

# TENTATIVE RULING

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

12	LYNCH MARKS, LLC,	)	
13		)	
14	Plaintiff(s),	)	No. C05-5178 BZ
15		)	
16	v.	)	<b>ORDER GRANTING IN PART AND</b>
17	VERMONSTER, LLC,	)	<b>DENYING IN PART DEFENDANT'S</b>
		)	<b>MOTION TO DISMISS</b>
	Defendant(s).	)	
		)	

18 Before the court is defendant Vermonster, LLC's motion to  
19 dismiss certain of plaintiff Lynch Marks, LLC's claims  
20 pursuant to Fed. R. Civ. P. 12(b)(6) and to dismiss  
21 plaintiff's fraud claim for lacking the specificity required  
22 under Fed. R. Civ. P. 9(b).<sup>1</sup>

23 A motion to dismiss for failure to state a claim will  
24 only be granted when considering all well pleaded facts in the

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26 <sup>1</sup> The court has not considered the materials attached  
27 to the declaration of James Lucey. In ruling on a motion to  
28 dismiss, the court is limited to the allegations of the  
complaint and exhibits attached thereto and may not consider  
matters outside the pleading. Fed. R. Civ. P. 12(b).

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complaint in the light most favorable to plaintiff, the court concludes that plaintiff is entitled to no relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The motion to dismiss the contract claim is **DENIED**.

Plaintiff has sufficiently pled the existence of a written agreement between the parties, and the court cannot conclude as a matter of law that plaintiff would not be entitled to any relief on the facts alleged. Accepting plaintiff's allegations that while the parties never executed a further written agreement, they treated the term sheet as "the written contractual agreement" which terms "have been agreed upon, confirmed and ratified thereafter by virtue of the parties [sic] subsequent oral and written agreements, communications and actions" for purposes of this motion, plaintiff has sufficiently alleged a claim. Compl. ¶ 10. The alleged

writings between the parties appear sufficient at the pleading stage to satisfy the statute of frauds. Levin v. Knight, 780 F.2d 786, 787 (9th Cir. 1986)(reversing district court's grant of summary judgment because "written memorandum [detailing understanding of parties for proposed sale of professional basketball franchise] would be sufficient to comply with the statute of frauds if all disputed matters were resolved in plaintiffs' favor"). Defendant's contention that the complaint does not set forth all the terms of the contract is not grounds for dismissing the complaint. See id. ("written memorandum indicates sufficiently the few terms deemed essential as a matter of law by California courts to satisfy

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2 the statute of frauds requirements"). Those terms are subject  
3 to discovery. While it is true that plaintiff has not alleged  
4 that it has performed as required by the contract, its  
5 allegations in paragraphs 14, 40 and 41, among others,  
6 sufficiently allege performance to withstand a motion to  
7 dismiss. Compl. ¶¶ 14, 40 and 41.

8 Defendant's motion to dismiss plaintiff's second cause of  
9 action for specific performance is **DENIED**. The court does not  
10 construe the allegations of the complaint as requiring the  
11 performance of personal services, but as requiring defendant  
12 to deliver software, which plaintiff claims it ordered and  
13 paid for. In fact, in moving to dismiss the contract claim,  
14 it was defendant who characterized the term sheet as  
15 describing the proposed terms for "the sale of goods for more  
16 than \$500" (Mot. 6:13-16), and not as a contract for personal  
17 services.

18 Defendant's motion to dismiss the claim for conversion is  
19 **GRANTED in part and DENIED in part**. First, plaintiff's claim  
20 that defendant converted its \$75,000 is not cognizable. "The  
21 elements of a conversion are the plaintiff's ownership or  
22 right to possession of the property at the time of the  
23 conversion; the defendant's conversion by a wrongful act or  
24 disposition of property rights; and damages." Farmers Ins.  
25 Exchange v. Zerin, 53 Cal.App.4th 445, 451 (Ct. App. 1997).  
26 Plaintiff "need only allege that it is 'entitled to immediate  
27 possession at the time of conversion.'" Id. at 452 (citations  
28 and emphasis omitted). "However, a mere contractual right of

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2 payment, without more, will not suffice." Id. Plaintiff's  
3 basis for its money conversion claim is that defendant "has  
4 possession of monies in excess of \$75,000 which were delivered  
5 . . . for goods and services either never delivered or not  
6 delivered in full, timely and in an appropriate and viable  
7 manner." Compl. ¶ 48. This is a claim under contract, which  
8 is insufficient for conversion. Therefore, defendant's motion  
9 to dismiss on plaintiff's conversion claim of the \$75,000 is  
10 **GRANTED** with leave to amend.

11 On plaintiff's second conversion claim regarding the  
12 intellectual property, plaintiff has alleged defendant "has  
13 failed to turn over the original code" which was "specifically  
14 assigned" to plaintiff pursuant to an assignment agreement.  
15 Compl. ¶ 48. Accepting plaintiff's allegations as true,  
16 plaintiff has a right to possess the code pursuant to the  
17 assignment agreement, and defendant has wrongfully retained  
18 it. While traditionally courts may have struggled to find  
19 conversion in cases involving intangible property, this is not  
20 the current state of the law in California. See Kremen v.  
21 Cohen, 337 F.3d 1024, 1036 (9th Cir. 2003)(holding that  
22 intangible property such as an internet domain name can be the  
23 subject of a viable claim for conversion). Plaintiff's claim  
24 that defendant converted its software code is cognizable, and  
25 defendant's motion to dismiss plaintiff's intellectual  
26 property conversion claim is **DENIED**.

27 The motion to dismiss the fifth and sixth claims for  
28 lacking specificity is **DENIED**. Plaintiff's allegations of

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2 defendant's misrepresentations concealing that it was "unable  
3 or unwilling to create a final working package of software"  
4 and "unable or unwilling to provide the [client] support" are  
5 sufficient to withstand defendant's motion to dismiss under  
6 Fed. R. Civ. P. 9(b). Compl. ¶¶ 52, 53. See, e.g., Gottreich  
7 v. San Francisco Investment Corp., 552 F.2d 866 (9th Cir.  
8 1977)(holding that a complaint alleging that defendants  
9 misrepresented their expertise and special knowledge was  
10 sufficient under Rule 9(b) because it identified the  
11 circumstances constituting fraud so that defendants could  
12 prepare an adequate answer from the allegations). See, e.g.,  
13 Gordon v. Impulse Marketing Group, Inc., 2006 WL 624838, at \*  
14 2 (E.D. Wash. Mar. 9, 2006)(under a similar Washington law,  
15 "[a]lthough Impulse Marketing has not pointed to any specific  
16 employers or relationships that were affected, its allegations  
17 [of tortious interference] are sufficient under general  
18 pleading standards to survive a motion to dismiss"). Any  
19 deficiencies of the sort claimed by defendants can best be  
20 dealt with on summary judgment.

21 Therefore, **IT IS ORDERED** that defendant's motion to  
22 dismiss is **DENIED** as stated above, except as to plaintiff's  
23 conversion claim for the \$75,000, which plaintiff is **GRANTED**  
24 leave to amend by **August 7, 2006**.

25 Dated:

26 \_\_\_\_\_  
27 Bernard Zimmerman  
28 United States Magistrate Judge