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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

GERALD HESTER, on behalf of himself and )  
all others similarly situated, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
VISION AIRLINES, INC., )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No.: 2:09-cv-00117-RLH-RJJ

**ORDER**

(Motion to Dismiss—#90)

Before the Court is Plaintiff Gerald Hester’s **Motion to Dismiss Amended Counterclaims** (#90), filed January 11, 2010. The Court has also considered Defendant Vison Airlines’ Opposition (#95), filed January 28, 2010, and Hester’s Reply (#97), filed February 8, 2010.

**BACKGROUND**

This is a class action lawsuit in which Plaintiff Gerald Hester alleges Defendant Visions Airlines failed to make required hazard payments to its employees who flew to Baghdad, Iraq and Kabul, Afghanistan from 2005 to the present. For a detailed account of the facts of this case, the Court refers the reader to its December 16, 2009 Order (#86), in which it granted Hester’s Motion for Class Certification.

1 In that Order, the Court also dismissed Vision Airlines' counterclaims against  
2 Hester for breach of Employment Agreement, breach of Non-Competition and Non-Disclosure  
3 Agreement, breach of the covenant of good faith and fair dealing, and declaratory relief. The  
4 Court dismissed these claims because Vision Airlines failed to adequately state a claim for relief  
5 under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Shortly after dismissal, Vision  
6 Airlines filed an amended counterclaim in which it alleges claims against Hester for breach of  
7 confidentiality and breach of non-disclosure agreements; injunctive relief; and declaratory relief.  
8 Hester now moves to dismiss these counterclaims under Rule 12(b)(6) of the Federal Rules of  
9 Civil Procedure. For the reasons discussed below, the Court denies Hester's motion.

## 10 DISCUSSION

### 11 I. Legal Standard

12 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which  
13 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short  
14 and plain statement of the claim showing that the pleader is entitled to relief." While a pleading  
15 generally need not contain detailed allegations, it must allege sufficient facts "to raise a right to  
16 relief above the speculative level." *Twombly*, 550 U.S. at 555. A complaint does not allege  
17 sufficient facts to raise a right to relief above the speculative level if it contains nothing more than  
18 "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft*  
19 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).  
20 Instead, in order to survive a motion to dismiss, a complaint must contain sufficient factual matter  
21 to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (internal citation  
22 omitted).

23 In *Ashcroft v. Iqbal*, the Supreme Court provided a two-step approach for district  
24 courts to apply when considering motions to dismiss. First, the court must accept as true all  
25 factual allegations in the complaint. *Id.* at 1950. A court does not, however, assume the truth of  
26 legal conclusions merely because the plaintiff casts them in the form of factual allegations. *Id.* at

1 1950; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Mere recitals  
2 of the elements of a cause of action, supported only by conclusory statements, also do not suffice.  
3 *Iqbal*, 129 S. Ct. at 1949. Second, the court must consider whether the factual allegations in the  
4 complaint allege a plausible claim for relief. *Id.* at 1950. “A claim has facial plausibility when the  
5 plaintiff pleads factual content that allows the court to draw a reasonable inference that the  
6 defendant is liable for the alleged misconduct.” *Id.* at 1949. Thus, where the complaint does not  
7 permit the court to infer more than the mere possibility of misconduct, the complaint has  
8 “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal quotation marks  
9 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,  
10 plaintiff’s complaint must be dismissed. *Twombly*, 550 U.S. at 570.

## 11 **II. Vision Airlines’ Amended Counterclaims**

### 12 **A. Breach of Confidentiality and Non-Disclosure Agreements**

13 The Court dismissed Vision Airlines’ original counterclaims for breach of  
14 Employment Agreement and breach of Employee Non-Competition and Non-Disclosure  
15 Agreement because Vision Airlines failed to adequately allege (1) what contractual provisions  
16 Hester violated; (2) how Hester violated these contracts; and (3) how it has suffered damages as a  
17 result of Hester’s alleged disclosures.

18 In its new counterclaim, Vision Airlines alleges Hester violated two important  
19 contracts, his Employee Non-Disclosure and Non-Competition Agreement and his Classified  
20 Information Non-Disclosure Agreement with the United States government (of which Vision  
21 claims it is a third-party beneficiary). Vision Airlines also provides facts not included in its  
22 original counterclaim regarding the information Hester allegedly disclosed in violation of these  
23 agreements. In its amended counterclaim, Vision Airlines alleges Hester disclosed confidential  
24 information to third parties regarding the procedures Vision uses to fly in and out of Baghdad and  
25 Kabul, what types of individuals Vision transports to and from these cities, and what happened  
26 when a departure in Kabul did not go as planned.

1           The Court finds Vision Airlines has stated a valid counterclaim for breach of  
2 confidentiality and non-disclosure agreements because the additional facts it alleges regarding  
3 Hester’s disclosures nudge its counterclaim across “the line from conceivable to plausible.”  
4 *Twombly*, 550 U.S. at 570. Taking Vision’s assertions as true, the Court now has an idea  
5 regarding how Hester allegedly violated his confidentiality agreements. Furthermore, the Court  
6 now understands the basis for Vision’s claim for contract damages such that the claim is no longer  
7 speculative. Finally, although Vision did not point to the exact contractual provisions Hester  
8 allegedly violated (as the Court instructed it to do), it did attach the agreements to its amended  
9 counterclaim. The Court therefore finds that Hester has sufficient notice regarding the basis of  
10 Vision’s counterclaim against him and that Vision has stated a claim upon which relief can be  
11 granted.

12           In denying Hester’s motion to dismiss, the Court disagrees with Hester’s assertion  
13 that his alleged disclosures are not confidential under the employment agreements or that Vision  
14 cannot bring a claim as a third-party beneficiary under Hester’s Classified Information Non-  
15 Disclosure Agreement with the federal government. Both of these issues are factual in nature, and,  
16 for the purposes of a motion to dismiss, the Court considers as true all factual assertions in the  
17 complaint and construes them in the light most favorable to the claimant. *See, e.g., Iqbal*, 129 S.  
18 Ct. at 1950. Under this standard, Vision Airlines’ counterclaim is sufficient. If discovery reveals  
19 that the disclosures at issue are not confidential under the contracts or that Vision is not a third-  
20 party beneficiary, Hester can ask this Court to grant summary judgment in his favor.

21           **B. Injunctive Relief and Declaratory Relief**

22           Hester also asks the Court to dismiss Vision Airlines’ counterclaims for injunctive  
23 relief and declaratory relief on the basis that these claims cannot be sustained in the absence of a  
24 valid claim for breach of contract. This argument fails because Vision has stated a viable claim for  
25 breach of contract. If Vision prevails on this counterclaim, it may very well be entitled to  
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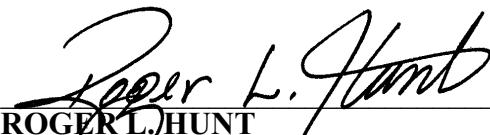
1 injunctive or declaratory relief. Accordingly, the Court denies Hester's motion to dismiss these  
2 counterclaims.

3 **CONCLUSION**

4 Accordingly, and for good cause appearing,

5 IT IS FURTHER ORDERED that Plaintiff Gerald Hester's Motion to Dismiss  
6 Amended Counterclaims (#90) is DENIED.

7 Dated: April 30, 2010.

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11 **ROGER L. HUNT**  
12 **Chief United States District Judge**