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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

MOSES CHOI, an individual; and SOUTHEAST REGIONAL CENTER, LLC, a Georgia limited liability company,

Plaintiffs,

v.

8TH BRIDGE CAPITAL, INC., a California corporation; YOUNG HUN KIM, an individual; 8TH BRIDGE CAPITAL, LLC, a California limited liability company; MANHATTAN REAL ESTATE FUND GP, LLC, a Delaware limited liability company; MANHATTAN REAL ESTATE FUND, LP, a Delaware limited partnership; MANHATTAN REAL ESTATE FUND II, LP, a Delaware limited partnership; MANHATTAN REAL ESTATE EQUITY FUND, LP, a Delaware limited partnership; and PATRICK JONGWON CHANG, an individual.

Defendants.

AND RELATED COUNTER-CLAIMS

Case No. 2:17-cv-8958-CAS(AFMx)
Hon. Christina A. Snyder

NOTICE OF MOTION AND MOTION TO DISMISS COUNTERCLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declaration of Moses Choi]

Date: July 16, 2018
Time: 10:00 a.m.
Ctrm: 8D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on July 16, 2018 at 10:00 a.m. in Courtroom 8D of the above-entitled court, located at 350 W. 1st Street, Los Angeles, CA 90012, Counterdefendants MOSES CHOI and SOUTHEAST REGIONAL CENTER, LLC, SRC AJIN FUND I, LLC, SRC AJIN FUND II, LLC, SRC AJIN FUND III, LLC, SRC AJIN-WOOSHIN FUND IV, LLC and SRC AJIN-WOOSHIN FUND V, LLC ("Counterdefendants") will and hereby do move to dismiss the following Counterclaims filed by Defendants and Counterclaimants 8TH BRIDGE CAPITAL, INC., YOUNG HUN KIM, 8TH BRIDGE CAPITAL, LLC, and PATRICK JONGWON CHANG (collectively, "Counterclaimants"):

1. The Third Counterclaim for Declaratory Relief against Counterdefendants AJIN FUND I, LLC, SRC AJIN FUND II, LLC, SRC AJIN FUND III, LLC, SRC AJIN-WOOSHIN FUND IV, LLC and SRC AJIN-WOOSHIN FUND V, LLC, on grounds that the Court lacks personal jurisdiction over these Counterdefendants (Rule 12(b)(2));
2. The Second Counterclaim for Intentional Interference With Prospective Economic Advantage, on grounds that Counterclaimants have failed to state a claim upon which relief can be granted (Rule 12(b)(6));
3. The Fourth Counterclaim for Rescission Based on Fraud, on grounds that Counterclaimants have failed to state a claim upon which relief can be granted (Rule 12(b)(6));
4. The Fifth Counterclaim for Breach of Oral Contract, on grounds that Counterclaimants have failed to state a claim upon which relief can be granted (Rule 12(b)(6)); and
5. The Sixth Counterclaim for Promissory Estoppel, on grounds that Counterclaimants have failed to state a claim upon which relief can be granted (Rule 12(b)(6)).

This Motion is made pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), on grounds set forth in the attached Memorandum of Points and Authorities and supporting declaration.

This Motion is based upon this Notice, attached Memorandum of Points and Authorities, the Declaration of Moses Choi filed concurrently herewith, the papers on file with the Court in this action, and such further evidence and argument has may be considered by the Court at or prior to the time the Motion is heard.

Local Rule 7-3 Certification

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on April 11, 2018

Dated: April 25, 2018

GREGG A. RAPOPORT, APLC

s/ *Gregg A. Rapoport*

Gregg A. Rapoport

Attorney for Plaintiffs and Counterdefendants MOSES CHOI and SOUTHEAST REGIONAL CENTER, LLC and Counterdefendants SRC AJIN FUND I, LLC, SRC AJIN FUND II, LLC, SRC AJIN FUND III, LLC, SRC AJIN-WOOSHIN FUND IV, LLC and SRC AJIN-WOOSHIN FUND V, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In their Counterclaims, Counterclaimants prove the wisdom of the adage that "just because you can doesn't mean you should." Most of the counterclaims are improper and should be dismissed. Specifically:

In their Third Counterclaim, they have named as counterdefendants five third-party entities (the "AJIN LLCs") that have no minimum contacts in California under due process standards, seeking declaratory relief as to rights under a joint venture to which these entities were not alleged parties. Counterclaimants cannot meet their burden to show grounds for personal jurisdiction against the AJIN LLCs.

In the Second Counterclaim, they allege tortious interference with prospective economic advantage based on alleged defamation about Young Kim, yet have not alleged facts to support any independent defamation claim.

In the Fourth Counterclaim, they allege a right to rescind the joint venture based on fraud, yet have failed to meet basic pleading standards for fraud.[1]

In the Fifth Counterclaim, Counterclaimant Patrick Chang, a former employee of Plaintiff SRC, alleges that Plaintiff Choi personally made an oral promise to pay for Chang to be able to attend business or law school. Chang has not alleged the existence of an enforceable contract, both due to the uncertainty of terms and the statute of frauds.

In the Sixth Counterclaim, Chang alleges that the very same oral contract is also enforceable under the doctrine of promissory estoppel, yet that theory is

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[1] Similarly, Defendants have not properly alleged the affirmative defense of Fraud, as discussed in Plaintiffs' concurrently-filed Motion to Strike.

barred by Chang's own allegations that a contract was formed based on the exchange of actual consideration.

Plaintiffs hereby move to dismiss the five AJIN LLCs from this action, and dismissing the Second, Third, Fourth, Fifth, and Sixth Counterclaims.

II. STATEMENT OF RELEVANT ALLEGATIONS

A. The Claims by Plaintiffs

In this action, Plaintiffs Moses Choi ("Choi") and Southeast Regional Center, LLC ("SRC") allege that in 2015, together they formed a joint venture partnership with Defendants Young Kim ("Kim") and 8th Bridge Capital, Inc. ("8th Bridge Inc.") to cooperatively market certain EB-5 projects to targeted investors in China, South Korea, Vietnam, and elsewhere. Choi invested more than $500,000 of his personal funds into the venture, devoted more than 18 months of his and SRC's time and effort, and contributed SRC's proprietary and confidential information. (FAC ¶¶ 4 and 35-62.) Defendants Kim and 8th Bridge Inc. requested and accepted these contributions from Plaintiffs in order to secure the funding for a successful EB-5 project (the Ace Hotel project), which then yielded to these Defendants substantial ongoing management and other fees. (FAC ¶ 5 and 63-70.) In early 2017, after the funding for the Ace Hotel project was secured, these Defendants froze Plaintiffs out, transferred the venture's assets to third parties, and refused to recognize Plaintiffs' partnership interest. (FAC ¶ 6 and 71-79.) Plaintiffs brought suit in December 2017, seeking damages, declaratory relief, imposition of a constructive trust on revenues obtained from the joint venture, an injunction, appointment of a receiver, restitution, and an accounting, in claims against Defendants Kim, 8th Bridge Inc., and six other affiliated defendants, including 8th Bridge Capital, LLC ("8BC LLC") and Patrick Chang ("Chang").

B. The Counterclaims by Kim, 8th Bridge Inc., 8th Bridge Capital, LLC, and Patrick Chang

In their responsive pleadings (Docket Nos. 31-34), Kim, 8th Bridge Inc., 8BC LLC, and Chang have filed six Counterclaims. Kim and 8BC LLC allege that Choi intentionally interfered with their contractual relations with a business in Vietnam called IMM Group PTE LTD ("IMM") and its representative or principal, Tony Tinh ("Tinh"). (Counterclaims at pp. 29, 51, and 52-66.) Kim and 8th Bridge Inc. seek declaratory relief to establish that no joint venture was formed or if it was formed, that they are entitled to a share in the profits of five EB-5 projects controlled by SRC and Choi. (*Id*. at ¶¶ 67-72.) They also seek to rescind such joint venture based on alleged fraud. (*Id*. at ¶¶ 73-76.) Finally, Counterclaimant Chang seeks to enforce an alleged oral contract requiring Choi to fund his graduate or law school education. (*Id*. at ¶¶ 77-81.)

In this Motion to Dismiss, Counterdefendants will address: (1) the lack of personal jurisdiction for Counterclaim 3 for Declaratory Relief against five EB-5 project entities -- SRC AJIN FUND I, LLC ("AJIN I"), SRC AJIN FUND II, LLC ("AJIN II"), SRC AJIN FUND III, LLC ("AJIN III"), SRC AJIN-WOOSHIN FUND IV, LLC ("AJIN IV"), and SRC AJIN-WOOSHIN FUND V, LLC ("AJIN V") (together, the "AJIN LLCs"); and (2) the failure to state a claim for Counterclaims 2, 4, 5 and 6 against Choi and SRC.

III. THE AJIN LLCS ARE NOT SUBJECT TO PERSONAL JURISDICTION IN THIS COURT

A. Statement of Jurisdictional Facts

In Counterclaim 3 for Declaratory Relief, Kim and 8th Bridge Inc. allege on information and belief that the five AJIN LLCs (which they refer to as "SRCAW") are "controlled by Choi and SRC," and "since personal jurisdiction is proper against them, it is also proper against SRCAW." (*Id*. at p. 25 ¶ 18.)

The following facts are set forth, as indicated, in the Declaration of Moses Choi, filed concurrently:

Choi is a resident of Georgia, and is the sole Managing Member of Southeast Regional Center, LLC ("SRC"), a Georgia LLC with its principal place of business in Georgia. SRC is serves as the Managing Member of the AJIN LLCs, referred to collectively by Counterclaimants as "SRCAW." (Choi Decl. ¶¶ 2-3.)

The AJIN LLCs were each formed for a single purpose, to hold the investment funds of their respective foreign investors, and to use those funds for a specific project created under the federal "EB-5 Program" and "EB-5 Immigrant Investor Program," administered by the U.S. Citizenship and Immigration Services ("USCIS").[2] (Choi Decl. ¶ 4.)

Each of the AJIN LLCs was formed as a limited liability company under either Georgia or Alabama law, for the purpose of investing in an approved EB-5

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[2] The EB-5 Program was created by Congress in 1990 to stimulate the economy through job creation and capital investment by foreign investors. The term "EB-5" is an acronym for the 10,000 "Employment-Based Fifth Preference" visas that USCIS grants each year to program participants and their spouses and unmarried children, enabling them to apply for permanent residency in the United States. Under federal law, to obtain an EB-5 visa, foreign investors must invest a minimum of $1,000,000 in capital in a USCIS-approved new commercial enterprise, or a minimum of $500,000 in capital in an approved new enterprise within a high-unemployment or rural area, known as a "Targeted Employment Area" (or "TEA"). The enterprise may be formed to conduct any lawful for-profit business, but must directly create full-time jobs for at least ten qualifying employees. The EB-5 Immigrant Investor Program was established in 1992 to set aside EB-5 visas for EB-5 Program participants who invest in commercial enterprises associated with "regional centers," which are for-profit entities approved by USCIS to pool investment capital based on specific project proposals located within the regional center's geographic territory. SRC is an EB-5 regional center. (Choi Decl. ¶¶ 5-6.)

project located in Alabama. The principal place of business for each of the AJIN LLCs has always been located in Georgia. (Choi Decl. ¶ 7.)

None of the AJIN LLCs has ever made sales, solicited or engaged in business in California, served the state's markets, designated an agent for service of process, held a license, or been registered to do business in California. None of the AJIN LLCs has ever owned or held assets, employed persons, or brought suit in California. (Choi Decl. ¶ 8.)

B. Standards for Establishing Personal Jurisdiction

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff (or in this case, the counterclaimant) has the burden of establishing that the court can properly exercise personal jurisdiction over a defendant (or counterdefendant). *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1101 (2012). Where a court decides the motion without an evidentiary hearing, the opposing party must make a prima facie showing of admissible jurisdictional facts to withstand the motion to dismiss. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174, 1181 (C.D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th Cir. 2001), *overruled on oth. grds.*, *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014) ("*Daimler*").

"Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute. Second, the exercise of jurisdiction must comport with federal due process." *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005); *Pebble Beach*, 453 F.3d at 1154–55. "California [law] permits the exercise of personal jurisdiction to the full extent permitted by due process." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *see also* Cal. Civ. Pro. Code § 410.10 ("A court of this state may exercise

jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). Therefore, the governing standard in this case is whether the court's exercise of personal jurisdiction over defendant comports with federal due process. *See Calderon*, 422 F.3d at 830-831.

The exercise of personal jurisdiction over a defendant comports with federal due process only if the defendant "has certain minimum contacts with the relevant forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (en banc) ("*Yahoo! Inc*") (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). In turn, sufficient "minimum contacts" can give rise to "general jurisdiction" or "specific jurisdiction." *Unocal Corp.*, 248 F.3d at 923.

C. There Is No Basis to Assert General Jurisdiction Over the AJIN LLCs.

Counterclaimants Kim and 8th Bridge Inc. (referred to as "8BC") do not allege a basis for general jurisdiction as to any of the five AJIN LLCs. Nevertheless, the AJIN LLCs deny that general jurisdiction exists, and address that issue here.

For individuals, general jurisdiction applies if the defendant's activities in the forum "are substantial, continuous and systematic," whereas specific jurisdiction applies if a defendant's "less substantial contacts with the forum give rise to the cause of action before the court." *Unocal Corp.*, 248 F.3d at 923; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-46.

A higher standard applies to a corporation, which is subject to general jurisdiction only when its place of incorporation and/or principal place of business renders it "essentially at home" in the state, or when its affiliations with the forum are so "continuous and systematic" as to render it essentially at home there. *Daimler*, 134 S.Ct. at 751, 754; *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558

(2017). Only in an "exceptional case" will general jurisdiction be available anywhere else. *Daimler*, 134 S.Ct. at 761 n.19. Simply doing business in the forum state in not sufficient to confer general jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-419 (1984); *Bancroft*, 223 F.3d at 1086 ("Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there.").

The same "at home" jurisdictional analysis should apply to limited liability companies. (Reid O'Connell, et al., Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 3-E ¶ 3:109 ["Since the rationale for imposing such a test is where the entity is 'at home' in terms of its business 'domicile,' it is doubtful that the type of entity involved should affect the jurisdictional analysis."].)

Counterclaimants have not alleged and cannot demonstrate any facts establishing that any of the AJIN LLCs is "at home" in California. All of the entities were formed in either Georgia or Alabama for the purpose of holding investment funds of investors relating to specific projects, and all have their principal places of business in Georgia. (Choi Decl. ¶¶ 4, 7.) None of the entities has "continuous and systematic" contacts" in California, as required; in that, none has ever made sales, solicited or engaged in business in the state, served the state's markets, designated an agent for service of process, held a license, or been registered to do business in California. None of the AJIN LLCs has ever owned or held assets, employed persons, or brought suit in California. (Choi Decl. ¶ 8.)

The AJIN LLCs thus have no minimum contacts with this state, and Counterclaimants cannot show a basis for general jurisdiction.

D. There is No Basis to Assert Specific Jurisdiction Over the AJIN LLCs.

The Ninth Circuit analyzes specific jurisdiction according to a three-prong test:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Yahoo! Inc., 433 F.3d at 1205-06 (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004); *Rano v. Sina Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993).

"The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state." *Schwarzenegger*, 374 F.3d. at 802. Once the plaintiff satisfies the first two prongs (and Counterclaimants cannot do so here), "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id*. (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78, 105 S.Ct. 2174 (1985)).[3]

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[3] Because Counterclaimants cannot meet their burden for the first two prongs of the purposeful availment analysis, Counterdefendants do not address the third prong, which would require consideration and balancing of the following seven factors: "(1) the extent of the defendant's purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum." *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir.1995); No one factor is dispositive; a court must balance all seven. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1482, 1323 (9th Cir. 1998).

For the first prong, where the alleged claims (or counterclaims) sound in contract, courts apply the "purposeful availment" test, asking whether the defendant has "purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (citations omitted). "A claim for declaratory judgment as to the existence of a contract is an action sounding in contract." *Id*. at 1212 ("our minimum contact inquiry for Picot's declaratory judgment claim focuses on whether Weston purposefully availed himself of the privilege of conducting business within California through the purported oral contract."). In determining whether the defendant made such contacts, the court considers "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing," but any "transitory presence will support jurisdiction only if it was meaningful enough to 'create a 'substantial connection' with the forum State." *Id*. (quoting *Burger King*, 471 U.S. at 475, 479). "A contract along does not automatically establish minimum contacts in the plaintiff's home forum. Rather, there must be 'actions by the defendant *himself* that create a 'substantial connection' with the forum State," including "some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Id*. (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008), and *Burger King*, 471 U.S. at 475, and *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990).

Counterclaim 3 against the AJIN LLCs seeks alternative declaratory relief, to establish that "if the Court were somehow to find that a partnership or joint venture agreement did exist," and that "such agreement entitles Choi and SRC to a portion of Kim's and 8BC's profits from the Ace Hotel, control of 8BC and access to 8BC's books and records, such agreement must necessarily also entitle Kim and 8BC to an equal portion of Choi's and SRC's profits from its projects, including

Ajin ….” (Counterclaims at p. 44 ¶ 72.) But the joint venture, as alleged, was between Choi and SRC on one hand, and Kim and 8th Bridge Inc. on the other. (FAC ¶¶ 35-41.) The AJIN LLCs exist for a single purpose, to hold the investment funds of their foreign investors, and to use those funds for a specific EB-5 project, located in Alabama. (Choi Decl. ¶¶ 4, 7.) None of the five entities has operated in this state. (Choi ¶ 8.) Kim and 8th Bridge Inc. cannot meet their burden under the first prong of the purposeful availment analysis to show that the AJIN LLCs purposefully availed themselves of the privilege of conducting business in this state through the joint venture.

The second prong of the purposeful availment analysis requires the plaintiff show that its claims arise out of or relate to defendant’s forum-related activities. *Yahoo! Inc.*, 433 F.3d at 1205-06 (quoting *Schwarzenegger*, 374 F.3d at 802). “This step explores the relationship between the cause of plaintiff’s harm and the defendant’s acts identified as creating purposeful contacts with the forum state.” *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987). Courts evaluate this relationship along a continuum. On one end, where a defendant has multiple and significant contacts to support general jurisdiction, no relationship is needed between the contacts and the cause of action. On the other end, where there is only one contact with the forum state, “the cause of action must arise out of that particular purposeful contact of the defendant with the forum state.” *Id*.

Here, Kim and 8th Bridge Inc. do not allege and cannot show facts to establish that their declaratory relief counterclaim against the AJIN LLCs arises out of purposeful contacts by the AJIN LLCs with California. *Yahoo! Inc* 433 F.3d at 1205-06. There is no evidence of actions of any kind taken by the AJIN LLCs in California, much less actions indicating that they were intended to be members of the joint venture.

Counterclaimants thus cannot meet their burden under the purposeful availment analysis, requiring dismissal of the AJIN LLCs for lack of in personam jurisdiction.

IV. COUNTERDEFENDANTS HAVE FAILED TO STATE A CLAIM FOR COUNTERCLAIMS 2, 4, 5 or 6.

A. Rule 12(B)(6) Standards

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). Under Rule 8(a), the plaintiff must allege "with at least some degree of particularity overt acts which Defendants engaged in that support the Plaintiff's claim." *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984).

However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007) ("*Twombly*"). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. at 555. This plausibility standard demands more than "labels and conclusions" or a "formulaic recitation of the elements of the causes of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (quoting *Twombly*). "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*, 553 U.S. at 678. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Courts are not required to accept as true "a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

B. Counterclaimants Have Not Stated a Claim for Interference with Prospective Economic Advantage

A cause of action for intentional interference with prospective economic advantage requires the plaintiff to plausibly plead "as an element not only that the defendant interfered with an economic relationship, but also 'that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" *Redfearn v. Trader Joe's Company* (2018) 20 Cal.App.5th 989, 1006 (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, and *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159). To be "independently wrongful," the interference must be "unlawful, that is … proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard," and "not merely the product of an improper, but lawful, purpose or motive." *Id*. (citing *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 944, and *Korea Supply*, 29 Cal. 4th at 1159 & n.11.) The conduct must also be "independently actionable, … meaning the legal standards must 'provide for, or give rise to, a sanction or means of enforcement for a violation of the particular rule or standard that allegedly makes the defendant's conduct wrongful.'" *Id.* (citing *Korea Supply*, at 1159, and *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1223.

In their Second Counterclaim, Counterclaimants Kim and 8BC LLC have not plausibly alleged an independently actionable form of independent wrongful conduct. They characterize the alleged statements made by Kim as "defamatory," yet the statements alleged are not sufficiently pled to be actionable as slander or libel. "To plead such a cause of action, [the plaintiff] must set forth 'either the specific words or the substance of' the allegedly defamatory statements." (Citing *Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 234.) "An allegation 'of a 'provably false factual assertion' ... is indispensable to any claim

for defamation.'" *Id*. (citing *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 32, and 5 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 739 ["It is sometimes said to be a requirement, and it certainly is the common practice, to plead the exact words or the picture or other defamatory matter. The chief reason appears to be that the court must determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo. Hence, the complaint should set the matter out verbatim, either in the body or as an attached exhibit."].)

Here, Kim and 8BC LLC allege that Moses Choi knew about their longstanding relationship with IMM and Tinh, knew that they were instrumental to Kim's various projects, and knew that Kim and 8BC LLC "had partnered with Tinh and were relying on Tinh for help" in a new EB-5 deal. (Counterclaims at pp. 40-41.) As alleged, Choi was upset with Kim, and "in a deliberate effort to demean Kim's reputation, paint him as an unscrupulous business partners and poison the relationship," "intentionally told Tinh information about his and Kim's business relationship," making statements that "effectively amounted to defamatory statements relating to Kim's trustworthiness and business ethics that were false…." and intended to disrupt the relationship. (*Id*. at p. 41 ¶ 63.) The statements by Choi "were deliberately misleading, full of half-truths and lies, and did in fact convince Tinh to cease doing business with Kim." (*Id*. at pp. 41-42 ¶ 64.) Choi further "also told Tinh that if Tinh wanted to market the Ajin project [SRC's EB-5 project], he had to cease doing business with Kim and 8BC [LLC]." (*Id*.) Kim and 8BC LLC allege that Choi's statements interfered with the relationship between Kim and Tinh and their companies with respect to the new project, causing a loss to Kim and 8BC LLC of at least $4.5 million. (*Id*. p. 42 ¶ 65.)

These allegations do not sufficiently describe the substance of Kim's alleged defamatory statement to enable the court to "determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo." 5 Witkin, Cal. Proc. (5th ed. 2008) Pleading, § 739.

Further, Choi's statements to Tinh, as alleged, amount to non-actionable statements of opinion. "[C]ourts distinguish between statements of fact and statements of opinion for purposes of defamation liability." *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1261. Under the First Amendment, "there is no such thing as a false idea." *Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 855 (citation omitted); *Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1313 ("statements of opinion can never subject the speaker to liability for making a false and defamatory statement"). Thus, only opinions "that imply a false assertion of fact are actionable." *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 685; *Nygard, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027, 1049 ("statements that cannot 'reasonably [be] interpreted as stating actual facts' cannot give rise to a cause of action for defamation."). "'The dispositive question ... is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.'" *Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, 16 (citations omitted). To ascertain whether a statement is a provably false factual assertion, the court must first examine the language of the statement to determine "whether the purported opinion discloses all of the facts on which it is based and does not imply that there are other, unstated facts which support the opinion. If that is the case, the statement is defamatory only if the disclosed facts themselves are false and defamatory. [Citation.] We also consider whether the statement was cautiously phrased in terms of the author's impression." *Dickinson*, 17 Cal.App.5th at 686; *Manufactured Home Communities, Inc. v. County of San Diego*, 544 F.3d

959, 963 (9th Cir. 2008) ("The critical determination is whether the allegedly defamatory statements "convey[ ] a false factual imputation." [citing *Kahn v. Bower* (1991), 232 Cal.App.3d 1599, 1607]).

Counterclaimants' allegations are essentially that Choi sought to "demean Kim's reputation, paint him as an unscrupulous business partners and poison the relationship," by telling Tinh "information about his and Kim's business relationship," including statements that "effectively amounted to defamatory statements relating to Kim's trustworthiness and business ethics that were false…." and intended to disrupt the relationship. (Counterclaims at p. 41 ¶ 63.) These allegations do not imply the assertion of actual facts that "themselves are false and defamatory," but are at best opinions phrased in terms of Choi's impressions about Kim.

Choi's alleged statements are thus non-actionable, and cannot form the basis of a defamation cause of action. Without that, there is no independently wrongful act alleged, and the interference with prospective economic advantage claim fails as a matter of law.

C. Counterclaimants Have Not Stated a Claim for Rescission Based on Fraud

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." (Rule 9(b), Fed. R. Civ. P.) "Averments of fraud must be accompanied by 'the who, what, when, where, and how'" of the misconduct charged. (*Vess v. Ciba-Geigy Corp. USA* 317 F.3d 1097, 1106 (9th Cir. 2003) [citation omitted].)

In Counterclaim 4, Kim and 8th Bridge Inc. request the Court rescind the partnership or joint venture agreement, if found to exist, "because of Choi's fraud." (Counterclaims at p. 44 ¶ 74.) The following alleged facts about Choi's "three representations" constituting fraud, in support of the rescission counterclaim, are pled at pages 31-32 and 44, ¶¶ 30 and 75:

- "The first lie was that Choi was experienced in the Chinese market."
- "The second was that Choi had a robust collection of foreign agents, based primarily in China, who had significant relationships with investors that were interested in EB-5 investments. On July 26, 2015, in an email, Choi went so far as to claim that he had 59 agents in China and the list he attached of those agents 'is our only asset and most valuable one.'"
- "The third was that Choi had a partner, Morrie Berez, who was a well-regarded EB-5 specialist and previously served as a Director/Chief Immigration Official at the USCIS."

Apart from the reference to the July 26, 2015 email, Counterclaimants do not allege: (1) on what specific or approximate date(s), where, and in what manner Choi made any of the three alleged fraudulent statements; and (2) what Choi actually said to Kim, as opposed to what seem to be summaries or at best paraphrasing.

As to the July 26, 2015 email, moreover, the representation that Choi "had 59 agents in China and the list he attached of those agents 'is our only asset and most valuable one," is not alleged to be factually false. Counterclaimants do not allege that Choi did not have 59 agents in China, but only that the list was not in fact "valuable" because the agents were in fact "unsophisticated, inexperienced, and simply incapable of attracting sufficient investors suitable for the types of deals Kim and 8BC were putting together…" (Counterclaims at pp. 31-32, ¶ 30.) Even if proven true, that would not make Choi's email fraudulent because Choi's statement was merely that the list was "our only asset and most valuable one."

Counterclaimants have thus failed to allege grounds for fraud with specificity, and cannot pursue a rescission counterclaim.

D. Counterclaimant Chang Has Not Stated a Claim for Breach of Oral Contract

Counterclaim 5 is by Patrick Chang, who alleges that in November 2015, "Choi orally promised that if Chang worked for SRC for one more year, if at that time Chang still wished to go to a graduate school (law or business), Choi would pay for it." (Chang Counterclaim at p. 45 ¶ 78.) Chang alleges that in reliance on Choi's oral promise, he agreed to stay on at SRC, where he worked until April 2017. (*Id*. ¶ 79.) At that point, Chang alleges that Choi reneged on his oral promise to pay for graduate school. (*Id*. ¶ 80.) Chang alleges damages "in excess of $200,000." (*Id*. ¶ 81.)

This counterclaim is not actionable for two reasons. First, the terms of the alleged oral agreement are fatally uncertain. 4 Witkin, Cal. Proc. (5th ed. 2008) Pleading § 522 ("the complaint is subject to a general demurrer if the allegations fail to show the nature of the contract with certainty."). "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.'" *Weddington Prods., Inc. v. Flick*, 60 Cal.App.4th 793, 811 (1998); 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts § 137; Rest.2d, Contracts § 33; 1 Williston on Contracts § 4:21 (4th ed.) ("It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning. … A lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations in the agreement."); Cal. Civ. Code § 1550 (consent and sufficient consideration essential to formation); Cal. Civ. Code § 1565 (consent must be communicated); Cal. Civ. Code § 1580 ("Consent is not mutual, unless the parties all agree upon the same thing in the same sense."); and Cal. Civ. Code § 3390 (uncertain agreements cannot be specifically enforced).

The alleged promise by Choi that "if at that time Chang still wished to go to a graduate school (law or business), Choi would pay for it," does not specify the maximum amount of tuition Choi would be required to pay, nor what types of programs Chang could apply for. Tuition could range from a modest amount for a state college or unaccredited MBA program to a large amount for a private university law school program. There is no agreed-upon objective standard for what a reasonable amount of tuition might be, nor what a reasonable type of program Chang could choose. The promise is too uncertain to form the basis for a binding agreement. *See*, *e.g., Goldberg v. City of Santa Clara* (1971) 21 Cal.App.3d 857, 861 (where "no objective standard [was] declared," an attorney was not entitled to enforce client's promise to pay additional compensation based on savings "of such magnitude as, in our opinion, would justify additional compensation.")

Second, Choi's alleged promise "that if Chang worked for SRC for one more year, if at that time Chang still wished to go to a graduate school (law or business), Choi would pay for it," is on its face barred by the statute of frauds, Civil Code § 1624(a) ("The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof."). Chang refers to an "email to Choi in September 2016," but does not allege the existence of any "note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by [Choi] or by [his] authorized agent or broker." Cal. Civ. Code § 1624(b)(3)(D).

Counterclaimant attempts to plead around the statute of frauds by alleging estoppel, i.e., that in reliance on Choi's oral promise, he agreed to stay on at SRC, where he worked until April 2017. (Chang Counterclaim at p. 45 ¶ 79.) To plead estoppel as a bar to the statute of frauds, however, Chang "must allege the facts of

representation, change of position in reliance on the representation, and unconscionable injury to [him] or unjust enrichment of [Choi] if the contract is not enforced." 4 Witkin, Cal. Proc. (5th ed. 2008) Pleading § 524.

Chang does not allege (plausibly under Rule 8(a) or otherwise) that he would suffer an unconscionable injury, or that Choi would be unjustly enriched, if the contract were not enforced. The extent of Chang's injury is not alleged, and instead, it appears from the pleading that he had not decided to go to either law school or business school, and had not yet applied. For example, while Chang alleges that he was "considering leaving SRC to go [to] law school," and that he "informed Choi that he was considering leaving the company to go to graduate school," it is not alleged that he had decided to do so, especially given that he was apparently undecided between law school and business school. (Chang Counterclaim at pp. 45-46 ¶¶ 78, 83.) And, if Chang had been intent on leaving SRC for graduate or law school once the one-year period was up, one would expect that he would have demanded performance by Choi then, in November 2016, rather than continue at SRC until April 2017. At that point, and only after Choi "demanded that Chang return to work for SRC in Georgia," Chang informed Choi that "he preferred to stay in Los Angeles and still wanted to attend graduate school." Chang does not allege that he was demanding performance even at that point. Instead, Chang implies that in fact, he had not demanded performance, accusing Choi of "anticipatorily" repudiating the oral agreement. (Chang Counterclaim at p. 45 ¶ 80.)

Thus, Chang has not alleged the facts showing unconscionable injury or unjust enrichment to establish an estoppel. The statute of frauds applies, and Chang cannot state a counterclaim for breach of an oral agreement. The counterclaim should be dismissed.

E. Counterclaimant Chang Has Not Stated a Claim for Promissory Estoppel

Chang then alleges in Counterclaim 6 that Choi is liable under the theory of promissory estoppel. "The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225. The doctrine of promissory estoppel applies when the plaintiff cannot allege and prove consideration. 1 Witkin, Summary (11th ed. 2017) Contracts § 244 ("One who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration; i.e., the estoppel is a substitute for consideration.").

As discussed above, Chang has not alleged "a promise clear and unambiguous in its terms." Beyond that, Chang is barred from alleging promissory estoppel because "Contract and promissory estoppel claims are not only distinct or alternative theories of recovery, but also are mutually exclusive." *Id*. (citing *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 242-244). Chang alleges, both directly and by incorporation, that "Choi did not want Chang to leave and instead promised that he would pay for Chang's graduate school if Chang agreed to continuing working for SRC," that this was a promise by Choi of "an effective retention bonus," and that Chang "agreed to forbear applying to school and leaving SRC's employ." (Chang Counterclaim at pp. 45-46 ¶¶ 78-79 and 83-85.) Thus, Chang has alleged the element of consideration, and cannot also allege promissory estoppel.

As such, Counterclaim 6 should be dismissed.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court to issue an order in the form lodged herewith, dismissing the five AJIN LLCs from

this action, and dismissing the Second, Third, Fourth, Fifth, and Sixth Counterclaims.

Dated: April 25, 2018

GREGG A. RAPOPORT, APLC

s/ *Gregg A. Rapoport*

Gregg A. Rapoport

Attorney for Plaintiffs and Counterdefendants MOSES CHOI and SOUTHEAST REGIONAL CENTER, LLC and Counterdefendants SRC AJIN FUND I, LLC, SRC AJIN FUND II, LLC, SRC AJIN FUND III, LLC, SRC AJIN-WOOSHIN FUND IV, LLC and SRC AJIN-WOOSHIN FUND V, LLC

CERTIFICATE OF SERVICE

I, Gregg A. Rapoport, am over the age of 18 years and am not a party to this action. Upon my oath, I hereby state that on the date set forth below, I caused the foregoing document to be filed electronically, and notice hereof will automatically be sent to all counsel of record that participate in electronic filing, by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. In addition, if any attorneys are not participating in electronic filing, they are identified below and have been mailed, via first-class postage, notice hereof on the date this document is being electronically filed.

Dated: April 25, 2018

By: s/ *Gregg A. Rapoport*
Gregg A. Rapoport