950 F.3d 610
United States Court of Appeals, Ninth Circuit.

BRIDGE AINA LE‘A, LLC, Plaintiff-Appellant/Cross-Appellee,
v.
State of Hawaii LAND USE COMMISSION; Vladimir P. Devens, in his individual and official capacity; Kyle Chock, in his individual and official capacity; Normand Robert Lezy, in his individual and official capacity; Duane Kanuha, in his official capacity; Charles Jencks, in his official capacity; Lisa M. Judge, in her individual and official capacity; Nicholas W. Teves, Jr., in his individual and official capacity; Ronald I. Heller, in his individual and official capacity, Defendants-Appellees/Cross-Appellants.

Nos. 18-15738
|
18-15817
|
Argued and Submitted October 21, 2019 Honolulu, Hawaii
|
Filed February 19, 2020

Synopsis

Background: Property owner filed state court action against Hawai‘i Land Use Commission, challenging reversion of 1,060 acres of land on island of Hawai‘i from urban use classification to prior agricultural use classification, seeking declaratory, injunctive, and monetary relief, and raising federal and state constitutional due process, equal protection, and takings claims. Following removal, the United States District Court for the District of Hawai‘i, Susan Oki Mollway, Senior District Judge, 125 F.Supp.3d 1051, partially granted Commission’s motion to dismiss for lack of subject matter jurisdiction and for failure to state claim, subsequently entered judgment for owner on takings claim after jury trial and awarded $1 in nominal damages, and 2018 WL 3149489, denied Commission’s renewed motion for judgment as matter of law. Parties cross-appealed.

Holdings: The Court of Appeals, Milan D. Smith, Circuit Judge, held that:

reversion did not effect regulatory taking under *Lucas*, 112 S.Ct. 2886;

reversion did not effect *Penn Central* regulatory taking; and

prior state court judgment barred owner from re-litigating equal protection issue.

Affirmed in part, reversed and vacated in part, and remanded.

Procedural Posture(s): On Appeal; Judgment; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict; Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Subject Matter Jurisdiction; Review of Administrative Decision.

Attorneys and Law Firms

***617** Bruce D. Voss (argued), Matthew C. Shannon, and John D. Ferry III, Bays Lung Rose & Holma, Honolulu, Hawaii, for Plaintiff-Appellant/Cross-Appellee.

Ewan C. Rayner (argued), Deputy Solicitor General; David D. Day, Deputy Attorney General; William J. Wynhoff, Supervising Deputy Attorney General; Clyde J. Wadsworth, Solicitor General; Department of the Attorney General, Honolulu, Hawaii; for Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court for the District of Hawaii, Susan O. Mollway, District Judge, Presiding, D.C. No. 1:11-cv-00414-SOM-KJM

Before: SUSAN P. GRABER, MILAN D. SMITH, JR., and PAUL J. WATFORD, Circuit Judges.

OPINION

M. SMITH, Circuit Judge:

This case stems from the reversion of the land use classification of 1,060 acres of largely vacant and barren, rocky lava flow land in South Kohala, on the island of ***618** Hawaii. In 2011, Defendant-Appellee and Cross-Appellant the State of Hawaii Land Use Commission (the Commission) ordered the land's reversion from its conditional urban use classification to its prior agricultural use classification. This reversion followed some twenty-two years during which various landowners made unfulfilled development representations to the Commission to obtain and maintain the land's urban use classification. Plaintiff-Appellant and Cross-Appellee Bridge Aina Le'a, LLC (Bridge), one of the landowners at the time of the reversion, challenged the reversion's legality and constitutionality in a state agency appeal, and in this case.

The cross-appeals here come to us following a final judgment in a jury trial with a verdict for Bridge and the district court's denial of a post-judgment motion for judgment as a matter of law (JMOL). Although the parties raise several issues, we need decide only two. First, we must decide whether the State[1] was entitled to JMOL on Bridge's claims that the reversion was a regulatory taking in violation of the Fifth Amendment. After an eight-day jury trial, the jury found that the reversion was such a taking. The State urges us to reverse on the ground that Bridge's evidence did not establish a taking. Second, we must decide whether the Hawaii Supreme Court's adjudication of Bridge's equal protection challenge in the state agency appeal barred the same issue Bridge alleged here. *See DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC,* 134 Hawai'i 187, 339 P.3d 685 (2014). Bridge contends that the Hawaii Supreme Court neither decided the same equal protection issue Bridge raised in this lawsuit, nor issued a final judgment on the merits in which Bridge had a full and fair opportunity to litigate the issue.

We reverse the denial of the State's renewed JMOL motion because, as a matter of law, the evidence did not establish an unconstitutional regulatory taking. We vacate the judgment and remand. We affirm the district court's dismissal of Bridge's equal protection claim.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Reclassification History of the 1,060 Acres

A. The Conditional Urban Reclassification

For over forty years before the reclassification, the 1,060 acres at issue were vacant and part of a larger 3,000 acre-parcel zoned for agricultural use. This classification generally restricted the landowner to certain statutorily specified uses. *See* Haw. Rev. Stat. § 205-2(d)(1)–(16) (setting forth the general uses for agricultural land); *see also id*. § 205-4.5 (elaborating on permissible uses of agricultural land depending on soil ratings). The landowner also could petition to obtain a permit for

"certain unusual and reasonable uses." *Id.* § 205-6(a).

In 1987, non-party Signal Puako Corporation (Signal), the then-landowner, decided that it would seek to develop a mixed residential community on the 1,060 acres as the first phase of a development project ***619** on the entire 3,000 acres. To do so, Signal petitioned the Commission to reclassify 1,060 acres as urban pursuant to Hawaii's land use reclassification procedure. *See* Haw. Rev. Stat. § 205-4(a). If the land were zoned for urban use, Signal could pursue "activities or uses as provided by ordinances or regulations of the county within which the urban district is situated." *Id.* § 205-2(b).

The Commission approved the petition in a January 1989 order (the 1989 Order). In doing so, the Commission exercised its authority to "modify the petition by imposing conditions necessary ... to assure substantial compliance with representations made by the petitioner in seeking a boundary change." *Id*. § 205-4(g). In relevant part, Condition One required Signal to make 60% of the proposed 2,760 residential units affordable, for a total of 1,656 affordable housing units. Condition Nine required Signal to develop the land in substantial compliance with representations made to obtain reclassification. The 1989 Order did not specify any deadlines, nor did the order specify any penalties for noncompliance. Nevertheless, the conditions the Commission imposed ran with the title to the land. *Id*.

At some point, non-party Puako Hawaii Properties (Puako), an entity in which Signal was a partner, took title to the 3,000 acres. Puako proposed a mixed residential community which would have fewer total housing units than Signal's proposal and for which construction would end by 1999. Puako therefore petitioned to modify the 1989 Order.

The Commission approved Puako's petition in a July 1991 order (the 1991 Order) with conditions. Like the 1989 Order, the 1991 Order required Puako to make 60% of the residential units affordable housing. But the 1991 Order reduced the required affordable housing units to 1,000 units given the reduction to the proposed development's total number of units. The 1991 Order again imposed a condition requiring Puako to develop the land in substantial compliance with its representations. This time, the Commission specified that "[f]ailure to so develop the Property may result in reversion of the Property to its former classification or change to a more appropriate classification."[2]

Notwithstanding Puako's representations, the 1,060 acres remained undeveloped by 1999. Bridge acquired the entire 3,000 acres at this time—inclusive of the 1,060 acres of conditionally reclassified urban land—for $5.2 million plus closing costs under its then-name Bridge Puako, LLC.

B. The Post-Acquisition Amendments to the Conditions

In September 2005, nearly six years after acquiring the land, Bridge moved to amend the 1991 Order in part. Like the prior landowners, Bridge proposed a ***620** mixed residential community. Bridge, however, argued that the cost of complying with the 1991 Order's affordable housing condition was too high. According to Bridge, it would be economically infeasible to develop the property without a lower level of required affordable housing units. Bridge contended that an appropriate benchmark would be the 20% level set by a then-recent County of Hawaii affordable housing ordinance.

The Commission amended the affordable housing condition in a November 2005 order (the 2005 Order). Condition One set the affordable housing unit requirement at 20%, requiring Bridge to build a minimum of 385 units. For the first time, the Commission set a deadline for the condition. Specifically, Bridge had to provide occupancy certificates for all affordable housing units by November 17, 2010. The Commission affirmed all other conditions of the 1989 Order, as amended by the 1991 Order.

Throughout 2006 and 2007, Bridge appeared before the Commission to assure the Commission of its compliance with the conditions, including through the apparent construction of wells, roads, and other infrastructure. According to Bridge, however, further progress "was hampered somewhat" by the requirement that Bridge prepare an environmental impact statement for the project in accordance with *Sierra Club v. Department of Transportation,* 115 Hawai'i 299, 167 P.3d 292 (2007).

C. The Order to Show Cause (OSC)

As early as September 2008, several commissioners expressed concerns that Bridge's status reports "showed 'no activity' with respect to the conditions imposed by the 1991 decision and order, as amended in 2005." *DW Aina Le'a Dev*., 339 P.3d at 693. In December 2008, the Commission ordered Bridge to show cause why the land should not revert to its prior agricultural use classification. The Commission explained that it had reason to believe that Bridge and its predecessors had failed to satisfy multiple reclassification conditions and had not fulfilled various representations.

The Commission held the first OSC hearing in January 2009. Notwithstanding the potential impact ongoing OSC proceedings might have on the use of the land, Bridge agreed to sell the 1,060 acres to non-party DW Aina Le'a Development, LLC (DW). Pursuant to a February 2009 written agreement, Bridge was to convey the land in three phases in exchange for a total of $40.7 million.[3] Bridge and DW would enter into a joint agreement, in which Bridge would develop the nearly 2,000 agricultural use acres remaining in its possession. Bridge would retain the right to plan for the overall 3,000 acres, including the placement of a sewage treatment plant, school, and park on the agricultural land.

On April 30, 2009, the Commission reconvened to discuss the OSC. Bridge represented to the Commission that it was in the process of transferring the 1,060 acres to DW, which would assume the responsibility of constructing the 385 affordable housing units. The State Office of Planning advocated for reversion, noting that Bridge indicated that it could not complete the 385 affordable housing units by the November 2010 deadline. Various commissioners expressed dismay at what they viewed as unfulfilled promises made to obtain the reclassification.

***621** At the conclusion of the hearing, the Commission held a voice vote on the OSC (the 2009 Voice Vote), in which seven commissioners voted to revert the zoning of the 1,060 acres to agricultural use. The Commission never put the result of the vote into a final written order.

After the 2009 Voice Vote, DW did not make any payments due pursuant to the February 2009 sale agreement. Nevertheless, in the month following the vote, DW intervened in the OSC proceedings and advised the Commission that any reversion would make development impossible, including providing the 385 affordable housing units. DW moved to stay any decision and order pending consideration of additional information, including an overall conceptual plan for the project and an affordable housing unit site plan. The Commission agreed to stay the proceedings in June 2009.

In August 2009, Bridge and DW co-petitioned the Commission to rescind the OSC, contending that they had performed, or were in the process of performing, all the conditions the OSC cited. They also contended that the 2009 Voice Vote "put an immediate and substantial cloud over the Project, making it extremely difficult in this economic environment to secure short-term or long-term financing to develop and complete the Project." Nevertheless, Bridge and DW represented that DW would still pursue completion of the 385 units by November 17, 2010, and that the units "will be provided" if the Commission rescinded the OSC. The Commission rescinded the OSC in September 2009, subject to the single "condition precedent" of requiring the construction of sixteen affordable units by March 31, 2010.

Following the OSC's rescission, Bridge and DW modified their sale agreement in December 2009 to change the timing of purchases but they retained the previously agreed-upon $40.7 million price. DW would buy a 60-acre affordable housing parcel for $5 million, effective December 11, 2009. DW also would pay Bridge "development expenses" of some $1.191 million for that parcel. The final closing date for the remaining 1,000 acres was set for February 28, 2010, by which point DW would have paid Bridge an additional $35.7 million. Consistent with this agreement, DW purchased the 60-acre parcel from Bridge in December 2009.

D. The Resumption of OSC Proceedings and the Reversion Order

On June 10, 2010, DW informed the Commission that it had completed the sixteen affordable housing units by the March 2010 deadline. In response, the State Office of Planning informed the Commission that the units were not habitable because they lacked water, a sewage system, electricity, and paved road access.

The Commission held a compliance hearing in July 2010, at which both Bridge and DW appeared. DW admitted that it lacked the money to build on the remaining 1,000 acres. The State Office of Planning requested that the Commission reopen

the OSC and advocated for reversion so that a "bona fide developer" could make a new proposal. All commissioners voted to reinstate the OSC, scheduled an OSC hearing, and entered a finding that the condition precedent had not been satisfied. About two weeks thereafter, the Commission issued an order reinstating the OSC and reiterating the 2005 Order's November 17, 2010 deadline to obtain 385 affordable housing unit occupancy certificates. Bridge contends that after the reinstatement, DW failed to make the additional $35.7 million in payments for the remaining urban land as contemplated by the modified December 2009 agreement.

***622** Bridge and DW moved to bar action on the OSC, arguing that the Commission's enforcement actions, starting with the OSC, violated various Hawaii statutes and administrative rules. At the conclusion of a second OSC hearing, however, five commissioners voted to revert the land. With the approval of a sixth commissioner, the Commission issued a final reversion order (the Reversion Order) on April 25, 2011.

The Reversion Order found that Bridge and DW had failed to comply with the 2005 Order's affordable housing condition, specifically noting that Bridge and DW had not completed 385 affordable housing units by the deadline and were unlikely to do so in the near future. Although the order acknowledged that Bridge and DW had constructed sixteen affordable housing units, the order determined that there was no infrastructure connected to them. The order outlined violations of the 1991 Order's substantial compliance condition based on representations made to the Commission between 2005 and 2010. The order also found that Bridge's and DW's procedural due process rights were not violated because they had received a full and fair opportunity to present their case. The order declined to resolve Bridge's equal protection challenge.

At the time of the Reversion Order, DW had purchased only the 60-acre affordable housing parcel while Bridge still owned the remaining 1,000 acres. The closing dates for the remaining 1,000 urban acres had passed several months earlier without DW making the additional $35.7 million in agreed-upon payments to Bridge.

II. The Direct Agency Appeal of the Reversion Order

Bridge and DW appealed the Reversion Order to a Hawaii circuit court. Although the court declined to preliminarily stay the Reversion Order, the court issued an amended final judgment in June 2012 in Bridge's favor. The court determined that the Commission had violated various Hawaii statutory procedural requirements in issuing the Reversion Order. The court also determined that the process by which the Commission issued the order violated Bridge's and DW's federal and state constitutional due process and equal protection rights. Thus, the circuit court vacated the Reversion Order and voided the OSC.

On appeal, the Hawaii Supreme Court affirmed in part and vacated in part the circuit court's judgment. The Hawaii Supreme Court acknowledged the Commission's authority to revert the land use classification, as well as the propriety of the December 2008 OSC. *DW Aina Le'a Dev.*, 339 P.3d at 711, 713. The court, however, affirmed the circuit court's determination that the Reversion Order violated applicable statutory procedural requirements.

The Hawaii Supreme Court explained that a reversion may or may not be subject to certain procedural requirements. *Id.* at 709–10. If a petitioner fails to substantially commence use of the land in accordance with its representations, then the Commission may revert a land use classification pursuant to Hawaii Revised Statute § 205-4(g) subject to a limited procedure. *Id.* at 710. However, if a petitioner has substantially commenced use, the Commission must follow the requirements of Hawaii Revised Statute § 205-4(h). *Id.* at 689, 714. The court determined that Bridge and DW had substantially commenced use after the Commission rescinded the OSC because DW actively prepared development plans and constructed sixteen affordable housing units by March 31, 2010. *Id.* at 712−14. Thus, the Commission had to find within 365 days of the OSC's initial issuance and by a "clear preponderance of the evidence" that reversion was reasonable, did not violate Hawaii Revised Statute § 205-2 and ***623** was otherwise consistent with the policies and criteria set forth in Hawaii Revised Statute §§ 205-16 and 205-17. *Id.* at 714; *see also* Haw. Rev. Stat. § 205-4(h). The Commission had failed to do so. *DW Aina Le'a Dev.*, 339 P.3d. at 714.

The Hawaii Supreme Court vacated the remainder of the circuit court's judgment. With respect to the due process ruling, the Hawaii Supreme Court concluded that Bridge and DW had received notice and a meaningful opportunity to be heard before the reversion. *Id.* at 716. Noting that "the land had changed hands numerous times," that the Commission "had amended the original reclassification order on multiple occasions," and the "long history of unfulfilled promises made in connection with

the development of this property," the court determined that the reversion was not "arbitrary and unreasonable." *Id.* at 717. With respect to equal protection, the court could not find that the Commission lacked a rational basis for its treatment of Bridge and DW "[g]iven the long history of this property and the [Commission's] dealings with the landowners over the course of many years." *Id.* at 718. The court otherwise reasoned that the Commission acted pursuant to its broad statutory authority to impose conditions and its related authority to enforce such conditions. *Id.* The court remanded for proceedings consistent with its decision. *Id.*

III. The Proceedings in this Case

Although Bridge and DW together pursued the agency appeal, Bridge alone sued the Commission and commissioners in Hawaii state court in June 2011.[4] Bridge's eleven-count complaint for declaratory, injunctive, and monetary relief raised federal and state constitutional due process, equal protection, and taking claims. Bridge sued all commissioners in their official capacities and sued the six commissioners who had voted for the Reversion Order in their individual capacities as well. Alleging that the $40.7 million DW agreed to pay for the 1,060 acres was the land's fair market value, Bridge claimed "not less" than $35.7 million in damages.

The State removed the case to federal court and moved to dismiss. Before ruling on that motion, the district court ordered a stay of the proceedings pending the agency appeal, an order which the parties cross-appealed to our court. After the Hawaii Supreme Court's decision, we remanded to the district court. *Bridge Aina Le'a, LLC v. Chock*, 590 F. App'x 705 (9th Cir. 2015) (unpublished).

On remand, the district court granted the State's motion to dismiss, which concerned only some of Bridge's claims. The court dismissed Bridge's due process and equal protection claims, reasoning that the Hawaii Supreme Court's decision barred re-litigation of the same issues. Applying the doctrine of quasi-judicial immunity, the court dismissed Bridge's individual capacity claims against the commissioners who voted for reversion. Ultimately, only Bridge's taking claims proceeded to trial on the theory that the reversion was an unconstitutional regulatory taking pursuant to the analyses in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and ***624** *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

A jury trial was held between March 13 and 23, 2018. After Bridge put on its case-in-chief, the State moved for JMOL on the grounds that Bridge had not established either a *Lucas* or *Penn Central* taking and, even if it had, Bridge should receive only nominal damages because Bridge lacked admissible evidence of just compensation. The district court granted the motion as to nominal damages but denied it as to taking liability. Using the 1,060 acres subject to the Reversion Order as the relevant property denominator at the court's instruction, the jury found that a taking occurred pursuant to both *Lucas* and *Penn Central*. The district court entered judgment for Bridge and awarded $1 in nominal damages.

Following the entry of judgment, the State renewed its JMOL motion and alternatively requested a new trial using 3,000 acres as the property denominator. The parties cross-appealed the judgment during the pendency of the renewed motion, and the appeals became effective upon the district court's denial of that motion. The State timely appealed the denial.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction over the appeals from the final judgment pursuant to 28 U.S.C. § 1291. We also have jurisdiction over the appeal from the previously nonfinal orders that have merged with the final judgment, *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070–71 (9th Cir. 2012), and over the denial of the renewed JMOL motion, *Wadler v. Bio-Rad Labs., Inc*., 916 F.3d 1176, 1185 (9th Cir. 2019).

We review de novo the denial of a renewed JMOL motion. *Reese v. County of Sacramento*, 888 F.3d 1030, 1036 (9th Cir. 2018). " '[W]hen reviewing a motion for judgment as a matter of law, we apply the law as it should be, rather than the law as

it was read to the jury,' even if the party did not object to the jury instructions." *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009) (en banc) (alteration in original) (quoting *Pincay v. Andrews*, 238 F.3d 1106, 1109 n.4 (9th Cir. 2001)). A renewed JMOL motion "is properly granted only if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (internal quotations and citation omitted). "A jury's verdict must be upheld if it is supported by ... evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

We review de novo the dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), *United States ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 676 (9th Cir. 2018), as well as the district court's issue preclusion ruling, *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (citation omitted).

ANALYSIS

I. The State's Renewed JMOL Motion on Bridge's Taking Claims

Our core focus in this appeal is the district court's denial of the State's renewed JMOL motion on Bridge's *Lucas* and *Penn Central* taking challenges to the reversion pursuant to the Fifth Amendment's Takings Clause.[5] As we explain, as ***625** matter of law, Bridge's evidence failed to establish a taking pursuant to either. Accordingly, it is unnecessary for us to consider the other taking issues that the parties raise on appeal.

A. The Fifth Amendment Regulatory Takings Framework

"The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation." *Knick v. Twp. of Scott*, —— U.S. ——, 139 S. Ct. 2162, 2167, 204 L.Ed.2d 558 (2019) (alterations in original). By its terms, the clause "does not prohibit the taking of private property," but instead requires "compensation in the event of [an] otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). A classic taking occurs when the "government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

Beyond a classic taking, the Supreme Court has recognized that "if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There are three types of regulatory action the Court has recognized, "each of which 'aims to identify regulatory actions that are functionally equivalent to the classic taking.' " *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530–31 (9th Cir. 2019) (quoting *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074). Two types of regulatory actions—*Loretto* and *Lucas* takings—are *per se* takings.[6] *Id.* at 531. *Penn Central* takings are the third type of regulatory taking. *Id.*

Generally, courts determine whether a regulatory action is functionally equivalent to the classic taking using "essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (citations and internal quotation marks omitted). These inquiries are set forth in the three *Penn Central* factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646.

Certain regulatory actions, however, are treated categorically as a taking without the necessity of the ***626** *Penn Central* inquiry. The *Lucas* rule "applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her

property." *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074 (alteration in original) (quoting *Lucas*, 505 U.S. at 1019, 112 S.Ct. 2886). Government regulations that constitute such a taking are typically those that require land to be left substantially in its natural state. *Lucas*, 505 U.S. at 1018, 112 S.Ct. 2886. This is a "relatively narrow" and relatively rare taking category, *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074, confined to the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 (emphasis in original).[7] Compensation is required in such a case unless the government can show that underlying principles of state property or nuisance law would have led to the same outcome as the challenged regulation. *See Tahoe-Sierra*, 535 U.S. at 330, 122 S.Ct. 1465; *Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886.

Here, the jury made dual findings that there was an unconstitutional taking of Bridge's property pursuant to both *Lucas* and *Penn Central*. The district court determined that either finding independently supported the verdict.

We underscore at the outset that when "a regulation 'denies all economically beneficial or productive use of land,' the multi-factor analysis established in *Penn Central* is not applied" because *Lucas* supplies the relevant rule. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (quoting *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886). When "a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on" the *Penn Central* framework. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (citing *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646). Thus, if the jury could find that the reversion deprived Bridge of *all* economically beneficial uses of the 1,060 acres, then *Penn Central* was inapplicable. Only if the reversion fell short of a total taking was application of *Penn Central* necessary. We apply this approach in considering the State's arguments.

B. *Lucas* Taking

Although the State raises several challenges to the jury's *Lucas* finding, the State's core challenges to that finding are that the land retained substantial residual value in its agricultural use classification and that this classification still allowed Bridge to use the land in economically beneficial ways. We agree and thus decline to reach the State's alternative challenges to the jury's *Lucas* finding.

We recognize that shortly after the Supreme Court announced the *Lucas* rule, we remarked that "the term 'economically viable use' has yet to be defined with much precision." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). Acknowledging the lack of precision in this concept, we stated that "the value of the subject property" is "relevant" to the *Lucas* inquiry, but we rejected "focusing solely on property values." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). Pointing to this passage in *Del Monte Dunes*, Bridge urges us to reject ***627** the State's arguments regarding the role of value in the *Lucas* context.

Subsequent developments in the Supreme Court's takings decisions, however, lead to three observations that guide our resolution of the parties' arguments here. First, the Court has made clear that "[i]n the *Lucas* context, ... the complete elimination of a property's value is the *determinative* factor." *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074 (emphasis added). As the Court has underscored, "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value." *Tahoe-Sierra*, 535 U.S. at 332, 122 S.Ct. 1465. "Anything less than a 'complete elimination of value,' or a 'total loss' ... would require the kind of analysis applied in *Penn Central*." *Id.* at 330, 122 S.Ct. 1465 (quoting *Lucas*, 505 U.S. at 1019 n.8, 112 S.Ct. 2886). Second, although value is determinative, use is still relevant. *See Murr v. Wisconsin*, ── U.S. ──, 137 S. Ct. 1933, 1949, 198 L.Ed.2d 497 (2017) (concluding that the challenged regulations did not deprive the landowners of all economically beneficial use because "[t]hey can use the property for residential purposes" and "[t]he property has not lost all economic value"). Finally, the Court has clarified that a token interest will not defeat a *Lucas* claim. *See Palazzolo*, 533 U.S. at 631, 121 S.Ct. 2448 ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest."). Guided by these observations, we conclude that Bridge's evidence did not satisfy *Lucas*.

1. The Land Retained Substantial Economic Value

We turn first to the land's value. Bridge relied on the expert testimony of Steven Chee to opine on the fair market value of the 1,060 acres in the urban and agricultural land use classifications before and after reversion. Chee expressly assumed that the 2009 Voice Vote on April 30, 2009 reverted the land. Although this assumption is demonstrably wrong, this testimony is the only valuation evidence in the record. We therefore address the argument as Bridge frames it.

Chee appraised the fair market value of the 1,060 acres by determining the highest and best use of the land in each classification, a metric "shaped by the competitive forces within the market where the property is located." First, Chee opined that the land had a value of $40 million on April 29, 2009 in an urban classification based on land banking until market conditions improved given the significant off-site work necessary before the land could be developed and the ongoing impacts of the Great Recession. Second, Chee opined that the land had a value of $6.36 million on April 30, 2009 in an agricultural classification. Although Chee did not presume that reclassification would be obtained, the agricultural use valuation accounted for land banking while simultaneously attempting to regain the former urban classification.[8] The difference reflects an 83.4 % diminution in value.

The State contends that this evidence shows that the land retained substantial residual value in an agricultural use classification and that any diminution in value was less than the land's total ***628** value. We agree. Absent more, there is no *Lucas* liability for this less than total deprivation of value. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (concluding that a 92% loss of value in one part of the land and a 78% loss in another part "is manifestly insufficient" under *Lucas*); *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (concluding that *Lucas* requires a loss of "100% of a property interest's value"); *Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) ("Contrary to the trial court's holding, the record shows that the 1993 denial apparently destroyed less than all of Cooley's property's value, which constitutes a non-categorical taking. The categorical takings directives of *Lucas* do not apply.").

In rejecting the State's arguments, the district court reasoned that value was relevant to but not dispositive of the *Lucas* inquiry by relying on our discussion on value versus use in *Del Monte Dunes*. This was error because, as we have explained, the Supreme Court's precedents underscore that value is determinative. *See Lingle*, 544 U.S. at 539, 125 S.Ct. 2074; *Tahoe-Sierra*, 535 U.S. at 330, 122 S.Ct. 1465. We have stated as much in a decision that the district court acknowledged but interpreted as irrelevant. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141 n.17 (9th Cir. 2014) ("*Lucas* plainly applies only when the owner is deprived of *all* economic benefit of the property. If the property retains any residual value after the regulation's application, *Penn Central* applies." (citation omitted) (emphasis in original)), *overruled on other grounds by Horne v. Dep't of Agric.*, —— U.S. ——, 135 S. Ct. 2419, 192 L.Ed.2d 388 (2015).

The district court also wrote off the substantial residual value that Bridge's evidence found in the land's agricultural use classification by pointing to our observation in *Del Monte Dunes* that if "no competitive market exists for the property without the possibility of development, a taking may have occurred." 95 F.3d at 1433. The district court read this passage to mean that the jury could find that *Lucas* applied here if no competitive market existed for the land without a change in the regulation. Bridge reprises this reasoning here.

Del Monte Dunes does not control here. There, we determined that "the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim" when the "government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space)." *Id*. at 1433. Thus, the fact that the government purchased the land subject to the challenged regulation that the government put in place did not defeat a *Lucas* theory. Unlike in *Del Monte Dunes*, the Commission neither attempted to buy the subject property, nor was Bridge captive to a single buyer exercising its regulatory power. Moreover, the Commission thought that reversion would encourage Bridge to sell the property so that a new developer could make a new proposal, suggesting that Bridge could have sold the land in a competitive market with a possibility of a regulatory change.

In the end, the relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use. *See Palazzolo*, 533 U.S. at 631, 121 S.Ct. 2448 (concluding that a 93% loss in value was insufficient for *Lucas* because the value was attributable to economic use, specifically residential use); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115–17 (Fed. Cir. 2015) (concluding that the *Lucas* rule applied to a ***629** 99.4% deprivation because the residual value was attributable to noneconomic uses). We do not think either situation applies here.

The land's $6.36 million value in an agricultural use classification was neither *de minimis*, nor did the value derive from noneconomic uses. Bridge's expert valued the land in a competitive market using pricing for similarly situated properties, and expressly accounted for the possibility of regaining the urban use classification. *Lucas* does not apply when "substantial present value" stems from "future use" of the land. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 781 n.26 (9th Cir. 2000), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012). Thus, the land's value in the agricultural use classification precludes a *Lucas* finding here.

2. The Reversion Did Not Deprive Bridge of All Economically Viable Uses of the Land

As a secondary matter, the permissible uses of land classified as agricultural reinforce our conclusion that the reversion did not completely deprive Bridge of all economically viable uses of the 1,060 acres as a matter of law. "[T]he *existence* of permissible uses determines whether a development restriction denies a property owner economically viable use of his property." *Del Monte Dunes*, 95 F.3d at 1432 (emphasis added); *Outdoor Systems*, 997 F.2d at 616. "[W]here an owner is denied *only some* economically viable uses, a taking still may have occurred" pursuant to the *Penn Central* analysis, but not pursuant to the *Lucas* rule. *Del Monte Dunes*, 95 F.3d at 1432 (emphasis added).

Hawaii law permits an array of uses for land classified as agricultural. *See* Haw. Rev. Stat. § 205-2(d)(1)−(16).[9] In addition, a landowner may obtain a permit for "certain unusual and reasonable uses within agricultural ... districts other than those for which the district is classified." *Id*. § 205-6(a). There are no express limitations on such specially permitted uses.[10] Against this statutory backdrop, we do not see how this case is like *Lucas*. The mere reclassification of the 1,060 acres from urban use to an agricultural use did not prohibit all development, nor did it require leaving the land in an idle state. *See Lucas*, 505 U.S. at 1008, 112 S.Ct. 2886.

***630** Although Bridge offered evidence suggesting that many of the statutorily permitted uses would not have been economically feasible, Bridge did not address *all* of the statute's permitted uses or account for any of the uses for which the Commission had granted special permits in the past, such as a sewage treatment plant or rock quarrying. Some of the specially permitted uses may have been especially suitable for this land. Bridge intended to place a sewage treatment plant on the adjacent 2,000 acres of agriculturally zoned land. Bridge's own witnesses also recognized that the land was "good for growing rocks." Based on the evidence that Bridge presented, we do not think that the jury could have reasonably found that the reversion deprived Bridge of *all* economically feasible uses of the land.

Bridge otherwise draws our attention to the Commission's findings in the 1989 and 1991 Orders that the soils were rated poorly and were not adequate for grazing to suggest that there were no viable uses in an agricultural use zone. By definition, however, "[a]gricultural districts include areas that are not used for, or that are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics." Haw. Rev. Stat. § 205-2(d). Thus, the Commission's findings are simply not evidence that the land lacked economically viable uses in an agricultural classification.

Ultimately, we think that the notion underlying Bridge's *Lucas* theory is that the inability to pursue a particular development and to obtain its value was a total taking. This view is unsupported by the law. *See Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (order) ("[M]ost land use restrictions do not deny the owner of the regulated property all economically viable uses of it."); *Hoehne v. County of San Benito*, 870 F.2d 529, 532−33 (9th Cir. 1989) ("A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development."). Accordingly, we conclude that the State was entitled to judgment as a matter of law on Bridge's *Lucas* theory, and we turn to the *Penn Central* analysis.

C. Penn Central Taking

Penn Central requires that we consider: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to

which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." 438 U.S. at 124, 98 S.Ct. 2646. Our consideration of these factors aims "to determine whether a regulatory action is functionally equivalent to the classic taking." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (internal quotation marks omitted). The first and second *Penn Central* factors are the primary factors. *Lingle*, 544 U.S. at 538–39, 125 S.Ct. 2074. "The outcome [of this inquiry] ... depends largely upon the particular circumstances [in the] case" at hand. *Palazzolo*, 533 U.S. at 633, 121 S.Ct. 2448 (O'Connor, J., concurring) (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646) (internal quotation marks omitted). When we apply the *Penn Central* factors to the trial evidence, we conclude that the jury could not reasonably find for Bridge.

1. The Reversion Order's Economic Impact

Our first consideration is the challenged regulation's economic impact on the property owner. *Lingle*, 544 U.S. at 528, 125 S.Ct. 2074. "[W]e 'compare the value that has been taken from the property ***631** with the value that remains in the property.' " *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)), *cert. denied*. —— U.S. ——, 139 S. Ct. 917, 202 L.Ed.2d 645 (2019). Although there is "no litmus test," *id.* at 451, our value comparison again aims "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain," *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074.

Bridge attempted to show the reversion's economic impact by relying on Chee's valuation testimony and on testimony regarding the disruption to the sale agreements between Bridge and DW. We address each in turn.

a. The Valuation Opinion

As we have explained, Chee calculated the fair market value of the land using the day of the 2009 Voice Vote as the relevant point at which the land reverted. Chee calculated the land's value as $40 million on the day before the vote and as $6.36 million on the day of the vote. The parties agree, uncritically, that Chee's opinion shows that the land suffered an 83.4% diminution in fair market value. On this account, the reversion would have resulted in a loss of $33.6 million in the land's value. We conclude, however, that, as a matter of law, Chee's calculation suffers from a number of defects for the purposes of Bridge's taking claim.

First, Chee's valuation opinion did not properly ascertain economic impact for the purposes of Bridge's taking claim because it assumed that the April 30, 2009 Voice Vote reverted the land.[11] We have already explained that it is not proper to measure economic impact based on a "hypothetical economic result" that assumes a state of affairs that did not exist. *See MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (rejecting the district court's comparison of the effect of a 1999 rent control ordinance with a "hypothetical economic result assuming that there was no rent control ordinance in effect at all"). The reversion did not occur until some two years after the 2009 Voice Vote and thus the vote could not be the proper reference point.

Second, the vote's effect on the land's fair market value during the ongoing OSC proceedings is not evidence of a taking. We understand that Bridge could account for what it contends cast a "dark cloud" over the project by using the vote as the reference point for its valuation calculation. Nevertheless, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense." *Tahoe-Sierra*, 535 U.S. at 332, 122 S.Ct. 1465 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)); *First English*, 482 U.S. at 320, 107 S.Ct. 2378 (same). Chee's valuation evidence falters for this reason as well.

***632** Third, even if we assume that Chee properly calculated the land's value, the asserted 83.4% diminution in value substantially overstates the relevant diminution in value Bridge could have suffered for the purposes of weighing this factor. *See MHC Fin.*, 714 F.3d at 1127 (taking issue with valuation evidence based on a hypothetical state of affairs but nevertheless assuming it could show economic impact). "[T]he duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 342, 122 S.Ct. 1465. When we account for the reversion's temporary duration, the resulting relevant diminution is much smaller than 83.4%.

We observe that, consistent with the nature of its temporary taking claim, Bridge did not attempt to pursue at trial damages that would reflect the full 83.4% diminution it asserted.[12] Instead, Bridge sought damages by taking (1) the diminution in the land's value attributed to the government action, (2) multiplied by the time period of the temporary taking, and (3) further multiplied by Bridge's rate of return. Using an overstated taking period from the date of the 2009 Voice Vote to the Hawaii Supreme Court's November 2014 decision, Bridge asserted that the relevant time period for its damages was 5.68 years. Seeking to apply a 10.12% rate of return to the $40 million valuation, Bridge claimed damages of $19.54 million. That is a roughly 48% diminution in value.

More critically, Bridge's claimed damages still overstate the relevant diminution in value for the purposes of this factor. The reversion lasted roughly a year, from the Reversion Order's issuance in April 2011 until the Hawaii state circuit court's judgment vacating the order in June 2012.[13] *See DW Aina Le'a Dev.*, 339 P.3d at 704. When we account for the reversion's actual one-year duration, Bridge's damages are at most $6.72 million if we use the higher 20% rate of return that Bridge hoped to receive on its total investment (an issue we discuss in further detail below). Bridge's loss thus amounts to an approximately 16.8% diminution in value, a number far lower than the 83.4% figure on which it relied at trial. This economic impact weighs against the conclusion that the reversion constituted a taking. *See Colony Cove Props.*, 888 F.3d at 451 (concluding that a 24.8% diminution was "far too small to establish a regulatory taking"); *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012) (finding that a "less than 15%" economic loss with respect to one property ***633** and no effect on two other properties "does not support a takings claim").

For these reasons, we conclude that the valuation evidence, properly understood, weighs strongly against a taking pursuant to the first *Penn Central* factor.

b. The Disrupted Sale Agreements

Bridge also relied on the disruption of the land sale agreements between it and DW to show economic impact. John Baldwin, the CEO of Bridge Capital and Bridge's parent company as well as Bridge's manager, testified that DW failed to purchase the remaining 1,000 acres for the $35.7 million price stated in the February 2009 sale agreement because of the vote. Apparently, the vote affected DW's ability to borrow money to finance the purchase. Baldwin further testified that DW failed to make any more payments to Bridge pursuant to the modified December 2009 agreement—which retained the same $35.7 million price for the remaining 1,000 acres—after the OSC's reinstatement.

There is a fundamental problem with using the claimed disruptions to the February 2009 and December 2009 sale agreements as evidence of the Reversion Order's economic impact. DW's contractual default under the February 2009 agreement after the 2009 Voice Vote occurred some two years *before* the 2011 Reversion Order. DW's default under the modified December 2009 agreement also occurred after the OSC's reinstatement in July 2010, several months *before* the Reversion Order's issuance. The Reversion Order thus could not have caused the contractual defaults that pre-dated it by several months. *See Esplanade Props.*, 307 F.3d at 984 (citing *Tahoe-Sierra*, 216 F.3d at 783 & n.33) (recognizing that a regulatory taking plaintiff must establish both causation-in-fact and proximate causation). Moreover, the record otherwise shows that Bridge's focus on the disruptions to these agreements overstated the reversion's impact on its contractual relationship with DW. After the Hawaii Supreme Court's decision, DW agreed to pay Bridge $14 million more than the previously agreed upon $40.7 million to purchase the land. Thus, the contractual defaults during the reversion's temporary duration do not affect our economic impact analysis.

2. The Extent of Any Interference with Any Reasonable Investment-Backed Expectations

We must consider next "the extent to which the regulation has interfered with distinct investment-backed expectations," *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646, that Bridge had for the 1,060 acres at the time of its acquisition, *see Colony Cove Props.*, 888 F.3d at 452; *Laurel Park Cmty.*, 698 F.3d at 1189. Although this factor raises "vexing subsidiary questions" about its proper scope and application, *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074, certain principles guide us.

For one, we must "use 'an objective analysis to determine the reasonable investment-backed expectations of the [o]wners.' " *Colony Cove Props.*, 888 F.3d at 452 (quoting *Chancellor Manor v. United States*, 331 F.3d 891, 907 (Fed. Cir. 2003)). Our focus is on interference with reasonable expectations. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 646, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). " 'Distinct investment-backed expectations' implies reasonable probability, ... not starry eyed hope of winning the jackpot if the law changes." *Guggenheim*, 638 F.3d at 1120 (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646). Thus, "unilateral expectation[s]" or ***634** "abstract need[s]" cannot form the basis of a claim that the government has interfered with property rights. *Ruckelshaus*, 467 U.S. at 1005, 104 S.Ct. 2862 (citation omitted).

Second, "what is 'relevant and important in judging reasonable expectations' is 'the regulatory environment at the time of the acquisition of the property.' " *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.23 (Fed. Cir. 2001) (en banc)). "[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end[.]" *Concrete Pipe & Prods.*, 508 U.S. at 645, 113 S.Ct. 2264 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958)).

With these principles in mind, we must determine what reasonable investment-backed expectations Bridge had and to what degree the Reversion Order interfered with them.

The record shows that Baldwin testified that Bridge hoped to make annually at least 20% from "the total investment," meaning every dollar put into the property.[14] Even if this hoped-for return was reasonable, the reversion could not have meaningfully interfered with it during the reversion's one-year duration. Bridge did not expect any profit from its purchase of the property unless and until the Commission amended the 1991 Order's affordable housing condition. Bridge also did not expect that an amendment to the affordable housing condition would translate into immediate profits. Indeed, Bridge represented to the Commission that $86 million in initial infrastructure costs and over $200 million in total development costs had to be spent before the construction and sale of any housing units could begin. At the time of the reversion, the project was nowhere near this level of investment—indeed only sixteen affordable housing units existed—and thus Bridge could have had no reasonable expectation of making the 20% annual return on the total investment at that time.

The State and Bridge largely focus on whether Bridge could have reasonably expected that the Commission would amend the 1991 Order's affordable housing condition requiring the construction of 1,000 affordable housing units.[15] Pointing to our distinction in *Guggenheim*, 638 F.3d at 1120−21, between reasonable expectations and speculative possibilities, both sides find support for the (un)reasonableness of Bridge's expectation in the $5.2 million that Bridge paid for the 1,060 acres. We will assume that Bridge reasonably expected an amendment to the 1991 Order's affordable housing condition, but we do not see what it proves. The Commission did not predicate the Reversion Order on a purported failure to build the 1,000 affordable housing units that the 1991 Order required prior to amendment, but instead ***635** on the reclassification conditions that Bridge conspicuously ignores.

Bridge further argues that the jury was entitled to find that Bridge had a reasonable expectation that the Commission would not revert the land to its prior zoning for agricultural use once Bridge purchased the property, obtained the amendment, and substantially commenced use of the land. The substantial commencement of use point stems from the Hawaii Supreme Court's determination that DW's active preparations for the land and completion of sixteen affordable housing units by March 2010 was substantial commencement of use. But again, we do not see what this proves. Substantial commencement of use did not eliminate the possibility of reversion; it simply changed the circumstances pursuant to which the Commission could exercise its reversion authority. *See DW Aina Le'a Dev.*, 339 P.3d at 714.

What we find dispositive are the conditions of the 1989 and 1991 Orders requiring the landowner to substantially comply with representations made to obtain reclassification. The 1991 Order made clear that the Commission might issue an OSC

why the land should not revert for failure to substantially comply with representations made to obtain reclassification. Hawaii law expressly authorized the Commission to impose this condition, and such conditions ran with title to the land. Haw. Rev. Stat. § 205-4(g). Critically, the substantial compliance condition turned on the *landowner's* own representations to the Commission.

Bridge expressly committed to build 385 affordable housing units as a part of the amendment to the order governing the land's conditional urban use classification. Based on Bridge's representations to the Commission, the 2005 Order required Bridge to build these units by November 2010. At no point in arguments before us does Bridge acknowledge this deadline, let alone Bridge's and DW's repeated representations to the Commission as part of seeking the OSC's rescission that they would complete the 385 affordable housing units.

The operative conditions in place at the time of the OSC and the Reversion Order, and Bridge's failure to meet them, dispel the notion that Bridge could reasonably expect that the Commission would not enforce the conditions. *See MHC Fin.*, 714 F.3d at 1127–28 (finding that plaintiff could not satisfy this factor in the context of challenging a 1999 rent control ordinance because the plaintiff "had even less reason to expect that the rent control regime would disappear altogether" given a prior 1993 rent control ordinance in effect when plaintiff bought its property). The Commission properly issued the OSC based on the suspicion that Bridge would not meet the conditions. *See DW Aina Le'a*, *Dev.*, 339 P.3d at 713 ("The [Commission] did not err in issuing the OSC. Bridge and DW do not contend otherwise." (citation omitted)). And, in fact, Bridge did not complete the 385 affordable housing units by the deadline to do so, which lapsed several months before the Reversion Order's issuance. Thus, we do not see how the Reversion Order interfered with any reasonable expectations that Bridge could have formed regarding enforcement or reversion. Accordingly, we conclude that, as a matter of law, this factor weighs strongly against finding a taking.

3. The Character of the Government's Action

Finally, we consider the Reversion Order's character. "[T]he character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting ***636** the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074 (internal quotation marks omitted). The government generally cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id*. at 537, 125 S.Ct. 2074 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). Even if this factor weighs in favor of finding a taking, this factor is not alone a sufficient basis to find that a taking occurred. *See Laurel Park Cmty.*, 698 F.3d at 1191.

The district court concluded that Bridge's evidence provided the jury with an ample basis to find for Bridge on this factor. The court reasoned that the Reversion Order's effect was concentrated because it directly affected the owners of the 1,060 acres. The court also reasoned that credible testimony showed that the Commission intended to cause Bridge to sell the property. In addition, the court observed that the "decision to revert the Property's classification was the first time in the [Commission's] 50-year history that it had taken such action," and that the Hawaii Supreme Court ultimately invalidated the reversion. Much of this evidence was insufficient to establish that this factor weighed in Bridge's favor.

For one, we recognize that government action that singles out a landowner from similarly situated landowners raises the specter of a taking. *See Lingle*, 544 U.S. at 542–44, 125 S.Ct. 2074. The concentrated effect of the reversion here, however, was reflective of the confines of a generally applicable Hawaii law land use reclassification procedure. *See* Haw. Rev. Stat. § 205-4(a) (permitting a landowner to petition). We cannot find in this generally applicable scheme that this factor weighed in Bridge's favor.

Second, the Hawaii Supreme Court's invalidation of the reversion as a matter of Hawaii *statutory procedural* requirements does not carry the constitutional significance that either Bridge or the district court ascribed to it. The reclassification history is critical to the reversion challenged here. *See Buckles v. King County*, 191 F.3d 1127, 1139 (9th Cir. 1999) (observing that a taking claim must be considered " 'in light of the context and ... history' of the land use decisions related to [the] property." (ellipsis in original) (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721, 119 S.Ct. 1624, 143

L.Ed.2d 882 (1999))).

As the Hawaii Supreme Court observed when it rejected Bridge's assertion that the Commission violated Bridge's substantive due process rights, the "reversion was not 'clearly arbitrary and unreasonable,' given the project's long history, the various representations made to the [Commission], and the petitioners' failure to meet deadlines." *DW Aina Le'a Dev.*, 339 P.3d at 689, 717. The court otherwise acknowledged that, despite their repeated assurances to the Commission that they would complete the 385 affordable housing units by November 2010, "Bridge and DW did not satisfy the affordable housing condition, and did not comply with numerous other representations made to the [Commission]." *Id.* at 717. The Hawaii Supreme Court's rejection of Bridge's equal protection challenge echoed this reasoning. *Id.* at 718. The same underlying history blunts the force of Bridge's assertion that the reversion's character established a taking.

4. The Balance of the *Penn Central* Factors

Although we construe the evidence in the light most favorable to the jury's verdict, ***637** we conclude that no reasonable jury could find that Bridge's evidence satisfied the *Penn Central* test. Even if we assume that the character of the government's action weighs in favor of finding a taking, the first and second factors weigh decisively against such a finding. Because Bridge's own evidence established a diminution in value that is proportionately too small and because the reversion did not interfere with Bridge's reasonable investment-backed expectations for the land, no reasonable jury could conclude that the reversion effected a taking pursuant to the *Penn Central* analysis.

D. The Outcome of the Taking Liability Analysis

Our analysis of Bridge's taking theories requires us to reverse the district court's denial of the State's renewed JMOL motion. Bridge's evidence could not establish that a taking occurred pursuant to either *Lucas* or *Penn Central*. Thus, the district court should have granted the State's motion. We vacate the judgment for Bridge and the nominal damages award and remand with instructions for the district court to enter judgment for the State. As a consequence of this determination, we need not address any other taking issues the parties raise on appeal.

II. The Dismissal of Bridge's Equal Protection Claim

Next, we must determine whether the Hawaii Supreme Court's decision in Bridge's agency appeal barred Bridge's equal protection claim in this case. Hawaii law governs whether we afford preclusive effect to the Hawaii Supreme Court's decision. *See Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir. 1996) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.* 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984))). Thus, if Hawaii law precludes Bridge from litigating the equal protection claim in state court, then Bridge cannot pursue the same claim here. *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989).

Pursuant to Hawaii law, the "judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties or their privies concerning the same subject matter." *Santos v. State Dep't of Transp.*, 64 Haw. 648, 646 P.2d 962, 965 (1982) (per curiam). A judgment has preclusive effect pursuant to the doctrine of issue preclusion if four requirements are met:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question;
> (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential

> to the final judgment; and (4) the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication.

Bremer v. Weeks, 104 Hawai'i 43, 85 P.3d 150, 161 (2004) (alteration in original); *see also Dorrance v. Lee,* 90 Hawai'i 143, 976 P.2d 904, 909 (1999).

The district court determined that all requirements were met. Bridge disputes the first and second requirements and further argues that it did not have a full and fair opportunity to litigate its equal protection challenge in the agency appeal. We reject each argument in turn.

A. Identical Issues

We can find no material difference between the equal protection issue Bridge raised in the agency appeal and the one raised in this suit. In the agency appeal, ***638** Bridge asserted that the Commission violated its equal protection rights because the Commission did not treat other developers the same way it treated Bridge. In its complaint here, Bridge alleged that the Commission lacked a rational basis to treat Bridge differently than it treated other developers. These are undoubtedly the same issue. Bridge's further contention that the Hawaii Supreme Court decided only whether the Commission had a rational basis to enforce the reclassification conditions ignores that the court determined that any differential treatment did not lack a rational basis. *See DW Aina Le'a Dev.*, 339 P.3d at 717–18.

Furthermore, we disagree with Bridge that Hawaii law requires the availability of identical remedies in both proceedings for an earlier judgment to have preclusive effect. In *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i,* 91 Hawai'i 94, 979 P.2d 1120 (1999), the Hawaii Supreme Court decided that issue preclusion did not bar the suit there because different standards governed the issue of standing to challenge an agency action pursuant to different Hawaii statutory provisions. *See Tax Found. of Haw. v. State,* 144 Hawai'i 175, 439 P.3d 127, 149 (2019) ("[I]n *Citizens*, we pointed out the difference between standing requirements for HRS § 91-14 agency appeals and HRS § 632-1 declaratory judgment actions[.]"). The court observed that the statutory provisions provided different forms of relief to bolster the conclusion that issue preclusion did not bar the later suit, not to fashion a new identical remedies requirement for Hawaii issue preclusion law. *See Citizens for the Protection of the North Kohala Coastline*, 979 P.2d at 1128 (citing *Pele Def. Fund v. Puna Geothermal Venture,* 77 Hawai'i 64, 881 P.2d 1210, 1216 n.13 (1994) (further explaining that in a § 91-14 agency appeal, "the court only has power to grant relief in accordance with HRS 91-14(g)")). Thus, we reject Bridge's challenge to the identical issue requirement.

B. Final Judgment on the Merits

We also reject Bridge's contention that the Hawaii Supreme Court's decision was not a final judgment on the merits. Insofar as the decision concerned Bridge's federal equal protection rights, the decision became final when the time expired for Bridge to seek review by the United States Supreme Court. *See E. Sav. Bank, FSB v. Esteban,* 129 Hawai'i 154, 296 P.3d 1062, 1068 (2013); *see also* 28 U.S.C. § 2101 (setting 90-day time period within which to file a writ of certiorari with the United States Supreme Court). We are not aware of Bridge ever pursuing any such appeal.

Contrary to Bridge's view, the Hawaii Supreme Court's remand for further proceedings consistent with its opinion does not render the judgment nonfinal. The Hawaii Supreme Court expressly vacated the circuit court's judgment on the issue of equal protection, and remanded for the circuit court to effectuate that vacatur. That remand could not have resulted in a different resolution of Bridge's equal protection challenge because no issue of law or fact regarding that challenge remained unresolved. *See Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287, 297 (1982). Moreover, Bridge has never identified any further agency appeal proceedings in the more than five years since the Hawaii Supreme Court's judgment. Thus, the court's decision was a final judgment on the merits.

C. Full and Fair Opportunity to Litigate

As a final matter, we consider whether Bridge lacked a full and fair opportunity to litigate its equal protection ***639** challenge in the agency appeal. Federal courts will not afford preclusive effect to a prior state court judgment if the party lacked a full and fair opportunity to litigate the issue on the merits. *See Allen v. McCurry*, 449 U.S. 90, 101, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Ross v. Alaska*, 189 F.3d 1107, 1112–13 (9th Cir. 1999).[16] "[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Instead, " 'state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.' " *Ross*, 189 F.3d at 1112 (quoting *Kremer*, 456 U.S. at 481, 102 S.Ct. 1883). The proceedings at issue here met that standard.

Bridge contends that it lacked a full and fair opportunity to litigate its equal protection challenge in the agency appeal because the Hawaii Supreme Court excluded from the evidence the dockets from the Commission's proceedings involving other property owners on which Bridge sought to rely to show differential treatment. *DW Aina Le'a Dev.*, 339 P.3d at 689, 714–15. Bridge did not lack the opportunity to present this evidence, but instead failed to properly introduce this evidence into the agency appeal record. *Id*. at 715 & n.18 (finding that Bridge and DW failed to request judicial notice). Bridge's failure to do so does not undermine the judgment's fairness. *See Kremer*, 456 U.S. at 483, 485, 102 S.Ct. 1883 (having "little doubt" that the state's procedures were constitutionality sufficient and concluding that the plaintiff's "fail[ure] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy").

It is otherwise clear that Bridge received a full and fair opportunity to raise the equal protection challenge in the agency appeal. Bridge raised, briefed, and argued the challenge during the proceedings before the Commission and on appeal before the circuit court and defended the issue before the Hawaii Supreme Court. *See DW Aina Le'a Dev.*, 339 P.3d at 689, 704–06, 717–18. Bridge thus received a full and fair opportunity pursuant to both Hawaii law and the federal exception to issue preclusion. *See Ross*, 189 F.3d at 1112–13 (finding that the plaintiff received a full and fair opportunity to litigate an issue in a prior Alaska state court proceeding when the plaintiff was able to raise as well as fully brief and argue the issue); *Dorrance*, 976 P.2d at 911 (making a similar finding under Hawaii law). We therefore affirm the district court's issue preclusion ruling that bars Bridge from re-litigating the equal protection issue in this case.

With no remaining viable claims, it is unnecessary for us to address Bridge's appeal from the district court's dismissal of the individual capacity claims Bridge raised against the commissioners who voted to revert. *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 n.2 (9th Cir. 1980) (declining to address judicial immunity "[i]n view of our holding that no claim for federal relief" existed).

CONCLUSION

The district court erred in denying the State's JMOL motion because Bridge's evidence ***640** did not establish a taking pursuant to either *Lucas* or *Penn Central*, and we reverse the denial. Consequently, we vacate the judgment for Bridge on the taking claims and remand with instructions for the district court to enter judgment for the State. We affirm the dismissal of Bridge's equal protection claim. We decline to address all other issues raised on appeal as unnecessary.

AFFIRMED IN PART, REVERSED AND VACATED IN PART, and **REMANDED** with instructions to enter judgment for Defendants-Appellees/Cross-Appellants. Costs are awarded to Defendants-Appellees/Cross-Appellants.

All Citations

950 F.3d 610, 20 Cal. Daily Op. Serv. 1330, 2020 Daily Journal D.A.R. 1230

Footnotes	
1	We use the term "the State" to refer collectively to the Commission and the commissioners whom Bridge sued in their official capacities. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) ("Suits against state officials in their official capacity ... should be treated as suits against the State."). The commissioners whom Bridge named in their official capacities are: Vladimir P. Devens, Kyle Chock, Normand R. Lezy, Lisa M. Judge, Nicholas W. Teves, Jr., Ronald I. Heller, Duane Kanuha, Thomas Contrades, and Charles Jencks. Bridge sued all but the last two commissioners—neither of whom voted for the reversion—in their individual capacities as well. Commissioner Contrades died during the pendency of this litigation before the district court.
2	This language tracked a 1990 amendment to the Commission's statutory authority to impose reclassification conditions pursuant to Hawaii Revised Statute § 205-4(g). The statute specifies that "[t]he commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification." Haw. Rev. Stat. § 205-4(g); *see also DW Aina Le'a Dev.*, 339 P.3d at 709 ("This sentence was added to [ ] § 205-4(g) in 1990. The legislative history indicates that the legislature sought to empower the [Commission] to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the [Commission]." (citations and emphasis omitted)).
3	This agreement replaced the prior 2008 sale agreement between Bridge and non-party Relco Corporation (Relco). Bridge and Relco amended that agreement before it closed so that Relco could give its interest to DW. Relco, however, was DW's managing entity.
4	DW sued the Commission in Hawaii state court in 2017, asserting federal and state constitutional taking claims. After the case's removal to federal court, a district court dismissed DW's claims as barred by the Hawaii statute of limitations. Our court has certified to the Hawaii Supreme Court a question regarding the proper statute of limitations for a taking claim raised pursuant to Hawaii law. *See DW Aina Le'a Dev., LLC v. Haw. Land Use Comm'n*, 918 F.3d 602, 609 (9th Cir. 2019) (certification order).
5	Bridge also asserted takings claims pursuant to the Hawaii Constitution, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. 1, § 20. The Hawaii Supreme Court has endorsed federal regulatory takings jurisprudence in determining whether government action is a taking in violation of the Hawaii Constitution. *Leone v. County of Maui,* 141 Hawai'i 68, 404 P.3d 1257, 1270–71 (2017) (acknowledging the *Lucas* and *Penn Central* tests). Because Bridge raises no distinct and separate arguments regarding its state law takings claims and given the Hawaii Supreme Court's reliance on the federal regulatory takings framework, our *Lucas* and *Penn Central* analyses apply equally to Bridge's state law takings claims.
6	A *Loretto* taking occurs "where government requires an owner to suffer a permanent physical invasion of her property." *Lingle*, 544 U.S. at 538, 125 S.Ct. 2074 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)). This "relatively narrow" *per se* rule requires the government to provide compensation, however minor the physical invasion. *Id.* Bridge's land did not suffer a permanent physical invasion, and thus *Loretto* does not apply.

7	One review of some 1,700 taking cases in state and federal courts decided over 25 years identified only 27 cases in which a landowner successfully brought a *Lucas* claim, *i.e.* 1.6%. *See* Carol N. Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1849–50 (2017).
8	We understand Chee's evidence to account for a realistic probability that the urban classification would be regained based on Chee's trial testimony that an appraiser will consider the possibility of rezoning if it "looks highly realistic." In actuality, we also know that Bridge did regain the conditional urban classification roughly a year after the reversion because of the circuit court's judgment.
9	These uses include: (1) crop cultivation activities and uses; (2) farming activities or uses related to animal husbandry and game and fish propagation; (3) aquaculture (*i.e.*, the production of aquatic plant and animal life within ponds); (4) wind-generated energy production for public, private, and commercial use; (5) biofuel production for public, private, and commercial use; (6) solar energy facilities; (7) bona fide agricultural activities and uses that support such activities, including accessory buildings; (8) wind machines and wind farms; (9) small-scale meteorological, air quality, noise, and other scientific and environmental data collection; (10) agricultural parks; (11) agricultural tourism conducted on a working farm, or a farming operation; (12) agricultural tourism activities; (13) open area recreational facilities, (14) geothermal resources exploration, (15) agricultural-based commercial operations registered in Hawaii; and (16) hydroelectric facilities. *See* Haw. Rev. Stat. § 205-2(d).
10	Trial testimony showed that prior examples of specially permitted uses in an agricultural district included: rock quarrying operations; cinder and sand mining facilities; concrete batching plants; construction waste facilities; landfills; public and private sewage treatment plants; gardens and zoos; schools (pre-kindergarten to college); memorial parks, including crematoria, commercial facilities, including post offices and gas stations; private storage facilities; construction yards; maintenance facilities; and telecommunications facilities and structures.
11	We observe that it appears that Chee's calculation of the land's value prior to voice vote failed to account for Bridge's November 2010 deadline to complete the 385 affordable housing units. Chee calculated the land's urban value as $40 million based on the "highest and best use" of " 'land banking' the property until overall market conditions improved," specifically waiting to gauge "the full fallout of the Great Recession." Thus, Chee's highest and best use valuation of the land in its urban classification also appears to have inflated the land's value.
12	In a temporary regulatory taking case, just compensation damages are modified because "the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit," not the loss of the property itself. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987). In these circumstances, "[t]he landowner's compensable interest ... is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction." *Id.* (citing *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir. 1985)).
13	Bridge treats the Hawaii Supreme Court's decision as *the* decision that invalidated the Reversion Order. We know of no principle of Hawaii law that would render ineffective the Hawaii circuit court's judgment vacating the Reversion Order. The general rule is that "an appeal does not vacate the judgment appealed from." *Solarana v. Indus. Elecs., Inc.*, 50 Haw. 22, 428 P.2d 411, 417 (1967). Thus, the circuit court's judgment is the relevant end point.

14	The district court denied the State's JMOL motion in part by relying on evidence that Bridge anticipated receiving a 20% return on its initial investment. On appeal, Bridge passingly refers to this in the factual background of its answering brief to the State's cross-appeal and does not argue it in its *Penn Central* analysis. Nevertheless, we address it here.
15	The propriety of the Commission's affordable housing conditions is not at issue in this case. As Bridge avers on appeal, "the 'challenged regulation' giving rise to Bridge's takings claim is *not* the affordable housing condition in effect when Bridge purchased the Property."
16	This parallels a requirement of Hawaii issue preclusion law, pursuant to which the plaintiff must have had a full and fair opportunity to litigate the relevant issue on the merits in the earlier case. *Dorrance*, 976 P.2d at 911; *Foytik v. Chandler,* 88 Hawai'i 307, 966 P.2d 619, 627 (1998).

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United States District Court, D. Oregon.

ALLIED WORLD SURPLUS LINES INSURANCE COMPANY, Plaintiff/Counter-Defendant,
v.
PTS SURVEYING, INC., Defendant/Counter-Claimant.

No. 3:19-cv-00948-MO
|
Signed 03/20/2020

Attorneys and Law Firms

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OPINION AND ORDER

MOSMAN, United States District Judge

***1** This case comes before me on Plaintiff Allied World Surplus Lines Insurance Company's ("Allied World") Motion for Summary Judgment [ECF 37]. On February 28, 2020, I heard oral argument on this motion and took it under advisement. Min. of Proceedings [ECF 46]. For the reasons stated below, I GRANT Allied World's motion.

BACKGROUND

Defendant PTS Surveying, Inc. ("PTS") is a land surveying company located in Hillsboro, Oregon. Pl.'s First Mot. Summ. J. [ECF 13] at 2. In 2014, PTS was hired by Flatiron West, Inc. ("Flatiron"), a general contractor, to perform survey work in Seattle for a Washington State Department of Transportation ("WSDOT") project. *Id.* at 2-4. The project, as described by WSDOT, was to construct the "West Approach Bridge North" ("WABN"). Mot. Summ. J. [37] at 3-4. The WABN is "a 6,000 foot roadway built on 41 sets of piers, which provides the western most connection point for the 7,700 foot long SR 520 floating bridge" which spans Lake Washington. *Id.* at 7; *see also* Def.'s Resp. to Mot. Summ. J. [ECF 40] at 3-4, 10 (providing PTS's description of the WABN).[1]

Flatiron is currently suing PTS in the Western District of Washington (the "Underlying Action"), alleging that PTS committed costly errors during its survey work on the WABN project. *Flatiron West, Inc. v. PTS Surveying, Inc.*, Case No. 2:19-cv-00201 (W.D. Wash Feb. 2, 2019). PTS has an insurance policy with Allied World ("the Policy") which PTS asserts provides defense and/or indemnity coverage for the claims brought against it by Flatiron in the Underlying Action. Mot. Summ. J. [37] at 1. Allied World filed this action seeking a declaration from this court that the Policy does not cover the claims brought against PTS in the Underlying Action. *Id.*

In the present motion, Allied World argues that a coverage exclusion provision in the Policy—what the parties term the "Bridge Exclusion"—precludes PTS from receiving coverage for its work on the WABN project. The Bridge Exclusion states:

> No coverage will be available under this Policy for Loss and Defense Expenses from any Claim or Disciplinary Proceeding based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged:
>
> [...]
>
> (3) **activities or services performed in connection with** any petroleum processing, storage or transportation facility, dam, mine, or tunnel **or bridge exceeding 150 feet in length**.

Mot. Summ. J. [37] at 6 (emphasis added); Yeisley Decl. Ex. 1 [ECF 15-1] at 9.

The question before this court is whether the WABN is a bridge, or, if it is not, whether PTS's work on the WABN was a service "performed in connection with" the SR 520 floating bridge.[2]

LEGAL STANDARD

***2** Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, summary judgment turns on a legal question involving the proper construction and application of an insurance policy.

In Oregon, the proper construction of an insurance policy is evaluated using the interpretive framework set forth by the Oregon Supreme Court in *Hoffman Constr. Co. of Alaska v. Fred S. James & Co. of Or.*, 836 P.2d 703, 706 (Or. 1992). The goal is to "determine the intention of the parties by analyzing the policy's express terms and conditions." *Hunters Ridge*

Condo. Ass'n v. Sherwood Crossing, LLC, 395 P.3d 892, 896 (Or. App. 2017) (citing *Hoffman*, 836 P.2d at 706). As to coverage exclusion provisions in insurance policies, "[t]he insurer has the burden of proof that the loss is excluded," and "any ambiguity in an exclusionary clause is strictly construed against the insurer." *Stanford v. American Guar. Life Ins. Co.*, 571 P.2d 909, 911 (Or. 1977).

DISCUSSION

I. Whether the WABN is a "bridge."

In a typical *Hoffman* analysis, there is a dispute over the proper construction of a purportedly ambiguous contact term or phrase. Here, there does not appear to be a dispute about what the term "bridge" means as used in the Policy. Only Allied World actually provides a definition of "bridge." PTS argues that the WABN is not a bridge but does not provide a competing definition. Allied World, citing Merriam-Webster dictionary, defines a "bridge" as "a structure carrying a pathway or roadway over a depression or obstacle (such as a river)." Mot. Summ. J. [37] at 7 (citing https://www.merriam-webster.com/dictionary/bridge). As this is the only definition provided, and it appears sensible, it is the definition I will apply.

Allied World argues that, under the provided definition, the WABN can be viewed as either a bridge in and of itself, or as a constituent part of the SR 520 floating bridge. Mot. Summ. J. [37] at 7. PTS argues that the WABN is an "elevated roadway" that provides "an onramp and approach" to the floating bridge, but that the WABN is not a bridge itself or a part of the floating bridge. Resp. [40] at 10.[3]

The unstated thrust of PTS's argument appears to be that an "elevated roadway" and a "bridge" are mutually exclusive concepts. They are not. In fact, most bridges are elevated roadways. And that certainly appears to be the case here. Whether in looking at the photographs provided by the parties, or in reading each side's description in their briefing, it is clear that the WABN is (1) a structure carrying a roadway (2) over an obstacle (here, water). PTS does not contest either of these two points (how could they?). Nor do they even attempt to provide a different definition of "bridge" that would not encompass the WABN.

***3** One of the hallmarks of legal thinking is to take nothing for granted. The downside of such an approach is that it can lead to overthinking the obvious. Here, the obvious remains undisturbed. The WABN—aptly named the "West Approach Bridge North" by WSDOT—is a bridge.[4] Therefore, the Bridge Exclusion applies, and the Policy excludes coverage for claims arising from PTS's work on the WABN project.

II. Whether, in the alternative, PTS's work on the WABN was a service "performed in connection with a bridge."

I note at the outset that I agree with the argument made by PTS at oral argument that the WABN, assuming *arguendo* that it is not a bridge, does not necessarily fall under the Bridge Exclusion because it *physically* connects to the SR 520 floating bridge. In other words, the language "in connection with" does not mean or connote literal physical connection. Nevertheless, the fact that the WABN physically connects to the SR 520 floating bridge is relevant. The WABN would not exist but for its sole purpose in providing access to the SR 520 floating bridge. The SR 520 floating bridge would be inoperable but for the existence of access points such as the WABN (or a series of such connections). While this is ultimately a line-drawing exercise, work on the WABN is so closely related to and intertwined with the SR 520 floating bridge that it comfortably falls within the language of the Bridge Exclusion.

The only way to construe the Bridge Exclusion so that PTS's work on the WABN would not be considered work "performed in connection with" the floating bridge would be to interpret the phrase "[work] performed in connection with ... a bridge" to mean work "performed *on* a bridge." But those two phrases mean different things; to construe them otherwise would warp

the plain meaning of the Bridge Exclusion. Therefore, I hold that the Bridge Exclusion applies to PTS's work on the WABN for this reason as well.

CONCLUSION

For the foregoing reasons, I GRANT Allied World's Motion for Summary Judgment regarding the Bridge Exclusion [37].

IT IS SO ORDERED.

Attachment

All Citations

Slip Copy, 2020 WL 1324998

Footnotes

1	At the February hearing, I ordered each side to submit to the court, via email, a photograph of the WABN. Those photographs are attached to this opinion as Exhibit A (Allied World's photo) and Exhibit B (PTS's photo).
2	There is no dispute that the SR 520 floating bridge is a "bridge" for purposes of the Bridge Exclusion.
3	PTS also argues that "PTS and Allied World clearly intended that this Policy cover the Work on the WABN project." Resp. [40] at 8. As evidence, PTS cites that it provided specific information about the WABN project to its insurance broker, who worked with Flatiron to ensure PTS's insurance met the requirements for the project. *Id.* But as PTS acknowledges, we determine the intent of the parties to an insurance contract by looking at the express terms of the policy. *Hoffman*, 836 P.2d. at 706. PTS has cited no authority which would permit me to consider these other arguments in interpreting the Policy. *See also Tualatin Valley Hous. Partners v. Truck Ins. Exch.*, 144 P.3d 991, 993 (Or. App. 2006) ("In all events, interpretation of an insurance policy is a question of law that is confined to the four corners of the policy without regard to extrinsic evidence.") (citation omitted).
4	Whether the WABN is better viewed as a bridge in and of itself or as a constituent part of the SR 520 floating bridge is immaterial.

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Only the Westlaw citation is currently available.
Supreme Court of the United States.

Andrey L. BRIDGES,
v.
GRAY, Warden

No. 19-7749
|
March 23, 2020

Opinion

***1** The petition for writ of certiorari is denied.

All Citations

--- S.Ct. ----, 2020 WL 1326101 (Mem)

2020 WL 2084905
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

UNITED STATES of America, Plaintiff,
v.
Gregory Lyle BRIDGES, Defendant.

CASE NO. CR15-181 MJP
|
Signed 04/30/2020

Attorneys and Law Firms

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John R. Crowley, The Crowley Law Firm, P.L.L.C., Seattle, WA, for Defendant.

ORDER DENYING MOTION TO INTERVENE

Marsha J. Pechman, United States Senior District Judge

***1** The above-entitled Court, having received and reviewed:

1. Motion to Intervene and to Order Production of Records (Dkt. No. 74),

2. Government's Response to Motion to Intervene and to Order Production of Records (Dkt. No. 77),

3. Defendant's Opposition to Plaintiff's Motion to Intervene and to Order Production of Records (Dkt. No. 78),

all attached declarations and exhibits, and relevant portions of the record, rules as follows:

IT IS ORDERED that the motion is DENIED.

This motion is brought by counsel for Carter Jesness, a victim of Defendant's criminal sexual activity and the plaintiff in a civil suit against Defendant (Jesness v. Bridges, C18-1225RSM). Liability in the civil matter has been established via summary judgment (based on the criminal conviction) and trial on the issue of damages is pending; a bench proceeding is currently set before the Honorable Ricardo S. Martinez of this district on November 16, 2020.

Mr. Jesness' request of this Court is twofold: (1) to permit Mr. Jesness to intervene in this criminal proceeding and (2) to order the Government to "produce the discovery in this matter concerning Bridges' crimes against Carter Jesness in order to assist in the preparation of the damages trial scheduled before Judge Martinez." (Dkt. No. 74, Motion at 14.)

Mr. Jesness' counsel cites FRCP 24(b)(1)(B) as authority for his client's right to intervene in this case. The problem (as the Government points out) is that this rule of federal *civil* procedure says nothing about intervention in criminal matters. It is, in fact, the general rule in the Ninth Circuit that "individuals lack standing to intervene in criminal prosecutions." U.S. v. Van Dyck, 866 F.3d 1130, 1133 (9th Cir. 2017), *citing* Linda R.S. v. Richard D. and Texas, 410 U.S. 614, 619 (1973).

There are a host of other problems with this motion, ranging from its vague and possibly overbroad nature, compliance issues related to evidence of child pornography and grand jury materials, and questions about why counsel chose not to simply enforce Judge Martinez's order compelling production of this material or subpoena it within the civil proceeding. All these issues are moot in face of Mr. Jesness' inability to establish his right to intervene herein.

This Court joins the Government in expressing its hope that Mr. Jesness is able to vindicate his rights and achieve all the compensation to which he is entitled. This must be accomplished, however, within the framework established for the just and orderly administration of civil litigation. Mr. Jesness has not succeeded in establishing that intervention in his abuser's criminal proceeding is among the rights accorded him in this process.

The motion to intervene and to order production of records in the above-entitled matter is DENIED.

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United States District Court, W.D. Washington,
at Seattle.

TEN BRIDGES, LLC, Plaintiff,
v.
MIDAS MULLIGAN, LLC, et al., Defendants.

CASE NO. C19-1237JLR
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Signed 04/17/2020
|
Filed 04/20/2020

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ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

***1** Before the court is Plaintiff Ten Bridges, LLC ("Ten Bridges") motion to dismiss Defendants Midas Mulligan, LLC ("Midas"), Madrona Lisa, LLC ("Madrona"), and Danielle Gore's (collectively, "Defendants") counterclaim. (*See* Mot. (Dkt. # 20).) The court has reviewed Ten Bridges' motion, the parties' submissions filed in support of and in opposition to Ten Bridges' motion, the relevant portions of the record, and the applicable law. Being fully advised,[1] the court GRANTS Ten Bridges' motion and DISMISSES Defendants' counterclaim with prejudice and without leave to amend.

II. BACKGROUND

Ten Bridges and Defendants engage in the business of purchasing residential property at judicial foreclosure sales. (*See* FAC

(Dkt. # 6) ¶ 1.) Ten Bridges and Defendants are direct competitors. (*See id.* ¶¶ 1, 9-10.) In its amended complaint, Ten Bridges alleges that Defendants abused the state court's judicial process and intentionally interfered with Ten Bridge's business relations. (*See generally id.*) Specifically, Ten Bridges alleges Defendants improperly interfered with Ten Bridges efforts to acquire redemption rights to foreclosed property and/or the rights to surplus proceeds from foreclosed property owners by engaging in improper litigation conduct in various state court proceedings. (*See id.* ¶¶ 17-20, 24-26, 28-30.) Based on this alleged conduct, Ten Bridges brings claims for tortious interference with business relationships and abuse of process against Defendants. (*See id.* ¶¶ 31-54.) Ten Bridges seeks both injunctive relief and damages from Defendants. (*See id.* ¶¶ 55-58 & Prayer for Relief at 11.)

***2** In their answer to Ten Bridges' amended complaint, Defendants assert counterclaims on behalf of Madrona and Midas. (*See* Answer (Dkt. # 19) at 13, ¶¶ 1-4.) Defendants allege "the absolute right to bring to the King County Superior Court's attention the fact that Ten Bridges' contracts ... violate RCW 63.29.350 and are therefore illegal, void, and unenforceable."[2] (*Id.* at 13, ¶ 2.) Defendants further allege that "[c]ommencement by Ten Bridges of this action against Midas and Madrona constitutes a violation of RCW 4.25.510, because the information brought to the King County Superior Court's attention by Midas and Madrona is and was reasonably of concern to the King County Superior Court." (*Id.* at 13, ¶ 3.) Defendants aver that "Midas and Madrona are entitled to each recover judgment against [Ten Bridges] in the amount of $10,000[.00], together with their expenses and reasonable attorney's fees incurred in and for this action, as a result of Ten Bridges' violations of RCW 4.24.510." (*Id.* at 13, ¶ 4.)

With respect to Midas' counterclaim, Defendants aver that Midas was the winning bidder at the King County Sheriff's judicial foreclosure sale of non-party Teresia Guandai's property, which is located on 15th Avenue Northeast, in Seattle, Washington. (*See* Resp. at 5 (citing FAC ¶ 15 ("[Midas] purchased the property ... owned by ... [Ms.] Guandai ... at a foreclosure sale....")).) The sale resulted in surplus proceeds of $89,234.72. (*See* FAC ¶ 17.) Following the sale, Ten Bridges entered into an agreement with Ms. Guandai, whereby she delivered a quit claim deed to Ten Bridges, which included a grant of Ms. Guandai's right to receive the surplus proceeds. (*See id.* ¶ 16.)

Ten Bridges then filed a motion in King County Superior Court to obtain the surplus proceeds from the judicial foreclosure sale of Ms. Guandai's property("the *Guandai* action"). (*See id.* ¶ 17; *see also* Beckett Decl. (Dkt. # 23) ¶ 2.a, Ex. 1 (attaching a copy of Ten Bridge's motion).) Midas filed an opposition to Ten Bridges' motion, arguing that Ten Bridges' agreement with Ms. Guandai violated RCW 63.29.350 and was therefore invalid and void. (*See* Answer at 13, ¶ 2; *see also* Beckett Decl. ¶ 2.b, Ex. 2 (attaching copy of Midas' response to Ten Bridges' motion).) The King County Superior Court entered an order denying Ten Bridges' motion in part. (*See* Answer at 9, ¶ 4 (stating as an affirmative defense that Ten Bridges' "contract[ ] with Teresia Guandai ... violate[s] RCW 63.29.350 and ha[s] been determined to be illegal, void, and unenforceable in King County Superior Court...."); Beckett Decl. ¶ 2.e, Ex. 5 (attaching King County Superior Court order denying "in part" Ten Bridges' motion for disbursement and awarding $73,996.95, less clerk's fees, if any, to Ms. Guandai, and $15,000.00, less clerk's fees, if any, to Ten Bridges).)

***3** With respect to Madrona's counterclaim, Defendants aver that Madrona was the winning bidder at the King County Sheriff's judicial foreclosure sale of Yukiko Asano's property located on Bellevue Way Northeast, in Bellevue, Washington. (*See* Resp. at 6 (citing FAC ¶ 27 ("Madrona purchased 1344 Bellevue Way NE....")); *see also* Answer ¶ 18 ("Defendants admit that Madrona was the winning bidder ... at a foreclosure sale of the real property located at 1344 Bellevue Way NE").) Following the sale, Ten Bridges entered into an agreement with Ms. Asano whereby she delivered a quit claim deed to Ten Bridges, which included a grant of Ms. Asano's right to redeem the property from Madrona. (FAC ¶ 28; Answer ¶ 19.) Ten Bridges attempted to redeem the property from Madrona. (FAC ¶ 28; Answer ¶ 19 ("Defendants admit that ... Ten Bridges delivered a Notice of Intent to Redeem the property and tendered funds to the King County Sheriff in order to do so....").) Madrona objected to Ten Bridge's notice. (FAC ¶ 28; Answer ¶ 19 ("Madrona objected to the attempt to redeem and argued, in part, that the Deed from Ms. Asano to Ten Bridges was void and of no legal effect.").)

Ten Bridges then filed a motion in King County Superior Court asking the court to set the amount for which Ten Bridges could redeem Ms. Asano's property from Madrona ("the *Asano* action"). (Beckett Decl. ¶ 2.f, Ex. 6.) Madrona opposed Ten Bridges' motion. (*Id.* ¶ 2.g, Ex. 7.) The King County Superior Court entered an order finding the quit claim deed to be "void and unenforceable" because the agreement between Ten Bridges and Ms. Asano was "unlawful." (*Id.* ¶ 2.h, Ex. 8 at 1.) The court further ordered that Ten Bridges had "no right to redeem the real property from Madrona." (*Id.* at 2.)[3]

Ten Bridges moves for dismissal with prejudice of Defendants' counterclaims, which are based on the facts underlying the *Guandai* and *Asano* actions and are premised on RCW 4.25.510. (*See generally* Mot.) The court now considers Ten Bridges'

motion.

III. ANALYSIS

A. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint—or in this case, the counterclaim—in the light most favorable to the nonmoving party. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the claimant. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The court, however, is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677-78. Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

B. Material the Court Considers

Defendants ask the court to take judicial notice of (1) the parties' filings in King County Superior Court and the Washington Court of Appeals (*see* Beckett Decl. (Dkt. # 23) ¶¶ 2.a, 2.b, 2.f, 2.g, 2.i, 2.j, Exs. 1-2, 6-7, 9-10); (2) transcripts of state court proceedings on file in the Washington Court of Appeals (*see id.* ¶¶ 2.c, 2.d, Exs. 3-4); and (3) state court orders (*id.* ¶¶ 2.e, 2.h, 2.k, Exs. 5, 8, 11). *See* Resp. at 3-5 (asking the court to take judicial notice of eleven documents on file in Washington State courts). Ten Bridges does not object to Defendants' request. (*See generally* Reply (Dkt. # 24).)

***4** Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citations omitted). One exception to this rule is that the court may take judicial notice of documents pursuant to Federal Rule of Evidence 201. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *see also* Fed R. Evid. 201. Thus, the "court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." *See Khoja*, 899 F.3d at 999 (quoting *Lee*, 250 F.3d at 689 (quotation marks and citation omitted)). However, the court may not take judicial notice of disputed facts contained in such public records. *See id.* The documents Defendants submit for judicial notice are public records. (*See* Beckett Decl. ¶¶ 2.a-k, Exs. 1-11.) Ten Bridges does not contest their authenticity. (*See generally* Reply.) The court, therefore, grants Defendants' request and takes judicial notice (1) of the eleven documents Defendants submit that are on file in Washington State courts, (2) that the state courts conducted certain transcribed hearings which are memorialized in some of those documents, and (3) that the state courts issued certain orders; but the court does not take judicial notice of any disputed facts contained in the parties' state court filings.

C. Defendants' Counterclaim

Defendants premise their counterclaims on RCW 4.24.510. (Answer at 13, ¶¶ 3-4.) Defendants contend that Ten Bridges' present lawsuit, which alleges abuse of process against Midas and Madrona for their litigation conduct in the *Asano* and *Guandai* actions (*see* FAC ¶¶ 45-54), constitutes a violation of RCW 4.24.510 (*see* Answer at 13, ¶ 3.) Defendants further allege that the statue entitles Madrona and Midas to recover $10,000.00, each, from Ten Bridges, along with their expenses and reasonable attorney's fees incurred in this suit. (*Id.* at 13, ¶ 4.)

The statutory provision upon which Defendants rely provides that "[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government ... is immune from civil liability for claims based upon the communication to the agency ... regarding any matter reasonably of concern to that agency." RCW 4.24.510. In addition, "[a] person prevailing upon the defense provided for in [RCW 4.24.510] ... is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars." *Id.* In 2002, the Washington Legislature amended the statute to clarify that it includes complaints made to any "branch" of government, and to eliminate the "good faith" requirement, conferring absolute immunity. *See Yanni v. City of Seattle*, No. C04-0896L, 2005 WL 8172266, at *1 (W.D. Wash. Feb. 28, 2005). However, "[s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." RCW 4.24.510.

Ten Bridges argues that RCW 4.24.510 "does not apply to information presented to a court acting in an adjudicative capacity," and accordingly, the court should dismiss Defendants' counterclaims with prejudice. (*See* Mot. at 1.) Defendants respond that their conduct falls within the plain language of the statute and that by bringing Ten Bridges' allegedly wrongful conduct to the attention of the King County Superior Court in the *Guandai* and *Asano* actions, Midas and Madrona were "communicat[ing] a complaint or information" to a "branch or agency of ... local government," and were thereby engaging in conduct within the purview and protection of RCW 4.24.510. (Resp. at 9-10.)

The court in *Yanni* addressed a similar issue.[4] *See* 2005 WL 8172266, at *1-2. In *Yanni*, the plaintiffs claimed that the City of Seattle and certain police officers had violated their Fourth and Fourteenth Amendment rights, and the plaintiffs filed suit under 42 U.S.C. § 1983. *Yanni*, 2005 WL 8172266, at *1. In response, the police officers brought a counterclaim for malicious prosecution pursuant to RCW 4.24.350. *Yanni*, 2005 WL 8172266, at *1. Like Defendants here, the *Yanni* plaintiffs argued that they were immune from any such state law claim for communicating their complaints about the officers' conduct to the federal court under RCW 4.24.510. *Yanni*, 2005 WL 8172266, at *1.

***5** In so arguing, the *Yanni* plaintiffs relied on *Kauzlarich v. Yarbough*, 20 P.3d 946 (Wash. Ct. App. 2001). 2005 WL 8172266 at *2. In *Kauzlarich*, a lawyer communicated a party's alleged death threats to the court during a child custody case in the interest of ensuring security within the courtroom. 20 P.3d at 949. The *Kauzlarich* court held that RCW 4.24.510 covered the lawyer's communication with the court because it accorded with the statute's purpose of encouraging effective law enforcement and because "[s]ecurity in the courtroom is vital to the administration of justice." 20 P.3d at 954-56.

The *Yanni* court, however, rejected the notion that the holding in *Kauzlarich* could be extended "to mean that RCW 4.24.510 covers lawsuits as 'communications' with courts." 2005 WL 8172266, at *2. Indeed, the *Yanni* court noted that "[n]o case has stated, even in dicta, that a lawsuit constitutes the type of 'communication' covered by the statute"; nor does the statute state that the "contents of [a] lawsuit are matters reasonably of concern to the courts." *Id.* Further, the *Yanni* court explained that "[e]very other case addressing RCW 4.24.510 in any context involve[d] a statement in the course of a public hearing, a complaint to a governmental authority, usually an agency, about a matter of public concern, or the communication of information regarding potential criminal activity to law enforcement." 2005 WL 8172266, at *2. Thus, the *Yanni* court declined to read the holding in *Kauzlarich* or the statute as broadly as the plaintiffs proponed. 2005 WL 8172266, at *2. Although the court acknowledged that some statements to a court could fall within the purview of the protection of the statute as the *Kauzlarich* court recognized, the court held that "the filing of lawsuit or the contents of a complaint" did not so qualify. 2005 WL 8172266, at *2.

Defendants argue that *Yanni* is distinguishable because the statements they made in the *Guandai* and *Asano* actions were "***not*** complaints filed at the commencement of lawsuits, or the contents of such complaints," but "[r]ather, ... communications [that] were 'made to the court during the course of litigation'—the very type of communication that [the Yanni court] agreed could be within RCW 4.24.510's coverage." (*See* Resp. at 16-17 (quoting *Yanni*, 2005 WL 8172266, at *2).) Defendants, however, skew the holding in *Yanni* both too broadly and too narrowly. Defendants read the *Yanni* court's statement that "the filing of a lawsuit and the contents of a complaint" are not protected by RCW 4.24.510 too narrowly to exclude any pleading or court filing other than a complaint, and they read the *Yanni* court's statement that "some communications made to the court during the course of litigation may be protected" by the statute too broadly—ignoring the context the *Yanni* court provided

for that statement in its discussion of the holding in *Kauzlarich*. Properly read, the *Yanni* court distinguished between statements made to the court in its adjudicative capacity and statements made to the court concerning its own administration. The former, like the statements in *Yanni*, are not protected by RCW 4.24.510, while the latter, like the statements in *Kauzlarich*, may be. Here, Defendants' statements or communications to the state courts at issue during the *Guandai* and *Asano* actions were in the former, and not the latter, category. Accordingly, similar to the court in *Yanni*, this court holds that RCW 4.24.510 does not provide Defendants with immunity in the context of this lawsuit or provide any basis for their counterclaims against Ten Bridges.

***6** Further, there is no evidence that, by enacting RCW 4.24.510, the Legislature intended to eliminate the tort of abuse of process. Indeed, this tort continues to exist in Washington. *See Bellevue Farm Owners Ass'n v. Stevens*, 394 P.3d 1018, 1024 (Wash. Ct. App. 2017) (listing the elements for the tort of abuse of process). Because abuse of process is premised on communicating with the court, if the court were to adopt Defendants' interpretation of RCW 4.24.510, a successful prosecution of the tort could result in an untenable award of attorney's fees and costs to the losing party. Although the statute permits the court to deny statutory damages if information is communicated in bad faith, there is no such exemption for an award of expenses and attorneys' fees. *See* RCW 4.24.510 ("A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith."). Thus, if the court were to hold that RCW 4.24.510 applies to adjudicative communications with the court—as Defendants suggest—that interpretation would irreconcilably conflict with common law torts—such as abuse of process and malicious civil prosecution—that the Legislature did not "clearly express[ ]" its intent to modify. *See Staats v. Brown*, 991 P.2d 615, 621 (Wash. 2000); *Price v. Kitsap Transit*, 886 P.2d 556, 560 (Wash. 1994) ("[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it"); *State ex rel. Munroe v. City of Poulsbo*, 37 P.3d 319, 322 (Wash. Ct. App. 2002) ("[W]e will not construe a statute in derogation of the common law absent a clearly expressed legislative intent to do so."); *see also Briscoe v. LaHue*, 460 U.S. 325, 334 (1983).

The *Yanni* court reached a similar conclusion when the court noted that if RCW 4.25.510 were interpreted to apply to adjudicative statements to the court, then it would conflict with the malicious prosecution statute in RCW 4.24.350. *See* 2005 WL 8172266, at *2. The Yanni court noted that the Legislature is presumed to have been aware of the provisions of the malicious prosecution statute at the time it amended RCW 4.24.510. *See id.* The court reasoned that "[i]f RCW 4.24.510 provides absolute immunity for all lawsuits filed with the courts, it would render the malicious prosecution statute moot." *Id.* Reading the statutes together, to give effect to both, the court concluded that RCW 4.24.510 did not provide the plaintiff with immunity from the defendant officers' counterclaim for malicious prosecution. *Id.* Likewise, this court cannot reconcile Washington's common law abuse of process tort claim with the statutory interpretation of RCW 4.24.510 proponed by Defendants. Thus, the court declines to construe RCW 4.24.510 as applicable to adjudicative communications with the court.

Defendants nevertheless contend that RCW 4.24.510 is a remedial statute that the court should construe liberally. (*See* Resp. at 4.) Although the Legislature expressly stated that the related, but now defunct, RCW 4.24.525[5] "shall be applied and construed liberally," *see* 2010 Wash. Sess. Laws 921, 924, ch. 118 § 3, the Legislature has never so stated with respect to RCW 4.24.510. In any event, the court concludes that RCW 4.24.510 is not remedial in nature. A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. *Miebach v. Colasurado*, 685 P.2d 1074, 1081 (Wash. 1984). In *Nguygen v. County of Clark*, 732 F. Supp. 2d 1190 (W.D. Wash. 2010), the court held that the now defunct RCW 54.24.525 was remedial because it "does not dismiss [the defendants'] counterclaim for malicious prosecution, but simply changes the procedures that they must adhere to in proving their claims." *Id.* at 1193. In contrast, RCW 4.24.510 "grants immunity from civil liability for those who complain to their government regarding issues of public interest or social significance." *Valdez-Zontek v Eastmont Sch. Dist.*, 225 P.3d 339, 350 (Wash. Ct. App. 2010) (quoting *Skimming v. Boxer*, 82 P.3d 707, 712 (Wash. Ct. App. 2004)). Thus, because RCW 4.24.510 provides immunity from suit, it affects substantive rights and cannot be said to be remedial in nature.

***7** In any event, as the Washington Supreme Court recently explained, "[t]he distinction between 'liberal construction' and 'strict construction' is easily overstated." *Estate of Bunch v. McGraw Residential Ctr.*, 275 P.3d 1119, 1123 (Wash. 2012). "Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature...." *Id.* Here, the Legislature specifically described the purpose of RCW 4.24.510 as "protect[ing] individuals who make good-faith reports to appropriate governmental bodies" and mitigating deterrents for "citizens who wish to report information to federal, state, or local agencies." RCW 4.24.500. The Legislature was concerned that such "[i]nformation provided by citizens ... is vital to

effective law enforcement and the efficient operation of government." *Id.* Defendants' broad construction of the statute, which would apply the immunity provided in RCW 4.24.510 to adjudicative statements made in court proceedings concerning disputes between private individuals, goes well-beyond the Legislature's expressly stated purpose in enacting the statute. *See* RCW 4.24.500. Accordingly, the court declines to adopt it.[6]

Based on the foregoing analysis, the court GRANTS Ten Bridges' motion to dismiss Defendants' counterclaims based on RCW 4.24.510. Because Defendants' counterclaims do not allege a cognizable legal theory, amendment would be futile and the court dismisses the counterclaim without leave to amend. *AE ex rel. Hernandez. v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) (stating that leave to amend need not be given if it would be futile); *Steele-Klein v. Int'l Bhd. of Teamsters, Local 117*, 696 F. App'x 200, 202 (9th Cir. 2017) ("Granting leave to amend would, again, be futile, because [the plaintiff] has not identified how she would articulate a cognizable legal theory if given the opportunity."); *Perez c. TBG Logistics, LLC*, No. CV-16-02916-PHX-ROS, 2016 WL 10919966, at *2 (D. Ariz. Dec. 16, 2016), *aff'd sub nom. Scalia v. Employer Sols. Staffing Grp., LLC*, 951 F.3d 1097 (9th Cir. 2020) ("If the underlying legal theories are not viable, there is no need to grant leave to amend.").

IV. CONCLUSION

Based on the foregoing analysis, the court GRANTS Ten Bridges' motion to dismiss Defendants' counterclaims, which are based on RCW4.24.510 (Dkt. # 20). Further, the dismissal is with prejudice and without leave to amend.

All Citations

Slip Copy, 2020 WL 1914912

Footnotes

1	Defendants request oral argument. (*See* Resp. (Dkt. # 22) at 1.) Generally, the court should not deny a request for oral argument made by a party opposing a dispositive motion unless the motion is denied. *See Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964). However, oral argument is not necessary where the non-moving party suffers no prejudice. *See Houston v. Bryan*, 725 F.2d 516, 517-18 (9th Cir. 1984); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (holding that no oral argument was warranted where "[b]oth parties provided the district court with complete memoranda of the law and evidence in support of their respective positions," and "[t]he only prejudice [the defendants] contend they suffered was the district court's adverse ruling on the motion."). "When a party has an adequate opportunity to provide the trial court with evidence and a memorandum of law, there is no prejudice [in refusing to grant oral argument]." *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (quoting *Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991)) (alterations in *Partridge*). Here, the issues have been thoroughly briefed by the parties, and oral argument would not be of assistance to the court. *See* Local Rules W.D. Wash. LCR 7(b)(4). Accordingly, the court DENIES Defendants' request for oral argument.

2	RCW 63.29.350 provides: (1) It is unlawful for any person to seek or receive from any person or contract with any person for any fee or compensation for locating or purporting to locate any property which he or she knows has been reported or paid or delivered to the department of revenue pursuant to this chapter, or funds held by a county that are proceeds from a foreclosure for delinquent property taxes, assessments, or other liens, or, funds that are otherwise held by a county because of a person's failure to claim funds held as reimbursement for unowed taxes, fees, or other government charges, in excess of five percent of the value thereof returned to such owner. Any person violating this section is guilty of a misdemeanor and shall be fined not less than the amount of the fee or charge he or she has sought or received or contracted for, and not more than ten times such amount, or imprisoned for not more than thirty days, or both. (2) The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. Any violation of this section is not reasonable in relation to the development and preservation of business. It is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW. Remedies provided by chapter 19.86 RCW are cumulative and not exclusive. *Id.*
3	Ten Bridges brought a second motion asking the King County Superior Court to set the amount for which Ten Bridges could redeem the property from Madrona, which Madrona again opposed, and the court again denied. (*See* Beckett Decl. ¶¶ 2.i, 2.j, 2.k, Exs. 9-11.)
4	Ten Bridges represents that it was unable to find a Washington State court decision addressing whether RCW 4.24.510 applies to lawsuits or communications made to the court during a lawsuit for adjudicative purposes. (Mot. at 7.) The court could not find one either.
5	*See Davis v. Cox*, 351 P.3d 862, 874-75 (Wash. 2015) (holding that RCW 4.24.525 "violates the right of trial by jury under article 1, section 21 of the Washington Constitution" and invalidating it "as a whole"), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018).
6	The court is also not persuaded by Defendants' reliance on *Eugster v. City of Spokane*, 156 P.3d 912 (Wash. Ct. App. 2007). (*See* Resp. at 12-14.) In *Eugster*, a city council member brought an action against the city, challenging a settlement between the city and parking garage developer in which the city releases parking meter funds to the developer and title to the garage would be passed through to the developer. The trial court granted summary judgment to the city but denied the city's request for Washington Civil Rule 11 sanctions against the council member. The council member appealed and argued that the city's Rule 11 motion entitled him to his attorney's fees and statutory damages under RCW 4.24.510. 156 P.3d at 918. The *Eugster* court held that the city's Rule 11 motion did not fall within the purview of the statute because it "was not a claim on a substantive issue." *Id.* The *Eugster* court did not consider whether RCW 4.24.510 extends generally to adjudicative court submissions because it did not need to do so. Contrary to Defendants' assertions, the *Eugster* court's silence on the issue is not an indication that the statute applies to such submissions; rather, it is merely an indication of judicial restraint. There is nothing in the *Eugster* court's holding that supports Defendants' position or undermines the court's ruling here.

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Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

TEN BRIDGES LLC, an Oregon limited liability company, Plaintiff,
v.
Susan D. HOFSTAD; Justin Thomas; the Estate of Benjamin H. Thomas; and John Does 1-10, Defendants.

Civil Action No. 2:19-cv-01134-RAJ
|
Signed 04/22/2020

Attorneys and Law Firms

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Craig David Sjostrom, Tacey Goss PS, Mount Vernon, WA, for Defendant the Estate of Benjamin H. Thomas.

ORDER

The Honorable Richard A. Jones, United States District Judge

***1** This matter is before the Court on Defendant Justin Thomas' motion to dismiss. Dkt. # 8. Defendants Susan D. Hofstad and the Estate of Benjamin H. Thomas join the motion. Dkt. ## 11, 12. For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

The following is taken Plaintiff's complaint, which is assumed to be true for the purposes of this motion to dismiss. *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007); *see also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("Moreover, when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.").

On June 13, 2010, Mr. Benjamin Thomas, Jr. ("Mr. Thomas Jr.") died intestate, leaving two heirs, Defendants Susan D. Hofstad and Justin Thomas. Dkt. # 1 at ¶¶ 1.4, 2.3. Mr. Thomas Jr.'s home was sold at a sheriff's foreclosure sale, later confirmed by the court in a judicial foreclosure action filed in Snohomish County Superior Court. Dkt. # 1 at ¶ 2.2. After the foreclosing plaintiff satisfied its judgment, approximately $156,490.44 in surplus proceeds remained. Dkt. # 1 at ¶ 2.5. These funds are currently on deposit in the Snohomish County Superior Court registry. *Id.*

In May 2019, Plaintiff Ten Bridges, LLC ("Plaintiff" or "Ten Bridges") contacted Defendant Justin Thomas and offered to purchase his interest in the property for $9,500. Mr. Thomas agreed and executed a Quit Claim Deed in favor of Ten Bridges. Dkt. # 1 at ¶¶ 2.6–2.8. Although not a named party in the foreclosure action, Ten Bridges subsequently filed a motion to disburse the surplus proceeds from the foreclosure sale to Ten Bridges based on the Quit Claim Deed. Dkt. # 1 at ¶ 2.9. In the motion, Ten Bridges also argued that the only other remaining heir, Ms. Hofstad, had previously disclaimed any interest in the property in November 2012. *Id.* The state court denied Ten Bridges' motion without prejudice, holding that the motion was not appropriate for the "civil motions calendar" and the surplus proceeds could not be disbursed until the parties' respective rights were adjudicated in a "separate action." Dkt. # 8-1 at 10.

Ten Bridges now brings this action against Defendants, alleging claims for declaratory judgment, promissory estoppel, breach of contract, and unjust enrichment. Dkt. # 1. Defendants move to dismiss for lack of subject matter jurisdiction. Dkt. # 8.

II. DISCUSSION

Federal courts are tribunals of limited jurisdiction and may only hear cases authorized by the Constitution or a statutory grant. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The burden of establishing subject-matter jurisdiction rests upon the party seeking to invoke federal jurisdiction. *Id.* Once it is determined that a federal court lacks subject-matter jurisdiction, the court has no choice but to dismiss the suit. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); Fed. R. Civ. P. 12(b)(1).

A. Prior Exclusive Jurisdiction Doctrine

***2** Defendants argue that this action is improper under the prior exclusive jurisdiction doctrine which requires federal courts to abstain from ruling on cases involving property subject to concurrent state proceedings. *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011). In other words, if a state or federal court has taken possession of a property or obtained jurisdiction over the property, then a second court may not assume jurisdiction over the same property. *Id.* To determine whether the prior exclusive doctrine applies, courts must (1) identify the priority of the actions (i.e. which court exercised jurisdiction first) and (2) characterize the nature of the concurrent actions (*in rem*, *quasi in rem*, or *in personam*). If the concurrent proceeding seeks to "determine interests in the property as against the whole world" (*in rem*) or "particular persons" (*quasi in rem*), the doctrine of prior exclusive jurisdiction applies. *State Eng'r*, 339 F.3d at 810. The prior exclusive jurisdiction doctrine does not apply to actions involving the personal rights and obligations of the parties or actions brought against a person rather than property (*in personam*). *Id.* "When applying the doctrine, courts should not 'exalt form over necessity,' but instead should 'look behind the form of the action to the gravamen of a complaint and the nature of the right sued on.' " *Chapman*, 651 F.3d at 1044 (citing *State Eng'r v. S. Fork Band of Te–Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 810 (9th Cir. 2003)).

The parties do not dispute that state court overseeing the judicial foreclosure action exercised *in rem* jurisdiction over the property first. However, it is not clear that there is still a pending concurrent state court action involving the rights to the surplus funds. *See Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 196 (1935) ("If the two suits do not have substantially the same purpose ... jurisdiction of the two courts may not be said to be strictly concurrent ..."). Defendants argue that the "determination of any party's entitlement to the foreclosure surplus proceeds is directly at issue in the judicial foreclosure action in Snohomish County Superior Court." Dkt. # 14 at 2. But this is contradicted by the record which shows that the court in the judicial foreclosure action explicitly denied Plaintiff's motion to disburse the surplus funds, finding that adjudication of the interests of the parties was not appropriate for the civil motions calendar and needed to be raised by a separate action. Dkt. # 8-1 at 10. Nothing in the record suggests that such an action was

ever brought in state court. Instead, it appears that the only case involving the surplus funds is the action pending before this Court.

And even if the judicial foreclosure proceeding is a pending concurrent state court action, Plaintiff's *in personam* claims in this court do not require the court to exercise possession or control over the *res*. Judgment on Plaintiff's breach of contract, promissory estoppel, and unjust enrichment claims would impose a personal liability or obligation on Defendants and would not affect the nature of their interest in the funds. Therefore, these claims are inherently *in personam* and the doctrine of prior exclusive jurisdiction does not apply. *See Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958).

And while Plaintiff's declaratory judgment claims could perhaps be characterized as *quasi in rem,* the prior exclusive jurisdiction doctrine does not apply where a party merely seeks declaratory relief regarding property interests. *See Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466–67 (1939) (holding that the prior exclusive jurisdiction doctrine does not apply to federal cases based on diversity jurisdiction where the plaintiff seeks adjudication of rights to funds in possession of state court); *Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego,* 865 F.3d 1237, 1254 (9th Cir. 2017) (same); *Morris v. SPSSM Investments 8, LP*, No. CV1401305MMMMANX, 2014 WL 12573523, *6 (C.D. Cal. June 4, 2014) (same). Thus, the prior exclusive jurisdiction doctrine does not apply. Defendants' motion to dismiss Plaintiff's complaint under the prior exclusion jurisdiction doctrine is DENIED.

B. Amount-In-Controversy Requirement

***3** Defendants alternatively argue that Plaintiff's complaint should be dismissed for failure to satisfy the amount-in-controversy requirement under 28 U.S.C. § 1332. *See* Dkt. # 14 at 1-2. Although this argument was improperly raised for the first time in Defendants' reply brief, it is not clear from the complaint if the $75,000 amount-in-controversy requirement is satisfied in this case. Before proceeding further with this matter, the Court is obligated to confirm whether it has subject-matter jurisdiction. *Moore v. Maricopa Cty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Accordingly, Plaintiff is ORDERED to SHOW CAUSE why the Court should not dismiss this action for failure to meet the amount-in-controversy requirement. Plaintiff must respond to this Order to Show Cause in a written submission, to be filed no later than 14 days after entry of this order. The submission must not exceed ten pages. If Plaintiff does not respond in time, the Court will dismiss this action, *sua sponte.* The Court DEFERS ruling on this issue pending Plaintiff's response.

III. CONCLUSION

For the above reasons, Defendants' motion to dismiss is **DENIED** in part and **DEFERRED** in part. Dkt. # 8.

All Citations

Slip Copy, 2020 WL 1940325

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796 Fed.Appx. 453 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Mary M. BRIDGES, Defendant-Appellant.

No. 19-50157
|
Submitted March 3, 2020*
|
FILED March 6, 2020

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Otis D. Wright II, District Judge, Presiding, D.C. No. 2:18-cr-00265-ODW-1

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

MEMORANDUM**

Mary M. Bridges appeals from the district court's order affirming her bench-trial conviction for assault within maritime jurisdiction, in violation of 18 U.S.C. § 113(a)(5). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Bridges contends that the government presented insufficient evidence that the assault took place within the special maritime and territorial jurisdiction of the United States. We need not resolve the parties' dispute regarding the standard of review for this claim because it fails even on de novo review. *See United States v. Hong*, 938 F.3d 1040, 1047-48 (9th Cir. 2019). At trial, the government presented expert testimony that the assault occurred at a residence on Oceanview Boulevard on Vandenberg Air Force Base (VAFB), that all of the residences on VAFB are located within a particular area, and that the United States has jurisdiction over that area. Testimony from the victim that that the assault occurred at a VAFB residence located on Oceanview Avenue, rather than Oceanview Boulevard, does not lead us to conclude that "no rational trier of fact could find" that the government established the jurisdictional element of section 113. *See United States v. Nevils*, 598 F.3d 1158, 1169 (9th Cir. 2010) (en banc); *see also United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019). Rather, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the assault occurred at a location within the jurisdiction of the United States. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The government's opposed motion for judicial notice is denied.

AFFIRMED.

All Citations

796 Fed.Appx. 453 (Mem)

Footnotes

*	The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).
**	This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2020 WL 2200833
Supreme Court of the United States.

Bridget Anne KELLY, Petitioner
v.
UNITED STATES

No. 18-1059
|
Argued January 14, 2020
|
Decided May 7, 2020

Synopsis

Background: Following denial of their motion to dismiss indictments, 2016 WL 3388302, defendant, who was then New Jersey Governor's Deputy Chief of Staff, and her co-defendant, who was an official with Port Authority of New York and New Jersey, were convicted in the United States District Court for the District of New Jersey, Susan D. Wigenton, J., of wire fraud, fraud on a federally funded program or entity, and conspiracy, arising from their scheme to impose traffic gridlock in city by limiting its access lanes to world's busiest bridge over four day period, to punish that city's mayor for refusing to endorse Governor's reelection bid. After defendants' motion for judgment of acquittal and for new trial was denied, 2017 WL 787122, defendants appealed. The United States Court of Appeals for the Third Circuit, Scirica, Senior Circuit Judge, 909 F.3d 550, affirmed the convictions. Certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

realignment of city's access lanes to bridge did not involve taking property of Port Authority, which administered the bridge, and thus could not support defendants' convictions, and

time and labor Port Authority employees expended in connection with the scheme could not support defendants' convictions.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Post-Trial Hearing Motion.

West Codenotes

Limitation Recognized
18 U.S.C.A. § 1346

Syllabus[*]

***1** During former New Jersey Governor Chris Christie's 2013 reelection campaign, his Deputy Chief of Staff, Bridget Anne Kelly, avidly courted Democratic mayors for their endorsements, but Fort Lee's mayor refused to back the Governor's campaign. Determined to punish the mayor, Kelly, Port Authority Deputy Executive Director William Baroni, and another Port Authority official, David Wildstein, decided to reduce from three to one the number of lanes long reserved at the George Washington Bridge's toll plaza for Fort Lee's morning commuters. To disguise their efforts at political retribution, Wildstein devised a cover story: The lane realignment was for a traffic study. As part of that cover story, the defendants asked Port Authority traffic engineers to collect some numbers about the effect of the changes. At the suggestion of a Port Authority manager, they also agreed to pay an extra toll collector overtime so that Fort Lee's one remaining lane would not be shut down if the collector on duty needed a break. The lane realignment caused four days of gridlock in Fort Lee, and only ended when the Port Authority's Executive Director learned of the scheme. Baroni and Kelly were convicted in federal court of wire fraud, fraud on a federally funded program or entity (the Port Authority), and conspiracy to commit each of those crimes. The Third Circuit affirmed.

Held: Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.

The federal wire fraud statute makes it a crime to effect (with the use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity. § 666(a)(1)(A). These statutes are "limited in scope to the protection of property rights," and do not authorize federal prosecutors to "set[ ] standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292. So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an object of their fraud was money or property. *Cleveland v. United States*, 531 U.S. 12, 26, 121 S.Ct. 365, 148 L.Ed.2d 221.

The Government argues that the scheme had the object of obtaining the Port Authority's money or property in two ways. First, the Government claims that Baroni and Kelly sought to commandeer part of the Bridge itself by taking control of its physical lanes. Second, the Government asserts that the defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors. For different reasons, neither of these theories can sustain the verdicts.

Baroni's and Kelly's realignment of the access lanes was an exercise of regulatory power—a reallocation of the lanes between different groups of drivers. This Court has already held that a scheme to alter such a regulatory choice is not one to take the government's property. *Id.,* at 23, 121 S.Ct. 365. And while a government's right to its employees' time and labor is a property interest, the prosecution must also show that it is an "object of the fraud." *Pasquantino v. United States*, 544 U.S. 349, 355, 125 S.Ct. 1766, 161 L.Ed.2d 619. Here, the time and labor of the Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's lanes—an incidental (even if foreseen) byproduct of their regulatory object. Neither defendant sought to obtain the services that the employees provided. Pp. —— – ——.

***2** 909 F.3d 550, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinion

Justice KAGAN delivered the opinion of the Court.

For four days in September 2013, traffic ground to a halt in Fort Lee, New Jersey. The cause was an unannounced realignment of 12 toll lanes leading to the George Washington Bridge, an entryway into Manhattan administered by the Port Authority of New York and New Jersey. For decades, three of those access lanes had been reserved during morning rush hour for commuters coming from the streets of Fort Lee. But on these four days—with predictable consequences—only a single lane was set aside. The public officials who ordered that change claimed they were reducing the number of dedicated lanes to conduct a traffic study. In fact, they did so for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid.

Exposure of their behavior led to the criminal convictions we review here. The Government charged the responsible officials under the federal statutes prohibiting wire fraud and fraud on a federally funded program or entity. See 18 U.S.C. §§ 1343, 666(a)(1)(A). Both those laws target fraudulent schemes for obtaining property. See § 1343 (barring fraudulent schemes "for obtaining money or property"); § 666(a)(1)(A) (making it a crime to "obtain[ ] by fraud ... property"). The jury convicted the defendants, and the lower courts upheld the verdicts.

The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. Tr. of Oral Arg. 58. We disagree. The realignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions.

I

The setting of this case is the George Washington Bridge. Running between Fort Lee and Manhattan, it is the busiest motor-vehicle bridge in the world. Twelve lanes with tollbooths feed onto the Bridge's upper level from the Fort Lee side. Decades ago, the then-Governor of New Jersey committed to a set allocation of those lanes for the morning commute. And (save for the four days soon described) his plan has lasted to this day. Under the arrangement, nine of the lanes carry traffic coming from nearby highways. The three remaining lanes, designated by a long line of traffic cones laid down each morning, serve only cars coming from Fort Lee.

***3** The case's cast of characters are public officials who worked at or with the Port Authority and had political ties to New Jersey's then-Governor Chris Christie. The Port Authority is a bi-state agency that manages bridges, tunnels, airports, and

other transportation facilities in New York and New Jersey. At the time relevant here, William Baroni was its Deputy Executive Director, an appointee of Governor Christie and the highest ranking New Jersey official in the agency. Together with the Executive Director (a New York appointee), he oversaw "all aspects of the Port Authority's business," including operation of the George Washington Bridge. App. 21 (indictment). David Wildstein (who became the Government's star witness) functioned as Baroni's chief of staff. And Bridget Anne Kelly was a Deputy Chief of Staff to Governor Christie with special responsibility for managing his relations with local officials. She often worked hand-in-hand with Baroni and Wildstein to deploy the Port Authority's resources in ways that would encourage mayors and other local figures to support the Governor.

The fateful lane change arose out of one mayor's resistance to such blandishments. In 2013, Governor Christie was up for reelection, and he wanted to notch a large, bipartisan victory as he ramped up for a presidential campaign. On his behalf, Kelly avidly courted Democratic mayors for their endorsements—among them, Mark Sokolich of Fort Lee. As a result, that town received some valuable benefits from the Port Authority, including an expensive shuttle-bus service. But that summer, Mayor Sokolich informed Kelly's office that he would not back the Governor's campaign. A frustrated Kelly reached out to Wildstein for ideas on how to respond. He suggested that getting rid of the dedicated Fort Lee lanes on the Bridge's toll plaza would cause rush-hour traffic to back up onto local streets, leading to gridlock there. Kelly agreed to the idea in an admirably concise e-mail: "Time for some traffic problems in Fort Lee." App. 917 (trial exhibit). In a later phone conversation, Kelly confirmed to Wildstein that she wanted to "creat[e] a traffic jam that would punish" Mayor Sokolich and "send him a message." *Id.*, at 254 (Wildstein testimony). And after Wildstein relayed those communications, Baroni gave the needed sign-off.

To complete the scheme, Wildstein then devised "a cover story"—that the lane change was part of a traffic study, intended to assess whether to retain the dedicated Fort Lee lanes in the future. *Id.,* at 264. Wildstein, Baroni, and Kelly all agreed to use that "public policy" justification when speaking with the media, local officials, and the Port Authority's own employees. *Id.,* at 265. And to give their story credibility, Wildstein in fact told the Port Authority's engineers to collect "some numbers on how[ ] far back the traffic was delayed." *Id.,* at 305. That inquiry bore little resemblance to the Port Authority's usual traffic studies. According to one engineer's trial testimony, the Port Authority never closes lanes to study traffic patterns, because "computer-generated model[ing]" can itself predict the effect of such actions. *Id.*, at 484 (testimony of Umang Patel); see *id.,* at 473–474 (similar testimony of Victor Chung). And the information that the Port Authority's engineers collected on this singular occasion was mostly "not useful" and "discarded." *Id.*, at 484–485 (Patel testimony). Nor did Wildstein or Baroni show any interest in the data. They never asked to review what the engineers had found; indeed, they learned of the results only weeks later, after a journalist filed a public-records request. So although the engineers spent valuable time assessing the lane change, their work was to no practical effect.

Baroni, Wildstein, and Kelly also agreed to incur another cost—for extra toll collectors—in pursuit of their object. Wildstein's initial thought was to eliminate all three dedicated lanes by not laying down any traffic cones, thus turning the whole toll plaza into a free-for-all. But the Port Authority's chief engineer told him that without the cones "there would be a substantial risk of sideswipe crashes" involving cars coming into the area from different directions. *Id.*, at 284 (Wildstein testimony). So Wildstein went back to Baroni and Kelly and got their approval to keep one lane reserved for Fort Lee traffic. That solution, though, raised another complication. Ordinarily, if a toll collector on a Fort Lee lane has to take a break, he closes his booth, and drivers use one of the other two lanes. Under the one-lane plan, of course, that would be impossible. So the Bridge manager told Wildstein that to make the scheme work, "an extra toll collector" would always have to be "on call" to relieve the regular collector when he went on break. *Id.,* at 303. Once again, Wildstein took the news to Baroni and Kelly. Baroni thought it was "funny," remarking that "only at the Port Authority would [you] have to pay a toll collector to just sit there and wait." *Ibid.* Still, he and Kelly gave the okay.

***4** The plan was now ready, and on September 9 it went into effect. Without advance notice and on the (traffic-heavy) first day of school, Port Authority employees placed traffic cones two lanes further to the right than usual, restricting cars from Fort Lee to a single lane. Almost immediately, the town's streets came to a standstill. According to the Fort Lee Chief of Police, the traffic rivaled that of 9/11, when the George Washington Bridge had shut down. School buses stood in place for hours. An ambulance struggled to reach the victim of a heart attack; police had trouble responding to a report of a missing child. Mayor Sokolich tried to reach Baroni, leaving a message that the call was about an "urgent matter of public safety." *Id.,* at 323. Yet Baroni failed to return that call or any other: He had agreed with Wildstein and Kelly that they should all maintain "radio silence." *Id.,* at 270. A text from the Mayor to Baroni about the locked-in school buses—also unanswered—went around the horn to Wildstein and Kelly. The last replied: "Is it wrong that I am smiling?" *Id.*, at 990 (Kelly text message). The three merrily kept the lane realignment in place for another three days. It ended only when the Port Authority's Executive

Director found out what had happened and reversed what he called their "abusive decision." *Id.*, at 963 (e-mail of Patrick Foye).

The fallout from the scheme was swift and severe. Baroni, Kelly, and Wildstein all lost their jobs. More to the point here, they all ran afoul of federal prosecutors. Wildstein pleaded guilty to conspiracy charges and agreed to cooperate with the Government. Baroni and Kelly went to trial on charges of wire fraud, fraud on a federally funded program or entity (the Port Authority), and conspiracy to commit each of those crimes. The jury found both of them guilty on all counts. The Court of Appeals for the Third Circuit affirmed, rejecting Baroni's and Kelly's claim that the evidence was insufficient to support their convictions. See *United States v. Baroni*, 909 F.3d 550, 560–579 (2018). We granted certiorari. 588 U.S. ——, 139 S.Ct. 2777, 204 L.Ed.2d 1156 (2019).

II

The Government in this case needed to prove *property* fraud. The federal wire fraud statute makes it a crime to effect (with use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Construing that disjunctive language as a unitary whole, this Court has held that "the money-or-property requirement of the latter phrase" also limits the former. *McNally v. United States*, 483 U.S. 350, 358, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The wire fraud statute thus prohibits only deceptive "schemes to deprive [the victim of] money or property." *Id.,* at 356, 107 S.Ct. 2875. Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity like the Port Authority. § 666(a)(1)(A). So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an "object of the[ir] fraud [was] 'property.' " *Cleveland v. United States*, 531 U.S. 12, 26, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000).[1]

That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials. Some decades ago, courts of appeals often construed the federal fraud laws to "proscribe[ ] schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 483 U.S. at 355, 107 S.Ct. 2875. This Court declined to go along. The fraud statutes, we held in *McNally*, were "limited in scope to the protection of property rights." *Id.,* at 360, 107 S.Ct. 2875. They did not authorize federal prosecutors to "set[ ] standards of disclosure and good government for local and state officials." *Ibid.* Congress responded to that decision by enacting a law barring fraudulent schemes "to deprive another of the intangible right of honest services"—regardless of whether the scheme sought to divest the victim of any property. § 1346. But the vagueness of that language led this Court to adopt "a limiting construction," confining the statute to schemes involving bribes or kickbacks. *Skilling v. United States*, 561 U.S. 358, 405, 410, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). We specifically rejected a proposal to construe the statute as encompassing "undisclosed self-dealing by a public official," even when he hid financial interests. *Id.,* at 409, 130 S.Ct. 2896. The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Cf. N. J. Stat. Ann. § 2C:30–2 (West 2016) (prohibiting the unauthorized exercise of official functions). Save for bribes or kickbacks (not at issue here), a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property." 18 U.S.C. § 1343; see § 666(a)(1)(A) (similar).

***5** The Government acknowledges this much, but thinks Baroni's and Kelly's convictions remain valid. According to the Government's theory of the case, Baroni and Kelly "used a lie about a fictional traffic study" to achieve their goal of reallocating the Bridge's toll lanes. Brief for United States 43. The Government accepts that the lie itself—*i.e.,* that the lane change was part of a traffic study, rather than political payback—could not get the prosecution all the way home. See *id.,* at 43–44. As the Government recognizes, the deceit must also have had the "object" of obtaining the Port Authority's money or property. *Id.,* at 44. The scheme met that requirement, the Government argues, in two ways. First, the Government claims that Baroni and Kelly sought to "commandeer[ ]" part of the Bridge itself—to "take control" of its "physical lanes." Tr. of Oral Arg. 58–59. Second, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment. On either theory, the Government insists, Baroni's and Kelly's scheme targeted "a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes." Brief for United States 22 (quoting *Pasquantino v. United States*, 544 U.S. 349, 356, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005)).

We cannot agree. As we explain below, the Government could not have proved—on either of its theories, though for different reasons—that Baroni's and Kelly's scheme was "directed at the [Port Authority's] property." Brief for United States 44. Baroni and Kelly indeed "plotted to reduce [Fort Lee's] lanes." *Id.,* at 34. But that realignment was a quintessential exercise of regulatory power. And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property. See *Cleveland*, 531 U.S. at 23, 121 S.Ct. 365. By contrast, a scheme to usurp a public employee's paid time is one to take the government's property. But Baroni's and Kelly's plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes.

Start with this Court's decision in *Cleveland*, which reversed another set of federal fraud convictions based on the distinction between property and regulatory power. The defendant there had engaged in a deceptive scheme to influence, to his own benefit, Louisiana's issuance of gaming licenses. The Government argued that his fraud aimed to deprive the State of property by altering its licensing decisions. This Court rejected the claim. The State's "intangible rights of allocation, exclusion, and control"—its prerogatives over who should get a benefit and who should not—do "not create a property interest." *Ibid.* Rather, the Court stated, those rights "amount to no more and no less than" the State's "sovereign power to regulate." *Ibid.*; see *id.,* at 20, 121 S.Ct. 365 ("[T]he State's core concern" in allocating gaming licenses "is *regulatory*"). Or said another way: The defendant's fraud "implicate[d] the Government's role as sovereign" wielding "traditional police powers"—not its role "as property holder." *Id.,* at 23–24, 121 S.Ct. 365. And so his conduct, however deceitful, was not property fraud.

The same is true of the lane realignment. Through that action, Baroni and Kelly changed the traffic flow onto the George Washington Bridge's tollbooth plaza. Contrary to the Government's view, the two defendants did not "commandeer" the Bridge's access lanes (supposing that word bears its normal meaning). They (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use. Rather, Baroni and Kelly regulated use of the lanes, as officials responsible for roadways so often do—allocating lanes as between different groups of drivers. To borrow *Cleveland*'s words, Baroni and Kelly exercised the regulatory rights of "allocation, exclusion, and control"—deciding that drivers from Fort Lee should get two fewer lanes while drivers from nearby highways should get two more. They did so, according to all the Government's evidence, for bad reasons; and they did so by resorting to lies. But still, *what* they did was alter a regulatory decision about the toll plaza's use—in effect, about which drivers had a "license" to use which lanes. And under *Cleveland*, that run-of-the-mine exercise of regulatory power cannot count as the taking of property.

***6** A government's right to its employees' time and labor, by contrast, can undergird a property fraud prosecution. Suppose that a mayor uses deception to get "on-the-clock city workers" to renovate his daughter's new home. *United States v. Pabey*, 664 F.3d 1084, 1089 (CA7 2011). Or imagine that a city parks commissioner induces his employees into doing gardening work for political contributors. See *United States v. Delano*, 55 F.3d 720, 723 (CA2 1995). As both defendants agree, the cost of those employees' services would qualify as an economic loss to a city, sufficient to meet the federal fraud statutes' property requirement. See Brief for Respondent Baroni 27; Tr. of Oral Arg. 16. No less than if the official took cash out of the city's bank account would he have deprived the city of a "valuable entitlement." *Pasquantino*, 544 U.S. at 357, 125 S.Ct. 1766.

But that property must play more than some bit part in a scheme: It must be an "object of the fraud." *Id.*, at 355, 125 S.Ct. 1766; see Brief for United States 44; *supra,* at ——— – ———. Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.[2] In the home-and-garden examples cited above, that constraint raised no problem: The entire point of the fraudsters' plans was to obtain the employees' services. But now consider the difficulty if the prosecution in *Cleveland* had raised a similar employee-labor argument. As the Government noted at oral argument here, the fraud on Louisiana's licensing system doubtless imposed costs calculable in employee time: If nothing else, some state worker had to process each of the fraudster's falsified applications. But still, the Government acknowledged, those costs were "[i]ncidental." Tr. of Oral Arg. 63. The object of the scheme was never to get the employees' labor: It was to get gaming licenses. So the labor costs could not sustain the conviction for property fraud. See *id.,* at 62–63.

This case is no different. The time and labor of Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's access lanes. Or said another way, the labor costs were an incidental (even if foreseen) byproduct of Baroni's and Kelly's regulatory object. Neither defendant sought to obtain the services that the employees provided. The back-up toll collectors—whom Baroni joked would just "sit there and wait"—did nothing he or Kelly thought useful. App. 303; see *supra,* at ———. Indeed, those workers came onto the scene only because the Port Authority's chief engineer managed to restore one of Fort Lee's lanes to reduce the risk of traffic accidents. See *supra,* at

——. In the defendants' original plan, which scrapped all reserved lanes, there was no reason for extra toll collectors. And similarly, Baroni and Kelly did not hope to obtain the data that the traffic engineers spent their time collecting. By the Government's own account, the traffic study the defendants used for a cover story was a "sham," and they never asked to see its results. Brief for United States 4, 32; see *supra,* at ——. Maybe, as the Government contends, all of this work was "needed" to realize the final plan—"to accomplish what [Baroni and Kelly] were trying to do with the [B]ridge." Tr. of Oral Arg. 60. Even if so, it would make no difference. Every regulatory decision (think again of *Cleveland*, see *supra,* at ——) requires the use of some employee labor. But that does not mean every scheme to alter a regulation has that labor as its object. Baroni's and Kelly's plan aimed to impede access from Fort Lee to the George Washington Bridge. The cost of the employee hours spent on implementing that plan was its incidental byproduct.

***7** To rule otherwise would undercut this Court's oft-repeated instruction: Federal prosecutors may not use property fraud statutes to "set[ ] standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360, 107 S.Ct. 2875; see *supra,* at ——. Much of governance involves (as it did here) regulatory choice. If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be—as *Cleveland* recognized—"a sweeping expansion of federal criminal jurisdiction." 531 U.S. at 24, 121 S.Ct. 365. And if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow. In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome. They do not "proscribe[ ] schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 483 U.S. at 355, 107 S.Ct. 2875; see *supra,* at ——. They bar only schemes for obtaining property.

III

As Kelly's own lawyer acknowledged, this case involves an "abuse of power." Tr. of Oral Arg. 19. For no reason other than political payback, Baroni and Kelly used deception to reduce Fort Lee's access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town's residents. But not every corrupt act by state or local officials is a federal crime. Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

All Citations

--- S.Ct. ----, 2020 WL 2200833, 20 Cal. Daily Op. Serv. 4117

Footnotes

*	The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
1	The conspiracy verdicts raise no separate issue. None of the parties doubts that those convictions stand or fall with the substantive offenses. If there was property fraud here, there was also conspiracy to commit it. But if not, not.

2	Without that rule, as Judge Easterbrook has elaborated, even a practical joke could be a federal felony. See *United States v. Walters*, 997 F.2d 1219, 1224 (CA7 1993). His example goes: "A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation," thus expending the cost of gasoline. *Ibid.* "But there is no party; the address is a vacant lot; B is the butt of a joke." *Ibid.* Wire fraud? No. And for the reason Judge Easterbrook gave: "[T]he victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it." *Id.,* at 1226.

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United States District Court, C.D. California.

Moses CHOI et al.
v.
8TH BRIDGE CAPITAL, INC. et al.

Case No. 2:17-cv-08958-CAS(AFMx)
|
Field 03/25/2020

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Proceedings: (IN CHAMBERS) - PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Dkt. [143], filed February 14, 2020)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Dkt. [146], filed February 18, 2020)

The Honorable CHRISTINA A. SNYDER, Judge

I. INTRODUCTION

A. Plaintiffs Initiate this Action

***1** Plaintiffs Moses Choi ("Choi") and Southeast Regional Center, LLC ("SRC") (collectively, "plaintiffs") filed this action on December 13, 2017, against defendants 8th Bridge Capital, Inc. ("8th Bridge"); 8th Bridge Capital, LLC; Manhattan Real Estate Fund GP, LLC; Manhattan Real Estate Fund, LP; Manhattan Real Estate Fund II, LP; Manhattan Real Estate Equity Fund, LP; Patrick Jongwon Chang ("Chang"); and Young Hun Kim ("Kim") (collectively, "defendants"). Dkt. 1. The gravamen of plaintiffs' claims is that Kim and his wholly-owned company, 8th Bridge, breached a joint venture agreement with Choi and SRC, Choi's company, regarding the marketing of federally-approved projects to foreign investors pursuant to the United States Citizen and Immigration Service's EB-5 immigrant visa program. See generally id.

Plaintiffs filed a first amended complaint against defendants on December 22, 2018. Dkt. 8 ("FAC"). The FAC asserts the following sixteen claims for relief: (1) declaratory judgment; (2) breach of joint venture partnership agreement; (3) enforcement of rights under the Revised Uniform Partnership Act ("RUPA"); (4) breach of fiduciary duty; (5) fraudulent concealment; (6) constructive fraud; (7) conversion; (8) violation of the Defense of Trade Secrets Acts; (9) violation of the California Uniform Trade Secrets Act; (10) judicial dissolution; (11) breach of contract to form joint venture; (12) breach of fiduciary duty; (13) promissory estoppel; (14) violation of California's Unfair Competition Law ("UCL"); (15) accounting; and (16) quantum meruit.[1] See generally FAC.

B. Defendants Assert Counterclaims Against Plaintiffs

Defendants answered on March 2, 2018. Dkts. 21–28. Pursuant to a joint stipulation between the parties, defendants subsequently filed amended answers and amended counterclaims on March 30, 2018. Dkts. 31–38. Defendants each asserted affirmative defenses for: (1) statute of limitations; (2) waiver/estoppel; (3) accord and satisfaction; (4) laches; (5) failure to perform; (6) fraud; (7) offset; and (8) unclean hands. Id. Four of the individual defendants, 8th Bridge, 8th Bridge Capital, LLC, Kim, and Chang, asserted counterclaims against Choi; SRC; and additional counter-defendants SRC Ajin Fund I, LLC; SRC Ajin Fund II, LLC; SRC Ajin Fund III, LLC; SRC Ajin-Wooshin Fund IV, LLC; and SRC Ajin-Wooshin Fund V, LLC (collectively, "the Ajin LLCs"). Dkts. 31–34. These counterclaims include: (1) intentional interference with contract; (2) intentional interference with prospective economic advantage; (3) declaratory relief; (4) rescission based on fraud; (5) breach of oral contract; and (6) promissory estoppel. Id.

C. The Court's Order on Plaintiffs' Motion to Strike Portions of Defendants' Amended Counterclaims and Affirmative Defenses and Plaintiffs' Motion to Dismiss Defendants' Counterclaims

***2** On April 25, 2018, plaintiffs filed a motion to strike portions of defendants' amended counterclaims and affirmative defenses. Dkt. 43. Plaintiffs and the Ajin LLCs also filed a motion to dismiss defendants' counterclaims on the grounds that: (1) the Ajin LLCs are not subject to personal jurisdiction; and (2) defendants failed to state counterclaims for interference with prospective economic advantage, rescission based on fraud, breach of oral contract, and promissory estoppel. Dkt. 44.

The Court granted in part and denied in part plaintiffs' and the Ajin LLC's motions on July 16, 2018. Dkt. 50. The Court struck particular allegations in defendants' counterclaims against Choi as "scandalous," "immaterial," and "impertinent." Id. at 11. The Court declined to strike defendants' statute of limitations and fraud affirmative defenses on the grounds that they were insufficiently pled. Id. at 11–13. Moreover, the Court denied the Ajin LLC's motion to dismiss based on lack of personal jurisdiction. Id. at 15. The Court likewise declined to dismiss defendants' counterclaims for rescission based on fraud, breach of oral contract, and promissory estoppel. Dkt. 50 at 21. The Court dismissed defendants' counterclaim for intentional interference with prospective economic advantage without prejudice, however, concluding that defendants had failed to

sufficiently plead an independently wrongful act to serve as the basis for the interference counterclaim. Id. at 18. The Court noted that "defendants may be able to cure this deficiency by alleging the substance of the defamatory statement with more specificity or pleading a claim for unfair business practices in violation of the UCL." Id. at 18.

Defendants subsequently filed second amended answers and counterclaims on August 16, 2018. Dkts. 52–59. Neither plaintiffs nor the Ajin LLCs moved to dismiss defendants' subsequent second amended answers and counterclaims.

D. The Court's Order on Chang's Motion for Judgment on the Pleadings

On September 5, 2019, Chang moved for judgment on the pleadings as to plaintiffs' claims against Chang for breach of fiduciary duty, fraudulent concealment, and violation of the UCL. Dkt. 75. The Court denied Chang's motion on October 7, 2019. Dkt. 88. The Court noted that "since plaintiffs first filed the operative FAC on December 22, 2017, there has been substantial progress in this case to date. For example, discovery is already well underway, and Chang's deposition was taken on August 15, 2019." Id. at 4. The Court therefore concluded that in light of the substantial discovery completed, the sufficiency of plaintiffs' claims against Chang "is better decided on a motion for summary judgment, rather than a motion for judgment on the pleadings." Id.

E. The Parties' Cross-Motions for Summary Judgment

On February 14, 2020, plaintiffs filed a motion for partial summary judgment as to defendants' counterclaims for intentional interference with contract, intentional interference with prospective economic advantage, declaratory relief, rescission based on fraud, breach of contract, and promissory estoppel, as well as on defendants' affirmative defenses based on fraud and for offset. Dkt. 143 ("Choi Mot."). Plaintiffs filed a statement of uncontroverted facts and conclusions of law. Dkt. 144 ("Choi SUF"). On February 28, 2020, defendants filed an opposition, dkt. 161 ("Choi. Opp."), and a statement of genuine disputed facts, dkt. 161-1 ("Choi GDF"). Plaintiffs filed a reply on March 9, 2020. Dkt. 167 ("Choi Reply").

***3** On February 18, 2020, defendants filed a motion for summary judgment as to plaintiffs' claims for declaratory relief, breach of joint venture partnership agreement, enforcement of rights under RUPA, breach of fiduciary duty; fraudulent concealment, constructive fraud, conversion, judicial dissolution, breach of contract to form a joint venture, breach of fiduciary duty, promissory estoppel, violation of the UCL, and accounting claims. Dkt. 146 ("Kim Mot."). Defendants also filed a statement of undisputed facts and conclusions of law. Dkt. 146-1 ("Kim SUF"). On February 28, 2020, plaintiffs filed an opposition, dkt. 162 ("Kim Opp."), as well as a statement of genuine disputed facts, dkt. 162-1 ("Kim GDF"). Defendants filed a reply on March 9, 2020. Dkt 168 ("Kim Reply").

On March 20, 2020, the Court determined that the parties' motions are suitable for decision without oral argument and took the motions under submission. Having carefully considered the parties' arguments, the Court finds and concludes as follows.

II. BACKGROUND

A. Choi's Contentions

1. Choi's Initial Discussions with Kim Regarding Collaborations

Choi contends that in 2015, he and Kim began discussions regarding potential opportunities for collaboration between their two respective companies, SRC and 8th Bridge. Kim SUF No. 37. Choi avers that on August 26, 2015, he and Kim entered into a "Mutual Non-Disclosure Agreement" for the stated purpose of "exploring a business opportunity under which each may disclose Confidential Information to the other." Dkt. 162-2, Declaration of Moses Choi in Support of Opposition to Defendants' Motion for Summary Judgment ("Choi Decl.") ¶ 4.[2] According to Choi, collaboration between Choi and Kim would take the form of their becoming co-owners of a business enterprise which would use Choi's operating capital as reasonably necessary, as well as Choi's and Kim's joint efforts, to source foreign investors in real estate projects. Id. ¶ 5. Choi contends that he and Kim decided to proceed initially on a "project basis" with respect to sourcing investors for the Ace Hotel in Manhattan, New York, and that a formal merger of Kim's and Choi's companies was "never a condition to proceeding with the 'project-based' venture focusing on the Ace Hotel[.]" Choi Decl. ¶¶ 5, 8. "By October 5, 2015, based on [his] discussions with Kim, [Choi] believed that there was an agreement in place to work together on the Ace Hotel Project[.]" Id. ¶ 10. According to Choi, that agreement required Choi and Kim to share equally in the profits that their companies derived from successfully sourcing foreign investors for the development of the Ace Hotel in Manhattan, New York. Kim SUF No. 16.

2. Choi Expends Time and Resources Towards the Ace Hotel Project

Choi asserts that he expended considerable time and resources towards his alleged joint venture with Kim regarding the Ace Hotel. For example, between October 13, 2015, and January 17, 2017, Choi made twelve wire transfers to Kim, through SRC, totaling $305,000.00. Choi Decl. ¶ 12. Moreover, between October 2015 and 2017, Choi "made at least trips separate to Asia to market EB-5 projects, ... often together with Kim" and that "[m]ost of the[se] efforts during this time were directed at promoting the Ace Hotel Project." Id. ¶ 13. In addition, Choi assigned Chang, an SRC employee, to work with 8th Bridge, allowing Chang to move to Los Angeles, California to work in office space that SRC leased and maintained. Id. ¶ 14.

***4** According to Choi, "Kim treated [Choi] and SRC as his marketing partners, assigning [Choi] and [Chang] business cards and '8thbrigecap.com' email addresses, and including [Choi and Chang] in his communications with third parties." Choi Decl. ¶ 16. Moreover, Kim "authorized [Choi] to sign commission agreements with foreign agents as the 'Manager' of Manhattan Real Estate GP, LLC, which was the general partner on the Ace Hotel Project," and Kim "introduced [Choi] to his most valued business associates in the U.S. and abroad, including prominent members of the Asian-American Los Angeles business community." Id.

3. Choi's Relationship with Kim Breaks Down

By December 2016, however, Choi asserts that his business relationship with Kim began to break down. In late December 2016, Choi asked Kim "to send [Choi] financial statements for the Ace Hotel Project." Choi Decl. ¶ 30. By January 3, 2017, Kim forwarded an income statement for 8th Bridge as of October 31, 2016, advising that he would send an updated statement to Choi. Id. Ultimately, however, "Kim did not send [Choi] any updated financial statements." Id. Nonetheless, "SRC continued marketing the Ace Hotel Project until at least early March 2017, and possibly later." Choi Decl. ¶ 32. By March 2017, though, Choi "suspected based on [his] understanding of the success [Choi] had seen in marketing the Ace Hotel Project that 8th Bridge had already disbursed funds and received substantial revenue, even though Kim still was not sharing his financial records." Id. ¶ 34. When Choi advised Kim that Choi needed to draw down on Choi's share of the profits to pay for a down payment on a house, Kim referred to this payment to Choi as a "repayment of your funding to" 8th Bridge. Id.

On April 17, 2017, Kim informed Choi by email that Kim was " 'sincerely sorry that we couldn't work together,' that [Kim] had decided to 'stop putting [his] effort to find a resolution to our prolonged cooperation terms," and that "[Choi and Kim] needed to discuss how to 'handle the LA office space and some of the matters related with [Chang] ASAP." Choi Decl. ¶ 37. Choi "realized at that point that Kim had betrayed our relationship, and [Choi] again asked [Kim] for financial records." Id. Choi "also asked [Kim] to make [Choi] a proposal to buy out [Choi's interest] in the Ace Hotel Project based on [their]

agreement, but [Kim] never did." Id.

B. Kim's Contentions

1. Choi and Kim Fail to Come to Terms Regarding a Partnership

Kim disputes that he, Choi, and their respective companies, 8th Bridge and SRC, ever finalized a joint venture agreement. Dkt. 161-3, Declaration of Young Kim in Support of Opposition to Plaintiffs' Motion for Summary Judgment ("Kim Decl ISO Choi Opp.") ¶ 2. According to Kim, Kim sent Choi a "Draft Term Sheet" on October 6, 2015, and Kim emailed Choi on October 13, 2015, asking Choi for his comments on the Draft Term Sheet. Kim SUF Nos. Nos. 12, 16. Kim followed up with an additional email to Choi on October 18, 2015, "asking Choi to review the Draft Term Sheet and give his thoughts. Choi wrote back the next day and stated that the goal was to finalize the agreement by the end of the month." Id. No. 17. On December 2, 2015, Kim sent another email to Choi "reminding and alerting him [that Kim and Choi] still needed to agree on how to share profits and how to organize the proposed new company, stating specifically 'besides the profit sharing, which you hate most to be discussed, we need to organize the company structure among entities and employees." Id. No. 18. On March 9, 2016, Kim against sent an email to Choi stating " 'you and I need to finalize our over-due partnership agreement. I'd like to suggest we go back to the outlines I've sent you previously.' " Id. No. 20. According to Kim, "Choi never wrote back." Id.

2. Kim Pauses Partnership Negotiations with Choi on March 15, 2016, and Kim Invites Choi to Serve as "Master Distributor"

***5** On March 15, 2016, Kim sent an email to Choi notifying Choi that Kim had "given a lot of thoughts [sic] about our partnership and [would] rather stop now before it's too late." Dkt. 146-3, Exh. F ("Mar. 15, 2016 Email") at EBC0360067. That email further communicated that Kim would "like to put a hold on our 'company merger' and just concentrate on the Ace Hotel EB-5 raise[.]" Id. To that end, Kim further advised that "[s]ince we have already launched Ace Hotel, I am thinking we could probably assign Moses Investment ... as a master distributor in China and Korea and [Moses Investment] ... can engage with ... any other agents as its sub-agents. Please let know if this works for you, then I will send an agreement." Id. at EBC0360067–68.

3. Kim Makes Further Attempts to Finalize a Partnership Agreement with Choi

On January 25, 2017, Kim sent Choi an email asking to "give another crack at organizing our relationship once and for all." Dkt. 146-3, Exh. G ("Jan. 25, 2017 Email") at EBC0015522. In that email, Kim advised Choi that he was "unclear about what you'd like to do" and that Choi should "not hesitate to let me know if you have different thoughts." Id. On January 30, 2017, Choi responded that he was "trying to fly over to LA later this week or beginning of next week. Let's discuss and finalize in person." Id.

On March 21, 2017, Kim again emailed Choi, indicating that "[a]s to our partnership terms, many of the below and previous questions are still remained to be unanswered [sic]. Let me know if you would like to discuss them." Dkt. 146-3, Exh. H ("Mar. 21, 2017 Email") at EBC00036524. According to Kim, "Choi never wrote me back to either discuss and try to resolve

the unanswered questions or to tell me he disagreed with my assessment and that he believed formalized and finalized deal terms had in fact been agreed to." Dkt. 146-3, Declaration of Young Kim in Support of Defendants' Motion for Summary Judgment ("Kim Decl.") ¶ 11.

4. Kim Repays Choi $200,000.00 on March 21, 2017, and Kim Terminates Partnership Negotiations on April 17, 2017

On March 21, 2017, Kim notified Choi by email that Kim was "going to wire you $200K all at once." Dkt. 146-3, Exh. M ("Mar. 21, 2017 Wire Transfer Email") at EBC0036524. In that email, Kim indicated that what he would "like to do is apply my payment to you as for the *repayment of your funding* to [8th Bridge] that were made from Oct. 2015 to Jan. 2017, which comes out to $248K in total." Mar. 21, 2017 Wire Transfer Email at EBC0036524.

On April 17, 2017 Kim wrote to Choi stating that "I've given deep thoughts to our working relationship and I'm sorry to say that I'd like to stop putting my effort to find a resolution on our prolonged cooperation terms." Dkt. 146-3, Exh. N ("Apr. 17, 2017 Email") at EBC0036498–99. Kim communicated that "I was never comfortable receiving your money from the first place ... without having any concrete plans or terms on papers." Id at EBC0036499.

According to Kim, in May 2017, "Choi stated ... that he believed he should get a portion of the Ace profits. Kim Decl ¶ 3. Kim "responded by telling [Choi] that we never formalized or finalized the partnership agreement so [Choi] wasn't entitled to any profits, but if [Choi] were insistent on acting as if the joint venture or partnership agreement had somehow been finalized, [Choi] would be responsible for paying some portion of the Ajin profits back to [Kim] because that is what was always contemplated. Choi disagreed and refused to pay any Ajin profits." Id.

III. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

***6** If the moving party meets its initial burden, the opposing party must then set out "specific facts showing a genuine issue for trial" in order to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

A. Plaintiffs' RUPA, Constructive Fraud, Judicial Dissolution, Accounting, and Declaratory Relief Claims

In connection with their motion for summary judgment on defendants' counterclaims and defendants' affirmative defenses, plaintiffs contend that they have elected "their remedy of monetary damages" and accordingly request that the Court dismiss plaintiffs' "alternative-pled claims" as follows: (1) plaintiffs' third claim for enforcement of rights under RUPA; (2) plaintiffs' sixth claim for constructive fraud; (3) plaintiffs' tenth claim for judicial dissolution; and (4) plaintiffs' fifteenth claim for accounting. Choi Mot. at 2–3. Accordingly, the Court **DISMISSES** these claims. To the extent that defendants seek summary judgment on these claims, the Court **DENIES** defendants' motion for summary judgment **as moot**.

The parties dispute whether plaintiffs' election of a monetary damages remedy and plaintiffs' voluntary dismissal of plaintiffs' RUPA, constructive fraud, judicial dissolution, and accounting claims necessarily requires dismissal of plaintiffs' first claim for declaratory relief. For example, on March 16, 2020, after both parties had filed their respective replies, and without leave of Court, plaintiffs' counsel filed a supplemental declaration "relating to several substantive misstatements of the record contained in Defendants' Reply brief," disputing defendants' representation in defendants' reply brief that plaintiffs had dismissed their declaratory relief claim in electing a damages remedy. Dkt. 173 at 2. On March 17, 2020, without leave of Court, defendants' counsel filed a supplemental declaration in response, contending that "whether or not Plaintiffs have taken the ministerial step of dismissing the First Claim for Declaratory Judgment, by representing that they ... are permanently eschewing any of the relief that claim could provide ... they have effectively already dismissed that claim or otherwise made it defective as a matter of law." Dkt. 174 at 3–4. In a second supplemental declaration that plaintiffs' counsel filed without leave of Court on March 18, 2020, plaintiffs contend that they "have not foregone the right to seek declaratory relief in addition to damages, but instead have elected not to enforce rights and remedies that are predicated upon holding a continuing partnership interest (i.e., appointment of a receiver, dissolution, and an accounting)." Dkt. 176 at 3. Accordingly, the Court declines to dismiss plaintiffs' declaratory relief claim on this basis.

B. Plaintiffs' Non-Quantum Meruit Claims

***7** The parties appear to agree that defendants' motion for summary judgment largely rises and falls with the question of whether an enforceable joint venture exists between Choi, Kim, SRC and 8th Bridge. See Kim Mot. at 7 ("Except for their quantum meruit claim, all of [p]laintiffs' remaining claims against the 8th Bridge [d]efendants (all Defendants except Patrick Chang) necessarily require proof of the existence of the alleged joint venture agreement between" Choi and Kim.); Kim Opp. at 1 ("At minimum, there are genuine issues of material fact as formation, and [d]efendants' motion should thus be denied."). Accordingly, the Court proceeds to determine whether plaintiffs have raised triable issues regarding the formation of a joint venture.

"A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit." Goodworth Holdings Inc. v. Suh, 239 F. Supp. 2d 947, 956 (N.D. Cal. 2002). "A joint venture *can* be created orally." Id. (emphasis in original). Similarly, a "joint venture can be formed by an agreement implied by the parties' conduct." Fields v. Wise Media, LLC, No. 12-cv-05160-WHA, 2013 WL 5340490, at *4 (N.D. Cal. Sept. 24, 2013). "Whether a joint venture exists is a question of fact." Fed. Indus. Inc. v. Cameron Techs. US Inc., No. 2:07-cv-01098-VBF-CT, 2009 WL 10670395, at *6 (C.D. Cal. Jan. 30, 2009). "The elements necessary to create a joint venture are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control." Pepper, N.A. v. Expandi, Inc., No. 15-cv-04066-NC, 2016 WL 1611039, at *2 (N.D. Cal. Apr. 22, 2016) (internal citation and quotation marks omitted). The Court addresses these elements in turn.

1. Joint Interest in a Common Business

Defendants contend that "it is irrefutably clear that the two plaintiffs, Moses Choi on the one hand and SRC on the other hand, are in disagreement about what the 'common business understanding' of the joint venture actually was." Kim Mot. at 12. Defendants therefore argue that "because [p]laintiffs are unable to describe the purported joint venture in anything other than directly conflicting terms, there is no possibility they can establish that a joint venture was created with Kim." Kim Mot. at 12 (internal emphasis omitted). Put differently, "[p]laintiffs have not, and cannot, establish the existence of such a joint venture agreement because ... Kim and Choi never had the requisite meeting of the minds about the basic 'common business undertaking' of the alleged joint venture[.]" Id. at 7.

Defendants point to several pieces of evidence in support of this argument. For example, defendants contend that plaintiffs have consistently maintained that the alleged joint venture was project-specific, concerning *only* the Ace Hotel project in Manhattan. Kim Mot. at 11. Indeed, Choi attests that "based on [his] discussions with Kim," Choi "believed that there was an agreement in place to work together on the Ace Hotel Project[.]" Choi Decl. ¶ 10. In contrast, Kim attests that "to be clear [sic] Choi and I never agreed in September 2015 to a joint venture that would *only* include sharing in the profits of *only* the Ace Hotel." Kim Decl. ¶ 4 (emphases added). That is because "[i]n [Kim's] mind, it only made sense for [Kim] to share the Ace profits if Choi was also going to share the Ajin profits with [Kim]." Id. ¶ 17. In addition, defendants point to the deposition testimony of Thomas Choi, the brother of plaintiff Moses Choi and a one-time in-house attorney for SRC. See Kim Mot. at 11. Indeed, Thomas Choi appears to have testified that one of the Ajin LLCs, "Fund 5 would be considered part of the partnership." Dkt. 161-2, Exh. H ("T. Choi Dep. Tr.") at 123:9–14.

***8** Notwithstanding these purported differences in understanding between Choi and Kim regarding whether the parties' purported joint venture would include *only* the Ace Hotel or *both* the Ace Hotel and some or all of the Ajin LLCs, the disputed record contains ample evidence from which the finder of fact could reasonably conclude that both Kim and Choi *acted* consistent with the notion that there was a common understanding as to the undertaking(s) that form the basis for the parties' joint venture.[3] For example, in a May 10, 2016 email exchange between Moses Choi, Thomas Choi, and SRC employee Amber Yang in response to a request for information from Kim, Thomas Choi instructed Yang that Yang should report information regarding one of the Ajin LLCs, "Fund V," to Kim. See Dkt. 146-2, Ex. G. If credited by the finder of fact, this email would tend to establish that at least several of SRC employees understood that there was an arrangement between Choi, Kim, SRC, and 8th Bridge and that arrangement included at least one of the Ajin LLCs.

On the other hand, however, Kim testified during deposition that, as an alternative to completely merging SRC and 8th Bridge, Kim "counter proposed" working on "initial projects" including the Ace Hotel, with a proposed "ownership-revenue stream" consisting of "50 percent to Moses Choi (SRC & Moses Investment)" and the remaining "50 percent to Young Kim, [8th Bridge]." Dkt. 162-5, Exh. 1 ("Kim Dep. Tr.") at 147:4–148:5. When asked by plaintiffs' counsel why his early proposals to Choi did not mention Ajin, Kim testified "I don't see why I would mention Ajin, ... I don't know." Id. at 147:16–22. Moreover, Kim acknowledged that SRC provided, and 8th Bridge accepted, some $254,000.00 in funding in 2016. See Jan. 25, 2017 Email at EBC0015522. Based on 8th Bridge's accepting funds from SRC, the finder of fact could reasonably determine that there was a meeting of the minds between Kim and Choi regarding the "common undertaking" that would serve as the basis for their contemplated joint venture. And, because Kim testified that he did not "see why [he] would mention Ajin" in negotiations with Choi, the fact finder could also reasonably conclude that that undertaking did not include Ajin.

The Court finds instructive Am. Med. Response, Inc. v. City of Stockton, No. 05-cv-1316-DFL-PAN, 2006 WL 768816 (E.D. Cal. Mar. 27, 2006). In that case, a county announced plans to solicit requests for proposals from emergency service providers to earn the exclusive right to provide emergency services within particular geographic areas. Id. at *1. An ambulance service provider and a municipality, which itself provided emergency services through its fire department, engaged in discussions to collaborate on a joint bid proposal to respond to the county's request for proposal. Id. After the ambulance service provider and municipality "continued to meet and discuss the terms of a bid and of their business relationship, ... the relationship ... began to break down." Am. Med. Response, 2006 WL 768816, at *2. Ultimately, the ambulance service provider submitted its own bid, and the county announced that the ambulance service provider "was the successful bidder." Id. at *2, *2 n.3.

***9** On the parties' cross-motions for summary judgment, the court noted that the ambulance service provider and the municipality "dispute whether the parties had a joint interest in a common business." Am. Med. Response, 2006 WL 768816, at *3. The municipality "argue[d] that the venture's common business purpose was to submit a joint bid in response to the RFP." Id. "By contrast," the ambulance service provider argued that "[b]ecause the parties never reached an agreement as to how the joint bidding entity would function, ... they never formed a joint venture." Id. The court determined that "[o]n this

record, the proper characterization of [the parties'] working relationship is uncertain." Id. at *4. That is because, on the one hand, "a trier of fact could infer the creation of a joint venture to bid and then, if successful, to form an operating company. On the other hand, a trier of fact could also conclude that the lack of specificity ... prevented the formation of a legitimate joint venture." Id.

Here, similar genuine disputes of material fact preclude the grant of summary judgment to defendants. A trier of fact could determine that Kim and Choi agreed to form a "project-specific" joint venture concerning only the Ace Hotel project. A finder of fact might also determine that Kim and Choi agreed to form a more-encompassing joint venture that included both the Ace Hotel project and at least one of the Ajin LLCs. Or, a fact finder might conclude that Kim and Choi's discussions never advanced beyond an enforceable "agreement to agree." See City Sols., Inc. v. Clear Channel Commc'ns, Inc., 201 F. Supp. 2d 1035, 1045 (N.D. Cal. 2001) (granting defendant's motion for summary judgment where "the parties reached, at most, an unenforceable agreement to agree in the future.").

2. Sharing of Profits and Losses

Defendants next contend that summary judgment on plaintiffs' non-quantum meruit claims is appropriate because "absent an agreement as to how much money Choi was going to contribute and the amount of the resulting profit distribution to which he would be entitled, the agreement is entirely too uncertain to enforceable." Kim Mot. at 15. The Court does not find defendants' arguments availing.

As a preliminary matter, defendants rely heavily on the Draft Term Sheet that Kim sent to Choi on October 6, 2015. The Draft Term Sheet provides "a strategic framework to achieve the stated objectives expressed by the Parties" including "their intention to collaborate on a variety of activities ... in connection with the EB-5 program." Dkt. 146-3, Exh. B ("Draft Term Sheet") at 1. Notably, the Draft Term Sheet sets forth a number of key terms, including an "Initial Capital Contribution" from Choi which the Draft Term Sheet leaves blank. Id. at 2. The Draft Term Sheet also indicates that "[t]he distribution of profits will be determined by [Kim] for up to 50% of the Company." Id. On repeated occasions, Kim asked Choi to provide his thoughts on the Draft Term Sheet, indicating that Choi had not yet executed it. For example, in an October 18, 2015 email to Choi regarding "open items," Kim writes, with respect to the Draft Term Sheet, "Can you please review and let me know?" Dkt. 146-3, Exh. C ("Oct. 18, 2015 Email") at P-0033800. Moreover, Kim attests that as of January 25, 2017, "Choi and I still had not agreed to any of [the] open deal points from the Draft Term Sheet[.]" Kim Decl. ¶ 7.

Choi's purported failure to sign the Draft Term Sheet does not foreclose the possibility that the parties reached an agreement to share in any profits or losses with a respect to a joint venture concerning only the Ace Hotel. Indeed, plaintiffs' position appears to be that in addition to the parties' alleged project-specific joint venture concerning the Ace Hotel, the parties were simultaneously discussing a merger of the parties' respective companies. See, e.g., Kim Opp. at 21. Moreover, the Draft Term Sheet's language appears to contemplate some arrangement between Choi and Kim beyond the "project-specific" joint venture that plaintiffs aver is the subject of their claims against defendants. Indeed, the Draft Term Sheet contemplates "initial projects" including the "SRC Ajin-Wooshin Fund," the Ace Hotel, "Green Land Metropolis," and "Shenlong Group's Grand Residency," in addition to undefined "future projects." Draft Term Sheet at 2. Accordingly, the Court cannot say that the fact that the Term Sheet, which Choi did not sign, left open terms including Choi's required initial capital contribution or Choi's distribution of the profits necessarily means that the parties failed to agree that the parties would share in any profits or losses with respect to a more narrow project-specific joint venture.

***10** Here, Choi attests that "Kim expressly confirmed to me his understanding that [8th Bridge's] profits from the Ace Hotel Project would be shared with SRC when we met in Malibu on or about February 7, 2016." Choi Decl. ¶ 17. Moreover, in a draft email that Kim intended for Choi, Kim acknowledges that "[p]rofits from Ace gets [sic] shared with you." Dkt. 162-5, Plaintiffs' Exhibit No. 468.[4] According to Choi, Choi and Kim "orally agreed to an effective 50-50 split [of profits] through their controlled entities SRC and 8th Bridge[.]" Kim USUF No. 37. That is sufficient to raise a genuine dispute regarding whether Choi and Kim agreed to share in any profits or losses realized from a project-specific joint venture involving the Ace Hotel.[5]

3. Right to Joint Control

"An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer." Pepper, 2016 WL 1611039, at *2. "[I]t is a well-established principal that there may be joint participation in the management and control of a joint venture where the contributions of the respective parties to the enterprise are unequal and not of the same character[.]" Gartner, 2008 WL 4601025, at *10 (internal citation omitted). Here, the disputed record raises genuine disputes regarding whether Choi was able to exercise a degree of control over 8th Bridge, the entity that the parties agree "always owned" the funds derived from the Ace Hotel. See Kim SUF No. 42.

For example, Kim proposed to Choi on September 30, 2015, that "[i]nstead of forming a new company, ... I can amend the existing [operating agreement] to have you become a *share holder* [sic] of [8th Bridge] if you are OK." Dkt. 146-3, Exh. K at P-048057 (emphasis added). Kim testified during deposition that this proposal was "serious." Kim Dep. Tr. at 202:19. In addition, a January 25, 2016 email conversation between Choi, Kim, and a third-party includes prepared "bios" of individuals associated with 8th Bridge. See Dkt. 162-5, Plaintiffs' Exh. No. 452. The "bio" document lists Choi as "a Managing Director at 8th Bridge Capital" that is "responsible for *overseeing all of the funds' activities and the projects* for 8BC." Id. at EBC0354082 (emphasis added). Similarly, as recently as January 1, 2017, 8th Bridge's website described Choi as a "Managing Director" that "is responsible for *overseeing the company* and fundraising efforts." Dkt. 162-5, Plaintiffs' Exh. 454 (emphasis added). Furthermore, Choi attests that Kim provided Choi business cards and an email address associated with 8th Bridge. Choi Decl. ¶ 16.

***11** Based on this evidence, a jury could reasonably conclude that 8th Bridge was subject to the joint control of Choi. See Kahn Creative Partners, Inc. v. Nth Degree, Inc., No. 2:10-cv-00932-JLS-FFM, 2011 WL 1195680, at *9 (C.D. Cal. Mar. 29, 2011) (finding that "organizational chart" which listed employees of both plaintiff and defendant as part of "the 'team' that would be handling the conference" raised triable issues regarding whether plaintiff and defendant were engaged in joint venture with respect to conference); accord Pepper, 2016 WL 1611039, at *3 (finding that plaintiff's authority to review "power point presentation slides" used in connection with pitch for marketing project raised triable issue as to whether plaintiff "had a right to control the joint venture."). Accordingly, genuine disputes of material fact regarding Choi's ability to exercise joint control of 8th Bridge preclude the grant of summary judgment to defendants on this basis.

4. Defendants' Additional Miscellaneous Arguments

Defendants make a number of additional arguments which defendants contend require the Court to grant summary judgment to defendants on plaintiffs' non-quantum meruit claims. The Court addresses these arguments in turn.

a. Failure to Reduce Agreement to Writing

First, defendants argue that "[t]he Draft Term Sheet and follow-up emails ... from Kim make explicitly clear that [Kim] was not willing to be bound until the parties agreed to the material terms, including profit sharing, membership interests and the amount of Choi's capital contribution, *in writing*." Kim Mot. at 23 (emphasis added). According to defendants then, "[t]he failure of the parties to agree in writing to any of the open ended material terms ... in the Draft Term Sheet means that under the law, no enforceable contract was formed." Id.

"[W]hen it is clear that both parties contemplate that acceptance of a contract's terms would be signified in writing, the failure to sign the agreement means that no binding contract is created." Goodworth, 239 F. Supp. 2d at 958 (internal citation omitted). "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately upon the oral agreement is to be determined by the surrounding facts and circumstances." Id.

Here, Kim attests that he "expected and requested that the material terms in the Draft Term Sheet be negotiated and agreed to in writing" and that he "was not willing ... [to] be contractually bound to Choi or SRC without us first having agreed upon the highlighted terms in the Draft Term Sheet in writing." Kim Decl. ¶ 4. Even assuming *arguendo* that Choi's signing of the Draft Term Sheet constituted a condition precedent to the formation of a project-specific joint venture concerning the Ace Hotel, evidence in the record indicates that despite Choi's failure to agree in writing to the Draft Term Sheet, Kim nonetheless proceeded to engage with Choi in marketing the Ace Hotel. See, e.g., Dkt. 162-5, Plaintiffs' Exh. 460 (March 14, 2016 email from Kim to Choi indicating that Kim would "like to put a hold on our 'company merger' and just concentrate on the Ace Hotel EB-5 raise with you."). Moreover, Kim provided Choi with business cards and an email address associated with 8th Bridge, and 8th Bridge's website and marketing materials described Choi as a "Managing Director."

Accordingly, the Court cannot say that there is no dispute as to whether Choi's failure to agree to the Draft Term Sheet in writing necessarily means that no joint venture was formed between Choi and Kim. See Moreno v. SFX Entm't, Inc., No. 2:14-cv-00880-RSWL-CW, 2015 WL 4573226, at *5 (C.D. Cal. July 29, 2015) (finding genuine dispute existed as to whether a joint venture was formed and rejecting defendants' argument "that the parties reserved final agreement until formal documents were signed" because "the Court does not find any indisputable statements that expressly reserve final agreement until formal documents are signed.").

b. Condition Precedents of Forming a New Company or Combining 8th Bridge and SRC

***12** Defendants next contend that "[t]he Draft Term Sheet, by its own plain language, sets forth a possible business relationship whereby Choi and Kim will form a New Holding Co, LLC ... to hold all the assets of [8th Bridge] and SRC with Choi and Kim as owners in a to-be-determined percentage." Kim Mot. at 24 (internal alterations and quotations omitted). According to defendants, "Choi and Kim *never formed a new company* nor combined their assets into a unified one" and "[c]ourts are clear that where the formation of a new company is a material term to a proposed joint venture, the failure to do [so] is grounds for summary judgment that no joint venture was ever formed." Id. (emphasis in original).

The record contains evidence from which the finder of fact could reasonably conclude that neither the formation of a new company nor a formal combination of 8th Bridge and SRC constituted conditions precedent to the forming of a joint venture between Kim and Choi. For example, in a September 30, 2015 email to Choi, Kim expressly asks "[i]nstead of forming a new company, can we keep ... 8th Bridge Capital?" Dkt. 162-5, Plaintiffs' Exh. 440. Similarly, in a March 14, 2016 email, Kim indicated to Choi that Kim would "like to put a hold on our 'company merger' and just concentrate on the Ace Hotel EB-5 raise with you." Dkt. 162-5, Plaintiffs' Exh. 460. And, as discussed above, the fact finder could determine, based on the continued communications between Kim and Choi, that Kim and Choi, through 8th Bridge and SRC, collaborated on the Ace Hotel project even after the parties failed to form a new company or merge 8th Bridge and SRC. Indeed, the parties do not dispute that between March 28, 2016 and April 5, 2016, Choi and Kim traveled together in Asia with their respective staffs, at SRC's expense, participating in marketing seminars with potential investors. See Dkt. 162-1, Plaintiffs' Statement of Additional Undisputed Material Facts ("Choi SAUMF") No. 76.

c. Choi's Accepting Repayment from Kim

On March 21, 2017, Kim agreed to wire Choi $200,000.00. See Mar. 21, 2017 Wire Transfer Email at EBC0036524. The parties dispute the significance of this payment. Choi contends that he "needed funds for a downpayment [sic] on a house, and [Choi] told Kim that [he] wanted to draw $200,000 from the profits [of the Ace Hotel] for that purpose." Choi Decl. ¶ 34. Defendants, on the other hand, contend that Choi's accepting Kim's transfer "constituted a novation ... that extinguished whatever earlier obligation Kim owed to Choi under any earlier implicit parentship agreement." Kim Mot. at 30.

Pursuant to California law, "[n]ovation is the substitution of a new obligation for an existing one." Cal. Civ. Code § 1530. "Whereas a modification of a term or a provision of a contract alters only certain portions of the contract, novation wholly extinguishes the earlier contract." Fanucchi & Limi Farms v. United Agri Prod., 414 F.3d 1075, 1081 (9th Cir. 2005). "The intention of the parties to extinguish the prior obligation and to substitute a new agreement in its place must clearly appear." Hunt v. Smyth, 25 Cal. App. 3d 807, 818 (1972). "In deciding whether an agreement was meant to extinguish the old obligation and to substitute a new one, California courts seek to determine the parties' intent." Fanucchi, 414 F.3d at 1082. "Determining the parties' intent is a highly fact-specific inquiry" and "[s]uch inquiries are not generally suitable for disposition on summary judgment." Id.

Here, in his March 21, 2017 email to Choi agreeing to wire Choi $200,000.00, Kim indicated that "[w]hat I'd like to do is to apply my payment to you as for the repayment of your funding to [8th Bridge] that were [sic] made from Oct. 2015 to Jan. 2017, which comes out to $284K in total." Mar. 21, 2017 Email at EBC0036524. In a subsequent email to Choi on May 1, 2017, following up on Kim's prior April 17, 2017 email, Kim stated that, with respect to the issue of "[r]epayment," "[y]ou have made direct payments to me from Oct. 2015 to Jan. 2017. With my previous $200K payment to you, I can pay you back another $84K to come to the total of $284K. For others [sic] expenses like travel expenses, office furniture and expense to agents please let me know your thoughts." Apr. 17, 2017 Email at EBC0036498.

***13** The Court does not find defendants' novation argument persuasive. First, determining whether the parties have entered into a novation "is a highly fact-specific inquiry, with the weight and sufficiency of the evidence being matters for the determination of the trier of facts." Glob. Trim Sales, Inc. v. Checkpoint Sys. UK Ltd., No. 8:12-cv-01314-JLS-RNB, 2014 WL 12690629, at *3 (C.D. Cal. Sept. 17, 2014). That is why the question of whether the parties have entered into a novation "is not generally suitable for disposition on summary judgment." Id. Moreover, given Kim was still proposing further repayments to Choi of "another $84K" and additional undefined amounts "[f]or expenses like travel expenses, officer furniture and expense to agents" as recently as May 1, 2017, it does not follow that Choi's previously accepting $200,000.00 from Kim in March 2017 "extinguished whatever earlier obligation Kim owed to Choi under any earlier implicit partnership agreement." Kim. Mot. at 30.

C. Plaintiffs' Motion for Summary Judgment

Plaintiffs seek summary judgment on defendants' intentional interference with contract, intentional interference with prospective economic advantage, declaratory relief, rescission based on fraud, breach of contract, and promissory estoppel counterclaims as well as on defendants' affirmative defenses for fraud and for offset. See generally Choi Mot. The Court addresses these counterclaims and affirmative defenses in turn.

1. Intentional Interference with Contract and Intentional Interference with Prospective Economic Advantage

In their second amended answers and counterclaims, Kim, Chang, and 8th Bridge assert counterclaims for intentional interference with contract and intentional interference with prospective economic advantage. See, e.g., Dkt. 52 ("Countercl.") ¶¶ 51–65. The gravamen of defendants' intentional interference counterclaims is that in July 2017, 8th Bridge entered into a "US Investment Management Service Agreement" ("IMM Service Agreement") with Tony Van Tinh and Tinh's company IMM Group PTE LTD ("IMM"); that Choi, upset from his dealings with Kim, "began telling Tinh falsehoods about his business relationship with Kim"; and that by December 20, 2017, "Tinh terminated communications with Kim and thereby repudiated the IMM Service Agreement with 8th Bridge[.]" Id. Plaintiffs seek summary judgment on defendants' intentional

interference counterclaims on the grounds that "[d]efendants have no admissible evidence to prove the required elements." Choi Mot. at 3.

"Under California law, the elements for the tort of intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1006 (9th Cir. 2014) (internal citation and quotation marks omitted). "The elements for intentional interference with prospective economic advantage are essentially the same, just substituting an economic relationship with a contract." Curtis v. Shinsachi Pharm. Inc., 45 F. Supp. 3d 1190, 1202 (C.D. Cal. 2014) (internal citation omitted). "But in the latter type of claim, the interference must be 'independently wrongful,' that is, it must be proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." Id. (internal citation and quotation marks omitted).

a. Hearsay and Litigation Privilege

Plaintiffs first seek summary judgment on defendants' intentional interference counterclaims on the basis that "there is no admissible evidence to prove [defendants'] allegation that, 'in or around mid-late 2017, Choi reached out to Tinh and deliberately told him misinformation about Kim and [8th Bridge] to diminish their reputation and poison the business relationship." Choi Mot. at 4 (citing Counterl. ¶ 50). According to plaintiffs, "[t]he only evidence Counterclaimants have identified to support this claim is a purported hearsay statement made to Kim by a person named Chor Gee." Choi Mot. at 4. Indeed, Kim testified during deposition that: (1) Chor Gee, IMM's other founding partner, told Kim that Choi forwarded Tinh a news article detailing the allegations in this lawsuit; and (2) that Tinh "got scared by that article," ultimately deciding not to work with defendants or perform the IMM Service Agreement. Kim Dep. Tr. at 295:1–297:10.

***14** In response, defendants assert that Kim's testimony regarding Chor Ghee's statements are not inadmissible hearsay "given the recent amendments to the Federal Rule of Evidence 807, otherwise known as the Residual Exception." Choi Opp. at 13. "The residual exception provides that a hearsay statement that does not qualify for the exceptions provided by Rule 803 or 804 may nonetheless be admissible if: (1) supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Sandhu v. United States, No. 2:05-cr-00449-KJM, 2020 WL 417542, at *6 (E.D. Cal. Jan. 27, 2020) (citing Fed. R. Evid. 807(a)). Defendants contend that the residual exception's first prong is satisfied because "Chor Ghee is the co-owner of IMM and thus would be in as good a position as anyone to know why IMM decided to stop working with Kim and 8th Bridge." Choi Opp. at 13. Defendants likewise assert that the residual exception's second prong is satisfied because IMM is a Vietnamese company, Tinh and Ghee are Vietnamese residents, Vietnam is not party to the Hague Convention, and "foreign attorneys are not permitted to take depositions of willing witnesses without the involvement of the Vietnamese government, which according to the U.S. government, is a process that 'may take a year or more.' " Id.

Assuming *arguendo* that Kim's testimony that Tinh repudiated Tinh's business relationship with Kim in part because Choi sent Tinh an article detailing the allegations in this lawsuit is admissible, plaintiffs aver that the litigation privilege bars defendants' intentional interference counterclaims because "[t]he article recounting [p]laintiffs' allegations was a 'fair and true report' of [p]laintiffs' allegations in a judicial proceeding[.]" Choi Mot. at 8. California's litigation privilege is not so broad. Pursuant to California's litigation privilege, "press releases *merely* informing a third party of the pendency of the litigation" are privileged." Adobe Sys. Inc. v. Christenson, 891 F. Supp. 2d 1194, 1210 (D. Nev. 2012) (emphasis in original) (internal alteration, citation, and quotation marks omitted). At this juncture, the Court cannot say that the article, which includes the headline "LA-based firm allegedly swindled regional center out of EB-5 spoils," Dkt. 144-1, Exh. 108, is covered by the litigation privilege. Cf. Adobe, 891 F. Supp. 2d at 1210 (nothing that "the press release at issue did announce the filing and subject matter of the lawsuit filed against Defendants" but determining that California's litigation privilege did not apply because press release "plainly went beyond merely reporting on the lawsuit and its allegations by directly accusing Defendants of 'swindling[.]' "); accord Rothman v. Jackson, 49 Cal. App. 4th 1134, 1142 (1996) (noting that California's litigation privilege does not necessarily attach to "a press release trumpeting one party's version of a legal dispute"). Moreover, "[t]he privilege does not extend ... to statements regarding the litigation made to non-participants in the action

which are thus actionable unless privileged on some other basis." TSMC N. Am. v. Semiconductor Mfg. Internat. Corp., 161 Cal. App. 4th 581, 599 (2008). Accordingly, if, in sending the article to Tinh, a nonparty to this action, Choi offered additional commentary such as making further statements about Kim's candor or business ethics, those statements would not necessarily be protected by the litigation privilege.[6]

Ultimately, however, the Court need not determine, at this juncture, whether Kim's testimony regarding the article constitutes hearsay or whether allegations premised on Choi's alleged sending of the article to Tinh are subject to California's litigation privilege. The Court notes that in an August 21, 2018 email exchange between Choi and Tinh, shortly after the Court ruled on Choi's motion to strike or dismiss portions of defendants' answers and counterclaims, Choi wrote to Tinh that:

> ***15** If you read full docs, judge dismissed most of his counter claims. Kim also wanted to fake claim to get Ajin involved to make it more intentionally complicated... *Young needs to make up lies* to fight this lawsuit. These are baseless counterclaims but I can't stop him from making up these false claims. *You need not worry about these...*

Dkt. 161-2, Exh. E ("Aug. 21, 2018 Email") (emphases added).[7] At this juncture, the Court cannot determine Choi's intent in sending this email and commenting on this litigation to Tinh. For example, the finder of fact could reasonably determine, based on this email exchange, that Choi had made previous representations to Tinh, *Kim's* business associate, regarding Kim's ethics and that Choi was using developments in this action to justify or reaffirm those previous representations.

For the foregoing reasons, the Court declines to grant summary judgment to plaintiffs on defendants' intentional interference counterclaims on hearsay and litigation privilege grounds.

b. Independent Wrong Requirement for Interference with Prospective Economic Advantage Claim

With respect to defendants' tortious interference with prospective economic advantage counterclaim, plaintiffs contend that defendants "cannot prove that ... Choi's interference was wrongful by some measure beyond the fact of the interference itself." Choi Mot. at 8 (internal citation and quotation marks omitted). According to plaintiffs, "there is no admissible evidence of statements made by Choi that would support a defamation claim" and defendants "have not alleged and cannot prove a 'contemporaneous and derivative UCL violation' as might serve as the predicate for a prospective economic advantage claim." Id. at 9.

The Court previously dismissed, at the pleading stage, defendants' counterclaim for intentional interference with prospective economic advantage without prejudice. See Dkt. 50 at 16–18. The Court noted that "defendants' counterclaim merely alleges that 'Choi intentionally told Tinh misinformation about his and Kim's business relationship' that 'effectively amounted to defamatory statements relating to Kim's trustworthiness and business ethics." Id. at 17. Accordingly, the Court concluded that "defendants' allegations are insufficiently specific regarding the substance of Choi's statements to constitute actionable defamation." Id. The Court likewise rejected defendants' argument that defendants' "substantive allegations support a claim for both intentional interference with contract and unfair business practices in violation of the UCL, which could supply the 'independently wrongful' conduct required to state a claim for intentional interference with prospective economic advantage." Id. at 18. That is because although defendants asserted a counterclaim for tortious interference with contract, defendants did not assert an independent UCL claim against plaintiffs. Cf. CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1111 (9th Cir. 2007) (determining that plaintiff had successfully stated a claim for tortious interference with prospective economic advantage where plaintiff asserted claims for tortious interference with contract, violation of the UCL, *and* tortious interference with prospective economic advantage because "the allegations of interference with existing contract do triple duty: first as a basis for tort, then as a basis for a statutory violation, then again as the basis for another tort *because* of the allegation of a statutory violation, *because* of the tort first alleged.") (emphases in original); see also California Expanded Metal Prod. Co. v. ClarkWestern Dietrich Bldg. Sys. LLC, No. 2:12-cv-10791-DDP-MRW, 2015 WL

12746230, at *6 (C.D. Cal. Oct. 2, 2015) (granting summary judgment with respect to intentional interference with prospective advantage claim notwithstanding intentional interference with contract claim because plaintiff did not assert UCL claim).

***16** Defendants do not again advance their unpled UCL violation argument here. Defendants do, however, argue that Choi's alleged statements to Tinh that "Kim was 'unethical' and a 'bad business man' would undeniably support a claim for tortious interference with prospective economic advantage because they are clear example[s] of defamation and/or slander, which are sufficient to satisfy the 'independent wrongful act' requirement." Choi Opp. at 12. Here, the Court has already determined that the August 21, 2018 email exchange between Choi and Tinh wherein Choi stated that "Kim also wanted to fake claim," that Kim "needs to make up lies to fight this lawsuit," and that Choi "can't stop [Kim] from making up these false claims" is admissible. Aug. 21, 2018 Email. If credited by the finder of fact, this email could support a defamation claim. See Huitron v. U.S. Foods, Inc., No. 2:14-cv-05482-MMM-PLA, 2014 WL 4215656, at *4 (C.D. Cal. Aug. 25, 2014) ("Under California law, it is well settled that 'calling someone a liar can convey a factual imputation of specific dishonest conduct capable of being proved false, and may be actionable depending on the tenor and context of the statement.' "). Moreover, the Court has likewise concluded that the finder of fact could determine, based on this email exchange, that Choi had previously made prior statements to Tinh regarding Kim's candor that could have caused Tinh to repudiate the IMM Service Agreement with Kim.

Accordingly, the Court declines to grant summary judgment to plaintiffs on defendants' intentional interference with prospective economic advantage claim based on the "independent wrong" requirement.

2. Declaratory Relief

Defendants assert a counterclaim for declaratory relief against plaintiffs. See Countercl. ¶¶ 66–71. According to defendants, Kim and 8th Bridge "contend that there was never any meeting of the minds sufficient to find the existence of any contract (partnership agreement or joint venture), whether implied or oral, between them and Choi and SRC." Id. ¶ 68. Defendants assert, however, that "[i]n the alternative, if the Court were somehow to find that a partnership or joint venture agreement did exist (and Kim and [8th Bridge] strongly deny that any such agreement does exist), Kim and [8th Bridge] are entitled to a declaratory judgment that if such agreement entitles Choi and SRC to a portion of Kim's and [8th Bridge's] profits from the Ace Hotel, ... such agreement must necessarily also entitle Kim and 8th Bridge to an equal portion of Choi's and SRC's profits from its projects, including Ajin[.]" Id. ¶ 71. In that case, defendants contend that "Kim should be entitled to an accounting, access to the books and records, and collection of profits of and from those entities[.]" Id.

Plaintiffs argue that defendants' declaratory relief counterclaim "fails as a matter of law because, as the parties who repudiated the joint venture, Kim and [8th Bridge] are barred from seeking a profit accounting or other rights under the venture, assuming [p]laintiffs elect to pursue a damages remedy." Choi Mot. at 13–14. Because plaintiffs have elected a remedy for monetary damages, they contend that "[d]efendants cannot override the effect of [p]laintiffs' election by way of their counterclaim." Id. at 16.

Plaintiffs rely heavily on the California Court of Appeal's opinion in Gherman v. Colburn, 72 Cal. App. 3d 544 (1977). In that case, plaintiffs asserted claims against defendants related to the defendants' alleged repudiation of a joint venture to purchase a parcel of land. Id. at 554. After the sale closed and the defendants took title to the property, the defendants denied the existence of a joint venture and denied that the plaintiffs had any interest in the property. Id. at 555. The plaintiffs asserted claims for: (1) damages for tortious exclusion of joint venture and punitive damages; (2) dissolution of joint venture, accounting, and a receiver; (3) declaratory relief; and (4) fraud. Id. at 553. Before trial, plaintiffs filed a request for partial dismissal requesting the dismissal of plaintiffs' claims for; (1) dissolution of joint venture, accounting, and a receiver; and (2) declaratory relief. Id. On the first day of trial, the defendants filed a motion for leave to file a cross-complaint seeking a judicial dissolution and accounting, which the trial court denied. Id. The trial entered a verdict in favor of the plaintiffs, and the defendants timely appealed, challenging the trial court's denial of the defendants' motion to file a cross-complaint for judicial dissolution and accounting. Id. at 554.

***17** On appeal, the Court of Appeal noted that "[i]t is clear that an action for damages is maintainable here without an action for judicial dissolution and an accounting." Gherman, 72 Cal. App. 3d at 563. Thus, "[w]hen plaintiffs here dismissed the

action for judicial dissolution and an accounting, plaintiffs made an election of remedies to sue for damages (either in tort or for breach of contract) and thereby removed accounting as a possible issue in the case." Id. at 565. The Court of Appeal affirmed the trial court's denial of the defendants' motion for leave to file a cross-complaint because the "[d]efendants cannot complain of the failure to order an accounting of a partnership or joint venture which they say is nonexistent where the nonexistence is attributable solely to their wrongful conduct." Id. [The] [d]efendants should not be permitted to say ... we repudiate the contract, but then if we do not get away with it, we repudiate our repudiation and demand an accounting." Id. The Court of Appeal acknowledged that while a defendant may "plead inconsistent defenses, ... the election of remedies is with plaintiffs and once they elected not to assert any partnership rights and to stand solely on the cause of action arising out of the repudiation, then as between the parties the cause of action for judicial dissolution and an accounting in equity become moot." Gherman, 72 Cal. App. 3d at 563.

Contrary to plaintiffs' argument, however, defendants' declaratory relief counterclaim is consistent with Gherman. Here, plaintiffs agree that they "have consistently denied that the alleged joint venture they are suing under called for the sharing of any of their Ajin profits with Kim or 8th Bridge." Kim GDF No. 1. Accordingly, the joint venture that plaintiffs "are suing under" is project-specific, concerning only the Ace Hotel. See, e.g., Kim Opp. at 17 ("By agreeing (orally or impliedly) to pursue, on a 'project-basis,' the Ace Hotel EB-5 project, Choi and Kim formed a joint venture."). In contrast, while defendants have repudiated the existence of a partnership or joint venture agreement between Choi and Kim that concerns only the Ace Hotel, defendants argue, in the alternative, that if a joint venture does exist, "it gave rise to joint venture agreement that obligated SRC and [8th Bridge] to share profits related to both the Ace and Ajin Projects." Choi Opp. at 6. Accordingly, Gherman is inapt here because a jury could find that while no project-specific joint venture existed between Choi and Kim concerning *only* the Ace Hotel, a joint venture did exist which included *both* the Ace Hotel and Ajin. Cf. Gherman, 72 Cal. App. 3d at 560 ("[P]laintiffs elected to seek *only* damages rather than establish an interest in a going partnership. If plaintiffs failed in that effort, then there would be an adjudication that there was no joint venture and therefore no right to or need for an accounting.") (emphasis in original). In other words, an adjudication that no Ace Hotel-only joint venture existed does not necessarily foreclose a determination that a joint venture involving both the Ace Hotel and one or more of the Ajin LLCs existed.

Accordingly, the Court **DENIES** plaintiffs' motion for summary judgment on defendants' declaratory relief counterclaim.

3. Defendants' Rescission Counterclaim and Fraud Affirmative Defense

Defendants assert a counterclaim against plaintiffs for rescission based on fraud. See Countercl. ¶¶ 72–75. According to defendants, "the only reason Kim even entertained Choi's overtures to collaborate together and the only reasons Kim prepared the Draft Term Sheet was because Choi misrepresented (1) his knowledge of, and experience in, the Chinese market; (2) the sophistication and experience of his foreign agents in sourcing investors for EB-5 transactions; and (3) the qualifications and expertise of his advisor, Morrie Berez."[8] Countercl. ¶ 74. "Thus, to the extent that this Court determines th[at] an agreement was somehow reached between Kim and [8th Bridge], and Choi and SRC, Kim and [8th Bridge] hereby assert their right to rescind that agreement have it voided due to the fraud in its inception[.]" Id. ¶ 75. Defendants also assert, based on these allegations, an affirmative defense for fraud. See Dkt. 53 ("Answ.") ¶ 6. Plaintiffs seek summary judgment on defendants' rescission counterclaim and on defendants' fraud defense.

a. Failure to Include "Restitution" in Prayer for Relief

***18** First, plaintiffs argue that "[t]here is no cause of action for rescission; rather, the equitable action for rescission was abolished in 1961, and the remedy is now a legal action for restitution based on a completed unilateral rescission." Choi Mot. at 17 (internal citation and quotation marks omitted). According to plaintiffs, then, because defendants "have not alleged a right to restitution, nor included a prayer for restitution in their pleadings," defendants "have alleged a non-existent claim

under California law." Id. at 17–18. In response, defendants "acknowledge that they failed to include their request for rescission in the prayer for relief" but contend "that was an inadvertent mistake and given the clear nature of the Counterclaim, there can be no argument that Choi and SRC were not given proper notice of [defendants'] intent to rescind the joint venture if it was in fact entered into." Choi Opp. at 16 n.7. Accordingly, defendants "hereby request ... leave to amend for the sole purpose of adding the rescission prayer for relief to the Counterclaims." Id.

"Rescission is not a cause of action, but a common-law remedy on the contract." Microsoft Corp. v. Hon Hai Precision Indus. Co., No. 19-cv-01279-LHK, 2020 WL 836712, at *6 (N.D. Cal. Feb. 20, 2020). Accordingly, "California courts no longer 'grant' rescission, but merely recognize that the underlying facts have been established and grant consistent relief." Id. However, "[w]hen notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liaiblity Litig., No. 18-ML-02814-AB-FFM, 2019 WL 7171546, at *4 (C.D. Cal. Dec. 2, 2019) (citing Cal. Civ. Code § 1691).

To the extent that plaintiffs seek summary judgment on defendants' rescission counterclaim on the basis that rescission is "not a cause of action" and defendants have not specifically requested restitution in defendants' prayer for relief, plaintiffs elevate form over substance. See Duarte v. Pac. Specialty Ins. Co., 13 Cal. App. 5th 45, 55 (2017) (finding that insurer's pleading of rescission defense in its answer was sufficient to allow trial court to justify award of summary judgment allowing insurer to rescind policy that insurer issued to insured because insurer adequately identified insurer's misrepresentations which allowed rescission and landlord waived any pleading defects by addressing rescission defense on the merits). Indeed, plaintiffs address here the merits of defendants' request for rescission. See Choi Mot. at 18–21; Choi Reply at 9–12.

Accordingly, the Court declines to enter summary judgment on defendants' rescission counterclaim in favor of plaintiffs on this hyper-technical basis. To the extent necessary, the Court **GRANTS** defendants' request for leave to amend to include a prayer for restitution with respect to defendants' rescission counterclaim.

b. Choi's Alleged Misrepresentations

In addition, plaintiffs seek summary judgment on defendants' rescission counterclaim and on defendants' fraud defense on the grounds that "[d]efendants have not shown with admissible evidence that Choi misrepresented to Kim 'his knowledge of, and experience in, the Chinese market' or 'the sophistication and experience of his foreign agents in sourcing investors for EB-5 transactions." Choi Reply at 9. According to plaintiffs, defendants "cannot rely on any of the three pieces of evidence they offer to raise a genuine issue of fact as to whether Choi made such representations." Id.

Defendants first rely on a November 19, 2015 email from Amber Jenkins, an SRC employee. In the email, which includes "China Trip Summary" as the subject line, Jenkins writes to Choi and Thomas Choi: "Current: We don't have an appropriate person in charge [of] our marketing in China. But we made a connection with a small team in Qingdao who have agreed to promote SRC projects ... and are willing to set up a[n] independent company after the business starts rolling." Dkt. 161-2, Exh. M ("Nov. 19, 2015 Email") at P-004595. Jenkins further advises that "[a]fter almost one month in China I think we urgently need a marketing person to maintain and promote our relations with all the agents and other selling channels that directly sell a project." Id. According to defendants, this email indicates that "SRC lacked an appropriate marketing person in China" which, "[a]t minimum, ... creates a triable issue of material fact as to whether Choi misrepresented SRC's marketing experience in China as of 2015." Choi Opp. at 17.

***19** In response, plaintiffs contend that Jenkins' November 19, 2015 email "does nothing to establish that Choi represented to Kim anything about *Choi's own past experience in China*."[9] Choi Reply at 9 (emphasis added). Drawing all inferences in favor of defendants, however, the Court cannot say that no finder of fact could determine that, based on SRC's nascence in China, and as confirmed by Jenkins' November 19, 2015 email, Choi personally lacked knowledge and experience in the Chinese market. See T.W. Elec. Serv., 809 F.2d at 631 ("if a rational trier of fact *might* resolve the issue in favor of the nonmoving party, summary judgment must be denied.") (emphasis added). For example, Jenkins testified during deposition that SRC initially hired her because Choi "need[ed] somebody who speaks Chinese and to help him to manage the office and

to ... *build some kind of tie with the Chinese agents."*[10] Dkt. 161-2, Exh. L ("Jenkins Dep. Tr.") at 30:25–31:8 (emphasis added). A jury could reasonably conclude that because Choi hired Jenkins to assist SRC to "build some kind of tie with the Chinese agents," SRC, and in turn Choi, lacked experience in that regard. Indeed, in the November 19, 2015 email, Jenkins advised that SRC retain "a marketing person" in China and opined that "this marketing person should really understand Moses's perspective, and positively build a bridge between Moses and agents, and be able to find common ground when Moses & Agent [sic] have different opinions." Nov. 19, 2015 Email at P-004595. That is "[b]ecause Chinese culture is very different with US, so if this person can understand what Moses wants eventually, and use Chinese way to complete it[,] [that] is the best scenario." Id. Accordingly, because Jenkins suggested the hiring of "a marketing person" to "build a bridge" between Choi and agents in China, a jury could conclude that Choi lacked the knowledge or experience of the Chinese market necessary to accomplish Choi's objectives.

In support of their argument that Choi made misrepresentations to Kim, defendants point to additional pieces of evidence including: (1) a July 26, 2015 email exchange between Choi and Kim wherein Choi shares a list of fifty-nine "major" SRC agents with whom SRC transacts with in China: (2) plaintiffs' purportedly contradictory interrogatory response, which defendants contend establishes that plaintiffs engaged with far fewer foreign agents in China: and (3) Choi's own deposition testimony, wherein Choi purportedly acknowledged that he misrepresented his own EB-5 experience when he acquired SRC from SRC's previous owner. Choi Opp. at 17–19. Because the Court has already concluded that Jenkin's deposition testimony and November 19, 2015 email raise triable issues regarding whether Choi misrepresented his experience and knowledge of the Chinese market in his preliminary dealings with Kim, the Court need not address these additional pieces of evidence.

For the foregoing reasons, the Court **DENIES** plaintiffs' motion for summary judgment on defendants' rescission counterclaim and on defendants' fraud affirmative defense.

4. Chang's Breach of Contract and Promissory Estoppel Counterclaims

Chang asserts counterclaims against Choi for breach of oral contract and for promissory estoppel. Countercl. ¶¶ 76–84. The gravamen of Chang's counterclaims is that: in November 2015, Chang advised Choi that Chang was considering leaving SRC to attend graduate school; that Choi promised that if Chang continued working for SRC for an additional year, Choi would pay for Chang's graduate education; that Chang relied on Choi's representation and forewent graduate school during this period, moving to Los Angeles at Choi's direction to begin working with Kim and 8th Bridge; and that Choi demanded Chang return to Georgia after Choi's relationship with Kim broke down if Chang wished for Choi to pay for Chang's graduate education. Id. Plaintiffs move for summary judgment on Chang's counterclaims on two bases.

a. Promise to Pay for Law School Rather than Business School

***20** First, plaintiffs contend "that Choi's promise, if any, was to pay for *law school*," rather than business school, and Chang is seeking damages in the form of his *business school* tuition. Choi Mot. at 22 (emphases added). The Court does not find plaintiffs' argument availing.

Here, the disputed records precludes the Court from determining, as a matter of law, whether Choi made an enforceable oral promise to Chang to pay for Chang's graduate school tuition; whether any promise by Choi to Chang was specifically limited to law school tuition; and whether Choi subsequently modified any promise to cover business school tuition instead. For example, Chang testified during deposition that in around September 2015, Choi told Chang, "I want you to work for me for another year and then ... if you work for me for another year, I'll pay for your *law school* then and then you can go and do what you want to do." Dkt. 144-1, Exh. 7 ("Chang Dep. Tr.") at 193:2–15 (emphasis added). Chang further testified that he decided to continue working for Choi based on Choi's representation. Id. at 201:5–8. On the other hand, Thomas Choi testified during deposition that "[w]e never agreed to pay any tuition[.]" T. Choi Dep. Tr. at 215:12. In addition, Chang

testified that Choi began urging Chang to consider "going to business school instead" and that Choi agreed to "pay for that as well." Id. at 193:23–194:3. Choi appeared to corroborate during deposition that he agreed to pay for Chang's graduate school. See Dkt. 161-2, Exh. I ("Choi Dep. Tr.") at 341:3–10. Similarly, Thomas Choi testified that "we did mention to [Chang] that we would be willing to consider paying for his education needs[.]" T. Choi Dep. Tr. at 215:12–14. And, in a 2017 email to Chang, Thomas Choi wrote that "[w]e wanted you to succeed as a person and professional and ... were willing to go to the distance, *like paying for your education* and personal needs." Id. at 215:6–9 (emphasis added).

b. Statute of Frauds

Plaintiffs contend that Chang's breach of contract counterclaim "is barred by the statute of frauds." Choi Mot. at 22. That is because, according to plaintiffs, "Choi's alleged promise could not be possibly performed within one year because ... there was simply no way Chang might have completed the requirements to attend either law school or business school by late 2016, thereby triggering Choi's alleged obligation to pay tuition." Id.

The Court previously considered—and rejected—plaintiffs' argument based on the Statute of Frauds in denying plaintiffs' motion to dismiss Chang's breach of contract and promissory estoppel counterclaims. Dkt. 50 at 20. The Court determined that Chang's breach of contract counterclaim did not necessarily come within the statute because "Chang could have fulfilled his end of the bargain by working for *exactly* one additional year." Id. (emphasis added). The Court also noted that "defendants allege that Chang fully performed under the oral contract by remaining at SRC for an additional year," and that "where the contract is unilateral, or, though originally bilateral, has been fully performed by one party, the remaining promise is taken out of the statute, and the party who performed may enforce it against the other." Dkt. 50 at 20 (citing Secrest v. Sec. Nat'l Mortg. Loan Tr. 2002-2. 167 Cal. App. 4th 544, 556 (2008)).

***21** Plaintiffs argue that Choi's promise necessarily could not have been performed within one year because Choi's obligation to pay Chang's graduate school tuition was contingent on Chang's applying—and being accepted to—graduate school. See Choi Mot. at 22. However, "California's one year provision is interpreted literally and narrowly." Rosenthal v. Fonda, 862 F.2d 1398, 1401 (9th Cir. 1988). Thus, "[i]t is well-established in California that an oral contract is invalid ... only w[here] by its *very terms* it cannot be performed within a year from the date it is made." Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1291 n.6 (9th Cir. 1987) (emphasis in original). Accordingly, if the *terms* of the alleged oral agreement do not preclude performance within once year, then the Statute of Frauds is not a bar, "even where performance is contemplated by the parties to be completed over a course of years." MS Int'l, Inc. v. Luxury Stone Imports, Inc., No. 8:11-cv-01700-JVS-JPR, 2012 WL 12894179, at *2 (C.D. Cal. May 10, 2012). Here, a genuine dispute exists that the terms of Choi's alleged promise provided only that if Chang worked for SRC for an additional year, Choi would pay for Chang's graduate school tuition. It is immaterial that the parties *contemplated* that it would be more than a year before Choi's first tuition payment became due because Chang would necessarily first have had to applied—and been accepted to—graduate school.

Even assuming *arguendo* that Choi's oral contract could not be performed within one year, "[u]nder California law, full performance by the party seeking enforcement of an oral contract removes the contract from the statute of frauds."[11] Griffin v. Green Tree Servicing, LLC, No. 2:14-cv-09408-MMM-VBK, 2015 WL 10059081, at *8 (C.D. Cal. Oct. 1, 2015). The Court has already concluded that triable issues exist regarding whether, in November 2015, Choi made Chang an oral promise to pay for Chang's graduate school tuition if Chang agreed to continue working at SRC for an additional year. Plaintiffs acknowledge that Chang continued working at SRC through until at least June 2017. See Choi Mot. at 23. Accordingly, to the extent that Chang worked at SRC for an additional year based on Choi's oral promise, it appears that Chang fully performed, taking Choi's oral promise outside the statute.

5. Defendants' Offset Affirmative Defense

Defendants assert an affirmative defense against plaintiffs for offset. See Answ. ("Seventh Affirmative Defense"). According to defendants, "[i]f the Court should find that [plaintiffs are] entitled to recovery against [defendants], then such recovery, if any, should be offset and reduced by any sums previously paid to [plaintiffs by defendants]," and that [defendants] ha[ve] valid and enforceable claims for money against [plaintiffs] ... and which [defendants] are entitled to set off against [plaintiffs'] claimed damages, if any should be found to exist." Id.

Plaintiffs contend that "[a]part from pursuing their existing counterclaims and seeking a credit for amounts paid to Choi, [d]efendants cannot seek affirmative relief against [p]laintiffs, and [p]laintiffs are thus entitled to judgment as a matter of law on the 'Offset' counterclaim to that extent." Choi Mot. at 25. In response, defendants contend that, "[t]o be totally candid, [d]efendants do not understand what summary judgment [p]laintiffs are seeking with respect to their affirmative defense for Offset." Choi Opp. at 19. Defendants assert that "[t]o the extent [p]laintiffs are asking for confirmation that the defense of setoff only affords 8th Bridge the best case scenario of reducing [p]laintiffs' damages to zero, rather than calling for an award of net damages owed by [p]laintiffs to [d]efendants, [d]efendants agree that is all that is allowed under the law." Id.

***22** "Two parties who are liable to each other in the same suit are generally entitled to a setoff of any recovery owed by the other party." Enodis Corp. v. Employers Ins. Co. of Wausau, No. 2:03-cv-00866-CAS-PJW, 2004 WL 5642006, at *2 (C.D. Cal. May 18, 2004). "Normally, a court should first determine whether a party will prevail on his claim and, if so, how much he will recover." Aqui es Texcoco, Inc. v. Lopez, No. 12-cv-01215-BEN-WVG, 2014 WL 714862, at *4 (S.D. Cal. Feb. 21, 2014). "Only after that liability is established is it appropriate to evaluate defensive setoffs." Id. Accordingly, "[c]ourts have denied summary judgment as premature where a party asked that the court determine the offset." Id.

At this preliminary stage, the Court declines to determine what offset, if any, defendants may or may not be entitled to. To the extent necessary, the Court may consider the issue of offset if, and when, damages are determined. See Acqui, 2014 WL 714862, at *5 ("[G]iven the many uncertainties surrounding an equitable situation that may never arise, this Court will not determine as a matter of law that an offset affirmative defense cannot succeed. If necessary, this Court will consider the matter when damages are determined.").

V. CONCLUSION

In accordance with the foregoing, the Court order as follows:

1. Pursuant to plaintiffs' election of remedies, the Court **DISMISSES** plaintiffs' third claim for enforcement of rights under the Revised Uniform Partnership Act, plaintiffs' sixth claim for constructive fraud, plaintiffs' tenth claim for judicial dissolution, and plaintiffs' fifteenth claim for accounting;

2. The Court **OVERRULES** the parties' evidentiary objections;

3. The Court **DENIES** defendants' motion for summary judgment as to plaintiffs' non-quantum meruit claims; and

4. The Court **DENIES** plaintiffs' motion for summary judgment as to defendants' intentional interference with contract, intentional interference with prospective economic advantage, rescission, breach of contract, and promissory estoppel counterclaims.[12] The Court also **DENIES** plaintiffs' motion for summary judgment as to defendants' fraud and offset affirmative defenses.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1446700

Footnotes

1	Plaintiffs subsequently dismissed their eighth and ninth claims for violations of the Defend Trade Secrets Act and California Uniform Trade Secrets Act. Dkt. 76, 77.
2	Defendants object to nearly every paragraph of Choi's declaration using boilerplate objections such as "hearsay," "sham declaration," "vague and ambiguous," and "best evidence rule." Accordingly, "the Court will not scrutinize each objection and give a full analysis of identical objections raised as to each fact." Stonefire Grill, Inc. v. FGF Brands, Inc., 987 F. Supp. 2d 1023, 1033 (C.D. Cal. 2013). The Court therefore **OVERRULES** these blanket objections. See Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 (C.D. Cal. 2010) ("In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised.").
3	Defendants rely heavily on Bustamante v. Intuit, Inc., 141 Cal. App. 4th 199 (2006). There, the California Court of Appeal affirmed the grant of summary judgment to a software company on the plaintiff's claim for *breach of contract* to establish a joint venture. See generally id. The Court of Appeal concluded "that the undisputed facts here show no meeting of the minds as to the essential structure and operation of the alleged joint venture, even if there was agreement on some of the terms." Id. at 215. The Court of Appeal reasoned that "[e]ven though a joint venture can be created with little formality, here the undisputed facts ... provide[ ] no basis for determining the existence of a breach and for giving an appropriate remedy" and the software company was "entitled to adjudication on the *contract cause of action*." Id. (emphasis added). Where, as here, the purported joint venturers have advanced beyond mere negotiations and have actually begun collaboration, Bustamante, which involved a breach of a contract *to form a joint venture*, is distinguishable. See Interserve, Inc. v. Fusion Garage PTE. LTD., No. 09-cv-05812-RS-PVT, 2010 WL 3339520, at *6 (N.D. Cal. Aug. 24, 2010) (distinguishing Bustamante on grounds as case where parties had not "in any otherway actually begun the business the proposed collaboration was intended to undertake.").
4	Kim testified during deposition that he sent this email to himself, rather than Choi, and that Kim regularly sent himself emails as part of his drafting process to "jot down some of my thoughts that are disorganized" and to "correct it." Kim Dep. Tr. at 281:9–282:3.
5	Defendants concede that "a party can prove a joint venture without a specific agreement as to profit sharing[.]" Kim Mot. at 14 n.6. Nevertheless, notwithstanding Choi's testimony that he and Kim agreed to equally split profits derived from the Ace Hotel, defendants contend that "as evidenced from the Draft Term Sheet and email correspondence, the parties never agreed on profit sharing amounts or equity ownership percentages." Id. Assuming *arguendo* that the parties failed to agree on a specific numerical method for sharing profits, that does not necessarily otherwise invalidate an otherwise valid joint venture between the parties. See, e.g., Gartner, Inc. v. Parikh, No. 2:07-cv-02039-PSG, 2008 WL 4601025, at *9 (C.D. Cal. Oct. 14, 2008) (noting that "[i]n recent years, however, courts have emphasized only the [common undertaking] and [right to joint control] elements."); see also Farhang v. Indian Inst. of Tech., Kharagpur, No. 08-cv-02658-RMW, 2010 WL 3504897, at *4 (N.D. Cal. Sept. 7, 2010) ("A joint venture agreement need not be formal or definite in every detail relating to the respective rights and duties of the parties but may be implied as a reasonable deduction from their acts and declarations.") (internal citation and quotation marks omitted).
6	Indeed, defendants make clear that they "are not relying at all on the fact that Choi forwarded a copy of an online 'Real Deal' article that listed certain allegations from the complaint." Choi Opp. at 12 n.5. Instead, defendants' theory is that Choi "did more than merely forward the article" and made additional statements that Kim was "unethical" and a "bad business man." Id. at 12, 12 n.5.

7	The Court **OVERRULES** plaintiffs' authentication and relevancy objections to this email. See Dkt. 167-2 ("Choi Opp. Evidentiary Objection") No. 6. First, the email is marked with document identifier number "P-093136," which is consistent with the labeling that plaintiffs have used when producing other documents in this litigation, indicating that plaintiffs produced this email See McQueeney v. Wilmington Tr. Co., 779 F.2d 916, 929 (3d Cir. 1985) (determining that plaintiff's production of documents was "probative" on issue of authentication). Second, the Court cannot say that Choi's description of defendants' counterclaims as "false," "baseless," and "lies" is so irrelevant to defendants' intentional interference counterclaims, based on allegations that Choi defamed Kim, so as to require exclusion. See United States Equal Employment Opportunity Comm'n v. Placer ARC, 147 F. Supp. 3d 1053, 1062 (ED. Cal. 2015) ("Relevance ... is typically quote a low bar to the admissibility of evidence.").
8	In a March 4, 2020 email to plaintiffs' counsel, defendants' counsel indicated that defendants "aren't relying on Morrie issues as part of the fraud counterclaim and defense for other reasons." Dkt. 167-1, Exh. 3.
9	The Court **OVERRULES** plaintiffs' authentication and hearsay objections to this email. See Choi Opp. Evidentiary Objection No. 9. As to authenticity, the email is marked consistent with the document labeling that plaintiffs have used when producing other documents in this litigation, indicating that plaintiffs produced this email, which is probative of its authenticity. Moreover, the email is not hearsay because it was written by Jenkins, plaintiffs' employee, and is being offered *against* plaintiffs. See Iorio v. Allianz Life Ins. Co. of N. Am., No. 05-cv-00633-JLS-CAB, 2010 WL 11508761, at *11 (S.D. Cal. Jan. 27, 2010) ("The e-mail chain between Defendant's employees, however, are admissions of the party-opponent and therefore are not hearsay under FRE 801(d).").
10	The Court **OVERRULES** plaintiffs' objection to Jenkins' deposition testimony based on lack of personal knowledge. See Choi Opp. Evidentiary Objection No. 8. Jenkins may testify regarding her understanding of why Choi and SRC hired her.
11	Plaintiffs argue that "an estoppel to plead the statute of frauds requires that Chang 'show unconscionable injury or unjust enrichment if the promise is not enforced,' including that he detrimentally relied upon Choi's conduct." Choi Mot. at 23 (internal citation omitted). Plaintiffs conflate the concepts of complete performance and equitable estoppel within the context of the Statute of Frauds. In other words, "[t]he statute of frauds has *no application* to an executed agreement." Dean v. Davis, 73 Cal. App. 2d 166, 168 (1946) (emphasis added). With respect to equitable estoppel, however, "part performance ... has no effect; the rights of the defrauded party are based upon his or her change of position in reliance upon the representations." Witkin, Summary 11th Contracts § 407 (2019).
12	To the extent necessary, the Court **GRANTS** defendants' request for leave to amend to include a prayer for restitution with respect to defendants' rescission counterclaim.

United States District Court, C.D. California.

CORBRUS, LLC
v.
8TH BRIDGE CAPITAL, INC. et al.

Case No. 2:19-cv-10182-CAS(AFMx)
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Filed 04/20/2020

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Proceedings: TELEPHONE HEARING ON PAZ DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT (Dkt. [34], filed February 21, 2020)

The Honorable CHRISTINA A. SNYDER, Judge

I. INTRODUCTION AND BACKGROUND

***1** Plaintiff Corbrus, LLC ("Corbrus") filed this action against defendants 8th Bridge Capital, Inc. ("8th Bridge Inc."), 8th Bridge Capital, LLC ("8th Bridge LLC"), Young Hun Kim ("Kim"), Omnia Group, Ltd. ("Omnia Ltd."), Omnia Properties LLC ("Omnia LLC"), David Paz ("Paz"), Jeffer Mangels Butler & Mitchell LLP ("Jeffer Mangels"), Catherine DeBono Holmes ("Holmes"), and Seth James Pardee ("Pardee") on November 30, 2019. Dkt. 1. Corbrus filed a first amended complaint on December 12, 2019. Dkt. 7 ("FAC"). The FAC asserts claims for: (1) fraud and deceit (oppression and malice); (2) fraudulent concealment and constructive fraud (oppression and malice); (3) negligent misrepresentation; (4) breach of fiduciary duty; (5) professional negligence; (6) breach of contract; and (7) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). See generally Id.

Paz, Omnia Ltd., and Omnia LLC filed a motion to dismiss on February 21, 2020. Dkt. 34 ("Mot."). Corbrus filed an opposition on March 30, 2020. Dkt. 45 ("Opp."). Paz, Omnia Ltd., and Omnia LLC, filed a reply on April 6, 2020. Dkt. 46 ("Reply").

The Court held a hearing on April 20, 2020. Having carefully considered the parties' arguments, the Court finds and concludes as follows.

A. Collaboration Between Corbrus, 8th Bridge, and the Paz Defendants

Fu-Shen Chang ("Chang") serves as the sole principal of Corbrus, a full-service real estate development and financing

company that locates real estate projects for potential foreign investors in connection with the EB-5 immigrant visa program.[1] FAC ¶¶ 8, 29. The gravamen of Corbrus' claims is that Corbrus entered into a partnership and joint venture with 8th Bridge Inc. and 8th Bridge LLC (collectively, "8th Bridge"), but that after Corbrus "expended significant time and resources," Kim, 8th Bridge, and "the other [d]efendants carried out a scheme to defraud [Corbrus] out its rightful place in the partnership." FAC ¶¶ 6–7.

Corbrus alleges that between April and June 2015, Corbrus and 8th Bridge discussed collaborating on several projects including real estate projects being developed by Paz and Paz's two companies, Omnia Ltd. and Omnia LLC (Omnia Ltd. and Omnia LLC together, "Omnia") (Paz and Omnia collectively, "the Paz defendants"), in New York City. FAC ¶ 35. According to Corbrus, "[b]etween approximately June 17 and 22, 2015," Corbrus and 8th Bridge "agreed in writing to have a joint venture and partnership, which would lend EB-5 funds to various projects including one or more of Paz's projects." Id. ¶ 36. Corbrus and 8th Bridge referred to this collaboration as the "Manhattan Real Estate Fund" ("the Manhattan Fund"). Id. Corbrus avers that "EB-5 investors would fund the Manhattan Fund, and the Manhattan Fund would in turn serve as a lender to Paz and Omnia, and other such projects that the Manhattan Fund partnership would pursue." Id. Corbrus and 8th Bridge agreed to be "equal partners in the Manhattan Fund, splitting the proceeds of the first Omnia deal as follows:" (1) "Corbrus would collect 2% of the closing fees and [8th Bridge] would collect 1%;" (2) "Corbrus would be entitled to 20% of the interest accrued for the life of the Manhattan Fund and [8th Bridge] would be entitled to 80% of the interest accrued;" and (3) "[a]ll other compensation, including but not limited to equity, equity reward, or equity-reward-like compensation, would be split equally between Corbrus and [8th Bridge]." Id. ¶ 37.

***2** Between May and September 2015, Corbrus, 8th Bridge, and Omnia negotiated an agreement whereby Corbrus and 8th Bridge would provide EB-5 financing for Omnia's projects through the Manhattan Fund. FAC ¶ 39. Chang, Kim, and Paz agreed that Omnia's Ace Hotel, also referred to as the "Sister City Hotel," would serve as the trio's first collaboration project. Id. According to Corbrus, "[t]he Ace Hotel Project would receive a loan of at least $20 million in EB-5 funds from the Manhattan Fund. Id. Corbrus contends that it subsequently "expended considerable time and effort on the Manhattan Fund on just about every aspect of the project including, *inter alia*, providing advice and expertise, negotiating terms with Paz (Omnia), retaining consultants, working with lawyers and consultants to comply with EB-5 requirements, and managing efforts on the ground in the U.S. coordinating, reviewing, and providing input on the drafting of numerous important documents[.]" FAC ¶ 40. According to Corbrus, it "even developed a robust PowerPoint presentation to help [8th Bridge] and Omnia sell the Ace Hotel Project to investors in China, which they used to sell the project." Id.

B. 8th Bridge and the Paz Defendants Induce Corbrus to Resign Its Partnership Interest in the Manhattan Fund in October 2015

Corbrus avers that "[b]etween approximately May and September 2015," Kim and Paz "had developed a close relationship and planned on doing future EB-5 projects together as envisioned by the Manhattan Fund partnership between Corbrus and [8th Bridge]." FAC ¶ 46. According to Corbrus, that "relationship was the direct result of Chang's (Corbrus) hard work and hustle in finding the right developer for the Partnership and cultivating the relationship and projects related thereto." Id. Despite Corbrus' contributions, however, Kim and Paz "sought to cut out Chang (Corbrus) and thereby secure for themselves a greater piece of the pie." Id. "The object of the fraud scheme was to cut out Corbrus from the Manhattan Fund Partnership by convincing Chang (Corbrus) that it was better for Corbrus to *not* be a partner on the Manhattan Fund, but to instead be paid as a consultant by Paz on the Omnia side." Id. ¶ 48. By October 2015, Corbrus had resigned its partnership interest in the Manhattan Fund. Id. ¶ 50. "As it turned out, however, the entire discourse by Kim ... and Paz (Omnia) was a charade and fraud to induce Chang (Corbrus) into giving up Corbrus' partnership place in the Manhattan Fund without any compensation." Id. ¶ 49.

C. Corbrus' Subsequent Inquiries Regarding its Consulting Agreement with the Paz Defendants

On December 1, 2015, Kim "informed Chang (Corbrus) *for the first time* that the Manhattan Fund EB-5 loan agreement had been fully executed, that Corbrus was not a part of it, ... and that Corbrus should work directly with Omnia on whatever agreement they would reach." FAC ¶ 50(t). Corbrus alleges that it immediately thereafter "responded protesting that Corbrus'

resignation from the Manhattan Fund partnership was contingent upon all parties working together to execute Corbrus' protective consulting agreement with Omnia. No one responded." Id. ¶ 50(u). "Instead, ... Paz (Omnia) proceeded to give Chang (Corbrus) the run-around." Id.

On November 7, 2017, "Chang (Corbrus) sent Kim ... an email inquiring about the funding status of the Manhattan Fund EB-5 project(s) with Omnia." FAC ¶ 52. Kim responded on November 13, 2017, "refusing to provide any information on the basis of Corbrus' resignation from the Manhattan Fund, which was fraudulently induced by Kim's own scheme." Id. On November 20, 2017, "Chang (Corbrus) sent Kim ... a follow up email reminding Kim of the parties' non-circumvention agreement and partnership along with Kim and Paz's assurances to Chang that Corbrus' interests would be protected." Id. ¶ 53. "Kim again refused to provide information on the basis of the fraudulently induced resignation." Id.

Corbrus emailed Holmes, its attorney at the Jeffer Mangels firm, on September 23, 2018, informing Holmes "that Corbrus believed it had been defrauded by Kim ... and Paz (Omnia), and requesting all files and communications concerning Jeffer Mangels' work on the Manhattan Fund projects with [8th Bridge] and Omnia." FAC ¶ 54. According to Corbrus, "Holmes did not respond" to Corbrus's September 23, 2018 email or to additional emails on September 28, 2018, and on October 10, 2018. Id.

D. Corbrus Receives Information from a Third-Party and Files Suit

***3** Corbrus avers that "[i]t was not until approximately June 2019 that Corbrus was coincidentally provided information by a third party from which Corbrus learned" of the fraud. FAC ¶ 55. It thereafter filed this action on November 30, 2019. See Dkt. 1.

II. LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if "there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.' " Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting Balisteri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. (internal citations omitted).

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

III. DISCUSSION

Corbrus asserts claims against the Paz defendants for: (1) fraud and deceit; and (2) negligent misrepresentation. See FAC. The Paz defendants argue that Corbrus' claims are time-barred or, in the alternative, fail based on other pleading defects. See generally Mot.

A. Fraud and Deceit Claim

***4** The gravamen of Corbrus' fraud claim is that the Paz defendants "deliberately and fraudulent induced [Corbrus] into a false sense of security to relinquish its rightful partnership position in the Manhattan Fund Companies ... which ... constitutes fraud and deceit." FAC ¶ 72. Corbrus alleges that "[o]n or about December 1, 2015, after stringing Corbrus along for months through the fraud scheme and immediately after the Manhattan Fund EB-5 loan agreement was fully executed with Corbrus officially cut out, Kim ... informed Chang (Corbrus) *for the first time* that the Manhattan Fund EB-5 loan agreement had been fully executed, that Corbrus was not a part of it,... and that Corbrus should work directly with Omnia on whatever consulting agreement they would reach." FAC ¶ 50(t) (emphasis in original). Accordingly, the Paz defendants argue that Corbrus' fraud claim began to accrue no later than December 1, 2015, and because Corbrus filed this action on November 30, 2019, Corbrus' fraud claim is now time-barred.

"In a federal court proceeding, state law determines when the statute of limitations begins to run on state claims." Soundgarden, et al. v. UMG Recordings, Inc., 19-cv-05449-JAK-JPR, 2020 WL 1815855, at *11 (C.D. Cal. Apr. 6, 2020) (internal citation and alterations omitted). "Under California Code of Civil Procedure § 338, a defrauded party has three years from the occurrence of the fraud to file a civil action against the defrauding party." Manlin v. Ocwen Loan Servicing, LLC, No. 16-cv-06625-AB-KS, 2017 WL 8180779, at *3 (C.D. Cal. Dec. 7, 2017). "Generally, a claim accrues at the time the injury occurs. An exception to this is the discovery rule which postpones accrual of a claim until the plaintiff discovers or has reason to discover the injury. Parrish v. Nat'l Football League Players Ass'n, 534 F. Supp. 2d 1081, 1089 (N.D. Cal. 2007). "Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period." Keilholtz v. Lennox Hearth Prod. Inc., No. 08-cv-00836-CW, 2009 WL 2905960, at *3 (N.D. Cal. Sept. 8, 2009). A party seeking to invoke the delayed discovery rule must, however, establish: (a) lack of knowledge; (b) lack of means of obtaining knowledge such that in the exercise of reasonable diligence, the facts could not have been discovered at an earlier date; and (c) how and when the party actually discovered the fraud." Gen. Bedding Corp. v. Echevarria, 947 F.2d 1395, 1397 (9th Cir. 1991).

"A close cousin of the discovery rule is the well accepted principle of fraudulent concealment." Bernson v. Browning-Ferris Indus., 7 Cal. 4th 926, 931 (1994) (internal citation and alteration omitted). "Succinctly stated, the rule of fraudulent concealment provides that a "defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations." Garamendi v. SDI Vendome S.A., 276 F. Supp. 2d 1030, 1041 (C.D. Cal. 2003) (internal citation and alteration omitted). The party seeking to invoke the doctrine of fraudulent concealment "must show: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." Cassis v. Sun Life Assurance Co. of Canada (U.S.), No. 17-cv-0148-DOC-KES, 2018 WL 1358971, at *14 (C.D. Cal. Jan. 18, 2018) (internal citation and quotation marks omitted). "A plaintiff must affirmatively excuse his failure to discover the fraud within three years by showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1024 (9th Cir. 2008).

Corbrus makes several arguments as to why its fraud and deceit claim is not time-barred. First, Corbrus argues that the statute of limitations did not begin to accrue until, at the earliest, September 23, 2018, or, at the latest, June 2019. Opp. at 16–17. In support of this argument, Corbrus points to the FAC, wherein Corbrus alleges that on "September 23, 2018, Corbrus emailed its attorney Holmes ... informing Holmes that Corbrus believed it had been defrauded by Kim ... and Paz (Omnia), and requesting all files and communications concerning Jeffer Mangels' work on the Manhattan Fund projects with [8th Bridge] and Omnia." FAC ¶ 54. Similarly, the FAC alleges that "[i]t was not until approximately June 2019 that Corbrus was coincidentally provided information by a third party" revealing the alleged fraud. Id. ¶ 55.

***5** However, "[g]enerally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements." Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 806 (2005) (internal citation omitted). Here, Corbrus asserts a claim for fraud and deceit against the Paz defendants, and a claim for fraud and deceit "will only lie when one makes a promise of future conduct with no intention, at the time of the promise, of actually performing that promise." Cedars Sinai Med. Ctr. v. Mid-W. Nat. Life Ins. Co., 118 F. Supp. 2d 1002, 1013 (C.D. Cal. 2000). The gravamen of Corbrus' fraud claim is that in October 2015, 8th Bridge and the Paz defendants induced Corbrus to resign its partnership interest in the Manhattan Fund based on a promise that Corbrus would be awarded a consulting agreement, but that the Paz defendants never intended to, or did, in fact, execute a consulting agreement with Corbrus after Corbrus resigned its partnership interest in the Manhattan Fund on October 25, 2015. See FAC ¶¶ 46–50. Accordingly, the Paz defendants' alleged fraud and deceit was "complete" when they fraudulently induced Corbrus to resign its partnership interest in the Manhattan Fund, which Corbrus did, in fact, do on October 25, 2015.[2]

Having determined that the Paz defendants' alleged fraud and deceit was complete no later than October 25, 2015, the Court next considers whether Corbrus has adequately alleged a basis from which the Court could conclude that Corbrus' fraud claim is not time-barred. Corbrus relies primarily on the discovery rule and the doctrine of fraudulent concealment.[3] "[T]o merit application of the discovery rule or fraudulent concealment tolling, a plaintiff must allege that he exercised due diligence to uncover his injury." Yetter v. Ford Motor Co., No. 19-cv-00877-LHK, 2019 WL 7020348, at *8 (N.D. Cal. Dec. 20, 2019). Here, Corbrus argues that it "has properly alleged that it did not discover the fraud scheme and could not have discovered it through the exercise of reasonable diligence until June 2019[.]" Opp. at 17. That is because "[i]t was not until approximately June 2019 that Corbrus was coincidentally provided information by a third party from which Corbrus learned the true nature of the fraud scheme[.]" Id. at 10. The FAC's allegations belie Corbrus' argument, however.

***6** For example, Corbrus alleges that on October 25, 2015, "induced by Kim ... and Paz's (Ombia) false promises and assurances, Corbrus sent its lawyers (Holmes, Pardee, and Jeffer Mangels) an email stating Corbrus' intention to resign as a Manhattan Fund partner per discussions with 'the project team' (i.e., Kim and Paz)." FAC ¶ 50(1). Corbrus further avers that Kim, Paz, and Chang communicated to Corbrus' attorneys "that as a condition of Corbrus' resignation, the Jeffer Mangels lawyers (Corbrus' lawyers) would need to draft a consulting agreement between Corbrus and Omnia to ensure that Corbrus' compensation due under the Manhattan Fund partnership would remain more or less intact." FAC ¶ 50(1). To that end, on December 1, 2015, after no such consulting agreement had been reached, Corbrus indicated that its "resignation from the Manhattan Fund partnership was contingent upon all parties working together to execute Corbrus' protective consulting agreement with Omnia" but that "[n]o one responded." Id. ¶ 50(u). It is clear, then, that the status of Corbrus' consulting agreement was of critical importance to Corbrus in late 2015.

Yet, it was not until November 7, 2017, that "Chang (Corbrus) sent Kim ... an email inquiring about the funding status of the Manhattan Fund EB-5 project(s) with Omnia"; until November 13, 2017, when "Kim responded refusing to provide any information on the basis of Corbrus' resignation from the Manhattan Fund"; and until November 20, 2017, when "Chang (Corbrus) sent Kim ... a follow up email reminding Kim of the parties' non-circumvention agreement and partnership along with Kim and Paz's assurances to Chang that Corbrus' interests would be protected." FAC ¶¶ 52–53. Corbrus does not meaningfully explain the almost *two-year* delay between December 2015, when Corbrus last inquired about the status of its consulting agreement (but did not receive a response), and November 2017, the next time that Corbrus inquired about the Manhattan Fund, Omnia projects, and Corbrus' still, as-of-yet consummated consulting agreement. While Corbrus contends that it "believed that payments would not become due and actual injury would not occur until the Manhattan Fund EB-5 loan was actually funded and disbursed, which, in the normal course, would take approximately two or more years (which would have been approximately December 2017 at the earliest)," see Opp. at 9 (citing FAC ¶ 51), that does not explain why Corbrus justifiably believed that it had any entitlement to those monies given that the Paz defendants never responded to Corbrus' December 2015 inquiry regarding Corbrus' consulting agreement.

To the contrary, Corbrus had reason to investigate the Paz defendants' alleged fraud in inducing Corbrus to resign from the Manhattan Fund when, in December 2015, the Paz defendants failed to acknowledge Corbrus' email regarding "Corbrus' protective consulting agreement with Omnia." FAC ¶ 50(u). See Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1110–11 (1988) ("Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.... Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights."); Cannon v. Harco Nat'l Ins. Co., No. 09-cv-26-MMA-JMA, 2009 WL 10725673, at *4 (S.D. Cal. July 16, 2009) ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."). Put differently, when Corbrus resigned its partnership interest in the Manhattan Fund in October 2015 based on the Paz defendants' alleged representations

that the Paz defendants would compensate Corbrus by executing a consulting agreement with Corbrus, the Paz defendants' *failure to respond* to Corbrus' December 2015 inquiries on the subject should have placed Corbrus on notice that something was potentially amiss. See Greenberg v. RiverSource Life Ins. Co., No. 12-cv-00552 WHA, 2012 WL 1155381, at *2 (N.D. Cal. Apr. 5, 2012) ("The statute commences to run ... after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry."). Corbrus' failure to follow up until at least November 2017, almost *two years later*, does not satisfy Corbrus' obligation to exercise the due diligence necessary for Corbrus to avail itself of the discovery rule or of fraudulent concealment tolling. See Platt Elec. Supply, Inc. v. EOFF Elec., Inc., 522 F.3d 1049, 1054 (9th Cir. 2008) ("Plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation."). Nor does Corbrus' filing suit in November 2019, almost *four years later*, serve the policy reasons animating California's three-year statute of limitations governing fraud claims. See Stockton Citizens for Sensible Planning v. City of Stockton, 48 Cal. 4th 481, 499 (2010) ("[T]he purposes of statutes of limitations are to prevent stale claims, give stability to transactions, protect settled expectations, promote diligence, encourage the prompt enforcement of substantive law, and reduce the volume of litigation.").

***7** In accordance with the foregoing, the Court concludes that Corbrus' fraud and deceit claim is time-barred.[4] The Court therefore **DISMISSES** Corbrus' fraud and deceit claim **without prejudice.**[5]

B. Negligent Misrepresentation

Corbrus also asserts a claim for negligent misrepresentation against the Paz defendants. See FAC ¶¶ 87–92. The gravamen of Corbrus' negligent misrepresentation claim is that the Paz defendants' "negligent misrepresentations and negligent material omissions induced [Corbrus] to relinquish its rightful partnership position in the Manhattan Fund Companies[.]" Id. ¶ 91. Pursuant to California law, a "negligent misrepresentation claim has either a two- or three-year statute of limitations." Fanucci v. Allstate Ins. Co., 638 F. Supp. 2d 1125, 11331 n.5 (N.D. Cal. 2009).

Corbrus' negligent misrepresentation claim is premised on the same allegations which form the basis for Corbrus' time-barred fraud and deceit claim against the Paz defendants, and the Court's reasoning with respect to the statute of limitations therefore applies equally here. And, since the Court has already determined that Corbrus' fraud and deceit claim against the Paz defendants, which has a three-year statute of limitations period, is time-barred, the Court likewise finds that Corbrus' negligent misrepresentation claim against the Paz defendants, based on the same allegations, is likewise time-barred under either the two-year or three-year statute of limitations periods which govern negligent misrepresentations claims.[6]

***8** Accordingly, the Court **DISMISSES** Corbrus' negligent misrepresentation claim against the Paz defendants **without prejudice.**[7]

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Paz defendants' motion to dismiss. The Court therefore **DISMISSES** Corbrus' fraud and deceit and negligent misrepresentation claims against the Paz defendants **without prejudice.** Corbrus shall tile a second amended complaint **within thirty (30) days.**

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1914899

Footnotes	
1	The EB-5 immigrant program, administered by the United States Citizenship and Immigration Services ("USCIS"), enables foreign investors in qualifying projects to obtain permanent resident status in the United States.
2	During the hearing, Corbrus' counsel argued that the Paz defendants' alleged fraud and deceit was not complete until December 2017, at the earliest, because that is the first time that payments from the Paz defendants would have become due to Corbrus pursuant to the parties' alleged consulting agreement, and therefore the first time that Corbrus was "injured." However, Corbrus' fraud and deceit claim, as currently alleged in the FAC, indicates that the Paz defendants' alleged fraud "induced [Corbrus] into giving up its partnership place in the Manhattan Fund Companies." FAC ¶ 75; see also id. ¶ 72 ("Defendants deliberately and fraudulently induced [Corbrus] into a false sense of security to relinquish its rightful partnership position in the Manhattan Fund Companies[.]"); FAC at 33 (requesting in prayer for relief "[r]estoration of Corbrus' partnership position in the Manhattan Fund Companies"). Accordingly, contrary to Corbrus' argument, the gravamen of Corbrus' fraud and deceit claim, as currently alleged in the FAC, is that the Paz defendants' alleged fraud injured Corbrus by causing Corbrus to relinquish its partnership interest in the Manhattan Fund, which Corbrus did, in fact, do on October 25, 2015.
3	"[T]he fraudulent concealment doctrine and the discovery doctrine are very similar." Migliori v. Boeing N. Am., Inc., 114 F. Supp. 2d 976, 983 (C.D. Cal. 2000). "However, although analogous, the two doctrines constitute separate bases for tolling the statute of limitations." Migliori, 114 F. Supp. 2d at 983. Courts interpreting California law frequently consider the doctrines together. See Rustico v. Intuitive Surgical, Inc., No. 18-CV-02213-LHK, 2019 WL 6912702, at *12 (N.D. Cal. Dec. 19, 2019) ("The discovery rule and fraudulent concealment are 'close cousins' under California law, the Court therefore considers the two doctrines together.").
4	Corbrus relies on the Court's opinion in Waldrup v. Countrywide Fin. Corp., No. 2:13-cv-08833-CAS, 2014 WL 1463881, (C.D. Cal. Apr. 14, 2014) and the Ninth Circuit's opinion in Bibeau v. Pac. Nw. Research Found. Inc., 188 F.3d 1105 (9th Cir.1999) for the proposition that the applicability of the discovery rule and fraudulent concealment "must be decided by a jury and is not even appropriate for summary judgment, let alone a motion to dismiss." Opp. at 1, 18. However, "[t]he statute of limitations defense may be raised in a motion to dismiss if the running of the statute is apparent from the face of the complaint." Apple Inc. v. Allan & Assocs. Ltd., No. 5:19-cv-8372-EJD, 2020 WL 1492665, at *9 (N.D. Cal. Mar. 27, 2020); accord Yamauchi v. Cotterman, 84 F. Supp. 3d 993, 1004 (N.D. Cal. 2015) ("A plaintiff fails to state a claim, and therefore dismissal is appropriate, where his failure to comply with the applicable statute of limitations is evident from the allegations of the complaint."). Because the FAC does not include allegations from which the Court can conclude that Corbrus' fraud and deceit claim is *not* time-barred, dismissal on statute of limitation grounds, at the pleading stage, is appropriate here.
5	Because the Court concludes that the FAC fails to state a claim for fraud and deceit based on statute of limitations grounds, the Court does not reach the Paz defendants' alternative arguments based on Rule 9(b).

6	Corbrus indicates that "[t]he statute of limitations for negligent misrepresentation is two years." Opp. at 15. However, courts have applied either a two-year or three-year statute of limitations period to negligent misrepresentation claims depending on the nature of the allegations which form the basis for the negligent misrepresentation claim. See Ferguson v. JPMorgan Chase Bank. N.A., No. 2:14-cv-00328-KJM, 2014 WL 2118527, at *6 (E.D. Cal. May 21, 2014).
7	Because the Court concludes that Corbrus' negligent misrepresentation claim is time-barred, the Court does not reach the Paz defendants' alternative arguments that Corbrus' negligent misrepresentation claim fails on the merits or based on pleading defects.

2020 WL 1660066
Only the Westlaw citation is currently available.
United States District Court, D. Alaska.

CHICAGO BRIDGE AND IRON COMPANY, N.V., Plaintiff,
v.
FAIRBANKS JOINT CRAFTS COUNCIL, AFL-CIO; International Brotherhood of Electrical Workers, Local #1547, Defendants.

Case No. 3:18-cv-00100-SLG
|
Signed 04/03/2020

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ORDER RE MOTIONS FOR SUMMARY JUDGMENT

Sharon L. Gleason, UNITED STATES DISTRICT JUDGE

***1** Before the Court at Docket 51 is Defendants International Brotherhood of Electrical Workers Local #1547 ("IBEW 1547") and Fairbanks Joint Crafts Council, AFL-CIO's ("FJCC") Motion for Summary Judgment. Plaintiff Chicago Bridge and Iron Company, N.V. ("Chicago Bridge") responded in opposition at Docket 54. Defendants IBEW 1547 and FJCC replied at Docket 56. Also before the Court, at Docket 52, is Chicago Bridge's Motion for Summary Judgment. Defendants IBEW 1547 and FJCC responded in opposition at Docket 55. Chicago Bridge replied at Docket 57. Defendants requested oral argument and the Court heard argument on the motions on January 13, 2020.[1]

BACKGROUND

Plaintiff Chicago Bridge[2] and Defendants IBEW 1547 and FJCC were co-signatories to a Collective Bargaining Agreement with a term from October 1, 2014 to September 30, 2016 ("2014 CBA").[3] Plaintiff is one of multiple employers that was a signatory to the agreement; Defendants are labor organizations representing employees.[4] The 2014 CBA governed work performed by the signatory employers at U.S. Army Alaska bases under the terms of a support services contract.[5] As a signatory to the 2014 CBA, Plaintiff was required to (and did) make contributions to the Alaska Electrical Pension Fund ("Fund"), a multi-employer pension plan.[6] Prior to the 2014 CBA, Defendants were signatories to a CBA with Shaw Environmental and Infrastructure, Inc. ("Shaw Environmental") with a term from October 1, 2012, to September 30, 2014 ("2012 CBA").[7] Like the 2014 CBA, the 2012 CBA also required contributions to the Fund.[8] During the term of the 2012 CBA, Plaintiff acquired the Shaw Group, Inc., of which Shaw Environmental was a subsidiary, and assumed Shaw Environmental's obligations under the CBA, including its pension contributions.[9]

***2** The mandatory employer contributions to the Fund are governed by Article 15.04 of the 2014 CBA, which provides that:

> With respect to employees covered by the Agreement, the Employer will contribute to the applicable Trust Fund according to Schedule "A," which is attached to this Agreement, for the purpose of providing retirements benefits for employees.... The Union warrants and represents that the Employer's liability, with respect to providing retirement benefits, shall be no greater than as provided above, that the respective Trust Funds are jointly established Trust Funds administered, operated, and maintained in accordance with the law, and further that the Trust Funds have been and continue to be qualified by the Internal Revenue Service.[10]

The 2012 CBA contains identical language, as did two earlier CBAs between FJCC and Shaw dating back to 2004 and 2009, respectively.[11]

In 2015, when the U.S. Government re-bid certain projects at military bases in Alaska, Plaintiff lost its projects to another bid.[12] As such, Plaintiff stopped making contributions to the Fund.[13] In a letter dated September 15, 2016, the Fund requested $678,171 of withdrawal liability from Plaintiff, which Chicago Bridge paid.[14] In turn, Plaintiff requested reimbursement from Defendants, relying on Article 15.04 of the CBA to assert that "the Union unequivocally warranted and represented that [Plaintiff's] cost of providing pension benefits to ... employees would be limited to those amounts expressly provided for in Schedule A of the CBA."[15] Defendants declined to reimburse Plaintiff.[16]

Plaintiff commenced this action against Defendants on April 20, 2018, alleging breach of contract and seeking a declaratory judgment "that Section 15.04 of the CBA requires the Union to reimburse CB&I for any and all future withdrawal liability payments by CB&I to the Fund."[17] On August 6, 2018, Defendants moved for judgment on the pleadings, contending that Plaintiff "failed to use the required grievance and arbitration machinery" provided for in the CBA and that Plaintiff's claim for damages was "futile because a union cannot contractually assume withdrawal liability for an employer."[18] On October 3, 2018, the Court denied Defendants' motion, holding that the mandatory arbitration provision "unambiguously applies to employee grievances only," and finding that Defendants failed to establish a "well-defined and dominant public interest that the scope of [Plaintiff's] relief would violate," as Plaintiff was not seeking that Defendants be directly liable to the Fund.[19]

On October 30, 2019, Defendants filed a joint motion for summary judgment and requested oral argument.[20] On October 31, 2019, Plaintiff filed a cross-motion for summary judgment.[21] The Court heard oral argument on both motions on January 13, 2020.[22]

***3** On January 23, 2020, Plaintiff filed a Notice of Bankruptcy for McDermott International, Inc. and Certain of Its Affiliates, and Notice of Automatic Stay of Proceedings.[23] The notice indicates that McDermott International, Inc. and certain of its affiliates (together "Debtors") filed petitions for relief under Chapter 11 of Title 11 of the U.S. Bankruptcy Code.[24] Plaintiff is among those affiliates.[25] Plaintiff's notice states that:

> [P]ursuant to section 362(a) of the Bankruptcy Code, the Debtors' filing of their respective voluntary petitions gives rise to a stay, applicable to all entities, of, among other things: (a) the commencement or continuation of any judicial, administrative, or other action or proceeding against the Debtors (i) that was or could have been commenced before the commencement of the Chapter 11 Cases or (ii) to recover a claim against the Debtors that arose before the commencement of the Chapter 11 Cases; (b) the enforcement against any of the Debtors or against any property of each of the Debtors' bankruptcy estates of a judgment obtained prior to the commencement of the Chapter 11 Cases; and (c) any act to obtain possession of property of or from any of the Debtors' bankruptcy estates, or to exercise control over property of any of the Debtors' bankruptcy estates.[26]

On February 3, 2020, Defendants responded to Plaintiff's Notice of Bankruptcy and Automatic Stay of Proceedings, stating that they "do not believe that the automatic stay has any application to this case, because it is an action Plaintiff initiated."[27] Defendants indicated that the parties conferred over the effect of the notice, but that "Plaintiff's counsel is conferring with his client and is not yet in a position to inform the Court if Plaintiff has a different position."[28] There have been no subsequent filings by either party on this issue. Regardless, the Court agrees with Defendants that the automatic stay provision of 11 U.S.C. § 362(a) does not apply to judicial proceedings that are initiated by the debtor.[29] It applies to actions "against the debtor" and is inapplicable to suits such as this one, commenced by Plaintiff.[30] Accordingly, the Court addresses the parties' motions for summary judgment.

LEGAL STANDARD

I. Summary Judgment

Federal Rule of Civil Procedure 56(a) directs a court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the non-moving party and a dispute is "material" if it could affect the outcome of the suit under the governing law.[31] When considering a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."[32]

II. Interpretation of Collective Bargaining Agreements

***4** Courts apply federal common law principles of contract interpretation when construing a CBA.[33] As the Ninth Circuit recently explained, "the Supreme Court has long interpreted the [Labor Management Relations Act] as authorizing federal courts to create a uniform body of federal common law to adjudicate disputes that arise out of labor contracts."[34] It continued: "any suit 'alleging a violation of a provision of a labor contract must be brought under § 301 [of the LMRA, 29 U.S.C. § 185,] and be resolved by reference to federal law.' "[35] Indeed, "this federal common law preempts the use of state

contract law in CBA interpretation and enforcement."[36] But "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy."[37]

Thus, courts "interpret collective bargaining agreements ... according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy,"[38] and CBAs should be read "in the context of an entire agreement's language, structure, and stated purpose."[39] " 'In this endeavor, as with any other contract, the parties' intentions control.' 'Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.' "[40]

III. Withdrawal Liability

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, created withdrawal liability to prevent employers from withdrawing from a multiemployer pension plan without paying their share of unfunded, vested benefits, and thereby threatening the plan's solvency.[41] The plan determines whether an employer has withdrawn from the fund and assesses the employer's share of any "unfunded vested benefits" as withdrawal liability.[42]

DISCUSSION

***5** The parties' dispute arises from conflicting interpretations of Article 15.04 of the 2014 CBA; the parties do agree, however, that the case is resolvable on summary judgment.[43] Indeed, in their cross-motions for summary judgment, each party maintains that Article 15.04 is unambiguous and that its plain meaning governs. Defendants contend that the plain language of the article and the extrinsic evidence confirm that Article 15.04 is a warrants-and-represents clause, and nothing more, and that, in any event, the provision applies only to retirement benefits and not to withdrawal liability.[44] Plaintiff, in contrast, contends that by its plain language, Article 15.04 guarantees that Defendants will indemnify Plaintiff if it has to pay more than the scheduled amount in retirement benefits—including any withdrawal liability—and that there is no extrinsic evidence that alters this plain meaning.[45]

I. Language of Article 15.04

The Court first considers the plain language of the disputed term of Article 15.04, in the context of the agreement as a whole.[46] Article 15.04 provides that:

> The Union warrants and represents that the Employer's liability, with respect to providing retirement benefits, shall be no greater than as provided above, that the respective Trust Funds are jointly established Trust Funds administered, operated, and maintained in accordance with the law, and further that the Trust Funds have been and continue to be qualified by the Internal Revenue Service.[47]

The parties disagree as to whether the language "[t]he Union warrants and represents that the Employer's liability ... shall be no greater than as provided above" is a promise to indemnify the employer for any additional incurred liability. They also dispute whether "retirement benefits" encompasses withdrawal liability. The Court considers each phrase in turn.

a. The "warrants and represents" language

Defendants emphasize that the term "indemnify" does not appear in Article 15.04, whereas it does elsewhere in the CBA.[48] Accordingly, Defendants conclude that "where the parties wanted to draft express indemnification provisions ..., they knew how to do so," and that Plaintiff's proposed construction requires the Court to read an implied right of indemnification into Article 15.04 even where express indemnification rights exist elsewhere in the CBA.[49] Defendants contend that the "Court should presume the parties' omission of any indemnification language in Article 15 is intentional" under basic canons of construction.[50]

Defendants further contend that the "warrants-and-represents" language in the article is express and intentional. They maintain that the term "warrants" is "generally understood to be 'an assurance by one party to a contract of the existence of a fact upon which the other party may rely,' "[51] and that the "representation" language is a "presentation of fact—either by words or by conduct—made to induce someone to act, esp[ecially] to enter into a contract."[52] Defendants contend that, in the context of Article 15.04, the "warrants-and-represents" provision is best understood as an "assurance and representation of an existing fact" for each of the three separate clauses contained within it.[53] Defendants contend that the first clause—the one at issue in this case—should be read "as an assurance that there are no side deals with individual signatory local unions that would force the employer to make additional pension contributions to generate additional benefits."[54] Citing three non-precedential opinions, Defendants contend that this more "limited construction ... is particularly persuasive" where a CBA contains other provisions with express indemnification language.[55]

***6** Plaintiff, on the other hand, maintains that Article 15.04 "should be interpreted to obligate the unions to reimburse Plaintiff for withdrawal liability."[56] Plaintiff contends that the "warrants and represents" provision is not acting as mere introductory language, as it does in some contracts, but "has teeth."[57] Plaintiff notes that "hold-harmless" and "indemnity" clauses are often referred to interchangeably,[58] and quotes Judge Learned Hand for the proposition that:

> A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.[59]

Plaintiff emphasizes that the provision uses the word "shall," which it interprets as a "word of command [that] denotes mandatory action."[60] Thus, Plaintiff concludes that the language in Article 15.04 providing that its liability with respect to retirement benefits "shall be no greater than" the amount set forth in Schedule A is a "definite future promise by the Union that if [Plaintiff's] payments for retirement benefits exceed the amounts set forth in the Schedules, it will reimburse the employer for those amounts."[61] Plaintiff contends that Defendants present "no evidence whatsoever" in support of their construction of the term as an "assurance that there are no side deals,"[62] and adds that if Article 15.04 is not read as a promise to indemnify, the provision is rendered meaningless.[63] Thus, while Plaintiff acknowledges that "the parties used the word 'indemnify' in other portions of the agreement," it maintains that the "omission of the magic word should not override the other canon of construction that the Court should not apply a construction to a term that would effectively render the provision meaningless."[64]

Plaintiff seeks to distinguish Defendants' trio of cases to the contrary, first, based on the language of the warranty provisions at issue in those cases—which it contends were not, as here, "clear warranty promis[es]"—and second, based on the facts.[65] Plaintiff maintains that "[t]he use of indemnify and hold-harmless language elsewhere in the CBA between the parties in the present case concerned different subject matters," and thus that the "failure of the parties to the CBA there to include the magic words 'indemnity' or 'hold harmless' in Article 15.04 should not be fatal to the claim that indemnity was intended."[66] Plaintiff contends that "the Union does not argue or provide any support for the proposition that the application of Article 15.04 to create an indemnity obligation for withdrawal liability is otherwise covered by *another* contractual provision regarding '**the same subject matter.**' "[67] Finally, it adds that under Alaska law, the doctrine of *expression unius est exclusion alterius* has "limited application."[68]

***7** The Court "interpret[s] written terms in the context of the entire agreement's language, structure, and stated purpose."[69] As the Ninth Circuit has explained:

> Under federal law, [a] written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.[70]

Here, the plain language of Article 15.04, in light of the structure of that article, and of the CBA as a whole, compels the Court to find that the disputed warrants-and-represents language is best understood as a warranty—providing assurance and representation of an existing fact—and not as an indemnification provision.

First, the provision uses the language "warrants and represents" and not "indemnifies." However, as Defendants point out, the parties expressly provided for indemnification elsewhere in the 2014 CBA. The parties specified that the Union would indemnify the Employer for costs (including legal fees) or liability incurred as a result of Article 3.01 or for any "claims, actions, and/or proceedings" arising from Article 4.01.[71] Thus, the parties clearly delineated the limited circumstances under which the Union agreed to indemnify the Employer. Although Plaintiff cites *Metropolitan Coalition Co. v. Howard* for Judge Learned Hand's statement that a warranty "amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue," there is no indication that the parties in that case had elsewhere provided expressly for indemnification.[72] Where, as here, the CBA contains express indemnification language, the Court finds that the parties could not have intended the "warrants and represents" language to create an implied promise of indemnification.

While the Court agrees with Plaintiff that the trio of cases cited by Defendants—*Fontenot, In re Air Crash Disaster Near Peggy's Cove*, and *In re TOUSA, Inc.*—are distinguishable factually, they are nonetheless informative. In particular, the Court finds the reasoning in *In re Air Crash Disaster Near Peggy's Cove* persuasive.[73] In that case, Interactive Flight Technologies ("IFT") sought indemnification from Hollingshead International ("HI") based on an alleged breach of an express warranty term in the parties' agreement.[74] Specifically, the agreement contained a warranty provision that stated, "HI hereby represents and warrants to IFT that .. HI shall comply with all applicable federal, state and local laws in effect ... [and] that all Services and Installation Labor shall be performed consistent with generally accepted professional standards."[75] Another subsection of the same provision stated that any product defects within the first 60 months after installation would be remedied by replacement or repair.[76] IFT sought indemnification from HI based on the warranty provision.[77] The District Court for the Eastern District of Pennsylvania concluded that the parties had agreed to the scope of remedial action—repair or replacement of a defective product and "nothing more"—and added that "the only express indemnification specified in the Agreement is found in [another provision], which pertains to infringement of intellectual property rights."[78] The district court found that "there is no basis for IFT's contention that it is entitled to express contractual indemnification from [HI] premised upon [HI's] alleged violation of a warranty provision."[79] Although the parties here did not expressly provide for the scope of remedial action in the event of a breach of the warranty provision, they did provide for express indemnification in two other places in the CBA. Accordingly, the Court concludes that Plaintiff has no basis to seek contractual indemnification premised on Defendants' alleged breach of the warranty provision.

***8** Moreover, this plain reading of the warrants-and-represents clause is underscored by the remainder of Article 15.04, which provides that the Union "warrants and represents ... that the respective Trust Funds are jointly established Trust Funds administered, operated, and maintained in accordance with the law" and "warrants and represents ... that the Trust Funds have been and continue to be qualified by the Internal Revenue Service."[80] As applied to those additional clauses, the "warrants and represents" language is naturally understood as an assurance and representation of those facts, and indeed, Plaintiff does not contend that these clauses amount to a promise of indemnification. Plaintiff's proposed construction would require the term "warrants and represents" to have two meanings within the same phrase—as a promise to indemnify with respect to the clause relating to liability for retirement benefits, and as a standalone warranty of fact as it pertains to the establishment and maintenance of the Trust Funds and to their qualification for the IRS.

Lastly, the Court is not persuaded by Plaintiff's assertion that the provision is meaningless unless the Court adopts Plaintiff's proposed meaning.[81] As Defendants correctly note, the provision serves to assure Plaintiff that its contributions to the retirement benefits of the employees are as outlined in Schedule A, and supersedes anything requiring additional contributions.[82]

For the aforementioned reasons, the Court finds that the warrants-and-represents clause does not provide a basis for Plaintiff

to obtain indemnification from Defendants for withdrawal liability.

b. The "retirement benefits for employees" language

The parties also dispute whether withdrawal liability is, in fact, a "retirement benefit[ ] for employees" within the meaning of Article 15.04. Defendants contend that "providing retirement benefits" cannot be read to extend to withdrawal liability.[83] They emphasize that "no benefits accrue or vest to any employee on account of the payment of withdrawal liability."[84] Defendants cite to the District Court for the Middle District of Pennsylvania's opinion in *Nitterhouse Concrete Products, Inc. v. Glass, Molders, Pottery, Plastics & Allied Workers International Union*, where the employer relied on contract language providing that "[t]he Company shall have no liability for the payment of benefits other than to make contributions to the Plan as above required" as a basis to seek indemnification from the Union for withdrawal liability.[85] Although the district court ultimately decided the case based on the expiration of the CBA, it expressly disagreed with the employer's reliance on that particular provision, finding that "paying withdrawal liability is not the same thing as paying benefits," because "withdrawal liability is not payable to Plaintiffs' employees, as benefits would be, but to the Plan, tied to the Plan's unfunded estimated liabilities."[86] Defendants propose that the additional liability contemplated by the parties in Article 15.04 "might encompass, for example, additional promises (outside of the ... CBAs) of pension contributions that would have led to the accrual or vesting of pension benefits for the employees," as opposed to withdrawal liability.[87]

***9** Plaintiff, for its part, contends that it is undisputed that the withdrawal liability it paid "was in excess of its contributions" as contemplated by the CBA schedules.[88] It rationalizes that "[a]ny payments made by a withdrawing employer are meant to go towards *future* retirement benefits payable by the Plan."[89] Plaintiff acknowledges that withdrawal liability "may not go *directly* to the pockets of the employees with vested benefits" but insists that "it goes to replenishing fund assets for that purpose by defraying the shortfall."[90] It contends that "[i]n the sense that withdrawal liability amounts are intended to make up for the shortfall in plan assets in the future as to certain unfunded vested pension benefit liabilities, there is a correlation between the withdrawal liability and the 'retirement benefits' payable into the future."[91] Plaintiff disputes Defendants' reliance on *Nitterhouse*, noting that the outcome of the case turned on the fact that expiration of the CBA barred the claim.[92] Plaintiff instead relies on the Third Circuit's opinion in *Pittsburgh Mack Sales & Service, Inc. v. International Union of Operating Engineers*, where the employer sought indemnification from a union for claims for withdrawal liability brought by a multiemployer pension fund.[93] However, the Court finds that *Pittsburgh Mack* does not further Plaintiff's position on the meaning of "retirement benefits." Not only was the provision at issue in *Pittsburgh Mack* an express "hold harmless" provision, rather than a "warrants and represents" provision, but, more importantly, due to the procedural posture of the case, the Third Circuit indicated it had accepted as true "Pittsburgh Mack's contention that [a provision of the] CBA constitutes an agreement by the Union to indemnify or hold it harmless from withdrawal liability."[94] Thus, the Third Circuit did not determine whether a hold harmless provision relating to benefits encompassed withdrawal liability.[95]

Having considered the plain language of the provision, the Court finds that the parties did not intend that "retirement benefits for employees"—within the context of Article 15.04 and the CBA—extend to withdrawal liability. In light of the Court's finding, *supra*, that the warrants-and-represents language serves to assure and represent an existing fact, and not as a promise to indemnify, the term "retirement benefits" does not logically extend to cover withdrawal liability, which is a future event that may never occur.[96] More critically, however, and as Plaintiff concedes, withdrawal liability does "not go *directly* to the pockets of the employees with vested benefits."[97] Thus, withdrawal liability—which employees will not actually receive as benefits—is not a retirement benefit according to the plain meaning of the term. This conclusion is consistent with the use of the term "retirement benefits" earlier in Article 15.04, which provides that "the Employer will contribute to the applicable Trust Fund according to Schedule 'A,' which is attached to this Agreement, for the purpose of providing *retirement benefits for employees.*"[98] The reference to a benefit "for employees" supports a plain reading of the term "retirement benefits" as encompassing only those benefits that are paid directly to employees.

***10** The Court cautions that there may well be contexts in which "retirement benefits" would encompass withdrawal liability, and that its holding here should not be understood to foreclose such an interpretation under all circumstances. However, in

the context of Article 15.04 of the 2014 CBA, for the aforementioned reasons, the Court finds that the term "retirement benefits" does not include withdrawal liability.

II. Extrinsic Evidence

Although both parties maintain that the CBA provision is unambiguous, each addresses extrinsic evidence as well. For their part, Defendants contend that the available extrinsic evidence shows that during negotiations, the parties did not understand the disputed provision to provide for indemnification.[99] Defendants contend the same was true for other employers to the CBA.[100] Defendants further maintain that extrinsic evidence shows that Plaintiff was on notice of Defendants' interpretation of the clause during negotiations for the 2014 CBA, and yet did not suggest a different interpretation before willingly entering the contract.[101]

***11** Moreover, Defendants assert that Plaintiff's course of performance under the CBA confirms that Plaintiff did not understand the clause to indemnify it; specifically, Defendants emphasize that Plaintiff was "required to pay pension surcharges and supplemental pension contributions in excess of the contributions required under the CBAs" but never sought reimbursement or indemnification from Defendants.[102] Defendants contend that Plaintiff's additional payments were "effectively identical to the payment of withdrawal liability" in that they "were not required by the CBAs and did not result in the accrual of pension benefits to any individual."[103] Finally, Defendants conclude that "Plaintiff can point to *no* fact supporting its interpretation."[104]

Plaintiff, on the other hand, contends that there is no relevant extrinsic evidence, representing that "the discovery taken in this case has established that there is no ... evidence" of "intent of the parties to the CBAs" as to the language of Article 15.04.[105] Specifically, Plaintiff contends that there was no discussion of the provision at issue during negotiations.[106] It disputes Defendants' characterization of the negotiators' deposition testimony, maintaining that it shows only that one of Plaintiff's negotiators "did not remember the negotiation for the initial" CBA at all and the other did not remember any discussion of Article 15.04.[107] Plaintiff adds that the FJCC's lead negotiator for the 2014 CBA was not part of the negotiation of the 2004 CBA where the language first appeared and testified that the disputed provision was not discussed during the negotiations that she did attend.[108]

In any event, Plaintiff maintains "there was no clear expression of intent on the part of [Defendants] ... as to its interpretation of Article 15.04 so as to put [Plaintiff] on notice sufficient to bind it by silence."[109] Moreover, Plaintiff contends that Defendants' discussions and negotiations with other employers are irrelevant as neither Plaintiff nor its predecessor were a party to those negotiations.[110] It emphasizes that "[w]hat [other employers] may have believed, understood, or sought from the Union in bargaining has no bearing whatsoever on what [Plaintiff] believed or understood."[111] Plaintiff adds that its failure to seek indemnification for its supplemental contributions and surcharges "does not provide proof that it did not have that right," adding that those supplemental payments were governed by separate letter agreements and "do not provide course of conduct evidence as to the treatment of withdrawal liability under Article 15.04."[112] Finally, Plaintiff urges that because the available evidence suggests that "the FJCC initially proposed the [Article] 15 language," that the Court should construe it against the drafters.[113]

***12** "A contract term is ambiguous only if 'multiple reasonable interpretations exist.' "[114] "If a term is ambiguous, the court may look to extrinsic evidence to determine the parties' intentions."[115] The Ninth Circuit has explained that:

> When the operation of an ordinary contract is not clear from its language, a court generally may consider extrinsic evidence to determine the intent of the parties in including that language. That principle is applied with even greater liberality in the case of a [CBA]. In ascertaining the intent of the parties to a [CBA], 'the trier of fact may look to the circumstances surrounding the contract's execution, including the preceding negotiations.... It may also consider the parties' conduct subsequent to a contract formation ... and such conduct is to be given great weight.'[116]

The Court finds, as described above, that the meanings of the disputed provisions in Article 15.04 are clear from the contract language and that the terms are not ambiguous. However, it is also the case that the extrinsic evidence in the record is

consistent with the plain and unambiguous meaning of Article 15.04. Plaintiff does not cite to any extrinsic evidence that is inconsistent with Defendants' proposed construction; indeed, it does not rely on any extrinsic evidence at all.[117] Thus, for the purposes of summary judgment, when considering the extrinsic evidence with all justifiable inferences made in Plaintiff's favor, the Court finds that Defendant is entitled to summary judgment.

For the aforementioned reasons, the Court concludes that Article 15.04 does not require Defendants to indemnify Plaintiff for withdrawal liability and grants summary judgment to Defendants.

CONCLUSION

In light of the foregoing, IT IS ORDERED as follows: Defendants IBEW 1547 and FJCC's Motion for Summary Judgment at Docket 51 is GRANTED and Plaintiff Chicago Bridge's Motion for Summary Judgment at Docket 52 is DENIED.

The Clerk of Court is directed to enter a final judgment accordingly.

All Citations

Slip Copy, 2020 WL 1660066

Footnotes

1	Due to the coronavirus pandemic, by Miscellaneous General Order 20-11, the District of Alaska imposed a stay on all civil matters for 30 days, effective March 30, 2020. As the presiding judge in this matter, the undersigned vacates the stay in this case to allow entry of judgment, taxing of costs, and post-judgment motions. *See* MGO-20-11 at 6–7. However, the parties may move or stipulate to extend any filing deadlines.
2	Chicago Bridge took an assignment of a claim from CBI Federal Services LLC, the party that was actually a signatory to the 2014 CBA. Docket 62 at 12: 17–22. *See also* Docket 1-2 (2014 CBA). However, as Plaintiff does not distinguish between the entities in its Complaint or in its Motion for Summary Judgment, the Court will refer to both entities as Plaintiff in this Order. *See, e.g.*, Docket 1 at 3, ¶¶ 6–7 (Complaint); *accord* Docket 1-2 at 3 (agreement between CB&I Federal Services LLC and unions).
3	Docket 1 at 2, 3 ¶¶ 3, 7; Docket 13 at 2, ¶ 3 (IBEW 1547 Answer); Docket 14 at 2, ¶ 2 (FJCC Answer). *See also* Docket 1-2.
4	Docket 1 at 2, ¶ 3; Docket 13 at 2, ¶ 3; Docket 14 at 2, ¶ 3. The FJCC is an affiliation of local labor unions, including IBEW 1547. Docket 51 at 8. FJCC negotiates CBAs for its affiliate unions on behalf of workers. Docket 51 at 8.
5	Docket 1-2 at 3; Docket 13 at 2, ¶ 3.
6	Docket 1 at 3–4, ¶¶ 5–11; Docket 13 at 2–3, ¶¶ 5–11; Docket 1-2 at 15.

7	Docket 1 at 3, ¶ 6; Docket 13 at 2, ¶ 6; Docket 14 at 2–3, ¶ 6; Docket 1-1 (2012 CBA).
8	Docket 1-1 at 15.
9	Docket 1-1 at 3; Docket 1 at 3, ¶ 6; Docket 51 at 9 n.4, 9–10.
10	Docket 1-2 at 15.
11	Docket 51 at 9–10; *see also, e.*g., Docket 1-1 at 15.
12	Docket 1 at 4, ¶ 12.
13	Docket 1-4 at 1.
14	Docket 1 at 4–5, ¶¶ 12–15; Docket 1-3. Pursuant to 29 U.S.C. § 1381, "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be withdrawal liability." The withdrawal liability amount was based on contributions dating back to 2010. Docket 1-3 at 3. The pre-2014 contributions are covered by the earlier CBAs, which contained the identical language governing mandatory employer contributions to retirement benefits. *See* Docket 51 at 9; Docket 1-1 at 15.
15	Docket 1-5 at 2. *See also* Docket 1-4 (letter from CB&I to union seeking reimbursement of withdrawal liability)
16	Docket 1 at 6, ¶ 21; Docket 13 at 6, ¶ 21; Docket 14 at 4, ¶ 21; Docket 1-6 (August 29, 2017 letter from unions declining to reimburse Chicago Bridge). Plaintiff reached a settlement with the Fund during arbitration proceedings in the amount of $550,000, the amount it now seeks to recover from Defendants. Docket 52 at 7; Docket 52-4 at 2 (settlement agreement between Fund and Chicago Bridge).
17	Docket 1 at 1, 8.
18	Docket 19 at 6, 20.
19	Docket 25 at 7, 9.
20	Docket 51.
21	Docket 52.
22	Docket 62.
23	Docket 60.
24	Docket 60 at 1.

25	Docket 60-1 at 7.
26	Docket 60 at 2–3.
27	Docket 61 at 2.
28	Docket 61 at 3.
29	*See, e.g., Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc.*, 654 F.3d 868, 875 (9th Cir. 2011) ("The [automatic] stay does not prevent a plaintiff/debtor from continuing to prosecute its own claims nor does it prevent a defendant from protecting its interests against claims brought by the debtor. This is true even if the defendant's successful defense will result in the loss of an allegedly valuable claim asserted by the debtor."); *Mitchell v. Fukuoka Daiei Hawks Baseball Club*, 206 B.R. 204, 212 (Bankr. C.D. Cal. 1997) ("The 11 U.S.C. § 362 automatic stay only stays lawsuits *against* the debtor and the debtor's bankruptcy estate. The Section 362 stay does not apply where, as here, the debtor is the plaintiff in a lawsuit." (emphasis in original)).
30	*See Gordon v. Whitmore*, 175 B.R. 333, 336 (B.A.P. 9th Cir. 1994) ("[T]he operative subsections in the case at hand ... contemplate actions '*against*' the debtor...." (emphasis in original)).
31	*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
32	*Moldex-Metric, Inc. v. McKeon Prods., Inc.*, 891 F.3d 878, 881 (9th Cir. 2018) (alteration in original) (quoting *Anderson*, 477 U.S. at 255).
33	*Alday v. Raytheon Co.*, 693 F.3d 772, 782 (9th Cir. 2012).
34	*Curtis v. Irwin Indus.*, 913 F.3d 1146, 1151 (9th Cir. 2019) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985) and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103–04 (1962)).
35	*Id.* at 1151–52 (quoting *Lueck*, 471 U.S. at 210). As the Supreme Court has explained, "the meaning given to terms in collective-bargaining agreements must be determined by federal law [because] ... '[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " *Lueck*, 471 U.S. at 210 (quoting *Lucas Flour Co.*, 369 U.S. at 103).
36	*Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1031 (9th Cir. 2016) (quoting *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001)).
37	*Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).
38	*M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015).
39	*Am. Fed'n of Musicians v. Paramount Pictures Corp.*, 903 F.3d 968, 977 (9th Cir. 2018) (quoting *Alday v. Raytheon Co.*, 693 F.3d 772, 782 (9th Cir. 2012)).
40	*Tackett*, 135 S. Ct. at 933 (first quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) then quoting 11 Richard A. Lord, A Treatise on Contracts § 30:6 (4th ed. 2012)).

41	*Concrete Pipe & Prods. v. Constr. Laborers Pension Trust.*, 508 U.S. 602, 608 (1993) (explaining that MPPAA was enacted in part to "alleviate the problem of employer withdrawals" by instituting "rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation" (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 216 (1986))).
42	29 U.S.C. §§ 1382, 1399(b)(1). *See also Connolly*, 475 U.S. at 217 ("This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984))).
43	Docket 62 at 22:7–23 and at 26:24–27:6.
44	Docket 51 at 20–37.
45	Docket 52 at 14–23.
46	*Alday v. Raytheon Co.*, 693 F.3d 772, 782 (9th Cir. 2012).
47	Docket 1-2 at 15.
48	Docket 51 at 22–23. Specifically, Defendants highlight Article 3 of the 2014 CBA, which provides that Defendants agreed "to indemnify the Employer for any costs, including legal fees, or liability incurred as a result of the Union's implementation and enforcement of" union membership obligations, and Article 4, which states that "the Union agrees to indemnify and hold harmless the Employer from any and all claims, actions and/or proceedings arising out of" union dues deductions. *See* Docket 51 at 23 (quoting Docket 1-2 at 5).
49	Docket 51 at 22–23.
50	Docket 51 at 23–24 (collecting cases).
51	Docket 51 at 24 (quoting *Metro. Coal. Co. v. Howard*, 155 F.2d 780, 784 (2d. Cir. 1946)).
52	Docket 51 at 24 (quoting *Representation*, Black's Law Dictionary (11th ed. 2019)).
53	Docket 51 at 25. Defendants contend that the "second and third clauses of the provision assure the signatories that the pertinent pension plans 'are jointly established Trust Funds administered, operated, and maintained in accordance with the law' and that the plans are 'qualified by the Internal Revenue Service.' " Docket 51 at 25. *See also* Docket 55 at 22 (identifying three clauses within "warrants-and-represents" provision).
54	Docket 51 at 25–26; Docket 56 at 10–11.
55	Docket 51 at 26 (citing *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986); *In re TOUSA, Inc.*, 408 B.R. 913, 919 n.6 (Bankr. S.D. Fla. 2009); *In re Air Crash Near Peggy's Cove*, MDL No. 1269, 99-5998, 2004 WL 2486263, at *8 (E.D. Pa. Nov. 2, 2004)).

56	Docket 52 at 14.
57	Docket 52 at 14–15.
58	Docket 52 at 15 (citing *Indemnity Clause*, Black's Law Dictionary (11th ed. 2019)).
59	Docket 54 at 8 (quoting *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946)). *See also* Docket 54 at 8 (collecting cases including *Glacier Gen. Assur. Co. v. Casualty Indem. Exch.*, 435 F. Supp. 855 (D. Mont. 1977) and *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888 (N.D. Cal. 2018)).
60	Docket 52 at 15–16.
61	Docket 52 at 16. *See also* Docket 54 at 10.
62	Docket 54 at 9 (quoting Docket 51 at 25–26).
63	Docket 52 at 17.
64	Docket 54 at 10.
65	Specifically, Plaintiff contends that in *Fontenot v. Mesa Petroleum Co.*, the "case involved competing provisions between the same parties each seeking indemnity from the other for the same loss" and the warranty provision was a representation of workmanlike performance rather than an "affirmative promise." Docket 54 at 11–12 (citing 791 F.2d 1207, 1219 (5th Cir. 1986)). Plaintiff seeks to distinguish *In re TOUSA, Inc*. because there, the parties sought indemnification based on a debtor's representation in an agreement that it would remain solvent, even though there was an express (and seemingly applicable) indemnity provision. Docket 54 at 12 (citing 408 B.R. 913, 916–17, 919 n.6 (S.D. Fla. 2009)). Lastly, Plaintiff contends that in *In re Air Crash Disaster Near Peggy's Cove*, the plaintiff sought indemnification based on a warranty of fitness and workmanlike performance, but the agreement had an express provision that the remedy for breach of warranty was repair/replacement, and not money damages. Docket 54 at 12–13 (citing MDL No. 1269, 99-5998, 2004 WL 2486263, at *7–8 (E.D. Pa. Nov. 2, 2004)).
66	Docket 57 at 13.
67	Docket 57 at 10–11 (emphasis in original).
68	Docket 57 at 11 (quoting *Chevron USA, Inc. v. LeResche*, 663 P.2d 923, 930–31 (Alaska 1983)).
69	*Trs. of the S. Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045, 1047 (9th Cir. 2008).
70	*Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003) (alteration in original) (internal quotations omitted).
71	Docket 1-2 at 5.

72	Docket 54 at 8 (155 F.2d 780 (2d Cir. 1946)).
73	MDL No. 1269, 99-5998, 2004 WL 2486263 (E.D. Pa. Nov. 2, 2004).
74	*Id.* at *2.
75	*Id.* at *8.
76	*Id.* at *7.
77	*Id.*
78	*Id.* at 8.
79	*Id.*
80	Docket 1-2 at 15.
81	Docket 54 at 10.
82	Defendants contend that the provision serves many purposes: to assure the employer there are no side deals and guarantee that if there are, the CBA supersedes them; to preclude former employees from seeking retirement benefits direction from the employer in the event the pension fund becomes insolvent; and potentially to entitle the employer to remedies if the warranty is breached. Docket 56 at 11. Defendants add that even Plaintiff's interpretation of the clause supports Defendants, insofar as Plaintiff contends that the clause is meant as a promise that liability for pension benefits will not exceed the amount in Schedule A, thereby necessarily overriding any side deals in other agreements. Docket 56 at 11–12.
83	Docket 51 at 21.
84	Docket 51 at 28.
85	Docket 51 at 28 (citing Case No. 1:15-cv-2154, 2018 WL 656013, at *14 (M.D. Pa. Feb. 1, 2018)).
86	*Id.*
87	Docket 51 at 27.
88	Docket 52 at 20, 27.
89	Docket 52 at 20 (emphasis in original).

90	Docket 54 at 15 (emphasis in original).
91	Docket 54 at 15.
92	Docket 54 at 16 ("Pronouncements by the district court as to whether indemnity for withdrawal liability under the 1970 CBA were mere dicta as they had no bearing on the court's holding."). Plaintiff also asserts that the *Nitterhouse* plan was enacted prior to the MPPAA, Docket 54 at 16; however, as the *Nitterhouse* court noted, "the Union agreed, from 1982 through 2014, to the same indemnification language, after withdrawal liability became a distinct possibility in connection with the existence of the Plan," concluding "that the indemnity language should be construed consistent with the circumstances present at the time the CBAs were entered into, not just in 1976." *Nitterhouse Concrete Prods., Inc. v. Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union,* Case No. 1:15-cv-2154, 2018 WL 656013, at *13 (M.D. Pa. Feb. 1, 2018).
93	Docket 52 at 20–21 (citing *Pittsburgh Mack*, 580 F.3d 185, 188 (3d Cir. 2009)).
94	*Id.* at 192. In its reply brief, Plaintiff acknowledges that the case was only cited for the "nature of withdrawal liability" and as "supporting the argument that indemnity for withdrawal liability in this context did not violate public policy." Docket 57 at 13–14.
95	*Id.* at 196, n.5 ("We note that there are other issues raised by the parties, such as how to construe Section 1 of the CBAs and whether it is explicit enough to show that the Union agreed to indemnify Pittsburgh Mack.... While the District Court touched on these issues below, its ultimate conclusions were explicitly based on whether, in the context of a motion to dismiss, a violation of public policy made Section 1 of the CBAs unenforceable. Accordingly we will not address these issues.").
96	At oral argument, counsel for Plaintiff characterized the language "with respect to providing retirement benefits" as meaning "all benefits provided to bargaining unit employees for pension benefits, and ... those that are funded immediately and withdrawal liability for unfunded, vested pension benefits that may arise." Docket 62 at 23:21–25.
97	Docket 54 at 7, 15 (emphasis in original). Plaintiff contends instead that "there is a correlation between the withdrawal liability and the 'retirement benefits' payable into the future." Docket 54 at 6–7, 15.
98	Docket 1-2 at 15 (emphasis added).
99	Docket 51 at 30–34. Defendants contend that, according to their deposition testimony, Plaintiff's representatives in the CBA negotiation did not understand the language as an indemnification provision. Docket 51 at 31; Docket 56 at 23 (asserting one negotiator testified he had never negotiated CBAs providing for reimbursement of withdrawal liability and the other "was not even *aware* of any withdrawal-liability indemnification language that could be included in a contract." (emphasis in original)). Defendants further contend that FJCC's lead negotiator and CEO, Eileen Whitmer, also did not understand the provision as an indemnification provision. Docket 51 at 31–32.
100	Defendants maintain that other employers to the CBA attempted to "supplement the 2012 CBA with express indemnification language" which "indicates that they themselves believed that they were not entitled to indemnification for withdrawal liability in the absence of that additional language." Docket 51 at 32. Defendants contend that "those parties' conduct supplies ... evidence of industry usage." Docket 56 at 15.

101	Docket 51 at 39–40. According to Defendants, Plaintiff's subcontractor, Inuit Services, Inc., which was also bound by the 2012 CBA, sought to supplement the agreement with a term that would have obligated one of the unions to "indemnify and hold harmless the Employer ... for any contingent or withdrawal liability of any kind." Docket 55 at 12–13. According to Defendants, the FJCC's negotiator refused and forwarded the exchange memorializing her refusal to Plaintiff. Docket 51 at 39–40.
102	Docket 51 at 35.
103	Docket 51 at 37. Defendant lists the following additional payments: monthly surcharges between Dec. 1, 2010, and Sept. 30, 2012, amounting to $17,809.09; monthly supplemental contributions between Oct. 12, 2012, and Apr. 30, 2015, amounting to $37,821.26; and supplemental contributions during the term of the 2014 CBA. Docket 51 at 36. They add that this failure to seek indemnification predates the 2014 CBA and thus the parties' course of dealing is impliedly incorporated therein. Docket 51 at 37–38.
104	Docket 51 at 38 (emphasis in original).
105	Docket 52 at 22.
106	Docket 52 at 22.
107	Docket 54 at 17–18 (emphasis omitted); Docket 57 at 7–8.
108	Docket 54 at 18–19.
109	Docket 54 at 25. On this basis, Plaintiff seeks to distinguish Defendant's cases, including *Perry & Wallis, Inc. v. United States*, 192 Ct. Cl. 310 (1970) and *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir. 2012). Docket 54 at 25–26; *see* Docket 51 at 40–41 (discussing cases). Specifically, Plaintiff notes that in both cases "there was direct back and forth between the parties as to expressions of intent regarding interpretation of a particular of an agreement, or direct and clear prior understanding of intent by the other party as to such provision." Docket 54 at 26.
110	Docket 54 at 20–22. Plaintiff contends that its knowledge of these discussions was limited to an email from FJCC's President and lead negotiator, Eileen Whitmer, to Plaintiff's lead negotiator, forwarding her response to a different employer who was seeking an indemnity provision. Docket 54 at 21.
111	Docket 54 at 21.
112	Docket 54 at 22–24. *See also* Docket 57 at 16–17.
113	Docket 52 at 23–24 (applying the "rule of *contra proferentem*" and citing *Barnes v. Indep. Auto. Dealers of Cal.*, 64 F.3d 1389, 1393 (9th Cir. 1995)).
114	*Am. Fed'n of Musicians of the U.S. v. Paramount Pictures Corp.*, 903 F.3d 968, 977 (9th Cir. 2018) (quoting *Trs. Of S. Cal. IBEW-NECA Pension Tr. Fund v. Flores*, 519 F.3d 1045, 1047 (9th Cir. 2008)).
115	*Id.*

116	*Ariz. Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1517–18 (9th Cir. 1985) (omissions in original) (emphasis omitted) (quoting *Laborers Health & Welfare Tr. Fund v. Kaufman & Broad*, 707 F.2d 412, 418 (9th Cir. 1983)).
117	Docket 52 at 22.

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Greg GIBBONS, Plaintiff-Appellee,
v.
UNION PACIFIC RAILROAD COMPANY, Defendant-Appellant.

No. 19-15839
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Submitted April 2, 2020* Pasadena, California
|
FILED April 9, 2020

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Nevada, Gloria M. Navarro, District Judge, Presiding, D.C. No. 2:15-cv-02231-GMN-CWH

Before: McKEOWN, N.R. SMITH, and NGUYEN, Circuit Judges.

MEMORANDUM**

***1** Union Pacific Railroad Company appeals the district court's judgment, entered in favor of Greg Gibbons after a jury trial, on Gibbons's negligence claim under the Federal Employers' Liability Act ("FELA"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.

Union Pacific did not file a post-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). It thus "waived [its] right to directly challenge the sufficiency of the evidence" and, on appeal, we "assess only the trial court's denial of [Union Pacific's] motion for a new trial [and to alter the judgment] under Rule 59." *Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (explaining that a "post-verdict motion under Rule 50(b) is an absolute prerequisite to any appeal based on insufficiency of the evidence" (quoting *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007))).

1. The district court did not abuse its discretion by concluding that Gibbons had proved each element of his FELA claim. *See Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014) (Rule 59(a)); *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (Rule 59(e)). As the district court explained, Gibbons had introduced evidence that supported the verdict, including: (1) testimony from expert Mark Burns, who described the "limited load-bearing capacity and structural integrity of the flatcar bridge"; (2) photographs that showed visible sagging in the center of the bridge prior to its collapse; and (3) testimony from inspector Randy Winn, who detailed the "limited nature of [Union Pacific's] bridge inspections."

From this evidence, which is much more than an "*absolute absence of evidence*," *Crowley*, 883 F.3d at 751 (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)), the jury reasonably could have inferred that Union Pacific should have known that the bridge posed a potential hazard, *see Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987) ("[T]he jury's power to engage in inferences is significantly broader [in FELA actions] than in common law negligence actions [and] [a] reviewing court must uphold a verdict even if it finds only 'slight' or 'minimal' facts to support a jury's findings of negligence." (citation omitted) (quoting *Mendoza v. S. Pac. Transp. Co.*, 733 F.2d 631, 633 (9th Cir. 1984))).

2. Union Pacific challenges the jury's award of $500,000 for future medical and hospital expenses, $1,500,000 for future lost wages and benefits, $1,500,000 for mental and emotional damages, and $1,500,000 for physical pain and suffering. We affirm in part and reverse in part.

We affirm the $500,000 damages award for Gibbons's future medical and hospital expenses. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996) ("We must uphold the jury's finding unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork."). The district court properly instructed the jury regarding present value, *see Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 339–40, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988), and Union Pacific, not Gibbons, bore the burden of offering competent evidence for discounting, *Alma v. Mfrs. Hanover Tr. Co.*, 684 F.2d 622, 626 (9th Cir. 1982).

***2** The district court did not err by allowing Dr. Dunn to testify regarding future medical damages. Contrary to Union Pacific's interpretation of the magistrate judge's pre-trial order, the order did not bear on Dr. Dunn's testimony. The order denied only Gibbons's motion to designate an additional expert witness and to reopen discovery. Lastly, the amount of damages was not "grossly excessive or monstrous," *Del Monte Dunes*, 95 F.3d at 1435, given Dr. Dunn's testimony regarding the costs of two likely future surgeries and the likelihood of a third future surgery, and Gibbons's testimony that he has been instructed to take a nerve medication indefinitely.

We also affirm the $1,500,000 award for mental and emotional humiliation or pain and anguish. The jury received evidence that Gibbons endured mental and emotional issues after the accident. Gibbons testified that post-accident he was unhappy and "was probably ornery all the time." His relationship with his wife, including their "intimate relationship," suffered. Gibbons also testified that he is compelled to take prescription medication even though he is "[d]efinitely anti-prescription" and he experiences panic symptoms near bridges. We cannot conclude that "there is a complete absence of probative facts to support the conclusion reached" by the jury. *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946). And although the award is significant, we have upheld similarly high damages awards. *See, e.g.*, *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 513 (9th Cir. 2000) (upholding a $1,000,000 emotional distress damages award where the claimant testified to "substantial anxiety" as a result of alleged discrimination).

For similar reasons, we also affirm the $1,500,000 award for physical pain and suffering. Gibbons testified that he gets headaches for days at a time and endures back pain and neck issues that, according to Dr. Dunn, likely will persist even after future surgeries. Because the evidence presented at trial supported the jury's finding that Gibbons has suffered and likely will continue to suffer significant physical issues, we cannot conclude that the award is grossly excessive or clearly not supported by the record. *See Del Monte Dunes*, 95 F.3d at 1435.

We reverse the $1,500,000 award for future lost wages and benefits. Union Pacific's argument that the district court "erred in allowing Gibbons' counsel to argue that Gibbons had a specific number of years in which he would be unable to work" is without merit. The district court precluded only Dr. Dunn from testifying as to Gibbons's work life capacity; it did not block Gibbons's counsel from making such an argument.

But the $1,500,000 award, which anticipated Gibbons's near-immediate inability to work in any capacity, was "clearly not supported by the evidence, or based only on speculation or guesswork." *Id.* Gibbons admits that he continues to work without restrictions at a salary of $60,000 to $70,000 per year. Even assuming a calculation based on the high end of that range, a $1,500,000 award corresponds to around two decades of missed work.[1] And Gibbons's counsel recommended only an award of $700,000 in future lost wages and benefits—less than half of what the jury awarded.

Although there is some evidence in the record from which the jury might have inferred that, at some point, Gibbons will be forced to leave his Union Pacific job due to his accident-related injuries, there is no evidence that he faces an imminent risk of losing his job or that he would be unable to find alternative employment. Gibbons has already had spinal surgery and continues to work without restrictions, taking pain medication that mitigates his pain. Therefore, because the award for future lost wages and benefits is unsupported by the evidence, we remand for the district court to "give[ ] [Gibbons] the option of either submitting to a new trial or of accepting a reduced amount of damage which the court considers justified." *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). We otherwise affirm.

***3** Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

All Citations

--- Fed.Appx. ----, 2020 WL 1814753

Footnotes

*	The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).
**	This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
1	This does not even take into account the jury instruction to use Gibbons's after-tax income, which would increase the number of years of missed work.

United States District Court, D. Oregon,
Eugene Division.

Reuben WEBB, Plaintiff,
v.
Dr. Reed PAULSON; and John Does 1-10, Defendants.

Case No. 6:17-CV-1343-JO
|
Signed 04/16/2020

Attorneys and Law Firms

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OPINION AND ORDER

JONES, District Judge:

***1** Plaintiff Reuben Webb (Webb), acting *pro se*, brought this prisoner civil rights action pursuant to 42 U.S.C. § 1983. ECF No.1. His claim arises from the medical care he received while incarcerated at the Oregon State Penitentiary (OSP) in Salem, Oregon. He alleges that Dr. Paulson[1] (Paulson) violated Webb's Eighth Amendment right when Paulson acted with deliberate indifference to Webb's medical needs. Webb seeks unspecified monetary damages in compensation.

Paulson filed a motion for summary judgment. ECF No. 35. For the following reasons, Paulson's motion is GRANTED.

LEGAL STANDARD

Summary judgment is proper where pleadings, discovery, and affidavits show there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The district court should grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the burden shifts to the non-moving party to "go beyond the pleadings and by [his] own affidavits or by the 'depositions, answers to interrogatories and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986) (quoting Fed. R. Civ. P. 56). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1542 (9th Cir. 1989). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party and inferences drawn from facts are viewed in the light most favorable to the non-moving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). A *pro se* plaintiff is to be held to a less stringent standard than a plaintiff acting with assistance of counsel. *Erickson v. Pardus*, 551 U.S. 89, 95 (2007).

The treatment a prisoner receives in prison is subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Eighth Amendment imposes duties on prison officials to provide prisoners with basic necessities,

including medical care. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97,—— (1976).

BACKGROUND[2]

After Webb suffered a stroke in June 2015, he was seen by Dr. Hoak, a neurologist at Oregon Health and Sciences University. ECF No. 27 at 24. Webb had been taking a stroke prevention medication, Aggrenox, but suffered from headaches. To relieve Webb's headaches, Dr. Hoak recommended changing to a different medication, Plavix. ECF No. 36 at 3, ¶ 10. Dr. Hoak also recommended a medication bridge during which Webb would take both Aggrenox and Plavix for four days and then discontinue Aggrenox. ECF No. 27 at 26. Webb's OSP medication records show that Webb was to begin taking Plavix on August 21, 2015 and to discontinue taking Aggrenox on August 26, 2015. ECF No. 27 at 34. Webb had a conversation about the medication bridge with Nurse Julie at OSP who called Paulson. ECF No. 44 at 4, ¶ 6; and 6, ¶ 8. According to Webb, Paulson told the nurse not to worry about the bridge and to just switch the medications. ECF No. 1 at 2.

***2** On August 29, 2015, Webb was admitted to Salem Hospital complaining of new neurologic symptoms: the sudden onset of imbalance, visual blurring, weakness in his right upper extremities, and clumsiness. ECF No. 27 at 41. Webb underwent testing, including a magnetic resonance imaging (MRI) and a magnetic resonance angiography (MRA). Although Webb claims he suffered another stroke, Dr. Delaney, the neurologist at the Salem Hospital concluded that Webb's "Neuroimaging is reassuring that there is likely not evidence of new cerebral ___[3] and the finding of his vertebral artery occlusion is an older finding." ECF No. 36. Attch. 5, at 5.

Webb filed this § 1983 action alleging that ignoring the medication bridge directive caused a stroke. Paulson moved for summary judgment arguing that he is not liable because he did not participate in any of the actions leading to the harm alleged. In his sworn declaration, Paulson claims he did not write the order changing Webb's medication from Aggrenox to Plavix. As to the alleged phone call between the nurse and him, Paulson declares he does "not have any independent recollection of this alleged conversation." ECF No. 36 at 3. Furthermore, Paulson contends that because Webb had "a personalized in-cell bubble pack" of Aggrenox, Webb was responsible for his own management of these medications. Finally, Paulson asserts that Webb cannot demonstrate any harm because the Salem Hospital was able to rule out a second cerebrovascular accident based on radiological tests. Alternatively, Paulson argues he is entitled to summary judgment based on qualified immunity.

DISCUSSION

I. Deliberate Indifference

The Ninth Circuit's test for deliberate indifference consists of two parts. *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir.1991), *overruled on other grounds by WMX Techs., Inc. v. Mille*, 104 F.3d 1133 (9th Cir.1997) (en banc). First, the plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' " *Id.* at 1059 (quoting *Estelle*, 429 U.S. at 104). Examples of a "serious" need for medical attention include the presence of a medical condition that significantly affects an individual's daily activities or the existence of chronic and substantial pain. *McGuckin*, 974 F.2d at 1059-60 (citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990)). Second, the plaintiff must demonstrate the defendant's response to the need was deliberately indifferent. *Id.* at 1060. The second prong is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. *Id.* Indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison

physicians provide medical care." *Id.* at 1059 (quoting *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir.1988)). An "inadvertent [or negligent] failure to provide adequate medical care" alone does not state a claim under § 1983. *Id.* (citing *Estelle*, 429 U.S. at 105). A prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs. *Id.* at 1060. If the harm is an "isolated exception" to the defendant's "overall treatment of the prisoner [it] ordinarily militates against a finding of deliberate indifference." *Id.* (citations omitted).

***3** Paulson was aware that Webb suffered a stroke in June 2015. ECF No. 36 at 2, ¶ 6. He also knew that Webb was being treated with anti-stroke medication. *Id.* at ¶ 6. Webb received a referral to a specialist who recommended a medication bridge. A reasonable doctor would know that the appropriate administration of medications was important to keeping Webb from suffering another stroke. Webb has established that he had a serious need for medical attention.

As to the second prong of the analysis, Webb states in his declaration that he was told by Dr. Hoak to take both the Aggrenox and Plavix for four days and that he discussed this protocol with Nurse Julie. ECF No. 44, at 4. Webb declares that Nurse Julie McCrae called Paulson, who said not to worry about the bridge and to switch the medications. *Id.* In his declaration, Paulson states that he has no independent recollection of the phone call. ECF # 36 at 3, ¶ 13. Paulson's response does not refute Webb's allegation. At best, it challenges Webb's credibility, which is a question of fact. I am obligated at this stage to construe the allegations in the light most favorable to Webb. Whether the phone call occurred and whether Paulson told Nurse McCrae not to continue the Aggrenox are genuine issues of material fact important to the determination of the first element of the second prong – whether Paulson denied, delayed or intentionally interfered with Webb's medical treatment.

However, to make out a claim for deliberate indifference, there must also be genuine issues of material fact showing Webb suffered harm. While Webb claims that he had a second stroke, the evidence in Webb's medical records from the Salem Hospital where he was treated proves otherwise. The findings from the MRI administered to Webb upon admission to the Salem Hospital state that "[n]o acute ischemia is demonstrated. There is no midline shift, no mass effect, no abnormal extra-axial fluid collection.... The defect seen on today's study appears chronic based on the prior exam. When compared to the prior exam(s). There is no worrisome interval change." ECF No. 36, Attach. 5 at 4. Dr. Prakash, one of Webb's treating physicians at the Salem Hospital, wrote a progress notes stating that Webb's MRI was negative for stroke. ECF No. 36, Attach. 5 at 13. And most notable, Dr. Delaney, a Salem Hospital neurologist, found Webb's neuroimaging to be "reassuring that there is likely not evidence of new cerebral [___]" and that the finding of vertebral artery occlusion appeared to be an older finding. ECF No. 36, Attach. 5 at 5. While there is a genuine issue of material fact as to whether Paulson directed the nurse not to provide Webb with a medication bridge, there is no genuine issue of material fact as to whether Webb suffered a second stroke. Without any facts supporting Webb's claim of harm, his action against Paulson is not sustainable. Thus, I find Paulson is entitled to summary judgment on the basis that he did not provide deliberately indifferent medical care to Webb.

II. Qualified Immunity

Because I find Paulson did not provide deliberately indifferent medical care, I do not consider the issue of qualified immunity.

CONCLUSION

I GRANT Paulson's motion for Summary Judgment. ECF No. 35. All other pending motions are DENIED as MOOT.

IT IS SO ORDERED.

All Citations

Footnotes	
1	Although Webb named ten John Does in his complaint, only Paulson was served and Webb's complaint alleges wrongdoing only by Paulson.
2	The following facts are based on the record viewed in the light most favorable to Webb, the non-moving party.
3	The copy of the medical record provided by Paulson does not show the entire page. It appears to have cut off one word. The missing word does not change the substance of Dr. Delaney's opinion.

2020 WL 2375221
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

MARINA POINT DEVELOPMENT ASSOCIATES, ET AL.
v.
COUNTY OF SAN BERNARDINO, ET AL.

Case No. 5:19-CV-00964-RGK-KS
|
Filed 02/19/2020

Attorneys and Law Firms

Sharon L. Williams (Not Present), Deputy Clerk, Attorneys Present for Plaintiff: Not Present

Not Reported, Court Reporter / Recorder, N/A, Tape No., Attorneys Present for Defendant: Not Present

Proceedings: (IN CHAMBERS) Order Re: Defendants Terri Rahhal and Janies Ramos' Motion to Dismiss [DE 46]

The Honorable R. GARY KLAUSNER. UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** On April 22, 2019, Marina Point Development Associates, Okovita Family Recoverable Trust UDT, and Irving Okovita (collectively, "Plaintiffs") filed a complaint in San Bernardino County Superior Court against the County of San Bernardino ("County"). Plaintiffs' claims arise from their efforts to redevelop a property along Big Bear Lake in San Bernardino County. On May 24, 2019, the County removed the action to federal court on the basis of federal question jurisdiction.

On July 17, 2019, Plaintiffs filed a Fust Amended Complaint ("FAC") against the County and three additional parties: the County of San Bernardino Board of Supervisors ("Board"), the Director of County Planning Terri Rahhal ("Rahhal") in her official capacity, and the Board's District Supervisor James Ramos ("Ramos") in his official capacity (collectively, "Defendants"). Plaintiffs' FAC asserted the following claims: (1) injunctive relief, (2) taxpayer injunctive relief pursuant to Cal. Code Civ. Proc. § 526a, (3) declaratory relief, (4) inverse condemnation, (5) civil rights violations pursuant to 42 U.S.C. § 1983, (6) takings, and (7) due process. On October 11, 2019, the Court dismissed Plaintiffs' fourth, fifth, and seventh claims against the Comity. Thereafter, Plaintiffs filed a Second Amended Complaint ("SAC").

On January 10, 2020, Plaintiffs filed a Third Amended Complaint ("TAC"). Unlike the FAC and SAC, the TAC names Rahhal and Ramos in their individual, rather than official, capacities. The TAC asserts the following claims against Defendants: (1) injunctive relief, (2) taxpayer injunctive relief pursuant to Cal. Code Civ. Proc. § 526a, (3) inverse condemnation, and (4) takings.

Presently before the Court is Rahhal and Ramos' (collectively, the "Individual Defendants") Motion to Dismiss. For the following reasons, the Court **GRANTS** the Motion.

II. FACTUAL BACKGROUND

Plaintiffs allege the following facts in the TAC:

Plaintiffs own the real property commonly known as Tract 12217 located in San Bernardino county along the north shore of Big Bear Lake at 39505 North Shore Drive, Fawnskin, California 92333 ("Property"). Since 1983, Plaintiffs have been working to obtain approvals and permits from the County and the Board "to convert the 12.51-acre parcel of land and 3.5-acre marina from an operating RV-park, campground, and commercial marina into a 133-unit condominium development, commercial clubhouse, and marina" ("Project"). (TAC ¶ 1, ECF No. 43.)

At all relevant times, Rahhal was the Director of the Comity Planning Department, which enforces the County's development code, issues land use approvals, and signs off on the County's conditions of approval for projects. Ramos, who is now in the state assembly, was the Board's supervisor for the district where the Property is located. Ramos, along with the other Board members, had final authority to implement and control land use regulation policies.

From 1983 throughout the 1990s, Plaintiffs received various approvals and permits for the Project from the County and the Board, as well as from a variety of other agencies. In April 2004, the Friends of Fawnskin and Center for Biological Diversity (collectively, "FOF") filed a lawsuit against Plaintiffs alleging violations of the Clean Water Act and the Endangered Species Act in federal court. The lawsuit resulted in a development injunction, which the Ninth Circuit overturned in 2009.

***2** After the Ninth Circuit's ruling, the County Defendants confirmed that Plaintiffs' grading permit remained active and Plaintiffs resumed construction work. in early 2010, however, when Plaintiffs attempted to retrieve the re-issuance of the grading permit from the County, the County informed Plaintiffs that the grading permit had been deleted from computer records, and it could not be re-issued. Subsequently, Plaintiffs faced a multitude of unreasonable delays, unlawful impediments, and other interruptions caused by the County.

In October 2017, Plaintiffs filed a request for documents from the County under the Public Records Act. Based on the documents Plaintiffs received in response to their request, Plaintiffs believe that Defendants Rahhal and Ramos implemented

—as early as 2009 and 2013, respectively—a de facto policy to prevent the continuation and completion of the Project. Plaintiffs allege that this policy has permeated other departments within the County, and that it has been the driving force behind the County's unreasonable delays and fees.

For example, in December 2013, the Board held a hearing on Plaintiffs' requested extension for completing the Project's bonded public improvements. At the hearing, Defendant Ramos suggested that the Board deny the extension and revert the Project site to acreage due to Plaintiffs' failure to timely complete the public improvements. The Board ultimately approved the extension by unanimous vote, but Ramos warned that it would be the last extension. Additionally, on April 24, 2014, the County delivered public notice comments to Plaintiffs. One public comment opposing the Project came from a FOF board member, who indicated that Defendant Ramos stated—while at a FOF board member's house—that any change to the Project would require Plaintiffs to start from scratch.

Throughout 2018, in furtherance of the de facto policy, Defendants continued to demand from Plaintiffs unsubstantiated charges dating back to 2014. Because of Defendants' recurring, unsubstantiated charges, Plaintiffs have been forced to sell other real properties to pay the charges in an attempt to continue the Project. Plaintiffs also allege that Defendants continue to violate the County Development Code, abusing their authority by threating to stop work until Plaintiffs' charges are paid. Plaintiffs further allege the de facto policy to prevent the continuation and completion of the Project has deprived Plaintiffs of the use and enjoyment of their land.

III. JUDICIAL STANDARD

Under Rule 12(b)(6), a party may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if the plaintiff alleges enough facts to draw a reasonable inference that the defendant is liable. *Iqbal*, 556 U.S. at 678. A plaintiff need not provide detailed factual allegations, but must provide more than mere legal conclusions. *Twombly*, 550 U.S. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

When ruling on a Rule 12(b)(6) motion, the Court must accept well-pled factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *See Autotel v. Nev. Bell. Tel. Co.*, 697 F.3d 846, 850 (9th Cir. 2012). Dismissal "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

IV. DISCUSSION

***3** The Individual Defendants move to dismiss Plaintiffs' third and fourth claims on the basis that individuals cannot be liable in damages for a taking. The Individual Defendants also move to dismiss the first and second claims for injunctive relief, arguing that these claims cannot survive without a viable underlying claim. The Court first addresses the inverse condemnation and takings claims in tandem. The Court then turns to Plaintiffs' claims for injunctive relief.

A. Takings and Inverse Condemnation Claims

The Individual Defendants argue that Plaintiffs' takings and inverse condemnation claims must be dismissed because a person cannot be held liable in their individual capacity for a taking. The Ninth Circuit has not addressed this issue. However, both the Fourth and Sixth Circuits have held that a Fifth Amendment takings claim cannot be brought against individuals

sued in then personal capacities, *see Longdon v. J.J. Swain*, 29 Fed. Appx. 171, 172 (4th Cir. 2002); *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984), and at least two district courts in this circuit have agreed, *see Bridge Aina Le'a, LLC v. State of Haw. Use Comm'n*, 125 F. Supp. 3d 1051, 1078 (D. Haw. 2015); *United States v. Sandwich Isles Commc'ns, Inc.*, No. CV 18-00145 JMS-RT, 2019 WL 4017233, at *5 (D. Haw. Aug. 26, 2019).

The Court agrees that monetary relief is unavailable against persons sued in their individual capacities for a taking. *See Langdon*, 29 Fed. Appx. at 172; *Vicory*, 730 F.2d at 467. As explained in *Bridge Aina Le'a*, "[t]he very nature of a taking is that a *public entity* is taking private property for a public purpose, and must provide just compensation in return." *Bridge Aina Le'a*, 125 F. Supp. 3d at 1078 (emphasis added). This concept is antithetical to "the notion that someone acting in an individual capacity has taken property or could be personally liable for a taking." *Id.* "By definition, the taking is not by a private person for private purposes, and the property does not belong to a private person who must accordingly pay just compensation out of private funds." *Id.* at 1079. This same logic also applies to Plaintiffs' inverse condemnation claim. *See Shaw v. Cty. of Santa Cruz*, 170 Cal. App. 4th 229, 260 (2008) ("Although the California Constitution affords somewhat broader protection by also requiring compensation when property is damaged for public use, apart from this difference, the state takings clause is construed congruently with the federal clause.")

Plaintiffs assert that the jurisprudence relating to § 1983 claims and Fifth Amendment takings supports the conclusion that a takings claim can be asserted against individual government employees who abuse their authority. But none of Plaintiffs' cited cases support this contention. For example, Plaintiffs argue that "[n]othing in the [*Bridge Aina Le'a*] decision indicates the individual [defendants] were improper parties as named in their individual capacities." (Opp. at 5, ECF No. 48.) But that is *precisely* what *Bridge Aina Le'a* says. In *Bridge Aina Le'a*, the district court specifically held that "monetary relief is not available against persons sued in their individual capacities for takings" and dismissed the takings claims asserted against the defendants sued in their individual capacities. *Bridge Aina Le'a*, 125 F. Supp. 3d at 1080. Plaintiffs' remaining cases are similarly inapposite.

Accordingly, the Court agrees that monetary relief is unavailable against the Individual Defendants for takings or inverse condemnation. The Court therefore grants the Individual Defendants' Motion as to Plaintiffs' third and fourth claims.

B. Injunctive Relief Claims

***4** The Individual Defendants next move to dismiss Plaintiffs' fust and second claims for injunctive relief. The Individual Defendants argue that because the underlying takings and inverse condemnation claims have been dismissed, the injunctive relief claims must be dismissed as well.

1. Injunctive Relief

The Court agrees that Plaintiffs' first claim for injunctive relief must be dismissed. An injunction is a remedy, not a cause of action. *See Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) ("A request for injunctive relief by itself does not state a cause of action"). Because the Court has dismissed Plaintiffs' underlying inverse condemnation and takings claims against the Individual Defendants, the injunctive relief claim must also be dismissed.

2. Taxpayer Injunctive Relief

Plaintiffs' second claim for taxpayer injunctive relief is a different matter. The purpose of Cal. Code Civ. Proc. § 526a is to provide a "mechanism for controlling illegal, injurious, or wasteful actions by government officials[.]" *A.J. Fistes Corp. v. GDL Best Contractors, Inc.*, 38 Cal. App. 5th 677, 688 (2019) *as modified* (Aug. 13, 2019). To effectuate this purpose, "[t]he California courts have interpreted § 526(a) to confer broad standing for taxpayers." *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001). However, despite § 526a's "lenient taxpayer standing requirements," a plaintiff who asserts a § 526a claim in federal court is not relieved "of the obligation to establish a direct injury under the more stringent federal requirements for state and municipal taxpayer standing." *Id.* To do this, "a plaintiff must allege a direct injury caused by the expenditure of tax dollars" and the pleadings must "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity." *Id.* (internal quotation marks and citations omitted). "When a plaintiff has failed to allege that the government spent specific amounts of tax dollars on the challenged conduct, [the Ninth Circuit] ha[s] denied standing." *Id.; see Gant v. Cty. of Los Angeles*, No. 2:08-CV-05756-GAF (PJW), 2009 WL 10655821, at *9-10 (C.D. Cal. Oct. 8, 2009), *aff'd*, 594 F. App'x 335 (9th Cir. 2014) (dismissing § 526a claim for lack of standing where plaintiffs failed to allege direct injuries resulting from defendants' conduct, and failed "to establish a direct relationship between the tax dollars and the use of the funds to engage in the activity in question").

Here, the Individual Defendants do not take issue with Plaintiffs' standing and argue only that Plaintiffs' § 526a claim "cannot survive without an attendant underlying claim for relief." (Mot. at 5, ECF No. 46.) But "it is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009) (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986)). Accordingly, the Court proceeds to consider Plaintiffs' standing under § 526a.

Upon review of the allegations of the TAC, the Court concludes that Plaintiffs have not alleged adequate facts to show standing under § 526a. The TAC does not allege that the government spent specific amounts of tax dollars on the challenged conduct, nor do the allegations establish a direct relationship between the expenditure of tax dollars and the alleged injuries. Plaintiffs make the single conclusory allegation that Plaintiffs "have been assessed and paid taxes in defendants' jurisdiction within one year before the commencement of this action." (TAC ¶ 158, ECF No. 43.) This is insufficient to establish standing under § 526a. The Court therefore dismisses Plaintiffs' § 526a claim.

V. CONCLUSION

***5** For the foregoing reasons, the Court **GRANTS** the Individual Defendants' Motion. Plaintiffs' claims against the Individual Defendants are hereby **DISMISSED.**

IT IS SO ORDERED.

___ : ___

Initials of Preparer ___

All Citations

Slip Copy, 2020 WL 2375221

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United States District Court, S.D. California.

IN RE OUTLAW LABORATORY, LP LITIGATION.

Case No.: 18-cv-840-GPC-BGS
|
Signed 04/23/2020

ORDER DENYING TAULER SMITH'S MOTION TO DISMISS; MICHAEL WEAR AND SHAWN LYNCH'S MOTION TO DISMISS; AND TAULER SMITH'S ANTI-SLAPP MOTION.

(ECF Nos. 143, 153, 156.)

Hon. Gonzalo P. Curiel, United States District Judge

***1** This Order addresses two motions to dismiss filed by newly added, third-party Defendants Michael Wear, Shawn Lynch, and Tauler Smith LLP ("Tauler Smith"). (ECF Nos. 143, 153.) In short, the third-party Defendants argue that the Second Amended Countercomplaint ("SACC"), (ECF No. 114), fails to plead RICO or rescission claims and is barred by the *Noerr-Pennington* doctrine. For the reasons that follow, the Court finds that these arguments fail and **DENIES** the motions.

This Order also addresses an anti-SLAPP motion filed by Tauler Smith as to the SACC's rescission claim. (ECF No. 156.) The Court finds rescission is a remedy, not a cause of action, and that the anti-SLAPP statute directs itself at causes of actions, not remedies. Consequently, the Court **DENIES** the anti-SLAPP motion.

I. BACKGROUND[1]

A. Procedural Background on the Counterclaims.

1. Outlaw Initiates Two Now-Consolidated Lawsuits.

The instant litigation arises out of two complaints filed by Plaintiff Outlaw Laboratory, LP ("Outlaw"). The first case, Case No. 18-CV-840, referred to by the parties as the "*DG in PB* action," was filed in May of 2018. Initially, the defendants in the *DG in PB* action were represented by the Law Offices of Steven A. Elia. The later-filed case, Case No. 18-CV-1882, referred to by the parties as the "*San Diego Outlet* action," was removed to federal court in August of 2018 by defendant Roma Mika, who is represented by the law firm Gaw | Poe LLP ("Gaw Poe"). On June 29, 2019, the Court granted a motion to substitute Gaw Poe as counsel for the defendants who were previously represented by Steven A. Elia in the *DG in PB* action. The two

cases have since been consolidated before the Court.

With some small differences not relevant here, the complaints in the *San Diego Outlet* and *DG in PB* actions were nearly identical. In each, Outlaw alleged that a large number of gas station and corner store defendants conspired to distribute and sell unlawful and misbranded male sexual enhancement drugs—i.e., the Rhino products—in violation of the Lanham Act and California's Unfair Competition Law, and that the scheme had diverted sales away from its legitimate, FDA-approved "TriSteel" male enhancement pill.

2. The Stores File RICO-based, Class Action Counterclaims.

On August 24, 2018, Counterclaimants filed a counterclaim and third-party complaint against Outlaw the *San Diego Outlet* action, Case No. 3:18-CV-1882. Counterclaimants sought to represent a class of gas station and corner store owners who received what Counterclaimants characterize as extortionate and demonstrably false demand letters sent by Outlaw. Outlaw's letters warned that sale of Rhino products exposed recipients to RICO and Lanham Act liability for amounts greater than $100,000, which Outlaw would forego for a much smaller settlement sum. According to Counterclaimants, Outlaw's demand letters were designed to coerce settlement, targeted mostly immigrant-run businesses, made allegations of illegality and adulteration which Counterclaimants claim are unfounded, and often included on-site photographs taken by "investigators" of the recipient's storefronts and sale of Rhino products.

***2** The original counterclaims asserted three causes of action: (1) civil RICO, 18 U.S.C. § 1962(c), (2) RICO conspiracy, 18 U.S.C. § 1962(d), and (3) rescission of any settlement agreements entered into as a result of Outlaw's demand letters. Specifically, Counterclaimants described a RICO enterprise between Outlaw, its attorneys, Tauler Smith LLP, and other as-yet-unnamed individuals, aimed at perfecting a legal "shakedown" of small-time San Diego convenience stores. Counterclaimants averred that the "TriSteel" products "were created as artifices" to "found the false advertising claims," and that Outlaw itself was no more than a front for the unlawful enterprise.

3. Outlaw Challenges the Counterclaims.

On November 27, 2018, the Court granted in part and denied in part Outlaw's motion to dismiss the counterclaims. (ECF No. 31.) The Court first concluded that the Counterclaimants were not required to allege a particular false statement to sustain a pleading for a RICO scheme to defraud, but then dismissed the RICO claims on the basis that Counterclaimants insufficiently alleged that Outlaw's demand letters fell within the sham litigation exception to the *Noerr-Pennington* doctrine. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (explaining that *Noerr-Pennington* generally confers First Amendment immunity against liability arising from a party's pre-litigation, petitioning conduct but that baseless sham litigation conduct is not protected); (ECF No. 31 at 9, 16.) The Court then denied Outlaw's arguments as to rescission, finding that it fell outside Outlaw's anti-SLAPP motion as a remedy. (ECF No. 31 at 20.)

On November 30, 2018, Counterclaimants filed a first amended counterclaim ("FACC"). (ECF No. 32.) Outlaw moved once more to dismiss, and the Court held that, upon amendment, Counterclaimants sufficiently pleaded the sham litigation exception. (ECF No. 56.) The Court denied Outlaw's motion on March 14, 2019. (*Id.*)

Thereafter, Outlaw filed a motion for judgment on the pleadings, which the Court denied on June 4, 2019. (ECF No. 85.) The Court again concluded that "Counterclaimants ha[d] alleged sufficient facts to frustrate *Noerr-Pennington* immunity on the subjective motivation prong" and found that "[j]udgment on the pleadings [was] therefore inappropriate." (*Id.* at 12.)

4. The Stores Add Third-Party Defendants and Amend Counterclaims.

On July 1, 2019, Defendant/Counterclaimant Roma Mikha, Inc., and Third-Party Plaintiffs NMRM, Inc. and Skyline Market, Inc. filed a motion for leave to amend their counterclaims and add three new defendants: Michael Wear, Shawn Lynch, and Tauler Smith. (ECF No. 92.) On August 19, 2019, the Court granted the motion, (ECF No. 113), and the counterclaimants subsequently filed the second amended countercomplaint and third-party complaint (the "SACC"). (ECF No. 114.)

This Order addresses three motions directed at the SACC: Tauler Smith's motion to dismiss the SACC, Michael Wear and Shawn Lynch's motion to dismiss the SACC, and Tauler Smith's special motion to strike the rescission claim of the SACC (more commonly known as an "anti-SLAPP"[2] motion). (ECF Nos. 143, 153, 156.) On January 10, 2020, Defendant Roma Mikha, Inc., and Third-Party Plaintiffs NMRM, Inc. and Skyline Market, Inc. (collectively, the "Stores") filed responses to the two motions to dismiss. (ECF Nos. 158, 159.) On January 23, 2020, Tauler Smith filed a reply. (ECF No. 164.) Michael Wear and Shawn Lynch filed their reply the next day. (ECF No. 167.) As to Tauler Smith's anti-SLAPP motion, the Stores filed a response on February 7, 2020, and a reply from Tauler Smith followed on February 21, 2020. (ECF Nos. 171, 173.)

B. Allegations of the SACC.

1. The Enterprise and Scheme.

***3** Consistent with the preceding pleadings, the SACC alleges an association-in-fact Enterprise – including Outlaw, its two principals Michael Wear and Shawn Lynch, and its prior counsel Tauler Smith – responsible for a widespread "shakedown" of mom and pop convenience stores around the San Diego. To execute the scheme, the Enterprise members first send demand letters to "small (almost always immigrant-run) independent corner stores and liquor stores" threatening disingenuous, baseless litigation against the stores for selling over-the-counter "sexual enhancement pills." (ECF No. 114 at ¶¶ 2, 30–31, 36–46.) The demand letters "make a series of false and misleading statements" that are "intentionally designed to be particularly misleading to its target audience" and which are unsupported by individual testing or investigation as to each recipient store. (*Id.* at ¶¶ 26–29, 39.) The demand letters, moreover, fraudulently allege that Outlaw Laboratories is "a manufacturer, distributor and retailer of male enhancement products 'TriSteel' and 'TriSteel 8 hour," but, in fact, the products have "been sold in any stores in this District, in California, or anywhere in the country" and "were created as artifices upon which to found the enterprise's scheme." (*Id.* at ¶¶ 66–67.)

The Enterprise members allegedly offer to settle with each store for a fraction of the "threatened liability of 'over $100,000,' " knowing that "99% of rational business-persons (especially immigrants with a first language other than English) are not going to hire a lawyer at $300-500/hour to defend against such a tiny demand." (*Id.* at ¶¶ 3, 53–56.) The Outlaw Enterprise's shakedown scheme, moreover, depends on that "threatened financial ruin" to dragoon the Stores into quick settlements. (*Id.* at ¶¶ 47–52.) Skyline Market, for example, paid $2,800 to settle the threatened $100,000, and now alleges an injury resulting from lost sales, the settlement payment itself, and "attorneys' fees to coordinate payment of the protection money." (*Id.* at ¶ 35.) Roma Mikha, Inc. and NMRM, Inc. allege "injury to [their] businesses because [they] initially believed the demand letter's false assertions, and removed [the] legal products from its shelves, thereby losing legitimate sales." (*Id.* at ¶¶ 33–35.)

2. Allegations Against Wear, Lynch, and Tauler Smith.

In the latest pleading, the Stores offer additional specific facts as to the alleged scheme and the role of the enterprise members. The Stores allege, for example, that "[p]ublic records indicate that Outlaw Laboratory is owned by enterprise members Michael Wear and Shawn Lynch." (ECF No. 114 at ¶ 69.) The Stores accuse them of "conducting the enterprise's

affairs, including by creating the 'competing' TriSteel products upon which to found the false advertising claims, and by working with other members to decide the geographies in which to conduct the scheme, and by signing for, and accepting receipt of the ill-gotten gains." (*Id.*) "Michael Wear and Robert Tauler, for example, were the signatories on the 'settlement' that extorted $2,800 from third-party plaintiff Skyline Market." (*Id.*)

The Stores likewise allege Tauler Smith's "role in conducting the affairs of the Outlaw Enterprise exceeds that of mere attorney agents of the 'client' Outlaw Laboratory." (*Id.* at ¶ 70.) The Stores allege that their "additional investigation" confirms Tauler Smith "worked directly with Mr. Wear and Mr. Lynch to orchestrate the very formation of this shakedown scheme" and worked with other Enterprise members "to create Outlaw Laboratory's 'TriSteel' product based on this experience with JST Distribution," another purveyor of sexual enhancement products. (*Id.* at ¶ 71(a)–(b) (emphasis in original)). The SACC additionally claims that Tauler Smith "was the architect of all the fraudulent statements in the demand letters;" "drafted the 'draft complaint' that was attached to the demand letters;" "obtain[ed] settlements" in furtherance of the scheme; acted as the "payee of the settlement proceeds;" negotiated a large multi-case resolution of such claims with an association of 7-11 franchisees in July 2018; sent "demand letters in states in which none of its attorneys is a member of the state bar;" and also received and retained "100% of the proceeds generated by the scheme." (*Id.* at ¶¶ 70(c)–(h)). Tauler Smith is further accused of recruiting investigators to further the scheme through advertising on Craigslist. (*Id.* at ¶ 73.)

3. The Causes of Action and Remedies.

***4** The Stores' SACC contains two causes of action, and one remedy styled as a cause of action. As to the first cause of action, the Stores allege that "Outlaw Laboratory, LP, Michael Wear, Shawn Lynch, and Tauler Smith LLP" violated 18 U.S.C. § 1962(c) through the scheme described in the SACC. (ECF No. 114 at ¶¶ 82–89.) The SACC alleges that Michael Smith, Shawn Lynch, and Tauler Smith participated in the association-in-fact Enterprise in the following manner:

> Michael Wear and Shawn Lynch conducted the affairs of the Outlaw Enterprise by coordinating its activities with Tauler Smith LLP, and by using the name of their joint creation, Outlaw Laboratory, LP to be used in the fraudulent mailings that constitute the pattern of racketeering activity (per 18 U.S.C. § 1961(5)) at issue in this case, in violation of 18 U.S.C. § 1962(c). Tauler Smith LLP conducted the affairs of the Outlaw Enterprise by drafting and mailing the fraudulent demand letter and attached "draft complaint," and each of the statements therein. Tauler Smith LLP further conducted the affairs of the Enterprise by negotiating the amounts of protection money it would charge to each of its victims, and by acting as the conduit of those ill-gotten gains. On information and belief, Tauler Smith shared in the spoils of the Outlaw Enterprise by receiving a percentage of the ill-gotten gains.

(*Id.* at ¶ 84.) The Stores further assert that the Enterprise participated in multiple counts of mail fraud "in drafting and arranging for the mailing of the fraudulent demand letters by which the scheme to defraud was perpetrated." (*Id.* at ¶ 85.) The Stores likewise claim that the Enterprise members "knowingly and intentionally" defrauded the victims through a variety of material "misrepresentations, acts of concealment, and failures to disclose," including the statements in their demand letters. (*Id.* at ¶ 86.)

As to the second cause of action, the Stores allege the Enterprise members conspired in violation of 18 U.S.C. § 1962(d). The members allegedly conspired by "agreeing with [ ] other members on the structure, purpose, and conduct of the Outlaw Enterprise, and by taking numerous overt acts in furtherance of the scheme to defraud." (*Id.* at ¶ 92.) Such acts include, "drafting and/or approving the fraudulent demand letters and 'draft complaint,' setting and/or approving the minimum amounts of protection money that the victims must pay, and by receiving and sharing in the ill-gotten proceeds from the shakedown." (*Id.*) The Stores further allege, as overt acts to the scheme, that Outlaw and Tauler Smith "hir[ed] and/or direct[ed] the activities of the 'investigators' who were tasked with identifying and selecting the victims of the racket, and/or by making payments to those 'investigators' in furtherance of the scheme." (*Id.*)

Lastly, the Stores claim the remedy of rescission in connection with the RICO counts. Skyline Market claims to "give[ ] notice of its intention to rescind the 'Confidential Settlement Agreement and Release' that it entered with Outlaw Laboratory, LP, and accordingly rescinds that agreement." (*Id.* at ¶ 97.) Further, Skyline Market asserts that it "signed the agreement ... under duress," given the difference in the threatened liability and the settlement offer, and as the settlement amount "would have been dwarfed" by the attorneys' fees to defend the action. (*Id.* at ¶ 98.) And, Skyline Market's agreement was "predicated upon a scheme to defraud that was illegal *ab initio*, as set forth" in the RICO counts. (*Id.* at ¶ 99.) In closing, the rescission section of the SACC asserts that "Outlaw Laboratory LP, Michael Wear, Shawn Lynch, and Tauler Smith LLP are jointly and severally liable for restitution of the amounts that were illegally taken from Skyline Market and the other members of the class it seeks to represent." (*Id.*)

II. THE MOTIONS TO DISMISS

***5** The Court first addresses the motions to dismiss. (ECF Nos. 143, 153.) The Court disposes of the Enterprise members' arguments against the RICO claims, finding that the SACC adequately pleads racketeering vis-à-vis mail fraud, the Stores' injury, and the "conduct" element as to Tauler Smith. Then the Court addresses the Enterprise members' arguments as to the *Noerr-Pennington* doctrine, finding once again that the RICO suit threatened in the Enterprise demand letters was objectively baseless and intentionally anti-competitive. Lastly, the Court denies the motion to dismiss the rescission remedy as it is not cognizable as a separate cause of action.

A. Legal Standard on a Motion to Dismiss.

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is facially plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

In reviewing a Rule 12(b)(6) motion, the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). If a court determines that a complaint fails to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. *See Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

B. Legal Standards for RICO and Mail Fraud.

RICO's private right of action is contained in 18 U.S.C. § 1964(c), which provides in relevant part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable

attorney's fee." 18 U.S.C. § 1964(c).

In turn, section 1962(c) renders it unlawful "for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ..." To recover under § 1962(c), a plaintiff must prove (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as "predicate acts"), (5) causing injury to the plaintiff's "business or property" by the conduct constituting the violation. *See Living Designs, Inc. v. E.I. Dupont de Numours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005).

***6** One type of predicate act of racketeering activity recognized by RICO, 18 U.S.C. § 1961(1) is mail fraud under 18 U.S.C. § 1341. A mail fraud violation consists of (1) the formation of a scheme or artifice to defraud; (2) use of the United States mails or causing a use of the United States mail in furtherance of the scheme; and (3) specific intent to deceive or defraud. *See Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986) ("Mail fraud occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do." ") (quoting 18 U.S.C. § 1341). The gravamen of the offense is the scheme to defraud, and any "mailing that is incident to an essential part of the scheme satisfies the mailing element," *Schmuck v. United States*, 489 U.S. 705, 712 (1989) (citation and internal quotation marks omitted), even if the mailing itself "contain[s] no false information." *id.* at 715.

C. RICO Claims

The Enterprise members contest whether the SACC adequately alleges a RICO claim. Specifically, the Enterprise members argue that the SACC fails to allege the element of "racketeering activity," either vis-à-vis mail fraud or the enterprise members' litigation conduct, and the "conduct" element as to Tauler Smith. The Enterprise members also contend that the Stores lack statutory standing in the absence of a precisely defined RICO injury. For the following reasons, the Court finds these arguments unpersuasive, and holds that the SACC adequately alleges a RICO claim.

1. Mail Fraud as a Pattern of Racketeering Activity.

First, the Court addresses whether the Stores have adequately pled mail fraud to satisfy the racketeering element of their RICO claims. (ECF No. 114 at ¶ 6 ("Because the members of the Outlaw Enterprise used the U.S. mails in conducting this 'scheme to defraud'— committing thousands of predicate acts of mail fraud over a period of many months—they are liable for disgorgement of their ill-gotten gains, three times the damages they caused, and an injunction ordering dissolution of the Outlaw Enterprise.")).

Here, again, members of the Enterprise field a variety of arguments predicated on the mistaken notion that mail fraud *must* entail a false or misleading statement. Tauler Smith argues that the SACC fails to adequately plead the predicate acts of mail fraud because Outlaw's demand letters allegedly contained no specific false statements, no actionable omissions, and no statements which together might be misleading. (ECF No, 143-1 at 11–29; ECF No. 164 at 5–7.) Michael Wear and Shawn Smith similarly claim that the SACC does not allege the required elements of mail fraud because the excerpts from Outlaw's demand letters set forth in the SACC cannot be construed as false or misleading; they are merely misrepresentations of law not actionable under RICO. (ECF No. 153-1 at 11–15; ECF No. 167 at 5–7.)

However, as the Court stated in rejecting Outlaw's argument "that a predicate act of mail fraud requires the allegation of a materially-false statement," (ECF No. 31 at 8), and as the Ninth Circuit made clear in *Woods*,

> If a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, *the fact that there is no misrepresentation of a single existing fact is immaterial.* It is only necessary to prove that it is a scheme reasonably calculated to deceive, and that the mail service of the United States

> was used and intended to be used in the execution of the scheme.

United States v. Woods, 335 F.3d 993, 998 (9th Cir. 2003) (quoting *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967)) (emphasis added). The Ninth Circuit continued in *Woods*,

> Put another way, [t]he fraudulent nature of the 'scheme or artifice to defraud' is measured by a non-technical standard. Thus, schemes are condemned which are contrary to public policy or which fail to measure up to the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."

***7** *Id.* (quoting *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)) (internal quotation marks and citations omitted); *see also United States v. Ali*, 620 F.3d 1062, 1070–71 (9th Cir. 2010) (quoting *United States v. Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000)) ("Under the mail fraud statute the government is not required to prove any particular false statement was made. Rather, there are alternative routes to a mail fraud conviction, one being proof of a scheme or artifice to defraud, which may or may not involve any specific false statements.")

Thus, here, the SACC adequately alleges the three elements of mail fraud. Specifically, the Stores allege a RICO enterprise aimed at executing a legal shakedown of small-time San Diego convenience stores between, among others, Outlaw, its two general partners (Defendants Michael Wear and Shawn Lynch), and their former counsel Tauler Smith, whose conduct allegedly "exceeds that of mere attorney agents ..." (ECF No. 114 at ¶¶ 1–6, 16, 17, 70, 71.) They claim that the TriSteel products sold by Outlaw were created as artifices to found the false advertising claims, and that Outlaw itself is no more than a front for the unlawful enterprise. (*Id.* at ¶¶ 64–67.) The Stores further allege that the enterprise effectuates its shakedown by sending demand letters to an especially "vulnerable community of victims," comprised of mostly "small, immigrant-run businesses," which would most likely elect to pay off the enterprise rather than face the prospect of protracted, costly litigation. (*Id.* at ¶¶ 3, 4, 26.) The Stores describe Outlaw's demand letters as manipulative and fraudulent for a variety of reasons, including, that the products are not illegal to sell, that the legal penalties were greatly exaggerated, and that the letters were sent without a genuine intent to pursue RICO litigation. (*Id.* at ¶¶ 26–31.) The Stores further allege that the fraudulent demand letters were sent through the U.S. Mails and, therefore, constitute the RICO predicate act of mail fraud under 18 U.S.C. § 1341. (*Id.* at ¶¶ 32–36.)

Accordingly, the Court finds that the elements of mail fraud are adequately pled.[3] Moreover, because the allegations of the SACC describe multiple instances of mail fraud, against different convenience stores, and in furtherance of the alleged scheme, the SACC adequately pleads a "pattern of racketeering activity" as required for RICO. *See Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) (describing what constitutes a pattern of racketeering)*; Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.14 (1985) (same).

2. The Stores' Injury.

***8** In addition to protesting the allegations as to racketeering element, the Enterprise member challenge the Stores' pleadings on the injury element. Specifically, Michael Wear and Shawn Lynch argue that the Stores' RICO claim fails to adequately specify injury from lost sales, and claims attorney costs and fees as injuries contrary to prevailing law. (ECF No. 153-1 at 28–30.) The Stores respond that the Court has already found the loss of sales constitutes an adequate injury. (ECF No. 159 at 14 (quoting ECF No. 113 at 16) (the SACC "articulates a loss of business profits resulting from allegedly unlawful RICO conduct, and is not contradicted by the fact that the two stores may have resumed selling the products after 'initially' withdrawing the products.")) The Stores further respond that, under the circumstances, legal fees and costs are legitimate injuries because it was an "express purpose of the Outlaw Enterprise's scheme was to extract settlement money," thus requiring the Stores to obtain counsel. (ECF No. 159 at 14–15.)

For the foregoing reasons, the Court finds that the Stores adequately plead an "injury" within the meaning of RICO.

a. Loss of Sales.

To successfully plead a RICO injury, Plaintiffs must satisfy two requirements. *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 957 (N.D. Cal. 2018). First, they must plausibly allege "a harm to a specific business or property interest." *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc). Second, they must plausibly allege that their injury has resulted in "concrete financial loss." *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008) (quoting *Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc)), *abrogated on other grounds by Diaz*, 420 F.3d 897.

Here, the Stores adequately plead a proximate injury to a business interest. A reduction to Plaintiff's sales is a "business or property interest." *Leonard v. City of Los Angeles*, 208 F. App'x 517, 519 (9th Cir. 2006). And, the "alleged [RICO] violation led directly to the plaintiff's" loss of sales, *Canyon Cty.*, 519 F.3d at 982, as the Stores allege "believe[ing] the demand letter's false assertions, and remov[ing] these legal products from [their] shelves, thereby losing legitimate sales." (ECF No. 114 at ¶¶ 33–35.) Consequently, the only question as to the alleged loss of sales is whether the Stores' allegations amount to a concrete financial loss.

As to this question, "it is important to distinguish between uncertainty in the fact of damage and in the amount of damage." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002) (citing *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976)) ("Different standards govern proof of the fact and proof of the amount of damages."). While the Enterprise members correctly state that the SACC does include a precise calculation of the damages, the fact that there was an injury, assuming the allegations are true, is unambiguous and specifically alleged. (ECF No. 114 at ¶¶ 33–35.) At this stage, the Stores need not plead more specific facts as to which items were removed from the Stores shelves, and for how long they were removed, in each store. *See, e.g.*, *Leonard*, 208 F. App'x at 519 (finding sufficient to establish a RICO injury that "[plaintiffs'] computers, business inventory, and financial records were seized illegally, causing them to incur replacement costs, and that they lost profits as a result of the improper criminal investigation" without detailing which specific items were seized or their value); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL-2672-CRB, 2017 WL 4890594, at *6 (N.D. Cal. Oct. 30, 2017) (finding that Franchise Dealers plausibly alleged the injury of lost profits from a stop-sale order without reference to specific cars that went unsold, their value, or the order's duration). After all, "[i]n the RICO context, and '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Leonard*, 208 F. App'x at 519 (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994)).

b. Attorneys' Fees Incurred to Settling Sham Lawsuits.

***9** "Whether incurring legal fees constitutes an injury to a plaintiff's 'business or property' is a question as yet unanswered by the Ninth Circuit." *See Dunmore v. Dunmore*, No. 2:11-CV-2867-MCE, 2013 WL 5569979, at *6 (E.D. Cal. Oct. 9, 2013), *report and recommendation adopted*, No. 2:11-CV-2867-MCE, 2014 WL 466257 (E.D. Cal. Feb. 5, 2014) (collecting cases which find that attorneys' fees do, and do not, qualify as an injury for the purposes of RICO); *see also Thomas v. Baca*, 308 F. App'x 87, 88 (9th Cir. 2009) (stating that the Ninth Circuit "has not recognized the incurment of legal fees as an injury cognizable under RICO" in considering an injury to "property"). Michael Wear and Shawn Lynch contend that they do not, (ECF No. 153-1 at 29–30), and thus take issue with the allegation that "Skyline Market has been further injured by paying attorneys' fees to coordinate payment of the protection money." (ECF No. 114 at ¶ 35.) The Stores assert that, here, the collection of settlements was central to the Enterprise's scheme and thus the Stores' attorneys' fees incurred in pursuing

settlement are a direct injury of the scheme. (ECF No. 159 at 14–15.) Because, the subject attorney fees were directly incurred by the convenience stores after receiving the demand letters, the Court finds that they are cognizable as an injury to the Stores' "business" for the purposes of RICO.

In reaching this conclusion, the Court relies largely on the reasoning of *Bankers Trust* and *Handeen*. In *Bankers Trust*, the Second Circuit held that plaintiff's past legal fees could confer standing as to a RICO violation because those fees were incurred in fighting "frivolous lawsuits" initiated by the defendants, i.e., the very wrongful conduct that comprised the RICO claim. *See Bankers Tr. Co. v. Rhoades* ("*Bankers Trust*"), 859 F.2d 1096, 1099, 1105 (2d Cir. 1988); *accord Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1167 (2d Cir. 1993) ("legal fees may constitute RICO damages when they are proximately caused by a RICO violation"). As *Bankers Trust* observed, the RICO statute "contains no special limitation on standing; all that is required is that plaintiff suffer injury in fact ... [i.e.,] that the plaintiff be 'injured in his business or property by the conduct constituting the violation,' ... and that the injury be caused by defendants' RICO violation." *Bankers Trust*, 859 F.2d at 1100 (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 495 (1985)). Likewise, in *Handeen*, the Eighth Circuit determined that "attorneys' fees [ ] incurred in objecting to the [the scheme's] supposedly fraudulent claims" were concrete injuries within the meaning of RICO. *Handeen v. Lemaire*, 112 F.3d 1339, 1354 (8th Cir. 1997). The *Handeen* court relied on the fact that those fees were "proximately caused by a predicate act of racketeering." *Id.*

Here, the attorney fees were, per *Bankers Trust*, incurred in the process of litigating a potential lawsuit that was part and parcel of the Enterprise's scheme. *Bankers Trust*, 859 F.2d at 1100. After all, the SACC alleges that obtaining such settlements was one of the purposes of the scheme and the most probable response by any convenience store owner reading the demand letters. (ECF No. 114 at ¶¶ 3, 4, 22, 56, 59.) Likewise, per *Handeen*, the attorneys' fees incurred in settling are also the result of a predicate act of racketeering, namely mail fraud, because the allegations in the allegedly fraudulent demand letters prompted the convenience stores to settle. *Handeen*, 112 F.3d at 1354. As such, the Court finds that the fees alleged by Skyline Market create an injury compensable under RICO, in line with several decisions by other district courts of the Ninth Circuit. *See Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1084–85 (C.D. Cal. 2009) ("This court concludes that plaintiff's RICO claim should not be dismissed on [the] basis [that no injury is alleged] because plaintiff adequately alleges that defendants' racketeering activity proximately caused ... the expenditure of attorneys fees' and legal expenses in the criminal proceedings resulting from the Menlo Park Police investigation ..."); *Burger v. Kuimelis*, 325 F. Supp. 2d 1026, 1035 (N.D. Cal. 2004) (quoting *Chaset v. Fleer/Skybox Int'l*, LP, 300 F.3d 1083, 1086–87 (9th Cir. 2002)) (dismissing RICO claim for inadequately pleading an injury of legal expenses, but recognizing that "[l]egal expenses are concrete financial losses, 'not mere injury to a valuable intangible property interest,' " and are thus recoverable under RICO").

***10** The Court, moreover, finds that other, in-circuit decisions concluding that attorneys' fees and expenses are *not* an injury under the RICO statute can be readily distinguished. *See, e.g.*, *Holloway v. Clackamas River Water*, No. 3:13-CV-01787-AC, 2014 WL 6998069, at *9 (D. Or. Sept. 9, 2014), *report and recommendation adopted*, No. 3:13-CV-01787-AC, 2014 WL 6998084 (D. Or. Dec. 9, 2014) (finding legal fees are not injuries under RICO in light of *Baca* and because plaintiff did not "establish that racketeering activity was the proximate cause of her injury") (citing *Baca*, 308 Fed. Appx. at 88); *Cobb v. Adams*, No. C 13-04917 JSW, 2014 WL 2212162, at *9 (N.D. Cal. May 28, 2014) (finding that "legal fees, bail fees, court ordered restitution fees, probation fees, and 'class fees' " did not create a RICO injury, even if that were possible in general, because plaintiff had "not alleged facts showing that a predicate act caused him to incur those fees."). Here, unlike the above district court cases, the Stores have alleged facts showing that the fraudulent scheme had caused them to incur attorney fees.

In light of the foregoing reasons, the Court finds that both the loss of sales and the attorneys' fees arising from the settlement process are compensable as injuries to the instant RICO scheme. Furthermore, the factual allegations giving rise to these two injuries are adequately alleged in the SACC.

3. The "Conduct" Element as to Tauler Smith.

Lastly, the Court considers the "conduct" element as challenged by Tauler Smith. The Court has already found that Tauler Smith's conduct constituted "a moving, active conscious force" in the alleged RICO scheme. (ECF No. 113 at 17.) Tauler Smith, nonetheless, argues now that it was merely "the agent of its client, not the other way around." (ECF No. 143-1 at 24.) Tauler Smith attacks the factual allegations of the SACC, arguing that "the mere fact that Outlaw Laboratory LP hired the

same litigation counsel that JST Distribution had hired" does not show control; that the Stores do not allege Tauler Smith created TriSteel "based on any specific facts;" that "the pedestrian fact that" Tauler Smith held its clients' settlement funds in trust does not evince control; that Tauler Smith did not engage "in the unauthorized practice of law in Arizona;" and that the Stores have overreached by speculating that Tauler Smith LLP received 100% of the settlement proceeds obtained on behalf of Outlaw. (ECF No. 143-1 at 24–26.)

In order to plead a violation of RICO, the pleading instrument must also allege sufficient facts to establish the "conduct" element. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). "In order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Id.* at 179 (quoting 18 U.S.C. § 1962(c)). "Of course ... RICO liability is not limited to those with primary responsibility for the enterprise's affairs ... [or] to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required." *Id.* (emphasis in original). In other words, "one must participate in the operation or management of the enterprise itself." *Id.* at 185.

"In the Ninth Circuit, to assess whether a defendant had a sufficient role in operation or management to meet the standard of § 1962(c) [and *Reves*], courts consider whether the defendant (1) gave or took directions; (2) occupied a position in the 'chain of command' through which the affairs of the enterprise are conducted; (3) knowingly implemented decisions of upper management; or (4) was indispensable to achievement of the enterprise's goal in that the defendant's position is 'vital' to the mission's success." *Tatung Co., Ltd. v. Hsu*, No. SA-CV-13-1743-DOC, 2015 WL 11072178, at *20 (C.D. Cal. Apr. 23, 2015) (quoting *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008)) (citations omitted).

***11** In light of this disjunctive, multi-factor test, Tauler Smith's argument is unpersuasive. For one, it is simply not true that the RICO claim fails if "Tauler Smith did not manage or control Outlaw Laboratory, LP ... because the alleged RICO enterprise is not just sending demand letters, but also selling supplements that compete with those sold by Counterclaimants." (ECF No. 164 at 10.) Rather, a subordinate in the enterprise may satisfy the "conduct" element by demonstrating some control over the scheme. *See United States v. Diaz*, 649 F. App'x 373, 383 (9th Cir. 2016) (quotation omitted) (finding that "lower rung participants in the enterprise who are under the direction of upper management" can also meet the conduct threshold). Likewise, an "enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." *Reves*, 507 U.S. at 184. Consequently, Tauler Smith does not need to be a "partner, shareholder, beneficial owner, director, officer, [or] employee" of Outlaw to held liable for conducting the affairs of the enterprise. (ECF No. 143-1 at 24.)

Instead, the Court looks to whether the allegations against Tauler Smith are sufficient to establish that it "participate[d] in the operation or management of the enterprise," and the Court finds that they do. *Reves*, 507 U.S. at 185. As a starting point, Tauler Smith is correct that "[s]imply performing [legal] services for the [association-in-fact] enterprise" cannot, of course, create RICO liability. *See Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (finding that the lawyerly conduct of "wr[iting] emails, g[iving] advice, and t[aking] positions on behalf of [one's] clients" does not constitute "conduct" within the meaning of RICO); *see also Baumer v. Pachl*, 8 F.3d 1341, 1344 (9th Cir. 1993) (finding that an attorney's preparation of two letters and a partnership agreement in 1982, and assistance in a bankruptcy proceeding in 1987, "[did] not suffice to impute liability under *Reves*").

However, unlike the attorneys' conduct in *Walter* or *Baumer*, here the allegations against Tauler Smith repeatedly indicate that the firm was "giving, or taking, direction" and became "indispensable to achiev[ing] of the enterprise's goal." *Walter*, 538 F.3d at 1249. As previously noted, Tauler Smith's conduct here allegedly encompasses "the firm's genesis of the scheme, its creation of 'TriSteel' as a front product, and its dispatch of 'investigators' to take photos of storefronts to identify new demand letter recipients." (ECF No. 113 at 18). The SACC, moreover, also alleges that Tauler Smith conceived of the demand letters, threatened RICO liability without a genuine intent to pursue such litigation, became the sole financial beneficiary of the enterprise, sent baseless subpoenas, enforced settlements predicated on fraudulent conduct, and, at times, acted without the guidance or direction of Outlaw. (ECF No. 114 at ¶¶ 68–71). If true, such conduct is enough to establish the firm's influence and control over some of the operations of the Enterprise and exceeds the conduct inherent in a firm's representation of Outlaw as a client. *See, e.g.*, *Tatung*, 2015 WL 11072178, at *10, 20 (C.D. Cal. Apr. 23, 2015) (finding attorney defendant Woo allegedly, among other actions, gave or took directions in "drafting unreasonable [legal] agreements" and was "indispensable" to the scheme, as Tauler Smith allegedly did here); *Cohen v. Trump*, 200 F. Supp. 3d 1063, 1072 (S.D. Cal. 2016) (finding an issue of material fact as to the conduct element of RICO where the defendant "reviewed and approved" the precise "marketing materials" that "form[ed] the basis of the fraud alleged by Plaintiff"); *Valadez v. Aguallo*, No. C 08-03100 JW, 2009 WL 10680865, at *3 (N.D. Cal. Aug. 28, 2009) (finding "conduct" element satisfied where defendants "indirectly influenced the decisions as to which independent contractor would obtain contracts or associations

with Avis").

Tauler Smith likewise errs in assailing the veracity of the factual allegations before the Court. (ECF No. 143-1 at 24–26.) After all, on a motion to dismiss, the Court is to presume the truth of the allegations, and instead assesses whether those allegations, if true, would adequately plead the claims stated in the complaint. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). Consequently, the Court finds that the SACC adequately alleges the "conduct" element of RICO as to Tauler Smith.

D. Rescission Remedy to the RICO Cause of Action.

***12** The Enterprise members also challenge the rescission remedy in their motions to dismiss, arguing that they are not parties to the settlement agreements and thus cannot be sued for rescission. (ECF 143-1 at 31; ECF 153-1 at 31.) The Stores argue that, pursuant to California state law, the Enterprise members are "jointly and severally liable for restitution of the amounts that were illegally taken from Skyline Market and the other members of the class it seeks to represent," (ECF No. 114 at ¶ 99), as "an ancillary remedy to the principal remedy of rescission restoring plaintiffs to their status quo ante." (ECF No. 158 at 17) (quoting *Snelson v. Ondulando Highlands Corp.*, 5 Cal. App. 3d 243, 252–54 (1970)). The Enterprise members reply that the Stores' cited precedents are applicable only to claims for consequential damages, and that any remedy of rescission inherently presupposes that the subject entities are parties to the to-be-rescinded agreement. (ECF No. 164 at 13–14; ECF No. 167 at 12.)

As a threshold matter, the Court again finds that Tauler Smith's anti-SLAPP motion fails as inapplicable here because rescission is a remedy, not a cause of action, consistent with its prior ruling on November 27, 2018. *See* (ECF No. 31) (published as *In re Outlaw Labs., LP Litig.*, 352 F. Supp. 3d 992, 1010–12 (S.D. Cal. 2018)). On that basis, the Court does not "dismiss" it for failing to state a claim to which relief can be granted because it is not a stand-alone cause of action. *Cf. Ozuna v. Home Capital Funding*, No. 08-CV-2367-IEG, 2009 WL 4544131, at *11 (S.D. Cal. Dec. 1, 2009) (dismissing a claim for "rescission" precisely because, as a remedy, it could not survive a motion to dismiss where all other causes of action were dismissed). Consequently, the Enterprise members' motions to dismiss the "claim of rescission" fail.

Skyline Market's rescission allegations do no more than provide notice of rescission and seek restoration of benefits provided to Outlaw Laboratory under the Settlement Agreement. (ECF No. 114 at ¶¶ 96–99.) The Court finds it unnecessary at this time to address the substance of the Parties' dispute as to the scope of a rescission remedy.[4] Consequently, the motion to dismiss the rescission claim under Rule 12(b)(6) is denied.

E. The *Noerr-Pennington* Doctrine.

The Court is also asked to assess whether the Enterprise members' alleged conduct is protected from suit by the *Noerr-Pennington* doctrine. "Under the *Noerr–Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). The *Noerr–Pennington* doctrine extends to sending demand letters, *id.* at 932–33, unless the letters are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.* at 938 (quoting *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)). The sham litigation exception applies where (1) the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) "the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.* ("*Pre II*"), 508 U.S. 49, 60–61 (1993).

***13** For the following reasons, and in line with the Court's prior rulings on the *Noerr-Pennington* doctrine, the Court finds that the SACC adequately pleads both elements of the sham litigation exception.

1. The Objective Prong of *Noerr-Pennington*.

Here, the Enterprise members offer two arguments for the Court to reconsider its prior ruling that the subject demand letters alleged sham litigation in threatening to bring objectively baseless RICO lawsuits against the Stores. (*See* ECF No. 56 at 7–19 (order denying a motion to dismiss the FACC)). First, the Tauler Smith argues that there was probable cause to threaten a RICO suit because, contrary to the Court's prior rulings, Outlaw's alleged harm could have been proximately caused by the Stores' alleged misconduct. (ECF No. 143-1 at 27–29; ECF No. 164 at 11–12). Second, Michael Wear and Shawn Lynch argue that the demand letters cannot be said to threaten sham litigation in light of a recent default judgment entered by the District Court of Michigan. (ECF No. 153-1 at 30–31; ECF No. 167 at 11–12.)

In light of the applicable law and the Court's own rulings in this matter, the Court finds that the Enterprise members' arguments fail for the subsequent reasons.

a. RICO Proximate Cause.

Among other elements, a successful claim for RICO requires that the subject enterprise's conduct "must be [ ] the proximate cause of harm to the victim." *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496–97 (1985)). In denying Outlaw's motion to dismiss the FACC, the Court found the RICO claim in the demand letters "legally untenable" as there was no probable cause to contend Outlaw was proximately harmed by the Stores' alleged scheme, in light of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). (ECF No. 56 at 14); *see PRE II*, 508 U.S. at 62 ("The existence of probable cause to institute legal proceedings ... precludes a finding that an antitrust defendant has engaged in sham litigation.")

Citing to *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), Tauler Smith now asserts that it "would have been able to establish proximate cause in asserting RICO claims on behalf of its client ... because Outlaw Laboratory LP directly competes in the same natural male enhancement industry" as the Stores. (ECF No. 143-1 at 29.) Tauler Smith argues, moreover, that the Stores refutation of this argument equates "a court disagreeing with a legal theory with that theory lacking probable cause." (ECF No. 164 at 11.) On these points, Tauler Smith is incorrect. The RICO suit threatened in the demand letters objectively lacks any basis for proximate cause pursuant to *Anza*, *Bridge*, and the related precedents.

In *Bridge*, the Supreme Court addressed a RICO suit alleging that defendants had obtained a disproportionate share of liens in a tax sale by using agents to place concurrent, winning bids, with the knowledge that the county awarded winning bids on a rotational basis, and in violation of the tax sale's rules. *Bridge*, 553 U.S. at 642–44. The Court concluded that, in order to allege a RICO violation, plaintiffs did not need to show they relied on the defendants' misrepresentations to the auctioneer that they had complied with the single-bidder rule. *Id.* at 661 ("For the foregoing reasons, we hold that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations."). The *Bridge* Court, however, only attributed proximate harm in this "zero-sum" scenario because, each time the fraud was perpetrated, a legitimate bidder like the plaintiffs was "necessarily passed over," and, moreover, the losing bidders were "the *only* parties injured by [defendants'] misrepresentation." *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 14–15 (2010) (quotation omitted) (referring to *Bridge*); *see Bridge*, 553 U.S. at 658 ("And here, unlike in *Holmes* and *Anza*, there are no independent factors that account for respondents' injury, there is no risk there are no independent factors that account for [the party's] injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue.")

***14** *Bridge* does not support a colorable argument that "Tauler Smith LLP would have been able to establish proximate cause in asserting RICO claims on behalf of its client." (ECF No. 143-1 at 29.) First, a loss to Outlaw's sales is not "necessarily" the result of the Stores' sales. *See Hemi Grp., LLC*, 559 U.S. 1 at 14. The "natural male enhancement industry" is not zero-sum in nature, *see id.*, and there are a number of "independent factors" that could explain Outlaw's loss of revenue (e.g., the quality, availability, or brand recognition of Outlaw's products), even if that loss were concurrent with an increase in the Stores' sales. *Bridge*, 553 U.S. at 658; *see also JST Distribution, LLC v. CNV.com, Inc.*, No. CV-17-6264-PSG, 2018 WL 6113092, at *8 (C.D. Cal. Mar. 7, 2018) (finding no proximate RICO injury where a loss of sales could have been explained

by "some other factor, such as price, productive effectiveness, familiarity with the seller, or purchasing habits of customers"). Also, in contrast to *Bridge*, Outlaw would certainly not be the "*only* party" injured by the sale of products containing illegal substances.

Likewise, under *Anza*, it seems exceedingly clear that the amorphous harm alleged by Outlaw is too "attenuated" to be proximately caused by Stores' alleged conduct. *Anza*, 547 U.S. at 459–60. In *Anza*, the Court found that a defendant's alleged RICO scheme to not charge sales tax on steel and then to file false tax returns reflecting diminished sales, did not proximately cause harm to the plaintiff competitor vis-à-vis defendants' lower prices. *Id.* at 459–60. Here, the draft RICO complaint attached to the demand letters likewise alleges a distant harm resulting from lost sales and participation in the same industry. (ECF No. 114-1 at ¶ 45) ("[Outlaw] has been injured ... [by] the massive diversion of sales to [the Stores], which sell product directly in competition with Plaintiff's products ..."). In addition, as in *Anza*, the Court recognizes "the speculative nature of the proceedings that would follow" if Outlaw's alleged RICO suit could establish proximate cause merely based on being competitors in the same or similar industry, as Tauler Smith now suggests. (ECF No. 143-1 at 29); *see Anza*, 547 U.S. at 459–60 (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 269 (1992)) ("A court considering the claim would need to begin by calculating the portion of [defendant's] price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of [plaintiff's] lost sales attributable to the relevant part of the price drop. The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.")

Consequently, Tauler Smith's "theory" as to proximate cause gains no traction from these cases and thus the threatened RICO suit is objectively baseless.

b. Default Judgments.

Michael Wear and Shawn Lynch also "respectfully request that the Court reconsider its prior ruling on the *Noerr–Pennington* doctrine (ECF 56) and enter a dismissal order in" light of a recent default judgment in Outlaw's favor, entered on October 30, 2019 in the Eastern District of Michigan, Southern Division. (ECF No. 153-1 at 30–31); *see PRE II*, 508 U.S. at 58 (a successful lawsuit generally "cannot be characterized as a sham"). The Stores offer two responses. First, they argue that a default judgment says nothing as to whether the threatened RICO suit is a sham because a default judgment is, by definition, "uncontested." (ECF No. 156 at 15.) Second, the Stores argue that the Enterprise members' pre-litigation conduct evinces an effort to defraud that cannot be "immunize[d]" by *Noerr–Pennington*, even if Outlaw ultimately wins some lawsuits when its defendants "fail to show up to defend themselves." (*Id.* at 15–16.) In reply, the Enterprise members contend that the Stores' response ignores the facts that, even absent a defense, the District Court "considered Outlaw's evidence of damages, found it persuasive, and rendered a significant judgment." (ECF No. 167 at 11–12.)

***15** The Court finds that the Stores are correct here. Though it appears the Ninth Circuit has not expressly decided this issue, and the Parties cite to no case addressing whether the entry of a default judgment precludes a finding that a claim is baseless within the meaning of *Noerr–Pennington*, at least one court, the District Court of Massachusetts, has addressed the issue. *See California Ass'n of Realtors, Inc. v. PDFfiller, Inc.* ("*CAR*"), No. CV-16-11021-IT, 2018 WL 1403330, at *15 (D. Mass. Mar. 2, 2018), *report and recommendation adopted*, No. 16-CV-11021-IT, 2018 WL 1399296 (D. Mass. Mar. 19, 2018). There, the court found counterclaimants' allegations that the plaintiffs initiated baseless lawsuits as an anticompetitive weapon satisfied both prongs of the sham litigation test, even though a number of cases brought by the plaintiffs in California had already "resulted in default judgments for failure to appear ..." *CAR*, 2018 WL 1403330, at *15. Taking judicial notice of those cases, the court pointed out that "none of the cases resulted in a judicial decision on the merits." *Id.*

Notwithstanding Defendants' arguments that the District Court of Michigan had to review Outlaw's requested damages in issuing its October 30, 2019 default judgment, the Court adopts the reasoning of *CAR* and finds that it comports with *PRE II*. *PRE II* approvingly cites to two cases, *Allied Tube* and *Vendo*, in stating that "a successful 'effort to influence governmental action ... certainly cannot be characterized as a sham.' " *See PRE II*, 508 U.S. at 58 (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988); *Vendo Co. v. Lektro–Vend Corp.*, 433 U.S. 623, 645 (1977)). Both matters addressed actions unlike an uncontested, default judgment. *See Allied Tube*, 486 U.S. at 502 (finding that petitioner's efforts to influence a private association's nationally-recognized product code were ineligible for *Noerr-Pennington* protection, but

that, if such conduct were eligible as "incidental to a valid effort to influence governmental action," then it would not be a sham "given the actual adoption of the 1981 Code into a number of statutes and local ordinances"); *Vendo*, 433 U.S. at 645 (addressing the "protracted litigation [of a] state-court action, [in which] the Illinois Supreme Court affirmed a judgment in petitioner's favor in an amount exceeding $7 million.") And, as recently noted by a sister court in the Ninth Circuit, a decision "on the merits" precludes a finding of baselessness. *See Keys v. Pearson Affiliated, Inc.*, No. CV-12-5244-PA, 2013 WL 12205581, at *5 (C.D. Cal. May 14, 2013) (finding that the *Noerr-Pennington* doctrine shielded a landlord and his attorneys from various claims by a tenant, including a RICO claim, on the basis that the "underlying unlawful detainer action was successful on the merits in state court").

In light of the applicable law on this issue, and the Parties' arguments, the Court finds that, despite the default judgment cited by Michael Wear and Shawn Lynch, the RICO suits threatened in the demand letters were "objectively baseless in the sense that no reasonable litigant could realistically expect success *on the merits*." *PRE II*, 508 U.S. at 60 (1993) (emphasis added).

2. The Subjective Prong of *Noerr-Penningnton*.

In addition to demonstrating baselessness, the Stores must also show that the subject litigation is "an attempt to interfere directly with the business relationships of a competitor" when invoking the sham litigation exception to the *Noerr-Pennington* doctrine. *PRE II*, 508 U.S. at 60–61; *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998) ("First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships.") (citation omitted). Here, Tauler Smith contends that the Stores "cannot establish the subjective prong of the sham-litigation exception because Tauler Smith LLP is not a competitor of stores that sell male enhancement supplements." (ECF No. 143-1 at 30–31; ECF No. 164 at 12–13.) The Stores argue that (1) the *Noerr-Pennington* doctrine nonetheless applies to this case because the "competitor" requirement arises from a different context and (2) that Tauler Smith acted as a competitor in generating the scheme, creating "TriSteel," and dispatching investigators in connection with the scheme. (ECF No. 158 at 16.)

***16** The Court finds the Stores are correct for various reasons. First, whether Tauler Smith is strictly a "direct competitor" to the Stores misses the point of the subjective prong of the sham litigation test. This prong encompasses situations in which people "use [ ] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *PRE II*, 508 U.S. at 61 (quoting recognition *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991)); *see also Sosa*, 437 F.3d at 938 ("To establish that a petition to the court is a sham, the party seeking to impose liability must establish both that the legal claim is objectively baseless and that the suit was brought for an anticompetitive purpose."). And, the Court has already twice held that the Enterprise's scheme is adequately pled with respect to that test because it is predicated on an anticompetitive purpose. (*See* ECF No. 85 at 11–12; ECF No. 56 at 17.)

The allegations of the SACC satisfy that same threshold with respect to Tauler Smith by alleging, in detail, the firm's involvement in the anti-competitive conduct central to the scheme, including that Tauler Smith (1) dispatched investigators to find targets for the scheme, (2) at times acted without the direction of Outlaw in defending the demand letters, (3) collaborated with Shawn Lynch and Michael Wear to create "TriSteel" products, (4) designed the "fraudulent statements" in the demand letters, (5) drafted the threatened RICO complaint which the Stores allege falsely claimed to sell "TriSteel" in storefronts around the United States, (6) settled cases on behalf of the Enterprise, (7) sent demand letters to stores in states whether its attorneys are not admitted to practice, and (8) received and retained all proceeds generated by the scheme. (ECF No. 114 at ¶¶ 68–71.) Such conduct, if true, would at a minimum "interfere[ ] with [the Stores'] business by, for example, sapping their financial resources or distracting their attention." *See Freeman v. Lasky, Haas & Choler*, 410 F.3d 1180, 1185 (9th Cir. 2005). Such conduct, moreover, is directly attributed to Tauler Smith in the SACC.

In addition, as an independent reason, the Court sees no reason for distinguishing Tauler Smith from the Enterprise members for the purposes of this inquiry, and thus treats the *Noerr-Pennington* doctrine as applicable to all third-party defendants to the Stores' counterclaims. Afterall, Tauler Smith is now a third-party defendant to the Stores' counterclaims and alleged to be part of the association-in-fact Enterprise selling TriSteel. (ECF Nos. 113, 114.) And, if applied, the *Noerr-Pennington* doctrine would immunize the litigation conduct of the enterprise – not just one member. *See Freeman v. Lasky, Haas &*

Choler, 410 F.3d 1180, 1186 (9th Cir. 2005) (affirming a district court's application of *Noerr–Pennington* to a law firm's defense of their client, and noting that the doctrine extends to the defendants generally, including "their employees, law firms, and lawyers, as their agents in that litigation").

Consequently, the SACC adequately alleges that Tauler Smith, as a member of the Enterprise, "use[d] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon" through its alleged conduct, and thus evidently intended to "interfere directly with the business relationships of a competitor" to the Enterprise. *PRE II*, 508 U.S. at 60–61.

III. THE ANTI-SLAPP MOTION

Lastly, the Court turns to Tauler Smith's anti-SLAPP motion. In light of California's laws and jurisprudence on rescission, as well as the Parties' briefing, the Court finds that a suit to enforce a party's unilateral contract rescission is not a "cause of action" within the meaning of the Anti-SLAPP statute.

A. Legal Standard

"California passed its Anti-SLAPP statute in 1992 to address a spike in lawsuits aimed at chilling the exercise of the rights to free speech and to petition for redress of grievances." *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 764 (9th Cir. 2017) (citing Cal. Civ. Proc. Code § 425.16(a)). "SLAPP" stands for strategic lawsuits against public participation. *See Batzel v. Smith*, 333 F.3d 1018, 1023–24 (9th Cir. 2003). As a result, section 425.16 has come to be known as the "Anti-SLAPP statute." *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042 (1997).

***17** The Anti-SLAPP statute provides that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

California courts employ a two-part inquiry for assessing anti-SLAPP motions. *See Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, 110 Cal. App. 4th 26, 31 (2003). At step one of the anti-SLAPP analysis, "the moving defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's constitutional right to free speech." *Makaeff v. Trump Univ.*, LLC, 715 F.3d 254, 261 (9th Cir. 2013). At step two, if showing has been made, the burden shifts to the plaintiff "to establish a reasonable probability that it will prevail on its claim[s]." *Id.*

B. Applicability to Remedy of Rescission

Consistent with its prior ruling on November 27, 2018, the Court again finds that the anti-SLAPP statute is inapplicable here because rescission is a remedy, not a cause of action. (*See* ECF No. 31) (published as *In re Outlaw Labs., LP Litig.*, 352 F. Supp. 3d 992, 1010–12 (S.D. Cal. 2018)).

Section 425.16 applies only to "causes of action." Cal. Civ. Proc. Code § 425.16(b)(1) (stating that "[a] cause of action

against a person ... shall be subject to a special motion to strike"). For the purposes of section 425.16, "[a] cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty." *Marlin v. AIMCO Venezia, LLC*, 154 Cal. App. 4th 154, 162 (2007) (citations and quotation marks omitted). Tauler Smith makes no effort to explain how the remedy of rescission qualifies as a cause of action under the *Marlin* test. The Court finds that Tauler Smith's failure to identify a primary right and corresponding duty relating to rescission supports the conclusion that rescission does not meet the definition of a "cause of action." *In re Outlaw Labs., LP Litig.*, 352 F. Supp. 3d 992, 1010 (S.D. Cal. 2018); *see Wong v. Jing*, 189 Cal. App. 4th 1354, 1360 n.2 (2010) (declining to apply § 425.16(b)(1) to a request for specific performance / injunctive relief); *Dep't of Fair Employment & Hous. v. 1105 Alta Loma Rd. Apartments, LLC*, 154 Cal. App. 4th 1273, 1281 n.3 (2007) ("However, damages are remedies, not causes of action or claims. Accordingly, the statute was inapplicable for Alta Loma's purpose.").

Under California law, rescission does not fall within the ambit of the anti-SLAPP statute. As the California courts have repeatedly held, "[r]escission is not a cause of action; it is a remedy."[5] *Nakash v. Superior Ct.*, 196 Cal. App. 3d 59, 70 (1987); *see also Hailey v. California Physicians' Serv.*, 158 Cal. App. 4th 452, 468 (2007), *as modified on denial of reh'g* (Jan. 22, 2008) (holding that "rescission ... is an equitable remedy"). Indeed, a court "does not rescind contracts but only affords relief based on a party's rescission." *Wong v. Stoler*, 237 Cal. App. 4th 1375, 1385–86 (2005), *as modified on denial of reh'g* (June 23, 2015).

***18** Thus, the mere fact that rescission is inartfully pled as a "claim" or "cause of action," *see, e.g.*, *Guan v. Hu*, 228 Cal. Rptr. 3d 169, 176–77 (Ct. App. 2018), *as modified* (Feb. 7, 2018), *review denied and ordered not to be officially published* (Mar. 28, 2018) (repeatedly referring to the rescission as a "cause of action" but clarifying that, as a legal matter, rescission is a remedy), or that cases describe suits to enforce rescission as "actions," *Runyan v. Pac. Air Indus., Inc.*, 2 Cal. 3d 304, 311 (1970), does not transform a claim for rescission into a "cause of action" for the purposes of Section 425.16. Instead, under California pleading principles, "the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called ..." *McDonald v. Filice*, 252 Cal. App. 2d 613, 622 (Ct. App. 1967).

The decision in *Forever 21, Inc.* clarifies this distinction. *Forever 21, Inc. v. Nat'l Stores Inc.*, No. 2:12-CV-10807-ODW, 2014 WL 722030 (C.D. Cal. Feb. 24, 2014). There, "Forever 21 move[d] to dismiss four of Ultimate's counterclaims for breach of contract, unfair competition, rescission, and fraud." *Id.* at *4. Forever 21 likewise filed an anti-SLAPP motion seeking to strike all the counterclaims except one for declaratory relief. *Id.* at *6. Though the counterclaims pled rescission separately, the court reasoned that the rescission was "related to Forever 21's allegedly fraudulent conduct," and thus recognized that "[r]escission is a remedy and not a separate claim." *Id.* at *6 (citing Cal. Civ. Code § 1689(b)). Consequently, in considering the claims' probability of success under the second prong of the two-step framework for an anti-SLAPP motion, the court looked only to the parties' allegations and understanding of fraud. *Id.* at *8. In other words, because rescission was a remedy, the "claim" for rescission rose and fell with the claim for fraud as the Court could not apply the anti-SLAPP framework to it. *Id.* ("Ultimate will not be able to prove its fraud claim and will therefore also have no basis for rescission.").

So too here. Though the Stores separately pled a third "cause of action" for rescission in the SACC, the pleading's plain language demonstrates that it is merely a remedy to the RICO causes that preceded it. The Stores expressly plead as much in stating that they are entitled to rescission because, "at the time they entered the 'Confidential Settlement Agreement and Release,' they did not know that their agreement had been predicated upon a scheme to defraud that was illegal ab initio, as set forth [in the RICO counts]." (ECF No. 114 at ¶ 99.) In addition, the Stores state that they are entitled to rescission because, at "the time Skyline Market signed the agreement, it did so under duress, given that it had been threatened with liability of 'over $100,000 ...' and was then presented with an offer to get out of that jam for a mere $2,800, or 2.8% of the asserted liability." (ECF 114 at ¶ 98.) And, that is precisely the intended effect of the Enterprise's fraudulent scheme as alleged in connection with the RICO counts. (*See, e.g.*, ECF at ¶¶ 3, 4, 56, 59.)

Tauler Smith's arguments in reply are unpersuasive. Tauler Smith asserts that *Nakash* "must be understood in context." (ECF No. 173 at 7.) In its view, *Nakash* stands for the proposition that a "party may seek rescission multiple times (if the facts permit), not that a party may never pursue an independent cause of action for rescission." (*Id.*) While parties sometimes plead rescission as a separate claim, *see, e.g.*, *Forever 21, Inc.*, 2014 WL 722030, at *4, an action brought to enforce a unilateral rescission nonetheless amounts to a remedy, not a cause of action, within the meaning of Section 425.16.

***19** In its reply, Tauler Smith also relies on *Suarez v. Trigg Labs., Inc.*, 3 Cal. App. 5th 118, 125 (Ct. App. 2016), to support its position that "California courts properly dismiss rescission claims pursuant to California's anti-SLAPP statute." (ECF No.

173 at 4.) However, this unremarkable proposition does not relate to the salient issue of whether rescission is a cause of action. It merely recognizes that, in granting an anti-SLAPP motion that challenges a cause of action, accompanying claims for rescission, restitution, specific performance will be dismissed. *See, e.g.*, *Forever 21*, 2014 WL 722030, at *8 ("the Court finds that Ultimate will not be able to prove its fraud claim and will therefore also have no basis for rescission.") Importantly, the *Suarez* court had no occasion to decide whether a rescission claim constituted a "cause of action" for purposes of the Anti-SLAPP statute.

Tauler Smith also reads *Suarez* as holding that rescission was a cause of action in its own right because it did not relate to the original quantum meruit action. (ECF No. 173 at 4.) In doing so, Tauler Smith ignores the fraudulent concealment cause of action that was added to the case and which supports the rescission claim. *See Suarez*, 3 Cal. App. 5th at 121–22 ("Suarez filed this action against Trigg in May 2014, seeking rescission of the settlement agreement in Suarez I based on Trigg's fraudulent concealment of the prospects for sale of the company, and quantum meruit.") And, Tauler Smith does not account for the unique procedural history of *Suarez*, which does not lend itself to the broad statement of law that Tauler Smith infers. (*Id.* at 120–22.)

California case law, moreover, expressly contradicts Tauler Smith's interpretation of the rescission allegations in the SACC. *See Runyan*, 2 Cal. 3d at 318; *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 959 (2005) ("Plaintiff has attempted to plead a separate cause of action for rescission. She is not entitled to that remedy."); *Guan*, 228 Cal. Rptr. 3d at 178 (quoting *Nakash*, 196 Cal. App. 3d at 70) (" 'Rescission,' however, 'is not a cause of action; it is a remedy.' "); *see also Taguinod v. World Sav. Bank, FSB*, 755 F. Supp. 2d 1064, 1072 (C.D. Cal. 2010) ("Rescission is a remedy, not a cause of action.").

Consequently, Tauler Smith's anti-SLAPP motion fails in that the Stores seek rescission, which is a "remedy," and not a cause of action, for the purposes of Section 425.16. *See Nakash*, 196 Cal. App. 3d at 70; *see also Runyan*, 2 Cal. 3d at 311.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Tauler Smith's motion to dismiss, Michael Wear and Shawn Lynch's motion to dismiss, and Tauler Smith's special anti-SLAPP motion. (ECF Nos. 143, 153, 156.)

IT IS SO ORDERED.

All Citations

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Footnotes

1	The instant matter has a lengthy factual and procedural history that need not be recounted here to adjudicate the instant motions. The Court directs the reader to its prior orders for a more background on this matter. (ECF Nos. 28, 32, 56, 85, 113.)
2	The term "SLAPP" stands for "strategic lawsuit against public participation."

3	The enterprise members, in particular Michael Wear and Shawn Lynch, also argue at length that litigation conduct cannot satisfy the "racketeering" element of RICO. (ECF No. 143-1 at 20–24; ECF No. 153-1 at 15–28). And, it appears at first glance, that the threat of litigation is not a predicate act for RICO purposes in the Ninth Circuit. *See First Pac. Bancorp, Inc. v. Bro*, 847 F.2d 542, 547 (9th Cir. 1988) (finding that the threat of shareholder derivative lawsuit did not qualify as a predicate act of extortion for RICO purposes). However, the Stores do not allege an act of extortion as a predicate act and the Court has found that the SACC adequately alleges a pattern of racketeering activity vis-à-vis multiple instances of mail fraud.
4	Rescission is a permissible remedy for civil RICO. *See* 5B John Bordeau et al., *Federal Procedure, Lawyer's Edition* § 10:281 (2020) ("Availability of rescission in RICO actions") (citing *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378 (N.D. Ill. 1984)) ("Generally, even if the relief sought is characterized as equitable rescission, such relief is still available to a private plaintiff under the Racketeer Influenced and Corrupt Organizations Act (RICO)."). Though some courts of the Ninth Circuit have limited the availability of rescission in complex civil RICO actions where rescission would require more than a "simple return of out-of-pocket loss," *see State Comp. Ins. Fund v. Khan*, 2012 WL 12887395, at *4 (C.D. Cal. Dec. 28, 2012) (limiting rescission where the subject agreements were "relatively complex, concerning thousands of liens"); *Volckmann v. Edwards*, 642 F. Supp. 109, 115 (N.D. Cal. 1986) (limiting rescission where the subject agreements "were relatively complex, multi-party transactions"), such does not appear to be the case here.
5	As background, it is edifying to review how the remedy of rescission has evolved under California law. Prior to 1961, a party seeking rescission in California had two options: unilateral rescission or judicial rescission. *Runyan v. Pac. Air Indus., Inc.*, 2 Cal. 3d 304, 311 (1970). The former required a party to unilaterally rescind the agreement and then bring an "action to enforce a rescission," while the later relied upon the court's equitable powers to rescind the contract through an "action to obtain a rescission." *Id.* at 312. Vis-à-vis the latter, parties seeking rescission of a contract used to be able to file an equitable suit stating a cause of action for rescission under California law. *S. Ins. Co. v. Workers' Comp. Appeals Bd.*, 11 Cal. App. 5th 961, 971 (Ct. App. 2017). In 1961, the California legislature made significant statutory changes intended to reduce the "complex duality of rescission procedures by" enacting a single procedure. *Runyan*, 2 Cal. 3d at 312–13. Pursuant to the post-1961 rules, rescission is now to be effected "by notice and [an] offer to restore the consideration." *S. Ins. Co. v. Workers' Comp. Appeals Bd.*, 11 Cal. App. 5th 961, 971 (Ct. App. 2017) (quotation omitted); *see also* 1 Witkin, Summary 11th Contracts § 960 (2019) ("Pursuant to a recommendation of the Law Revision Commission, the equitable action to have a rescission adjudged was abolished in 1961, and the statutes now deal solely with unilateral rescission by notice and offer to restore the consideration.").

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Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

Brenda Jean ANDERSEN-SWIDERSKI, individually, Plaintiff-Appellee,
v.
KAISER PERMANENTE SOUTHERN CALIFORNIA OPTOMETRIC ASSOCIATION, Defendant-Appellant,
and
Does, 1-10; Southern California Permanente Medical Group, a California partnership, Defendants.
Brenda Jean Andersen-Swiderski, individually, Plaintiff-Appellee,
v.
Southern California
Permanente Medical Group, a California partnership, Defendant-Appellant,
and
Kaiser Permanente Southern California Optometric Association; Does, 1-10, Defendants.

No. 19-55235, No. 19-55238
|
Submitted May 5, 2020* Pasadena, California
|
FILED May 11, 2020

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of California, William Q. Hayes, District Judge, Presiding, D.C. No. 3:18-cv-01219-WQH-AGS

Before: M. SMITH, BADE, and BRESS, Circuit Judges.

MEMORANDUM**

***1** Southern California Permanente Medical Group (Kaiser) and Kaiser Permanente Association of Southern California Optometrists (KPASCO) (collectively, Appellants) appeal the district court's grant of summary judgment in favor of Brenda Jean Andersen-Swiderski (Dr. Andersen) on her "hybrid" claim under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of a collective bargaining agreement by Kaiser and concomitant breach of the duty of fair representation by KPASCO. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). We have jurisdiction under 28 U.S.C. § 1291. Although we agree with the district court that the statute of limitations was tolled and that Kaiser breached the collective bargaining agreement, we vacate the judgment and remand for further proceedings because genuine disputes of material fact preclude summary judgment as to whether KPASCO breached its duty of fair representation.[1] *See, e.g.*, *Bliesner v. Commc'n Workers of Am.*, 464 F.3d 910, 913 (9th Cir. 2006) ("In order to prevail in [a hybrid § 301] suit, the plaintiff must show that the union and the employer have both breached their respective duties.").

1. We agree with the district court that the statute of limitations was tolled by Dr. Andersen's "good faith attempts ... to resolve [her] claim through grievance procedures." *Galindo v. Stoody Co.*, 793 F.2d 1502, 1510 (9th Cir. 1986). The delay was "only a few months," *id.* at 1510 n.4, and Kaiser handled (and ultimately denied) Dr. Andersen's claim as a formal Step 1 grievance. Appellants cite no evidence indicating that Dr. Andersen pursued non-judicial resolution of her dispute in bad faith, nor that the non-judicial grievance procedures she followed could not have resulted in the relief she sought. *See id.* at 1510 & n.5.

***2** 2. On de novo review, we agree with the district court that the collective bargaining agreement unambiguously entitled Dr. Andersen to a salary continuance benefit of 50% of her base salary regardless of any other benefits she received through state disability insurance or otherwise. *See Westinghouse Hanford Co. v. Hanford Atomic Metal Trades Council*, 940 F.2d 513, 516 (9th Cir. 1991) (describing standard of review). Under the local collective bargaining agreement, both Short-Term Disability Insurance and Long-Term Disability "provide[ ] at least" 50% of base salary, or "up to" 60% of base salary if "combined" or "integrated" with other benefits. By contrast, Salary Continuance "bridge[s] the Optometrist's income with a total of 50%" of base salary. Applying "ordinary principles of contract law," it is evident that the drafters knew how to expressly require integration with state benefits and conspicuously did not do so in the Salary Continuance provision. *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 430, 135 S.Ct. 926, 190 L.Ed.2d 809 (2015); *see* Cal. Civ. Code §§ 1638–1639.

Appellants offer no reasonable alternative interpretation of the Salary Continuance provision. Appellants argue that the term "total" signifies that an employee on Salary Continuance should receive a sum total of 50% of base salary when Kaiser's payment is added to state benefits. However, the term cannot support the weight that Appellants place on it when compared to the much more express language regarding integration used in the adjacent provisions. Appellants argue that the term "bridge" signifies that Salary Continuance is meant to provide the same benefits as Short-Term Disability Insurance and/or Long-Term Disability. But these benefits provide up to 60% of base salary when combined with state benefits, which is plainly not the same as the Salary Continuance benefit's total of 50%, with or without integration. Thus, the term "bridge" cannot support the weight Appellants place on it either.

We reject Appellants' alternative argument that the national agreement supersedes even if the local agreement provides the better benefit. The national agreement supersedes unless the local agreement "contain[s] explicit terms which provide a superior wage, benefit or condition." Appellants argue that at best the local Salary Continuance provision is "silent" as to integration. However, the local provision clearly provides for a total of 50% of base salary regardless of the optometrist's receipt of any state benefits. Thus, it "explicit[ly]" provides "a superior wage, benefit or condition."

Appellants' extrinsic evidence of past practice does not alter our conclusion that the collective bargaining agreement is not reasonably susceptible to the interpretations offered by Appellants. *See Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641, 645 (1968).

While we agree with the district court that Kaiser breached the collective bargaining agreement, we note that this does not resolve Dr. Andersen's claim against Kaiser, which is "inextricably interdependent" with her claim against KPASCO. *DelCostello*, 462 U.S. at 164–65, 103 S.Ct. 2281 (quoting *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 66, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring in the judgment)).

3. On de novo review, we conclude that Appellants have shown that a genuine issue of material fact precludes summary judgment on Dr. Andersen's claim that KPASCO breached its duty of fair representation. *See Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (describing standard of review). In the absence of discrimination or bad faith, neither of which Dr. Andersen alleges, a union breaches its duty of fair representation only when its actions are "so far outside a wide range of reasonableness that [they are] wholly irrational or arbitrary." *Id.* at 879 (alteration in original) (quoting *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991)). "[S]o long as a union exercises its judgment, no matter how mistakenly, it will not be deemed to be wholly irrational." *Id.* (citing *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998); *O'Neill*, 499 U.S. at 78, 111 S.Ct. 1127). However, "the 'merits of the grievance' are 'relevant to the sufficiency of the union's representation.' " *Rollins v. Cmty. Hosp. of San Bernardino*, 839 F.3d 1181, 1187 (9th Cir. 2016) (quoting *Gregg v. Chauffeurs, Teamsters & Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir. 1983)). "[W]hen a grievance is 'important and meritorious' a union must provide a 'more substantial [ ] reason' for abandoning it." *Id.* (alteration in original) (quoting *Gregg*, 699 F.2d at 1016).

***3** Although we affirm the district court's finding that the collective bargaining agreement is unambiguous, we do not think that this is enough, on its own, to show as a matter of law that the union failed to exercise judgment. Construing the facts in KPASCO's favor, a reasonable factfinder could conclude that KPASCO did not altogether "fail[ ] to research the [collective bargaining agreement]," *Peters v. Burlington N. R.R. Co.*, 931 F.2d 534, 541 (9th Cir. 1990), *as amended on denial of reh'g* (Apr. 23, 1991), or decline to pursue Dr. Andersen's grievance on a "wholly irrational or arbitrary" basis, *Beck*, 506 F.3d at 880. KPASCO introduced evidence that representatives "reviewed" the local as well as the national agreement. KPASCO introduced evidence suggesting that representatives contemporaneously concluded that the national agreement controlled because the local agreement was silent—an argument we reject but nevertheless do not find "wholly irrational." *Beck*, 506

F.3d at 879. KPASCO additionally introduced evidence that its representatives spoke with multiple contract specialists, considered past practice, and consulted a summary of benefits, all of which could potentially support a finding that KPASCO exercised the requisite level of diligence. On this record, we cannot say as a matter of law that KPASCO's actions breached its duty of fair representation.

VACATED AND REMANDED. The parties shall each bear their own costs on appeal.

All Citations

--- Fed.Appx. ----, 2020 WL 2316622

Footnotes

*	The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).
**	This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
1	Although we vacate the grant of summary judgment, we address the propriety of the district court's rulings that the statute of limitations was tolled and that Kaiser breached the collective bargaining agreement "in case the same issues arise on remand." *United States v. Mancuso*, 718 F.3d 780, 796 (9th Cir. 2013).

2020 WL 614653
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Elena KOLOVA, et al., Plaintiffs,
v.
ALLSTATE INSURANCE COMPANY, et al., Defendants.

CASE NO. C19-1730JLR
|
Signed 02/10/2020

Synopsis
Background: Insured condominium owners brought state court action against insurer alleging claims for bad faith, breach of contract, and for violations of Washington's Consumer Protection Act and Insurance Fair Conduct Act. Following removal,

insureds filed motion for remand and for award of attorneys' fees and costs.

Holdings: The District Court, James L. Robart, Senior District Judge, held that:

insureds did not act in bad faith by joining non-diverse defendants, and

insurer knew or should have known about the relevant one-year bar to removal for cases based on diversity jurisdiction when it removed action more than one year after it was brought.

Motions granted.

Procedural Posture(s): Motion for Remand; Motion for Costs; Motion for Attorney's Fees.

Attorneys and Law Firms

Dan W. Bridges, McGaughey Bridges Dunlap, PLLC, Seattle, WA, for Plaintiffs.

Jeremy Muth, Rory W. Leid, III, Cole Wathen Leid Hall PC, Seattle, WA, for Defendants.

ORDER GRANTING MOTION TO REMAND AND AWARDING ATTORNEYS' FEES AND COSTS

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

***1** Before the court is Plaintiffs Elena Kolova, Benjamin Risha, and Riza Khanlari's (collectively, "Plaintiffs") motion to remand this case to King County Superior Court. (MTR (Dkt. # 4).) Defendant Allstate Insurance Company ("Allstate") opposes the motion. (Resp. (Dkt. # 11).) Plaintiffs also seek an award of attorneys' fees and costs incurred as a result of Allstate's removal. (*See* MTR at 1.) The court has considered Plaintiffs' motion, all submissions filed in support of and opposition to the motion, the relevant portions of the record, and the applicable law. Being fully advised,[1] the court GRANTS Plaintiffs' motion, REMANDS this case to state court, and GRANTS Plaintiffs' motion for costs and fees.

II. BACKGROUND

This is an insurance case in which Plaintiffs, condominium owners with properties in the same complex, assert bad faith and breach of contract claims in King County Superior Court against their insurer, Allstate, as well as claims for violations of Washington's Consumer Protection Act, RCW ch. 19.86, and Insurance Fair Conduct Act, RCW 48.30.015. (*See* Compl. (Dkt. # 1-2) ¶¶ 1.1-3.3.) Plaintiffs filed their initial complaint in April 2018. (*See id.*) As part of the same action, Plaintiffs

also sued Bryon Dill, an Allstate agent who handled at least one of Plaintiffs' claims; Mr. Dill's wife; and Jane and John Does 1-10 ("Doe Defendants").[2] (*Id.* ¶¶ 1.3-2.1.)

Allstate, a citizen of Delaware and Illinois, previously removed the matter based on diversity jurisdiction, despite Mr. Dill's shared Washington citizenship with Plaintiffs. *Kolova v. Allstate Ins. Co.*, No. C18-1066JCC, 2018 WL 5619052, at *1 (W.D. Wash. Oct. 30, 2018) ("*Kolova I*"). In its first notice of removal, Allstate argued that the case should be removed because Mr. Dill and his wife were not necessary and indispensable parties under Federal Rules of Civil Procedure 19 and 21. *Id.*; *see* Fed. R. Civ. P. 19, 21. Plaintiffs, in turn, moved to remand the case, and the court granted that motion on October 30, 2018. *Kolova I*, 2018 WL 5619052, at *3. The *Kolova I* court rejected Allstate's argument that Rules 19 and 21 were applicable to the court's jurisdictional analysis in considering Plaintiffs' motion to remand. *Id.* Instead, the court held that its analysis was governed by the doctrine of fraudulent joinder. *Id.* The court reasoned that "[t]o argue that the Dill[s] ... were fraudulently joined would be untenable in light of *Keodalah* [*v. Allstate Ins. Co.*, 3 Wash.App.2d 31, 413 P.3d 1059, 1063 (2018), *rev'd*, 194 Wash.2d 339, 449 P.3d 1040 (2019)]," which at the time provided a separate cause of action against the insurance adjuster, who in this case was Mr. Dill. *See Kolova I*, 2018 WL 5619052, at *2.

***2** The Washington Supreme Court reversed *Keodalah* in October 2019, one year after this court's first decision to remand this case, holding that insureds do not have a separate cause of action against an insurance adjuster for bad faith. *See Keodalah*, 449 P.3d at 1046. Given the change in law, Plaintiffs and Allstate stipulated to the dismissal of Mr. Dill and his wife on October 22, 2019. (*See* Stip. (Dkt. # 1-5); MTR at 2.) Once Mr. Dill was no longer a party, Allstate removed the case for a second time based on diversity jurisdiction, on October 25, 2019. (*See* Not. of Removal (Dkt. # 1) at 1, 4.)

Plaintiffs' counsel emailed Allstate's counsel to: (1) advise Allstate that in the absence of bad faith on the part of a plaintiff, 28 U.S.C. § 1446(c) bars removal more than one year after an action commences; and (2) request that Allstate take steps to withdraw its second notice of removal. (1st Bridges Decl. ¶ 1, Ex. 2 (Dkt. # 5) at 1.) After Allstate refused to do so, Plaintiffs filed the present motion to remand and included a request for attorneys' fees and costs under 28 U.S.C. § 1447(c).[3] (*See* MTR.) In response, Allstate argues that Plaintiffs acted in bad faith when they named Mr. Dill as a party, and therefore, Allstate's removal falls under the bad faith exception found in 28 U.S.C. § 1446(c)(1). (*See* Resp. at 1, 4.)

III. ANALYSIS

The court first considers Plaintiffs' motion to remand, before turning to Plaintiffs' request for attorneys' fees and costs.

A. Legal Standards

"A civil case commenced in state court may, as a general matter, be removed by the defendant to federal district court, if the case could have been brought there originally." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005); *see* 28 U.S.C. § 1441(a). One such basis for removal is diversity jurisdiction, which exists if the suit is brought between citizens of different states and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a)(1). If a case is not initially removable, the defendant may file a notice of removal within 30 days of receiving a copy of an amended pleading or other paper form from which the defendant first ascertains that the case has become removable. 28 U.S.C. § 1446(b)(3). However, a case may not be removed on the basis of diversity jurisdiction more than one year after commencement of the action unless the district court finds that the plaintiff acted in bad faith in order to prevent a defendant from removing the action. 28 U.S.C. § 1446(c)(1).

It is a "longstanding, near-canonical rule that the burden on removal rests with the removing defendant." *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). Furthermore, "[courts] strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941).

B. Motion to Remand

***3** No party disputes that Allstate filed its second notice of removal in this case based on diversity jurisdiction more than one year after Plaintiffs commenced suit in state court. (*Compare* Compl. (filed on April 30, 2018) *with* Not. of Removal (filed on October 25, 2019).) Therefore, unless the bad faith exception applies, Allstate's removal is barred under 28 U.S.C. § 1446(c)(1) by the one-year limitation for removal based on diversity jurisdiction. *See* 28 U.S.C. § 1446(c)(1). Thus, the issue the court must resolve is whether Plaintiffs acted in bad faith by first joining Mr. Dill and his wife.

Although the Ninth Circuit has not defined a standard for district courts to use when evaluating the 28 U.S.C. § 1446(c)(1) bad faith exception, district courts in the Ninth Circuit have stated that "defendants face a high burden to demonstrate that a plaintiff acted in bad faith to prevent removal." *Heacock v. Rolling Frito-Lay Sales, LP*, No. C16-0829JCC, 2016 WL 4009849, at *3 (W.D. Wash. Jul. 27, 2016). Further, district courts apply a "strict standard" and find "bad faith when a plaintiff fail[s] to actively litigate a claim against a defendant *in any capacity.*" *Id.* This standard is consistent with the requirement to strictly construe the removal statute against removal. *Id.*; *see also Gaus*, 980 F.2d at 566. District courts often consider three factors when evaluating bad faith under 28 U.S.C. § 1446(c)(1): "[t]he timing of naming a non-diverse defendant, the timing of dismissal, and the explanation given for that dismissal." *Heacock*, 2016 WL 4009849, at *3.

It is instructive to consider cases in which courts have applied the foregoing standards. For example, "[a] plaintiff who added a non-diverse defendant in response to a defendant's attempt to remove an action, and subsequently dismissed the defendant shortly after the deadline for removal expired, was held to have acted in bad faith." *Id.* (citing *NKD Diversified Enters., Inc. v. First Mercury Ins. Co.*, No. 1:14-cv-00183-AWI-SAB, 2014 WL 1671659, at *4 (E.D. Cal. Apr. 28, 2014)). Other district courts have found bad faith when "plaintiffs failed to take any discovery from a defendant or failed to serve them within the one-year period of limitation." *Id.* (citing *Heller v. American States Ins. Co.*, Case No. CV 15-9771 DMG, 2016 WL 1170891, at *3 (C.D. Cal. Mar. 25, 2016); *Hamilton San Diego Apartments, LP v. RBC Capital Markets, LLC*, No. 14cv01856 WQH, 2014 WL 7175598, at *4 (S.D. Cal. Dec. 11, 2014)). However, this court declined to find bad faith when a plaintiff settled with non-diverse defendants one week after the one-year mark and dismissed them one month later, *see Bishop v. Ride the Ducks Int'l, LLC*, No. C18-1319JCC, 2018 WL 5046050, at *2 (W.D. Wash. Oct. 27, 2018), and when a plaintiff sought additional information about a non-diverse defendant through indirect discovery, and then settled with that defendant and dismissed the defendant from the case, *see Stroman v. State Farm Fire & Cas. Co.*, No. C18-1297RAJ, 2019 WL 1760588, at *2 (W.D. Wash. Apr. 22, 2019). Although courts have found bad faith where a plaintiff dismissed a non-diverse defendant without conducting any discovery, courts consider even "bare minimum" discovery attempts to not amount to bad faith. *Heacock*, 2016 WL 4009849, at *3 (quoting *NKD Diversified Enters., Inc.*, 2014 WL 1671659, at *5).

Based on the three *Heacock* factors, the court does not find bad faith on the part of Plaintiffs. *See Heacock*, 2016 WL 4009849, at *3. Plaintiffs named Mr. Dill and his wife in their initial complaint, arguing that Mr. Dill "failed to exercise good faith in the handling of [at least one Plaintiff's] claim." (*See* Compl. ¶ 2.6.) Plaintiffs then dismissed the Dills nearly six months after the 28 U.S.C. § 1446(c)(1) one-year period of limitation for removal had lapsed. (*See id.*; Stip. at 1.) The timing of these two activities does not indicate that Plaintiffs included the Dills in the action merely to fraudulently defeat diversity jurisdiction. *See Bishop*, 2018 WL 5046050, at *2 (finding no bad faith based on timing of settlement negotiation emails). Furthermore, Plaintiffs' basis for dismissing the Dills was the Washington Supreme Court's reversal of the appellate decision upon which Plaintiffs relied in bringing their suit against Mr. Dill in the first place—a decision that was beyond Plaintiffs' control. (*See* Stip. at 1; MTR at 2); *see also Keodalah*, 449 P.3d at 1046. Not only is this explanation for dismissing the Dills not indicative of the bad faith required under 28 U.S.C. § 1446(c)(1)—it is not indicative of bad faith at all. Indeed, based on the change in law, Plaintiffs were required to dismiss the Dills following the Supreme Court's reversal of the appellate court's decision or risk a Federal Rule of Civil Procedure 11 violation. *See* Fed. R. Civ. P. 11(b)(2) ("By presenting to the court a pleading ... or later advocating for it—an attorney ... certifies that to the best of the person's knowledge, information, and belief ... the claims ... are warranted by existing law....").

***4** Allstate's arguments to the contrary do not persuade the court. Allstate argues that the court should find bad faith as "[n]one of the written discovery issued by Plaintiffs was addressed to the Dills." (*See* Resp. at 5.) Although this appears to be true, Plaintiffs have made at least a "bare minimum" discovery attempt in relation to Mr. Dill by submitting interrogatories for the personal information of "each and every employee of [Allstate] who participated in or otherwise contributed to the handling or adjustment of each and every [of Plaintiffs'] claims." (*See* Disc. Reqs. (Dkt. # 14-1) at 3); *Heacock*, 2016 WL 4009849, at *3. Additionally, this court previously found that Plaintiffs' joinder of the Dills was not fraudulent due to

Plaintiffs' valid claim against the Dills under state law at the time. *See Kolova I*, 2018 WL 5619052, at *2. Finally, although Allstate asserts that "Plaintiffs' Complaint does not make any allegations of misconduct against the Dills" (*see* Resp. at 5), Plaintiffs in fact allege that "[Mr. Dill] failed to exercise good faith in the handling of [the] claim" (*see* Compl. ¶ 2.6). Thus, Allstate fails to meet its high burden in demonstrating bad faith on the part of Plaintiffs.

In summary, the one-year removal limitation of 28 U.S.C. § 1446(c)(1) applies and the statute's bad faith exception does not. Accordingly, the court GRANTS Plaintiffs' motion to remand this case to King County Superior Court.

C. Costs and Fees

Section 1447(c) allows a court to award "just costs and any actual expenses, including attorney fees" incurred due to removal. 28 U.S.C. § 1447(c). "[A]bsent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin*, 546 U.S. at 136, 126 S.Ct. 704. However, the court may award such fees and costs if the attempted removal was objectively unreasonable. *Id.* at 141, 126 S.Ct. 704; *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008). The Ninth Circuit has found removal objectively unreasonable when "[t]he relevant case law clearly foreclosed [the defendant]'s attempted removal." *Houden v. Todd*, 348 F. App'x 221, 223 (9th Cir. 2009) (citing *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999-1000 (9th Cir. 2006)).

In determining whether removal is objectively reasonable, district courts retain discretion to consider whether unusual circumstances warrant a departure from that general rule in a given case. *Id.* at 141, 126 S.Ct. 704. When so departing, the court's reasons should be faithful to the purposes of the awarding fees under 28 U.S.C. § 1447(c). *Martin*, 546 U.S. at 141, 126 S.Ct. 704. Those purposes include Congress' desire to deter removals designed to prolong litigation or to impose costs on an opposing party, while not undermining Congress' basic decision to allow defendants to remove as a general matter when statutory criteria are met. *See id.* at 140, 126 S.Ct. 704.

Here, Allstate contends that removal was proper because it was bad faith for Plaintiffs to include the Dills in the action (*see* Resp. at 5), although such inclusion was proper under Washington law at the time, *see Keodalah*, 413 P.3d at 1063. Allstate makes this argument despite this court's 2018 remand of this case, in which the court held that the Dills were not fraudulently joined parties under Washington law as it existed at that time. *See Kolova I*, 2018 WL 5619052, at *3 ("To argue that the Dill[s] ... were fraudulently joined would be untenable in light of *Keodalah*[, which] ... explicitly grants a cause of action against the insurance adjuster in this case...."). Finally, Plaintiffs notified Allstate of the one-year limitation at the time of Allstate's second notice of removal and provided Allstate with an opportunity to withdraw the notice. (1st Bridges Decl. ¶ 2, Ex. 2 at 1.) Because the relevant case law, and indeed the court's previous rulings in this very case, foreclosed removal, and Allstate knew or should have known about the relevant one-year bar to removal in 28 U.S.C. § 1446(c)(1) for cases based on diversity jurisdiction, Allstate's second removal of this action was objectively unreasonable. *See Houden*, 348 F. App'x at 223 ("The relevant case law clearly foreclosed [the defendant's] attempted removal; it was thus objectively unreasonable, and the [plaintiffs] could have been awarded costs and fees under 28 U.S.C. § 1447(c)."). Thus, the court GRANTS Plaintiffs' request for attorneys' fees and costs.

IV. CONCLUSION

***5** Based on the foregoing analysis, the court GRANTs Plaintiffs' motion to remand and for an award of attorneys' fees and costs. (Dkt. # 4.) The court ORDERS that:

1. Plaintiffs shall submit a brief not to exceed three (3) pages and a declaration or affidavit detailing the reasonable attorneys' fees and costs they incurred prosecuting their motion to remand no later than seven (7) days from the entry of this order;

2. Allstate may, but is not required to, file a responsive brief not to exceed three (3) pages no later than ten (10) days from the date of this order;

3. Except for the court's determination of reasonable attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c), all further proceedings in this case are REMANDED to the Superior Court for King County, Washington;

4. The Clerk shall send copies of this order to all counsel of record for all parties;

5. Pursuant to 28 U.S.C. § 1447(c), the Clerk shall mail a certified copy of the order of remand to the Clerk for the Superior Court for King County, Washington;

6. The Clerk shall also transmit the record herein to the Clerk of the Court for the Superior Court for King County, Washington;

7. Except for their briefs regarding attorneys' fees and costs, the parties shall file nothing further in this matter, and instead are instructed to seek any further relief to which they are entitled from the courts of the State of Washington, as may be appropriate in due course; and

8. The Clerk shall CLOSE this case.

All Citations

--- F.Supp.3d ----, 2020 WL 614653

Footnotes

1	No party requests oral argument (*see* MTR at 1; Resp. at 1), and the court does not consider oral argument helpful in its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).
2	The court does not consider the citizenship of fictitious "Doe" defendants for purposes of assessing removal based on diversity jurisdiction. *See* 28 U.S.C. § 1441(b)(1); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989).
3	Plaintiffs cite 28 U.S.C. § 1441(c) in support of their request for fees and costs in both their motion and their reply. (*See* MTR at 7; Reply (Dkt. # 13) at 5.) However, 28 U.S.C. § 1441 does not mention cost nor fees. *See* 28 U.S.C. § 1441. Instead, the language Plaintiffs quote in their motion makes it apparent that they intended to rely upon 28 U.S.C. § 1447(c). (*Compare* MTR at 7 ("28 USC 1441(c) provides the removing party may be required to pay 'just costs and any actual expenses, including attorney's fees, incurred as a result of the removal.' ")) *with* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.").

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

Peter ALBERS, Plaintiff,
v.
YARBROUGH WORLD SOLUTIONS, LLC, et al., Defendants.

Case No. 5:19-cv-05896-EJD
|
Signed 05/07/2020

Attorneys and Law Firms

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Jon Paul Webster, Jon Webster Law Group, APC, Concord, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 12

EDWARD J. DAVILA, United States District Judge

***1** Plaintiff Peter Albers brings suit against Defendants Yarbrough World Solutions, LLC ("YWS") and Dally E. Yarbrough alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and of California labor laws. Defendants contend that this Court must dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Having considered the Parties' papers, the Court **GRANTS in part and DENIES in part** Defendants' motion to dismiss.[1]

I. BACKGROUND

A. Factual Background

Plaintiff is a construction worker in California—he is not personally licensed by the California Contractors State License Board to perform construction services in the state of California. Complaint ¶ 21 ("Compl."), Dkt. 1. Defendants operate a "staffing solutions" company, which helps contractors find construction workers for large-scale commercial and government projects in California and across the United States. *Id.* ¶¶ 13, 14. Defendants provide contractors with a site representative and handle the compensation, benefits, and taxes for the construction workers "without the [contractor] having the additional overhead." *Id.* ¶ 14; *see also id.* ¶ 15. Plaintiff worked for Defendants from approximately 2006 until August 6, 2019. *Id.* ¶

21.

Plaintiff alleges that Defendant YWS controlled and directed his construction work. *Id.* ¶ 16. Defendant YWS "negotiates all compensation" with its contractor clients on behalf of its construction workers. *Id.* Defendant YWS requires construction workers to report their hours to YWS through YWS's contractor clients, and Defendant YWS maintains the right to terminate its construction workers if a contractor client determines that a construction worker has failed to perform as promised. *Id.* Defendant YWS makes profit by retaining a portion of the compensation generated by construction workers. *Id.* ¶ 17. The construction workers are not customarily engaged in an independently established trade, occupation, or business and are not required to have any professional licenses or specified experience in the construction industry. *Id.* ¶ 18. Defendant YWS represented to its contractor-clients that construction workers are YWS employees whose tax withholding and conferment of benefits are handled by YWS. *Id.* ¶ 19.

In fact, Defendant YWS allegedly forced its construction workers to sign "independent contractor/exclusion" waivers for the right to benefits, workers compensation, and employee status. *Id.* ¶ 19. Moreover, Defendant YWS did not provide its employees with any benefits or insurance, did not pay YWS's employer's share of state or federal taxes, and did not withhold any state or federal taxes from YWS employees. *Id.* ¶ 20. Defendants withheld these facts from their contractor clients. *Id.*

As a condition of his employment, Defendants required Plaintiff to sign an "Independent Contractor/Exclusion Letter" ("Exclusion Letter") prepared by YWS. *Id.* ¶ 22. This letter stated: (1) Plaintiff "operates as an independent contractor/consultant;" (2) Plaintiff "wishes to be excluded from workers' compensation and client liability;" (3) Defendant YWS "and its clients are not liable for any benefits or damages to [Plaintiff] should an injury occur;" and (4) by signing the letter, Plaintiff "elected to be excluded from any workers' compensation policy." *Id.* As a condition of employment, Plaintiff was required by Defendant YWS to execute a "List and Refer Agreement" ("Employment Agreement"), which designated Plaintiff as a subcontractor who performed services through his own "independently established business and independently of YWS/Y.E.S." *Id.* ¶ 22. This Employment Agreement set forth (1) the terms of Plaintiff's compensation, (2) Plaintiff's performance of services, (3) Plaintiff's non-entitlement to supplies or reimbursement of expenses, (4) Plaintiff's acknowledgment of his performance of services as an independent contractor, (5) Plaintiff's agreement to indemnify YWS against "any form of financial detriment, including attorney's fees, whether alleged or actually incurred" in connection with Plaintiff's performance of services, (6) the operative term of the agreement, and (7) Plaintiff's agreement to keep confidential information about YWS's contractor clients, as well as the nature of Plaintiffs' employment. *Id.* ¶ 24.

***2** Specifically, Plaintiff alleges that, throughout his employment with Defendant YWS, he:

- Consistently worked forty hours per week on construction projects throughout the State of California and the United States under YWS's direction and control;
- Was compensated by YWS to provide construction related services;
- Was terminable at YWS's will;
- Was prevented by YWS from engaging in "other obligations [which] interfere with the timely performance" of YWS work;
- Was required to "provide all of his own insurance for general liability, errors and omissions, casualty, etc., as he deems necessary and appropriate;"
- Was not entitled to any benefits, such as, premium overtime pay, worker's compensation, health plans, retirement plans, disability insurance, vacation pay, sick leave and the like;" and
- Was solely responsible for paying his own social security and income taxes per federal and state law.

Id. ¶ 25. In addition, Plaintiff had a non-compete clause in his Employment Agreement. *See id.* ¶ 28.

On March 15, 2017, Plaintiff was assigned by Defendant YWS to an Army Corps of Engineers construction project at the United States Army Garrison Facility, Presidio of Monterey in Monterey, California ("the Monterey Presidio Project"). *Id.* ¶ 29. CTE Cal, Inc., the subcontractor on the project, used YWS's services to find Plaintiff. *Id.* Pursuant to his compensation agreement, Plaintiff was to be compensated $50.00 per hour for providing services to CTE Cal on the Presidio Project. *Id.* ¶

30. Under CTE Cal's contract, however, Plaintiff was to be compensated $68 per hour. *Id.* ¶ 34. On October 21, 2017, CTE Cal left the Presidio Project following a nonpayment by the general contractor—this terminated CTE's Service Agreement with Defendant YWS. *Id.* ¶ 38. CTE Cal still paid Defendant YWS for services under the CTE Service Agreement and Plaintiff was compensated pursuant to his Employment Agreement. *Id.*

On April 20, 2017, federal litigation ensued regarding various alleged construction defects and nonpayment claims arising from the Monterey Presidio Project. *Id.* ¶ 39. The litigation was between Halbert Construction Company, Inc. (the general contractor on the project), CTE Cal. and McCullough Plumbing, Inc. (another subcontractor). *Id.* McCullough sued Halbert and Halbert filed a third-party complaint against CTE Cal for breach of contract related to alleged construction deficiencies. CTE Cal counterclaimed for nonpayment. *Id.* ¶ 40.

CTE Cal identified Plaintiff as a possible witness. *Id.* ¶ 41. In March 2019, Plaintiff sat for a deposition and as the case neared trial, Plaintiff was advised that CTE Cal intended to subpoena him to testify at trial. *Id.* On May 16, 2019, Plaintiff prepared and executed a declaration, which CTE Cal used for pre-trial motions, that set forth details concerning the nature of Plaintiff's employment at YWS. *Id.* ¶ 42. Plaintiff was subpoenaed by CTE Cal to testify at trial; CTE Cal arranged and paid for Plaintiff's travel accommodations to San Diego. *Id.* ¶ 43. Before the trial, on or around July 12, 2019, Defendant Yarbrough contacted Plaintiff by telephone and advised him that he was prohibited from testifying at the trial and that if he testified, his employment with YWS would be terminated. *Id.* ¶ 44. Plaintiff still flew to San Diego to testify, but ultimately was not called to testify. *Id.* ¶ 45.

***3** On or around August 6, 2019, Defendant Yarbrough demanded reimbursement from Plaintiff for any fees Plaintiff had received from CTE Cal for testifying in the litigation. *Id.* ¶ 46. Plaintiff told Defendant Yarbrough that he had not received any fees or compensation. *Id.* Defendant Yarbrough then informed Plaintiff by telephone that he was terminated from his employment with YWS. *Id.* At the time, Plaintiff was assigned to a construction project at a naval base in Monterey, California. *Id.* Following his termination, he was no longer allowed to access the project. *Id.*

B. Procedural History

On September 20, 2019, Plaintiff filed his Complaint alleging that Defendants violated RICO, 18 U.S.C. § 1962(c) and committed (1) unlawful business practices in violation of California Business & Professions Code 17200, (2) unfair business practices in violation of California Business & Professions Code 17200, (3) wrongful termination in violation of public policy, and (4) wrongful termination in breach of the covenant of good faith and fair dealing. *See generally* Compl. On January 21, 2020, Defendants filed a motion to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6). Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) ("Mot"), Dkt. 12. In this same motion, Defendants filed a request for judicial notice. Defendants' Request for Judicial Notice in Support of Defendants' Motion to Dismiss ("RJN"), Dkt.12-1. On February 4, 2020, Plaintiff filed an opposition. Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss ("Opp."), Dkt. 18. Defendants filed their reply on February 11, 2020. Defendants' Reply Brief in Support of Defendants' Motion to Dismiss ("Reply"), Dkt. 20. Along with their reply brief, Defendants filed a second request for judicial notice. Defendants' Second Request for Judicial Notice in Support of Defendants' Motion to Dismiss ("RJN 2"), Dkt. 19.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (discussing Federal Rule of Civil Procedure 8(a)(2)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The requirement that the court "accept as true" all allegations in the complaint is "inapplicable to legal conclusions." *Id.* It is improper for the court to assume "the [plaintiff] can prove facts that it has not alleged" or that the defendant has violated laws "in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

If there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, the "plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Dismissal can be based on "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Hence, when a claim or portion of a claim is precluded as a matter of law, that claim may be dismissed pursuant to Rule 12(b). *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 975 (9th Cir. 2010) (discussing Rule 12(f) and noting that 12(b)(6), unlike Rule 12(f), provides defendants a mechanism to challenge the legal sufficiency of complaints). However, a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *No. 84 Employer-Teamster Joint Council v. Am. W. Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003).

III. DISCUSSION[2]

***4** Defendants first argue that Plaintiff's RICO claim fails to adequately allege fraud and a pattern of racketeering activity. *See* Mot. at 3–5. Defendants next argue that Plaintiff's state law claims are barred under the federal enclave doctrine. *Id.* at 8. The Court addresses each in turn.

A. RICO Claim

RICO prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of unlawful debt." 18 U.S.C. § 1962(c). A violation of § 1962(c), the section on which Plaintiff relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

"To support the mail and wire fraud allegations, the plaintiffs must plausibly allege 'the existence of a scheme or artifice to defraud or obtain money or property by false pretenses, representations or promises,' and that [defendants] communicated, or caused communications to occur, through the U.S. mail or interstate wires to execute that fraudulent scheme." *George v. Urban Settlement Servs.*, 883 F.3d 1242, 1254 (10th Cir. 2016) (citation omitted). Because Federal Rule of Civil Procedure 9(b) requires a plaintiff to plead mail and wire fraud with particularity, the plaintiff must set forth, with detail, the time, place, and contents of the alleged false representation. *Id.* Defendants argue that Plaintiff has failed to adequately plead the predicate acts of mail and wire fraud. Mot. at 3. Plaintiff alleges that Defendants engaged in the predicate acts of mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343). Compl. ¶¶ 69–70. Defendants argue that the Complaint fails to allege the predicate acts with sufficient particularity. Mot. at 3–4. Defendants also argue that because Plaintiffs' fraud claim rest on misrepresentation of law, it does not amount to actionable fraud. *Id.* at 4 (citing *Miller v. Yokohama Tire Corp.*, 358 F.3d 616 (9th Cir. 2004)).

In *Miller*, the Ninth Circuit held that an employer's misrepresentation of law to its employees does not constitute actionable fraud. 358 F.3d at 621. There, Christopher Miller sued his former employer, Yokohama Tire Corporation, for RICO violations. *Id.* at 618–19. Miller worked for Yokohama from 1990 until 2001. *Id.* at 618. Miller alleged that throughout his eleven years of employment, he was ordered to work many overtime hours for which he was never paid additional compensation. *Id.* He claimed that various Yokohama managers falsely represented to him and other employees that they were not entitled to overtime pay because they were salaried. *Id.* Because Yokohama mailed him and other employees their paychecks or pay stubs twice monthly and their W-2s annually (or sent these items via wire transfers), Miller contended that the scheme to deny overtime pay was furthered through these paycheck-related mailings and wire transfers. *Id.* at 619. Hence, Miller argued that every time the Yokohama managers[3] sent him or other employees a paycheck or W-2, they committed a predicate act of mail or wire fraud and violated RICO (18 U.S.C. § 1962(c)). *Id.* at 619, 620. Miller's theory of fraud, however, was not actionable because the misrepresentation—*i.e.*, that he and his coworkers were not entitled to overtime pay—was a misrepresentation of law. Such misrepresentations are not actionable. *Id.* at 622.

***5** Plaintiff's theory of fraud is that Defendants mischaracterized YWS construction workers' status to clients. In Plaintiff's view, Defendants misled their contractor-clients into believing that YWS construction workers were employees when, in fact, the workers were independent contractors. Opp. at 6. Plaintiff argues that this misrepresentation differs from the misrepresentation analyzed in *Miller* because Defendants did not make the misrepresentations to YWS employees. *Id.* at 5. This is a distinction without a difference. In determining whether or not a misrepresentation is legal or factual, the question is not to *whom* the misrepresentation was made, but rather *what* the contents of the misrepresentation are. *See Miller*, 358 F.3d at 621 ("Statements about domestic law are normally regarded as expressions of opinion which are not actionable in fraud even if they are false."). Hence, the relevant inquiry is—does Plaintiff allege that Defendants made a misrepresentation of fact *or* of law?

Plaintiff alleges that Defendants defrauded contract-clients by misrepresenting the status of YWS construction workers. This is a misrepresentation of law—the allegation focuses on the construction workers' employment status. Indeed, a "statement that an individual is a contractor, vendor, or an employee of a contractor, is a statement of law." *Bernal v. FedEx Ground Package Sys. Inc.*, 2015 WL 4273034, at *3 (C.D. Cal. July 14, 2015) (citing *Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1136 (N.D. Cal. 2009)). As noted, misrepresentations of law cannot form the basis of a fraud claim.[4] *Id.* at 621.

Tronsgard v. FBL Financial Group, Inc. is instructive. 312 F. Supp. 3d 982 (D. Kan. 2018). There, the court held that the plaintiffs' complaint failed to allege facts supporting a RICO predicate act because the alleged fraudulent statements did not involve a misrepresentation of fact. *Id.* at 991 (citing *Miller*, 358 F.3d at 620–21). As in *Miller*, the plaintiffs premised their RICO claims on purported acts of mail and wire fraud involving their employers' alleged misrepresentations about their employment classification. *Id.* The plaintiff argued that factual issues existed as to whether or not the defendants properly classified the plaintiffs as independent contractors. *Id.* at 994. In the context of alleging mail or wire fraud, however, the court merely considers the alleged misrepresentations that the defendant made. *Id.* Hence, after assessing the alleged misrepresentation—*i.e.*, that the plaintiffs were independent contractors—the court determined that the plaintiffs alleged a legal misrepresentation and not a misrepresentation of fact. *Id.*

Likewise, here, Plaintiff's allegation that Defendants misrepresented his and other YWS construction workers' employment status is a misrepresentation of law. The alleged misrepresentation is nearly identical to that of *Miller* and *Tronsgard*—as in those cases, the alleged misrepresentation focuses on misstatements about Plaintiff's employment status. *See* Opp. at 6 ("[Defendants] knowingly carried out a material scheme to defraud its contractor clients by misrepresenting to them the *status* of YWS employees." (emphasis added)). The Complaint alleges that Defendants lied to contractor-clients by stating that YWS construction workers were employees when, in fact, they were independent contractors. As established, this is a legal representation. *See e.g.*, *Tronsgard*, 312 F. Supp. 3d at 994. It appears that, like the plaintiff in *Miller*, Plaintiff is attempting to "transform a California state law wage and hour claim into a federal RICO claim under 18 U.S.C. § 1962(c)." 358 F.3d at 618.

***6** Contrary to Plaintiff's position, *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2009) does not change this analysis. *Bridge* does not disrupt the requirement that a plaintiff must plead a fraudulent misrepresentation of fact to support the predicate act requirement. Rather, *Bridge* only held that a plaintiff need not show reliance. 553 U.S. at 649; *see also Tronsgard*, 312 F. Supp. 3d at 994 ("*Bridge* merely held that a plaintiff need not show reliance; it never held that a federal mail fraud claim does not require the other elements of a common law fraud claim—such as the existence of a material misrepresentation of fact.").

Because Plaintiff's predicate act allegations rest on a misrepresentation of law, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's RICO claim. When dismissing a complaint for failure to state a claim, a court should grant leave to amend "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). It may be possible that Plaintiff could plead facts showing that Defendants misrepresented facts about YWS construction workers' employment status. Accordingly, Plaintiff may file an amended complaint as to his RICO claim no later than **June 26, 2020**.[5]

B. State Law Claims[6]

Defendants next argue that Plaintiff's second through fifth causes of action must be dismissed because they are barred under the federal enclave doctrine. Mot. at 8. While Plaintiff concedes that the Monterey Presidio is a federal enclave, he argues that because the federal government has enacted legislation stating that State wage-and-hour law applies to federal enclaves, his state law causes of action are not barred. *See* Opp. at 13. In the alternative, Plaintiff argues that even if the federal enclave doctrine bars these causes of action, he has plead sufficient facts to show that Defendants did not perpetrate their tortious acts exclusively on federal enclaves.

Under the U.S. Constitution, the United States has the power to acquire land from the states for certain unspecified uses and to exercise exclusive jurisdiction over such lands. These lands are known as "federal enclaves." *Swords to Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005). Article 1, Section 8, Clause 17 grants Congress the power to "exercise exclusive legislation in all cases whatsoever" over all places purchased with the consent of a state "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." *Id.* The power to exercise "exclusive legislation" holds the same meaning as "exclusive jurisdiction." *Id.* (quoting *Surplus Trading Co. v. Cook*, 281 U.S.647, 652 (1930)). Exclusive jurisdiction "assumes the absence of any interference with the exercise of the functions of the Federal Government and ... debar[s] the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory." *Silas Mason Co. v. Tax Comm'n of Wash.*, 302 U.S. 186, 197 (1937); *see also S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946) (noting that exclusive legislative power is "in essence complete sovereignty" because the federal property is immune from state taxation and from "state laws, not adopted directly or impliedly by the United States").

***7** On federal enclaves, in the absence of federal legislation displacing state law, those state laws that existed at the time that the enclave was ceded to the federal government remain in force. *Paul v. United States*, 371 U.S. 245, 268 (1963). Three exceptions exist to this rule: (1) where Congress has, by statute, provided a different rule; (2) where the state explicitly retained the right to legislate over specific matters at the time of cession; and (3) where minor regulatory changes modify laws existing at the time of cession. *United States v. Sharpnack*, 355 U.S. 286, 294–95 (1958). Federal enclaves are thus typically under the exclusive jurisdiction of the United States, meaning the property and activities of individuals and corporations within that territory are also under federal jurisdiction. *See Swords to Plowshares*, 423 F. Supp. 2d at 1034.

The California Legislature ceded the Monterey Presidio to the United States Government in 1897. Mot at 8; *see also* RJN, Ex. A. It is not contested by the Parties and the case law supports that, when California ceded the Presidio to the United States, exclusive jurisdiction over that area was conferred upon the United States. *Standard Oil Co. v. People of State of Cal.*, 291 U.S. 242, 244 (1934). Because the state laws on which Plaintiff relies were enacted *after* the federal government acquired the Monterey Presidio, Plaintiff argues that California law applies on federal enclaves.

Plaintiff cites to 40 U.S.C. § 3172 and 26 U.S.C. § 3305(d) to support his argument that California law applies to the Presidio. Opp. at 13. Neither of these statutes, however, support Plaintiff's argument. These statutes vest California with authority to enforce its labor laws on federal enclaves—neither statute provides for a private right of action. 40 U.S.C. § 3172(a) states that "[t]he *state authority* charged with enforcing and requiring compliance with the state workers' compensation laws ... may apply the laws to all land and premises in the State which the Federal Government owns or holds." (emphasis added). This waiver of jurisdiction however is limited to "the state authority." *See* 40 U.S.C. § 3172(b) ("Limitation on relinquishing jurisdiction. The Government under this section *does not relinquish its jurisdiction for any other purpose.*" (emphasis added)). Likewise, 26 U.S.C. § 3305(d) states that while unemployment compensation law cannot be evaded on federal enclaves, only the "State shall have full jurisdiction and power to enforce the provisions of such law ... as though such place were not owned, held, or possessed by the United States." Thus, neither statute provides for a private cause of action. The statutes only allow for California or its agencies to enforce compliance with worker's compensation laws. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress."). Plaintiff's use of *S. G. Borello & Sons Inc. v. Department of Industrial Relations*, 769 P.3d 399 (Cal. 1989) is thus unpersuasive; that case involved the California Department of Industrial Relations, which is a state authority. Accordingly, Section 3172 and Section 3305(d) are unhelpful to Plaintiff.

In the alternative, Plaintiff argues that even if the federal enclave doctrine applies, it is irrelevant to Plaintiff's Complaint since many of the alleged tortious acts occurred outside of federal enclaves. Opp. at 11. Pursuant to the above analysis, Plaintiff's state-law wage and hour claims that stem from the Monterey Presidio project are barred by the federal enclave doctrine. Likewise, any claims stemming from projects on federal lands are barred. The issue thus becomes whether or not

Plaintiff has plead sufficient facts about non-federal enclave projects to support his wage-and-hour and wrongful termination claims. The Court finds that Plaintiff has.

***8** Plaintiff first contends that the point of the allegations pertaining to the Monterey Presidio Project were to provide context about the severity and scope of Defendants' scheme so as to support the RICO claim. Opp. at 12. Plaintiff maintains that the California Labor Code violations are unrelated to Plaintiff's services at the Presidio of Monterey. The Court agrees. The Complaint alleges that Defendants required him to enter into an illegal agreement accepting his misclassification as an independent contractor and that this violated California Business and Professions Code. *See* Compl. ¶¶ 80–95 (Counts II & III); *see also supra* I.A. (recounting the alleged labor violations). This is an actionable. *See Dynamex Operations W v. Superior Court*, 416 P.3d 1 (Cal. 2018); *see also Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998, 1004 (N.D. Cal. 2016). The "illicit agreement" exists outside of the federal enclave. Indeed, Plaintiff had to enter this agreement regardless of where he performed construction services—the agreement was applied to *all* contracted services (private, state, *or* federal). Plaintiff has pled sufficient facts to show that the agreement applied equally to his non-federal projects. These projects can support Plaintiffs' unfair/unlawful business practices claims.[7]

Plaintiff next argues that the alleged witness tampering, which support his wrongful termination claims (counts four and five), is not barred by the federal enclave doctrine. In Plaintiff's view, because the facts giving rise to these claims occurred outside of the federal enclave and a year after Plaintiff stopped working on the Monterey Presidio project, the federal enclave doctrine does not apply to these claims. Defendants argue that these claims are still barred because the federal enclave doctrine applies even in circumstances where the alleged wrongful conduct occurs off the enclave. Reply at 9. The Court disagrees with Defendants.

Powell v. Tessada & Associates, Inc. is instructive. There, the court held that the federal enclave doctrine still barred the plaintiffs' state law claims even though the decision to fire the plaintiffs was made off the federal enclave. 2005 WL 578103, at *1 (N.D. Cal. 2005). Notably, in *Powell*, the plaintiffs worked *only* on the federal enclave and the decision to fire the plaintiffs was a decision about employment practices *on* the federal enclave. *Id.* at *2. Here, in contrast, Defendants' decision to fire Plaintiff had nothing to do with his work on a federal enclave. To the contrary, Plaintiff alleges that Defendants terminated him to stop him from talking. Hence, the termination decision had nothing to do with "employment practices on the federal enclave." Moreover, unlike the *Powell* plaintiffs, Plaintiff did not work exclusively on a federal enclave. Rather, Plaintiff worked on both commercial and government projects. In other words, he worked generally for Defendant YWS; his work was not exclusively on federal enclaves. Indeed, the decision to terminate Plaintiff prevented Plaintiff from working on *all* YWS projects, regardless of whether such projects were on federal land. Accordingly, Plaintiff's unfair business practice and wrongful termination claims are not barred by the federal enclave doctrine.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED in part and DENIED in part**. Plaintiff may file an amended complaint as to his RICO claim by **June 26, 2020.** *See supra.* Plaintiff may not add new claims or parties without leave of the Court or stipulation by the Parties pursuant to Federal Rule of Civil Procedure 15.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 2218964

Footnotes

1	Pursuant to N.D. Cal. Civ. L.R. 7-1(b), this Court found this motion suitable for consideration without oral argument. *See* Dkt. 23.
2	Defendants request for the Court to take judicial notice of several exhibits. First, Defendants request for the Court to take judicial notice of the history of the Presidio of Monterey. *See* RJN, Ex. A. Second, Defendants request for the Court to take judicial notice of various public court documents. *See* RJN 2, Exs. A, 1, B, C. Federal Rule of Evidence 201(b) permits a court to take judicial notice of an adjudicative fact "not subject to reasonable dispute," that is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Specifically, a court may take judicial notice of matters of public record. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Because the exhibits sought to be noticed are "matters of public record," Defendants' request for judicial notice is **GRANTED.**
3	Miller brought this same claim against Yokohama. The Ninth Circuit determined that Miller's RICO claim against Yokohama failed because Miller premised Yokohama's liability on a respondeat superior theory. *Miller*, 458 F.3d at 619–20. That reasoning, however, is irrelevant to this Order and so this Court does not address that portion of the *Miller* order.
4	There are four exceptions to this rule. A misrepresentation of law is actionable where the party making the misrepresentation: (1) purports to have special knowledge; (2) stands in a fiduciary or similar relation of trust and confidence to the recipient; (3) has successfully endeavored to secure the confidence of the recipient; or (4) has some other special reason to expect that the recipient will rely on his opinion. *Miller*, 358 F.3d at 621. None of these exceptions appear to be present here and Plaintiff does not argue that one is present. *See generally* Opp.
5	Because it is unnecessary, this Court does not address Defendants' other RICO arguments.
6	While the Court held that Plaintiff's federal RICO claim must be dismissed, the Court retains diversity jurisdiction over Plaintiff's state law claims. *See* Compl. ¶ 9.
7	As noted, Plaintiff's work on the Monterey Presidio Project or on other federal enclaves cannot form the basis of Plaintiff's unfair/unlawful business practices claims. A contrary ruling would permit plaintiffs to circumvent the federal enclave doctrine.

2020 WL 673498
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Jeri Christine VILLA, Plaintiff,
v.
COLLINS COURT APARTMENTS, et al., Defendants.

No. CV-18-03332-PHX-MTL

Signed 02/10/2020

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ORDER

Michael T. Liburdi, United States District Judge

***1** Plaintiff Jeri Christine Villa filed suit against seven defendants, alleging violations of the Fair Housing Act and other claims. Before the Court are three Motions to Dismiss, filed respectively by Defendants Collins Court Apartments ("Collins Court") (Doc. 40), Maricopa Regional Continuum of Care ("MCC") (Doc. 20), and Human Services Campus, Inc. ("HSC") (Doc. 76).[1] Defendant Community Bridges Inc. ("CBI") has also filed a Motion for Entry of Final Judgment. (Doc. 109.) The Motions to Dismiss are granted; Plaintiff will be given leave to amend. CBI's Motion for Entry of Final Judgment is denied.

I. BACKGROUND

Plaintiff Jeri Christine Villa, pro se, filed the original Complaint on October 17, 2018 (Doc. 1), and the First Amended Complaint on October 22, 2018. (Doc. 9.) The Court granted Plaintiff's request to file a Second Amended Complaint on December 4, 2018. (Doc. 13.)[2]

Plaintiff moved into the Collins Court Apartments in Phoenix, Arizona on December 21, 2012. (Doc. 14 at 5.) The Second Amended Complaint states that Plaintiff was a participant in the "Permanent Supportive Housing (PSH) program under the [Continuum of Care] and funded in part by [the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009]." (Doc. 14 at 5.) The majority of the Second Amended Complaint describes various conflicts and other issues between Plaintiff and other tenants, and between Plaintiff and the apartment's personnel. It describes, for example, another tenant's physical attack on Plaintiff following a disagreement (*Id.* at 5); "[c]onstant harassment, ridicule and intimidating behavior" by the same fellow tenant despite grievances that Plaintiff filed to the Property Manager (*Id.* at 6); a meeting with a "Peer Support Specialist" who subsequently shared Plaintiff's "private medical information and other very personal information" with other residents (*Id.* at 9); and an unjustified citation for having "excessive trash" in the apartment. (*Id.* at 10.) The Second Amended Complaint alleges that Plaintiff faced discriminatory treatment. (*See id.* at 19 ("The neighbor I had so many problems with was given preferential treatment by all members associated with Collins Court Apartments because she was the only Hispanic tenant and 4 of the 5 Complex staff members were also Hispanic.")).

Plaintiff claims that after receiving two 30-day notices and ultimately an eviction notice, she was "physically removed from [her] apartment on November 3, 2016 by the Constable and not allowed to return until 29 days later to remove [her] property from the apartment." (*Id.* at 16.) Plaintiff spent the next 369 days homeless and "had a very hard time finding housing due to the Property Manager's report of the eviction." (*Id.*) Plaintiff demands an award of $10,000,000 for "mental anguish, pain and suffering" as well as $1,000,000 "from each Defendant named in this Complaint for violations of my Civil Rights." (*Id.* at 20.)

***2** Plaintiff named seven defendants in the Second Amended Complaint: Collins Court Apartments; Maricopa Regional Continuum of Care; Arizona Housing, Inc.; Human Services Campus; HOM, Inc.; Dunlap & Magee Property Management, Inc.; and Community Bridges, Inc. Plaintiff states that the defendants are "government entities OR incorporated OR have entered into Partnerships within Maricopa County, AZ AND have entered in to [sic] legal contracts with Maricopa Regional Continuum of Care AND are bound by the laws of the United States of America. They are Applicants AND Recipients OR Recipients OR Sub-recipients of federal grant monies under the Department of Housing and Urban Development (HUD) HEARTH Program and other HUD programs." (*Id.* at 2.)

Although not entirely clear as to which claims are brought against which defendants, the Second Amended Complaint states that the Court "has jurisdiction in this matter pursuant to TITLE VIII of the Civil Rights Act of 1968 as amended (Fair Housing Act) (FHA) (42 USC 3601); Homeless Emergency Assistance and Rapid Transition to Housing Continuum of Care Program Interim Rule (HEARTH) (24 CFR Part 78), Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act (QPQHEHLDHP) (24 CFR-100), Health Insurance and Portability and Accountability Act of 1996 (HIPAA), The Fair Credit Reporting Act (15 U.S.C. 1681)[.]" (*Id.* at 1.)

Defendants Arizona Housing, Inc. and Dunlap & Magee Property Management, Inc. have answered the Second Amended Complaint. (Docs. 36, 108.) Defendant HOM, Inc. was previously dismissed (Doc. 101) after Plaintiff moved the Court to "dismiss all claims against HOM" (Doc. 81 at 1); judgment has not yet entered. Defendants Collins Court, MCC, and HSC have filed the pending Motions to Dismiss. (Docs. 20, 40, 76.) Defendant CBI was previously dismissed (Doc. 91) after Plaintiff failed to respond to CBI's Motion to Dismiss. CBI has filed the pending Motion for Entry of Final Judgment. (Doc. 109.)

II. MOTIONS TO DISMISS

A. Legal Standards

1. Rule 12(b)(6)

To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" such that the defendant is given "fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 545, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The Court must accept Plaintiff's material allegations as true and construe them in the light most favorable to Plaintiff. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle it to relief." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

Review of a Rule 12(b)(6) motion is "limited to the content of the complaint." *North Star Int'l*, 720 F.2d at 581. A district court generally "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v. City of Los*

Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). If "matters outside the pleadings are presented to and not excluded by the court" on a Rule 12(b)(6) motion, "the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). There are two exceptions to this general rule. First, a court may consider "material which is properly submitted as part of the complaint" without converting the motion. *Lee*, 250 F.3d at 688. The same is true for documents not physically attached to the complaint but whose "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them. *Id.* (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998)). Second, a court may take judicial notice of "matters of public record" without converting the motion to dismiss into a motion for summary judgment. *See Lee*, 250 F.3d at 689; Fed. R. Evid. 201(b)(2).

2. Rule 12(b)(5)

***3** A defendant may move to dismiss, pursuant to Rule 12(b)(5), for insufficient service of process under Rule 4. *See* Fed. R. Civ. P. 12(b)(5). "Before a ... court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Strong v. Countrywide Home Loans, Inc.*, 700 Fed. App'x 664, 667 (9th Cir. 2017) (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). The plaintiff bears the burden of establishing the validity of service on a Rule 12(b)(5) motion. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

B. ANALYSIS

1. Collins Court Apartments

The Second Amended Complaint names Collins Court, Plaintiff's apartment complex, as a defendant. (Doc. 14.) Although it references various events that occurred at Collins Court the Second Amended Complaint does not specify any claims against it. Collins Court argues that the Second Amended Complaint should be dismissed for three reasons: Collins Court is not a properly named party, service of process was insufficient, and Plaintiff failed to state a claim. (Doc. 40.) The Court will grant the motion with leave to amend.

a. Wrong Party

Collins first moves to dismiss pursuant to Rule 12(b)(6)[3] because "[n]o entity identified as 'Collins Court Apartments' is a legal entity in the State of Arizona." (*Id.* at 3.)[4] Collins Court attaches as Exhibit 2 to its motion an Arizona Corporation Commission record demonstrating that no such entity is recognized by the State of Arizona. (Doc. 40-2.) Plaintiff has accordingly "brought into this dispute a party against whom no judgment may be procured or other relief ordered" under Rule 17 of the Federal Rules of Civil Procedure. (Doc. 40 at 3.)

In response, Plaintiff asserts that "[t]he defendants know that I am a Pro Se Plaintiff and they made a deliberate and exaggerated effort to conceal who the owner is from me in their MOTION in an attempt to confuse me and by filing numerous, duplicated and nonsensical documents thru [sic] CM/ECF." (Doc. 69 at 3.) The Court notes that this is not accurate; Collins Court has filed only its Motion to Dismiss (Doc. 40) and a motion to seal an exhibit to its Motion to Dismiss (Doc. 64). Nonetheless, in an apparent concession to Collins Court's argument, Plaintiff was ultimately "able to ascertain" that Collins Court is "indeed, owned and operated by Arizona Housing, Inc. (AHI) with the assistance of Dunlap & Magee Property Manage, Inc. as their Agent[.]" (*Id.*)[5]

***4** As stated, a court must generally convert a Rule 12(b)(6) motion into a motion for summary judgment under Rule 56 if it considers evidence extrinsic to the complaint. Fed. R. Civ. P. 12(d). However, Exhibit 2 to Collins Court's motion is a "matter of public record." *See Lee*, 250 F.3d at 689. "A district court may properly take judicial notice of public records filed with the Arizona Corporation Commission because such filings are 'not subject to reasonable dispute.' " *Robinson v. Heritage Elementary Sch.*, No. CV-09-0541-PHX-LOA, 2009 WL 1578313, at *1 n.3 (D. Ariz. June 3, 2009) (citing Fed. R. Evid. 201(b); *Intri–Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (district court may take judicial notice of matters of public record)). The Court notes that Plaintiff did not question or dispute the accuracy of Exhibit 2. Accordingly, the Court takes judicial notice, pursuant to Federal Rule of Evidence 201, that "Collins Court Apartments" is not a corporation or other entity recognized under Arizona law.[6] The Court therefore agrees with Collins Court that it is a "party against whom no judgment may be procured or other relief granted" under Rule 17 (Doc. 40 at 3.) Accordingly, the Court will grant the motion and dismiss Collins Court from this case.

b. Insufficient Service of Process

Second, Collins Court moves to dismiss pursuant to Rule 12(b)(5) for improper service of process. The motion states that the individual upon whom the summons and complaint were served ("Legal Owner(s) Collins Court Apartments Attn: Alta Garcia – Property Manager") was not authorized to accept service of process pursuant to Rule 4(h). (*Id.*) The motion attaches Plaintiff's lease agreement, which "identified the person who was authorized to accept service on behalf of that ownership as the 'statutory agent for Dunlap & Magee Property Management Co., Inc.' " (*Id.* at 2, Doc. 40-1 at 2.) The Court need not reach this issue because it has already concluded that Collins Court is dismissed from this case. The Court nonetheless emphasizes the importance of compliance with Rule 4, should Plaintiff file a Third Amended Complaint.

c. Failure to State a Claim

Third, Collins Court moves to dismiss under Rule 12(b)(6) for failure to state a claim. Collins Court argues that Plaintiff "raises no issues suggesting that she was harmed by building's ownership or that there is any factual or legal basis for holding the ownership of that property liable for any harm that she believes she incurred during her tenancy." (*Id.* at 5.) It also states that the Second Amended Complaint "[d]oes not provide any information about her residence at Collins Court Apartments other than the fact that she was physically housed there for almost four years." (*Id.*)

Although it need not address this issue, the Court agrees with Collins Court that Plaintiff has failed to state a claim against it. Aside from descriptions of various altercations occurring at the apartment complex, the Second Amended Complaint's references to Collins Court are as follows: "On December 21, 2012 I moved in to Collins Court Apartments as a Participant in the Permanent Supportive Housing (PSH) program" (Doc. 14 at 5); "In an attempt to preserve my mental health, I approached [the] Peer Support Specialist assigned to Collins Court for assistance" (*Id.* at 8); Plaintiff was advised, in the context of receiving a 30-day notice, that "[she] would face trespassing charges if [she] returned to Collins Court for any reason" (*Id.* at 11); following Plaintiff's eviction, "[o]n October 17, 2017, I was rejected by an apartment complex who uses the same Attorney for the 'Legal matters' as the one that is noted [on] most, if not all the 'Notices' given by Collins Court" (*Id.* at 17); and the statement referenced above that a neighbor was given preferential treatment "by all members associated with Collins Court Apartments" because she was Hispanic. (*Id.* at 19.) Even construing the facts as favorably for Plaintiff as possible, the Second Amended Complaint does not specify any claims brought against Collins Court. (Doc. 14.) The few specific references to Collins Court do not provide it with "fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Court concludes that dismissal of Collins Court is also appropriate for this independent reason.

2. Maricopa Regional Continuum of Care

***5** MCC is a "Continuum of Care" under the federal Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, 77 FR 45422-01 (July 31, 2012), which means that it is a "coordinating body for homeless services and homelessness prevention activities across the geographic area." (Doc. 20 at 3); 77 FR 45422-01 at *45426. MCC's Motion to Dismiss argues that the claims against it should be dismissed because they were not timely filed, and because the Second Amended Complaint fails to state a claim under the Fair Housing Act. (Doc. 20 at 2.) The Court will grant the motion with leave to amend.[7]

a. Untimely

MCC first argues that Plaintiff's claims against it are untimely because Plaintiff exceeded the two-year statute of limitations for bringing a Fair Housing Act claim. (Doc. 20 at 4.) MCC states that the last date on which the statute of limitations could have begun to run was November 3, 2016—the date Plaintiff states that she was evicted from her apartment. (*Id.*) However, MCC was not added to the case until the November 19, 2018 lodging of the Second Amended Complaint.[8] Accordingly, the two-year statute of limitations has run, "rendering [Plaintiff's] claim against MCC untimely and barred as a matter of law." (*Id.*)

In response, Plaintiff argues that the statute of limitations has not run because the alleged discriminatory practice "continues to this day." (Doc. 51 at 5.) Plaintiff states that she was not permitted to return to the apartment to remove her property until December 2, 2016, and that "almost a year later, after searching for an apartment for weeks and submitting an application to another complex," Plaintiff was turned down due to negative comments on a background check.[9] (*Id.* at 4.)

As noted, MCC was added as a defendant in this case by the Second Amended Complaint. The Second Amended Complaint's references to MCC are limited to the following: "Maricopa Regional Continuum of Care and Human Services Campus have been named as additional Defendants" (Doc. 14 at 4); a reference to a document called the "Maricopa Regional Continuum of Care Governance Charter Operating Policies (Rev. 3/27/2017)"[10] (*Id.*); "There aren't any written policies or procedures ... that even mention the Maricopa Regional Continuum of Care" (*Id.* at 18–19); "Who watches over the Program Director? Who makes sure that the person entrusted with the decision, the 'boots on the ground', is doing his due diligence to treat all tenants in a fair and equal manner? With RESPECT! With DIGNITY! Without PREJUDICE! Where was the Maricopa Regional Continuum of Care? Who knows!" (*Id.* at 19); and "It is for these important reasons that I also name the Maricopa Regional Continuum of Care as a Defendant in this matter and as provided for under the Fair Housing Act, Homeless Emergency Rapid Transition to Housing[.]" (*Id.*) MCC was not referenced in the original Complaint (Doc. 1) or the Amended Complaint. (Doc. 9.)

***6** The first issue is the date on which the statute of limitations began to run. The statute of limitations for a Fair Housing Act claim is "2 years after the occurrence or the termination of an alleged discriminatory housing practice[.]" *See* 42 U.S.C. § 3613(a)(1)(A). In considering statute of limitations issues, a court is to "look at when the operative decision occurred" and to "separate from the operative decisions those inevitable consequences that are not separately actionable." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002) (internal citations and quotations omitted). The Supreme Court has held that where a Fair Housing Act plaintiff challenges not just one incident, but rather a continuing practice, the complaint is timely when it is filed within two years of "the last asserted occurrence of that practice." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982).[11] In other words, "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (*citing Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)).

Even assuming that Plaintiff is arguing a continuing practice theory of the Fair Housing Act, the Court concludes that, at the

latest, the statute of limitations began to run on the date Plaintiff was evicted from her apartment—November 3, 2016. The alleged date on which Plaintiff removed her items from the apartment, and her resulting difficulty in finding another apartment, are more properly characterized as alleged "continual ill effects" than alleged "continual unlawful acts." *Garcia*, 526 F.3d at 462.

Accordingly, the second issue is whether the Second Amended Complaint "relates back" to the October 17, 2018 Complaint, or the October 22, 2018 Amended Complaint, with respect to MCC. Rule 15(c) of the Federal Rules of Civil Procedure governs when amended pleadings "relate back" to the date of the original pleading. Fed. R. Civ. P. 15(c). When an amended pleading changes a party or a party's name—as the Second Amended Complaint did when adding MCC for the first time—the rule requires that "the party to be brought in by amendment ... knew or should have known that the action would been brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C)(ii). Rule 15(c) "asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original complaint." *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 548 (2010) (emphasis in original). The Complaint and Amended Complaint, both of which made *no* reference to MCC, did not provide actual or constructive notice to MCC that it would be added to the case. Accordingly, the Court grants MCC's motion with respect to any Fair Housing Act claim brought against it.

The Court notes that the Second Amended Complaint states, "It is for these important reasons that I also name the Maricopa Regional Continuum of Care as a Defendant in this matter and as provided for under the Fair Housing Act, **Homeless Emergency Rapid Transition to Housing**[.]" (Doc. 14 at 19) (emphasis added). The latter is an apparent reference to the Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program, which does not appear to provide for a private right of action. *See* 77 FR 45422-01. Nonetheless, Plaintiff will be given leave to clarify any remaining claim against MCC.

b. Failure to State a Claim

MCC also argues that Plaintiff failed to state a Fair Housing Act claim against it. (Doc. 20 at 5.) Although the Court need not reach this issue, it agrees with MCC that dismissal is also warranted for this reason. A prima facia case of intentional discrimination under the Fair Housing Act requires a showing that "(1) plaintiff's rights are protected under the Fair Housing Act; and (2) that as a result of defendant's discriminatory conduct, the plaintiff has suffered a distinct and palpable injury." *Stiles v. Paragon Realty*, No. CV 07-670-TUC-RCC, 2011 WL 13190186, at *4 (D. Ariz. Jan. 20, 2011) (citing *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999)). Based on the Second Amended Complaint's limited references to MCC, stated above, the Court agrees that Plaintiff has "utterly failed to plead any facts which would give rise to an inference that MCC engaged in *any* discriminatory practices." (Doc. 20 at 7.)[12]

***7** Further, Plaintiff has not stated a claim for vicarious liability, even if Plaintiff's statement "Where was the Maricopa Regional Continuum of Care? Who knows!" (Doc. 14 at 19) is generously interpreted as such. The Supreme Court has held that "ordinary, not unusual, rules of vicarious liability should apply" to Fair Housing Act claims. *Meyer v. Holley*, 537 U.S. 280, 289 (2003). "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Id.* at 285. Plaintiff does not allege that any such agency or employment relationship exists. Accordingly, Plaintiff has failed to plead both a "cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory" against MCC. *Balistreri*, 901 F.2d at 699. Dismissal of MCC is appropriate for the independent reason that Plaintiff has failed to state a claim against it.

3. Human Services Campus, Inc.

HSC moves to dismiss on grounds that Plaintiff's claim was untimely and that the Second Amended Complaint fails to state a claim against HSC. The Court will grant the motion with leave to amend.

a. Untimely

Like MCC, HSC moves to dismiss Plaintiff's Fair Housing Act claim because it is barred by the two-year statute of limitations. HSC was also added to the case by the November 19, 2018 lodging of the Second Amended Complaint. (Doc. 14.) HSC argues that, based on Plaintiff's November 3, 2016 eviction date, the two-year statute of limitations expired before the Second Amended Complaint was filed. (Doc. 76 at 3.)

In response, Plaintiff states, "there is some sort of 'partnership' between HOM, Inc. and HSC and between HSC and Arizona Housing, Inc. (AHI)" that Plaintiff did not discover until after the filing of the First Amended Complaint and "until doing more extensive research on the parties named in this matter and their roles in the Permanent Supportive Housing Program I was involved with[.]" (Doc. 89 at 2.) Plaintiff further asserts that each iteration of the Complaint was filed against "Collins Court Apartments, **Et Al.**," therefore "indirectly nam[ing] HSC from the filing of the original Complaint on October 17, 2018." (*Id.* at 3.) Plaintiff asserts that "[i]t is important to know the nature of these partnerships before dismissing them from liability in this matter" and requests that the Court "compel the Defendant to disclose the nature of their partnerships." (*Id.* at 4–5.) The Court will not compel Defendants to "disclose the nature of their partnerships" pursuant to Plaintiff' response to HSC's Motion to Dismiss.

The Second Amended Complaint references HSC only three times: "Maricopa Regional Continuum of Care and Human Services Campus have been named as additional Defendants" (Doc. 14 at 4); a citation to a publication regarding the Permanent Supportive Housing Program[13]; and "Peer Support Specialists assigned to each complex owned by HSC and AHI." (*Id.* at 5.) Even assuming, in the light most favorable to Plaintiff, that Plaintiff intended to bring a Fair Housing Act claim against HSC, the Court agrees that the statute of limitations has expired. For the same reasons as stated with respect to MCC, the two-year statute of limitations pursuant to 42 U.S.C. § 3613(a)(1)(A) began to run no later than Plaintiff's November 3, 2016 eviction date. HSC was not added to the case until the November 19, 2018 lodging of the Second Amended Complaint. The Court is not convinced by Plaintiff's argument that the fact that the Complaint was brought against "Collins Court Apartments, **Et Al.**," provided notice to HSC that it would be added to the case. (Doc. 89 at 3.) The Second Amended Complaint therefore does not "relate back" to the earlier pleadings under Rule 15(c). The two-year statute of limitations has expired on any Fair Housing Act claim against HSC. This claim is dismissed.

b. Failure to State a Claim

***8** HSC also argues that Plaintiff has failed to state a claim against it. (Doc. 76 at 6.) Although it need not reach this issue, the Court agrees. The Second Amended Complaint does not specify *any* claims against HSC. The scant references to HSC in the Second Amended Complaint, referenced above, allege neither a cognizable legal theory nor sufficient facts to support a cognizable legal theory. *Balistreri*, 901 F.2d at 699. For the independent reason that Plaintiff has not provided "fair notice of what the ... claim is," *Twombly* 550 U.S. at 550, dismissal of HSC is appropriate.

4. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure is a liberal standard, stating that "[t]he court should freely give leave

[to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). In granting a motion to dismiss, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The Ninth Circuit has also recognized that a "rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

Exceptions to the general policy of granting leave exist "where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). The case has been pending since October 17, 2018 (Doc. 1) and Plaintiff has already amended her complaint twice. The Court is accordingly concerned that further amendment would produce an "undue delay." Nonetheless, in light of the considerations above, the Court will permit Plaintiff to file a Third Amended Complaint. Unless Plaintiff can assert otherwise, however, amendment would be futile in the following respects: Collins Court is not a legal entity and therefore not a proper party to this lawsuit, and the statute of limitations has expired for a Fair Housing Act claim against both MCC and HSC.

III. CBI'S MOTION FOR ENTRY OF JUDGMENT

Defendant CBI has filed a motion for entry of partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Doc. 109.) Rule 54(b) states that when an action presents more than one claim for relief, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

The Court previously dismissed CBI from the case, on grounds that Plaintiff failed to respond to CBI's Motion to Dismiss and that the Health Insurance Portability and Accountability Act does not provide for a private right of action. (Doc. 91.) The pending motion argues that good cause exists to enter final judgment on all claims against CBI, and states in particular that "CBI should not be forced to incur additional attorneys' fees and costs just to be dragged along in a case that Plaintiff never should have filed in the first place." (Doc. 109 at 4.) Plaintiff did not respond to the pending motion.

***9** Under Ninth Circuit case law, "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Frank Briscoe Co. v. Morrison–Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985) (citation omitted). The Court is not convinced that this case is adequately "unusual." Further, "[a] similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result[.]" *Id.* Just as Plaintiff asserted a Fair Housing Act claim against CBI, it also asserted a Fair Housing Act claim against most, if not all, of the Defendants in this case. Accordingly, the Court concludes that granting the "Rule 54(b) request does not comport with the interests of sound judicial administration." *Wood v. GCC Bend, L.L.C.*, 422 F.3d 873, 879 (9th Cir. 2005); *See also Lindsay v. Beneficial Reinsurance Co.*, 59 F.3d 942, 951 (9th Cir. 1995) (warning against "[t]he dangers of profligate Rule 54(b) determinations"). The Court denies CBI's motion to entry of final judgment.

IV. CONCLUSION

Accordingly,

IT IS ORDERED granting Defendant Collins Court Apartments' Motion to Dismiss (Doc. 40).

IT IS FURTHER ORDERED granting Defendant Maricopa Regional Continuum of Care's Motion to Dismiss Plaintiff's

Second Amended Complaint (Doc. 20).

IT IS FURTHER ORDERED granting Defendant Human Services Campus, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 76).

IT IS FURTHER ORDERED allowing Plaintiff 21 days from the issuance of this Order to file a Third Amended Complaint that conforms with the requirements set forth in this Order. Because the Court is giving Plaintiff leave to amend, the Clerk of the Court shall not enter judgment at this time.

IT IS FINALLY ORDERED denying Defendant Community Bridges, Inc.'s Rule 54(B) Motion for Entry of Final Judgment on All Claims Against Defendant Community Bridges, Inc. (Doc. 109).

All Citations

Slip Copy, 2020 WL 673498

Footnotes

1	Only Defendant HSC requested oral argument. (Doc. 76.) The Court believes that oral argument would not significantly aid the decisional process. *See* Fed. R. Civ. P. 78(b) (court may decide motions without oral hearing); LRCiv 7.2(f) (same).
2	The Court previously noted that the original Complaint "offers a confusing narrative rendering the Court unable to determine the plausibility of Plaintiff's claims." (Doc. 6.) The Second Amended Complaint, although significantly more detailed than the original Complaint, remains confusing; it is accordingly difficult, if not impossible, to determine the plausibility of Plaintiff's claims.
3	Although the motion does not specifically state as much, the Court presumes that this argument is brought under Rule 12(b)(6). *See, e.g., v Bispo v. GSW Inc.*, No. CV. 05-1223-PK, 2006 WL 8442912, at *5 (D. Or. May 17, 2006), report and recommendation adopted, No. 05-CV-1223-PK, 2006 WL 8442911 (D. Or. July 28, 2006) (granting a Rule 12(b)(6) motion on grounds that Plaintiff named the wrong entity); *Oland v. Forever Living Prod. Int'l*, Inc., No. CV 09-8039-PHX-MHM, 2009 WL 5128658, at *2 (D. Ariz. Dec. 17, 2009) (addressing Rule 12(b)(6) motion to dismiss arguing that "Plaintiff named the wrong defendant in this lawsuit").
4	Collins Court noted on its motion that it "appears specially to move this court to dismiss the above captioned action[.]" (Doc. 40 at 1.)
5	In the Conclusion, Plaintiff's response requests that Plaintiff's Motion [for] Default Judgment (Doc. 67) be entered against AHI. (Doc. 69 at 5.) That is an entirely separate issue from Collins Court's Motion to Dismiss, however, and has been separately addressed. (Doc. 100.)

6	Rule 17(b) states that the capacity for an individual to be sued is determined by the law of an individual's domicile or the law under which a corporation was organized, and "for all other parties, by the law of the state where the court is located, except that: a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws[.]" Fed. R. Civ. P. 17(b). Collins Court is not an individual or corporation under subsections (b)(1) or (b)(2), respectively. Although neither party has specifically addressed this issue, Plaintiff did not allege that Collins Court—the name of an apartment complex—is any other type of party, including a partnership or incorporated association, that is subject to suit. *See id.; see also* Ariz. R. Civ. P. 17.
7	MCC states, in footnote 1 to its Motion to Dismiss, that "MCC is not a legal entity under Arizona law and therefore cannot be sued." (Doc. 20 at 1 n.1). It states that the appropriate entity, if any, is the Maricopa Association of Governments. The Court does not deem this to be a proper issue for this Motion to Dismiss. The relevant regulation states that a Continuum of Care "*might not* be a legal entity," 77 FR 45422-01 at *45429 (emphasis added), and the "Maricopa Regional Continuum of Care Governance Charter Operating Policies," referenced in both the Second Amended Complaint and MCC's Motion to Dismiss, is attached to neither filing.
8	The Second Amended Complaint was filed by the Clerk of the Court on December 4, 2018.
9	Plaintiff also appears to argue that she should not be penalized for the fact that as a pro se litigant, "every filing submitted in this case must first be reviewed by the Court." (Doc. 51 at 5.) Although the Second Amended Complaint was lodged on November 19, 2018, the official filing date was not until December 4, 2018. (*Id.*) However, given that Plaintiff was evicted on November 3, 2016, the analysis is identical with respect to both dates.
10	"The entity that oversees PSH; 1 of 3 supporting housing programs defined in HEARTH. The Grant APPLICANT AND RECIPIENT of grant funds OR the RECIPIENT o[f] the Grant. Its duties are to **OPERATE** the Continuum of Care (C of C); **DESIGNATE** an HMIS (Homeless Management Information System (dat[a] collection) for the C of C and **PLAN** for the C of C. – *Maricopa Regional Continuum of Care Governance Charter Operating Policies. Rev 2/27/2017*" (Id. at 4.)
11	At the time of *Havens*, the relevant statute of limitations was 180 days. *Id.* at 380.
12	The Court is not convinced by MCC's argument that nothing in MCC's Charter "allows it to make decisions regarding the 'sale or rental of a dwelling,' or make any dwelling unavailable to any person." (Doc. 20 at 6.) The Court must accept Plaintiff's material allegations as true and construe them in the light most favorable to Plaintiff. *North Star Int'l*, 720 F.2d at 580. Nonetheless, Plaintiff does not make any allegations that MCC engaged in these practices.
13	"The PSH is operated by HOM, Inc. and includes a partnership with HSC. HOM, Inc. manages the program eligibility and financial rental assistance. HSC partners with AHI to rent units at their properties that are designed to provide supportive services to assist program participants achieve success in housing'.—*Human Service Campus Supportive Housing Program, written and published by HOM, Inc. Housing Operations & Management (2012, estimated. No date available)*" (*Id.*).

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Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

John HASTINGS, Plaintiff,
v.
Elvin Garry GRUNDY, III; and The Grundy Law Firm, PLLC, Defendants.

No. CV-19-4645-PHX-DGC
|
Signed 05/12/2020

Attorneys and Law Firms

John Hastings, Frisco, TX, pro se.

ORDER TO SHOW CAUSE

David G. Campbell, Senior United States District Judge

***1** Pursuant to Federal Rule of Civil Procedure 55(a), Plaintiff John Hastings has filed a motion for entry of default against Defendant Grundy Law Firm, PLLC. Doc. 15. For reasons stated below, the Court will defer ruling on the motion and require Plaintiff, by **June 5, 2020**, to show cause why this case should not be dismissed for lack of federal subject matter jurisdiction.

I. Background.

Plaintiff asserts claims for legal malpractice, breach of fiduciary duty, and inadequate representation against Defendants Elvin Grundy and the Grundy Law Firm. *Id.* at 2-4. Plaintiff seeks compensatory damages in the amount of $350,000 and unspecified punitive damages. *Id.* at 4.

On July 8, 2019, the Court granted Plaintiff's application to proceed in forma pauperis, but denied his motion for service of process by the U.S. Marshal. Docs. 2, 5, 10. Plaintiff thereafter moved to extend the service deadline and allow for alternative service. Doc. 12. The Court gave Plaintiff until February 24, 2020 within which to properly serve Defendants, but denied his request for alternative service. Doc. 13. Plaintiff now seeks the entry of default against the Grundy Law Firm. Doc. 15.

A. Motion for Entry of Default.

Elvin Grundy is the statutory agent for the Grundy Law Firm. *See* Arizona Corporation Commission ("ACC"), Entity Information, https://ecorp.azcc.gov/BusinessSearch/BusinessInfo?entityNumber=P16988395 (last visited May 8, 2020). His

address for receiving service of process as statutory agent is 808 East Desert Drive North, Phoenix, AZ 85042. *Id.* Plaintiff attempted to serve process on Defendants at that address but the documents were returned as undeliverable. Doc. 14 at 4.

On January 30, 2020, the ACC received the summons and complaint as an agent for the Grundy Law Firm and mailed copies of the documents to the firm's last known business address, P.O. Box 90166, Phoenix, AZ 85066. *Id.* at 3; *see* A.R.S. § 29-606(B) ("If a limited liability company fails to appoint or maintain a statutory agent at the address shown on the records of the commission, the commission is an agent of the limited liability company on whom any process ... may be served.").[1] The Grundy Law Firm has failed to answer or otherwise respond to the complaint and the time for doing so has expired. *See* Fed. R. Civ. P. 12(a)(1)(A)(i) ("A defendant must serve an answer ... within 21 days after being served with the summons and complaint[.]"); A.R.S. § 29-606(B) ("If service is made on the commission, whether under this chapter or a rule of court, the limited liability company has thirty days to respond in addition to the time otherwise provided by law.").

Rule 55(a) requires the entry of default where "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise[.]" Fed. R. Civ. P. 55(a). Plaintiff has submitted an affidavit and proof of service showing that the Grundy Law Firm was properly served through the ACC. Docs. 14, 16; *see* A.R.S. § 29-606(B); *Nicklaus Cos. LLC v. Bryan Hepler Golf LLC*, No. CV-18-01748-PHX-ROS, 2019 WL 1227198, at *1 (D. Ariz. Mar. 15, 2019) (§ 29-606(B) "allows for service of process on the [ACC] when a 'limited liability company fails to appoint or maintain a statutory agent at the address shown on the records of the commission' "); *Same Day Garage Door Servs. v. Y.N.G. 24/7 Locksmith LLC*, No. CV-19-04782-PHX-MTL, 2020 WL 1659913, at *1 (D. Ariz. Apr. 3, 2020) (same); *Hahne v. AZ Air Time, LLC*, No. 1 CA-CV 14-0586, 2016 WL 1117747, at *2 & n.4 (Ariz. Ct. App. Mar. 22, 2016) (same); *see also* Fed. R. Civ. P. 4(e)(1) (plaintiffs may utilize the service of process rules that apply in the state in which the federal district court is located).

B. Subject Matter Jurisdiction.

***2** The Court is inclined to enter default against the Grundy Law Firm under Rule 55(a), but it is not clear from the complaint that subject matter jurisdiction exists. Before proceeding further, the Court is obligated to confirm whether it has subject matter jurisdiction. *See Ten Bridges LLC v. Hofstad*, No. 2:19-CV-01134-RAJ, 2020 WL 1940325, at *3 (W.D. Wash. Apr. 22, 2020) (citing *Moore v. Maricopa Cty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011)). "[A] federal court has an independent duty to assess whether federal subject matter jurisdiction exists, whether or not the parties raise the issue." *White v. O'Reilly Auto Enters. LLC*, No. 2:20-cv-00453-JAM-KJN-PS, 2020 WL 1532310, at *1 (E.D. Cal. Mar. 31, 2020) (citing *United Investors Life Ins. Co. v. Waddell & Reed Inc.,* 360 F.3d 960, 967 (9th Cir. 2004)). Indeed, a district court "must sua sponte dismiss the case if, at any time, it determines that it lacks subject matter jurisdiction." *Id.* (citing Fed. R. Civ. P. 12(h)(3)); *see Moore*, 657 F.3d at 894 (same).[2]

Federal subject matter jurisdiction may be based on either federal question jurisdiction or diversity jurisdiction. 28 U.S.C. §§ 1331, 1332. Courts "analyze federal question jurisdiction with reference to the well-pleaded complaint rule." *Yokeno v. Mafnas*, 973 F.2d 803, 807 (9th Cir. 1992). Under that rule, "federal jurisdiction exists only when a federal question is presented on the face of a properly pleaded complaint." *Scholastic Entm't, Inc. v. Fox Entm't Grp., Inc.*, 336 F.3d 982, 986 (9th Cir. 2003). Plaintiff's complaint asserts state law tort claims for legal malpractice, breach of fiduciary duty, and inadequate representation. Doc. 1 at 2-4. Because the complaint asserts no federal claim, the Court lacks subject matter jurisdiction under the federal question statute. *See* 28 U.S.C. § 1331; *Yokeno*, 973 F.2d at 809.

Diversity jurisdiction has two requirements: (1) complete diversity of citizenship between the parties, and (2) an amount in controversy exceeding $75,000. 28 U.S.C. § 1332(a). While there appears to be complete diversity between the parties in this case (Doc. 1 at 1), it is not evident that the amount in controversy has been met. Plaintiff alleges in the complaint that as a result of Defendants' tortious conduct, he was not able to obtain a $13,200 judgment against the opposing party and instead was ordered, in July 2015, to pay more than $18,000 in legal fees to the opposing party. Doc. 1 at 2. Plaintiff estimates that with accrued interest, this amount has increased to more than $36,000 as of June 2019. *Id.* Plaintiff further alleges that he paid thousands of dollars to Defendants, but does not specify the actual amounts paid. *Id.* Plaintiff claims to have "lost employment opportunities and benefits valued at greater than a quarter of a million dollars," but does not describe what was lost or explain why it was worth more than $250,000. *Id.* at 2.[3] While Plaintiff seeks punitive damages because Defendants' alleged conduct would "shock the conscience of reasonable people" (*id.* at 4), the "mere possibility of a punitive damages

award is insufficient to prove that the amount in controversy requirement has been met." *Burk v. Med. Sav. Ins. Co.*, 348 F. Supp. 2d 1063, 1069 (D. Ariz. 2004); *see Propst v. Simon*, No. CV-08-2111-PHX-DGC, 2009 WL 307274, at *2 (D. Ariz. Feb. 9, 2009) ("a general prayer for punitive damages, by itself, may not be sufficient to meet the defendant's burden of proof"); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089 (9th Cir. 2003) (a complaint seeking "in excess" of $10,000 for punitive damages did not clearly satisfy the jurisdictional minimum).

***3** Plaintiff "bears the burden of both pleading and proving diversity jurisdiction." *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 613-14 (9th Cir. 2016). Plaintiff has failed to meet his "burden to plead facts supporting a conclusion that the amount in controversy is satisfied." *Raymond v. Bank of Am., N.A.*, No. 1:19-cv-00790-DAD-JLT, 2019 WL 2465433, at *3 (E.D. Cal. June 13, 2019). The Court will require Plaintiff, by **June 5, 2020**, to show cause why the Court should not dismiss the complaint for failure to meet the $75,000 amount-in-controversy requirement. *See* 28 U.S.C. § 1332(a); *Ten Bridges LLC*, 2020 WL 1940325, at *3. The Court defers ruling on Plaintiff's motion for entry of default pending his response to this Order to Show Cause.[4]

IT IS ORDERED that by **June 5, 2020**, Plaintiff shall show cause why this case should not be dismissed for failure to meet the $75,000 amount-in-controversy requirement for diversity jurisdiction. Plaintiff's failure to respond to this Order to Show Cause will result in dismissal of the case.

All Citations

Slip Copy, 2020 WL 2395168

Footnotes

1	*See also* ACC, https://ecorp.azcc.gov (listing the same business address for the Grundy Law Firm); State Bar of Arizona, Find a Lawyer, https://azbar.legalservices link.com/attorneys-view/ElvinGarryGrundy (same) (last visited May 8, 2019).
2	*See also* 28 U.S.C. § 1915(e)(2) (requiring the district court to screen complaints filed by plaintiffs proceeding in forma pauperis); *Lopez v. Smith*, 203 F.3d 1122, 1126 n.7 (9th Cir. 2000) (§ 1915(e) applies to all in forma pauperis complaints).
3	Nor does Plaintiff allege that the lost "opportunities and benefits" were caused by Defendants' conduct. *See Nigro v. Corizon Med. Servs.*, No. 1:19-CV-00441-BLW, 2020 WL 572714, at *1 (D. Idaho Feb. 5, 2020) (explaining that "a complaint cannot recite only the elements of a cause of action, supported by mere conclusory statements that a defendant is responsible for the harm alleged") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).
4	If the Court were to enter the Grundy Law Firm's default and Plaintiff moved for default judgment under Rule 55(b), Plaintiff would be required to provide an evidentiary basis for the damages he seeks. *See Valenzuela v. Regency Theater*, No. CV-18-2013-PHX-DGC, 2019 WL 5721062, at *2 (D. Ariz. Nov. 5, 2019); *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).