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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MORTGAGE INDUSTRY  
SOLUTIONS, INC.,

Plaintiff,

No. CIV S-10-2636 KJM DAD

vs.

COLLABERA, INC., et. al,

Defendants.

ORDER

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On March 2, 2011, this court heard argument on defendant Collabera, Inc.’s motion to dismiss plaintiff’s first amended complaint (FAC). Adam M. Rose from the Law Office of Robert Starr appeared for plaintiff; Mara B. Brandes from Ogletree, Deakins, Nash, Smoak & Stewart, P.C. appeared telephonically for defendant Collabera, Inc.

I. Background

On September 28, 2010, defendant Collabera, Inc. removed this case from Sacramento County Superior Court. ECF No. 1. Jurisdiction in this court is appropriate under 28 U.S.C. § 1332(a)(1). Plaintiff filed its first amended complaint on November 2, 2010, alleging generally that defendant had breached a contract with plaintiff. FAC (ECF No. 10). On December 17, 2010, defendant filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Mot. to Dismiss (ECF No. 13).

1 II. Standards For A Motion To Dismiss

2 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to  
3 dismiss a complaint for "failure to state a claim upon which relief can be granted." A court may  
4 dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged  
5 under a cognizable legal theory." *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699  
6 (9th Cir. 1990).

7 Although a complaint need contain only "a short and plain statement of the claim  
8 showing that the pleader is entitled to relief," ( Fed. R. Civ. P. 8(a)(2)), in order to survive a  
9 motion to dismiss, this short and plain statement "must contain sufficient factual matter . . . to  
10 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct.  
11 1937, 1949 (2009) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007)). A  
12 complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-  
13 me accusation" or "labels and conclusions" or "a formulaic recitation of the elements of a  
14 cause of action." *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Determining  
15 whether a complaint will survive a motion to dismiss for failure to state a claim is a "context-  
16 specific task that requires the reviewing court to draw on its judicial experience and common  
17 sense." *Iqbal*, 129 S.Ct. at 1950. Ultimately, the inquiry focuses on the interplay between the  
18 factual allegations of the complaint and the dispositive issues of law in the action. *See Hishon v.*  
19 *King & Spalding*, 467 U.S. 69, 73 (1984).

20 In making this context-specific evaluation, this court must construe the complaint  
21 in the light most favorable to the plaintiff and accept as true the factual allegations of the  
22 complaint. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). This rule does not apply to "a legal  
23 conclusion couched as a factual allegation," (*Papasan v. Allain*, 478 U.S. 265, 286 (1986)  
24 (quoted in *Twombly*, 550 U.S. at 555)), nor to "allegations that contradict matters properly  
25 subject to judicial notice" or to material attached to or incorporated by reference into the  
26 complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001). A court's

1 consideration of documents attached to a complaint or incorporated by reference or as a matter of  
2 judicial notice will not convert a motion to dismiss into a motion for summary judgment.  
3 *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003); *Parks School of Business v.*  
4 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *compare Van Buskirk v. CNN*, 284 F.3d 977, 980  
5 (9th Cir. 2002) (noting that even though court may look beyond pleadings on motion to dismiss,  
6 generally court is limited to face of the complaint on 12(b)(6) motion).

7 III. Analysis

8           There are six causes of action in the FAC: breach of contract, common counts,  
9 conversion, unjust enrichment, intellectual property infringement and unfair competition.  
10 Defendant argues that plaintiff has not adequately pleaded its contract claim; that the common  
11 count claim is not supported by sufficient factual allegations; and that the third, fourth, fifth and  
12 sixth claims for relief fail because they are necessarily based on the inadequately pleaded breach  
13 of contract claim. Plaintiff opposes the motion. Although the FAC is not artfully pleaded, it  
14 withstands the motion to dismiss as discussed below.

15 A. Breach Of Contract

16           Plaintiff alleges that in 2004, its predecessor “entered into a written agreement  
17 with COLLABERA’s predecessor;” that under the terms of the agreement, plaintiff would pay  
18 defendant’s predecessor, Planet Asia, “to develop software based on plaintiff’s original idea to  
19 locate mortgages tailored for borrowers;” that as of June 2006, plaintiff had paid Planet Asia  
20 approximately \$300,000; that on or about December 2006, defendant “breached the contract by  
21 not returning the software that incorporated plaintiff’s idea that was developed pursuant to the  
22 contract;” and that plaintiff has suffered damages, including the conversion of its intellectual  
23 property, as the proximate result of the breach. FAC ¶¶ 6-7, 25, 27-31. Plaintiff identifies the  
24 contract as the attachment labeled Exhibit A, but as defendant notes, the unpaginated exhibit

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1 includes two documents entitled “Master Service Agreement,” only one of which is signed.  
2 FAC, Ex. A at 51 (signature page for second agreement).<sup>1</sup>

3 Defendant argues that the complaint does not include sufficient factual detail to  
4 state a plausible claim for relief, but rather relies on the type of conclusory, speculative  
5 allegations found wanting by the Supreme Court. Mot. to Dismiss at 4-6. It also argues that  
6 plaintiff does not identify the contract at issue or attach an adequate copy and incorporate it by  
7 reference, a requirement of California law. *Id.* at 6-7, citing *inter alia* *FPI Dev. Inc. v.*  
8 *Nakashima*, 231 Cal.App.3d 367, 383 (1991). In federal court, however,

9 [a] cause of action for a breach of contract must include facts  
10 demonstrating (1) that a contract exists between the parties, (2)  
11 that plaintiff performed his contractual duties or was excused from  
nonperformance, (3) that the defendant breached those contractual  
duties, and (4) that plaintiff’s damages were a result of the breach.

12 *Walters v. Fidelity Mortgage of California, Inc.*, 2010 WL 1493131 at \*7 (E.D. Cal. 2010);  
13 *Blanco v. American Home Mortgage Servicing, Inc.*, 2009 WL 4674904 at \*7 (E.D. Cal. 2009)  
14 (claim not properly pled when plaintiff described only a “vague promise to provide an  
15 ‘affordable loan’” and did not describe “what consideration was given for such a promise.”).  
16 Federal procedural rules do not require that the contract at issue be attached to the complaint,  
17 contrary to defendant’s claim that the confusion over the attachments dooms plaintiff’s claim.  
18 *Downtown Plaza LLC v. Nail Trix, Inc.*, 2008 WL 5099656 at \*1 (E.D. Cal. 2008).

19 In this case, plaintiff has alleged that its predecessor entered into a contract with  
20 defendant’s predecessor for the development of a search engine for mortgage information, FAC  
21 ¶¶ 6-7, 27; that plaintiff has paid defendant’s predecessor \$300,000, the amount due to defendant  
22 under the contract, FAC ¶¶ 18, 28; that defendant has refused to turn over the software  
23 incorporating plaintiff’s idea, FAC ¶¶ 19-20, 24, 29; that as the result of the breach, plaintiff has  
24 lost access to its intellectual property. FAC ¶¶ 25, 31. These allegations are sufficient to plead a  
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26 <sup>1</sup> The court relies on the pagination assigned by its ECF system.

1 breach of contract. See *Dobyns v. United States*, 91 Fed. Cl. 412, 430 (2010) (*Iqbal* and  
2 *Twombly* do not require a plaintiff to “jump through considerably more hoops now, in pleading a  
3 breach of contract claim, than was the case previously”).

4 B. Common Counts

5 Plaintiff alleges that defendant “became indebted to MISI within the last four  
6 years for money had and received by COLLABERA and its predecessors for the use and benefit  
7 of MISI” and that “at least \$300,000 is due and unpaid.” FAC ¶¶ 34-35. Defendant asserts that  
8 this state law claim is not pleaded adequately because it is “left to guess at the basis for  
9 Plaintiff’s second claim for relief.” Mot. to Dismiss at 8.

10 In California,

11 “A common count is not a specific cause of action, however; rather  
12 it is a simplified form of pleading normally used to aver the  
existence of various forms of monetary indebtedness . . . .

13 *McBride v. Boughton*, 123 Cal.App.4th 379, 394 (2004). There are three “essential allegations”  
14 of the cause of action: “(1) the statement of indebtedness in a certain sum, (2) the consideration,  
15 i.e., goods sold, work done, etc. and (3) non-payment.” *Farmers Insurance Exchange v. Zerin*,  
16 53 Cal.App.4th 445, 460 (1997). Defendant suggests that the complaint fails to identify “what  
17 common count it is alleging,” but then argues that the failure of the breach of contract claim  
18 means that the common count claim also fails. ECF No. 13-1 at 8.

19 Plaintiff has adequately pleaded the claim. Its second cause of action  
20 incorporates the paragraphs of the complaint that describe the dealings between the two parties,  
21 including the nature of the contract, the consideration paid, and the ultimate breach of the  
22 contract. This too is sufficient.

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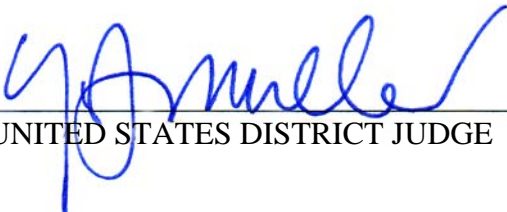
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1 C. Conversion, Unjust Enrichment, Intellectual Property Infringement, Unfair  
2 Competition

3 Defendant also argues that plaintiff's remaining causes of action must be  
4 dismissed because they depend on the inadequately pleaded breach of contract claim. Mot. to  
5 Dismiss at 9. In light of this court's conclusion that the breach of contract claim may proceed,  
6 defendant's argument is unavailing.

7 Accordingly, and good cause appearing, IT IS THEREFORE ORDERED that  
8 defendant Collabera, Inc.'s motion to dismiss (ECF No. 13) is denied.

9 DATED: March 24, 2011.

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13 UNITED STATES DISTRICT JUDGE  
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