

JENNIFER N. HARRIS, SBN: 256009
ATTORNEY AT LAW
1851 E. First Street, Suite 900
Santa Ana, California 92705
Telephone No.: (714) 619-9395
Facsimile No.: (714)619-9396
Email: jenniferharrislaw@gmail.com

Attorney for Defendants
Teddy Riley and TRMUSICGROUP

BRAD A. MOKRI, SBN: 208213
LAW OFFICES OF MOKRI & ASSOCIATES
1851 E. First Street, Suite 900
Santa Ana, California 92705
Telephone No.: (714) 619-9395
Facsimile No.: (714)619-9396
Email: amirmokri1@yahoo.com

Attorney for Defendants
Teddy Riley and TRMUSICGROUP

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

THE RECEIVABLES EXCHANGE,
LLC., a limited liability company,
Plaintiff,

vs.

TRMUSICGROUP, a Nevada
corporation; TEDDY RILEY, an
individual; LAURA RILEY, an
individual; STORM DUBOIS, an
individual; and DOES 1 through 10,
inclusive,
Defendants

Case No.: 2:14-cv-09219-DSF-FFM

**DEFENDANTS
TRMUSICGROUP'S AND TEDDY
RILEY'S NOTICE OF MOTION
AND MOTION TO DISMISS THE
FIRST AMENDED COMPLAINT
FOR DAMAGES; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

**Date: April 6, 2015
Time: 1:30 p.m.
Ctrm: 840
Judge: Hon. Dale S. Fischer**

1 TO ALL PARTIES AND THEIR RESPECTED ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that on April 6, 2015, at 1:30 p.m., or as soon
4 thereafter as the matter may be heard in Courtroom 840 of the above-entitled
5 Court, located at 255 E. Temple St., Los Angeles, CA 90012, Defendants
6 TRMUSICGROUP and TEDDY RILEY (collectively referred to as "Defendants")
7 will and hereby do move for an order dismissing the First Amended Complaint for
8 Damages, Docket No. 11 ("FAC") filed by Plaintiff The Receivables Exchange,
9 LLC on December 16, 2014.

10 The Motion to Dismiss is made pursuant to Rules 12(b)(1), 12(b)(6) and
11 12(b)(7) of the Federal Rules of Civil Procedure, on the ground that Plaintiff does
12 not have standing to assert tort claims; Plaintiff fails to state facts giving Plaintiff a
13 claim for relief against Defendants; and Plaintiff fails to join parties pursuant to
14 Rule 19.

15 **This motion is made following the conference of counsel pursuant to**
16 **L.R. 7-3 which took place on: February 19, 2015 at approximately 2:30 p.m.**

17 This Motion is based on this Notice of Motion and Motion, the
18 Memorandum of Points and Authorities filed herewith, the First Amended
19 Complaint and all other pleadings and records on file in this action, the exhibits,
20 and upon such other argument as the Court may consider at the hearing on this
21 motion.

22
23 Dated: March 4, 2015

Respectfully submitted

24
25 By: /s/Jennifer N. Harris
26 Jennifer N. Harris
27 Attorney for Defendants
28 TRMUSICGROUP and
TEDDY RILEY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 16, 2014, Plaintiff The Receivables Exchanges, LLC (hereinafter referred to as “TRE”) file a First Amended Complaint (“FAC”) alleging six causes of action against four defendants. Plaintiff has alleged the following causes of action against Defendant TRMUSICGROUP, a Nevada Corporation (hereinafter referred to as “TR Music”): (1) Breach of Contract; (2) Open Book Account; (3) Account Stated; (4) Fraud; (5) Negligent Representation; and (6) Conspiracy to Commit Fraud. Plaintiff alleges only the Sixth Cause of Action for Conspiracy to Commit Fraud against Defendant Teddy Riley (hereinafter referred to as “RILEY”).

Defendants TR Music and RILEY accepted service of the First Amended Complaint by Notice and Acknowledgment of Receipt of Summons and Complaint on February 11, 2015. On February 19, 2015, Counsel for the Defendants TR Music and RILEY met-and-conferred pursuant to L.R. 7-3 with Plaintiff’s counsel Matthew Mickelson regarding the issues set forth in this Motion. The parties were unable to resolve the matter necessitating the bringing of this motion.

As set forth below, Plaintiff lacks standing to bring its tort claims against the Defendants. Additionally, Plaintiff’s fraud allegations fail to meet the special pleading standard set forth in Fed. R. Civ. P. Rule 9. Plaintiff also fails to join “persons whose presence is needed for a just adjudication” under Rule 19. As such, Defendant moves for dismissal of the FAC.

II. FACTUAL AND PROCEDURAL BACKGROUND

According to the First Amended Complaint, on or about July 18, 2013, a contract was entered into between Advanced Technology Services, Inc. (hereinafter referred to as “ATS”) and TR Music. ATS promised to provide certain software services to TR Music and TR Music agreed to pay for those services. The contract price was \$326,480.00 with 60 days. Plaintiff purchased

1 this open account from ATS sometime between July 18, 2013 and August 5, 2013.
2 The FAC is silent as to the date Plaintiff allegedly entered into the assignment
3 agreement with ATS, but according to the FAC, the account was sold on Plaintiff's
4 exchange on August 5, 2013. (FAC, Ex. C).

5 **III. LEGAL AUTHORITY**

6 **Fed. R. Civ. P. Rule 12(b)(1):**

7 Federal Rules of Civil Procedure Rule 12(b)(1) provides for motions to
8 dismiss for lack of subject matter jurisdiction. "Because standing and mootness
9 both pertain to a federal court's subject matter jurisdiction under Article III, they
10 are properly raised in a motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(1)..." *White v. Lee*, 227 F. 3d 1214, 1242 (9th Cir. 2000). "[T]he burden is
12 on the plaintiff, as the party asserting jurisdiction, to establish that subject matter
13 jurisdiction exists." *Dominion Assets LLC* 2014 U.S. Dist. LEXIS 88285, at *10
14 citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "To invoke
15 a federal court's subject matter jurisdiction, a plaintiff needs to provide only 'a
16 short and plain statement of the grounds for the court's jurisdiction.'" *Leite v. Crane*
17 *Co.*, 749 F. 3d 1117, 1121 (9th Cir. 2014). However, "[t]he plaintiff must allege
18 facts, not mere legal conclusions, in compliance with the pleading standards
19 establish by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v.*
20 *Iqbal*, 556 U.S. 662 (2009)." *Id.* Here, where a factual attack on subject-matter
21 jurisdiction is made, "the plaintiff must support [its] jurisdictional allegations with
22 'competent proof.'" *Id.* (quoting *Hertz Corp. v. Friend* 559 U.S. 77, 96-97 (2010)).
23 The standard applied is "the same evidentiary standard that governs in the
24 summary judgment context." *Id.* "The plaintiff bears the burden of proving by a
25 preponderance of the evidence that each of the requirements for subject-matter
26 jurisdiction has been met." *Id.*

27 If a motion to dismiss for lack of subject matter jurisdiction simply
28 challenges the sufficiency of the allegations of subject matter jurisdiction, then the

1 pleadings contents are taken as true for purposes of the motion. However, if it
2 challenges the actual existence of subject matter jurisdiction, then the pleading's
3 allegations are merely evidence on the issue. Since the party invoking the federal
4 court's jurisdiction has the burden of proving the actual existence of subject matter
5 jurisdiction, regardless of the pleading's allegations, the courts have held that the
6 pleader must establish jurisdiction with evidence from other sources, such as
7 affidavits or depositions...

8 ...The requirement that the nonmoving party present evidence outside his
9 pleadings in opposition to a motion to dismiss for lack of subject matter
10 jurisdiction is the same as that required under Rule 56(e) that the nonmoving party
11 to a motion for summary judgment must set forth specific facts, beyond his
12 pleading, to show that a genuine issue of material fact exists. *Trentacosta v.*
13 *Frontier Pac. Aircraft Indus., Inc.*, 813 F. 2d 1553, 1558-59 (9th Cir. 1987).

14 **Fed. R. Civ. P. Rule 12(b)(6):**

15 Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires not only
16 'fair notice of the nature of the claim, but also grounds on which the claim rests.
17 (*Zixiang Li v. Kerry*, 710 F. 3d 995, 998-99 (9th Cir. 2012)). While detailed factual
18 allegations are not generally required, the facts alleged must state a claim for relief
19 that is *plausible on its face*; i.e., the factual allegations "must be enough to raise a
20 right to relief above the speculative level..." (*Bell Atlantic Corp. v. Twombly*, 550
21 U.S. 544, 555; *Ashcroft v. Iqbal* (2009) 556 U.S. 662).

22 There are special pleading requirements pursuant to Fed. R. Civ. P. Rule 9
23 when the Plaintiff has alleged fraud or mistake. The Plaintiff must state *with*
24 *particularity* the circumstances constituting fraud or mistake. (Fed. R. Civ. P. Rule
25 9(b); *Desaigoudar v. Meyercord* (9th Cir. 2000) 223 F. 3d 1020, 1022-fraud must
26 be plead "with a high degree of meticulousness"). Courts usually interpret Rule
27 9(b) to require that the complaint specify the alleged fraudulent representations,
28 allege the representations were false when made, identify the speaker, state when

1 and where the statements were made; and state the manner in which the
2 representations were false and misleading. (See *DiLeo v. Ernst & Young* (7th Cir.
3 1990) 901 F. 2d 624, 627—“the who, what, when, where and how: the first
4 paragraph of any newspaper story”; *Arnold & Assocs., Inc. v. Misys Healthcare*
5 *Systems* (D AZ 2003) 275 F. Supp. 2d 1013, 1028; *Swanson v. Citibank, N.A.* (7th
6 Cir. 2010) 614 F. 3d 400, 406—Rule 9(b) requires pleading with particularity
7 “actual damages arising from (plaintiff’s) reliance on a fraudulent statement”).
8 Fed. R. Civ. P. 9(b) requires plaintiffs to state time, place, and specific content of
9 false representations as well as identities of parties to misrepresentation; complaint
10 must detail what is false or misleading about statement, and why it is false. (*Segal*
11 *Co. v Amazon* (2003, WD Wash) 280 F Supp 2d 1229).

12 Plaintiff’s failure to meet the specific pleading requirements of Rule 9(b)
13 may result in dismissal of the complaint. (See *Vess v. Ciba-Geigy Corp. USA* (9th
14 Cir. 2003) 317 F. 3d 1097, 1107-1108—dismissal for failure to comply with Rule
15 9(b) treated as dismissal for failure to state claim upon which relief can be
16 granted). Dismissal with prejudice is proper where the defect is not curable by
17 amendment. (*Id.*).

18 **Fed. R. Civ. P. Rule 12(b)(7)**

19 Rule 12(b)(7) permits defendant to challenge the complaint’s failure to join
20 “persons whose presence is needed for a just adjudication” under Rule 19. (See *HS*
21 *Resources, Inc. v. Wingate* (5th Cir. 2003) 327 F. 3d 432, 438). Rule 19 governs
22 the circumstances under which persons *must* be joined as parties to the action. Its
23 purpose is to protect the interests of the parties who are not yet involved in the
24 litigation. (See *Jimenez v. Rodriguez-Pagan* (1st Cir. 2010) 597 F. 3d 18, 25).

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1 **IV. ANALYSIS**

2 **A. PLAINTIFF’S TORT CLAIMS SHOULD BE DISMISSED**
3 **BECAUSE PLAINTIFF LACKS STANDING. [FED. R. CIV. P. 12(b)(1)]**

4 Several fundamental principles of law preclude a party that does not own
5 something from bringing a lawsuit to recover for alleged harm to that object. Not
6 the least of these is the constitutional mandate of standing.

7 As recently reiterated by the United States Supreme Court:

8 *Article III of the Constitution limits federal courts’ jurisdiction*
9 *to certain ‘Cases’ and ‘Controversies.’ As we have explained,*
10 *no principle is more fundamental to the judiciary’s proper role*
11 *in our system of government than the constitutional limitation*
12 *of federal-court jurisdiction to actual cases or controversies.*
13 *One element of the case-or-controversy requirement is that*
14 *plaintiffs must establish that they have standing to sue.*
15 *[Clapper v. Amnesty Int’l 133 S. Ct. 1138, 1146 (2013)(internal*
16 *quotation marks and citations omitted)].*

17 In order to meet the case-or-controversy requirement of Article III, a
18 plaintiff...must establish three elements of standing, namely, that the plaintiff
19 suffered an injury in fact, that there is a causal connection between the injury and
20 the conduct complained of, and that it is likely the injury will be redressed by a
21 favorable decision. *United States v. \$133,420.00 in United States Currency*, 672 F.
22 3d 629, 637 (9th Cir. 2012). The undisputed facts, as set forth in more detail
23 below, establish that Plaintiff does not own the claims it is suing upon and thus
24 lacks standing as a matter of law.

25 **1. Plaintiff has not Suffered an “Injury in Fact” because the tort**
26 **claims do not belong to the Plaintiff.**

27 “The standing question is whether the plaintiff has alleged such a personal
28 stake in the outcome of the controversy as to warrant [its] invocation of federal-
court jurisdiction and to justify the exercise of the court’s remedial powers on [its]
behalf.” *Wash. Legal Found. v. Legal Found of Wash*, 271 F. 3d 835, 847 (9th Cir.

2001)(en banc)(internal quotes and cites omitted). The first requirement of standing requires Plaintiff TRE to demonstrate that it has “suffered an injury in fact” by “an invasion of a legally protected interest.” *Id.* Here, Plaintiff cannot demonstrate that it has suffered an “invasion of a legally protected interest.”

TRE alleges that: “Buyers on the exchange have **contractually assigned to Plaintiff all their rights to collect sums from defaulting account debtors** such as TR Music, and accordingly Plaintiff possesses standing to sue for the fraudulent representations made to it.” (FAC ¶ 38, ln. 20-24, ¶ 49, ¶60). Plaintiff further alleges that “ATS assigned **its right to receive payment** for the materials and licenses over to Plaintiff’s receivables marketplace. (FAC ¶¶ 23, 33).

Furthermore, in Plaintiff’s prior action in the U.S. District Court, Eastern District of Louisiana, against ATS and Defendant TR Music, Plaintiff defined “receivables” as “a right to be paid by a third party.”¹ In the prior action, Plaintiff admitted that “[U]pon conclusion of the sale, the buyer is the owner of the receivable and is legally empowered and entitled to **collect the debt in its own name.**” (Emphasis Added).

While no particular form of assignment is required, it is essential to assignment of a right that the assignor manifests an intention to transfer “the right.” Here, the Plaintiff has only pled a right to receive payment under the contract. In *Heritage Pacific Financial, LLC v. Monroy*, 215 Cal. App. 4th 972, 990-991, the Court ruled that *Heritage’s* allegations showed an assignment of the promissory

¹ Defendants request Judicial Notice of the Complaint filed in U.S. District Court, Eastern District, Case No. 2:14-cv-00668 on or about March 24, 2014 and the facts stated in Paragraph 6 of that Complaint, six lines down. Plaintiff defines a “receivable” as “a right to be paid by a third party” and “[U]pon conclusion of the sale, the buyer is the owner of the receivable and is legally empowered and entitled to **collect the debt in its own name.**” It should also be noted that Defendant TR Music was dismissed from this action and Plaintiff did not allege any claims against Defendant Teddy Riley as an individual. Nor did Plaintiff allege any fraud claims in that case. (See Defendants’ Request for Judicial Notice filed concurrently herewith).

1 note. However, the assignment of this contract right ***did not*** carry with it a
2 **transfer of the original contracting party’s tort rights.** The fraud claims were
3 **not “incidental to” the transfer of the promissory note.** “A suit for fraud does
4 **not involve an attempt to recover on a debt or note.”** (Id. citing *Guild Mortgage*
5 *Co. v. Heller* 193 Cal. App. 3d 1505, 1512; See *Millner v. Lankershim Packing Co.*
6 13 Cal. App. 2d 315, 319-320—assignment of mortgage did not include
7 assignment of right to recover for injury to the mortgaged property; *Schauer v.*
8 *Mandarin Gems of Cal., Inc.* 125 Cal. App. 4th 949, 956-957—divorce agreement
9 awarding diamond right purchased by husband to wife did not automatically
10 transfer husband’s claim against jeweler for fraud).

11 Fraud rights are not, as a matter of law, incidental to the transfer of the
12 contract. (Id. at. 991). The conveyance of the right to payment on the contract, did
13 not automatically assign to Plaintiff and its Buyers the right to the performance of
14 other, distinct obligations owed by Defendants, such as the obligation to provide
15 truthful information. (See *Heritage v. Monroy, supra*, at 991). Plaintiff’s FAC
16 alleges nothing more than the assignment of a contract right.

17 Plaintiff cannot meet its burden of showing that there was an assignment that
18 specifically or impliedly authorized Plaintiff to sue on ATS’ tort claims. Fraud is
19 an ancillary cause of action to the contract. “Unless an assignment specifically or
20 impliedly designates them, accrued causes of action arising out of an assigned
21 contract, whether *ex contractu* or *ex delicto*, do not pass under the assignment as
22 incidental to the contract if they can be asserted by the assignor independently of
23 his continued ownership of the contract and are not essential to a continued
24 enforcement of the contract.” (Id). For these reasons, Plaintiff’s tort claims must
25 be dismissed with prejudice as Plaintiff does not have standing to sue.

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1 **B. DEFENDANTS’ MOTION PURSUANT TO RULE 12(b)(6)**
2 **SHOULD BE GRANTED BECAUSE PLAINTIFF FAILS TO PLEAD**
3 **FRAUD WITH PARTICULARITY AS REQUIRED UNDER RULE 9.**

4 In the event the Court finds that Plaintiff has standing to pursue its tort
5 claims, the FAC is still defective in that it fails to state facts sufficient to state a
6 claim for fraud, negligent misrepresentation and conspiracy to commit fraud.

7 **1. Failure to Allege the Assignment with Particularity:**

8 TRE claims that it was assigned the right to payment and therefore has
9 standing to sue for fraud. Indeed, TRE fails to allege the assignment with
10 sufficient particularity. “An assignment agreement “must describe the subject
11 matter of the assignment with sufficient particularity to identify the rights assigned.
12 (Id. citing *Mission Valley East, Inc. v. County of Kern* 120 Cal. App. 3d 89, 97)
13 An assignment is “a manifestation to another person by the owner of the right
14 indicating his or her intention to transfer, without further action or manifestation of
15 intention, the right to such other person, or to a third person. (Id). As with
16 contracts generally, the nature of an assignment is determined by ascertaining the
17 intent of the parties. (Id at 988-989 citing *Cambridge Co. v. City of Elsinor* 57 Cal.
18 App. 245).

19 Since the policy of liberal construction of pleadings does not apply to fraud
20 causes of action, Plaintiff must allege with particularity the assignment of the fraud
21 claims. The conveyance of the right to payment on the account, does not establish
22 that ATS assigned to Plaintiff and the Buyers its right to the performance of other,
23 distinct obligations owed by Defendants, such as the obligation to provide truthful
24 information. (See *Heritage v. Monroy, supra*, at 991). There are no allegations in
25 the FAC showing that there was an assignment that specifically or impliedly
26 authorizes Plaintiff to sue on ATS’ tort claims. As such, Defendant’s Motion to
27 Dismiss should be granted without leave to amend.
28

1 **2. Plaintiff's Failure to State Sufficient Facts With Respect to the**
 2 **Elements of its Fraud Claim:**

3 In addition to the assignment issue set forth above, Plaintiff's FAC also fails
 4 to state sufficient facts as to its fraud claim. There are two representations that
 5 Plaintiff alleges were false. The first was a written acknowledgment of the change
 6 of accounts for payment on July 18, 2014. (FAC ¶37). The second was an oral
 7 confirmation on July 25, 2013 that the notice regarding payment for the account
 8 was received and that payment would be made to the new address. (FAC ¶37).
 9 With respect to the first representation made to ATS, Plaintiff does not acquire
 10 standing to sue for fraud simply based on the assignment of the contract rights as
 11 set forth above. Plaintiff cannot assert a cause of action for fraud based on
 12 representations Defendants allegedly made to ATS. (*Supra*). Furthermore, there are
 13 no facts showing that the written acknowledgment was false.

14 Further, in the prior action in the Eastern District of Louisiana, Plaintiff
 15 alleged that ATS (not RILEY or TR Music) made the representations that allegedly
 16 caused Plaintiff's damages. Plaintiff stated that: "Only Eligible Receivables are
 17 eligible for sale over the Exchange. "Eligible Receivables" are defined as
 18 Receivables subject to sale under Article 9 of the UCC that, among other things,
 19 **are valid and bona fide payment obligation not "subject to dispute,**
 20 **compromise, reduction, cancellation, refund, offset, counterclaim, or**
 21 **recoupment for any reasons.'** *ATS represented* and warranted to TRE and the
 22 Buyers that the Receivables were Eligible Receivables under the SMB Agreement,
 23 and that the Account Debtors had accepted the product and/or services giving rise
 24 to the Receivables without condition or reservation of rights...Before ATS posted
 25 each Invoice for auction over the Exchange, *ATS represented* that such Invoices
 26 were duly owed, valid and enforceable, and was an Eligible Receivable under the
 27 Exchange Agreements...*ATS represented* to TRE and the Buyers of each Invoice
 28 that the face value of the Invoice was state in paragraph 10...The Buyers bid on the

1 Receivables *based upon ATS's representations.* ”² Any fraud cause of action
2 that Plaintiff (or its Buyers) may have is against ATS not the Defendants.

3 With respect to the second representation alleged in the complaint, Plaintiff
4 cannot establish the falsity of the representation at the time it was made because
5 the debt had not yet become due. According to the FAC, the Invoice due date was
6 Tuesday September 17, 2013. (FAC, Exhibit C). There are no facts alleged that
7 on July 25, 2013, the representation that payment would be made was false. The
8 fact that Defendants may have subsequently breached the agreement (to which
9 Defendants deny) by not making a payment by September 17, 2013 does not show
10 that Defendants never intended to make the payment.

11 Furthermore, Plaintiff's FAC fails to state any facts as to the element of
12 reliance and cannot cure this defect because the representation was made after ATS
13 had already assigned the contract and right to payment to Plaintiff. According to
14 the Complaint, on July 18, 2013, ATS entered into a Customer Agreement with
15 Defendant TR Music. Plaintiff attaches the Customer Agreement as its Exhibit
16 "A." (FAC ¶ 20). ATS assigned its right to receive payment over to the Plaintiff.
17 (FAC ¶ 23). Attached as Plaintiff's Exhibit "C" is the Auction Summary for the
18 account showing the auction closed on August 5, 2013. (FAC ¶ 23). According to
19 the Complaint, the balance owed pursuant to the Customer Agreement was not due
20 and payable until September 17, 2013. (FAC ¶¶ 26; Plaintiff's Exhibits B & C).

21 Plaintiff alleges that as part of its procedures for verifying the accounts
22 receivables, it requires the seller of the accounts, in this case ATS, to send to TR
23 Music a notice that all payments for the particular account receivable *sold* be made
24 to a new account controlled by Plaintiff. (FAC ¶37). Plaintiff states that this notice
25 was sent from ATS to TR Music in late July 2013 and that TR Music
26

27 ² See Defendants' Request for Judicial Notice, Exhibit "A", the Complaint in the prior
28 action, Paragraphs 11, 12, 13.

1 acknowledged the changed account on July 18, 2013. (FAC ¶37). By directing
2 TR Music to forward all payments to a new account controlled by Plaintiff,
3 Plaintiff had already acquired the account prior to the alleged representation made
4 to Plaintiff on July 25, 2013. Thus, the July 25th representation could not have
5 induced Plaintiff to acquire and list the account on its exchange (FAC ¶42-43).
6 Plaintiff had already intended to do so prior to the representation and had already
7 informed Defendant that all payments, which were not yet due, were to be made to
8 Plaintiff.

9 Additionally, Plaintiff alleges that Defendants intended to induce the Buyers
10 on the exchange to purchase the account. (FAC ¶38). However, no representations
11 were ever made to the Buyers. And for the same reasons set forth above, Plaintiff
12 cannot state a claim on behalf of the Buyers against Defendants. As such,
13 Defendant's Motion to Dismiss should be granted without leave to amend.

14 **3. Plaintiff Fails to State Facts Sufficient to State a Cause of Action for**
15 **Negligent Misrepresentation:**

16 Although Fed. R. Civ. P. 9(b) does not expressly apply to claim for
17 negligent misrepresentation, Fed. R. Civ. P. 8 does require plaintiffs to give
18 defendants fair notice of claim against them; complaint should state, among other
19 things, facts alleged to have been misrepresented by defendant and identity of
20 person who made statements. (*In re Heritage Bond Litig.* (2003, CD Cal) 289 F
21 Supp 2d 1132, request gr (2004, CD Cal) 220 FRD 624, 58 FR Serv 3d 693 and
22 (criticized in *Phillips v E.I Dupont de Nemours & Co.* (In re Hanford Nuclear
23 Reservation Litig.) (2008, CA9 Wash) 521 F3d 1028) and (criticized in *Phillips v*
24 *E.I Dupont de Nemours & Co.* (In re Hanford Nuclear Reservation Litig.) (2008,
25 CA9 Wash) 521 F3d 1028, CCH Prod Liab Rep P 17808) and (ovrld on other
26 grounds as stated in *Kandel v Brother Int'l Corp.* (2009, CD Cal) 2009 US Dist
27 LEXIS 105242)).
28

1 In the FAC, Plaintiff states that “no reasonable person would state that
 2 payment would be made on an invoice when no materials or licenses had ever been
 3 delivered to TR Music from ATS. (FAC ¶ 49). However, at Paragraph 33,
 4 Plaintiff alleges that: “TR Music was indebted to ATS in the sum of \$326,480 for
 5 materials and licenses purchased...**and said materials and licenses were**
 6 **delivered.”** The FAC states facts inconsistent to Plaintiff’s Fifth Cause of Action
 7 and Plaintiff cannot cure this defect by amendment. These inconsistencies are so
 8 irreconcilable that an amendment would constitute a sham pleading. (See *Bradley*
 9 *v. Chiron Corp.* 1996 U.S. Dist. LEXIS 23211, 11 (N.D. Cal. July 15, 1996)—
 10 “The Court found that ‘the self-serving inconsistency is so irreconcilable as to be
 11 sufficient grounds to strike the entire paragraph from the second amended
 12 complaint.’ The inconsistent pleading clearly violated the purpose of Rule 11, and
 13 could also ‘properly be stricken as a sham pleading.’” (internal citations omitted).
 14 As such, Defendants’ Motion to Dismiss should be granted *without* leave to
 15 amend.

16
 17 **4. Plaintiff’s Conspiracy Cause of Action Fails to Comply with Rule 9**
 18 **and is also barred as a matter of law.**

19 A conspiracy does not stand as an independent claim, rather it is a legal
 20 doctrine to establish joint liability by the conspirators for the underlying tort. (See
 21 *Entm't Research Group v. Genesis Creative Group*, 122 F.3d 1211, 1228 (9th Cir.
 22 1997) (citing *Applied Equipment Corp.*, 7 Cal. 4th at 511). Each member of the
 23 conspiracy must be able to commit the underlying tort, intend the success of the
 24 purpose of the conspiracy, and all the elements of that tort must be satisfied.
 25 (citation omitted). If a plaintiff fails to plead the underlying claim, the
 26 corresponding conspiracy claim must also fail. (citation omitted) (“It is the acts
 27 done and not the conspiracy to do them which should be regarded as the essence of
 28 a civil action”) (internal citation omitted). (*Jercich v. County of Merced*, 2006 U.S.
 Dist. LEXIS 94030, 44 (E.D. Cal. Dec. 18, 2006). For the same reasons set forth

1 above with respect to Plaintiff's Fourth Cause of Action for Fraud, Plaintiff's Sixth
2 Cause of Action also fails to meet the special pleading requirements of Rule 9.

3 Further, Plaintiff alleges that Defendants conspired to defraud Plaintiff and
4 the buyers on the Plaintiff's exchange by providing phony accounts receivable.
5 (FAC ¶57). First, Defendants had no agreement with the Plaintiff. Defendants had
6 an agreement with ATS. ATS allegedly assigned the contract to TRE. Defendants
7 were not privy to the assignment agreement between ATS and TRE. Nor was the
8 plaintiff privy to the contract between ATS and TR Music. Plaintiff *only* received
9 a right to payment via an assignment of the contract rights. Defendants had no part
10 in the assignment between ATS and TRE. Furthermore, as set forth above,
11 Plaintiff's facts are contradictory. On the one hand, Plaintiff claims that the
12 materials and licenses were delivered creating an obligation of TR Music to pay
13 the Invoice. On the other hand, Plaintiff claims that the account was phony. It
14 can't be both and Plaintiff cannot cure this defective pleading.

15 Second, as set forth above, Plaintiff does not have standing to sue for the tort
16 claims set forth in the FAC. Conspiracy is a theory of liability and not a stand-
17 alone cause of action. (See *Applied Equipment Corp. v. Litton Saudi Arabia* 7 Cal.
18 4th 503, 514). A cause of action for conspiracy will not stand where the actor is
19 legally incapable of committing the tort forming the basis for the alleged
20 conspiracy because of a statutorily created or other immunity from suit [*Applied*
21 *Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 513, 28 Cal. Rptr.
22 2d 475, 869 P.2d 454; see also *Hardy v. Vial* (1957) 48 Cal. 2d 577, 582–583, 311
23 P.2d 494 (agents of college were immune from liability for malicious prosecution
24 because performing investigative duties and therefore could not be liable for
25 conspiring with defendants not similarly immune)]. Defendants TR Music and
26 Teddy Riley are legally incapable of committing fraud against the Plaintiff because
27 Plaintiff was never assigned the tort claims. As such, Plaintiff's conspiracy cause
28 of action fails as a matter of law.

1 Third, a corporation cannot conspire with itself. The agent's immunity rule
2 provides that agents and employees of a corporation cannot conspire with their
3 corporate principal or employer if they are acting in their official capacities on
4 behalf of the corporation, and not acting either as individuals for their individual
5 advantage or beyond the scope of their authority [Applied Equip. Corp. v. Litton
6 Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512, n.4, 28 Cal. Rptr. 2d 475, 869 P.2d
7 454; Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4–6, 35 Cal. Rptr. 2d 725].
8 A corporation is a legal fiction that cannot act at all except through its employees
9 and agents, whose acts are the acts of the corporation. A corporation cannot
10 conspire with itself any more than a private individual can [Black v. Bank of Am.
11 (1994) 30 Cal. App. 4th 1, 6, 35 Cal. Rptr. 2d 725]. The Agent's Immunity Rule is
12 based on the logical notion that a conspiracy requires two independent persons or
13 entities. (See *Black v. Bank of America* 30 Cal. App. 4th 1, 6). As such,
14 Defendant Teddy Riley cannot be liable under a conspiracy theory by operation of
15 law.

16 Lastly, an allegation that an individual owns a majority of the capital stock
17 of a corporation and that he or she controls and dominates its affairs does not
18 allege facts sufficient to satisfy the requirement of the alter ego doctrine, which
19 requires that there be a unity of interest and ownership such that the separate
20 identities of the shareholder and the corporation have disappeared [Dos Pueblos
21 Ranch & Improvement Co. v. Ellis (1937) 8 Cal. 2d 617, 621, 67 P.2d 340].
22 Assuming that the defendant does operate the corporation as a business conduit,
23 the separate identity of the corporation will not be disregarded unless there are
24 facts showing that failure to ignore the corporate entity would produce an
25 inequitable result [Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641;
26 Shafford v. Otto Sales Co., Inc. (1953) 119 Cal. App. 2d 849, 862, 260 P.2d 269;
27 Norins Realty Co., Inc. v. Consolidated Abstract Title Co. (1947) 80 Cal. App. 2d
28 879, 883, 182 P.2d 593].

1 To state a cause of action against an individual based on his or her liability
2 for the acts and obligations of a corporation, the complaint must show that there is
3 such a unity of interest and ownership between the individual and the corporation
4 that their individuality or separateness has ceased; and that the facts are such that
5 an adherence to the fiction of the separate existence of the corporation would,
6 under the particular circumstances, sanction a fraud or promote injustice [Minifie
7 v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]. Here, the Plaintiff does not
8 allege any facts showing a unity of interest and ownership such that the separate
9 identities of Defendant Teddy Riley and TR Music have disappeared.

10 As such, the Defendants' Motion to Dismiss should be granted and the Sixth
11 Cause of Action dismissed with prejudice.

12
13 **C. THE FAC SHOULD BE DISMISSED BECAUSE PLAINTIFF**
14 **FAILS TO JOIN PERSONS WHOSE PRESENCE IS NEEDED FOR A JUST**
15 **ADJUDICATION.**

16 Rule 12(b)(7) permits defendant to challenge the complaint's failure to join
17 "persons whose presence is needed for a just adjudication" under Rule 19. (See *HS*
18 *Resources, Inc. v. Wingate* (5th Cir. 2003) 327 F. 3d 432, 438). Rule 19 governs
19 the circumstances under which persons *must* be joined as parties to the action. Its
20 purpose is to protect the interests of the parties who are not yet involved in the
21 litigation. (See *Jimenez v. Rodriguez-Pagan* (1st Cir. 2010) 597 F. 3d 18, 25).

22
23 **1. The "Buyers" Must Be Joined:**

24 A person who is subject to service of process and whose joinder will not
25 deprive the court of subject-matter jurisdiction must be joined as a party if: (a) in
26 that person's absence, the court cannot accord complete relief among existing
27 parties; or (b) that person claims an interest relating to the subject of the action and
28 is so situated that disposing of the action in the person's absences may: (i) as a
practical matter impair or impede the person's ability to protect the interest; or (ii)

1 leave an existing party subject to substantial risk of incurring double, multiple, or
 2 otherwise inconsistent obligations because of the interest. (Rule 19(a)).

3 In its FAC, Plaintiff has alleged that the true owners of the receivable are its
 4 member buyers and that the buyers, upon the conclusion of the sale on Plaintiff's
 5 electronic auction, are legally empowered and entitled to collect the debt in their
 6 own name. (FAC ¶¶12, 13). Plaintiff further alleges that "upon conclusion of the
 7 sale, if the receivable is not paid by the payment date Plaintiff retains the right to
 8 sue on the receivable in its own capacity and as an administrative agent and
 9 collateral agent of the buyer." (FAC ¶ 14). Thus, pursuant to the allegations in the
 10 FAC, the Buyers own the claim Plaintiff is suing on and thus must be made a
 11 party. Assignee of part of a claim is a real party in interest in suit on a claim and
 12 must be made party. *McWhirter v Otis Elevator Co.* (1941, DC SC) 40 F Supp 11.
 13 (See also *United States v Washington Institute of Technology, Inc.* (1942, DC Del)
 14 47 F Supp 384, 55 USPQ 127, affd (1943, CA3 Del) 138 F2d 25, 58 USPQ 503--
 15 Inventor who has assigned his patent application to another, but has retained right
 16 to participate in profits and to restrict alienation of invention is indispensable party
 17 to action by another assignee against commissioner of patents to compel issuance
 18 of patent, and failure to join him as party defendant is grounds for dismissal).

19 If the allegations in the FAC, are taken as true, the Buyers have a stake in
 20 the outcome of this litigation and would not be barred by res judicata or collateral
 21 estoppel. There would be no barrier preventing the Buyers from bringing a
 22 separate lawsuit against the defendants for all or part of plaintiff's claims. Thus,
 23 the Buyers (who have not been sufficiently identified) must be joined or the case
 24 must be dismissed.

25 **2. If Joinder is Not Feasible, the Action Should be Dismissed:**

26 Rule 19(b) states that: If a person who is required to be joined if feasible
 27 cannot be joined, the court must determine whether, in equity and good conscience,
 28 the action should proceed among the existing parties or should be dismissed. The

factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Here, if the Buyers cannot be joined, the case must be dismissed. Any judgment rendered in the absence of the Buyers would severely prejudice the defendants and could not be avoided because the Buyers would not be precluded from suing the defendants in another action based on the same claims. Defendants should have the benefit of the finality of a judgment of this Court without having to fear being exposed to future litigation from others asserting duplicate claims.

3. ATS Should Also be Joined:

In the prior action in Louisiana, Plaintiff sued ATS for breach of the repurchase agreement with respect to the TR Music account. (See Defendants' Request for Judicial Notice filed concurrently herewith). Plaintiff obtained a default judgment against ATS. If ATS satisfies the Judgment issued by the Louisiana Court, and repurchases the account, Defendants could be subjected to a duplicate lawsuit by ATS. Hence, ATS should also be joined in order to provide just adjudication.

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1 **V. CONCLUSION**

2 For the reasons set forth herein, Defendants RILEY and TR Music
3 respectfully request an Order granting their Motion to Dismiss the FAC without
4 leave to amend.

5
6 Dated: March 4, 2015

Respectfully submitted,

7
8 By: /s/ Jennifer N. Harris
9 Attorney for Defendants
10 Teddy Riley and TRMUSICGROUP

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this case or proceeding. 1851 East First, Street, Suite 900, Santa Ana, CA 92705

A true and correct copy of the foregoing document described as **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS** will be served or was in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Rule(s) ("LR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On March 4, 2015, I checked the CM/ECF docket for this case and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Matthew C. Michelson: mattmickelson@bizla.rr.com

Service information continued

on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On March 4, 2015, I served the following person(s) and/or entity(ies) at the last known address(es) in this case by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows.

CHAMBERS COPY:

Hon. Dale S. Fischer
255 E. Temple St., Ctrm: 840
Los Angeles, CA 90012
[via overnight mail delivery by noon]

Service information continued

on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

Service information continued

on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

3/4/15

Jennifer N. Harris

/s/Jennifer N. Harris

Date

Type Name

Signature