UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JASON P. SHURNAS; HORIZON COMPANIES, LLC; and HORIZON FINANCIAL, LLC,

Plaintiffs,

v.

JAN LYNN OWEN, in her official capacity as Commissioner of the CALIFORNIA DEPARTMENT OF BUSINESS OVERSIGHT (formerly STATE OF CALIFORNIA DEPARTMENT OF CORPORATIONS) and THE STATE OF CALIFORNIA,

Defendants.

No. 2:15-cv-00908-MCE-DB

MEMORANDUM AND ORDER

Plaintiffs Jason P. Shurnas; Horizon Companies, LLC; and Horizon Financial, LLC allege that Defendants Jan Lynn Owen and the State of California violated Plaintiffs' rights under the United States Constitution and California Constitution. Pending before the Court is Defendants' Motion to Dismiss the First Amended Complaint ("FAC"). ECF No. 29. For the reasons set forth below, Defendants' Motion to Dismiss is GRANTED with prejudice.

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BACKGROUND[1]

The California Corporations Commissioner issued a "Desist and Refrain Order" to Plaintiffs on December 30, 2008. The Order alleged that Plaintiffs had violated California Corporations Code §§ 25100 and 25401 and California Financial Code § 22100. According to the Order, Plaintiffs advertised on the Sacramento-area Craigslist website that an unnamed "private company" was soliciting investors with at least $100,000 available in liquid funds to form a "secret investor syndicate." That syndicate purportedly offered membership interests in a Las Vegas casino and real estate venture. The Order states that Plaintiff Shurnas placed a telephone call to a California resident who responded to the Craigslist posting. In the course of their conversation, Plaintiff discussed details regarding how the resident's contribution would be invested.

Based on these factual findings, the Commissioner determined that the membership interests that Plaintiffs had offered were securities subject to qualification under the California Corporate Securities Law of 1968, that those securities were offered without qualification, and thus Plaintiffs were in violation of § 25110 of that statute. Finally, according to the Commissioner, Plaintiffs engaged in business as a finance lender or broker without first obtaining a license in violation of California Financial Code § 22100.

In their FAC, Plaintiffs allege that they were not properly served with the Commissioner's Order. They also contend that the documents Defendants intended to serve failed to include any language regarding how to file a request for hearing or the timeline for doing so. According to Plaintiffs, the State of California does not provide such information online. Plaintiffs further allege that there is no provision within the California Corporations Code or Financial Code which mandates what information must

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[1] Unless otherwise noted, the allegations in this section are drawn directly, and in some cases verbatim, from the allegations of Plaintiffs' FAC.

accompany a Desist and Refrain Order so that an individual would know how to respond or the consequences for failing to do so.

Plaintiffs' original Complaint, ECF No. 1, included four causes of action: a facial due process claim under § 1983, as well as three claims based on the specific Order issued against Plaintiffs. Defendants brought a Motion to Dismiss the claims under Rule 12(b)(6), ECF No. 6, which was granted. This Court held that the three claims based on the Order itself were time-barred, and thus were dismissed without leave to amend. See Mem. & Order, ECF No. 26. On the other hand, the Court held the facial due process claim was not time-barred, but nonetheless, Plaintiff failed to state a claim. See id. at 7. Plaintiff was given leave to amend, and that Amended Complaint is now before the Court.

STANDARD

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (citation omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level."

Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Id. at 555 n.3 (citation omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright & Miller, supra, at 94–95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149,

1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

ANALYSIS

"[A] generally applicable statute is not facially invalid unless the statute 'can never be applied in a constitutional manner.'" United States v. Kaczynski, 551 F.3d 1120, 1125 (9th Cir. 2009). Defendants argue that Plaintiffs have not alleged sufficient facts to make plausible their claim that California Corporations Code § 25532 is unconstitutional under all circumstances. Specifically, Defendants argue that the California Administrative Procedures Act ("California APA") applies to § 25532, making Plaintiffs' claim effectively "an attack of California's administrative review procedures as a whole." Defs.' Mem. of P & A in Supp. of Mot. to Dismiss ("Defs.' MTD"), ECF No. 29-1, at 8 (quoting Baffert v. Cal. Horse Racing Bd., 332 F.3d 613, 619 (9th Cir. 2003)). Because "the Ninth Circuit has held that California law offers an adequate opportunity for judicial review of administrative order," Defendants continue, Plaintiffs' facial challenge cannot succeed. Id. (citing Baffert, 332 F.3d at 619–20).

Conversely, Plaintiffs argue that the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), supports their claim that § 25532 is facially unconstitutional. That balancing test weighs the interests of the individual and the value of additional procedures against the costs of implementing additional procedures. See id. at 335. Specifically, Plaintiffs argue that orders issued under § 25532 act as a "lifetime sentence" that are unreviewable by any court. Pls.' Opp'n to MTD at 5. Furthermore, Plaintiffs argue that additional notice requirements and access to judicial review of the facts underlying a § 25532 order would be of minimal cost to the government, but of enormous value to an individual subject to a § 25532 order. Id. at 13–14.

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Contrary to Plaintiffs' assertions, § 25532 orders are subject to review, both in administrative hearings and in judicial proceedings. Section 25532 provides that after an order has been issued by the Commissioner, "the order shall be deemed a final order of the commissioner" unless the subject of the order "file[s] a written request for hearing within 30 days from the date of service of the order." Cal. Corp. Code § 25532(f). That hearing is to "be held in accordance with provisions of the [California] Administrative Procedure Act," id., which also provides opportunity for judicial review of that hearing in California courts, see Cal. Gov. Code § 11523. Furthermore, if no hearing is held within 15 days of the filing of a request for a hearing, "the order is rescinded." Id. Accordingly, Plaintiffs are incorrect in asserting that there is no mechanism to have an order reviewed. And because Plaintiffs ignore the fact that an order issued under § 25532 is reviewable under the California APA, they fail to allege any deficiency in the California APA's procedures that would render them unconstitutional under all circumstances.

Plaintiffs are also incorrect in asserting that a § 25532 functions as a "lifetime sentence" with "no mechanism whatsoever for having an uncontested Order reviewed." See Pls.' Opp'n to MTD at 8 (emphasis removed). Orders issued under § 25532 operate only until the unqualified securities that prompted the order are qualified under California law or until the person acting in an unlicensed capacity is "appropriately licensed." Cal. Corp. Code. § 25532(a)–(b). Thus, even when an order issued under § 25532 becomes final, procedures are available to rescind the order.

Plaintiffs' FAC does little more than reiterate the same arguments the Court already rejected when dismissing the original Complaint. The gravamen of Plaintiffs' allegations is that because they were not properly served with the Commissioner's Order, they were unable to challenge the Order in an administrative or judicial hearing. This amounts to an as-applied challenge, which this Court already ruled is time-barred due to Plaintiffs waiting over two years from when they received actual notice of the Order to file their Complaint. Mem. & Order at 6–7. Plaintiffs have alleged no facts that would support a claim that § 25532 "can never be applied in a constitutional manner,"

Kaczynski, 551 F.3d at 1125 (9th Cir. 2009), and have therefore failed to state a claim. Furthermore, because Plaintiffs have already been given leave to amend, and allegations in their FAC are substantially the same as those in their original Complaint, it has become apparent that further leave to amend would be futile.

CONCLUSION

For the reasons provided above, Defendants' Motion to Dismiss is GRANTED.[2] ECF No. 29. Because it has become apparent that further leave to amend would be futile, the dismissal is with prejudice. The Clerk of Court is directed to close the file.

IT IS SO ORDERED.

Dated: November 10, 2016

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs in accordance with Local Rule 230(g).