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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH R. CLAYTON,

Plaintiff,

v.

AUTOMATED GAMING TECHNOLOGIES,
INC., a Nevada corporation, and
DOE 1 through DOE 50, inclusive

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 AND
MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT**

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

1 (Doc. #37) Defendant and Counter-Claimant Automated Gaming
2 Technologies, Inc.'s ("AGT") Counterclaim (Doc. #34) and
3 Plaintiff's Motion for Leave to File Third Amended Complaint
4 (Doc. #41).¹ AGT filed oppositions to both motions (Doc. ##46-
5 47). Plaintiff replied to both motions (Doc. ##49, 52) and they
6 are considered together here.

7
8 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

9 The Counterclaim states four causes of action against
10 Plaintiff: (1) breach of contract, (2) breach of duty of loyalty,
11 (3) negligence, and (4) negligent interference with economic
12 relations. Answer & Counterclaim ("CC") at pp. 13-16.

13 AGT is a Nevada corporation that develops and sells software
14 and hardware for the cash processing industries. CC ¶ 70. In
15 September 2009, AGT hired Plaintiff as the Executive Vice
16 President of its Systems Department. CC ¶ 71; MTD at p. 1. AGT
17 and Plaintiff executed a written employment agreement ("the
18 Employment Agreement"). CC, Exh. A. Plaintiff was responsible
19 for creating and developing software for AGT's cash processing
20 machines, as well as supporting all activities relating to the
21 development, distribution and support of products sold or
22 supported by AGT. CC ¶¶ 71, 73-74 & Exh. A.

23 During his employment, Plaintiff developed software to
24 provide a web-based application for AGT's machines. CC ¶ 75.
25 According to the counterclaim, the software did not function
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 October 23, 2013.

1 properly. Id. ¶ 80. AGT alleges that Plaintiff failed to make
2 sufficient effort to travel to AGT's offices in Nevada to test
3 the software and was employed with Intel at the same time he was
4 employed with AGT, both in violation of the Employment Agreement.
5 Id. ¶¶ 79, 83. As a result, Plaintiff was unable to fix the
6 software issues, and ultimately it became unworkable, requiring
7 AGT to rebuild the software at its own expense. Id. ¶¶ 80-81.

8 Plaintiff filed the First Amended Complaint (Doc. #1-A) on
9 March 29, 2013, alleging five causes of action arising from the
10 Employment Agreement and a separate Software Sale Contract. AGT
11 removed the case to this Court and brought a Motion to Dismiss
12 for Lack of Personal Jurisdiction and/or Improper Venue or in the
13 alternative to Transfer Venue (Doc. #7) to the District of
14 Nevada. Plaintiff filed an unopposed counter-motion for leave to
15 file the Second Amended Complaint (Doc. #18). AGT's motion was
16 dismissed in its entirety (Doc. #29), and Plaintiff was given
17 leave to file the Second Amended Complaint (Doc. #30). The
18 Second Amended Complaint was deemed filed by this Court as of
19 July 10, 2013 (Doc. #30); it added, in relevant part, allegations
20 of a subsequent version of the Employment agreement. A Status
21 (Pre-trial Scheduling) Order (Doc. #33) was issued on July 25,
22 2013, stating that "[n]o further joinder of parties or amendments
23 to pleadings is permitted except with leave of court, good cause
24 having been shown." On September 21, 2013, Plaintiff filed his
25 motion for leave to file Third Amended Complaint.

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1 II. OPINION

2 A. Request for Judicial Notice

3 AGT requests the Court to judicially notice its application
4 and receipt of a Nevada Business License for each of the years
5 from 2009 through 2012. Generally, the Court may not consider
6 material beyond the pleadings in ruling on a motion to dismiss
7 for failure to state a claim. The exceptions are material
8 attached to, or relied on by, the complaint so long as
9 authenticity is not disputed, or matters of public record,
10 provided that they are not subject to reasonable dispute. E.g.,
11 Sherman v. Stryker Corp., 2009 WL 2241664, at *2 (C.D. Cal.
12 2009) (citing Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th
13 Cir. 2001) and Fed. R. Evid. 201).

14 Although the Court may take notice of AGT's certified
15 business licenses, it does not find any of the documents
16 particularly relevant to resolution of the issues now before the
17 Court. Accordingly, the Court denies AGT's request for judicial
18 notice.

19 B. Legal Standard

20 A party may move to dismiss an action for failure to state a
21 claim upon which relief can be granted pursuant to Federal Rule
22 of Civil Procedure 12(b)(6). To survive a motion to dismiss a
23 plaintiff must plead "enough facts to state a claim to relief
24 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
25 556 U.S. 662, 570 (2007). In considering a motion to dismiss, a
26 district court must accept all the allegations in the complaint
27 as true and draw all reasonable inferences in favor of the
28 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),

1 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
2 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). "First, to be
3 entitled to the presumption of truth, allegations in a complaint
4 or counterclaim may not simply recite the elements of a cause of
5 action, but must sufficiently allege underlying facts to give
6 fair notice and enable the opposing party to defend itself
7 effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir.
8 2011), cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S.
9 2012). "Second, the factual allegations that are taken as true
10 must plausibly suggest an entitlement to relief, such that it is
11 not unfair to require the opposing party to be subjected to the
12 expense of discovery and continued litigation." Id. Assertions
13 that are mere "legal conclusions" are therefore not entitled to
14 the presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678
15 (2009) (citing Twombly, 550 U.S. at 555). Dismissal is
16 appropriate when a plaintiff fails to state a claim supportable
17 by a cognizable legal theory. Balistreri v. Pacifica Police
18 Department, 901 F.2d 696, 699 (9th Cir. 1990).

19 Upon granting a motion to dismiss for failure to state a
20 claim, a court has discretion to allow leave to amend the
21 complaint pursuant to Federal Rule of Civil Procedure 15(a).
22 "Dismissal with prejudice and without leave to amend is not
23 appropriate unless it is clear . . . that the complaint could not
24 be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
25 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

26 C. Discussion

27 Plaintiff contends AGT's counterclaims should all be
28 governed under Nevada law. According to the Employment

1 Agreement and the Counterclaim, the Employment Agreement is to
2 be governed by and interpreted under Nevada state law. CC ¶ 90
3 & Exh. A. In its Opposition to the Motion to Dismiss, AGT
4 agrees that its claim for breach of the Employment Agreement is
5 governed by Nevada law, but argues that the choice of law issue
6 should be deferred and that the Court should preserve all
7 counterclaims that are viable under either California or Nevada
8 law. Opp. MTD at pp. 4-6. AGT further argues its tort claims
9 should be analyzed under California's governmental interest
10 test. As discussed below, the Court finds AGT's argument
11 unpersuasive.

12 1. Breach of Contract

13 AGT's first counterclaim is for breach of the Employment
14 Agreement. The Employment Agreement involved Plaintiff's
15 agreement "to work exclusively and in good faith for AGT, using
16 [Plaintiff's] best efforts." AGT alleges Plaintiff breached the
17 agreement by being employed with Intel while he was employed
18 with AGT. CC ¶ 87. As a result of this other employment, AGT
19 contends Plaintiff failed to use his best efforts in developing
20 and creating functioning software for AGT, resulting in damages
21 to AGT. Id. ¶ 88. The Counterclaim and the Employment
22 Agreement explicitly state that the agreement is to be governed
23 by and interpreted under Nevada law.

24 The Supreme Court of California has stated that California
25 courts shall apply the principles set forth in section 187 of
26 the Restatement Second of Conflict of Laws, reflecting the
27 "strong policy favoring enforcement of [contractual choice-of-
28 law] provisions." Nedlloyd Lines B.V. v. Superior Court, 3

1 Cal.4th 459, 464-65 (1992). The first test is to determine
2 "(1) whether the chosen state has a substantial relationship to
3 the parties or their transaction, or (2) whether there is any
4 other reasonable basis for the parties' choice of law." Id. at
5 466. If either is met, the provision should be enforced as long
6 as the chosen state's law is not "contrary to a *fundamental*
7 policy of California." Id.

8 The Employment Agreement governed Plaintiff's employment
9 with a Nevada corporation and the alleged damages were suffered
10 in Nevada, clearly providing a substantial relationship to the
11 transaction. Nothing in Nevada's law governing the relevant
12 employment relationship is contrary to a fundamental policy of
13 California and no argument has been made by AGT to that effect.
14 Therefore, the Court will apply Nevada law to the breach of
15 contract claim.

16 Nevada Revised Statutes § 78.138 codifies the business
17 judgment rule and provides in relevant part:

18 [A] director or officer is not individually liable to
19 the corporation . . . for any damages as a result of
20 any act or failure to act in his or her capacity as a
21 director or officer unless it is proven that:

22 (a) The director's or officer's act or failure to act
23 constituted a breach of his or her fiduciary
24 duties as a director or officer; and

25 (b) The breach of those duties involved intentional
26 misconduct, fraud or a knowing violation of law.

27 N.R.S. § 78.138(7); see also Rapaport v. Soffer, 2:10-CV-935-
28 MMD-RJJ, 2012 WL 2522069, at *5 (D. Nev. 2012).

1 Plaintiff argues that AGT has failed to state facts
2 sufficient to state a claim for breach of contract in light of
3 the requirements set forth in § 78.138. In response, AGT argues
4 that Plaintiff was not an "officer" for purposes of the statute
5 and even if he could be so labeled, the conduct underlying the
6 claim was performed for Plaintiff's personal benefit and not "in
7 his [] capacity as a director or officer." N.R.S. § 78.138(7).

8 The Employment Agreement specifies that Plaintiff was
9 employed as the Executive Vice President of AGT's Systems
10 Department. It further provides that Plaintiff would be charged
11 with "supporting all activities related to the development,
12 distribution and support of products sold or supported by AGT."
13 Given the title and scope of responsibilities, the Court finds
14 the Employment Agreement adequately supports Plaintiff's
15 argument that he was an "officer" as understood by § 78.138.
16 AGT's reliance on its own corporate filings fails to support an
17 interpretation of Plaintiff's title that refutes its common
18 understanding.

19 Next, AGT argues that Plaintiff breached the Employment
20 Agreement by working for Intel. It claims this conduct was for
21 Plaintiff's own benefit and therefore was not carried out in the
22 scope of his employment with AGT. However, the basis for
23 damages in AGT's first cause of action is Plaintiff's failure to
24 adequately develop and test functioning software. The claim is
25 based on Plaintiff's failure to adequately monitor or develop
26 the software. This "failure to act" in his capacity of
27 Executive Vice President of Systems is clearly controlled by the
28 provisions of § 78.138. Plaintiff may have been acting in his

1 own best interest when working with Intel, but his alleged
2 employment with Intel is not the basis, in and of itself, of any
3 damages alleged by AGT. Rather the employment allegedly caused
4 Plaintiff's failure to adequately fix the software, which in
5 turn caused damage to AGT.

6 Therefore, the breach of contract claim is one against an
7 "officer" of AGT for damages caused by an "act or failure to act
8 in his [] capacity as a director or officer." N.R.S.
9 § 78.138(7). Such a claim requires that the employee's breach
10 "involve[] intentional misconduct, fraud or a knowing violation
11 of law." Id. AGT's counterclaim fails to allege such conduct,
12 and, therefore, fails to state facts sufficient to state a claim
13 for breach of contract. Accordingly, Plaintiff's Motion to
14 Dismiss the first cause of action in the counterclaim is
15 granted. As it is not clear to the Court that the claim could
16 not be saved by alleging facts sufficient to meet the
17 requirements of § 78.138, the motion is granted without
18 prejudice. Eminence Capital, L.L.C., 316 F.3d at 1052.

19 2. Breach of Duty of Loyalty

20 AGT's second cause of action alleges Plaintiff violated a
21 duty of loyalty owed to it by virtue of Plaintiff's employment
22 and the Employment Agreement. CC ¶¶ 92, 95. AGT claims
23 Plaintiff's unauthorized employment with Intel was contrary to
24 the best interests of AGT and that it suffered damages as a
25 result. It further seeks punitive damages for the breach.

26 An implied duty of loyalty is recognized under both Nevada
27 and California law. See White Cap Indus., Inc. v. Ruppert, 119
28 Nev. 126, 129 (2003); James v. Childtime Childcare, Inc., CIV. S-

1 06-2676 DFL DA, 2007 WL 1589543, at *3 (E.D. Cal. 2007)
2 ("California law recognizes a duty of loyalty that is breached
3 when an employee takes action against an employer's best
4 interests"). The elements of a cause of action for a breach of
5 the duty of loyalty are: "(1) the existence of a relationship
6 giving rise to a duty of loyalty; (2) one or more breaches of
7 that duty; and (3) damage proximately caused by that breach."
8 Huong Que, Inc. v. Luu, 150 Cal.App.4th 400, 410 (Cal. Ct. App.
9 2007).

10 Both parties rely on a District Court of Nevada opinion,
11 Tousa Homes, Inc. v. Phillips, 363 F. Supp. 2d 1274, 1280 (D.
12 Nev. 2005) for their relative positions. The Tousa Homes court
13 found "an employee generally owes his employer a duty of loyalty
14 respecting prospective business opportunity." Id. As Plaintiff
15 points out, the final clause, "respecting prospective business
16 opportunity," drastically limits the scope of the duty of
17 loyalty. This Court has similarly found that the duty of loyalty
18 requires an agent "'to act loyally for the principal's benefit **in**
19 **all matters connected with the agency relationship**' (citations
20 omitted)." Ikon Office Solutions, Inc. v. Rezente, CIV. 2:10-
21 1704 WBS, 2011 WL 1402882, at *2 (E.D. Cal. 2011) (emphasis
22 added).

23 Plaintiff argues that AGT has failed to state a viable cause
24 of action for breach of the duty of loyalty because it has not
25 alleged that Plaintiff ever diverted business opportunities,
26 competed against AGT or helped a competitor, or that any
27 confidential information was ever divulged as a result of
28 Plaintiff's alleged employment with Intel.

1 The Tousa Homes court relied on the Nevada Supreme Court
2 opinion in White Cap, which in turn relied on the Restatement
3 (Second) of Agency. 363 F. Supp. 2d at 1280. The Restatement
4 provides that "an agent is subject to a duty to his principal to
5 act solely for the benefit of the principal in all matters
6 connected with his agency." Restatement (Second) of Agency
7 § 387. Comment (a) to § 393 states that "an agent can properly
8 act freely on his own account in matters not within the field of
9 his agency and in matters in which his interests are not
10 antagonistic to those of the principal, except that he can not
11 properly thus use confidential information." The Restatement
12 (Third) of Agency § 8.04 further provides that "an agent has a
13 duty to refrain from competing with the principal and from taking
14 action on behalf of or otherwise assisting the principal's
15 competitors."

16 In addition, the most recent version of the Restatement
17 (Third) of Employment Law similarly holds the duty of loyalty is
18 limited to matters related to the employment relationship and
19 that a breach occurs when an employee discloses confidential
20 information or competes against the employer. Restatement
21 (Third) of Employment Law: Employee Duty of Loyalty § 8.01
22 (Tentative Draft No. 3, 2010). Comment (a) to § 8.01 hones in on
23 the circumstances confronting the Court here:

24 The duty of loyalty . . . is separate and distinct
25 from the duty of performance "to act in accordance
26 with the express and implied terms of any contract"
27 with the employer . . . ; as well as a duty "to act
28 with the care, competence, and diligence normally

1 exercised by agents in similar circumstances
2 (citations omitted).” These latter duties are
3 normally enforced by the employer through legitimate
4 workplace discipline or termination of employment.

5 Id.

6 The Court finds this reasoning persuasive. AGT has failed
7 to provide support for a claim for breach of the duty of loyalty
8 by alleging nothing more than Plaintiff having a second job.
9 Whether Plaintiff’s inability to adequately perform his job
10 duties in the minds of AGT’s management might have been a
11 function of his employment with Intel does not implicate the duty
12 of loyalty. See Thomas Petroleum, LLC v. Lloyd, 1:11-CV-00902-
13 LJO, 2012 WL 4511369, at *6 (E.D. Cal. 2012) (“duty of loyalty
14 does not preclude an employee from engaging in all outside
15 business pursuits”). Under the facts as alleged by AGT, the
16 “inadequate performance [was] simply an incident of trying to
17 work two jobs.” Food Lion, Inc. v. Capital Cities/ABC, Inc., 194
18 F.3d 505, 516 (4th Cir. 1999).

19 Therefore, the Court finds AGT has failed to state a cause
20 of action for breach of the duty of loyalty in Count Two of the
21 counterclaim. Accordingly, Plaintiff’s motion to dismiss that
22 claim is granted. Again, it is not clear to the Court that AGT
23 could not amend the Counterclaim to state a cause of action for
24 breach of the duty of loyalty. Thus, the claim is dismissed
25 without prejudice.

26 As a result, Plaintiff’s arguments regarding AGT’s claim for
27 punitive damages in connection with this cause of action are
28 moot.

1 3. Negligence

2 In its third cause of action, AGT seeks to hold Plaintiff
3 liable for negligence in the performance of his duties. AGT
4 claims that as a result of this negligence, it was "forced to
5 rebuild and replace the software developed by [Plaintiff] at its
6 sole expense." CC ¶ 104. Plaintiff argues the negligence claim
7 as pleaded is barred by the economic loss rule, as well as the
8 provisions of N.R.S. § 78.138. MTD at p. 13.

9 Section 78.138 is quite broad in scope. It provides that an
10 officer is not individually liable to the corporation for any
11 damages as a result of any failure to act in his or her capacity
12 as an officer, unless a breach of a fiduciary duty involved
13 intentional misconduct, fraud or a knowing violation of law.
14 § 78.138(7). Additionally, both California and Nevada follow the
15 economic loss doctrine. The Nevada Supreme Court has stated that
16 the doctrine "bars unintentional tort actions when the plaintiff
17 seeks to recover 'purely economic losses.'" Terracon Consultants
18 Western, Inc. v. Mandalay Resort Group, 125 Nev. 66, 72-73
19 (2009). This Court has similarly held that "purely economic
20 losses are not recoverable in tort" unless there is a legal duty
21 imposed independent of a contract. NuCal Foods, Inc. v. Quality
22 Egg LLC, 918 F. Supp. 2d 1023, 1028 (E.D. Cal. 2013).

23 The Ninth Circuit discussed the operation of the economic
24 loss doctrine at some length in Giles v. General Motors
25 Acceptance Corp., 494 F.3d 865, 872-79 (9th Cir. 2007). It found
26 that based on Nevada case law and consistent with the law of
27 other jurisdictions, the economic loss doctrine has been deployed
28 to bar recovery in tort for purely monetary harm in negligence

1 cases unrelated to product liability. Id. at 879. However, it
2 found that Nevada "does not bar recovery in tort where the
3 defendant had a duty imposed by law **rather than by contract** and
4 where the defendant's **intentional** breach of that duty caused
5 purely monetary harm to the plaintiff." Id. AGT's claim does
6 not allege intentional conduct on the part of Plaintiff and the
7 duty arose from the parties' contractual employment relationship.

8 AGT argues in its Opposition that the doctrine does not
9 apply because it has "suffered damage to other property—namely
10 its cash processing machines." Opp. MTD at p. 12. It also
11 alleges that it suffered damage to its reputation and business as
12 a result of the negligence. As Plaintiff points out, the
13 counterclaim itself does not allege any property damage or any
14 other non-economic damages.² Therefore, the economic loss
15 doctrine applies to the claim regardless of whether the Court is
16 applying Nevada or California law. Accordingly, the Court
17 dismisses the negligence claim without prejudice.

18 4. Negligent Interference with Economic Relations

19 In its fourth cause of action, AGT makes a claim for
20 negligent interference with economic relations. It alleges that
21 as a result of Plaintiff's breach of contract, negligence, and
22 breach of fiduciary duty, AGT's relationships with third parties
23 were disrupted, causing economic damages. CC ¶¶ 110-111.

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25 _____
26 ² Because only economic damages were alleged, the Court need not
27 address AGT's claim in its Opposition that the failure of the
28 software to achieve its intended result somehow resulted in
"property damage" as that phrase is understood in the relevant
case law. Opp. at p. 12.

1 Similar to the claims above, § 78.138 does not permit such a
2 claim to be brought against Plaintiff, a former officer of AGT,
3 as alleged. In addition, Nevada law does not recognize a
4 *negligent* interference with economic relations cause of action.
5 Terracon Consultants, 125 Nev. at 73-74 (tortious interference
6 with contractual relations cognizable only when intentional,
7 rejecting the minority view permitting recovery for negligent
8 interference). The Court finds that applying Nevada law to a
9 claim involving damage to a Nevada corporation incurred in Nevada
10 under an employment contract expressly providing that Nevada law
11 would govern is proper and would not be "contrary to a
12 *fundamental* policy of California." Nedlloyd, 3 Cal.4th at 464-
13 66.

14 Accordingly, the Court grants Plaintiff's motion to dismiss
15 the fourth cause of action. It is dismissed with prejudice as it
16 appears clear to the Court that there is no set of facts that
17 could be alleged to state such a claim under Nevada law.

18 D. Motion to Amend

19 Plaintiff has filed a motion for leave to file a Third
20 Amended Complaint. Plaintiff seeks to add copyright
21 infringement and promissory fraud claims against existing
22 defendant, AGT, as well as against two newly named defendants,
23 AGT officers John Prather and Robert Magnanti (collectively
24 "Defendant Officers"). Motion to Amend at p. 1.

25 Under Federal Rule of Civil Procedure 15(a)(2), a party may
26 amend its pleading only with the opposing party's written
27 consent or the court's leave. Fed. R. Civ. P. 15(a)(2). Rule
28 15(a)(2) prescribes that "[t]he court should freely give leave

1 when justice so requires." Id. "This [leave] policy is 'to be
2 applied with extreme liberality.'" Eminence Capital, LLC v.
3 Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (internal
4 citations omitted). "Four factors are commonly used to
5 determine the propriety of a motion for leave to amend. These
6 are: bad faith, undue delay, prejudice to the opposing party,
7 and futility of amendment." DCD Programs, Ltd. v. Leighton, 833
8 F.2d 183, 186 (9th Cir. 1987) (citing United States v. Webb, 655
9 F.2d 977, 979 (9th Cir. 1981)).

10 However, a pre-trial scheduling order (Doc. #33) has been
11 issued in this case. Pursuant to Federal Rule of Civil
12 Procedure 16(b)(4), good cause is required to file an amended
13 pleading after a pre-trial scheduling order has been issued.
14 See Johnson v. Mammoth Recreations, Inc., 975 F. 2d 604, 608
15 (9th Cir. 1992). The Ninth Circuit has held:

16 Unlike Rule 15(a)'s liberal amendment policy which
17 focuses on the bad faith of the party seeking to
18 interpose an amendment and the prejudice to the
19 opposing party, Rule 16(b)'s "good cause" standard
20 primarily considers the diligence of the party seeking
21 the amendment. The district court may modify the
22 pretrial schedule "if it cannot reasonably be met
23 despite the diligence of the party seeking the
24 extension." Fed.R.Civ.P. 16 advisory committee's
25 notes (additional citations omitted).

26 Id. at 609.

27 Plaintiff contends he did not have the factual basis to
28 state the claim of promissory fraud against AGT or the Defendant

1 Officers until AGT filed the declaration of Prather, indicating
2 AGT and its officers were denying the existence of the amended
3 Employment Agreement and an agreement to pay for the software
4 developed by Plaintiff. Motion for Leave at pp. 4-5. In
5 addition, Plaintiff argues that it first filed an application
6 for registration of the Software with the United States
7 Copyright Office on July 20, 2013. Id. at pp. 6-7. It argues
8 such a claim could not have been brought any earlier.

9 AGT argues that Plaintiff has not shown good cause
10 sufficient to modify the Status Order and that all facts upon
11 which these new claims are based were known to Plaintiff in
12 advance of filing the Second Amended Complaint. AGT further
13 contends that it will be prejudiced by the delay.

14 The Court finds good cause has been shown to grant
15 Plaintiff leave to file the Third Amended Complaint. The new
16 claims are clearly intertwined with those already present in
17 this action and the Defendant Officers have already been
18 involved in the dispute as officers of AGT. There is no
19 indication that Plaintiff has not been diligent in bringing
20 these new claims in a timely fashion or that bad faith is
21 involved. This matter is still in its relatively early stages,
22 and is not set for trial until October 6, 2004. The Court does
23 not find granting Plaintiff's motion will unduly prejudice AGT
24 or Defendant Officers. Accordingly, the Court grants
25 Plaintiff's Motion for Leave to File Third Amended Complaint.

26 At AGT's request, the Court hereby permits the parties to
27 file an amended joint status report suggesting modifications to
28 the deadlines currently imposed by the Status Order of July 25,

1 2013. This amended joint status report shall be filed within
2 sixty (60) days of the date of this Order.

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III. ORDER

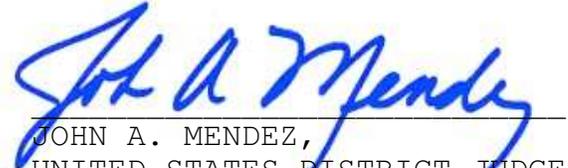
For the reasons set forth above, the Court GRANTS WITHOUT PREJUDICE Plaintiff's Motion to Dismiss the First, Second and Third Causes of Action in the Counterclaim. The Court GRANTS WITH PREJUDICE Plaintiff's Motion to Dismiss the Fourth Cause of Action.

Plaintiff's Motion for Leave to File Third Amended Complaint is GRANTED. The Third Amended Complaint, attached to Plaintiff's motion, is deemed filed as of the date of this Order.

AGT shall file its responsive pleading to the Third Amended Complaint within thirty (30) days from the date of this Order. If AGT files an amended Counterclaim as part of its responsive pleading, Plaintiff's response to the amended Counterclaim shall be filed within thirty (30) days thereafter.

IT IS SO ORDERED.

Dated: November 27, 2013



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE