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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 PLAINTIFF  
AND COUNTER DEFENDANT'S  
MOTION TO DISMISS IN PART  
AND DENYING IN PART**

This matter is before the Court on Plaintiff and Counter-  
Defendant Keith R. Clayton's ("Plaintiff") Motion to Dismiss

1 (Doc. #86) Defendant and Counter-Claimant Automated Gaming  
2 Technologies, Inc.'s ("AGT") First Amended Counterclaim (Doc.  
3 #69).<sup>1</sup> AGT opposed the motion (Doc. #99), and Plaintiff replied  
4 (Doc. #100).

5  
6 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

7 The allegations and extensive procedural history of this  
8 action are well known to the parties and do not need to be  
9 repeated in detail here. In brief, Plaintiff's suit and AGT's  
10 counter claims arise out of a series of negotiations between the  
11 parties regarding two iterations of an employment agreement and  
12 an alleged sales contract for the purchase of software created by  
13 Plaintiff, as well as the subsequent employment relationship.  
14 Plaintiff earlier moved to dismiss (Doc. #37) AGT's Counterclaim  
15 (Doc. #34), which alleged four causes of action: (1) breach of  
16 contract, (2) breach of duty of loyalty, (3) negligence, and (4)  
17 negligent interference with economic relations.

18 The Court dismissed the first two causes of action without  
19 prejudice. Relevant here, the Court ruled that Plaintiff was an  
20 "officer" within the meaning of Nevada Revised Statutes §  
21 78.138(7) ("§78.138"). The Court found that AGT failed to allege  
22 that Plaintiff's breach of the employment contract involved  
23 "intentional misconduct, fraud or a knowing violation of law" as  
24 required by §78.138 when bringing an action against an officer of  
25 a corporation for acts in his or her capacity as an officer. The  
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27 <sup>1</sup> 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 April 9, 2014.

1 Court then found AGT's allegations regarding Plaintiff's conduct  
2 failed to amount to a breach of Plaintiff's duty of loyalty to  
3 AGT, as alleged in the second cause of action, although the Court  
4 did find such a duty existed. The Court dismissed the remaining  
5 causes of action.

6 The First Amended Counterclaim states three causes of action  
7 against Plaintiff: (1) breach of fiduciary duties, (2) fraud, and  
8 (3) breach of contract. The relevant allegations contained in the  
9 First Amended Counterclaim supporting each of these causes of  
10 action will be discussed below.

## 11 12 II. OPINION

### 13 A. Request for Judicial Notice

14 Plaintiff requests the Court judicially notice certain  
15 facts and representations made in previous filings with the  
16 Court in this matter (Doc. #88). Generally, the Court may not  
17 consider material beyond the pleadings in ruling on a motion to  
18 dismiss for failure to state a claim. The exceptions are  
19 material attached to, or relied on by, the complaint so long as  
20 authenticity is not disputed, or matters of public record,  
21 provided that they are not subject to reasonable dispute. E.g.,  
22 Sherman v. Stryker Corp., 2009 WL 2241664, at \*2 (C.D. Cal.  
23 2009) (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th  
24 Cir. 2001) and Fed. R. Evid. 201).

25 The Court denies Plaintiff's request. The Court has  
26 considered the First Amended Counterclaim and the contract  
27 relied on and attached to it in deciding Plaintiff's motion to  
28 dismiss herein.

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2 B. Sanctions

3 Pursuant to the Court's Order Re Page Limits (Doc. #4-2),  
4 reply memoranda are limited to ten (10) pages. Plaintiff's Reply  
5 (Doc. #100) to AGT's opposition to this motion was twenty-four  
6 (24) pages long. The Court hereby sanctions Plaintiff \$50 for  
7 each page in excess of the court-ordered limit, amounting to  
8 \$700.

9 C. Discussion

10 1. Breach of Fiduciary Duties

11 Plaintiff contends AGT's first cause of action for breach  
12 of fiduciary duties must fail because it does not meet the  
13 requirements of §78.138, namely that it does not allege  
14 "intentional misconduct, fraud or a knowing violation of law".  
15 MTD at pp. 20-24.

16 In the First Amended Counterclaim, AGT alleges that  
17 Plaintiff wrongfully withheld technical information from AGT in  
18 order to demand payment regarding the disputed software sale  
19 contract and "additional and excessive compensation." FACC ¶  
20 33. In addition, AGT alleges that Plaintiff misappropriated  
21 proprietary information obtained from AGT and used it improperly  
22 in the software for which he is currently seeking a copyright.  
23 FACC ¶ 34. AGT alleges this resulted in damages, including loss  
24 of customers and goodwill. FACC ¶ 35.

25 As compared to the allegations in the original  
26 Counterclaim, these additional allegations involve Plaintiff's  
27 intentional misuse of "confidential information" gained from AGT  
28 and intentionally withholding information from AGT for profit

1 while employed by AGT, thereby acting against the best interests  
2 of his employer in "matters connected with his agency."

3 Restatement (Second) of Agency §§ 387, 393 comment (a). These  
4 allegations meet the requirements of §78.138, a breach of  
5 fiduciary duties involving Plaintiff's intentional misconduct.  
6 The claim for breach of fiduciary duties in the First Amended  
7 Counterclaim "sufficiently allege[s] underlying facts" that  
8 "plausibly suggest an entitlement to relief." Starr v. Baca,  
9 652 F.3d 1202, 1216 (9th Cir. 2011), cert. denied, 132 S. Ct.  
10 2101, 182 L. Ed. 2d 882 (U.S. 2012). The basis for this claim  
11 does not trigger the heightened pleading requirements of Rule 9,  
12 as argued by Plaintiff, as it does not rely on fraudulent  
13 conduct. Accordingly, Plaintiff's motion to dismiss AGT's first  
14 cause of action is DENIED.

15 2. Fraud

16 AGT's second claim for relief is for fraud. Plaintiff  
17 contends the allegations supporting this cause of action fail to  
18 meet the heightened pleading requirements of Rule 9 of the  
19 Federal Rules of Civil Procedure.

20 In the First Amended Counterclaim, AGT alleges it was  
21 induced to hire Plaintiff by misrepresentations made by him in  
22 "his resume and other communications." FACC ¶ 37. The alleged  
23 misrepresentations concerned his possession of the "expertise and  
24 experience to write and develop the cash processing software AGT  
25 is in the business of selling." Id. He also represented that he  
26 had the experience to support and run the Systems Department at  
27 AGT, which AGT alleges he did not. Id. He also represented that  
28 the software he had created "had certain capabilities" that AGT

1 later learned it did not have. Id. ¶ 38.

2 The Court finds AGT's counterclaim fails to state a claim  
3 for fraud with the requisite particularity pursuant to Rule 9.  
4 What is lacking from the pleadings is, coincidentally, exactly  
5 what AGT offers to provide if the Court dismisses the claim:  
6 "additional and more specific facts in support of its claim";  
7 allegations that "identify conversations" and their details; and  
8 "additional facts relating to [Plaintiff's] representations,"  
9 which "allege more specifically how such representations were  
10 false." Opp. at pp. 20-21. Accordingly, the Court grants  
11 Plaintiff's motion to dismiss the second cause of action for  
12 fraud, but grants AGT leave to amend.

13 Plaintiff includes a one sentence argument in his Motion to  
14 Dismiss contending the statute of limitations bars the claim for  
15 fraud. MTD at p.19 "A motion to dismiss based on the running of  
16 the statute of limitations period may be granted only 'if the  
17 assertions of the complaint, read with the required liberality,  
18 would not permit the plaintiff to prove that the statute was  
19 tolled.'" Supermail Cargo, Inc. v. United States, 68 F.3d 1204,  
20 1206-07 (9th Cir. 1995) (quoting Jablon v. Dean Witter & Co., 614  
21 F.2d 677, 682 (9th Cir.1980)). However, "[b]ecause the  
22 applicability of the equitable tolling doctrine often depends on  
23 matters outside the pleadings, it 'is not generally amenable to  
24 resolution on a Rule 12(b)(6) motion.'" Id. (quoting Cervantes  
25 v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993). The  
26 Court does not find that AGT can plead no set of facts that would  
27 establish the timeliness of the claim." Id. Therefore,  
28 notwithstanding Plaintiff's statute of limitations argument, the

1 Court grants AGT leave to amend this claim. As a result of the  
2 Court's dismissal, Plaintiff's arguments regarding AGT's claim  
3 for punitive damages in connection with this cause of action are  
4 moot.

5 3. Breach of Contract

6 Plaintiff contends the breach of contract claim must fail  
7 because it does not state facts sufficient to constitute a  
8 viable claim under §78.138. MTD at p. 24. He argues AGT has  
9 primarily just repeated allegations from the rejected breach of  
10 contract claim from the initial Counterclaim, and that AGT  
11 misstates the nature of the employment agreement.

12 AGT argues that it has sufficiently stated a claim. It  
13 points to allegations that Plaintiff purposefully obtained  
14 employment with another company and did not tell AGT about it.  
15 Opp. at pp. 14-15. As a result of this other employment,  
16 Plaintiff was preoccupied and did not have as much time for his  
17 work with AGT and therefore his work suffered. These  
18 allegations parallel those in the first Counterclaim and again  
19 fail to meet the requirements of §78.138 for the same reasons  
20 laid out in the Court's previous order dismissing AGT's breach  
21 of contract claim.

22 AGT has added additional allegations regarding Plaintiff's  
23 unauthorized use of its proprietary information in the software  
24 Plaintiff seeks to copyright and/or alleges the software is the  
25 property of AGT because it was constructed during the time  
26 Plaintiff was employed by AGT. FACCC ¶ 54. This conduct is  
27 certainly actionable under §78.138, but as a breach of  
28 Plaintiff's fiduciary duties to AGT, as stated in AGT's first

1 cause of action. In its opposition, AGT contends that the claim  
2 does not even fall within the purview of §78.138 because it is  
3 not one against Plaintiff as an officer of AGT. Were the Court  
4 to accept this argument, AGT would thereby undermine its claim  
5 that the underlying conduct is actionable as a violation of the  
6 terms of Plaintiff's employment. If the actions underlying the  
7 claim occurred outside of Plaintiff's employment relationship  
8 with AGT, a claim for breach of the employment contract is  
9 misplaced. Accordingly, the Court dismisses the breach of  
10 contract claim. As AGT has been unable to assert a viable breach  
11 of contract claim after sufficient leave to amend its first  
12 attempt, the claim is dismissed without leave to amend. The  
13 Court finds any actionable conduct alleged by AGT under its  
14 breach of contract claim, is more properly brought under its  
15 breach of fiduciary duties claim in the first cause of action.

### 16 17 III. ORDER

18 For the reasons set forth above, the Court DENIES  
19 Plaintiff's Motion to Dismiss the First Cause of Action for  
20 breach of fiduciary duties in the First Amended Counterclaim.  
21 The Court GRANTS WITH LEAVE TO AMEND Plaintiff's Motion to  
22 Dismiss the Second Cause of Action for fraud. The Court GRANTS  
23 WITHOUT LEAVE TO AMEND Plaintiff's Motion to Dismiss the Third  
24 Cause of Action for breach of contract. A Second Amended  
25 Counterclaim must be filed within twenty (20) days of the date of  
26 this Order. Plaintiff's responsive pleading must be filed within  
27 twenty (20) days thereafter.


28 Plaintiff's counsel shall pay the \$700 in sanctions to the



1 clerk of the court within ten (10) days of the date of this  
2 Order.

3 IT IS SO ORDERED.

4 Dated: April 18, 2014

  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE

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