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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 – Crtrm 8D

OPPOSITION TO MOTION TO STRIKE PORTIONS OF COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

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

Action Filed: December 13, 2017

ERVIN COHEN & JESSUP LLP

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I. INTRODUCTION

It is not enough that the pleading allegations Counter-Defendants wish to strike might paint them in a negative or unflattering light. Rather, in order for this Court to grant Counter-Defendants motion, the allegations must have "no logical connection to the controversy" and "no possible bearing on the subject matter of the litigation." Here, the relevant allegations are directly relevant to the declaratory relief and fraud counterclaims and thus the motion must be denied.

Counterclaimants have alleged a claim for declaratory relief based on the parties' dispute as to the nature of the agreed upon business relationship between them (Counterclaimants claim they only agreed for Counter-Defendants to serve as their agents and Counter-Defendants contend a joint venture or partnership agreement was reached). Thus, allegations that Counter-Defendants have a history of fabricating or conflating the true nature of their business dealings with other companies working in the same industry and improperly claiming ownership of assets to which they are not entitled is indisputably relevant and has a "logical connection" to the declaratory relief claim.

Counterclaimants have also alleged a fraud/rescission claim that any agreement to form a joint venture or partnership (which Counterclaimants deny ever existed) was induced by Counter-Defendants' misrepresentations. Consequently, allegations that Counter-Defendants have demonstrated a pattern of defrauding individuals in similar circumstances is certainly an issue the Court is free to consider and at a minimum, has some "possible bearing" on the fraud claim.

Counter-Defendants' Motion to strike the pleading allegations is doomed for a second reason: courts are clear that even if the relevant allegations were impertinent or scandalous (they are not), absent a concrete showing of prejudice, the motion must be denied. Here, Counter-Defendants have barely made any attempt to satisfy this requirement and ultimately fail in this regard.

Finally, as detailed below, both the statute of limitations and fraud affirmative defenses are viable and well-plead. The motion should thus be denied in its entirety.

II. STANDARDS ON MOTION TO STRIKE

"Motions to strike are generally disfavored because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice…A federal court will not exercise its discretion under Rule 12(f) to strike a pleading **unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues or otherwise prejudice a party…**Motions to strike generally will not be granted unless it is clear that the matter to be stricken **could not have any possible bearing on the subject matter of the litigation…**A court should not strike allegations supplying background or historical material unless it is unduly prejudicial to the opponent…" *Cortina v. Goya Foods, Inc.* (S.D. Cal. 2015) 94 F.Supp.3d 1174, 1182. (citations omitted, emphasis added)

Courts "have held that a motion to strike matter from a complaint simply for being redundant, immaterial, impertinent or scandalous should only be granted **if the matter has no logical connection to the controversy *and* may prejudice one or more parties to the suit…**Where the moving party cannot adequately demonstrate such prejudice, courts frequently deny motions to strike even though the offending matter literally was within one or more of the categories set forth in Rule 12(f)." *McRee v. Goldman* (N.D. Cal. 2012) 2012 WL 929825 at *5. (Citations omitted, emphasis added, italics in original).

Even allegations that are "distasteful, unsavory, and ultimately may have a minimal degree of relevant to the issues and claims in this litigation" do not need to be stricken. *Citizens for Quality Education San Diego v. San Diego Unified School District* (S.D. Cal. 2018) 2018 WL 828099 at *4. "It is not enough that the matter offends the sensibilities of the objecting party or the person who is the subject of the statements in the pleading, if the challenged allegations describe acts or events that

are relevant to the action…A court must resolve any doubt as to the relevance of the challenged allegations in favor of the non-moving party…For this reason, if there is any doubt as to whether under any contingency the matter may raise an issue, the motion may be denied." *Id.* (citations omitted).

III. THE RELEVANT ALLEGATIONS SHOULD NOT BE STRICKEN

A. The Relevant Allegations Relate Directly to the Declaratory Relief Counterclaim, and at Bare Minimum, Have a Possible Relationship Thereto

Counterclaimants' Third Counterclaim for Declaratory Relief seeks this Court's determination as to the nature of the business relationship that existed between Counterclaimants and Counter-Defendants.

Counterclaimants' allege that the only reason they began discussing any business relationship with Counter-Defendants was because of fraudulent statements made by Counter-Defendants to induce the formation of a business relationship. (Amended Counterclaim, ¶¶ 30-31). Counterclaimants also allege that the only agreement ever reached between themselves and Counter-Defendants was for Counter-Defendants to serve as master distributors (an agent who would locate and source certain investors in exchange for a fee). (Amended Counterclaim, ¶¶ 38, 69). Counter-Defendants, for their part, contend that a much more significant partnership or joint venture was reached such that Counter-Defendants are entitled to a portion of the profits Counterclaimants realized in the Ace Hotel transaction. (Amended Counterclaim, ¶ 70).

The nature of this counterclaim logically requires this Court to review and analyze a bit of he-said, she-said, and to evaluate the parties' communications, their intent, and their reasonable interpretations of those communications. Given the foregoing, the fact that Counter-Defendants have a history of deliberately mischaracterizing and fabricating the true nature of an agreed upon business relationship in order to improperly claim ownership of other's assets has a direct

bearing on this claim.

Paragraph 1 of the Amended Counterclaim alleges that Counter-Defendant Choi has done exactly what he is attempting in this lawsuit multiple times in the past, namely "claiming unfounded ownership of [Counterclaimant's] companies… and undeserved entitlement to [Counterclaimant's] profits." That Counter-Defendants have found themselves in this spot multiple times before, as alleged in Paragraph 1, has a clear and logical connection to the claim. Similarly, the notion that "Choi has an established pattern of practice of unilaterally attempting to create and modify business relationships that were not agreed to by the other party", as set forth in Paragraph 50 of the Amended Counterclaim, also has a direct bearing and high degree of relevance to this claim. In fact, it may turn out that some of the details fleshed out in Paragraph 50 regarding Choi's extraordinarily similar past misdeeds may factor into this Court's decision. Regardless, there is certainly at least *some* connection because the pleadings allegations sought to be stricken and the declaratory relief claim so the motion must be denied.[1]

B. <u>The Subject Allegations Tie Directly to the Fraud Counterclaim and at Minimum Have Some Bearing on and Are Logically Related Thereto</u>

Counterclaimants' Fourth Counterclaim for Rescission Based on Fraud asks this Court, to the extent it finds that Counterclaimants ever entered into any joint

[1] The allegations of Choi's "egregious personality flaws" in Paragraph 3 are also relevant, especially given the context in which that phrase is used and the subsequent allegations of the Amended Counterclaim. The "egregious personality flaws" referred to Choi's dishonesty and delusion which are detailed in Paragraphs 2, 30 and in the Fourth Counterclaim. Paragraph 3 states that Counterclaimants "recognized some of Choi's less egregious personality flaws early on and avoided entering into any partnership agreement with Choi and SRC." This is the very heart of the declaratory relief counterclaim—that no joint venture or partnership was reached. Furthermore, the personality issues that led Counterclaimants to decide not to partner with Choi are detailed in Paragraph 36 and thus they too have bearing on this action.

venture or partnership agreement with Counter-Defendants, to rescind and reject that agreement on the grounds Counterclaimants' consent was induced by Counter-Defendants' fraud. Counterclaimants' allege that the only reason they ever began discussing any type of business relationship with Counter-Defendants was predicated on a variety of misrepresentations deliberately made to Counterclaimants. (Amended Counterclaim, ¶ 75).

The allegations in Paragraphs 1 and 50 that Choi had a prior history of engaging in similar targeted fraudulent conduct is undeniably related to the fraud claim. Under Federal Rule of Evidence 404(b), evidence of prior fraudulent acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See e.g. International Business Machines Corp. v. Brown* (9th Cir. 1998) 124 F.3d 377 (evidence of prior fraud used to prove knowledge and intent of future illegal enterprise). Evidence that Choi had a regular practice of defrauding EB-5 investors to then claim ownership of the entity or assets could be admissible to prove, *inter alia*, that Counter-Defendants knew the nature of the business transaction to be other than joint venture or partnership, reached out to Counterclaimants with the motivation into getting them into a joint venture (and not some other business relationship) and or intended to defraud Counterclaimants. *See e.g. Fallon Min. Co, Inc. v. Caddell* (9th Cir. 2003) 77 Fed.Appx. 416, 418 (evidence that joint venture's prior deal involving machine ended "bitterly" and that its system failed was relevant and admissible in customer's fraud and libel action against the joint venture to show joint venturer's intent, plan, knowledge and absence of mistake).

Ultimately though, the analysis just proffered goes far beyond what is required at this stage. The notion that a previous act of fraud, directed at similarly situated individuals in the same industry, perpetrated through similar means to obtain similar ends, would have *some* bearing on or relation to this fraud claim is hardly a stretch. Furthermore, as detailed above, the motion must be denied unless

there is no relevance between the allegations and the action and any doubt must be resolved in favor of Counterclaimants. Thus, unless this Court can unequivocally state at this juncture that none of the similar fraudulent conduct alleged in Paragraphs 1 or 50 has or could have any logical connection or relation to this lawsuit, the motion must be denied.

C. Counter-Defendants Have Not Demonstrated Prejudice

Counter-Defendants must independently demonstrate that they will be prejudiced if this Motion is not granted. The only argument they make is that "they are potentially prejudicial to Choi, however, because they are part of the public record and, while defamatory, will be published by Kim, et al., to potential investors under the claim that the litigation privilege shields them from liability. (Motion, p. 5). This argument fails for several reasons.

By their own admission, any prejudice they point to is purely "potential". There is no evidence that Choi has suffered any actual prejudice, nor that Kim engaged in the activity Choi suggests. Even if he had, however, this would still not be prejudicial to Counter-Defendants. The fact that other lawsuits have been filed against Choi in other jurisdictions are necessarily already part of the public record. So what Counter-Defendants are really expressing is their fear that this document might direct interested parties to other public records that reflect other misdeeds. The notion that allegations in a pleading would be stricken simply because they reference other public records defies the high burden needed to grant a 12(f) motion. Finally, as detailed above, these allegations are not gratuitous. The previous behavior of targeted duplicity and habitual fraudulent behavior are directly relevant to the declaratory relief and fraud counterclaims herein.

IV. THE AFFIRMATIVE DEFENSES SHOULD NOT BE STRICKEN

A. The Statute of Limitations Defense is Well-Pleaded

"Fed R. Civ. P 8(c) determines whether the pleading of the limitations defense was sufficient. Rule 8(c) provides, in pertinent part, that a party shall set

forth affirmatively…(a defense based upon the) statute of limitations. The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense." *Wyshak v. City Nat. Bank* (9th Cir. 1979) 607 F.2d 824, 827.

Unless the defense is one that falls under Rule 9, there is no requirement that a party plead an affirmative defense with particular specificity. *Wong v. U.S.* (9th Cir. 2004) 373 F.3d 952, 969. It is furthermore well established that there is no obligation to even identify the specific statute of limitations that applies or plead the statute of limitations defense in any detail. *See Belvedere Partnership, Ltd. v. SSI Investment Management, Inc.* (C.D. Cal. 2010) 2010 WL 11508362 at * 3 (holding that the bare assertion of the defense was acceptable and "although [defendant] does not explicitly state what the applicable statute of limitations is, the lawsuit's factual and legal context provides [plaintiff] with fair notice by enabling [plaintiff] to ascertain the applicable statute of limitations."). Courts regularly find that identifying the specific statute at issue is sufficient to give plaintiff notice. *See e.g. Federal Deposit Insurance Corporation v. Reis* (C.D. Cal. 2013) 2013 WL 12126777 at *3.

Equally important, even if a statute of limitations defense is unlikely to prevail, the Court should not strike it unless the Plaintiff can demonstrate prejudice. *Joe Hand Promotions, Inc. v. Dorsett* (E.D. Cal. 2013) 2013 WL 1339231 at *5 ("Although it is unlikely Defendants could prevail on this [statute of limitations] defense, the Court finds, again, that Plaintiff's Motion to Strike is denied because Plaintiff has failed to demonstrate prejudice.")

Here, Defendants did not simply insert boilerplate affirmative defenses. Rather, they limited their statute of limitations defense to the 2nd and 11th causes of action, which are both for breaches of non-written contracts. And, they went beyond the call of duty by identifying in the affirmative defense that the specific statute of limitation that applied was C.C.P. §339 for breach of an oral contract.

Thus, by providing notice of the two claims that the statute of limitations could apply to, and identifying the specific statute, Defendants have more than satisfied their obligations under Fed. R. 8(c) and by limiting the statute of limitations to only two of the sixteen total claims, there is no plausible prejudice Plaintiffs can demonstrate (nor have they even attempted to do so).

Given the foregoing, the only way this Court can justifiably strike the statute of limitations defense is if it believes, at this early stage, there is no set of plausible facts that could theoretically support the defense. In truth, numerous allegations in the First Amended Complaint and First Amended Counterclaim give rise to the possibility that the statute of limitations has already run.

Plaintiff never specifies the exact date that the alleged joint venture was formed, but seems to imply the time was around September 2015 (First Amended Complaint, ¶¶ 38, 44). However, Plaintiff does specify that the alleged breaches of contract occurred in 2017 and, more importantly, that the alleged breaches were effectively the repudiation or disavowing of the alleged joint venture. (First Amended Complaint, ¶¶ 71-73.

Notably, Plaintiff subsequently alleges that on October 25, 2015, "Kim executed, on behalf of 8th Bridge, Inc., an Operating Agreement for MRE Fund GP which stated that 8th Bridge Inc. would serve as its sole member and manager, with Kim as its President. At the time, Kim did not disclose to Plaintiffs that MRE Fund GP was under his sole control, and falsely told Plaintiffs that the Operating Agreement was "not available yet." (First Amended Complaint, ¶ 64). This alleged act could be construed as a repudiation of whatever agreement the parties had entered into, and thus, would be the exact same breach that Plaintiff alleges occurred in 2017. It remains a factual question whether Plaintiffs knew these facts prior to two years before this action was commenced in December 2017. Thus, this presents a viable statute of limitations defense against the breach of contract claims, as the alleged breach may have occurred, to Plaintiff's knowledge, well before 2017 as

alleged.

Furthermore, in the First Amended Counterclaim, Counterclaimants allege that an email was sent to Counter-Defendants more than two years before this case was filed stating that many key points had not been reached, *i.e.*, that Counterclaimant did not believe any joint venture agreement existed at that time. (First Amended Counterclaim, ¶ 33). It is possible that additional evidence may show that by December 2015, over two years prior to the filing of this action, Plaintiff knew, or reasonably should have known, that Defendants was disavowing and otherwise did not intend to honor whatever agreement Plaintiff believed it had entered into with them. That too would present a statute of limitations defense that should be decided on the merits.

B. <u>The Fraud Defense is Well Pleaded</u>

Defendants' fraud affirmative defense and Amended Counterclaim sufficiently alleges the "who, what, when, where and how" that Plaintiffs demand. The "who" is clearly labeled as Moses Choi on behalf of himself and SRC. The "how" is readily identified as in person, by telephone and by email. The "when" is described as over a series of times between April 2015 through October 2015. The "where" is admittedly absent in the affirmative defense but that, and more details on the "when", are fleshed out in detail in the Amended Counterclaim. For instance, Choi and Kim talked in person in late April 2015 in Washington D.C. (Amended Counterclaim, ¶ 26); in person in China (Amended Counterclaim, ¶ 27), in person multiple times in Los Angeles (Amended Counterclaim, ¶ 27); through email on July 26, 2015 (Amended Counterclaim, ¶ 30). Finally, the "what" is explicitly stated in the affirmative defense and throughout the Amended Counterclaim as three primary categories of fraudulent representations: (1) Plaintiffs' experience in the Chinese market; (2) the experience and accomplishments of Plaintiffs' foreign agents; and (3) the experience and accomplishments of Plaintiffs' partner, Morrie Berez.

Counter-Defendants complain that Counterclaimants have failed to identify and isolate what exactly was said, through what medium, on each relevant day between April 2015 and October 2015. However, Counter-Defendants have not provided any authority requiring this extra-extra-heightened degree of specificity. Counterclaimants have provided enough information to put Counter-Defendants on notice and satisfy the heightened standards of Rule 9(b). That is sufficient. Similarly, Counterclaimants alleged in form and substance what Choi said and that is also adequate. Counterclaimants are unaware of any requirement that they recite Choi's words verbatim and it is unreasonable, bordering on absurd, for Counter-Defendants to suggest that paraphrasing oral conversations from several years prior is insufficient notice (notably, through the Amended Counterclaim, Counterclaimants did make a point to frequently post verbatim what was memorialized in emails and other writings).

V. CONCLUSION

For the reasons set forth herein, Counterclaimants respectfully request that the motion be denied in its entirety. If this Court is inclined to grant any part of the motion, Counterclaimants respectfully request leave to amend to add additional information to support the affirmative defenses and rephrase the pleadings.

DATED: June 25, 2018

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CERTIFICATE OF SERVICE

CENTRAL DISTRICT OF CALIFORNIA

Moses Choi, et al. v. 8th Bridge Capital, Inc, et al.

Case No.: 2:17-cv-8958-CAS-AFM

The undersigned certifies that on June 25, 2018, the following documents and all related attachments ("Documents") were filed with the Court using the CM/ECF system.

OPPOSITION TO MOTION TO STRIKE PORTIONS OF COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

Pursuant to L.R. 5-3.2, all parties to the above case and/or each attorneys of record herein who are registered users are being served with a copy of these Documents via the Court's CM/ECF system. Any other parties and/or attorneys of record who are not registered users from the following list are being served by first class mail.

By: */s/ Russell M. Selmont*
Russell M. Selmont

ERVIN COHEN & JESSUP LLP