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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)
Company,)

2:10-cv-02483-GEB-CMK

Plaintiff,)

ORDER

v.)

STEVEN VESTBIRK, JEFFREY BALLIET)
aka JEFF BALLIET, ALLISON)
HANSLIK, JAMES GRANAT aka 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 Texas 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, and DOES 1 through 10,)
inclusive,)

Defendants.)

1 Certain Defendants move for dismissal of Plaintiff's First
2 Amended Complaint ("FAC") under Federal Rule of Civil Procedure ("Rule")
3 12(b)(1). (ECF No. 56.) Defendants argue, *inter alia*, that Plaintiff MVP
4 Asset Management (USA) LLC ("MVPAM") lacks Article III standing to
5 pursue this securities fraud action since MVPAM "has failed to properly
6 allege its putative standing as an assignee to assert claims purportedly
7 held by MVP." (Mot. to Dismiss under 12(b)(1) ("Mot.") 1:13-14.) MVPAM
8 opposes the motion. (ECF No. 64.)

9 I. LEGAL STANDARD

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

15 [T]o satisfy Article III's standing requirements, a
16 plaintiff must show that (1) it has suffered an
17 "injury in fact" that is (a) concrete and
18 particularized and (b) actual or imminent, not
19 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.

20 Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528
21 U.S. 167, 180-81 (2000). "The existence of federal jurisdiction
22 ordinarily depends on the facts as they exist when the complaint is
23 filed." Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989).
24 Plaintiff has the burden of establishing jurisdiction. See Kokkonen v.
25 Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

26 "A Rule 12(b)(1) jurisdictional attack may be facial or
27 factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.
28 2004). "In a facial attack, the challenger asserts that the allegations

1 contained in a complaint are insufficient on their face to invoke
2 federal jurisdiction. By contrast, in a factual attack, the challenger
3 disputes the truth of the allegations that, by themselves, would
4 otherwise invoke federal jurisdiction." Id.

5 Defendants argue their motion is both a facial and a factual
6 attack on subject matter jurisdiction. (Mot. 5:11-13, 20-22.) Since
7 Defendants prevail on their facial attack arguments, only this portion
8 of the motion is reached. Therefore, the factual allegations in
9 Plaintiff's FAC are assumed to be true, and all reasonable inferences
10 capable of being drawn therefrom are drawn in Plaintiff's favor. Wolfe
11 v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). However, "the tenet
12 that a court must accept as true all of the allegations contained in a
13 complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 129
14 S. Ct. 1937, 1949 (2009).

15 **II. ALLEGATIONS IN FAC**

16 MVPAM alleges it is "the investment manager to the MVP Fund of
17 Funds Ltd. ("MVP"), an Investment Company organized and existing under
18 the laws of the British Virgin Islands, with unrestricted decision
19 making authority to control, and act as MVP's attorney-in-fact with
20 respect to, all investments and litigation relating thereto." (FAC ¶ 3
21 (emphasis added).) MVPAM alleges it "brings this action as assignee
22 pursuant to an assignment by MVP for collection[.]" Id. MVPAM further
23 alleges:

24 In February 2009, pursuant to its power of attorney
25 for MVP . . . , MVPAM caused MVP to enter into an
26 agreement with MVPAM under which MVP assigned its
27 claims arising out of and relating to the Ark
28 Discovery Fund ("MVP Claims") to MVPAM for
collection in return for MVPAM's agreement to
account to MVP for any recovery obtained, net of
the cost of prosecuting the MVP Claims. Stratford,
as the sole voting shareholder of MVP with the
authority to bind MVP, confirmed and approved on

1 MVP's property, or specifically a chose in action, from MVP to MVPAM[
2 since] . . . [t]he alleged power of attorney speaks only to control over
3 investments and litigation, not rights to transfer property[.]” (Mot.
4 9:3-5, 7-8.) MVPAM counters: “[as MVP’s] attorney-in-fact, [it] has the
5 power to bind [MVP] to contracts governing investments and
6 litigation[,]” and “the assignment of [MVP’s] Ark Discovery claims for
7 collection is a contract relating to the Ark Discovery investments and
8 the related litigation.” (Opp’n 4:5-8.) Defendants reply that “such
9 arguments are mere legal conclusions that contradict case law and are
10 inconsistent with the scope of the power of attorney as actually
11 alleged.” (Reply 3:22-23.)

12 MVPAM alleges it has power of attorney “with respect to[] all
13 investments and litigation relating thereto.” (FAC ¶ 3.) British Virgin
14 Islands law provides that:

15 (1) Subject to its memorandum and articles, a
16 company may, by an instrument in writing appoint a
17 person as its attorney either generally or in
relation to a specific matter.

18 (2) An act of an attorney appointed under
19 subsection (1) in accordance with the instrument
under which he was appointed binds the company.

20 British Virgin Islands Business Companies Act of 2004, page 70, §
21 106(1)-(2) (emphasis added). MVPAM’s alleged power of attorney is not a
22 general power of attorney, it is specific to investments and litigation
23 related to those investments. As alleged, MVPAM’s specific power of
24 attorney does not establish that MVPAM has the power to assign MVP’s
25 claims.

26 Defendants further argue the sole voting shareholder’s
27 purported ratification does not save the assignment since “this
28 purported shareholder ratification is not premised upon allegations of

1 fact, but instead on conclusions of law that need not be accepted as
2 true." Id. 11:22, 12:10-11. Defendants also argue "this allegation runs
3 contrary to MVP's governing documents as well as the law of the British
4 Virgin Islands[since] MVP's Articles of Association provide that its
5 business is to be conducted through its Directors, not its shareholders"
6 and "the law of the British Virgin Islands requires a company's business
7 to be conducted through its directors, not its shareholders." Id. 12:13-
8 18.

9 MVPAM alleges that "Stratford, as the sole voting shareholder
10 of MVP with the authority to bind MVP, confirmed and approved on behalf
11 of MVP the assignment of the MVP Claims for collection to MVPAM." (FAC
12 ¶ 87.) However, this allegation contains factual allegations and a legal
13 conclusion that the sole voting shareholder of MVP has the authority to
14 bind MVP. Only the factual allegations are assumed to be true.

15 British Virgin Island law provides that:

16 (1) The business and affairs of a company shall be
17 managed by, or under the direction or supervision
of, the directors of the company.

18 (2) The directors of a company have all the powers
19 necessary for managing, and for directing and
supervising, the business and affairs of the
20 company.

21 (3) Subsections (1) and (2) are subject to any
modifications or limitations in the memorandum or
articles.


22 British Virgin Islands Business Companies Act of 2004, page 70-71, §
23 109(1)-(3) (emphasis added). Therefore, under British Virgin Islands
24 law, the directors of MVP have the power to manage, direct, and
25 supervise the business and affairs of MVP, unless MVP has modified this
26 general rule in its Articles of Association. MVPAM has not alleged that
27 MVP's Articles of Association modified the general rule as set forth in
28 the Act. Therefore, MVP's directors have the power to confirm MVPAM's

1 assignment of MVP's claims, and the shareholder's confirmation does not
2 bind MVP and make MVPAM's assignment valid. Since MVPAM's allegations
3 are insufficient to allege a valid assignment, MVPAM has not established
4 Article III standing. Therefore, Defendants' motion under Rule 12(b)(1)
5 is GRANTED.

6 **V. CONCLUSION**

7 MVPAM is granted ten (10) days from the date on which this
8 order is filed to file a Second Amended Complaint addressing the issues
9 raised in this order. Further, MVPAM is notified that this action may be
10 dismissed with prejudice under Federal Rule of Civil Procedure 41(b) if
11 MVPAM fails to file an amended Complaint within the prescribed time
12 period.

13 Dated: September 21, 2011

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16 GARLAND E. BURRELL, JR.
17 United States District Judge
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