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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MYECHECK, INC.,

Plaintiff,

v.

SWEETSUN INTERTRADE, INC., et al.,

Defendants.

No. 2:14-cv-02889-KJM-AC

ORDER

This matter is before the court on defendant Scottsdale Capital Advisors' motion to dismiss. ECF No. 19. The other defendants, Sweetsun Intertrade, Inc., Seven Miles Securities, and Titan International Securities, Inc., have not yet appeared. MyECheck (MYEC) filed an opposition and requested leave to amend. ECF No. 22. The court held a hearing on this matter on July 24, 2015, at which Brian Katz appeared for MYEC and Alan Baskin for Scottsdale. For the following reasons, the motion to dismiss is GRANTED with prejudice and without leave to amend.

I. BACKGROUND

For purposes of this motion, the court assumes the following allegations are true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In 2012, Sweetsun told MYEC it had purchased a \$32,200 promissory note from Tangiers Investors, L.P., entitling it to MYEC shares. Compl.

1 ¶¶ 10–12, ECF No. 1. Sweetsun had never actually purchased a promissory note and had no right
2 to the shares. *Id.* ¶ 16. Oblivious to the fraud, MYEC issued shares to Sweetsun and Titan, as
3 directed by Sweetsun. *Id.* ¶¶ 13–14. MYEC believes the shares issued to Titan were sent to
4 Scottsdale. *Id.* ¶ 14. Sweetsun also induced MYEC’s transfer agent to issue additional shares in
5 MYEC, none of which were authorized, including shares sent to Seven Mile and Sweetsun.
6 *Id.* ¶ 17.

7 MYEC discovered the fraud in October 2013. *Id.* ¶ 18. On about November 13,
8 2013, MYEC contacted Scottsdale and requested it freeze trading in the fraudulent shares. *Id.*
9 ¶ 23. Scottsdale froze the shares temporarily, but on January 16, 2014, it emailed MYEC to say it
10 could not continue a freeze without a temporary restraining order. *Id.* ¶ 24. The remaining
11 560,005,000 shares, held by Seven Miles, Titan, and an unknown entity are currently worth about
12 \$16 million. *Id.* ¶¶ 28–29. MYEC seeks to enjoin the defendants, including Scottsdale, from
13 transferring these remaining shares. *Id.* at 10.

14 MYEC filed its complaint in December 2014. *Id.* at 11. Approximately five
15 months later, no other party had appeared, and the court issued an order for MYEC to show cause
16 why its complaint should not be dismissed for failure to prosecute. ECF No. 7. MYEC
17 responded and reported it had completed service on Seven Miles and Scottsdale, but the other
18 defendants’ foreign status made service difficult. ECF No. 12 (citing Article 2 of the Hague
19 Convention).¹

20 Scottsdale filed the pending motion to dismiss on June 1, 2015. ECF No. 19. It
21 asserts it is merely a broker-dealer that clears and sells restricted stock, ensuring the stock meets
22 certain federal conditions for sale. *Id.* at 3. It denies ever owning any of the relevant MYEC
23 stock, but agrees it held the certificates for purposes of obtaining confirmation that the shares
24 were marketable. *Id.* at 4. Scottsdale acknowledges MYEC’s request to freeze the shares in
25 November 2013, but asserts MYEC made no specific allegation of fraud; rather MYEC only
26 indicated the shares were issued “in error.” *Id.* at 4–5. Scottsdale also points out that MYEC

27 ¹ The order to show cause is hereby discharged.
28

1 never pursued a temporary restraining order and filed this action almost a year after its earlier
2 correspondence. *Id.* at 6.

3 In light of these assertions, Scottsdale argues MYEC lacks standing. *Id.* at 7–13.
4 Additionally, Scottsdale argues MYEC is barred by laches because its allegations show MYEC’s
5 efforts - or absence thereof - lacked diligence and caused prejudice to Scottsdale. *See id.* at 13–15
6 (citing *Apache Survival Coal v. United States*, 21 F.3d 895, 905 (9th Cir. 1994)). Finally,
7 Scottsdale argues MYEC’s claims must be dismissed for failure to join indispensable parties
8 under Federal Rule of Civil Procedure 19(a)(1), because MYEC did not join the current MYEC
9 shareholders, who now own the MYEC shares at issue. *Id.* at 15.

10 MYEC addresses none of these arguments in its opposition, but requests leave to
11 amend its complaint to include new allegations against Scottsdale under section 8-115 of the
12 Uniform Commercial Code. Opp’n 4–6 (citing U.C.C. § 8-115(2)). That section allows for the
13 liability of a “securities intermediary” or “broker” who “acted in collusion with the wrongdoer in
14 violating the rights of the adverse claimant.” *Id.* MYEC has not attached a proposed amended
15 complaint to its opposition; it does describe discrepancies in the documents Scottsdale relied on
16 when it lifted the freeze on MYEC shares. *See id.* at 5.

17 II. DISCUSSION

18 A. Motion to Dismiss

19 MYEC opposes Scottsdale’s motion, but contests none of Scottsdale’s factual
20 assertions and omits any argument against dismissal other than to request leave to amend. By
21 ignoring these arguments, MYEC tacitly concedes dismissal of its claims is appropriate. *See*
22 *Walsh v. Nev. Dep’t of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006); *Silva v. U.S. Bancorp*,
23 No. 10-01854, 2011 WL 7096576, at *2–3 (C.D. Cal 2011) (citing *Tatum v. Schwartz*, No.
24 08–16987, 2007 WL 419463, *3 (E.D. Cal. 2007)). At hearing, MYEC agreed Scottsdale’s
25 motion should be granted with prejudice and without leave to amend as to the claims originally
26 pleaded.

1 B. Leave to Amend

2 As noted above, MYEC requests leave to amend. Federal Rule of Civil Procedure
3 15(a)(2) provides: “The court should freely give [leave to amend] when justice so requires,” and
4 the Ninth Circuit has “stressed Rule 15’s policy of favoring amendments.” *Ascon Props., Inc. v.*
5 *Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989.) “In exercising its discretion [regarding
6 granting or denying leave to amend] ‘a court must be guided by the underlying purpose of Rule
7 15—to facilitate decision on the merits rather than on the pleadings or technicalities.’” *DCD*
8 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*,
9 655 F.2d 977, 979 (9th Cir. 1981)). However, “the liberality in granting leave to amend is subject
10 to several limitations. Leave need not be granted where the amendment of the complaint would
11 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility,
12 or creates undue delay.” *Ascon Props.*, 866 F.2d at 1160 (internal citations omitted). Not all the
13 factors merit equal weight; prejudice to the opposing party carries the greatest weight. *Eminence*
14 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

15 Here, Scottsdale argues MYEC’s request was procedurally deficient, unduly
16 delayed, and should be denied because amendment would be futile.

17 1. Procedural Impropriety

18 This district’s Local Rules provide: “If filing a document requires leave of court,
19 such as an amended complaint after the time to amend as a matter of course has expired, counsel
20 shall attach the document proposed to be filed as an exhibit to moving papers seeking such leave
21 and lodge a proposed order as required by these Rules.” E.D. Cal. L.R. 137(c). All motions must
22 also be noticed on this court’s civil law and motion calendar, *id.* R. 230(b), unless filed as an *ex*
23 *parte* application, and then must comply with this court’s standing order, ECF No. 3-1. MYEC
24 did not attach a proposed amended complaint to its opposition, did not file a motion or notice of
25 hearing, and did not comply with the standing order’s provisions on *ex parte* requests. These
26 shortfalls make adjudication of the parties’ dispute more difficult and less efficient, but do not
27 alone warrant a denial of MYEC’s request. Counsel is cautioned against future violations of the
28 court’s orders and the Local Rules.

1 2. Delay

2 MYEC’s timing in seeking amendment is questionable. In response to MYEC’s
3 request for leave to amend, Scottsdale filed copies of email correspondence sent to MYEC’s
4 counsel five months before Scottsdale moved to dismiss. *See* Cruz Decl. ¶¶ 2–3 & Ex. 1, ECF
5 No. 24-1. To these emails Scottsdale attached the evidence it relied on when it decided to revoke
6 the freeze on MYEC shares, *see id.*, the same documents MYEC cites to support its request for
7 leave to amend, *see* Opp’n at 5. These documents include a July 31, 2013 letter from Thomas
8 Russell, who purported to be “counsel to MYECHECK, Inc.” Cruz Decl. Ex. 1, at 16–19,² ECF
9 No. 24-1. Mr. Russell gave his opinion that the \$32,200 note, discussed above, was a binding
10 obligation to MYEC, was duly assigned by Tangiers to Sweetsun, and entitled Sweetsun to 300
11 million MYEC shares. *Id.* at 19. The documents also included a copy of a letter from the “Law
12 Office of Thomas Russell” addressed “To whom it may concerned [sic],” enclosing a check for
13 \$9,100. *Id.* at 12–13. The letter included a copy of the enclosed check, which was addressed to
14 “Tangiers Investors LPC,” was paid from Mr. Russell’s “Client Trust Account,” and included the
15 note, “Sweetsun Intertrade Inc. MyECheck Client Distr. Assignments 9/10/12 4/30/13 7/26/13.”
16 *Id.* at 13.

17 MYEC’s counsel acknowledged receipt of the email and attachments on February
18 6, 2015, and said he would discuss them with his client. *See* Cruz Decl. ¶ 4 & Ex. 2. But counsel
19 did not request leave to amend the complaint until opposing Scottsdale’s motion to dismiss on
20 July 10, 2015. This delay, although substantial, is not so prejudicial as to warrant denial of
21 MYEC’s request. Discovery has not yet commenced, no trial has been set, and the proposed new
22 claim would not substantially alter the nature of MYEC’s complaint. *Cf. Morongo Band of*
23 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *DCD Programs*, 833 F.2d at
24 187–88.

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27 ² Pages cited in this document are those printed at the top of each page by the CM/ECF
28 system.

1 3. Futility

2 If allowed leave to amend, MYEC explains it would assert a claim “against
3 Scottsdale pursuant to U.C.C. § 8-115(2).” Opp’n at 6 (capitalization altered). California has
4 adopted section 8-115 of the Uniform Commercial Code and its comments. *See* Cal. Com. Code
5 § 8115. That section provides, in relevant part,

6 A securities intermediary that has transferred a financial asset
7 pursuant to an effective entitlement order, or a broker or other agent
8 or bailee that has dealt with a financial asset at the direction of its
9 customer or principal, is not liable to a person having an adverse
 claim to the financial asset, unless the securities intermediary, or
 broker or other agent or bailee . . . [a]cted in collusion with the
 wrongdoer in violating the rights of the adverse claimant. . . .

10 *Id.* The parties agree, at least for purposes of this motion, that section 8115 applies to Scottsdale
11 in general. *See* Opp’n at 4–6; Reply at 6–7.

12 “As a general proposition, section 8115 immunizes brokers from liability in
13 connection with their activities as conduits for the transfer of securities on behalf of their
14 customers.” *Decker v. Yorkton Sec., Inc.*, 106 Cal. App. 4th 1315, 1320–21 (2003); *see also* Cal
15 Com. Code § 8115 cmt. 2. Under section 8115, “a broker will not be liable even if it ‘has notice
16 that someone asserts a claim to a customer’s securities or security entitlements,’ because ‘the firm
17 should not be placed in the position of having to make a legal judgment about the validity of the
18 claim at the risk of liability either to its customer or to the third party for guessing wrong.” *Id.*
19 at 1321 (quoting Cal. Com. Code § 8115 cmt. 3). In other words, a defendant intermediary or
20 broker “is privileged to act on the instructions of its customer or entitlement holder, unless it has
21 been served with a restraining order or other legal process enjoining it from doing so,” Cal. Com.
22 Code § 8115 cmt. 3, because “[i]t is not the role of the record-keeper to police whether the
23 transactions recorded are appropriate,” *id.* cmt. 5. The broker’s knowledge of an adverse claim
24 “is a necessary but not sufficient condition of the collusion test.” *Id.*

25 Paragraph 2 of section 8115 is meant to carve out “egregious cases,” in which
26 defendants’ actions “go[] beyond the ordinary standards of the business of implementing and
27 recording transactions, and reach[] a level of affirmative misconduct in assisting the customer in
28 the commission of a wrong.” *Id.* Another federal district court, interpreting the identically

1 worded provisions of Michigan law on a motion to dismiss, found that paragraph 2 does not apply
2 if the defendant allegedly ignored red flags but took no affirmative steps. *See H & R Block Fin.*
3 *Advisors, Inc. v. Express Scripts, Inc.*, 426 F. Supp. 2d 656, 661–63 (E.D. Mich. 2006)
4 (interpreting Mich. Compl. L. § 440.8115). To find otherwise, in that court’s opinion, would
5 “turn a negative into a positive.” *Id.* at 663. Later, on summary judgment, upon revelation that
6 the defendant had not only ignored red flags but had “pressur[ed] a 78-year-old woman to sell
7 stock that she insisted did not belong to her,” the same court found section 8-115 could not
8 preclude liability. *H&R Block*, No. 05-73306, 2006 WL 2125226, at *6 (E.D. Mich. July 27,
9 2006); *see also Pine Belt Enterprises, Inc. v. SC & E Admin. Servs., Inc.*, No. 04-105, 2005 WL
10 2469672, at *7 (D.N.J. Oct. 6, 2005) (finding broker was not liable under analogous New Jersey
11 provision despite plaintiffs’ allegations that defendant “conducted no due diligence before
12 transferring funds from the Account”); *but see Davis v. Sterne, Agee & Leach, Inc.*, 965 So. 2d
13 1076, 1086 (Ala. 2007) (finding U.C.C. section 8-115 does not protect a defendant who
14 transferred a financial asset in reliance on a forged document; citing *Watson v. Sears*, 766 N.E.2d
15 784 (Ind. Ct. App. 2002) and *Powers v. Am. Express Fin. Advisors, Inc.*, 82 F. Supp. 2d 448 (D.
16 Md. 2000), *aff’d*, 238 F.3d 414 (4th Cir. 2000)).

17 Here, MYEC cites three aspects of Sweetsun’s paperwork to argue Scottsdale
18 faces liability under section 8115(2): (1) the number of shares approved in MYEC corporate
19 resolutions are not the same as the number of shares MYEC told Scottsdale were fraudulently
20 issued; (2) the checks to Sweetsun postdated its reported purchase by many months and were
21 issued from Sweetsun’s attorney’s trust account rather than Sweetsun’s own account; (3) some of
22 the documents bear what appear to be electronic signatures rather than signatures applied by
23 hand. MYEC also points out that it told Scottsdale the shares were issued in error and later
24 clarified that the shares were issued fraudulently.

25 Assuming these allegations are true, and construing the cited documents in the
26 light most favorable to MYEC, it can at most be said that Scottsdale ignored red flags and
27 overlooked suspicious circumstances, but undertook no affirmative misdeed. MYEC makes out a
28 possible case of collusion, but not a plausible case. *See Iqbal*, 556 U.S. at 679 (“[W]here the

1 well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
2 the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”
3 (quoting Fed. Rule Civ. Proc. 8(a)(2)). MYEC does not describe why or how these discrepancies
4 confirmed the alleged fraud, let alone explain why the documents are evidence Scottsdale
5 colluded with the other defendants.

6 MYEC protests that it told Scottsdale the shares were issued fraudulently and
7 argues this is sufficient evidence of collusion. As noted above, Scottsdale’s knowledge of an
8 adverse claim “is a necessary but not sufficient condition of the collusion test.” Cal. Com. Code
9 § 8115, cmt. 5. Section 8115 and its comments repeatedly paraphrase the same rule: a securities
10 intermediary or broker need not make legal judgments or police its customer’s claims and is
11 privileged to act on the instruction of one customer, even if it is aware of another’s competing
12 claim.

13 Lastly, MYEC advances no argument to oppose Scottsdale’s laches defense, which
14 would apply equally to the proposed amendment: despite a claimed fraud and Scottsdale’s advice
15 to obtain a temporary restraining order, MYEC delayed filing a complaint or obtaining any court
16 order and so exacerbated its damages. Amendment would be an exercise in futility.

17 III. CONCLUSION

18 Scottsdale’s motion to dismiss, ECF No. 19, is GRANTED with prejudice and
19 without leave to amend.

20 IT IS SO ORDERED.

21 DATED: October 16, 2015.

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25 UNITED STATES DISTRICT JUDGE
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