

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

ROCKWELL AUTOMATION, INC.,

CIVIL ACTION NO. 17-415

VERSUS

JUDGE ELIZABETH FOOTE

RONALD J. MONTGOMERY, ET AL.

MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

Before the Court is Defendants' motion to dismiss. Record Document 10. Plaintiff Rockwell Automation, Inc. ("Rockwell") brought this action against Defendants Ronald J. Montgomery ("Montgomery") and Custom Control & Design, LLC ("Custom Control") alleging four claims arising out of the same course of events. Record Document 1. Defendants moved to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. For the reasons discussed below, Defendants' motion [Record Document 10] is **DENIED**.

I. Background

Plaintiff is a corporation that works in the "development and production of industrial components and automation products and services." Record Document 1, p. 5. Defendant Custom Control is a purchaser of goods and software from Plaintiff, sometimes directly and sometimes through a third-party distributor. *Id.*, p. 8. Montgomery is an officer of Custom Control. *Id.* Plaintiff alleges that Defendants misrepresented Custom Control as a system integrator – a purchaser who adds value to the product before reselling it – in order to obtain a steep discount on Rockwell's Toolkit

software. Record Document 15, p. 8. This software normally sells for \$650,000, but is discounted for system integrators to \$50,000. Id., p. 9. The software's license sets out the system integrator requirement and also the authorized uses of the software. Record Document 1, p. 7. Plaintiff also asserts that Defendants got a discount on thousands of pieces of hardware and resold them at lower prices, underselling Rockwell's authorized distributors as a result, and causing significant damages to Plaintiff. Id. Custom Control made some purchases directly from Rockwell and others through a third party distributor. Id., p. 8. Plaintiff brings four claims against Defendants on the basis of this conduct: fraud, unfair trade practices, breach of contract, and copyright infringement. Record Document 1, pp. 1-2.

II. Discussion

A. Standard of Review

In order to survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. In determining whether the plaintiff has stated a plausible claim, the court must construe the complaint in the light most favorable to the plaintiff, see In re Great Lakes Dredge & Dock Co. LLC, 624 F.3d 201, 210 (5th Cir. 2010), and accept as true all of the well-pleaded factual allegations in the complaint. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); In re Katrina

Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2009). However, "[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. Thus, the Court does not have to accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." Plotkin v. IP Axxess Inc., 407 F.3d 690, 696 (5th Cir. 2005).

B. Fraud

Plaintiff alleges that Defendants intentionally misrepresented that Custom Control was a system integrator in order to receive a discount on software, resulting in significant loss of income to Plaintiff. Record Document 1, p. 8. Defendants assert that Plaintiff has not stated a claim for fraud because there was no contract between the parties. Record Document 10-1, p. 5. Louisiana recognizes causes of action for fraud between parties to a contract (La. Civ. Code art. 1953) and for delictual fraud, which does not require the existence of a contract. La. Civ. Code art. 2315; see Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058 (5th Cir. 1993) (discussing a plaintiff's parallel fraud claims under both article 1953, which "pertains only to parties to a contract," and article 2315, under which a plaintiff "need not prove the existence of a contract"). In order to recover under article 1953, Plaintiff must show: (1) the existence of a contract, (2) that Defendants misrepresented the truth with intent to gain an unjust advantage or to cause Plaintiff to suffer a loss, and (3) that the misrepresentation caused actual or probable damages to Plaintiff. Id. at 1067. To recover under article 2315, Plaintiff must show: "(1) a misrepresentation of a material fact, (2) made with the intent to deceive,

and (3) causing justifiable reliance with resultant injury.” Id. at 1068.

Plaintiff argues that it has adequately pled both forms of fraud. Plaintiff alleges that the parties entered into a contract for the sale of the Toolkit software, in the form of the license agreement, that Defendants intentionally misrepresented that Custom Control was a system integrator in order to obtain a steep discount on the software, that Plaintiff reasonably relied on that misrepresentation, and that Plaintiff was deprived of significant income as a result. Record Document 1, p. 13. At this stage, the Court must accept all of Plaintiff’s factual allegations as true. Plaintiff has alleged sufficient facts to state a claim for fraud under both article 1953 and article 2315. Defendants’ motion to dismiss Plaintiff’s fraud claim is **DENIED**.

C. Unfair Trade Practices

Plaintiff’s second claim is brought under the Louisiana Unfair Trade Practices Act (“LUTPA”). La. R.S. 51:1409(A). This claim centers around Defendants’ alleged unauthorized resale of Rockwell hardware products. LUTPA provides for private enforcement actions: “Any person who suffers any ascertainable loss of money or movable property...as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful...may bring an action...to recover actual damages.” Id. Thus, in order to prove a violation of LUTPA, Plaintiff must show: “(1) an unfair or deceptive trade practice declared unlawful; (2) that impacts a consumer, business competitor or other person to whom the statute grants a private right of action; (3) which has caused ascertainable loss.” Who Dat Yat LLC v. Who Dat?

Inc., 2011 WL 39043 at *3 (E.D. La. Jan. 4, 2011). Defendants argue that Rockwell is not a proper plaintiff in a LUTPA claim because LUTPA allows claims to be brought only by consumers or business competitor, and Rockwell is neither. This argument ignores both the plain language of the statute and the interpretation of LUTPA by the Louisiana Supreme Court. In Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc., a plurality of the court reasoned that the plain language of the statute allows "any person" who suffers an ascertainable loss to bring a private enforcement action for unfair trade practices, not just competitors and consumers. 2009-1633 (La. 4/23/10); 35 So. 2d 1053, 1056-57 ("Although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members."); see also Frontline Petroleum Training Sys., LLC v. Premier Safety Mgmt., Inc., 2013 WL 6667332, at *4 n. 17 (W.D. La. Dec. 17, 2013) (noting that Cheramie "cur[ed] a split in the circuits by holding that 'although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members'"); Corley v. Southeastern Metals Mfg. Co., 2011 WL 3665015, at *4 (W.D. La. Aug. 19, 2011) ("Although the LUTPA was previously interpreted to provide a cause of action only to consumers or business competitors, the Louisiana Supreme Court recently clarified that any person who asserts a 'loss of money or...property...as a result of...an unfair or deceptive method, act or practice' has standing to bring such a claim."). Thus, because Rockwell alleges that it suffered ascertainable loss as a result of unfair trade practices, it is a proper plaintiff.

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