

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:23-CV-136-D

EPIC TECH, LLC, and BLUE STREAK
BIDS, LLC,

Plaintiffs,

v.

RALEIGH STARTUP SOLUTIONS LLC,
d/b/a Good Luck NC and
www.goodlucknc.com, et al.,

Defendants.

ORDER

On March 20, 2023, Epic Tech, LLC (“Epic Tech”) and Blue Streak Bids, LLC (“Redibids”) (collectively “plaintiffs”) filed a complaint against 33 named defendants and 55 unnamed defendants alleging several intellectual property claims [D.E. 1]. On June 12, 2023, defendants Michael A. Griffin, Sr. (“Griffin”) and Cash Out NC, Inc. (“Cash Out”), proceeding *pro se*, moved to dismiss plaintiffs’ claims against them [D.E. 109]. Griffin and Cash Out move to dismiss the complaint on four grounds: lack of knowledge, absence of fault, purchase of a server, and payment of a monthly maintenance fee. *See* [D.E. 109]. The court liberally construes the motion as a motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). On July 3, 2023, plaintiffs responded in opposition [D.E. 119].

On August 30, 2023, plaintiffs moved for entry of default concerning 15 defendants [D.E. 135–47]. On September 20, 2023, defendant Kaiser Hauter (“Hauter”) responded in opposition to the motion for entry of default [D.E. 167].

As explained below, the court denies Griffin's motion to dismiss concerning plaintiffs' claims against Cash Out, grants in part Griffin's motion to dismiss concerning plaintiffs' indirect copyright infringement and indirect trademark infringement claims, grants plaintiffs' motions for entry of default concerning twelve defendants, and denies plaintiffs' motions for entry of default concerning three defendants.

I.

Epic Tech develops and markets software programs and entertainment games. See Compl. ¶ 1. Redibids is a wholly owned subsidiary of Epic Tech. See id. at ¶ 2. Plaintiffs' offerings include software programs that host "sweepstakes games, electronic bingo games, or skill games." Id. at ¶ 56. One such software program is called "Legacy Software," which customers sometimes call "Frontier." See id. at ¶¶ 56–57. According to plaintiffs, "[i]t is well understood in the industry that [Frontier is a] reference[] to Plaintiff Epic Tech's Legacy Software." Id. at ¶ 57. Legacy Software hosts numerous "popular and valuable games." Id. at ¶ 59. Within Legacy Software, plaintiffs own numerous copyrights, registered trademarks, and unregistered marks. See, e.g., id. at ¶¶ 68, 70–110, 111–49; [D.E. 1-2] (copyright registrations); [D.E. 1-3] (trademark registrations).

Defendants are individuals and business entities that operate physical establishments, online websites, and mobile applications which offer software and games similar to plaintiffs' Legacy Software. See Compl. ¶ 6. According to plaintiffs, most defendants "have obtained possession of and are distributing and operating an infringing software system" called "Phantom Software" which "clearly duplicat[es] many of the icons, graphics, and games featured in" Legacy Software. Id. at ¶ 153. Some defendants "have obtained possession of and are distributing an infringing software system" called "Phoenix Gold" which also "duplicat[es] many of the icons, graphics, and games featured in" Legacy Software. Id. at ¶ 205. Plaintiffs allege that the developers and distributors of

Phantom Software and Phoenix Gold have infringed plaintiffs' copyrights, registered trademarks, and unregistered trademarks. See id. at ¶¶ 276–449.

Plaintiffs allege that Griffin markets, distributes, and operates Phantom Software, including Frontier, “via [his] virtual and physical presence.” Id. at ¶¶ 178–80. Plaintiffs allege that Griffin directly infringes plaintiffs' copyrights through his distribution and operation of Phantom Software. See id. at ¶ 214. Plaintiffs also allege that Griffin indirectly infringes plaintiffs' copyrights by intentionally inducing and encouraging the direct infringement of Phantom Software end users, that Griffin has “the right and ability to supervise the infringing activity of Phantom Software end users,” and he has “an obvious and direct financial interest in the infringement of Epic Tech's copyrights.” Id. at ¶ 216. Plaintiffs allege that Griffin “knew or reasonably should have known that the Phantom Software [he] use[s] contains images from the Legacy Software and covered by the Epic Tech Copyrights.” Id. at ¶ 279.

Plaintiffs allege that any customer who played games on Legacy Software and “finds games using the identical, materially identical, or confusingly similar names and logos on the Phantom Software . . . is likely to be confused as to the source of the Phantom Software games.” Id. at ¶ 228; see id. at ¶ 247. Plaintiffs allege that Griffin directly infringes plaintiffs' trademarks through his distribution and operation of Phantom Software. See id. at ¶¶ 230, 248. Plaintiffs allege that Griffin indirectly infringes plaintiffs' copyrights and trademarks by intentionally inducing and encouraging the direct infringement of Phantom Software end users, and that Griffin has “at least joint control over the[] provision of the infringing Phantom Software to end users.” Id. at ¶ 231; see id. at ¶ 250. Moreover, plaintiffs allege that Griffin's “infringement of Epic Tech's . . . Trademarks was and is undertaken with the goal and intention of capitalizing on the goodwill and recognition of” Epic Tech's trademarks. Id. at ¶ 227; see id. at ¶ 246.

II.

A.

“[A] corporation may appear in the federal courts only through licensed counsel” and “the rationale for that rule applies equally to all artificial entities” including “corporations, partnerships, [and] associations.” Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council, 506 U.S. 194, 201–02 (1993); see Fed. Trade Comm’n v. Pukke, 53 F.4th 80, 106 (4th Cir. 2022). Thus, Griffin may not proceed pro se on behalf of Cash Out. See [D.E. 109]. Accordingly, the court denies Griffin’s motion to dismiss plaintiffs’ claims against Cash Out. See, e.g., Pukke, 53 F.4th at 106.

As for Griffin, a motion to dismiss under Rule 12(b)(6) tests the complaint’s legal and factual sufficiency. See Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff’d, 566 U.S. 30 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). To withstand a Rule 12(b)(6) motion, a pleading “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678 (quotation omitted); see Twombly, 550 U.S. at 570; Giarratano, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences “in the light most favorable to [the nonmoving party].” Massey v. Ojaniit, 759 F.3d 343, 352 (4th Cir. 2014) (quotation omitted); see Clatterbuck v. City of Charlottesville, 708 F.3d 549, 557 (4th Cir. 2013), abrogated on other grounds by Reed v. Town of Gilbert, 576 U.S. 155 (2015). A court need not accept as true a complaint’s legal conclusions, “unwarranted inferences, unreasonable conclusions, or arguments.” Giarratano, 521 F.3d at 302 (quotation omitted); see Iqbal, 556 U.S. at 678–79. Rather, a plaintiff’s factual allegations must “nudge[] [his] claims,” Twombly, 550 U.S. at 570, beyond the realm of “mere possibility” into “plausibility.” Iqbal, 556 U.S. at 678–79.

When evaluating a motion to dismiss, a court considers the pleadings and any materials “attached or incorporated into the complaint.” E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011); see Fed. R. Civ. P. 10(c); Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 165–66 (4th Cir. 2016); Thompson v. Greene, 427 F.3d 263, 268 (4th Cir. 2005). A court may also consider a document submitted by a moving party if it is “integral to the complaint and there is no dispute about the document’s authenticity.” Goines, 822 F.3d at 166; Occupy Columbia v. Haley, 738 F.3d 107, 117 n.7 (4th Cir. 2013). Additionally, a court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment. See, e.g., Fed. R. Evid. 201; Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cnty. Mem’l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

Plaintiffs classify Griffin as a “Phantom Defendant.” Compl. ¶ 151. Against all Phantom Defendants, plaintiffs bring claims for: (1) copyright infringement, see id. at ¶¶ 276–86; (2) contributory copyright infringement, see id. at ¶¶ 287–97; (3) vicarious copyright infringement, see id. at ¶¶ 298–308; (4) trademark infringement, see id. at ¶¶ 342–50; (5) contributory trademark infringement, see id. at ¶¶ 351–60; (6) vicarious trademark infringement, see id. at ¶¶ 361–70; (7) Lanham Act section 43(a) infringement, see id. at ¶¶ 400–06; (8) contributory Lanham Act section 43(a) infringement, see id. at ¶¶ 407–15; and (9) vicarious Lanham Act section 43(a) infringement, see id. at ¶¶ 416–24.¹

¹ Plaintiffs’ Lanham Act section 43(a) infringement claims effectively duplicate plaintiffs’ trademark infringement claims, but for unregistered marks. See, e.g., Matal v. Tam, 582 U.S. 218, 225–26 (2017); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 767–68 (1992); Lamparello v. Falwell, 420 F.3d 309, 312–13 (4th Cir. 2005); MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 341 (4th Cir. 2001); JFY Props. II LLC v. Gunther Land, LLC, Civ. No. 17-1653, 2019 WL 4750340, at *14–15 (D. Md. Sept. 30, 2019) (unpublished). Thus, the court considers them together.

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