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16 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

17 **IN AND FOR THE COUNTY OF WASHOE**

18 SOMERSETT OWNERS ASSOCIATION, a
19 Nevada non-profit corporation;

20 Plaintiff/Counterdefendant,

21 vs.

22 SOMERSETT COUNTRY CLUB, INC., a
23 Nevada non-profit corporation dba
24 SOMERSETT GOLF AND COUNTRY CLUB;
25 JOHN DOES I-X, inclusive; and ROE
26 CORPORATIONS I-X, inclusive;

27 Defendant/Counterclaimant.

28 **Case No.: CV20-00872**

Dept. No.: 6

**PLAINTIFF/COUNTERDEFENDANT
SOMERSETT OWNERS ASSOCIATION'S
MOTION FOR A MORE DEFINITE
STATEMENT, AND TO DISMISS**

29 Plaintiff/Counterdefendant SOMERSETT OWNERS ASSOCIATION (the "Association")
30 and moves this Court for a more definite statement of certain counterclaims asserted by
31 Defendant/Counterclaimant SOMERSETT COUNTRY CLUB, INC. ("SCC") pursuant to NRCP
32 12(e), and to dismiss pursuant to NRCP 12(b)(5). The motion is based upon all papers and exhibits
33 on file herein, the memorandum of points and authorities below, and any oral argument the Court
34 sees fit to allow at hearing on this matter.

35 ///

36 ///

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 This straightforward action ultimately will be controlled by the clear and unmistakable
4 language of agreements between the parties regarding responsibilities for repair or replacement of
5 damage to and equipment on a Reno golf course property owned by the Association and leased to
6 the golf course’s previous owners, SCC. The 220-acre parcel (the “Property”) is identified at ¶ 11
7 of the Complaint.

8 The Association purchased the Property from SCC in 2014, through a real property purchase
9 agreement (the “Purchase Agreement,”) and the parties entered into a lease agreement (the
10 “Lease”) wherein the Association, as landlord, leased back the Property to SCC as tenant.
11 Complaint ¶¶ 10, 14. As part of the Purchase Agreement, SCC agreed to warranty the Property
12 and its condition for four years and to promptly repair damage to or destruction of all or any part
13 of the Property. Complaint ¶ 12-13. As part of the Lease, SCC agreed to promptly repair, restore,
14 and replace as required to maintain, or to remedy all damage to or destruction of all or any part of
15 the Property. Complaint ¶¶ 17-18. Furthermore, SCC agreed to indemnify the Association in very
16 broad terms. Complaint ¶ 19.

17 In 2017, a slope, rockery wall, and a part surrounding a green on the golf course Property
18 partially collapsed. Complaint ¶¶ 20-21. SCC has failed to repair the damage, by its own
19 admissions. Answer, ¶ 9. Neither has it reimbursed the Association for repairs undertaken by the
20 Association pursuant to the Purchase Agreement and Lease, again by its own admissions. Answer,
21 ¶ 19. The Association filed the present suit on June 5, 2020 to vindicate its rights and seek
22 damages in the matter, making out a total of seven causes of action, including declaratory relief
23 and a prayer for specific performance. *See* Complaint, generally.¹

24 In response, SCC has asserted five causes of action as counterclaims attempting to shift
25

26 ¹ For brevity, the Association does not recite facts related to that portion of the Complaint
27 regarding the Water Facilities Agreement and the well/pump issues, Complaint ¶¶ 43-56, as the
28 counterclaims asserted by SCC do not touch upon the matters therein.

1 blame and responsibility back upon the Association, quite implausibly. The problems with the
2 vague, ambiguous, and inadequately-plead causes of action, however, render the Association
3 unable to frame a response or to perform the inquiries to which all legal claims are subject in order
4 to determine their sufficiency. Further pleading problems plague SCC’s claim for fraud, making
5 that cause of action ripe for outright dismissal.

6 **II. PERTINENT LEGAL STANDARDS**

7 **A. NRCP 12(e)**

8 NRCP 12(e) states that “a party may move for a more definite statement of a pleading to
9 which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot
10 reasonably prepare a response.” If a [counter]defendant feels that certain allegations in the
11 complaint are not sufficiently focused to permit a definite answer, the [counter]defendant may
12 move for a more definite statement under NRCP 12(e). *See Mays v. District Court*, 105 Nev. 60,
13 63, 768 P.2d 877 (1989).

14 **B. NRCP 9(b)**

15 NRCP 9(b) states that “in alleging fraud or mistake, a party must state with particularity the
16 circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a
17 person's mind may be alleged generally.” Specifically, “the circumstances that must be detailed
18 include averments to the time, the place, the identity of the parties involved, and the nature of the
19 fraud or mistake.” *Brown v. Kellar*, 97 Nev. 582, 583-584, 636 P.2d 874 (1981). “Failure of a
20 plaintiff to comply with NRCP 9(b),” however, “does not ipso facto divest a trial court of
21 jurisdiction, but only subjects the complaint to a motion for a more definite statement, or at the
22 very worst to dismissal with leave to amend.” *Britz v. Consolidated Casino Corp.*, 87 Nev. 441,
23 447, 488 P.2d 911 (1971).

24 **C. NRCP 12(b)(5)**

25 Pursuant to NRCP 12(b)(5), “[a] complaint should only be dismissed for failure to state a
26 claim if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it
27 to relief.” *Kim v. Dickinson Wright, PLLC*, 135 Nev. 161, 164, 442 P.3d 1070, 1073 (2019)
28 (quoting *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1283

1 (2017)). The court should “presume that all alleged facts in the complaint are true and draw all
2 inferences in favor of the complainant.” *Benko v. Quality Loan Serv. Corp.*, 135 Nev. 483, 486,
3 454 P.3d 1263, 1266 (2019).

4 **III. ARGUMENT**

5 **A. SCC’s First Cause Of Action For Premises Liability Is Too Vague For The** 6 **Association To Answer Properly**

7 Owing to deficiencies in its pleading, the Association is compelled to ask the Court to
8 require SCC to plead a more definite statement of its First Cause of Action. The best version of the
9 gravamen of this claim that the Association can make out is that SCC is claiming that something
10 happened somewhere near the Property, on land or space for which SCC is claiming the
11 Association is responsible, which “posed a risk” and “caused or contributed” to the collapse
12 identified in the Complaint. Counterclaim, ¶ 5-6.

13 This, SCC alleges, is somehow attributable to the Association because the Association
14 “was aware... that there were problems with that portion of the Common Area under its control
15 and responsibility situated above SCC leased Property, comprised of a slope, benching, and a
16 rockery wall, as well as the structural fill soil of certain private residences adjacent thereto...
17 constituting a dangerous condition.” Counterclaim, ¶ 5. This will not suffice. Of what “problems”
18 is SCC charging the Association with awareness? On what “portion of the Common Area” are
19 these problems supposed to have manifested themselves? Apparently the problems are or were
20 located “above SCC’s leased Property,” but the Property is enormous and geographically diverse.
21 *Id.* SCC then alleges the Association was aware of problems with “the structural fill of certain
22 private residences adjacent thereto...” *Id.* Thereto where? Which private residences? The failure to
23 locate the common areas which SCC is trying to indicate is compounded, therefore, by failure to
24 locate apparently discrete private residences “adjacent thereto” which also are alleged to have
25 contributed to some “dangerous condition.” And what dangerous condition?

26 SCC appears to be making some sort of seismological argument; very well, but such a
27 matter is obviously highly complex in nature, and to make it SCC must have better information
28 than it provides. SCC must do better that to say, essentially, “a thing happened in a place up above

1 a place, next to other places, and it was dangerous.” Surely, if SCC has particular common areas
2 and private residences in mind, it can state them. If there is or was a “dangerous condition” in
3 these location rising to the level that would shift responsibility for the damages described in the
4 Complaint from SCC to the Association, the condition or conditions can be described. Nevada is a
5 notice pleading state, to be sure, but this falls short of what is required for the Association to frame
6 a response and properly test the claims SCC is making, all of which is the Association’s
7 prerogative as a counterdefendant. The Court should require SCC to re-plead, if it can, with at
8 least the modicum of specificity that achieves the goals of notice pleading. “Nevada is a notice-
9 pleading jurisdiction and pleading should be liberally construed to allow issues that are fairly
10 noticed to the adverse party.” *Great American Insurance Co. v. General Builders, Inc.*, 113 Nev.
11 346, 353-354, 934 P.2d 257 (1997), citing *Nevada State Bank v. Jamison Family Partnership*, 106
12 Nev. 792, 801, 801 P.2d 1377, 1383 (1990).

13 This is not some matter that arose mere weeks ago and now SCC is scrambling to
14 investigate while hamstrung by the looming deadlines of litigation. The events described in the
15 Complaint occurred three years ago, and the parties have—as each side avers—conducted
16 exchanges of information complex reports, as well as attempts to negotiate, resolve, and settle the
17 dispute, even as the Association proceeded to make the necessary repairs at its own expense.
18 Complaint, ¶¶ 24-26, 29-30, 34-36, 42; Answer, ¶¶ 1, 8, 10-12. The claims made have the familiar
19 hallmarks of *post-hoc* legal inventions designed to win temporary position in a litigation. In any
20 event, either SCC has, and can plead, the information necessary to achieve the fair notice required
21 or it does not, but as stated, SCC’s First Cause of Action falls short of what is required for the
22 Association to test and respond to the allegations.

23 **B. SCC’s Second Cause Of Action For Misrepresentation Is Similarly Too Vague**
24 **For Response, Is Not Plead With The Requisite Particularity, And Fails To**
25 **Properly Allege A Duty On The Part Of The Association**

26 **1. The Second Cause of Action is does not provide fair notice of the claim**

27 Following on from the problems identified with the First Cause of Action, it does no good
28 for SCC simple to rely, in the Second Cause of Action for Misrepresentation, on references to the
“problems,” “history,” “issues,” or “defects” inadequately plead in the initial instance.

1 Counterclaim, ¶ 10-12. To what “adjacent private residences” or “adjoining areas” is SCC
2 referring, if it knows? *Id.* Clearly, SCC is trying to narrate a scenario in which it knows now
3 something or set of facts which it claims not to have known—but allegedly should have been
4 informed—before leasing the property, going so far as to claim with apparent confidence that with
5 the benefit of the knowledge it fails to identify, “SCC would not have entered into the Lease or
6 would not have made the warranties concerning the Property that it did.” Counterclaim, ¶ 11.

7 In other words, SCC is saying they have facts they have not plead, facts that would bring
8 some clarity to the gravamen of its contentions and provide the Association with fair notice of,
9 here, its alleged misrepresentation. SCC should be required to present those facts at the pleading
10 stage by virtue of a more definite statement.

11 **2. SCC’s Second Cause of Action is not plead with particularity**

12 In this instance, because the claim here sounds in fraud, pleading requirements demand
13 more from SCC than merely a slightly more expanded recitation of facts to provide basic fair
14 notice.

15 Pursuant to NRCP 9(b), “In alleging fraud or mistake, a party must state with
16 particularity the circumstances constituting fraud or mistake.” Clearly, SCC is alleging intention
17 misrepresentation by the Association—fraud, in fact. “In actions involving fraud, the
18 circumstances of the fraud are required by NRCP 9(b) to be stated with particularity. The
19 circumstances that must be detailed include averments to the time, the place, the identity of the
20 parties involved, and the nature of the fraud or mistake.” *Brown*, 583-584. Furthermore, Rule
21 9(b)'s particularity requirement ensures that the defendants are on notice of the particular
22 misconduct so that they can defend against the charge and not just deny that they have done
23 anything wrong.” *Switch, Ltd. v. Uptime Institute, LLC*, 426 F.Supp.3d 636, 642 (D.Nev.
24 2019)(internal quotations omitted).

25 Granted, here SCC is making what appears to be a claim of misrepresentation of fraud by
26 omission. That does not mean, however, that such claimants are excused from particularity
27 requirements; they are not. “Despite this distinction, claims sounding in fraud, even concealment
28 or omission claims, still must be pled with particularity.” *Stewart v. Electrolux Home Products*,

1 *Inc.*, 304 F.Supp.3d 894, 907 (E.D.Cal. 2018). *See also Kearns v. Ford Motor Co.*, 567 F.3d 1120,
2 1126 (9th Cir. 2009), (“the contention that ... nondisclosure claims need not be pleaded with
3 particularity is unavailing.”). In order to plead the circumstances of omission with specificity, a
4 party must describe the content of the omission and where the omitted information should or could
5 have been revealed. *See Stewart*, 907. This requirement is in *addition* to the particularity that could
6 be achieved under the rule apart from what difficulties a claim of omission or nondisclosure may
7 raise for other heightened pleading requirements—and those problems and deficiencies in
8 pleading ought to be announced as well, in order for the Court and the target of a cause of action
9 for fraud to test the sufficiency of the claims being made.

10 Here, SCC does not approach the level of particularity necessary to assert a claim of
11 misrepresentation. The vagueness identified in this claim above, having to do with “adjacent
12 private residences,” “adjoining areas,” “problems,” and “issues” that do not even rise to the level
13 of basic notice pleading certainly cannot serve, therefore, to meet Rule 9(b)’s heightened
14 standards. The nature of the claim is not described adequately enough for the Association to
15 frame a response or test the allegations. If SCC is going to make claims of fraud against the
16 Association, it has to bring the goods in its pleading; here, it has not, and it should be made to do
17 so, with much more specificity, if it is to continue with this cause of action. What is the
18 information the Association is alleged to have withheld? When and where was it required to
19 disclose it, if it did have that information? Which private residences, at what times? What
20 adjoining areas? SCC has a long way to go to make out a fraud claim in its counterclaims.

21 **3. SCC alleges no duty supporting its Second Cause of Action**

22 Perhaps even a bit more problematic, and the reason why this motion contains a request to
23 dismiss the Second Cause of Action rather than merely a demand for more definite statement or
24 greater particularity, is that SCC does not plead a fundamental element of its claim for
25 misrepresentation by omission. “In order for a mere omission to constitute actionable fraud, a
26 plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue.” *Nevada*
27 *Power Co. v. Monsanto Co.*, 891 F. Supp. 1406 (D. Nev. 1995), citing *Cohen v. Wedbush, Noble,*
28 *Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir.1988)

1 Here, SCC has not only failed to identify with particularity the “defects” and “dangerous
2 condition” it alleges, it has not alleged the Association had any duty to disclose these unidentified
3 conditions even if it could discern what SCC is talking about. The word *duty* appears nowhere in
4 the set of SCC’s counterclaims, much less an allegation describing any such duty in any
5 reasonable detail. There is no citation to any section of the Purchase Agreement outlining a duty
6 that the Association has failed to meet in this regard, nor any other specific allegation that such a
7 duty existed at all, or when it came into being, or when and how it was allegedly breached.

8 The Association is under no obligation to guess at the duties SCC *thinks* it has or had;
9 these facts must be plead, so they may be tested for plausibility, counted against statutes of
10 limitation, and held up generally to the legal scrutiny that is the Association’s right to undertake.
11 Pursuant to NRCP 12(b)(5), absent a properly-made allegation of a specific duty the Association is
12 claimed to have violated, SCC cannot make out a claim for misrepresentation by omission, and the
13 cause of action should be dismissed.

14 **C. SCC’s Third Cause of Action For Breach Of The Implied Covenant Is Also Too**
15 **Vague For The Association To Answer Properly**

16 The same failures to plead adequately described above also infect SCC’s Third Cause of
17 Action, and render it insufficient. Again, what are the “problems associated with private
18 residences or Common Area... adjacent to the leased Property that would impact SCC’s future use
19 or responsibility for the Property?” Counterclaim, ¶ 14. What are the “facts” that the Association
20 is alleged to have failed to disclose, under the nebulous duty SCC claims existed? If SCC knows,
21 it should be compelled to plead what it knows sufficiently to permit the Association to respond; if
22 it does not, then the claim is not properly made and should not proceed. As above, the general
23 allegations made here do not rise to the requirements of notice pleading.

24 **D. Finally, SCC’s Fifth Cause of Action For *Quantum Meruit* Is Likewise Too**
25 **Ambiguous That The Association Is Not Able To Respond To Its Allegations**

26 Lastly, and in a slightly different manner, SCC’s Fifth Cause of Action, for *quantum*
27 *meruit*, fails for the same sorts of reasons. SCC alleges that “within the last four years, the
28 Association has become indebted to SCC for materials and labor expended as a result of damage

1 to its Property caused by the work performed by the Association on its own Property...”
2 Counterclaim, ¶ 29.

3 On a pure syntactical level, this sentence is not clear enough to permit response, in that the
4 Association cannot discern the source of the “indebtedness” SCC is trying to identify, or the
5 reasons underlying the claim for damages. At the very least, it is necessary to require SCC to
6 identify the “work,” and give some pleading detail regarding “materials and labor expended.” The
7 level of generalization here simply is too great to provide the fair notice required by Nevada
8 pleading standards. Once more, simply saying “a thing happened and it’s your fault” is not
9 adequate to permit the Association to test the allegations that are being made against it, and the
10 Court should require a more definite statement from the Counterclaimant.

11 **IV. CONCLUSION**

12 Based upon the foregoing, the Association asks this Court to require more definite
13 statements regarding the four causes of action indicated here; a finding that SCC’s
14 misrepresentation claim is not plead with appropriate particularity pursuant to NRCP 9(b); and
15 outright dismissal of the misrepresentation claim for failure to plead the essential element of duty.

16 **AFFIRMATION**

17 Pursuant to NRS 239B.030(1), the undersigned does hereby affirm that this document and
18 any attachments do not contain personal information as defined in NRS 603A.040 about any
19 person.

20 DATED this 31st day of July, 2020

21 **WOLF, RIFKIN, SHAPIRO,**
22 **SCHULMAN & RABKIN, LLP**

23 By: */s/ Bradley S. Schrager*

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CERTIFICATE OF SERVICE

I hereby certify on this 31st day of July, 2020, that the foregoing **PLAINTIFF / COUNTERDEFENDANT SOMERSETT OWNERS ASSOCIATION'S MOTION FOR A MORE DEFINITE STATEMENT, AND TO DISMISS** was served via the Washoe County E-Flex Filing System on all parties or persons requesting notice.

By: /s/ Danielle Fresquez
Danielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP