

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MICROSOFT CORPORATION, et al.,  
Plaintiffs,  
v.  
HON HAI PRECISION INDUSTRY CO.,  
LTD.,  
Defendant.

Case No. 19-CV-01279-LHK

**ORDER DENYING MOTION TO  
DISMISS AND/OR STRIKE  
PURSUANT TO RULE 12(B)(6) AND  
RULE 12(F)**

Re: Dkt. No. 26

**PUBLIC REDACTED VERSION**

Plaintiff Microsoft Corporation (“Microsoft”) filed this action for breach of contract against Defendant Hon Hai Precision Industry Co., Ltd. (“Hon Hai”). Microsoft alleges that Hon Hai breached several provisions of their license agreement. ECF No. 1 (“Compl.”). Hon Hai now moves to dismiss or strike Plaintiff’s claim for unpaid royalties and Plaintiff’s prayer for supervised discovery and attorney fees. ECF No. 26 (“Def. Mot.”). Having considered the parties’ briefing, the relevant law, and the record in this case, the Court hereby DENIES Defendant’s motion to dismiss and its alternative motion to strike.

**I. BACKGROUND**

Though the Court must accept the allegations in the Complaint as true at the motion to

1 dismiss stage, *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008),  
2 the parties do not appear to dispute the basic facts of this case. As part of its global software  
3 business, Microsoft licenses software for use in a wide array of computing devices produced by  
4 other companies. Compl. ¶¶ 2, 4. Hon Hai, also known as Foxconn, is a contract manufacturer of  
5 electronics based in Taiwan; as such, Hon Hai manufactures and assembles products for its  
6 various brand name customers in the computer, communication, and consumer-electronics  
7 industry. *Id.* at ¶ 3, 15. In 2013, the parties entered into a “Confidential Patent License  
8 Agreement” (“the Agreement”), in which Microsoft granted Hon Hai a worldwide license to  
9 Microsoft’s portfolio of patents for certain “Covered Products” in exchange for specified royalties.  
10 *Id.* at ¶¶ 5, 16. Specifically, the Agreement requires Hon Hai to pay Microsoft a “Device Fee”  
11 “for each unit of a Covered Product [s]old by Hon Hai or any of its Subsidiaries . . . .” ECF No.  
12 19-4 (“Ex. 1 to Compl.”) at 10; *see* Compl. ¶¶ 5, 16-17. The Agreement exempts from Hon Hai’s  
13 royalty obligations certain “Unlicensed Devices” and any device units for which a brand name  
14 customer of Hon Hai has already fully paid royalties to Microsoft. Ex. 1 to Compl. at 8, 13; *see*  
15 Compl. ¶ 17.

16 Of relevance here, Section 4.2.2 of the Agreement spells out the following payment  
17 process. Twice a year, “within thirty (30) days after the end of each Royalty Period,” Hon Hai  
18 “shall submit” a “Royalty Report” calculating its royalty obligations for the preceding six-month  
19 Royalty Period. Ex. 1 to Compl. at 10; *see* Compl. ¶ 19. The Device Fee varies depending on the  
20 device category (“General Purpose Consumer Device,” “Smartphone,” or “Smart TV”) and the  
21 transfer price range in which the unit falls. Ex. 1 to Compl. at 4-5. Accordingly, the Royalty  
22 Report—a template for which is included in the Agreement, *id.* at 22-23—must include, *inter alia*,  
23 the number of units sold in each category of product and each transfer price range, which of those  
24 units are exempt, and “the total amount of Royalties owed by Hon Hai for the Royalty Period.”  
25 Ex. 1 to Compl. at 10; *see* Compl. ¶ 19. The Agreement then states:

26 If the Royalties are greater than zero, MICROSOFT shall thereafter  
27 invoice Hon Hai for payment of the Royalties, and within sixty (60)

1 days after the date indicated on MICROSOFT'S invoice, Hon Hai  
2 shall pay MICROSOFT the amount invoiced for the Royalties owed  
3 during such Royalty Period.

4 Ex. 1 to Compl. at 10.

5 Section 4.2.4 of the Agreement gives Microsoft the right to audit Hon Hai's compliance  
6 with its royalty payment obligations. Ex. 1 to Compl. at 11; *see also* Compl. ¶ 21. The  
7 Agreement therefore also requires Hon Hai to "keep and maintain . . . complete and accurate  
8 books and records of all information necessary to support Hon Hai's compliance with the terms of  
9 this Agreement," including the information necessary to complete Royalty Reports (referred to in  
10 the Agreement as "Audit Information"), "for a period of at least two (2) years" after each Royalty  
11 Period. Ex. 1 to Compl. at 11; *see also* Compl. ¶ 20. Upon Microsoft's request, Hon Hai must  
12 facilitate an audit by "independent certified public accounting . . . designated by MICROSOFT  
13 and approved by Hon Hai," "subject to the Auditor's and Hon Hai's execution of a non-disclosure  
14 agreement." Ex. Ex. 1 to Compl. at 11; *see also* Compl. ¶ 21. In particular, the audit is to take  
15 place "at Hon Hai's principal place of business" and Hon Hai must give the Auditor "full access to  
16 all Audit Information," including certain raw data. Ex. 1 to Compl. at 11; *see also* Compl. ¶ 21.  
17 Should the audit reveal an underpayment, Hon Hai must "pay MICROSOFT the amount of the  
18 underpayment, together with interest" at a rate specified in the Agreement; if the underpayment is  
19 greater than a certain percentage "of the actual payable Royalties owed for the Royalty Period(s)  
20 subject to the audit, then Hon Hai shall reimburse MICROSOFT within [a specified time frame],  
21 upon request, for all costs and expenses (including Auditor and attorney fees) reasonably incurred  
22 by MICROSOFT to conduct the audit." Ex. 1 to Compl. at 12; *see also* Compl. ¶ 21.

23 Microsoft alleges that Hon Hai committed the following breaches of the Agreement over  
24 the past five years: submitting inaccurate Royalty Reports for the 2014 Royalty Periods; failing to  
25 submit Royalty Reports for any of the 2015, 2016, 2017, or 2018 Royalty Periods; and failing to  
26 make royalty payments to Microsoft for those same years. Compl. ¶ 24. In response to these  
27 lapses, in March 2017, Microsoft invoked its right to conduct an audit for the period 2013 through  
28 June 30, 2017. *Id.* at ¶ 25. Although Hon Hai agreed to the appointment of Deloitte & Touche

1 (“Deloitte”) as the Auditor and entered into a non-disclosure with the firm, Hon Hai’s cooperation  
2 with the audit ended there. *Id.* According to Microsoft, Hon Hai has stonewalled Deloitte’s  
3 document requests and on-site fieldwork request. *Id.* Microsoft purportedly attempted to  
4 negotiate with Hon Hai throughout 2017 and early 2018, to no avail. Finally, in March 2018,  
5 Microsoft sent Hon Hai written notice that Microsoft intended to escalate the dispute, as required  
6 by the Agreement, Ex. 1 to Compl. at 19.

7 To put an end to the standstill, Microsoft filed this suit against Hon Hai on March 8, 2019,  
8 which asserts a single cause of action for breach of contract. ECF No. 1. The prayer for relief  
9 includes: (a) specific performance of the provisions requiring Hon Hai to submit complete and  
10 accurate Royalty Reports; (b) specific performance of the provision requiring Hon Hai to  
11 cooperate with an audit; (c) “Court-supervised discovery of Hon Hai’s books and records”; (d)  
12 “damages in the form of royalty payments and interest”; and (e) costs, including attorneys’ fees.  
13 Compl. ¶ Prayer for Relief (a)-(e). The parties have consented to personal jurisdiction in this  
14 Court, which has subject matter jurisdiction under 28 U.S.C. § 1331, diversity of citizenship. *See*  
15 Ex. 1 to Compl. at 18-19.

16 Hon Hai now moves to dismiss—pursuant to Federal Rule of Civil Procedure Rule  
17 12(b)(6)—or strike—pursuant to Rule 12(f)—several discrete portions of the Complaint. Def.  
18 Mot. at 1. In particular, Hon Hai challenges (1) the “allegations and prayers for relief related to  
19 allegedly unpaid royalties,” (2) the “prayer for relief asking for Court-supervised discovery of Hon  
20 Hai’s books and records and an allegation that mirrors the prayer,” and (3) the prayer for relief  
21 asking for attorney fees. *Id.* at 2.

22 **II. LEGAL STANDARDS**

23 **A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)**

24 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a  
25 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint  
26 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure  
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1 12(b)(6). In ruling on a Rule 12(b)(6) motion, a court must “accept factual allegations in the  
2 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”  
3 *Manzarek*, 519 F.3d at 1031. A complaint must, however, contain “enough facts to state a claim  
4 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A  
5 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
6 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,  
7 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability requirement, but it  
8 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal  
9 quotation marks omitted).

10 A motion to dismiss under Rule 12(b)(6) must rely solely on matters within the pleadings,  
11 *see* Fed. R. Civ. P. 12(d). Exhibits attached to a complaint—such as copies of written  
12 instruments—are considered part of the pleadings. Fed. R. Civ. P. 10(c). Hence, a court may  
13 consider those materials on a motion to dismiss without treating the motion “as one for summary  
14 judgment under Rule 56.” Fed. R. Civ. P. 12(d); *see United States v. Ritchie*, 342 F.3d 903, 908  
15 (9th Cir. 2003).

16 **B. Motion to Strike Under Federal Rule of Civil Procedure 12(f)**

17 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading . . . any  
18 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “[T]he function  
19 of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from  
20 litigating spurious issues by dispensing with those issues prior to trial.” *Sidney–Vinstein v. A.H.*  
21 *Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A matter is immaterial if it “has no essential or  
22 important relationship to the claim for relief or the defenses being pleaded.” *Fantasy, Inc. v.*  
23 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev’d on other grounds*, 510 U.S. 517 (1994).  
24 Similarly, “[i]mpertinent’ matter consists of statements that do not pertain, and are not necessary,  
25 to the issues in question.” *Id.* A matter is redundant if it needlessly duplicates other material in  
26 the complaint. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010).

1           At the same time, Federal Rule of Civil Procedure 8 expressly recognizes that a party’s  
2 demand for relief “may include relief in the alternative or different types of relief.” Fed. R. Civ. P.  
3 8(b)(3). The Ninth Circuit has also made clear that “Rule 12(f) is not a proper way to procure  
4 dismissal of all or part of a complaint,” *Brands v. First Transit, Inc.*, 278 F. App’x 722, 724 (9th  
5 Cir. 2008) (unpublished); that is the function of a Rule 12(b)(6) motion. *See Whittlestone*, 618  
6 F.3d at 974. Moreover, motions to strike “are generally disfavored because they are often used as  
7 delaying tactics and because of the limited importance of pleadings in federal practice.” *Rosales*  
8 *v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. February 14, 2001). The court therefore will  
9 not grant a motion to strike unless “the matter to be stricken clearly could have no possible bearing  
10 on the subject of the litigation.” *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057  
11 (N.D. Cal. April 19, 2004). A court may also “refuse to grant Rule 12(f) motions unless prejudice  
12 would result to the moving party from denial of the motion.” *Id.*

13           “As with motions to dismiss, when ruling on a motion to strike, the Court takes the  
14 plaintiff’s allegations as true and must liberally construe the complaint in the light most favorable  
15 to the plaintiff.” *Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1140 (N.D. Cal.  
16 July 21, 2010). Whether to grant a motion to strike is within the sound discretion of the district  
17 court. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 963 (9th Cir. 2018).

18 **III. DISCUSSION**

19           The Court separately addresses each of the challenged portions of the Complaint: the  
20 allegations and claim for unpaid royalties, the prayer for attorney fees, and the prayer for  
21 supervised discovery.

22           Before reaching the merits, however, the Court clarifies which jurisdiction’s substantive  
23 law applies to Plaintiff’s cause of action for breach of contract, which is a state law claim. When a  
24 federal court sits in diversity to hear a state law claim, “[t]he conflicts laws of the forum state—  
25 here California—are used to determine which state’s substantive law applies.” *CRS Recovery, Inc.*  
26 *v. Laxton*, 600 F.3d 1138, 1141 (9th Cir. 2010). The California Supreme Court has held that “a  
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1 valid choice-of-law clause, which provides that a specified body of law ‘governs’ the ‘agreement’  
2 between the parties, encompasses all causes of action arising from or related to that agreement,  
3 regardless of how they are characterized, including tortious breaches of duties emanating from the  
4 agreement or the legal relationships it creates.” *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th  
5 459, 470 (1992). In this case, the Agreement contains the following choice of law provision:

6           The validity, construction, and performance of this Agreement shall  
7           be governed by and construed first in accordance with the federal laws  
8           of the United States to the extent federal subject matter jurisdiction  
          exists, and second in accordance with the laws of the State of  
          California, exclusive of its choice of law rules.

9 Ex. 1 to Compl. at 18. The parties have stipulated that, pursuant to this provision, California  
10 substantive law governs any issues concerning the “validity, construction, and performance” of the  
11 Agreement that may arise in this action. ECF No. 40.

12           **A. Claim for Unpaid Royalties**

13           The Complaint alleges, *inter alia*, that Hon Hai “breached Section 4.2.2 of the Agreement  
14 by failing (a) to submit complete and accurate Royalty Reports when due and, (b) to submit any  
15 Royalty Reports at all for multiple Royalty Periods, leading to Hon Hai’s failure to pay royalties  
16 under the Agreement.” Compl. ¶ 32. Hon Hai takes issue with the reference to “Hon Hai’s failure  
17 to pay royalties under the Agreement,” which is also made in two other places in the Complaint.  
18 *See* Def. Mot. at 6-7 (quoting Compl. ¶ 24 (“... leading to Hon Hai’s complete failure to make  
19 royalty payments to Microsoft when due.”); Compl. ¶ 28 (“... and may result only in additional  
20 delay in Hon Hai’s payment of overdue royalties.”)). In the instant motion, Hon Hai moves to  
21 dismiss or strike all three clauses and Microsoft’s prayer for “damages in the form of royalty  
22 payments and interest as required by the Agreement.” Def. Mot. at 4 (quoting Compl. ¶¶ 32,  
23 Prayer for Relief (d)). Hon Hai contends the claim for royalties—and thus the associated  
24 allegations—are “unripe” because the Agreement “provides that Hon Hai’s payment of royalties is  
25 not due until 60 days after Microsoft issues an invoice for such royalties.” *Id.* at 5 (quoting Ex. 1  
26 to Compl. at 10). Because Microsoft has not alleged that it issued any invoices, Hon Hai argues

1 that “royalties therefore are not ‘due.’” *Id.*

2 At the outset, Hon Hai concedes that a motion to dismiss under Rule 12(b)(6) and not a  
3 motion to strike under Rule 12(f) is the proper vehicle for its challenge. Def. Mot. at 4-5 n.3  
4 (citing *Whittlestone*, 618 F.3d at 975-76); *see also Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th  
5 Cir. 1977) (“Rule 12(f) is neither an authorized nor a proper way to procure the dismissal of all or  
6 a part of a complaint”) (internal quotation marks omitted). The Court agrees. Accordingly, Hon  
7 Hai’s motion to strike is denied, and the Court proceeds to consider Hon Hai’s motion to dismiss.

8 Under California law, in order to state a claim for breach of contract, a plaintiff must allege  
9 (1) the existence of a contract; (2) that it has performed or that its nonperformance is excused; (3)  
10 defendant’s breach of the contract; and (4) damages resulting from the breach. *Walsh v. W. Valley*  
11 *Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (Cal. Ct. App. 1998). Additionally, and  
12 relevantly, “the performance of conditions precedent must be alleged either generally or  
13 specifically.” *Gordon Bldg. Corp. v. Gibraltar Sav. & Loan Ass’n*, 247 Cal. App. 2d 1, 6 (1966).  
14 Here, Hon Hai argues Microsoft “fail[ed] to plead the occurrence of a condition precedent to the  
15 alleged obligation to pay royalties,” *viz.*, the issuance of invoices. Microsoft counters that the  
16 issuance of invoices is not a condition precedent to Hon Hai’s obligation to pay royalties and, even  
17 if it were, its nonperformance would be excused by Hon Hai’s failure to submit Royalty Reports  
18 upon which the invoices are based. As set out below, the Court agrees on both counts.

19 Unless extrinsic evidence is involved, “the interpretation and construction of a written  
20 contract present only questions of law, within the province of the court,” *Levi Strauss & Co. v.*  
21 *Esprit US Distribution Ltd.*, 588 F. Supp. 2d 1076, 1080 (N.D. Cal. 2008), and is therefore  
22 properly reached on a 12(b)(6) motion to dismiss. *See also WYDA Assocs. v. Merner*, 50 Cal.  
23 Rptr. 2d 323, 327 (Cal. Ct. App. 1996). Turning to the provision at issue, it is true that Section  
24 4.2.2 of the Agreement requires Microsoft to “invoice Hon Hai for payment of the Royalties.”  
25 Under California law, however, conditions precedent “are not favored,” *JMR Constr. Corp. v.*  
26 *Envtl. Assessment & Remediation Mgmt., Inc.*, 198 Cal. Rptr. 3d 47, 66 (Cal. Ct. App. 2015), and  
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1 courts will not interpret a contractual provision as a condition precedent unless “such a  
2 construction is made necessary by the express terms of the contract.” *Baker Aircraft Sales, Inc. v.*  
3 *Cassel*, 200 Cal. App. 2d 563, 568 (1962). Courts are especially inclined to deem contractual  
4 terms as covenants rather than conditions precedent “when the latter would result in . . .  
5 inequitable consequences in favor of the defendant.” *Weinstein v. Moers*, 207 Cal. 534, 541  
6 (1929).

7 Nothing in the Agreement at hand suggests that Microsoft’s responsibility to invoice Hon  
8 Hai constitutes a condition precedent. To begin with, as Microsoft points out, Section 4.2.1 lays  
9 out the essential bargain reached by the parties:

10 Royalties. As consideration for the License, Covenants and other  
11 rights granted under this Agreement, for each unit of a Covered  
12 Product Sold by Hon Hai or any of its Subsidiaries during the  
applicable Royalty Period, Hon Hai will pay MICROSOFT the  
applicable Device Fee for each Covered Product unit (“Royalties”).

13 Ex. 1 to Compl. at 10. This provision makes clear that Hon Hai’s obligation to pay arose when it  
14 availed itself of the patent rights granted to it by Microsoft; nothing else need occur to trigger the  
15 obligation. Section 4.2.2, which contains the invoicing provision, does not purport to alter or limit  
16 this essential bargain; it simply describes the process by which royalties are to be determined and  
17 paid. To be sure, the Agreement speaks in mandatory terms: “MICROSOFT shall thereafter  
18 invoice Hon Hai . . . .” But the parties did not use conditional language such as “if” or “provided  
19 that,” or otherwise indicate that Hon Hai’s obligation to pay exists only once Microsoft furnishes  
20 an invoice. *See, e.g., Nomadix, Inc. v. Guest-Tek Interactive Entm’t LTD*, No.  
21 CV1608033ABFFMX, 2017 WL 7240765, at \*5 (C.D. Cal. Oct. 17, 2017). The Court therefore  
22 declines Hon Hai’s invitation to construe the invoicing provision as a condition precedent.

23 This conclusion is bolstered by the inequitable consequences that would result if the Court  
24 were to do so. The Agreement outlines a three-step process: (1) Hon Hai reports to Microsoft the  
25 amount of royalties due, based on its sale data; (2) Microsoft “thereafter” invoices Hon Hai for the  
26 amount owed; (3) Hon Hai pays Microsoft the amount invoiced. That is because Hon Hai, and not  
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1 Microsoft, possesses the information necessary to determine the amount of its royalty obligation.  
2 As Microsoft correctly asserts, “[i]t is hornbook law that where one contracting party prevents the  
3 other’s performance of a condition precedent, the party burdened by the condition is excused from  
4 performing it, and the benefitted party’s duty of performance becomes unconditional.” *City of*  
5 *Hollister v. Monterey Ins. Co.*, 81 Cal. Rptr. 3d 72, 100 (Cal. Ct. App. 2008). Microsoft brings  
6 this suit precisely because Hon Hai’s failure to complete Royalty Reports prevented Microsoft  
7 from invoicing Hon Hai for the royalties Microsoft was owed. During their months of extended  
8 negotiations, Microsoft also “asked Hon Hai to provide Microsoft directly with information that  
9 will allow Microsoft to determine the amount of royalties owed . . . .” Compl. ¶ 27. Having  
10 thwarted Microsoft’s ability to carry out its invoicing responsibilities, Hon Hai cannot now  
11 complain that Hon Hai never received an invoice.

12 Hon Hai responds that it has “not prevented or made impossible Microsoft’s performance  
13 of the condition precedent” because the “PLA provides a remedy for unpaid royalties in the form  
14 of an audit, and Microsoft should be required to pursue that remedy.” ECF No. 29 (“Def. Reply”)  
15 at 3, 5. This argument is galling. As the Complaint lays out in detail, Microsoft has doggedly  
16 endeavored to exercise its right to audit Hon Hai, and Hon Hai has refused to comply. Under  
17 these circumstances, it is not “premature,” *id.*, for Microsoft to seek damages in the form of unpaid  
18 royalties. Moreover, although it is true that “a party may not obtain both specific performance and  
19 damages for the same breach of contract,” *id.* at 2 (quoting *Mycogen Corporation v. Monsanto*, 28  
20 Cal. 4th 888, 905 (2002)), Rule 8 specifically permits a plaintiff to plead “relief in the alternative  
21 or different types of relief.” Fed. R. Civ. P. 8(b)(3); *see, e.g., JPMorgan Chase Bank, N.A. v.*  
22 *Paramount Residential Mortg. Grp., Inc.*, No. EDCV1300471JGBSPX, 2013 WL 12133894, at \*5  
23 (C.D. Cal. May 30, 2013).

24 In sum, Microsoft has pleaded a plausible claim that it is entitled to unpaid royalties as  
25 damages stemming from Defendant’s alleged breach of the Agreement. Defendant’s motion to  
26 dismiss is therefore DENIED.

**B. Prayer for Attorney Fees**

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2 Second, Hon Hai asks the Court to dismiss or strike Microsoft’s prayer for attorney fees on  
3 the ground that “[t]he PLA does not provide for attorney’s fees awards.” As with its challenge to  
4 Microsoft’s claim for unpaid royalties, the Court denies Hon Hai’s motion to strike pursuant to  
5 Rule 12(f) as foreclosed by the Ninth Circuit’s decision in *Whittlestone*. See 618 F.3d at 975  
6 (denying the defendant’s motion to strike the plaintiff’s request for “lost profits and consequential  
7 damages” because it was “really an attempt to have certain portions of [the plaintiff’s] complaint  
8 dismissed,” which is “better suited for a Rule 12(b)(6) motion.”); see also *Harvey v. Bank of Am.,*  
9 *N.A.*, 906 F. Supp. 2d 982, 996 (N.D. Cal. 2012) (applying *Whittlestone* to reject defendant’s Rule  
10 12(f) motion to strike “the portions of Plaintiff’s amended complaint that mention punitive  
11 damages or attorney fees”).

12 Turning to the motion to dismiss analysis, the Court concludes Microsoft has plausibly  
13 alleged its entitlement to attorney fees. “California follows what is commonly referred to as the  
14 American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney  
15 fees.” *Trope v. Katz*, 11 Cal. 4th 274, 278 (1995) (citations omitted). Specifically, attorney fees  
16 are recoverable only if they are authorized by contract, statute, or law. *Santisas v. Goodin*, 17 Cal.  
17 4th 599, 606 (1998); see Cal. Civ. Proc. Code §§ 1021, 1033.5. In this case, Microsoft claims  
18 Section 4.2.5 of the Agreement provides the requisite contractual authorization for attorney fees.  
19 It states in pertinent part:

20 [I]f any audit reveals an underpayment of more than [REDACTED]  
21 [REDACTED], then Hon Hai shall reimburse MICROSOFT within [REDACTED]  
22 [REDACTED], upon request, for all costs and expenses (including Auditor  
and attorney fees) reasonably incurred by MICROSOFT to conduct  
the audit.

23 Ex. 1 to Compl. at 12 (emphasis added). It is “reasonable,” says Microsoft, to construe “the  
24 attorneys’ fees ‘reasonably incurred to conduct the audit’” as encompassing “the attorneys’ fees  
25 Microsoft will incur to litigate this case.” ECF No. 28. (“Pl. Opp.”) at 12. Meanwhile, Hon Hai  
26 maintains that the provision does not extend to litigation costs. Def. Reply at 7. Hon Hai offers  
27 several cases in support of its view, none of which are directly on point. In *Tire Hanger*



1 Finally, Hon Hai asks the Court to dismiss or strike Microsoft’s prayer for “Court-  
2 supervised discovery of Hon Hai’s books and records, including document and written discovery  
3 and witness examinations under oath.” Hon Hai takes issue with this aspect of the prayer for relief  
4 because it is “partly redundant and duplicative of Microsoft’s separate requests for specific  
5 performance.” Def. Mot. at 6. The Court therefore construes Hon Hai’s motion as one to strike  
6 under Rule 12(f) as “redundant,” rather than as a motion to dismiss. Yet, Hon Hai concedes that  
7 the prayer is only “partly, not wholly redundant” because the audit provisions for which Microsoft  
8 seeks specific performance “do not allow the full range of discovery mechanisms authorized by  
9 the Federal Rules of Civil Procedure.” Reply at 6. Consequently, the Court cannot say the  
10 material is “redundant” within the meaning of Rule 12(f). *See Whittlestone*, 618 F.3d at 974  
11 (“[T]he claim for damages could not be redundant, as it does not appear anywhere else in the  
12 complaint.”). Hon Hai asserts no other ground for striking the prayer.

13 Nor will Hon Hai be prejudiced by this request in the Complaint. Indeed, as Hon Hai  
14 acknowledges, discovery is a “procedure pursued during litigation” rather than an independent  
15 claim. Def. Reply at 6. For that reason, requests for discovery need not be pleaded in a complaint  
16 and are not decided at the motion to dismiss stage. “The purpose of a motion to strike is to clean  
17 up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters, and  
18 it is not clear how any of these purposes are served by striking from the complaint claims that  
19 plaintiffs are not even required to plead.” *Pension Tr. Fund for Operating Engineers Local 3 v.*  
20 *McMorgan & Co.*, No. CIVS06904 WBS JFM, 2006 WL 2788340, at \*4 (E.D. Cal. Sept. 26,  
21 2006). Microsoft will be entitled to court-supervised discovery by virtue of this suit, and the  
22 parties will have the opportunity to litigate the scope of that discovery in due course.

23 Defendant’s motion to dismiss or strike plaintiff’s prayer for court-supervised discovery is  
24 therefore DENIED.

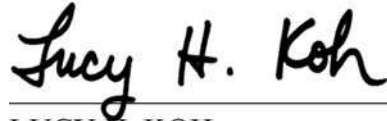
#### 25 **IV. CONCLUSION**

26 For the foregoing reasons, Defendant’s Motion to Dismiss and/or Strike is DENIED.

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**IT IS SO ORDERED.**

Dated: August 16, 2019



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LUCY H. KOH  
United States District Judge