

TENTATIVE Order Regarding Motion to Dismiss

Defendant ShiftPixy, Inc. (“ShiftPixy”) filed a motion to dismiss the third claim for relief (for fraudulent inducement) and the fourth claim for relief (for fraudulent concealment) in Plaintiff Radaro Inc.’s (“Radaro”) Complaint. Mot., Dkt. No. 13. ShiftPixy also moves to dismiss or strike Radaro’s punitive damages allegations and attorney’s fees requests. *Id.* Radaro opposed the motion. Opp’n. Dkt. No. 19. ShiftPixy replied. Reply, Dkt. No. 21.

For the following reasons, the Court **GRANTS in part and DENIES in part** the motion with leave to amend.

I. BACKGROUND

The following facts are alleged in Radaro’s Complaint.

Radaro is a software company that licenses white-label software products to its customers. Compl. ¶ 1. White label products are “sold by retailers with their own branding and logo but the products themselves are manufactured by a third party.” *Id.*, at fn. 1. One of Radaro’s customers is ShiftPixy. *Id.* ¶ 1

On or about September 17, 2019, Radaro and ShiftPixy entered into an agreement which obligated ShiftPixy to pay Radaro a monthly fee over a three-year term consisting of \$75,000 for the first 12 months, \$82,500 per month for the second 12 months, and \$90,800 for the third 12 months in exchange for licensing certain Radaro software. *Id.* ¶ 16. The agreement prohibited ShiftPixy from “assigning or sub-licensing any of its rights under the Agreement without Radaro’s prior written approval, from selling, renting, leasing, sub-licensing, transferring, distributing, or permitting the use of Radaro’s software by any parties other than ShiftPixy, and from using Radaro’s software outside of ShiftPixy’s existing software platform.” *Id.*

ShiftPixy paid as agreed through September 2019, but materially breached the agreement by failing to make any payments thereafter. *Id.* ¶ 17.

Radaro alleges, based on information and belief, that “ShiftPixy has either

assigned, sold, rented, leased, sub-licensed, transferred, or distributed copies of Radaro’s software” to ShiftPixy’s Co-Founder and Director, Steven Holmes (“Holmes”), to use on his website natedelivery.com, which predominantly displayed screenshots of the software Radaro licensed to ShiftPixy as its own market offering in violation of sections 5.3, 7.2, and 7.7 of the agreement. Id. ¶¶ 18, 4.

Radaro further alleges, based on information and belief, “that ShiftPixy induced Radaro into entering into the Agreement by misrepresenting that it would not assign or sub-license any of its rights under the Agreement without Radaro’s prior written approval, that it would not sell, rent, lease, sub-license, transfer, distribute, or permit the use of Radaro’s software by any parties other than ShiftPixy, and that it would not use Radaro’s software outside of ShiftPixy’s existing software platform. At the time it made these misrepresentations, it intended to permit Mr. Holmes to use Radaro’s software in violation of the Agreement.” and “ShiftPixy willfully concealed the fact that it permitted Mr. Holmes to use Radaro’s software so that ShiftPixy and Mr. Holmes could benefit from the use thereof to Radaro’s detriment.” Id. ¶¶ 19, 20.

Radaro fully performed its obligations by allowing ShiftPixy to use its software as agreed until May 31, 2020, when it was excused from performance by ShiftPixy’s material breach and non-payment, after which point Radaro exercised its right to suspend ShiftPixy’s use of its software pursuant to section 6.14 of the agreement. Id. ¶ 21. On June 1, 2020, Radaro notified ShiftPixy of its intent to terminate the agreement pursuant to section 25.1(a), which gave ShiftPixy until Monday, June 15, 2020, to remedy its material breach by tendering payment in full, which it failed to do, thereby terminating the agreement. Id. ¶ 22.

Radaro brings six claims against ShiftPixy for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraudulent inducement; (4) fraudulent concealment; (5) accounting; and (6) violation of the unfair competition law (Bus. and Prof. Code § 17200 *et. seq.*).

II. LEGAL STANDARD

A. Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a

claim upon which relief can be granted. A plaintiff must state “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility” if the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678. Nor must the Court “accept as true a legal conclusion couched as a factual allegation.” Id. at 678–80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

B. Motion to Strike

Under Rule 12(f), a party may move to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). A motion to strike is appropriate when a defense is insufficient as a matter of law. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1057 (5th Cir. 1982). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters of which the Court may take judicial notice. SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995).

The essential function of a Rule 12(f) motion is to “avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). “As a general proposition, motions to strike are regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice.” Sands, 902 F. Supp. at 1165–66 (alteration in original) (internal quotation marks omitted).

Therefore, courts frequently require the moving party to demonstrate

prejudice “before granting the requested relief, and ‘ultimately whether to grant a motion to strike falls on the sound discretion of the district court.’” Greenwich Ins. Co. v. Rodgers, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (quoting Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc., 217 F.Supp.2d 1028, 1033 (C.D.Cal.2002)).

III. DISCUSSION

A. Fraudulent Inducement and Fraudulent Concealment Claims

ShiftPixy argues that Radaro’s “fraud allegations consist of two bare conclusions, alleged on information and belief, lacking detail and particularity,” which fail to provide ShiftPixy with “notice of the claims against them so they can appropriately respond.” Mot., Dkt. No. 13, at 11.

Under Fed. R. Civ. P. 9(b), a plaintiff must plead each element of a fraud claim with particularity, *i.e.*, the plaintiff “must set forth *more* than the neutral facts necessary to identify the transaction.” Cooper v. Pickett, 137 F.3d 616, 625 (9th Cir. 1997) (emphasis in original) (quoting Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994)). A fraud claim must be accompanied by “the who, what, when, where, and how” of the fraudulent conduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper, 137 F.3d at 627). “A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.” Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Statements of the time, place, and nature of the alleged fraudulent activities are sufficient, but mere conclusory allegations of fraud are not. Id. Furthermore, though allegations based on information and belief are usually insufficient, in circumstances of corporate fraud, this rule may be relaxed as to matters within the opposing party’s knowledge. Id.

ShiftPixy argues that Radaro does not state a claim for fraud under Fed. R. Civ. P. 9(b) because the Complaint “fails to specify who made the alleged statements, when and where the alleged statements were made, specifically what ‘intentions’ Defendant communicated to Plaintiff, and how the communications were made to Plaintiff.” Mot., Dkt. No. 13, at 11.

Radaro responds that it identifies Holmes as the individual who represented

that ShiftPixy “would not assign or sub-license any of its rights under the Agreement without Radaro’s prior written approval. . . .” Opp’n, Dkt. No. 19, at 5 Radaro also alleges that ShiftPixy made this and other false representations “knowing at the time that it intended to permit Mr. Holmes to use Radaro’s software” and that “Radaro reasonably relied on ShiftPixy’s misrepresentations when executing the Agreement.” *Id.* Radaro argues that ShiftPixy willfully concealed the fact that it permitted Holmes to use the software for his own benefit, and that the Complaint shows that the parties were in a fiduciary relationship that gave rise to ShiftPixy’s duty to disclose. *Id.* at. 7.

Nevertheless, the Court finds that Radaro fails to allege sufficient facts for a fraud pleading under Fed. R. Civ. P. 9(b). As ShiftPixy points out, the face of the complaint fails to allege that Holmes was the individual who made the false representations. Instead, the Complaint alleges that it was ShiftPixy generally, not Holmes as an individual, who made the alleged misrepresentations. *See* Compl., Dkt. No. 1 ¶ 36 (“In order to induce Radaro into executing the Agreement, ShiftPixy represented that it would not assign or sub-license any of its rights under the Agreement without Radaro’s prior written approval, that it would not sell, rent, lease, sub-license, transfer, distribute, or permit the use of Radaro’s software by any parties other than ShiftPixy, and that it would not use Radaro’s software outside of ShiftPixy’s existing software platform.”) Notably, “[t]he requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991). The Court finds that ShiftPixy failed to allege with the requisite specificity who made the allegedly fraudulent statement as is required by the heightened Fed. R. Civ. P. 9(b) pleading standard.

The Court also agrees with ShiftPixy that Radaro has failed to sufficiently allege what fraudulent representations were made and how they were made. *See* Mot, Dkt. No. 13, at 13. ShiftPixy’s fraud allegations are based primarily on information and belief. Compl., Dkt. No. 1 ¶ 37; 38; 42; 43; 44. Although “allegations of fraud based on information and belief usually do not satisfy the particularity requirements under rule 9(b). . . the rule may be relaxed as to matters within the opposing party’s knowledge.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Accordingly, Radaro argues that “[l]ess specificity is required” in its pleading in the present case because the facts are within

ShiftPixy's knowledge. Opp'n, Dkt. No. 19, at 5 (quoting *Mesa Safe Co., Inc v. Amazon.com Servs., Inc.*, No. SACV1801247JVSAD SX, 2019 WL 1883897, at *2 (C.D. Cal. Mar. 4, 2019)).

The Court finds this argument unconvincing. At the heart of Radaro's fraud allegations is the claim that Radaro "reasonably relied on ShiftPixy's misrepresentations when executing the Agreement." Compl., Dkt. No. 1 ¶ 38. As ShiftPixy points out, "[a]bsent unusual circumstances (not alleged here), if Radaro received and relied on the information, Radaro, as a party to the communications, would know with whom they were communicating, what was communicated, and when and where it was communicated." Reply, Dkt. No. 21, at 4. The Court agrees that the relaxed pleading standard is inappropriate here, and that ShiftPixy has failed to allege sufficient facts to meet the heightened standard.

Accordingly, the Court **GRANTS** ShiftPixy's motion to dismiss with leave to amend.

B. Motion to Strike or Dismiss

ShiftPixy next argues that Radaro's references to punitive damages and attorney's fees should be dismissed or stricken. See Mot., Dkt. No. 13, at 17. The Court will address each in turn.

i. Punitive Damages Allegations

ShiftPixy argues that the Court should dismiss or strike Radaro's punitive damages allegations. Mot. Dkt. No. 13, at 17. Specifically, ShiftPixy states that the "Complaint seeks punitive damages both at common law and pursuant to California Civil Code § 3294 in paragraphs 40 and 46, and at paragraph 5 of the Prayer. But pursuant to the Complaint's own terms, and by the organization of the Prayer, the punitive damages allegations relate only to the fraud claims (Third and Fourth Claims.)" Id.

As stated above, the Court has dismissed Radaro's fraud claims with leave to amend, and California Civil Code § 3294 does not allow punitive damages for causes of action sounding in contract. Accordingly, the Court **GRANTS** ShiftPixy's motion to dismiss the punitive damages allegations and prayer for relief, as no punitive damages are appropriate in this case once the fraud causes of

action have been dismissed. Naturally, the Court will reconsider this if Radaro submits an amended complaint with an adequately plead fraud cause of action.

ii. Attorney's Fees Allegations

Finally, ShiftPixy urges the Court to dismiss or strike the reference to attorney's fees in Radaro's prayer for relief because "the Agreement lacks any attorney fee clause and Plaintiff fails to identify or allege any statutory basis to recover attorney's fees." Mot. Dkt. No. 13, at 17.

As stated above, the Court has dismissed Radaro's fraud claims with leave to amend. Accordingly, the Court **GRANTS** ShiftPixy's motion to dismiss the attorney's fees request as they relate to the fraud causes of action. However, the Court finds that Radaro's claim for violation of Bus. and Prof. Code § 17200, which has not been challenged or dismissed, could support an award of attorney's fees. Accordingly, the court **DENIES** ShiftPixy's request to dismiss or strike all references to attorney's fees, and will dismiss only those that relate to the fraud causes of action that have been dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part and DENIES in part** the motion. Radaro has 30 days to amend its complaint with respect to the dismissed claims.

IT IS SO ORDERED.

Effective immediately all oral arguments are VACATED. The Court will continue to post tentatives in the afternoon of the Court day prior to the scheduled hearing (e.g., Friday afternoon for Monday hearings). Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. the day following the scheduled hearing (e.g., Tuesday 5:00 p.m. for a Monday hearing) stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted. The Court asks for the parties' understanding and patience in these difficult times.