additional counts, ONEOK alleges:

- 8 (1) Southwest failed to disclose material facts to ONEOK prior to
9 ONEOK's execution of an amended merger agreement (ONEOK's
10 Amended Complaint at ¶ 25);
- 11 (2) If Southwest had disclosed those material facts, ONEOK would not
12 have entered into the amended merger agreement (Id. at ¶ 27);
- 13 (3) As a result of Southwest's fraudulent omissions, ONEOK was damaged
14 (Id. at ¶¶ 31-32); and
- 15 (4) Southwest breached the original merger agreement in various respects
16 (Id. at ¶ 34).

17 In the second Arizona action, Southwest asserts claims against ONEOK for fraud in
18 the inducement, fraud, breach of contract, breach of the implied covenant of good faith and
19 fair dealing, and declaratory relief. Southwest specifically alleges:

- 20 (1) ONEOK fraudulently induced Southwest to enter into the amended
21 merger agreement (Southwest's Complaint at ¶¶ 81-84);
- 22 (2) ONEOK made numerous misrepresentations to Southwest and failed
23 to disclose material facts, including the involvement of Rose and Irvin
24 (Id. at ¶ 89);
- 25 (3) Southwest relied upon ONEOK's misrepresentations and
26 nondisclosures and was induced not to notify ONEOK that it was in
27 breach of the amended merger agreement (Id. at ¶ 90);
- 28 (4) ONEOK breached the amended merger agreement (Id. at ¶ 99); and
- (5) ONEOK breached the implied covenant of good faith and fair dealing
in the amended merger agreement (Id. at ¶ 108).

⁴⁶ ONEOK has asserted identical counterclaims, as well as a counterclaim for
declaratory judgment, in the second Arizona action.

1 Applying the "liberal 'logical relationship' test" prescribed by Pochiro, 827 F.2d at
2 1249, the Court finds that ONEOK's fraudulent inducement and breach of contract claims
3 in the second Oklahoma action are "so logically connected" to Southwest's claims in the
4 second Arizona action that they arise out of the same transaction or occurrence. See Fed. R.
5 Civ. P. 13(a). Because the Amended Complaint in the second Oklahoma action was filed
6 approximately seven months after the second Arizona action commenced, the Court will
7 identify Counts One, Two, and Three in the second Oklahoma action as compulsory
8 counterclaims in the second Arizona action.⁴⁷

9 **C. Choice of Law**

10 Applying Arizona's choice of law principles, Southwest argues that Oklahoma law
11 applies to all contract claims, pursuant to a forum selection clause, and Arizona law applies
12 to Southwest's tort claims. Southwest further avers in its Supplemental Response Brief that
13 Oklahoma law should apply to ONEOK's fraudulent inducement claim. ONEOK also
14 contends that Oklahoma law applies to all of the claims between Southwest and ONEOK.
15 Because ONEOK and Southwest agree that Oklahoma law governs the contract claims, the
16 Court will yield to the parties on this issue.⁴⁸

17 Southwest asserts only two tort claims against ONEOK in the second Arizona action:
18 fraudulent inducement and fraud. ONEOK has also asserted two fraudulent inducement tort
19

20 ⁴⁷ As with certain of the claims between Southern Union and Southwest, there
21 appears to be some duplicity with respect to the claims asserted in the second Oklahoma and
22 second Arizona action between Southwest and ONEOK.

23 ⁴⁸ Southwest initially contends that the forum selection clause should apply to its
24 contractual claim for breach of the implied covenant of good faith and fair dealing.
25 (Southwest's Supplemental Brief at 14). However, it then argues, without citation to legal
26 authority, that Arizona law should apply to that claim because it is a tort claim. (Id. at 15).
27 Because Southwest has not identified any differences between the law of Arizona and
28 Oklahoma with respect to such claims, the Court will apply Oklahoma law. As Southwest
points out, the remedy for a breach of this covenant "is ordinarily by action on the
contract[.]" Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 355, 813 P.2d 710,
720 (1991).

1 claims. Because the Court has determined that ONEOK's tort claims constitute compulsory
2 counterclaims in the second Arizona action, the Court will apply Arizona's choice of law
3 rules to determine which law should apply to these claims. See Abogados, 223 F.3d at 934
4 (9th Cir. 2000) ("court must apply the choice-of-law rules of the state in which it sits.").

5 As previously discussed at great length in this Order, claims of fraudulent inducement
6 are governed by § 201 of the Restatement (Second) of Conflict of Laws. Like the fraudulent
7 inducement claims, the fraud claim asserted by Southwest against ONEOK is also governed
8 by § 201, because it is based upon "[t]he effect of misrepresentation . . . upon a contract[.]"

9 Although Arizona courts have not expressly adopted § 201, the Court finds that
10 Arizona would adopt the traditional view. See Sparling, 864 F.2d at 641. This result is
11 consistent with Arizona law, because Arizona courts have repeatedly relied upon § 187 of
12 the Restatement (Second) of Conflict of Laws. See, e.g. Cardon v. Cotton Lane Holdings,
13 Inc., 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992); Landi v. Arkules, 172 Ariz. 126, 130,
14 835 P.2d 458, 462 (App. 1992).

15 The Court must therefore apply § 187 of the Restatement (Second) of Conflict of
16 Laws to determine whether the forum selection clause should be enforced with respect to
17 the fraudulent inducement and fraud claims. See § 201, Illustration 1 (the choice of law
18 provision must still be effective under § 187 before it is applied). As previously stated, this
19 analysis is governed by § 187(2). See discussion supra at 22. The Court must thus
20 determine whether Oklahoma "has no substantial relationship to the parties or the transaction
21 and there is no other reasonable basis for the parties choice," or whether it "would be
22 contrary to a fundamental policy of a state which has a materially greater interest than"
23 Oklahoma if the Court applies Oklahoma law in the determination of the fraudulent
24 inducement claims. § 187(2)(a) & (b).

25 The Court finds that Oklahoma has a substantial relationship to the parties.
26 Southwest alleges in its Complaint that ONEOK "is a corporation organized and existing
27 under the laws of the State of Oklahoma with its principal place of business in Tulsa,
28 Oklahoma[.]" and it "serves approximately 1.4 million customers in Kansas and Oklahoma."

1 (Southwest's Complaint at ¶ 2). See § 187, comment f (the substantial relationship
 2 requirement is met "where one of the parties is domiciled or has his principal place of
 3 business" in the selected state); Consul Limited, 802 F.2d at 1147 (the substantial
 4 relationship test is met if one of the parties resides in the selected state); see also Ciena
 5 Corp., 203 F.3d at 324 (substantial relationship test is met where one of the parties is
 6 incorporated in the selected state).

7 The Court further finds that it would not contravene public policy to apply Oklahoma
 8 law to these claims. Neither ONEOK nor Southwest contends that the law of Oklahoma is
 9 any different from the law of Arizona with respect to fraudulent inducement or fraud claims.
 10 The Court will therefore apply Oklahoma law to the fraudulent inducement and fraud claims
 11 asserted by Southwest and Oneok.

12 **Conclusion**

13 **A. First Arizona Action**

14 The claims remaining in the first Arizona action, and their status, are as follows:

15

Count	Claim	Against	Status	Applicable Law
16 3	Fraud in the Inducement	Southwest and Maffie	Counterclaim in Nevada	California
17 4	Breach of Contract	Southwest	Counterclaim in Nevada	California
18 5	Breach of the Covenant of Good Faith and Fair Dealing	Southwest	Counterclaim in Nevada	California
19 6	Rescission	Southwest	Counterclaim in Nevada	California
20 7	Tortious Interference with a Business Relationship	ONEOK	Counterclaim in Oklahoma	Arizona
21		Dubay, Irvin, Rose, and Gaberino	Claim in Arizona	Arizona
22 8	Tortious Interference with Contractual Relations	Dubay, Irvin, Rose, and Gaberino	Claim in Arizona	Arizona

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B. Nevada Action

1. Southwest's Claims

With respect to the Complaint filed in the Nevada action, the claims, and their status, are as follows:

Count	Claim	Against	Status	Applicable Law
1	Breach of Contract	Southern Union	Claim in Nevada	California
2	Breach of the Implied Covenant of Good Faith and Fair Dealing	Southern Union	Claim in Nevada	California
3	Misappropriation of Trade Secrets	Southern Union	Claim in Nevada	Nevada
4	Intentional Interference with Contract	Southern Union	Claim in Nevada	Nevada
5	Intentional Interference with Prospective Economic Advantage	Southern Union	Claim in Nevada	Nevada
6	Declaratory Relief (on Agreement)	Southern Union	Claim in Nevada	California
7	Unfair Competition (Under California Law)	Southern Union	Claim in Nevada	California
8	Violation of Section 14(e) of the Securities Exchange Act	Southern Union	Claim in Nevada	Federal

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1 **2. Southern Union's Claims**

2 With respect to the counterclaims asserted in the Nevada action, their status is as
 3 follows:

Counter-claim	Claim	Against	Status	Applicable Law
1	Declaratory Judgment on Fraud in the Inducement and Breach of Contract	Southwest	Counterclaim in Nevada	California
2	Declaratory Judgment of Revocation Based on the Terms of the Contract	Southwest	Counterclaim in Nevada	California
3	Rescission of Letter Agreement	Southwest	Counterclaim in Nevada	California
4	Breach of Contract	Southwest	Counterclaim in Nevada	California
5	Breach of the Covenant of Good Faith and Fair Dealing	Southwest	Counterclaim in Nevada	California
6	Mistake of Fact	Southwest	Counterclaim in Nevada	California
7	Injunctive Relief (to maintain the status quo)	Southwest	Counterclaim in Nevada	Not Briefed

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C. Second Arizona Action

1. Southwest's Claims

As for the claims asserted by Southwest in the second Arizona action, their status is as follows:

Count	Claim	Against	Status	Applicable Law
1	Fraud in the Inducement	ONEOK	Claim in Arizona	Oklahoma
2	Fraud	ONEOK	Claim in Arizona	Oklahoma
3	Breach of Contract	ONEOK	Claim in Arizona	Oklahoma
4	Breach of the Implied Covenant of Good Faith and Fair Dealing	ONEOK	Claim in Arizona	Oklahoma
5	Declaratory Relief (on the amended merger agreement)	ONEOK	Claim in Arizona	Oklahoma
6	Breach of Contract	Southern Union	Court Declines to Rule	California
7	Breach of the Covenant of Good Faith and Fair Dealing	Southern Union	Court Declines to Rule	California
8	Intentional Interference with Contract	Southern Union	Court Declines to Rule	Court Declines to Rule
9	Misappropriation of Trade Secrets	Southern Union	Court Declines to Rule	Court Declines to Rule
10	Declaratory Relief (on the contract)	Southern Union	Court Declines to Rule	California

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2. ONEOK's Claims

With respect to the counterclaims asserted in the second Arizona action, their status is as follows:

Counter-claim	Claim	Against	Status	Applicable Law
1	Fraudulent Inducement - Rescission	Southwest	Counterclaim in Arizona	Oklahoma
2	Fraudulent Inducement - Damages	Southwest	Counterclaim in Arizona	Oklahoma
3	Breach of Contract	Southwest	Counterclaim in Arizona	Oklahoma
4	Declaratory Judgment (on the merger agreements)	Southwest	Claim in Oklahoma	Oklahoma

D. First Oklahoma Action

1. ONEOK's Claims

The status of the claims asserted in the first Oklahoma action is as follows:

Count	Claim	Against	Status	Applicable Law
1	Breach of Contract	Southern Union	Claim in Oklahoma	Not Briefed
2	Intentional Interference with Contract	Southern Union	Claim in Oklahoma	Not Briefed
3	Intentional Interference with Prospective Economic Advantage	Southern Union	Claim in Oklahoma	Not Briefed
4	Declaratory Judgment	Southern Union	Claim in Oklahoma	Not Briefed

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2. Southern Union's Claims

Counter-claim	Claim	Against	Status	Applicable Law
1	Declaratory Judgment on Enforceability of Contract	ONEOK	Counterclaim in Oklahoma	Not Briefed
2	Declaratory Judgment on Interpretation of the Contract	ONEOK	Counterclaim in Oklahoma	Not Briefed

E. Second Oklahoma Action

The status of the claims⁴⁹ asserted in the second Oklahoma action is as follows:

Count	Claim	Against	Status	Applicable Law
1	Fraudulent Inducement - Rescission	Southwest	Counterclaim in Arizona	Oklahoma
2	Fraudulent Inducement - Damages	Southwest	Counterclaim in Arizona	Oklahoma
3	Breach of Contract	Southwest	Counterclaim in Arizona	Oklahoma
4	Declaratory Judgment (on the merger agreements)	Southwest	Claim in Oklahoma	Oklahoma

IT IS THEREFORE ORDERED that the First R&R (Doc. #707) is **ADOPTED**, Dioguardi's Motion to Dismiss (Doc. #377) is **GRANTED**, and all claims against Dioguardi are **DISMISSED** with prejudice. Dioguardi is hereby terminated from this action.

IT IS FURTHER ORDERED that the Second R&R (Doc. #731) is **ADOPTED IN PART**, and ONEOK's Motion to Dismiss (Doc. #352) and Irvin's Joinder (Doc. #367) are **GRANTED IN PART** and **DENIED IN PART** to the extent set forth in this Order.

⁴⁹ No counterclaims were asserted in the second Oklahoma action.

1 **IT IS FURTHER ORDERED** that Count Three in the Second Amended Complaint
2 is **DISMISSED** with prejudice as to Zub, ONEOK, Dubai, Gaberino, Rose, Irvin, and
3 Hartley, and Hartley and Zub are hereby terminated from this action. Count Three is not
4 dismissed with respect to Southwest or Maffie. Count Three is identified as a counterclaim
5 in the Nevada action, and California law shall apply to Count Three.

6 **IT IS FURTHER ORDERED** that Counts Seven and Eight are **DISMISSED** with
7 prejudice as to Maffie, and Count Eight is **DISMISSED** with prejudice as to ONEOK.
8 Count Seven is identified as a compulsory counterclaim in the Oklahoma action, but only
9 with respect to ONEOK. Count Seven is identified as a direct claim in the Arizona action
10 as to Defendants Irvin, Rose, Dubai, and Gaberino. Arizona law shall apply to Counts
11 Seven and Eight.

12 **IT IS FURTHER ORDERED** that California law shall apply to all contract claims
13 between Southwest and Southern Union.

14 **IT IS FURTHER ORDERED** that Nevada law shall apply to the tort claims asserted
15 by Southwest in the Nevada action.

16 **IT IS FURTHER ORDERED** that Oklahoma law shall apply to all claims asserted
17 by Southwest against ONEOK in the second Arizona action and to all claims asserted by
18 ONEOK against Southwest in the second Arizona and second Oklahoma actions.

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20 DATED this 30 day of July, 2001.

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25 Roslyn O. Silver
26 United States District Judge
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