DAVID B. FARKAS (SBN 257137)
david.farkas@us.dlapiper.com
DLA PIPER LLP (US)
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, California 90067-4704
Tel: (310) 595-3412
Fax: (310) 595-3312

JOHN K. LYONS (*Pro Hac Vice*)
john.lyons@us.dlapiper.com
JEFFREY S. TOROSIAN (*Pro Hac Vice*)
jeffrey.torosian@us.dlapiper.com
JOSEPH A. ROSELIUS (*Pro Hac Vice*)
joseph.roselius@dlapiper.com
DLA PIPER LLP (US)
444 West Lake Street, Suite 900
Chicago, Illinois 60606-0089
Tel: (312) 368-4000
Fax: (312) 236-7516

Attorneys for Jonathan D. King as Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: ZETTA JET USA, INC., a California corporation, Debtor.	Lead Case No.: 2:17-bk-21386-SK Chapter 7 Jointly Administered With: Case No.: 2:17-bk-21387-SK
In re: ZETTA JET PTE, LTD., a Singaporean corporation, Debtor.	Adv. Proc. No. 2:19-ap-01383-SK **LIMITED OBJECTION TO REQUESTS FOR JUDICIAL NOTICE**
JONATHAN D. KING, solely in his capacity as Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Jet PTE, Ltd. Plaintiff, v. YUNTIAN 3 LEASING COMPANY DESIGNATED ACTIVITY COMPANY f/k/a YUNTIAN 3 LEASING COMPANY LIMITED, YUNTIAN 4 LEASING COMPANY DESIGNATED ACTIVITY COMPANY f/k/a YUNTIAN 4 LEASING COMPANY LIMITED, MINSHENG FINANCIAL LEASING CO., LTD., MINSHENG BUSINESS AVIATION LIMITED, EXPORT DEVELOPMENT CANADA, LI QI, UNIVERSAL LEADER	Next Hearing: Date: August 11, 2021 Time: 9:00 a.m. (PDT) Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012 [Relates to Adv. Docket No. 240]

INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED, and TRULY GREAT GLOBAL LIMITED,

WELLS FARGO BANK NORTHWEST, N.A., in its capacity as trustee to Yuntian 3 Trust dated September 20, 2016 (formed and administered in Utah) and its capacity as trustee of Yuntian 4 Trust dated September 20, 2016 (formed and administered in Utah); TVPX ARS, INC., in its capacity as trustee to Zetta MSN 9688 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), Zetta MSN 9606 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), collectively Nominal Defendants,

Defendants.

Jonathan D. King, solely in his capacity as Chapter 7 Trustee (the "Trustee") of Zetta Jet USA, Inc. and Zetta Jet PTE, Ltd., the debtors (the "Debtors" or, collectively, "Zetta") in the above-captioned bankruptcy cases, hereby files this limited objection to the *Request for Judicial Notice in Support of Defendant Li Qi's Motion to Dismiss Counts I, II, VII, VIII, AND IX of Amended Adversary Complaint and Universal Leader Limited, Glove Assets Investment Limited, and Truly Great Global Limited's Motion to Dismiss Counts I, II, VI, VII, VIII, IX & X AND Motion to Strike Counts VIII & IX of Amended Adversary Complaint* (the "Requests") [Docket No. 240] and respectfully states as follows:

The Defendants made the Requests in support of the motions to dismiss.[1] The Trustee objects to the Requests on several grounds. First, the Defendants do not adequately identify what they are seeking to have judicially noticed. The Trustee cannot determine, in many instances, if the Defendants are seeking to have the Court merely notice that a document was filed, notice a particular statement from the document, or notice a disputed fact or conclusion drawn from the document. Second, it appears that many Requests seek judicial notice of disputed facts or conclusions allegedly contained within or drawn from public documents, which is improper under Ninth Circuit law. The Trustee objects to these Requests to the extent that they are not merely seeking judicial notice of the existence or filing of the documents themselves. Third, several of the Requests seek judicial notice of irrelevant, non-adjudicative documents and facts, which is again improper under Ninth Circuit law. The Trustee objects to these improper Requests. Fourth, the Defendants have not properly authenticated the list of correspondent banks, and the Trustee objects to this Request. Finally, a number of Requests are unnecessary because they seek judicial notice of orders entered by this Court or the very motions before it in this adversary proceeding. The Court can consider these documents without taking judicial notice of them.

Legal Standard for Judicial Notice

"Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is 'not subject to reasonable dispute.'" *Khoja v. Orexigen Theraputics Inc.*, 899 F.3d 988, 999 (9th Cir.

[1] Universal Leader Limited, Glove Assets Investment Limited, and Truly Great Global Limited shall be referred to as the "UL Defendants." The UL Defendants' motion to dismiss [Docket No. 238] shall be referred to as the "UL Motion." The motion to dismiss filed by Li Qi ("Li") [Docket No. 239] shall be referred to as the "Li Qi Motion."

2018) (quoting Fed. R. Evid. 201(b)). "Adjudicative facts are simply the facts of the particular case[.]" *Shetty v. Wells Fargo Bank*, 2016 WL 9686987 at *4 (C.D. Cal. Aug. 19, 2016) (quoting Advisory Notes to Fed. R. Evid. 201). Courts will not take judicial notice of irrelevant, non-adjudicative facts. *See, e.g., Moreau v. Kenner*, 2009 WL 10674116 at * 2 (C.D. Cal. May 14, 2009) ("[T]he Court may decline to judicially notice facts that are not relevant to the issues before the Court, and therefore do not require 'adjudication.'"); *Bondarenko v. Wells Fargo Bank, N.A.*, 2016 WL 6267927 at *2 (C.D. Cal. Aug. 10, 2016) ("As with evidence generally, the document to be judicially noticed must be relevant to an issue in the case."); *Kohn Law Grp., Inc. v. Jacobs*, 2018 WL 6131149 at *2, n. 1 (C.D. Cal. Feb. 16, 2018) (denying request for judicial notice that "presents no adjudicative or relevant facts"); *Molski v. Foley Estates Vineyard & Winery, LLC*, 2009 WL 10715116 at * 7 (C.D. Cal. Sept. 25, 2009) (finding that the "Declarations are not adjudicative facts; the statements made within the Declarations relate to the facts of another case" and denying request for judicial notice).

"A fact is 'not subject to reasonable dispute' if it is 'generally known,' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Khoja*, 899 F.3d at 999 (quoting Fed. R. Evid. 201(b)(1)-(2)). Moreover, "[j]ust because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Id*. Documents are judicially noticeable "only for the purpose of determining what statements are contained therein, not to prove the truth of the contents or any party's assertion of what the contents mean." *U.S. v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 975 (E.D. Cal. 2004). For example, the Ninth Circuit has noted that a transcript of a conference call is judicially admissible to show that the conference call occurred on a specific date. *Khoja*, 899 F.3d at 999-1000. However, it would be "improper" to judicially notice the substance of the transcript to establish a fact in dispute, because the transcript is "subject to varying interpretations[.]" *Id*. at 1000. (quoting *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011)). *See also Baird v. BlackRock Inst. Tr. Co. NA*, 403 F. Supp. 3d 765, 774 (N.D. Cal. 2019) ("Accordingly, a court may take 'judicial notice of matters of public record' but 'cannot take judicial notice of disputed facts contained in such public records.'") (quoting *Khoja*, 899 F.3d at 999).

The Ninth Circuit has recognized that defendants "face an alluring temptation to pile on numerous documents to their motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage." *Khoja*, 899 F.3d at 998. This trend has led the Court to warn about the "overuse and improper application of judicial notice." *Id*. As set forth herein, granting the Requests would lead to such overuse and improper application of judicial notice.

Objection to Requests

A. The Trustee objects to all Requests because they do not sufficiently identify the facts sought to be judicially noticed.

The Court should reject the Requests entirely because they fail to sufficiently identify the facts sought to be judicially noticed. "The Ninth Circuit has clarified that if a court takes judicial notice of a document, it must specify what facts it judicially noticed from the document." *Baird*, 403 F. Supp. 3d at 774. Accordingly, "a proper request for judicial notice includes identification of specific facts the court is requested to notice as true." *Segura v. Felker*, 2010 WL 5313770 at *1, n.1 (E.D. Cal. Dec. 20, 2010). The Defendants seek judicial recognition of 29 documents. *See generally* Requests. Defendants seem to seek recognition of all 29 documents in their entirety. To be sure, there are some references to certain sections of the documents; however, Defendants exhibits contain the entire documents, and Defendants do not clarify whether those are the only sections for which they seek judicial notice. Moreover, Defendants have not identified specific sections for several of the documents, and even if they had, the sections and pages do not identify the specific facts for which Defendants seek judicial notice. Accordingly, the Trustee objects to each of the Requests as not sufficiently identifying the fact sought to be judicially noticed.

B. The Trustee objects to Requests that seek judicial notice of non-adjudicative facts.

The Defendants seek judicial notice of various documents from other adversary pleadings, including a pleading filed by the Trustee, a memorandum of decision, an order, and a transcript of a hearing. They also seek judicial notice of two judgments from the Republic of Singapore. The defendants also request judicial notice of a plaintiff's memorandum of law filed in a California state court proceeding.

These documents do not relate to any facts that need to be adjudicated by this Court. They do not concern this particular adversary proceeding. Taking judicial notice of these documents will not aid the Court in ruling on the Defendants' motions. The Court should not take judicial notice of these non-adjudicative facts and documents. *See, e.g., Moreau*, 2009 WL 10674116 at * 2.

Document Sought to be Noticed	Defendants Citing Requested Document
Courts Memorandum of Decision on Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustees Adversary Complaint filed in Adv. Proc. No. 2:19-ap-01147-SK [Dkt. No. 168]	UL Defendants
Order Denying Motion to Consolidate Related Adversary Cases filed in Adv. Proc. No. 2:19-ap-01147-SK [Dkt. No. 236]	UL Defendants
Transcript Regarding Hearing Held 03/31/21 filed in Adv. Proc. No. 2:19-ap-01147-SK [Dkt. No. 237]	UL Defendants
Trustee's Opposition to Jetcraft Defendants' Motion to Dismiss filed in Adv. Proc. No. 2:19-ap-01382-SK [Dkt. No. 69]	UL Defendants
Judgement (Partial Recognition), [2018] SGHC 16 (Jan. 24, 2018) filed in *Re: Zetta Jet Pte Ltd. and others*, In the High Court of the Republic of Singapore, Originating Summons No 1391 of 2017	Li
[Judgment (Recognition), [2019] SGHC 53 (March 4, 2019)] filed in *Re: Zetta Jet Pte Ltd. and others*, In the High Court of the Republic of Singapore, Originating Summons No 1391 of 2017	Li
Excerpts from Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants James Seagrim and S. Matthew Walter's Motion for an Order Requiring an Undertaking and Staying the Action filed in *Truly Great Global Ltd. v. Seagrim et. al.*, BC694919 (Cal. Super. Ct. Jan. 17, 2018)	Li

C. The Trustee objects to Requests that seek judicial notice of facts in dispute.

Rule 201 of the Federal Rules of Evidence explicitly provides that the Court may only take judicial notice of adjudicative facts that are "not subject to reasonable dispute." Fed. R. Evid. 201(b). The Ninth Circuit has recognized that where a document is "subject to varying interpretations" it is not proper to judicially notice a fact or conclusion drawn therefrom. *Khoja*, 899 F.3d at 1000. Accordingly, documents are not judicially noticeable "to prove the truth of the contents or any party's assertion of what the contents mean." *S. Cal. Edison Co.*, 300 F. Supp. 2d

at 975. This Court has previously agreed with the Trustee that it is improper to take judicial notice of disputed facts stated or alleged in court filings. [Dkt. No. 174 at 4-5.] While the Court can take notice of the fact that the documents were filed, it "cannot take judicial notice of any of the facts stated or alleged in those documents." [*Id.*]

Although the Defendants fail to specifically identify what facts they seek to notice, it appears that the Defendants are seeking to judicially notice disputed facts and legal conclusions drawn from the following documents. Accordingly, the Trustee objects to the following Requests to the extent the Defendants do not simply seek judicial notice of their existence or filing. To be sure, however, if the Court takes judicial notice of the truth of *some* allegations in the original and Amended Adversary Complaints and other documents, then the Court should accept as true *all* allegations in those documents rather than allow the Defendants to pick and choose which facts they want to dispute. That is of course the proper standard for a motion to dismiss.

Document Sought to be Noticed	**Defendants Citing Requested Document**	**Underlying Disputed Fact or Conclusion Sought to be Noticed**
Main Bankruptcy Proceeding Documents		
Claim No. 95: Proof of Claim filed by Glove Assets[2]	UL Defendants	"Accordingly, to facilitate and in conjunction with the transaction, which resulted in substantial cash and other material benefits to Zetta PTE, the parties contemporaneously entered into a 'Clarification' under which outstanding payment obligations were confirmed as obligations of Zetta PTE, in the form of an unsecured note. Dkt. 232 ¶¶ 264, 265. This is the basis of Glove's $43 million proof of claim." UL Motion at 5.

[2] The Trustee does not object to the Defendants' requests for judicial notice of Proof of Claim number 95 to the extent such request is limited solely to the filing in this Court of the claims themselves and not any of the factual or legal allegations therein. The Trustee has previously sought judicial notice of the filing of proofs of claims by the Defendants.

Dkt. No. 26: Debtors' Emergency Motion for Entry of an order Authorizing the Debtors to Honor Certain Prepetition Obligations to Customers	UL Defendants	"The sale of block hours is not an indication of fraud; to the contrary, block hours are a standard and routine way to purchase air charter services. *See* Aircraft Charter Consumer Guide at 5,7, National Business Aviation Association, https://nbaa.org/flight-department-administration/aircraft-operating-ownership-options/aircraft-charter/aircraft-charter-consumer-guide/ (last visited May 7, 2021).[3] Indeed, the Debtors filed a motion seeking authority to honor prepetition block hour arrangements, which the Trustee supported and the Court approved, with certain modifications." UL Motion at 17 n.8.
Dkt No. 138: Transcript of Proceedings Debtor's Emergency Motion to Approve Stipulation for Appointment of a Chapter 11 Trustee and Debtors Emergency Motion for Entry of an Order Authorizing Debtors to Honor Pre-Petition Obligations to Critical Vendors	Li	"In fact, less than two weeks after the Singapore Injunction issued, this Court ruled that '[t]he injunction doesn't have any language that appears to impact or address this Court's ability to continue adjudicating these matters, or any language that indicates the Singapore court was seeking to impact the Court's ability to rule in these cases.'" Li Motion at 8-9, 29.
Dkt. No. 294: Final Order Granting Debtors' Emergency Motion for an Order Authorizing Debtors to Honor Pre-Petition Obligations to Customers as Modified by Agreement of the Trustee and Committee	UL Defendants	"The sale of block hours is not an indication of fraud; to the contrary, block hours are a standard and routine way to purchase air charter services. *See* Aircraft Charter Consumer Guide at 5,7, National Business Aviation Association, https://nbaa.org/flight-department-administration/aircraft-operating-ownership-options/aircraft-charter/aircraft-charter-consumer-guide/ (last visited May 7, 2021).[4] Indeed, the Debtors filed a motion seeking authority to honor prepetition block hour arrangements, which the Trustee supported and the Court approved, with certain modifications." UL Motion at 17 n.8.

[3] The Defendants did not seek judicial notice of this document from outside the Amended Adversary Complaint, nor is it incorporated by reference in the Amended Adversary Complaint, so the Court should strike it and not consider it.
[4] The Defendants did not seek judicial notice of this document from outside the Amended Adversary Complaint, nor is it incorporated by reference in the Amended Adversary Complaint, so the Court should strike it and not consider it.

Dkt. No. 381: Chapter 11 Trustee's Emergency Motion for Interim and Final Orders Memorandum of Points and Authorities; Declaration of Jonathan D. King	UL Defendants	"The Trustee believed there was a viable business when he sought approval for debtor-in-possession financing, stating 'that with the benefit of the liquidity from the Postpetition Financing Facility, the Debtors will be able to operate on a cash flow positive basis.'" UL Motion at 16-17.
Documents Previously Filed in this Adversary Proceeding		
Dkt. No. 1: Adversary Complaint	Li and the UL Defendants	"Over the next year, Zetta PTE paid approximately $2.3 million in interest on the loans in accordance with the agreements." UL Motion at 4.
Dkt. No. 1-4: Schedule D	UL Defendants	"Over the next year, Zetta PTE paid approximately $2.3 million in interest on the loans in accordance with the agreements." UL Motion at 4.
Dkt. No. 45-7: Declaration of Brian Condon in Support of UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV Exhibit G	UL Defendants	"The document states that '[t]he Company [Zetta Jet PTE] hereby covenants with the Lender [UL] that the Company will repay the Indebtedness in the manner and at the times as set out in Schedule I herein,' . . . contains provisions for the payment of interest, maturity dates, . . . acceleration, and that the delay in the exercise of any right does not constitute a partial or full waiver of such right." UL Motion at 33 (citations omitted).
Full Copy of Confirmatory Deed of Loan, Previously filed in Excerpted form in **Dkt. No. 45:** Declaration of Brian Condon in Support of UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV	UL Defendants	"The document states that '[t]he Company [Zetta Jet PTE] hereby covenants with the Lender [UL] that the Company will repay the Indebtedness in the manner and at the times as set out in Schedule I herein,' . . . contains provisions for the payment of interest, maturity dates, . . . acceleration, and that the delay in the exercise of any right does not constitute a partial or full waiver of such right." UL Motion at 33 (citations omitted).
Dkt. No. 45-7: Declaration of Brian Condon in Support of UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV at ¶¶ 7-8	UL Defendants	"The document states that '[t]he Company [Zetta Jet PTE] hereby covenants with the Lender [UL] that the Company will repay the Indebtedness in the manner and at the times as set out in Schedule I herein,' . . . contains provisions for the payment of interest, maturity dates, . . . acceleration, and that the delay in the exercise of any right does not constitute a partial or full waiver of such right." UL Motion at 33 (citations omitted).

Dkt. No. 53-1: Trustees Combined Opposition to Motions to Dismiss Adversary Complaint	UL Defendants	"He repeatedly argued on the motion to dismiss the original Complaint that his claims could be saved if the Court looked to the 'obligations incurred.'" UL Motion at 9.
Dkt. No. 62-2: Declaration of Harprabdeep Sing	UL Defendants	"As set forth in the Declaration of Harprabdeep Singh, . . . recharacterization is not an available remedy." UL Motion at 33.
Dkt. No. 62-3: Declaration of Daniel Chan	UL Defendants	"Singapore courts do not recharacterize lease agreements as a secured financing arrangements [*sic*] where the parties, by the terms of the contract, had agreed to a lease." UL Motion at 24.
Dkt. No. 100: Opposition to Trustee's Motion for Alternative Service on Defendants	Li	"Over the objection of Arnold & Porter that the Trustee should serve Li Qi using the established Hague Convention process rather than serving Arnold & Porter as his counsel or serving him by email, the Court authorized the Trustee to serve Li Qi by email to Li Qi and by email and FedEx to Arnold & Porter." Li Motion at 34 (citations omitted).
Dkt. No. 101: Request for Judicial Notice in Support of Opposition to Trustee's Motion for Alternative Service on Defendants	Li	"Over the objection of Arnold & Porter that the Trustee should serve Li Qi using the established Hague Convention process rather than serving Arnold & Porter as his counsel or serving him by email, the Court authorized the Trustee to serve Li Qi by email to Li Qi and by email and FedEx to Arnold & Porter." Li Motion at 34 (citations omitted).
Dkt. No. 139: Order on Motion for Alternative Service on Defendants Li Qi and Minsheng Financial Leasing Co., Ltd. Under Fed. R. Civ. P. 4(f)(3)	Li	"Over the objection of Arnold & Porter that the Trustee should serve Li Qi using the established Hague Convention process rather than serving Arnold & Porter as his counsel or serving him by email, the Court authorized the Trustee to serve Li Qi by email to Li Qi and by email and FedEx to Arnold & Porter." Li Motion at 34 (citations omitted).
Dkt. No. 169: Transcript of Hearing re Export Canada, Yuntian, Minsheng, and UL Defendants Motions to Dismiss July 22, 2020	UL Defendants	"The Trustee's argument based on 'obligations' rather than 'transfers' is not new. He repeatedly argued on the motion to dismiss the original Complaint that his claims could be saved if the Court looked to the 'obligations incurred.' . . . RJN Ex. 20 at 84 ('They say transfer, but I think it's important to understand, your Honor, 548 doesn't just speak in terms of avoidance of transfers.')" UL Motion at 9.

Dkt. No. 174: Memorandum of Decision on UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, and XV of Adversary Complaint	Li and the UL Defendants	"The Court already considered the same payment instructions on which the Amended Complaint relies to conclude that the transfers were made for the credit of UL's account in Hong Kong despite being routed through HSBC's intermediary account in New York." Li Motion at 14 n.4. "Furthermore, this Court has previously held that the avoidance claims in this case are impermissibly extraterritorial." *Id.* at 23. "But the Court already decided both that § 548 does not have extraterritorial scope, and the 2016 transactions that are the subject of Counts VIII and IX are foreign." UL Motion at 14 "The Third Loan is governed by Hong Kong law." *Id.* at 32
Dkt. No. 175: Memorandum of Decision on Yuntian 3 Motion to Dismiss Counts II, III, VI, VII, IX, X, XI, XII, and XV of Adversary Complaint	UL Defendants	"In arguing that the 'transfers' alleged in his original Complaint were domestic, the Trustee contended that 'the test for whether the relevant conduct was extraterritorial is 'flexible' and allows courts to consider all components of the transfers, including whether the participants, acts, targets, and effects involved in the transactions are primarily foreign or primarily domestic.'" UL Motion at 6.
Dkt. No. 188: Order on UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV of Adversary Complaint	UL Defendants	"These new counts exceed the scope of leave to amend granted in the Court's Order dismissing the Trustee's original Complaint . . . stat[ing] that the UL Defendants' 'Motion [to Dismiss] is GRANTED regarding Counts I, II, IV, V, VIII, XIII and XV, which are dismissed with leave to amend.'" UL Motion at 34.

D. The Trustee objects to the Request to take judicial notice of the list of correspondent banks.

Defendants' request to take judicial notice of the list of correspondent banks is improper because, despite Defendants claims to the contrary, its accuracy can be reasonably questioned. "If the authenticity of a document is not established, the Court cannot conclude that its accuracy cannot reasonably be questioned because it *is* being questioned." *Lawson v. Reynolds Indus.*, 2005 WL 8165610, at *2 (C.D. Cal. Feb. 4, 2005) (original emphasis). Even when it is not suggested that documents are forgeries, it is proper for a court to decline to take judicial notice of a document that has not been properly authenticated. *Id.* at *3. *See also Madeja v. Olympic Packers, LLC*, 310 F.3d

628, 639 (9th Cir. 2002) (affirming district court's refusal to take judicial notice of bankruptcy proceedings because the documents were not authenticated). Courts routinely refuse to take judicial notice of documents that are not authenticated. *Lawson*, 2005 WL 8165610, at *3; *Madeja*, 310 F.3d at 639; *Perkins v. Kaiser Found. Health Plan, Inc.*, 2010 WL 11509237, at *6 (C.D. Cal. Mar. 3, 2010); *Murray v. Parsons*, 2020 WL 5099405, at *4-5 (C.D. Cal. July 27, 2020), *R. & R. adopted sub nom. Murray v. City of Fountain Valley Police Sgt. Mike Parsons*, 2020 WL 5097153 (C.D. Cal. Aug. 27, 2020).

It is also not clear that Defendants have provided a list of correspondent banks from the appropriate time period. The list of correspondent banks is stamped with a date of January 2016. [Requests at Ex. 28.] The payments at issue happened after January 2016. [Dkt. No. 232 Schedules A-D.] A court can properly deny a request for judicial notice of a fact that "is of questionable relevance to the time period alleged" in the complaint. *U.S. v. Woody's Trucking, LLC*, 2018 WL 1997306, at *2 (D. Mont. Apr. 27, 2018); *see also United States v. Cohen*, 2012 WL 505918, at *10-11 (C.D. Ill. Feb. 15, 2012) (denying judicial notice where the agreement sought to be noticed did not cover the relevant time period). Thus, even if the list of correspondent banks were properly authenticated, it would still not be proper for judicial notice because it is not clear that it is from the relevant time period.

Finally, this document is sent from a private party to a private party. It is not a part of the public record. "Courts may take judicial notice of document that are matters of public record or are quasi-public documents," but not documents sent to private parties. *Morrow v. City of San Diego*, 2012 WL 4447624, at *2 n.1 (S.D. Cal. Sept. 25, 2012); *see also Gooden v. Suntrust Mortg., Inc.*, 2012 WL 996513, at *3 (E.D. Cal. Mar. 23, 2012) ("Items C and D are not proper subjects of judicial notice because they appear to be prepared and certified by a private entity . . . and are not matters of public record"); *Nugent v. Fed. Home Loan Mortg. Corp.*, 2013 WL 1326425, at *3 n.2 (E.D. Cal. Mar. 29, 2013) (denying a bank's request to take judicial notice of a private letter it sent because it was not "available to the public"). Defendants' citation to a case taking judicial notice of SWIFT documents is inapposite because the documents were "publicly available" from the SWIFT website. *MAM Apparel & Textiles Ltd. v. NCL Worldwide Logistics USA, Inc.*, 2020 WL

4336362, at *4 n.4 (E.D.N.Y. July 28, 2020). Here, Defendants do not identify anywhere this document is publicly available. Instead, it "is a document provided by HSBC," a private bank, to its customers. [Requests at 8.]

The Defendants do not even attempt to authenticate the list of correspondent banks, nor is it clear that the list is from the relevant time period. This is neither a public record nor a publicly available document. Without proper authentication, its accuracy can be reasonably questioned. Without supplying the list from the time period covering the alleged payments, the document lacks relevance. This is an unauthenticated, private record, and it is not clear that it is from the relevant time period. Accordingly, the Trustee objects to the request for judicial notice of the list of correspondent banks.

E. The Trustee objects to Requests that unnecessarily seek judicial notice of pleadings, motions, and orders before this Court.

Finally, the Defendants make numerous unnecessary requests for judicial notice of orders entered by the Court and pleadings filed in this case. These requests serve no purpose, other than complicating the record and wasting resources. It is well-established that "the Court need not take judicial notice of its own order to consider its effect." *Lyles v. Ford Motor Credit Co.*, 2013 WL 987723, at * 2 (C.D. Cal. Mar. 11, 2013); *see also West v. Finander*, 2015 WL 4498018, at * 1 (C.D. Cal. July 21, 2015) ("There is no need for the Court to take judicial notice of its own order or of documents that are already judicially known."). Likewise, the Court does not need to take judicial notice of pleadings currently before it. *See, e.g., Audionics Sys., Inc. v. AAMP of Fla., Inc.*, 2014 WL 12580235 at *2 (C.D. Cal. Mar. 24, 2014) ("The court denies this request because it need not take judicial notice of the documents; they are already part of the files and records in the action."); *Williams v. State of California*, 2016 WL 4607738 at *2 (C.D. Cal. July 25, 2016) ("The Judicial Defendants filed a Request for Judicial Notice seeking judicial notice of plaintiff's Complaint and the Court's own Order. . . The Court denies their request as unnecessary because the Court need not take judicial notice of its own records."). The Court can consider these orders and pleadings without needing to take judicial notice of them.

The Defendants appear to believe that the Court is required to take judicial notice of every

single document cited in their pleadings. This is unnecessary and a misuse of judicial notice.

Document Sought to be Noticed	Defendants Citing Requested Document
Main Bankruptcy Proceeding Documents	
Claim No. 95: Proof of Claim filed by Glove Assets	UL Defendants
Dkt. No. 26: Debtors' Emergency Motion for Entry of an order Authorizing the Debtors to Honor Certain Prepetition Obligations to Customers	UL Defendants
Dkt No. 138: Transcript of Proceedings Debtor's Emergency Motion to Approve Stipulation for Appointment of a Chapter 11 Trustee and Debtors Emergency Motion for Entry of an Order Authorizing Debtors to Honor Pre-Petition Obligations to Critical Vendors	Li
Dkt. No. 294: Final Order Granting Debtors' Emergency Motion for an Order Authorizing Debtors to Honor Pre-Petition Obligations to Customers as Modified by Agreement of the Trustee and Committee	UL Defendants
Dkt. No. 381: Chapter 11 Trustee's Emergency Motion for Interim and Final Orders Memorandum of Points and Authorities; Declaration of Jonathan D. King	UL Defendants
Documents Previously Filed in this Adversary Proceeding	
Dkt. No. 1: Adversary Complaint	Li and the UL Defendants
Dkt. No. 1-4: Schedule D	UL Defendants
Dkt. No. 45-7: Declaration of Brian Condon in Support of UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV Exhibit G	UL Defendants
Dkt. No. 45-7: Declaration of Brian Condon in Support of UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV at ¶¶ 7-8	UL Defendants
Dkt. No. 53-1: Trustees Combined Opposition to Motions to Dismiss Adversary Complaint	UL Defendants
Dkt. No. 62-2: Declaration of Harprabdeep Sing	UL Defendants
Dkt. No. 62-3: Declaration of Daniel Chan	UL Defendants
Dkt. No. 100: Opposition to Trustee's Motion for Alternative Service on Defendants	Li
Dkt. No. 101: Request for Judicial Notice in Support of Opposition to Trustee's Motion for Alternative Service on Defendants	Li
Dkt. No. 139: Order on Motion for Alternative Service on Defendants Li Qi and Minsheng Financial Leasing Co., Ltd. Under Fed. R. Civ. P. 4(f)(3)	Li
Dkt. No. 169: Transcript of Hearing re Export Canada, Yuntian, Minsheng, and UL Defendants Motions to Dismiss July 22, 2020	UL Defendants
Dkt. No. 174: Memorandum of Decision on UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, and	Li and the UL Defendants

XV of Adversary Complaint	
Dkt. No. 175: Memorandum of Decision on Yuntian 3 Motion to Dismiss Counts II, III, VI, VII, IX, X, XI, XII, and XV of Adversary Complaint	UL Defendants
Dkt. No. 188: Order on UL Defendants Motion to Dismiss Counts I, II, IV, V, VII, XII, XIV, & XV of Adversary Complaint	UL Defendants

For the avoidance of doubt, the Trustee in no way concedes that judicial notice of any of these documents would be proper even if they were not already on the docket in this Adversary Proceeding. But it is particularly silly for a party to seek judicial notice of documents that are already before the Court.

CONCLUSION

For the foregoing reasons, the Trustee requests that the Court enter an order denying all Requests and instructing the Defendants to adequately identify the facts that they seek to judicially notice or, in the alternative, enter an order (1) denying all Requests identified in Section B; (2) denying all Requests in Section C, to the extent that the Requests seek judicial notice of disputed facts or conclusions and not simply the filing or existence of the document; (3) denying the Request for the list of correspondent banks in Section D; and (4) denying all Requests in Section E.

DATED: June 3, 2021

DLA PIPER LLP (US)

By: */s/ John K. Lyons*
DAVID B. FARKAS
JOHN K. LYONS (*Pro Hac Vice*)
JEFFREY S. TOROSIAN (*Pro Hac Vice*)
JOSEPH A. ROSELIUS (*Pro Hac Vice*)

Attorneys for the Chapter 7 Trustee

Exhibit 1

DAVID B. FARKAS (SBN 257137)
david.farkas@us.dlapiper.com
DLA PIPER LLP (US)
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, California 90067-4704
Tel: (310) 595-3412
Fax: (310) 595-3312

JOHN K. LYONS (*Pro Hac Vice*)
john.lyons@us.dlapiper.com
JEFFREY S. TOROSIAN (*Pro Hac Vice*)
jeffrey.torosia@us.dlapiper.com
JOSEPH A. ROSELIUS (*Pro Hac Vice*)
joseph.roselius@us.dlapiper.com
DLA PIPER LLP (US)
444 West Lake Street, Suite 900
Chicago, Illinois 60606-0089
Tel: (312) 368-4000
Fax: (312) 236-7516

Attorneys for Jonathan D. King as Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: ZETTA JET USA, INC., a California corporation, Debtor.	Lead Case No.: 2:17-bk-21386-SK Chapter 7 Jointly Administered With: Case No.: 2:17-bk-21387-SK
In re: ZETTA JET PTE, LTD., a Singaporean corporation, Debtor.	Adv. Proc. No. 2:19-ap-01383-SK
JONATHAN D. KING, solely in his capacity as Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Jet PTE, Ltd., Plaintiff, v. YUNTIAN 3 LEASING COMPANY DESIGNATED ACTIVITY COMPANY f/k/a YUNTIAN 3 LEASING COMPANY LIMITED, YUNTIAN 4 LEASING COMPANY DESIGNATED ACTIVITY COMPANY f/k/a YUNTIAN 4 LEASING COMPANY LIMITED, MINSHENG FINANCIAL LEASING CO., LTD., MINSHENG BUSINESS AVIATION LIMITED, EXPORT DEVELOPMENT CANADA, LI QI,	**APPENDIX OF UNPUBLISHED OPINIONS CITED IN TRUSTEE'S LIMITED OBJECTION TO REQUESTS FOR JUDICIAL NOTICE** Next Hearing: Date: August 11, 2021 Time: 9:00 a.m. (PDT) Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012

UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED, and TRULY GREAT GLOBAL LIMITED,

WELLS FARGO BANK NORTHWEST, N.A., in its capacity as trustee to Yuntian 3 Trust dated September 20, 2016 (formed and administered in Utah) and its capacity as trustee of Yuntian 4 Trust dated September 20, 2016 (formed and administered in Utah); TVPX ARS, INC., in its capacity as trustee to Zetta MSN 9688 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), Zetta MSN 9606 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), collectively Nominal Defendants,

Defendants.

In accordance with Local Bankruptcy Rule 9013-2(b)(4), the Trustee hereby submits copies of unpublished judicial opinions cited in Trustee's Limited Objection to Requests for Judicial Notice (the "Objection"). The unpublished judicial opinions cited in the Objection are attached hereto as follows:

1. Exhibit 1: *Audionics Sys., Inc. v. AAMP of Florida, Inc.*, 2014 WL 12580235 (C.D. Cal. Mar. 24, 2014)
2. Exhibit 2: *Bondarenko v. Wells Fargo Bank, N.A.*, 2016 WL 6267927 (C.D. Cal. Aug. 10, 2016)
3. Exhibit 3: *Gooden v. Suntrust Mortg., Inc.*, 2012 WL 996513, (E.D. Cal. Mar. 23, 2012)
4. Exhibit 4: *Kohn Law Group, Inc. v. Jacobs*, 2018 WL 6131149 (C.D. Cal. Feb. 16, 2018)
5. Exhibit 5: *Lawson v. Reynolds Indus.*, 2005 WL 8165610 (C.D. Cal. Feb. 4, 2005)
6. Exhibit 6: *Lyles v. Ford Motor Credit Co.*, 2013 WL 987723 (C.D. Cal. Mar. 11, 2013)
7. Exhibit 7: *MAM Apparel & Textiles Ltd. v. NCL Worldwide Logistics USA, Inc.*, 2020 WL 4336362 (E.D.N.Y. July 28, 2020)
8. Exhibit 8: *Molski v. Foley Estates Vineyard & Winery, LLC*, 2009 WL 10715116 (C.D. Cal. Sept. 25, 2009)
9. Exhibit 9: *Moreau v. Kenner*, 2009 WL 10674116 (C.D. Cal. May 14, 2009)

10. Exhibit 10: *Morrow v. City of San Diego*, 2012 WL 4447624 (S.D. Cal. Sept. 25, 2012)
11. Exhibit 11: *Murray v. City of Fountain Valley Police Sgt. Mike Parsons*, 2020 WL 5097153 (C.D. Cal. Aug. 27, 2020)
12. Exhibit 12: *Murray v. Parsons*, 2020 WL 5099405 (C.D. Cal. July 27, 2020)
13. Exhibit 13: *Nugent v. Fed. Home Loan Mortg. Corp.*, 2013 WL 1326425 (E.D. Cal. Mar. 29, 2013)
14. Exhibit 14: *Perkins v. Kaiser Found. Health Plan, Inc.*, 2010 WL 11509237 (C.D. Cal. Mar. 3, 2010)
15. Exhibit 15: *Segura v. Felker*, 2010 WL 5313770 (E.D. Cal. Dec. 20, 2010)
16. Exhibit 16: *Shetty v. Wells Fargo Bank*, 2016 WL 9686987 (C.D. Cal. Aug. 19, 2016)
17. Exhibit 17: *United States v. Woody's Trucking, LLC*, 2018 WL 1997306 (D. Mont. Apr. 27, 2018)
18. Exhibit 18: *US v. Cohen*, 2012 WL 505918 (C.D. Ill. Feb. 15, 2012)
19. Exhibit 19: *West v. Finander*, 2015 WL 4498018 (C.D. Cal. July 21, 2015)
20. Exhibit 20: *Williams v. State of California*, 2016 WL 4607738 (C.D. Cal. July 25, 2016)

Respectfully submitted,

DATED: June 3, 2021 **DLA PIPER LLP (US)**

By: /s/ *John K. Lyons*
DAVID B. FARKAS (SBN 257137)
JOHN K. LYONS (*Pro Hac Vice*)
JEFFREY S. TOROSIAN (*Pro Hac Vice*)
JOSEPH A. ROSELIUS (*Pro Hac Vice*)

Attorneys for the Chapter 7 Trustee

2014 WL 12580235
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

AUDIONICS SYSTEM, INC. d.b.a. Crux Interfacing Solutions, a California Company, Plaintiff,
v.
AAMP OF FLORIDA, INC., d.b.a. AAMP of America, Inc., a Florida Company, Defendant.

CASE NO. CV 12-10763 MMM (JEMx)
|
Signed 03/24/2014

Attorneys and Law Firms

Dylan C. Dang, R. Joseph Trojan, Trojan Law Offices, Beverly Hills, CA, for Plaintiff.

Allison W. Buchner, Kirkland and Ellis LLP, Los Angeles, CA, David L. Luikart, III, Dennis Parker Waggoner, Hill Ward and Henderson PA, Tampa, FL, Dennis J. Abdelnour, Kirkland and Ellis LLP, Chicago, IL, Gregg F. Locascio, Kirkland & Ellis LLP, Washington, DC, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART AAMP OF FLORIDA, INC.'S MOTION TO STRIKE AUDIONICS SYSTEM, INC.'S INEQUITABLE CONDUCT DEFENSE

MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

***1** Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the court finds the matter appropriate for decision without oral argument and vacates the hearing scheduled for March 24, 2014.

I. BACKGROUND

A. Factual Background

This is a patent dispute between Audionics System, Inc. d/b/a Crux Interfacing Solutions ("Crux") and AAMP of Florida, Inc. ("AAMP"). AAMP owns the rights to U.S. Patent No. 8,014,540 ("the '540 patent") and 8,184,825 ("the '825 patent") (together, "the patents"). The patents disclose interface devices for vehicle accessories that are adapted to permit the use of factory-installed remote vehicle stereo controls with after-market replacement stereos. [1] The '540 patent issued on September 6, 2011. [2] It protects a "Remote Control Interface for Replacement Vehicle Stereos." [3] The '825 patent issued on May 22, 2012, [4] and protects a "Vehicle Remote Control Interface for Controlling Multiple Electronic Devices." [5]

The patents both claim priority through U.S. Patent No. 6,956,952 ("the '952 patent"), which was filed November 17, 1999. [6] The '952 patent, in turns, claims priority through Provisional Application No. 60/108,711 (the "'711 patent application"), which was filed on November 17, 1998. [7] The named inventor of both of asserted patents is Brett D. Riggs, a current AAMP employee. [8]

AAMP alleges that Crux's interface devices, which it sells under the trade names "SOOGM-15," "SOOGM-16," and "SOOGM-16B," infringe claims 1, 5, 6, and 9 of the '540 patent. [9] It also asserts that the same devices infringe claims 1, 2, 4, 6, 7, 15, and 16 of the '825 patent. [10]

B. Procedural History

Crux filed an action seeking a declaratory judgment of noninfringement, invalidity, and unenforceability on December 17, 2012. [11] On June 20, 2013, the court entered an order consolidating the declaratory relief action with a patent infringement action against Crux that AAMP had filed in the United States District Court for the Middle District of Florida and that had been transferred to this district. [12] Crux answered AAMP's complaint on August 2, 2013, asserting twenty affirmative defenses. [13] On August 22, 2013, AAMP filed a motion to strike Crux's inequitable conduct defense and fifteen other affirmative defenses. [14] On November 19, 2013, the court granted AAMP's motion with leave to amend. [15] Crux filed an amended answer on December 9, 2013, [16] and on December 30, 2013, AAMP moved once again to strike Crux's inequitable conduct affirmative defense. [17] Crux opposes the motion. [18]

C. Request for Judicial Notice

***2** Crux requests that the court take judicial notice of "the documents filed in this case." [19] Crux does not identify

specific documents it wishes to have judicially noticed, but notes that many of the allegations in its amended answer are based on nearly a year of fact discovery, and that many of the facts pled in its amended answer have been presented in other papers previously filed in this case. The court denies this request because it need not take judicial notice of the documents; they are already part of the files and records in the action. See *Lyles v. Ford Motor Credit Co.*, No. SACV 12-1736 AG (RNBx), 2013 WL 987723, *2 (C.D. Cal. Mar. 11, 2013) ("[T]he Court need not take judicial notice of its own order to consider its effect"); *Elliott v. Amador County Unified Sch. Dist.*, No. 2:12–cv–00117–MCE–DAD, 2013 WL 796563, *6 (E.D. Cal. Mar. 4, 2013) ("[T]his Court's own orders in this same case ... are already properly before the Court, and judicial notice is not necessary"). AAMP argues that, in any event, the court may not consider matters outside the pleadings in deciding its motion.[20] While it is true that a court generally may not consider matters outside the pleadings in deciding a motion to strike, the court may consider matters of which it can take judicial notice. *In re Toyota Motor Corp.*, 790 F.Supp.2d 1152, 1170 (C.D. Cal. 2011) ("The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters which the Court may take judicial notice"); *County Vanlines Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 152 (S.D.N.Y. 2002) ("In deciding a Rule 12(f) motion, a court ... may also consider matters of which judicial notice may be taken under Fed. R. Evid. 201"). In fact, AAMP cites repeatedly in its moving papers to matters the court has previously judicially noticed in this litigation. Nonetheless, the court views Crux's request as an improper attempt to incorporate in the second amended answer the entirety of its voluminous filings in this case. The court finds such a request inappropriate, unwieldly, and unnecessary given that the court previously granted Crux leave to amend its answer and affirmative defenses.

II. DISCUSSION

A. Legal Standard Governing Motions to Strike

Rule 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED.R.CIV.PROC. 12(f). "The essential function of a Rule 12(f) motion is to 'avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.' " *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1478 (C.D. Cal. 1996) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), overruled on other grounds, 510 U.S. 517 (1994)). Motions to strike under Rule 12(f) are "generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101, 1152 (C.D. Cal. 2003).

"An affirmative defense may be insufficient as a matter of pleading or as a matter of law. It may be insufficiently pleaded where it fails to provide the plaintiff with fair notice of the defense asserted." *Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438, 440 (C.D. Cal. 2013) (citing *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979)). "It also may be insufficient as a matter of law where 'there are no questions of fact, ... any questions of law are clear and not in dispute, and ... under no set of circumstances could the defense succeed.' " *Huntington Oaks Del. Partners, LLC*, 291 F.R.D. at 440 (quoting *Ganley v. County of San Mateo*, No. C06–3923 THE, 2007 WL 902551, *1 (N.D. Cal. Mar. 22, 2007)). If a motion to strike is granted, "[i]n the absence of prejudice to the opposing party, leave to amend should be freely given." *Wyshak*, 607 F.2d at 826.

B. Legal Standard Governing the Pleading of an Inequitable Conduct Defense

"The remedy for inequitable conduct is the 'atomic bomb' of patent law. Unlike validity defenses, which are claim specific, inequitable conduct regarding any single claim renders the entire patent unenforceable.... Moreover, the taint of a finding of inequitable conduct can spread from a single patent to render unenforceable other related patents and applications in the same technology family. Thus, a finding of inequitable conduct may endanger a substantial portion of a company's patent portfolio." *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d at 1288 (citations omitted); *Fox Indus., Inc. v. Structural Preservation Sys., Inc.*, 922 F.2d 801, 803-04 (Fed. Cir. 1990) ("In determining inequitable conduct, a trial court may look beyond the final claims to their antecedents.... [A] breach of the duty of candor early in the prosecution may render unenforceable all claims which eventually issue from the same or a related application" (citations omitted)). See also *eSpeed, Inc. v. Brokertec USA, L.L.C.*, 417 F.Supp.2d 580, 595-96 (D. Del. 2006) ("The '974 patent and the '580 patent are closely related. The disclosures of the two patents are strikingly similar, and the claims of the '974 patent are likewise similar to asserted claims 20–23 of the '580 patent. Both patents claim a method of trading that comprises various trading states, including a 'Bid/Offer state' where a passive participant enters a bid or offer, and a method for distributing these bid and offer positions to other participants in the trade.

Both patents further describe a transition into a trading state when an aggressor hits the bid or lifts the offer. Additionally, as earlier indicated and more fully described below, the Super System is highly material prior art to the '580 patent. Finally, the '580 patent claims priority from the '733 application. As a result of the close relation of the asserted claims of the '580 patent to the claims of the '974 patent, the inequitable conduct committed during the prosecution of the '733 application, which matured into the '974 patent, infects the '580 patent, rendering it unenforceable" (citations omitted)).

***3** The affirmative defense of inequitable conduct "falls within the strictures of Rule 9(b)." *Multimedia Patent Trust v. Microsoft Corp.*, 525 F.Supp.2d 1200, 1211 (S.D. Cal. 2007); see *Central Admixture Pharmacy Servs., Inc. v. Advanced Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007) ("We have held that 'inequitable conduct, while a broader concept than fraud, must be pled with particularity,' " quoting *Ferguson Beauregard/Logic Controls, Inc. v. Mega Sys., LLC*, 350 F.3d 1327, 1344 (Fed. Cir. 2003)); see also *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326-27 (Fed. Cir. 2009) (inequitable conduct counterclaim and defense must be pled with particularity under Rule 9(b)). Inequitable conduct defenses not pled with adequate particularity can be stricken. *Multimedia Patent Trust*, 525 F.Supp.2d at 1211 ("[A]n inequitable conduct defense to a patent infringement claim may be stricken pursuant to Rule 12(f) for failure to plead with particularity").

To satisfy Rule 9(b), a defendant asserting an inequitable conduct defense "must identify the specific who, what, when, where, and how" of the plaintiff's alleged material misrepresentation or omission before the Patent and Trademark Office ("PTO"). *Exergen Corp.*, 575 F.3d at 1328. The standard for materiality is "but-for" materiality, such that "the PTO would not have granted the patent but for [the] failure to disclose" the invalidating information. *Therasense, Inc.*, 649 F.3d at 1295-96. The defendant must also include "sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information or of the falsity of the material misrepresentation, and (2) withheld or misrepresented this information with a specific intent to deceive the PTO." *Exergen Corp.*, 575 F.3d at 1328. See *Therasense, Inc.*, 649 F.3d at 1290 ("Because direct evidence of deceptive intent is rare, a district court may infer intent from indirect and circumstantial evidence"); *Human Genome Sciences, Inc. v. Genentech, Inc.*, 2:11-CV-6519-MRP, 2011 WL 7461786, *3 (C.D. Cal. Dec. 9, 2011) ("Because intent is a condition of [the] mind, direct evidence of intent is rarely available. This requires an accused infringer to attempt to prove deceptive intent through circumstantial evidence").

C. Whether the Court Should Strike Crux's Equitable Conduct Defense

Crux's allegations focus on alleged omissions by Brett D. Riggs, the named inventor;[21] P.B. Clarke & Associates, to whom Riggs assigned his patent applications;[22] and AAMP, to whom P.B. Clarke subsequently assigned the applications.[23] Crux alleges inequitable conduct arising from the failure to disclose three categories of material prior art to the PTO: the Soundgate devices, which allow factory-installed steering wheel audio controls to interface with after market stereos; devices designed by Terry Weeder, and two articles he published in trade magazines in 1995 and 1998 describing those devices;[24] and AAMP's own steering wheel interface devices.[25] The court analyzes each category in turn.

1. The Soundgate Interfaces

a. Facts Alleged in the Second Amended Answer

***4** Crux alleges that AAMP, Clarke, Riggs, and their attorneys failed to disclose the Soundgate devices, sold under the trade names "ALSW1," "FRDSW1," and "GMSW1."[26] It asserts that the FRDSW and GMSW1 were offered for sale at least as early as 1995.[27] Crux contends that AAMP, P.B. Clarke, and Riggs had actual knowledge of the products prior to the filing of the application for the '952 patent on November 17, 1999.[28] It alleges that Michael Trenholm, the attorney who prosecuted the '540 and '952 patents, sent Soundgate a letter on December 10, 1999. The letter purportedly stated that Trenholm had purchased an ALSW1 product and concluded that it fell within the scope of claims included in the application that subsequently matured into the '952 patent, and that continued sale of the ALSW1 could infringe the patent.[29] On December 16, 1999, Rob Putman —the president of Putman Group, which owned Soundgate —replied, stating that the GMSW1 began shipping nationally in 1995, and that Soundgate had conceptualized the ALSW1, and had working prototypes in circulation "long ago."[30]

Crux asserts that the PTO would not have allowed the claims in the '952 patent but for the failure to disclose the Soundgate reference.[31] It notes that on September 27, 2004, prior to issuance of the '952 patent, Trenholm argued to the PTO that "the Applicant's device was directed toward an after-market product that can be installed into a vehicle and connected to an existing original equipment control system such that the after-market interface can then be used to control an after-market stereo"; Crux asserts that Trehnolm also distinguished prior art on this basis.[32] It asserts that the Soundgate products are precisely this type of aftermarket interface.[33]

b. Whether Crux has Adequately Pled Inequitable Conduct

1. Materiality

To satisfy Rule 9(b), Crux must first identify "who" engaged in the allegedly inequitable conduct. *Cyber Acoustics, LLC v. Belkin Intern., Inc.*, —— F.Supp. 2d ——, 2013 WL 6842755, *6 (D. Or. Dec. 27, 2013). The "who" must be a "specific individual associated with the filing or prosecution of the application issuing as [the patent in suit], who both knew of the material information and deliberately withheld or misrepresented it." *Exergen Corp.*, 575 F.3d at 1329. AAMP does not dispute that Crux has adequately pled this aspect of the claim. Crux alleges that Trenholm and Riggs knew of the Soundgate products and believed they were sufficiently similar to the claims of the then-pending '952 application that they concluded the Soundgate products infringed.[34] Nonetheless, it asserts, they failed to disclose the Soundgate products to the PTO.[35] This allegation sufficiently pleads the "who" of the defense by identifying the individuals responsible for the allegedly inequitable conduct. See *Exergen Corp.*, 575 F.3d at 1329. Crux also alleges that AAMP and P.B. Clarke also "made a deliberate decision not to disclose the Soundgate products to the PTO."[36] This allegation, by contrast, does not satisfy the "who" requirement because it identifies organizations rather than specific individuals. See *id.* ("[T]he pleading refers generally to 'Exergen, its agents and/or attorneys,' but fails to name the specific individual associated with the filing or prosecution of the application issuing as the '685 patent, who both knew of the material information and deliberately withheld or misrepresented it. The pleading thus fails to identify the 'who' of the material omissions and misrepresentation" (citation omitted)).

To plead the 'what' and 'where' of inequitable conduct, a defendant must "identify [the] claims, and ... limitations in those claims, [to which] the withheld references are relevant...." *Id.* See *Cyber Acoustics, LLC*, 2013 WL 6842755 at *7 ("The 'what and where' requirements demand that a pleading 'identify which claims, and which limitations to those claims, the withheld references are relevant to, and where in those references the material information is found,' " quoting *Exergen*); *Breville Pty Ltd. v. Storebound LLC*, No. 12–cv–01783–JST, 2013 WL 1758742, *5 (N.D. Cal. Apr. 24, 2013) (quoting *Exergen Corp.*, 575 F.3d at 1329); *Pixion, Inc. v. Citrix Sys., Inc.*, No. C 09-3496 SI, 2012 WL 762005, *7 (N.D. Cal. Mar. 8, 2012) ("*Exergen* requires that the party alleging inequitable conduct 'identify which claims, and which limitations in those claims, the withheld references are relevant to, and where in the references the material information is found,' " quoting *Exergen*). See also 37 C.F.R. § 1.56(a) ("The duty to disclose information exists *with respect to each pending claim* until the *claim* is cancelled or withdrawn from consideration, or the application becomes abandoned" (emphasis added)). Crux's allegations do not identify specific claims or limitations to which the Soundgate devices were material; thus, they thus fail to satisfy the "what" and "where" requirements of Rule 9(b). *Exegen*, 575 F.3d at 1329.

***5** Crux contends it need not identify specific claims or limitations, because its pending motion for summary judgment puts AAMP on notice of the specific claims to which the Soundgate devices were relevant.[37] Based on Trenholm's assertions in his letter to Putman, Crux contends the Soundgate ALSW1 must have contained all the limitations of the then-pending claims of the '952 patent.[38] Thus, it asserts, it need not identify the specific claims to which the Soundgate devices were relevant because they affected every claim in the '952 patent and in the '540 and '825 patents derived therefrom.[39] AAMP responds that the Trenholm letter refers only to the ALSW1, and not to the GMSW1 and FRDSW1, and thus that there is no basis for concluding that GMSW1 and FRDSW1 are relevant to all claims.[40]

Crux's argument that its motion for summary judgment puts AAMP on notice of the claims to which the Soundgate devices are purportedly relevant is unavailing for several

reasons. As noted, the Federal Circuit in *Exegen* held that the pleading of inequitable conduct must satisfy the heightened pleading requirements of Rule 9(b); notice pleading, therefore, is insufficient. 575 F.3d at 1316. See *Tessenderlo Kerley, Inc. v. Or-Cal, Inc.*, No. C 11–04100 WHA, 2012 WL 10943324, *4 (N.D. Cal. Mar. 29, 2012) ("In its opposition, defendant argues that plaintiff 'cannot seriously contend it does not know what claims defendant is referring to—i.e. all of the claims asserted by [plaintiff] in this case.' The pleading standard for inequitable conduct requires more than that a plaintiff should know to what defendant refers. To satisfy *Exergen*, the pleading, itself, must specifically identify to which claims, and which limitations in those claims, the withheld references are relevant"). Thus, mere notice to AAMP of the specific claims to which Crux believes the Soundgate devices are relevant does not satisfy Crux's burden to plead the inequitable conduct defense with particularity. Moreover, the pleading that purportedly provides notice—Crux's motion for summary judgment—is irrelevant to this motion, which the court must decide on the basis of the answer alone, not on extraneous filings in this case. See *In re Toyota Motor Corp.*, 790 F.Supp.2d 1152, 1170 (C.D. Cal. 2011) ("The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters which the Court may take judicial notice").

Citing *Playtex Products, Inc. v. Procter & Gamble Co.*, 400 F.3d 901, 909 (Fed. Cir. 2005), Crux argues that by accusing Soundgate of infringing the '925 patent, Trenholm's letter signaled that he believed "every claim limitation [was] found in the accused device," as this is the requirement for infringement.[41] See *id.* ("For infringement to be found, the court must determine that every claim limitation is found in the accused device"). Crux's argument fails, however, because Trenholm does not identify which of the various claims the Soundgate devices purportedly infringed; more fundamentally, Crux does not identify the specific claim or claims it believes were infringed in its answer.[42] Crux also asserts that the specific claims to which the prior art are relevant are of consequence to a determination of inequitable conduct only insofar as they determine whether the prior art is material. This argument misapprehends the legal standard, under which materiality is determined with regard to specific claims.

***6** AAMP also argues that Crux fails to plead the "why" and "how" that shows the Soundgate devices were material.[43] "An inequitable conduct claimant must also plead the 'particular claim limitations, or combination of claim limitations, that are supposedly absent from the information of record,' because such allegations are necessary 'to explain both "why" the withheld information is material and not cumulative, and "how" an examiner would have used this information in assessing the patentability of the claims.' " *Breville Pty Ltd.*, 2013 WL 1758742 at *6 (quoting *Exergen*, 575 F.3d at 1329–30). See also *Cyber Acoustics, LLC*, 2013 WL 6842755 at *7 ("In order to satisfy the 'how' requirement under Exergen, a party must plead " 'how" an examiner would have used this information in assessing the patentability of the claims,' " quoting *Exergen*, 575 F.3d at 1330). "This information puts a party on notice of how the material misrepresentation or omission was committed before the PTO." *Id.*

Crux contends that Trenholm's letter indicates that the Soundgate ALSW1 contained all the limitations of the then-pending claims of the '952 patent. Because it does not plead the specific claims and claim limitations to which the Soundgate devices were relevant, however, it has failed adequately to plead the "why" and "how" of the misrepresentation or omission. AAMP argues the Soundgate products were not material because the PTO previously considered the devices multiple times, but nonetheless issued the patents in suit.[44] It asserts that the file wrapper for Patent Application No. 09/442,627—which matured into the '952 patent—shows that the patent examiner reviewed Soundgate's website on February 18, 2005.[45] The record does not indicate, however, what information could be found on the website, however, or whether it provided a sufficient basis for evaluating whether the Soundgate products were material prior art. The court therefore finds this argument unavailing. AAMP also maintains that the PTO's denial of a request for *ex parte* reexamination of the '540 patent based on the Soundgate devices provides further evidence that the devices were not material.[46] Crux responds that the reexamination is irrelevant, because the examining attorney considered only the Soundgate manual, not the Soundgate devices.[47] As the record does not indicate what information the manual contained, the court is unable to conclude that the PTO's denial of reexamination based on a review of the manual supports an inference that the devices were not material prior art. AAMP contends finally that it disclosed the Soundgate devices to the PTO during prosecution of the '825 patent.[48] Crux counters that AAMP's attorneys failed to explain to the examiner why the Soundgate devices were material to prosecution of the '825 patent.[49] The second amended complaint contains no allegations supporting this

assertion, however, and thus fails adequately to plead the "why" and "how" of this purported omission. For this reason as well, the court concludes that Crux has failed to plead the materiality of the Soundgate reference sufficiently. [50]

2. Intent to Deceive

***7** To plead inequitable conduct, a defendant must also "allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind." *Exergen*, 575 F.3d at 1327. Thus, to plead the defense, Crux must allege facts giving rise to a reasonable inference that a specific individual knew of material information and withheld the information with the intent to deceive the PTO. See *id.* at 1328–29. "A reasonable inference is one that is plausible and flows logically from the facts alleged, including any objective indications of candor and good faith." *Id.* at 1329 n. 5.

In its November 19 order, the court concluded that Crux had failed to allege facts demonstrating an intent to deceive. It stated:

> "AAMP's disclosure of the Soundgate products to the PTO in its prosecution of a later patent would seem to undermine, rather than support, an inference of deceptive intent. As AAMP notes, if it intended to deceive the PTO by concealing the Soundgate products during its prosecution of the '952 and '540 patents, it would be 'undeniably poor strategy' to disclose those very products to the PTO in its later prosecution of the related '825 patent." [51]

In its second amended answer, Crux adds new allegations that it contends demonstrate AAMP's intent to deceive the PTO. Specifically, Crux alleges that Trenholm stated during an examiner interview for the '952 patent that "[The prior art reference] Kirson ... [has] no teaching of an interface device itself which is also an after-market product that is adapted to be installed while mounted or otherwise positioned within a vehicle to allow existing controls to be used in conjunction with replacement stereos." [52] Crux asserts that Trenholm argued that no prior art taught or disclosed the aftermarket nature of the invention, even though Soundgate's products are exactly this type of aftermarket interface. [53] It contends that Trenholm knew Soundgate sold aftermarket interface devices that "allow[ed] existing controls to be used in conjunction with replacement stereos," yet misrepresented there were no such devices with specific intent to deceive the PTO examiner. [54] AAMP argues that this allegation takes Trenholm's statement out of context, as Trenholm was referring only to the Kirston reference, and was not disclaiming the existence of any prior art teaching the aftermarket nature of the invention. [55] In its reply, AAMP cites a response to an office action from the prosecution history of the 09/442,627 patent application, which later matured into the '952 patent. [56] Trenholm stated:

> "However, after careful review of the Kirston et al. reference, it appears that there is no teaching of an interface device itself which is also an after-market product that is adapted to be installed while mounted or otherwise positioned within a vehicle to allow existing controls to be used in conjunction with replacement stereos. Kirson discloses using a new bus architecture system, the intelligent transportation system (ITS) bus architecture, in conjunction with the existing OEM bus and then interposing a gateway controller there between. The ITS bus is defined as an industry-wide standard (See, Column 2, line 24) and appears to be used to allow for more elaborate controlling of multiple devices in conjunction with the existing vehicle control system architecture. As such, this would suggest that the ITS bus architecture is an existing feature of the system disclosed in the Kirson reference." [57]

AAMP is correct that this statement, which encompasses the passage quoted in Crux's amended answer, indicates that Trenholm told the PTO Kirson did not teach the after-market nature of the invention. The statement does not, however, contradict Crux's allegation that Trenholm also argued *no* prior art taught or disclosed aftermarket interface devices. Crux's allegation, which the court accepts as true, is not inconsistent with the language AAMP quotes: it is plausible Trenholm denied that Kirson taught the after-market nature of the invention, *and further denied* that any other prior art device taught this attribute. AAMP argues that the examiner subsequently searched "keywords such as OEM, aftermarket, existing controls" and even reviewed the Soundgate website. [58] This information does not undermine the inference that Trenholm intended to deceive the PTO, however; it merely calls into question the efficacy of the effort. Accordingly, the court concludes that Crux has adequately pled facts supporting a plausible inference of knowing intent to deceive by Trenholm and his client, Riggs. [59] See *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178 (Fed. Cir. 1995) ("Applicants for patents are

required to prosecute patent applications in the PTO with candor, good faith, and honesty. This duty extends also to the applicant's representatives. See *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1415 n. 8 (Fed. Cir. 1987) (the knowledge and actions of an applicant's representative are chargeable to the applicant). A breach of this duty constitutes inequitable conduct"). Because Crux has failed to allege materiality sufficiently, however, the court concludes that its Soundgate allegations must be stricken.

3. The Weeder Articles and Devices

a. Facts Alleged in the Second Amended Answer

***8** The second category of prior art Crux alleges AAMP, Clarke, and Riggs failed to disclose consists of devices designed by Terry Weeder, and two articles Weeder wrote and published in trade magazines in 1995 and 1998 describing the devices.[60] Crux asserts the articles provided specific details concerning the design of a programmable remote control device.[61] It contends that Riggs contacted Weeder shortly after the second article was published,[62] that Riggs knew of the remote control adapter Weeder had developed, and that he asked Weeder to discuss the programmability of remote controls and technology for capturing and re-transmitting infrared data.[63] Crux alleges that Riggs was well aware that the key firmware and circuit design used in his device had been disclosed in various trade magazines and publications,[64] and that he knew specifically of Weeder's articles.[65] Crux contends the Weeder articles disclosed the program mode and recalling of stored signal data in run mode that the '540 patent and '825 patent claim.[66] It asserts that the routine and procedures used to store signal data and provide a responsive indication to the programmer—an apparent reference to an LED that provides a visual indication of the device's programming status[67]—described in the Weeder articles is identical to those taught in the patents.[68] The claims of the '540 and '825 patents discusses the capturing of infrared data, the re-transmitting of the data, and the programmability routine as follows:

> "[P]rogrammable to store in the memory output signals corresponding to the local stereo control such that subsequent activation of the local stereo control results in the aftermarket stereo control interface recalling from the memory at least one output signal corresponding to the local stereo control and wherein the stereo receiver is an after-market stereo receiver and wherein the aftermarket stereo control interface is programmable so that the interface can be adapted for use with a plurality of different types of aftermarket stereo receivers."[69]

Crux alleges that during the prosecution of the '825 and '540 patents, the PTO twice rejected the original claims based on obviousness, and allowed them only after AAMP agreed to include a programmable limitation.[70] It asserts that, despite knowing that the patents' description of the process for capturing infrared data and re-transmitting that data, the program mode, and the recalling of stored signal data in run mode was virtually identical to Weeder's prior art devices, neither Riggs, his company, Pacific Advisory Corporation, nor AAMP ever disclosed the existence of Weeder's prior art devices or articles to the PTO.[71]

Crux alleges that Riggs retained Trenholm to prosecute the '952 patent, and that Trenholm advised Riggs of his duty to disclose material prior art to the PTO; it contends Riggs nonetheless withheld information concerning Weeder's devices.[72] Riggs purportedly also withheld information concerning Weeder from Trenholm to prevent Trenholm from learning of, and disclosing, Weeder's prior art to the PTO.[73] Crux asserts that Riggs concealed the patents' existence from Weeder, so that Weeder would not claim co-inventorship of, or an interest in, the patents.[74] It contends Riggs also misrepresented to the PTO that he was the sole inventor.[75]

Crux alleges that on October 19, 2012, Weeder contacted AAMP's president and CEO, claiming co-inventorship of the '952 patent based on the techniques set forth in his articles.[76] On June 7, 2013, Weeder sent an email to AAMP's lead counsel in this action, stating that he was prepared to communicate to Crux's lawyer the existence of his articles.[77] Crux alleges that less than two hours after receiving Weeder's email, AAMP agreed to pay Weeder $20,000 for an assignment to AAMP of all of his rights and interest in Riggs's patents, and that AAMP's lead counsel told Weeder not to send the letter he had written to Crux's attorney.[78]

b. Whether Crux has Adequately Pled Inequitable Conduct

1. Materiality

Crux has adequately pled the "who" of its inequitable conduct defense based on the Weeder devices and articles by alleging that Riggs knew the articles and devices were material prior art, and deliberately withheld the information from or misrepresented it to the PTO. *Exergen Corp.*, 575 F.3d at 1329. It has also adequately alleged the "what" and "where" of the purportedly inequitable conduct by alleging the specific claim limitations of the patents in suit to which the withheld references are relevant. *Id.* Finally, Crux has alleged "why" the undisclosed information was material, and "how" an examiner would have used the information in assessing the patentability of the claims, because it has "identif[ied] the particular claim limitations, or combination of claims limitations, that are supposedly absent from the information of record." *Id.* In other words, Crux's allegations demonstrate the "but for" materiality of the prior art that was withheld because what the prior art teaches—a process for capturing infrared data and re-transmitting that data, the program mode, and the recalling of stored signal data in run mode—was absent from the record before the examiner during prosecution of the patents in suit.

***9** AAMP argues that Crux has failed to allege materiality sufficiently because the Weeder articles do not read on the asserted claims and are cumulative. [79] It contends that other references considered during the prosecution of the '952 patent describe the same technology as the Weeder articles, but in greater detail. [80] Courts have declined to determine at the pleading stage whether prior art is cumulative. See *Breville Pty Ltd.*, 2013 WL 1758742 at *6 ("Breville argues that the withheld information is immaterial because it is cumulative of other information that was already before the USPTO. The Court expresses no opinion on that argument. It would be inappropriate to judge the viability of Storebound's claim of inequitable conduct on the basis of evidence and argument produced by Storebound in its reply brief. If the Breville Plaintiffs' argument is correct, then Storebound's counterclaim will fail. But the 'why' and the 'how' of the allegation have been pled with specificity, and they 'plausibly suggest an entitlement to relief' " (citation omitted)). Accordingly, the court finds that Crux has adequately alleged facts demonstrating that Weeder's articles and devices were material prior art. [81]

2. Intent to Deceive

AAMP next argues that Crux cannot demonstrate Riggs intended to deceive the PTO, because he testified under penalty of perjury that he neither saw nor read the Weeder articles until 2013. [82] The court cannot consider Riggs' testimony because it is restricted to the face of the pleading (and material that can be judicially notice) in deciding AAMP's motion to strike. See *Munoz v. PHH Corp.*, No. 1:08–cv–0759–AWI–BAM, 2013 WL 1278509, *6 (E.D. Cal. Mar. 26, 2013) ("Defendants' arguments concerning new information uncovered through discovery disregard the legal standards on Rule 12 motions." A motion to strike affirmative defenses under Federal Rule of Civil Procedure 12(f) looks to the face of the pleadings to determine whether the defenses are sufficient or not. In deciding a motion to strike, a court will not consider matters outside the pleadings, and well-pleaded facts will be accepted as true (internal citations and quotation marks omitted)).

AAMP also contends that Riggs in fact disclosed Weeder's work and name to the PTO; it cites the fact that Weeder was listed as an author of the "IR Remote Learning Receiver/Transmitter" on the '711 patent application, from which the '952, '540, and '825 patents claims priority. [83] AAMP has produced a copy of application; it lists Terry Weeder as the "author" of the "IR Remote Learning Receiver/Transmitter," but does not indicate whether Weeder's articles and devices were disclosed. [84] Consequently, AAMP's argument does not undermine the inference that arises from Crux's allegations that Riggs acted with intent to deceive the PTO.

Consequently, the court concludes that Crux has adequately alleged facts supporting a plausible inference that Riggs acted with intent to deceive the PTO. Crux has alleged that Riggs failed to disclose Weeder's articles or devices; that he withheld the same information from Trenholm; and that he withheld information concerning the patent from Weeder. This inference is further reinforced by Crux's allegations that AAMP's lead counsel acted years later to suppress knowledge of the Weeder prior art, by facilitating payment to Weeder of $20,000 for an assignment of his rights in the patents, and an agreement not to follow through with his purported plan to notify Crux's counsel of Weeder's articles. Although not aimed at the PTO, a jury could conclude that counsel's actions were designed to prevent Crux's counsel from learning of Weeder or the articles, because Crux might then share this

information with the PTO. Cf. *Intellect Wireless, Inc. v. HTC Corp.*, 732 F.3d 1339, 1344-45 (Fed. Cir. 2013) (affirming the district court's finding of intent to deceive, where the inventor engaged in a "pattern of deceit," including misrepresentations to the PTO made after the asserted patent was allowed, and stating that "[w]hile the misleading Smithsonian press release was submitted after the asserted patents were allowed, it reinforces the pattern of deceit"). Accordingly, the court concludes that Crux has adequately pled inequitable conduct based on failure to disclose the Weeder's articles and devices.

3. The AAMP PESW1 Interface

***10** Crux's final allegation of inequitable conduct concerns AAMP's failure to disclose its own devices that permit factory-installed steering wheel audio controls in vehicles to interface with aftermarket stereos. These include models designated "PESW1." Crux on alleges on information and belief that these devices were offered for sale prior to the priority date of the patents in suit, and that AAMP knew they were material prior art. [85] This brief and entirely conclusory allegation fails to satisfy the Rule 9(b) pleading standard. As AAMP correctly argues, Crux's answer does not adequately allege materiality because it pleads no facts describing the PESW1 or its functionality, how the PESW1 embodies any of the limitations of the claimed invention, or why the PESW1 is not cumulative to the PESWI-2, which was disclosed as a reference during prosecution of the '952 patent. [86] See *Human Genome Sciences, Inc.*, 2011 WL 7461786 at *4 ("[T]he accused infringer must identify some fact that would make it plausible that the PTO would not have granted the patent but-for the misrepresentation").

AAMP also notes correctly that Crux has not sufficiently pled intent to deceive, because it alleges no facts from which such intent could be inferred. [87] See *id.* ("[A]s recently reiterated in *Therasense*, proving that an applicant knew of a reference, should have known of its materiality, and failed to disclose the reference to the PTO is insufficient on its own to prove a specific intent to deceive," citing *Therasense*, 649 F.3d at 1290). The court therefore grants AAMP's motion and strikes Crux's inequitable conduct defense to the extent based on allegations concerning AAMP's PESW1 devices.

III. CONCLUSION

For the reasons stated, the court grants in part and denies in part AAMP's motion to strike Crux's inequitable conduct defense. The court grants AAMP's motion to strike the defense to the extent it is based on failure to disclose the Soundgate devices and AAMP's PESW1 devices. The court denies AAMP's motion to strike the defense to the extent it is based on failure to disclose the Weeder articles and devices. As Crux may plausibly be able adequately to allege inequitable conduct based on the Soundgate devices and AAMP's PESW1 devices, the court grants it leave to amend. See *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (" '[A] district court should grant leave to amend ... unless it determines that the pleading could not possibly be cured by the allegation of other facts,' " quoting *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990)). Any amended answer must be filed within twenty days of the date of this order. No new affirmative defenses can be alleged. This will be Crux's final opportunity to plead these portions of its inequitable conduct defense sufficiently.

All Citations

Not Reported in Fed. Supp., 2014 WL 12580235

Footnotes

1 Declaration of Steven A. Wilson in Support of AAMP's Opening Claim Construction Brief ("Wilson Decl."), Docket No. 58-1 (June 17, 2013), Exh. A ('540 Patent), col. 1:16-21; see also Wilson Decl., Exh. B ('825 Patent), col. 1:17-20.

2 Complaint, No. 13-1950, Docket No. 1 (Dec. 27, 2012), ¶ 6.

3 *Id.*

4 *Id.*, ¶ 15.

5 *Id.*

6 Opposition re: Motion to Strike Affirmative Defenses, Docket No. 115 (Oct. 28, 2013) at 2.
7 Second Amended Answer and Affirmative Defenses ("SAA"), Docket No. 178 (Dec. 9, 2013)., ¶¶ 28, 33, 35.
8 '540 Patent at 1; '825 Patent at 1.
9 Preliminary Infringement Contentions, Docket No. 40 (Apr. 15, 2013).
10 *Id.*
11 *Id.* at 9.
12 Order re: Consolidation of Case Under Case Number CV 12-10763 and Termination of Case Number CV 13-01950, Docket No. 60 (June 20, 2013).
13 Answer, Docket No. 77 (Aug. 2, 2013).
14 Motion to Strike Affirmative Defenses, Docket No. 82-1 (Aug. 22, 2013) at 5 n. 2; *id.*, Exh. A, Docket No. 82-3 (Aug. 22, 2013).
15 Order Granting AAMP of Florida, Inc's Motion to Strike, Docket No. 136 (Nov. 19, 2013).
16 SAA.
17 Motion to Strike Crux's Inequitable Conduct Defense ("Motion"), Docket No. 209 (Dec. 30, 2013).
18 Opposition to AAMP of Florida, Inc.'s Motion to Strike ("Opposition"), Docket No. 213 (Mar. 3, 2014).
19 *Id.* at 3.
20 Reply, Docket No. 214 (Mar. 10, 2014) at 2.
21 SAA, ¶¶ 36, 39.
22 *Id.*, ¶¶ 37-39.
23 *Id.* Riggs assigned Application Serial No. 09/442,627, which matured into the '952 patent, to P.B. Clarke & Associates on January 31, 2000. P.B. Clarke then assigned the application to AAMP on September 24, 2009. Crux alleges that Riggs assigned Application Serial No. 12/605,950, which matured into the '540 patent, to P.B. Clarke, which assigned it to AAMP, and that these assignments were made pursuant to the assignment of Application Serial No. 09/442,627. This appears to indicate that the assignments of the '627 application and the '950 application occurred on the dates listed above. Crux also alleges that Application Serial No. 12/698,930, upon which the '825 patent is based, was assigned by Riggs to P.B. Clarke and by P.B. Clarke to AAMP. It does not provide the dates of these assignments, however. (SAA, ¶¶ 37-39.)
24 *Id.*, ¶¶ 51, 60.
25 *Id.*, ¶ 40.
26 *Id.*, ¶¶ 41-42.
27 *Id.*, ¶ 41.
28 *Id.*, ¶¶ 42, 43.
29 *Id.*, ¶ 43.
30 *Id.*, ¶ 44.
31 *Id.*, ¶ 46.
32 *Id.*, ¶ 46.
33 *Id.*, ¶ 47.
34 *Id.*, ¶ 43.
35 *Id.*, ¶ 45.
36 *Id.*, ¶ 47.
37 Opposition at 6-7.
38 *Id.* at 6, 7-8.
39 *Id.* at 7.
40 Reply at 5.
41 Opposition at 6.
42 AAMP argues that because Putman's December 10, 1999 letter, written just over one year after Riggs filed his provisional application on November 17, 1998, does not state that the ALSW1 was on sale before AAMP filed its patent, the only reasonable inference is that the ALSW1 is not prior art. (Reply at 5.) Crux counters that Putman reported that Soundgate had conceptualized the ALSW1 and had working prototypes in circulation

"long ago." (SAA, ¶ 44.) Although Putman does not identify the date on which Soundgate began to circulate prototypes of the ALSW1 or sell the device, the court disagrees that the only reasonable inference is that the ALSW1 is not prior art. The phrase "long ago" could potentially support a reasonable inference that the ALSW1 was in use or offered for sale more than one year prior to Putman's letter. Accordingly, the court concludes that Crux has sufficiently that the ALSW1 is prior art.

43 Motion at 5-7.

44 *Id.* at 6.

45 *Id.*; *id.*, Exh. B. The court took judicial notice of the prosecution history of the '952 patent in its order striking Crux's inequitable conduct defense in its amended answer. (Order at 3.)

46 Motion at 6; *id.*, Exh. C. The court also took judicial notice of the PTO's order. (*Id.*)

47 Opposition at 9-10.

48 Motion at 6. Although Crux alleged this fact in its amended answer (Answer, ¶ 56), there is no similar allegation in Crux's second amended answer, which is the subject of AAMP's motion. Crux does not dispute that AAMP disclosed the Soundgate devices to the PTO in connection with its prosecution of the '825 patent; it acknowledges as much in its opposition. (Opposition at 9.) The court can *sua sponte* take judicial notice of "a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED.R.EVID. 201(b). "Judicial notice is appropriate for records and 'reports of administrative bodies.' " *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008) (quoting *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1954)). For this reason, courts can take judicial notice of documents issued by the PTO. See *Iconfind, Inc. v. Google, Inc.*, No. 2:11–cv–0319–GEB–JFM, 2012 WL 158366, *1 (E.D. Cal. Jan. 18, 2012) ("Since the prosecution history is a public record that is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,' the request is granted"); *Aten Intern. Co., LTD v. Emine Tech. Co., Ltd.*, No. SACV 09–0843 AG (MLGx), 2010 WL 1462110, *1 (C.D. Cal. Apr. 12, 2010) (taking judicial notice of a PTO report); *Sorenson v. Fein Power Tools*, No. 09cv558 BTM (CAB), 2009 WL 3157487, *1 n. 1 (S.D. Cal. Sept. 28, 2009) (taking judicial notice of PTO documents); *Coinstar, Inc. v. Coinbank Automated Sys., Inc.*, 998 F.Supp. 1109, 1114 (N.D. Cal. 1998) (taking judicial notice of two patents and documents in the file history of a patent). Because it will be helpful in deciding AAMP's motion, the court takes judicial notice of the prosecution history of the '825 patent.

49 Opposition at 8.

50 Crux's failure to plead the "what," "where," "why," and "how" of the allegedly inequitable conduct of Trenholm, Riggs, AAMP, and P.B. Clarke renders the defense insufficient even as to aspects where Crux has adequately pled the "who"—i.e., portions of the defense based on Trenholm's and Riggs' purported failure to disclose the Soundgate devices. Moreover, even had Crux adequately pled the "who" of AAMP's and P.B. Clarke's purported failure to disclose the Soundgate devices, the court would find that it had not sufficiently pled the "what," "where," "why," and "how" of their allegedly inequitable conduct.

51 Order at 15.

52 SAA, ¶ 46.

53 *Id.*, ¶ 47.

54 *Id.*

55 Motion at 8.

56 Reply, Exh. A.

57 *Id.* at 6.

58 Motion at 8.

59 As noted, Crux has not adequately alleged the "who," "what," "where," "why," and "how" of AAMP's and P.B. Clarke's alleged inequitable conduct. Nor has it sufficiently alleged AAMP's and P.B. Clarke's intent to deceive. Consequently, the court finds these aspects of Crux's inequitable conduct defense inadequate for this further reason as well.

60 SAA, ¶¶ 51, 60.

61 *Id.*, ¶ 52.
62 *Id.*, ¶ 53.
63 *Id.*, ¶ 53.
64 *Id.*, ¶ 54.
65 *Id.*, ¶ 56.
66 *Id.*, ¶ 55.
67 See '540 Patent at col. 6:49-51.
68 SAA, ¶ 55.
69 *Id.*, ¶ 56. See also '540 patent at col. 12:56-65; '825 patent at col. 24:45-54.
70 SAA, ¶¶ 57-59.
71 *Id.*, ¶ 60.
72 *Id.*, ¶¶ 61, 65.
73 *Id.*, ¶ 62.
74 *Id.*, ¶¶ 62, 64.
75 *Id.*, ¶ 66.
76 *Id.*, ¶ 68.
77 *Id.*, ¶ 69.
78 *Id.*, ¶ 70.
79 Motion at 9.
80 *Id.* at 10.
81 For reasons already discussed, Crux has adequately pled materiality only with respect to Riggs, not with respect to AAMP or P.B. Clarke.
82 *Id.* at 12.
83 Reply at 10; SAA, ¶¶ 28, 33, 35.
84 Provisional Application 60/108,711, Docket No. 141-1 (Nov. 25, 2013) at 17.
85 SAA, ¶ 40.
86 Motion at 3; *id.*, Exh. A.
87 *Id.* at 4.

End of Document

Exhibit 2

2016 WL 6267927
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Leonid BONDARENKO, et al.
v.
WELLS FARGO BANK, N.A., et al.

CV 15-403 DMG (JEMx)
|
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Attorneys and Law Firms

Ronald D. Tym, The Tym Firm, Agoura Hills, CA, Uri Litvak, Litvak Law Group PC, Newport Beach, CA, for Leonid Bondarenko, et al.

Dean A. Reeves, Anglin Flewelling Rasmussen Campbell and Trytten LLP, Pasadena, CA, Edward A. Treder, James T. Lee, Barrett Daffin Frappier Treder and Weiss LLP, Diamond Bar, CA, for Wells Fargo Bank, N.A., et al.

**Proceedings: IN CHAMBERS—
ORDER RE MOTION TO DISMISS [34]**

DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

I.

PROCEDURAL BACKGROUND

***1** On February 11, 2015, Plaintiffs Leonid Bondarenko and Nelly Bondarenko filed a First Amended Complaint ("FAC") against Defendants Wells Fargo Bank, N.A. and NDEx West for (1) violation of California Civil Code section 2923.6; (2) unfair business practices; and (3) quiet title. [Doc. # 12.] On February 25, 2015, Wells Fargo moved to dismiss the FAC in its entirety. [Doc. # 15.] On April 18, 2016, the Court issued an order denying the motion to dismiss the FAC as to the first two causes of action, but granting as to the third cause of action, allowing Plaintiffs leave to amend "as to the quiet title claim." [Doc. # 32.]

On April 26, 2016, Plaintiffs filed a Second Amended Complaint ("SAC"), asserting the following three causes of action: (1) violation of California Civil Code section 2923.6; (2) unfair business practices; and (3) "quiet title/cancellation of instrument." [Doc. # 33 ("SAC").] In their Prayer for Relief, Plaintiffs request an order from the Court cancelling the Trustee's Deed upon Sale and declaring Plaintiffs the sole titled owners of the Home as of May 1, 2014. (*Id.* at 10.)

On May 11, 2016, Wells Fargo filed a Motion to Dismiss the SAC's third cause of action ("MTD") and a Request for Judicial Notice in support of the MTD ("RJN"). [Doc. ## 34 ("MTD"), 35 ("RJN").] On May 19, 2016, Plaintiffs filed an Opposition to the MTD. [Doc. # 36. ("Opp.").] On May 27, 2016, Wells Fargo filed a "Reply" to Plaintiffs' Opposition. [Doc. # 37 ("Reply").]

II.

JUDICIAL NOTICE

In considering whether to grant a Rule 12(b)(6) motion to dismiss, courts must accept all factual allegations in the complaint as true, considering the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). These include documents incorporated into the complaint by reference, and matters over which a court may take judicial notice. *Id.*

Pursuant to Federal Rule of Evidence 201(b), Wells Fargo requests that the Court take judicial notice of the following documents in support of its MTD:

1. Adjustable Rate Mortgage Note, dated June 8, 2006, and signed by Plaintiffs (Ex. A);

2. Deed of Trust, dated June 8, 2006, and recorded in the official records of the Office of the Santa Barbara County Recorder on June 20, 2006, as Document No. 2006-0048811 (Ex. B);

3. Certificate of Corporate Existence, dated April 21 2006, Office of Thrift Supervision, Department of the Treasury (Ex. C);

4. Letter dated November 19, 2007, Office of Thrift Supervision, Department of the Treasury (Ex. D);

5. Charter of Wachovia Mortgage, FSB, dated December 31, 2007 (Ex. E);

6. Official Certification of the Comptroller of the Currency ("OCC") stating that effective November 1, 2009, Wachovia Mortgage, FSB converted to Wells Fargo Bank Southwest, N.A., which then merged with and into Wells Fargo Bank, N.A. (Ex. F);

***2** 7. Printout from the website of the Federal Deposit Insurance Corporation, dated March 14, 2012, showing the history of Wachovia Mortgage, FSB (Ex. G);

8. Notice of Default and Election to Sell Under Deed of Trust, dated October 16, 2012, and recorded in the official records of the Office of the Santa Barbara County Recorder on October 18, 2012, as Document No. 2012-0070037 (Ex. H);

9. Substitution of Trustee, dated November 6, 2012, and recorded in the official records of the Office of the Santa Barbara County Recorder on November 30, 2012, as Document No. 2012-0081851 (Ex. I);

10. Notice of Trustee's Sale, dated March 21, 2014, and recorded in the official records of the Office of the Santa Barbara County Recorder on May 1, 2014, as Document No. 2014-0019647 (Ex. J); and

11. Trustee's Deed Upon Sale, dated April 29, 2014, and recorded in the official records of the Office of the Santa Barbara County Recorder on May 1, 2014, as Document No. 2014-0019647 (Ex. K).

(RJN at 2-3.) Plaintiffs have not filed objections to Wells Fargo's RJN.

Federal Rule of Evidence 201 enables a court to take judicial notice of adjudicative facts. A fact may be judicially noticed if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). "Facts are indisputable, and thus subject to judicial notice, only if they are either 'generally known' under Rule 201(b)(1) or 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned' under Rule 201(b)(2)." *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). As with evidence generally, the document to be judicially noticed must be relevant to an issue in the case. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006) (denying request for judicial notice of information not relevant to any issue on appeal).

Although often conflated, the doctrine of incorporation by reference is distinct from judicial notice. Incorporation by reference " 'permits a district court to consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the ... pleadings.' " *Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1061 (C.D. Cal. 2012) (quoting *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999)) (internal quotation marks omitted). *See also Marder v. Lopez*, 450 F.3d 445, 448-49 (9th Cir. 2006) ("A court may consider evidence on which the complaint 'necessarily relies' if (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."). Under such circumstances, the document becomes part of the complaint and the Court may assume its truth for purposes of ruling on a motion to dismiss. *Ritchie*, 342 F.3d at 908. The mere mention of the existence of a document, however, is insufficient to incorporate the contents of a document by reference. *Id.* (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1327 (2d ed. 1990)).

A. Exhibit A

Plaintiffs do not question the authenticity of Exhibit A, which Wells Fargo provides as a copy of the Adjustable Rate Mortgage Note entered into by Plaintiffs on June 8, 2006. Exhibit A is further described in Plaintiffs' SAC and is central to Plaintiffs' claims. Therefore, the Court will incorporate Exhibit A by reference and consider it in ruling on this MTD. *See Marder*, 450 F.3d at 448.

B. Exhibits B, H, I, J, K

***3** Courts may take judicial notice of adjudicative facts that can be accurately determined from sources whose accuracy cannot be questioned, Fed. R. Evid. 201(b)(2), and courts in this circuit have frequently taken judicial notice of mortgage-related documents on record with public offices, including deeds of trust, notices of default, notices of trustee's sale, and assignments of deed of trust. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1264 (C.D. Cal. 2010).

In this case, Exhibit B ("Deed of Trust"), Exhibit H ("Notice of Default"), Exhibit I ("Substitution of Trustee"), Exhibit J ("Notice of Trustee's Sale"), and Exhibit K ("Trustee's Deed Upon Sale"), have all been recorded in the Santa Barbara County Recorder's Office. (RJN at 3.) Therefore, the Court may take judicial notice of the existence of these exhibits and

the fact of their public filing, but not of the facts contained therein. *See Lee*, 250 F.3d at 689 ("A court may take judicial notice of 'matters of public record.' ").

Moreover, Plaintiffs' SAC specifically references Exhibit B, Deed of Trust (*see* SAC ¶¶ 10-12, 40, 43, 45); Exhibit H, Notice of Default (*see id.* ¶ 12); Exhibit J, Notice of Trustee's Sale (*see id.* ¶ 24 & Ex. A); and Exhibit K, Trustee's Deed upon Sale (*see id.* ¶¶ 42, 46-47). Defendants have attached these documents to their Motion and neither party questions the authenticity of the documents. *See Marder*, 450 F.3d at 448. Therefore, the Court will also incorporate Exhibits B, H, J, and K by reference.

Although Exhibit I, the "Substitution of Trustee," is not referenced in the SAC, Plaintiffs make allegations in the SAC regarding the validity of the substitution. (SAC ¶¶ 39-40.) Moreover, in their Opposition to the MTD, Plaintiffs do not contest the authenticity of Exhibit I and, instead, refer to Exhibit I to support their case. (Opp. at 3.) The Ninth Circuit has "extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)). Therefore, the Court will also incorporate Exhibit I by reference. *See id.*

C. Exhibits C, D, E, F, G

The Court takes judicial notice of the documents proffered regarding Wachovia's corporate formation and merger with Wells Fargo: Exhibit C ("Certificate of Corporate Existence"), Exhibit D ("Notice of Amendment of Charter and Bylaws"), Exhibit E ("Charter of Wachovia Mortgage"), and Exhibit F ("Merger and Conversion of Wachovia to Wells Fargo"). These are documents issued by or on file with federal agencies, and are "not subject to reasonable dispute" in that the facts contained therein "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Grant*, 736 F. Supp. 2d at 1265 (taking judicial notice of documents regarding defendant's incorporation and conversion to an LLC and collecting cases in which courts have taken judicial notice of documents related to corporate formation).

***4** The Court also takes judicial notice of Exhibit G, a printout from the website of an independent agency of the federal government, because "[u]nder Rule 201, [a] court can take judicial notice of public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies." *U.S. ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (collecting cases in which courts have taken judicial notice of the websites of government agencies).

III.

FACTUAL BACKGROUND

The Court has laid out the factual background of this case in its prior order granting in part and denying in part Defendants' motion to dismiss the FAC, and incorporates it here. [*See* Doc. 32.] The Court will set forth only the newly alleged facts from the SAC pertinent to the current motion as to the quiet title claim.

A Substitution of Trustee form purporting to substitute NEDx as a trustee for Golden West was filed and recorded in the Santa Barbara County Recorder's Office on November 30, 2012. (RJN, Ex. I.) Wells Fargo did not sign the form itself, and NDEx signed the form on behalf of Wells Fargo as its "attorney-in-fact." (*Id.*) The substitution was invalid because there was no existing power of attorney between Wells Fargo and NDEx. (Opp. at 3, Reply at 2.) [1] NEDx was therefore not validly substituted as trustee in place of Golden West. (SAC ¶ 40.)

The trustee's sale of the Home on April 17, 2014, was not valid, and the Trustee's Deed upon Sale is therefore invalid. (SAC ¶¶ 41-42.) Plaintiffs have title to the Home pursuant to the Grant Deed issued on or about April 30, 2004. (*Id.* ¶¶ 9, 44.)

IV.

LEGAL STANDARD

The Court has articulated the legal standard to be applied in a motion to dismiss in its prior orders and need not repeat it here. [*See* Doc. # 32.]

V.

DISCUSSION

A. Third Cause of Action for Quiet Title

In Plaintiffs' amended claim for "Quiet Title/Cancellation of Instrument," Plaintiffs assert that "the Trustee's Deed upon Sale is invalid and must be cancelled." (SAC ¶ 42.) They also "claim title to the Home pursuant to the Grant Deed" described in the SAC (*id.* ¶ 44), and pray for "[a]n order from the Court cancelling the Trustee's Deed upon Sale and declaring Plaintiffs the sole titled owners of the Home as of May 1, 2014" (*id.* at p. 10).

A complaint to quiet title must be verified and include (1) a description of the property; (2) the title of the plaintiff and the basis of the title; (3) the adverse claims to the title; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff. Cal. Civ. Proc. Code § 761.020. The purpose of a quiet title action is "to establish title against adverse claims to real ... property or any interest therein." *Id.* § 760.020(a).

"In California it is well-settled that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1032 (N.D. Cal. 2010) (internal citation and quotations omitted). "Thus, to maintain a quiet title claim, a plaintiff is required to allege tender of the proceeds of the loan at the pleading stage." *Id.* (internal citation, quotations, and brackets omitted). "The cloud upon [a borrower's] title persists until the debt is paid." *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477 (1974).

1. Adverse Claim to Title Requirement

***5** Wells Fargo has moved to dismiss Plaintiffs' quiet title claim, arguing in part that Plaintiffs have failed to allege "adverse claims" to the Home's title because equitable relief is not available for a violation of California Civil Code section 2923.6 and because, to the extent Plaintiffs base their claim on Wells Fargo's security interest in the Home through the Deed of Trust, the claim fails because a deed of trust carries none of the incidents of ownership of the property other than the right to convey upon the debtor's default. (MTD at 4.)

In the quiet title context, a "claim" includes a legal or equitable right, title, estate, lien, or interest in property or cloud upon title." *Mortg. Elec. Registration Sys. v. Robinson*, 45 F. Supp. 3d 1207, 1210 (C.D. Cal. 2014) (citing Cal. Civ. Code § 760.010). Although Plaintiffs do not address this argument in their Opposition to the MTD, the SAC clearly alleges on its face an adverse claim by Wells Fargo to the Home in that NDEx deeded the Home to Wells Fargo, as is set forth in the recorded Trustee's Deed upon Sale, and Wells Fargo obtained a judgment for possession of the Home in an unlawful detainer action. (SAC ¶¶ 24, 27.) Wells Fargo's reliance on *Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160 (E.D. Cal. 2010), is misplaced, as *Hamilton* addresses alleged adverse claims of trustees as opposed to beneficiaries, and recent cases have held that security interests granted beneficiaries under deeds of trust are sufficient to allege adverse claims in quiet title actions. *See Robinson*, 45 F. Supp. 3d at 1211 n.1 (distinguishing *Hamilton*) (citing *Monterey S.P. P'ship v. W.L. Bangham, Inc.*, 49 Cal. 3d 454, 460 (1989)). [2]

2. Plaintiffs' Claim to Title and Ability to Tender

Wells Fargo also argues that the quiet title claim should be dismissed because Plaintiffs have not paid off their debt, and thus cannot claim title to the Home. (MTD at 4.) It further argues that Plaintiffs are not entitled to any equitable relief based on their failure to tender their outstanding debt. (*Id.* at 4-6.) In Opposition to the MTD, Plaintiffs argue that tender is not required to state a claim for quiet title in this case because the sale of the Home by NDEx as trustee was void. (Opp. at 2-4.)

A trustee sale is void where the trustee that executed the sale was not properly substituted as trustee, had no interest in the subject property, and thus was not authorized to initiate a nonjudicial foreclosure. *See Avila v. Wells Fargo Bank*, No. C-12-01237-WHA, 2012 WL 2953117, *15 (N.D. Cal. July 19, 2012). In pertinent part, Plaintiffs allege that the trustee sale was void because, "upon information and belief," NDEx was "never lawfully substituted as trustee" in place of Golden West pursuant to California Civil Code section 2934a. (SAC ¶ 40.)

***6** Under Section 2934a(a)(1), a trustee under a trust deed may be substituted by the recording of a substitution executed and acknowledged by all of the beneficiaries under the trust deed, or their successors in interest. Cal. Civ. Code § 2934a(a)(1). The recording of a substitution of a trustee transfers to the new trustee the exclusive power to conduct a trustee's sale. *Dimock v. Emerald Props., LLC*, 81 Cal. App. 4th 868, 874-75 (2000).

According to Plaintiffs, NDEx was never properly substituted in as trustee under the Deed of Trust, and was therefore not authorized to initiate the non-judicial foreclosure when it recorded the notice of default. The sale of the Home was therefore void. *See Avila*, 2012 WL 2953117 at *15; *Christiansen v. Wells Fargo Bank*, No. C-12-02526, 2012 WL 4716977, *8 (N.D. Cal. Oct. 1, 2012); *compare Capodiece v. Wells Fargo Bank*, No. C-13-00032, 2013 WL 1962310, *1-3 (N.D. Cal. May 10, 2013) (on summary judgment, the court relied on "several declarations" to determine that NDEx had not been properly substituted as trustee in place of Gold West, and was therefore not authorized to conduct a nonjudicial sale of property).

Although it is generally true that, in California, an action to quiet title must be accompanied by tender of the full amount owed on the property, courts in this Circuit have held that the tender requirement does not apply where the plaintiff's quiet title claim seeks to set aside a trustee's sale that is void. *See Martinez v. America's Wholesale Lender*, 446 Fed. Appx. 940 (9th Cir. 2011); *Avila*, 2012 WL 2953117 at *15. [3]

Nevertheless, in cases where the plaintiff seeks title to the property free of any encumbrances, even in cases where the sale was void, it follows that the plaintiff must tender the amount owed to obtain quiet title, as a void sale does not automatically vest a plaintiff with free title to the property. *See Warwick v. Bank of New York Mellon*, No. CV-15-3343, 2016 WL 2997166, *14-15 (C.D. Cal. May 23, 2016). Indeed, a plaintiff cannot be considered a "rightful owner" of a property, and thus able to quiet title against a mortgagee, if there remains a debt secured on the property. *See Kelley v. Mortg. Elec. Registration Sys.*, 642 F.Supp.2d 1048, 1057 (N.D. Cal. 2009); *Briosos*, 737 F. Supp. 2d at 1032.

In the SAC, it is unclear what relief Plaintiffs seek from their quiet title claim. Insofar as Plaintiffs seek to set aside the Trustee's Deed upon Sale as void, Plaintiffs are not required to tender the amount due on the loan. Insofar as Plaintiffs seek a declaration from the Court that they are owners of the title to the Home free of any encumbrances, however, Plaintiffs are required to tender the amount due.

Plaintiffs' claim for quiet title also asserts a claim for "Cancellation of Instrument." To the extent that this claim constitutes a separate claim under California Civil Code section 3412, Wells Fargo does not address the claim. Nor does the fact that Plaintiffs have failed to repay the debt secured affect the claim because Plaintiffs have alleged that the sale was void. *Martinez*, 446 Fed.Appx. at 943 ("The tender rule does not apply to a void, as opposed to a voidable, foreclosure sale."); *Dimock*, 81 Cal. App. 4th at 878.

B. Plaintiffs' Offer to Tender the Debt Secured

***7** Plaintiffs argue that they have also offered to tender the debt secured by alleging in the SAC that they are able to refinance the Note and Deed of Trust due to their "improved financial condition," and therefore "offer to tender the amount validly outstanding under the Note." (SAC ¶ 43.) This offer, even if accepted as true, would be insufficient to allow the Court to find that the Plaintiffs have offered to tender the full amount of the debt secured, as would be required to quiet title to the Home free of any encumbrances. In sum, Plaintiffs admit that they are in default on the property, there exists a debt secured on the property, and Plaintiffs have not offered to tender the amount of the debt secured. This is insufficient to quiet title to the property free of any encumbrances.

VI.

CONCLUSION

Insofar as Plaintiffs seek to quiet title by setting aside the Trustee's Deed of Sale as void, the MTD is **DENIED**. Insofar as Plaintiffs seek to quiet title such that they would receive title to the property free of any encumbrances, the MTD is **GRANTED** without further leave to amend. Defendant Wells Fargo shall file its Answer within 15 days from the date of this Order.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6267927

Footnotes

1 While this fact is not asserted in the SAC, Plaintiffs contend in their opposition that there was no existing power of attorney between Wells Fargo and NDEx, and NDEx therefore unlawfully and invalidly substituted itself as trustee. (Opp. at 3.) Wells Fargo does not contend that NDEx was, in fact, Wells Fargo's attorney-in-in fact, or otherwise contest this fact through any request for judicial notice. (Reply at 2.)

2 The Court agrees with Wells Fargo, however, that Plaintiffs may not base their claim for quiet title on an alleged violation of California Civil Code section 2923.6 because the Trustee's Deed upon Sale has already been recorded. (MTD at 4.) Although Cal. Civ. Code § 2924.12(a) provides for injunctive relief for a violation of Section 2923.6 where a trustee's deed upon sale "has not been recorded," Section 2923.6(b) states that, "[a]fter a trustee's deed upon sale has been recorded, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall be liable to a borrower for actual economic damages ... resulting from a material violation of ... 2923.6 by that [entity] where the violation was not corrected and remedied prior to the recordation of the trustee's deed upon sale." Cal. Civ. Code § 2924.12(a)-(b).

3 Although not alleged specifically in Plaintiffs' SAC, in California, "[a]fter a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale." *Lona v. Citibank, N.A.*, 202 Cal.App.4th 89, 103 (2011) (citing *Anderson v. Heart Fed. Sav. & Loan Assn.*, 208 Cal.App.3d 202, 209-10 (1989)). "Generally, a challenge to the validity of a trustee's sale is an attempt to have the sale set aside and to have the title restored." *Id.* (citing *Onofrio v. Rice*, 55 Cal.App.4th 413, 424 (1997)).

End of Document

Exhibit 3

2012 WL 996513
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Sheila GOODEN, an individual, Plaintiff,
v.
SUNTRUST MORTGAGE, INC., a Virginia Corporation; and Suntrust Banks, Inc., a Georgia Corporation, Defendants.

No. 2:11–cv–02595–JAM–DAD.
|
March 23, 2012.

Attorneys and Law Firms

Eric James Buescher, Justin T. Berger, Niall P. McCarthy, Cotchett Pitre & McCarthy, LLP, Burlingame, CA, for Plaintiff.

Philip Barilovits, Severson & Werson, San Francisco, CA, for Defendants.

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

JOHN A. MENDEZ, District Judge.

***1** This matter is before the Court upon Defendants Suntrust Mortgage, Inc. and Suntrust Banks, Inc.'s Motion to Dismiss Class Action Complaint (Doc. # 11). [1] Plaintiff Sheila Gooden ("Plaintiff") opposes the motion (Doc. # 14). Defendants also filed a Request for Judicial Notice In Support of Motion to Dismiss (Doc. # 12), which Plaintiff opposes in part (Doc. # 14, Attachment 1). [2]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

This action originated when Plaintiff filed her complaint in this Court on September 30, 2011. Plaintiff alleges that she obtained a mortgage from Suntrust Mortgage, Inc. ("Defendant") to refinance the existing debt on her property in June 2005. Plaintiff's property is located at 632 S. Murdock, Willows, CA 95988. According to Plaintiff, the terms of the mortgage agreement required Plaintiff to purchase hazard and flood insurance coverage at least equal to the replacement value of the improvements on the property or the principal balance of the mortgage, whichever was less. Plaintiff alleges that she maintained coverage on the property between $130,130 and $161,960 at all times.

Plaintiff also alleges that at the time her property was refinanced, it was in a Federal Emergency Management Agency ("FEMA") designated flood zone. As a result, the complaint indicates that Plaintiff was required to maintain flood insurance based on the Flood Disaster Protection Act ("FDPA") and the agreement between the parties. If Plaintiff did not maintain adequate insurance, then Defendant was empowered to "force place" coverage on Plaintiff's property and bill her for the cost of that coverage. Then, in August 2010, FEMA published a new flood zone map that indicated that Plaintiff's property was no longer subject to the insurance requirements of the FDPA.

The replacement value of improvements on the property is not explicitly alleged in Plaintiff's complaint. Plaintiff alleges that from July 1, 2010 through June 30, 2011, the Glenn County Assessor's office valued the improvements on Plaintiff's property at between $85,000 and $120,057. The complaint does not indicate whether or not the assessor's determination was for replacement value or resale value.

Plaintiff alleges that in October 2010, after 6 years of carrying the same amount of insurance, Defendant determined without explanation that her existing insurance coverage was inadequate. In a series of letters starting on October 19, 2010 and concluding on March 1, 2011, Defendant allegedly demanded that Plaintiff increase her flood insurance coverage by amounts ranging from $25,300 to $44,900, depending on the letter. Plaintiff alleges that she purchased additional flood insurance in November 2010 and provided documentation of that insurance to Defendant. In December 2010, Defendant allegedly force placed additional flood coverage on Plaintiff's property. Finally, in March 2011, Defendant force placed additional flood and hazard insurance on Plaintiff's property and sent her a mortgage bill that contained line item charges for the premiums of the additional coverage. Plaintiff's monthly mortgage payment allegedly increased from $517.37 to $775.89.

***2** Plaintiff asserts six causes of action in her complaint: (1) Violation of Truth in Lending Act ("TILA") (Hazard Insurance), 15 U.S.C. § 1601; (2) Violation of TILA (Flood

Insurance), 15 U.S.C. § 1601; (3) Breach of Contract; (4) Violation of Cal. Civ.Code § 2955.5; (5) Violation of California Unfair Competition Law ("UCL") (Hazard Insurance), Cal. Bus. & Prof.Code § 17200; and (6) Violations of California Unfair Competition Law (Flood Insurance), Cal. Bus. & Prof.Code § 17200.

The Court has jurisdiction over Plaintiff's federal causes of action pursuant to 28 U.S.C. § 1331 and the related state law claims pursuant to 28 U.S.C. § 1367.

II. OPINION

A. *Legal Standard*

1. *Motion to Dismiss*

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear ... that the complaint could not be saved by amendment." *Eminence Capital, L.L.C. v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir.2003).

B. *Discussion*

1. *Defendant Sun Trust Banks, Inc.*

Defendant Suntrust Banks, Inc. argues that all claims against it should be dismissed because the allegations in the complaint appear to only address actions taken by defendant Suntrust Mortgages, Inc. Plaintiff does not dispute Suntrust Banks, Inc.'s dismissal, but requests leave to amend the complaint in order to include allegations specific to defendant Suntrust Banks, Inc. Plaintiff does not, however, provide any explanation as to why Suntrust Banks, Inc. was named as a defendant or specify any of the claims she believes can be brought against this defendant. Given Plaintiff's failure to provide this information, it appears to this Court that granting leave to file an amended complaint against this defendant would be futile. Accordingly, all claims against defendant Suntrust Banks, Inc. are dismissed with prejudice.

2. *Defendant's Request for Judicial Notice*

***3** Defendant requests that the Court take judicial notice of four documents: (A) a letter dated May 3, 2011 from the Federal Reserve Bank of Atlanta, (B) a Consumer Compliance Handbook published by the Board of Governors of the Federal Reserve System, (C) a FEMA flood hazard determination dated June 24, 2005 prepared by Core Logic, and (D) a FEMA flood hazard determination dated March 24, 2011 prepared by Core Logic. Plaintiff objects to documents A, C, and D. The objections to all three documents are sustained.

Generally, the Court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. The exceptions are material attached to, or relied on by, the complaint so long as authenticity is not disputed, or matters of public record, provided that they are not subject to reasonable dispute. *E.g., Sherman v. Stryker Corp.,* 2009 WL 2241664 at *2 (C.D.Cal. Mar.30, 2009) (citing *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir.2001) and Fed.R.Evid. 201).

Item A is a letter from the Federal Reserve Bank of Atlanta that indicates that if Defendant refunded forced placed insurance policy premiums to Plaintiff, then there was no violation of law or regulation. The letter does not state that the amount was actually refunded. Since the contents of the letter are disputed it is not a proper subject of judicial notice.

Items C and D are not proper subjects of judicial notice because they appear to be prepared and certified by a private entity, Core Logic, and are not matters of public record. The forms are instead a third party's interpretation of public records, flood zone maps, produced by FEMA. Defendant

argues that items C and D are judicially noticeable because they are relied on by the complaint. The Court does not find that the allegations in the complaint rely on these documents. Judicial notice of items C and D is not proper, and they will also not be considered in this order.

3. *Defendant's Motion to Dismiss*

a. *The Adequacy of Plaintiff's Insurance Coverage Claims*
Defendant argues that all of Plaintiff's claims related to both hazard and flood insurance should be dismissed because the complaint does not properly allege that the insurance required by Defendant exceeded the replacement value of the improvements on Plaintiff's property. Defendant focuses on the allegations concerning the Glenn County tax assessor's determination of value, arguing that California law requires assessors to determine market value, not replacement cost value. Plaintiff argues that even if the county assessor's valuation referenced in paragraph 22 of the Complaint does not approximate the replacement costs of the property improvements, she has still adequately pled, in paragraphs 20 and 21, that the insurance required or force placed by Defendant exceeded the replacement value of improvements on the property in breach of the contract and in violation of California law. Defendant replies that those allegations are conclusory and do not meet federal pleading standards.

***4** For the purposes of a motion to dismiss, the Court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer,* 416 U.S. at 236.

In this case, Plaintiff alleges that she purchased insurance in 2005 and maintained at least that level of coverage at all times. She further alleges that the coverage exceeded the replacement cost of improvements. Turning to the loan documents attached to the complaint, which are properly considered in a motion to dismiss, Plaintiff was required to obtain coverage that was greater than or equal to either the balance of the loan principal or the replacement cost of improvements, whichever was less. *Sherman,* 2009 WL 2241664, at *2; Compl. Ex. 1, at 8–9. There is no dispute that the loan closed in 2005, so taking the alleged facts as true gives rise to a plausible inference that Plaintiff did obtain sufficient hazard coverage in 2005. As Plaintiff states in the complaint, "[T]here was no explanation [from Defendant] as to why the amount of insurance Plaintiff had carried for the past six years, including flood insurance, was suddenly inadequate [in 2010 and 2011 when Defendant force placed additional coverage]." Compl. ¶ 29.

Defendant's argument that Plaintiff did not allege facts sufficient to meet the federal pleading standard is not persuasive. Plaintiff alleged facts that, if true, plausibly show that she obtained sufficient coverage in 2005, and that the coverage she maintained from that time forward met the terms of her loan agreement. Defendant may disagree with the sufficiency of Plaintiff's insurance coverage, but the Court cannot properly resolve a factual dispute about the value of Plaintiff's property in a motion to dismiss. *Scheuer,* 416 U.S. at 236. Accordingly, the Court finds that Plaintiff adequately alleges that she maintained insurance coverage at least equal to the replacement value of improvements on her property.

b. *Breach of Contract*
Defendant argues that Plaintiff's Breach of Contract claim should be dismissed because Plaintiff did not adequately plead the replacement value of the improvements on her property. As discussed in the preceding section, the Court finds that Plaintiff adequately pleads that she maintained replacement value coverage at all times and that, as a result, any additional coverage allegedly force placed by Defendant exceeded the coverage required by the loan agreement. Accordingly, Defendant's motion to dismiss this third cause of action is denied.

c. *TILA (Hazard Insurance)*
Defendant argues that Plaintiff's TILA claim related to excess hazard insurance (first cause of action) should be dismissed because TILA does not apply to insurance purchased from a third party insurer such as State Farm. Plaintiff concedes that point, but argues that TILA does apply to the insurance allegedly force placed on Plaintiff's property as far as it exceeded the replacement value of improvements. Defendant agrees in the reply that such force placed insurance is subject to TILA, but again argues that Plaintiff's allegations do not meet federal pleading standards.

***5** "[A]ccording to 12 C.F.R. § 226.4(d)(2)(i), premiums for insurance against loss or damage to property are specifically excluded from the mandated disclosure when the borrower may choose the provider of insurance coverage and the ability to choose is disclosed." *Hayes v. Wells Fargo Home Mortg.,* No. 06–1791, 2006 WL 3193743, at *7 (E.D.La. Oct.31, 2006). Thus, insurance purchased by Plaintiff from State Farm cannot give rise to a TILA claim.

The law treats force placed insurance coverage that exceeds that required in the loan agreement differently. As discussed above, the Court finds that Plaintiff adequately alleges that Defendant force placed unauthorized hazard insurance on Plaintiff's property, exceeding the amount required by the loan agreement and which required accurate and meaningful disclosures as well as changes to the policy's requirements, none of which Defendant provided. Such allegations, if true, entitle Plaintiff to relief under TILA. *Hofstetter v. Chase Home Fin., LLC,* 751 F.Supp.2d 1116, 1126–27 (N.D.Cal.2010) (finding that increasing insurance requirements beyond the terms of the original loan agreement constitutes a prohibited "change of terms" in violation of TILA and 12 C.F.R. 226.5b(f)(3)).

For the first time in its reply, Defendant argues that while Plaintiff pleads that she was billed for force placed insurance, she does not plead that she actually paid the bill and does not therefore plead that she actually sustained damages. The Court first finds that based on the allegations in the complaint, it can reasonably draw the inference that Plaintiff sufficiently alleges payment of the premiums. Second, TILA provides for statutory damages in cases where there is a violation of TILA's requirements, but a plaintiff does not show monetary damage. *See* 15 U.S.C. §§ 1640(a)(1)-(2) (authorizing suits for actual damage, statutory damages ranging from $400–$4,000, and suits for minimum class action damages); *Russell v. Mortgage Solutions Mgmt., Inc.,* No. CV 08–1092–PK, 2010 WL 3945117, at *6–*7 (D.Or. Apr.6, 2010) (acknowledging that all three types of damages are authorized by § 1640). Accordingly, Defendant's motion to dismiss Plaintiff's TILA hazard insurance claim based on force placed insurance is denied.

d. *Cal. Civ.Code § 2955.5*

Cal. Civ.Code § 2955.5 prohibits a lender from "requiring[ing] a borrower ... to provide hazard insurance coverage ... in an amount exceeding the replacement value of improvements on the property." Cal. Civ.Code § 2955.5(a). Defendant seeks dismissal of this fourth cause of action for the same reasons raised with respect to Plaintiff's breach of contract claim.

In this case Plaintiff pleads that she maintained insurance coverage on her property at least equal to the replacement value of improvements on the property. Then, in March 2011 Defendant force placed additional insurance on Plaintiff's property and billed her for the premiums.[3] As discussed above, these allegations are sufficient to state a claim under this statute, and Defendant's motion to dismiss this fourth cause of action is denied.

e. *UCL (Hazard Insurance)*

***6** Defendant argues that Plaintiff's fifth cause of action for a UCL violation is based upon a failure to disclose under TILA and is, therefore, preempted because her legal theory is contradicted by 12 C.F.R. § 226.4(d)(2)(i) and TILA preempts state law claims which contradict it or the regulation promulgated thereunder. Defendant points out that any insurance purchased by Plaintiff from a third party is not subject to the disclosure requirements of TILA, and as a result no UCL claim can be predicated on such a purchase. Plaintiff concedes that TILA does not regulate her purchase of insurance from State Farm, but again argues that the force placed insurance premiums are subject to TILA. Plaintiff also argues that a violation of Cal. Civ.Code § 2955.5 can give rise to a UCL claim based on insurance purchased by Plaintiff from a third party.

TILA's savings clause provides that TILA does not preempt state law unless the state law is inconsistent with TILA. *Silvas v. E*Trade Mortg. Corp.,* 514 F.3d 1001, 1007 (9th Cir.2008).

Plaintiff is correct that a UCL claim may be predicated on a TILA violation since the UCL and TILA do not conflict when the UCL claim is based on conduct prohibited by TILA. Since Defendants' "preemption" argument is dependent on its TILA argument, and this Court has already rejected that argument, Defendants' motion to dismiss this UCL claim is denied.

f. *Plaintiff's Flood Insurance Claims*

Defendant argues that Plaintiff's second and sixth causes of action, i.e., her flood insurance claims, should be dismissed on several grounds. First, Defendant argues that under the National Flood Insurance Act ("NFIA"), it was entitled to force place flood insurance on Plaintiff's property even if the property was no longer in a flood zone. Next, Defendant reproduces the arguments raised in support of dismissing Plaintiff's TILA and UCL hazard insurance claims as discussed in the preceding section. Finally, Defendant argues that the NFIA preempts Plaintiff's flood insurance UCL claim.

(i) *TILA (Flood Insurance)*

Defendant argues that the NFIA and the FDPA legally entitle it to engage in the conduct alleged in the complaint, making dismissal of Plaintiff's flood insurance claims appropriate. Defendant argues that under federal flood insurance law, it is entitled to rely on a determination of flood plain status for 7 years, which eliminates its liability in this case. Plaintiff responds that Defendant was not entitled to force place flood insurance on her property once it knew that the property was no longer in a FEMA designated flood zone. Additionally, Plaintiff argues that even if Defendant could force place some amount of insurance on her property, it violated the law when it allegedly force placed insurance on Plaintiff's home that exceeded the value of improvements on the property.

The minimum amount of flood insurance required by the NFIA is an amount equal to "the outstanding principal balance of the loan or the maximum limit of coverage made available under the Act ..., whichever is less." 42 U.S.C. § 4012a(b)(1). "Flood insurance under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located." 12 C.F.R. § 339.3. In other words, the NFIA requires flood insurance equal to the lesser of the replacement value of improvements to the property or the principal balance of the loan secured by the property.

***7** Based on Exhibit 1 to Plaintiff's complaint, Defendant disclosed to Plaintiff at the origination of the loan that flood insurance that complied with the NFIA was required. Defendant then allegedly required increased flood insurance coverage, eventually force placing the additional coverage. The additional premium was reflected in Plaintiff's April 2011 mortgage statement. As discussed above, the Court finds that the complaint gives rise to a reasonable inference that Plaintiff's existing policy was at least equal to the replacement value of improvements on the property. Additional coverage force placed by Defendants therefore exceeded coverage required under the NFIA and the loan agreement. Insurance premiums for coverage in excess of replacement value of improvements were not disclosed in the original loan agreement, as alleged, which is an impermissible change of terms in violation of TILA. *See Hofstetter v. Chase Home Fin., LLC,* 751 F.Supp.2d 1116, 1125 (N.D.Cal.2010). Based on the allegation that Defendant required flood insurance coverage on Plaintiff's property in excess of that required under the NFIA, Plaintiff's complaint states a claim.

Defendant also argues that it was entitled to rely on the 2005 determination of the property's flood status for seven years, and require Plaintiff to maintain flood insurance for at least that time period. Defendant points to guidance from the Federal Reserve Board that explains that Defendant did not have a duty to monitor the flood zone status of the property. Plaintiff responds that Defendant learned that Plaintiff's property was no longer in a flood zone at the latest on or before March 24, 2011, but that Defendant nevertheless force placed flood insurance on her property the next month and never refunded her payment.

Defendant concedes that the NFIA does not allow for charging a borrower for forced placed insurance where a lender has contacted FEMA and actually learned that a property was no longer in a flood zone. Reply, at 7. Defendant also points out that if it did overcharge Plaintiff, there was a credit and refund mechanism in place to return Plaintiff's premium payments. Defendant argues for the first time in its reply that Plaintiff does not specifically allege that her payments were not refunded.

If, as alleged, Defendant actually knew that Plaintiff's property was not in a flood zone, then its duty to monitor for changes, along with the Federal Reserve Board's guidance on that point, became irrelevant. Further, Plaintiff clearly pleads that she was billed for the flood insurance, and that she was damaged by the "expenses and costs for insurance...." Compl. ¶ 35. At the motion to dismiss stage, Plaintiff's allegations must be accepted as true. Plaintiff plausibly pleads that she was billed for insurance, and that she paid the bill. In light of the allegations, the Court finds a reasonable inference that Plaintiff was not refunded her alleged overpayments. *Scheuer,* 416 U.S. at 236. In short, to the extent Plaintiff's TILA flood insurance claim is based on Defendant's force placement of flood insurance after it allegedly knew that such coverage was not required, Plaintiff has sufficiently pled this cause of action and Defendant's motion to dismiss this claim is denied.

***8** Defendant also argues that Plaintiff's flood insurance allegations fail to state a claim under TILA because Plaintiff purchased her insurance from State Farm. As discussed above, the Complaint alleges that Defendant force placed both hazard and flood insurance on Plaintiff above and beyond the insurance she had purchased from State Farm. Since TILA would apply to the forced placed flood insurance of Defendant, the motion to dismiss this second cause of action on this ground is denied as well.

(ii) *UCL (Flood Insurance)*

Defendant argues that the NFIA preempts state law causes of action for excessive flood insurance. Plaintiff responds that claims for coverage in excess of amounts required by the NFIA are not preempted.

The NFIA does not preempt state law claims that allege that a defendant required coverage in excess of that required by the NFIA. *Hofstetter v. Chase Home Fin., LLC,* No. C 10–01313 WHA, 2010 U.S. Dist. LEXIS 84050, at *30–31, 2010 WL 3259773 (N.D.Cal. Aug. 13, 2010). As stated above, Plaintiff's claim concerns coverage that exceeds the amount required by the NFIA, so her claim is not preempted. Defendant's motion to dismiss this sixth cause of action is denied.

4. *Defendant's Motion to Dismiss Plaintiff's Class Allegations*

Defendant argues that the class allegations in Plaintiff's complaint should be dismissed or stricken. Defendant asserts that the class definitions would, if certified, include class members who lack standing under Article III. Plaintiff responds that it is proper to determine the sufficiency of class definitions at the class certification stage, making Defendant's motion premature.

Defendant primarily relies on *Sanders v. Apple Inc.,* 672 F.Supp.2d 978 (N.D.Cal.2009). In that case, the court ruled that it was proper to strike class definitions from the complaint prior to discovery because the class included members that lacked Article III standing, and the complaint asserted claims on behalf of a nationwide class that would be subject to varying state laws. *Sanders,* 672 F.Supp.2d at 991.

There is nothing in the *Sanders* court holding that requires a court to consider the sufficiency of class definitions during a motion to dismiss or strike. While a court may in some circumstances consider class allegations earlier, the Court declines to do so in this case. The class definitions will be considered during the certification process and Defendant's motion to dismiss the class allegations is denied.

III. ORDER

For all the foregoing reasons, the motion is GRANTED WITH PREJUDICE with respect to Defendant Suntrust Banks, Inc., and DENIED as to Defendant Suntrust Mortgages, Inc. A responsive pleading from Defendant Suntrust Mortgage, Inc. is due 20 days from the date of this order.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 996513

Footnotes

1 This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). scheduled for February 22, 2012.

2 The complaint names Suntrust Banks, Inc., but does not contain any allegations specific to that party. Accordingly, the following order refers to Suntrust Mortgage, Inc. as the sole defendant.

3 Plaintiff does not plead that she purchased additional hazard insurance from a third party.

Exhibit 4

2018 WL 6131149
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

KOHN LAW GROUP, INC.
v.
Bruce JACOBS, et al.

Case No. LA CV 18-0820-VAP (Ex)
|
Filed 02/16/2018

Attorneys and Law Firms

Robert E. Kohn, Kohn Law Group Inc., Santa Monica, CA, for Kohn Law Group, Inc.

Darren S. Enenstein, Teri T. Pham, Enenstein Pham and Glass, Marc Steven Nurik, Law Offices of Marc S. Nurik, Los Angeles, CA, for Bruce Jacobs, et al.

Proceedings: MINUTE ORDER DENYING PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND REQUEST TO ADVANCE THE HEARING ON PLAINTIFF'S PENDING MOTION TO COMPEL ARBITRATION (DOC. NO. 16) (IN CHAMBERS)

VIRGINIA A. PHILLIPS, CHIEF UNITED STATES DISTRICT JUDGE

***1** On February 11, 2018, Plaintiff Kohn Law Group, Inc. ("Plaintiff") filed an Ex Parte Application for a Temporary Restraining Order ("TRO"), an Order to Show Cause Regarding Preliminary Injunction, and a Request to shorten the time for briefing for, and advance the hearing on, Plaintiff's pending Motion to Compel Arbitration ("Application"). (Doc. No. 16.) With this Application, Plaintiff asks that this Court enjoin Defendants Bruce Jacobs, the LS Law Firm, and Lilly Ann Sanchez (collectively, "Defendants") from pursuing any actions or proceedings, including Defendants' previously filed action in Miami, Florida, in purported violation of an arbitration clause in a fee agreement between the parties. Defendants did not file an opposition. After consideration of the Application, the Court DENIES the Application.

Plaintiff fails to establish why he seeks this relief on an ex parte basis. Ex parte relief is appropriate only in the face of "real urgency." *In re Intermagnetics Am., Inc.*, 101 B.R. 191, 194 (C.D. Cal. 1989). Both the Federal Rules of Civil Procedure and the Local Rules of this Court "contemplate that *noticed* motions should be the rule" because noticed motions "provide a framework for the fair, orderly, and efficient resolution of disputes." *Id.* at 193 (emphasis in original). Ex parte applications throw this system "out of whack." *Id.* By "demand[ing] priority consideration," they "impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel." *Id.* Accordingly, absent a showing that "bypassing the regular noticed motion procedure is necessary," an ex parte filing is procedurally improper. *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492-93 (C.D. Cal. 1995). To justify ex parte relief, the moving party must show (1) that his "cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures," and (2) that he is "without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect." *Id.* Plaintiff has not established either of these criteria.

Additionally, Plaintiff's Application also fails because Plaintiff has not shown that there is a likelihood of irreparable harm. The standard for issuing a TRO is the same as that for the issuance of a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2010). Thus, a moving party "must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014). In order to demonstrate irreparable injury, Plaintiff would have to show there is a likelihood that another court, and in particular the Miami court where the preceding related action is ongoing, "would fail to properly police its own jurisdiction and thus not dismiss, transfer, or stay proceedings so that arbitration could proceed." *Mastro v. Momot*, No. CV-09-01076-PHX-ROS, 2009 WL 1993772, at *3 (D. Ariz. July 9, 2009). "This Court cannot premise injunctive relief on the theory that another District Court will be derelict in its duty, nor does any evidence suggest that it will be." *Id.; see also Gonzales v. Fresenius Med. Care Holdings*, No. 12CV2488, 2013 WL 12116600, at *1 (S.D. Cal. June 17, 2013) ("Federal courts have long recognized that the principle of comity requires federal district courts to exercise care to avoid interference with each others' affairs.

(citing *Sutter Corp. v. P & P Indus., Inc.*, 125 F.3d 914, 917 (5th Cir. 1997)).

***2** For these reasons, the Court finds that Plaintiff has failed to demonstrate that *ex parte* relief is justified under the present circumstances. [1]

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 6131149

Footnotes

1 Plaintiff also filed a Request for Judicial Notice ("RJN") of Plaintiff's Ex Parte Application. (Doc. No. 19.) This Request appears to be an improper attempt to (1) demand priority consideration and unnecessarily remind the Court of its pending ex parte, and (2) oppose a motion Plaintiff anticipated Defendants would file in this Court in the future. Plaintiff's Request presents no adjudicative or relevant facts, and the Court thus DENIES Plaintiff's Request. *See* Fed. R. Evid. 201 advisory committee notes (explaining that Rule 201 deals only with judicial notice of "adjudicative" facts, meaning facts within the area of reasonable controversy of a particular case). The Court advises Plaintiff that such conduct in the future may warrant sanctions.

Exhibit 5

2005 WL 8165610
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Pamela LAWSON, Plaintiff,
v.
REYNOLDS INDUSTRIES, et al., Defendants.

CV 04-6533 FMC (FMOx)
|
Signed 02/04/2005

Attorneys and Law Firms

Tyron J. Sheppard, Tyron J. Sheppard Law Offices, Los Angeles, CA, for Plaintiff.

Joseph L. Greenslade, Stephanie B. McNutt, McKenna Long and Aldridge LLP, Los Angeles, CA, for Defendants.

ORDER GRANTING AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

FLORENCE-MARIE COOPER, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Defendants' Motion to Dismiss (docket no. 13) and Request for Judicial Notice (docket no. 14), filed October 28, 2004 and on Plaintiff's Motion Requesting Opportunity to Be Heard on Defendant's Request for Judicial Notice (docket no. 15), filed December 27, 2004, which the Court treats as an opposition to Defendants' Request for Judicial Notice. The Court has read and considered the moving, opposition, and reply documents submitted in connection with these motions. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for February 14, 2005 is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby **GRANTS AND DENIES IN PART** Defendants' Motion to Dismiss and **DENIES** Defendants' Request for Judicial Notice.

I. Factual and Procedural Background

Plaintiff Pamela Lawson was previously employed by Defendants Reynolds Industries, Inc., et al., as a Department Supervisor. First Amended Complaint, FAC at ¶ 4. Plaintiff alleges that, while in the position of Supervisor, several employees under her supervision began to refuse to accept her authority and became insubordinate. FAC at ¶ 5. Plaintiff allegedly reported the incidents to her supervisor and complained that she was being harassed by him and other employees because of her race and gender. FAC ¶ 6. Defendants allegedly began to criticize Plaintiff's performance without cause shortly thereafter and eventually suspended her for insubordination on July 17, 2003. FAC at ¶ 9. Plaintiff also alleges that she was required to attend counseling sessions with her supervisor during this time. FAC at ¶ 15. Plaintiff was thereafter discharged from her employment on July 28, 2003, allegedly in violation of company progressive discipline rules. FAC at ¶ 9. Plaintiff further alleges that she exhausted all applicable administrative remedies prior to filing the present suit. FAC at ¶ 9.

Plaintiff filed this action on August 6, 2004, asserting the following causes of action against Defendants: (1) Discrimination in violation of FEHA and Title VII; (2) FEHA Retaliation; (3) Title VII Retaliation; (4) Violation of 42 U.S.C. § 1981; and (5) Intentional Infliction of Emotional Distress ("IIED"). Defendant filed a Motion to Dismiss on August 30, 2004, which the Court granted and denied in part. The Court granted the motion as it pertained to IIED, holding that Plaintiff had failed to allege extreme and outrageous conduct and that her claim was subject to the exclusivity provision of Worker's Compensation law. The Court denied the motion as it related to Plaintiff's claims for retaliation and race and gender discrimination, concluding that Plaintiff had adequately pleaded the exhaustion of administrative remedies.

Plaintiff filed a FAC on October 15, 2004. Plaintiff added allegations pertaining to her IIED claim. She now alleges, in addition to her previous allegations, that Defendants "[i]nvaded Plaintiff's right to Privacy under state and federal constitutions by attending counseling sessions over Plaintiff's objections" and "[e]ngaged in illegal reprisals and discrimination under the FEHA and Title VII as set forth in the first four causes of action." FAC ¶ 21.

***2** Defendants then brought the instant motion to dismiss. Defendants argue that Plaintiff has again failed to sufficiently allege extreme and outrageous conduct for IIED. Defendants also challenge Plaintiff's Title VII and FEHA claims race

and gender and Title VII retaliation claims, arguing that they are untimely and that Plaintiff has failed to exhaust administrative remedies. In support of Defendants' Title VII and FEHA arguments, Defendants requested that the Court take judicial notice of Plaintiffs EEOC charges and right-to-sue letters received from the Equal Employment Opportunity Commission ("EEOC") and the California Department of Fair Employment and Housing ("DPEH").

On January 4, 2005, the Court ordered further briefing on the issue of whether Plaintiff had exhausted administrative remedies. The Court reasoned that whether administrative remedies were exhausted was a question of subject matter jurisdiction. In order for the Court to resolve the question of whether it had jurisdiction, it needed all relevant evidence before it. Because in her opposition to Defendants' Motion to Dismiss Plaintiff relied on the presumptive truthfulness of her allegations, she did not attach evidence supporting her allegation that she had exhausted administrative remedies. The Court gave Plaintiff the opportunity to present such evidence.

On January 31, 2005, in response to the Court's order, Plaintiff filed a Notice of Non-Opposition to Defendants' Motion to Dismiss her race and gender discrimination claims. She maintained her opposition to Defendants' motion insofar as it sought to dismiss her retaliation claims (for untimeliness) and her claim for IIED.

II. Judicial Notice

A court may take judicial notice of an EEOC charge and right-to-sue letter as they are matters of public record. *Gallo v. Bd. of Regents of the University of California*, 916 F. Supp. 1005, 1007-1008 (S.D. Cal. 1995); *see also Wynn v. Nat'l Broadcasting Co.*, 234 F. Supp. 2d 1067, 1076 n.3 (C.D. Cal. 2002) (taking judicial notice of EEOC charges); *Martinez v. City of Richmond*, No. C 95-2549 TEH, 1995 WL 729308 (N.D. Cal. Dec. 4, 1995) (same). Because the documents are of the same nature, a court may also take judicial notice of a DFEH charge and right-to-sue letter.

There is a split of authority on whether judicially noticed documents must also be authenticated. Some authorities conclude or assume that judicial notice obviates the need for authentication. *See Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1300 n.10 (S.D. Cal. 2003) (holding that documents that were not properly authenticated may be judicially noticed); *Pavone v. Citicorp Credit Services, Inc.*, 60 F. Supp. 2d 1040, 1045 (S.D. Cal. 1997) (stating that documents that cannot be judicially noticed may nevertheless be admitted if authenticated); *In re Bestway Products, Inc. v. Willow Lane, Inc.*, 151 B.R. 530 (E.D. Cal. Bankr. 1993) (stating that judicial notice establishes a document's authenticity). Others assume that judicially noticed documents must also be authenticated. *See Madeja v. Olympic Packers, LLC*, 310 F.3d 628, 639 (9th Cir. 2002) (concluding that lower court did not abuse its discretion in refusing to judicially notice unauthenticated documents); *California v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1053 (N.D. Cal. 2003) (refusing to take judicial notice of unauthenticated document). Because the cases addressing this issue do so without full analysis, they are of little guidance to the Court in determining whether authentication is needed in this case.

Here, the Court is not concerned with whether a document, the authenticity of which is not challenged, must nevertheless "go through the hoops" of authentication before it can be judicially noticed. Suffice it to say, if authenticity is challenged, then the Court cannot dispense with the authentication requirement. By definition, judicially noticed facts are "generally known within the territorial jurisdiction of the trial court" or those that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b). If the authenticity of a document is not established, the Court cannot conclude that its accuracy cannot reasonably be questioned because it *is* being questioned. When the authenticity of a document is in question, its authenticity must be established, even if that document is subject to judicial notice.

***3** Although Plaintiff does not claim that the EEOC and DFEH charges and right-to-sue letters submitted by Defendants are forgeries, she does challenge the Defendant's failure to authenticate the documents. They are subject to judicial notice as part of a public record, but to be authenticated, there must be evidence that the document "is from the public office where items of this nature are kept." Fed. R. Evid. Rule 901(7). Defendants have provided no such evidence. The only foundation they have laid for the documents is a declaration by Defendants' counsel that they have provided "true and correct" copies of the EEOC and DFEH charges and right-to-sue letters. It was not, however, within defense counsel's personal knowledge that the documents she copied were in fact the documents sent by the EEOC and DFEH. She necessarily depended on the representations of Defendants in concluding that these

documents were from the EEOC and DFEH. Therefore, the declaration that the copies are true and correct is not sufficient to establish the authenticity of the original documents. In order to authenticate the documents, Defendants must provide a declaration that those documents are the documents they received from the EEOC and DFEH or a declaration from someone within the EEOC and DFEH that the documents are from their office.

Defendants argue that the Court should not require the documents to be authenticated because this is "nothing more than a ploy to delay the inevitable–the dismissal of Plaintiff's Title VII claims and her FEHA discrimination claim." In other words, Defendants argue that Plaintiff is relying on a mere technicality. In support of this argument, Defendants point out that Plaintiff is not claiming that the documents are not what Defendants say they are or that they are not true and correct copies. There is appeal to the argument that if the documents were not what Defendants' claim, Plaintiff would surely say so. However, if Defendants wish to see Plaintiff's claims dismissed on the basis of these documents, it is not too much to ask that Defendants properly authenticate them. Plaintiff has a right to have the rules of evidence enforced, regardless of whether she in fact knows the documents to be genuine.

Because the documents are not properly authenticated, the Court does not take judicial notice of them at this time. Were the documents authenticated, the Court would take such notice.

III. Motion to Dismiss

A. Race and Gender Discrimination under Title VII and FEHA

Defendants contend that Plaintiff did not exhaust her administrative remedies under Title VII or the FEHA because she did not claim race and gender as the bases for discrimination when she filed her charges. Exhaustion of administrative remedies is a prerequisite for the Court's jurisdiction. *See Shah v Mt. Zion Hospital and Medical Center*, 642 F.2d 268, 271 (9th Cir. 1981). The party invoking federal jurisdiction has the burden of establishing it once challenged. *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001) (citing *Smith v. McCullough*, 270 U.S. 456 (1926)). Because Plaintiff does not oppose dismissal of her race and gender discrimination claims, she proffers no evidence in support of the Court's jurisdiction. Therefore, she fails to meet her burden of establishing jurisdiction. Plaintiff's Title VII and FEHA claims based on race and gender are therefore dismissed.

B. Title VII Retaliation

Defendant's contend that Plaintiff's claim for retaliation under Title VII is barred because it is untimely. Under 42 U.S.C. § 2000e-5(f)(1), a plaintiff must bring a Title VII action within 90 days of receiving a right-to-sue letter. Defendants argue that Plaintiff failed to bring her action within this 90-day period.

Defendants' argument necessarily depends on the Court taking judicial notice of the right-to-sue letter, which the Court has declined to do. *see also Madeja*, 310 F.3d at 639 (lower court did not abuse discretion in refusing to take judicial notice of unauthenticated document).

However, even if the Court did take judicial notice, the document does not establish the untimeliness of Plaintiff's claim. This is because there is a dispute over the date on which the letter was sent. Although Defendants contend that Plaintiff filed her charge on August 28, 2003, the right-to-sue letter is dated September 8, 2002. [1] This date is clearly wrong. The letter could not have been sent nearly a year before the charge was filed. However, the correct date the letter was sent is unknown. While Defendants claim that the correct date was September 8, 2003, and this stands to reason, it is not necessarily so. After it is determined that September 8, 2002 is the wrong date, there is no real evidence was to what the right date is. Without knowing on what date the right-to-sue letter is sent, it is not possible to determine whether the 90-day period expired before Plaintiff filed her suit. Without knowing whether the 90-day period expired, Plaintiff's claim should not be dismissed, because it cannot be said that Plaintiff cannot prove any set of facts in support of the claims that would entitle her to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

C. IIED

***4** As to Plaintiff's IIED claim, Defendants contend that: (1) the conduct described by Plaintiff does not rise to the level of "extreme and outrageous" conduct as required to assert a claim for IIED under California law; and (2) Plaintiff's claim is subject to the exclusivity provision of California's worker's compensation law.

To establish a claim for IIED under California law, a Plaintiff must allege the following elements: "(1) outrageous conduct by the defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional suffering; and (4) actual and proximate causation of the emotional distress." *Cole v. Fair Oaks Fire Protection District*, 43 Cal.3d 148, 155 n.7 (1987). "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not constitute outrageous conduct. *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 499 n.5 (1970); *see also Cole*, 43 Cal. 3d at 155 n.7; *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 80 (1996). Only where the "conduct [is] so extreme and outrageous 'as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' " will the conduct support a claim for IIED. *Alcorn*, 2 Cal. 3d at 499 n.5.

The Supreme Court of California addressed whether conduct normally occurring in the workplace will support a claim for IIED in *Cole.* In *Cole*, the Court stated that where the Plaintiff's supervisor had continuously harassed the plaintiff, instituted unjustified disciplinary proceedings, publicly stripped the plaintiff of his captain's badge and demoted him, and eventually attempted to force the plaintiff to retire early, these actions did not support a claim for IIED. 43 Cal. 3d at 152-54. In explanation the Court stated that:

> The allegations ... as to the *conduct* of the employer ... reflect matters which can be expected to occur with substantial frequency in the working environment. Some harassment by superiors when there is a clash of personality or values is not uncommon. Disciplinary hearings and demotions and friction in negotiations as to grievances are also an inherent part of the employment setting as are decisions to seek disability retirement and demands to appear at meetings which interfere with personal arrangements." *Id.* at 161.

In support of Plaintiff's claim for IIED, Plaintiff alleges that Defendants: (a) would not support her management decisions; (b) sabotaged her relationship with her subordinate male employees; (c) invaded Plaintiff's right to Privacy under state and federal constitutions by attending counseling sessions over Plaintiff's objections; (d) engaged in illegal reprisals and discrimination under the FEHA and Title VII; and (e) finally discharged her from employment in violation of Defendant Reynolds' policy of progressive discipline. None of the actions that Plaintiff complains of constitutes "extreme and outrageous" conduct as required to support a claim for IIED. Rather, failure to provide adequate support, unpleasant personal relationships, inappropriate discipline and termination are all actions and management decisions that could be considered part of the normal employment environment. This type of conduct, while unfortunate, does not come close to being "extreme and outrageous" as required to support a claim for IIED.

***5** Plaintiff cites *Sheppard v. Freeman*, 67 Cal. App. 4th 339, 349 (1998) for the proposition that *illegal* conduct is outside of the normal employment environment and can constitute extreme and outrageous conduct. Plaintiff reasons that because her amended complaint asserts violations of the state and federal constitutions and anti-discrimination laws, she has alleged conduct outside the normal employment environment. *Sheppard*, contrary to Plaintiff's representation, does not address IIED and does not hold that an employer's liability for IIED can arise from a statute. *Sheppard* holds that an employee cannot be not liable for personnel actions, regardless of motive or scope of employment. 67 Cal. App. 4th at 349. It is inapposite. Plaintiff cites no authority for the proposition that because conduct violates a statute or the constitution it necessarily is extreme and outrageous. If Plaintiff's claim were correct, every discrimination suit would also be an IIED suit because every discrimination suit arises from the violation of a statute. Simply alleging that Defendants' conduct is illegal is not sufficient to make it extreme and outrageous.

Plaintiff, having been given an opportunity to amend her complaint, has failed to allege extreme and outrageous conduct. Therefore, her claim is dismissed with prejudice.

IV. Conclusion

Defendant's request for judicial notice is DENIED. Defendant's motion to dismiss is DENIED and GRANTED in part. It is denied as to Plaintiff's retaliation claim under Title VII, the third cause of action. It is granted as to Plaintiff's race and gender discrimination claims under Title VII and FEHA (the first cause of action) and granted as to Plaintiff's

IIED claim (the fifth cause of action). All dismissed claims are dismissed with prejudice. Plaintiff's second, third and fourth causes of action therefore remain. Defendant is given 20 days to answer Plaintiff's Complaint.

All Citations

Slip Copy, 2005 WL 8165610

Footnotes

1 At least on the copy Defendants submitted, the date looks like “9/08/02.” But the copy is faded around the signature. It is possible it is also faded around the date, and that what looks like a “2” in the copy is actually a “3.”

Exhibit 6

2013 WL 987723
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Le Dawn P. LYLES
v.
FORD MOTOR CREDIT CO., et al.

No. SACV 12–1736 AG (RNBx).
|
March 11, 2013.

Attorneys and Law Firms

Le Dawn P Lyles, Northridge, CA, pro se.

Austin Benjamin Kenney, Severson And Werson, San Francisco, CA, for Ford Motor Credit Co., et al.

Proceedings: [IN CHAMBERS] ORDER GRANTING MOTION TO DISMISS AND DECLINING TO RULE ON MOTION TO STRIKE

ANDREW J. GUILFORD, Judge.

***1** Lisa Bredahl, Deputy Clerk.

In October 2012, pro se plaintiff Le Dawn P. Lyles ("Plaintiff") sued Ford Motor Credit Company LLC ("Ford Credit"); MacDowell and Associates, Ltd.; David T. Chen; and Todd A. MacDowell (together, "Defendants"). Plaintiff alleges violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, et seq. and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, et seq. Defendants filed a Motion to Dismiss the Complaint, or Alternatively, for a More Definite Statement ("Motion to Dismiss") and a Motion to Strike Portions of Complaint ("Motion to Strike"). (Dkt.Nos.23, 24.) The Court GRANTS the Motion to Dismiss. Because the Court grants the Motion to Dismiss, the Court need not rule on the Motion to Strike.

BACKGROUND

The following facts come primarily from Plaintiff's Complaint, and for purpose of this Motion, the Court assumes them to be true. The Court also considers the contents of official court documents from the San Bernardino Superior Court, which may be considered on a motion to dismiss, as explained in the Preliminary Matters section of this Order.

In June 2002, Plaintiff got a car loan with Ford Credit. (First Amended Complaint ("FAC"), at Dkt. No. 22, at ¶ 11.) Plaintiff apparently fell behind in her payments. At some point, Ford Credit allegedly assigned or transferred the debt for collection to MacDowell and Associates, Ltd., David T. Chen, and Todd A. MacDowell (together, the "MacDowell Defendants"). (*Id.* ¶ 13.)

Ford Credit sued Plaintiff to collect the debt. (*Id.* ¶ 14.) Plaintiff was served with a state court summons and complaint on March 15, 2012. (*Id.* ¶ 14.) Plaintiff alleges that the state court complaint misrepresented (1) "the true source and nature of the relations" between Ford and the MacDowell Defendants and (2) "the true source and nature" of Defendants' debt collection efforts. (*Id.* ¶¶ 20–21.) Plaintiff also claims that the MacDowell Defendants "engaged in deceptive practices" and "used an unconscionable means" to collect the debt. (*Id.* ¶¶ 22–23.)

On April 1, 2012, Plaintiff mailed Ford Credit a letter disputing the debt. (*Id.,* at 8.) Ford Credit received it on April 5, 2012. (*Id.* ¶ 24.) On May 19, 2012, Plaintiff mailed the MacDowell Defendants a letter disputing the debt and demanding that they "validate the alleged debt by providing strict proof of the indebtedness." (*Id.* at 8.) This letter was received May 22, 2012. (*Id.*)

In October 2012, Plaintiff brought this suit against Ford Credit and the MacDowell Defendants, alleging violations of the FDCPA and the FCRA. On November 9, 2012, a court trial on the state case was held in San Bernardino Superior Court. (Defendants' Request for Judicial Notice ("RJN"), Dkt. No. 24; Defendants' Supplemental Request for Judicial Notice ("SRJN"), Dkt. No. 27.) Judgment was entered in favor of Defendants for $4,848.83 that same day. (SRJN.)

***2** Defendants ask the Court to take judicial notice of three documents: (1) this Court's December 17, 2012 Order granting Defendants' previous motion to dismiss; (2) a certified reporter's transcript ("State Court Transcript") of the trial in the related case of *Ford Motor Credit Company LLC v. Ledawn Dyson,* Case No. CIVRS 1200349 (the "State Court Case"), held in San Bernardino Superior Court on November 9, 2012; and the judgment in the State Court Case. (RJN; SRJN.)

The request to take judicial notice of the December 17, 2012 Order is DENIED because the Court need not take judicial notice of its own order to consider its effect.

The request to take judicial notice of the State Court Transcript and the Judgment is GRANTED. Courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,* 971 F.2d 244, 248 (9th Cir.1992). Courts can also take judicial notice of pleadings and court orders that are matters of public record. *See MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir.1986). Although the Court takes judicial notice of the existence of the State Court Transcript and the Judgment, it does not adopt the factual findings of that court. *See Cal. ex rel Lockyer v. Mirant Corp.,* 266 F.Supp.2d 1046, 1054 (N.D.Cal.2003).

LEGAL STANDARD

A court should dismiss a complaint when its allegations fail to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). A complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). " '[D]etailed factual allegations' are not required." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 555 (2007) (stating that "a complaint attacked by a Rule 12(b) (6) motion to dismiss does not need detailed factual allegations")). The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Pollard v. Geo Group, Inc.,* 607 F.3d 583, 585 n. 3 (9th Cir.2010).

But the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U .S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). A court should not accept "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," *id.,* or "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). "[A]nalyzing the sufficiency of a complaint's allegations is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' " *Sheppard v. David Evans and Associates,* 694 F.3d 1045, 1051 (9th Cir. Sept.12, 2012). The Ninth Circuit also addressed post-*Iqbal* pleading standards in *Starr v. Baca,* 652 F.3d 1202, 1204 (9th Cir.2011). The *Starr* court held that allegations "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively ... [and] plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.* at 1216.

***3** If the Court decides to dismiss a complaint, it must also decide whether to grant leave to amend. "A district court may deny a plaintiff leave to amend if it determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency ... or if the plaintiff had several opportunities to amend its complaint and repeatedly failed to cure deficiencies." *Telesaurus VPC, LLC v. Power,* 623 F.3d 998, 1003 (9th Cir.2010); *see also Steckman v. Hart Brewing,* 143 F.3d 1293, 1298 (9th Cir.1998) (holding that pleadings may be dismissed without leave to amend if amendment "would be an exercise in futility").

Defendants argue that the Court should dismiss this case for two reasons: (1) Plaintiff's claims are barred by the *Rooker–Feldman* doctrine and (2) Plaintiff has failed to state a claim for relief. For the reasons explained in detail in the Court's December 17, 2012 Order ("December Order"), the Court finds that this case is not barred by *RookerFeldman.* (*See* Order Granting Motion to Dismiss ("December Order"), Dkt. No. 20, at 5–6.)

The Court now turns to Defendants' argument that Plaintiff fails to state a claim. Defendants argue, and the Court agrees, that Plaintiff's FDCPA and FCRA claims should be dismissed. Because the Court dismisses all of Plaintiff's claims, the Court need not rule on Defendants' Motion to Strike.

1. FAIR DEBT COLLECTION PRACTICES ACT CLAIMS

In its December Order, the Court dismissed Plaintiff's FDCPA claims against Ford Credit without leave to amend because Ford Credit was not a debt collector under 15 U.S.C. 1692g. The Court dismissed Plaintiff's FDCPA claims against the MacDowell Defendants with leave to amend. Plaintiff amended, asserting violation of three different FDCPA provisions. Now Defendants again ask the Court to dismiss the FDCPA claims against the MacDowell Defendants. The Court GRANTS the Motion.

First, Plaintiff alleges that the MacDowell Defendants violated the Section 1692g by continuing their efforts to collect Plaintiff's debt after she disputed the validity of the debt. (FAC, at 8.) In its December Order, the Court dismissed both FDCPA claims because Plaintiff had not alleged that she disputed the debt with the MacDowell Defendants within 30 days of receiving notice. *See* 15 U.S.C. § 1692g(b) (requiring debt collectors to stop collection efforts *if* consumer disputes the debt in writing within 30 days after receiving notice). Plaintiff has not corrected this deficiency. Plaintiff still alleges that she notified the MacDowell Defendants that she disputed the debt on May 19, 2012, more than 30 days after Plaintiff allegedly received notice on March 15, 2012. (*See* FAC, at 7–8.) Plaintiff therefore fails to allege an FDCPA violation based on validation.

Second, Plaintiff alleges that "communications from the Defendants to the Plaintiff discuss alleged amount owed and solicit methods to tender immediate payment, which overshadows the consumer warning." (FAC, at 9.) Like the validation claim, Plaintiff's overshadowing claim fails because she has not alleged that she timely notified the MacDowell Defendants of the dispute. The overshadowing claim also fails because she has not alleged that the debt collection communication contained language "likely to deceive or mislead a hypothetical 'least sophisticated debtor' ... or language regarding payment of the alleged debt [that] contradicted or overshadowed the validation notice." *Elliot v. Credit Control Services, Inc.,* 2010 WL 1495402, at *2–3 (S.D.2010) (citing *Terran v. Kaplan,* 109 F.3d 1428, 1431 (9th Cir.1997)). In her FAC, Plaintiff makes the same conclusory allegation that the Court previously found did not adequately identify the language likely to deceive a debtor and overshadow the notice. (FAC, at 9).

***4** Third, Plaintiff asserts a claim under Section 1692f of the FDCPA. Section 1692f prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect a debt." 15 U.S.C. § 1692f. In paragraph 23 of her FAC, Plaintiff alleges that "[t]hrough this conduct, [the MacDowell Defendants] used an unfair unconscionable means to collect or attempt to collect a debt." (FAC ¶ 23.) Plaintiff's reference to "this conduct" apparently refers to the MacDowell Defendants' purported misrepresentations, alleged in paragraphs 20–23. Plaintiff has presented no facts to support these assertions. She also fails to state a claim under Section 1692f of the FDCPA.

The Court GRANTS Defendants' Motion to dismiss the FDCPA claims against the MacDowell Defendants.

2. FAIR CREDIT REPORTING ACT CLAIMS

Plaintiff claims that Defendants violated Section 1681 s–2 of the FCRA by failing to report to credit reporting agencies Experian and TransUnion (the "CRAs") that Plaintiff's account was in dispute. The FCRA requires "furnishers of information" to CRAs to provide CRAs with accurate information about a consumer's debt. 15 U.S.C. § 1681s–2(a). As Defendants correctly note, Section 1681 s–2(a) does not create a private right of action, so the Court only addresses allegations that Defendants violated Section 1681 s–2(b). *See Nelson v. Chase Manhattan Mortgage Corp.,* 282 F.3d 1057, 1059 (9th Cir.2002) (no private right of action for Section 1681 s–2(a)).

Courts have held that consumers asserting Section 1681 s–2(b) violations based on "furnishing inaccurate information [ ] must identify which information is inaccurate." *Noel v. Bank of America,* No. 12–4019–SC, 2012 WL 5464608, at *5 (N.D.Cal. Nov.8, 2008) (citing *Carvalho v. Equifax Info. Servs., LLC,* 588 F.Supp.2d 1089, 1096 (N.D.Cal.2008)); *see also, e.g., Mortimer v. JP Morgan Chase Bank, Nat. Ass'n,* C 12–1936 CW, 2012 WL 3155563, at *3 (N.D.Cal. Aug.2, 2012); *Manukyan v. Cach, LLC,* No. CV–12–08356 RGK (JCx), 2012 WL 6199938, at *3 (C.D. Dec. 11, 2012). Plaintiff has not done so here, so her claim fails. Plaintiff's FCRA claim against Ford Credit also fails because she doesn't allege Ford Credit is a "furnisher of information" under the FCRA. Because Plaintiff has failed to allege essential elements of her Section 1681 s–2 claim, the Court GRANTS Defendants' Motion to Dismiss.

DISPOSITION

The Court GRANTS Defendants' Motion to Dismiss. Plaintiff's rote repeating of allegations this Court had duly notified her are deficient indicates that amendment would be futile and leave to amend is inappropriate. *See Telesaurus,* 623 F.3d at 1003. Defendants shall submit a short judgment, without factual recitals and reflecting that judgment is entered against Plaintiff and for all the Defendants.

All Citations

Not Reported in F.Supp.2d, 2013 WL 987723

End of Document

Exhibit 7

2020 WL 4336362
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

MAM APPAREL & TEXTILES LTD., Plaintiff,
v.
NCL WORLDWIDE LOGISTICS USA, INC.; American Shipping and Logistics Inc.; Express Trade Capital, Inc.; Swift Transportation Limited; Bank Leumi USA; and JPMorgan Chase Bank, N.A., Defendants.

19-CV-3750 (NGG) (RML)
|
Signed 07/23/2020
|
Filed 07/28/2020

Attorneys and Law Firms

Hyun-Jeong Baek, Howard M. Rubin, Goetz Fitzpatrick LLP, New York, NY, for Plaintiff.

Andrew Moulinos, Astoria, NY, for Defendant NCL Worldwide Logistics USA, Inc.

Lon J. Seidman, Diamond McCarthy LLP, New York, NY, for Defendant Express Trade Capital, Inc.

Andrea Likwornik Weiss, Walter Everett Swearingen, Becker Glynn Muffly Chassin & Hosinski LLP, New York, NY, for Defendant JPMorgan Chase Bank N.A.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge

***1** Plaintiff MAM Apparel & Textiles LTD. ("MAM") brings this action for, *inter alia*, allegedly wrongful dishonor of certain letters of credit and fraud. (*See generally* Compl. (Dkt. 1).) Defendant Bank Leumi USA now moves to dismiss the claims against it pursuant to Fed. R. Civ. P. 12(b)(6). (*See* Mot. to Dismiss (Dkt. 25); Mem. in Supp. of Mot. ("Mem.") (Dkt. 26); Mem. in Opp. to Mot. ("Opp.") (Dkt. 27); Reply (Dkt. 29).) For the following reasons, Bank Leumi's motion is GRANTED.

I. BACKGROUND

The following factual summary is drawn from the facts alleged in the complaint, which the court generally accepts as true. *See N.Y. Pet Welfare Ass'n v. City of New York*, 850 F.3d 79, 86 (2d Cir. 2017).[1] The court also considers those documents attached to the complaint or incorporated by reference, documents over which it may take judicial notice, and documents so central to the complaint as to be considered integral thereto. *Id.* Further, while the complaint contains allegations against each Defendant, the court summarizes only those facts relevant to MAM's claims against Bank Leumi.

MAM is a foreign corporation which conducts business in Bangladesh. (Compl. ¶ 1.) Bank Leumi is a New York State chartered bank. (*Id.* ¶ 8.) In or around February 2017, Defendant Express Trade Capital, Inc. ordered approximately 69,156 pieces of apparel totaling $96,530.25 from MAM (the "February Order").[2] (*Id.* ¶ 20.) The February Order was processed in two shipments, pursuant to two commercial invoices. (*Id.* ¶ 21.) The first shipment contained 25,040 pieces totaling $34,951.67, and the second shipment contained 44,116 pieces totaling $61,578.58. (*Id.*) The February Order was secured by a letter of credit issued by Bank Leumi to the benefit of Plaintiff (the "L/C"). (*Id.* ¶ 22; *see also* L/C (Dkt. 1 at ECF 23-25).)

The L/C provides for the release of funds upon the presentation of certain documents, including, *inter alia*: (1) a commercial invoice; (2) an ocean bill of lading; (3) a signed telefax; and (4) an authenticated SWIFT message stating that an authorized representative has inspected the goods prior to shipment and that the shipment is authorized. (L/C at ECF 23.) The L/C further provides that it is governed by UCP 600, the latest version of the Uniform Customs and Practice for Documentary Credits (the "UCP"). (*Id.* at ECF 24).

On April 9, 2017, Plaintiff (through Basic Bank, its advising bank in Bangladesh) transmitted shipping documents for the first shipment, specifically a Bill of Exchange, Commercial Invoice, Packing List, Air Way Bill, Inspection Certificate, and Certificate of Origin, with originals and copies, to Bank Leumi. (Compl. ¶ 25.)

***2** On April 14, 2017, approximately five days after Plaintiff transmitted documents for the first shipment, Bank Leumi sent a SWIFT network message[3] to Basic Bank notifying it of discrepancies in the provided documents. (*Id.* ¶ 27.) Specifically, the message stated that copies of the of shippers/beneficiary's detailed telefax and authenticated

SWIFT message had not been presented, the inspection certificate did not conform to the L/C's requirement, and that shipment by air was not in accordance with the L/C's requirements. (Apr. 14, 2017 SWIFT Mess. (Dkt. 25-2).) Further, the message contained a "77B - /NOTIFY/" code. (*Id.*)

On April 17, 2017, Plaintiff, through Basic Bank, transmitted shipping documents for the second shipment, specifically a Bill of Exchange, Commercial Invoice, Packing List, Air Way Bill, Inspection Certificate, and Certificate of Origin, with originals and copies, to Bank Leumi. (Compl. ¶ 26.)

On April 25, 2017, approximately eight days after Plaintiff transmitted the documents for the second shipment, Bank Leumi sent another SWIFT Message to Basic Bank notifying it of discrepant documents. (Apr. 26, 2017 SWIFT Mess. (Dkt. 25-3).) This message was materially identical to the April 14, 2017 message.

On May 16, 2017, Basic Bank sent a SWIFT message to Bank Leumi inquiring about the payment status of the L/C, to which Bank Leumi never replied. (Compl. ¶ 31.) On May 23, 2017, the L/C expired. (L/C at ECF 22.) On June 16, 2017, Bank Leumi informed Basic Bank that it was discharging the L/C, returning the shipping documents for both shipments of the February Order, and charging MAM a total of $780.00 in fees. (Compl. ¶ 32.) To date, Bank Leumi has not disbursed any funds to MAM. (*Id.* ¶ 33.)

II. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), 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)). In making this determination, the court need not credit "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678.

Federal Rule of Civil Procedure 9(b) creates a heightened pleading standard for fraud claims that requires the party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." To satisfy this standard, a complaint must generally: "(1) specify the statement that the Plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F. 3d 1170, 1175 (2d Cir. 1993).

III. DISCUSSION

Bank Leumi argues Plaintiff's claim for wrongful dishonor of the L/C fails as a matter of law because Plaintiff did not present conforming documents. (Mem. at 4.) Bank Leumi further asserts that it timely and adequately notified Plaintiff of these discrepancies as required under the UCP. (*Id.* at 6.) Finally, Bank Leumi argues that Plaintiff's fraud claim fails to allege any misrepresentation and thus fails as a matter of law. (*Id.* at 7.) For the reasons that follow, the court agrees and, accordingly, grants Bank Leumi's motion.

A. Wrongful Dishonor Claim

1. Plaintiff Did Not Provide Strictly Conforming Documents

***3** "To prevail on a claim for wrongful dishonor of a letter of credit, a plaintiff must demonstrate: (1) that there exists a letter of credit issued by the defendant for the benefit of the plaintiff; (2) that the plaintiff timely presented conforming documents to the defendant as required by the letter of credit; and (3) that the defendant failed to pay the plaintiff on the letter of credit." *ACR Sys., Inc. v. Woori Bank*, 232 F. Supp. 3d 471, 478 (S.D.N.Y. 2017). In reviewing a plaintiff's submission of documents, the bank has a ministerial role that imparts no obligation to go beyond the face of documents. *See Mago Int'l v. LHB AG*, 833 F.3d 270, 272 (2d Cir. 2016); *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 816 (2d Cir. 1992). As such, to satisfy the second element of a wrongful dishonor claim, the plaintiff must demonstrate strict compliance with the terms of the letter of credit. *See Mago Int'l*, 833 F.3d at 272.

Although documents must be precisely conforming, courts in this circuit have allowed exceptions to this standard for minor variations. This exception is very narrow, and the variation must be minor, such as where a word in a document is unmistakably clear despite a typographical error. *See Creaciones con Idea, S.A. de C.V. v. MashreqBank PSC*, 51 F. Supp. 2d 423, 427 (S.D.N.Y. 1999); *see also Bank of Cochin, Ltd. v. Mfrs. Hanover Tr. Co.*, 612 F. Supp. 1533, 1541 (S.D.N.Y. 1985) (providing five copies of required documents instead of six copies as specified by letter of credit did not amount to noncompliance); *but see Mago Int'l* 833 F.3d at 270 (unsigned bill of lading did not comply with letter of credit's requirement that plaintiff "provide a photocopy of a bill of lading evidencing shipment of the goods to the applicant").

Here, among other documents, the L/C required: (1) a signed telefax; (2) an authenticated SWIFT message; and (3) an ocean bill of lading. Plaintiff alleges it sent Bank Leumi originals and copies of a Bill of Exchange, Commercial Invoice, Packing List, Air Way Bill, Inspection Certificate, and Certificate of Origin for the first shipment on April 9, 2017, and the same for the second shipment on April 17, 2017. The question, thus, is whether presentation of these documents constitutes strict compliance with the L/C's conditions. The answer to this question is no.

While Plaintiff is correct that *minor* discrepancies between the documents presented and the documents required under a letter of credit are permissible, the discrepancies here are not minor. First, Plaintiff provided an air way bill instead of an ocean bill of lading. *See Bd. Of Trade of San Francisco v. Swiss Credit Bank*, 728 F.2d 1241, 1243 (9th Cir. 1984) (presentation of air way bill where letter of credit required bill of lading noncompliant as a matter of law justifying dishonor) (applying prior UCP version); *see also CVD Equip Corp. v. Taiwan Glass Indus. Corp.* No. 10-cv-573 (RJH), 2011 WL 1210199, at *3 (S.D.N.Y. Mar. 21, 2011) (where letter of credit required "clean on board ocean bill of lading," bill of lading that "d[id] not indicate that the shipment was placed on a ship" was noncompliant as a matter of law). Moreover, it remains undisputed that Plaintiff did not provide the required signed telefax, authenticated SWIFT message, and ocean bill of lading; nor was the inspection certificate as the L/C required. Completely omitting documents and providing nonconforming shipping documents are likewise not "minor variances." As such, Plaintiff cannot make out a wrongful dishonor claim.

2. Bank Leumi Timely and Adequately Notified Plaintiff of Discrepancies.

Notwithstanding Plaintiff's failure to demonstrate its own strict compliance, the UCP required Bank Leumi to send notice to Plaintiff stating that: (1) the bank is refusing to honor or negotiate; (2) each discrepancy in respect of which the bank refuses to honor or negotiate; and (3) that the bank is holding the documents pending further instructions from the presenter, or until the bank receivers a waiver from the applicant, or that the bank is returning the documents, or that the bank is acting in accordance with instructions previously received from the presenter. *See* UCP Art. 16(c). This notice must "be given by telecommunication or by other expeditious means no later than the close of the fifth banking day following the day of presentation." *See* UCP Art. 16(d); *see also* UCP Art. 14(b). Failure to provide such notice would estop Bank Leumi from asserting that its dishonor was justified because the presentation was nonconforming. *See* UCP Art. 16(e); *ACE Am. Ins. Co. v. Bank of the Ozarks*, No. 11-cv-3146 (PGG), 2014 WL 4953566, at *9 (S.D.N.Y. Sept. 30, 2014) (collecting cases) (analyzing prior UCP version).

***4** In support of its motion, Bank Leumi attached the SWIFT messages it sent to Basic Bank advising it of the discrepant presentation. These messages are referenced in the complaint (*see* Compl. ¶ 27), and since there is no dispute over their authenticity, the court considers them. *Cf. Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d. Cir. 2016) ("Even where a document is considered integral to the complaint, it must be clear on the record that no dispute exists regarding authenticity or accuracy of the document.").

Plaintiff argues that Bank Leumi's notices were deficient and untimely; the court disagrees as to both contentions. Both the April 14, 2017 and April 26, 2017 SWIFT messages explicitly specify that the telefax and authenticated SWIFT message were not presented and that the inspection certificates were not in conformity with the L/C. Plaintiff does not dispute that it was notified of these discrepancies. However, Plaintiff argues that such notice was deficient because Bank Leumi did not "attempt" to provide notice by telecommunication, as expressed in UCP Art. 16(d). (Opp. at 11.) This argument is nonsensical. As previously noted, SWIFT messages are a form of telecommunication. *See supra* n.2; *see also EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 204 n.3 (2d Cir. 2012) ("SWIFT ... is an electronic messaging system that provides instructions to banks, brokerages, and other financial institutions for money transfers.").

Plaintiff's next argument, that the notices were deficient because Bank Leumi did not notify it that they were holding onto the shipping documents, also fails. Both SWIFT messages contain a "77B-/NOTIFY/" code, indicating that the documents are being held until the issuing bank receives a waiver from the applicant and agrees to accept it or receives further instructions from the presenter.[4] It is undisputed that neither Plaintiff nor Basic Bank provided further instructions or a waiver. Instead, on May 16, 2017, a *month* after Bank Leumi's initial SWIFT notification, Basic Bank inquired as to the *payment* status of the goods. (Compl. ¶ 31.) Plaintiff's argument that Bank Leumi's silence after its initial SWIFT notification made Plaintiff believe that it would honor the L/C notwithstanding Bank Leumi's express notification of

noncompliance is also rejected. The notification specifically alerted Plaintiff that further action was necessary.

***5** Equally unavailing is Plaintiff's contention that Bank Leumi did not provide notice of nonconformity by the close of the fifth banking day following presentation, as required by the UCP. Presentation takes place when documents are delivered, not when they are transmitted. *See* UCP Art. 2. It is undisputed that documents for the first shipment were sent to Bank Leumi on April 9, 2017 and that Bank Leumi sent the SWIFT message notifying Plaintiff of discrepancies on April 14, 2017, five calendar days later. As for the second shipment, Plaintiff alleges transmission of documents "on or about April 17, 2017" but does not indicate form of transmission. The L/C requires submission of documents by overnight courier. (L/C at ECF 24.) Drawing inferences in Plaintiff's favor and assuming compliance with this requirement, presentation occurred no earlier than April 18, 2017. The court takes judicial notice of the facts that April 22, 2017 was a Saturday, April 23, 2017 was a Sunday, and that Saturday and Sunday are not banking days. As such, the fifth banking day after April 18, 2017 was April 25, 2017, the date of Bank Leumi's second SWIFT message. As such, this notification was also timely.

Accordingly, Plaintiff's wrongful dishonor claim against Bank Leumi fails as a matter of law and is therefore dismissed.

B. Fraud Claim

As discussed *supra*, FRCP 9(b) requires a plaintiff to plead fraud with particularity. Specifically, a fraud complaint should: "(1) specify the statement that the Plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills,* 12 F. 3d at 1175. A plaintiff must also "[a]llege facts that give rise to a strong inference of fraudulent intent." *First Capital Asset Mgmt, Inc. v. Satinwood, Inc.,* 385 F.3d 159, 179 (2d Cir. 2004). "[T]he essence of fraud is misrepresentation." *United States v. Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018). Simply asserting that a Defendant never intended to perform its duties under an agreement does not meet the level of deliberate fraud. *Lomaglio Assocs. v. LBK Marketing Corp.,* 892 F. Supp. 89, 95 (S.D.N.Y. 1995).

Here, Plaintiff's fraud allegations are wholly conclusory. Plaintiff does not cite statements, speakers, or any misrepresentations made by Bank Leumi. Further, Plaintiff provides no substantive allegations suggesting any fraudulent intent. Plaintiff concedes that, despite being notified of discrepant shipping documents, Basic Bank failed to obtain a waiver or attempt to correct the discrepancies. Nonpayment occurred at the fault of Plaintiff; no fraudulent intent or malice can be assumed.

Further, Plaintiff's claim that all Defendants named in the complaint "effectuated a plan designed to procure ... [g]oods ... without full payment tendered to the Plaintiff" (Compl. ¶ 101), does not meet FRCP 9(b)'s pleading standard. Plaintiff alleges no facts supporting an inference that Bank Leumi was ever even in contact with the other Defendants, let alone that they devised some sort of plan. Plaintiff's fraud claim thus fails as well.

IV. CONCLUSION

For the foregoing reasons, Defendant Bank Leumi USA's (Dkt. 26) Motion to Dismiss is GRANTED. The Clerk of Court is respectfully DIRECTED to terminate Bank Leumi USA as a Defendant in this action.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 4336362

Footnotes

1 When quoting cases, unless otherwise noted, all citations and internal quotation marks are omitted and all alterations are adopted.

2 The complaint alleges that the total value of the February order was $96.563.30. However, this appears to be an error, given that the combined value of the shipments comprising the February order is $96,563.25 and the letter of credit securing said order was in the amount of $96.563.25.

3 The court takes judicial notice of the fact that Society Worldwide Interbank Financial Telecommunication ("SWIFT") provides an electronic communication system by the same name for use in interbank correspondence.

4 *See Standards: Category 7 Documentary Credits and Guarantees*, at 172, available at https://www.swift.com/swift-resource/164981/download. ("NOTIFY Documents held until the issuing bank receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver."). The court takes judicial notice of this document; it is publicly available and not subject to dispute. The court notes, however, that this document is dated April 21, 2017, several days after the first SWIFT message was sent. In the absence of any United States case law discussing this particular SWIFT code, the court also takes judicial notice of a decision issued by the Queen's Bench Division of the High Court of Justice of England and Wales solely for the proposition that the NOTIFY code has been in use since at least 2013. *See Bulgrains & Co. v. Shinhan Bank*, [2013] EWHC 2498 (QB) [51] ("Notify ... is another industry term of art clearly and unequivocally understood to mean: Documents held until the issuing bank receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver.").

End of Document

Exhibit 8

2009 WL 10715116
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Jarek MOLSKI et. al. Plaintiffs,
v.
FOLEY ESTATES VINEYARD AND WINERY, LLC Defendant.

No. CV-03-09393 CBM (RCx)
|
Signed 09/25/2009

Attorneys and Law Firms

Thomas E. Frankovich, Thomas E. Frankovich Law Offices APLC, Chico, CA, Thuy Minh-Ha Hoang, Thomas E. Frankovich Law Offices, San Francisco, CA, for Plaintiffs.

Ashley Ann Dorris, Barry Clifford Snyder, Snyder Burnett Egerer, LLP, Sean R. Burnett, Snyder Law LLP, Santa Barbara, CA, for Defendant.

ORDER:

(1) Granting Plaintiff DREES's Motion for Attorneys' Fees; and

(2) Denying the Parties' Requests for Judicial Notice

CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

***1** The matters before the Court are: (1) Plaintiff Disability Rights Enforcement Education Services's (hereinafter, "DREES") Motion for Attorneys' Fees and Litigation Expenses; (2) Plaintiff's Request for Judicial Notice; and (3) Defendant Foley Estates Vineyard and Winery's (hereinafter "Defendant") Request for Judicial Notice.

DREES prevailed in its American with Disabilities Act (hereinafter "ADA") claim against Defendant and now requests its attorneys' fees and costs in the amount of $129,446.41. The parties do not dispute that DREES is entitled to attorneys' fees and costs, but instead the amount the Court should award DREES. For the reasons, stated below, the Court **GRANTS** DREES's Motion and awards DREES $63,767.59.

BACKGROUND

DREES is a nonprofit organization working on behalf of individuals with disabilities. Jarek Molski, a paraplegic who uses a wheelchair for mobility, is a member of DREES. [Docket No. 54.]

In 2003, Mr. Molski visited Defendant's winery in Santa Barbara, California. While there, Mr. Molski encountered several barriers to handicap access to Defendant's historic wine tasting room. These barriers included: an entry ramp with a slope too great; a raised threshold too high; a round door knob instead of a lever; a rear door and another access door too narrow to be entered thru; and a wine-tasting counter height too high. *Id.*

Mr. Molski and DREES subsequently filed suit for injunctive and monetary relief against Defendant pursuant to the American with Disabilities Act and California state law. *Id.* On July 25, 2005, Mr. Molski settled his claims against Defendant. DREES did not participate in this settlement.

DREES abandoned its California state law claim but tried its ADA claim to this Court on February 14, 2006. This Court found that removal of Defendant's interior barriers would be readily achievable but that removal of the exterior barriers would not be achievable because removal would threaten the architectural significance of the building and entered a permanent injunctive consistent with this finding. [Docket No. 55.]

On October 4, 2006, Plaintiff appealed the Court's finding regarding the exterior access. The Ninth Circuit affirmed the judgment in part and reversed in part, remanding it for further proceedings which respect to whether the building of an accessible ramp can be readily achieved in light of Defendant's argument that the winery is a historic building pursuant to 28 C.F.R. 36.405(a). *See Molski v. Foley Estates Vineyard*, 531 F.3d 1043 (9th Cir. 2008); [Docket No. 77].

Since remand and before the additional proceedings ordered by the Circuit could take place, the parties executed a Consent Decree wherein Defendant agreed, *inter alia*, to construct an accessible exterior entrance ramp in the front of the winery. The Consent Decree neither addressed nor provided

for handicap access through the back of the winery. DREES's claims are now resolved. [Docket No. 99.]

DREES's MOTION FOR ATTORNEYS' FEES AND EXPENSES

DREES argues it is entitled to $129,446.41 in attorneys' fees and costs pursuant to the ADA, 42 U.S.C. § 12205, because it was the prevailing party in this litigation. This amount represents:

Attorney and Paraprofessional Time:	$112,384.00
Litigation Expenses such as copying, postage, travel and expert fees:	$17,062.41
TOTAL:	$129,446.41

***2** DREES is represented by Thomas E. Frankovich, a Professional Law Corporation. DREES calculates its fee request using the following billing rates:

Thomas Frankovich (Partner) for work in 2008:	40.8 hours @ $475 per hour
Thomas Frankovich (Partner) for work in 2003-2007:	142.6 hours @ $375 per hour
Jennifer Stenenberg (Associate, 1999 graduate) for work in 2004-2007:	24 hours @ $250 per hour
Julia Adams (Associate, 2004 graduate) for work in 2004-2007:	172 hours @ $160 per hour
Thuy Hoang (Associate, 2003 graduate) for work in 2003-2005:	33.8 hours @ $160 per hour
Sarah Kraemer (Associate, 2004 graduate) for work in 2004:	5.9 hours @ $160 per hour

Defendant opposes on the grounds that DREES's request is unreasonable and/or excessive and should be reduced to $13,598.87 because: (1) DREES improperly seeks fees and costs for work its lawyers performed on Mr. Molski's behalf and/or for which Mr. Frankovich's firm has already compensated, Opp'n at p. 3:23 to 4:13; (2) DREES's "Itemization of Attorneys and Paraprofessionals Time" is illegitimate and was created solely for the purposes of this Motion, Opp'n at p. 2:19-22; (3) Mr. Frankovich and his associates billed their full billable rates for travel time when the leading practice in the legal industry is to bill clients for only half a lawyer's billable rate for travel0 time, Declaration of Barry Snyder (hereinafter, "Snyder Decl.") at ¶3a; (4) DREES seeks fees for the performance of non-legal services such as printing letters, issuing checks and coordinating travel; (5) Mr. Frankovich and his associates billed time for unnecessary, duplicative and excessive work, Opp'n at p. 3:17-19; (6) Mr. Frankovich's and Ms. Stenenberg's hourly rates are excessive; and (7) DREES only achieved a limited degree of success because, according to Defendant, "Plaintiff Molski was dismissed for a small settlement, all of the state claims were abandoned by DREES, and DREES ultimately accepted a resolution that included a concept for access devised solely by [D]efendant and never considered, argued or offered at any time by [P]laintiff DREES before, during or after trial. There was in fact no monetary payment associated with the Consent Decree." Snyder Decl. at ¶ 11.

I. Legal Standard

Under the American rule, a prevailing litigant ordinarily may not collect attorneys' fees absent contractual or statutory authorization. Section 12205 of the ADA is a fee-shifting provision that enables the prevailing party to recover its

attorneys' fees. 42 U.S.C. § 12205. Specifically, section 12205 provides:

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Id. Although section 12205 places an award of attorneys' fees in the court's discretion, the Supreme Court has held that the prevailing party pursuant to statutes like the ADA "should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Hensley v. Eckhart*, 461 U.S. 424, 429 (1976).

***3** To calculate an award of reasonable attorneys' fees, courts use the lodestar formulation set forth in *Hensley*, 461 U.S. at 433, which instructs the court to take the number of hours reasonably expended on the litigation and multiply it by a reasonable hourly rate. *See also Blum v. Stevenson*, 465 U.S. 886, 897 (1984).

In determining the "lodestar figure," courts must consider the *Kerr* factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee; (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

Although there is a strong presumption that the lodestar fee is reasonable, *see Blum*, 465 U.S. at 897; *see also Gates v. Deukmejian*, 461 U.S. 424, 433 (9th Cir. 1992), the court may downwardly or upwardly depart from the lodestar figure if doing so "is necessary to the determination of a reasonable fee." *City of Burlington v. Dague*, 505 U.S. 557, 559 (1992).

The moving party bears the burden of proof on a motion for attorneys' fees and must present sufficient evidence showing that his lawyers' hourly rates are reasonable. *See Blum*, 465 U.S. at 891.

II. Analysis

Here, DREES requests $129,446.41. Although the Court concludes that DREES's is entitled to fees and costs, the Court nevertheless concludes that the amount of attorneys' fees and costs DREES requests is unreasonable and its fee award should be reduced to $63,767.59.

A. DREES' Success Is Not *De Minimis*

Although both Defendant and DREES agree that DREES is the prevailing party in this litigation, Opp'n at p. 1:24-25, Defendant contends that DREES's limited success requires the Court to reduce its fees award. Specifically, Defendant contends that DREES's success was minimal because it only achieved one of its goals: a judgment with respect to the front door. Defendant further argues that DREES's success was limited because the provision in the Consent Decree requiring Defendant to construct a ramp at the front door of the winery was Defendant's idea. The Court finds otherwise.

A party prevails in litigation "when actual relief on the merits of [the plantiff's] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000). A material alteration of the parties' legal relationship takes place when the plaintiff is entitled to enforce a judgment, consent decree, or settlement against the defendant; when a judgment, consent decree or settlement takes place, "the plaintiff can force the

defendant to do something he otherwise would not have to do." *Id.* at 1118; *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Resources*, 532 U.S. 598, 605 (2001); *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992); *Jankey v. Poop Deck*, 537 F.3d 1122, 1129-1130 (9th Cir. 2008) (internal citations omitted) (prevailing party has relief that carries judicial imprimatur).

***4** The court may reduce a fee award where the party technically prevails but recovers only *de minimis* relief. Relief is limited or *de minimis* when the recovery is purely technical or paltry in comparison to the requested relief. *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) ("a plaintiff who seeks compensatory damages but receives no more than nominal damages" may not be entitled to all its attorneys fees); *see also Farar*, 214 F.3d at 115; *see also Hensley*, 461 U.S. at 436.

Here, DREES obtained more than *de minimis* relief. The Consent Decree and this Court's Judgment and Order permanently enjoining Defendant materially alter the parties' relationship in that Defendant has obligations it would not otherwise have: providing access to its winery to individuals with disabilities such as DREES's members. [1] [Docket No. 99.] Defendant has an ongoing obligation to make its wine tasting room accessible to those in wheelchairs. *See id.* If Defendant fails to perform its obligations, DREES has a means of redress to enforce the Judgment and Consent Decree. *See Farrar*, 506 U.S. at 111-112.

Defendant's argument that Plaintiff's victory was merely technical or minimal is unavailing. One of the purposes of the ADA is provide people with disabilities access to places of public accommodation. Here, DREES achieved that. Neither the fact that DREES did not achieve relief with respect to the back door nor the fact that Defendant, not DREES, devised the plan for the construction of the ramp is relevant. *See Rock Creek Ltd. v. Water Resources Control Bd.*, 972 F.3d 274, 279 (9th Cir. 1992) (plaintiff may be prevailing party if it "succeeds on any significant issue in the litigation which achieves some of the benefit that parties sought in bringing the suit.") The goal of DREES's lawsuit was to make Defendant's tasting room accessible to those with handicaps. *See id.* The changes to the front entrance achieve that. *See id.* Accordingly, the Court finds that a reduction based on DREES's limited success is inapplicable.

II. DREES's Request Is Not Reasonable

The Court does find, however, that DREES's request of $129,446.41 is unreasonable pursuant to *Kerr. See* 526 F.2d at 70.

A. Billable Rates

Defendant argues that DREES used excessively high attorney billing rates to calculate its lodestar and request for attorneys' fees. The Court agrees in part [2] and finds that Mr. Frankovich's billing rate between 2008 to the present is unreasonable.

***5** An award of attorneys' fees must be based on reasonable hourly rates. Reasonable fees are to be calculated according to the prevailing market rate in the relevant community for similar work performed by attorneys of comparable skill, experience and reputation. *Blum*, 465 U.S. at 889; *see also Chalmers v. L.A.*, 796 F.2d 1205, 1210-1211 (9th Cir. 1986). If a lawyer's billing rate is excessively high or does not reflect the prevailing rate in his community, the court should calculate the fee award using a reasonable billing rate instead.

Between 2003 and 2007 Mr. Frankovich billed $375 per hour. The Court finds [3] this rate reasonable given Mr. Frankovich's trial experience and thirty years of experience in the area of ADA law.

The same cannot be said for Mr. Frankovich's rate from 2008 to the present. Mr. Frankovich's rate jumped from $375 to $475 on January 1, 2008. The Court finds this rate increase to be excessive. Although the Court understands that Mr. Frankovich's billing rate remained fixed at $375 between 2003 and 2007, Declaration of Thomas Frankovich at ¶ 13, Mr. Frankovich fails to offer either admissible evidence or legal authority for the proposition that his billing rate of $475 per hour between 2008 and the present reflects the prevailing market rate in his community. *See Blum*, 465 U.S. at 889. Accordingly, the Court reduces Mr. Frankovich's hourly rate for the work he performed in 2008 and 2009 to $400 per hour. Applying a rate of $400 per hour for the 49 hours of work Mr. Frankovich performed in 2008-2009 results in a *reduction of $3,675.00 from DREES's requested fee award.*

B. Time Billed Prior to Mr. Molski's Settlement

Defendant argues the Court should not award DREES attorneys fees or expenses for work its lawyers performed before Mr. Molski settled his claim on the basis that Mr. Frankovich has already been compensated for this work

because such work benefitted Mr. Molski, not DREES. The Ninth Circuit has reasoned that an attorney cannot be compensated in a fee award for work done on behalf of an early-settling plaintiff or for fees duplicative of those included in the early-settling plaintiff's settlement. *See Huang Yu Cyi v. Am. Investment Corp.*, (No-93-1686) 1995 U.S. App. LEXIS 11295, *1 (9th Cir. May 4, 1995).

Despite the fact that DREES subtracted $8,667.00, the attorneys' fees and expenses Mr. Frankovich was paid for his work on Mr. Molski's case, DREES still requests over $17,000 in litigation expenses without any explanation as to when these expenses accrued or on whose behalf they were incurred. By the time Mr. Molski settled his case, Mr. Frankovich had already incurred the bulwark of travel, discovery and expert expenses. The Court cannot accept the proposition that after Mr. Molski's case settled Mr. Frankovich's firm expended over $17,000 in expenses on DREES's behalf without proof. Accordingly, the Court finds that DREES's is entitled to half its requested litigation expenses and *reduces $8,531.20 from DREES's requested fee award.*

C. Travel Time

Defendant argues that DREES is not entitled to its attorney's billable rate for time spent traveling from San Francisco to Santa Barbara because the practice in the industry is to bill clients a reduced rate for travel time, especially when the travel time is prolonged, as in from one end of the state to another.

***6** A growing trend in the legal industry and in this District is to charge clients only half the lawyer's billable rate for travel time. *See Jankey*, 2006 WL 4569361 at *4-5 (Mr. Frankovich not permitted to bill his full hourly rate for trips between San Francisco and Southern California); *Molski v. Conrads Rest. Glendale*, CV 04-1075 ABC (Mr. Frankovich "has submitted no evidence showing a local customary practice of billing clients for travel time, Indeed, from this Court's experience, such time is not billable for local attorneys."). Accordingly, the Court finds that DREES is only entitled to half their attorney's billable rate for travel time and *reduces $5,113.70 from DREES's requested fee award.*

D. Administrative Professionals' Time

Next, Defendant argues that DREES is not entitled to time billed by secretarial and support staff for administrative work. The Court agrees. DREES may not collect legal fees for administrative work completed by members of Mr. Frankovich's administrative and paraprofessional staff. Accordingly, the Court reduces *$700 from DREES's fee award.*

E. Lawyer Time Spent On Administrative Tasks

Similarly, DREES is not entitled to an award of fees for administrative tasks performed by its lawyers. A party may be awarded fees for work it would not ordinarily pay its lawyers. *See Hensley*, 461 U.S. at 434 (counsel for a prevailing party should not request fees on an attorneys' fee motion that he would not otherwise bill his client). Lawyers should not be compensated for time spent rendering non-legal services.

Here, Mr. Frankovich and his associates billed time for non-legal work. For example, DREES submitted several time entries there are several time entries for administrative tasks, such as "conference regarding travel dates", "direct staff to send fax", etc. Mr. Frankovich and his associates also billed for time they spent responding to Orders to Show Cause and making sanction payments. No client would ordinarily expect to pay for such items. *See Hensley*, 461 U.S. at 434. Accordingly, the Court finds that DREES is not entitled to legal fees incurred in connection with its lawyers' misconduct and/or performance of administrative tasks and reduces *$1,900 from DREES's requested fee award.*

F. Straightforward Application Of The ADA

Next, the Court finds that DREES is not entitled to all of its requested fees because most of the issues in this case required a straightforward application of the ADA. But for whether Defendant's winery is historic within the meaning of 28 C.F.R. 36.405(a), and who carried the burden of proof in respect thereto, the issues presented in this litigation were ones the Court expects a lawyer with Mr. Frankovich's level of skill and expertise to understand and be comfortable with. In light of Mr. Frankovich's thirty years of experience in ADA law, the Court concludes that the amount of time he and his associates billed on this case unreasonable. Accordingly, the Court finds a 15% reduction in DREES's requested fee award is appropriate and *reduces $19,416.96 from DREES's requested fee award.*

G. Fees On Motion For Attorney's Fees

DREES requests $12,350 in fees associated with bringing this Motion. The Court finds this amount to be excessive.

First, the $12,350 figure includes an estimate of seven (7) hours to appear at the Hearing on this Motion. The Motion was taken under submission. Accordingly, DREES is not entitled to fees for appearance time for this Motion.

Next, Mr. Frankovich's time entries show that he spent nineteen hours (19) preparing this Motion. Again, the Court notes that Mr. Frankovich is a seasoned ADA practitioner who should be well versed in the law relating to attorneys' fees in ADA cases. This Motion should not have taken Mr. Frankovich more than ten hours to prepare. Accordingly, the Court *reduces $6,925.00 from DREES's requested fee award.*

H. Incorrect Or Improper Time Entries

***7** Defendant also argues that there is evidence that Mr. Frankovich and his associates manufactured or fabricated their time entries. Defendant points to typos in the time entries, incorrect time entries and misdated time entries as evidence that Mr. Frankovich's firm may have doctored their time entries.[4] Aside from the time entries themselves, Defendant offers no independent proof of fabrication. Accordingly, the Court makes no finding with respect to whether these time entries are illegitimate.

The Court notes that the Ninth Circuit has authorized reductions in attorneys' fees awards where "the documentation of the hours is inadequate." *Chalmers*, 796 F.2d at 1210. Despite a Declaration by Pepper Maupin, Mr. Frankovich's office manager, stating that she collects lawyers' time entries and enters them verbatim into the firm's computer system and that from time to time typographical errors appear, several inexcusable errors appear on Mr. Frankovich's and his associates' time entries.[5] Clients should not be billed for erroneous or incorrect time entries. This Court will not compensate DREES for that which it would not have paid itself.

Moreover, while the foregoing may be the result of something as innocuous as sloppy timekeeping, it may betray something far more pernicious. Accordingly, the Court finds that a 15% reduction is appropriate and reduces *$19,416.96 from DREES's requested fee award.*

I. Conclusion on DREES's Fee Award

The Court's application of *Kerr* results in a reduction of $65,678.82 to DREES's requested $129,446.41, for an overall fee award of $63,767.59 for DREES.

JUDICIAL NOTICE

Federal Rule of Evidence 201 enables a court to take judicial notice of adjudicative facts. A fact may be judicially noticed if it is "not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

DREES requests this Court take judicial notice of four Declarations filed in other cases in other district courts in California by individuals who opine in those cases that Mr. Frankovich's hourly rate is reasonable. These Declarations are not adjudicative facts; the statements made within the Declarations relate to the facts of another case. *See* Fed. R. Evid. 201 ("Adjudicative facts are simply the facts of the particular case."). Additionally, these Declarants are not before this Court. Accordingly, the statements made in the Declarations are not capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. Accordingly, the Court **DENIES** DREES's Request for Judicial Notice.

Next, Defendant requests this Court take judicial notice of *Jankey v. Beach Hut*, (No CV-05-3856 CVW) 2006 WL 4569361, *5 (C.D. Cal. Dec. 19, 2006). Case law is not an adjudicative fact; the Federal Rules of Evidence do not require this Court to take judicial notice of case law. *See* Fed. R. Evid. 201, Adv. Cmte. Notes ("no rule deals with judicial notice of 'legislative facts' .... Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."); *see also U.S. v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964 (E.D. Cal. 2004) (case law not judicially noticeable). Accordingly, Defendant's Request for Judicial Notice is **DENIED.**

CONCLUSION

***8** Based on the foregoing, the Court: **(1) GRANTS** Plaintiff DREES's Motion and awards it Attorneys' Fees and Litigation Expenses in the amount of $63,767.59; (2) **DENIES** DREES's Request for Judicial Notice; and (3) **DENIES** Defendant's Request for Judicial Notice.

IT IS SO ORDERED.

All Citations

Slip Copy, 2009 WL 10715116

Footnotes

1 By and through the Consent Decree and this Court's Judgment, Defendant is required to make the following changes to its property: (1) provide handicapped accessible parking signage for van parking; (2) provide a van accessible parking stall; (3) provide tow-a-way signage that includes the phone number for the appropriate law enforcement agency; (4) produce directional signage for the path of travel leading into the wine tasting areas of the gazebo and at the main building; (5) provide the international symbol of access signage at the gazebo ramp and at the main building; (6) provide access to the gazebo; (7) provide access to the wine tasting room in the main building; and (8) provide a unisex bathroom.

2 In its Opposition, Defendant argues that Mr. Frankovich's and Ms. Stenenberg's rates are unreasonable. With respect to Ms. Stenenberg, the Court disagrees. Ms. Stenenberg graduated from law school in 1999 and starting working on this case in 2003 when she was a fourth year associate. Between 2003 and 2007, when Ms. Stenenberg was an eighth year associate, Ms. Stenenberg billed a total of 24 hours at $250 per hour. The Court finds that $250 per hour is a reasonable rate for an associate with four to eight years of practice in San Francisco.

3 The Court's finding is supported by the numerous other district courts in California which have found Mr. Frankovich's rate of $375 to be reasonable. *E.g. Jankey v. Beach Hut*, (No CV-05-3856 CVW) 2006 WL 4569361, *5 (C.D. Cal. Dec. 19, 2006) (Wilson, J.) (Mr. Frankovich's rate of $375 per hour and Ms. Stenenberg's rate of $250 per hour are reasonable).

4 For example, Mr. Frankovich billed time for a conference with himself.

5 There are repeated instances where Mr. Frankovich bills time for conferences with himself. There is also a time entry for a conference in Solvang that actually took place in Los Angeles. Snyder Decl. at ¶ 2h. A time entry appears for Mr. Frankovich on March 6, 2005, for a court appearance which actually took place on March 16, 2005. *Id.* at ¶2j. Additionally, there are several time entries that are misdated: the time entries for one of Mr. Frankovich's associates jump from May, 2004 to May, 2005 back to June, 2004.

Exhibit 9

2009 WL 10674116
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Ethan MOREAU, an individual, Plaintiff,
v.
Phillip A. KENNER, et al. Defendants

No. CV 08–08640 CBM(PJWx)
|
Signed 05/14/2009

Attorneys and Law Firms

Becky Hsiao, Carol A. Dwyer, Michael L. Meeks, Buchalter Nemer LLP, Irvine, CA, for Plaintiff.

Ronald N. Richards, Ronald Richards and Associates, Beverly Hills, CA, J. T. Fox, Arthur H. Barens Law Offices, Jennifer Marie Goldstein, Thomas J. Griffin, Nelson & Griffin LLP, Los Angeles, CA, Morris S. Getzels, Morris S. Getzels Law Offices, Tarzana, CA, for Defendants.

ORDER DENYING DEFENDANTS PHILLIP A. KENNER, STANDARD ADVISORS, LLC, AND STANDARD ADVISORS, INC.'S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS THE COMPLAINT

CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

***1** The matters before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding, are Defendants Phillip A. Kenner, Standard Advisors, LLC, and Standard Advisors, Inc.'s (collectively "Kenner Defendants") [1] : (1) motion to compel arbitration and stay the action pursuant to 9 U.S.C. §§ 3 and 4; and (2) motion to dismiss the complaint for lack of subject matter jurisdiction, improper venue, and/or failure to state a claims pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3) and 12(b)(6).

Upon consideration of the papers submitted and arguments presented, the Court DENIES the motions.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Ethan Moreau brings this action against the Kenner Defendants and various business entities alleging a series of "investment scams" perpetrated by the Kenner Defendants against Plaintiff. Complaint, ¶ 1–2. Plaintiff is a Canadian professional hockey player who hired Kenner as his business manager and investment advisor. Plaintiff alleges that Kenner advised Plaintiff to enter into a variety of investment opportunities that were fraudulent. *Id.*

In April 2003, Plaintiff entered into a written contract (the "Agreement") with Standard Advisors, Inc. for financial services, including estate planning, with the Plaintiff. *See* Mot. to Dismiss Exh. 1 at 1. The Agreement contemplated that Standard Advisors, Inc. would provide the following services for Plaintiff:

1. Maintain deposit accounts;

2. Prepare checks drawn on checking accounts maintained in Plaintiff's name;

3. Complete certain accounting books and records on Plaintiff's behalf;

4. Provide Plaintiff with periodic quarterly cash-basis financial statements;

5. Arrange for the preparation by a third party tax service provider for the filing of federal and state tax returns;

6. Assist in tax planning in order to minimize Plaintiff's overall tax burden;

7. Coordinate with Plaintiff's insurance agents to review existing policies;

8. Review contracts "solely for financial and tax implications" and make comments to Plaintiff's attorney or agent;

9. Provide estate planning consultation;

10. Provide Plaintiff with introductions to qualified legal professionals and other advisers as Plaintiff may require in the course of Plaintiff's personal and business affairs;

11. Prepare and coordinate the filing of payroll;

12. Coordinate with Plaintiff's pension administrator in the preparation and filing of annual forms for Plaintiff's retirement trusts;

13. Review union, guild and dues report;

14. Submit paid medical bills to guilds and/or private insurance companies for reimbursement;

***2** 15. Coordinate, through the use of an external service provider, the submission of paid medical bills to guilds and/or private insurance companies;

16. Assist in determining the advisability of real estate purchases and real estate investments and provide Plaintiff with access to real estate professionals and mortgage brokers to facilitate Plaintiff's transactions.

The Agreement also states that any additional services not contemplated by the Agreement would require "separate agreements" to cover those services. *Id.* at 3.

The Agreement also contained the following arbitration clause:

> any dispute arising out of or relating to this Agreement, including our performance or failure to perform services in accordance with our duties to you, is subject to binding arbitration. In additional, all questions regarding the arbitrability of the dispute, shall be decided by such arbitration. The arbitration shall be held in Scottsdale, Arizona.

Id. at 4.

DISCUSSION

A. The Kenner Defendants' Evidentiary Objections

The Court SUSTAINS the Kenner Defendants' objections to paragraph 2 of Kristine Myrick's declaration as lack of personal knowledge and lack of foundation. Fed. R. Evid. 602, 701.

B. Plaintiff's Requests for Judicial Notice

A court may take judicial notice of an "adjudicative fact" where it is shown that the fact is not subject to reasonable dispute such that it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court is required to take judicial notice of a fact "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). However, the Court may decline to judicially notice facts that are not relevant to the issues before the Court, and do not therefore require "adjudication." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (declining to take judicial notice of government records that were not relevant to resolution of appeal).

The Court GRANTS Plaintiff's request to take judicial notice of the California Secretary of State's public record that shows Standard Advisors, Inc.'s corporate status was "forfeited" in California on December 5, 2003 because it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The Court DENIES Plaintiff's request to take judicial notice of the motion to dismiss in *Moreau v. Kenner* because it is not relevant to the instant motion. *Santa Monica Food Not Bombs*, 450 F.3d at 1025 n.2.

C. Motion to Compel Arbitration

Section 2 of the Federal Arbitration Act provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Any individual who is a party to an arbitration agreement may petition any United States district court for an order directing that such arbitration proceed in the manner provided for in such agreement. *See* 9 U.S.C. § 4; *see also Volt Information Services, Inc. v. Board of Trustees of Leland Junior University*, 489 U.S. 468, 474 (1989). If the Court exercises its authority to compel arbitration, it may stay the action until such arbitration has been had in accordance with the terms of the arbitration agreement. 9 U.S.C. § 3.

***3** "The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 626 (1985). Once satisfied that a valid arbitration agreement exists the second step in the analysis turns to whether the dispute in question falls within the scope of the agreement. *See* 9 U.S.C. § 4; *see also Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F. 3d 1126, 1130 (9th Cir. 2000).

Here, it is clear that the Plaintiff and Standard Advisors, Inc. are parties to the Agreement and agreed to arbitrate "any dispute arising out of or relating to" the Agreement. However, Standard Advisors, Inc. does not have standing to bring the instant motion because it is a defunct corporation. "It is well settled that a delinquent corporation may not bring suit and may not defend a legal action." *United States v. 2.61 Acres of Land, More or Less, Situated in Mariposa County, State of Cal*, 791 F.2d 666, 668 (9th Cir. 1985). Kenner declares that on June 1, 2003, he merged Standard Advisors, Inc. into Standard Advisors, LLC. Kenner Decl. ¶ 2. Therefore, Standard Advisors, Inc. ceased to exist as of June 1, 2003. Moreover, the California Secretary of State public record that shows Standard Advisors, Inc.'s corporate status was "forfeited" [2] in California on December 5, 2003.

The Kenner Defendants have also failed to show that either Kenner (as an individual) or Standard Advisors, LLC can bring the instant motion to compel arbitration because they are not parties to the Agreement. Instead, they argue that although Standard Advisors, LLC is not a party to the Agreement, it has standing to enforce the Agreement because on June 1, 2003, Standard Advisors, LLC acquired all "interest, indebtedness, contracts, commitments, business, obligations past present and future of Standard Advisors, Inc. a DE Corporation." Kenner Decl., Exh. 1. Thus, by virtue of this assignment, Standard Advisors, LLC believes it is a party to the Agreement. This argument fails because if a contract calls for "the skill, credit, or other personal quality of the promisor, it is neither assignable nor survivable." 1 Witkin, Summary 10th Contracts § 718 (2005); *see also Coykendall v. Jackson*, 17 Cal.App.2d 728, 731 (1936) (holding that a contract for personal services cannot be assigned).

Thus, the motion to compel arbitration and motion to stay in DENIED because the Kenner Defendants do not have standing to bring the motion. The Court declines to reach the issue of whether Plaintiff's claims fall within the scope of the Agreement because the Kenner Defendants do not have standing to compel arbitration.

D. Motion to Dismiss the Complaint

***4** The Kenner Defendants also seek dismissal of the complaint pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) because there is a mandatory arbitration clause. As explained above, the Kenner Defendants do not have standing to enforce the arbitration clause in the Agreement because: (1) Standard Advisors, LLC and Phillip Kenner (as an individual) are not parties to the Agreement; (2) Standard Advisors, Inc. is a delinquent corporation and may not appear in this action. Therefore, the Kenner Defendants may not move to dismiss the complaint based on the arbitration clause.

Thus, the Court DENIES the motion to dismiss the complaint without prejudice.

CONCLUSION

Based on the foregoing, the Court DENIES the motion to compel arbitration and stay the action with prejudice. The Court also DENIES the motion to dismiss the complaint without prejudice.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2009 WL 10674116

Footnotes

1 Defendants Na' Alehu Ventures 2006, Little Isle IV, LLC, and AZ Eufora Partners II, LLC were parties to the motion but in their reply, they requested leave of Court to voluntarily withdraw from the motion and for

a reasonable extension to file their answer. During the April 27, 2009 hearing, the Court granted a 20–day extension to file an answer so that their answer is due on May 18, 2009.

2 Forfeiture may result from failure to file a tax return required by the statutes regulating corporate taxes. Cal. Rev. & Tax. Code, § 23301.5. Forfeiture may also result from failure to pay in a timely manner, in whole or in part, any of the following: (1) any tax, penalty, or interest due and payable under the statutes regulating corporate taxes; or (2) any tax, penalty, or interest due and payable under the statutes regulating corporate taxes upon notice and demand from the Franchise Tax Board; or (3) any liability due and payable under Rev. & Tax. Code §§ 19131 (consequences of failure to file tax return and related violations).

End of Document

Exhibit 10

2012 WL 4447624
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

Floyd L. MORROW and Marlene Morrow,
as taxpayers of the City of San Diego,
State of California, and on behalf of
those similarly situated, Plaintiffs,
v.
CITY OF SAN DIEGO, a charter
city; and Does 1–100, Defendants.

No. 11–CV–1497–IEG (KSC).
|
Sept. 25, 2012.

Attorneys and Law Firms

Malinda Dickenson, Law Office of Malinda R. Dickenson, San Diego, CA, for Plaintiffs.

Carmen A. Brock, San Diego City Attorney, San Diego, CA, Timothy J. Harris, Charlston Revich & Wollitz LLP, Los Angeles, CA, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR ABSTENTION

IRMA E. GONZALEZ, District Judge.

***1** Presently before the Court is Defendant City of San Diego ("Defendant" or "City")'s motion for abstention requesting the Court to abstain from adjudicating the claims of Plaintiffs Floyd and Marlene Morrow ("Plaintiffs"). In the alternative, Defendant asks the Court to exercise its discretion and stay the pending federal claim upon state court resolution of the state claims. [Doc. No. 51.] For the following reasons, the Court **GRANTS** the City's motion for abstention and **REMANDS** the action to the California Superior Court in the County of San Diego.

BACKGROUND

Plaintiffs are a married couple and landowners in the City Heights community of the City of San Diego. Plaintiffs are the owners of a duplex commonly known as 2804 and 2806 46th Street, San Diego, CA 92105, Assessor's Parcel Number 476–392–06 ("APN–06"). Since 2006, Plaintiffs have resided in one of the duplex units and have rented the other unit out to tenants. [Doc. No. 47, *Fourth Amended Compl.* ¶ 11.] Plaintiffs also own property to the north of APN–06, known as Assessor's Parcel Number 476–392–11 ("APN–11"). [*Id.* ¶ 12.]

Plaintiffs allege that on or about January 21, 2009, Defendant opened a "code enforcement" case with respect to APN–11 "proactively," rather than by responding to a citizen complaint, to "target blight." This investigation was later expanded to include APN–06. [*Id.* ¶ 30.] On June 3, 2010, the City issued a Civil Penalty Notice and Order ("the June 3, 2010 Notice") with respect to APN–06, and, on June 4, 2010, the City issued a Civil Penalty Notice and Order ("the June 4, 2010 Notice") with respect to APN–11. [Doc. No. 47, *Fourth Amended Compl.* ¶¶ 32–33; Doc. No. 24–2, Request for Judicial Notice ("RJN"), Exs. D, E.] The notices stated that APN–06 and APN–11 were in violation of various sections of the San Diego Municipal Code and that Plaintiffs were subject to civil penalties for the violations. [*Id.*] The notices ordered Plaintiffs to correct the violations by July 5, 2010 and July 6, 2010, respectively, and stated that failure to comply may result in a civil penalty hearing and the assessment of civil penalties against them. [*Id.*] Plaintiffs allege that due to difficulties with the mail, they did not receive the notices until weeks after they were issued and with only a few days left to comply. [Doc. No. 47, *Fourth Amended Compl.* ¶¶ 32–34.]

A civil penalty hearing against Plaintiffs with respect to these violations commenced on October 14, 2010, and continued on October 21, 2010, November 15, 2010, and November 30, 2010. [*Id.* ¶ 38; RJN, Ex. A ("Admin.Order").] Plaintiffs were present at all the hearings and presented evidence on their behalf including testimony, written comments, and supporting factual materials. [Doc. No. 47, *Fourth Amended Compl.* ¶¶ 38, 57.] Plaintiffs allege that after the hearings, on December 23, 2010, the City provided an additional list that contained new violations ("Remaining Violations List"). [*Id.* ¶¶ 39–52.] Plaintiffs allege that they were able to respond to the Remaining Violations List, but that they were not able to cross-examine the City's witnesses about the demands and violations contained on the list. [*Id.* ¶ 44, 53.] Plaintiffs also allege that they were unable to correct the purported violations prior to being punished. [*Id.* ¶ 44.]

***2** On February 15, 2011, the administrative hearing officer, Mandel E. Himelstein, issued an administrative enforcement

order ("the Administrative Order"). [*Id.* ¶ 54; Admin. Order.] The Administrative Order found that Plaintiffs had violated the sections of the San Diego Municipal Code listed in the June 3, 2010 Notice and the June 4, 2010 Notice and that Plaintiffs had not complied with the notices. [Admin. Order, Findings of Fact ¶¶ 2–3.] The Administrative Order ordered Plaintiffs to pay (1) $2,250 in civil penalties with a stay of $9,000 pending compliance with the order for the violations related to APN–06; (2) $6,750 in civil penalties with a stay of $15,750 pending compliance with the order for the violations related to APN–11; and (3) $2,303.32 in administrative costs. [Doc. No. 47, *Fourth Amended Compl.* ¶ 55; Admin. Order, Order ¶¶ 1–2.] Plaintiffs allege that the City subsequently invoiced them in the amount of (1) $2,303.32 due March 30, 2011; (2) $2,250 due April 15, 2011; and (3) $6,750 due May 1, 2011. [Doc. No. 47, *Fourth Amended Compl.* ¶ 56.]

On March 28, 2011, Plaintiffs filed a complaint in state court against Defendants City of San Diego and Mandel E. Himelstein, the hearing officer. [Doc. No. 1–1, *Compl.*] On July 1, 2011, Defendants removed the action to this Court on the basis of federal question jurisdiction and supplemental jurisdiction. [Doc. No. 1, *Notice of Removal.*] On October 7, 2011, the Court dismissed Defendant Mandel E. Himelstein from the action, leaving the City as the only Defendant. [Doc. No. 19.] On October 18, 2011, the Court granted the City's motion to dismiss Plaintiffs' second amended complaint and granted Plaintiffs leave to file a third amended complaint. [Doc. No. 20.] On January 11, 2012, the Court granted in part and denied in part the City's motion to dismiss Plaintiffs' third amended complaint.

Plaintiffs filed a fourth amended complaint on July 9, 2012 alleging five causes of action: (1) waste of taxpayer funds; (2) violation of 42 U.S.C. § 1983 under the Equal Protection Clause of the U.S. Constitution; (3) a writ of mandate to enjoin and stay the Administrative Order and for damages; (4) a writ of prohibition to enjoin and stay the Administrative Order and for damages; (5) a writ of administrative mandamus to enjoin and stay the Administrative Order and for damages. [Doc. No. 47, *Fourth Amended Compl.*] Plaintiffs' sole federal claim is their second cause of action brought under § 1983 alleging violations of the Equal Protection Clause of the U.S. Constitution.

By the present motion, Defendant requests that the Court abstain under the *Younger* and *Pullman* abstention doctrines. In the alternative, Defendant asks the Court to exercise its discretion and stay the pending federal claim upon state court resolution of the state claims. [Doc. No. 51, *Def's Mot.*] [1]

DISCUSSION

I. *Younger* Abstention

***3** Defendant moves for abstention on the basis of the *Younger* doctrine. A court must abstain under *Younger* and dismiss the action if four requirements are met: "(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that *Younger* disapproves." *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose,* 546 F.3d 1087, 1092 (9th Cir.2008).

Defendant is unable to satisfy the first element of *Younger* abstention because there is no pending state proceeding. Defendant argues that a state court proceeding is pending because this Court may decline to exercise supplemental jurisdiction over the writ of administrative mandamus claim. [Doc. No. 51, *Def's Mot.* at 7–8.] Defendant's argument lacks merit because a state court action does not remain pending following its removal to federal court.

A "case after removal is treated as if it had been commenced in federal court." *Resolution Trust Corp. v. Bayside Developers,* 43 F.3d 1230, 1240 (9th Cir.1994). "After removal, 28 U.S.C. § 1446(d) prohibits any proceedings in the state court unless and until the case is remanded." *Id.* at 1238. 28 U.S.C. § 1446(d) states that after the filing of the notice of removal with the clerk of a state court, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). "[T]he clear language of the general removal statute provides that the state court loses jurisdiction upon the filing of the petition for removal." *Resolution Trust Corp.,* 43 F.3d at 1238. When Defendant removed this action from the Superior Court to this Court on July 6, 2011 [Doc. No. 1, *Notice of Removal*], the Superior Court lost jurisdiction to hear this action. Therefore, the Superior Court may not proceed further unless the case is remanded.

Because Defendant is unable to satisfy the first element, the Court **DENIES** Defendant's motion for abstention on the basis of the *Younger* doctrine.

II. *Pullman* Abstention

The doctrine of *Pullman* abstention permits district courts, in exceptional cases, to postpone the exercise of jurisdiction. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). "Abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman v. Forssenius,* 380 U.S. 528, 534, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). *"Pullman* abstention does not exist for the benefit of either of the parties but rather for 'the rightful independence of the state governments and for the smooth working of the federal judiciary.' " *San Remo Hotel v. City and Cnty. of San Francisco,* 145 F.3d 1095, 1105 (9th Cir.1998) (quoting *R.R. Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971 (1941) (internal quotation marks omitted)).

***4** *Canton v. Spokane Sch. Dist. No. 81,* 498 F.2d 840 (9th Cir.1974) sets forth a three-prong analysis for *Pullman* abstention: (1) The case "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;" (2) "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy;" and (3) "[t]he possibly determinative issue of state law is doubtful." *Id.* at 845. "[I]t is not even necessary that the state adjudication 'obviate the need to decide all the federal constitutional questions' as long as it will 'reduce the contours' of the litigation." *Smelt v. County of Orange,* 447 F.3d 673, 679 (9th Cir.2006) (quoting *C–Y Dev. Co. v. City of Redlands,* 703 F.2d 375, 380 (9th Cir.1983)). "In applying these criteria, the district court should identify the state law issues that might be determinative or critical to the case's outcome and should explain why the resolution of those issues is uncertain." *Pearl Inv. Co. v. City and Cnty. of San Francisco,* 774 F.2d 1460, 1463 (9th Cir.1985). If a court abstains under the *Pullman* doctrine, retention of jurisdiction, and not dismissal of the action, is the proper course. *Columbia Basic Apt. Ass'n v. City of Pasco,* 268 F.3d 791, 802 (9th Cir.2001). The Court addresses each element of *Pullman* abstention in turn.

A. Sensitive Area of Social Policy

"[The Ninth Circuit has] repeatedly stated that land use planning is a sensitive area of social policy ...." *C–Y Dev. Co.,* 703 F.2d at 377. Because this matter involves the City's proactive code enforcement program to target blight and improve deteriorating neighborhoods in low to moderate income areas, in addition to the imposition of civil penalties and administrative costs in connection with alleged violations of the San Diego Municipal Code [Doc. No. 51, *Def's Mot.* at 11], the Court finds that the first element of *Pullman* abstention has been met.

B. Eliminating or Narrowing Constitutional Issues

A state court ruling on the writ of administrative mandamus would narrow Plaintiffs' sole Constitutional claim, a cause of action brought under 42 U.S.C. § 1983 alleging violations of the Equal Protection Clause. "Under the California administrative mandamus procedure, a state court might invalidate [the challenged] conditions if it found that the Commission had abused its discretion ." *Pearl Inv. Co.,* 774 F.2d at 1464 (citing Cal.Civ.Proc.Code § 1094.5 (internal citations omitted)). With respect to their equal protection claim, Plaintiffs allege that Defendant targeted them as residents of low to moderate income areas to generate revenue through a proactive code enforcement program. [Doc. No. 47, *Fourth Amended Compl.* ¶ 97, 105, 107.] In their complaint, Plaintiffs seek compensatory damages and to enjoin Defendant and its agents from violating their Constitutional rights. [Doc. No. 47, *Fourth Amended Compl.* at 37.] The California Superior Court could grant the writ of administrative mandamus and declare the Administrative Order null and void and enjoin collection of the civil penalties and administrative costs. Alternatively, the California Superior Court could rule that Defendant's proactive code enforcement program violates the equal protection clause of the California Constitution. This relief could moot or narrow the Plaintiffs' Constitutional claims to the extent that they seek redress for imposition of the civil penalties and administrative costs and for the proactive code enforcement program.

C. Uncertain State Law Issue

***5** The potentially outcome determinative state issue, the writ of administrative mandamus, is sufficiently uncertain to satisfy the third requirement for *Pullman* abstention. The Ninth Circuit has concluded that "uncertainty surrounds application of the administrative mandamus procedure found in Cal.Civ.Proc.Code § 1094.5." *C–Y Dev. Co.,* 703 F.2d at 380–81 (citing *Sederquist v. City of Tiburon,* 590 F.2d 278, 282–83 (9th Cir.1978)). When considering a writ of administrative mandamus, "[t]he inquiry in such a case shall extend to the questions whether the [administrative agency]

has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." *Woods v. Superior Court,* 28 Cal.3d 668, 675, 170 Cal.Rptr. 484, 620 P.2d 1032 (Cal.1981) (quoting Cal.Civ.Proc.Code § 1094 .5(b)). The Ninth Circuit reasoned that because the question of abuse of discretion "is by nature a question turning on the peculiar facts of each case in light of the many local and state-wide land use laws and regulations applicable to the area in question," it could not predict whether a state court would find that the city abused its discretion. *Sederquist,* 590 F.2d at 282–83.

Similarly, this Court cannot predict whether a state court will find that Defendant abused its discretion because this issue turns on the facts of this case in light of local land use laws. More specifically, Plaintiffs' administrative mandamus claim in the instant case challenges the legality of Defendant's actions pursuant to San Diego Municipal Code section 12, which pertains to land development reviews. [Doc. No. 47, *Fourth Amended Compl.* ¶ 80–88.] Therefore, the Court finds that the possibly determinative issue of state law is sufficiently uncertain to satisfy the third requirement for *Pullman* abstention.

Because all of the factors for *Pullman* abstention are met, the Court **GRANTS** Defendant's motion for abstention under the *Pullman* doctrine and **REMANDS** the action to state court. Plaintiffs may preserve their right to federal district court adjudication of their federal claim by making a reservation on the state court record. *England v. Louisiana State Bd. of Med. Exam'rs,* 375 U.S. 411, 421, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Following state court adjudication, Plaintiffs may then return to federal court to have their federal claim decided if it has not been mooted by the state proceeding. *Id.* at 421–22.

III. Defendant's Request to Stay the Federal Claim to Allow the State Court to Decide Matters of State Law

Defendant alternatively requests that the Court stay the federal claim until a California state court decides the state claims. Because the Court grants Defendant's motion for abstention under the *Pullman* doctrine, the Court does not address this request.

CONCLUSION

For the reasons above, the Court **GRANTS** the City of San Diego's motion for abstention and **REMANDS** the action to the California Superior Court. Specifically, the Court:

***6** 1. **DENIES** Defendant's motion for abstention on the basis of the *Younger* doctrine;

2. **GRANTS** Defendant's motion for abstention on the basis of the *Pullman* doctrine;

3. **REMANDS** the action to the Superior Court of the State of California in the County of San Diego. The Court retains jurisdiction to address Plaintiffs' federal claim involved herein, if Plaintiffs, in the state court proceeding make an *England* "reservation," *England,* 375 U.S. at 421, and such claim is not mooted in the state court proceeding.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4447624

Footnotes

1 Plaintiffs request that the Court take judicial notice of the existence of a February 28, 2011 letter from Amie Ontiveros, Hearing Coordinator for the City of San Diego's Neighborhood Code Compliance, and the fact that it makes the representations contained therein. They do not request that the Court take the representations contained therein as true. [Doc. No. 55–1, RJN.] Courts may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201. Courts may take judicial notice of documents that are matters of public record or are quasi-public documents. *See Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir.2001); *Del Puerto Water Dist.*

v. U.S. Bureau of Reclamation, 271 F.Supp.2d 1224 (E.D.Ca.2003) (holding that Senate and House reports, water permit applications, and copies of Bureau reports are public or quasi-public records). This letter sent to a private party is neither part of the public record nor a quasi-public document. Because the requirements of Rule 201 are not met, the Court **DENIES** Plaintiffs' request for judicial notice.

End of Document

Exhibit 11

2020 WL 5097153
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Jane M. MURRAY, Plaintiff,
v.
CITY OF FOUNTAIN VALLEY POLICE SGT. MIKE PARSONS, et al., Defendants.

Case No. 8:19-cv-0768-GW-JC
|
Signed 08/27/2020

Attorneys and Law Firms

Jane M. Murray, Fountain Valley, CA, pro se.

Caylin Jones, Carpenter Rothans and Dumont, Los Angeles, CA, for Defendants.

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

[DOCKET NO. 14]

HONORABLE GEORGE H. WU, UNITED STATES DISTRICT JUDGE

***1** The Court has conducted the review required by 28 U.S.C. § 636 and accepts the findings, conclusions and recommendation of the Magistrate Judge reflected in the July 27, 2020 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation").

IT IS HEREBY ORDERED:

1. the Request of the City of Fountain Valley (on behalf of itself and the individual defendants in their official capacities) (collectively "Moving Defendants") for Judicial Notice is denied;

2. the Moving Defendants' Motion to Dismiss is granted to the extent it seeks dismissal of the Complaint and punitive damages request as against the Moving Defendants;

3. the Complaint is dismissed with leave to amend as against the Moving Defendants and the punitive damages request is dismissed with prejudice as against the Moving Defendants;

4. within fourteen (14) days of the date of this Order, plaintiff shall do one of the following:

(a) file a First Amended Complaint which cures the defects identified in the Report and Recommendation; [1]

(b) file a Notice of Dismissal which will result in the voluntary dismissal of this action without prejudice; or

(c) file a Notice of Intent to Stand on Complaint, indicating plaintiff's intent to stand on the original Complaint despite the pleading defects therein that were identified in the Report and Recommendation, which may result in the dismissal of this action in its entirety based upon such defects as against the Moving Defendants; and

Plaintiff is cautioned that her failure timely to file a First Amended Complaint, a Notice of Dismissal, or a Notice of Intent to Stand on Complaint may be deemed plaintiff's admission that amendment is futile, and may result in the dismissal of this action with or without prejudice as against the Moving Defendants on the grounds identified in the Report and Recommendation and/or on the ground that amendment is futile, and/or dismissal of this action with or without prejudice as against all defendants for failure diligently to prosecute and/or for failure to comply with the District Judge's Order.

***2** IT IS FURTHER ORDERED that the Clerk serve copies of this Order on plaintiff and counsel for defendants.

IT IS SO ORDERED

All Citations

Slip Copy, 2020 WL 5097153

Footnotes

1 Any First Amended Complaint must: (a) be labeled "First Amended Complaint"; (b) be complete in and of itself and not refer in any manner to the original Complaint – *i.e.*, it must include all claims on which plaintiff seeks to proceed (Local Rule 15-2); (c) contain a "short and plain" statement of each claim for relief "showing that [plaintiff] is entitled to relief" (Fed. R. Civ. P. 8(a)); (d) make each allegation "simple, concise and direct" and contain factual allegations in clear short, concise, numbered paragraphs, each "limited as far as practicable to a single set of circumstances" (Fed. R. Civ. P. 8(d)(1), 10(b)); (e) set forth clearly the sequence of events giving rise to the claim(s) for relief; (f) reflect which claims are brought against which defendant(s) in which capacity and allege specifically what each defendant did and how that individual's conduct specifically violated plaintiff's civil rights; and (g) not add defendants or claims that are not related to the claims asserted in the original Complaint.

End of Document

Exhibit 12

2020 WL 5099405
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Jane M. MURRAY, Plaintiff,
v.
City of Fountain Valley Police Sgt. Mike PARSONS, et al., Defendants.

Case No. 8:19-cv-0768-GW-JC
|
Signed 07/27/2020

Attorneys and Law Firms

Jane M. Murray, Fountain Valley, CA, pro se.

Caylin Jones, Carpenter Rothans and Dumont, Los Angeles, CA, for Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

[DOCKET NO. 14]

Honorable Jacqueline Chooljian, UNITED STATES MAGISTRATE JUDGE

***1** This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On April 26, 2019, plaintiff Jane M. Murray, who is at liberty, is proceeding *pro se* and has been granted leave to proceed *in forma pauperis*, filed a Civil Rights Complaint ("Complaint" or Comp.") pursuant to 42 U.S.C. § 1983 ("Section 1983") against (1) the City of Fountain Valley (the "City"); (2) the City's Police Chief Kevin Childes in his official capacity; and (3) Fountain Valley Police Sergeant Mike Parsons in both his individual and official capacities. (Comp. at 1, 3-4). Plaintiff's Complaint asserts five causes of action relating to a traffic stop and the impound of her vehicle and seeks compensatory and punitive damages. (Complaint at 5-10).

On January 31, 2020, the City filed a Motion to Dismiss ("Motion to Dismiss"), with an accompanying Memorandum of Points and Authorities ("Mot. Mem.") and Request for Judicial Notice (alternatively, "Request") and seeks, among other relief, dismissal of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim without leave to amend and dismissal of the request for punitive damages. [1] On February 11, 2020, Plaintiff filed an Opposition to the Motion to Dismiss (alternatively, "Opp.") and Objections to the Request ("Obj."). The City filed a Reply on February 18, 2020.

Based upon the record and the applicable law, and for the reasons discussed below: (1) the Request should be denied; (2) the Motion to Dismiss should be granted to the extent it seeks dismissal of the Complaint and punitive damages request as against the City (and as against the individual defendants in their official capacities as to which the City is effectively alleged to be the real party in interest); [2] (3) the Complaint should be dismissed as against such defendants with leave to amend except as to the punitive damages request which should be dismissed with prejudice; and (4) plaintiff should be granted leave to file an amended complaint, except as to the punitive damages request.

II. THE COMPLAINT

***2** Plaintiff alleges she is a long-time Fountain Valley resident who has been a licensed driver since 1979 and at all relevant times had – and still has – a valid California driver's license. (Comp. at 7). She has never been arrested or had a traffic ticket or an at-fault accident. (Comp. at 7).

On April 28, 2018, plaintiff purchased a vehicle from a "California licensed used car dealer." (Comp. at 6). The vehicle's registration had expired in August 2017, and the vehicle's license plates reflected that fact. (Comp. at 6). At the time of purchase, the dealer attached a temporary registration document to the vehicle's windshield in compliance with Cal. Veh. Code § 4456. [3] (Comp. at 6-7).

Plaintiff asserts that on June 18, 2018, she was driving her vehicle when Sergeant Parsons stopped her, allegedly because she had been illegally parked in a 7-11 parking lot. (Comp. at 5). Since plaintiff's car was not illegally parked, she believes the traffic stop was initiated because of the appearance of her vehicle, which caused Sergeant Parsons to assume plaintiff "was in violation of something" and initiate the traffic stop. (Comp. at 5). In Claim One, plaintiff alleges the traffic

stop violated her Fourth Amendment right to be free from unwarranted searches and seizures. (Comp. at 5-6).

In Claim Two, plaintiff alleges that the duration of the traffic stop, which lasted for almost one hour, was excessive in violation of her Fourth Amendment rights. [4] (Comp. at 6-7).

In Claim Three, plaintiff contends that when Sergeant Parsons stopped her vehicle, she informed him about the temporary registration and Sergeant Parsons asked a co-worker to verify this information. (Comp. at 7). Although the co-worker verified plaintiff was correct, Sergeant Parsons still impounded plaintiff's car, which violated her Fourth Amendment rights. (Comp. at 7).

In Claim Four, plaintiff asserts that on June 22, 2018, she went to the City of Fountain Valley Police Department to address the unlawful impounding of her vehicle, and spoke to someone in dispatch. (Comp. at 8). The next day, she called and spoke with a desk officer. (Comp. at 8). On June 25, 2018, she returned to the Police Department and spoke to the records department. (Comp. at 8). Each time, she was told the officer who impounded her vehicle was the only person who could redress her complaints and he was unavailable. (Comp. at 8). Plaintiff alleges this failure to redress her complaint and deprived her of her due process "right to be heard and the right to a non-bias[ed] tribunal or decision maker." (Comp. at 8). Plaintiff also asserts that since "3 different police personnel, in 3 different divisions, on 3 different days all stated the same procedural process[,] it is reasonable to believe that the 3 employees were following department policy[,]" and Chief Childes is responsible for enforcing adherence to departmental policies and training. (Comp. at 8).

***3** In Claim Five, plaintiff alleges she filed a claim on June 25, 2018, asking for the return of her vehicle, which was denied on July 8, 2018. (Comp. at 9). Thereafter, she filed a second claim with the City Clerk, which was not acknowledged at all. (Comp. at 9). Plaintiff alleges the City was made aware of the situation, but failed to uphold the law. (Comp. at 9).

Plaintiff seeks compensatory and punitive damages to remedy the alleged constitutional violations. (Comp. at 9).

III. GOVERNING LEGAL STANDARDS

A Rule 12(b)(6) motion to dismiss for failure to state a claim should be granted if plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "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 678; Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013). Although plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," Twombly, 550 U.S. at 555; Iqbal, 556 U.S. at 678, "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the ... claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citations and internal quotation marks omitted); Twombly, 550 U.S. at 555 & n.3; see also Zixiang Li v. Kerry, 710 F.3d 995, 998-99 (9th Cir. 2013) ("Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires not only 'fair notice of the nature of the claim, but also [the] grounds on which the claim rests.' " (citation omitted)).

In considering whether to dismiss a complaint, the Court must accept the factual allegations of the complaint as true, [5] Wood v. Moss, 572 U.S. 744, 755 n.5 (2014); Erickson, 551 U.S. at 93-94, construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). *Pro se* pleadings are "to be liberally construed" and are held to a less stringent standard than those drafted by a lawyer. Erickson, 551 U.S. at 94; Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal incorporated the Twombly pleading standard and Twombly did not alter courts' treatment of pro se filings; accordingly, we continue to construe pro se filings liberally when evaluating them under Iqbal."). Dismissal for failure to state a claim can be warranted based on either the lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Taylor v. Yee, 780 F.3d 928, 935 (9th Cir. 2015), cert. denied, 136 S. Ct. 929 (2016); Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. See Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 902 (9th Cir. 2013), cert. denied, 573 U.S. 916 (2014).

***4** In general, courts consider only the contents of a complaint when evaluating a motion to dismiss. United States v. Corinthian Colleges, 655 F.3d 984, 998-99 (9th Cir. 2011) (citation omitted). However, in certain circumstances a court may consider documents attached to the complaint (or upon which the complaint "necessarily relies") as well as judicially noticed matters of public record. Id. at 999 (citations omitted). A court may also consider factual allegations outside of the complaint when determining whether to grant leave to amend after a motion to dismiss is granted. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

If a *pro se* complaint is dismissed because it does not state a viable claim, the court must freely grant "leave to amend" if it is "at all possible" that the plaintiff could fix the identified pleading errors by alleging different or new facts. Cafasso v. General Dynamics C4 Systems, Inc., 637 F.3d 1047, 1058 (9th Cir. 2011) (citation omitted); Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000) (en banc) (citations and internal quotation marks omitted). Nonetheless, courts have the discretion to deny leave to amend in cases of undue delay, bad faith, undue prejudice to the opposing party, and futility. See Foman v. Davis, 371 U.S. 178, 182 (1962); Cafasso, 637 F.3d at 1058 (citations omitted).

IV. DISCUSSION

A. The City's Request for Judicial Notice Should Be Denied

The City requests that the Court take judicial notice of a document (Motion to Dismiss, Exhibit A; Reply Exhibit A), which it describes as "the Department of Motor Vehicle ('DMV') vehicle history ... generated on June 18, 2018 which shows that the last registered release of liability[ ] was February 20, 2018." (Mot. Mem. at 8). Plaintiff objects to the Request arguing that the document is incomplete, irrelevant, and contradicts on-scene audio recordings. [6] (Obj. at 1-2).

Pursuant to Fed. R. Evid. 201, judicial notice can be taken of an adjudicative fact "not subject to reasonable dispute" because it "is generally known within the trial court's territorial jurisdiction" or it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018), cert. denied, 139 S. Ct. 2615 (2019). "Accordingly, '[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment.' " Khoja, 899 F.3d at 999 (citation omitted); see also In re Icenhower, 755 F.3d 1130, 1142 (9th Cir. 2014) ("Judicial notice may be taken 'at any stage of the proceeding.' " (quoting Fed. R. Evid. 201(d))). "But a court cannot take judicial notice of disputed facts contained in such public records." Khoja, 899 F.3d at 999. Moreover, a court "may take judicial notice on its own" but "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

The City, as "[t]he party requesting judicial notice[,] bears the burden of persuading the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned.' " Newman v. San Joaquin Delta Comty. Coll. Dist., 272 F.R.D. 505, 516 (E.D. Cal. 2011) (citation omitted); Wilkins v. Ramirez, 455 F. Supp. 2d 1080, 1112 (S.D. Cal. 2006). The City has not met its burden. While it might be appropriate to take judicial notice of DMV documents in some circumstances, see, e.g., Shaghoian v. Aghajani, 228 F. Supp. 2d 1107, 1109 n.4 (C.D. Cal. 2002), the City has not provided the Court with the information necessary to take judicial notice of the requested documents. The City has simply attached a printout to its Motion to Dismiss and called it a DMV record, but nothing on the printout itself establishes it is a DMV record, and the City has not authenticated it. [7] See Fed. R. Evid. 901-02; see also Madeja v. Olympic Packers, LLC, 310 F.3d 628, 639 (9th Cir. 2002) (district court properly declined to take judicial notice of unauthenticated documents). Moreover, even if the City had authenticated the document in question, it has not established its relevance to the pending Motion to Dismiss. While the document purports to set forth, among other things, a license plate number and vehicle identification number for a certain vehicle, nothing in the Complaint correlates this information with the vehicle that is the subject of the Complaint. [8] For this reason, as well, the Court declines to take judicial notice of the purported DMV document. [9] See Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286, 1298 n.6 (9th Cir. 2015) (declining to take judicial notice of irrelevant documents); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (same).

***5** Accordingly, the City's Request for Judicial Notice should be denied.

B. Plaintiff Has Failed to State a Claim Against the City and the Individual Defendants in Their Official Capacities

As noted above (see supra note 2), a suit against a public employee in his official capacity is equivalent to a claim against the state or local government entity that employs the named individual, Kentucky v. Graham, 473 U.S. 159, 166 (1985); Hartmann, 707 F.3d at 1127, which plaintiff asserts is the City.[10] (Comp. at 4). A municipality such as the City may be held liable under Section 1983 only for constitutional violations occurring pursuant to an official government policy or custom. Collins v. City of Harker Heights, Tex., 503 U.S. 115, 121 (1992); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). However, "a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Monell, 436 U.S. at 692; Board of the Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 403 (1997). Thus, "[i]n order to hold the [City] liable under § 1983, [plaintiff] must show (1) that [she] possessed a constitutional right of which [she] was deprived; (2) that the [City] had a policy; (3) that the policy amounts to deliberate indifference to [plaintiff's] constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.' " Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006) (citations and internal quotation marks omitted); Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011), cert. denied, 569 U.S. 904 (2013). "To meet [the 'moving force'] requirement, the plaintiff must show both causation-in-fact and proximate causation." Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1096 (9th Cir. 2013), cert. denied, 571 U.S. 1199 (2014); see also Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 957 (9th Cir. 2008) (en banc) ("[T]here must be 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.' " (quoting City of Canton v. Harris, 489 U.S. 378, 385 (1989)). Plaintiff's claims fail to meet these requirements.

1. Claims One Through Three

Since Claims One through Three identify no City policy responsible for the constitutional violations plaintiff alleges, these claims fail to state a cognizable claim against the City or the individual defendants in their official capacities. See Fortson v. Los Angeles City Attorney's Office, 852 F.3d 1190, 1195 (9th Cir.) ("Fortson's official-capacity claims against the [police department] fail because he has not sufficiently ... identified an official policy or custom that was the 'moving force' behind a potential constitutional violation."), cert. denied, 138 S. Ct. 69 (2017); Dougherty, 654 F.3d at 900-01 (affirming dismissal of Monell claim when the plaintiff failed to allege "any facts demonstrating that his constitutional deprivation was the result of a custom or practice of the City of Covina or that the custom or practice was the 'moving force' behind his constitutional deprivation."). Nor is this result changed by the vague statement in the introduction of plaintiff's Complaint alleging that the City "was made aware of the violation of [plaintiff's] civil rights by police department employees" and the City's "failure to intercede has shown [it is] neglecting to uphold federal laws and is deliberately indifferent to civil rights violations by [its] police department." (Comp. at 2); Iqbal, 556 U.S. at 678; see also Litmon v. Harris, 768 F.3d 1237, 1241 (9th Cir. 2014) (A "liberal interpretation of a pro se civil rights complaint may not supply essential elements of the claim that were not initially pled. Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss' " (quoting Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992)); AE ex rel. Hernandez v. Cnty. of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (Monell claims "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively" and "must plausibly suggest an entitlement to relief" (quoting Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011), cert. denied, 566 U.S. 982 (2012)). Accordingly, as to the City (including the individual defendants in their official capacities), Claims One through Three should be dismissed with leave to amend.[11]

2. Claim Four

***6** In Claim Four, plaintiff alleges she was denied the "minimal protection[s]" of due process of law – that is, the "right to be heard and the right to a non-bias[ed] tribunal or decision maker" – when between June 22, 2018 and June 25, 2018, she spoke to three different people at the City's police department to address the unlawful impounding of her vehicle, and each person told her the officer who impounded her vehicle was the only person who could redress her complaints and he was unavailable. (Comp. at 8). She also alleges that since each of these individuals told her the same thing, it is reasonable to believe these individuals were following department policy, and Chief Childes is responsible for department policy. (Comp. at 8). These somewhat vague

allegations are insufficient to state a Monell claim against the City or its police department. While due process requires plaintiff be afforded a prompt post-towing hearing if timely requested, Scofield v. City of Hillsborough, 862 F.2d 759, 764 (9th Cir. 1988), plaintiff does not allege she requested, and was denied, a prompt post-towing hearing. [12] Nor does she assert that the City has a policy of denying requests for post-towing hearings and that such policy was the moving force behind the alleged constitutional violation. [13] Dougherty, 654 F.3d at 900; Anderson, 451 F.3d at 1070. Therefore, plaintiff has not stated a viable Monell claim in Claim Four, and this claim should be dismissed as against the City and the individual defendants in their official capacities with leave to amend.

3. Claim Five

Claim Five, in its entirety, alleges:

> [Plaintiff] filed a claim with the City Clerk on June 25, 2018 asking for the return of her vehicle. The claim was denied on July 8, 2018. [She] filed a second claim with the City Clerk ... that ... was not acknowledged at all. The City ... was made aware of the situation and the City['']s failure to uphold the law and correct the situation[ ] contributed to the filing of [t]his lawsuit.

(Comp. at 9).

Among other things, Claim Five fails since plaintiff has not identified any City policy, practice or custom that caused the alleged violation of her constitutional rights. Fortson, 852 F.3d at 1195; Dougherty, 654 F.3d at 900-01. Indeed, plaintiff merely alleges she filed a claim with the City Clerk that was denied and a second claim that was ignored. Such vague and conclusory allegations are manifestly insufficient to state a viable Section 1983 claim against the City or the individual defendants in their official capacities. Iqbal, 556 U.S. at 678; Litmon, 768 F.3d at 1241; AE ex rel. Hernandez, 666 F.3d at 637. Accordingly, Claim Five should be dismissed with leave to amend as against the City and the individual defendants in their official capacities.

4. Punitive Damages

Among other remedies, plaintiff requests punitive damages. (Comp. at 9). However, to the extent plaintiff seeks punitive damages against the City (or Chief Childes and Sergeant Parsons in their official capacities), plaintiff's request is dismissed with prejudice because a "municipality is immune from punitive damages under 42 U.S.C. § 1983." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981); Howard v. City of Coos Bay, 871 F.3d 1032, 1044 n.9 (9th Cir. 2017); Mitchell v. Dupnik, 75 F.3d 517, 527 (9th Cir. 1996).

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order:

1. approving and accepting this Report and Recommendation;

2. denying the Request for Judicial Notice;

3. granting the Motion to Dismiss to the extent it seeks dismissal of the Complaint and punitive damages request as against the City and the individual defendants in their official capacities;

4. dismissing the Complaint with leave to amend as against the City and the individual defendants in their official capacities and dismissing the punitive damages request as against such defendants with prejudice;

***7** 5. directing plaintiff, within fourteen (14) days of the date of the District Judge's Order relative to the Report and Recommendation, to do one of the following:

(a) file a First Amended Complaint which cures the defects set forth herein; [14]

(b) file a Notice of Dismissal which will result in the voluntary dismissal of this action without prejudice; or

(c) file a Notice of Intent to Stand on Complaint, indicating plaintiff's intent to stand on the original Complaint despite the pleading defects set forth herein, which may result in the dismissal of this action in its entirety based upon such defects

as against the City and the individual defendants to the extent sued in their official capacities; and

6. expressly cautioning plaintiff that her failure timely to file a First Amended Complaint, a Notice of Dismissal, or a Notice of Intent to Stand on Complaint may be deemed plaintiff's admission that amendment is futile, and may result in the dismissal of this action with or without prejudice as against the City and the individual defendants in their official capacities on the grounds set forth above and/or on the ground that amendment is futile, and/or dismissal of this action with or without prejudice as against all defendants for failure diligently to prosecute and/or for failure to comply with the District Judge's Order.

All Citations

Slip Copy, 2020 WL 5099405

Footnotes

1 The City alternatively seeks a more definite statement – a request the Court need not address in light of the recommendation herein.

2 As noted above, plaintiff sued Chief Childes in his official capacity only and Sergeant Parsons in both his individual and official capacities and alleges that they are employed by the City. (Comp. at 4). As Section 1983 suits against individuals in their official capacities are effectively suits against the governmental entity which employs the individuals (see Kentucky v. Graham, 473 U.S. 159, 166 (1985); Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1127 (9th Cir. 2013)), the Court construes the Motion to Dismiss to be addressed to claims against the City and the individual defendants in their official capacities. However, as Sergeant Parsons has not appeared in this action in his individual capacity and as there is no indication that the City's attorneys are representing him in such capacity, the Court herein addresses only whether plaintiff has stated a claim for relief against the City and the individual defendants in their official capacities.

3 At the time of the vehicle stop, Cal. Veh. Code § 4456 provided, in pertinent part:

> (c) A vehicle displaying a copy of the report of sale may be operated without license plates or registration card until either of the following, whichever occurs first: [¶] (1) The license plates and registration card are received by the purchaser [or] [¶] (2) A 90-day period, commencing with the date of sale of the vehicle, has expired.

Cal. Veh. Code § 4456(c) (2018).

4 Plaintiff alleges both she and Sergeant Parsons were in the 7-11. (Comp. at 6). She assertedly left the store at 2:39 p.m. and Sergeant Parsons followed her. (Comp. at 6). Sergeant Parsons allegedly initiated the traffic stop at 2:42 p.m. and detained her inside her vehicle until she was released at 3:39 p.m. (Comp. at 6). While plaintiff alleges that she was "forced to remain in her vehicle until she was released 56 minutes later at 3:39 p.m.," the Court, unlike the City (see Mot. Mem. at 2, 7), construes Claim Two to be an excessive detention, as opposed to an excessive force claim. See Berkemer v. McCarty, 468 U.S. 420, 437 (1984) ("[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes."); Florida v. Royer, 460 U.S. 491, 500 (1983) (An "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.").

5 "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678; Yagman v. Garcetti, 852 F.3d 859, 863 (9th Cir. 2017). Likewise, the Court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2006); Seven Arts Filmed Entm't Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013).

6 Plaintiff is correct that the document attached to the Motion to Dismiss is incomplete. (see Motion to Dismiss, Exhibit A), but the City corrected this defect by attaching the purported second page of the document to its Reply (see Reply, Exhibit A).

7 In contrast, the Shaghoian court took judicial notice of "certified copies" of DMV documents. Shaghoian, 228 F. Supp. 2d at 1109 n.4; see also Fed. R. Evid. 902(4).

8 Plaintiff's Complaint states she purchased a vehicle on April 28, 2018 (Comp. at 4), but does not otherwise identify the vehicle by license plate, vehicle identification number or otherwise. (See Comp. at 1-10). Therefore, nothing ties the document as to which the City seeks judicial notice to the pending Complaint.

9 Despite this lack of correlation, the City argues "[t]he DMV records show that the registered owner of the vehicle [p]laintiff was driving on June 18, 2018 was [not plaintiff]. The [p]laintiff's name has no attachment to the vehicle whatsoever." (Mot. Mem. at 10). In any event, plaintiff's ownership of the vehicle that was towed – assuming it is the vehicle identified in the purported "DMV records" – is disputed and is not the proper subject of judicial notice. Khoja, 899 F.3d at 999.

10 Given this uncontested allegation and the recommended dismissal of the Complaint with leave to amend, the Court need not, at least at this juncture, consider whether the proper defendant for plaintiff's official capacity claims is the City or its police department. See, e.g., Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 n.2 (9th Cir. 1988) ("Municipal police departments are 'public entities' under California law and, hence, can be sued in federal court for alleged civil rights violations.").

11 As indicated above, the Court may consider factual allegations outside of the complaint when determining whether to grant leave to amend after a motion to dismiss is granted. See Broam, 320 F.3d at 1026 n.2. Here, the City and plaintiff both proffer factual allegations outside of the Complaint and matters not properly the subject of judicial notice. See, e.g., Mot. Mem. at 1, 5-9; Opp. at 5-13; Reply at 1. Plaintiff has not previously amended her Complaint, and she should be afforded leave to do so. See Fed. R. Civ. P. 15(a)(2) (Leave to amend should be freely given "when justice so requires."). In so doing, plaintiff should, among other things, clearly allege which claims are brought against which defendants in which capacity as the current Complaint does not do so and accordingly fails to give the defendants fair notice of what claims have been brought against them. See Erickson, 551 U.S. at 93 (complaint required to give defendant fair notice of what claim against defendant is and grounds upon which it rests).

12 California law provides for post-towing hearings if the owner of the vehicle requests such hearing within 10 days, with the hearing to be "conducted within 48 hours of the request, excluding weekends and holidays." Cal. Veh. Code § 22852(b-c); Scofield, 862 F.2d at 764. A due process violation occurs if a post-towing hearing is timely requested, but not timely provided. Scofield, 862 F.2d at 764.

13 The City cites its Request for Judicial Notice in support of its assertion that plaintiff had no property interest in the vehicle and no standing to seek a post-tow hearing. (Mot. Mem. at 10-11). This argument is rejected for the reasons set forth above.

14 Plaintiff should be advised that any First Amended Complaint must: (a) be labeled "First Amended Complaint"; (b) be complete in and of itself and not refer in any manner to the original Complaint – *i.e.*, it must include all claims on which plaintiff seeks to proceed (Local Rule 15-2); (c) contain a "short and plain" statement of each claim for relief "showing that [plaintiff] is entitled to relief" (Fed. R. Civ. P. 8(a)); (d) make each allegation "simple, concise and direct" and contain factual allegations in clear short, concise, numbered paragraphs, each "limited as far as practicable to a single set of circumstances" (Fed. R. Civ. P. 8(d)(1), 10(b)); (e) set forth clearly the sequence of events giving rise to the claim(s) for relief; (f) reflect which claims are brought against which defendant(s) in which capacity and allege specifically what each defendant did and how that individual's conduct specifically violated plaintiff's civil rights; and (g) not add defendants or claims that are not related to the claims asserted in the original Complaint.

End of Document

Exhibit 13

2013 WL 1326425
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Aquila P. NUGENT, Andrew Nugent, Plaintiffs,
v.
FEDERAL HOME LOAN MORTGAGE CORPORATION; Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Mortgage; and Does 1 to 20, inclusive, Defendants.

No. 2:12–cv–00091–GEB–EFB.
|
March 29, 2013.

ORDER GRANTING MOTIONS TO DISMISS SECOND AMENDED COMPLAINT

GARLAND E. BURRELL, JR., Senior District Judge.

***1** Defendants Federal Home Loan Mortgage Corporation ("Freddie Mac") and Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Mortgage ("Wells Fargo") (collectively "Defendants") separately move under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for dismissal of all claims in the Second Amended Complaint ("SAC"). Plaintiffs Aquila P. Nugent and Andrew Nugent (collectively "Plaintiffs") allege claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, wrongful foreclosure, set aside of the trustee's sale, fraud, declaratory relief, and intentional infliction of emotional distress in connection with the foreclosure sale of Plaintiffs' home. Plaintiffs oppose each motion.

I. LEGAL STANDARD

Decision on Defendants' Rule 12(b)(6) dismissal motion requires determination of "whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.,* 637 F.3d 1047, 1054 (9th Cir.2011) (citing *Ashcroft v. Iqbal,* 556 U .S. 662, 678–79 (2009)). "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 678 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007)).

When determining the sufficiency of a claim, "[w]e accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party[; however, this tenet does not apply to] ... legal conclusions ... cast in the form of factual allegations." *Fayer v. Vaughn,* 649 F.3d 1061, 1064 (9th Cir.2011) (citation and internal quotation marks omitted). "Therefore, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Id.* (citation and internal quotation marks omitted); *see also Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555) (stating "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do' ").

II. JUDICIAL NOTICE

The parties submitted forty-one requests for judicial notice, including requests for judicial notice of the recorded (1) deed of trust between Aquila and Carla Nugent and Wells Fargo, (Wells Fargo Req. for Judicial Notice ("RJN"), ECF No. 33, Ex. 5); (2) grant deed whereby Aquila and Carla Nugent granted to Andrew Nugent an undivided 50% interest in the property, (RJN Ex. 6); (3) notice of default in connection with the deed of trust, (RJN Ex. 7); (4) notice of trustee's sale of the property, (RJN Ex. 9); (5) assignment of the deed of trust to Freddie Mac, (RJN Ex. 10); (6) trustee's deed upon sale granting the property to Freddie Mac, (RJN Ex. 11); and (7) grant deed whereby Freddie Mac granted the property to a third party. (RJN Ex. 12.)

***2** As a general rule, a district court " 'may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.' " *United States v. Corinthian Colls.,* 655 F.3d 984, 998 (9th Cir.2011) (quoting *Lee v. City of L.A.,* 250 F.3d 668, 688 (9th Cir.2001)). However, judicial notice may be taken of the existence of matters of public record, which are not subject to reasonable dispute over their authenticity. *E.g., Lee,* 250 F.3d at 690; *Gardner v. Am. Home Mortg. Servicing, Inc.,* 691 F.Supp.2d 1192, 1196 (E.D.Cal.2010). Since the seven documents described here are all publicly recorded, they are proper subjects for judicial notice. Accordingly, Wells Fargo's request for judicial notice of these documents is granted. The remainder of the parties' requests for judicial notice are denied since they "do not alter ... determination of th[is]

case." *Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura,* 371 F.3d 1046, 1052 n. 5 (9th Cir.2004).

III. FACTUAL ALLEGATIONS

The following allegations are drawn from Plaintiffs' SAC and the documents of which judicial notice has been taken. In April 2004, Aquila and Carla Nugent obtained a $300,000 home loan as husband and wife from Wells Fargo. (RJN Ex. 5.) The loan was secured by a deed of trust that encumbered the property and granted Wells Fargo the right to accelerate the loan should "all or any part of the Property or any interest in the Property [be] sold or transferred ... without [Wells Fargo's] prior written consent." (*Id.* ¶ 18.) In 2006, Aquila and Carla Nugent transferred an undivided 50% interest in the property to Aquila Nugent's brother, Andrew Nugent. (RJN Ex. 6.) There is no allegation in the SAC that Wells Fargo's consent was obtained prior to this transfer.

In October 2009, a notice of default was recorded in connection with the deed of trust. (RJN Ex. 7.) Around December 2009, Aquila Nugent attempted to obtain a loan modification. (SAC ¶ 11.) On January 4, 2010, a notice of trustee's sale of the property was recorded, announcing a sale date of January 25, 2010. (RJN Ex. 9.) The trustee's sale did not go forward on that date, and in February 2010, after providing Wells Fargo with financial documentation, Aquila and Carla Nugent received a letter from Wells Fargo. (SAC ¶¶ 13–15 & SAC App. ("TPP").) The letter states: "You did it! By entering into a Home Affordable Modification Trial Period Plan you have taken the first step toward making your payment more affordable." (TPP at 1.)[1] It also states: "As long as you comply with the terms of the Trial Period Plan, we will not start foreclosure proceedings or conduct a foreclosure sale if foreclosure proceedings have started." (*Id.* at 6.) According to the letter, to comply with their Home Affordable Modification Program ("HAMP") Trial Period Plan ("TPP"), Aquila and Carla Nugent had to make three TPP payments, sign and return the TPP and other required documentation, and certify that "[t]here has been no change in the ownership of the Property since I signed the Loan Documents." (*Id.* at 7.) Aquila Nugent "executed the required documents," "returned the completed application to Defendant Wells Fargo," and "timely made each of the payments required by the TPP Agreement." (SAC ¶¶ 16, 25.) Andrew Nugent likewise "submitted proof of income and agreed to be a cosigner on the loan modification." (SAC ¶ 22.) However, since ownership of the property changed two years after the loan documents were signed, neither Aquila nor Andrew Nugent could truthfully certify that "[t]here has been no change in the ownership of the Property since I signed the Loan Documents." (TPP at 7.) Yet when Plaintiffs "met with Jennie Onofre of Freddie Mac," she "concluded that Plaintiff Aquila Nugent qualified for a permanent Home Loan Modification." (SAC ¶¶ 20, 21.)

***3** While Plaintiffs were making payments under the TPP, "[o]n May 19, 2010, un[beknownst] to Plaintiffs, a foreclosure sale was conducted and Defendant Freddie Mac acquired title to the property." (SAC ¶ 27; RJN Exs. 10, 11.)[2] Two years later, Freddie Mac sold the property to a third party. (RJN Ex. 12.)

IV. DISCUSSION

A. Breach of Contract

Plaintiffs allege Defendants breached the parties' TPP by failing to offer Plaintiffs a permanent modification and by selling the property at a trustee's sale while the TPP was in effect and Plaintiffs were performing under it. (SAC ¶¶ 37–44.) Wells Fargo seeks dismissal of Plaintiffs' breach of contract claim, arguing that the TPP did not constitute a contract, and even if it was a contract, it was validly terminated. Freddie Mac likewise argues that "Plaintiffs cannot establish the existence of a TPP" contract, and "even if there was an enforceable TPP agreement," Defendants validly terminated it since Plaintiffs were ineligible for a TPP based on the transfer of an interest in the property to Andrew Nugent. (Freddie Mac Mot. 7:19–21, 8:8.) Plaintiffs do not address Defendants' argument that the TPP was rightly terminated based on Plaintiffs' ineligibility, but instead argue generally that the HAMP TPP was an enforceable contract that required Defendants to grant Plaintiffs a permanent modification and refrain from foreclosing on Plaintiffs' property. (*See* SAC ¶ TBA.)

To withstand dismissal, Plaintiffs' breach of contract claim requires the existence of a contract between the parties. *Oasis W. Realty, LLC v. Goldman,* 51 Cal.4th 811, 821 (2011) (noting that the first element of a breach of contract claim is "the existence of the contract"). However courts have split on whether HAMP TPPs constitute contracts. *Compare, e.g., Alimena v. Vericrest Fin., Inc.,* No. CIV. S12–0901 LKK/JFM, 2012 WL 6651201, at *8 (E.D.Cal. Dec. 20, 2012) (ruling that a TPP constitutes "an enforceable agreement to grant a permanent loan modification based on the borrower's compliance with the terms therein"), *and Jackson v. Ocwen*

Loan Servicing, LLC, No. 2:10–cv–00711–MCE–GGH, 2011 WL 587587, at *3 (E.D.Cal. Feb. 9, 2011) (finding that for purposes of defendants' dismissal motion plaintiffs pled that "HAMP is an enforceable contract, that they had performed contractual obligations under the HAMP, and that [d]efendant subsequently refused to perform"), *with Grill v. BAC Home Loans Servicing LP,* CIV No. 10–CV03057–FCD/GGH, 2011 WL 127891, at *4 (E.D.Cal. Jan. 14, 2011) (holding TPP does not constitute "a binding contract between plaintiff and [defendant] regarding a loan modification"). *See generally Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 559 n. 4 (7th Cir.2012) (noting that claims based on HAMP TPPs survive dismissal motions in federal courts about 40% of the time). This Court does not reach the question of whether a TPP constitutes an enforceable contract to grant permanent a modification and refrain from foreclosure since here there is no allegation that Plaintiffs' qualified for a HAMP TPP or permanent modification.

***4** At the time when Plaintiffs received their HAMP TPP in February 2010, loan "[s]ervicers were not required to verify financial information prior to the effective date of the trial period [plan]." Supplemental Directive 09–01, at 17; *see also Wigod,* 673 F.3d at 557; *Lucia v. Wells Fargo Bank, N.A.,* 798 F.Supp.2d 1059, 1069–70 (N.D.Cal.2011). Instead, servicers could "use recent verbal financial information to prepare and offer a Trial Period Plan," and later determine whether a homeowner met "all of the eligibility criteria for the HAMP." Supplemental Directive 09–01, at 18; *see also* Supplemental Directive 10–01, at 1. Since Defendants could offer Plaintiffs a HAMP TPP before verifying their eligibility for HAMP, Plaintiffs' TPP did not constitute a binding agreement to permanently modify their loan. *See Lucia,* 798 F.Supp.2d at 1069–70 (concluding that "at the time [p]laintiffs were offered Trial Period modifications, there was no promise that [p]laintiffs would be found eligible for permanent loan modification" since plaintiffs' eligibility remained subject to verification). In fact, the sequencing of this process, wherein homeowners first received TPPs and then were screened for eligibility, resulted in permanent modifications for "fewer than 15 percent of the 1.4 million homeowners who had been offered trial plans" in HAMP's first year. *Wigod,* 673 F.3d at 557 n. 2. Like many of those homeowners, Plaintiffs could not establish their documentary eligibility for HAMP. The TPP that Aquila and Carla Nugent received states that a homeowner's "representations in Section 1 [of the TPP must] continue to be true in all material respects" for a lender to be "obligated or bound." (TPP at 7–8.) Thus, to obtain a modification, Aquila and Carla Nugent had to certify and represent that "[t]here has been no change in the ownership of the Property since I signed the Loan Documents." *Id* . at 7; *see also Sutcliffe v. Wells Fargo Bank, N.A.,* 283 F.R.D. 533, 537 (N.D.Cal.2012) (recognizing the same). Aquila and Carla Nugent could not make this representation since the ownership of the property changed two years after the loan documents were signed, when they transferred an undivided 50% interest in the property to Andrew Nugent. (RJN Ex. 6.) Plaintiffs are therefore ineligible for the HAMP agreement that forms the basis of their breach of contract claim. Accordingly, the breach of contract claim is dismissed.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs allege Defendants breached the implied covenant of good faith and fair dealing by "making inaccurate calculations and determinations of Plaintiffs' eligibility for HAMP; failing to follow through on written and implied promises; failing to follow through on contract obligations; and failing to give permanent HAMP modifications." (SAC ¶¶ 53–56.) Wells Fargo argues that "[b]ecause Plaintiffs fail to allege the existence of a binding TPP agreement, Plaintiffs' breach of the implied covenant of good faith and fair dealing [claim] should be dismissed." (Wells Fargo Mot. 11:12–14.) Similarly, Freddie Mac argues that Plaintiffs' "claim for breach of the implied covenant of good faith and fair dealing fails for the lack of a contractual obligation." (Freddie Mac Mot. 10:12–13.) Plaintiffs rejoin that they allege in the SAC a claim for breach of the covenant of good faith and fair dealing since the TPP is a contract and the SAC "detail[s] a series of [Defendants'] actions and omissions that undermined [Plaintiffs'] ability to perform under the TPP." (Pls.' Opp'n to Freddie Mac 8:15–16.)

***5** The covenant of good faith and fair dealing is implied by law in every California contract. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.,* 2 Cal.4th 342, 371 (1992); *see also Steiner v. Thexton,* 48 Cal.4th 411, 419 (2010). Since the covenant of good faith and fair dealing is *implied* by contract, the covenant only exists if there is a contract. *Smith v. City & Cnty. of S.F.,* 225 Cal.App.3d 38, 49 (1990). "There is no obligation to deal fairly or in good faith absent an existing contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation,* 11 Cal.App. 4th 1026, 1032 (1992); *accord Keen v. Am. Home Mortg. Servicing, Inc.,* 664 F.Supp.2d 1086, 1101 (E.D.Cal.2009). Thus to state a claim for breach of the covenant of good faith and fair dealing, a plaintiff must allege both the existence of a contract and conduct that "frustrate[s the plaintiff's] right to receive the benefits of the agreement

actually made." *Guz v. Bechtel Nat'l Inc.*, 24 Cal.4th 317, 349 (2000) (emphasis omitted); *accord Keen,* 664 F.Supp.2d at 1101. The covenant itself "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz,* 24 Cal.4th at 349; *accord Appling v. State Farm Mut. Auto. Ins. Co.,* 340 F.3d 769, 779 (9th Cir.2003). "[I]f the [defendants'] decisions, however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant." *Guz,* 24 Cal.4th at 350.

Assuming, without deciding, that the TPP constituted an enforceable contract, to state a claim based on the implied covenant of good faith and fair dealing, Plaintiffs still must allege that Defendants frustrated Plaintiffs' "right to receive the benefits" of the TPP. *Id.* at 349. However, Plaintiffs cannot allege that Defendants frustrated their rights under the TPP since Defendants have shown that Plaintiffs were not eligible for a HAMP TPP or modification. The TPP required Plaintiffs to "compl[y] with their obligations" under the TPP, including representing "that there has been no change in ownership since the loan documents were signed." *Sarantapoulas v. Bank of Am., N.A.,* No. C 12–0564 PJH, 2012 WL 4761900, at *5, *4 (N.D.Cal. Oct. 5, 2012); *see also Sutcliffe,* 283 F.R.D. at 537 (recognizing that a HAMP TPP requires plaintiffs "to certify ... '[t]here has be[en] no change in the ownership of the Property since I signed the Loan Documents' "). This Plaintiffs could not do. Since Plaintiffs have not alleged *Defendants'* breach of "a substantive contract provision," Defendants' actions "however arbitrary ... are not precluded by the covenant." *Guz,* 24 Cal.4th at 350. Accordingly, Plaintiffs have failed to state a claim for breach of the implied covenant of good faith and fair dealing, and these portions of Defendants' dismissal motions are granted.

C. Promissory Estoppel

***6** Wells Fargo seeks to dismiss Plaintiffs' promissory estoppel claim, arguing that "[e]ven if the TPP did contain the promise Plaintiffs assert, they could not have reasonably relied on it in light of the various terms and conditions spelled out in the TPP." (Wells Fargo Mot. 12:16–17.) Freddie Mac similarly submits that the TPP did not contain "a clear promise ... because Plaintiffs knew at the time they submitted the TPP Agreement that they could not comply with [its] terms." (Freddie Mac Mot. 11:9–11.) Plaintiffs' promissory estoppel claim states that Defendants "made a representation [in the TPP] to Plaintiffs that if they returned the TPP Agreement executed and with supporting documentation, and made their TPP payments, they would receive a permanent HAMP modification." (SAC ¶ 62.) Plaintiffs also allege that Defendants foreclosed on their home without notice, while Plaintiffs were making payments under the HAMP TPP, and even though Freddie Mac's representative told Aquila Nugent he was eligible for a HAMP modification.

In California, a promise is enforceable absent consideration if the promisor should " 'reasonably expect' " the promisee to rely on the promise, the promisee does rely on the promise, and " 'injustice can be avoided only by enforcement of the promise.' " *Kajima/Ray Wilson v. L.A. Cnty. Metro. Transp. Auth.,* 23 Cal.4th 305, 310 (2000) (quoting *Restatement (Second) of Contracts* § 90); *accord Glen Holly Entm't, Inc. v. Tektronix, Inc.,* 352 F.3d 367, 381 (9th Cir.2003). While Plaintiffs' allegations are significant, they are insufficient to state a claim for promissory estoppel since Plaintiffs' reliance on the TPP's promise to supply a permanent modification and forestall foreclosure was neither "reasonable" nor "foreseeable" under the circumstances. *Sateriale v. R.J. Reynolds Tobacco Co.,* 697 F.3d 777, 792 (9th Cir.2012). The first sentence of Andrew and Carla Nugent's TPP letter states that "[i]f I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement." (TPP at 7; Pls.' Opp'n 5:19–21 (noting the same). Yet Plaintiffs could not make the Section 1 representations required by the first sentence of their TPP. (*See supra.*) Given Plaintiffs' facial ineligibility for the TPP, their reliance on the TPP's promise was not "reasonable and foreseeable." *Sateriale,* 697 F.3d at 792. Accordingly, Plaintiffs' promissory estoppel claim is dismissed.

D. Wrongful Foreclosure & Set Aside of Trustee's Sale

Each Defendant also seeks dismissal of Plaintiffs' claims for wrongful foreclosure and to set aside the trustee's sale, arguing these claims are "fatally defective" because Plaintiffs failed to tender the full amount owing on the loan. (Wells Fargo Mot. 6:3; Freddie Mac Mot. 6:3.) Plaintiffs respond generally that tender was unnecessary because the TPP modified the terms of Plaintiffs' loan so that there was no default. (Pls.' Opp'n to Freddie Mac 9:11–20; Pls.' Opp'n to Wells Fargo 10:1–10.) Plaintiffs allege in the SAC that Defendants wrongfully foreclosed on the property because Defendants did not (1) own "the loan, or the corresponding note," (SAC ¶ 68); (2) have "beneficiar[y] or representative of the beneficiary" status, (SAC ¶ 69); (3) contact Plaintiffs by telephone to assess their financial situation before foreclosing, as required by Cal. Civ.Code § 2923.5(a), (SAC ¶ 71); or (4) include a declaration of compliance with this

requirement, as required by Cal. Civ.Code § 2923.5(b). (*Id.*) Plaintiffs also allege in the SAC that they seek to set aside the trustee's sale because the deed of trust "was improperly assigned and/or transferred" and Defendants' interest in the note and deed of trust was "never acknowledged and recorded in violation of Civil Code § 2932.5." (SAC ¶¶ 79, 78.)

***7** To obtain the equitable set aside of a trustee's sale or maintain a wrongful foreclosure claim, Plaintiffs must allege that (1) Defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) Plaintiffs suffered prejudice or harm; and (3) Plaintiffs tendered the amount of the secured indebtedness or were excused from tendering. *Lona v. Citibank, N.A.,* 202 Cal.App. 4th 89, 112 (2011); *accord Solomon v. Auroroa Loan Servs. LLC,* No. 2:12–00209 WBS KJN, 2012 WL 4747151, at *5 (E.D.Cal. July 3, 2012).

"The first element [of this showing] may be satisfied by allegations that (1) the trustee or beneficiary failed to comply with the statutory procedural requirements for the notice or conduct of the sale; (2) the trustee did not have the power to foreclose; (3) the trustor was not in default, no breach had occurred, or the lender waived the breach; or (4) the deed of trust was void." *West v. JPMorgan Chase Bank, N.A.,* ––– Cal.Rptr.3d ––––, 2013 WL 1104739, at *10 (2013). Plaintiffs plead claims under the first two of these theories.

Plaintiffs allege in the SAC that Defendants failed to contact Plaintiffs by telephone to assess their financial situation before foreclosing and failed to include a notice of compliance with this obligation, as required by Cal. Civ.Code § 2923.5(a), (b). However, the recorded "trustee's deed upon sale recites that the trustee complied with the deed of trust and all applicable statutory requirements of the State of California," and "[n]o inconsistent recitals appear on the face of the trustee's deed." *West,* 2013 WL 1104739, at *12; RJN Ex. 11. Therefore Plaintiffs' § 2923.5 allegations concern "only procedural irregularities in the sale notice and procedure." *West,* 2013 WL 1104739, at *12.

Because Plaintiffs' claims for wrongful foreclosure and set aside under Cal. Civ.Code § 2923.5 are based on irregularities in the sale notice and procedure, to prevail on these claims, Plaintiffs must offer to tender "the full amount of the debt for which the property was security," unless an exception to the tender requirement applies. *Lona,* 202 Cal.App. 4th at 112 (requiring plaintiffs "to do equity before the court will exercise its equitable powers" granting wrongful foreclosure or set aside of a trustee's sale); *see also Raedeke v. Gibraltar Sav. & Loan Ass'n,* 10 Cal.3d 665, 671 (1974); *Barroso v. Ocwen Loan Servicing, LLC,* 208 Cal.App. 4th 1001, 1016 (2012).

California courts recognize exceptions to the tender requirement in set aside and wrongful foreclosure claims when (1) the underlying debt is void, (2) the foreclosure sale or trustee's deed is void on its face, (3) a counterclaim offsets the amount due, (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale, or (5) the foreclosure sale has not yet occurred. *E.g. Lona,* 202 Cal.App. 4th at 112–13 (outlining the first four exceptions to the tender requirement); *Pfeifer v. Countrywide Home Loans, Inc.,* 211 Cal.App. 4th 1250, 1280–81 (2012) (recognizing the fifth exception to the tender requirement). However, Plaintiffs do not allege in the SAC facts implicating these or other exceptions to the tender requirement. Since Plaintiffs do not allege that they "tendered ... or w[ere] excused from tendering" the amount of their indebtedness, *Lona,* 202 Cal.App. 4th at 104, Plaintiffs' wrongful foreclosure and set aside of the trustee's sale claims based on § 2923.5 are dismissed. *See Shuster v. BAC Home Loans Servicing, LP,* 211 Cal.App. 4th 505, 512 (2012) (sustaining demurrer of plaintiffs' wrongful foreclosure claim based on procedural irregularities where plaintiffs' complaint alleges neither "tender" nor "facts implicating these exceptions" to the tender requirement).

***8** Under the second theory, Plaintiffs assert that Defendants "did not have the power to foreclose," *Lona,* 202 Cal.App. 4th at 112, since Defendants did not own "the loan, or the corresponding note" and were not "beneficiaries or representatives of the beneficiary" under the note. (SAC ¶¶ 68, 69.) Defendants argue that the law governing non-judicial foreclosure in California is exhaustive, and "does not require production of the original note [or beneficiary status] as a basis for initiating nonjudicial foreclosure." (Wells Fargo Mot. 13:3–5; Freddie Mac Mot. 20–24.) Defendants are correct. California Civil Code Sections 2924 through 2924k establish a "comprehensive" and "exhaustive" statutory framework for nonjudical foreclosure sales. *Debrunner v. Deutsche Bank Nat. Trust Co.,* 204 Cal.App. 4th 433, 440 (2012); *I.E. Assocs. v. Safeco Title Ins. Co.,* 39 Cal.3d 281, 285 (1985) ("These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.") Nothing in this comprehensive framework for non-judicial foreclosure "precludes foreclosure when the foreclosing party does not possess the original promissory note." *Debrunner,*

204 Cal.App. 4th at 440. A "beneficial interest in or physical possession of the note" is unnecessary to confer "statutory authority to commence foreclosure." *Shuster,* 211 Cal.App. 4th at 511–12. Therefore, the foreclosing entities were not required to hold the note or be designated as beneficiaries, and these bases for Plaintiffs' wrongful foreclosure and set aside claims are dismissed.

Defendants also argue that Plaintiffs' § 2932.5 allegation is factually wrong and legally incorrect since the title records show otherwise and Cal. Civil Code § 2932.5 does not apply to deeds of trust. (Well Fargo Mot. 14:3–7; Freddie Mac Mot. 12:11–21.) Plaintiffs allege in their SAC that the note and deed of trust were "never acknowledged and recorded in violation of Civil Code § 2932.5." (SAC ¶ 78). "Section 2932.5 is inapplicable in the instant case" since this case concerns a deed of trust, not a mortgage. *Herrera v. Fed. Nat'l Mortg. Ass'n,* 205 Cal.App. 4th 1495, 1509 (2012); *see Calvo v. HSBC Bank USA, N.A.,* 199 Cal.App. 4th 118, 123 (2011) ("section 2932.5 does not apply to deeds of trust"); *see also Haynes v. EMC Mortg. Corp.,* 205 Cal.App. 4th 329, 336 (2012) (holding the same). Accordingly, Plaintiffs' claims premised on § 2932.5 are dismissed.

For the reasons stated, Defendants' dismissal motions concerning Plaintiffs' wrongful foreclosure and set aside of the trustee's sale claims are granted in full.

E. Violation of Cal. Civ.Code § 1572

Wells Fargo seeks dismissal of Plaintiffs' Cal. Civ.Code § 1572 claim, arguing that Plaintiffs do not "allege which of the [D]efendants made the purported misrepresentations, what they said, to whom, when, where, by what means, or what made the statement(s) false" as required by Rule 9(b). (Wells Fargo Mot. 15:4–7.) Freddie Mac echoes this argument, contending that Plaintiffs have not pled their allegations with the requisite specificity. (Freddie Mac Mot. 13:22–23). Plaintiffs allege in their SAC that Defendants are liable under § 1572 because Defendants "misrepresented to Plaintiffs that [Plaintiffs] qualified for a loan modification," "that [Defendants] intended to or were willing to enter into a loan modification," and that "[Defendants] would not foreclose" on Plaintiffs while the modification was in effect. (SAC ¶ ¶ 85–87.)

***9** The elements of a claim for fraud under Cal. Civ.Code § 1572 are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage. *Engalla v. Permanente Med. Grp., Inc.,* 15 Cal.4th 951, 974 (1997); *see also Schroeder v. Auto Driveaway Co.,* 11 Cal.3d 908, 917 (1974) (noting Cal. Civ.Code § 1572 "defin [es] fraud"). California fraud claims in federal court must satisfy Rule 9(b)'s heightened pleading requirements. *See Vess v. Ciba–Geigy Corp. USA,* 317 F.3d 1097, 1103 (9th Cir.2003). Thus a party must " 'state with particularity the circumstances constituting fraud or mistake,' including 'the who, what, when, where, and how of the misconduct charged.' " *Ebeid ex rel. United States v. Lungwitz,* 616 F.3d 993, 998 (9th Cir.2010) (quoting *Vess,* 317 F.3d at 1106). This heightened pleading standard is further heightened when a party pleads fraud against a corporation, since allegations of fraud against a corporation generally must include "the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto Ins. Co.,* 2 Cal.App. 4th 153, 157 (1991).

Plaintiffs have not met this heightened standard. Plaintiffs' fraud claim concerns Defendants' statements that Plaintiffs were eligible for a HAMP modification. However, Plaintiffs do not identify Defendants' misrepresentations with enough particularity to permit the reasonable inference that Plaintiffs "justifiably relied" on Defendants' statements, as is required to state a fraud claim. *Alliance Mortg. Co. v. Rothwell,* 10 Cal.4th 1226, 1248 (1995). Specifically, Plaintiffs "fail[ ] to allege facts or offer any argument as to how [they] could justifiably rely on a representation" to grant a HAMP modification that they knew was contradicted by the first sentence of the TPP. *See Intengan v. BAC Home Loans Servicing LP,* —— Cal.Rptr.3d ——, 2013 WL 1180435 (2013). Accordingly, this portion of Defendants' dismissal motion is granted.

F. Intentional Infliction of Emotional Distress

Defendants seek dismissal of Plaintiffs' claim for intentional infliction of emotional distress, arguing that Plaintiffs cannot establish " 'outrageous' and 'extreme' " conduct "or any of the other required elements" for this claim. (Wells Fargo Mot. 15:17; Freddie Mac Mot. 14:18–19.) Plaintiffs respond that "being forcibly removed from your residence in your underwear at gunpoint without legal justification is extreme and outrageous conduct." (Pls.' Opp'n to Freddie Mac 11:24–26.) Plaintiffs allege in their SAC that "Freddie Mac caused and directed ... the Solano County Sheriff's Department [to] remove [ ] Andrew Nugent from the property," (SAC ¶ 92), and that "[f]ive deputy sheriffs appeared with weapons" at

the property and "detained [ ] Andrew Nugent and his minor children." (SAC ¶ 93.)

***10** "A cause of action for intentional infliction of emotional distress exists when there is: '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " *Hughes v. Pair,* 46 Cal.4th 1035, 1050 (2009) (quoting *Potter v. Firestone Tire & Rubber Co.,* 6 Cal.4th 965, 1001 (1993)); *accord Lawler v. Montblanc N. Am., LLC,* 704 F.3d 1235, 1245 (9th Cir.2013). Further, "it must also appear that the defendants' conduct was unprivileged." *Ross v. Creel Printing & Publ'g Co.,* 100 Cal.App. 4th 736, 745 (2002) (quotation omitted).

"[C]ollection of a debt by its very nature often causes the debtor to suffer emotional distress." *Id.; accord Costa v. Nat'l Action Fin. Servs.,* 634 F.Supp.2d 1069, 1079 (E.D.Cal.2007). "Frequently, the creditor intentionally seeks to create concern and worry in the mind of the debtor in order to induce payment." *Bundren v. Superior Court,* 145 Cal.App.3d 784, 789 (1983). Although a creditor's actions are often calculated to create distress, debt collection is a privileged activity if it based on a good faith assertion of an economic interest by permissible means. *Mathis v. Pac. Gas & Elec. Co.,* 75 F.3d 498, 505 (9th Cir.1996); *Ross,* 100 Cal.App. 4th at 745 n. 4; *Restatement (Second) of Torts* § 46 comm. g. It is only a creditor's use of "outrageous and unreasonable" means of seeking payment that is unprivileged. *Ross,* 100 Cal.App. 4th at 748.

Plaintiffs' allegations do not involve "outrageous and unreasonable" conduct by Freddie Mac. *Id.* Plaintiffs' complaint describes "a creditor/debtor situation, whereby the defendants were exercising their rights under the loan agreements. There are no allegations that in conducting the foreclosure proceedings any of the [D]efendants threatened, insulted, abused or humiliated the [Plaintiffs]. Thus, the [Plaintiffs] cannot state a claim for intentional infliction of emotional distress." *Wilson v. Hynek,* 207 Cal.App. 4th 999, 1009 (2012); *see also Quinteros v. Aurora Loan Servs.,* 740 F.Supp.2d 1163, 1172 (E.D.Cal.2010) ("The act of foreclosing on a home (absent other circumstances) is not the kind of extreme conduct that supports an intentional infliction of emotional distress claim."). Accordingly, Plaintiffs' intentional infliction of emotional distress claim is dismissed.

G. Declaratory Relief

Plaintiffs seek a declaration that "Defendants do not have standing or any enforceable right to enforce the note ... so as to foreclose" on the property. (SAC 83.) Plaintiffs' declaratory relief claim is dismissed since Plaintiffs have not shown that Defendants lack "standing" or the "right ... to foreclose" on the property. *See supra* (dismissing each of Plaintiffs' claims).

V. CONCLUSION

***11** For the reasons stated, all of Plaintiffs' claims are dismissed. Plaintiffs are granted fifteen (15) days leave from the date on which this Order is filed to file an amended complaint amending the dismissed claims.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1326425

Footnotes

1 The letter is considered because it is attached to Plaintiffs' SAC and "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes." Fed.R.Civ.P. 10(c); *see also Hartmann v. Cal. Dep't of Corr. & Rehab.,* 707 F .3d 1114, 1124 (9th Cir.2013) (recognizing the same).

2 Wells Fargo argues that it notified Plaintiffs that their HAMP modification was denied, and it attaches to its Reply brief a letter dated April 29, 2010, informing Plaintiff and Carla Nugent that "we [Wells Fargo] are unable to offer you a Home Affordable Modification ." (Wells Fargo Reply, Ex. A.) However, this letter is not considered since it is submitted for the first time in connection with Wells Fargo's Reply and it is not a proper subject for judicial notice. *See Ojo v. Farmers Grp., Inc.,* 565 F.3d 1175, 1185 n. 13 (9th Cir.2009) (recognizing

that a movant should not introduce new facts in its reply brief); Fed.R.Evid. 201(b) (permitting judicial notice of a fact only if it "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). This private letter is not "available to the public," and accordingly, judicial notice is improper. *N. Cnty. Cmty. Alliance, Inc. v. Salazar,* 573 F.3d 738, 746 n. 1 (9th Cir.2009).

End of Document

Exhibit 14

2010 WL 11509237
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Karen PERKINS, an individual, Plaintiff,
v.
KAISER FOUNDATION HEALTH PLAN, INC., a corporation; Kaiser Foundation Hospitals, a corporation; Southern California Medical Group, a partnership; and Does 1 through 100, inclusive, Defendants.

CV 09-8499 SVW (FMOx)
|
Signed 03/03/2010

Attorneys and Law Firms

Benjamin Zeng, Charles T. Mathews, Deane L. Shanander, Charles T. Mathews and Associates, San Marino, CA, for Plaintiff.

B. Casey Yim, Murchison and Cumming LLP, Brian Keith Condon, Elizabeth G. Frank, Kristen Lynn Roberts, Lawrence Allen Cox, Arnold & Porter LLP, Los Angeles, CA, for Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS [37]

STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** This ERISA dispute centers on Defendants' refusal to provide certain medical treatments to Plaintiff at her home.

Defendants have filed a Motion to Dismiss Plaintiff's Second Amended Complaint. Defendants argue that Plaintiff's complaint fails to state a claim under ERISA because it fails to show that Defendants abused their discretion in administering the health plan.

Defendants' Motion is procedurally problematic. Defendants' Motion attempts to short-circuit the requisite factual inquiry into the complete Administrative Record, and fails to allow Plaintiff an opportunity to present extrinsic evidence of Defendants' conflicts of interest and procedural irregularities. In short, Defendants' Motion is DENIED.

II. FACTS [1]

Plaintiff, a former nurse who is on medical leave, is a member of a Kaiser Permanente health insurance plan. Plaintiff has a relatively long history of medical problems. She previously suffered from primary pulmonary hypertension, and now suffers from transient pulmonary hypertension, a less-severe diagnosis that could escalate into primary pulmonary hypertension with little warning and lead to a fatal heart attack.

The present dispute revolves around Plaintiff's condition called "hypokalemia," which involves dangerously low levels of potassium. In December 2008, Plaintiff received treatment for the hypokalemia and was discharged from the hospital. She continued receiving weekly infusions of nutrients and electrolytes at the hospital, but in April 2009 her potassium levels again dropped to a dangerously low level. She was discharged after ten days and was readmitted shortly thereafter while the Defendants sought to find the cause of her condition. She was then hospitalized from April 22, 2009 through July 1, 2009.

While Plaintiff was in the hospital, Defendants ultimately diagnosed Plaintiff's condition as having a "psychogenic" origin—that is, that her problem were psychological rather than physiological in nature. There are suggestions in the record (but not stated directly in the Second Amended Complaint) that Plaintiff drinks waters compulsively, which potentially contributes both to her potassium imbalance and to her general unwillingness to go to the hospital (given that the hospital appears to heavily limit her water intake, thus causing her emotional distress). Plaintiff asserts that one of Defendants' doctors, Dr. Jeffrey Hananel, who had previously treated Plaintiff's condition and was more sympathetic to Plaintiff's medical needs, was only allowed to treat her for two weeks and was not allowed to participate in Defendants' efforts to diagnose Plaintiff's condition. Plaintiff also asserts that Defendants' "psychogenic" diagnosis was based on an inadequate investigation (less than one hour total) that ignored the opinion of Plaintiff's psychologist (who had treated Plaintiff for three years) and Dr. Hananel (who had treated Plaintiff for longer than the diagnosing doctors). Plaintiff's psychologist apparently explained to Defendants that Defendants' proposed hospital treatment —which included 24 hour supervision and sever water

restrictions—would cause Plaintiff to suffer significant psychological distress.

***2** Plaintiff notes that, after some wrangling over whether Defendants would pay for her to visit an outside expert, her case was eventually reviewed by a UCLA nephrologist, Dr. Minthrie Nguyen, who is an expert in electrolyte imbalances. According to the Complaint, Dr. Nguyen determined that Plaintiff's problems were not psychological in origin and that excessive fluid intake was not the cause of Plaintiff's hypokalemia. She explained that, if the hypokalemia were caused by excessive water intake, Plaintiff would likely suffer from sodium imbalances as well the potassium imbalances that Plaintiff suffered. But Dr. Nguyen found no such sodium imbalance, suggesting that the water intake was not the cause of Plaintiff's potassium problems.

After Plaintiff received the "pyschogenic" diagnosis and was discharged from the hospital, Plaintiff's doctor, Dr. Hananel, sought to have Plaintiff's portable catheter line replaced in order to avoid problems with her IV infusions. Defendants refused to replace the catheter on the ground that Plaintiff would use it to infuse non-prescribed medications. Defendants insisted that any potassium-related infusions must be conducted in a hospital so that the infusions and treatment could be monitored by medical professionals.

In late September 2009, Plaintiff was permitted to visit UCLA for a consultation regarding the causes of her potassium imbalance. However, some of the lab results were lost; Plaintiff went for the tests a second time; some of the results were lost again; and Plaintiff, after a third set of tests (this time at Defendants' facility), finally obtained proper lab results on October 7, 2009. (Although these lab tests are discussed in the Complaint, it is unclear whether these tests are relevant to the benefits decision at issue. The Complaint does not explain the nature of the lab test's findings.)

According to documents submitted by Defendants,[2] Defendants made their decisions according to the following timeline: On September 3, 2009, one of Defendants' doctors, Richard Silverstein (Chief of the Department of Internal Medicine) filed a report based on Plaintiff's hospital record. This report recommended that Plaintiff's home-IV potassium infusions were not necessary or within the standard of care. On September 3 and 4, on the basis of Dr. Silverstein's report, Dr. Silverstein, Dr. Hananel, and Kaiser's Home Health Department (who collectively formed the "Expedited Review Committee") offered Plaintiff equivalent treatment in the hospital setting. On September 5, Defendant Kaiser Foundation Health Plan sent Plaintiff a denial letter, stating that home-based potassium IV was not "medically indicated" because it was "not the standard in the medical community and poses a safety risk." (Defs.' Request for Judicial Notice, Ex. E, at 1.) The denial letter offered Plaintiff a "higher level of care with admission to the hospital at the Panorama City Medical Center [which is a Kaiser facility], or at any other Kaiser Permanente hospital facility for evaluation, monitoring and development of an alternative treatment plan for your condition. Our review found that you have refused the offer of admission because you stipulated that you did not want a sitter to observe you and that you were upset with fluid restriction during a previous hospitalization which normalized your electrolytes.... [A] Kaiser Permanente Emergency Department or Urgent Care evaluation is available to you at any time if you are concerned and want to seek hospital admission." (Id.) Upon Plaintiff's appeal of this decision, Kaiser forwarded Plaintiff's file (including hospital charts from April 22, 2009 to July 1, 2009 and clinic charts) to the California Department of Managed Health Care (which regulates HMOs and health plans in California). The Department conducted an Independent Medical Review by an independent physician, who concluded that Defendants' denial of in-home IV treatment was medically appropriate.

***3** In this action, Plaintiff alleges that Defendants have wrongfully denied her health care benefits provided by and administered by Defendants. Plaintiff seeks reinstatement of medical benefits and declaratory relief clarifying her entitlement to future benefits.

Specifically, Plaintiff alleges that Defendants did the following in violation of the health plan:

- denied Plaintiff a referral to determine the nature of her potassium imbalance (Compl. ¶ 36(a));

- withheld medically necessary treatment and care (Compl. ¶ 36(b));

- denied authorization for Plaintiff to receive treatment at a non-Kaiser facility when Kaiser was not able to provide such treatment (Compl. ¶ 36(c));

- unreasonably delayed providing Plaintiff with benefits to which she was entitled (Compl ¶ 36(d));

- unreasonably investigated and processed Plaintiff's claim for benefits (Compl. ¶ 36(e));

- failed to promptly provide a reasonable explanation of the basis for denying Plaintiff's claim for benefits (Compl. ¶ 36(f));

- failed to provide adequate treatment and care to Plaintiff, whether at a Kaiser facility or a non-Kaiser facility (Compl. ¶ 36(g)).

It is unclear whether each one of these claims is actionable under ERISA (given that, unlike in a state-law insurance case, there is no relief under ERISA for "bad faith" claims handling). However, if proven, these allegations taken as a whole state a plausible claim that Defendants abused their discretion in denying Plaintiff's benefits.

III. LEGAL STANDARD

On a Motion to Dismiss, a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, —— U.S. ——, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)). "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. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 129 S.Ct. at 1951).

Generally, the Court's analysis is limited to the contents of the complaint. See Schneider v. Cal. Dept. Of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (citations omitted). However, "[w]hen a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal [i]s proper." Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted). Likewise, the Court "may ... consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint,[3] or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003).

IV. DEFENDANTS' MOTION

Defendants' Motion to Dismiss fails both because it is procedurally improper and because it lacks merit.

A. Procedural Problems

***4** Plaintiff's Opposition contains an accurate summary of the procedural inadequacies in Defendants' Motion to Dismiss. Plaintiff states that "Defendants' Rule 12(b)(6) Motion is really a motion for summary judgment." (Opp. at 3.) Plaintiff points out that Defendants have "proffered only [ ] cases ... that were decided either at the **summary judgment** phase or after a **bench trial on the merits**." (Id.)

In Reply, Defendants identify only two cases in which an ERISA benefits claim was decided on a Rule 12(b)(6) motion. In one case, Parrino v. FHP, Inc., 146 F.3d 699 (9th Cir. 1998) *superceded by statute on other grounds*, the court dismissed the complaint on the ground that ERISA completely preempted the plaintiff's state-law causes of action. The court relied on matters outside the complaint **solely** to determine that the plaintiff was in fact a "participant" in an employer-sponsored health plan for purposes of ERISA. The district court determined that the complaint was necessarily predicated on the existence of the employer's health plan and plaintiff's participation in it, and on this basis the court of appeals affirmed the district court's decision to take judicial notice of the employer's benefits plan and the plaintiff's application to join the plan. Id. at 705-06 & n.4. These judicially noticed facts provided a legal ground for granting the motion to dismiss the plaintiff's state-law causes of action, as those causes of action were completely preempted by ERISA. Notably, at no point in its opinion did the court address the merits of the plan's decision to deny benefits. See generally id. at 699-707.

In the other ERISA case decided on a motion to dismiss, Anderson v. The Bakery and Confectionary Union, 654 F. Supp. 2d 267 (E.D. Pa. 2009), the court was faced with the adequacy of the plaintiffs' allegations in stating that the defendant engaged in unlawful conduct in violation of the parties' ERISA plan. Notably, the court expressly stated that "**[a]t this procedural stage, it is not for the court to decide whether the Appeals Committee or the Board of Trustees actually abused its discretion by issuing the Plan Denial.**" Id. at 279 (emphasis added). The court was not faced with conflicting **factual** assertions regarding the abuse of discretion; rather, the court only needed to examine the sufficiency of the allegations **as pled by the plaintiffs**. In relevant part, the complaint asserted that the plan abused its discretion by treating similarly situated

employees in a disparate manner. The court, examining the facts pled, determined that the plaintiffs failed to allege facts supporting their conclusion that the plan abused its discretion. Although the plaintiffs stated the legal **conclusion** that the defendants had engaged in disparate treatment of the plan participants, the plaintiffs' **factual allegations** failed to support this conclusion. In light of Twombly and Iqbal, the court determined that "plaintiffs have not, in actuality, alleged that they were treated differently from similarly situated employees. At most, plaintiffs allege that they were treated differently from differently situated employees." Id. at 280. In short, the court determined that the plaintiffs' own allegations, taken as true, failed to support the plaintiffs' actual legal conclusion. Id. at 280-81.

Neither of these two cases is applicable here. In the present case, Defendants attempt to establish that they did not abuse their discretion by denying Plaintiff's request for benefits. In cases such as this one, it is appropriate to follow the near-uniform practice in ERISA cases of deciding the case on summary judgment or after a bench trial. (See, e.g., Pl.'s Opp. at 3 (citing cases).) As discussed *infra* with respect to the merits of Defendants' claims, an "abuse of discretion" review under ERISA requires an examination of the entire administrative record. This is rarely, if ever, appropriate on a Rule 12(b)(6) motion to dismiss, which focuses solely on the sufficiency of the allegations contained in the complaint. Thus, in the present case, the procedural problems overwhelmingly favor denial of Defendants' motion to dismiss.

***5** Aside from these general observations, a closer look at Defendants' Motion reveals the additional inadequacies and difficulties posed by the fact that Defendants brought a Motion to Dismiss rather than a Motion for Summary Judgment.

It is true, as Defendants emphasize, that on a Rule 12(b)(6) motion to dismiss, "[a] court **may** ... consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003) (emphasis added). But the Ninth Circuit's use of the word "may" suggests that this is **discretionary**. Furthermore (and more importantly), Defendants' evidence **omits** a number of documents that are referenced in the Complaint. On a motion to dismiss, the Court is not permitted to review **only** the evidence chosen by the Defendants; rather, to the extent that Defendants believe Plaintiff's allegations are defeated by the documents referenced in the Complaint, Defendants should submit **all of those documents**. It is both unfair and misleading for Defendants to submit certain documents while omitting others. [4] Notably, Defendants have failed to submit documents relating to Plaintiff's psychiatrist's opinion that Defendants' proposed treatment would cause "an emotional meltdown" (SAC ¶ 20); Defendants fail to submit the opinion of the doctor from UCLA, Dr. Nguyen, that Plaintiff's condition did not arise from a "psychogenic origin" (SAC ¶ 21); and Defendants fail to submit Dr. Hananel's opinion that the portable catheter was medically necessary (SAC ¶ 26). In short, Defendants seek to dismiss Plaintiff's complaint on the basis of a select body of favorable evidence.

Simply put, this is not how ERISA cases are decided. In order to conduct a proper abuse of discretion review of Defendants' actions, a review of the complete administrative record is necessary. Defendants' purported "administrative record" is not the entire and complete set of documentation; it consists only of denial letters, not the underlying records and documents supporting these denials. Defendants acknowledge that they have only submitted portions of the administrative record. (Defs.' Request for Judicial Notice at 2.) As the Ninth Circuit has explained, "[i]n the ERISA context, the administrative record consists of the papers the insurer had when it denied the claim." Montour v.Hartford Life & Acc. Ins. Co., 588 F.3d 623, 632 n.4 (9th Cir. 2009) (internal quotations and citation omitted). Defendants have not presented submitted these records.

Finally, and most importantly, Defendants fail to adequately authenticate and lay a foundation for the documents upon which they rely. Defendants provide a completely unauthenticated photocopy of the health insurance plan (Request for Judicial Notice Ex. 1); a number of photocopies of denial letters that are supported by the conclusory declaration of Jenny Rodriguez, a Kaiser records and compliance officer who prepared the administrative record, that some of the documents are a "true copy" (Request for Judicial Notice Ex. 2A, 2D, 2G); and a number of photocopies of denial letters that do not even contain a conclusory "true copy" affidavit (Request for Judicial Notice Ex. 2B, 2C, 2E, 2F). These documents are not properly authenticated. In United States v. Dibble, the court explained:

> ***6** A writing is not authenticated simply by attaching it to an affidavit.... The foundation is laid for receiving a document in evidence by the testimony of a witness with personal knowledge of the facts who attests to the identity and due execution of the document and, where appropriate, its delivery.

Dibble, 429 F.2d 598, 602 (9th Cir. 1970); accord Wright & Gold, 31 Federal Practice & Procedure Evidence § 7106 (2009) ("A document can be authenticated by a witness who wrote it, signed it, used it, or saw others do so.") Although the documents sworn by Rodriguez arguably satisfy this standard, the other documents (including the plan agreement itself) fail to meet this standard. Because the documents are not properly authenticated, the Court has discretion not to take judicial notice of them, as the Court has not been "supplied with the necessary information" required under Fed. R. Evid. 201(d). See Madeja v. Olympic Packers, LLC, 310 F.3d 628, 639 (9th Cir. 2002).

In summary, Defendants seek to use a Rule 12(b)(6) motion in an unprecedented manner to decide that the ERISA plan administrator did not abuse its discretion when denying Plaintiff's claim for benefits. Defendants seek to do so on the basis of selectively chosen, largely unauthenticated documents, and Defendants fail to submit all of the relevant documents referenced by the complaint. Defendants do not point to the deficiency of Plaintiff's factual allegations; rather, they seek to prevail on the merits without even providing the Court the evidence necessary to reach such a conclusion.

B. Defendants' Arguments on the Merits

With respect to the merits of Defendants' arguments, Defendants argue that the Second Amended Complaint fails to allege facts showing that Defendants abused their discretion in administering the ERISA plan and providing medical benefits to Plaintiff.

Defendants' arguments are essentially the *reverse* of the rule stated in Twombly—Defendants largely argue that Plaintiff's claim fails under Rule 12(b)(6) **because** Plaintiff failed to allege the proper "labels and conclusions." For example, Defendants argue that "it is not alleged that [Defendants] relied on a clearly erroneous factual finding in making [their] benefits determination, or interpreted the terms of the Group Agreement in a way that conflicted with the plain language of the plan." (Mot. at 1.) However, even if Plaintiff did not explicitly state that Defendants make a "clearly erroneous factual finding," the facts alleged in the Second Amended Complaint plainly lead to a plausible inference that Defendants made clearly erroneous factual findings that Plaintiff's condition was psychogenic and that Plaintiff's hospitalization required strict limitations on water consumption. Plaintiff's Complaint successfully alleges facts that state a cause of action, even if the Complaint fails to allege the proper labels and conclusions to state that cause of action. This is sufficient to satisfy Twombly and Iqbal. Accord Foam Supplies, Inc. v. Dow Chem. Co., No. 4:05CV1772 CDP, 2006 WL 2225392, at *4 (E.D. Mo. Aug. 2, 2006) ("Instead of searching for magic words or phrases, a court must determine whether the complaint alleges sufficient facts."); Weatherby v. RCA Corp., Nos. 85-CV-1613, 85-CV-1614, 85-CV-1615, 1986 WL 21336, at *3 (N.D.N.Y. May 9, 1986) (stating that plaintiffs "do not have to plead any magic words").

***7** Defendants argue that Plaintiff fails to show an abuse of discretion because Plaintiff fails to identify facts showing that: 1) Defendants unreasonably interpreted or applied the plan's language; 2) Defendants failed to comply with the procedures required under ERISA and the Plan's language; or 3) Defendants made a clearly erroneous factual finding. Defendants are correct that the Complaint does not address points one or two. However, Plaintiff adequately alleges that Defendants ignored relevant evidence when diagnosing Plaintiff's condition, and that this mis-diagnosis may have led Defendants to impose unreasonable conditions on Plaintiff's hospital treatment. Although Defendants are correct that the plan administrator is not required to give extra weight to the opinion of a treating physician, see Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003), it is also true that "Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." Id. Plaintiff's Complaint adequately alleges that Defendants completely ignored relevant evidence from Plaintiff's psychiatrist and treating physician.

The Court notes that, with respect to the third basis for "abuse of discretion" review, there is some confusion in the Ninth Circuit regarding the precise legal standard—some courts say that a plan abuses its discretion if it makes a "clearly erroneous" factual finding, while other courts say that a plan

abuses its discretion if it "fails to develop facts necessary to its determination." Compare Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) ("An ERISA administrator abuses its discretion only if it ... (3) relies on clearly erroneous findings of fact.") (emphasis added) with Anderson v. Suburban Teamsters of Northern Ill. Pension Fund Bd. of Trustees, 588 F.3d 641, 649 (9th Cir. 2009) ("[a] plan administrator abuses its discretion if it ... [3] **fails to develop facts necessary to its determination**") (emphasis added). Defendants argue only that their factual determinations were not "clearly erroneous." Defendants fail to argue under the "failure to develop necessary facts" theory. Defendants would be well-advised to address both standards, or at least to explain to the Court why it should apply only the "clearly erroneous" standard.

Regardless of which standard the Court applies, the Court must review the "**entire evidence**." See Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (emphasis added) (cited in Mot. at 10). Here, Defendants have not provided the "entire evidence," see *supra*, so the Court cannot adequately gauge the merits of Defendants' factual arguments.

In addition, Plaintiff asserts that she may be entitled to present extrinsic evidence regarding the extent of Defendants' conflicts of interest. Defendants argue that Plaintiff fails to allege that such a conflict exists. (See Mot. at 6-7 & n.1.) Again, Defendants turn Twombly on its head—it is true that Plaintiff failed to say *in haec verba* that Defendants had a "conflict of interest." But Twombly stands for the proposition that the Court must look at the facts alleged, not mere labels and conclusions. Plaintiff clearly has alleged a conflict of interest among the Defendants. Plaintiff states that the Defendants—Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and Southern California Permanente Medical Group—are jointly owned, controlled, and operated as an entity known as "Kaiser Permanente." (SAC ¶¶ 8-9, 12-13.) Plaintiff also alleges that the Defendants are responsible for every aspect of claims funding, administration, and the provision of medical services. This is a classic structural conflict of interest. Abatie, 458 F.3d at 965 ("[A]n insurer that acts as both the plan administrator and the funding source for benefits operates under what may be termed a structural conflict of interest.") Plaintiff also alleges that this conflict influenced Defendants' decision-making process and that Defendants made their health-care decisions in a manner aimed at saving costs. (SAC ¶ 1.) These facts plausibly state that Defendants had a conflict of interest and that the conflict affected Defendants' decision-making. It is eminently plausible that a health benefits plan that denies a participant's benefits is doing so in order to save costs. [5] Plaintiff has therefore adequately alleged facts permitting her to seek further discovery on the extent and effect of this conflict. See Abatie, 458 F.3d at 970 ("The district court may, in its discretion, consider evidence outside the administrative record to decide the nature, extent, and effect on the decision-making process of any conflict of interest.").

V. CONCLUSION

***8** Accordingly, Defendants' Motion to Dismiss is DENIED. As the Court stated at the March 1, 2010 hearing, the Court will hold a bench trial on June 1, 2010, at 9:00 a.m., and Defendants are ORDERED to turn over Plaintiff's complete medical history dating back to 2002.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2010 WL 11509237

Footnotes

1 The following facts are set forth in the Second Amended Complaint, and are taken as true for purposes of this motion.

2 See *infra* regarding the procedural problems posed by Defendants' reliance on extrinsic evidence in their Motion to Dismiss.

3 A document is "incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." Ritchie, 342 F.3d at 908.

4 In this regard, Plaintiff cites to Fed. R. Evid. 106, which provides that "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

5 Defendants dispute that their decisions were influenced by cost-saving motivations. Defendants argue that they would have saved more money costs by permitting Plaintiff to go forward with self-administered treatments. Defendants' assertion is plausible, but this does not necessarily mean that Plaintiff's allegations are implausible. This is a factual matter that is outside the scope of a 12(b)(6) motion.

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Exhibit 15

2010 WL 5313770
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. California.

Lorenzo SEGURA, Plaintiff,
v.
T. FELKER, et al., Defendants.

No. CIV S–08–2477 KJM P.
|
Dec. 20, 2010.

Attorneys and Law Firms

Lorenzo Segura, Calipatria, CA, pro se.

Richard B. Price, Office of the Attorney General, Sacramento, CA, for Defendants.

ORDER AND FINDINGS AND RECOMMENDATIONS

KIMBERLY J. MUELLER, United States Magistrate Judge.

***1** Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Defendant McGuire (defendant) is an employee of the California Department of Corrections and Rehabilitation (CDCR) at High Desert State Prison. Defendant's motion to dismiss is before the court.

I. *Sur-reply*

Defendant requests that plaintiff's sur-reply regarding the motion be stricken. Sur-replies concerning motions are generally not permitted, and plaintiff did not seek leave to file a sur-reply. *See* Local Rule 230(1). Therefore, the sur-reply will not be considered.

II. *Analysis*

This action is currently proceeding against defendant for an alleged violation of the Eighth Amendment. Plaintiff asserts defendant failed to protect him from an inmate assault occurring on January 31, 2007. Am. Compl. ¶ 24.

Defendant asserts plaintiff's complaint must be dismissed because plaintiff failed to exhaust administrative remedies with respect to his claim before filing suit. A motion to dismiss for failure to exhaust administrative remedies prior to filing suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. *Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir.2003). In deciding a motion to dismiss for a failure to exhaust non-judicial remedies, the court may look beyond the pleadings and decide disputed issues of fact. *Id.* at 1120. If the district court concludes the prisoner has not exhausted non-judicial remedies, the proper remedy is dismissal of the claim without prejudice. *Id.*

The Prison Litigation Reform Act provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). California prison regulations provide administrative procedures in the form of one informal and three formal levels of review to address plaintiff's claims. *See* Cal.Code Regs. tit. 15, §§ 3084.1–3084.7. Administrative procedures generally are exhausted once a prisoner has received a "Director's Level Decision," or third level review, with respect to his issues or claims. Cal.Code Regs. tit. 15, § 3084.5. All steps must be completed before a civil rights action is filed, unless a plaintiff demonstrates a step is unavailable to him. Exhaustion during the pendency of the litigation will not save an action from dismissal. *McKinney v. Carey,* 311 F.3d 1198, 1200 (9th Cir.2002). Defendants bear the burden of proving plaintiff's failure to exhaust. *Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir.), *cert. denied sub nom, Alameida v. Wyatt,* 540 U.S. 810, 124 S.Ct. 50, 157 L.Ed.2d 23 (2003).

Defendant presents evidence indicating plaintiff did not exhaust the prisoner grievance procedure with respect to the claim remaining in this action. [1] Specifically, plaintiff did not file any lower level or Director's Level appeal regarding any alleged failure to protect. *See* Decl. of W.N. Grannis & Ex. A; Decl. of T. Robertson & Ex. A. Plaintiff counters that he did file a grievance concerning defendant and the events of January 31, 2007. Exhibit A attached to plaintiff's opposition appears to be a copy of the grievance, dated November 28, 2007. *See* Opp'n at 14–15. [2] The grievance was screened out because it was filed well beyond the 15–day time limit for initiating an appeal. Cal.Code Regs. tit. 15, § 3084.6(c). [3] The Supreme Court has held that an agency's deadlines generally must be complied with to effect proper exhaustion

of administrative remedies. *Woodford v. Ngo,* 548 U.S. 81, 90, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). Because plaintiff filed his grievance after the deadline, without providing an explanation to excuse the timeliness requirement, and because he fails to point to anything else suggesting he properly exhausted administrative remedies with respect to his Eighth Amendment claim remaining in this action, this action must be dismissed.

***2** In light of the foregoing, the court need not reach defendant's argument that this action should be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's motion to strike plaintiff's sur-reply (docket # 30) is granted;

2. Plaintiff's October 19, 2010 sur-reply regarding defendant's motion to dismiss is stricken; and

3. The Clerk of the Court assign a district court judge to this case.

IT IS HEREBY RECOMMENDED that:

1. Defendant McGuire's motion to dismiss (docket # 23) be granted; and

2. This case be dismissed without prejudice for failure to exhaust administrative remedies.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir.1991).

All Citations

Not Reported in F.Supp.2d, 2010 WL 5313770

Footnotes

1 Defendant requests that the court take judicial notice of two declarations submitted in support of his motion. While the court may consider the declarations subject to the Rules of Evidence, the court does not take judicial notice of declarations; it takes judicial notice of facts not subject to reasonable dispute. *See* Fed.R.Evid. 201. In other words, a proper request for judicial notice includes identification of specific facts the court is requested to notice as true. Defendant does not specifically identify such facts in his request.

2 Page references are to those assigned by the court's CM/ECF system.

3 In documents attached to his opposition, plaintiff suggests that he actually had a year under California law to file his grievance. Opp'n at 21. This is incorrect. Non-inmates have one year within which to file a "citizen's complaint" against a CDCR peace officer. Cal.Code Regs. tit. 15 § 3391(b). Inmates filing a "citizen's complaint" against a peace officer—meaning a complaint against a CDCR peace officer that alleges misconduct—must still utilize the CDCR grievance and appeal procedure. Cal. Dep't of Corrections and Rehab. Operations Man. at § 54100.25.1. As indicated above, prisoner grievances must be filed within 15 days. *Cleveland v. Dennison,* No. 06cv1578–WQH (BLM), 2007 WL 4632095, at *5 (S.D.Cal. Dec. 4, 2007) (findings and recommendations), *adopted,* 2008 WL 667416 (S.D.Cal. Mar.6, 2008).

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Exhibit 16

2016 WL 9686987
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Niki–Alexander SHETTY, Plaintiff,
v.
WELLS FARGO BANK, et al., Defendants.

Case No. CV–16–01514 AB (MRWx)
|
Signed 08/19/2016

Attorneys and Law Firms

Niki–Alexander Shetty, Woodland Hills, CA, pro se.

Eric D. Houser, Kaitlyn Q. Chang, Houser and Allison APC, Long Beach, CA, for Defendants.

ORDER GRANTING MOTION TO DISMISS, DENYING MOTION TO STRIKE APPEARANCE, AND DENYING APPLICATION FOR ENTRY OF DEFAULT JUDGMENT

ANDRÉ BIROTTE JR., UNITED STATES DISTRICT COURT JUDGE

***1** Before the Court is the Motion to Dismiss and Request for Judicial Notice filed by Defendant Wells Fargo Bank, National Association, as Trustee Under the Pooling and Servicing Agreement for September 1, 2006 Securitized Asset Backed Receivables LLC Trust 2006–HE2 Mortgage Pass–Through Certificates, Series 2006–HE2 ("Wells Fargo"), filed on April 4, 2016. (Dkt. No. 10.) Also before the Court is Plaintiff Niki–Alexander Shetty's ("Plaintiff") Motion to Strike Appearance of Counsel as Unauthorized, filed on April 25, 2016. (Dkt. No. 27.) Both motions were opposed. Also before the Court is Plaintiff's Application for Entry of Default Judgment against defendant GF Mortgage, Inc. (Dkt. No. 32.) The Court previously took these matters under submission. After consideration of the parties' submissions, Court **GRANTS** the motion to dismiss, and **DENIES** the motion to strike and application for entry of default judgment.

I. BACKGROUND

The present action is the fourth lawsuit arising from a non-judicial foreclosure. The following background encapsulates not only the statement of facts contained in the Plaintiff's Complaint, but also includes relevant facts from the three previous lawsuits. (*See* Dkt. No. 11, Def.'s Request for Judicial Notice ("RJN") Exhs. 3, 8, 10.) The Plaintiff's Complaint is at times incoherent and difficult to follow. Given this difficulty, and applying a liberal interpretation of the Complaint in Plaintiff's favor, the Court puts forth its best attempt to chronicle and surmise the following events in the most accurate manner possible.

This case arises from a disputed foreclosure on a residential property in Burbank, California ("Subject Property"). The original property owner, and previous plaintiff in the first three actions, Elizabeth Hernandez ("Hernandez"), refinanced her home multiple times between 1993 and 2005. (Compl. at ¶ 16.) In 2006, Hernandez had the opportunity to refinance her debt for a significantly lower rate. (*Id.* at ¶ 17.) In response to this solicitation, Hernandez decided to consolidate her mortgage debt with her credit card debt and executed a new loan with lender GF Mortgage, Inc., DBA Greystone Financial ("GF Mortgage") (*Id.* at ¶¶ 20, 21.)[1] This loan comprised a promissory note secured by two separate deeds of trust. (*Id.* at ¶ 20.) The first loan was in the amount of $516,000 and the second loan was for $129,000. (*Id.*) Hernandez then defaulted on her home loan in 2008.[2] (Def.'s RJN, Exh. 2.) The notice of default was recorded on August 5, 2008. (Compl. at ¶ 48.)

***2** On October 3, 2008, Hernandez sent a notice of rescission to Barclays Capital, the entity she believed held the note for the mortgage. (*Id.* at ¶ 96.) It is unclear from the Complaint which lender held the note at this time, because GF Mortgage had assigned the deeds of trust to a different lender. Shortly thereafter, the notice of trustee's sale was recorded against Hernandez's property. (Def.'s RJN, Exh. 2.) This notice of sale set off the following sequence of events.

The foreclosure sale was initially set for December 9, 2008. (Def.'s RJN, Exh. 2.) Evidently, the property failed to sell on this date.[3] On January 28, 2009, Hernandez filed a lawsuit against various lenders including GF Mortgage, and the case was removed to the District Court for the Central District of California. (Def.'s RJN, Exh. 3, docket from *Elizabeth Hernandez v. GF Mortgage, Inc. et al.*, Case No. 2:09–cv–00681–ODW–JWJx (filed C.D. Cal. Jan. 28, 2009)). This lawsuit disrupted the foreclosure process, and for purposes of this order is referred to as **"Action 1"**. The following year, in January of 2010, Hernandez filed for bankruptcy. (Def.'s RJN, Exh. 5.) On April 30, 2010 the District Court returned

a judgment in Action 1. (Def.'s RJN, Exh. 4.) The Court granted summary judgment in favor of defendants, ruling against Hernandez on the merits of her claims. (*Id.*)

On January 27, 2011 another notice of default and election to sell was recorded against Hernandez. (Def.'s RJN, Exh. 7.) Although it's unclear exactly when Wells Fargo became the assignee of this note, in the most recent action regarding this case, the District Court for the Southern District of New York found that at the time of this recording the note had been assigned to Wells Fargo. *See* SDNY Order p 3.

On November 26, 2012, Hernandez brought another lawsuit against the lenders. (RJN, Exh. 8, docket from *Elizabeth Hernandez v. Wells Fargo Bank, N.A., et al.*, Case No. EC059728 (filed Sup. Ct. Los Angeles Cty, Jul. 5, 2013) (hereafter **"Action 2"**)). This time, the case was heard in the Superior Court of California, County of Los Angeles. Hernandez alleged eleven causes of action, including fraud and intentional misrepresentation by the various lenders named in the action. (*Id.*) These claims were all closely related to and derived from the original non-judicial foreclosure (deed of trust) dispute. Wells Fargo was named as one of the defendant lenders. (*Id.*) On June 14, 2013, the Superior Court sustained the Defendants' demurrer, and Hernandez lost her case on the merits. *See* SDNY Order p. 4 (describing the opinion from the California Superior Court "Action 2"). The Superior Court held that the Plaintiff failed to state a claim for relief, and failed to plead her claims with particularity. (*Id.*) Each of the eleven claims brought in that action was dismissed without leave to amend.

On June 17, 2014 the property was finally foreclosed upon and sold at a foreclosure sale to Wells Fargo for $612,000. (Def.'s RJN, Exh. 9.) The total outstanding debt on the loans was a combined $836,119.85. (*Id.*)

On September 23, 2014, Hernandez filed a third lawsuit, this time in the District Court for the Southern District of New York. (RJN, Exh. 10, docket from *Elizabeth Hernandez v. Wells Fargo Bank, N.A. et al.*, Case No. 1:14–cv–07701–VEC (S.D.N.Y. Mar. 2, 2016) (hereafter **"Action 3"**)). While this action was still pending, on February 10, 2016 Hernandez sold her property and conveyed her interest in the property via grant deed to the present Plaintiff, Satish Shetty ("Plaintiff"). (Compl. at ¶ 156; Exh. A.) Wells Fargo contends that this grant deed was illusory and did not convey any property interest to Plaintiff because Hernandez no longer owned the property after the foreclosure sale was consummated approximately 18 months prior to this conveyance.[4] On March 1, 2016, the New York court returned a judgment dismissing Hernandez's case with prejudice on the ground that all of her claims were res judicata because they were either previously adjudicated or were derived from claims already adjudicated in Action 2, the litigation in the Superior Court of California. *See* SDNY Order.

***3** On March 4, 2016, Plaintiff filed the present action (**"Action 4"**). Plaintiff essentially claims that Hernandez was an unsophisticated party who fell victim to improper lender solicitation when she refinanced in 2006. (*See* Compl. at ¶¶ 17–19.) Plaintiff purports to bring his claims as a privy and assignee of original property owner and Plaintiff Hernandez.[5]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), the court may dismiss a complaint if it fails to state a claim upon which relief may be granted. To withstand a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007). These "factual allegations must be enough to raise a right to relief above the speculative level." (*Id.*)

In considering a Rule 12(b)(6) motion, 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). When ruling on the motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

While considering the merits of the claims presented on a motion to dismiss, the court can only consider matters contained within the pleadings. Fed. R. Civ. P. 12(d). However, the court may consider matters beyond the pleadings so long as they are subject to judicial notice and comport with Federal Rule of Evidence 201. *See Dancy v. Aurora Loan Services, LLC*, 2011 WL 835787, at *1 (N.D. Cal. Mar. 4, 2011). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that

it is either (1) generally known within the trial court's territorial jurisdiction; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Dancy,* 2011 WL 835787 at *4; *see also* Fed. R. Evid. 201(b).

Rule 12(b)(6) also allows a court to dismiss any claim in the complaint *sua sponte* if it appears that the plaintiff cannot prevail on the claim as alleged. *See Omar v. Sea–Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) ("A trial court may dismiss a claim sua sponte under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief."). Upon dismissal, leave to amend a complaint should be freely granted. *See* Fed. R. Civ. P. 15(a). However, the Court retains its discretion to deny a plaintiff leave to amend the complaint when alleging additional facts would fail to cure the original deficiency. *See Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

III. DISCUSSION

A. The Plaintiff's Motion to Strike Counsel As Unauthorized is DENIED.

***4** Before addressing the merits of the 12(b)(6) Motion to Dismiss, the Court will resolve the Plaintiff's Motion to Strike.

The Court **DENIES** the Plaintiff's Motion to Strike Appearance of Counsel as Unauthorized because this Motion fails to meet the requirements of Local Rule 7–3. In addition to this local rule violation, any previous error that existed in the filing of Certificate of Interested Parties ("COIP") was corrected when Plaintiff filed an amended COIP correcting those errors. See Dkt. Nos. 17 (amended COIP), 12 (original COIP stricken by the court). Plaintiff's motion based the initial COIP is unfounded and is therefore **DENIED**.

B. Requests for Judicial Notice

Judicial notice as defined by the Federal Rules of Evidence permits notice of adjudicative facts only. *See* Fed. R. Evid. 201(a). "Adjudicative facts are simply the facts of the particular case ... If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite" in this determination. Advisory Notes to Fed R. Evid. 201. In adjudicating a motion to dismiss, the Court can look to materials beyond what is included in the pleadings if they are exhibits attached to the Complaint or incorporated by reference in the pleadings. *See Swartz v. KMPG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Both the Plaintiff and Defendant seek judicial notice of certain exhibits attached to their pleadings. If Notice is granted, the Court is permitted to look beyond the pleadings without converting the motion to a motion for summary judgment

1. Plaintiff's Request for Judicial Notice

Plaintiff asks the Court to take judicial notice of two exhibits. Exhibit No. 1 is *Jesinoski v. Countrywide Home Loans,* 135 S. Ct. 790, 190 L.Ed. 2d 650 (2015). The Court **DENIES** this request because the Court does not need to take judicial notice of a Supreme Court opinion that can easily be located and cited by the Plaintiff.

Further, the Court also finds that this opinion does not change the analysis of the case before us, nor does it revive any claims from the previous res judicata rulings. This case is irrelevant to the claims presented and not instructive to the Court's analysis. The Plaintiff has misinterpreted the rule in *Jesinoski* as implicating the merits of the case he presents, and the Court does not find it instructive.

The second item Plaintiff asks to judicially notice is the notice of rescission that Hernandez filed with the County Recorder on November 4, 2008. *See* Pl.'s RJN Exh. 2. The Court will take notice of the existence and authenticity of this document, but this notice does not establish the validity of the rescission or give rise to any legal conclusions. *See Swartz v. KPMG LLP*, 476 F.3d at 756, 763; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001) *impliedly overruled on other grounds in Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002) (holding that matters of public record may be noticed by the court upon consideration of a motion to dismiss). The Court will take Notice that Plaintiff Hernandez attempted to rescind the loan, but this does not establish whether the rescission is effective.

2. Defendant's Request for Judicial Notice

***5** Defendant requests judicial notice of the following ten documents:

1. April 2006 Deed of Trust (Def.'s RJN, Exh. 1)

2. Notice of Trustee's Sale, recorded on November 20, 2008 (Def.'s RJN, Exh. 2)

3. Court docket from Action 1, *Elizabeth Hernandez v. GF Mortgage Inc.*, et al., Case No. CV–09–00681–ODW–JWJx (filed C.D. Cal. 1/28/2009) (Def.'s RJN, Exh. 3)

4. Judgment in Action 1 (Def.'s RJN, Exh. 4)

5. Voluntary Petition for Bankruptcy filed by Hernandez on April 8, 2010 (Def.'s Exh. 5) [6]

6. Order Dismissing Plaintiff Hernandez's Chapter 7 Bankruptcy Case on April 30, 2010 (Def.'s RJN, Exh. 6)

7. Notice of Default, recorded on January 27, 2011 (Def.'s RJN, Exh. 7)

8. Court docket from Action 2, *Elizabeth Hernandez v. Wells Fargo Bank, N.A., et al.*, Case No. EC059738, filed 11/26/2012 in Sup. Ct. Los Angeles County (Def.'s RJN, Exh. 8)

9. Trustee's Deed Upon Sale, signed by the trustee and recorded on July 17, 2014 (Def.'s RJN, Exh. 9)

10. Court docket from Action 3, *Elizabeth Hernandez v. Wells Fargo Bank, N.A., itself and trustee and Ocwen Loan Servicing, LLC*, Case No. CV–14–07701–VEC (filed S.D.N.Y. 9/23/2014) (Def.'s RJN, Exh. 10)

All of these documents are either orders and/or judgments issued by other courts, or matters of public record. They are also essential to the Plaintiff's complaint. *See Terry v. O'Donnell*, 797 F.2d 1346–1351 (9th Cir. 1984) (matters of public record are appropriate for Judicial Notice); *see also Alicea v. GE Money Bank*, No. C 09–00091 SBA, 2009 WL 2136969, at *2 (N.D. Cal. July 16, 2009) ("The Court may consider documents referred to by the Complaint if they are authentic and central to plaintiff's claim.") (internal quotations omitted).

Unlike the Requests for Judicial Notice made by the Plaintiff, the Exhibits offered by the Defendant concerning case dockets and judgments are relevant and appropriate for notice because the Court needs to take account of the prior litigation history that surrounded the claims and parties at issue. The Plaintiff's argument that these documents are irrelevant and should not be given Judicial Notice fails because each and every Exhibit directly relates to the foreclosure of the subject property. These Exhibits concerning the court opinions are of particular relevance to this case because Wells Fargo's res judicata defense is predicated upon the claims and court rulings from prior cases.

It is also worth noting that Plaintiff concedes that the April 2006 Deed of Trust (RJN Exh. 1) is proper for judicial notice because it is a true and correct copy. See Pl.'s Opp'n (Dkt. No. 26) 2:15–21. Given this, it is illogical for the Plaintiff to accept the authenticity or veracity of one public record, while maintaining that other public records less favorable to his case are inauthentic and not fit for notice.

Therefore, the Court **GRANTS** Defendant's request for judicial notice. However, the Court also notes that Defendant's RJN was incomplete or misleading in several respects. For example, it omitted the SDNY Order, so the Court itself had to locate it. Similarly, the RJN identified Exh. 3 as a "lawsuit," when in fact it is only a docket sheet and reflects little about the action. Again, the Court had to locate and access the necessary documents, like the complaint, on PACER to understand what was actually litigated in this action.

C. Defendant's Motion to Dismiss is GRANTED.

***6** Defendant moved to dismiss Plaintiff's Complaint on numerous grounds. Although the Motion did not include an extensive discussion of res judicata, this ground is dispositive. Therefore, the Court will address only res judicata and one alternative ground for dismissal.

1. Res Judicata

Within the constructs of a Rule 12(b)(6) motion to dismiss, a defendant can raise the affirmative defense of res judicata. Res judicata, or claim preclusion, is rooted in the common law, and is made available as a tool for defendants to bar previously litigated claims, and for the court to conserve resources and ensure full faith and credit is given to a prior court's ruling. *See* 28 U.S.C. § 1738; *see also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336 (2005). Res judicata is a 'judge made' doctrine that in substance operates similarly between the federal and state courts. Modernly, res judicata encompasses the legal theories of 'claim preclusion' and 'issue preclusion', where "the cause

is merged into the judgment and may not be asserted in a subsequent lawsuit." *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896–897 (2002).

In California, the applicability of res judicata is determined using the primary rights theory. *See San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement Sys.*, 568 F.3d 725, 734 (9th Cir. 2009) (citing *Crowley v. Katleman*, 8 Cal. 4th 666, 881 P.2d 1083 (1994), *as modified* (Nov. 30, 1994)). "If two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* "California courts apply res judicata when '(1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.' " *Tobin v. Nationstar Mortgage, Inc.*, 2016 WL 1948786, at *5 (C.D. Cal. May 2, 2016) (citing *Boeken v. Phillip Morris USA, Inc.*, 48 Cal. 4th 788, 797 (2010)). Further, res judicata applies to more than just identical claims asserted in prior litigation, but also to claims that are so similar to or derivative of those claims alleged in the prior proceeding, that they should have been included and asserted in the prior case. *See Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002).

The present case is the fourth time Plaintiff or his predecessor Hernandez have brought essentially the same action. Although the Plaintiff may assert that the claims are discrete, the Court finds that the five primary causes of action alleged in the Complaint are all either identical to or derivative of claims that were previously decided in the District Court for the Central District of California (Action 1), the California Superior Court for the County of Los Angeles (Action 2), and the District Court for the Southern District of New York (Action 3).

Furthermore, case law proffered by the Plaintiff regarding TILA is irrelevant to the claims presented here because in Action 3 the District Court in New York decided that the original loan transaction described on the April 2006 Deed of Trust is a refinance, and a refinance is not subject to TILA's right of rescission. *See* 15 U.S.C. § 1635(e)(1),(2) (transactions defined as a refinance or consolidation under 15 USCA § 1602(w) are exempt from TILA rescission rights). Accordingly, res judicata compels this Court to honor the prior court's ruling.

2. Plaintiff Shetty and Plaintiff Hernandez are Privies.

***7** As mentioned above, res judicata is a bar to re-litigation when a new Plaintiff brings identical or derivative claims to Court and that new Plaintiff is a privy of the previous Plaintiff. *Boeken,* 48 Cal. 4th at 809. Privity connects the first Plaintiff to a subsequent plaintiff, and precludes a Plaintiff from undercutting the policy goals of res judicata by substituting another to bring its claim. Here, Plaintiff Shetty asserts that he is an assignee and in privity with the previous Plaintiff Hernandez because she deeded him her interest in the subject property. (*See* Compl. at ¶ 6–8.) The Court will not analyze the merits of whether this new Plaintiff has standing to sue as a valid assignee of claims and interest. However, assuming that Plaintiff is in fact a privy of Elizabeth Hernandez, as Plaintiff asserts he is, then Plaintiff's present claims are dependent on this established privity. However, because Hernandez's claims were litigated and defeated in previous courts of competent jurisdiction, Plaintiff by way of privity is also bound to these rulings. Therefore, as her privy, Plaintiff is barred from re-litigating these identical and derivative claims surrounding the April 2006 Deed of Trust.

Because Shetty is a privy of Plaintiff Hernandez, and the claims he asserts are in substance the same claims, the Court finds this Plaintiff to be a privy of the previous Plaintiff to this initial dispute. Even if these claims were found to be superficially distinct, Hernandez herself should have asserted any claims arising from the Subject Property foreclosure in previous actions, for "California, as most states, recognizes that the doctrine of res judicata will bar not only those claims litigated in a prior proceeding, but also claims that could have been litigated." *Palomar v. Mobilehome Ass'n v. City of San Marcos*, 989 F.2d 364 (9th Cir. 1993).

Further, regarding the privity of Wells Fargo to previous Defendants, Wells Fargo is named in Action 2 and Action 3, and is again named as the Defendant in this action. Although Wells Fargo was not named in Action 1, it appears that Wells Fargo was in privity to a named defendant in that action, GF Mortgage, by way of the Deed of Trust assignment from GF Mortgage. Given that all the parties are the same or in privity to each other, this factor is satisfied, and the present claims are barred.

3. The Present Claims Are the Same as the Claims Litigated in Prior Suits.

Plaintiff in this suit ("Action 4") brings five claims against Defendant. (1) Rescission Pursuant to 15 U.S.C. § 1601, 1640, 1635 et. seq., 12 C.F.R. 226 Cal Civ. Code § 1689(b)(5); (2) Wrongful Foreclosure; (3) Cancellation and Expungement of Written Instruments; (4) Quiet Title; and (5) Declarative Judgment. (Compl. at 1.)

In applying the primary rights test, the Court first looks to whether any of these claims are identical, or similar enough to be derivative of a claim in the previous action.

First, Plaintiff's current claim for "Rescission Under TILA" is identical to the claims entitled "Rescission" and "Violations of the Truth in Lending Act" that Hernandez asserted in Action 1. *See* Compl. in Case No. 09–00681 (Dkt. 1). The present claims and those in Action 1 are substantively identical in that they seek the same relief for the same alleged misconduct arising out of Hernandez's 2006 refinance. The District Court granted summary judgment in Action 1, so Hernandez already lost these claims on the merits. As a result, any additional claims that Plaintiff may seek to attach within the frame work of the loan rescission grievance should have been brought in the first action.

Second, the "Wrongful Foreclosure" claim was in effect already adjudicated in Action 2 before the California Superior Court. There, Hernandez claimed "Fraud," "Deceit," and "Intentional Misrepresentation" among eight other causes of action. Although she did not entitle any claim "Wrongful Foreclosure," she asserted the same injury that the current Plaintiff pleads here. Under the "Primary Rights Test," this same injury is sufficient for res judicata. The Superior Court in Action 2 sustained the defendants' demurrer and dismissed these claims without leave to amend. *See* SDNY Order p. 4. Previous to that lawsuit, the District Court in Action 1 granted ruled summary judgment in favor of the Defendant for "Fraud." Finally, in the most recent litigation, the District Court in Action 3 found that the claim asserted there "seeks redress for the same injury of wrongful collection and foreclosure on the same mortgage loan; thus, this claim [for wrongful foreclosure], too, is part of the same cause of action." SDNY Order p. 8. Consistent with these findings, this claim is also barred in this action.

***8** Third, the "Cancellation and Expungement of Written Instruments" claim was asserted by Hernandez and defeated on summary judgment in the Action 1. Additionally, this claim is derivative of the Wrongful Foreclosure claim, and based upon the same factual allegations as asserted in the previous actions. This claim should have been asserted in one of the previous actions.

Fourth, the "Quiet Title" claim was also asserted in the second and third actions by Hernandez, and each time the claim failed on the merits. Plaintiff now asserts the same claim, and by operation of res judicata this claim is precluded.

Finally, the "Declarative Judgment" request was asserted and defeated on the merits upon dismissal in Action 2. This request for declaratory judgment is also entirely duplicative and derivative of the substantive claims in adjudicated in the previous three actions. For Plaintiff to obtain declaratory relief, he would have to prevail on an underlying substantive claim. Unfortunately for Plaintiff, all of the underlying substantive claims are barred by res judicata, so Plaintiff's fifth and final claim is also barred.

4. The Prior Cases Ended in Final Judgments on the Merits.

The next factor to analyze is whether rulings in prior court proceedings were judgments on the merits. All three previous actions were adjudicated on the merits: Action 1 was resolved when the court granted summary judgment against the Plaintiff; Action 2 was resolved when the court sustained the defendant's demurrer; and Action 3 was resolved when the court granted the defendants' motion to dismiss (on res judicata grounds). All three are adjudications on the merits, and all of Plaintiff's claims in this action were already litigated in the previous three actions. Therefore, applying res judicata to all of Plaintiff's claims in this action is appropriate.

If Hernandez, the Plaintiff in any of the three previous actions, truly believed that any of those judgments was erroneous, the appropriate step was to file an appeal. Instead the Plaintiff, a privy of Hernandez, attempts to re-litigate this matter with creative variations of the original claims asserted. The doctrine of res judicata prevents such tactics.

5. Plaintiff's Claims Also Fail Because he Does Not Allege Facts Satisfying the Tender Rule.

Defendant is correct when it cites the tender rule as applicable California law in this case. *See United States Cold Storage v. Great W. Sav. & Loan Assn.*, 165 Cal. App. 3d 1214, 1225 (1985) (defining the tender rule as, "[I]t is sensible to require that a trustor, whose default to begin with resulted in the foreclosure, give proof before the sale is set aside that he now can redeem the property"). California has adopted the tender rule from the rule of equity in common law to apply to specific foreclosure scenarios. The case law is particularly instructive regarding the application of the tender rule to actions seeking to set aside a foreclosure sale. "[A] growing number of federal courts have explicitly held that the tender rule only applies in cases seeking to set aside a completed sale, rather than an action seeking to prevent a sale in the first place." *Barrionuevo v. Chase Bank, N.A.*, 885 F. Supp. 2d 964, 969 (N.D. Cal. 2012). More specifically, in California, "[i]t is settled that an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." *Arnolds Management Corp. v. Eischen*, 158 Cal.App.3d 575, 578 (1984) (citing *Karlsen v. America Sav. & Loan Ass'n*, 15 Cal. App. 3d 112, 117 (1971)). Here, Plaintiff seeks to set aside a foreclosure sale that was carried out in 2014. Part of Plaintiff's allegations involve irregularities in the sale notice and procedure, including the assignability of the Deed of Trust. Assuming Plaintiff could otherwise pursue any of his claims to reverse the foreclosure sale, Plaintiff has not alleged that he could tender the amount due in loans to pay off the note for the property. Plaintiff fails to address this point, and appears to want to rescind a loan without giving back the money he borrowed or alternatively the property of which he claims ownership. Because all of Plaintiff's claims appear to involve some attempt to reclaim ownership of the property, they trigger the tender rule. Because Plaintiff has not pled that he can tender the amount due, he has not adequately pled his claims.

D. Plaintiff's Request for Default Judgment Ruling Against GF Mortgage, Inc., is DENIED.

***9** The last motion to be resolved by the Court is the application for a default judgment ruling against the remaining defendant named in the Complaint, GF Mortgage. The Court **DENIES** application for default judgment. Plaintiff asserts that GF Mortgage is a defunct corporate entity, and has failed to answer its Complaint. Assuming this allegation is true, it raises the question of whether a default judgment should be entered at all, or whether such an order would be moot. But setting such issues aside, default judgment is unavailable because, like Plaintiff's claims against Wells Fargo, Plaintiff's claims against GF Mortgage are barred by res judicata. In Action 1, Plaintiff named GF Mortgage as a defendant, and as discussed above, Plaintiff's claims here are the same claims that were adjudicated in Action 1. Because res judicata bars relitigating these claims, Plaintiff cannot obtain a default judgment on them. Plaintiff's motion for default judgment is therefore **DENIED**.

IV. CONCLUSION

The Court has liberally construed the Plaintiff's Complaint and read his allegations in a light most favorable to the Plaintiff. This effort has shown that all of Plaintiff's claims were already litigated on the merits in the three previous actions filed by Plaintiff's predecessor-in-interest. Therefore, all of Plaintiff's claims are already settled and barred by the doctrine of res judicata. The Court therefore **GRANTS** Wells Fargo's Motion to Dismiss, and **DENIES** Plaintiff's Request for Default Judgment. The Court also **DENIES** Plaintiff's Motion to Strike.

Because no amendment can overcome the bar of res judicata, Plaintiff's Complaint is hereby **DISMISSED WITH PREJUDICE**.

All Citations

Not Reported in Fed. Supp., 2016 WL 9686987

Footnotes

1 Plaintiff disputes that this action qualifies as a re-finance, but as discussed later, the District Court for the Southern District of New York already ruled that this consolidation was a refinance. *See Elizabeth Hernandez*

v. Wells Fargo Bank, N.A. et al., Case No. 1:14–cv–07701–VEC (S.D.N.Y. Mar. 1, 2016), Order at Dkt. No. 47. Unfortunately, Wells Fargo did not provide the Order itself, but the Court located it on PACER and takes judicial notice of it. Hereinafter, the Court will refer to it as the "SDNY Order."

2 Default was acknowledged through Notice of Trustee Sale, dated on November 6, 2008, attached in Def.'s RJN, Exh. 2.

3 As discussed below, the subject property was finally sold to Wells Fargo in June, 2014. (*See* Def.'sRJN, Exh. 9).

4 Plaintiff claims that the original Deed of Trust was rescinded or should have been rescinded, and by operation of this rescission the foreclosure was wrongful and never consummated. Plaintiff asserts Hernandez maintained title until she conveyed it to him via grant deed. This assertion is contradicted by the Trustee's Deed Upon Sale. (*See* Compl. Exh. AB).

5 Significant portions of Plaintiff's Complaint are incoherent, unorganized, and at times appear contrary to sound logic and reasoning. The Court has put forth a great deal of time and effort to recount the facts and allegation in the most accurate and appropriate manner, as well as resolve the Motions according to the Court's best understanding of the surrounding context and claims asserted.

6 Plaintiff's Request for Judicial Notice misidentified this document as a dismissal of Defendant MERS from Action 1. The Court's list corrects this error.

End of Document

Exhibit 17

2018 WL 1997306
United States District Court, D. Montana,
Billings Division.

UNITED STATES of America, Plaintiff,
v.
WOODY'S TRUCKING, LLC, and
Donald E. Wood, Jr., Defendants.

CR 17–138–BLG–SPW
|
Signed 04/27/2018

Attorneys and Law Firms

Eric E. Nelson, U.S. Environmental Protection Agency—OCEFT, Denver, CO, William Adam Duerk, U.S. Attorney's Office, Missoula, MT, for Plaintiff.

Carlo John Canty, Browning Kaleczyc Berry & Hoven, Helena, MT, Catherine A. Laughner, Browning Kaleczyc Berry & Hoven, P.C., Bozeman, MT, for Defendants.

ORDER

SUSAN P. WATTERS, United States District Judge

***1** Before the Court are three motions filed by Defendant's Woody's Trucking and Donald E. Wood, Jr. ("Woody's"). First, Woody's moves for an order compelling the government to disclose certain materials. (Doc. 103). Second, Woody's moves for an order excluding the testimony of the government's expert witness. (Doc. 105). Third, Woody's moves for judicial notice that the United States Energy Information Administration's website defines crude oil to include drip gas. (Doc. 102). For the following reasons, the Court denies the motions.

I. Background

For the factual underpinnings of the case, see the Court's order denying the Defendants' five motions to dismiss the indictment. (Doc. 80).

II. Discussion

A. Motion to compel

Woody's argues the government has failed to turn over certain documents referenced in other documents provided in discovery. The government responds it has either provided all of the documents to Woody's or does not possess the documents. Additionally, the government states the Presentence Report information requested by Woody's is not normally subject to discovery, but the government will submit the information to the Court for in camera review to determine if the information contains *Brady* material. Woody's responds the government has indeed provided the information requested, except for the Investigative Activity Report and agent notes generated from a witness interview.

As stated in a prior order, the government's discovery obligations do not include disclosing, or offering for inspection, reports, memorandum, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. (Doc. 81 at 4 (citing Fed. R. Crim P. 16(a)(2)). The Court has little authority to order otherwise. However, the government stipulates that evidence should be limited to documents the defense has seen. (Doc. 108).

The motion to compel production of the IAR and agent notes is denied and the motion to limit evidence to documents the defense has seen is granted. Further, the government is ordered to provide the Court, for in camera review, a copy of the Presentence Report information within five days of the date of this order. *See United States v. Alvarez*, 358 F.3d 1194, 1207–1208 (9th Cir. 2004) (appropriate procedure when defendant requests probation files is for trial judge to conduct an in camera review to determine whether they contain *Brady* information).

B. Motion to exclude

Woody's argues the government's expert from the Occupational Safety and Health Administration (OSHA) is a "dual role" witness whose mixed expert and lay testimony will confuse jurors. The government responds any potential for prejudice can be addressed through jury instructions and trial management. The Court agrees with the government.

Dual role witnesses are permissible. *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007). When the government seeks to use an investigating agent as both an expert and a lay witness, district courts must take appropriate measures to avoid confusing the jury. First, the lay and expert testimony should be clearly separated. *United States v.*

Torralba–Mendia, 784 F.3d 652, 658 (9th Cir. 2015). Second, the government must provide an adequate foundation for the witness's expert testimony. *Torralba–Mendia*, 784 F.3d at 658. Third, the jury must be appropriately instructed. *Torralba–Mendia*, 784 F.3d at 658. Fourth, the witness cannot testify based on speculation or hearsay. *Torralba–Mendia*, 784 F.3d at 658.

***2** The Court will follow the procedure outlined in *Torralba–Mendia*. The OSHA expert's testimony will be separated into a lay witness phase and an expert witness phase. *See United States v. Anchrum*, 590 F.3d 795, 803–804 (9th Cir. 2009). The parties are ordered to include in their joint proposed jury instructions an instruction on dual role witnesses. Woody's motion is denied.

C. Motion for judicial notice

An issue of consequence in this case is whether Woody's falsified a bill of lading when it allegedly stated the materials transported were "slop oil and water from condensate." (Doc. 115 at 3). At trial, Woody's apparently plans to advance a theory that "slop oil and water from condensate" may mean several different things in oilfield jargon. To prove this theory, Woody's is calling an expert who will testify to oilfield jargon. (Doc. 109 at 7). In addition, Woody's requests the Court take judicial notice that the United States Energy Information Administration's website defines crude oil to include drip gas as of March, 29, 2018. (Doc. 102–1).

The government does not dispute that the United States Energy Information Administration's website defines crude oil to include drip gas. Instead, the government argues that the Energy Information Administration's definition is a legislative fact that is not subject to judicial notice. The government further argues that the Energy Information Administration's website is irrelevant because Woody's has not established how, if at all, the Energy Information Administration's website defined crude oil during the time frame alleged in the indictment.

Courts may judicially notice a fact that is not subject to reasonable dispute. Fed. R. Evid. 201(b). If the Court is supplied with the necessary information to determine the fact is beyond reasonable dispute, it must take judicial notice of the fact. Fed. R. Evid. 201(c)(2). The rule allows judicial notice of adjudicative facts, not legislative facts. Fed. R. Evid. 201(a). Adjudicative facts are those "to which the law is applied in the process of adjudication. They are the facts that normally go to the jury ... [and] relate to the parties, their activities, their properties, their businesses." Fed. R. Evid. 201(b) 1972 Advisory Comm. Notes (citing 2 K. Davis Administrative Law Treatise § 15.03 at 353). Legislative facts are those "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201(b) 1972 Advisory Comm. Notes (citing Kenneth Davis, *An approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404–407 (1942)). In a criminal case, the jury must be instructed that it may or may not accept the noticed fact as conclusive. Fed. R. Evid. 201(f).

The fact the United States Energy Information Administration's website defines crude oil to include drip gas is an adjudicative fact, not a legislative fact, because it is a fact that the jury would normally decide when weighing the merits of Woody's theory of defense. Furthermore, the website is not a law or rule, nor is the definition stated therein a law or rule. Courts often take judicial notice of information displayed on government websites when neither party disputes the authenticity of the website or the accuracy of the information displayed. *Daniels–Hall v. National Educ. Ass'n*, 629 F.3d 992, 998–999 (9th Cir. 2010) (citing *In re Amgen Inc. Sec. Litig.*, 544 F.Supp.2d 1009, 1023–1024 (C.D. Cal 2008) and *County of Santa Clara v. Astra USA, Inc.*, 401 F.Supp.2d 2011, 2014 (N.D. Cal 2005)). However, Woody's has not supplied the Court with the "necessary information" to judicially notice the Energy Information Administration's website defines crude oil to include drip gas for any date before March 29, 2018. (Doc. 102–1). And because the Energy Information Administration's website definition of crude oil on March 29, 2018, is of questionable relevance to the time period alleged in the indictment, the Court declines the request for judicial notice. *See Tate v. University Medical Center of Southern Nevada*, 2016 WL 7045711 *7 (D. Nev. 2016) (declining to take judicial notice of irrelevant fact).

***3** The government's reciprocal request for judicial notice of various Department of Transportation regulations is denied because, as the government states in its brief, statutes and regulations are not appropriate for judicial notice. (Doc. 111 at 4 (citing *Lemieux v. CWALT, Inc. Alternative Loan Trust 2006–33CB*, 2016 WL 4059210 (D. Mont. 2016)).

III. Conclusion and order

It is hereby ordered:

1. The motion to compel (Doc. 103) is denied in part and granted in part. The motion is denied with respect to production of the IAR and agent notes but granted as to limiting evidence to documents the defense has seen. Further, the government is ordered to provide the Court, for in camera review, a copy of the Presentence Report information within five days of the date of this order.

2. The motion to exclude (Doc. 105) is denied. The parties are ordered to include in their joint proposed jury instructions an instruction on dual role witnesses.

3. The motion for judicial notice (Doc. 102) is denied.

All Citations

Not Reported in Fed. Supp., 2018 WL 1997306, 106 Fed. R. Evid. Serv. 287

End of Document

Exhibit 18

2012 WL 505918
United States District Court, C.D. Illinois.

UNITED STATES of America, Plaintiff,
v.
Irving COHEN, The Windsor Organization, Inc., and 3–B Stores, Inc., Defendants.

No. 08–3282.
|
Feb. 15, 2012.

Attorneys and Law Firms

Sean Beaty, U.S. Department of Justice, Washington, DC, for Plaintiff.

Irving Cohen, Boca Raton, FL, pro se.

Jason T.H. Germeraad, Pamela E. Hart, R. Stephen Scott, Scott & Scott PC, Springfield, IL, Thomas W. Moss, Bickes Wilson Moss & Gibson, Decatur, IL, for Defendants.

OPINION

RICHARD MILLS, District Judge:

***1** The Court now considers the following motions in limine: the Plaintiff's motion for judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens [d/e 182]; the Plaintiff's motion for judicial notice of certain matters of public record [d/e 183]; Defendant Windsor Organization's motion for judicial notice of various State Department documents [d/e 188]; and the Plaintiff's motion for judicial notice of the Schengen Agreement of 1985 [d/e 195].

I. Motion for Judicial Notice of Fact that Countries are Tax Havens

(A)

Plaintiff United States of America has filed a motion for judicial notice of the fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens. It notes that Defendant The Windsor Organization, Inc. claims that it is wholly-owned by a British Virgin Islands corporation, TI & M Services, LTD. Moreover, Defendant Irving Cohen and Windsor both allege that Cohen had in-person meetings with Markus Kolzoff, a citizen of Liechtenstein and alleged member of TI & M's Board of Directors. The Plaintiff claims that, because Kolzoff refused to be deposed and refused to produce any documents at the hearing before the Principality of Liechtenstein's Princely Court of Justice, the United States was unable to take any discovery from TI & M or Kolzoff. The Plaintiff thus requests that the Court take judicial notice at trial of the fact that both the Principality of Liechtenstein and the British Virgin Islands are widely regarded as "tax havens."

The Federal Rules of Evidence require that the Court take judicial notice of an adjudicative fact "if a party requests it and the court is supplied with the necessary information." *See* Fed.R.Evid. 201(c)(2). A court may take judicial notice of a fact not subject to reasonable dispute in that it: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). Judicial notice may be taken at any stage of the proceeding. *See* Fed.R.Evid. 201(d).

In support of its motion, the Plaintiff notes that the Organisation for Economic Co–Operation and Development ("OECD") has defined "tax haven" as follows:

> [A] tax haven is a jurisdiction that imposes no or only nominal taxes itself and offers itself as a place to be used by nonresidents to escape taxes in their country of residence. A tax haven can offer this service because it has laws or administrative practices that prevent the effective exchange of information on taxpayers benefitting from the low-tax jurisdiction.

See Slemrod & Wilson, *Tax Competition with Parasitic Tax Havens,* NBER Working Paper Series (May 2006), p. 2 (available here: http:// www.nber.org/papers/w12225). The Plaintiff asserts that the OECD published criteria that qualified a country as a "tax haven" in its 1998 report, *Harmful Tax Competition: An Emerging Global Issue.* See http:// www.oecd.org/dataoecd/33/0/1904176.pdf. In 2000, the OECD published a list of 41 tax haven countries that met the 1998 criteria: the list identified both Liechtenstein and

the British Virgin Islands as tax havens. *See* Towards Global Tax Co–Operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD 2000 (available here: http://www.oecd.org/dataoecd/9/61/2090192.pdf).

***2** The Plaintiff further asserts that the National Bureau of Economic Research ("NBER") has noted that Liechtenstein and the British Virgin Islands are tax havens as defined by the OECD, as well as under the more narrowly-tailored Hines–Rice text. *See* Dharmapala & Hines, Which Countries Become Tax Havens?, NBER Working Paper Series (December 2006), p. 34 (available here: *http://www.nber.org/papers/w12802*). Moreover, the Tax Justice Network has identified Liechtenstein and the British Virgin Islands as tax havens. *See* Identifying Tax Havens and Offshore Finance Centres, Tax Justice Network, (July 8, 2007), p. 8 (available here: http://www.taxjustice.net/cm s/upload/pdf/Identifying_Tax_Havens_Jul_07.pdf).

The Plaintiff contends that even William Reed, the former president of Asset Protection Group, Inc.—the entity Cohen hired to incorporate Windsor in Nevada—recognized Liechtenstein and the British Virgin Islands as tax havens. In his book, *Bulletproof A et Protection,* Reed wrote, "The BVI has a good infrastructure and would always make my short list of best offshore havens." *See* William S. Reed, *Bulletproof A et Protection,* p. 145. As for Liechtenstein, Reed states, "Liechtenstein still has some of the best bank secrecy laws in the world," and "[i]n spite of this waiver, Liechtenstein is still one of the best offshore havens in the world." *See id.* at 153–54.

The Plaintiff contends that Defendants put the countries of Liechtenstein and the British Virgin Islands at issue by virtue of the defense they have asserted: that Cohen met with a citizen of Liechtenstein to discuss investing in the property, and that the purported owner of Windsor is TI & M, a British Virgin Islands corporation. The Plaintiff further asserts that, because of Windsor's and Cohen's defense and because the United States was unable to take any discovery about Kolzoff's or TI & M's actual interest in the Springfield property, the issue of Liechtenstein's and British Virgin Islands' status as a tax haven is relevant.

Based on the foregoing, the Plaintiff claims there can be no reasonable dispute that Liechtenstein and the British Virgin Islands are widelyregarded as tax havens. Accordingly, it asks the Court to take judicial notice.

(B)

In its response, Windsor asserts that the parties had reached an agreement as to a possible protective order and a potential location of Markus Kolzoff's deposition (Switzerland), when the Plaintiff filed its motion for issuance of Letters Rogatory to the Principality of Liechtenstein, which ended the possibility of obtaining Kolzoff's voluntary deposition. Windsor questions the Plaintiff's assertion that it has been foreclosed from obtaining discovery from TI & M, the sole shareholder of Windsor, when the Plaintiff did not, either through a Letter of Request through this Court or the Liechtenstein Court, pursue the matter further and did not seek an appeal of the Regional Court's ruling that "[t]he refusal to give testimony of witness, Dr. Markus Kolzoff, is legitimate."

***3** Windsor further asserts that Plaintiff's assertion is subject to reasonable dispute and is not known within the territorial jurisdiction of this Court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Windsor notes that, in support of the Plaintiff's motion, it has cited persuasive authority consisting of William Reed's book, *Bulletproof A et Protection,* in addition to Committee Reports of an international organization, a national non-profit research organization and a research and advocacy committee launched in the British Parliamentary. According to Windsor, these documents are not proper subjects of judicial notice and fail to satisfy the standard of Rule 201. Moreover, Windsor has objected to the admissibility of Reed's book and other marketing tools in its first motion in limine. Additionally, Windsor contends that some of the documents that Plaintiff has relied on were not properly disclosed.

Windsor further alleges that Plaintiff has not explained NBER's and OECD's connection to their role with the federal government and their role in obtaining the information cited by the Plaintiff. Moreover, Windsor claims that much of the information cited is purported expert opinion which was not disclosed, and hearsay. Additionally, Windsor asserts that Plaintiff has not established foundation for admission of the contents of the documents.

(C)

Windsor has raised a number of issues pertaining to the admissibility of the documents on which the Plaintiff relies. The status of Liechtenstein and the British Virgin Islands as alleged tax havens appears to be relevant. However, "[j]udicial notice merits the traditional caution it is given, and courts should strictly adhere to the criteria by the Federal Rules of Evidence before taking judicial notice of pertinent facts." *Doss v. Clearwater Title Co.,* 551 F.3d 634, 640 (7th Cir.2008).

The language of the rule makes it clear that courts must use caution in taking judicial notice of adjudicative facts. "In order for a court fact to be judicially noticed, indisputability is a prerequisite." *See Hennessy v. Penril Datacomm Networks, Inc.,* 69 F.3d 1344, 1354 (7th Cir.1995).

Because it is unable to determine that the issue is beyond "reasonable dispute," the Court declines at this time to take judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens. The parties may litigate the issue through the introduction of any admissible evidence at trial.

Therefore, the Court will Deny the Plaintiff's motion in limine. The motion may be renewed at an appropriate time. *See* Fed.R.Evid. 201(d).

II. Motion for Judicial Notice of Public Records

Plaintiff United States has filed a motion for judicial notice of matters of public record relating to William Reed and the Asset Protection Group, Inc. This includes two civil cases against Reed and Asset Protection Group. *See FTC v. Neiswonger,* Civil No. 96–2225–SNL (E.D.Mo. Nov. 13, 1996); *United States v. Reed,* Civil No. 07–1471 (E.D.Mo. Aug. 20, 2007). It also includes the recent criminal indictment against William Reed and Wendell Waite, CPA. *See United States v. Reed et al.,* 11–cr–00247 (D.Nev. July 5, 2011). The Plaintiff further asks the Court to take judicial notice of the lawsuit against Defendant Irving Cohen, Marvin Rosenbaum, and Herman Schwartzman in *Morley v. Cohen,* 610 F.Supp. 798, 804 (D.Md.1985), as well as the jury verdict entered against Cohen in that case. *See Morley v. Cohen,* 888 F.2d 1006, 1008 (4th Cir.1989).

(A)

***4** In support of the motion as to William Reed and the Asset Protection Group (APG), the Plaintiff states that Irving Cohen hired Reed's company, APG, to incorporate Defendant The Windsor Organization, Inc. in Nevada. Reed served as the nominee President of Windsor, which meant that APG served as the registered agent. The Nevada Secretary of State would see Reed's name as officer and director. The Plaintiff notes that Reed testified that he sold "privacy" as one of the benefits of a Nevada corporation, and that clients who wanted "total privacy" would ask Reed to serve as the nominee. Based on the foregoing, the Plaintiff asserts that the services provided by Reed and APG are relevant to the question of whether Cohen created Windsor to hold the Springfield Property as his nominee.

The Plaintiff further claims that, starting in 2006, Reed and APG came under scrutiny for its involvement with Reed's business partner, Richard Neiswonger. In April of 2007, the Eastern District of Missouri found Reed and APG in contempt for violating a 1997 permanent injunction against Neiswonger. *See FTC v. Neiswonger,* 494 F.Supp.2d 1067 (E.D.Mo.2007). Subsequently, the Department of Justice sued to permanently enjoin Reed from promoting fraudulent tax schemes. *See United States v. Reed,* Civil No. 07–1471 (E.D.Mo. Aug. 20, 2007). In October of 2007, Reed consented to the entry of a permanent injunction against him. *See id.,* Docket No. 5.

Although Windsor does not dispute these matters, Windsor asserts that these cases and their holdings are irrelevant under Rules 402, 403 and 404 of the Federal Rules of Evidence. Thus, it alleges these are not proper subjects of judicial notice. Windsor contends the fact that Neiswonger, Reed and APG were found to have violated an injunction entered in 1997 (five years before the incorporation of Windsor) in a case brought by the Federal Trade Commission is completely irrelevant to whether Windsor is holding property in Springfield as the nominee or alter ego of Irving Cohen. Moreover, Reed's alleged misleading marketing of business opportunities sold by APG in no way helps establish what Cohen's motive, opportunity or intent was when he used APG to incorporate Windsor.

Windsor further asserts that the allegations made by the Plaintiff in a prior suit against Reed, such as that "Reed has established thousands of Nevada Corporations for customers to use as nominees to hide their income and assets," are subject to reasonable dispute, which Reed did dispute and would dispute if named as a party in this case. Windsor states

that those allegations were not admitted by Reed and were never proven by the Plaintiff in that case. *See Reed,* 07–1471, Stipulated Order of Permanent Injunction (E.D.Mo. Oct. 11, 2007) (stating "Defendant, without admitting any of the allegations in the complaint except as to jurisdiction, waives the entry of findings of fact and conclusions of law.").

The Plaintiff further notes that Reed, along with Neiswonger and Windsor's CPA, Wendell Waite, were indicted by a federal grand jury in Nevada for crimes arising from their participation in APG. *See Reed, et al.,* 11–cr–00247. Windsor states that this criminal matter is set for trial on May 8, 2012. Accordingly, Windsor claims that the unproven allegations made against these Defendants are contested and are not the proper subject of judicial notice.

***5** Windsor contends that factual assertions made in other cases are not proper subjects of judicial notice because they are subject to reasonable dispute. It further asserts that some of these matters are irrelevant and admissible and are the subject of Windsor's motions in limine. Windsor alleges that Plaintiff cannot circumvent the Rules of Evidence by having this Court take judicial notice of evidence which is not admissible.

(B)

The Plaintiff further alleges that David Morley and several other plaintiffs filed suit against Cohen and over one dozen co-defendants for their promotion of a tax shelter scheme in the 1970s that failed to yield the tax advantages promised. *See Morley,* 610 F.Supp. at 803. The plaintiffs named Herman Schwartzman, Windsor's purported expert on New York trust law, as one of Cohen's co-defendants in that case due to his law firm's preparation of promotional materials for the tax shelter scheme. *See id.* at 804. Marvin Rosenbaum, the accountant who issued a tax opinion for the tax shelter scheme, was also named as a defendant. *See id.* Cohen successfully quashed the subpoena to compel his attendance at trial and was tried in absentia. *See Morley v. Cohen,* 888 F.2d 1006, 1009 (4th Cir.1989). The Plaintiff notes that the jury entered a verdict against Cohen for Civil RICO, common law fraud, breach of contract, conversion, and breach of fiduciary duty. *See id.* Pursuant to Cohen's motion, the court modified the damages to $265,940, trebled under the Civil RICO statute only. *See id.*

The Plaintiff contends that this background is relevant to the allegations in this case. Because it has alleged that Cohen hid his property interest in the Springfield Property to avoid detection and collection by the IRS, the Plaintiff claims the fact that Cohen had other outstanding judgments against him is relevant as evidence of additional motive for Cohen to hide assets. It further asserts that Cohen's promotion of other tax shelters—in addition to the shelter that gave rise to the I.R.C. § 6700 penalties in this case—is relevant to Cohen's sophistication and familiarity with complex corporate transactions and structures.

Windsor alleges that, for the reasons provided in its second motion in limine, *Morley* is inadmissible because the evidence related to *Morley* is irrelevant and improper character evidence to prove Cohen, Herman Schwartzman and Marvin Rosenbaum's conformity therewith. All counts against Schwartzman and Rosenbaum were dismissed. Windsor asserts it is improper for the Court to take judicial notice of facts of a case in which no verdict was entered against those defendants. Moreover, it is wholly irrelevant to the determination of the issues in this case that "disgruntled" plaintiffs filed a civil case against Schwartzman and Rosenbaum, which was dismissed.

(C)

To the extent that Windsor argues that the Court cannot take judicial notice of allegations in another lawsuit simply because they were disputed, the Court disagrees. In *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.,* 631 F.3d 436 (7th Cir.2011), the United States Court of Appeals for the Seventh Circuit took judicial notice of a complaint in another lawsuit. *See id.* at 443. This Court did the same thing in *Floyd v. Excel Corp.,* 51 F.Supp.2d 931, 934 n. 3 (C.D.Ill.1999). However, the existence of public records such as court documents cannot be used to establish any disputed facts. *See Independent Trust Corp. v. Stewart Information Services Corp.,* 665 F.3d 930, 2012 WL 32066 (7th Cir. Jan. 6, 2012), at *11. The Seventh Circuit explained:

> ***6** The district court was reciting the long procedural history of this case. The Hargrove indictment, the Capriotti plea agreement, and *Fidelity v. Intercounty* are documents in the public domain that further that

> procedural narrative. The district court took judicial notice of the indisputable facts that those documents exist, they say what they say, and they have had legal consequences. The district court did not rely on the documents as proof of disputed facts in any other sense.

Id.

Some of the information which is the subject of the Plaintiff's judicial notice request appears to potentially be relevant. The Plaintiff asks the Court to take judicial notice of the following alleged facts:

> (1) On November 13, 1996 the Federal Trade Commission filed suit against Richard Neiswonger for falsely promoting training and business opportunity programs. In 1997, Neiswonger stipulated to the entry of a permanent injunction against him.
>
> (2) On April 23, 2007, the Eastern District of Missouri found Reed and APG in contempt for acting in concert and participating with Neiswonger in violation of the 1997 permanent injunction against Neiswonger.
>
> (3) On August 20, 2007, the Department of Justice sued to enjoin Reed from promoting fraudulent tax schemes that helped his customers evade the assessment and collection of federal tax liens.
>
> (4) On October 11, 2007, Reed stipulated to an order of permanent injunction barring him from promoting tax-fraud schemes.
>
> (5) On July 15, 2011, a grand jury in the District of Nevada indicted Reed, Neiswonger, and Waite for their involvement in the "APG scheme" to conceal assets and income through disguised corporate ownership services. The indictment contains thirty-two counts, including Conspiracy to Defraud the United States, Attempt to Evade or Defeat Tax, and Money Laundering Conspiracy.

The Plaintiff also requests that the Court take judicial notice of the following alleged facts pertaining to *Morley v. Cohen:*

> (1) Morley and other plaintiffs filed suit against Cohen and other defendants regarding their promotion of a tax shelter involving mining rights in Kentucky.
>
> (2) Cohen, Schwartzman and Marvin Rosenbaum were all named as individual defendants in the suit.
>
> (3) The jury returned a verdict against Cohen on counts of Civil RICO, common law fraud, breach of contract, conversion, and breach of fiduciary duty. The Court modified the damages to $265,940 trebled under Civil RICO statute only.

The fact that some of this information appears to be relevant does not necessarily mean it is admissible. In determining whether to take judicial notice of a fact under Rule 201, the Court will have to consider any other applicable Federal Rules of Evidence in determining admissibility. *See Doss,* 551 F.3d at 640. Some of the rules which may be applicable include, but are not limited to, Rule 401, Rule 402, Rule 403 and Rule 404. Until some evidence is presented, however, it is difficult for the Court to determine whether the information which is the subject of the motion is admissible. The Court notes that judicial notice may be taken at any stage of the proceeding. *See* Fed.R.Evid. 201(d).

***7** The Court will defer ruling on the motion for judicial notice of public records.

III. Motion for Judicial Notice of Documents

Windsor has filed a motion requesting that the Court take judicial notice of the United States Department of State ("Department") documents evidencing that Switzerland and Liechtenstein extend visa-free entry and exit to United States citizens staying in Switzerland and Liechtenstein for up to 90 days. The Department advises United States citizens to "make sure you obtain a stamp in your passport from the police office in Buchs" if you wish to stay in Liechtenstein for a longer period of time.

In support of the motion, Windsor alleges that the information is capable of accurate and ready determination by resort to the Department's website providing information to United States citizens regarding travel abroad. *See http://travel.state.gov/travel/cis_pa_tw/cis/cis1034.html.* Windsor claims that the Department maintains the website for the benefit of American citizens and the information therein cannot reasonably be questioned for accuracy.

The Plaintiff claims that the issue of whether Irving Cohen actually traveled to Liechtenstein in late 2001 or early 2002

is relevant to whether TI & M invested in the Property, and to Cohen's credibility generally. The Plaintiff notes that Cohen produced a copy of his passport during discovery. It has several stamps that show Cohen entered Spain, England, and Switzerland. However, Cohen's passport does not show any entry stamps anywhere in Europe in late 2001 or early 2002.

Although the Plaintiff does not object to the Court's taking judicial notice of a printout from a Department of State website that discusses entry and exit requirements for U.S. citizens traveling to Switzerland, the Plaintiff contends that Windsor is citing the document to mislead the Court to accept Windsor's conclusion that Cohen's passport should not contain a stamp from his late 2001 or early 2002 visit to Liechtenstein. The Plaintiff claims that the Court should reject Windsor's "specious conclusion."

The Court will take judicial notice of the requested documents. At this time, the Court is not drawing any conclusions based on the documents.

IV. Motion for Judicial Notice of Schengen Agreement of 1985

The Plaintiff has filed a motion for judicial notice of the Schengen Agreement of 1985 and the 1990 Convention implementing the Schengen Agreement as they have been adopted and implemented by the European Commission.

(A)

The Schengen Agreement was a treaty signed on June 14, 1985, between Belgium, France, Luxembourg, the Netherlands, and West Germany. *See* Regulation (EC) No. 562 of 2006, Official Journal of April 3, 2006, L 105, p. 1. On June 19, 1990, the same five countries signed a Convention implementing the Schengen Agreement, which created the "Schengen Area." *See* European Commission Official Website, Schengen: Europe without internal borders (available here: http://ec.e uropa.eu/home-affairs/policies/borders/borders_schengen_en.htm). The Convention abolished border controls for travel within the Schengen Area, and provided common rules on entry from outside the Schengen Area. *See id.*

***8** The Plaintiff states that the Schengen Agreement and the implementing Convention were incorporated into the main body of European Union law (the "acquis communautaire") as part of the October 1997 Treaty of Amsterdam. *See* Treaty of Amsterdam, October 2, 1997, Official Journal of November 10, 1997, C 340, p. 1, 37 I.L.M. 56. The Plaintiff alleges that, on May 20, 1999, the Council of the European Union adopted the "Common Manual," which was established to execute the provisions of the implementing Convention to the Schengen Agreement.

Twenty-five European countries are now included in the Schengen Area. *See* European Commission Official Website, Schengen: Europe without internal borders (available here: http:// ec.europa.eu/homeaffairs/policies/borders/borders_schengen_en .htm). The Plaintiff notes that Switzerland is a party to the Schengen Agreement, even though it is not a member of the European Union. *See id.* The United Kingdom and Ireland are not parties to the Schengen Agreement. *See id.*

The Schengen Agreement "allows for free travel within a multicountry zone of Europe." *See* Docket No. 153–6. "Within the Schengen area, you do not show your passport when crossing country borders." *See id.* However, the Plaintiff claims that the purpose of the Schengen Agreement was to abolish border controls within the Schengen Area, while strengthening border control for entry into the Schengen Area from outside. *See* European Commission Official Website, Home Affairs, Crossing Borders (available here: http://ec.e uropa.eu/home-affairs/policies/borders/borders_crossing_en.htm).

The Plaintiff claims that the European Commission maintains a strict policy of stamping the travel documents of all third-country nationals (travelers from outside the Schengen Area countries):

Article 10: *Stamping of the travel documents of third-country nationals*

1. The travel documents of third-country nationals shall be systematically stamped on entry and exit. In particular an entry or exit stamp shall be affixed to:

   (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border;

   (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border;

(c) the documents enabling third-country nationals not subject to a visa requirement to cross the border.

See Regulation (EC) No. 562 of 2006, Official Journal of April 3, 2006, L 105, p. 1. The Plaintiff alleges that the Common Manual, which member states established to execute the provisions of the implementing Convention to the Schengen Agreement, contains an almost identical directive. *See* Common Manual No. 313 of 2002, Part II, Point 2.1.1, Official Journal of December 16, 2002, C 313 pp. 97, 107. The relevant portion, Point 2.1.1: Practical procedures for checks, Affixing Stamps, was not modified until December 13, 2004. *See* Regulation (EC) No. 2133 of 2004, Official Journal of December 16, 2004, L 369, p. 5.

***9** The Plaintiff contends that the strict policy of stamping the passports of foreign travelers has been in place since at least May 20, 1999, which is when the European Commission formally adopted the Common Manual. *See* Decision No.1999/435/EC, OJ L 176L, p. 1 of 10.7.1999.

Based on the foregoing, the Plaintiff asks the Court to take judicial notice of the Schengen Agreement of 1985, and the 1990 Convention implementing the Schengen Agreement, as they have been adopted and implemented by the European Commission. Specifically, the Government asks the Court to take notice of the European Commission's strict regulations regarding the systematic stamping of travel documents of foreign nationals, which have been in place since at least May 20, 1999.

(B)

Windsor claims that Switzerland did not implement the Schengen Agreement until December 12, 2008, and Liechtenstein has not yet acceded to the Schengen Agreement. *See* http://www.eda.admin/ch/eda/en/home/reps/nameri/vusa/ref_ visinf/visusa.html; Europa, Press Release, European Commission Welcomes Switzerland to the Schengen Area, http:// europa.eu/rapid /pressReleasesAction.do?reference=IP/081955; Greek Embassy, Schengen Countries, http://www.greekembassy.org.uk/Contact/SchengenCountries.aspx; *see also* Docket No. 195, p. 3 (text within the map states, "Liechtenstein is expected to join by the end of 2011"); European Commission, Home Affairs—Policies—Boarders & Visas—Schengen, *http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_ en.htm.*

Windsor further alleges that travelers to Liechtenstein who arrive by air must fly into Zurich, Switzerland, as Liechtenstein does not have any airports. *See* Liechtenstein Travel Guide, http://wikitravel.org/en/Liechtenstein. Moreover, until at least the time of Switzerland's accession to the Schengen Agreement, there were no border controls on the forty-one kilometer border separating Switzerland and Liechtenstein. *See* Border Controls with Liechtenstein to cost Switzerland millions, *http://www.swissinfo.ch/en g/politicsSchengen_ arrangements_for_Liechtenstein_ agreed.html?cid=6945042.*

Windsor contends that, because many Member States of the Schengen Agreement were failing to systematically stamp passports of thirdcountry nationals, the Council of the European Union passed Council Regulation (EC) No 2133/2004 on December 13, 2004. *See* Council Regulation (EC) No. 2133/2004, Official Journal L 369, 1 (16/12/2004). It asserts that the Convention was necessary because the lack of clarity of the E.U. Convention Implementing the Schengen Agreement resulted in divergent practices in the Member States and made it difficult to check whether the conditions related to duration of stay of short-term travelers were fulfilled. *See id.* Moreover, the Convention created an obligation on Member States to "stamp systematically third-country nationals' travel documents on entry and exit at external border crossings." *Id.* "Although European Union regulations require that non-E.U. visitors obtain a stamp in their passport upon initial entry to a Schengen country, many borders are not staffed with officers carrying out this function." Craig Hemberger, *Global Entry & Exit Requirements: U.S. Department of State Citizen Travel Information,* (2008), available at http:// travelogue.travelvice.com/pos tfiles/2008–06–01_global–entry–exit–requirements.pdf.

***10** Windsor contends that Rule 201 of the Federal Rules of Evidence only governs judicial notice of adjudicative facts and the law of foreign nation is not a proper subject of judicial notice. "Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure." *See* Fed.R.Evid. 201, Adv. Comm. Note, Subdivision (a). Rule 44.1 provides:

> A party who intends to raise an issue about a foreign country's law

> must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. The Advisory Committee Note provides in part:

> The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law.... Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Fed.R.Civ.P. 44. 1, Note 1966 Adoption.

Windsor claims that the Court should not make a determination of foreign law as the Plaintiff presents it because the Plaintiff has inadequately researched Liechtenstein and Switzerland's accession to the Schengen Agreement. Specifically, it alleges that Plaintiff "presented the Agreement in such a partisan manner that Plaintiff failed to state that neither Liechtenstein nor Switzerland were signatories to the Schengen Agreement on the years in question, namely in 2001 or 2002, or 2004 when Cohen testified he traveled to Liechtenstein, via Switzerland, to meet Kolzoff." Windsor notes that Cohen's passport does contain 2009 Swiss entry and exit stamps, after Switzerland's accession to the Schengen Agreement. Windsor claims this corroborates Cohen's testimony regarding his visits to Liechtenstein to meet with Kolzoff after the Plaintiff filed its lien.

Windsor further alleges that, even if the Schengen Agreement is a fact of which the Court can take judicial notice, a fact must first be admissible. Windsor contends that the Schengen Agreement of 1985 is irrelevant to the issues because, at the relevant times, in 2001, 2002 and 2004, Liechtenstein and Switzerland were not members to the agreement. Thus, it asserts that evidence of the Schengen Agreement does not make any matter before the Court more or less probable, including the factual issue of whether Cohen traveled to Liechtenstein to meet Kolzoff. Windsor claims the Plaintiff cannot dispute that Cohen's passport contains a stamp evidencing his visit to Switzerland in 2009 which corroborates Cohen's testimony that he met with Kolzoff at such time. It alleges that evidence of Switzerland's application of the Schengen Agreement after 2008 is needless presentation of cumulative evidence.

(C)

***11** At this time, the Court will Deny the Plaintiff's motion for judicial notice of the Schengen Agreement of 1985. Of course, the Plaintiff may renew its request at any time during the trial. *See* Fed.R.Evid. 201(d). Consistent with Rule 44.1 of the Federal Rules of Civil Procedure, the Court concludes that Plaintiff has provided notice of its intent to raise an issue of foreign law.

Windsor has raised certain issues pertaining to the relevance of the evidence which is the subject of the Plaintiff's motion. Therefore, the Court is unable at this time to take judicial notice of the Schengen Agreement of 1985.

V. CONCLUSION

For the foregoing reasons, the Plaintiff's motion for judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens will be denied.

The Court will defer ruling on the Plaintiff's motion for judicial notice of public records pertaining to notice of the two civil cases against William Reed and Asset Protection Group; the recent criminal indictment against Reed and William Waite; the lawsuit against Cohen, Marvin Rosenbaum, and Herman Schwartzman; as well as the jury verdict against Cohen in that case.

The Court will allow Windsor's motion for judicial notice of United States Department of State documents. However, the Court draws no conclusions from those documents at this time.

The Plaintiff's motion for judicial notice of the Schengen Agreement of 1985 will be Denied.

The parties may renew any motions for judicial notice after a proper evidentiary showing is made. The Court must take judicial notice in such circumstances if a party requests it. *See* Fed.R.Evid. 201(c)(2). Moreover, the Court is authorized to take judicial notice on its own. *See* Fed.R.Evid. 201(c)(1).

Ergo, the Plaintiff's Motion for judicial notice of the fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens [d/e 182] is DENIED.

The Court hereby DEFERS ruling on the Plaintiff's Motion for judicial records [d/e 183], until such time as the Court determines whether the records are admissible.

The Motion of Defendant Windsor Organization for judicial notice of certain United States Department of State documents [d/e 188] is ALLOWED, to the extent provided in this Order.

The Motion for judicial notice of the Schengen Agreement of 1985 [d/e 195] is DENIED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 505918, 109 A.F.T.R.2d 2012-1023, 87 Fed. R. Evid. Serv. 930

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Exhibit 19

2015 WL 4498018
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Anthony Edward WEST, Plaintiff,
v.
Paulette FINANDER, et al., Defendants.

No. CV13–4547–DOC (AS)
|
Signed 07/21/2015

Attorneys and Law Firms

Anthony Edward West, Lancaster, CA, pro se.

Elizabeth G. O'Donnell, Office of the Attorney General, Dean J. Smith, Stephan Oringher Richman Theodora and Miller, Deborah S. Taggart, Schmid and Voiles, Los Angeles, CA, for Defendants.

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

DAVID O. CARTER, UNITED STATES DISTRICT JUDGE

***1** Pursuant to 28 U.S.C. section 636, the Court has reviewed the Third Amended Complaint ("TAC"), all of the records herein, and the Report and Recommendation of United States Magistrate Judge. After having made a *de novo* determination of the portions of the Report and Recommendation to which Objections were directed (*see* Docket Entry No. 139), the Court concurs with and accepts the findings and conclusions of the Magistrate Judge. However, the Court addresses certain arguments raised in the Objections below.

Plaintiff requests that the Court take judicial notice of its previous Order dismissing the Second Amended Complaint ("SAC") with leave to amend. (Objection 9.) Plaintiff refers to a statement in that order informing Plaintiff that if he failed to file a Third Amended Complaint, the action could still proceed on the SAC's claims against Defendant Finander, and the Eighth Amendment claim against Defendant C. Chin. (*See* "Order Dismissing SAC," Docket Entry No. 106, at 57.)

There is no need for the Court to take judicial notice of its own order or of documents that are already judicially known. Moreover, because Plaintiff has amended his claims, the court's prior ruling is immaterial. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir.2012); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.1997) (an amended complaint supersedes a previous complaint and renders the previous complaint of no legal effect).

Nevertheless, Plaintiff avers that the Court should sustain his Eighth Amendment claims against Defendant Finander and Defendant C. Chin because the Court did not dismiss these claims from the SAC and the allegations with respect to these Defendants have not been changed in the TAC. (Objection 10.) However, in the order dismissing the SAC, the Court never determined whether Plaintiff had properly alleged § 1983 claims against Defendant Finander. This is because Finander previously filed an answer to the SAC and decided not to move to dismiss. (*See* Order Dismissing SAC at 22, note 13.) Here, however, Defendant Finander filed a Rule 12(b)(6) Motion to Dismiss the TAC for failure to state a claim. (Docket Entry No. 121.) The Report and Recommendation addresses the reasons for granting Defendant's motion. (*See* Docket Entry No. 136, at 9–19.)

With respect to the allegations against Defendant C. Chin, the Court finds that Plaintiff has not "state[d] a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In the Order Dismissing the SAC, the Court stated that Defendant C. Chin's "alleged refusal to treat Plaintiff's symptoms on June 20, 2011" constituted a *prima facie* Eighth Amendment deliberate indifference claim. (Order Dismissing SAC, at 28.) However, as noted in the exhibits attached to the TAC, Plaintiff was not denied treatment that day. Plaintiff was treated by Dr. Mai, and complained of "mouth discharge green and gray in color, swollen gland under tongue, stiff neck [and] headache." (TAC, Ex. C1 at 42.) Plaintiff's contention that he returned several times for medical treatment and was refused is simply untrue. On and after June 20, 2011, Plaintiff was seen by and referred to numerous physicians in and out of the facility for his complaints of abdominal pain, pain associated with his blocked salivary gland, as well as other complaints. (TAC Exs. A–E, at 37–54.)

***2** Petitioner's remaining objections are simply re-assertions of arguments raised in his Opposition to Defendants' Motions to Dismiss. These arguments were addressed in and rejected by the Report and Recommendation and do not cause the Court to reconsider its decision to accept the Magistrate Judge's conclusions and recommendations.

IT IS ORDERED that Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on Plaintiff at his current address of record.

LET JUDGMENT BE ENTERED ACCORDINGLY.

REPORT AND RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE

ALKA SAGAR, UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05–07 of the United States District Court for the Central District of California. For the reasons stated below, it is recommended that Defendants' Motions to Dismiss be GRANTED, and Plaintiff's Third Amended Complaint be DISMISSED in its entirety WITHOUT LEAVE TO AMEND.

I.

INTRODUCTION

On January 22, 2015, Plaintiff Anthony Edward West ("Plaintiff"), a prisoner at California State Prison, Los Angeles County ("CSP–LAC") proceeding *pro se,* filed a Third Amended Complaint ("TAC"), pursuant to 42 U.S.C. § 1983 ("§ 1983"). (Docket Entry No. 110.) The TAC brings suit against eleven Defendants in their respective individual capacities. (*See* TAC ¶¶ 4–15.) Nine of the Defendants are alleged to have been CSP–LAC officials during the events discussed in the TAC: (1) Dr. Paulette Finander, the Chief Medical Officer; (2) Dr. Anise Adams, the Chief Medical Executive; (3) Dr. Corina Chin, a primary care physician; (4) Dr. Cheryl Bingham, the Chief Supervising Dentist; (5) Dr. Judy Chin, a staff dentist; (6) Dr. Jauasree Mettu, another staff dentist; (7) Dr. Lanh Mai, yet another staff dentist; (8) Kay Donnelly, a registered nurse; and (9) T. Van Dongen, the Appeals Coordinator. (*See id.* at ¶¶ 4–6, 9–14.)[1] The other two Defendants are "contractor physicians": (1) Dr. Alvaro Bolivar, a general surgeon; and (2) Dr. Hendrik DeJager, an ear, nose, and throat surgeon. (*See id.* at ¶ 7–8.) At this stage in the proceedings, the Court must resolve Motions to Dismiss on behalf of all Defendants named in the TAC.

A. *Motions To Dismiss The Third Amended Complaint*

On February 6, 2015, Defendant DeJager filed a Motion to Dismiss the TAC, pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). ("DeJager Mot." (Docket Entry No. 115).) On March 2, 2015, Defendants Adams, C. Chin, Bingham, J. Chin, Finander, Mettu, Mai, and Donnelly also filed a Motion to Dismiss pursuant to Rule 12(b)(6). ("Moving Prison Defendants' Mot." (Docket Entry No. 121).) On March 6, 2015, Defendant Bolivar filed his own Motion to Dismiss pursuant to Rule 12(b)(6). ("Bolivar Mot." (Docket Entry No. 123).)

On April 13, 2015, Plaintiff filed one Opposition to all of the Defendants' Motions to Dismiss. (Docket Entry No. 128.) On April 16, 2015, Defendant DeJager filed a Reply to Plaintiff's Opposition, followed by a Reply from Defendant Bolivar on April 24, 2015, and a Reply from the Moving Prison Defendants on April 28, 2015. (Docket Entry Nos. 130, 131, 132.)

***3** After considering the briefing provided by the parties, the Court recommends GRANTING the pending Motions to Dismiss, and DISMISSING Plaintiff's § 1983 claims with prejudice.

III.

ALLEGATIONS OF THE THIRD AMENDED COMPLAINT[2]

On May 8, 1998, Plaintiff arrived at CSP–LAC, where prison physicians subjected him to physical and mental health examinations. (*See* TAC ¶¶ 16–17.) Upon completion of those examinations, Plaintiff was placed in: (1) the "Chronic Care Program" (because of his hypertension, diabetes, asthma, and obesity), and (2) the "CCCMS Program (upon being diagnosed with depression and generalized anxiety disorder). (*See id.* at ¶¶ 18–20.) The Chronic Care Program policy requires all primary care physicians to closely monitor and control each chronic disease listed in the inmate's medical history central file. (*See id.* at ¶ 19.)

On June 20, 2011, Plaintiff visited Defendant C. Chin, the CSP–LAC primary care physician responsible for medical intake illness evaluations. (TAC ¶¶ 6, 21.) Plaintiff reported that he was experiencing "severe upper abdominal pain, shortness of breath, severe neck pain with swelling under [the] right [ ] side of [the] jawbone, and constant flow of puss discharge infection[ ] coming from under [the] right [ ] side of the tongue area." (*See id.* at ¶ 22.) Plaintiff also reported "uncontrol[l]ed high blood pressure[,] dizziness, [and] nausea." (*See id.*) Defendant C. Chin apparently refused to administer any treatment, "demanded that Plaintiff leave her office immediately," and ordered Plaintiff to undergo a psychiatric evaluation because he refused to take his high blood pressure medication. (*See id.* at ¶ 23.) Plaintiff claims that he returned to see Defendant C. Chin on numerous occasions between June 20, 2011 and December 5, 2011, and Defendant C. Chin refused to provide any medical treatment. (*See id.* at ¶¶ 24–25.)

Also on June 20, 2011, Plaintiff visited Defendants J. Chin and Mettu, two CSP–LAC staff dentists, and complained of shortness of breath, abdominal and neck pain, oral swelling and puss. (*See id.* at ¶ 28.) A few days later on June 24, 2011, Plaintiff visited Defendant Mai, another CSP–LAC staff dentist, and complained of the same symptoms. (TAC ¶ 29.) Defendants Mettu, J. Chin, and Mai all refused to have Plaintiff admitted to the hospital and prescribed a "low dose pain medication" and "ineffective antibiotic[s]." (*See id.* at ¶¶ 30–33; TAC Ex. A.)

Because Plaintiff continued to suffer from symptoms after these initial medical and dental visits, "Plaintiff continued to request [ ] medical treatment." (*See* TAC ¶ 32.) Plaintiff alleges that he was sent for off-site emergency medical treatment four times between June 29, 2011 and December 5, 2011. (TAC ¶ 32.) Each time, a supervisor approved the request for off-site treatment and then "countersign[ed]" reports upon his return to the prison. (TAC ¶¶ 40–41.) Plaintiff asked repeatedly what he had to do to receive proper medical treatment for his blocked saliva gland and puss discharge. (TAC ¶ 35.) Defendant Mettu and Chin told Plaintiff that their supervisor, Dr. Cheryl Bingham, had to make a decision about Plaintiff's condition. (*Id.*) Plaintiff states that he was then "forced to wait for urgent surgery [for] 6 months" because Defendant Bingham "disregarded the medical reports she countersigned before and following lab diagnoses of Plaintiff's medical condition." (TAC ¶ 37.)

***4** On December 16, 2011, Defendant Bolivar (an off-site contractor and general surgeon) performed a gallbladder surgery on Plaintiff, and Defendant DeJager (an off-site contractor and ear, nose, and throat specialist) performed blocked saliva gland surgery. (*See id.* at ¶¶ 44–45.) Plaintiff alleges that his surgery was delayed because of a "Shared Contract Physicians Low Cost Agreement" which requires that the outside contracting physicians be available to perform the surgery. (*See* TAC ¶¶ 41, 42, 44, 45.) Plaintiff contends that the delay in providing adequate medical treatment caused Plaintiff "prolonged and extreme pain," and continues to do so this present day. (TAC ¶ 53.)

Moreover, while Plaintiff was recovering from his surgeries in the CSP–LAC infirmary on December 21, 2011, Defendant Finander (the Chief Medical Officer) "pressed hard with all [of] her [strength] on [his] surgery wounds[ ] on the stomach and neck[,]" and ordered the medical staff to remove staples from his abdominal region, causing it to split open. (*See id.* at ¶¶ 54–69.) As a result of this incident, Plaintiff "constantly suffers severe [abdominal] cramping" and pain in his jaw, tongue, and neck. (*Id.* at ¶ 70.)

On December 25, 2011, Plaintiff filed an inmate grievance that asserted an excessive force misconduct complaint against Defendant Finander. (*See id.* at ¶ 81.) After Plaintiff did not receive a response, he reported the incident to Defendant Donnelly (a CSP–LAC registered nurse), who told him that she sent the complaint to Dr. Finander. (TAC ¶ 82.) Plaintiff filed another excessive force grievance asserting similar claims as the instant complaint. (TAC ¶ 86–87; Ex. F.) However, Plaintiff states that Defendants Adams and C. Chin falsely alleged "lack of cooperation" on the grievance and stated that Plaintiff "refused to come to the clinic for his appointment." (TAC ¶ 88.) After this grievance was cancelled, Plaintiff submitted a new appeal grievance on September 3, 2012. (TAC ¶ 96.)

On the basis of the TAC's averments, Plaintiff asserts an Eighth Amendment claim for inadequate medical care against Defendants Adams, Bingham, Bolivar, C. Chin, J. Chin, DeJager, Finander, Mai, and Mettu (TAC ¶¶ 105–06); an excessive force claim as to Defendant Finander (TAC ¶¶ 54–73, 105); and a First Amendment claim against Defendants Adams, C. Chin, Van Dongen, and Donnelly for denial of access to courts and retaliation (TAC ¶¶ 105–07). To remedy these purported constitutional violations, Plaintiff seeks: (1) "a declaratory judgment that the acts and the omissions described in [the TAC] violated Plaintiff's First and Eighth

Amendment rights; (2) "a preliminary injunction[ ] against any further[ ] deliberate indifference and cruel and unusual punishment, or any form of retaliation; (3) "[c]ompensatory damages in the amount of $25,000 against each Defendant, jointly and severally"; and (4) "punitive damages in the amount of $10,000." (*See id.* at 34.)

III.

DISCUSSION

A. *Standard Of Review For Rule 12(b)(6) Motions*

Under Rule 12(b)(6), a party may move to dismiss a complaint on the ground that it "[f]ail[s] to state a claim upon which relief can be granted." *See* Fed.R.Civ.P. 12(b)(6). To state a claim for which relief may be granted, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). In addition, a court must interpret a *pro se* complaint liberally and construe all material allegations of fact in the light most favorable to the plaintiff. *See Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir.2010) ("[A] complaint [filed by a *pro se* prisoner] 'must be held to less stringent standards than formal pleadings drafted by lawyers.' ") (quoting *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam)). However, a court does not have to accept as true mere legal conclusions. *See* Iqbal, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Furthermore, in giving liberal interpretation to a *pro se* complaint, a court may not supply essential elements of a claim that were not initially pled. *Pena v. Gardner,* 976 F.2d 469, 471–72 (9th Cir.1992).

***5** Moreover, in ruling on a motion to dismiss for failure to state a claim, a court may consider not only the allegations of the complaint, but also exhibits attached thereto. *See Parks Sch. of Bus. v. Symington,* 51 F.3d 1480, 1484 (9th Cir.1995) (citing *Cooper v. Bell,* 628 F.2d 1208, 1210 n.2 (9th Cir.1980)) ("When a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal [pursuant to Rule 12(b)(6)] was proper without converting the motion to one for summary judgment.").

B. *Plaintiff Has Not Adequately Alleged a Violation of His Eighth Amendment Rights*

In order to obtain relief under § 1983, a plaintiff must show that: "(1) [an] action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right."[3] *See Jones v. Williams,* 297 F.3d 930, 934 (9th Cir.2002) (quoting *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 328–36 (1986)). Here, Defendants claim, *inter alia,* that the TAC fails to properly allege a deprivation of Plaintiff's constitutional right. (*See* Bolivar Mot. 5; DeJanger Mot. 4–8; Moving Prison Defendants' Mot. 5–6.)

The Eighth Amendment to the U.S. Constitution provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII. "In prison-conditions cases[,]" an official will be held liable for an Eighth Amendment violation "only when two requirements are met": an objective prong and a subjective prong. *See Farmer v. Brennan,* 511 U.S. 825, 834 (1994). The objective prong examines whether the deprivation was "sufficiently serious" to constitute a "denial of 'the minimal civilized measure of life's necessities[.]' " *See id.* (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347 (1981)). Under the subjective prong, a prisoner must show that the official was " 'deliberate[ly] indifferen[t]' to inmate health or safety[.]" *See id.* (quoting *Wilson v. Seiter,* 501 U.S. 294, 302–03 (1991)).

With regard to the subjective prong, a plaintiff must show that "the [prison] official [knew] of and disregard[ed] an excessive risk to inmate health or safety[.]" *See id.* at 837. Put differently, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *See id.* "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that it was obvious." *Id.* at 842 (citations omitted). Accordingly, "Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.' " *Id.* at 835 (quoting *Whitley v. Albers,* 475 U.S. 312, 319 (1986)).

***6** Furthermore, even if a prison official "actually knew of a substantial risk to inmate health or safety[,]" and the prisoner was ultimately harmed by that risk, the official "may be found

free from liability if [he or she] responded reasonably to the risk[.]" *See id.* at 844. This is because "[a] prison official's duty under the Eighth Amendment is to ensure *reasonable safety* [.]" *See id.* (emphasis added) (quoting *Helling v. McKinney,* 509 U.S. 25, 33 (1993)) (internal quotation marks omitted).

Plaintiff alleges Eighth Amendment claims against three groups of defendants: (1) the CSP–LAC physicians and dentists who treated Plaintiff (C. Chin, J. Chin, Mettu, and Mai), (2) the CSP–LAC supervisory physicians (Finander, Adams, Bingham), (3) and the contract physicians who performed Plaintiff's surgeries (DeJanger and Bolivar). The Court finds that Plaintiff failed to allege sufficient facts to show that any of these Defendants acted with deliberate indifference to Plaintiff's constitutional rights.

1. *Defendants C. Chin, J. Chin, Mettu, and Mai*

Plaintiff alleges that Defendant C. Chin (a CSP–LAC primary care physician), along with Defendants J. Chin, Mettu, and Mai (CSP–LAC dentists), were deliberately indifferent to Plaintiff's Eighth Amendment rights by delaying his medical treatment. (TAC ¶¶ 28–32.) To show that a physician acted with deliberate indifference, a prisoner must allege that the doctor acted with "a sufficiently culpable state of mind." *Wilson v. Seiter,* 501 U.S. 294, 297 (1991). This requires that the defendant "must purposefully ignore or fail to respond to a prisoner's pain or possible medical need." *McGuckin v. Smith,* 974 F.2d 1050, 1053 (9th Cir.1992) (overruled on other grounds in *WMX Techs. V. Miller,* 104 F.3d 1133, 1136 (9th Cir.1997)). Merely providing inadequate treatment does not amount to a constitutional violation cognizable under Section 1983. *Estelle v. Gamble,* 429 U.S. 97 (1976) ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.").

Where a claim alleges "mere delay of surgery," a prisoner can make "no claim for deliberate medical indifference unless the denial was harmful." *Shapley v. Nevada Board of State Prison Comm'rs,* 766 F.2d 404, 407 (9th Cir.1985); *see also Wood v. Housewright,* 900 F.2d 1332, 1334–35 (9th Cir.1990) (delay in treatment did not constitute eighth amendment violation because plaintiff's condition did not require emergency attention).

Plaintiff alleges that on June 20, 2011, he attended a medical appointment with Defendant C. Chin, the primary care physician responsible for medical intake illness evaluations. (TAC ¶¶ 6, 21.) As noted in the exhibits to the TAC, Plaintiff sought treatment for "mouth discharge green and gray in color, swollen gland under tongue, stiff neck [and] headache." (TAC ¶ 21, Ex. C.) Plaintiff alleges that Dr. C. Chin refused to provide any medical care treatment. (TAC ¶ 23.) However, according to the TAC, Plaintiff was examined later that day by Defendants Mettu and J. Chin, dentists responsible for diagnosing oral infections. (TAC ¶ 28.) On June 24, 2011, Plaintiff was also seen and treated by another dentist, Defendant Mai. (*See* TAC ¶ 29, Ex. C.) Other than concluding that the treatment by these physicians was ineffectual, Plaintiff offers nothing to support a claim that the course of treatment the doctors chose was "in conscious disregard of and excessive risk to plaintiff's health." *Jackson v. McIntosh,* 90 F.3d 330, 332 (9th Cir.1996).

***7** From July to December, Plaintiff received counseling, medication, x-rays, ultra-sounds and laboratory testing of his kidneys, liver and pancreas. (*See* TAC, Ex. B.) He was seen and referred to physicians and dentists in and out of the facility on numerous occasions for his complaints of abdominal pain and pain associated with his blocked salivary gland. (*See* TAC, Ex. A–E.) This sort of consistent treatment does not constitute an extreme deprivation of "the minimal civilized measures of life's necessities" or "wanton and unnecessary infliction of pain" that would make Plaintiff's claim rise to the level of an Eighth Amendment violation. *See Hudson v. McMillian,* 503 U.S. 1, 9 (1992).

Plaintiff alleges that the Defendants should have learned that the course of treatment they prescribed was not working to resolve Plaintiff's medical issues; therefore, they should have ordered a surgery before December 2011. (*See, e.g.,* TAC ¶ 33.) However, "[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference." *Sanchez v. Vild,* 891 F.2d 240, 242 (9th Cir.1989). Merely being negligent "in the diagnosis and treatment" of Plaintiff does not constitute an Eighth Amendment violation. *Estelle,* 429 U.S. at 106. Plaintiff fails to point to anything in the medical record which would support his conclusion that surgery on his gallbladder or salivary gland was medically necessary prior to the time it was performed. Therefore, Plaintiff has failed to state a claim that Defendants C. Chin, J. Chin, Mettu, and Mai acted with deliberate indifference to Plaintiff's constitutional rights.

2. *Defendants Finander, Adams, and Bingham*

Plaintiff contends that Defendants Finander, Adams, and Bingham violated his Eighth Amendment rights by virtue of their positions as supervisors. (TAC ¶¶ 38–53.) Under the deliberate indifference standard, a supervisory official cannot be held liable under a theory of respondeat superior or vicarious liability. *Iqbal,* 556 U.S. at 662. Prison officials in supervisorial positions can only be liable under section 1983 if they were "personally involved in the constitutional deprivation or a sufficient causal connection exists between [their] unlawful conduct and the constitutional violation." *Lemire v. Cal. Dept. of Corrections & Rehab.,* 726 F.3d 1062, 1085 (9th Cir.2013) (citing to *Lolli v. Cnty. Of Orange,* 351 F.3d 410, 418 (9th Cir.2003). Moreover, a prison official cannot be held liable for failure to alleviate a risk of harm to the inmate's health or safety that he should have perceived but did not. *Farmer v. Brennan,* 511 U.S. 825, 838 (1994). There must be a purposeful act or failure to act by the prison official. *McGuckin,* 974 F.3d at 1060.

Plaintiff attempts to impose liability on Finander, Adams, and Bingham for their failure to intervene in Plaintiff's course of treatment. (TAC ¶¶ 40–41.) He alleges that they each had "longstanding knowledge" of Plaintiff's need for urgent medical care because he was sent for off-site emergency medical treatment four times, and each supervisor is required to read and approve requests for off-site emergency medical procedures and then "counter-sign" reports upon the inmates' return to the prison. (TAC 55 45, 49.)

A supervisor's mere knowledge of his or her subordinate's unconstitutional conduct cannot amount to a constitutional violation. *See Iqbal,* 556 U.S. at 677. Plaintiff makes no reference in the TAC or in the attached medical records as to any problems that would have put the supervisory Defendants on notice of the need for further medical care or surgery, or that there was a substantial risk to Plaintiff's health that was not being addressed. To the contrary, the medical records demonstrate that Plaintiff was receiving continuous care and testing in regard to his medical conditions. Furthermore, nothing in the record supports a conclusion that Plaintiff's surgeries were necessary at any time before they were provided.

***8** Accordingly, Plaintiff has failed to state a claim that Defendants Finander, Adams, and Bingham violated his Eighth Amendment rights.

3. *Defendants Bolivar and DeJager*

The TAC alleges that Defendant Bolivar and Defendant DeJager were "contract physicians" who performed Plaintiff's gallbladder and blocked saliva gland surgeries on December 16, 2011. (TAC ¶ 44.) According to Plaintiff, a "shared contract" existed between the contract physicians and the prison facility which provided needed medical treatments only upon the contract physicians' open schedule for availability to perform surgical procedures. (*See id.* ¶¶ 41–42, 45.) Upon information and belief, Plaintiff alleges that another physician was unavailable to perform the saliva gland surgery; therefore, his surgeries were delayed until DeJager and Bolivar were available to perform them on December 16, 2011. (*Id.* ¶ 44.)

As the Court has already noted, a mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference. *Shapley,* 766 F.2d at 407. "Delays and waiting to see medical specialists are not uncommon in the world outside prisons." *Trillo v. Grannis,* No. 206–CV–00075–JKS–DAD, 2008 WL 2018339, *3 (E.D.Cal. May 8, 2008). Plaintiff did not allege that the delay in his surgeries caused any further injuries that constituted substantial harm. *See Hallett v. Morgan,* 296 F.3d 732, 746 (9th Cir.2002) (stating that delay of medical treatment does not constitute deliberate indifference unless delay led to further injury); *Daniels v. Evans,* No. C 08–3780 RMW PR, 2010 WL 1221798, *5 (N.D.Cal. Mar. 24, 2010) (Plaintiff's complaint that 6–month delay in receiving knee surgery exacerbated his alleged injuries was more akin to a difference of medical opinion regarding when tests and surgery should occur).

Moreover, Plaintiff does not allege any facts demonstrating that Defendants Bolivar and DeJager were aware of Plaintiff's supposed medical problems before they performed surgeries on him on December 16, 2011. The TAC conclusorily avers that Defendants Bolivar and DeJager both "had longstanding knowledge of Plaintiff's 'chronic care' medical conditions, [and] that if left medically untreated, [they] could result in serious injury or death." (TAC ¶ 46.) However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550

U.S. 544, 555 (2007)). Furthermore, none of the supporting documents attached to the TAC mentions Defendants Bolivar or DeJager with the exception of a pathology report confirming the removal of Plaintiff's submaxillary gland and gallbladder. (*See* TAC, App. E, at 52–54.)

Accordingly, Plaintiff fails to adequately allege Eighth Amendment violations against Defendants Bolivar and DeJager.

C. *Plaintiff Has Not Adequately Alleged an Excessive Force Claim Against Defendant Finander*

On December 21, 2011, four days after Plaintiff's surgeries, Plaintiff requested to leave the medical wing and return to his cell to recover from surgery, as it was Christmas and he was feeling isolated. (TAC ¶¶ 56—57.) Plaintiff alleges that Defendant Finander denied Plaintiff's request, asked Plaintiff to lift up his shirt, and then "pressed hard with all her strength on [Plaintiff's] surgery wounds on the stomach and neck." (TAC ¶¶ 61—62.) Plaintiff immediately felt severe abdominal pain and his neck began to leak white fluid, followed by extreme throbbing pain. (TAC ¶¶ 63—64.) Defendant Finander then ordered the nursing staff to remove Plaintiff's stomach staples and exclaimed, "[t]hat may keep him here [ ] longer." (TAC ¶ 65.) Plaintiff alleges that he suffered severe cramping in his abdomen, along with pain in his jaw, tongue, and neck. (TAC ¶ 70.)

***9** A *de minimis* use of physical force does not constitute an Eighth Amendment violation. *Hudson v. McMillian,* 503 U.S. 1, 10 (1992). For an excessive force claim, the plaintiff must allege the officer applied the force "maliciously or sadistically" and not "in a good-faith effort to maintain or restore discipline." *Id.* at 7. Relevant factors in this determination include the necessity of the force used, the relationship between the necessity and the amount of force used, the threat reasonably perceived by the responsible officials, any efforts made to temper the severity of a forceful response, and the extent of the injury inflicted. *Id.*; *see also Whitley,* 475 U.S. at 321.

Plaintiff's complaints involve a post-surgical examination by Dr. Finander. As noted by the exhibit attached to the TAC, on that day Plaintiff's wounds were examined, flushed, and his surgical staples replaced. (TAC Ex. F, at 58.) A certain amount of pain is necessarily involved in the examination and cleaning of surgical wounds. Moreover, Plaintiff's assignment of motivation to Dr. Finander's actions is not sufficient to support a claim that Finander maliciously and sadistically pushed on his incision sites for the purpose of causing harm. At most, Dr. Finander's statement that the condition of Plaintiff's surgical wounds "may keep" him in the medical wing longer addresses Plaintiff's requests to return to his cell, by noting that the condition of his wounds would not allow for his return.

Therefore, Plaintiff has failed to allege an excessive force claim against Defendant Finander.

D. *Plaintiff Has Not Adequately Alleged A Violation of His First Amendment Rights to the Courts or for Retaliation*

The TAC alleges that after Plaintiff filed inmate grievances to challenge the purportedly inadequate medical care and the supposed excessive force discussed elsewhere in the pleading, Defendant Adams, Defendant C. Chin, Defendant Van Dongen (the Appeals Coordinator at CSP–LAC), Defendant Donnelly (a registered nurse at the institution), and Defendant Finander used retaliatory appeals screening to prevent Plaintiff from accessing the courts. (*See* TAC ¶¶ 4, 13–14, 77, 84.) On December 25, 2011, Plaintiff filed an inmate grievance that asserted an excessive force misconduct complaint against Defendant Finander. (*See id.* at ¶¶ 81–82.) After Plaintiff did not receive a response, he reported the incident to Defendant Donnelly, who told him that she sent the complaint to Dr. Finander. (*Id.* ¶ 82.) When the grievance could not be located, Donnelly allegedly told Plaintiff that his "evil plan" had not succeeded. (*Id.* ¶ 84.)

Plaintiff filed a replacement grievance on July 12, 2012, which included both allegations of excessive force by Finander and a delay in providing him his surgery. (TAC ¶¶ 86–87; Appendix F.) On August 3, 2012, Plaintiff appeared at the medical clinic to receive his daily diabetic accu-check to monitor his blood sugar levels. (*Id.* ¶ 90.) Plaintiff decided to decline the accu-check by signing a refusal form. (*Id.* ¶ 90.) Plaintiff states that Defendants Adams and C. Chin falsely alleged "lack of cooperation" on his grievance because Plaintiff "refused to come to the clinic for his appointment." (*Id.* ¶¶ 88–89.) Defendant C. Chin and Defendant Adams purportedly cancelled Plaintiff's appeal because he refused to attend his grievance interview. (*Id.*)

On September 3, 2012, Plaintiff appealed the cancellation of the grievance. (TAC ¶ 96.) According to Plaintiff, Defendant Van Dongen improperly "screened out" this appeal. (*Id.* ¶ 97.) Plaintiff then filed a misconduct claim against Defendant Van Dongen for screening out the appeal. (*Id.*) Plaintiff filed a

complaint with the Office of the Inspector General and filed a third level appeal of her decision. (TAC ¶ 97.)

***10** Plaintiff wishes to recover against each of these Defendants under two theories of liability: (1) denial of access to the courts, *see, e.g., Christopher v. Harbury,* 536 U.S. 403, 415 (2002); and (2) retaliation for engaging in First Amendment activities. *See, e. g., Watison v. Carter,* 668 F.3d 1108, 1114 (9th Cir.2012).

Because a plaintiff must suffer an "actual injury" in order to obtain relief in federal court, he or she "must demonstrate that a nonfrivolous legal claim [has] been or [is] being impeded." *See Lewis v. Casey,* 518 U.S. 343, 348–51 (1996) (footnotes omitted). Here, Plaintiff has not pled any facts demonstrating that the Defendants are "presently denying" him an "opportunity to litigate" his claims, or that the underlying claims he intended to assert through either the December 2011 grievance or the replacement grievance dated July 2012 "cannot now be tried." *Christopher,* 536 U.S. at 412—14. To the contrary, Plaintiff has brought these claims and is currently litigating them. Because of this, his claim of denial to access to the court fails. *See id.* ("There is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element.")

Additionally, First Amendment retaliation claims are cognizable under § 1983 and have five *prima facie* elements. *See Pratt v. Rowland,* 65 F.3d 802, 806 (9th Cir.1995); *Watison,* 668 F.3d at 1114–15. "First, the plaintiff must allege that the retaliated-against conduct is protected." *Watison,* 668 F.3d at 1114 (citing *Rhodes v. Robinson,* 408 F.3d 559, 568 (9th Cir.2005)). "Second, the plaintiff must claim the defendant took adverse action against the plaintiff. The adverse action need not be an independent constitutional violation." *Id.* (citation omitted) (citing *Rhodes,* 408 F.3d at 568; *Pratt,* 65 F.3d at 806).

"Third, the plaintiff must allege a causal connection between the adverse action and the protected conduct. Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal." *Id.* (citing *Pratt,* 65 F.3d at 808; *Murphy v. Lane,* 833 F.2d 106, 108–09 (7th Cir.1987)).

"Fourth, the plaintiff must allege that the 'official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.' " *Id.* (quoting *Rhodes,* 408 F.3d at 568). However, if this "chilling effect" is not alleged, "[a plaintiff] may still state a claim if [the complaint] alleges he [or she] suffered some other harm,' that is 'more than minimal[.]' " *Id.* (citations omitted) (quoting *Brodheim v. Cry,* 584 F.3d 1262, 1269 (9th Cir.2009); *Rhodes,* 408 F.3d at 568 n.11).

"Fifth, the plaintiff must allege 'that the prison authorities' retaliatory action did not advance [the] legitimate goals of the correctional institution[.]' " *Id.* (quoting *Rizzo v. Dawson,* 778 F.2d 527, 532 (9th Cir.1985)). "The plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct he [or she] complains of." *Pratt,* 65 F.3d at 806 (citing *Rizzo,* 778 F.2d at 532). "A plaintiff successfully pleads this element by alleging, in addition to a retaliatory motive, that the defendant's actions were arbitrary and capricious, or that they were 'unnecessary to the maintenance of order in the institution[.]' " *Watison,* 668 F.3d at 1114–15 (citations omitted) (quoting *Franklin v. Murphy,* 745 F.2d 1221, 1230 (9th Cir.1984)) (citing *Rizzo,* 778 F.2d at 532).

***11** The TAC's factual theory appears to be that: (1) Defendant Donnelly retaliated against Plaintiff in connection with his December 2011 grievance which he purportedly sent to Dr. Finander creating a conflict of interest, (2) Defendant C. Chin and Defendant Adams cancelled Plaintiff's July 2012 grievance under false pretenses, and (3) Defendant Van Dongen retaliated against Plaintiff by improperly screening out Plaintiff's September 2012 appeal. (*See* TAC ¶¶ 74–102.) As discussed below, Plaintiff fails to state a First Amendment retaliation claim against each of these Defendants.

1. *Defendants Donnelly and Finander*

As in the SAC, Plaintiff again bases his factual theory that Defendant Donnelly retaliated against him on the circumstantial evidence that she was pleased that the December 2011 grievance had not been received and that Plaintiff's "evil plan" had been thwarted. The Court has already determined that these allegations are insufficient to state a retaliation claim because they do not "plausibly demonstrate that Defendant Donnelly took any 'adverse action' against him." (*See* Order Dismissing SAC with Leave to Amend, at 46.)

Plaintiff adds to his allegations Donnelly's averment that she sent the December 2011 grievance directly to Dr. Finander, which purportedly constitutes a "conflict of interest" under the California Code of Regulations. (*See* TAC ¶ 83 (citing to 15 C.C.R. 3084.7(d)(1)(A).) The California Code of Regulation cited by Plaintiff states that an appeal is not to be "reviewed and approved" by a staff person who participated in the aggrieved event. 15 C.C.R. 3084.7(d)(1). However, "[t]his does not preclude the involvement of staff who may have participated in the event or decision being appealed, so long as their involvement with the appeal response is necessary in order to determine the facts or to provide administrative remedy, and the staff person is not the reviewing authority and/or their involvement in the process will not compromise the integrity or outcome of the process." 15 C.C.R. 3084.7(d)(1)(A). Thus, Plaintiff fails to rule out the more plausible theory that Dr. Finander was sent the grievance to review and provide her input, not that she was ultimately responsible for reviewing the grievance.

Similarly, Plaintiff does not demonstrate that Defendant Finander took any retaliatory actions against him. The only allegation involving Dr. Finander is the one alleged in Plaintiff's underlying grievance. Plaintiff does not allege any further facts supporting a claim that Defendant Finander retaliated against Plaintiff for filing the grievance, or caused it to be lost.

2. *Defendants C. Chin and Adams*

Plaintiff avers that Defendant C. Chin and Defendant Adams falsely alleged "lack of cooperation" as grounds for cancelling his grievance, stating that he refused to meet to discuss his grievance during his scheduled appointment. (TAC ¶¶ 88–91, Ex. F, at 59.) Plaintiff alleges that although he refused his daily diabetic accu-check on the morning of August 3, 2012, he did not refuse to discuss his grievance. (TAC ¶ 91.) In support of his argument, Plaintiff attached to the FAC two exhibits: a "Refusal of Examination" form signed by a medical personnel and a "Primary Care Provider Progress Note" signed by Defendant C. Chin. (TAC, Ex. G, at 64–65.) Both forms indicate that Plaintiff refused his scheduled appointment to discuss his grievance (a "602 visit"). Plaintiff claims that Defendant Adams and Defendant C. Chin "added falsified written words" to these documents, in an effort to later use Plaintiff's refusal to meet regarding his appeal as grounds for cancelling it. (TAC ¶¶ 88–91.)

***12** Plaintiff's allegations are not sufficient to assert a plausible claim of retaliation against Defendant C. Chin or Defendant Adams. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal,* 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 557) (internal quotation marks omitted). Although Plaintiff's theory that the Defendants falsified documents in order to prevent Plaintiff from accessing the courts is certainly consistent with a claim for retaliation, it is not a plausible theory. At most, the TAC and attached exhibits reveal that a miscommunication occurred between Plaintiff and a nurse as to the Plaintiff's purpose for being in the medical line that day. (TAC ¶ 65.) When the nurse communicated Plaintiff's refusal to Defendant C. Chin, Defendant C. Chin simply recorded it in Plaintiff's medical records. (See TAC Ex. G, at 65.) Defendant Adams merely signed the cancellation letter in his capacity as chief physician and surgeon. (*See* TAC Ex. F, at 59—60.) No other evidence of retaliatory intent appears in the pleading. (*See* TAC ¶¶ 74–102.)

3. *Defendant Van Dongen*

Plaintiff's allegations against Defendant Van Dongen are largely the same as those asserted in the Second Amended Complaint. As the Court previously ruled, Plaintiff fails to allege facts demonstrating that Defendant Van Dongen rejected and ignored Plaintiff's appeals with the *intent to retaliate* against him for *attempting to access the courts. See, e.g., Pratt,* 65 F.3d at 803, 807–08 (reversing district court's grant of a preliminary injunction on a retaliation claim in part because the plaintiff failed to establish the requisite "retaliatory intent"). Notwithstanding the fact that "allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal[,]" *see Watison,* 668 F.3d at 1114 (citing *Pratt,* 65 F.3d at 808), the timeline provided by the TAC merely reveals that Defendant Van Dongen rejected and ignored Plaintiff's grievances *after* they were filed, and no other evidence of retaliatory intent appears in the pleading. (*See* TAC ¶¶ 96–98.) If such allegations were sufficient to state this type of claim, then any prison official who "screen[s] out" a grievance (and fails to respond to an inmate's resubmissions) would be found to have retaliated against a prisoner for attempting to exhaust administrative remedies. (TAC ¶¶ 96–98.) Because that assumption does not comport with "judicial experience and common sense[,]" the SAC's allegations "do not permit the [C]ourt to infer more

than the possibility of misconduct[.]" *See Iqbal,* 556 U.S. at 679. Thus, because Plaintiff does not allege facts that "state[ ] a plausible claim for relief[,]" his First Amendment retaliation claim against Defendant Van Dongen does not "survive[ ] a motion to dismiss." *See id.* at 679 (citing *Twombly,* 550 U.S. at 556). [4]

E. ***Plaintiff Should Not Be Granted Leave To Amend***

Federal Rule of Civil Procedure 15(a) provides in relevant part that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely grant leave when justice so requires." *See* Fed.R.Civ.P. 15(a)(2). When determining whether to grant leave to amend, courts weigh certain factors: "undue delay, bad faith or dilatory motive on the part of [the party who wishes to amend a pleading], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment[.]" *See Foman v. Davis,* 371 U.S. 178, 182 (1962). Although prejudice to the opposing party "carries the greatest weight[,] ... a strong showing of any of the remaining *Foman* factors" can justify the denial of leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir.2003) (per curiam). Furthermore, analysis of these factors can overlap. For instance, a party's "repeated failure to cure deficiencies" constitutes "a strong indication that the [party] has no additional facts to plead" and "that any attempt to amend would be futile[.]" *See Zucco Partners, LLC v. Digimarc Corp.,* 552 F.3d 981, 988, 1007 (9th Cir.2009) (internal quotation marks omitted) (upholding dismissal of complaint with prejudice when there were "three iterations of [the] allegations—none of which, according to [the district] court, was sufficient to survive a motion to dismiss"); *see also Simon v. Value Behavioral Health, Inc.,* 208 F.3d 1073, 1084 (9th Cir.2000) (affirming dismissal without leave to amend where plaintiff failed to correct deficiencies in complaint, where court had afforded plaintiff opportunities to do so, and had discussed with plaintiff the substantive problems with his claims), *amended by* 234 F.3d 428, *overruled on other grounds by Odom v. Microsoft Corp.,* 486 F.3d 541, 551 (9th Cir.2007); *Plumeau v. Sch. Dist. # 40 Cnty. of Yamhill,* 130 F.3d 432, 439 (9th Cir.1997) (denial of leave to amend appropriate where further amendment would be futile).

***13** Here, Plaintiff has filed three pleadings with this Court, none of which have alleged sufficient facts to state an Eighth Amendment deliberate indifference claim, an excessive force claim, or a First Amendment retaliation claim. (*See, e.g.,* Order Dismissing FAC, Docket Entry No. 12, at 5—11; Order Dismissing SAC, Docket Entry No. 106, at 12–47.) Moreover, Plaintiff has continually failed to correct flaws, even after the Court warned him that failure to cure these deficiencies could result in dismissal. In fact, Plaintiff has relied in part on *precisely the same factual allegations* as those found to be deficient in the SAC. Therefore, because there is a strong showing on at least two, if not three of the *Foman* factors, Plaintiff should not be granted leave to file an amended pleading, and the Court should dismiss the Third Amended Complaint and the action without leave to amend and with prejudice. [5]

IV.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) granting Defendant Bolivar's, Defendant DeJager's, and the Moving Prison Defendants' respective Motions to Dismiss; and (3) dismissing with prejudice Plaintiff's TAC in its entirety without leave to amend.

Dated: May 21, 2015

All Citations

Not Reported in Fed. Supp., 2015 WL 4498018

Footnotes

1 When referring to filings in this case, the Court shall use the pagination provided by the Court's electronic docket. Additionally, because two Defendants have the surname "Chin," the Court shall refer to Defendant Corina Chin as "C. Chin," and Defendant Judy Chin as "J. Chin."

2 This Part provides a brief summary of the facts alleged in the TAC. The Court addresses more specific factual allegations directed against some of the Defendants later in this Order. *See infra* Part III.C–D. In this Part, the Court expresses no opinion as to the veracity or plausibility of these allegations.

> Furthermore, attached to the TAC are fifty pages of documents relating to Plaintiff's medical care and inmate grievances, divided into ten appendices, which the Court will refer to as exhibits. (*See* TAC Exs. A–J.)

3 Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4 Defendant Van Dongen has not appeared in this action, and it appears that service of process was never executed upon him. (*See* Process Receipt and Return, Docket Entry Nos. 43, 122.) Nevertheless, the Court exercises its authority to *sua sponte* dismiss Plaintiff's claims against him. *See* 28 U.S.C.1915A(a)-(b) (authorizing *sua sponte* dismissal of claims filed by prisoners that "seek[ ] redress from ... [an] officer or employee of a governmental entity"); 28 U.S.C. § 1915(e)(2) (authorizing such dismissal in *in forma pauperis* proceedings); 42 U.S.C. § 1997e(c)(1) (authorizing such dismissal for suits "brought with respect to prison conditions").

5 At least one other district court has denied leave to amend when an amended complaint's factual allegations were identical to averments that had been previously dismissed. *See Johnson v. Wash. Mut.,* No. CV09-929-AWI (DLB), 2010 WL 1797250, at *1-2 (E.D. Cal. May 4, 2010).

End of Document

Exhibit 20

2016 WL 4607738
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Roosevelt WILLIAMS, Jr., Plaintiff,
v.
STATE OF CALIFORNIA, et al., Defendants.

Case No. CV 15-04781 AG (AFM)
|
Signed 07/25/2016

Attorneys and Law Firms

Roosevelt Williams, Jr., Monroeville, AL, pro se.

David B. Owen, Jonathan Berres Cole, Nemecek and Cole PC, Sherman Oaks, CA, Sarah L. Overton, Cummings McClorey Davis Acho and Associates PC, Riverside, CA, Charles W. Tourdot, Law Offices of Charles W. Tourdot, Fullerton, CA, for Defendants.

REPORT AND RECOMMDENATION OF UNITED STATES MAGISTRATE JUDGE

ALEXANDER F. MacKINNON, UNITED STATES MAGISTRATE JUDGE

***1** This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF PROCEEDINGS

On June 24, 2015, plaintiff filed this *pro se* civil rights action herein pursuant to 42 U.S.C. § 1983 and diversity jurisdiction. (*See* ECF No. 1 at 2; No. 29 at 60.) Plaintiff subsequently was granted leave to proceed *in forma pauperis* ("IFP"). (ECF Nos. 3, 5.) Plaintiff's 74-page Complaint named numerous defendants, including the State of California, the County of Los Angeles ("County"), the County of Los Angeles Department of Children and Family Services ("DCFS"), several individuals employed by DCFS, two attorneys, and two County of Los Angeles Superior Court judges. (*See* ECF No. 1 at 1-2, 4-5). Plaintiff purported to raise 26 "causes of action," most of which appeared to arise under state law. Plaintiff also alleged violations of the First, Fifth, and Fourteenth Amendments, as well as several federal statutes. (*Id.* at 1-2). All of plaintiff's claims appeared to pertain to an ongoing custody proceeding in state court (the "Dependency Action").

Prior to ordering service on any named defendant, the Court screened the Complaint for purposes of determining whether the action was frivolous or malicious; or failed to state a claim on which relief may be granted; or sought monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B). Section 1915(e)(2) pertains to any action by a litigant who is proceeding IFP. *See, e.g., Shirley v. Univ. of Idaho*, 800 F.3d 1193 (9th Cir. 2015) (citing 28 U.S.C. § 1915(e)(2)(B) and noting that a "district court shall screen and dismiss an action filed by a plaintiff proceeding *in forma pauperis*"); *Lopez v. Smith*, 203 F.3d 1122, 1127 n.7 (9th Cir. 2000) (noting "section 1915(e) applies to all *in forma pauperis* complaints" and directing "district courts to dismiss a complaint that fails to state a claim upon which relief may be granted") (en banc). Such screening is required before a litigant proceeding IFP may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir. 2015) (noting that "a preliminary screening" of a complaint filed by a litigant seeking to proceed IFP is "required by 28 U.S.C. § 1915(e)(2)"), *petition for cert. filed*, (Mar. 17, 2016); *O'Neal v. Price*, 531 F.3d 1146, 1152-53 (9th Cir. 2008) (citing *Lopez* and discussing a district court's "mandatory duty" to dismiss an IFP complaint under the criteria of 28 U.S.C. § 1915(e)(2)(B)).

Following review of the Complaint, the Court found that its allegations appeared insufficient to state any claim upon which relief may be granted, that plaintiff appeared to be impermissibly attempting to appeal an erroneous state court judgment against him, and that some defendants were entitled to absolute immunity from his claims. Accordingly, on September 24, 2015, the Court issued an Order Dismissing Complaint With Leave to Amend ("Order," ECF No. 9) and instructed plaintiff, if he wished to pursue the action, to file a First Amended Complaint no later than November 2, 2015. Further, plaintiff was admonished that, if he failed to timely file a First Amended Complaint, or failed to remedy the deficiencies of his pleading as set forth in the Court's Order, the Court would recommend that this action be dismissed without leave to amend.

***2** On October 30, 2015, plaintiff filed a 36-page document entitled "First Amended Complaint" ("FAC"). (ECF No. 16.) Although the FAC includes a cover page listing the defendants

in this action, it does not state any causes of action and does not seek any relief. In the FAC, plaintiff acknowledges that the Court's Order instructed him, if he wished to pursue this action, to file a FAC that was "complete in and of itself without reference to the original complaint." (ECF No. 16 at 2, 5.) Plaintiff, however, states that he wishes to instead "address" the issues presented in the Court's Order and that he "will not repeat 26 Causes of Action [ ] in light of judicial economy." (*Id.* at 5.) Rather, the FAC states: "In addition to the 26 Causes of Action cited in the Original Complaint, plaintiff also raises the below causes of action under the same legal theories stated in the Original Complaint," sets forth a list of eight new "causes of action," and purports to add six new defendants. (*Id.* at 3-4.) Plaintiff does not include any factual allegations pertaining to these new "causes of action" or the new defendants. (*Id.*) Then, on November 6, 2015, plaintiff filed a proof of service by United States mail on twelve defendants. (ECF No. 17.)

On November 24, 2015, defendant Jasminder Deol filed a Motion to Dismiss ("First Motion") accompanied by a Request for Judicial Notice. Defendant Deol contends that: (1) the FAC fails to comply with Rule 8 and fails to cure the deficiencies of the Complaint; (2) plaintiff's claims are barred by the *Rooker-Feldman* doctrine; [1] (3) plaintiff cannot state a federal civil rights claim against Deol because, as a private attorney, she was not acting under color of state law; (4) plaintiff failed to allege that Deol participated in a conspiracy; and (5) Deol's conduct is privileged under state law. (ECF No. 18.) Deol seeks judicial notice of a California State Bar entry indicating that she is not employed by a government agency. (ECF No. 19.)

Plaintiff filed Opposition to the First Motion on December 23, 2015, contending that: (1) his claims are not subject to *Rooker-Feldman* because he is not purporting to raise an appeal since the Dependency Action "is still ongoing" and his children have not been adopted (ECF No. 26 at 2, 13); (2) defendant Deol is employed by a "public firm" (*id.* at 3-4); (3) the "length of [the state court] case is enough to warrant a second look by the Court and acknowledge that there have been fundamental wrongs committed" (*id.* at 2); (4) Deol "has a special relationship with ... Judge Downing to the point where the Attorney knows the ruling prior to the ruling being read on Record" (*id.* at 6, 16); and that (5) his "FAC and [Complaint] are very clear, concise and based on the facts and Law" (*id.* at 16).

In her Reply filed on January 4, 2016, defendant Deol argues that: (1) plaintiff's claims against her "are patently frivolous"; and (2) plaintiff's argument that she is a state agent because she works for a government agency is incorrect because her employer is a private, non-profit organization. (ECF No. 27; ECF No. 19-1.) The Court grants defendant Deol's request for judicial notice of a California State Bar entry indicating that she is employed by the Los Angeles Dependency Lawyers, Inc. (ECF No. 19-1.) Pursuant to Fed. R. Evid. 201(b), the Court may take judicial notice of "a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Accordingly, the Court may take judicial notice of the public records of the California State Bar. *See, e.g., White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (court may take judicial notice of state bar records).

On December 16, 2016, defendants Carlos Vazquez and Marguerite Downing, Judges of the Superior Court of California, County of Los Angeles, and Terry Truong, Commissioner of the Superior Court of California, County of Los Angeles (collectively the "Judicial Defendants") filed a Motion to Dismiss ("Second Motion") pursuant to Rule 12(b)(1) and (6). The Judicial Defendants contend that plaintiff's FAC should be dismissed on the grounds that: (1) the Judicial Defendants are entitled to judicial immunity; (2) the Court lacks subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine; (3) the FAC fails to comply with Rule 8; and (4) the allegations fail to state any claim against the Judicial Defendants. (ECF No. 22 at 2.) The Judicial Defendants filed a Request for Judicial Notice seeking judicial notice of plaintiff's Complaint and the Court's own Order. (ECF No. 24.) The Court denies their request as unnecessary because the Court need not take judicial notice of its own records.

***3** Plaintiff filed Opposition to the Second Motion on January 13, 2016, in which he contends that: (1) judicial immunity is not applicable; (2) the *Rooker-Feldman* doctrine does not apply because the case is continuing and there has not been a final judgment; and (3) the Judicial Defendants "made erroneous ruling" and have continued a case for five years in which they have no jurisdiction. (ECF No. 29.) The Judicial Defendants filed a Reply on February 1, 2016, contending that judicial immunity does apply because plaintiff's allegations only pertain to an alleged lack of personal jurisdiction in the Dependency Action. (ECF No. 32.)

Because, as set forth below, the gravamen of plaintiff's claims is his allegation that he is being wrongfully deprived of the custody of his children by an on-going state court dependency proceeding, the Court recommends that the action be dismissed for lack of subject matter jurisdiction. Accordingly, the Court need not address the merits of the pending motions to dismiss, which are moot.

II. APPLICABLE LEGAL STANDARD

A Rule 12(b)(1) motion to dismiss tests whether a complaint alleges grounds for federal subject matter jurisdiction. Where the motion attacks subject matter jurisdiction based on extrinsic evidence, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). In determining the existence of subject matter jurisdiction, a court may review evidence beyond the complaint without converting a motion to dismiss into one for summary judgment. *See Gemtel Corp. v. Cmty. Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (a "court may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"). "The plaintiff bears the burden of proving" the existence of subject matter jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir.), *cert. denied*, 135 S. Ct. 361 (2014).

III. DISCUSSION

A. "Causes of Action" raised in the FAC

The Court concurs with defendants that plaintiff's FAC fails to cure any of the deficiencies of the Complaint and fails to comply with the Court's Order that an amended complaint be complete in and of itself without reference to the original Complaint. (*See* ECF No. 9 at 12.) In addition, an amended complaint supersedes the original in most cases. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012) (en banc) (holding that an amended complaint does not supersede an earlier complaint only in the limited circumstance such that a party is not required to replead claims dismissed with prejudice to preserve those claims for appeal). Once an amended complaint has been filed, the "original pleading no longer performs any function." *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992)).

Accordingly, plaintiff is not permitted to incorporate by reference into his FAC the claims that he previously raised in his Complaint. (*See* FAC at 3-5.) In any event, the two pending Motions address the "claims" plaintiff is purporting to raise as if expressly included in the FAC. Because the Court must liberally construe plaintiff's *pro se* filings and must afford him the benefit of any doubt in attempting to ascertain what claims he is intending to raise, the Court has considered both plaintiff's Complaint and the FAC in attempting to determine the "general theory and nucleus of facts under which he [seeks] relief." *Walker v. Beard*, 789 F.3d 1125, 1133-34 (9th Cir.) (discussing the "liberal standard" applicable to motion papers and pleadings filed by *pro se* litigants), *cert. denied*, 136 S. Ct. 570 (2015).

B. Subject matter jurisdiction

(1) The FAC is not barred by the Rooker-Feldman doctrine under the current record.

***4** The *Rooker-Feldman* doctrine provides that federal district courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over state court decisions. *See Feldman*, 460 U.S. at 482-86; *Rooker*, 263 U.S. at 415. Review of state court decisions may be conducted only by the United States Supreme Court. *See Feldman*, 460 U.S. at 476, 486; *Rooker*, 263 U.S. at 416; *see also* 28 U.S.C. § 1257. *Rooker-Feldman* thus bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The *Rooker-Feldman* doctrine applies even when the challenge to the state court decision involves federal constitutional issues. *See Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994); *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986). Further, "*Rooker-Feldman* bars any suit that seeks to disrupt or 'undo' a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims." *See Bianchi v. Rylaarsdam*, 334 F.3d 895, 901 (9th Cir. 2003) (internal quotation marks omitted).

Defendants contend that plaintiff's FAC is barred by the *Rooker-Feldman* doctrine. In response, plaintiff contends that *Rooker-Feldman* does not apply because the Dependency Action is "still ongoing" and his children have not been

adopted. (ECF No. 26 at 2, 13; ECF No. 29 at 60-61.) In her reply, defendant Deol argues that the allegations in plaintiff's FAC "clearly demonstrate" that he "is seeking to remedy the alleged wrongs that he believes were made by the underlying state court" [sic]. (ECF No. 27 at 3.) Defendant Deol does not address plaintiff's contention that the Dependency Action is ongoing. The Judicial Defendants also contend that "plaintiff complains about numerous orders of the judicial defendants during the juvenile dependency proceedings," including an order of adoption that they contend is a final order. (ECF No. 32 at 4.) The Judicial Defendants do not seek judicial notice of any specific ruling or order in the Dependency Action that they contend is final for purposes of the *Rooker-Feldman* doctrine.

In *Exxon Mobil*, the Supreme Court clarified that the *Rooker-Feldman* doctrine is only applicable in cases in which suit in federal court was initiated after state proceedings had ended. 544 U.S. at 291-92. In addition, the Ninth Circuit has indicated that "[p]roceedings end for *Rooker-Feldman* purposes when the state courts finally resolve the issue that the federal court plaintiff seeks to relitigate in a federal forum, even if other issues remain pending at the state level." *Mothershed v. Justices of Supreme Ct.*, 410 F.3d 602, 604 n.1 (9th Cir. 2005) (as amended) (citing *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 25 (1st Cir. 2005)); *see also ScripsAmerica, Inc. v. Ironridge Global LLC*, 56 F. Supp. 3d 1121, 1138 (C.D. Cal. 2014) ("where a federal action is filed 'while the state court action continue[s] in the appeals process in state court, the state proceedings ha[ve] not ended' " (alterations in original; quoting *Nicholson v. Shafe*, 558 F.3d 1266, 1278 (11th Cir. 2009))).

The Court acknowledges that a Ninth Circuit panel, in an unpublished decision subsequent to *Exxon Mobil*, has upheld the application of the *Rooker-Feldman* doctrine in dismissing a case in which the plaintiff had filed his federal action before the state court appeal had concluded. *See Marciano v. White*, 431 Fed. Appx. 611, 612-13 (9th Cir. 2011). The plaintiff in *Marciano* brought suit in federal court against the state court judge who had issued the adverse ruling that the plaintiff was seeking to overturn. The Ninth Circuit noted that *Marciano's* case was unusual in that, rather than filing an action in federal court against the defendants in his state court action, he brought suit directly against the presiding state court judge. The Ninth Circuit concluded that, in that context, the state court's decisions were "sufficiently final to support the dismissal of the federal action under *Rooker-Feldman*." However, the Ninth Circuit panel in *Mothershed* implicitly recognized that *Exxon Mobil* abrogated earlier Ninth Circuit decisions holding that federal proceedings were barred by state court judgments under *Rooker-Feldman* whether or not the state court judgment was on appeal. *See, e.g., ScripsAmerica, Inc.*, 56 F. Supp. 3d at 1138 n.54, 1142 (discussing cases).

***5** In the present case, plaintiff states in his pleadings that the Dependency Action remains ongoing. Defendants have pointed to no evidence to show that any relevant portion of the Dependency Action had ended before plaintiff initiated his federal action. Because the Court must give a *pro se* plaintiff the benefit of any doubt, the Court finds (for purposes of the present motion) that the proceedings in the Dependency Action had not ended at the time that plaintiff initiated this federal action. Thus, the *Rooker-Feldman* doctrine does not bar plaintiff's federal action under the current record.

(2) As to injunctive or declaratory relief, the Younger abstention doctrine bars the Court's intervention in ongoing state court dependency proceedings.

As a general proposition, a federal court will not intervene in certain pending state proceedings absent extraordinary circumstances where the danger of irreparable harm is both great and immediate. *See Younger v. Harris*, 401 U.S. 37, 45-46 (1971). The Court may raise *Younger* abstention *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976); *Hoye v. City of Oakland*, 653 F.3d 835, 843 n.5 (9th Cir. 2011) ("Neither party has raised the *Younger* doctrine, but it may be raised *sua sponte* at any time in the appellate process.") (internal quotation marks omitted).

Pursuant to *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013), the *Younger* abstention doctrine may be applicable in cases in which one of three types of state proceedings are pending: (1) state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving orders in furtherance of the state court's ability to perform judicial functions. The Court should abstain under *Younger* in a civil case if four requirements are met: (1) a state proceeding is ongoing; (2) the proceedings "involve a state's interest in enforcing the orders and judgments of its courts"; (3) the proceedings "implicate an important state interest'; and (4) the federal plaintiff is allowed to raise federal constitutional challenges in the state proceeding. *See ReadyLink Healthcare, Inc. v. State*

Compensation Ins. Fund, 754 F.3d 754, 759 (9th Cir. 2014). If these "threshold elements" are satisfied, then the Court considers "whether the federal action would have the practical effect of enjoining the state proceedings." *Id.*

Here, as set forth above, it appears that the state court Dependency Action was ongoing at the time that plaintiff filed this action. Custody and parentage proceedings initiated by a state have long been recognized as implicating important state interests. *See Moore v. Sims*, 442 U.S. 415, 423 (1979) (holding that *Younger* abstention is appropriately applied to challenges to state custody and parentage proceedings); *H.C. ex rel Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000) (dismissing case under *Younger* where parents sought "wholesale federal intervention into an ongoing state domestic dispute" involving child custody). Further, even following plaintiff's attempt at amendment, no factual allegations reflect that the state proceedings are inadequate to provide plaintiff with an opportunity to raise his constitutional challenges. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary," for federal claims). Finally, because plaintiff alleges that the state court "wrongfully" removed his children from his custody (*see, e.g.*, ECF No. 26 at 13; No. 29 at 5, 11, 32), action in this case would directly interfere with the ongoing state court proceedings. *See, e.g., Carlson v. County of Ramsey, Minnesota*, 2016 WL 3352196, at *6 (D. Minn. June 15, 2016) (holding that the court lacked subject matter jurisdiction, or should abstain pursuant to *Younger*, where plaintiff challenged state court orders concerning child custody and visitation, and noting that plaintiff "will have an adequate opportunity to raise any federal challenges in the state custody proceedings themselves").

***6** Accordingly, to the extent that plaintiff is seeking declaratory or injunctive relief against defendants in connection with the Dependency Action (*see* ECF No. 1 at 3, 73), such relief would interfere with the pending Dependency Action. Because federal courts must abstain from such interference, plaintiff's claims for declaratory and injunctive relief should be dismissed. *See Gilbertson v. Albright*, 381 F.3d 965, 975 (9th Cir. 2004) (en banc) ("federal courts should also refrain from exercising jurisdiction in actions for declaratory relief because declaratory relief has the same practical impact as injunctive relief on a pending state proceeding"). Similarly, plaintiff's claims for damages in connection with the state court Dependency Action (if not otherwise barred) should be stayed until the pending Dependency action is complete. *See Gilbertson*, 381 F.3d at 984 ("when damages are at issue rather than discretionary relief, deference – rather than dismissal – is the proper restraint"). In this case, however, as set forth below, plaintiff's federal claims for damages arising from the Dependency Action are barred for other reasons.

(3) This Court lacks jurisdiction over plaintiff's claims pursuant to the domestic relations exception.

Even if not raised by a defendant, the Court has an "independent obligation" to address jurisdictional issues *sua sponte*. *See, e.g, Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The Court may dismiss a suit *sua sponte* for lack of subject matter jurisdiction. *See Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 985 (9th Cir. 2003).

It has long been the law that "[a]s to the right to the control and possession of [a] child, as it is contested by its father and its grandfather, it is one in regard to which neither the congress of the United States, nor any authority of the United States, has any special jurisdiction." *Ex parte Burrus*, 136 U.S. 586, 594 (1890). As the Supreme Court has emphasized, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (alteration omitted), *abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014); *see also United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("Federal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy ... of the States in the regulation of domestic relations.' " (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992))). "Even when a federal question is presented, federal courts decline to hear disputes which would deeply involve them in adjudicating domestic matters." *Thompson v. Thompson*, 798 F.2d 1547, 1558 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988). It is particularly inappropriate for a federal court to interfere in family law matters pending in state court. *See Coats v. Woods*, 819 F.2d 236, 237 (9th Cir. 1987) (finding it was not an abuse of discretion for district court to abstain from hearing § 1983 claims arising from a child custody dispute pending in state court); *Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983) (affirming district court's dismissal after declining jurisdiction in dispute involving father's visitation rights). As the Supreme Court

has explained, "[s]ubject to certain constitutional guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2680 (internal citation and quotation marks omitted).

It has become apparent — in light of plaintiff's complaint and amendment, and his arguments in opposition to the pending Motions — that plaintiff seeks to assert claims here "pertain[ing] to the right to parent" and defendants' alleged "wrongful interference with his right to affection and companionship with his children." (ECF No. 1 at 10-11; *see* No. 16 at 4, 7, 12; No. 26 at 6 (defendants' "violation of Plaintiff [sic] fundamental right to parent"), 10, 13; No. 29 at 7, 11.) In effect, plaintiff is attempting to use the present federal case to challenge the result of the California state custody proceeding. In addition, plaintiff alleges that defendants have "reached beyond their State borderlines and into the State of Alabama to enforce their marital law" and to deprive him of his "fundamental right to associate and raise his biological children." (ECF No. 1 at 4, 10, 12-13, 26, 28; No. 16 at 12-13.) It is thus clear that plaintiff's claims directly involve "elements of the domestic relationship" of plaintiff's custody of his children, and would require the Court to review or interfere with the state proceedings in the Dependency Action — a matter traditionally within the domain of the state courts. In these circumstances, subject matter jurisdiction does not exist in this Court. *See Todd v. Bahrke*, 604 Fed. Appx. 558, 559 (9th Cir. 2015) (affirming district court's dismissal without leave to amend of a § 1983 case alleging federal and state law violations arising out of child custody proceedings in which the district court found that the domestic relations exception bolstered the determination that subject matter jurisdiction was inappropriate); *Angelet v. Ruiz*, 2016 WL 2977271, at *2 (E.D.N.Y. May 20, 2016) (applying the domestic relations exception and finding lack of subject matter jurisdiction over a § 1983 action relating to child custody by a father against his ex-wife and various state court judges and officials); *Bodda v. State of Idaho Child Protective Servs.*, 2016 WL 3647841 (D. Idaho July 1, 2016) (holding that the court lacked subject matter jurisdiction over claims involving parental rights where plaintiff had alleged the wrongful deprivation of custody of her child).

RECOMMENDATION

***7** IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying the pending motions to dismiss as moot; and (3) dismissing plaintiff's claims without leave to amend and without prejudice for lack of subject matter jurisdiction.

DATED: July 25, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4607738

Footnotes

1 *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

DLA Piper LLP (US)
2000 Avenue of the Stars, Suite 400 North Tower
Los Angeles, CA 90067-4704

A true and correct copy of the foregoing document entitled *Limited Objection to Requests for Judicial Notice* will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On June 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Aaron S. Craig	acraig@kslaw.com; lperry@kslaw.com
United States Trustee	ustpregion16.la.ecf@usdoj.gov
Matthew S. Walker	matthew.walker@pillsburylaw.com; renee.evens@pillburylaw.com; docket@pillsburylaw.com
Scott H. Olson	solson@vedderprice.com; scott-olson-2161@ecf.pacerpro.com; ecfsfdocket@vedderprice.com; nortega@vedderprice.com

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On June 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on June 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

VIA HAND DELIVERY

VIA ELECTRONIC MAIL

(Party, who is being served if different, and email address for each)

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

June 3, 2021	William L. Countryman, Jr.	*/s/ William L. Countryman, Jr.*
Date	*Printed Name*	*Signature*

Service via Electronic Mail	
Li Qi, Truly Great Global, Ltd., Universal Leader Investment Ltd., and Glove Assets Investment Ltd. Attn.: Michael L. Bernstein Email: michael.bernstein@apks.com Attn.: Charles A. Malloy Email: charles.malloy@apks.com Attn.: Lisa Hill Fenning Email: lisa.fenning@apks.com	**Yuntian 3 Leasing Company Designated Activity Company f/k/a Yuntian 3 Leasing Company Limited, Yuntian 4 Leasing Company Designated Activity Company f/k/a Yuntian 4 Leasing Company Limited and Minsheng Business Aviation Limited** Attn.: Dan T. Moss Email: dtmoss@jonesday.com Attn.: Joshua M. Mester Email: jmester@jonesday.com Attn.: David S. Torborg Email: dstorborg@jonesday.com
United States Trustee Attn.: Dare Law Email: dare.law@usdoj.gov Attn.: Ron Maroko Email: ron.maroko@usdoj.gov Attn.: Jill Sturtevant Email: jill.sturtevant@usdoj.gov Attn.: Peter C. Anderson Email: peter.c.anderson@usdoj.gov	**Export Development Canada Limited** Attn.: Scott H. Olson Email: solson@vedderprice.com Attn.: Michael J. Edelman Email: mjedelman@vedderprice.com

Service via Mail	
Minsheng Financial Leasing Co., Ltd. Floor 3-6, Distinguished Guest Building Beijing Friendship Hotel One South Zhongguancun Street HaidianHaidian District Beijing, 100873 and Zhongguancun South Street Beijing Friendship Hotel Guest House 1 2-6 Beijing, 100873	