IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OREGON-IDAHO UTILITIES, INC and MEDIASNAP SOLUTIONS, LLC,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO. 1:17-cv-03016-ELR
v.	)	
SKITTER CABLE TV, INC.; SKITTER, INC; GALVA CABLE COMPANY, LLC; SOUTHEAST CONTENT GROUP, LLC; TBM CONTENT PARTNERS, LLC; VIDEO 6 LLC; KINGDOM TELEPHONE COMPANY; and ROBERT SAUNDERS,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY SKITTER DEFENDANTS

Plaintiffs Oregon-Idaho Utilities, Inc. and MediaSnap Solutions, LLC, (collectively, "OIU") hereby submits this Memorandum in Opposition to the Motion to Dismiss filed by Defendants Skitter Cable TV, Inc., Skitter, Inc., Robert Saunders, Galva Cable Company, LLC, Southeast Content Group, LLC, and TBM Content Partners, LLC (collectively, "Skitter").

Skitter seeks to have four of OIU's claims dismissed – the fraud claim (Count II), the unjust enrichment claim (Count V), and both the Idaho state and federal RICO claims (Counts VI and VII, respectively). Additionally, Skitter claims that *all* of OIU's claims should be dismissed under Rule 12(e), for violating the Eleventh Circuit's rule against shotgun pleadings. However, as set forth below, Skitter's arguments are specious, and OIU's Amended Complaint sufficiently pleads all counts and should not be dismissed.

ARGUMENT

I. Choice of Law

Skitter claims that all of OIU's claims "must be evaluated under Georgia law in light of the Franchise Agreement's governing law provision." (Skitter Defendants' Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint, Doc. #80-1 ("Skitter Mem.") at 10.) However, this is incorrect. The Franchise Agreement ("Agreement") states as follows: "*The validity and effect of this Agreement* are to be governed by and construed and enforced in accordance with the laws of the State of Georgia." (*See* Franchise Agreement, Doc. #80-2, at ¶18(c) (emphasis added).) In other words, OIU's *breach of contract claims* are subject to the Agreement's choice-of-law provision, but OIU's *tort and statutory claims* are not.

The Court's jurisdiction over this case is based on both federal question and diversity of citizenship, and as such, it should apply "the forum state's choice-of-law rules." *Raak Techs., Inc. v. Marx CryptoTech, LP*, 2016 WL 9451440, at *3 (N.D. Ga. May 2, 2016) (*citing Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020 (1941)). Georgia "adhere[s] to the traditional conflict of law rules." *Convergys Corp. v. Keener*, 582 S.E.2d 84, 86-87 (Ga. 2003). Under the traditional rule, *lex loci delicti*, tort actions are adjudicated according to the law of the place where the tort or wrong occurred. *Carroll Fulmer Logistics Corp. v. Hines*, 710 S.E.2d 888, 890 (Ga. App. 2011). And Georgia law states that "the place of wrong, the locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place." *Risdon Enters. v. Colemill Enters.*, 324 S.E.2d 738, 740 (Ga. App.1984).

The case of *Garland v. Advanced Med. Fund, L.P. II*, 86 F. Supp. 2d 1195 (N.D. Ga. 2000) is instructive. In that case, the plaintiffs (the Garlands) entered into certain agreements and paid the defendants money based on fraudulent misrepresentations. Thereafter, the Garlands brought claims against the defendants for breach of contract, common law fraud, securities fraud (under federal and

Florida state law), and civil theft. The agreements the Garlands had signed had choice-of-law provisions, stating that "all . . . matters pertaining to this [agreement] shall be construed and enforceable in accordance with and governed by the laws of the State of Georgia." *Id*. at 1203.

The defendants argued that Georgia law applied to *all* of the Garlands' claims. The court disagreed, holding that while the breach of contract claims was governed by Georgia law under the choice-of-law provision, *id*. at 1204, the tort and statutory claims were not. The court first reasoned that, because the Garlands lived in Florida, executed the agreements in Florida and wrote the checks in Florida, the Florida securities law applied. *Id*. at 1204-05. The court further stated:

> Plaintiffs' remaining claims all sound in tort. Therefore, the choice-of-law provisions found in the promissory note and guaranty do not apply to those claims, and the court must address which state's law does apply. . . . With regard to Plaintiffs' claims for fraud in the inducement, negligent misrepresentation . . . and civil theft and conspiracy, the rule of *lex loci delicti* provides for the application of Florida law. Under Georgia law, "the place of wrong, the locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place."

Garland, 86 F. Supp. 2d at 1204-05 (*quoting Risdon Enters.*, 324 S.E.2d at 740).

The court went on to state that "the place of the injury is where the economic loss occurred rather than the state where the fraudulent misrepresentations were made," and held that Florida law applied:

> [T]he Garlands resided at all relevant times in Florida and bore the economic impact of the alleged torts in Florida. Therefore, any harm suffered as a result of the fraud, misrepresentation . . . or civil theft occurred in Florida. Similarly, the Garlands' detrimental reliance is the last event necessary to make Defendants liable, and their reliance and any damages attributable thereto occurred in Florida.

Garland, 86 F. Supp. 2d at 1205.

Similarly here, the harm suffered as a result of Skitter's misconduct occurred in Idaho. OIU and MediaSnap's principal place of business is Nampa, Idaho, (Am. Comp., Doc. #75, at ¶12), and as such, OIU suffered its financial harm there. Indeed, after OIU signed the Franchise Agreement, it spent a significant amount of money (more than $45,000) buying equipment and preparing its Nampa facility for the head-end equipment that Skitter was supposedly going to provide. (*Id*. ¶¶64, 66, 81). Additionally, as OIU is headquartered in Idaho, it is axiomatic that OIU wired its payments (the $295,000 franchise fee and the $4,500 loan so Skitter could "make payroll") from Idaho. (*Id*. ¶¶57, 93.) Finally, OIU has provided tele-communication services to people throughout Idaho since 1990. (*Id*. ¶19.) Last, OIU was finally able to "soft-launch" Skitter local TV services to the Boise, Idaho area in mid-2015. However, Skitter "went dark" and refused to provide further television content to OIU six months later. (*Id.* ¶¶109, 111, 114, 119.) As a result, OIU's reputation in Idaho (and particularly in Boise) suffered. In sum, all of the harm suffered in this case occurred in Boise, and as such, Idaho law should apply to OIU's tort and statutory claims.[1]

II. The Fraud Claim Should Not be Dismissed.

Skitter claims that OIU's fraud claim is deficient for three reasons. First, Skitter claims that OIU's Amended Complaint only contains allegations of unfulfilled promises, which cannot be the basis of a fraud claim. (Skitter Mem. at 10-12.) Second, Skitter argues that OIU failed to plausibly allege "scienter," (*id*. at 12-13), and third, they contend that the merger clause contained in the Franchise Agreement bars the fraud claim, (*id*. at 14). For the following reasons, Skitter's arguments are specious, and the fraud claim should not be dismissed.

A. The Misrepresentations Alleged in the Amended Complaint are Actionable.

Skitter claims that OIU's fraud claim should be dismissed because "the accused representations – Remillard and Saunder's alleged pre-Franchise Agreement representations as to the parties' expected performance and profitability

[1] As set forth above, Idaho law applies to OIU's tort and statutory claims. In the event that the Court disagrees with OIU, OIU has included citations to Georgia cases as well.

under the Franchise Agreement – are at most unfulfilled predictions, which cannot support a fraud claim." (Skitter Mem. at 10-11.) However, Skitter misapprehends OIU's fraud claim. OIU's fraud claim is *not* based on a handful of statements made prior to the Franchise Agreement. To the contrary, it is predicated on multiple misrepresentations made over the course of years (from 2012 to 2015, including some contained in the Franchise Agreement), all of which were made in an attempt: (1) to induce OIU to sign the Franchise Agreement and pay the $295,000 franchise fee; and thereafter (2) to prevent OIU from terminating the Agreement and seeking a $295,000 refund. To contend that OIU's fraud claim is based on statements made over a two-month period in 2012 grossly understates OIU's fraud claim.

Skitter's argument is also legally and factually incorrect. First, the misrepresentations that Skitter, Remillard and Saunders (Skitter's VP of Sales and CEO, respectively) made prior to the Franchise Agreement were of presently existing facts. Second, Idaho (and Georgia) law is clear that broken promises may support a fraud claim if the promisor had no intention of keeping them.

1. OIU has Alleged Multiple Misrepresentations of Presently Existing Facts.

Skitter contends that OIU's fraud claim is based on "unfulfilled predictions" and "broken promises" of future performance. To the contrary, the majority of the misrepresentations made prior to Franchise Agreement concern presently existing facts. For example, the Amended Complaint alleges that:

- In April 2012, Remillard represented that Skitter, at that time, had a working platform by which OIU could provide its customers with a full television line up, even though Skitter did not have the capability to install the necessary head-end equipment or provide the content. (Am. Comp. ¶¶23(a), 28.)

- In April 2012, Remillard indicated that all channels (7 local and 54 Satellite channels) could be run through an inexpensive Roku or Western Digital box, even though the inexpensive boxes could only provide local channels and not Satellite channels. (*Id*. ¶¶29, 30.)

- In April 2012, Remillard represented that Skitter could and would install all head-end equipment at OIU within 90 days of the execution of the Franchise Agreement. (*Id*. ¶27(a),(c).) Yet Skitter lacked the capabilities and finances to do so. Indeed, in January 2013 (more than 6 months after OIU executed the Franchise Agreement), Skitter tried to raise funds to "complete the build out and deployment of systems that have been contracted for with the Company." (*Id*. ¶73.) A few weeks later, Saunders stated that Skitter had to sell two more Franchise Agreements (and get two more franchise fees) to be able to afford OIU's head-end equipment, and asked OIU to pay an additional $145,000 to help with the costs. (*Id*. ¶¶75, 76.)

- On April 30, 2012, Remillard gave OIU a Franchise Disclosure Document ("FDD"), which overstated the company's cash flow and financial stability. (*Id*. ¶¶37, 38.) Indeed, in January 2013, Skitter sought investments of five million dollars, and a few months later, Saunders indicated that Skitter was "flat broke." (*Id*. ¶¶73, 82.)

- When Ryan Clark (OIU's Vice President) raised concerns in mid-May 2012 that Skitter lacked transmission rights for certain channels such as Fox, ABC and CBS, Saunders assured Mr. Clark that Skitter had valid retransmission rights in OIU's areas. (*Id*. ¶¶48, 49.) Yet in June 2013, Skitter informed OIU that it had not yet received retransmission rights from certain local channels, and that Skitter might not be able to provide west coast channel feeds to OIU's subscriber base. (*Id*. ¶83.)

- The June 2012 Franchise Agreement itself contains several misrepresentations of presently existing fact. Indeed, it stated that at that time (in June 2012), Skitter owned or otherwise possessed "sufficient rights" in the equipment and content to allow OIU to distribute 7 local channels and 54 Satellite channels. (*See id*. ¶54(a); Ex. B to Franchise Agreement.) Yet Skitter (at that time) did not have sufficient capabilities to deliver the equipment nor did it possess sufficient rights in the content to allow OIU to distribute the channels. (Am. Comp. ¶¶60, 83.)

In short, the Amended Complaint alleges numerous misrepresentations of presently existing facts. Indeed, Skitter repeatedly indicated that they *currently* (at the time of the misrepresentations) had the capability to provide content and install head-end equipment, even though they lacked those capabilities. Skitter also misstated its financial viability, and even how the system would run (claiming that an inexpensive Roku box was all that the customer would need). These are all misrepresentations of presently existing facts.

2. Skitter's Broken Promises Support a Fraud Claim.

In addition, Skitter also misstates the law, stating that "broken promises" cannot support a fraud claim. (Skitter Mem. at 10-11.) However, a promise to do something in the future, which is subsequently broken, may constitute a misrepresentation of existing fact if "at the time of making the promise the promisor had no intention of performing the promise." *Weatherhead v. Griffin*, 123 Idaho 697, 702, 851 P.2d 993, 998 (Ct. App. 1992); *see also W.O. Kepler v. WHW Mgmt., Inc.*, 121 Idaho 466, 478, 825 P.2d 1122, 1134 (Ct. App. 1992) ("If . . . at the time of contracting, [defendant] had no intention of performing the contract, [defendant] has misrepresented a material fact; his present intention.")[2] Additionally, although a mere breach of a contract or promise is not enough in itself to show fraudulent intent, that intent may be inferred from circumstantial evidence. *See Weatherhead*, 123 Idaho at 702, 851 P.2d at 998.[3]

Here, as set forth above, most of Skitter's misrepresentations prior to the Franchise Agreement were misrepresentations of presently existing facts. However, assuming *arguendo,* that they were simply promises, OIU has alleged sufficient circumstantial evidence to show that Skitter had no intention of performing these promises at the time it made them. For example, Skitter promised to provide head-

[2] Georgia courts have also held that a promise about future events may support a fraud claim if it "is made with a present intent not to perform or where the promisor knows that the future event will not take place." *JTH Tax, Inc. v. Flowers*, 691 S.E.2d 637, 642 (Ga. App. 2010).

[3] *See also JTH Tax, Inc. v. Flowers*, 691 S.E.2d 637, 642 (Ga. App. 2010) ("Fraudulent intent at the time of contracting can be inferred based on subsequent conduct of the defendant that is unusual, suspicious, or inconsistent with what would be expected from a contracting party who had been acting in good faith. . . . Fraud may be proved by slight circumstances, and whether a misrepresentation is fraudulent and intended to deceive is generally a jury question.")

end equipment within 90 days of execution of the Franchise Agreement, yet Saunders told OIU's General Manager eight months later that Skitter needed two more franchise fees to be able to afford the build-out, stating "that's just how we operate." (Am. Comp. ¶76.) Additionally, Skitter promised to provide content to OIU customers 90 days after the Franchise Agreement was signed, even though they admitted a year later that they still did not have retransmission rights from certain local channels on the west coast. In short, there is ample evidence in the Amended Complaint that Skitter did not intend to fulfill the promises they made.

Additionally, after OIU and Skitter executed the Franchise Agreement and Skitter failed to provide the necessary content and equipment, Skitter continued to make misrepresentations in an attempt to string OIU along. Specifically, in June 2013, Skitter admitted that it had not delivered to OIU the necessary content and equipment required by the Franchise Agreement. As such, Skitter and OIU signed another agreement giving OIU the right to terminate the Franchise Agreement and receive a $295,000 refund if Skitter did not deliver all necessary content licensing and equipment by March 2014. (Am. Comp. ¶¶84, 86.) Thereafter, Skitter continued to make misrepresentations, in an attempt to prevent OIU from terminating the Franchise Agreement and receiving the refund. For example, in October 2013, Skitter told OIU that Skitter services would be available in January

2014, and in December 2013, they told OIU that the services would be available in February 2014. (*Id*. ¶¶99, 100.) In March 2014, Skitter told OIU that the services would be available to OIU customers in July 2014, and in June 2014, they represented that the services would be available in August or September 2014. (*Id*. ¶¶103-105.) Thereafter, in October 2014, Skitter misrepresented to OIU that the Skitter services would be available in February 2015, yet Skitter services did not launch for several months thereafter. (*Id*. ¶¶107-109.) Considering all of the circumstances, OIU has alleged sufficient circumstantial evidence that Skitter had no intention of keeping these promises and were instead simply stringing OIU along so it would not cancel the Franchise Agreement and seek a refund.

B. OIU Sufficiently Pled Scienter.

Skitter claims that OIU's fraud claim must be dismissed because the fraud allegations "fail to support a plausible inference that Skitter intended to deceive OIU." (Skitter Mem. at 12-13.) Under Federal Rule of Civil Procedure 9(b), intent and other states of mind may be averred "generally." Fed. R. Civ. P. 9(b). However,

> "[G]enerally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading . . . intent under an elevated pleading standard. It does not give [a plaintiff] license to evade the less rigid – though still operative – strictures of Rule 8.

Ashcroft v. Iqbal, 556 U.S. 662, 686–87, 129 S. Ct. 1937, 1954 (2009). Under Rule 8, a complaint must contain factual allegations "sufficient to plausibly suggest [defendants'] . . . state of mind." *Id*., 556 U.S. at 683, 129 S. Ct. at 1952. Additionally, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*., 556 U.S. at 678, 129 S. Ct. at 1949.

Here, OIU has pled factual content that allows the Court to draw a reasonable inference that Skitter knew that their representations were false and/or made promises that they never intended to keep. Indeed, Skitter's VP of Sales told OIU that all of its channels (including Satellite) could be run through inexpensive boxes (like Roku boxes), when he knew that these inexpensive Roku boxes could only provide local channels. (Am. Comp. ¶¶29, 30.) He also provided an FDD with overstated financial information, (*id*. ¶¶37, 38), and told OIU that Skitter would be able to install all head-end equipment within 90 days of execution of the Franchise Agreement, (*id*. ¶27(a),(c)). Considering that Skitter had no money to install this head-end equipment (and actually had to offer a Private Placement Offering several months later in an attempt to raise funds to "complete the build out"), (*id*. ¶73), it is axiomatic that Remillard knew that his representations regarding the financial viability and the ability to install head-end equipment were false. Saunders also repeatedly told OIU (and the Franchise Agreement indicated) that Skitter had the rights to transmit 7 local channels and 54 Satellite channels, even though Skitter did not have those retransmission rights. (*Id*. ¶¶49, 83.) And finally, after Skitter gave OIU the right to terminate the Franchise Agreement and seek a refund, Skitter continued to make promises it knew it could not keep. In sum, OIU has pled sufficient facts to allow the Court to reasonably infer that Skitter knew that their representations were false and/or made promises that they never intended to keep.

C. The Merger Clause does not Bar OIU's Fraud Claim.

Skitter argues that OIU's fraud claim fails because the Franchise Agreement contains a merger clause, and OIU has not rescinded that Agreement, a prerequisite to maintaining a fraud claim under Georgia law. (Skitter Mem. at 7-9.) However, as set forth in Section I above, Idaho law applies to the fraud claim, and under Idaho law, a merger clause does not bar evidence of fraudulent inducement. Even under Georgia law, a merger clause does not a bar a fraud claim that is based on misrepresentations contained in the contract itself, which is the situation here.

1. Under Idaho Law, a Merger Clause Does Not Bar a Fraud Claim.

Idaho law allows a party who has been fraudulently induced to enter into a contract containing a merger clause to bring an action in fraud without rescinding the contract. In *Thomas v. Campbell*, 690 P.2d 333 (Idaho 1984), the plaintiff was induced to enter into a land purchase agreement based on misrepresentations that the adjoining property could not be developed. When the buyer learned that the seller actually planned on building an extensive condominium complex there, litigation ensued. The trial court refused to allow testimony about the misrepresentations because the parties had executed integrated agreements. On appeal, the Idaho Supreme Court held that such testimony was admissible because "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." *Id*. at 337.

Not only are misrepresentations admissible to show that a party has been fraudulently induced to enter into a contract, but if proved, they can form an independent basis for an award of damages. In *Apiazu v. Mortimer*, 82 P.3d 830 (Idaho 2003), the defendants agreed to purchase the plaintiffs' restaurant for $375,000. Because of a limit on the amount the bank would lend, the sales contract was amended to reflect a sale price of only $335,000, and the defendants agreed to make up the difference by paying the plaintiffs $40,000 on a separate consulting agreement. When the defendants refused to pay the additional amount, the plaintiffs sued for fraud, which defendants contended was barred by the integrated sales contract. The appeals court disagreed:

> While normally the terms of a written contract will control. Idaho law firmly allows that "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." . . . Fraud vitiates the specific terms of the agreement and can provide a basis for demonstrating that the parties agreed to something apart from or in addition to the written documents.

Id. at 833.

As alleged in the Amended Complaint, Skitter made numerous fraudulent misrepresentations for the purpose of inducing OIU enter into the Franchise Agreement, and thereafter, to not rescind that Agreement. (Am. Comp. ¶¶38, 50, 63-67, 133-135.) Although the Franchise Agreement contains a merger clause and purports be an integrated contract, such misrepresentations are admissible and the fraud claim is not barred under Idaho law. Moreover, these misrepresentations can be used to show the true extent of what had been promised by the defendants and form an independent basis for an award of damages.

2. The Fraud Claim is not barred even if Georgia law applies.

Skitter overstates the preclusive effect that a merger clause has under Georgia law. Although it has been criticized as leaving a defrauded party with no remedy,[4] Georgia law does prohibit a party from suing both for breach of contract and fraud based on pre-contract misrepresentations when there is a valid merger

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[4] *Carpenter v. Curtis*, 395 S.E.2d 653, 656 (Ga. App. 1990) (concurring opinion).

clause. *See Meadow River Lumber Co. v. University of Georgia*, 503 S.E.2d 655, 660 (Ga. App. 1998). However, Georgia law is also clear that "a valid merger clause does not prohibit a claim based upon a misrepresentation in the contract itself." *Chhina Family Partnership, L.P. v. S-K Group of Motels, I*nc., 622 S.E.2d 40, 43 (Ga. App. 2005).

Here the essential misrepresentations which form the basis of the fraud claim were also set forth in the Franchise Agreement and the Franchise Disclosure Document ("FDD"), which was incorporated by reference into the Franchise Agreement. (*See* Franchise Agreement ¶18(i).) Indeed, the Franchise Agreement contains misrepresentations about the content and services that Skitter could provide, namely that Skitter: had sufficient rights in the products, equipment, content and licensed software to perform the services under the Franchise Agreement (and could provide OIU customers 7 local channels and 54 Satellite channels); had full and authority to undertake the obligation in the Franchise agreement; would comply with all laws and regulations; and had not been notified that they were violating any copyrights, trade secrets, trademarks, patent or other intellectual property right. (Am. Comp. ¶54.) Additionally, the FDD also contained numerous false and misleading statements, including statements that: the customer could use inexpensive Roku or Western Digital boxes; the initial start-up would be

12 months; and Skitter would deliver all equipment needed to broadcast television to OIU's customers. (Am. Comp. ¶38.) As set forth above, all of these representations were material and false and were reasonably relied upon by OIU. In sum, the key misrepresentations which form the basis of the fraud claim were set forth in either the Franchise Agreement or the FDD. Accordingly, the merger clause in the Franchise Agreement does not bar that claim, even if Georgia law applies.[5]

III. OIU's Unjust Enrichment Claim Should not be Dismissed.

Skitter contends that the unjust enrichment claim against them fails because OIU has not alleged that they knew about the benefit or that repayment was

[5] There is another potential basis for finding that the merger clause does not bar the fraud claim. The cases relied upon by Skitter only address the issue of misrepresentations which were made to induce a party to enter an agreement. *See, e.g., Stricker v. Epstein*, 444 S.E.2d 91 (Ga. App. 1994). It is unclear under Georgia law that a merger clause would bar a fraud claim based on representations that were made *after* the Franchise Agreement was signed, such as occurred in part here. The distinction between pre- and post-contract misrepresentations, and that only the former are barred by a merger clause under Georgia law, is discussed at some length in *Paternak & Fidis, P.C. v. Recall Total Information Management, Inc.*, 95 F.Supp.3d 886, 905-6 (D. Maryland 2015) ("But, Defendant has not identified any authority that applies these limitations under the circumstances of this case, in which Plaintiff's fraud claim is based on misrepresentations that *postdated* the Agreement.") While this distinction has not been directly addressed by a Georgia court, the cases do recognize an exception to the preclusive effect of a merger clause when the misrepresentations apply to an "intrinsic defect in the article forming the subject matter." *SCM Corp. v. Thermo Structural Prod.*, 265 S.E.2d 598, 600 (Ga. App. 1980). Here, arguably the misrepresentations went to intrinsic defects in the Skitter product and service which were not discernible to OIU.

expected. (Skitter Mem. at 21.) However, there is no such argument under Idaho law, which is as follows:

> Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff . . . . The elements of unjust enrichment are that (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit.

Countrywide Home Loans, Inc. v. Sheets, 371 P.3d 322, 329 (Idaho 2016).[6]

Here, OIU alleged that it provided a benefit to the Skitter Defendants by paying $4500 to Kingdom Telephone; that Skitter "accepted the benefits"; and that it would be unjust under the circumstances to retain the money "without compensating [OIU] for the value received." (Am. Comp. ¶¶157-59.) Additionally, the Amended Complaint makes it clear that this payment was "a loan, not a gift."

[6] Georgia law regarding unjust enrichment is the same:

> Unjust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.

Wachovia Ins. Servs., Inc. v. Fallon, 682 S.E.2d 657, 665 (Ga. App. 2009). Moreover, when the issue is the payment or overpayment of money, as is the case here, a claim for unjust enrichment "is appropriate where the plaintiff overpays or deposits more than was necessary with another, who has no legal right to retain the money. . . . Such action is based upon the equitable principle that one ought not retain money where one would thereby be unjustly enriched at another's expense." *Cochran v. Ogletree*, 536 S.E.2d 194, 197 (Ga. App. 2000).

(*Id*. ¶92.) These paragraphs alone satisfy the requirements set forth in *Countrywide (*and under Georgia law as well*)*. However, the Amended Complaint also specifies that Skitter was aware of and received the benefit of the loan, in that the loan was forwarded to Skitter to help Skitter "make payroll." (Am. Comp. ¶¶92, 93.) In sum, the facts as pled show that OIU loaned money to Skitter, that Skitter benefitted from the money by using it to make payroll, and that the payment was a loan and therefore repayment is expected. Under either Idaho or Georgia law, unjust enrichment is sufficiently pled and should not be dismissed.

IV. OIU's RICO Claims Should not be Dismissed.

Skitter claims that OIU cannot satisfy RICO's continuity requirement. (Skitter Mem. at 17-20.) A RICO plaintiff must show a pattern of racketeering that "amount[s] to or pose[s] a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900 (1989). Continuity may be established through either "closed-ended continuity" or "open-ended continuity." Here, the Amended Complaint sufficiently pleads both.

A. OIU's Amended Complaint Sufficiently Alleges Closed-Ended Continuity.

The Supreme Court has stated that "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending *over a substantial period of time*." *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. at 2902 (emphasis added). What a "substantial period" means changes depending on the Circuit. In the Eleventh Circuit, "closed-ended continuity cannot be met with allegations of schemes lasting less than a year,"[7] whereas the Ninth Circuit has refused to establish a "hard and fast, bright line, one-year rule" because "establish[ing] such a rigid requirement . . . would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J. Inc.*" *Allwaste, Inc. v. Hecht,* 65 F.3d 1523, 1528 (9th Cir. 1995). Regardless, the Supreme Court has made it clear that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement" for closed-ended continuity." *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. at 2902.

Skitter misrepresents OIU's Amended Complaint, claiming that it alleges misrepresentations between April and May 2012. (Skitter Mem. at 19.) However, this is patently false. Indeed, as set forth above, OIU has alleged misrepresentations ranging from April 2012 to at least October 2014, all of which caused financial harm to OIU. Specifically,

- OIU alleged misrepresentations in April, May and June 2012, which induced OIU to enter into the Franchise Agreement and pay the franchise

[7] *Ferrell v. Durbin*, 311 F. App'x 253, 256 (11th Cir. 2009) (*quoting Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1266 (11th Cir.2004)).

fee. (Am. Comp. ¶¶51, 57.) Thereafter, OIU spent a significant amount of money (more than $45,000) buying equipment and preparing its facility for the head-end equipment that Skitter was supposedly going to provide. (*Id*. ¶¶64, 66, 81.)

- OIU alleged further misrepresentations in October and December 2013, and more misrepresentations in March, June and October 2014. These misrepresentations (made *after* OIU executed the Franchise Agreement) further harmed OIU, in that they prevented OIU from terminating the Agreement and receiving a full refund.

In sum, the Amended Complaint alleges predicate acts – misrepresentations made over email and the phone, all of which financially harmed OIU – over a number of years. In sum, the Amended Complaint sufficiently alleges closed-ended continuity.

B. OIU's Amended Complaint Sufficiently Alleges Open-Ended Continuity.

The Supreme Court has defined "open-ended continuity" as "past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241, 109 S. Ct. at 2902. Open-ended continuity may be established by showing that the predicate acts at issue are the company's "regular way of doing business." *Id*., 492 U.S. at 242, 109 S. Ct. at 2902.

Here, Skitter made multiple misrepresentations over email and the phone, in an attempt to induce OIU and other potential franchisees to contribute money to the scheme. There is evidence that this was Skitter's "regular way of doing business." For example, although OIU executives reasonably believed that their $295,000 franchise fee would go toward building out their own (OIU's) head-end equipment, Saunders informed OIU's VP that Skitter had to sell two more Franchise Agreements (and get two more franchise fees) to be able to afford building out such equipment. Saunders stated: "that's just how we operate." (Am. Comp. ¶76.) Based on this statement, it appears that Skitter was engaged in a type of Ponzi scheme, whereby they used OIU's $295,000 franchise fee to build out the head-end equipment for a prior franchisee, and thereafter, they continued to make misrepresentations to find other franchisees who could pay for OIU's equipment.

Additionally, in January 2013, Skitter participated in a Private Placement Offering ("PPO"), wherein they sought 5 million dollars from investors and indicated that they were going to target 625 small to mid-sized telephone companies to sell their services. The PPO documents (like the documents provided to OIU) falsely claimed that Skitter held the rights to distribute "the most popular cable channels," had received retransmission rights to almost all major cable channels, and had the capability to provide head-end equipment for their franchisees. (Am. Comp. ¶¶68-73.) In short, there is sufficient evidence in the Amended Complaint to demonstrate open-ended continuity.[8]

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[8] Skitter makes additional RICO arguments that are addressed by other sections of OIU's brief. First, Skitter claims that the misrepresentations do not constitute

V. The Amended Complaint Clearly Lays Out the Causes of Action and Therefore Is Not an Impermissible Shotgun Pleading.

In its Amended Complaint, OIU "incorporate[d] by reference all of the paragraphs and allegations set forth above" at the beginning of each of its seven Causes of Action. OIU apologizes for doing so. The Amended Complaint was filed when the matter was still before the District Court in Idaho, where the phrase is regularly used and not considered to constitute a "shotgun pleading."

Notwithstanding the use of the offending phrase, the Amended Complaint really does not constitute a shotgun pleading because of the clarity and specificity with which it has been pled. As the Court noted in *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015), "[t]he unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way

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"predicate acts" under RICO because they "show at most unfulfilled promises and predictions, as opposed to the knowing misrepresentation of an existing fact." (Skitter Mem. at 16, 20.) However, as set forth in Section II.A. above, OIU clearly alleged that Skitter made multiple misrepresentations of presently existing facts, and even if they didn't, OIU alleged sufficient facts to show that Skitter made promises they did not intend to keep. Second, Skitter claims that OIU failed to sufficiently plead "scienter." (Skitter Mem. at 17, 20.) However, as set forth in Section II.B. above, OIU has pled sufficient facts that would allow the Court to reasonably infer that Skitter knew that their representations were false and/or made promises that they never intended to keep. Third, Skitter claims that OIU's Idaho RICO claim should be dismissed because "it is barred by the Franchise Agreement's governing law clause," which "selects Georgia law." (Skitter Mem. at 19.) However, as set forth in Section I above, Idaho law should apply to this claim.

or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323.[9]

The Amended Complaint here does not contain such infirmities. To the contrary, it gives a detailed recitation of what occurred (through paragraph 122), and thereafter, the individual Causes of Action are pled with detail. By way of example, the First Cause of Action (Breach of Contract) sets forth the agreement which was breached (the Franchise Agreement), and then sets forth 13 separate ways in which Skitter breached that Agreement. (Am. Comp. ¶127.) Similarly, the Second Cause of Action (Fraud) details the multitude of fraudulent statements that were made, and then pleads the other elements of a fraud claim. (Am. Comp. ¶¶134-142.) Indeed, Skitter does not actually allege that they do not understand the claims being made or the factual basis therefor. To the contrary, Skitter just objects to OIU's incorporation by reference. In sum, the offending phrase notwithstanding

[9] Under Georgia law, and the rule of *lex fori*, "procedural . . . questions are governed by the law of the forum." *McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1361 (N.D. Ga. 2013) (*citing Fed. Ins. Co. v. Nat'l Distrib. Co.*, 417 S.E.2d 671, 673 (Ga. App. 1992)). As such, OIU relies on Georgia law here.

the Amended Complaint makes clear the basis for each cause of action and the allegations against Skitter.[10]

CONCLUSION

For the foregoing reasons, Oregon-Idaho Utilities, Inc. and MediaSnap Solutions, LLC, respectfully requests that the Court deny Skitter's Motion to Dismiss.

Respectfully submitted, this 11th day of December, 2017.

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WOMBLE BOND DICKINSON (US)
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[10] If the Court so orders, OIU would be glad to redraft the complaint minus that offending phrase.

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CERTIFICATION OF COMPLIANCE WITH L.R. 5.1

I hereby certify that the foregoing has been computer processed with 14 point New Times Roman font in compliance with the United States District Court for the Northern District of Georgia Local Rule 5.1.

Dated: December 11, 2017

/s/ Robert R. Ambler, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within and foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY SKITTER DEFENDANTS** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

This 11th day of December, 2017.

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