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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|------------------------------|---|---------------------------------------|
| OXSANA BAIUL-FARINA, |) | Case No. CV 15-07325 DDP (MRWx) |
| professionally known as |) | |
| OXSANA BAIUL, an individual, |) | |
| |) | |
| Plaintiff, |) | |
| |) | AMENDED ORDER DENYING MOTION |
| v. |) | TO REMAND AND GRANTING MOTIONS |
| |) | TO DISMISS |
| JOSEPH CHARLES LEMIRE, an |) | |
| individual; OLYMPIC |) | [Dkts 89, 91, 92, 96, 105] |
| CHAMPIONS LTD., a Delaware |) | |
| corporaiton; OLYMPIC |) | |
| CHAMPIONS LTD., a British |) | |
| Virgin Islands corporation; |) | |
| REPUBLIC OF UKRAINE, a |) | |
| sovereign nation, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| _____ |) | |

Presently before the court are Plaintiff's Motion to Remand and separate Motions to Dismiss, one filed by Defendants Joseph Lemire, Olympic Champtions, Ltd., and Olympic Champions, Ltd.-BVI (Collectively, "Lemire") and the other by Defendant Republic of Ukraine. Having considered the submissions of the parties, the court denies the motion to remand and grants the motions to dismiss.

1 **I. Background**

2 This is one in a series of law suits brought by Plaintiff
3 relating to professional figure skating performances in the 1990s.
4 This is not Plaintiff's first suit against Lemire. In 2013,
5 Plaintiff filed suit against Lemire, William Morris Agency, LLC,
6 and others in New York. Plaintiff's wide-ranging complaint in that
7 case (the New York Complaint) alleged, among other things, that
8 Lemire stole money from Plaintiff, misrepresented amounts owed to
9 her, and made other false statements. (Lemire's Request for
10 Judicial Notice ("RJN", Ex. 5). The New York Complaint alleged
11 causes of action against Lemire for racketeering and conspiracy and
12 conversion. (RJN Ex. 5.) The court dismissed all claims with
13 prejudice, characterizing the suit as "frivolous . . ., bizarre,
14 [and] wholly without merit." (RJN Ex. 7 at 1, 29.) The New York
15 court determined that Plaintiff could not possibly satisfy the
16 applicable statute of limitations, as, according to her own
17 pleadings, she had notice of, or should have discovered, the
18 alleged wrongdoing no later than the year 2000. (RJN Ex. 7 at 12,
19 23.) The dismissal was affirmed on appeal. (RJN Ex. 9.)

20 The operative complaint in the instant case alleges causes of
21 action against Lemire for breach of contract, fraud and
22 constructive fraud, and money had and received.¹ (First Amended
23 Complaint ("FAC") ¶¶ 1, 3-5, 18, 21, 27, 30, 33.) Like the New
24 York Complaint, the First Amended Complaint ("FAC") here alleges
25 that Lemire stole money from Plaintiff and made fraudulent
26 representations to her, including false statements regarding

27
28 ¹ Plaintiff's First Amended Complaint alleges all but the
fraud claim against Defendant Ukraine as well.

1 amounts payable to Plaintiff. (See Declaration of Martin Domb, Ex.
2 3.) Defendants now move to dismiss the FAC.

3 **II. Legal Standard**

4 A complaint will survive a motion to dismiss when it contains
5 "sufficient factual matter, accepted as true, to state a claim to
6 relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.
7 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
8 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
9 "accept as true all allegations of material fact and must construe
10 those facts in the light most favorable to the plaintiff." *Resnick*
11 *v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
12 need not include "detailed factual allegations," it must offer
13 "more than an unadorned, the-defendant-unlawfully-harmed-me
14 accusation." *Iqbal*, 556 U.S. at 678. Conclusory allegations or
15 allegations that are no more than a statement of a legal conclusion
16 "are not entitled to the assumption of truth." *Id.* at 679. Even
17 under the liberal pleading standard of Federal Rule of Civil
18 Procedure 8(a)(2), under which a party is only required to make a
19 "short and plain statement of the claim showing that the pleader is
20 entitled to relief," a "pleading that offers 'labels and
21 conclusions' or a 'formulaic recitation of the elements of a cause
22 of action will not do.'" *Id.* 678 (quoting *Twombly*, 550 U.S. at
23 555).

24 Federal Rule of Civil Procedure 12(b)(2) provides that a court
25 may dismiss a suit for lack of personal jurisdiction. The
26 plaintiff has the burden of establishing that jurisdiction exists,
27 but need only make "a prima facie showing of jurisdictional facts
28 to withstand the motion to dismiss." *Pebble Beach Co. v. Caddy*,

1 453 F.3d 1151, 1154 (9th Cir. 2006). "Uncontroverted allegations in
2 the complaint must be taken as true, and conflicts over statements
3 contained in affidavits must be resolved in [the plaintiff's]
4 favor." Love v. Associated Newspapers. Ltd., 611 F.3d 601, 608
5 (9th Cir. 2010).

6 **III. Discussion**

7 A. Plaintiff's Motion to Remand

8 Plaintiff moves for remand of this action to state court,
9 notwithstanding the appearance and participation of Defendant
10 Republic of Ukraine, which confers subject matter jurisdiction over
11 this matter upon this Court. See 28 U.S.C. 1441(d); 28 U.S.C. §
12 1603(a). Plaintiff contends, in a single sentence and without
13 citation to authority, that "the issue of sovereign immunity is the
14 only issue for which Ukraine is entitled to a Federal forum and
15 that request can be accommodated as a jurisdictional ruling prior
16 to remand." (Opp. at 2.) This Court declines what appears to be
17 Plaintiffs' invitation to split claims to accommodate Defendant
18 Republic of Ukraine's "request." Furthermore, Plaintiff does not
19 dispute that she made no attempt to meet and confer with respect to
20 this motion. (Opp. at 1). This failure alone would merit denial
21 of Plaintiff's motion. C.D. Cal. L.R. 7-3, 7-4. Plaintiff's
22 motion to remand is denied.

23 B. Lemire's Motion to Dismiss

24 Lemire argues first that Plaintiff's claims are barred by the
25 doctrine of res judicata. (Lemire Motion at 9.) "[A] federal
26 court sitting in diversity must apply the res judicata law of the
27 state in which it sits." Constantini v. Trans World Airlines, 681
28 F.2d 1199, 1201 (9th Cir. 1982). California law looks to federal

1 law to determine the effect of a prior federal judgment. Id.; See
2 also Louie v. BFS Retail and Commercial Operations, LLC, 178 Cal.
3 App. 4th 1544, 1553-54 (“[W]here a prior federal judgment was based
4 on *federal question* jurisdiction, the preclusive effect of the
5 prior judgment of a federal court is determined by federal law.
6 Where a prior federal judgment was based on *diversity* jurisdiction,
7 the preclusive effect is subject to federal common law - meaning
8 the law of the state in which the federal court sits - if the state
9 law is compatible with federal interests.”) (internal citations
10 omitted, emphases original); Butcher v. Truck Ins. Exchange, 77
11 Cal.App.4th 1442, 1452 (2000) (“California follows the rule that
12 the preclusive effect of a prior judgment of a federal court is
13 determined by federal law, at least where the prior judgment was on
14 the basis of federal question jurisdiction.”). Here, the New York
15 Complaint was litigated in federal court after having been removed
16 on the basis of federal question jurisdiction. This court will,
17 therefore, apply federal law preclusion principles.

18 Res judicata “bars litigation in a subsequent action of any
19 claims that were raised or could have been raised in the prior
20 action.” Owens v. Kaiser Foundation Health Plan, Inc. 244 F.3d
21 708, 713 (9th Cir. 2001); W. Radio Servs. Co. v. Glickman, 123 F.3d
22 1189, 1192 (9th Cir. 1997). The doctrine applies when there is “1)
23 [an] identity of claims, 2) a final judgment on the merits, and 3)
24 identity or privity between the parties.” W. Radio Servs. Co., 123
25 F.3d at 1192. There is no dispute that the New York Complaint and
26 this case involve the same parties. Although Plaintiff contends
27 that the New York court’s decision was not “on the merits,” but
28 rather “procedural,” insofar as it was premised on statute of

1 limitations concerns, that arguments is not persuasive. "The rules
2 of finality, both statutory and judge made, treat a dismissal on
3 statute-of-limitations grounds the same way they treat a dismissal
4 for failure to state a claim . . . : as a judgment on the merits."
5 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 28 (1995).²

6 The question remains, however, whether there is an identity of
7 claims between the two cases. Courts in the Ninth Circuit rely on
8 four factors to determine if there is an identity of claims:

9 (1) whether rights or interests established in the prior
10 judgment would be destroyed or impaired by prosecution of
11 the second action; (2) whether substantially the same
12 evidence is presented in the two actions; (3) whether the
13 two suits involve infringement of the same right; and (4)
14 whether the two suits arise out of the same transactional
15 nucleus of facts.

16 Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980); Constantini,
17 681 F.2d at 1201-02. The central issue in determining whether
18 there is an identity of claims is whether the two suits "arise out
19 of the same transactional nucleus of facts." Costantini, 681 F.2d
20 at 1202; see also Frank v. United Airlines, Inc., 216 F.3d 845, 851
21 (9th Cir. 2000). Satisfaction of the fourth Constantini factor is
22 often sufficient to find an identity of claims for res judicata
23 purposes, even without analysis of the other factors. Quinto v.
24 JPMorgan Chase Bank, No. 11-CV-02920, 2011 WL 6002599, at *8 (N.D.
25 Cal. Nov. 30, 2011); see Int'l Union of Operating Eng'rs-Employers
26 Constr. Indus. Pension, Welfare and Training Trust Funds v. Karr,
27 994 F.2d 1426, 1430 (9th Cir. 1993). When analyzing the nucleus of

28 ² The New York court also observed that "each of Baiul's
claims also suffers from additional fatal defects, but there is
simply no reason to spend the resources to review them all in light
of this glaring and dispositive [statute of limitations] issue."
(RJN Ex. 7 at 12.)

1 facts factor, courts ask "whether [the two actions] are related to
2 the same set of facts and whether they could conveniently be tried
3 together." W. Systems, Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir.
4 1992).

5 The facts of the New York case and the instant matter overlap
6 almost entirely. (Domb Decl., Ex. 3.) Plaintiff, focusing largely
7 on California rather than federal law, nevertheless contends that
8 there is no identity of claims because the two suits allege
9 different causes of action. (Opp. at 18-19.) That argument is not
10 persuasive. "The fact that res judicata depends on an 'identity of
11 claims' does not mean that an imaginative attorney may avoid
12 preclusion by attaching a different legal label to an issue that
13 has, or could, have been litigated." Tahoe-Sierra Pres. Council,
14 Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077-78 (9th
15 Cir. 2003). Plaintiff also argues that the claims do not arise out
16 of the same nucleus of facts because the same evidence, and one fax
17 in particular, was not at issue in the prior case but is crucial
18 here. (Opp. at 19.) Plaintiff's argument not only conflates
19 separate factors in the identity of claims analysis, but fails to
20 acknowledge that the fax at issue was discussed in the prior case.³
21 (RJN, Ex. 15.)

22 Because this suit and the New York case arise out of the same
23 nucleus of transactional facts, there is an identity of claims
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27 ³ Plaintiff's argument concerning rights and interests
28 similarly conflates separate identity of claims factors and, in any
event, restates Plaintiff's argument about distinctly labeled
"claims." (Opp at. 19-20.)

1 between the two cases. All three res judicata factors, therefore,
2 are met.⁴ Accordingly, Plaintiff's claims are dismissed.⁵

3 C. Defendant Republic of Ukraine's Motion to Dismiss

4 Defendant Republic of Ukraine ("Ukraine") moves separately to
5 dismiss Plaintiff's FAC. Ukraine's motion must be granted, for the
6 reasons stated above. See note 4, supra. Furthermore, it does not
7 appear that Ukraine has been properly served. Plaintiff does not
8 dispute that she made no attempt to comply with 28 U.S.C. §
9 1608(a)(1) or (b)(1).⁶ See Peterson v. Islamic Republic Of Iran,
10 627 F.3d 1117, 1129 n.4 (9th Cir. 2010) ("The four forms of service
11 [under Section 1608] are listed in descending order of
12 preference."); Angellino v. Royal Family Al-Saud, 688 F.3d 771, 773
13 (D.C. Cir. 2012); Magness v. Russian Fed'n, 247 F.3d 609, 613 (5th
14 Cir. 2001).

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16 ⁴ Even if the particular claims here were not precluded, the
17 issue of when Plaintiff had notice of the alleged wrongdoing would
18 be. "Issue preclusion . . . bars successive litigation of an issue
19 of fact or law actually litigated . . ., even if the issue recurs
20 in the context of a different claim." White v. City of Pasadena,
21 671 F.3d 918, 926 (9th Cir. 2012) (internal quotation and citation
22 omitted). Issue preclusion applies where "(1) the issue at stake
23 was identical in both proceedings; (2) the issue was actually
24 litigated and decided in the prior proceedings; (3) there was a
25 full and fair opportunity to litigate the issue; and (4) the issue
26 was necessary to decide the merits." Oyeniran v. Holder, 672 F.3d
27 800, 806 (9th Cir. 2012).

28 ⁵ The court need not address Lemire's remaining arguments.

⁶ Even if Plaintiff had attempted service under the Section
208 hierarchy, Plaintiff did not, contrary to her argument,
"substantially" comply with Section 208(b)(3), as she does not
dispute that she did not provide a translated version of her
complaint. See Straub v. A P Green, Inc., 38 F.3d 448, 453 (9th
Cir. 1994) ("Failure to deliver a complaint in the correct language
is such a fundamental defect that it fails both a 'strict
compliance' test and a 'substantial compliance' test.")

1 Accordingly, Plaintiff's claims against Ukraine are
2 dismissed.⁷

3 **IV. Conclusion**

4 For the reasons stated above, Plaintiff's motion to remand is
5 DENIED. Defendants' Motions to Dismiss are GRANTED. Plaintiff's
6 FAC is DISMISSED, with prejudice.

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8 IT IS SO ORDERED.

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11 Dated: June 18, 2018



United States District Judge

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⁷ The court need not address Ukraine's remaining arguments.