UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REALSCAPE GROUP LLC d/b/a REALOGIC SOLUTIONS, Plaintiffs, v. ORACLE AMERICA, INC., Defendant.	Case No. 1:24-cv-00558 Hon. Charles E. Fleming **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ORACLE AMERICA, INCORPORATED'S MOTION TO DISMISS OR TRANSFER VENUE

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STATEMENT OF ISSUES TO BE DECIDED

Oracle America, Incorporated ("Oracle") moves to dismiss or, in the alternative, transfer the Complaint brought by Realscape Group, LLC d/b/a Realogic Solutions ("Realogic") that attempts—and fails—to plead contract- and tort-based claims.[1]

Issue One: Whether the Court should dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) or, alternatively, transfer it under 28 U.S.C. § 1404 to the United States District Court for the Northern District of California, San Francisco Division, given that the contract between the parties—which governs the purchase of the NetSuite software subscription and related services at issue—provides that the parties agree "to submit to exclusive jurisdiction of, and venue in, the courts in San Francisco or Santa Clara counties in California."

Issue Two: Whether the Court should dismiss Realogic's claims for breach of contract and breach of warranty, given that the parties' contract did not require implementation of the software module occur by July 1, 2023 (or any other date), as Realogic alleges; Realogic fails to identify any contract provision or warranty that Oracle breached; and the contract contains an integration clause and spells out exclusive limited warranties that preclude Realogic's warranty claim.

Issue Three: Whether the Court should dismiss Realogic's claims for unjust enrichment, which cannot lie given the express contract between the parties.

Issue Four: Whether the Court should dismiss Realogic's claims for negligence and negligent misrepresentation because each fails to state that Oracle owed a separate duty independent of contract and each is barred by the economic-loss doctrine.

[1] Pursuant to Local Rule 16, Oracle has concurrently filed a Notice of Complex Case, requesting that the Court designate this matter as "Complex Litigation."

Issue Five: Whether the Court should dismiss Realogic's Declaratory Judgment Act claim because no separate cause of action exists under the Declaratory Judgment Act.

SUMMARY OF ARGUMENT

Realogic alleges that it purchased "licenses" for Oracle's NetSuite software and corresponding implementation services and that the software and services did not meet Realogic's expectations. While Realogic purports to bring a nationwide class action with contract, warranty, and tort claims, this dispute is nothing more than an individualized and baseless contract case. The contract underlying Realogic's allegations and claims, which is incorporated into the Complaint by reference, requires dismissal under Federal Rule of Civil Procedure 12(b)(6) or, at minimum, transfer to the United States District Court for the Northern District of California under 28 U.S.C. § 1404.

First, the contract contains a mandatory forum-selection clause that provides for the exclusive jurisdiction of, and venue in, the courts in San Francisco or Santa Clara counties in California. Because this provision is valid and enforceable, and because it applies to all of Realogic's claims, the Court should enforce it and dismiss Realogic's Complaint or, alternatively, transfer the case to the Northern District of California, San Francisco Division.

Second, even if the Court does not enforce the parties' forum-selection clause, it should still dismiss the Complaint. The parties' contract requires Realogic to provide Oracle with notice of its claims, but Realogic failed to do so before filing suit. For this reason alone, its Complaint should be dismissed.

Notice aside, all of Realogic's claims fail. The contract bars Realogic's claims for breach of contract and breach of warranty. The contract contains an integration clause and did not require Oracle to deliver any software module by July 1, 2023 (or any other date), as Realogic alleges. The contract also has a limited, exclusive warranty that precludes Realogic's breach-of-warranty claim. Perhaps most important, Realogic's vague and ambiguous Complaint fails to identify the specific contract provision or warranty provision that Oracle allegedly breached, or even whether

it is purporting to place at issue an express versus an implied warranty. Realogic alleges a general failure of performance by Oracle but provides no details at all regarding the alleged failures or how they give rise to a claim upon which relief can be granted.

Realogic's claims for unjust enrichment, negligence, and negligent misrepresentation also fail, because they do not exist independent of the contract—and therefore cannot proceed—and because the negligence and negligent-misrepresentation claims are barred by the economic-loss doctrine. Finally, Realogic's declaratory-relief claim is not an independent cause of action and therefore falters with the rest of Realogic's claims.

I. BACKGROUND

A. Realogic Agrees to Obtain Subscriptions to NetSuite Software and Related Services from Oracle

Realogic is a company based in Ohio that offers IT services and consulting and healthcare staffing. Compl. (Dkt. 1) ¶ 22.[2] Oracle is a software company registered in Delaware with its principal place of business in Redwood Shores, California.[3] *See* Am. Corporate Disclosure Statement (Dkt. 9). Oracle offers subscriptions to its NetSuite cloud services, which provide primarily enterprise resource planning ("ERP") and human-resources software "modules" designed to allow smaller to mid-size companies to automate different business processes. Compl. ¶ 30; *see id.* ¶ 8 n.1.

Realogic alleges that it "acquire[d] software licenses" to three modules from Oracle:[4] "accounting," "human resources," and "payroll."[5] *Id.* ¶ 30. Realogic alleges that, in "2022 and into 2023," Oracle pitched various aspects of NetSuite to Realogic and provided "price quotes which included multi-year license fees and implementation charges." *Id.* ¶ 25. Oracle also allegedly "represented that, if Realogic committed to purchasing a software license from Oracle in May 2023, Oracle would ensure that its software would be fully implemented and integrated

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[2] Unless otherwise stated, Oracle assumes the truth of the allegations in the Complaint only for purposes of this motion, but it does not in any way concede or admit the truth or accuracy of Realogic's allegations. *See Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008).

[3] Realogic's allegation of Oracle's principal place of business is incorrect. *See* Compl. ¶ 2.

[4] Realogic incorrectly refers to the NetSuite cloud services as software "licenses" throughout its Complaint. As the relevant agreements make clear, however, Realogic obtained subscriptions to use NetSuite software, which is delivered via cloud services for a designated term. *See* disc. *infra* at 2–9 (discussing and citing contracts between Oracle and Realogic related to the modules Realogic discusses in its Complaint).

[5] "Accounting" software falls within the ERP category of Oracle's software, while "payroll" software is generally part of the "human resources" module.

into Realogic's business operations by July 1, 2023." *Id.* ¶ 26. "As a result" of these alleged representations, which were supposedly "material to Realogic's decision to commit to Oracle," Realogic alleges that it "agreed to acquire software licenses from Oracle in exchange for a license fee for each [module] and agreed to pay Oracle's implementation charges related to the software." *Id.* ¶ 27. It also agreed to finance the transaction. *Id.* ¶ 28.

B. Realogic's Subscriptions to NetSuite Software Is Governed by Written Contracts Consisting of Three Primary, Integrated Documents

Although Realogic does not attach them to its Complaint, several written agreements govern Realogic's purchases of NetSuite cloud services for the accounting, human-resources, and payroll modules and corresponding implementation services referenced in the Complaint.[6] The dates of these documents establish that Realogic's claims relate specifically and exclusively to its purchase of a subscription to the NetSuite payroll module. *Compare* Compl. ¶ 26 (alleging Oracle proposed that Realogic "commit[ ] to purchasing a software license from Oracle in May 2023"), *with* Ex. 1, Estimate No. 1213066 for NetSuite SuitePeople US Payroll Cloud Service ("Payroll Estimate") at 4 (executed May 31, 2023).[7] But the terms of Realogic's purchase of a subscription for the payroll module are materially the same as the terms of its prior purchases of subscriptions for the accounting and human-resources modules. *See* disc. *infra* at 3–7. Indeed, Realogic's purchase of a subscription to each module (and any related services, such as support,

[6] The Court may consider these contracts in ruling on this motion because they are "referred to in the complaint" and are "central" to Realogic's claims. *Gardner v. Quicken Loans, Inc.*, 567 F. App'x 362, 364–65 (6th Cir. 2014); *see* Compl. ¶ 27 (referring to contract, stating that Realogic "agreed to acquire software licenses from Oracle in exchange for a license fee for each product and agreed to pay Oracle's implementation charges related to the software"); *id.* ¶ 28 ("Realogic also agreed to finance the transaction through Oracle's related financing company"); *id.* ¶ 58 ("Plaintiff agreed to purchase license fees from Oracle and pay for the timely implementation of NetSuite software for the use of such products in Plaintiff's business").

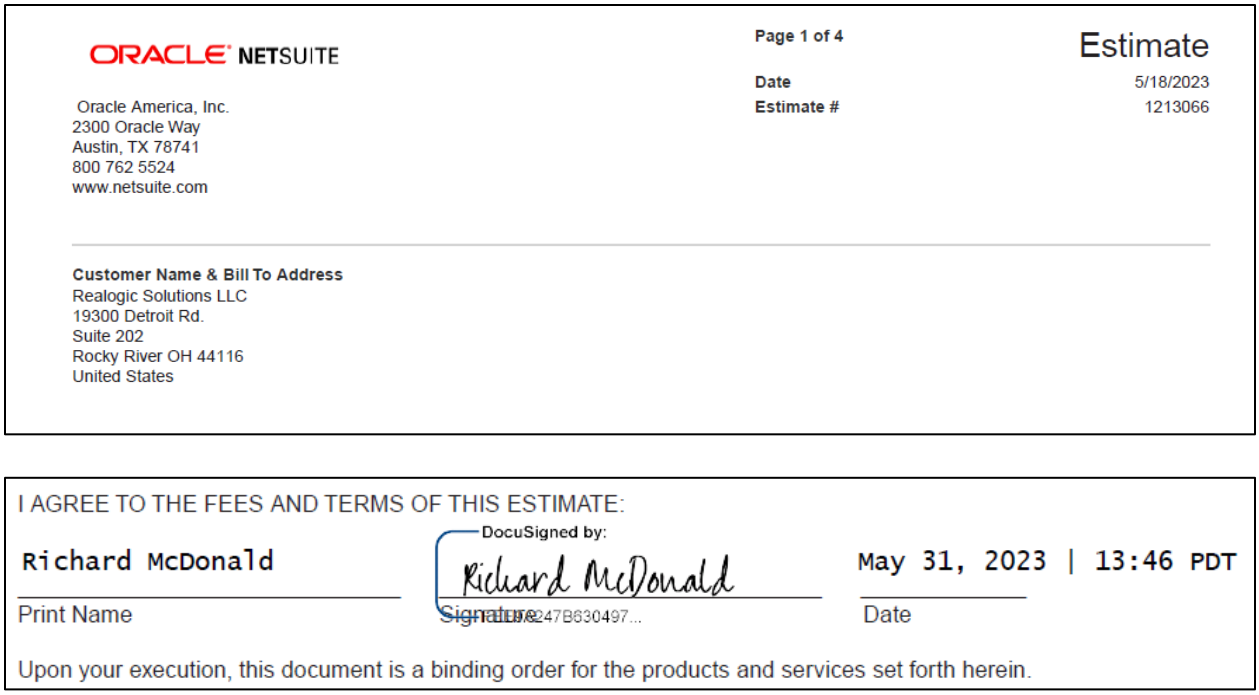
[7] All exhibits are attachments to the Declaration of Dylan Glenn filed in support of this motion.

implementation, or training services) is memorialized in a separate contract, each of which consists of three primary, integrated documents.

1. The Estimate

Realogic's purchase of each subscription to a NetSuite module is referenced in a signed order form that Oracle calls an "Estimate." *See* Payroll Estimate; Ex. 2, Estimate No. 1130780 for NetSuite SuiteSuccess Financials First Standard Cloud Service ("Accounting Estimate");[8] Ex. 3, Estimate No. 1228279 for NetSuite SuitePeople HR Cloud Service ("HR Estimate"). Each Estimate lays out the duration of the cloud subscription, the features and functionality included with the particular modules subscribed to, and the price Realogic agreed to pay. *See* Payroll Estimate at 1; Accounting Estimate at 1–2; HR Estimate at 1–2. Each also includes the fixed price of the Professional Services, if ordered, that Oracle will provide to implement the software module for use by the customer to automate its relevant business processes. *See* Payroll Estimate at 2; Accounting Estimate at 2; HR Estimate at 2. Each Estimate identifies Realogic as the customer and is signed by an authorized Realogic representative, such as Chief HR Officer Richard McDonald:

[8] Realogic initially purchased a subscription to the "accounting" module on January 28, 2022, for a twelve-month term. *See* Ex. 4, Estimate No. 963822 for NetSuite SuiteSuccess Financials First Standard Cloud Service ("Initial Accounting Estimate"). After the successful implementation of that module, Realogic renewed its subscription on December 30, 2022, through its execution of the Accounting Estimate, for a twenty-four month term, commencing at the conclusion of the initial term. *See* Accounting Estimate.



ORACLE NETSUITE

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Estimate

Date 5/18/2023

Estimate # 1213066

Oracle America, Inc.
2300 Oracle Way
Austin, TX 78741
800 762 5524
www.netsuite.com

Customer Name & Bill To Address
Realogic Solutions LLC
19300 Detroit Rd.
Suite 202
Rocky River OH 44116
United States

I AGREE TO THE FEES AND TERMS OF THIS ESTIMATE:

Richard McDonald — Print Name

DocuSigned by: Richard McDonald — Signature 247B630497...

May 31, 2023 | 13:46 PDT — Date

Upon your execution, this document is a binding order for the products and services set forth herein.

Payroll Estimate at 1, 4; *see also* Accounting Estimate at 1, 4; HR Estimate at 1, 4.

2. The Statement of Work

For implementation of the services ordered under each of the Estimates, Oracle and Realogic also executed a "Statement of Work" or "SOW"—referenced by each Estimate—that describes the Professional Services to be performed by Oracle in connection with the implementation of the relevant software module subscribed to. *See* Ex. 5, SOW No. US-155763 ("Payroll SOW"); Ex. 6, SOW No. US-1166273 ("Accounting SOW"); Ex. 7, SOW No. US-142480 ("HR SOW"). Each Statement of Work confirms the scope of the implementation project for the particular module, including "Project Management," "Data Migration," and "Setup and configur[ation]" of the various features of the module. Payroll SOW § 2; Accounting SOW § 2; HR SOW § 2. Oracle developed the scope of each SOW in conjunction with Realogic in order to identify its main business requirements. For instance, each SOW is tailored to Realogic's business operations and processes, providing for the configuration of each NetSuite module based on Realogic's number of employees, the jurisdictions in which it operates, the states in which it files

taxes, and other aspects of Realogic's business that the software needs to address. *See, e.g.*, Payroll SOW § 2.D. Each Statement of Work also lists Realogic's obligations, such as to perform certain tasks like data migration, and to provide certain information and access to its systems and employees to allow Oracle to complete its work. *See* Payroll SOW § 3.1; Accounting SOW § 3.1; HR SOW § 3.1. Notably, the SOWs do not identify a date by which the NetSuite modules being implemented will "go live" (i.e., will be usable by Realogic in a production environment).

Like the Estimates, each SOW identifies Realogic as the customer and is signed by an authorized Realogic representative:

ORACLE
NETSUITE

Fixed Price Statement of Work

Customer Name: Realogic Solutions LLC ("Customer" or "You")
Customer Address: 19300 Detroit Rd., Suite 202, Rocky River OH 44116 United States

This SOW is valid through **May 31, 2023** and shall become binding upon execution by You and acceptance by Oracle.

CUSTOMER		**ORACLE AMERICA, INC.**	
Authorized Signature:	DocuSigned by: Richard McDonald FEE9A247B630497...	**Authorized Signature:**	DocuSigned by: Laura McDonald 3ACC6387EC744D0...
Print Full Name:	Richard McDonald	**Print Full Name:**	Laura McDonald
Job Title:	Chro	**Job Title:**	Sr Business Analyst
Signature Date:	May 31, 2023 | 13:46 PDT	**Signature Date:**	May 31, 2023 | 17:00 EDT

Payroll SOW at 1, 7; *see also* Accounting SOW at 1, 7; HR SOW at 1, 7. Above the signature line where Realogic executed the SOWs, there is an integration clause. *See* Payroll SOW § 7;

Accounting SOW § 7; HR SOW § 7. In it, Oracle and Realogic "acknowledge that they have had previous discussions" about Oracle's performance of the services described in the particular SOW, and they "expressly disclaim any reliance on any and all prior agreements, understandings, RFPs, verbal and/or written communications" related to those services. Payroll SOW § 7; Accounting SOW § 7; HR SOW § 7. The parties agree that each Statement of Work and Estimate "constitute[s] the entire understanding" between them and are "intended to be the final expression of the Parties' agreement" on the services Oracle will provide. Payroll SOW § 7; Accounting SOW § 7; HR SOW § 7.

3. The Subscription Services Agreement

The Estimates and SOW expressly incorporate the "Subscription Services Agreement" or "SSA" that provides the general terms and conditions that apply to the software and services that Oracle agrees to deliver or perform. Payroll Estimate § A.1 ("products and/or services set forth in th[e] Estimate . . . are governed by the Subscription Services Agreement" and providing a link to access it); HR Estimate § A.1 (same); Accounting Estimate § A.1 (same); *see also* Ex. 8, Subscription Services Agreement v060122 ("SSA") at 1 (stating it is between Oracle and "the entity which has accepted [it] through a document that references it.").[9] Subject to the "terms and conditions" contained therein, the SSA provided Realogic with a "non-exclusive, worldwide, limited right to use the Cloud Service, Support Services and Professional Services ordered by Customer (collectively, the 'Services')." SSA § 1. The "Services" are: (i) the "Cloud Service,"

[9] The Payroll Estimate incorporates version "v060122" of the SSA—that is, the effective version as of June 1, 2022. Payroll Estimate § A.1. The Initial Accounting Estimate, executed by Realogic on January 28, 2022, incorporates an earlier version, "v020121," of the SSA—the effective version as of February 1, 2021. *See* Ex. 9, Subscription Services Agreement v020121; Initial Accounting Estimate § A.1. Regardless, the two versions of the SSA do not materially differ for purposes of this motion. *See* Ex. 10, Redline Comparing "v020121" SSA and "v060122" SSA.

i.e., the subscription to the NetSuite software modules "procured by [Realogic] from Oracle in the Estimate"; (ii) the "Support Services," i.e., "technical support" for the Cloud Service Oracle will provide; and (iii) the "Professional Services," i.e., the "implementation . . . services" Oracle will provide under the "the terms" of the particular "Statement of Work." *Id.* at 1 (definitions).

a. Realogic Agreed to Bring All Disputes in California Pursuant to California Law

Pursuant to the terms of the SSA, Realogic and Oracle agreed that for "any dispute arising out of or relating to" their agreement, the parties will "submit to the exclusive jurisdiction of, and venue in, the courts in San Francisco or Santa Clara counties." *Id.* § 12. The parties also agreed that the SSA is "governed by the substantive and procedural laws of the State of California." *Id.*

b. Realogic Agreed to an Exclusive, Limited Warranty and Notice-and-Cure Provisions

In addition to the forum-selection and choice-of-law provisions, the SSA includes a "Services Warranty" that defines certain of Oracle's obligations under the SSA and related Estimates and SOWs. *See id.* § 9. Under the Services Warranty, Oracle agreed to perform the Cloud Services "using commercially reasonable care and skill" and perform "Professional Services and Support Services in a professional manner consistent with industry standards." *Id.* § 9.1. The Services Warranty is "EXCLUSIVE," and there are "NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING FOR SOFTWARE, HARDWARE, SYSTEMS, NETWORKS OR ENVIRONMENTS OR FOR MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR A PARTICULAR PURPOSE." *Id.* § 9.4. Section 9 makes clear that Oracle "DOES NOT WARRANT" that it will provide the Services "ERROR-FREE OR UNINTERRUPTED," that it will "CORRECT ALL SERVICES ERRORS[,]" or that it "WILL MEET CUSTOMER'S REQUIREMENTS OR

EXPECTATIONS." *Id.* § 9.2. Oracle also is "NOT RESPONSIBLE FOR ANY ISSUES RELATED TO . . . CUSTOMER DATA." *Id.*

The Services Warranty also requires Realogic to "promptly" notify Oracle in writing of any performance deficiency that Realogic identifies and to do so within 60 days of the deficiency. *Id.* § 9.1. After providing notice, Realogic's "EXCLUSIVE REMEDY" and Oracle's "ENTIRE LIABILITY" is the "CORRECTION OF THE DEFICIENT SERVICES." *Id.* § 9.3. If Oracle cannot correct the deficiency, then Realogic "MAY END THE DEFICIENT SERVICES," and Oracle will "REFUND" to Realogic any funds it has pre-paid for future services. *Id*.

For any alleged breach that the non-breaching party asserts as a basis to terminate the contract, Oracle and Realogic each agreed to provide the party allegedly in breach with "written specification of the breach" and to give said party "30 days" to "correct the breach" before terminating the agreement. *Id.* § 7.3. Similarly, if Realogic has a "legal dispute" with Oracle, Realogic agreed to "promptly send written notice" to Oracle at its principal place of business in Redwood Shores, California and to the attention of Oracle's General Counsel. *Id.* § 6.2.

4. Realogic Agreed the Estimate, Statement of Work, and Subscription Services Agreement Form a Complete, Integrated Contract

Like each Statement of Work, the SSA has an integration clause. SSA § 14.1. In it, Oracle and Realogic agreed that the SSA, along with the particular Estimate and any "referenced items" in the Estimate, such as the Statement of Work, constituted "the final and entire expression of their agreement." *Id.* § 14.1.1. In other words, the Estimate, the Statement of Work, and the SSA—taken together—form the complete contract, and Oracle and Realogic expressly "disclaim[ed] any reliance on any and all prior discussions, emails . . . and/or agreements between the parties" and confirmed there are "no other verbal agreements, representations, warranties undertakings or other agreements between" them. *Id.* Modifications to the SSA must be in signed, in writing, or

accepted electronically by "the party against whom the modification . . . is to be asserted." *Id.* § 14.1.3.

C. Without Providing Notice, Realogic Sues Oracle Related to Its Purchase of a Subscription to the Payroll Module and Related Services

Without any other details or explanation, Realogic alleges that it "never received the benefit of the software promised by Oracle." Compl. ¶ 32. In particular, Realogic alleges it "committed to purchasing" a software subscription "in May 2023," *id*. ¶ 26, that Oracle's software had unidentified "data errors" and other "defects," *id.* ¶ 32, and that it was "neither possible nor realistic" for Oracle to implement the software for Realogic by July 1, 2023, *id.* ¶¶ 26, 29. The time period alleged by Realogic indicates that Realogic's claims can only relate to the Payroll Estimate, which was signed on May 31, 2023. *See* Payroll Estimate at 4.[10]

Realogic filed suit in March 2024, purporting to plead claims for breach of contract, breach of warranty, unjust enrichment, negligence, negligent misrepresentation, and declaratory relief. *See* Compl. ¶¶ 47–74. Realogic does not allege it notified Oracle in writing of: these alleged defects; any breach that would give rise to terminating the contract; or this dispute, as required by the SSA—and it did not. *See id.* at *passim*; SSA §§ 6.4, 9.1.

II. GOVERNING LAW

Absent the presence of a choice-of-law provision, a federal court sitting in diversity should generally apply federal procedural law and the substantive law of the forum state, Ohio. *Hoven v. Walgreen Co.*, 751 F.3d 778, 783 (6th Cir. 2014). But here, the SSA includes a choice-of-law provision stating that "any dispute arising out of or relating to" the SSA is "governed by the

[10] By contrast, the Accounting Estimate was initially executed in January 2022 and renewed in December 2022, while the HR Estimate was executed in December 2022. *See* Initial Accounting Estimate at 4; Accounting Estimate at 4; HR Estimate at 4.

substantive and procedural laws of the State of California." SSA § 12. To decide whether to apply this choice-of-law provision, the Court applies Ohio conflict-of-law principles. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The Ohio Supreme Court has held that "where the parties to a contract have made an effective choice of the forum law to be applied," Ohio conflict-of-law principles "will not be applied" in a way that "contravene[s] the choice of the parties as to the applicable law," meaning the Court should apply the parties' choice-of-law provision. *Jarvis v. Ashland Oil, Inc.*, 17 Ohio St. 3d 189, 192 (1985). But even if the Court does not enforce the parties' choice-of-law provision, the result will be the same. No conflicts exist between California law and Ohio law on any issue—substantive or procedural—raised by this motion, and Oracle cites cases applying the law of both states throughout it.

III. ARGUMENT

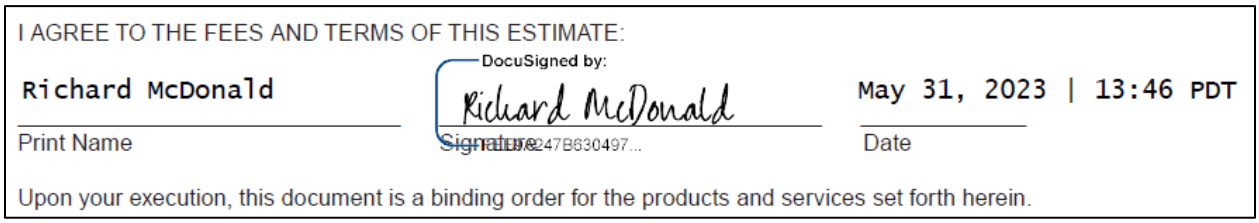
A. Based on the SSA's Forum-Selection Clause, the Court Should Dismiss Realogic's Complaint or, in the Alternative, Transfer It to California

The forum-selection clause in the SSA is binding and requires Realogic (and Oracle) to submit to the jurisdiction of, and venue in, the "courts in San Francisco or Santa Clara counties in California"—not in Ohio. SSA § 12. Because Realogic filed its Complaint in violation of this forum-selection clause, the Court should either dismiss the action under Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, transfer it to the Northern District of California, San Francisco Division, under 28 U.S.C. § 1404(a). *See Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 934 (6th Cir. 2014) (affirming dismissal of complaint under Fed. R. Civ. P. 12(b)(6) based on forum-selection clause, but noting the court also could have transferred the case under 28 U.S.C. § 1404(a)); *Micropower Grp. v. Ametek, Inc.*, 953 F. Supp. 2d 801, 811 (S.D. Ohio 2013) (dismissing complaint under forum-selection clause).

1. The Terms of the SSA Are Valid and Enforceable

The SSA is incorporated through each Estimate and Statement of Work, which themselves are valid and enforceable as between Oracle and Realogic. Thus, the terms of the SSA, including its forum-selection clause, are valid and enforceable against Realogic.

The essential elements of a contract are "1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." *Aton Ctr., Inc. v. United Healthcare Ins. Co.*, 93 Cal. App. 5th 1214, 1231 (2023) (cleaned up) (citing Cal. Civ. Code § 1550); *see also Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 16. Consent is "usually accomplished through the medium of an offer and acceptance." *Aton Ctr.*, 93 Cal. App. 5th at 1231. The Payroll Estimate and Statement of Work satisfy all of these essential elements. Realogic consented to the Payroll Estimate and Statement of Work when its Chief HR Officer, Richard McDonald, signed those agreements. When executing the Estimate, Realogic Chief HR Officer Richard McDonald expressly "AGREE[D] TO THE FEES AND TERMS OF THE ESTIMATE" and acknowledged that "[u]pon [his] execution, [the Estimate] is a binding order for the products and services set forth [t]herein":


I AGREE TO THE FEES AND TERMS OF THIS ESTIMATE:

Richard McDonald — Print Name

DocuSigned by: Richard McDonald — Signature

May 31, 2023 | 13:46 PDT — Date

Upon your execution, this document is a binding order for the products and services set forth herein.

Payroll Estimate at 4; *see also* Accounting Estimate at 4 (substantively same); HR Estimate at 4 (substantively same); *Fulwell 73 UK Ltd v. Slate Ent. Grp. Inc.*, No. 2:20-cv-05745, 2021 WL 3261965, at *2 (C.D. Cal. Mar. 30, 2021) (under California law, a contract need not contain signatures of all parties to be effective unless there is a specific condition requiring signatures of all parties); *Est. of Battle-King v. Heartland of Twinsburg*, 2021-Ohio-2267, ¶ 29 (same under

Ohio law). And when executing the SOW, Mr. McDonald again acknowledged that "upon execution[,]" it would "become binding":

This SOW is valid through **May 31, 2023** and shall become binding upon execution by You and acceptance by Oracle.

CUSTOMER		**ORACLE AMERICA, INC.**	
Authorized Signature:	DocuSigned by: Richard McDonald FEE9A247B630497...	**Authorized Signature:**	DocuSigned by: Laura McDonald 3ACC6387EC744D0...
Print Full Name:	Richard McDonald	**Print Full Name:**	Laura McDonald
Job Title:	Chro	**Job Title:**	Sr Business Analyst
Signature Date:	May 31, 2023 | 13:46 PDT	**Signature Date:**	May 31, 2023 | 17:00 EDT

Payroll SOW at 7; *see also* Accounting SOW at 7; HR SOW at 7.

The Payroll Estimate and Statement of Work (like the Accounting and HR Estimates and their related SOWs) provide sufficient consideration: Realogic receives the right to access and use the NetSuite software and related services during the subscription term, and Oracle receives payments from Realogic. *See Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1403 (E.D. Cal. 1997); *Elevation Enters. Ltd. v. NMRD Ltd.*, 2023-Ohio-4433, ¶ 21, 231 N.E.3d 1198, 1207. In fact, Realogic's allegations confirm the Payroll Estimate and Statement of Work are valid, as it alleges that it "*agreed*" to accept Oracle's offer to sell "software licenses . . . *in exchange for* a license fee." Compl. ¶ 27 (emphases added).

The SSA, including its forum-selection provision, is properly incorporated with and into the Payroll Estimate and the Statement of Work. *See* Payroll Estimate § A.1; SSA § 4.1. Parties "may incorporate by reference into their contract the terms of some other document." *Shaw v. Regents of Univ. of California*, 58 Cal. App. 4th 44, 54 (1997); *see also Mohmed v. Certified Oil Corp.*, 2015-Ohio-2398, ¶ 35. The Estimate plainly states that the "products and/or services set forth" in the Estimate "*are governed by the Subscription Services Agreement*." Payroll Estimate

§ A.1 (emphasis added); *see also* Accounting Estimate § A.1 (same); HR Estimate § A.1 (same). The Estimate provides a hyperlink to access the SSA on Oracle's website. *See, e.g.*, Payroll Estimate § A.1 (stating the Estimate is governed by the SSA "found at https://www.oracle.com/corporate/contracts/cloud-services/netsuite"); Accounting Estimate § A.1 (same); HR Estimate § A.1 (same). "Several courts" have held that hyperlinking to "terms and conditions located on a company's website" sufficiently "incorporate[s] [them] into a contract," especially when the "challenging party," like Realogic, is a "commercial entity." *Morgantown Mach. & Hydraulics of Ohio, Inc. v. Am. Piping Prods., Inc.*, No. 5:15-cv-1310, 2016 WL 705261, at *5 (N.D. Ohio Feb. 23, 2016); *see, e.g.*, *In re Holl*, 925 F.3d 1076, 1084 (9th Cir. 2019). Indeed, just seven months ago, a court held that the terms of Oracle's form "Estimate and Statement[ ] of Work" properly incorporate the SSA. *River Supply, Inc. v. Oracle America, Inc.*, No. 3:23-cv-02981, 2023 WL 7346397, at *10 (N.D. Cal. Nov. 6, 2023) (dismissing claims for breach of contract, breach of warranty, and negligent misrepresentation). The court held that the relevant documents provide hyperlinks to a page "that conspicuously identifies and links to" the SSA, which is binding—even if a party, like Realogic, "may not have read" them. *Id.*; *see also Bennett v. KeyBank, N.A.*, 2020-Ohio-1152, ¶ 26 ("Whether [a party] actually reviewed the terms and conditions referenced by [the contract] is irrelevant"). The SSA, including the forum-selection clause, is incorporated into the Payroll Estimate and Statement of Work and is fully enforceable.

2. The Forum-Selection Clause Requires Dismissal or Transfer of Realogic's Complaint

Under the SSA's forum-selection clause, Realogic must submit to the "exclusive jurisdiction of, and venue in, the courts in San Francisco or Santa Clara counties in California" for "any dispute arising out of or relating to" to the SSA. *See* SSA § 12. Federal district courts sitting in diversity in the Sixth Circuit must apply federal common law to determine whether to enforce

a forum-selection clause like the one in the SSA. *Lakeside Surfaces, Inc. v. Cambria Co.*, 16 F.4th 209, 215 (6th Cir. 2021). In so doing, the court must ask whether the clause is (i) mandatory, (ii) applicable to the claims, and (iii) valid and enforceable. *See id.* Each of these elements is more than satisfied here, and Realogic cannot make the "strong showing" necessary to set this provision aside. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009). The claims against Oracle are subject to dismissal or, in the alternative, transfer to the Northern District of California. *See Smith*, 769 F.3d at 934.

a. The Forum-Selection Clause Is Mandatory

When the parties "use [ ] the word 'exclusive,' the forum selection clause . . . is explicitly mandatory, not permissive." *Braman v. Quizno's Franchise Co.*, No. 5:07-cv-2001, 2008 WL 611607, at *6 (N.D. Ohio Feb. 20, 2008). Because the SSA's forum-selection clause requires the parties to submit to the "*exclusive* jurisdiction of, and venue in, the courts in San Francisco or Santa Clara counties in California," it is mandatory. SSA § 12 (emphasis added); *see also Rosskamm v. Amazon.com, Inc.*, 637 F. Supp. 3d 500, 509 (N.D. Ohio 2022) (clause was mandatory where parties "consent[ed] to exclusive jurisdiction and venue in these courts").

b. The Forum-Selection Clause Applies to All of Realogic's Claims

The forum-selection clause covers "any dispute arising out of or relating to" the SSA, which itself governs and is incorporated into the Payroll Estimate and Statement of Work. SSA § 12; *see also* disc. *supra* at 6–7 (explaining that the SSA is incorporated into the Payroll Estimate and Statement of Work and governs the "Cloud Service"—the NetSuite module "in the Estimate"—and the "Professional Services"—the implementation services in the "Statement of Work"). Courts in the Sixth Circuit "interpret forum selection clauses with 'related to' language" broadly, covering not only the contractual claims, but also "tort or consumer protection claims

'related to' the contract's purpose." *Lorenzana v. 2nd Story Software, Inc.*, No. 4:12-cv-00021, 2012 WL 2838645, at *6 (W.D. Ky. July 10, 2012) (collecting cases).

Here, all of Realogic's claims relate to the purpose of the SSA to govern the sale of cloud subscriptions to NetSuite modules and related implementation services from Oracle to Realogic:

- Count One seeks declaratory relief related to "commitments made" to "pay[ ] license and implementation fees in exchange for functioning software programs." Compl. ¶ 49.
- Count Two for unjust enrichment turns on the allegation that Oracle "accepted payment related to software licenses" but "never provided the software as [it] represented it would." *Id.* ¶¶ 52–53.
- Count Three for breach of contract arises from Realogic's "agree[ment] to purchase license fees from Oracle and pay for the timely implementation of NetSuite software." *Id.* ¶ 58.
- Count Four for negligence stems from Oracle's alleged duty to "provide[ ] functioning NetSuite software." *Id.* ¶ 64.
- Count Five for negligent misrepresentation turns on Oracle's alleged representation that "its NetSuite software is easily integrated into existing business operations." *Id.* ¶ 68.
- Count Six for breach of warranty arises from Oracle's alleged warranty that its "NetSuite software . . . is suitable for the required purposes." *Id.* ¶ 72.

Thus, even though Realogic's causes of action "sound[ ] in contract [and] tort," they all arise out of or relate to the SSA. *Lorenzana*, 2012 WL 2838645, at *6 (enforcing forum-selection clause that covered "any lawsuits arising from or relating to" plaintiff's agreement to purchase software where plaintiff alleged product-defect tort claims related to the software); *PolyOne Corp. v. Teknor Apex Co.*, No. 1:14-cv-0078, 2014 WL 4207671, at *5 (N.D. Ohio Aug. 25, 2014) ("The general rule in [the Sixth Circuit] is that regardless of the duty sought to be enforced in a particular cause of action, if the duty arises from the contract, the forum selection clause governs the action. This rule includes tort or consumer protection claims related to the contract's purpose." (internal citations omitted)); *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir.

2018) ("[F]orum-selection clauses covering disputes 'relating to' a particular agreement apply to any disputes that reference the agreement or have some 'logical or causal connection' to the agreement") (collecting cases).

c. The Forum-Selection Clause Is Valid and Enforceable

Forum-selection clauses are prima facie valid, and courts enforce them unless the party resisting enforcement shows the clause is unreasonable. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). In order to do so—and "defeat the strong presumption in favor of enforceability"—the party resisting enforcement must establish either: "(i) the clause was obtained by fraud, duress, or other unconscionable means; (ii) the designated forum would ineffectively or unfairly handle the suit; (iii) the designated forum would be so seriously inconvenient that requiring the plaintiff to bring suit there would be unjust; or (iv) enforcing the forum selection clause would contravene a strong public policy of the forum state." *Lakeside Surfaces*, 16 F.4th at 219–20. Realogic cannot establish any of these circumstances.

First, the clause was not obtained by fraud, duress, or other unconscionable means. As discussed, the Payroll Estimate and Statement of Work, which Realogic freely entered into, properly incorporate the SSA, and any claim by Realogic that it failed to review those terms is irrelevant. *See Morgantown Mach.*, 2016 WL 705261, at *5; *Bennett*, 2020-Ohio-1152, ¶ 24; *River Supply*, 2023 WL 7346397, at *10.

Second, the proposed forum—the Northern District of California—is capable of adjudicating this suit. *See Ellenberger v. Alphabet, Inc.*, No. 3:19-cv-527, 2020 WL 11772628, at *3 (W.D. Ky. July 17, 2020) ("[T]he courts of Santa Clara County, California, appear to be fully capable of effectively and fairly adjudicating this suit." (quotation marks omitted)).

Third, the designated forum is not "so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust." *Wong*, 589 F.3d 821 at 828; s*ee also Carnival Cruise*

Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991) (enforcing forum-selection clause and finding no basis for inconvenience even where evidence suggested that plaintiffs were "physically and financially incapable of pursuing [the] litigation in Florida"). To the contrary, because Realogic has "intentionally broadened the geographic scope of the action by seeking to certify a class"—here, a nationwide class—its choice of this forum is "diminished." *Donia v. Sears Holding Corp.*, No. 1:07-cv-2627, 2008 WL 2323533, at *4 (N.D. Ohio May 30, 2008); *Koster v. American Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (in a nationwide class action, "the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened").

Fourth, application of the forum-selection clause does not offend a strong public policy of Ohio. In fact, requiring Oracle to defend this suit in Ohio, in contravention of the forum-selection clause, would be more offensive to the public policy of the forum. As courts in this district have held, "the public has a strong interest in applying contracts as they are written." *Braman*, 2008 WL 611607, at *7. "[D]enying transfer" based on a valid forum-selection clause "would require the Court" to act contrary to that interest. *Id.*; *see also Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W.D. Tex.*, 571 U.S. 49, 62 (2013) ("[E]xtraordinary circumstances" are required to ignore a forum-selection agreement between the parties.).

The Court should thus dismiss Realogic's Complaint under Federal Rule of Civil Procedure 12(b)(6). *See Smith*, 769 F.3d at 933–34 (affirming dismissal under Rule 12(b)(6) based on forum-selection clause); *Wilson v. 5 Choices, LLC*, 776 F. App'x 320, 326 (6th Cir. 2019) ("[A] motion to dismiss under [Rule] 12(b)(6) is a permissible way to enforce [a] forum-selection" clause); *Micropower*, 953 F. Supp. 2d at 811 (dismissing claims "because the forum-selection clause dictates that all suits . . . be brought in Pennsylvania"); *Race Winning Brands, Inc. v. Crawford*,

601 F. Supp. 3d 279, 288 (N.D. Ohio 2022) (dismissing claims where forum-selection clause "preclude[d] litigation in Ohio").

Alternatively, if the Court declines to dismiss the Complaint, it should transfer this action to the Northern District of California, San Francisco Division. *See* 28 U.S.C. § 1404(a) (empowering a district court to "transfer any civil action . . . to any other district or division . . . to which all parties have consented"). "Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion" based on a valid forum-selection clause "be denied." *Atl. Marine Constr.*, 571 U.S. at 62. Where, as here, the parties' contract contains a valid, mandatory, and enforceable forum-selection clause, the plaintiff's choice of forum merits "no weight." *Id.* at 63. Instead, Realogic "bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Id*.

That burden, again, is one that Realogic cannot meet. While "[i]n the typical case not involving a forum-selection clause, a district court considering a §1404(a) motion . . . must evaluate both the convenience of the parties and various public-interest considerations," "the calculus changes" where—as here—the "parties' contract contains a valid forum-selection clause." *Id*. at 62–63. Any argument against the forum-selection clause may "only" rely on the "public-interest factors," as the court "must deem the private-interest factors to weigh *entirely* in favor of the preselected forum." *Id.* at 64 (emphasis added). The public-interest factors include the "administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum that is at home with the law." *Id*. at 62 n.6. Those factors will "rarely" defeat a transfer motion—and they cannot do so here. *Id*. at 64. Indeed, the latter two factors favor transfer. The "local interest" favors California because Oracle is domiciled there and, although Realogic is based in

Ohio, the weight of that fact is "diminished" in the context of its assertion of a nationwide class action. *Donia*, 2008 WL 2323533, at *4; *see also* Compl. ¶ 1; Am. Corporate Disclosure Statement. And because the SSA calls for the application of California law, the California courts there will be "at home." SSA § 12; *Atl. Marine Constr.*, 571 U.S. at 62 n.6. Thus, if not dismissed, the Court should transfer Realogic's claims to the Northern District of California, San Francisco Division.

B. The Court Should Dismiss Realogic's Claims Based on the Terms of the SSA

If the Court does not dismiss or transfer the Complaint based on the forum-selection clause, Realogic's claims still fail. As an initial matter, Realogic never provided Oracle notice of this dispute and an opportunity to cure, as the SSA requires. SSA § 6.2 (Realogic must "promptly send written notice" of a dispute with Oracle); *id.* § 7.3 (party alleging breach of material term must provide "written specification of the breach" and give the other party "30 days" to "correct the breach" before terminating the agreement); *id.* § 9.1 (to allow Oracle an opportunity to cure, requiring Realogic to provide "prompt" written notice of any breach of warranty and defining "prompt" notice as 60 days for any deficiencies with implementation services). This type of notice-and-cure provision is a material term, and Realogic's failure to comply alone requires dismissal. *See King v. Navy Fed. Credit Union*, No. 2:23-cv-05915, 2023 WL 8250482, at *3 (C.D. Cal. Oct. 19, 2023) ("Failure to plead compliance with a notice-and-cure provision of a contract will serve as a bar to a claim for breach of contract, where the provision was clearly stated in the contract that was allegedly breached."); *Williams v. Fed. Express Corp.,* No. 2:99-cv-06252, 1999 WL 1276558, *3–4 (C.D. Cal. Oct. 6, 1999) (claims failed where plaintiff did not comply with notice provision); *Kirkbride v. Antero Res. Corp.*, No. 23-3484, 2024 WL 340782, at *4 (6th Cir. Jan. 30, 2024) (same).

Even if Realogic had provided notice, the SSA still bars Realogic's claims for breach of contract and breach of warranty. Moreover, those claims are hopelessly unclear, failing to provide Oracle with fair notice of the defects and breaches that allegedly occurred. Realogic's claims for unjust enrichment, negligence, and negligent misrepresentation fail because they arise out of the parties' contractual relationship, and the negligence and negligent-misrepresentation claims are barred by the economic-loss rule. Finally, its claim for declaratory relief cannot stand alone.

1. The SSA Bars Realogic's Claims for Breach of Contract and Breach of Warranty

A claim for breach of contract or breach of warranty may be dismissed "if the pleadings" and the contract's terms "demonstrate that the express contract in question was not breached." *OCD Moving Servs. LLC v. Navistar Inc.*, No. 2:20-cv-01307, 2021 WL 106466, at *2 (E.D. Cal. Jan. 12, 2021) (dismissing claims based on terms of applicable contract); *see, e.g.*, *World Shipping, Inc. v. RMTS, LLC*, No. 1:12-cv-3036, 2013 WL 774503, at *3 (N.D. Ohio Feb. 22, 2013) (dismissing breach-of-contract claim); *Jblanco Enters. v. Soprema Roofing & Waterproofing, Inc.*, No. 1:13-cv-2831, 2016 WL 6600423, at *13 (N.D. Ohio Nov. 8, 2016) (dismissing breach-of-warranty claim). Such is the case here.

a. Breach of Contract

Although its breach-of-contract claim is hard to follow, Realogic alleges that it "committed to purchasing" a module "in May 2023," Compl. ¶ 26, which can only refer to the payroll module, given that only the Payroll Estimate is dated in May 2023. *See* Payroll Estimate at 4. Realogic then alleges that it expected the module would be "fully implemented" by July 1, 2023, but that it was not. Compl. ¶¶ 26, 29. Realogic thus claims that Oracle failed to meet its alleged promise to "timely" implement the payroll module. *Id.* ¶ 58.

Oracle, however, did not promise to deliver the payroll module by July 1, 2023. *See* Payroll Estimate at *passim*; Payroll SOW at *passim*. Nor does the SSA say anything about a specified date of implementation. *See* SSA at *passim*. To the contrary, the Payroll Estimate states the "Implementation Service" will have a term of six months from May 31, 2023 to be completed, meaning the module might not be "fully implemented" until November 30, 2023—not July 1, 2023—directly undermining Realogic's claim. Payroll Estimate at 1 (executed by Realogic on May 31, 2023). And the Statement of Work makes clear that, if Realogic fails to provide "full cooperation" with the implementation of the module or to perform its obligations, there may be "delays," further demonstrating that Realogic knew that Oracle could not have committed to completing the Payroll implementation by July 1, 2023. Payroll SOW § 3.

The SSA, incorporated into the Estimate and the SOW, is "the final and entire expression of [the parties'] agreement." SSA § 14.1.1. It "disclaim[s] any reliance on any and prior discussions, emails . . . and/or agreements between the parties" and confirms there are "no other verbal agreements, representations, warranties undertakings or other agreements between" them. *Id.* Thus, even if Realogic were alleging that Oracle made some prior, oral representation to implement the Payroll module by July 1, 2023, those representations would not be part of the agreement with Realogic. *See, e.g.*, *Granite Rock Co. v. Teamsters Union Loc. No. 890*, No. 3:12-cv-02974, 2012 WL 5877494, at *6 (N.D. Cal. Nov. 20, 2012) (dismissing claims based on integration clause under California law); *Brantley Venture Partners II, L.P. v. Dauphin Deposit Bank & Tr. Co.*, 7 F. Supp. 2d 936, 941 (N.D. Ohio 1998) (Under Ohio law, when an integration clause exists, "[i]ntentions not expressed in the writing are deemed to have no existence."). The Court should thus dismiss Realogic's breach-of-contract claim. *See OCD Moving*, 2021 WL

106466, at *2 (dismissing breach-of-contract claim because "the sales agreement does not include any provisions requiring the performance plaintiff assumes it was owed").

b. Breach of Warranty

The Court should also dismiss Realogic's claim for breach of warranty. As much as Realogic's breach-of-warranty claim can be understood, it alleges that Oracle breached a warranty that its software would be "suitable for the required purposes," Compl. ¶ 72, because the software had "data errors" and other "defects." *Id.* ¶ 32.

But the SSA's "EXCLUSIVE" warranty disclaims any warranty that the software will suit a particular purpose or will be free of defects. SSA § 9.4. In particular, the warranty is limited to Oracle's commitment to provide the NetSuite modules "using commercially reasonable care and skill" and perform implementation services "in a professional manner consistent with industry standards." *Id.* § 9.1. It states, in capital letters, that Oracle "DOES NOT WARRANT" that it "WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS" or provide its software or implementation services "ERROR-FREE." *Id.* § 9.2. It also makes clear that there are "NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS," including warranties "FOR A PARTICULAR PURPOSE." *Id.* § 9.4 (also disclaiming the implied warranty of "MERCHANTABILITY"). Thus, Realogic's claims that Oracle's software was not "suitable for the required purposes" and was not free of "data errors" or "defects" do not fall within the ambit of the SSA's warranty provision. And even if they did, Realogic could not seek relief from this Court. Its "EXCLUSIVE REMEDY" is the "CORRECTION OF THE DEFICIENT SERVICES," and if that does not work, a "REFUND." *Id.* § 9.3.

These limitations are fully enforceable under either California or Ohio law and bar Realogic's claim for breach of warranty. To disclaim warranties, California and Ohio law require only that the parties put the disclaimer in a conspicuous writing. *See* Cal. Com. Code § 2316 ("to

exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous"); Ohio Rev. Code Ann. § 1302.29 cmt. 4 ("[I]mplied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous."). The SSA's disclaimer qualifies as conspicuous because it is in all capital letters, as courts have routinely held. *See, e.g.*, *In re Google Phone Litig.*, No. 10-cv-01177, 2012 WL 3155571, at *8 (N.D. Cal. Aug. 2, 2012) (enforcing disclaimer that was in all capital letters surrounded by lowercase font); *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. 3:07-cv-04178, 2008 WL 552482, at *8 (N.D. Cal. Feb. 27, 2008) (same); *OCD Moving*, 2021 WL 106466, at *2 (same); *JBlanco*, 2016 WL 6600423, at *7 (finding warranty disclaimer "conspicuous in bold face type and all capital letters").

Not only that, courts enforce warranty disclaimers with increased frequency when the plaintiff is a "business customer." *Inter-Mark*, 2008 WL 552482, at *8. Realogic is a business customer, and the SSA is "not a consumer contract involving buried terms" but "a business contract for services costing" tens of thousands of dollars. *River Supply*, 2023 WL 7346397, at *11. The Court should enforce the warranty disclaimer of the SSA and dismiss Realogic's claim for breach of warranty.

2. Realogic's Claims for Breach of Contract and Breach of Warranty Do Not Provide Oracle with Fair Notice of the Dispute

The Court should independently dismiss Realogic's claims for breach of contract and breach of warranty because Realogic fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Realogic instead relies only on "bare assertion[s] of legal conclusions" without the necessary "direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *First Am. Title Co. v. DeVaugh*, 480 F.3d 438,

444 (6th Cir. 2007). As a result, Oracle is left without "fair notice" of Realogic's claims for breach of contract and breach of warranty and "the grounds" on which they rest. *Twombly*, 550 U.S. at 555 (citing Fed. R. Civ. P. 8(a)(2)).[11]

a. Realogic Fails to Identify the Contractual Provision That Oracle Allegedly Breached

Realogic fails to plead the specific contract provisions that Oracle allegedly breached, as it was required to do. *See EHPLabs Rsch., LLC v. Smith*, No. 5:22-cv-0653, 2022 WL 3139604, at *8 (N.D. Ohio Aug. 5, 2022) (under Ohio law, breach-of-contract claims require allegation of specific provision breached); *Morrow-Meadows Corp. v. Honeywell Int'l Inc.*, No. 2:22-cv-05716, 2022 WL 14751479, at *3 (C.D. Cal. Oct. 24, 2022) (same under California law). Instead, Realogic first pleads there is no contract, Compl. ¶ 50(a) (asking for a declaration "[n]o contract exists" between Oracle and Realogic), and then pleads there is some contract Oracle breached, *see id.* ¶¶ 57–62.

Either way, Realogic never alleges the specific term Oracle breached. It says merely that Oracle breached the contract when it did not provide "timely" implementation and "functioning" software, without ever explaining what those terms mean or where in the contract those terms are

[11] The SSA's choice-of-law provision embraces both "the substantive *and procedural* laws of the State of California." SSA § 12 (emphasis added). The Sixth Circuit has not ruled on whether a reference to "procedural" law in a choice-of-law provision requires a federal court sitting in diversity to apply the pleading standard of the chosen state or still to apply the federal pleading standard. But the issue is irrelevant to this motion because Realogic's claims for breach of contract and breach of warranty flunk both California's pleading standard and the federal one. *See Pickens v. Cnty. of Riverside*, No. D080922, 2023 WL 3557389, at *8 (Cal. Ct. App. May 19, 2023) ("The basic principles of federal law for pleading a cause of action are similar to California's."); *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 537 (1979) (holding that "in pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise" and complaints should be dismissed if they contain "ambiguous" allegations that make for "uncertain" claims); *see* disc. *supra* at 9–10 (Governing Law).

found. This is not enough to provide Oracle notice of its breach, requiring dismissal. *See Johnson v. Chapman Univ.*, No. 8:21-cv-00019, 2021 WL 3463893, at *2 (C.D. Cal. June 23, 2021) (allegations of a contract for "reliable" transportation or "best option" housing not definite enough to sustain breach-of-contract claim); *Doe v. BMG Sports, LLC*, 584 F. Supp. 3d 497, 514 (S.D. Ohio 2022) (dismissing claim for alleged breach of contract through verbally abusive conduct because plaintiff did not provide "specifics" "—what was said, when, to whom, etc.—that would move the allegations beyond 'cursory'").

b. Realogic Fails to Identify the Warranty That Oracle Allegedly Breached

Realogic's claim for breach of warranty is also impermissibly incomplete. Realogic never explains whether Oracle breached an express warranty or an implied warranty. *See* Compl. ¶¶ 71–74 (pleading a general "Breach of Warranty"). In fact, it seems to allege that the relevant warranty is both express *and* implied, stating, "Oracle . . . implies, *if not outright states*, that the [NetSuite] software is suitable for the required purposes." *Id.* ¶ 72 (emphasis added). What the "required purposes" are, Realogic never says, saying only that NetSuite software does not "meet" them. *Id.* ¶ 73. This is insufficient for a claim for breach of express warranty, which requires Realogic to identify and plead the terms of the express warranty. *Hubbard v. AASE Sales, LLC*, 2018-Ohio-2363, ¶ 42 (must plead express warranty exists); *River Supply*, 2023 WL 7346397, at *16 (same). And it is not enough for a breach of implied warranty either, as it offers only "labels and conclusions" that Oracle breached a warranty without the specifics necessary to provide Oracle notice of the claim. *Twombly*, 550 U.S. 544, 555. In any event, as discussed, the SSA disclaims "IMPLIED WARRANTIES" including those for "FOR MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR A PARTICULAR PURPOSE." SSA § 9.4;

see disc. *supra* at 7–8. Whether for breach of express or implied warranty, Realogic's claim should be dismissed.

3. Realogic's Claims for Unjust Enrichment Fails as Derivative of the Parties' Contract

A claim for unjust enrichment requires "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the 'unjust enrichment' element)." *Hammill Mfg. Co. v. Park-Ohio Indus., Inc.*, 2013-Ohio-1476, ¶ 14; *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (unjust enrichment involves a defendant being "unjustly conferred a benefit through mistake, fraud, coercion, or request").

Realogic alleges it conferred on Oracle the benefit of a "financing agreement and other compensation." Compl. ¶ 54. But that is not an unjust "benefit"; it is contractual consideration for the cloud subscriptions and implementation services that Oracle agreed to provide to Realogic. This is true whether under the terms of the Payroll Estimate and the Statement of Work or under the vague, limited contract that Realogic alleges. *See id.* ¶¶ 58–59. A claim for unjust enrichment does "not lie when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (applying California law); *Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047, 1057 (N.D. Cal. 2021) ("a quasi-contract claim for unjust enrichment cannot lie where there exists between the parties a valid express contract covering the same subject matter" (internal citations omitted)); *Lucas v. Eclipse Cos., LLC*, 2023-Ohio-4728, ¶ 50 ("existence of a valid, enforceable contract covering the subject of a dispute generally precludes a claim for unjust enrichment"). Given the contract between the parties, the Court should dismiss Realogic's claim for unjust enrichment.

4. Realogic's Claims for Negligence and Negligent Misrepresentation Fail Because of the Parties' Contract and the Economic-Loss Rule

In the same vein, claims for negligence and negligent misrepresentation are not viable unless there is a "separate duty owed by [the defendant] outside of the duties created by the contract." *Dayton Childrens Hosp. v. Garrett Day LLC*, No. 2016-cv-02061, 2018 WL 10096366, at *10 (Ohio Com. Pl. June 7, 2018) (dismissing negligent-misrepresentation claim); *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 923-24 (2022) (negligent-misrepresentation claims are "barred when they arise from—or are not independent of—the parties' underlying contracts"); *N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764, 774 (1997) ("[T]he general rule that where the 'negligent' performance of a contract amounts to nothing more than a *failure* to perform the express terms of the contract, the claim is one for contract breach, not negligence[.]"(emphasis in original)) ; *Wolfe v. Cont'l Cas. Co.*, 647 F.2d 705, 710 (6th Cir. 1981) (under Ohio law, "a tort exists only if a party breaches a duty which he owes to another independently of the contract").

Realogic does not allege any duty on the part of Oracle that is independent of its contractual relationship with Oracle, nor could it, given that the relationship between the parties is based solely on an arms'-length, commercial transaction. For its negligence claim, Realogic alleges a "duty of care" to "provide[ ] functioning NetSuite software." Compl. ¶ 64. And for its negligent-misrepresentation claim, Realogic alleges that Oracle represents that "its NetSuite software is easily integrated into existing business operations and that its software is suitable for the intended use." *Id.* ¶ 68. Both claims simply regurgitate the primary purpose of Realogic's contract with Oracle. *See* SSA § 1 (The SSA "governs the terms and conditions" of Realogic's "non-exclusive, worldwide, limited right to use" of "the Services."); Compl. ¶ 58 ("Plaintiff agreed to purchase license fees from Oracle and pay for the timely implementation of NetSuite software for the use of such products in Plaintiff's business.").

Even if there were no contract between Realogic and Oracle, Realogic's allegations still fall *well short* of pleading the "special relationship" that is required to claim economic loss for negligent conduct. *See, e.g.*, *Foster v. Health Recovery Servs., Inc.*, 493 F. Supp. 3d 622, 639 (S.D. Ohio 2020) (where plaintiff failed to plead "special relationship," claims for negligence barred by economic-loss doctrine); *S. Cal. Gas Leak Cases*, 18 Cal. App. 5th 581, 594 (2017), *aff'd*, 7 Cal. 5th 391 (2019) (in the "absence of personal injury or property damage, the special relationship requirement serves as a foreseeability gauge" that is required to maintain negligence claims). Because Realogic seeks nothing more than economic loss, its claims fail.

5. Realogic Cannot Maintain a Claim for Declaratory Relief as an Independent Cause of Action

The Declaratory Judgment Act is "procedural in nature and does not create an independent cause of action that can be invoked absent some showing of an articulated legal wrong." *Kondaur Cap. Corp. v. Smith*, 802 F. App'x 938, 948 (6th Cir. 2020); *see also City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022) ("The Declaratory Judgment Act does not provide a cause of action when a party . . . lacks a cause of action under a separate statute and seeks to use the Act to obtain affirmative relief."). Claims under the Declaratory Judgment Act are therefore "barred to the same extent that the claim for substantive relief on which it is based would be barred." *Kondaur Cap.*, 802 F. App'x at 948.

Realogic's claim for declaratory relief asks the Court to declare that "[n]o contract exists" between Realogic and Oracle and that Realogic is "entitled to restitution" from Oracle. Compl. ¶ 50.a–b. Thus, its claim for declaratory relief is inconsistent with its claims for breach of contract and breach of warranty, and must be based on only its claims for unjust enrichment, negligence, and negligent misrepresentation. Because the Court should dismiss those claims, it should dismiss Realogic's claim for declaratory relief as well. *See Kondaur Cap.*, 802 F. App'x at 948; *Medtronic,*

Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191, 199 (2014) (the Declaratory Judgment Act is "only procedural, leaving substantive rights unchanged" (internal quotation marks and citations omitted)).

IV. CONCLUSION

For these reasons, Realogic's Complaint should be dismissed in its entirety. In the alternative, the Court should transfer this action to the Northern District of California, San Francisco Division.

Date: June 3, 2024

Respectfully submitted,

By: /s/ *Sarah M. Ray*

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CERTIFICATION OF COMPLIANCE

I, Sarah M. Ray, certify that this case has not been assigned to a track pursuant to Local Rule 16.3. Oracle has, however, noticed this case is appropriate for the complex track. I certify that the Memorandum of Law in Support of Defendants' Motion to Dismiss or Transfer Venue complies with the page limitation set forth in Local Rule 7.1(f) for dispositive motions of cases on the complex track.

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CERTIFICATION OF SERVICE

I, Sarah M. Ray, hereby certify that on June 3, 2024, I electronically filed the foregoing document with the Court via CM/ECF, which will automatically send notice and a copy of same to counsel of record via email.

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