

1 Joseph R. Taylor (SBN 129933)
 jtaylor@fkks.com
 2 Tricia L. Legittino (SBN 254311)
 tlegittino@fkks.com
 3 Jessica R. Medina (SBN 302236)
 jmedina@fkks.com
 4 FRANKFURT KURNIT KLEIN & SELZ PC
 2029 Century Park East, Suite 1060
 5 Los Angeles, CA 90067
 Telephone: (310) 579-9600
 6 Facsimile: (310) 579-9650

7 Attorneys for Counter-Defendants GOG Sp. z o.o.
 (incorrectly sued herein as GOG Limited and GOG
 8 Poland Sp. Z.o.o.)

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

12 STARDOCK SYSTEMS, INC.

13 Plaintiff,

14 vs.

15 PAUL REICHE III and ROBERT
 FREDERICK FORD,

16 Defendants.

17 AND RELATED COUNTERCLAIM
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Case No. 4:17-cv-07025

**REPLY MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 FURTHER SUPPORT OF GOG
 COUNTER-DEFENDANTS'
 MOTION TO DISMISS COUNT
 NINE OF SECOND AMENDED
 COUNTERCLAIM**

Date: March 13, 2019
 Time: 2:00 p.m.
 Courtroom: TBD
 Judge: Hon. Sandra Brown Armstrong

1 **I. INTRODUCTION**

2 The central argument in GOG’s Motion to Dismiss Count Nine of Reiche and
3 Ford’s Second Amended Counterclaim (the “Motion”) is that Reiche and Ford failed
4 to plead a factually-sufficient fraud claim against GOG pursuant to Rule 9(b).
5 Rather than address this issue head-on in their Opposition, Reiche and Ford spend
6 the entirety of their Opposition (which contains less than one page of substantive
7 text) regurgitating the conclusory allegations in the SAC and then essentially
8 concede the Motion by requesting leave to amend.

9 However, the Motion and the Opposition make it abundantly clear that Reiche
10 and Ford should never have filed this claim against GOG because the facts simply
11 do not exist to adequately plead a fraud claim before this Court. As a result, the
12 Motion should be granted and leave to amend denied because amendment would be
13 futile, and Reiche and Ford have not shown otherwise.

14 **II. ARGUMENT**

15 **A. Reiche and Ford’s Fraud Claim Against GOG Does Not Satisfy Rule 9(b)**

16 Reiche and Ford concede that their fraud claim is governed by Rule 9(b),
17 which requires them to “identify ‘the who, what, when, where, and how of the
18 misconduct charged,’ as well as what is false or misleading about [the purportedly
19 fraudulent] statement and why it is false.” *Cafasso, U.S. ex rel. v. Gen. Dynamics*
20 *C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (citation omitted). Although both
21 the SAC and the Opposition *say* that that GOG concealed information it had a duty
22 to disclose, the SAC fails to plead a single fact required to support this allegation.
23 This is wholly insufficient pursuant to Rule 9(b) and, as a result, Count Nine of the
24 SAC must be dismissed for this reason alone.

25 Dismissal is also appropriate because the Opposition does not address or
26 respond to the substantive arguments made in the Motion. *Silva v. U.S.*
27 *Bancorp*, 2011 WL 7096576, at *3 (C.D. Cal. Oct.6, 2011) (“[T]he Court finds that
28 Plaintiff concedes his . . . claim should be dismissed by failing to address

1 Defendants’ arguments in his Opposition.”); *Tatum v. Schwartz*, 2007 WL 419463,
2 at *3 (E.D. Cal. Feb.5, 2007) (holding that plaintiff “tacitly concede[d]” that her
3 claim should be dismissed by failing to address the defendants’ argument in
4 opposition).

5 In the Motion, GOG argued that Reiche and Ford failed to plead *any of the*
6 *elements* of a fraudulent concealment claim with the requisite particularity. *See*
7 Mot. at pp. 6-9. In response to this showing within the Motion, Reiche and Ford’s
8 Opposition simply recommitts the same offense that the SAC is guilty of: nowhere
9 in the 15 lines of the Opposition’s “Argument” is there any reference to any
10 paragraph of the SAC wherein facts demonstrating the particulars of any fraudulent
11 concealment are plead with any degree of particularity whatsoever. Instead, Reiche
12 and Ford merely rehash the speculative, general, and conclusory allegations from
13 the SAC. *See* Opp. at 3. Those conclusory allegations offer no “factual
14 enhancement” for their claim, and so their fraud claim must be dismissed. *Ashcroft*
15 *v. Iqbal*, 556 U.S. 662, 696 (2009).

16 **B. Reiche and Ford’s Fraud Claim Should Be Dismissed With Prejudice**

17 Reiche and Ford spend much of their three-page Opposition arguing that if
18 the fraud claim is dismissed, it should be without prejudice so that may re-plead and
19 try again. There is no basis for that request as there is no reason to think that
20 another bite at the apple would yield a different result. Indeed, Reiche and Ford’s
21 Opposition did not even attempt to demonstrate what *facts* they could possibly plead
22 to support a viable fraud claim. To the contrary, the Opposition makes crystal clear
23 that Reiche and Ford’s fraud claim is based on nothing more than *speculation*, not
24 facts. *See* Opp. at 2 (“*In the event that* Stardock Systems, Inc’s *allegations are*
25 *true*, then GOG fraudulently concealed the alleged lapse of its separate and
26 confidential trademark license agreement with Atari”) (emphasis added). This is
27 plainly insufficient.

28 Reiche and Ford *waited nearly a year* before dragging GOG into the case

1 during which time they participated in discovery in the main action and received
 2 nearly 1,200 pages of documents from GOG in response to a subpoena. If Reiche
 3 and Ford had the facts to plead a factually sufficient fraud claim against GOG, they
 4 would have. Moreover, Reiche and Ford did not even explain to the Court how they
 5 could amend their fraud claim to meet the stringent requirements of Rule 9(b). The
 6 fraud claim against GOG is irretrievably flawed, and its dismissal should be final
 7 and with prejudice. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d
 8 1034, 1041 (9th Cir. 2011) (“a district court may dismiss without leave where a
 9 plaintiff’s proposed amendments would fail to cure the pleading deficiencies and
 10 amendment would be futile”).

11 **III. CONCLUSION**

12 For the foregoing reasons, GOG respectfully requests that the Court grant its
 13 motion and dismiss Count Nine of the Second Amended Counterclaim with
 14 prejudice.

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16 Dated: February 19, 2019

FRANKFURT KURNIT KLEIN & SELZ PC

17 By: /s/ Tricia L. Legittino
 18 Tricia L. Legittino
 19 Jessica R. Medina
 20 Attorneys for Counter-Defendant
 21 GOG Sp. z o.o. (incorrectly sued herein as
 22 GOG Limited and GOG Poland Sp. Z.o.o.)
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