

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

Habr v. RXMAPPER, LLC

Habr · No. 4:23-cv-2061-YGR · Decided July 18, 2025

OPINION

Habr v. RXMAPPER, LLC

PER CURIAM.

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 4 EDWAR HABR ET AL., Case No. 4:23-cv-2061-YGR 5 Plaintiffs, PRETRIAL ORDER NO.

3 RE: 6 v. S

SCHEDULING AND JURY INSTRUCTIONS

7 RXMAPPER, LLC, ET AL.,

8 Defendants. 9

AND RELATED COUNTERCLAIMS

10 11 In light of the Court's trial calendar in a criminal matter and the parties' additional 12
submissions on April 18, 2025, which the Court required in its Pretrial Order No. 2, the Court 13
enters the following additional pretrial orders: 14 • Trial Schedule 15 Due to the Court's
obligations for a separate a criminal trial, the trial schedule in this action 16 is revised as follows:
Jury selection will proceed as originally scheduled on Friday, August 15, 17 2025 but the parties
will be required to move directly to opening statements, and if sufficient time 18 remains, the first
witness. The trial schedule will revert to that originally provided: 19 8:30 a.m. – 10:00 a.m. (1.5
hours), then a 20-minute break 20 10:20 a.m. – 11:50 a.m. (1.5 hours), then a 40-minute break
12:30 p.m. – 2:00 p.m. (1.5 hours), then a 20-minute break 21 2:20 p.m. – 4:00 p.m. (1 hour, 40
minutes) for a daily total of 6 hours and 10 min 22 Alternatively, if both parties agree, the Court
should be able to advance the trial date to August 23 11, 2025 with a trial day ending at 1:40 p.m.
If the parties prefer that option, the parties should 24 advise the Court jointly within three business
days of this Order. 25 • Jury Instructions 26

1. Benefit-of-the-Bargain versus Out-of-Pocket Damages.

27 The Court finds that plaintiffs' fraud claim, if successful, will be limited to recovery for out- 28
of-pocket damages. Based on the parties' briefing, the Court finds that Cal. Civ. Code § 3343(a) 1
applies to plaintiffs' claim regarding the promise of equity in RxMapper, LLC. Equity in a 2
company, like RxMapper, is a form of property. Hill v. Wrather, 158 Cal. App. 2d 818, 825 (1958)
3 ("Had there been actionable fraud in the sale of the stock, the measure of damages would have
been 4 that set forth in section 3343 of the Civil Code, the so-called 'out-of-pocket' loss rule.")

5 Section 3343 expressly cabins recovery in fraud cases to “the difference between the actual
6 value of that with which the defrauded person parted and the actual value of that which he 7
received.” See also *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 236 (2003) (“In fraud cases 8
involving the ‘purchase, sale or exchange of property,’ the Legislature has expressly provided that
9 the ‘out-of-pocket’ rather than the ‘benefit-of-the-bargain’ measure of damages should apply. . .
10 Civil Code section 3343 provides the exclusive measure of damages for fraud in such cases.) In
11 California, defrauded parties are limited to recovering out-of-pocket losses, while expectation
12 damages, which plaintiffs seek, are traditionally reserved as a contractual remedy: 13 The out-
of-pocket measure “has been termed more consistent with the logic and purpose of the tort form of
action (i.e., compensation for loss 14 sustained rather than satisfaction of contractual
expectations).” *Stout v. Turney*, 22 Cal. 3d 718, 725 (1978) (citations omitted) (en banc). 15 The
benefit-of-the-bargain rule is viewed as closer to a contractual remedy, i.e., “it tends to give the
injured party the benefit of his bargain 16 and insofar as possible to place him in the same position
he would have been in had the promisor performed the contract.” *Pepitone v. Russo*, 17 64 Cal.
App. 3d 685, 689, 134 Cal.Rptr. 709 (1976) (citations omitted). 18 District courts applying
California law in this circuit have determined 19 benefit-of-the-bargain damages cannot be
recovered on a fraud claim, with the possible exception of fraud by a fiduciary. 20 21 *Kelley v.*
Fundomate, Inc., 773 F.Supp.3d 899, 925–926 (C.D. Cal. 2025); see also *City Sols., Inc.* 22 *v.*
Clear Channel Commc’ns, Inc., 242 F.Supp.2d 720, 726–32 (N.D. Cal. 2003), *aff’d in part, rev’d*
23 *in part sub nom. City Sols., Inc. v. Clear Channel Commc’ns*, 365 F.3d 835 (9th Cir. 2004)
(same). 24 Plaintiffs cite no authority to establish that they would be entitled to expectation
damages 25 (i.e. benefit-of-the-bargain damages). The authority that plaintiffs cite, *Cupps v.*
Mendelson, is 26 unpublished, involves concessions not made here, and does not otherwise
persuade. 2010 WL 27 1366996 (Cal. Ct. App. Apr. 7, 2010). Moreover, even under Cal. Civ.
Code § 3333, which 28 plaintiffs favor, plaintiffs cannot recover benefit-of-the-bargain damages.
Michelson v. Camp, 72 1 Cal.App.4th 955, 973 (1999) (“Thus, the [California] Supreme Court is
clearly of the view that 2 damages for fraud which induces the making of a real estate loan,
whether sought under section 3 3343 or section 3333, will be limited to the plaintiff’s out-of-
pocket losses, plus any consequential 4 damages, unless the defendant is a fiduciary.”); *Auble v.*
Pacific Gas & Elec. Co., 55 F.Supp.2d 5 1019, 1022–23 (N.D.Cal.1999) (“In California, in the
absence of a fiduciary relationship, recovery 6 for the tort of fraud is limited to the actual, out-of-
pocket damages suffered by the plaintiff.”) 7 (citations omitted); *All. Mortg. Co. v. Rothwell*, 10
Cal. 4th 1226, 1240 (1995) (“In California, a 8 defrauded party is ordinarily limited to recovering
his ‘out-of-pocket’ loss”). 9 Plaintiffs cannot recover “benefit of the bargain” damages unless they
show (1) a fiduciary 10 relationship, and (2) that defendant made intentional misrepresentations.
Because plaintiffs do not 11 make that showing here as to a fiduciary duty, they cannot recover
expectation damages. 12 The Court denies plaintiffs request for a jury instruction in this regard.
Rather, proposed 13 jury instruction 42.1-D on this issue will be given. 14 2. Mitigation of

Damages for Intentional Misrepresentation. 15 The parties dispute whether defendants may raise an affirmative defense for mitigation of 16 damages. The Court agrees with defendants that the affirmative defense raises a factual issue to be 17 resolved by the jury. Plaintiffs' arguments are not based upon law, i.e. on the ground that they are 18 not legally allowed, but on the application of the facts to the law. At trial, plaintiffs may raise the 19 same arguments that it raises in the joint supplemental issue briefing. Proposed jury instruction 34 20 on this issue will be given. 21 3. Conversion of Intellectual Property. 22 Plaintiffs dispute whether intellectual property (here, RxMapper's source code) can be the 23 subject of a conversion claim. The Court preliminarily agrees with defendants that a source code 24 can be converted. Although not all intellectual property can be converted, the Court is satisfied at 25 this juncture that sufficient evidence can be presented to a jury to support the claim. Courts in the 26 Ninth Circuit apply a three-part test in this context: "First, there must be an interest capable of 27 precise definition; second, it must be capable of exclusive possession or control; and third, the 28 putative owner must have established a legitimate claim to exclusivity." *Kremen v. Cohen*, 337 1 || F.3d 1024 (9th Cir. 2003) (concluding that a domain name can be the subject of a conversion 2 || claim); see also, *Eng. & Sons, Inc. v. Straw Hat Restaurants, Inc.*, 176 F. Supp. 3d 904, 921 (N.D. 3 || Cal. 2016) (applying *Kremen*). Should the evidence presented support each prong, defendants will 4 || be permitted to submit their conversion counterclaim to the jury. Proposed jury instructions 5 || numbers 62—64 on this issue are preliminarily allowed. 6 4, Defendants' Basis for Lanham Act Claim, ! 7 At the February conference, the Court raised concerns about the defendants' ability to prove 8 || actual confusion and requested that defendants submit authority on that point. In the filing, the 9 || parties dispute the sufficiency of the evidence and provide no specific authority on the issue raised. 10 || Accordingly, the Court will defer until the charging conference whether sufficient evidence was 11 || presented at trial to warrant an instruction. In the event defendant has, the relevant instructions 12 || (Nos. 65-68) will be included preliminarily. E 13 5 14 IT IS SO ORDERED. Gy 16 || Date: July 18, 2025

a YVONNE GONZAL OGERS

17 NITED STATES DISTRICT COURT JUDGE

Z 19 20 21 22 23 24 25 26 27 . . ' To the extent that plaintiff is considering filing a motion for summary judgment on this or 28 the Lanham Act claim, leave is denied. The deadline for filing any such motion was November 22, 2024 and has long since passed.