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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 SAN JOSE DIVISION

7
8 SIMULADOS SOFTWARE, LTD.,

9 Plaintiff,

10 v.

11 PHOTON INFOTECH PRIVATE, LTD.,

12 Defendant.

Case No. [5:12-cv-04382-EJD](#)

**ORDER ADDRESSING POST-APPEAL
MATTERS**

Re: Dkt. Nos. 207, 212

13 On May 7, 2019, the Ninth Circuit affirmed in part, reversed in part, vacated, and
14 remanded this Court's September 2017 Order Denying Defendant's Motion for Judgment as a
15 Matter of Law.¹ The Parties construe the Ninth Circuit's Memorandum differently, which the
16 Court resolves below. The Court finds this motion suitable for consideration without oral
17 argument. *See* N.D. Cal. Civ. L.R. 7-1(b). Having considered the Parties' papers, the Court holds
18 that pursuant to the bar on double recovery, Plaintiff may not recover contract and tort damages.
19 However, under the economic loss rule, Plaintiff may recover tort damages instead of contract
20 damages. The Court also holds that the contractual cap on liability is not applicable to such
21 damages. Accordingly, Plaintiff is entitled to \$309,674 in fraud damages.

22 **I. BACKGROUND**

23 **A. Factual Background**

24 On May 11, 2012, Plaintiff Simulados Software, Ltd. filed a Complaint against Defendant
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27 ¹ Plaintiff's Motion for Attorney's Fees was also addressed in this Order. The award of attorney's
28 fees was not discussed or altered on appeal, and so the Court does not address the award of fees
herein.

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ORDER ADDRESSING POST-APPEAL MATTERS

1 Photon Infotech Private, Ltd. alleging that Defendant breached the Parties’ contract and
2 intentionally misrepresented its ability to complete the contract. *See generally* Dkt. 1; *see also*
3 Short Statement of Case, Dkt. 135. The jury found for Plaintiff on both claims and awarded
4 Plaintiff \$309,674 for each claim. *See* Judgment, Dkt. 167; *see also* Verdict Forms, Dkt. 165.

5 Defendant renewed its motion for judgment as a matter of law. Dkt. 178. Despite the jury
6 award of contractual damages, the parties had a negotiated provision that limited the amount of
7 contractual damages to the amount of money actually received by the breaching party. Plaintiff
8 paid Defendant \$18,848 for Defendant’s services, and so Defendant’s liability on the breach of
9 contract claim was capped at \$18,848. *See* Supplemental Brief Regarding Plaintiff Simulados
10 Software Ltd.’s “Election of Remedy” at 5, Dkt. 193 (“[B]oth parties agree that the consideration
11 paid by [Plaintiff] was \$18,848.”).

12 Ultimately, the Court denied Defendant’s motion for judgment as a matter of law. The
13 Court determined that sufficient evidence, viewed in the light most favorable to the non-moving
14 party, supported the jury’s findings of breach of contract and fraud. Order Denying Defendant’s
15 Motion for Judgment as a Matter of Law (“JMOL Order”), Dkt. 197. Defendant questioned
16 whether: (1) the fraud claim was sufficiently independent of the contract to allow recovery under
17 California law for both fraud and breach of contract; and (2) the contractual provision limiting
18 damages applied to Plaintiff’s fraud claim. This Court determined it did not need to address those
19 issues because it granted Plaintiff’s request to rescind the contract and awarded Plaintiff \$18,848
20 in consideration damages and \$309,674 in consequential damages. *Id.* at 6.

21 On appeal, the Ninth Circuit affirmed this Court’s holdings that sufficient evidence
22 supported the jury’s fraud and breach of contract findings. *Simulados Software, Ltd. v. Photon*
23 *Infotech Private, Ltd.*, 771 F. App’x 732, 734 (9th Cir. 2019). The Ninth Circuit reversed and
24 vacated this Court’s order granting rescission because Plaintiff “failed to meet the notice
25 requirement” required to rescind a contract. *Id.* Defendant argued that the panel should reduce the
26 jury’s award pursuant to the contractual limitation on damages. *Id.* at 735. The Ninth Circuit
27 agreed “that there is an \$18,848 cap on [Plaintiff’s] recovery for breach of contract.” *Id.* “It is

1 undisputed that [Plaintiff] paid [Defendant] \$18,848, and the contractual provision limits damages
2 to the amount that [Plaintiff] paid on the contract.” *Id.* The Ninth Circuit, however, did not
3 address whether this provision applied to the fraud damages or if Plaintiff could recover damages
4 for both the fraud and contract claim.

5 Judge Bea concurred in the Memorandum Disposition but wrote separately to note that he
6 would include an instruction that on remand, the district court should consider whether its award
7 of \$309,674 to Plaintiff based on the jury’s fraud verdict is duplicative of its separate award of
8 \$18,848. *Id.* The Parties’ briefing focuses on this question—may Plaintiff receive damages for
9 both the fraud and contract claims without violating the rule against duplicative recovery? And, if
10 yes, what effect does the contractual provision limiting damages have on Plaintiff’s fraud claim?

11 **B. Procedural History**

12 On August 9, 2019, Defendant filed a brief addressing the effect of the Ninth Circuit’s
13 decision. Defendant Photon Post-Appeal Opening Brief (“D Brief”), Dkt. 212. Plaintiff filed its
14 response brief on August 23, 2019. Plaintiff Simulados Response to Defendant’s Post-Appeal
15 Opening Brief (“P Brief”), Dkt. 214. On August 30, 2019, Defendant filed its reply brief.
16 Defendant Photon’s Post-Appeal Reply Brief (“D Reply”), Dkt. 215.

17 **II. DISCUSSION**

18 **A. Duplicative Recovery**

19 There is no dispute between the Parties that Plaintiff’s damages for the contractual claim is
20 \$18,848. The Parties dispute whether the Court may award Plaintiff \$309,674 in fraud damages in
21 addition to the \$18,848 in contract damages or if such an award constitutes double recovery. D
22 Brief at 7; P Brief at 6–7. Defendant argues that because Plaintiff suffered only one loss, past
23 economic damages, Plaintiff may only recover one form of damages, *i.e.*, either contract or fraud
24 damages. Plaintiff rejects Defendant’s view and argues that each harm caused different losses and
25 so the Court must award both fraud and contract damages.

26 Regardless of the nature or number of legal theories advanced by a plaintiff, he may only
27 recover once for each distinct item of compensable damage supported by the evidence.

1 *Tavaglione v. Billings*, 847 P.2d 574, 580 (Cal. 1993). “Double or duplicative recovery for the
2 same items of damage amounts to overcompensation and is therefore prohibited.” *Id.* A plaintiff
3 is entitled to recover the entire amount of damages if such damages are supported by “separate
4 items” and are proven by distinct and independent evidence. *Id.* In contrast, if a “given state of
5 facts entitles one to recover damages upon the theory of tort, and the same facts entitles him to
6 recover upon the theory of contract, it would seem plain that recovery could not be twice had
7 simply because the facts would support recovery upon either theory.” *Shell v. Schmidt*, 126 Cal.
8 App. 2d 279, 291 (1954). Hence, even if a plaintiff prevails on a tort and contract claim, it may
9 not receive damages for each claim unless a distinct loss underlies each claim. This is true even if
10 the plaintiff sets forth alternate theories of recovery because if “the plaintiff has suffered only one
11 loss, only one measure of damages may be awarded.” *Ambassador Hotel Co., Ltd. v. Wei-Chuan*
12 *Inv.*, 189 F.3d 1017, 1031–32 (9th Cir. 1999).

13 In *DuBarry International, Inc. v. Southwest Forest Industries, Inc.*, the appellate court held
14 that the trial court improperly awarded duplicative damages. 231 Cal. App. 3d 552, 563 (1991).
15 There, the plaintiff, a broker, negotiated a contract on the defendant’s behalf. *Id.* at 556–57. The
16 defendant breached the contract. *Id.* at 559. The plaintiff sued the defendant for breaching the
17 Parties’ agency contract and for various torts. *Id.* at 559. The plaintiff prevailed on his breach of
18 contract claim and the jury awarded him \$1,502,604 in damages. *Id.* at 559–60. The jury also
19 determined that the defendant denied the agency agreement in bad faith and awarded the plaintiff
20 \$1,502,604 in damages. *Id.* at 560.

21 The appellate court noted that the plaintiff only offered damages evidence about his lost
22 commissions, which the jury determined amounted to \$1,502,604. *Id.* at 563. “There was no
23 evidence offered by [the plaintiff] of any damages *other* than lost commissions.” *Id.* “There was
24 no attempt to show that [the defendant’s] alleged bad faith denial of the agency contract’s
25 existence had caused [the plaintiff] any damages beyond those already claimed for the breach of
26 that contract.” *Id.* at 564. The court concluded that because the jury determined that the lost
27 commissions amounted to \$1,502,604, a single award of damages fully compensated the plaintiff’s

1 breach of contract and bad faith denial harms. *Id.*

2 Likewise, in *Ambassador Hotel*, the Ninth Circuit held that the district court impermissibly
3 allowed the plaintiff double recovery on its tort and contract claims. 189 F.3d at 1032. There, the
4 plaintiff and defendant entered into a joint venture agreement to develop hotels. *Id.* at 1021–22.
5 Pursuant to the agreement, the plaintiff invested millions into the venture. After the defendant
6 failed to comply with the agreement, the plaintiff sued for, among other things, breach of contract
7 and fraud. *Id.* at 1023. The district court entered judgment in the plaintiff’s favor and awarded the
8 plaintiff tort and contract damages. The Ninth Circuit reversed the district court’s award because,
9 while the plaintiff suffered two separate harms, breach of contract and fraudulent inducement, it
10 suffered only one loss, the loss of its investment. *Id.* at 1032.

11 *DuBarry* and *Ambassador Hotel* are particularly analogous to the case at hand. As in those
12 cases, while Plaintiff suffered two harms, breach of contract and fraud, it suffered only one loss—
13 the loss of profits and money paid for Defendant’s services. Plaintiff asked for \$96,703 in out-of-
14 pocket damages, \$212,971 in expected profits, and \$475,616 or \$736,674 in lost revenues.
15 Transcript of Trial at 49–54, Dkt. 176 (“There are three areas of damages that we’re after, three
16 areas.”). During closing argument, Plaintiff also stated that it believed the same evidence
17 supported its claim for breach of contract damages and fraud damages. *Id.* at 54 (“We believe the
18 evidence . . . shows that [Defendant] didn’t deliver on the breach of contract issue, but I think this
19 goes to a lot, lot more and that is what they said before the contract was ever signed. . . . That’s the
20 basis for our fraud claim.”). This supports the Court’s conclusion that Plaintiff suffered only one
21 loss, the loss of money paid for Defendant’s services and to remedy Defendant’s breach. *See*
22 *Shell*, 126 Cal. App. 2d at 291 (noting that if a state of facts entitles one to recover damages upon
23 the theory of tort, and the same facts entitles him to recover upon the theory of contract, recovery
24 on both is improper because the facts would support recovery upon either theory).

25 As in *DuBarry*, the jury in this case awarded Plaintiff \$309,674 for both the breach of
26 contract and fraud claim. In fraud cases, a plaintiff may recover “extra out-of-pocket” damages if
27 the plaintiff presents *separate* evidence to show *separate* damages. *See Cty. of Santa Clara v. Atl.*

1 *Richfield Co.*, 40 Cal. Rptr. 3d 313, 344 (Ct. App. 2006). However, the jury awarded the same
2 amount for each harm, which indicates that the loss suffered is not distinct to either claim. This is
3 especially true considering that the same evidence supported the jury’s award of damages. Thus,
4 because Plaintiff offered no evidence showing a distinct loss resulted from the breach of contract
5 or the fraud, Plaintiff may recover either contract or fraud damages, but not both.

6 **B. Economic Loss Rule**

7 Having determined that Plaintiff may only recover one set of damages, the Court must now
8 decide whether Plaintiff should receive contract or tort damages. This has a special implication in
9 this case—if Plaintiff must recover contract damages, recovery will be capped at \$18,848.
10 Defendant argues that Plaintiff must be awarded contract damages pursuant to the economic loss
11 rule. D Brief at 9.

12 As an initial matter, Defendant collapses the bar on double recovery and the economic loss
13 rule into one argument. *See* D Reply at 6 n.3. This is improper; double recovery and economic
14 loss are distinct concepts. Defendant argues that because the bar on double recovery applies, the
15 economic loss rule prevents plaintiff from recovering a fraud remedy identical to one recovered in
16 contract. *Id.* But, an examination of these rules reveals the opposite. The bar on double recovery
17 prohibits Plaintiff from recovering damages for its fraud *and* contract claims. In other words, this
18 Court may not award Plaintiff \$619,348.² On the other hand, the economic loss rule prohibits the
19 Court from awarding tort damages for contractual harms. It preserves “the valuable distinction
20 between tort and contract remedies and avoids the problems that would arise if every routine
21 breach were susceptible to both tort and contract claims.” *Robinson Helicopter Co., Inc. v. Dana*
22 *Corp.*, 102 P.3d 268, 279 (Cal. 2004). These are distinct concepts; one prescribes how *much* may
23 be awarded while the other dictates *which type* may be awarded. Thus, the fact that the bar on
24 double recovery applies is irrelevant to the economic loss assessment. *See Nada Pac. Corp. v.*

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27 ² This combines the \$309,674 contract award with the \$309,674 tort award. It also assumes
28 Plaintiff could fully recover the \$309,674 for its contract claim, *i.e.*, it assumes that the contractual
cap on liability does not apply. In reality, if Plaintiff could recover both sets of damages, the
proper value would be \$328,522 (\$309,674 + \$18,848).

1 *Power Eng'g & Mfg., Ltd.*, 73 F. Supp. 3d 1206, 1218–22 (N.D. Cal. 2014) (analyzing the bar on
2 double recovery and the economic loss rule as distinct concepts).

3 In California, “[t]he economic loss rules requires a purchaser to recover in contract for
4 purely economic loss due to disappointed expectations, unless he can demonstrate harm above and
5 beyond a broken contractual promise.” *Robinson*, 102 P.3d at 272. “[C]onduct amounting to a
6 breach of contract becomes tortious only when it also violates a duty independent of the contract
7 arising from the principles of tort law.” *Erlich v. Menezes*, 981 P.2d 978, 983 (Cal. 1999); *see*
8 *also Harris v. Atl. Richfield Co.*, 17 Cal. Rptr. 2d 649, 654 (Ct. App. 1993) (“The most widely
9 recognized exception is when the defendant’s conduct constitutes a tort as well as a breach of the
10 contract. For example, *when one party commits a fraud* during the contract formation or
11 performance, the injured party may recover in contract and tort.” (emphasis added)).

12 “Tort damages have been permitted in contract cases . . . where the contract was
13 fraudulently induced.” *Erlich*, 981 P.2d at 983. In such a case, “the duty that gives rise to tort
14 liability is either completely independent of the contract or arises from conduct which is both
15 intentional and intended to harm.” *Id.*

16 The Ninth Circuit affirmed this Court’s denial of Defendant’s renewed motion for
17 judgment as a matter of law as to Plaintiff’s fraud claim. *Simulados Software*, 771 F. App’x at
18 733–34. It found that

19 [r]ecord evidence, taken in the light most favorable to the jury’s
20 verdict, shows: (1) Photon made representations about the appropriateness of the REALbasic platform for the project and
21 Photon’s expertise in creating the requested products; (2) these representations were false; (3) Photon made these representations
22 with knowledge of their falsity or with reckless disregard of their truth; (4) Photon intended to induce reliance (*i.e.*, to induce Simulados
23 to sign the contract); (5) Simulados’s reliance on Photon was justifiable; and (6) Photon suffered resulting damage.

24 *Id.*

25 The Ninth Circuit thus concluded that Defendant made “intentional” misrepresentations to
26 Plaintiff and that Plaintiff suffered harm as a result. Under California law, the economic loss rule
27 permits Plaintiff to recover fraud damages. *See Robinson*, 102 P.3d at 275–76.

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Defendant argues that even while this may be true, the liability provision caps damages at \$18,848 and so Plaintiff may not recover damages beyond this amount. The California Supreme Court, however, has rejected Defendant’s argument. A “breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach.” *Id.* at 275. When parties contract, they agree upon governing rules and regulations, inherent risks, and the likelihood of breach. *Id.* It is “appropriate to enforce only such obligations as each party voluntarily assumed.” *Id.* But, enforcement of a provision as to fraud damages is improper because “[n]o rational party would enter into a contract anticipating that they are or will be lied to.” *Id.* at 276. Parties are not expected to anticipate fraud and dishonesty. *Id.* Hence, pursuant to *Robinson*, the liability provision has no bearing on Plaintiff’s fraud claim and Plaintiff may recover full fraud damages.

III. CONCLUSION

For the foregoing reasons, Plaintiff shall be awarded **\$309,674 in fraud damages**. Plaintiff may **not** recover the \$18,848 in contractual damages as this would permit duplicative recovery.

IT IS SO ORDERED.

Dated: January 9, 2020


EDWARD J. DAVILA
United States District Judge