UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE UPPER DECK COMPANY, Plaintiff, v. RYAN MILLER et al., Defendants.	CASE NO. C23-1936-KKE ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This is a copyright infringement and breach of contract case. Plaintiff Upper Deck Company ("Upper Deck") claims that Defendant Ryan Miller, a former contractor working on the trading card game "Rush of Ikorr," took a job with competitor, Defendant Ravensburger North America Inc. ("Ravensburger"), and used Upper Deck's confidential and copyrighted material in Ravensburger's "Disney Lorcana" trading card game. Defendants move to dismiss every claim except for the breach of contract claim against Miller, arguing the economic loss rule bars tort claims against Miller, the claims against Ravensburger omit required elements, the state law claims are preempted by the Copyright Act, and Upper Deck fails to identify any copyrighted material. Except for the conversion, copyright, and parts of the fraud claim, the Court agrees with Defendants but finds many of these failures can be cured by amendment.

I. BACKGROUND[1]

In 2018, Miller entered into an agreement ("2018 Agreement") with Upper Deck wherein Miller would attend a gaming summit to brainstorm and provide feedback on new games and game mechanics. Dkt. No. 12 ¶ 26, Dkt. No. 48 at 7–11. Rush of Ikorr[2] was created at this gaming summit. Dkt. No. 12 ¶ 28. In 2019, Miller entered into another agreement with Upper Deck ("2019 Agreement") wherein Miller would be the lead game designer for Rush of Ikorr and would be paid upon completion of specific milestones, with a timeline running through March 2021. *Id.* ¶ 30. In October 2020, Miller terminated the 2019 Agreement and, around that time, began working with Ravensburger. *Id.* ¶¶ 35, 37. In September 2022, Ravensburger announced the Disney Lorcana game and identified Miller as the "product manager and co-designer" of the game. *Id.* ¶ 41.

In June 2023, Upper Deck filed this case against Defendants in San Diego Superior Court and Defendants removed the case to the Southern District of California. Dkt. No. 1. In July 2023, Upper Deck filed its amended complaint, which is the operative complaint. Dkt. No. 12. The complaint brings three causes of action against Miller (breach of contract, breach of fiduciary duty, and fraudulent misrepresentation and/or fraudulent concealment under Cal. Civ. Code §§ 1709–10), two causes of action against Ravensburger (inducing breach of a written contract, and intentional interference with prospective economic relations), and three causes of action against both Defendants (copyright infringement, conversion, and unfair competition under Bus. & Profs. Code § 17200). *Id.* Defendants moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim. Dkt. No. 20. After full briefing on Defendants' motion to dismiss for

[1] This section assumes, for purposes of resolving the motion to dismiss, that the factual allegations in the first amended complaint (Dkt. No. 12) are true.

[2] The game was previously called Shell Beach. Dkt. No. 12 ¶ 29.

lack of personal jurisdiction, and limited jurisdictional discovery, Judge M. James Lorenz transferred the case to this Court under 28 U.S.C. § 1404(a) and denied the remainder of the motion to dismiss as moot. Dkt. No. 29-1. After the transfer, Defendants filed this motion to dismiss for failure to state a claim on all causes of action except the breach of contract claim against Miller. Dkt. No. 46. The Court has considered the parties' briefing and for the reasons explained below, the Court grants in part and denies in part the motion to dismiss.

II. ANALYSIS

A. This Court Has Subject Matter Jurisdiction.

This Court has subject matter jurisdiction under 28 U.S.C. § 1332(a) because complete diversity exists between the parties and the amount in controversy exceeds $75,000. Dkt. No. 1. Upper Deck is a citizen of Nevada and California. Dkt. No. 12 ¶ 18. And Ravensburger and Miller are citizens of Washington. *Id.* ¶¶ 19, 20. Based on the harms alleged in the complaint, the amount in controversy exceeds $75,000. *Id.* ¶¶ 73, 103; Dkt. No. 1 ¶¶ 11–22.

The Court also has federal question subject matter jurisdiction over the copyright claim under 28 U.S.C. § 1331.

B. The Court Will Apply California Law to the State Law Claims.

The parties dispute whether Washington or California law applies to the state law claims after the transfer under 28 U.S.C. § 1404(a). Upper Deck argues California law applies because, following a transfer under 28 U.S.C. § 1404(a), the Court "must 'apply the state law, including the choice-of-law rules, of the original transferor court.'" Dkt. No. 54 at 9 (quoting *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 69 F.4th 665, 674 (9th Cir. 2023)). Defendants posit that this general rule does not apply because the transferor court, the Southern District of California, did not have personal jurisdiction over Defendants. Dkt. No. 46 at 13–14.

While the transfer order did not explicitly say it had personal jurisdiction over Defendants, it implicitly so found when it stated, "[i]f transferred, the transferee Court would have to apply California choice-of-law rules to determine the governing law for the non-statutory claims and apply California law for the statutory claims." Dkt. No. 29-1 at 8. Indeed, this Court would only apply California choice-of-law rules if the Southern District of California had personal jurisdiction, otherwise, the Court would apply Washington choice-of-law rules. *See* 15 Charles Alan Wright et al., *Federal Practice and Procedure* § 3846 (4th ed. 2018) ("[W]hen transfer of a diversity of citizenship case is ordered under Section 1404(a) from a court with personal jurisdiction, *Van Dusen*[3] requires the transferee district to apply the choice-of-law rules of the state in which the transferor court sat."). Defendants do not explain why this statement in the transfer order, that could only be true if the transferring court had personal jurisdiction, should be ignored. Because the Southern District of California implicitly found it had personal jurisdiction over Defendants, this Court must use California choice-of-law rules to determine what law applies to each claim.

Defendants do not argue that if California's choice-of-law rules govern, Washington law should apply.[4] Accordingly, the Court will assume that since California is the forum where the claim was filed, California substantive law applies to each state law claim. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 561 (9th Cir. 2019) ("By default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply."). This Court will therefore apply California substantive law to the state law claims and Ninth Circuit law to the copyright claim.

[3] *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

[4] Instead, in reply, Defendants state "there does not appear to be any meaningful difference between California and Washington law with respect to the claims in this case[.]" Dkt. No. 55 at 7.

C. The Court Will Consider Limited Extrinsic Evidence.

On a motion to dismiss, district courts can typically only consider the pleadings "when assessing the sufficiency of a complaint." *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 998 (9th Cir. 2018). However, the district court has discretion to consider extrinsic evidence under the incorporation-by-reference doctrine and by judicial notice under Federal Rule of Evidence 201. *Id.*

Defendants ask the Court to consider the following extrinsic evidence: the declaration of Ravensburger's International Category Director (Dkt. No. 47 at 1–2), an online article announcing the Disney Lorcana game (*id.* at 6–8), the Disney Lorcana game rules (Dkt. No. 46 at 12), the declaration of Miller (Dkt. No. 48 at 1–3), the 2018 Agreement (*id.* at 7–11), the 2019 Agreement (*id.* at 13–21), and two copyright registrations (Dkt. No. 49 at 4–7).

The only relevant and necessary extrinsic evidence that the Court will consider is the two copyright registrations and the two agreements. The copyright registrations are proper subjects of judicial notice. *See Idema v. Dreamworks*, Inc., 90 F. App'x 496, 498 (9th Cir. 2003), *as amended on denial of reh'g* (Mar. 9, 2004) (describing a copyright registration as "the sort of [document] as to which judicial notice is appropriate"); *Laatz v. Zazzle, Inc*., No. 22-cv-04844-BLF, 2024 WL 1023849, at *3 (N.D. Cal. Mar. 7, 2024) ("It is common practice for courts to take judicial notice of copyright registrations and applications."). And, as both parties agree (Dkt. No. 46 at 11 n.2, Dkt. No. 54 at 14), the 2018 and 2019 Agreements are incorporated by reference in the complaint. *See Vesta Corp. v. Amdocs Mgmt. Ltd*., 80 F. Supp. 3d 1152, 1157 (D. Or. 2015) (incorporating nondisclosure agreement contracts by reference when they are "referred to extensively in the Complaint and are the basis of [a] breach of contract claim.").

D. Legal Standard for Motions to Dismiss

Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either the lack

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