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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MVP ASSET MANAGEMENT (USA) LLC,)
a Delaware Limited Liability) 2:10-cv-02483-GEB-CMK
Company,)

Plaintiff,) ORDER

v.)

STEVEN VESTBIRK, JEFF BALLIET,)
ALLISON HANSLIK, JIM GRANAT, ARK)
ROYAL ASSET MANAGEMENT, LTD, a)
Bermuda Limited Company,)
VESTBIRK CAPITAL MANAGEMENT,)
LTD, a Bermuda Limited Company,)
ARK ROYAL ASSET MANAGEMENT, LLC,)
a Nevada Limited-Liability)
Company, ARK DISCOVERY, LLC, a)
Business Entity of Unknown Form,)
ARK ROYAL HOLDINGS, LLC, a)
Nevada Limited-Liability)
Company, ARK ROYAL SERVICES,)
LLC, a Nevada Limited-Liability)
Company, ARK ROYAL CAPITAL, LLC,)
a Nevada Limited-Liability)
Company, ARK ROYAL CAPITAL)
FUNDING, LLC, a Nevada Limited-)
Liability Company, ARK ROYAL)
CAPITAL, INC, a Nevada)
Corporation, ARK ROYAL)
RESOURCES, LLC, a Nevada)
Limited-Liability Company, ARK)
ROYAL ASSURANCE LLC, a Nevada)
Limited-Liability Company, and)
ARK ROYAL INVESTMENTS, LLC, a)
Nevada Limited-Liability)
Company,)

Defendants.)

_____)

1 Certain Defendants move for dismissal of Plaintiff's Complaint
2 under Federal Rules of Civil Procedure ("Rule") 12(b)(1), 12(b)(2),
3 12(b)(6), and 12(b)(7). (The caption has been amended according to the
4 order dismissing Defendant Royal Capital Funding, LLC.) Plaintiff MVP
5 Asset Management (USA) LLC ("MVPAM") opposes the motion. (ECF No. 26.)
6 Since Defendants prevail on their Rule 12(b)(1) argument and the motion
7 will be granted on this ground, the remaining dismissal arguments are
8 disregarded.

9 Defendants argue, *inter alia*, that MVPAM lacks Article III
10 standing to pursue this securities fraud action since MVPAM is "merely
11 [an] investment advisor and attorney in fact" and has not suffered an
12 injury-in-fact. (Mot. 13:5-7, 19-20.)

13 "A suit brought by a plaintiff without Article III standing is
14 not a 'case or controversy,' and an Article III federal court therefore
15 lacks subject matter jurisdiction over the suit. In that event, the suit
16 should be dismissed under Rule 12(b)(1)." Cetacean Community v. Bush,
17 386 F.3d 1169, 1174 (9th Cir. 2004) (citation omitted).

18 [T]o satisfy Article III's standing requirements, a
19 plaintiff must show that (1) it has suffered an
20 "injury in fact" that is (a) concrete and
21 particularized and (b) actual or imminent, not
22 conjectural or hypothetical; (2) the injury is
fairly traceable to the challenged action of the
defendant; and (3) it is likely, as opposed to
merely speculative, that the injury will be
redressed by a favorable decision.

23 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528
24 U.S. 167, 180-81 (2000). Plaintiff has the burden of establishing
25 jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377
26 (1994).

27 "A Rule 12(b)(1) jurisdictional attack may be facial or
28 factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.

1 2004). "In a facial attack, the challenger asserts that the allegations
2 contained in a complaint are insufficient on their face to invoke
3 federal jurisdiction. By contrast, in a factual attack, the challenger
4 disputes the truth of the allegations that, by themselves, would
5 otherwise invoke federal jurisdiction." Id. Defendants' Rule 12(b)(1)
6 motion is "a facial attack on . . . subject matter jurisdiction[.]" Doe
7 v. Holy See, 557 F.3d 1066, 1073 (9th Cir. 2009). Therefore, the
8 factual allegations in Plaintiff's Complaint are assumed to be true and
9 all reasonable inferences capable of being drawn therefrom are drawn in
10 Plaintiff's favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir.
11 2004). In light of Defendants facial jurisdictional attack, the
12 extrinsic evidence Plaintiff submitted in its opposition brief is
13 disregarded.

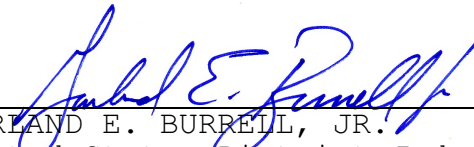
14 MVPAM alleges in its Complaint that it is the investment
15 manager for MVP Fund of Funds Ltd. ("MVP") and in this capacity it has
16 "unrestricted decision making authority to control and act as MVP's
17 attorney-in-fact [concerning] . . . all investments and litigation
18 relating thereto." (Compl. ¶ 3.) MVPAM alleges it invested two million
19 dollars in Ark Discovery Fund (Offshore) Ltd. ("Ark Discovery Fund") on
20 behalf of MVP between February and August 2008. Id. ¶ 24. MVPAM alleges
21 Defendants made false and misleading representations regarding their due
22 diligence in confirming the legitimacy of the Ark Discovery Fund and
23 that "[b]y the end of October 2008, the Ark Discovery Fund was in
24 liquidation . . . [and] Plaintiff . . . lost virtually the entire \$2
25 million it invested in the Ark Discovery Fund." Id. ¶¶ 26, 64. MVPAM
26 seeks rescission of MVP's investment in the Ark Discovery Fund; or, in
27 the alternative, an award of damages in an amount no less than two
28 million dollars plus interest. Id. ¶ 94.

1 Defendants argue MVPAM "lacks constitutional standing because
2 [it] has not suffered an injury-in-fact." (Mot. 13:19-20.) MVPAM
3 counters that MVP "assigned its claims arising out of the investments in
4 Ark Discovery to MVPAM . . . [and, as] an assignee of a claim, . . .
5 MVPAM[] has Article III standing." (Opp'n 9:24-10:1.) However, MVPAM's
6 Complaint does not allege MVP assigned its claims arising out of the
7 investments in Ark Discovery to MVPAM.

8 MVPAM's "status as both an attorney-in-fact for litigation
9 purposes and an investment advisor with unfettered discretion over its
10 client['s] investment decisions does not confer on [MVPAM] Article III
11 standing to sue in a representative capacity on its client['s] behalf."
12 W.R. Huff Asset Management Co., LLC v. Deloitte & Touche LLP, 549 F.3d
13 100, 111 (2d Cir. 2008). Therefore, MVPAM has not established Article
14 III standing and Defendants' motion under Rule 12(b)(1) is GRANTED.

15 MVPAM is granted ten (10) days from the date on which this
16 order is filed to file a First Amended Complaint. Further, MVPAM is
17 notified that this action may be dismissed with prejudice under Federal
18 Rule of Civil Procedure 41(b) if MVPAM fails to file an amended
19 Complaint within the prescribed time period.

20 Dated: April 14, 2011

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23 _____
GARLAND E. BURRELL, JR.
United States District Judge