IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ISAAC A. POTTER, JR.,

Plaintiff,

v.

DARK HORSE COMICS, INC., MICHAEL RICHARDSON, PAULINA GANUCHEAU, KEVIN PANETTA, and ROBERTA BREN,

Defendants.

Case No. 3:16-cv-02090-SB

FINDINGS AND RECOMMENDATION

BECKERMAN, Magistrate Judge.

Isaac Potter, Jr. ("Plaintiff"), a Florida resident proceeding *pro se*, brings this action against Dark Horse Comics, Inc. ("Dark Horse"), Michael Richardson ("Richardson"), Paulina Ganucheau ("Ganucheau"), Kevin Panetta ("Panetta"), and Roberta Bren ("Bren") (collectively, "Defendants"), alleging claims for violation of the Copyright Act, 17 U.S.C. §§ 101-1332; trademark infringement under the Lanham Act, 15 U.S.C. §§ 1051-1127; violation of the Economic Espionage Act ("EEA"), 18 U.S.C. §§ 1831-39; violation of the Anti-Cybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d); and fraud. (Am. Compl. at 3, 9, 12-14.) Dark Horse, Richardson, Ganucheau, and Panetta (collectively, the "Moving Defendants") move to dismiss Plaintiff's amended complaint, pursuant to FED. R. CIV. P. 12(b)(6). The Court

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has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. For the reasons explained below, the Court recommends that the district judge grant the Moving Defendants' motion to dismiss (ECF No. 61). [1]

BACKGROUND

Plaintiff initiated the present action on October 28, 2016. On May 17, 2017, the undersigned recommended that the district judge dismiss Plaintiff's complaint without prejudice. In so recommending, the undersigned noted that: (1) Plaintiff "has filed at least *eleven* federal actions in different courts in the last seven years in relation to [the] same copyright and trademark claims" at issue in this proceeding; (2) Plaintiff has a history of submitting incomprehensible filings, failing to respond to substantive arguments post-conferral, and failing meaningfully to participate in court proceedings; (3) Plaintiff's complaint should be dismissed because it included undifferentiated allegations against multiple defendants and, therefore, failed to provide Defendants with the notice required under FED. R. CIV. P. 8; (4) Plaintiff's conclusory allegations of fraud failed to satisfy the particularity requirement of Fed. R. Civ. P. 9(b); (5) Plaintiff's copyright claim failed because he failed plausibly to allege that the two works in question (drawings titled "Zodiac Knights 2000" and a comic book titled "Zodiac Starforce") were strikingly or substantially similar; (6) Plaintiff's bare allegations were insufficient to support claims for cyberpiracy or cybersquatting under the ACPA; and (7) Plaintiff's claim under the EEA failed as a matter of law because there is no private right of action under the

[1] Bren was added as a defendant in Plaintiff's amended complaint (Am. Compl. at 2), but she has yet to make an appearance and does not appear to have been served. As discussed below, Plaintiff has failed to state a claim for relief or cure previously-identified deficiencies in his complaint. Accordingly, the Court recommends that the district judge dismiss Plaintiff's claims against Bren as well.

EEA. *Potter v. Dark Horse Comics, Inc.*, No. 16-2090, 2017 WL 2642973, at *1-3 (D. Or. May 17, 2017).

In an Order dated June 16, 2017, the district judge adopted the undersigned's Findings and Recommendation over Plaintiff's objections, dismissed Plaintiff's complaint without prejudice, ordered Plaintiff to cure the deficiencies identified in his complaint within fourteen days, and warned Plaintiff that "[f]ailure to timely amend, diligently prosecute this case, or follow court orders, will result in the dismissal of this proceeding with prejudice." *Potter v. Dark Horse Comic, Inc.*, No. 16-2090, 2017 WL 2642276, at *1 (D. Or. June 16, 2017) (Hernández, J.).

Plaintiff timely filed an amended complaint, and it was entered on the court's docket on July 6, 2017. *See* ECF No. 60, noting that the amended complaint and attached exhibit were "[e]ntered: 07/06/2017". Plaintiff's amended complaint is largely incomprehensible and is not the same version that was initially served on the Moving Defendants. (*See* Defs.' Mot. Dismiss at 2 n.1, explaining that, unlike the version initially served on the Moving Defendants, the amended complaint entered on CM/ECF includes an "irrelevant" sixty-three page exhibit titled "Statement of Claim," which appears to be a copy of a "Petition to Cancel" that Plaintiff filed with the United States Patent and Trademark Office on March 15, 2013, regarding a "Knights of the Zodiac" trademark that is registered to nonparty Toei Animation Co. Ltd. Corporation ("Toei Animation").) In addition to the "Petition to Cancel" exhibit, Plaintiff's amended complaint consists of the same deficient allegations that were included in his original complaint; a portion of the docket sheet from this case; email correspondence between Plaintiff, the Moving Defendants' counsel, and the undersigned's courtroom deputy; a number of notices of electronic filing generated by the district court's CM/ECF system; a number of Internet links that reference

the word "Zodiac"; and a number of citations to and quotations of various statutes, federal and local procedural rules, case law, and *Black's Law Dictionary*. (Am. Compl. at 1-34; *id*. Ex. 1, at 1-63.)

On July 10, 2017, the Moving Defendants filed a motion to dismiss Plaintiff's amended complaint, pursuant to FED. R. CIV. P. 12(b)(6).[2] In their motion, the Moving Defendants note, among other things, that "[t]his lawsuit has underscored Plaintiff's perpetual misuse of the judicial system by filing dozens of meritless lawsuits," that Plaintiff's amended complaint simply "rehashes the same deficient allegations" from his original complaint, and that Plaintiff's failure to cure those deficiencies should be treated as a "conce[ssion] that he is unable to allege additional facts." (Defs.' Mot. Dismiss at 2.) The Court took the motion under advisement on July 28, 2017.

ANALYSIS

I. STANDARD OF REVIEW

The Ninth Circuit has "held that dismissal for failure to state a claim is 'proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.'" *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In evaluating the sufficiency of a complaint's factual allegations, district courts must "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-

[2] Contrary to Plaintiff's suggestion, the Moving Defendants timely filed their motion to dismiss. The Moving Defendants did not receive a true and complete copy of Plaintiff's amended complaint until they were served through the district court's CM/ECF system on July 6, 2017. (*See* Clarke Decl. ¶¶ 2-4.) The Moving Defendants timely filed their motion to dismiss four days later, on July 10, 2017. *See* FED. R. CIV. P. 15(a) ("Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within [fourteen] days after service of the amended pleading, whichever is later.").

moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (citation omitted). District courts "are not, however, required to accept as true allegations that contradict exhibits attached to the complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id.* Nor are district courts required to accept as true allegations that simply recite the elements of a cause of action. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Ultimately, surviving a motion to dismiss requires that the complaint "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

II. DISCUSSION

The Moving Defendants argue that Plaintiff's amended complaint fails to state a claim upon which relief may be granted. As explained below, the Court agrees that Plaintiff has failed to state a claim for relief, and therefore recommends that the district judge grant the Moving Defendants' motion to dismiss. The Court further recommends that Plaintiff's amended complaint be dismissed with prejudice in light of his failure to cure the previously-identified deficiencies.

A. Fraud

Pursuant to Fed. R. Civ. P. 9(b), "a plaintiff 'must state with particularity the circumstances constituting fraud.'" *Puri v. Khalsa*, 674 F. App'x 679, 687 (9th Cir. 2017) (citation omitted). In other words, "the plaintiff must allege 'the who, what, when, where, and how of the misconduct charged,' including what is false or misleading about a statement, and why it is false." *Id.* (quoting *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)).

Under his fraud claim, Plaintiff alleges that "the Defendants were aware of the following infractions," and he then quotes the elements of a claim for theft of trade secrets under the EEA, 18 U.S.C. § 1832, and cites a number of Internet links that include the word "Zodiac." (Am. Comp. at 13-14) (all caps omitted). The Court concludes that Plaintiff's allegations fail to satisfy the particularity requirements of Fed. R. Civ. P. 9(b). *See Puri*, 674 F. App'x at 687 (stating that "[m]ere conclusory allegations of fraud are insufficient," and that "[b]road allegations that include 'no particularized supporting detail' [also] do not suffice") (citations and quotation marks omitted). Accordingly, the Court recommends that the district judge dismiss Plaintiff's fraud claim.

B. EEA

Plaintiff also brings claims against Defendants for violating the EEA. (Am. Compl. at 3, 9, 14.) There is no private right of action under the EEA. *See Sorodsky v. U.S. Attorney*, No. 12-4420, 2012 WL 4891697, at *3 (E.D.N.Y. Oct. 11, 2012) (dismissing a *pro se* plaintiff's EEA claim for the same reason); *Taylor v. U.S. Patent & Trademark Office*, No. 12-3851, 2012 WL 5873685, at *1 (N.D. Cal. Nov. 20, 2012) ("EEA is a criminal statute and does not afford a private right of action to any civil plaintiff. Therefore, plaintiff has failed to state a claim upon which relief may be granted."); *Cooper Square Realty Inc. v. Jensen*, No. 04-1011, 2005 WL 53284, at *1 & n.3 (S.D.N.Y. Jan. 10, 2005) (noting that "congressional intent—articulated in the text of the EEA as well as its legislative record—expressly and unambiguously demonstrates that Congress did not establish a private cause of action in the EEA"). Accordingly, the Court recommends that the district judge grant the Moving Defendants' motion to dismiss Plaintiff's EEA claim.

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C. Copyright and Trademark Infringement

1. Applicable Law

To state a claim for copyright infringement, Plaintiff "had to allege facts plausibly showing that the defendants copied the protected elements in [his] work." *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 668 F. App'x 803, 803 (9th Cir. 2016) (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000)). A plaintiff can satisfy this standard by plausibly alleging "either that the two works in question are strikingly similar, or . . . that they are substantially similar and that the defendant had access to the plaintiff's work." *Id.* In order to allege "striking or substantial similarity," a plaintiff can, for example, describe the work's "protectable elements" and identify "those same elements" in the defendants' work. *Id.* at 803-04 (citation omitted).

To state a claim for trademark infringement, Plaintiff must "plead the following: (1) a valid, protectable trademark; and, (2) that the defendant's use of the mark is likely to cause confusion." *Advanced Transit Dynamics, Inc. v. Ridge Corp.*, No. 15-1877, 2016 WL 6804918, at *5 (C.D. Cal. Feb. 1, 2016) (citing *Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir. 2007)).

2. Analysis

Under his copyright and trademark claims, Plaintiff (1) cites a number of Internet links that include the "Zodiac," (2) quotes portions of the Copyright Act, correspondence between Plaintiff, the Moving Defendants' counsel, and the undersigned's courtroom deputy, and notices of electronic filing generated by the district court's CM/ECF system, and (3) alleges, in a conclusory fashion, that Defendants knowingly made a "false representation of a material fact in an application for Copyright Registration and Trademark Registration," Defendants "willfully acted," Defendants' "property Zodiac Starforce and Knights of the Zodiac infringed upon

[Plaintiff's] registered copyright and [t]rademark material Zodiac Knights 2000," and Ganucheau "had access to . . . Plaintiff's [c]opyrighted [m]aterial" when she worked for Toei Animation. (Am. Compl. at 3-12.)

With respect to his claim for copyright infringement, Plaintiff has failed to state a claim because he fails plausibly to allege that (1) any work is strikingly or substantially similar to his work, or explain how his work's "protectable elements" are striking or substantial similar to the "same elements" in Defendants' works, or that (2) Plaintiff has any exclusive right to the use of the word "Zodiac." As to his claim for trademark infringement, Plaintiff has failed to state a claim because he fails plausibly to allege that Defendants' use of a mark "is likely to cause confusion." *Advanced Transit*, 2016 WL 6804918, at *5. For these reasons, the district judge should dismiss Plaintiff's claims for copyright and trademark infringement.

D. ACPA

Plaintiff also brings claims against Defendants for cybersquatting and cyberpiracy under the ACPA. (Am. Compl. at 3, 12-13.) To state claims for cyberpiracy or cybersquatting under the ACPA, a trademark owner must plausibly allege that the defendant: "(1) registered, trafficked in, or used a domain name, (2) that is confusingly similar to the plaintiff's trademark, and (3) had a bad faith intent to profit from that domain name." *See Nucal Foods, Inc. v. Kaye*, No. 2:12-02754, 2013 WL 1680643, at *3 (E.D. Cal. Apr. 17, 2013) (setting forth the pleading standards for ACPA cyberpiracy); *Renovation Realty, Inc. v. Esplanade*, No. 13-cv-00396, 2013 WL 12114628, at *2 (S.D. Cal. May 9, 2013) (setting forth the pleading standards for ACPA cybersquatting).

Plaintiff has failed to state plausible claims for cyberpiracy or cybersquatting under the ACPA. The allegations Plaintiff includes in support of his ACPA claims consist only of (1) quotes from the ACPA, and (2) several Internet links referencing "Zodiac Starforce." (Am.

Compl. at 12-13.) As the Court explained in its initial Findings and Recommendation, such bare allegations are insufficient to support claims for ACPA cyberpiracy or cybersquatting. *See Starr*, 652 F.3d at 1216 ("[T]he factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."). Accordingly, the Court recommends that the district judge grant the Moving Defendants' motion to dismiss Plaintiff's claims under the ACPA.

E. Leave to Amend

The remaining issue is whether Plaintiff should be granted leave to file a second amended complaint. "When a district court has already granted a plaintiff leave to amend, its discretion in deciding [whether to grant leave] to amend is particularly broad.'" *Godwin v. Christianson*, 594 F. App'x 427, 428 (9th Cir. 2015) (quoting *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002)). Here, the Court recommends that the district judge dismiss Plaintiff's amended complaint with prejudice because he was given an opportunity to cure the deficiencies identified in his original complaint and failed to do so, and because the allegations in the amended complaint suggest that Plaintiff is unable to remedy the deficiencies that the Court already brought to his attention. *See Arias v. Mercy Hosp.*, 07-175, 2007 WL 1574941, at *3 (E.D. Cal. May 30, 2007) ("The Court has given [this *pro se* plaintiff] one opportunity to amend and given the insufficient allegations in the amended complaint, it does not appear that Plaintiff can remedy the above deficiencies. The Court therefore recommends that this action be dismissed without leave to amend.").

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CONCLUSION

For the reasons stated, the Court recommends that the district judge GRANT the Moving Defendants' motion to dismiss Plaintiff's amended complaint with prejudice (ECF No. 61), and enter final judgment.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 19th day of September, 2017.

Stacie F. Beckerman

STACIE F. BECKERMAN
United States Magistrate Judge