UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARK SHIN,

Plaintiff,

v.

ICON FOUNDATION,

Defendant.

Case No. 20-cv-07363-WHO

ORDER DENYING MOTION TO DISMISS COUNTERCLAIM

Re: Dkt. No. 77

Plaintiff Mark Shin moves to dismiss a class action counterclaim filed by defendant ICON Foundation ("ICON"), arguing that ICON's claims of money had and received, unjust enrichment, and restitution, and declaratory relief, are insufficiently pleaded or barred as a matter of law. The motion to dismiss is GRANTED in part and DENIED in part, with leave to amend. ICON has failed to sufficiently plead ownership of the cryptocurrency tokens at issue, as required for its money had and received claim. But the unique circumstances here support unjust enrichment as an appropriate cause of action—as pleaded, Shin knowingly took advantage of a software defect to arrogate to himself over 13 million ICX tokens, to the detriment of others in the ICON Community. ICON's claim for declaratory relief may also proceed, as it offers a remedy—the destruction of the currency at issue—distinct from the surviving substantive claim.

BACKGROUND

This appears to be a case of first impression, involving the ownership of cryptocurrency. The parties agree that Shin used a software glitch to create the cryptocurrency at issue. They disagree, however, as to who lawfully possesses it and what legal standards should apply.

The ICON Network hosts a "delegated proof of stake" blockchain protocol, which allows for the creation and transaction of a cryptocurrency called "ICX." Countercl. [Dkt. No. 69-1] ¶¶ 1

17. The ICON Network is decentralized—it is "not controlled or maintained by any single entity, but exists simultaneously on computers all over the world."[1] *Id*. at ¶ 13. All ICX holders have a say in the ICON Network's operation and governance, in part by selecting delegates (called "Public Representatives" or "P-Reps") to "serve in a governance role and to validate Network transactions." *Id*. at ¶¶ 17-20. There are currently 143 P-Reps, however only the top 22 "Main P-Reps" validate transactions and govern the ICON Network, including the proposal and approval of any material software updates. *Id*. at ¶¶ 19-20. The ICON Network also has a publicly available constitution that outlines its guiding and operating principles for "ICONists"—those who participate in the ICON Network. *Id*. at ¶ 21.

In order to select delegates, ICX holders "stake" and "delegate" their tokens as votes. *Id*. at ¶ 18. To encourage ICX holders to participate in this process, the ICON Network rewards users who stake their tokens. *Id*. at ¶ 22. ICX holders "receive staking rewards based on the amount of ICX they have staked for as long as it remains staked." *Id*. The Network sends the reward scores to the ICX holder's "wallet," which the holder can then redeem for ICX. *Id*. at ¶ 25. A user can redeem a reward score of 1,000 for 1 ICX. *Id*. However, ICX holders do not earn rewards for unstaking their tokens. *Id*. at ¶ 22.

On August 22, 2020, the Main P-Reps approved a software update ("Revision 9") to the ICON Network. *Id*. at ¶ 28. Despite pre-release testing, the update contained a software defect that allowed users to generate and receive an "amount of tokens equal to the number of tokens that the user was attempting to unstake." *Id*. at ¶¶ 29-30.

The same day that the Revision 9 update was released, Shin attempted to unstake 25,000 of his ICX tokens to redelegate them from one P-Rep to another. *Id*. at ¶ 31. Because of the glitch, he immediately received 25,000 tokens instead. *Id*. Shin repeated the process and, "in a matter of hours," had received almost 14 million new ICX tokens. *Id*. at ¶¶ 33-34. At the time, each token

[1] The party in this suit, the ICON Foundation, "was formed to develop and support the ICON Network." Countercl. at ¶ 7. The ICON Foundation is the largest holder of ICX tokens, owning about 10% of the total supply. *Id*. What ICON refers to as the "ICON Community" is broader, consisting of "owners of ICX, software developers, vendors . . . municipal governments, financial

was worth about 65 cents, meaning the total haul was worth nearly $9 million. *Id*. at ¶ 35. Its value today is more than $21 million. *Id*.

Members of the ICON Community attempted to recover the ICX at issue from Shin, but he refused to return it. *See id*. at ¶ 47. ICON contends that Shin funneled the ICX tokens to third-party exchanges, relatives, and acquaintances "in an effort to put them beyond the reach of the Network." *Id*. at ¶¶ 41-42.

Shin filed suit on October 20, 2020, seeking declaratory judgment that he owned the ICX tokens at issue and alleging claims of conversion, trespass to chattel, and prima facie tort against the ICON Foundation. Dkt. No. 1. After two rounds of motions to dismiss, his case has narrowed to claims of conversion and trespass to chattel. *See* Dkt. No. 68.

On August 23, 2021, ICON filed a class action counterclaim against Shin, bringing two causes of action: money had and received, unjust enrichment, and restitution; and declaratory relief. *See* Dkt. No. 69-1. Shin filed this motion to dismiss on September 20, 2021.[2] Dkt. No. 77. I heard arguments from both parties on December 1, 2021.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted

[2] Shin alternatively argued that I should strike the class allegations in ICON's counterclaim, along with references to an ongoing criminal case related to the events described here. *See* Mot. to Dismiss ("MTD") [Dkt. No. 77] 21-24. This motion is DENIED in part and GRANTED in part. Motions to strike are "generally disfavored because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice." *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). Shin's arguments about whether the proposed class is contrary to ICON's theory of the case or whether the requisite commonality or typicality exist will be more thoroughly and better addressed on a motion for class certification. I will, however, strike

unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555, 570.

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

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

DISCUSSION

As a preliminary matter, although ICON pleaded its first cause of action as "money had and received / unjust enrichment / restitution," the parties treated money had and received and unjust enrichment as separate claims in their briefing and at oral argument. *See* Countercl. at 20-21. I also treat them as separate claims, primarily because after accepting ICON's allegations as true and drawing all reasonable inferences in its favor, one better fits the unique facts and circumstances at hand.

I. UNJUST ENRICHMENT

Unjust enrichment, "which is synonymous with 'restitution,'" describes the theory that "a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (citations omitted). "When a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." *Id.* (citation omitted). This is a form of equitable relief which is "not

appropriate where an adequate remedy exists at law." *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009). Unjust enrichment "applies where plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009). The elements of a claim of unjust enrichment are: "(1) receipt of a benefit and (2) unjust retention of the benefit at the expense of another." *Epic Games, Inc. v. Apple Inc.*, --- F. Supp. 3d ----, 2021 WL 4128925, at *125 (N.D. Cal. 2021).

Courts disagree as to whether unjust enrichment is a standalone claim under California law. *See, e.g., Abuelhawa v. Santa Clara Univ.*, 529 F. Supp. 3d 1059, 1070 (N.D. Cal. 2021) ("California does not recognize a separate cause of action for unjust enrichment."); *Brooks v. Thomson Reuters Corp.*, No. 21-CV-01418-EMC, 2021 WL 3621837, at *11-12 (N.D. Cal. Aug. 16, 2021) ("Plaintiffs can raise a standalone unjust enrichment claim."). However, the Ninth Circuit has allowed a claim for unjust enrichment "as an independent cause of action or as a quasi-contract claim for restitution." *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016). The California Supreme Court decided similarly in *Hartford Cas. Ins. Co. v. J.R. Mktg., LLC*, 61 Cal. 4th 988 (2015), when it allowed an independent claim for unjust enrichment to proceed. (The Ninth Circuit recognized the "clarification" of *Hartford* when reversing the dismissal of a claim for unjust enrichment in *Bruton v. Gerber Prods. Co.*, 703 Fed. App'x 468, 470 (9th Cir. 2017)—an unpublished but still persuasive opinion). Taken together, these cases allow unjust enrichment as a separate cause of action.

Moreover, given the novelty of the issues at hand, unjust enrichment is an appropriate cause of action here. ICON has not sufficiently pleaded another claim that would provide an adequate legal remedy, nor have the parties suggested a cause of action that better fits these facts. Notably, there is no breach of contract claim. Although Shin argued in his papers that ICON pleaded the existence of an enforceable contract, referencing the ICON constitution, the parties agreed at oral argument that there is no such contract between Shin and the ICON Foundation. See MTD at 15-16; *see also* Tr. of Dec. 1, 2021 Proceedings [Dkt. No. 93] 3-5 ("[T]he

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