

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BUNGIE, INC., a Delaware corporation,

Plaintiff,

v.

L.L., a minor,

Defendant.

Case No. 2:22-cv-0981-RAJ

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT’S MOTION TO
DISMISS**

I. INTRODUCTION

THIS MATTER comes before the Court on Defendant’s Motion to Dismiss (“Motion”). Dkt. # 18. Having reviewed the briefing, the relevant record, and applicable law, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion.

II. BACKGROUND

The following is taken from Plaintiff’s complaint, which is assumed to be true for the purposes of Defendants’ motion to dismiss. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *see also Dole Food Co. v. Watts*, 303 F.3d 1104, 1107 (9th Cir. 2002).

On July 15, 2022, Plaintiff Bungie, Inc. (“Bungie”) filed a complaint against Defendant L.L. for (1) breach of contract, (2) copyright infringement, (3) fraud, (4) Digital Millennium Copyright Act (“DMCA”) anti-circumvention, and (4) violation of the Washington Consumer Protection Act (“CPA”). Dkt. # 1. Plaintiff developed a first-

1 person shooter video game called *Destiny 2*. *Id.* ¶ 1. Plaintiff claims that Defendant
2 breached the Limited Software License Agreement (“LSLA”) when he used cheating
3 software to gain a competitive advantage, streamed himself on Twitch playing *Destiny 2*
4 using that cheating software, and sold *Destiny 2* emblems (digital art badges obtained by
5 in-game achievements) on “OGUsers,” a hacking and selling forum. *Id.* ¶¶ 1, 2, 5, 6.
6 Moreover, Plaintiff claims Defendant committed fraud and circumvented Plaintiff’s
7 technological measures when he continuously agreed, then subsequently violated, the
8 LSLA by making new accounts (thirteen in total) every time he was banned for cheating.
9 *Id.* ¶¶ 2, 173-175. Lastly, Plaintiff claims Defendant also circumvented Plaintiff’s
10 technological measures by using cheat software designed to avoid detection by Plaintiff’s
11 anti-cheat software. *Id.* ¶¶ 164, 169, 172.

12 Plaintiff also provides statements from Twitter written by Defendant that detail his
13 alleged cheating, streaming, and selling. *Id.* ¶¶ 65-77, 87. These statements also detail
14 purported threats to Defendant’s content moderators. *Id.* ¶¶ 54-64.

15 Pursuant to RCW § 26.28.030, Defendant properly disaffirmed all contracts
16 between himself and Plaintiff due to his status as a minor. Dkt # 17. Defendant moved to
17 dismiss for failure to state a claim, which is currently before the court. Dkt. # 18.

18 III. LEGAL STANDARD

19 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a
20 complaint if it fails to state a claim upon which relief can be granted. To survive a Rule
21 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to
22 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
23 This “facial plausibility” standard requires the plaintiff to allege facts that add up to
24 “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*,
25 556 U.S. 662, 678 (2009). While courts do not require “heightened fact pleading of
26 specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the
27 speculative level.” *Twombly*, 550 U.S. at 555, 570.

1 In deciding whether the plaintiff has stated a claim upon which relief can be
2 granted, the Court must assume that the plaintiff's allegations are true and draw all
3 reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d
4 556, 561 (9th Cir. 1987). However, the Court is not required to accept as true "allegations
5 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."
6 *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

7 IV. DISCUSSION

8 Defendant's Motion argues Plaintiff's claims for (1) breach of contract, (2) fraud
9 in the inducement, (3) copyright infringement, (4) circumvention of technological
10 measures, and (5) violation of the CPA must be dismissed under Rule 12(b)(6) for failure
11 to state a claim. Dkt. # 18 at 1. The Court will address each claim in turn.

12 A. Breach of Contract

13 Defendant argues the breach of contract claim should be dismissed because there
14 is no enforceable contract between Defendant and Plaintiff. Dkt. # 18 at 11-2. Defendant
15 was a minor when he agreed to the LSLA and, pursuant to RCW § 28.28.030, has
16 properly disaffirmed the contract for lack of capacity. Dkt. # 17. Defendant therefore
17 asserts that there is no basis for Plaintiff's breach of contract claim. *Id.* at 12. In response,
18 Plaintiff concedes that Defendant's disaffirmance of the contract renders the contract
19 void and eliminates any breach of contract liability. Dkt. # 19 at 9. As such, Plaintiff
20 recommends the Court dismiss the breach of contract claim. *Id.* at 10.

21 Because Defendant properly disaffirmed the contract under RCW § 28.28.030,
22 Defendant is no longer bound by its terms. *See Paulson v. McMillan*, 8 Wn.2d 295, 299
23 (1941) (holding an "infant" is bound by the contract until and unless he properly
24 disaffirms it). Accordingly, the Court grants Defendant's motion to dismiss the breach of
25 contract claim without prejudice.

26 B. Fraud in the Inducement

27 Defendant contends that Plaintiff did not rely on any misstatement of material fact
28

1 as required for fraud because Plaintiff either knew that minors would assent to the LSLA
2 or chose to “look the other way” and rely on software that provided access to anyone who
3 agreed to abide by the LSLA. Dkt. # 18 at 12-13. In response, Plaintiff argues that (1)
4 they have plead clearly all nine elements required for fraudulent inducement, Dkt. # 19 at
5 10, and (2) reliance is a factual issue that must be taken as true on a motion to dismiss. *Id.*
6 at 11.

7 The Court agrees with Plaintiff. There are nine essential elements that a plaintiff
8 must show to bring a claim of fraudulent inducement: “(1) a representation of existing
9 fact, (2) its materiality, (3) its falsity, (4) the speaker’s knowledge of its falsity, (5) the
10 speaker’s intent that it be acted upon by the person to whom it was made, (6) ignorance
11 of its falsity on the part of the person to whom the representation is addressed, (7) the
12 latter’s reliance on the truth of the representation, (8) the right to rely upon it, and (9)
13 consequent damage.” *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d
14 157, 166 (2012). Reasonable reliance is a question of fact. *Aliya Medicare Finance, LLC*
15 *v. Nickell*, 156 F.Supp.3d 1105, 1123 (C.D. Cal. May 26, 2015); *see also Living Designs,*
16 *Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 363 (9th Cir. 2005) (holding
17 plaintiffs adequately plead reasonable reliance in their amended complaint).

18 Defendant’s argument that Plaintiff did not rely on any misrepresentation fails. In
19 the complaint, Plaintiff states they relied on Defendant’s purported acceptance of the
20 LSLA because Plaintiff had no way of knowing the account accepting the LSLA was an
21 account made by Defendant. Dkt. # 1 ¶¶ 143-5. Because the Court must assume the facts
22 alleged in the complaint are true, Plaintiff’s contention that they relied on Defendant’s
23 misrepresentation that he would abide by the LSLA is assumed to be true. Whether
24 Plaintiff reasonably relied on any alleged misrepresentation by Defendant is a question to
25 be addressed at a later stage of the litigation. *See Cleverly v. Ballantyne*, No.
26 212CV00444GMNGWF, 2013 WL 12320134, at *10 (D. Nev. Aug. 29, 2013). Plaintiff
27 has alleged sufficient facts to state a claim. *Id.* ¶¶ 68, 75, 114, 119, 135-146. Therefore,

1 the Court denies Defendant's motion to dismiss the fraudulent inducement claim.

2 **C. Copyright Infringement**

3 Defendant argues the use of ancillary software to gain an advantage in gameplay is
4 not copyright infringement because (1) the use of the cheat software did not create a
5 derivative work, and (2) the anti-cheat language in the LSLA are covenants, not
6 conditions, which requires any remedy pursued to be based in contract, not copyright
7 infringement. Dkt. # 18 at 14-17. Plaintiff counters that Defendant's disaffirmance of the
8 LSLA renders each of his uses of *Destiny 2* infringing and any subsequent play on new
9 accounts unlicensed because Defendant fraudulently represented his intent to abide by the
10 LSLA. Dkt. # 19 at 12.¹ Plaintiff also asserts that even without the disaffirmance and the
11 alleged fraudulent inducement, Defendant still infringed for two reasons: (1) the anti-
12 cheat language in the LSLA are conditions, and (2) the cheating created an unauthorized
13 creation of derivative work. *Id.* at 15-17.

14 Plaintiff's arguments are persuasive. To establish a copyright infringement,
15 Plaintiff must show (1) ownership of the allegedly infringed material, and (2) that the
16 alleged infringers violated exclusive rights granted to the copyright holder under the
17 Copyright Act. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).
18 The owner of a copyright has the exclusive right to prepare derivative works based on its
19 original work. *DC Comics v. Towle*, 803 F.3d 1012, 1023 (9th Cir. 2015). A derivative
20 work is a "work based upon one or more preexisting works that recasts, transforms, or
21 adapts the preexisting work." *Id.* If a third party creates a derivative work without consent
22 from the copyright owner, the owner may sue for copyright infringement. *Id.*

23 First, it is undisputed that Plaintiff owns copyrights to *Destiny 2* both as a software
24

25 ¹ Plaintiff indicated in their response to this Motion that they plan to amend the complaint
26 to assert that all of Defendant's "downloads, uses, and streams of *Destiny 2* were infringing,
27 including his initial download, uses, and streams prior to his first violation of the LSLA." Dkt. #
28 19 at 15. Plaintiff is free to amend their complaint within 14 days of this order to include the
29 additional copyright infringement claims.

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