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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH R. CLAYTON,

Plaintiff,

v.

AUTOMATED GAMING TECHNOLOGIES,
INC., a Nevada corporation, JOHN
R. PRATHER, and ROBERT MAGNANTI,

Defendants.

AUTOMATED GAMING TECHNOLOGIES,
INC., a Nevada corporation,

Counter-Claimant,

v.

KEITH R. CLAYTON, and DOES 1
through 10, inclusive,

Counter-Defendants.

No. 2:13-cv-00907-JAM-EFB

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

This matter is before the Court on Defendants Automated
Gaming Technologies, Inc. ("AGT"), John R. Prather, and Robert

1 Magnanti's (collectively "Defendants") Motion to Dismiss (Doc.
2 #68) the sixth and seventh causes of action in Plaintiff Keith R.
3 Clayton's ("Plaintiff") Third Amended Complaint ("TAC") (Doc.
4 #60).¹ Plaintiff filed an opposition (Doc. #90) and Defendants
5 replied (Doc. #94).

6
7 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

8 The Third Amended Complaint states seven causes of action
9 against Defendants: (1) restitution after rescission of the
10 software contract, (2) breach of the software contract,
11 (3) common count for goods delivered, (4) breach of employment
12 contract, (5) common count for labor and services, (6) fraud, and
13 (7) copyright infringement.

14 AGT is a Nevada corporation that develops and sells software
15 and hardware for the cash processing industries. TAC ¶¶ 4, 10.
16 Prather is the executive vice-president and secretary at AGT, and
17 Magnanti is the president of AGT. Id. ¶¶ 5-6. Plaintiff is a
18 computer programmer and a designer and author of computer
19 software. Id. ¶ 10.

20 In September 2009, AGT hired Plaintiff as the Executive Vice
21 President of its Systems Department. TAC ¶ 32. AGT and
22 Plaintiff executed a written employment agreement ("First
23 Employment Agreement"). In April 2010, Plaintiff and AGT entered
24 into a subsequent employment agreement ("Second Employment
25 Agreement"), amending and superseding the First Employment
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for March 5, 2014.

1 Agreement. Id. ¶ 33, Exh. A. In 2010, Plaintiff entered into an
2 oral contract with AGT ("Software Sale Agreement") to sell it
3 certain software that he had created, called an Administrative
4 Application ("Admin App"). TAC ¶¶ 11-13.

5 Plaintiff alleges that in the period from August to mid-
6 September 2009, and in the First Employment Agreement, Prather
7 and Magnanti, on behalf of AGT, promised they would pay 1.5% of
8 gross profits from the Systems division and give Plaintiff 1% of
9 AGT's stock after each year of employment. TAC ¶ 49.

10 Subsequently, Prather and Magnanti renegotiated the terms of
11 Plaintiff's employment in March 2010, representing and promising
12 to Plaintiff additional compensation from AGT. Id. ¶¶ 50-53.

13 The substance of these representations was included in the Second
14 Employment Agreement. Plaintiff further alleges that starting
15 in August 2009, through early 2010, Defendants made repeated
16 representations that they would buy and pay for the Admin App.
17 Id. ¶¶ 55-56. Eventually, these promises and the specific terms
18 of the deal were included in the Software Sale Agreement.

19 Plaintiff is the owner of the copyright for the Admin App. Id.
20 ¶ 67. The Admin App was used as the foundation for developing
21 certain software for AGT, including "Currency Banking Management
22 System" software ("CBMS software") and Biometric software. Id.
23 ¶ 16, 68.

24 Plaintiff filed the First Amended Complaint (Doc. #1-A) on
25 March 29, 2013, alleging five causes of action against AGT
26 arising from the Employment Agreements and the Software Sale
27 Agreement. AGT removed the case to this Court and brought a
28 Motion to Dismiss for Lack of Personal Jurisdiction and/or

1 Improper Venue or in the alternative to Transfer Venue (Doc. #7)
2 to the District of Nevada. Plaintiff filed an unopposed counter-
3 motion for leave to file the Second Amended Complaint (Doc. #18).
4 AGT's motion was dismissed in its entirety (Doc. #29), and
5 Plaintiff was given leave to file the Second Amended Complaint
6 (Doc. #30). The Second Amended Complaint was deemed filed by
7 this Court as of July 10, 2013 (Doc. #30); it added, in relevant
8 part, allegations of a subsequent version of the Employment
9 agreement. On September 21, 2013, Plaintiff filed a motion for
10 leave to file the Third Amended Complaint (Doc. #41), which added
11 claims for copyright infringement and promissory fraud against
12 then-existing defendant, AGT, as well as against newly named
13 defendants Prather and Magnanti. Plaintiff also filed a motion
14 to dismiss (Doc. #37) AGT's Counterclaim (Doc. #34). The Court
15 granted both motions (Doc. #59). The current motion to dismiss
16 was filed on January 6, 2014 and seeks dismissal of the sixth and
17 seventh causes of action in the Third Amended Complaint.

18 19 II. OPINION

20 A. Request for Judicial Notice

21 Plaintiff requests the Court judicially notice (Doc. #91)
22 two copies of the First Employment Agreement.

23 Generally, the Court may not consider material beyond the
24 pleadings in ruling on a motion to dismiss for failure to state
25 a claim. The exceptions are material attached to, or relied on
26 by, the complaint so long as authenticity is not disputed, or
27 matters of public record, provided that they are not subject to
28 reasonable dispute. E.g., Sherman v. Stryker Corp., 2009 WL

1 2241664, at *2 (C.D. Cal. 2009) (citing Lee v. City of Los
2 Angeles, 250 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid.
3 201).

4 The First Employment Agreement is clearly relied on in the
5 complaint and its authenticity is not disputed. Accordingly,
6 the Court grants Plaintiff's request for judicial notice.

7 B. Discussion

8 Defendants' Motion to Dismiss targets the sixth and seventh
9 causes of action in the Third Amended Complaint. Defendants
10 contend the claims for fraud and copyright infringement do not
11 meet even the most liberal pleading requirement, and thus cannot
12 withstand this motion filed pursuant to Rule 12(b)(6) of the
13 Federal Rules of Civil Procedure. MTD at p. 2.

14 1. Fraud

15 Defendants contend Plaintiff's claim for fraud must fail
16 because the allegations of the Third Amended Complaint do not
17 meet the heightened pleading requirements imposed by Rule 9(b).
18 MTD at p. 6.

19 Under either Nevada or California law, the elements of a
20 claim for fraud are: (1) a false representation, (2) defendant's
21 knowledge of its falsity, (3) intent to induce reliance,
22 (4) justifiable reliance, and (5) resulting damages. See Small
23 v. Fritz Companies, Inc., 30 Cal. 4th 167, 173 (2003); Nelson v.
24 Heer, 123 Nev. 217, 225 (2007). Averments of fraud must be
25 accompanied by the who, what, when, where, and how of the
26 misconduct charged. Vess v. Ciba, 317 F.3d 1097, 1106 (9th Cir.
27 2003); Fed. R. Civ. Proc. 9(b).

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1 Defendants contend that the Third Amended Complaint is
2 completely devoid of any specific facts and details and thus
3 fails to meet the heightened standard. MTD at pp. 6-8. They
4 argue the allegations are vague, referring to "representations"
5 made by Defendants without details as to their content or timing.
6 Defendants also argue the claim should fail because Plaintiff has
7 failed to adequately allege that Defendants knew their
8 representations were false or that they had no intent to perform
9 at the time the representations were made.

10 Plaintiff responded in the Opposition that the details of
11 the false representations underlying his fraud claim are
12 explicitly contained in the agreements themselves. Plaintiff
13 states that the allegations regarding the negotiations prior to
14 the contracts being formed "supply but a background" to the
15 agreements entered into by the parties; the agreements themselves
16 supply the "specific content of the false representations." Opp.
17 at pp. 11-12.

18 In their Reply, Defendants admit that they misunderstood the
19 claim as arising from the negotiations prior to the agreements,
20 rather than being based on the promises and representations
21 specifically contained in the agreements. Reply at p. 2. They
22 argue that Plaintiff has now clearly articulated that the false
23 representations underlying the fraud claim are those promises
24 made in the agreements themselves. Defendants contend that the
25 claim is therefore barred by the economic loss doctrine. The
26 Court agrees and because it does not believe that additional
27 briefing on the issue is necessary, grants Defendants' motion on
28 this ground.

1 “[T]he economic loss doctrine is designed to maintain a
2 distinction between damage remedies for breach of contract and
3 for tort. The term “economic loss” refers to damages that are
4 solely monetary The economic loss doctrine provides that
5 certain economic losses are properly remediable only in
6 contract.” Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865,
7 873 (9th Cir. 2007). The economic loss doctrine has been applied
8 to bar fraud claims where “the damages plaintiffs seek are the
9 same economic losses arising from the alleged breach of
10 contract.” Multifamily Captive Group, LLC v. Assurance Risk
11 Managers, Inc., 629 F.Supp.2d 1135, 1146 (E.D. Cal. 2009); see
12 also Foster Poultry Farms v. Alkar-Rapidpak-MP Equip., Inc., 868
13 F. Supp. 2d 983, 991-92 (E.D. Cal. 2012); Alvarado Orthopedic
14 Research, L.P. v. Linvatec Corp., No. 11-CV-246-IEG (RBB), 2011
15 WL 3703192, at *3 (S.D. Cal. 2011). “Quite simply, the economic
16 loss rule ‘prevent[s] the law of contract and the law of tort
17 from dissolving one into the other.’” Robinson Helicopter Co.,
18 Inc. v. Dana Corp., 34 Cal. 4th 979, 988 (2004) (quoting Rich
19 Products Corp. v. Kemutec, Inc., 66 F.Supp.2d 937, 969 (E.D. Wis.
20 1999)).

21 The sixth cause of action in the Third Amended Complaint
22 contains a series of paragraphs describing the alleged false
23 representations underlying the claim. TAC ¶¶ 49-56. Plaintiff
24 alleges that the false representations were made during the
25 negotiations of the two employment agreements and the Software
26 Sale Agreement and eventually formed the basis of those
27 agreements. Plaintiff makes clear in his Opposition that the
28 specific content of the false representations made during the

1 contract negotiations is in fact contained in the three
2 agreements. Opp. at pp. 11-12. He downplays any emphasis on the
3 content of the negotiations outside of and prior to the
4 agreements as simply a way to tie Prather and Magnanti to the
5 formation of the agreements containing these representations and
6 to show their knowledge and participation in the formation of the
7 agreements. Id.

8 "To allow a fraud claim [where the false representations
9 underlying it are those made in the contract itself] would 'open
10 the door to tort claims in virtually every case in which a party
11 promised to make payments under a contract but failed to do so.'" Multifamily Captive Group, 629 F. Supp. 2d at 1146 (quoting
12 Intelligraphics, Inc. v. Marvell Semiconductor, Inc., No. C07-
13 02499 JCS, 2009 WL 330259, at *17 (N.D. Cal. 2009)). The Court
14 finds Plaintiff's fraud claim is merely a restatement of his
15 contract claims in the form of a tort claim. The economic loss
16 doctrine must be applied to bar such a claim. See id.; Giles,
17 494 F.3d at 880; Foster Poultry Farms, 868 F. Supp. 2d at 991-92.

19 Accordingly, Defendants' Motion to Dismiss the sixth cause
20 of action for fraud is GRANTED. Because Plaintiff has clearly
21 indicated that the specific content of the false representations
22 was included in the agreements themselves, the claim cannot be
23 amended to state a viable cause of action for fraud. Therefore
24 the claim is dismissed with prejudice.

25 2. Copyright Infringement

26 Defendants contend Plaintiff's copyright infringement claim
27 should be dismissed because it fails to adequately allege a
28 required element, copying, and even if it did, the allegations as

1 a whole do not meet even the most liberal pleading standard. MTD
2 at pp. 9-11.

3 To demonstrate copyright infringement, a plaintiff must
4 prove two elements: (1) "ownership of a valid copyright" and
5 (2) "copying of constituent elements of the work that are
6 original." Twentieth Century Fox Film Corp. v. Entm't Distrib.,
7 429 F.3d 869, 876 (9th Cir. 2005).

8 It appears that, for purposes of their Motion to Dismiss,
9 Defendants have conceded the first element. MTD at p. 9.
10 However, they argue Plaintiff has failed to plead the requisite
11 copying to establish a copyright infringement claim. Defendants
12 contend the CBMS and Biometric software, which Plaintiff
13 identifies as sources of infringing material, are "works made for
14 hire" and thus cannot serve as the basis for Plaintiff's
15 copyright infringement claim because AGT is the owner of the
16 software. MTD at p. 10. Therefore, they argue, the copyright
17 infringement claim fails as a matter of law.

18 A "work made for hire" is "a work prepared by an employee
19 within the scope of his or her employment." 17 U.S.C. § 101.
20 Defendants argue the CBMS and Biometric software were made while
21 Plaintiff was an employee of AGT in the scope of that employment.
22 Plaintiff argues the CBMS and Biometric software are derivative
23 works and that AGT has no rights to them because AGT unlawfully
24 used Plaintiff's copyrighted Admin App in developing it. Opp. at
25 p. 18-19.

26 A "derivative work" is a "work based upon one or more
27 preexisting works." 17 U.S.C. § 101. However, "protection for a
28 work employing preexisting material in which copyright subsists

1 does not extend to any part of the work in which such material
2 has been used unlawfully." Id. § 103(a). Therefore, regardless
3 of whether AGT may be considered the "author" or owner of the
4 CBMS and Biometric software, it does not own or have rights in
5 the Admin App ("the preexisting material in which copyright
6 subsists") if that material was used unlawfully. Id.; see U.S.
7 Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1015-
8 16 (9th Cir. 2012). Taking the allegations in the Third Amended
9 Complaint as true, the CBMS and Biometric software are derivative
10 works using the Admin App as their foundation (TAC ¶ 68); AGT's
11 use of the Admin App was unlawful and thus AGT is liable for any
12 improper use of it (TAC ¶¶ 69-70).

13 Defendants further argue that even if improper copying has
14 been alleged, the Third Amended Complaint fails to allege
15 sufficient facts relating to what acts and during what time
16 Defendants infringed upon the copyright. MTD at p. 11.
17 Defendants claim the allegations include nothing more than bare
18 assertions and legal conclusions.

19 Copyright claims need not be pled with particularity.
20 Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F. Supp. 2d
21 1114, 1120 (C.D. Cal. 2001). "[C]omplaints simply alleging
22 present ownership by plaintiff, registration in compliance with
23 the applicable statute and infringement by defendant have been
24 held sufficient under the rules." Id.; see also Facebook, Inc.
25 v. Power Ventures, Inc., C 08-5780 JF (RS), 2009 WL 1299698, at
26 *4 (N.D. Cal. 2009); Marvel Enterprises, Inc. v. NCSOFT Corp., CV
27 04-9253RGKPLAX, 2005 WL 878090, at *2 (C.D. Cal. 2005).

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1 The Third Amended Complaint specifically alleges Defendants
2 have infringed on Plaintiff's copyright in the Admin App through
3 its unauthorized direct reproduction and copying of the Admin App
4 as well as through the reproducing, distributing, displaying, and
5 offering for sale of derivate works unlawfully incorporating the
6 Admin App. TAC ¶¶ 67-70. Therefore, Plaintiff has sufficiently
7 alleged a copyright infringement claim.

8 Defendants cite several cases supporting their contention
9 that these allegations are not enough. However, their reliance
10 is misplaced as many of these cases involve more speculative or
11 vague allegations. For instance, Defendants cite to Universal
12 Surface Tech., Inc. v. Sae-A Trading Am. Corp., CV 10-6972
13 CASPJWX, 2011 WL 281020, at *6 (C.D. Cal. 2011) where the court
14 dismissed the plaintiff's copyright claim. However, the court
15 made its ruling on standing grounds and even when it considered
16 the allegations in the complaint the court found it alleged "no
17 facts indicating what acts constitute the alleged infringement,
18 and which copyrights have allegedly been infringed." Id. Here,
19 Plaintiff has clearly indicated what copyright has been allegedly
20 infringed and the acts that constitute the infringement.

21 Accordingly, Defendants Motion to Dismiss the copyright
22 infringement claim as a whole is denied.

23 Defendants argue that even if the claim is sufficiently
24 alleged against AGT, the complaint lacks factual allegations
25 establishing Prather and Magnanti's individual liability. MTD at
26 p. 12. Defendants cite Berster Technologies, LLC v. Christmas,
27 CIV. S-11-1541 KJM, 2011 WL 5307834 (E.D. Cal. 2011) as support
28 for their contention.

1 In Berster, the court did dismiss plaintiff's copyright
2 infringement claim against one defendant, EinsteinModz, reasoning
3 plaintiff made nothing more than conclusory references to its
4 involvement in any infringement. Berster, at *9-10. However, in
5 the same paragraph the Berster court found the claims against
6 another defendant, Coy Christmas, an officer of the defendant
7 companies, sufficient. Id. The court stated that the
8 plaintiff's allegations were sufficient to state a copyright
9 violation because they identified the copyright and the allegedly
10 infringing activities, citing a section of the complaint in which
11 the defendant officer is alleged to have improperly sold
12 copyrighted material. Id.

13 Again, Plaintiff has identified the copyright and the
14 allegedly infringing activities, specifically alleging that
15 Prather and Magnanti personally directed the improper
16 reproducing, distributing, public displaying and selling of
17 Plaintiff's copyrighted Admin App and its derivate works. TAC ¶¶
18 70-71. The Ninth Circuit has clearly stated that in the context
19 of copyright law, liability may extend "to cases in which a
20 defendant 'has the right and ability to supervise the infringing
21 activity and also has a direct financial interest in such
22 activities.'" A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004,
23 1022 (9th Cir. 2001) (internal citation omitted). Corporate
24 officers may be held personally liable for copyright infringement
25 if they authorize or direct or participate in the unlawful
26 activity, even when acting as agents of the corporation. Bangkok
27 Broad. & T.V. Co., Ltd. v. IPTV Corp., 742 F. Supp. 2d 1101,
28 1114-15 (C.D. Cal. 2010). Plaintiff's allegation that Prather

1 and Magnanti personally directed the infringing activities is
2 enough to allow the claim to proceed.

3 Accordingly, Defendants motion to dismiss the copyright
4 infringement claim as against Prather and Magnanti is DENIED.

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III. ORDER

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For the reasons set forth above, the Court GRANTS WITH
PREJUDICE Defendants' Motion to Dismiss the Sixth Cause of Action
for fraud.

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The Court DENIES Defendants' Motion to Dismiss the Seventh
Cause of Action for copyright infringement.

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IT IS SO ORDERED.

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Dated: April 2, 2014

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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