

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

TD AMERITRADE, INC., TD AMERITRADE
HOLDING CORPORATION, INC., TD
AMERITRADE IP COMPANY, INC., and TD
AMERITRADE SERVICES COMPANY,
INC.,

Plaintiffs,

v.

JAMES RICHARD MATTHEWS,

Defendant.

Case No. 3:16-cv-00136-SLG

ORDER RE MOTION TO DISMISS

Before the Court at Docket 41 is Plaintiffs' Rule 12(b)(6) Motion to Dismiss. The motion has been fully briefed.¹ Oral argument was not requested and was not necessary to the Court's decision.

Plaintiffs (collectively, "TD Ameritrade") initiated this action on June 27, 2016.² TD Ameritrade's Amended Complaint asserts three causes of action: declaratory judgment, cancellation and release of claimed nonconsensual common law lien pursuant to Alaska law, and injunctive relief.³ Defendant James Matthews filed an Answer to the Amended

¹ See Docket 45 (Opp.); Docket 50 (Reply).

² Docket 1 (Compl.).

³ Docket 4 (Am. Compl.).

Complaint that also asserted a counterclaim for copyright infringement.⁴ On March 20, 2017, Mr. Matthews filed an Amended Answer asserting seven additional counterclaims.⁵

The Court has jurisdiction as to Mr. Matthews' copyright infringement claims under federal question jurisdiction.⁶ The Court has supplemental jurisdiction over Mr. Matthews' state law counterclaims.⁷

STANDARD OF REVIEW

TD Ameritrade moves to dismiss all of Mr. Matthews' counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Supreme Court's interpretation of that rule in *Ashcroft v. Iqbal*.⁸ "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"⁹ *Iqbal* does not require a litigant to prove his case in his pleading, but it requires the litigant to "state 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the misconduct alleged].'"¹⁰ The pleading must contain "enough facts to state a claim to relief that is plausible on its face."¹¹ This inquiry requires a court to

⁴ Docket 22 (Ans.) at 7, ¶ 55.

⁵ Docket 33 (Am. Ans. and Countercls.); see *infra* pp. 5–6.

⁶ 28 U.S.C. § 1331.

⁷ See 28 U.S.C. § 1367(a) ("[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

⁸ See Docket 41 at 5 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

⁹ *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹⁰ *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556) (alterations in original).

¹¹ *Twombly*, 550 U.S. at 570.

“draw on its judicial experience and common sense.”¹² When reviewing a Rule 12(b)(6) motion, a court considers only the complaint and other pleadings, documents incorporated into the pleadings by reference, and matters on which a court may take judicial notice.¹³

When a motion to dismiss for failure to state a claim is granted, a court “should freely give leave when justice so requires.”¹⁴ But leave to amend is properly denied as to those claims for which amendment would be futile.¹⁵

BACKGROUND

For purposes of TD Ameritrade’s Motion to Dismiss, the Court accepts the factual allegations in Mr. Matthews’ operative pleading as true and “construe[s] them in the light most favorable” to him.¹⁶ According to the First Amended Answer and Counterclaims, in April 2012, Mr. Matthews applied for an unfunded user-modifiable investment account with TD Ameritrade.¹⁷ At or about the same time as he opened the account, Mr. Matthews entered into a Client Agreement with TD Ameritrade.¹⁸ The account provided Mr.

¹² *Iqbal*, 556 U.S. at 679.

¹³ *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

¹⁴ Fed. R. Civ. P. 15(a).

¹⁵ *Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010) (citing *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988)).

¹⁶ *OSU Student All. v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012) (citing *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

¹⁷ Docket 33 at 10, ¶¶ 61–63.

¹⁸ Docket 4-3 (Matthews’ Commercial Affidavit) at 15. The record also includes an End User License Agreement for thinkorswim® platform and paperMoney® functionality. Docket 4-10 (End User License Agreement) at 68. However, that document is dated January 29, 2016 and its

Matthews access to TD Ameritrade’s “thinkorswim” applications program interface (“API”), which gave him the ability to create his own analytical tools for a self-directed trading environment.¹⁹ Mr. Matthews alleges that users such as him were permitted to download the API and “were encouraged to devise their own software programs” by “modifying software routines available on the site.”²⁰ Mr. Matthews alleges that “all copyrighted routines created by TD Ameritrade [were] locked, and thus could not be modifiable.”²¹ After signing up for an account, Mr. Matthews alleges that he used the API to create analytical routines “in a novel manner.”²² By May 27, 2012, Mr. Matthews alleges that he had created source code for over 100 routines to work with the thinkorswim API.²³

On May 27, 2012, Mr. Matthews alleges that TD Ameritrade “perpetrated a cyber attack” which “destroyed [Mr. Matthews’] hard drive controller.”²⁴ Mr. Matthews had saved 84 of the routines he had developed on another hard drive, so they were not destroyed by the cyber attack.²⁵ However, Mr. Matthews asserts that TD Ameritrade had copied the

relevance to Mr. Matthews’ claims, which arose in 2012, is undetermined. The record also contains a License Agreement in which Mr. Matthews agreed that his use of TD Ameritrade’s trading software was subject to the terms and conditions of that agreement. See Docket 4-3 at 46.

¹⁹ See Docket 33 at 10, ¶¶ 61–64.

²⁰ Docket 33 at 10–11, ¶¶ 65–70.

²¹ Docket 33 at 11, ¶¶ 67.

²² Docket 33 at 10, ¶¶ 64.

²³ Docket 33 at 12, ¶¶ 74.

²⁴ Docket 33 at 12, ¶¶ 75.

²⁵ Docket 33 at 12, ¶¶ 75.

routines he had created, all or most of which had copyright notices that Mr. Matthews had imbedded in them.²⁶ After obtaining Mr. Matthews' software, TD Ameritrade is alleged to have inserted its own copyright notice and date into Mr. Matthews' software.²⁷ TD Ameritrade alleges that it terminated its business relationship with Mr. Matthews in early June 2012.²⁸ Mr. Matthews maintains that TD Ameritrade had "effectively wrongfully terminated" his account on May 27, 2012.²⁹

Mr. Matthews filed a copyright notice for the 84 routines under United States Copyright Registration Number TXu1-822-654 effective June 28, 2012.³⁰ Mr. Matthews asserts that TD Ameritrade has been using his routines and allows at least 6.5 million of its funded users to use Mr. Matthews' code without his authorization.³¹

DISCUSSION

Mr. Matthews alleges eight counterclaims: a copyright infringement claim in violation of 17 U.S.C. § 101 *et seq.*; one claimed violation of 17 U.S.C. §§ 1201 and 1202; a claim seeking injunctive relief on claims one and two; a violation of Alaska Statute 45.50.471, the Unfair Trade Practices Act; two claims of breach of contract and breach of the implied covenant of good faith and fair dealing; trespass on real property; and a

²⁶ Docket 33 at 12, ¶¶ 76, 78.

²⁷ Docket 33 at 12, ¶¶ 79.

²⁸ Docket 4-2 (Letter from TD Ameritrade to Matthews dated June 11, 2012) at 1.

²⁹ Docket 33 at 4, ¶¶ 13.

³⁰ Docket 33 at 13, ¶¶ 81.

³¹ Docket 33 at 13, ¶¶ 82.

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