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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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BRUCE BUTCHER,

Plaintiff,

v.

ADVANCED MINERAL  
TECHNOLOGIES, INC.; H. PHILIP  
CASH; GARY MASON; CLETIUS  
ROGERS; AND BIL ZELENY,

Defendants.

AND RELATED COUNTERCLAIMS.

2:10-CV-01802-PMP-LRL

ORDER

Presently before the Court is Plaintiff’s Motion to Dismiss Counterclaim Filed by Defendant H. Philip Cash (Doc. #13), filed on December 9, 2010. Defendants H. Philip Cash, Gary Mason, Cletius Rogers, and Bil Zeleny filed an Opposition (Doc. #20) on December 27, 2010. Plaintiff filed a Reply (Doc. #23) on January 6, 2011.

Also before the Court is Plaintiff’s Motion to Dismiss Counterclaim Filed by Defendant Advanced Mineral Technologies, Inc. (Doc. #18). No opposition was filed.

**I. BACKGROUND**

This is a derivative stockholder suit initiated by Plaintiff Dr. Bruce Butcher (“Butcher”), a stockholder of nominal Defendant Advanced Mineral Technologies, Inc. (“AMT”). (Compl. (Doc. #1).) AMT is a Nevada corporation with headquarters in Idaho. (Id. at 3.) AMT primarily is engaged in exploration activities at a mine site in Canada. (Id. at 4.) Defendant H. Philip Cash (“Cash”) is AMT’s Chief Executive Officer and President.

1 (Id. at 3.) Defendant Bil Zeleny is AMT's Chief Financial Officer. (Id.) Defendant Cletius  
2 Rogers is AMT's Vice President and Secretary. (Id.) Defendants Cash, Rogers, and Gary  
3 Mason comprise AMT's current Board of Directors. (Id. at 3-4.)

4 Generally, Butcher's derivative action alleges that Defendants made  
5 misrepresentations and took unauthorized corporate actions to entrench themselves as  
6 AMT's board and to enrich Cash and Zeleny. Butcher asserts securities fraud claims  
7 against Defendants based on their alleged scheme to defraud AMT and its innocent  
8 stockholders. Defendant Cash counterclaims against Butcher, alleging Butcher fraudulently  
9 induced Cash to transfer millions of AMT shares to Butcher.

10 According to the Counterclaim, Cash met with Butcher in July 2007. (Ans. &  
11 Countercl. (Doc. #10) at 4.) Butcher presented himself as someone who could raise funds  
12 through his contacts in the oil and mining industries. (Id.) Butcher and Cash discussed two  
13 projects for which Cash was seeking investments, the Platinum Creek Mine in Alaska, and  
14 the Tillicum Mine in Canada. (Id.) Based on Butcher's ability to raise funds and Cash's  
15 operational knowledge, the two decided to become partners in the Platinum Creek Mine  
16 venture. (Id.)

17 AMT, meanwhile, had not filed its annual report with the Securities Exchange  
18 Commission ("SEC") for 2007. (Id.) According to the Counterclaim, in November 2007,  
19 Cash and Butcher orally agreed that Butcher would pay the costs associated with bringing  
20 AMT into compliance with the SEC, in exchange for which Cash would transfer to Butcher  
21 35 million shares of AMT common stock which Cash owned. (Id.)

22 On July 14, 2008, Cash wrote a letter to Butcher confirming their oral agreement  
23 that Butcher would receive 35 million AMT shares in exchange for funding the efforts to  
24 get AMT into compliance. (Id. at 4-5.) Cash also confirmed that per their oral agreement,  
25 Butcher was to receive an additional 22,750,000 shares of AMT stock from Cash, which,  
26 according to the Counterclaim, Butcher represented he would use to raise \$22 to \$25

1 million for AMT at one dollar per share. (Id. at 5.) According to the Counterclaim, at the  
2 time Butcher represented he would raise these funds, he had no intention of doing so. (Id.)

3 In June 2009, Cash was approached to meet with a potential investor in San  
4 Francisco. (Id.) Butcher thereafter contacted Cash and told him that Butcher had set up a  
5 meeting with a potential investor in Las Vegas, but that Butcher could not attend the  
6 meeting. (Id.) Butcher asked Cash to attend in his stead. (Id.) When Cash arrived in Las  
7 Vegas, no investor was present. (Id.) Instead, Butcher met with Cash, told Cash he was  
8 aware of the meeting with the potential investor in San Francisco, and that Cash should not  
9 attend the meeting in San Francisco. (Id.) Cash followed Butcher's recommendation. (Id.)

10 While in Las Vegas, Butcher advised Cash that Butcher had an investor for AMT  
11 whose funding of the project was imminent. (Id.) Butcher told Cash that to complete the  
12 deal, Cash would need to transfer the additional 22,750,000 shares to Butcher. (Id.) Cash  
13 and Butcher traveled to the company that handled stock transfers for AMT, and on June 17,  
14 2009, Cash transferred the shares to Butcher. (Id.)

15 According to the Counterclaim, Butcher thereafter kept all the shares without  
16 paying the funds necessary to bring AMT into compliance with the SEC and without raising  
17 funds to make AMT's mine operational. (Id. at 6.) Cash alleges Butcher never intended to  
18 raise money to make AMT's mine operational, and instead fraudulently misrepresented his  
19 intentions to obtain the shares from Cash. (Id.) Cash thus brings counterclaims for fraud,  
20 negligent misrepresentation, constructive fraud, breach of contract and the covenant of good  
21 faith and fair dealing, and securities fraud.

22 Butcher now moves to dismiss the counterclaims. Butcher requests the Court  
23 consider certain exhibits at the dismissal stage which Butcher contends contradict Cash's  
24 allegations. Butcher argues that upon reviewing these materials, dismissal is appropriate  
25 because Cash did not justifiably rely on any alleged misrepresentations by Butcher, several  
26 of the statements attributable to Butcher are not actionable, no special relationship exists to

1 support a constructive fraud claim, and the terms of the contract upon which Cash relies  
2 contradict his allegations in the Counterclaims. Cash opposes, arguing that the Court  
3 should not consider the exhibits Butcher attaches to his motion at the dismissal stage. Cash  
4 contends he adequately has alleged facts supporting each element, and the Court should not  
5 delve into competing views over what the exhibits mean at the dismissal stage.

## 6 **II. DISCUSSION**

7 In considering a motion to dismiss, “all well-pleaded allegations of material fact  
8 are taken as true and construed in a light most favorable to the non-moving party.” Wylor  
9 Summit P’ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation  
10 omitted). However, the Court does not necessarily assume the truth of legal conclusions  
11 merely because they are cast in the form of factual allegations in the plaintiff’s complaint.  
12 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a  
13 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock  
14 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual  
15 allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550  
16 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions,  
17 [or] a formulaic recitation of the elements of a cause of action.” Id. at 555.

### 18 **A. Exhibits**

19 Butcher attaches to his motion to dismiss a sworn declaration by Cash which was  
20 filed in a Nevada state court action, a letter dated July 14, 2008 from Cash to Butcher, and  
21 three documents AMT filed with the SEC. Butcher requests the Court consider these  
22 exhibits at the motion to dismiss stage as incorporated by reference in the Counterclaims or  
23 subject to judicial notice.

24 Cash objects to the Court considering these documents at the dismissal stage.  
25 Cash objects to the consideration of the July 14 letter because it is unauthenticated,  
26 incomplete, and not incorporated by reference in the Counterclaim. Cash objects to the

1 Court considering the Cash declaration because doing so would require interpreting the  
2 statements therein, which is inappropriate at the motion to dismiss stage. Cash disputes  
3 Butcher’s interpretation of the SEC documents’ meaning, which he argues counsels against  
4 the Court considering them at this point in the proceedings.

5           If the Court considers evidence outside of the pleadings when examining a  
6 motion to dismiss for failure to state a claim, the Court generally must convert the motion  
7 into a motion for summary judgment and give the nonmoving party an opportunity to  
8 respond. United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). However, the Court  
9 may “consider certain materials-documents attached to the complaint, documents  
10 incorporated by reference in the complaint, or matters of judicial notice-without converting  
11 the motion to dismiss into a motion for summary judgment.” Id. at 908. Additionally, the  
12 Court may consider extrinsic documents, including contracts, when “the plaintiff’s claim  
13 depends on the contents of a document, the defendant attaches the document to its motion to  
14 dismiss, and the parties do not dispute the authenticity of the document, even though the  
15 plaintiff does not explicitly allege the contents of that document in the complaint.” Knievel  
16 v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

17           The Court may take notice of matters of public record without converting a  
18 motion to dismiss into one for summary judgment so long as the facts noticed are not  
19 “subject to reasonable dispute.” Intri-Plex Tech., Inc. v. Crest Group, Inc., 499 F.3d 1048,  
20 1052 (9th Cir. 2007) (quotation omitted). Under Federal Rule of Evidence 201, judicially  
21 noticeable facts not subject to reasonable dispute are facts that are either “(1) generally  
22 known within the territorial jurisdiction of the trial court or (2) capable of accurate and  
23 ready determination by resort to sources whose accuracy cannot reasonably be questioned.”  
24 When a court takes judicial notice of a matter of public record, it may judicially notice the  
25 document’s contents, but may not take judicial notice of “the truth of the facts recited  
26 therein.” Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001) (quoting S. Cross

1 Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d  
2 Cir. 1999)).

3           The Court takes judicial notice of the fact that Cash made certain statements  
4 under oath in his declaration filed in the Nevada state court action, but the Court will not  
5 take judicial notice of the truth of the facts stated therein, as Cash's statements do not  
6 constitute facts not subject to reasonable dispute. The Court also will take judicial notice of  
7 the fact of the SEC filings, but will not take judicial notice of the truth of the facts stated  
8 therein, as AMT's statements do not constitute facts not subject to reasonable dispute.

9           The Court will not consider the July 14 letter at the motion to dismiss stage. The  
10 letter is not appended to the Counterclaim, incorporated by reference therein, or subject to  
11 judicial notice. Additionally, while the letter might constitute a document upon which  
12 Cash's claims depend, Cash disputed the authenticity and completeness of the exhibit  
13 attached to Butcher's motion. Butcher attempted to authenticate the letter through his  
14 attorney's affidavit, but that affidavit gives no basis to conclude that Butcher's attorney has  
15 personal knowledge that the July 14 letter is what it purports to be. Moreover, the exhibit is  
16 incomplete, as the letter references enclosures which Butcher has not included. The Court  
17 therefore will not consider this exhibit in ruling on Butcher's motion to dismiss.

#### 18           **B. Fraud/Negligent Misrepresentation**

19           Butcher argues many of the statements which Cash attributes to him are not  
20 actionable because they are mere puffery or predictions of future performance.  
21 Additionally, Butcher contends Cash's claim that Butcher promised to obtain funds for  
22 AMT is contrary to the parties' written agreement, set forth in the July 14 letter, that  
23 Butcher would obtain funds for another company, XS Platinum Ltd. ("XS"), not AMT.  
24 Butcher also argues that Cash did not justifiably rely on any representations by Butcher  
25 because Cash stated in his affidavit submitted in another court action that by the time he  
26 transferred his shares to Butcher he doubted Butcher's representations that Butcher could or

1 would obtain the promised funding.

2 Cash responds that his declaration from the state court case sets forth facts  
3 supporting justifiable reliance based on Butcher’s assurance that he had secured an investor  
4 whose investment was imminent, but could not be completed until Cash transferred the  
5 shares to Butcher. Cash also argues whether he justifiably relied is a jury question not  
6 suitable for resolution at dismissal. Cash further contends the Court should not consider the  
7 July 14 letter, but even if it does, his counterclaim is consistent with the letter. As to  
8 whether Butcher’s statements are actionable, Cash argues that Butcher received millions of  
9 AMT shares by falsely representing he would use those shares to obtain investors with  
10 money to bring the mine into operation.

11 Under Nevada law, a plaintiff asserting a fraud claim must prove by clear and  
12 convincing evidence that (1) the defendant made a false representation (2) knowing or  
13 believing that the representation was false (or lacking a sufficient basis for making the  
14 representation), (3) intending to induce the plaintiff to act or to refrain from acting in  
15 reliance on the misrepresentation; (4) the plaintiff justifiably relied on the  
16 misrepresentation; and (5) damage to the plaintiff resulted from such reliance. Albert H.  
17 Wohlers & Co. v. Bartgis, 969 P.2d 949, 957-58 (Nev. 1998). As for negligent  
18 misrepresentation, Nevada follows the definition in Restatement (Second) of Torts § 552:

19 One who, in the course of his business, profession or employment, or  
20 in any other action in which he has a pecuniary interest, supplies false  
21 information for the guidance of others in their business transactions, is  
22 subject to liability for pecuniary loss caused to them by their justifiable  
23 reliance upon the information, if he fails to exercise reasonable care or  
24 competence in obtaining or communicating the information.

23 Scaffidi v. United Nissan, 425 F. Supp. 2d 1159, 1169-70 (D. Nev. 2005); Barmettler v.  
24 Reno Air, Inc., 956 P.2d 1382, 1387 (Nev. 1998). Whether the plaintiff has established the  
25 elements for intentional or negligent misrepresentation is “ordinarily a question of fact.”  
26 Epperson v. Roloff, 719 P.2d 799, 802 (Nev. 1986).

1 In his declaration in the Nevada state court action, Cash stated that despite  
2 Butcher's promises, "no large funding ever seemed to come through," and that in 2008, he  
3 "began to reach a crisis point regarding the Tillicum property . . . ." (Aff. of Jeffrey S.  
4 Rugg (Doc. #14), Ex. A at ¶¶ 8-9.) Cash averred that in July 2008, Butcher sent him an  
5 agreement Butcher had drafted, which Cash signed even though he stated that "[a]t this  
6 point I was beginning to suspect that Mr. Butcher was not what he was purporting to be,  
7 due to his inability to raise additional funds for the Platinum, Alaska project, the fact that I  
8 was still neither on the board of directors for XS, nor was I the president of that company."  
9 (Id. at ¶ 11.) However, Cash states he "was desperate and Mr. Butcher knew that [he] was  
10 desperate." (Id.) Cash also states that over the next six months, "it became more and more  
11 apparent that Mr. Butcher was not able to raise funds. He reneged on several contracts  
12 through XS, even though he had illegally funded both his and Mr. Balfour's retirement  
13 funds." (Id. ¶ 12.) Cash also averred that Zeleny was informing Cash that he was having  
14 difficulty bringing AMT into compliance due to Butcher's "reluctance in providing the  
15 funds necessary to make this happen." (Id. at ¶ 13.) Cash stated he was becoming "more  
16 and more uneasy with Mr. Butcher." (Id. at ¶ 14.)

17 According to Cash's declaration, Butcher "would occasionally announce the  
18 imminent funding of XS, and he would also continually reinforce the idea that he was trying  
19 to fund AMT at the same time." (Id. at ¶ 16.) When Cash met Butcher in Las Vegas in  
20 June 2009, he was "leery" of transferring the stock to Butcher, but Butcher "assured [Cash]  
21 that he had an investor who would infuse AMT with \$22M-\$25M 'within the month'" and  
22 assured Cash that "if he had the shares, he could culminate the deal and we could begin  
23 bringing the mine into production during the 2010 season . . . ." (Id. at ¶ 17.) Cash states  
24 that he "allowed [his] judgment to be swayed by [his] desperation," and he transferred the  
25 shares. (Id.)

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1 Cash does not dispute that most of the statements the Counterclaim attributes to  
2 Butcher are not actionable. However, Cash contends Butcher’s promises that he would  
3 secure funding via the 22,750,000 shares was not mere puffery, and is an actionable  
4 misrepresentation. The Cash declaration includes some language suggesting Cash did not  
5 justifiably rely on Butcher’s alleged misrepresentations regarding his intent to raise funds  
6 for AMT, specifically that Cash had become leery of Butcher, suspected Butcher was not  
7 what he represented, and was uneasy in dealing with Butcher. But Cash also averred that  
8 Butcher assured him of his ability to obtain imminent funds from an investor. Whether  
9 Cash justifiably relied on Butcher’s reassurances, despite his qualms, is a fact question not  
10 suitable for determination at the dismissal stage. As stated above, the Court will not  
11 consider the July 14 letter, and the Court therefore will not dismiss based on the argument  
12 that the Counterclaim and the letter are inconsistent. The Court therefore will deny  
13 Butcher’s motion to dismiss the fraud and negligent misrepresentation counterclaims.

14 **C. Constructive Fraud**

15 Butcher argues the constructive fraud counterclaim must be dismissed because  
16 the allegations do not support a special relationship existed between Butcher and Cash.  
17 Butcher notes that to the contrary, Cash averred in his declaration that he did not trust  
18 Butcher. Cash responds that he placed special confidence in Butcher when he transferred  
19 the shares to Butcher to be used for Cash’s and AMT’s benefit.

20 Under Nevada law, constructive fraud is “the breach of some legal or equitable  
21 duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency  
22 to deceive others or to violate confidence.” Long v. Towne, 639 P.2d 528, 529-30 (Nev.  
23 1982). “Constructive fraud is characterized by a breach of duty arising out of a fiduciary or  
24 confidential relationship.” Id. Such a relationship exists “when one reposes a special  
25 confidence in another so that the latter, in equity and good conscience, is bound to act in  
26 good faith and with due regard to the interests of the one reposing the confidence.” Id.

1 Ordinarily, an arms-length contractual relationship will not support a finding of a fiduciary  
2 or confidential relationship. Executive Mgmt., Ltd. v. Ticor Title Ins. Co., 963 P.2d 465,  
3 477 (Nev. 1998). Further, where the plaintiff testifies that he or she did not trust the  
4 defendant, no special confidence is reposed. Long, 639 P.2d at 529-30.

5 The Counterclaim alleges no facts supporting a fiduciary or confidential  
6 relationship. The Counterclaim alleges an oral agreement between two individuals to  
7 exchange shares of a corporation for funds to bring AMT into SEC compliance and to  
8 obtain investors for AMT. The Court therefore will grant Butcher's motion to dismiss this  
9 claim, with leave to amend to allege facts supporting a fiduciary or confidential  
10 relationship.

#### 11 **D. Breach of Contract and Covenant of Good Faith and Fair Dealing**

12 Butcher argues the allegations supporting Cash's breach of contract and breach of  
13 the covenant of good faith and fair dealing claim are contrary to the terms of the parties'  
14 written agreement as reflected in the July 14 letter, and the parol evidence rule would bar  
15 evidence relating to oral promises between the parties. Because the Court will not consider  
16 the July 14 letter, the Court will deny the motion to dismiss this claim.

#### 17 **E. Securities Fraud**

18 Butcher moves to dismiss this claim because Cash's allegations of justifiable  
19 reliance contradict his declaration in the Nevada state court case. Butcher also argues that  
20 Cash admitted in that same declaration that Butcher satisfied his obligations by raising \$13  
21 million for XS. Cash responds that he has alleged justifiable reliance. Cash also argues  
22 that Butcher raised \$13 million for XS, but failed to raise any funds for AMT as promised.

23 "Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it  
24 unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of  
25 any security . . . any manipulative or deceptive device or contrivance in contravention of  
26 such rules and regulations as the Commission may prescribe[.]" In re Daou Sys., Inc., 411

1 F.3d 1006, 1014 (9th Cir. 2005) (quotation omitted). Pursuant to section 10(b), the SEC  
2 promulgated Rule 10b-5, which makes it unlawful:

- 3 (a) To employ any device, scheme, or artifice to defraud,  
4 (b) To make any untrue statement of a material fact or to omit to state a  
5 material fact necessary in order to make the statements made, in light  
6 of the circumstances under which they were made, not misleading, or  
7 (c) To engage in any act, practice, or course of business which operates  
8 or would operate as a fraud or deceit upon any person, in connection  
9 with the purchase or sale of any security.

10 17 C.F.R. § 240.10b-5.

11 The Court will deny Butcher's motion based on a lack of justifiable reliance for  
12 the reasons stated above with respect to the fraud and negligent misrepresentation claims.  
13 The Court also will deny Butcher's motion based on Cash's statements in his declaration.  
14 Although Cash stated Butcher obtained \$13 million for XS, the gravamen of Cash's  
15 securities claim is that Butcher falsely represented he would use 22,750,000 AMT shares to  
16 obtain funding for AMT, and that Butcher did not do so and never intended to do so.

#### 17 **F. AMT's Counterclaim**

18 Butcher moves to dismiss AMT's Counterclaims (Doc. #12) for lack of standing,  
19 as well as on the merits. AMT did not respond to this motion. Pursuant to Local Rule  
20 7-2(d), AMT's failure to respond to the motion constitutes consent to the motion being  
21 granted. The Court therefore will grant the motion to dismiss AMT's counterclaims.

#### 22 **III. CONCLUSION**


23 IT IS THEREFORE ORDERED that Plaintiff's Motion to Dismiss Counterclaim  
24 Filed by Defendant H. Philip Cash (Doc. #13) is hereby GRANTED in part and DENIED in  
25 part. The motion is granted as to Defendant/Counterclaimant H. Philip Cash's third  
26 counterclaim for constructive fraud. The motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendant/Counterclaimant H. Philip Cash  
may file an amended complaint within thirty (30) days of the date of this Order.

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1 IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss Counterclaim  
2 Filed by Defendant Advanced Mineral Technologies, Inc. (Doc. #18) is hereby GRANTED.  
3 Defendant/Counterclaimaint Advanced Mineral Technologies, Inc.'s Counterclaims (Doc.  
4 #12) are hereby dismissed.

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6 DATED: March 2, 2011

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9 PHILIP M. PRO  
United States District Judge

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