

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BUNGIE, INC.,

Plaintiff,

v.

AIMJUNKIES.COM; PHOENIX  
DIGITAL GROUP LLC; DAVID  
SCHAEFER; JORDAN GREEN;  
JEFFREY CONWAY; and JAMES  
MAY,

Defendants.

C21-0811 TSZ

ORDER

THIS MATTER comes before the Court on a motion to dismiss counterclaims, docket no. 64, filed by plaintiff Bungie, Inc. (“Bungie”). Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following Order.

**Background**

Bungie creates and sells videogames, including Destiny 2. It brought this action to prevent Defendants from distributing “cheat software” relating to Destiny 2. Defendant and counterclaimant James May brings four causes of action against Bungie, three for violation of the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, and one

1 for circumvention of technological measures under 17 U.S.C. § 1201(a). *See* Countercls.  
2 at ¶¶ 1–32 (docket no. 63). May maintains and operates a personal computer on which he  
3 stores private and confidential information. *Id.* at ¶ 2. He protects access to the files on  
4 his personal computer through the use of one or more passwords and a firewall. *Id.* at  
5 ¶¶ 3, 16, 22. In October or November 2019, May accepted the terms of Bungie’s Limited  
6 Software License Agreement (“LSLA”) in order to access the Destiny 2 videogame. *Id.*  
7 at ¶ 4; Ex. A to Countercls. (docket no. 63-1). “On several occasions” between October  
8 2, 2019, and May 25, 2021, Bungie allegedly accessed May’s computer and obtained  
9 information from his personal files without his knowledge or authorization. Countercls.  
10 at ¶ 7. On information and belief, May contends that Bungie “bypassed, removed,  
11 deactivated, and/or impaired one or more of the technological measures” May used to  
12 control access to the device. *Id.* at ¶ 28. Although May agreed to the terms of the LSLA,  
13 the agreement does not provide Bungie with authorization to “surreptitiously access files”  
14 on his personal computer without his authorization. *Id.* at ¶ 6. May alleges that Bungie  
15 accessed his personal computer and downloaded information from the device on at least  
16 104 occasions. *Id.* at ¶¶ 8–9; Ex. B to Countercls. (docket no. 63-2). As a result of  
17 Bungie’s alleged conduct, May contends that he has suffered “irreparable injury and  
18 damage.” Countercls. at ¶¶ 11, 17, 23, 29.

19 Defendant and counterclaimant Phoenix Digital Group LLC (“Phoenix Digital”)  
20 brings two causes of action against Bungie, one for breach of contract and another for  
21 circumvention of technological measures under 17 U.S.C. § 1201(a). Phoenix Digital  
22 alleges that users of the cheat software at issue in this matter must agree to certain  
23

1 “Terms of Service” in order to access the software through the Aimjunkies.com website.  
2 Countercls. at ¶ 33; Ex. C to Countercls. (docket no. 63-3). Under Phoenix Digital’s  
3 Terms of Service, users agree not to “decompile, reverse engineer or otherwise inspect  
4 the internal workings” of the cheat software. Countercls. at ¶¶ 34–37. On information  
5 and belief, Phoenix Digital alleges that a Bungie employee or agent obtained a license to  
6 the cheat software on or about January 3, 2020, using the alias “Martin Zeniu.” *Id.* at  
7 ¶ 39. Phoenix Digital contends that, in violation of its terms of service, Bungie  
8 decompiled, reverse engineered and/or otherwise inspected the internal workings of the  
9 cheat software obtained by Martin Zeniu. *Id.* at ¶¶ 40–41. Phoenix Digital also alleges  
10 that Bungie improperly gained access to its proprietary “loader software,” which is used  
11 to distribute the cheat software to Phoenix Digital’s customers. *Id.* at ¶ 45. Phoenix  
12 Digital claims that it has suffered injury as a result of Bungie’s alleged conduct. *Id.* at  
13 ¶¶ 42, 48.

14 Bungie now moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss all  
15 of May’s and Phoenix Digital’s counterclaims with prejudice.

## 16 **Discussion**

### 17 **1. Motion to Dismiss Standard**

18 Although a pleading challenged by a Rule 12(b)(6) motion to dismiss need not  
19 provide detailed factual allegations, it must offer “more than labels and conclusions” and  
20 contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl.*  
21 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The pleading must indicate more than mere  
22 speculation of a right to relief. *See id.* When a pleading fails to adequately state a claim,  
23

1 such deficiency should be “exposed at the point of minimum expenditure of time and  
2 money by the parties and the court.” *Id.* at 558. A counterclaim may be lacking for one  
3 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a  
4 cognizable legal claim. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534  
5 (9th Cir. 1984). In ruling on Bungie’s motion to dismiss, the Court must assume the truth  
6 of May’s and Phoenix Digital’s allegations and draw all reasonable inferences in their  
7 favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question  
8 for the Court is whether the facts in the counterclaims sufficiently state a “plausible”  
9 ground for relief. *See Twombly*, 550 U.S. at 570. If the Court considers matters outside  
10 the pleading, it must convert the motion into one for summary judgment. Fed. R. Civ.  
11 P. 12(d). If the Court dismisses the pleading or portions thereof, it must consider whether  
12 to grant leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

13           Before addressing the merits of the motion to dismiss, the Court must decide  
14 whether to consider evidence outside of May’s and Phoenix Digital’s pleading.  
15 Defendants ask the Court to consider declarations from May and defendant David  
16 Schaefer, docket nos. 67-1 and 67-2, which provide additional factual matter in support  
17 of the counterclaims. The law is well established that, unless the Rule 12(b)(6) motion is  
18 treated as brought under Rule 56, the Court may consider only documents referenced in  
19 the pleading and evidence subject to judicial notice. *See Alexander v. Chase Bank NA*,  
20 No. C16-26, 2016 WL 1658286, at \*2 (W.D. Wash. Apr. 26, 2016). Accordingly, the  
21 Court will not consider the declarations. Further, May’s and Phoenix Digital’s reliance  
22 on these declarations demonstrates a lack of candor with the Court. The Court notes that  
23

1 substantially all of the factual allegations contained in these declarations constitute facts  
2 known to May and Phoenix Digital prior to the filing of their counterclaims.

## 3 **2. Computer Fraud and Abuse Act Claims**

4 Bungie argues that the Court should dismiss May’s three CFAA claims because  
5 (i) May does not allege a cognizable loss under the statute, and/or (ii) Bungie did not  
6 access May’s computer without authorization. “The CFAA creates criminal and civil  
7 liability for ‘acts of computer trespass by those who are not authorized users or who  
8 exceed authorized use.’” *United Fed’n of Churches, LLC v. Johnson*, -- F. Supp. 3d --,  
9 2022 WL 1128919, at \*4 (W.D. Wash. Apr. 15, 2022) (quoting *Facebook, Inc. v. Power*  
10 *Ventures, Inc.*, 844 F.3d 1058, 1065 (9th Cir. 2016)). The Ninth Circuit has held that “a  
11 person is ‘without authorization’ under the CFAA ‘when the person has not received  
12 permission to use the computer for any purpose (such as when a hacker accesses  
13 someone’s computer without any permission).” *Facebook*, 844 F.3d at 1066 (quoting  
14 *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009)). “The CFAA  
15 authorizes a person damaged by prohibited conduct to bring a civil suit only where the  
16 conduct involves one of an enumerated set of factors.” *United Fed’n of Churches*, 2022  
17 WL 1128919, at \*4 (citing 18 U.S.C. §§ 1030(g)).

18 May can only bring suit under the statute if Bungie’s alleged conduct caused “loss  
19 to 1 or more persons during any 1-year period . . . aggregating at least \$5,000 in value.”  
20 18 U.S.C. § 1030(c)(4)(A)(i)(I). Loss is defined in the statute as “any reasonable cost to  
21 any victim, including the cost of responding to an offense, conducting a damage  
22 assessment, and restoring the data, program, system, or information to its condition prior  
23

1 to the offense, and any revenue lost, cost incurred, or other consequential damages  
2 incurred because of interruption of service.” *Id.* at § 1030(e)(11). May alleges in a  
3 conclusory fashion that he suffered “irreparable injury and damage,” *see* Countercls. at  
4 ¶¶ 11, 17, 23, but he does not allege that his loss exceeded \$5,000 during a one-year  
5 period. The Court concludes that May has not sufficiently pleaded the requisite loss  
6 necessary to pursue a CFAA civil action.

7       Moreover, May has failed to sufficiently allege that Bungie accessed his personal  
8 computer and files without authorization. To support his allegation that Bungie accessed  
9 his personal computer, May relies on a document that Bungie purportedly produced  
10 during discovery in this matter. Countercls. at ¶ 8; Ex. B to Countercls. (docket no. 63-  
11 2). May, however, does not explain what this document is or how it evidences 104  
12 instances in which Bungie allegedly accessed his computer without authorization and  
13 downloaded his personal information. A claim is plausible on its face “when the  
14 [claimant] pleads factual content that allows the court to draw the reasonable inference  
15 that the [opposing party] is liable for the misconduct alleged.” *Aschcroft v. Iqbal*, 556  
16 U.S. 662, 678 (2009). Although detailed factual allegations are not required, *Twombly*,  
17 550 U.S. at 555, additional factual content is necessary. Thus, May’s first, second, and  
18 third counterclaims for violation of the CFAA are DISMISSED.

### 19 **3. Anti-Circumvention Claims**

20       Both May and Phoenix Digital bring causes of action against Bungie under the  
21 anti-circumvention provision of the Digital Millennium Copyright Act (“DMCA”), 17  
22 U.S.C. § 1201(a). To state a claim under this provision, a claimant must allege that  
23

1 (i) the work at issue was protected under the Copyright Act, (ii) the copyrighted work  
2 was protected by “a technological measure,” and (iii) the technological measure was  
3 “circumvented” in order to obtain access to the copyrighted work. *Id.* at § 1201(a)(1)(A).  
4 Importantly, neither May nor Phoenix Digital allege that Bungie accessed any  
5 copyrighted work. May, for example, alleges only that Bungie accessed “files on his  
6 personal computer’s hard drive” without addressing whether any of those files are  
7 protected under the Copyright Act. *See* Countercls. at ¶ 3. Phoenix Digital contends that  
8 Bungie accessed its “loader software,” *id.* at ¶ 44, but does not address whether the  
9 “loader software” constitutes a copyrighted work.

10 Further, Phoenix Digital has not pleaded any facts to support that its “loader  
11 software” was protected by a technological measure. Instead, Phoenix Digital merely  
12 recites this element of the cause of action. *See id.* at ¶ 45 (“Bungie defeated and  
13 compromised technological measures implemented by Phoenix Digital to preclude access  
14 to its loader software.”). Phoenix Digital’s allegations are insufficient. To state a claim  
15 under the DMCA’s anti-circumvention provision, Phoenix Digital must allege additional  
16 factual content.<sup>1</sup> *See, e.g., Philips N. Am., LLC v. Summit Imaging Inc.*, No. 19-1745,

---

17  
18 <sup>1</sup> Similarly, May and Phoenix Digital do not identify how Bungie allegedly circumvented any  
19 technological measures. Instead, the counterclaims contain nothing more than a recitation of the  
20 statutory language. *Compare* Countercls. at ¶ 28 (“Bungie bypassed, removed, deactivated,  
21 and/or impaired one or more of the technological measures Mr. May employed to control access  
22 to his computer(s) and the files and data contained thereon without the authority of Mr. May.”),  
23 *and id.* at ¶ 44 (“Bungie bypassed, removed, deactivated, and/or impaired one or more of the  
technological measures Phoenix Digital employed to control access to its proprietary programs it  
uses to distribute the ‘cheat software’ at issue here.”), *with* 17 U.S.C. § 1201(a)(3)(A) (“[T]o  
‘circumvent a technological measure’ means to . . . bypass, remove, deactivate, or impair a  
technological measure, without the authority of the copyright owner.”).

1 2020 WL 1515624, at \*3 (W.D. Wash. Mar. 30, 2020) (denying motion to dismiss where  
2 the pleading identified six technological measures used to protect claimant’s copyright-  
3 protected works). The Court, therefore, DISMISSES May’s fourth cause of action and  
4 Phoenix Digital’s second cause of action.

#### 5 **4. Breach of Contract Claim**

6 To state a claim for breach of contract, Phoenix Digital must allege (i) “the  
7 existence of a valid contract,” (ii) “breach of that contract,” and (iii) “resulting damages.”  
8 *Bailey-Medwell v. Hartford Life & Accident Ins. Co.*, No. C17-1697, 2018 WL 5264335,  
9 at \*3 (W.D. Wash. Oct. 23, 2018) (citing *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 35, 330  
10 P.3d 159 (2014)). In this case, Phoenix Digital has not sufficiently pleaded damages.  
11 Phoenix Digital alleges that Bungie’s purported breach of Phoenix Digital’s Terms of  
12 Service “has caused and is continuing to cause harm and damage.” *Id.* at ¶ 42. “But the  
13 court is not bound to accept as true mere conclusions or formulaic recitations of the  
14 elements of a claim.” *Bardy v. Cardiac Science Corp.*, No. 13-778, 2014 WL 294526, at  
15 \*5 (W.D. Wash. Jan. 27, 2014) (citing *Twombly*, 550 U.S. at 555). Phoenix Digital’s  
16 conclusory allegation that it has suffered unspecified injury and damage is insufficient,  
17 and its first cause of action for breach of contract is DISMISSED.

#### 18 **5. Leave to Amend**

19 Having dismissed May’s and Phoenix Digital’s counterclaims, the Court must  
20 decide whether to grant leave to amend. The Court considers five factors when assessing  
21 “the propriety” of a party’s request to amend a pleading: (i) “bad faith”; (ii) “undue  
22 delay”; (iii) “prejudice to the opposing party”; (iv) “futility of amendment”; and  
23



1 (v) whether the party previously amended his or her pleading. *See Allen v. City of*  
2 *Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Bungie argues that the first four factors  
3 weigh in favor of denying leave to amend. The Court agrees that Bungie has made a  
4 strong showing that the counterclaims should be dismissed with prejudice. Notably,  
5 Defendants make no attempt to explain their delay in filing the answer and counterclaims  
6 and do not even attempt to address the above-referenced factors in their response. The  
7 Court, however, is mindful that the current deadline for amending pleadings is  
8 November 21, 2022, *see* Minute Order (docket no. 44), and it should freely give leave to  
9 amend when justice so requires, Fed. R. Civ. P. 15(a)(2). Accordingly, May's and  
10 Phoenix Digital's counterclaims are DISMISSED without prejudice and with leave to  
11 amend.

## 12 **Conclusion**

13 For the foregoing reasons, the Court ORDERS:

14 (1) Bungie's motion to dismiss, docket no. 64, is GRANTED, and May's and  
15 Phoenix Digital's counterclaims, docket no. 63, are DISMISSED without prejudice and  
16 with leave to amend.

17 (2) Any amended pleading shall be filed on or before November 21, 2022, and  
18 any responsive pleading or motion shall be filed on or before December 8, 2022.<sup>2</sup>

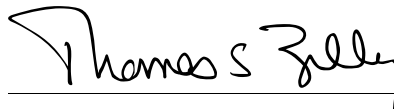
---

19  
20 <sup>2</sup> The Court recognizes that Defendants failed to submit their answer and counterclaims in the  
21 time prescribed by Rule 12(a)(4)(A). Inexplicably, Defendants' Counsel provides no  
22 explanation or justification for this delay. The Court again REMINDS all Defendants of their  
23 obligation to comply with federal rules, local rules, and the deadlines imposed by this Court.  
This Court's deadlines are not just suggestions and any request for relief from a deadline must be

1 (3) The Clerk is directed to send a copy of this Order to all counsel of record.

2 IT IS SO ORDERED.

3 Dated this 10th day of November, 2022.

4 

5  
6 Thomas S. Zilly  
United States District Judge

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21 \_\_\_\_\_  
22 brought in accordance with LCR 7(j). The Court will consider whether sanctions are appropriate  
23 if Defendants continue to disregard applicable deadlines.