UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 08-1374 ABC (JWJx)	Date	September 22, 2009
Title	VCL Communications GmbH v. Crystal Sky, LLC, et al.		

Present: The Honorable	Audrey B. Collins, Chief Judge	
Angela Bridges	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S AND COUNTERDEFENDANTS' SUMMARY JUDGMENT MOTION (In Chambers)

Pending before the Court is the motion for summary judgment filed by Plaintiff and Counterdefendant VCL Communications ("VCL" or "Plaintiff") and Counterdefendant Datty Ruth ("Ruth") (collectively, "Counterdefendants"). Mot. for Summary Judgment (Docket # 61). The motion seeks summary judgment on VCL's claims for breach of contract and promissory fraud against Defendants Crystal Sky ("Crystal Sky") and Steven Paul ("Paul") (collectively, "Defendants"), as well as on Crystal Sky's counterclaims for breach of contract and intentional interference with prospective economic advantage. Defendants opposed the motion. Opp'n (Docket # 78). The Court determined that the motion was properly resolved without oral argument. See September 3, 2009 Minute Order (Docket # 99). Having considered the parties' submissions, the case file, and counsels' arguments, the Court **GRANTS** in part and **DENIES** in part the motion.

I. PROCEDURAL AND FACTUAL BACKGROUND

Beginning in 1999, Crystal Sky and VCL entered into a series of agreements providing distribution rights to VCL throughout German-speaking Europe for certain motion pictures. See Defs.' Statement of Genuine Issues of Fact 2 ("DSGI") (Docket # 79).[1] In connection with

[1] Defendants purport to dispute almost all of the facts proffered by Counterdefendants without any explanation and with citation only to Paul's declaration. See DSGI 2-24, 27-51. The Court has reviewed Paul's declaration and finds that many of the facts are not actually disputed. Instead, Defendants appear to dispute facts on

VCL's acquisition of its distribution rights, VCL paid Crystal Sky $3,683,334. See DSGI 4. One of the motion pictures covered by the distribution agreements was "Ghost Rider." See DSGI 3. Notwithstanding the distribution agreements, however, Crystal Sky granted distribution rights in Ghost Rider for German-speaking Europe to another distributor, Sony Pictures Releasing GmbH ("Sony"). See DSGI 5. Thereafter, on July 11, 2005, VCL filed a court action in Germany against Sony seeking inter alia an injunction against Sony's distribution of Ghost Rider. See DSGI 6. From roughly March 2006 to May 2006, Crystal Sky, through Paul, and VCL engaged in a series of settlement discussions regarding the dispute. See DSGI 7.[2] On or about May 12, 2006, Crystal Sky and VCL entered into an agreement resolving the dispute. See DSGI 8; see also Ruth Decl. Ex. 1 ("Settlement Agreement" or "SA"). The current dispute revolves around the parties' performance under the Settlement Agreement.

A. COMPENSATION UNDER THE SETTLEMENT AGREEMENT

The Settlement Agreement has a total value of $3,683,334, exclusive of any interest accrued. SA ¶ 2.2. It generally provides two mechanisms by which Crystal Sky could compensate VCL to satisfy its contractual obligation. First, the Settlement Agreement outlines a payment schedule, as follows:

> CRYSTAL SKY shall pay to VCL the following settlement

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artificial or highly technical grounds. For example, Counterdefendants' second uncontroverted fact states: "Beginning in 1999, Crystal Sky and VCL entered into a series of agreements pursuant to which VCL was to receive, inter alia, valuable distribution rights throughout German-speaking Europe . . . for certain motion pictures." See DSGI 2. Defendants purport to dispute this (without any explanation) by referring to a paragraph of Paul's declaration that repeats Counterdefendants' statement nearly verbatim: "Crystal Sky and VCL [] entered into a series of distribution agreements beginning in 1999 by the terms of which VCL became obligated to pay for, and then to receive, distribution rights throughout German-speaking Europe for certain motion pictures." Paul Decl. ¶ 4 (Docket # 78). Defendants' tactic of raising bad faith "disputes" wasted significant judicial resources. The Court admonishes Defendants for failing to comply with either the letter or the spirit of local rule 56-2.

[2] Paul is the Chairman and Chief Executive Officer of Crystal Sky. Paul Decl. ¶ 1. Ruth is the Managing Director of VCL. Ruth Decl. ¶ 3 (Docket # 63).

payments . . . which total $1,850,000 and all of which shall be credited against the Settlement Amount. The Settlement Payments shall be paid in U.S. dollars pursuant to the following payment schedule.

a. $250,000 no later than 5 business days following the Effective Date (with no grace period or opportunity to cure);

b. $100,000 on or before July 1, 2006 (with a 30 day grace period);

c. $175,000 on or before September 1, 2006 (with a 30 day grace period);

d. $200,000 on or before November 1, 2006 (with a 30 day grace period);

e. $100,000 on or before January 1, 2007 (with a 30 day grace period);

f. $125,000 on or before March 1, 2007 (with a 30 day grace period);

g. $125,000 on or before May 1, 2007 (with a 30 day grace period);

h. $175,000 on or before July 1, 2007 (with a 30 day grace period);

I. $100,000 on or before September 1, 2007 (with a 45 day grace period);

j. $100,000 on or before November 1, 2007 (with a 45 day grace period);

k. $100,000 on or before January 1, 2008 (with a 45 day grace period);

l. $100,000 on or before March 1, 2008 (with a 45 day grace period);

m. $100,000 on or before May 1, 2008 (with a 45 day grace period); and

n. $100,000 on or before July 1, 2008 (with a 45 day

grace period).

SA ¶ 3.1.[3] In the event that the first payment was not timely made, VCL could declare the Settlement Agreement to be null and void. See SA ¶ 3.1.1. Crystal Sky timely made the initial payment and VCL then withdrew the German action against Sony with prejudice. See DSGI 16.

Thereafter, Crystal Sky did not make any monetary payments to VCL in accordance with the schedule outlined in Paragraph 3.1. See DSGI 17. The Settlement Agreement provides that, "[i]f Crystal Sky fails to pay a Settlement Payment . . . by the applicable due date (after giving CRYSTAL SKY the benefit of the applicable grace period), as set forth at above Paragraph 3.1 (b) through (n)," then interest "shall accrue on such unpaid amount" at a specified rate. SA ¶ 3.1.4. The Settlement Agreement further provides that "CRYSTAL SKY shall automatically be deemed in default with respect to any payment not paid within 180 days of its applicable due date (after taking into account the applicable grace period)." Id.

The Settlement Agreement also includes an Offset provision. See SA ¶ 3.1.2. That provision states in relevant part that: "The last six Settlement Payments set forth above totaling $600,000, together with the balance of the Settlement Amount, may be satisfied by CRYSTAL SKY on a dollar for dollar basis out of the amount that VCL hereafter may become obligated to pay to CRYSTAL SKY . . ., including amounts that VCL may become obligated to pay in connection with films to be licensed by CRYSTAL SKY." Id. The Settlement Agreement relatedly provides that Crystal Sky may put to VCL up to two qualifying motion pictures (the "First Picture" and "Second Picture"). To be considered a qualifying First Picture, a motion picture must:

> (I) have a final, direct, out of pocket, third party cost (all of which shall be arm's length) ("Direct Cost") (and, for the purpose of this Settlement Agreement only, such Direct Cost shall exclude any and all producer and/or rights fees and/or other payments to CRYSTAL SKY and its Related Entities and/or Steven Paul and/or any and all deferments, participations, or other contingent compensation) (and which such Direct Cost shall be confirmed by a recognized bond company . . .) of no less than US $20,000,000 and no more than US $35,000,000, and (ii) ultimately be released theatrically in the United States by a major studio . . . no

[3] These payments account for only part of the settlement amount. The remaining portion was due on May 12, 2009. See SA ¶ 3.2.

> later than 12 months from delivery to VCL in at least 800 theaters within two weeks of the initial release.

SA ¶ 1.1.[4] The qualifying criteria outlined in the Settlement Agreement for the Second Picture are substantially the same as the criteria for the First Picture, except that the "Second Picture shall have a Direct Cost of no less than US $10,000,000 and no more than US $20,000,000 which such Direct Cost shall be confirmed by a recognized bond company." See SA ¶ 3.4.

The Settlement Agreement provides that "CRYSTAL SKY shall deliver the First Picture [and Second Picture] to VCL no later than the Outside Date." SA ¶¶ 1.1, 3.4. The Outside Date is defined as May 31, 2009. SA ¶ 3.2.

On or about May 11, 2009, Crystal Sky sent VCL a letter stating that "Crystal Sky has elected to 'put' to VCL the motion picture 'Tekken' as the 'First Picture' to be delivered pursuant to Paragraph 1.1., page 6, of the Settlement Agreement." Martin Barab Decl. Ex. 1 (Docket # 78). The letter further states that:

> "Tekken" is available for delivery prior to the Outside Date pursuant to the terms of the Output Agreement between the parties. . . . [I]nsofar as the Picture is completed, verification of the budget is available for inspection as of the Outside Date. Further, as provided for in the agreement, Crystal Sky will deliver and/or give free access to the delivery material as contemplated in the Output Agreement between the parties as of May 31, 2009, the "Outside Date." Furthermore, . . . "Tekken" is a qualifying picture pursuant to the conditions stated in Paragraph 1.1 and the budget thereof is not less than $21 million.

Id. The letter concludes that Crystal Sky was entitled to "a reduction from the Settlement Amount on a dollar-for-dollar basis in the sum of and not less than $2,310,000." Id.

Crystal Sky also sent a substantially similar letter to VCL, asserting that it had elected to put the motion picture "Bratz" to VCL pursuant to the Settlement Agreement. See Martin Barab Decl. Ex. 3.

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[4] The Settlement Agreement contains a typographical error in the numbering of this Paragraph, as it also contains another Paragraph numbered 1.1. All references hereafter to Paragraph 1.1 refer to the Paragraph 1.1 appearing on page 6 of the Settlement Agreement.

That letter asserts inter alia that Bratz had a "budget" of "not less than $10 million" and that Crystal Sky was entitled to a reduction from the Settlement Amount of $1,100,000. Id.

B. CONFIDENTIALITY OF THE SETTLEMENT AGREEMENT

The Settlement Agreement also includes a confidentiality provision, which states that the parties agree that "it is a material element of this Settlement Agreement that the terms of this Settlement Agreement remain confidential." SA ¶ 6. The provision further states that the parties agree to "use their best and reasonable efforts to maintain the confidentiality of the terms and provisions of the Settlement Agreement." Id. Although the provision generally precludes disclosure, it also lists a series of exceptions. One such exception allows the parties to disclose the Settlement Agreement "to the extent such disclosure is necessary to satisfy contractual obligations with third parties." Id.

It is undisputed that VCL disclosed the Settlement Agreement to certain individuals at Bavarian Future Flows ("BFF") and Octave Entertainment Fund ("Octave"), which owned BFF. See DSGI 29, 30. VCL had a contract dated December 13, 2004 ("BFF Agreement"), through which it obtained a loan facility from BFF. See DSGI 30; Ruth Decl. Ex. 5. The loan facility was secured by VCL's cash flows and assets, including its receivables. See DSGI 31. As part of the BFF Agreement, VCL was obligated to report and disclose to BFF/Octave certain financial information. See DSGI 32.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment shall be granted where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute as to a material fact is genuine if there is evidence sufficient to make that fact reasonably resolved in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmovant. Id. at 255.

The moving party has the burden of identifying those portions of the record that demonstrate the absence of a genuine issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving

party meets its initial burden, the burden shifts to the nonmoving party to go beyond the pleadings and "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party's "mere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989).

III. VCL'S BREACH OF CONTRACT CLAIM AGAINST CRYSTAL SKY

VCL first moved for summary judgment on its claim that Crystal Sky breached the Settlement Agreement by failing to compensate it. For the reasons discussed below, the Court agrees that VCL is entitled to summary judgment on that claim.

A. CHOICE OF LAW

As a threshold matter, the Court must decide which law applies to this claim. The Settlement Agreement provides that it "shall be construed and interpreted pursuant to the laws of the State of New York as it applies to contracts entered into and performed wholly within California or, if appropriate, the Federal laws of the United States of America." SA ¶ 10. Neither party analyzes the meaning of this provision. Instead, both simply cite to it in support of their competing contentions as to whether New York law applies. See Memo. at 13 (asserting that New York law applies); Defs.' Response to Plf.'s Conclusions of Law 5 (Docket # 79) (disputing that New York law applies). The Court declines to construe this provision without any assistance from the parties. Given that the parties failed to point to any substantive difference in law relevant to this claim, the Court assumes New York law applies to the breach of contract claims as the moving papers rely predominately on New York authority.[5]

B. CRYSTAL SKY'S BREACH OF THE SETTLEMENT AGREEMENT

VCL asserts that Crystal Sky breached the Settlement Agreement by failing to make payments as articulated therein. To prevail on a breach of contract claim, a plaintiff must establish: (1) the formation of a contract between the plaintiff and the defendant; (2) performance by the plaintiff; (3) the defendant's failure to perform; and (4) resulting damage. Clearmont Prop., LLC v. Eisner, 872 N.Y.S.2d 725, 728 (3d Dep't 2009). The crux of the dispute here is

[5] It should be noted that Defendants failed to cite to any case law whatsoever in their opposition brief other than federal authorities describing the burdens on summary judgment.

whether Crystal Sky failed to perform.

"It is well settled that a court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which would contradict the clearly expressed language of the contract." Republic Nat. Bank of N.Y. v. Olshin Woolen Co., 758 N.Y.S.2d 45, 46 (1st Dep't 2003). Instead, "[a] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Bridge Public Relations & Consulting, Inc. v. Hylan Elec. Contracting, Inc., 884 N.Y.S.2d 172, 174 (2d Dep't 2009).

There is no dispute that Crystal Sky failed to make monetary payments as outlined in the Settlement Agreement. Instead, Crystal Sky argues that it did not breach the agreement because it offset any amount due when it put Tekken and Bratz to VCL. This argument is not persuasive. To be entitled to an offset, Crystal Sky had to put to VCL motion pictures that meet certain criteria. For example, the motion pictures had to have Direct Costs within a certain range (i.e., between $20,000,000 and $35,000,000 for the First Picture and between $10,000,000 and $20,000,000 for the Second Picture) and the Direct Cost had to be confirmed by a recognized bond company. See SA ¶¶ 1.1, 3.4. "Direct Cost" has a specific meaning: it includes the "final, direct, out of pocket, third party cost," and expressly excludes "any and all producer and/or rights fees and/or other payments to CRYSTAL SKY and its Related Entities and/or Steven Paul and/or any and all deferments, participations, or other contingent compensation." SA ¶ 1.1.

Crystal Sky failed to create a triable issue of fact that Tekken and Bratz meet this requirement. Instead, Crystal Sky states generally (without any supporting documentation) that Tekken had a "budget" of "not less than $21 million" and Bratz had a "budget" of "not less than $10 million." See Paul Decl. ¶¶ 13, 16. Paul's statements are insufficient. First, the relevant criteria relates to the Direct Cost of the motion pictures, not more generally to the "budget." Second, even if that were not the case, Crystal Sky's conclusory assertions unsupported by factual data do not create a genuine issue of fact that the offset applies. Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Indeed, the Settlement Agreement required Crystal Sky to have the Direct Cost confirmed by a recognized bond company. No such confirmation has been provided. Thus, there is no evidence creating a genuine issue of fact that

Crystal Sky is entitled to an offset.[6]

Accordingly, there is no genuine issue of fact that Crystal Sky materially breached the Settlement Agreement and Plaintiff suffered damage in the amount of the payments owed to it, plus the interest that accrued under the provisions of the agreement. VCL is entitled to summary judgment on its breach of contract claim.[7]

C. REMEDY

Having found that Crystal Sky breached the Settlement Agreement, the Court turns to the amount of damages VCL sustained. VCL is entitled to the entire amount owed it under the Settlement Agreement, which consists of the unpaid principal plus interest as outlined in the Settlement Agreement.[8] As of April 27, 2009, VCL was owed $1,600,000 in principal plus $554,371.21 in interest on those payments. As of May 12, 2009, VCL was due additional principal in the amount of $1,833,334.

Accordingly, the Court awards VCL $3,987,705.21, plus the additional interest that has accrued on the $2,154,371.21 since April 27, 2009 and plus the additional interest that accrued on the $1,833,334 since May 12, 2009. In addition, VCL is entitled to recover post-judgment interest and costs.

IV. VCL'S PROMISSORY FRAUD CLAIM AGAINST CRYSTAL SKY AND PAUL

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[6] The Court rejects Crystal Sky's argument that it did not breach the Settlement Agreement because the only consequence for failing to make timely payments was the accrual of interest. See SA ¶ 3.1.4 (stating that Crystal Sky is automatically deemed to be in default for any payments more than 180 days overdue); see also SA ¶ 3.2 (accrual of interest is "in addition to any and all other rights and remedies at law or otherwise which may be available to VCL").

[7] VCL raises various other arguments as to why Crystal Sky is not entitled to an offset. In light of the Court's ruling above, it declines to address these additional arguments.

[8] The Court rejects Crystal Sky's argument that interest did not accrue on its missed payments until the Outside Date. See SA ¶ 3.1.4 (providing for accrual of interest prior to Outside Date); SA ¶ 3.2 (providing that amount due on Outside Date includes "all accrued compounded interest").

VCL also moved for summary judgment as to its promissory fraud claim. VCL claims that Defendants made a series of misrepresentations through which they expressed an intention to compensate VCL, and that those misrepresentations induced VCL to enter into the Settlement Agreement. "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." Lazar v. Superior Court, 12 Cal.4th 631, 638 (1996).[9] There are five elements for such a claim: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. Id.

Issues of a defendant's knowledge of falsity and intent to defraud are normally questions of fact left for the jury. See, e.g., Fanucchi & Limi Farms v. United Agri Prods., 414 F.3d 1075, 1082 (9th Cir. 2005); Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1220 (9th Cir. 1980). In promissory fraud cases, fraudulent intent must often be established by circumstantial evidence and may be "inferred from such circumstances as defendant's failure even to attempt performance." Locke v. Warner Bros., Inc., 57 Cal. App. 4th 354, 368 (1997) (quoting Tenzer v. Superscope, Inc., 39 Cal.3d 18, 30 (1985)). Fraudulent intent cannot be proven, however, by simply pointing to a defendant's failure to perform as promised. Tenzer, 39 Cal.3d at 30-31.

VCL argues that no triable issue of fact exists as to Defendants' fraudulent intent based on Defendants' "objective conduct in failing to make any payment to VCL after the German Action was dismissed." Reply at 11. It is undisputed that Defendants made the first payment of $250,000 to VCL. Once Defendants made that first payment, VCL dismissed the German Action against Sony as required by the Settlement Agreement. The dismissal of the German Action against Sony was of utmost importance to Defendants in entering the Settlement Agreement. See Paul Decl. ¶¶ 6-7. Defendants then ceased providing any compensation to VCL despite the Settlement Agreement's provisions requiring them to do so.

On VCL's pending motion for summary judgment, the Court must construe all reasonable inferences in favor of Defendants. Anderson, 477 U.S. at 255. While a jury may well be able to infer fraudulent intent from VCL's circumstantial evidence, VCL has not persuaded the Court that a jury would be required to do so. Defendants argue that there is at least some evidence putting in dispute whether they had

[9] The parties assume without any discussion that California law applies to the promissory fraud claim. Accordingly, the Court will also assume California law applies to this claim.

the requisite intent. Defendants essentially assert that they did intend to comply with their contractual obligations, as evidenced by their recent actions in May 2009 with respect to Tekken and Bratz. See Opp'n at 11. Such evidence appears to be very weak given that VCL's promissory fraud claim depends on Defendants' state of mind when the relevant promises were made rather than three years later when they sent the letters regarding Tekken and Bratz. See First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 940 (N.D. Cal. 2008). Moreover, Defendants' argument would require a finding that it actually believed that the earlier cash payments were not required so long as they put two qualifying movies to VCL prior to the Outside Date, which is contrary to the Settlement Agreement provisions, and that their efforts with respect to Tekken and Bratz were actually in "good faith" despite their failure to comply with the requirements to receive an offset. Nonetheless, the Court finds that a material issue of fact exists as to whether Defendants knew of the falsity of their promises and intended to defraud VCL. Although the Court considers Defendants' position to be weak, that is an issue best left to the jury.[10]

Accordingly, VCL's motion for summary judgment on its claim for promissory fraud is **DENIED**.

V. CRYSTAL SKY'S BREACH OF CONTRACT COUNTERCLAIM AGAINST VCL

[10] Since this failure is enough for Defendants to survive summary judgment, the Court declines to address the evidence as it pertains to the other elements of this claim. The Court also does not reach Defendants' contention that VCL's claim is precluded as a matter of law based on the Settlement Agreement provision that the parties did not rely on statements not contained in the agreement itself and that "[t]he Parties have included this clause to preclude any claim that any Party was in any way fraudulently induced to execute this Settlement Agreement." SA ¶ 5.2. It would appear to be in the interest of judicial economy for the parties to address this issue before trial in the event that Defendants continue to believe they have a good faith basis for making this argument. See, e.g., Fed. R. Civ. P. 12(c) (allowing for motion for judgment on the pleadings after the pleadings have closed). The Court notes, however, that such briefs should more fully analyze the issue, including analysis of (1) which law applies to determine the effect (if any) of this provision on VCL's fraud claim, and (2) whether such a provision is unenforceable, see, e.g., McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 794 (2008). These important threshold considerations were not addressed in the summary judgment papers.

VCL also moved for summary judgment as to Crystal Sky's counterclaim for breach of contract. As noted above, to prevail on a breach of contract claim, a party must establish: (1) the formation of a contract; (2) performance by the counterclaimant; (3) the counterdefendant's failure to perform; and (4) resulting damage. Clearmont Property, 872 N.Y.S.2d at 728. Crystal Sky's breach of contract counterclaim is premised on its allegation that VCL disclosed the Settlement Agreement to third parties in violation of the confidentiality provision in the agreement. VCL maintains inter alia that it did not improperly disclose the Settlement Agreement and, even if it had, Crystal Sky failed to proffer admissible evidence of resulting damage. The Court agrees with VCL.

The confidentiality provision establishes that the parties could disclose the Settlement Agreement's terms "to the extent such disclosure is necessary to satisfy contractual obligations with third parties." SA ¶ 6. It is undisputed that VCL disclosed the Settlement Agreement to individuals at BFF/Octave. It is also undisputed that VCL had a contract with BFF obligating VCL to disclose to BFF/Octave certain financial information. VCL submitted unrefuted testimony that VCL was required by the BFF Agreement to disclose the Settlement Agreement to BFF/Octave. Welles Dep. 26:16-27:11; 27:21-28:25 (Rose Decl. (Docket # 65) Ex. 2). Hence, VCL argues that the disclosure to BFF/Octave could not constitute a breach of the Settlement Agreement. Crystal Sky does not provide a coherent argument in response. Rather, Crystal Sky states generically that VCL breached the Settlement Agreement by disclosing it to "third parties other than those within the specifically enumerated categories of parties" in the confidentiality provision. See Opp'n at 11-12; Paul Decl. ¶ 21. Such conclusory assertions are not sufficient to withstand summary judgment. See, e.g., Hansen, 7 F.3d at 138. Summary judgment on this claim as it relates to BFF/Octave is therefore appropriate.

Crystal Sky also asserts that Ruth made disclosures regarding the Settlement Agreement (and, purportedly, about Crystal Sky's non-performance) to Mirko Ikonomoff and other unidentified persons in the entertainment industry. See Paul Decl. ¶ 25. Crystal Sky's evidence of such purported disclosures consists of only Paul's declaration that he was told by third parties that Ruth was making such statements. Id. Such assertions are based on inadmissible hearsay that will not be considered on summary judgment. See, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distrs., 69 F.3d 337, 345 n.4 (9th Cir. 1995).[11]

[11] The parties raised many evidentiary objections in connection with the pending motion. The Court considered these objections in

Summary judgment on this claim as it relates to any individuals mentioned or alluded to in Paragraph 25 of Paul's declaration is therefore appropriate.

Crystal Sky lastly argues that VCL breached the Settlement Agreement by disclosing its terms to Cedar Lane. Notably, Ruth submitted a declaration in which he admits that he discussed this litigation with Sam Adams of Cedar Lane, including that it related to a settlement agreement between VCL and Crystal Sky. Ruth Decl. ¶ 29.[12] Adams also testified that he was told that Crystal Sky had to make payments to VCL pursuant to the schedule provided in the settlement agreement. See Adams Dep. at 60:4-7.[13] Thus, there is evidence that VCL disclosed the existence and terms of the Settlement Agreement to Cedar Lane. VCL has not provided persuasive argument that such a disclosure would not constitute a breach of the

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reaching the conclusions herein and specifically rules on several of them. But the Court declines to address all of them in this Order. Accordingly, objections not addressed explicitly herein are overruled to the extent that they are inconsistent with this Order. See Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1992).

[12] Adams testified that he became aware of the underlying dispute between VCL and Crystal Sky while he worked for Octagon Asset Management, a company affiliated with Octave and BFF. See Adams Dep. 53:2-54:15 (Rose Decl. Ex. 3). He subsequently left that company for Cedar Lane. The exact timing of when Adams became aware of the Settlement Agreement and/or some of its terms is not entirely clear based on the record before the Court. See Adams Dep. 54:20-22.

[13] VCL oddly argues that there is no evidence that it disclosed the terms of the Settlement Agreement to Cedar Lane. See Reply at 14 (citing inter alia Adams Dep. at 60:4-7). But the cited deposition testimony indicates that Adams was told that Crystal Sky was required to make payments to VCL according to the Settlement Agreement's schedule, which are clearly terms of the Settlement Agreement.

VCL also relies on Adams's testimony that he was never given a physical copy of the Settlement Agreement. See Reply at 13, 14. The confidentiality provision does not only prohibit disclosure vis-a-vis a party providing a copy of the Settlement Agreement to a third party, but also more broadly prohibits a party from "disclos[ing] any information about or concerning the terms or provisions of this Settlement Agreement." SA ¶ 6 (emphasis added).

confidentiality provision.[14] Accordingly, a genuine issue of fact exists as to whether VCL breached the Settlement Agreement by disclosing its terms to Cedar Lane.

Nonetheless, the breach of contract counterclaim fails as it relates to Cedar Lane for the independent reason that Crystal Sky failed to establish a genuine issue of fact that it was damaged as a result of any breach. On that issue, Paul asserts that:

> Sam Adams at Cedar Lane told me that he would not loan more money to Crystal Sky because Crystal Sky was involved in a dispute with VCL. Mr. Adams reasoned that if Crystal Sky was not paying VCL, Cedar Lane would not loan additional funds to Crystal Sky, thereby lowering the amount of the capital commitment that the fund was to provide to Crystal Sky as a result of the disclosure of the Settlement Agreement by VCL to [sic] the Cedar Lane.

Paul Decl. ¶ 22. Paul's statements fail to establish a triable issue of fact. Most importantly, Crystal Sky is relying on hearsay that will not be considered by the Court. Anheuser-Busch, 69 F.3d at 345 n.4. That leaves Crystal Sky solely with the assertion that, after the disclosure, Cedar Lane declined to provide financing to Defendants. Even assuming as true that Cedar Lane declined to provide funds to Crystal Sky, that fact standing alone is not sufficient to withstand summary judgment. In particular, VCL provided unrefuted testimony from Adams that the disclosure did not adversely impact Crystal Sky's ability to obtain funds from Cedar Lane. Adams Dep. at 63:17-25, 64:10-21, 65:16-21. To the contrary, his testimony establishes that the disclosure actually increased the likelihood that Crystal Sky would receive funding. See Adams Dep. at 58:19-21, 65:16-24. As Crystal Sky offered no admissible evidence to refute that testimony, it failed to create a triable issue of fact that it was damaged by any disclosure to Cedar Lane. VCL is entitled to summary judgment as to Crystal Sky's breach of contract counterclaim as it relates to Cedar Lane, as well.

Accordingly, the Court **GRANTS** VCL's motion for summary judgment as to Crystal Sky's breach of contract counterclaim in its entirety.

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[14] The confidentiality provision allows for disclosure "in any litigation to enforce the terms of this Settlement Agreement." SA ¶ 6. VCL did not identify language in the confidentiality provision allowing for disclosure of the Settlement Agreement's terms to third parties not involved in the litigation, such as Cedar Lane.

VI. CRYSTAL SKY'S INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE COUNTERCLAIM AGAINST VCL AND RUTH

VCL lastly moved for summary judgment as to Crystal Sky's counterclaim for intentional interference with prospective economic advantage. A counterclaimant can only prevail on a claim for intentional interference with prospective economic advantage by showing: (1) an economic relationship between the counterclaimant and some third party with the probability of future economic benefit to the counterclaimant; (2) the counterdefendant's knowledge of the relationship; (3) intentional acts by the counterdefendant designed to disrupt the relationship; (4) actual disruption of the relationship; (5) economic harm to the plaintiff proximately caused by the acts of the defendant; and (6) conduct that was wrongful by some legal measure other than the fact of interference itself. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1164-65 (2003); Della Penna v. Toyota Motor Sales, USA, Inc., 11 Cal.4th 376, 380 n.1, 392-93 (1995).

Crystal Sky failed to present evidence creating a genuine issue of fact on this claim. For example, Crystal Sky failed to come forward with admissible evidence that Counterdefendants engaged in wrongful conduct. Crystal Sky's counterclaim is premised on disclosures purportedly made by Counterdefendants to third parties; but, as noted above, there was only a triable issue of fact that Counterdefendants improperly disclosed the Settlement Agreement to Cedar Lane. See Section V. Even assuming Counterdefendants breached the confidentiality provision, however, that would not constitute wrongful conduct sufficient to state a claim for intentional interference with prospective economic advantage. See First Advantage Background Servs. Corp. v. Private Eyes, Inc., No. C-07-2424 SC, 2007 WL 2572191, at *2 (N.D. Cal. Sept. 5, 2007).[15]

Accordingly, the Court **GRANTS** summary judgment on Crystal Sky's counterclaim of intentional interference with prospective economic

[15] Crystal Sky also alleged that Counterdefendants made "false and defamatory statements." See First Amended Counterclaims at ¶ 18. Crystal Sky provides essentially no discussion of this allegation. As discussed above, Crystal Sky's evidence of Counterdefendants' statements to third parties is based almost entirely on hearsay that will not be considered on summary judgment. Moreover, Crystal Sky failed to submit evidence of any statements by Counterdefendants that were actually *false*. Accordingly, to the extent that this counterclaim is based on purported defamation, there is no triable issue of fact.

advantage.

VII. CONCLUSION

For the reasons stated above, the Court **GRANTS** VCL's motion for summary judgment on its claim for breach of contract and on Crystal Sky's counterclaim against it for breach of contract. The Court also **GRANTS** VCL's and Ruth's motion for summary judgment on Crystal Sky's counterclaim for intentional interference with prospective economic advantage.

For the reasons stated above, the Court **DENIES** VCL's motion as to its claim for promissory fraud against Crystal Sky and Paul. The Court previously vacated the scheduled dates for the final pretrial conference and trial. See May 15, 2009 Minute Order (Docket # 74). In light of the Court's denial of VCL's motion on its promissory fraud claim, the parties are **ORDERED** to meet and confer on new pretrial and trial dates, and to submit a joint proposal to the Court no later **October 6, 2009.**

IT IS SO ORDERED.

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