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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 WILLIAM SWOGER,) Case No.: SACV09-903 CJC (ANx)
12 Plaintiff,)
13 vs.) **MEMORANDUM OF LAW IN**
14 RARE COIN WHOLESALERS,) **SUPPORT OF DEFENDANTS'**
15 STEVEN L. CONTURSI, DONALD) **MOTION TO DISMISS**
16 KAGIN AND DOES 1-10 INCLUSIVE)
17 Defendants.)

Date: October 5, 2009
Time: 1:30 PM
Before: Hon. Cormac J. Carney

18
19 Defendants Rare Coin Wholesalers, Steven Contursi, and Donald Kagin, by
20 their counsel of record, respectfully submit this Memorandum in support of
21 Defendants' Motion to Dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) and
22 9(b).

23 **Summary of Argument**

24 Plaintiff alleges that he approached Defendants, the owners of a unique U.S.
25 Colonial era coin, with unsolicited information which he told them would increase
26 the coin's value. He alleges that Defendants offered \$250,000 for the information
27 without even knowing what it was, but then alleges in the same paragraph that
28 Defendants asked to know what the information was so they could determine a
value. In any event, Plaintiff admits that Defendants decided not to use the

1 information after he willingly disclosed it to them. Therefore, Plaintiff's claim that
2 he is nevertheless entitled to a quantum meruit recovery fails for lack of a plausible
3 factual predicate. Plaintiff's fraud claim likewise fails the plausibility test, as well
4 as failing to sufficiently allege elements of a fraud cause of action with the
5 requisite particularity.

6 **Law Applicable to Motions to Dismiss**

7 A dismissal for failure to state a claim is appropriate when it appears that the
8 plaintiff can prove no set of facts that would entitle him to relief. *Johnson v.*
9 *Knowles*, 113 F.3d 1114, 1117 (9th Cir.), *cert. denied*, 522 U.S. 996, 118 S. Ct. 559,
10 139, L. Ed. 2d 401 (1997); Fed. R. Civ. P. 12(b)(6). The U.S. Supreme Court has
11 declared that complaints which rely on "naked assertions" rather than on
12 "plausible" facts do not satisfy Fed. R. Civ. P. 8 and must be dismissed. See
13 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009), quoting *Bell Atlantic*
14 *Corp. v. Twombly*, 550 U.S. 544 (2007). As the Supreme Court explained:

15 [T]he pleading standard Rule 8 announces demands more than an
16 unadorned the-defendant-unlawfully-harmed-me accusation....

17 To survive a motion to dismiss, a complaint must contain sufficient
18 factual matter, accepted as true, to 'state a claim to relief that is
19 plausible on its face.' A claim has facial plausibility when the
20 plaintiff pleads factual content that allows the court to draw the
21 reasonable inference that the defendant is liable for the misconduct
22 alleged. The plausibility standard is not akin to a 'probability
23 requirement', but it asks for more than a sheer possibility that the
24 defendant has acted unlawfully. Where a complaint pleads facts that
25 are 'merely consistent with' a defendant's liability, it 'stops short of
26 the line between possibility and plausibility of 'entitlement to relief.'

27 *Ashcroft, supra*, 129 U.S. at 1949 (citations omitted).

28 In addition, where the complaint alleges fraud, Fed. R. Civ. P. 9(b) imposes
an even higher pleading standard. See, e.g., *Alan Neuman Productions, Inc. v.*
Albright, 862 F.2d 1388, 1392 (9th Cir. 1988)(allegations of fraud must "state the

1 time, place and specific content of the false representations as well as the parties to
2 the misrepresentations.”)

3 It is appropriate to deny a plaintiff leave to amend if the complaint cannot be
4 cured by additional factual allegations. *Doe v. U.S.*, 58 F.3d 494 (9th Cir. 1995);
5 *Cook, Perkiss & Liehe v. N. Cal. Collections Serv.*, 911 F.2d 242, 247 (9th Cir.
6 1990).

8 **I. Plaintiff’s Quantum Meruit Claim Fails the “Plausibility” Test**

9 California law regarding quantum meruit was summarized in the recent case
10 of *Strong v. Beydown*, 166 Cal. App.4th 1398 (4th Dist. 2008)(citations omitted):

11 " 'Quantum meruit refers to the well-established principle that "the
12 law implies a promise to pay for services performed under
13 circumstances disclosing that they were not gratuitously rendered." To
14 recover in quantum meruit, a party need not prove the existence of a
15 contract, but it must show the circumstances were such that "the
16 services were rendered under some understanding or expectation of
17 both parties that compensation therefor was to be made." The burden
18 is on the person making the quantum meruit claim to show the value
19 of his or her services and that they were rendered at the request of the
20 person to be charged.

19 The Complaint in this action admits that whatever “independent research”
20 Plaintiff did with respect to the coin (Complaint para. 4) was done without
21 Defendants’ knowledge or request. According to Paragraph 6 of the Complaint,
22 *after* the research was completed Plaintiff approached Defendants and “indicated”
23 that he had “specialized information” that would increase the coin’s value
24 (Complaint, para. 6). This same Paragraph 6 goes on to allege that Plaintiff asked
25 Defendants for \$500,000 for his information without disclosing the information
26 (id.), and that Defendants offered \$250,000, again without Plaintiff having
27 disclosed his information (id.). Paragraph 6 then alleges that Defendant Kagin told
28 Plaintiff that Defendants needed to know Plaintiff’s information “so that they could

1 evaluate it and determine the appropriate fee.” As Plaintiff put it in a recent *L.A.*
2 *Times* interview “[H]ow can they buy a pig in a poke? So, it was a necessary
3 step.” (see Defendants’ Request for Judicial Notice Exhibit A) Plaintiff concedes
4 that Defendants did not use his information, but concludes without any supporting
5 factual allegations that the coin “increased in value” by \$5,000,000 as a result of
6 his information and that he is entitled to that sum under his quantum meruit theory.

7 Plaintiff has not met the Fed. R. Civ. P. 8 “plausibility” test. The only
8 possible bases for a conclusion that *both parties* understood that Plaintiff would be
9 paid for the information are (1) Defendants’ alleged offer of \$250,000 before
10 Plaintiff even disclosed the information; (2) Defendants (subsequent?) request that
11 Plaintiff disclose the information so Defendants could “evaluate it and determine
12 the appropriate fee”. The alleged pre-disclosure offer defies common sense and is
13 contradicted by Plaintiff’s own allegation that Defendants requested that he
14 disclose the information so they could “evaluate it”. Defendants’ reasonable desire
15 to know what information Plaintiff was offering to sell them – to avoid buying a
16 “pig in a poke” as Plaintiff himself well understood – does not constitute an
17 agreement to pay Plaintiff regardless of whether Defendants thought the
18 information was useful, and certainly doesn’t allow Plaintiff to arbitrarily allege
19 that the information was worth \$5,000,000 when he himself had requested only
20 \$500,000 for it.

21 The Complaint never alleges an actual understanding that Defendants would
22 pay Plaintiff for information, but rather alleges only that Plaintiff made an
23 unsolicited offer to Defendants, which Defendants declined after hearing what was
24 being offered. On these facts, Plaintiff does not – and cannot – state a claim for
25 quantum meruit.

26 **II. Plaintiff Does Not State a Fraud Claim**

27 Fraud requires proof of the following elements: (1) a misrepresentation, (2)
28 knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting

1 damages. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 806-807
2 (2007). Paragraph 11 of the Complaint states that “defendants falsely and
3 fraudulently represented to plaintiff that upon disclosure of the information they
4 would provide payment although they did not intend to do so.” This contradicts
5 Paragraphs 6 and 7, which state that Plaintiff willingly gave the information to
6 Defendants so Defendants could “evaluate it”, and is based on the wholly-
7 implausible suggestion that Defendants had earlier offered \$250,000 for the
8 information without even knowing what it was. It strains credulity to allege that
9 Defendants *knew* all along they would not pay Plaintiff for his information when
10 Plaintiff admits that it was reasonable and prudent for Defendants to want to know
11 what information he was selling before they made a decision.

12 Beyond the lack of plausibility, the Complaint violates Fed. R. Civ. P. 9(b)
13 because it never alleges when all these alleged conversations and meetings took
14 place (not even the year), where they allegedly took place, and which of the three
15 “defendant(s)” were involved.

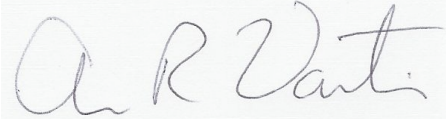
16 Finally, Plaintiff provides no support for the conclusory allegation that he
17 relied upon Defendants’ representations to his detriment by “discussing his
18 information”, and was “damaged” thereby in the amount of \$465,000. Any
19 reliance allegation is contradicted by Plaintiff’s admission that he willingly
20 provided the information to Defendants so they could evaluate it, and the damages
21 figure is derived from Plaintiff’s own \$500,000 demand for the information (minus
22 the \$35,000 coin Defendants alleged “gave” Plaintiff), which the Complaint never
23 alleges was agreed to by Defendants. Plaintiff does not allege what he would have
24 done with the information but for Defendants’ conduct, as he concedes the
25 information would be of benefit only to the owners of this unique coin, i.e.,
26 Defendants. There was neither reliance nor detriment as a matter of law.
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28

1 **CONCLUSION**

2 Defendants' reasonable request to know what information Plaintiff was
3 offering before purchasing it cannot create a legal obligation to pay for that
4 information regardless of its value, and cannot form the basis for a fraud claim.
5 Defendants' Motion should be GRANTED and the Complaint DISMISSED
6 without leave to amend.

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8 Dated: August 26, 2009

9 Respectfully submitted,

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Armen R. Vartian
14 Attorney for Defendants
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