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

UTHE TECHNOLOGY CORP.,
Plaintiff,
v.
AETRIUM, INC. and HARRY ALLEN,
Defendants.

No. C 95-02377 WHA

**ORDER DENYING IN PART
AND GRANTING IN PART
DEFENDANTS' MOTION
TO DISMISS**

INTRODUCTION

In this securities fraud dispute, defendants move to dismiss claims one through six and eight pursuant to the law of case doctrine and for lack of standing. Defendants move to dismiss claim seven pursuant to FRCP 12(b)(6). For the following reasons defendants' motion is **GRANTED IN PART AND DENIED IN PART.**

STATEMENT

Plaintiff Uthe Technology Corporation, a manufacturer and distributor of semiconductor equipment, asserts several claims for relief against defendants Aetrium, Inc., a manufacturer of semiconductor equipment, and its former officer in charge of Asian sales Harry Allen. Plaintiff alleges that defendants participated in a conspiracy to create a new corporation and take over plaintiff's former wholly-owned subsidiary, Uthe Singapore. Uthe Singapore was the Asian distributor of semiconductor equipment for plaintiff and other semiconductor equipment manufacturers, including defendant Aetrium. Plaintiff alleges that defendant Allen lied to

1 plaintiff by making affirmative and false representations to plaintiff's CEO that he knew nothing
2 of the effort to destroy plaintiff's Asian semiconductor business while simultaneously concealing
3 efforts to destroy plaintiff's Asian semiconductor business. Plaintiff further alleges that
4 defendants used a secret corporation in conjunction with three individuals to take over Uthe
5 Singapore. Plaintiff contends that defendants directly contacted customers and told them to
6 terminate orders and cease payments, participated in theft of customer lists and business plans,
7 interfered with contracts and withheld diverted payments. As a result of defendants' conduct,
8 plaintiff alleges that it was forced to sell its shares in Uthe Singapore at a depressed price.
9 Plaintiff is now seeking redress for fraud by omission, conspiracy to commit fraud, conversion,
10 intentional interference with contract, intentional interference with economic relations, civil
11 RICO, securities fraud and unfair competition arising out of defendants participation in the
12 conspiracy.

13 This matter was originally filed against the above-named defendants and three Singapore
14 defendants in state court in 1993, and subsequently removed here on federal question and
15 diversity grounds. The Singapore defendants moved to dismiss the action as to them because the
16 stock-sales agreement governing the claims required that the parties arbitrate any claims relating
17 to the stock sale in Singapore. The two other defendants — Aetrium and Allen — moved to stay
18 the claims against them pending resolution of the arbitration in Singapore. Judge James Ware,
19 then the assigned judge, granted both motions. Plaintiff moved for reconsideration on the
20 grounds that the alleged misconduct occurred prior to and was unrelated to the stock sale and
21 thus not subject to the arbitration clause. Plaintiff also sought leave to amend their complaint.
22 Judge Ware denied plaintiff's motion to reconsider the stay and removal and denied plaintiff's
23 request for leave to amend. Plaintiff pursued the arbitration in Singapore against the Singapore
24 defendants. Plaintiff was successful in the Singapore arbitration and was awarded damages
25 in the amount of \$12,286,350. The amount was determined to be the difference between the
26 artificially depressed stock price actually paid for the plaintiff's shares and the true value of the
27 shares absent the effect of the wrongful conduct of defendants.
28

1 Upon completion of the Singapore arbitration, plaintiff moved to revive the action
2 against defendants Aetrium and Allen. The action was reassigned to the undersigned judge
3 in May 2012. Plaintiff then moved to file a second amended complaint. Both motions were
4 granted and plaintiff filed a second amended complaint. Defendants now seek to dismiss claims
5 one through six and claim eight pursuant to FRCP 12(b)(1) for lack of standing, claims three and
6 six pursuant to FRCP 12(b)(6) and claim seven as barred by the single recovery rule.

7 **ANALYSIS**

8 **1. LAW OF CASE.**

9 Defendants Aetrium and Allen contend that claims one through six and eight must be
10 dismissed pursuant to the law of the case doctrine because Judge Ware previously addressed the
11 issue of standing before staying this action. Judge Ware stated plaintiff:

12 has no standing to bring the claims which stem from the pre-stock
13 sale conduct. Since these claims allege that Defendants inflicted
14 harm on USTPL [plaintiff's former wholly-owned subsidiary] and
15 not on UTHE directly, UTHE, as a shareholder in USTPL, may not
16 bring these claims in its own right but must sue derivatively on
17 behalf of USTPL. That UTHE may have suffered losses in the
18 form of diminution in value of its stock as the result of the
19 diversion of revenue from USTPL does not entitle it to bring an
20 action in its own name. *Dowling v. Narragansett Capitol Corp.*,
21 735 F. Supp. 1105, 1113 (D.R.I. 1990). Moreover, UTHE lost
22 standing to sue derivatively when it sold its interests in USTPL.
23 It is well settled that a plaintiff must remain a shareholder at the
24 time of the filing of the action to have standing to maintain a
25 shareholder derivative suit. *Berni v. Gourmet Restaurants of
26 America*, 838 F.2d 642, 646 (2d Cir. 1988).

27 Because UTHE lacks standing to assert claims for damage to
28 USTPL occurring before the stock sale, UHTE's only cognizable
claims arise out of the stock sale agreement

(Br. Exh. K). Defendants argue the law of case doctrine applies and all claims for damages
occurring prior to the sale of stock should be dismissed. This order disagrees.

Under the "law of the case" doctrine, "a court is generally precluded from reconsidering
an issue that has already been decided by the same court, or a higher court in the identical case."
Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993) The doctrine is not a limitation on a
tribunal's power, but rather a guide to discretion. *Arizona v. California*, 460 U.S. 605, 618
(1983).

1 Judge Ware’s order found plaintiff lacked standing to assert claims for damage to its
2 subsidiary occurring before the stock sale because plaintiff’s standing to maintain a derivative
3 suit was destroyed when plaintiff was divested of its shares. In its second amended complaint,
4 however, plaintiff alleges that it has suffered *direct* harm as a result of defendants’ actions,
5 namely direct loss of its own primary revenue stream, customers, confidential documents about
6 clients and company strategy and harm to its own business reputation. Judge Ware’s order did
7 not make a decision regarding plaintiff’s standing to assert claims of direct harm. It was limited
8 to the issue of standing to sue derivatively. As such, the law of case doctrine does not apply to
9 plaintiff’s claims of direct harm.

10 **2. STANDING.**

11 Apart from law of the case, the motion contends that plaintiff lacks standing to allege
12 claims one through six and claim eight because the harm alleged in the second amended
13 complaint is incidental to and dependent on the injury to plaintiff’s subsidiary. Specifically,
14 defendants argue a shareholder does not have standing to redress an injury to the corporation.
15 To have standing to maintain an action, a shareholder must assert more than personal economic
16 injury resulting from a wrong to the corporation. A shareholder must be injured directly and
17 independently of the corporation. *Shell Petroleum, N.V. Inc. v. Graves*, 709 F.2d 593 (9th Cir.
18 1983). While defendants’ statement of law is accurate, defendants’ framing of the harm alleged
19 in the complaint as incidental is inaccurate.

20 At the pleading stage, all material allegations of the complaint are taken as true and
21 construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*,
22 80 F.3d 336, 340 (9th Cir. 1996). Plaintiff alleges in the operative complaint that:

23 As a direct, proximate and foreseeable result of AETRIUM and
24 ALLEN’s fraudulent omission and concealment of their effort to
25 destroy UTHE’s Singapore subsidiary and business, UTHE was
26 damaged by the direct loss of a primary revenue stream and
27 clients’ business worth millions of dollars, as well as in the loss of
28 confidential documents and information concerning its Singapore
clients, operations and business strategy, which harmed its ability
to do future business in Singapore. (Second Amd. Compl. ¶¶ 33,
40).

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As a result of UTHE’s actions, money that was due to UTHE was diverted to and retained by AETRIUM and ALLEN and their co-conspirators. UTHE was thereby damaged in the amount of the revenue that was wrongfully taken and diverted from it, in the amount of millions of dollars (Second Amd. Compl. ¶ 44).

* * *

As a direct, proximate and foreseeable result of the actions of AETRIUM and ALLEN, UTHE SINGAPORE was no longer able to fulfill its contractual duties to Uthe and the contract between UTHE and UTHE SINGAPORE was disrupted. UTHE suffered millions of dollars of damages in the loss of a primary revenue stream and permanent harm to long-standing relationships with Asian customers (Second Amd. Compl. ¶ 48).

* * *

As a direct, proximate and foreseeable result of the actions of AETRIUM and ALLEN, UTHE’s relationships with its customers were destroyed and its reputation was damaged (Second Amd. Compl. ¶ 53).

* * *

As a direct, proximate and foreseeable result of the fraudulent communications described above, UTHE was damaged in the direct loss of its customers, contracts and orders for semiconductor business in Asia (Second Amd. Compl. ¶ 66).

* * *

As a result of AETRIUM’s and ALLEN’s violation of Business & Professions Code § 17200, *et seq.*, UTHE has suffered an actual injury, including direct injury to its business operations in California, amounting to millions of dollars (Second Amd. Compl. ¶ 81).

These allegations plainly state plaintiff suffered harm directly and independently of its subsidiary as a result of defendants’ actions. Accordingly, these allegations of direct harm are sufficient to give rise to an inference plaintiff suffered direct, not incidental, harm.

Defendants contend that “the court is not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–1296 (9th Cir. 1998). Defendants argue that the arbitration awards appended to the second amended complaint as exhibits clearly establish that the harm plaintiff is alleging is incidental and dependent upon the harm suffered by the subsidiary. In an effort to bolster their argument, defendants made reference at oral argument to a case from our court of

1 appeals in which the plaintiff's allegations in the complaint were found to be contradicted by the
2 appended arbitration award, resulting in the dismissal of the plaintiff's claims. *See Sprewell v.*
3 *Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001). *Sprewell*, is an accurate framing of the
4 law, however, it is distinguishable from the facts in this action. In *Sprewell* the plaintiff's
5 claims required a finding of racial bias and the appended arbitration award expressly found
6 the defendant did not act with racial bias. Here, unlike *Sprewell*, the arbitration awards do not
7 explicitly state plaintiff did not suffer harm. The arbitration awards detail harm suffered by the
8 subsidiary. Specifically, the arbitration awards show that the subsidiary suffered harm in the
9 form of loss of documents, revenue, employees, customers, contracts and orders (Second Amd.
10 Compl. Exh. A ¶¶ 28, 33, 35, 38, 41, 112). The appended arbitration awards, however, do not
11 automatically preclude the possibility that plaintiff suffered direct harm not discussed in the
12 arbitration awards. Without more facts, it is premature to rely upon the arbitration awards to
13 determine that plaintiff has not suffered direct harm and therefore lacks standing. The Court
14 will be most disappointed if, as the facts unfold, it turns out that plaintiff is trying to pass off
15 damage to the subsidiary as damage to itself. Accordingly, defendants' motion to dismiss
16 claims one through six and claim eight for lack of standing is **DENIED**.

17 3. SECURITIES FRAUD.

18 Claim seven alleges that defendants engaged in securities fraud pursuant to
19 Section 10(b) of the Securities and Exchange Act. Defendants contend claim seven is barred
20 by the single recovery rule and collateral estoppel because as a result of the Singapore arbitration
21 plaintiff was already awarded the difference between the artificially depressed stock price and
22 the true value of the shares absent the effect of wrongful conduct. Plaintiff concedes that it
23 is not entitled to double recovery for damages awarded pursuant to the Singapore arbitration.
24 Plaintiff argues under the law of this circuit it is also entitled to additional damages —
25 consequential damages that can be proven with reasonable certainty to have resulted from fraud.
26 *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1413 (9th Cir. 1987). Plaintiff, however,
27 has failed to make any reference to consequential damages in its second amended complaint.
28 FRCP 9(g) requires that if an item of special damage is claimed, it must be specifically stated.

1 Because plaintiff has failed to seek consequential damages in the second amended complaint
2 it cannot use consequential damages as an avenue for avoiding preclusion. Furthermore,
3 defendants contend plaintiff cannot assert a claim under 10(b) because plaintiff's sale of its
4 subsidiary's shares was not a domestic transaction. This order need not make a determination
5 on defendants' contention because plaintiff has conceded it is not entitled to double recovery
6 and has failed to plead special damages. As such, defendants' motion to dismiss claim seven
7 is **GRANTED**.

8 **4. CONVERSION.**

9 Plaintiff's third claim is for conversion. "The elements of a conversion are the plaintiff's
10 ownership or right to possession of the property at the time of the conversion; the defendant's
11 conversion by a wrongful act or disposition of property right; and damages." *Oakdale Village*
12 *Group v. Fong*, 43 Cal. App. 4th 539, 543–544 (1996). Defendants contend plaintiff's
13 claim fails as a matter of law because plaintiff has not alleged conversion of any tangible
14 property to which it was entitled immediate possession at the time of the alleged conversion.
15 Defendants further allege that plaintiff has failed to properly identify a specific sum of
16 money required for an actionable claim of monetary conversion. This order disagrees.

17 Plaintiff alleges that it had a contractual right to receive payment of amounts certain
18 under its distribution contracts with its subsidiary. Plaintiff further alleges that defendants
19 had plaintiff's customers cancel orders and withhold or redirect payments already due to
20 plaintiff for plaintiff's own products, not the subsidiary's products. Plaintiff's allegations are
21 sufficient to create a reasonable inference of plaintiff's right to possess an identifiable sum
22 of money. Accordingly defendants' motion to dismiss claim three is **DENIED**.

23 **5. RICO.**

24 Defendants argue that plaintiff cannot meet RICO's pattern or enterprise continuity
25 requirement. The Supreme Court has held that continuity can be demonstrated by proving
26 either "a series of related predicates extending over a substantial period of time" or "past
27 conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc. v. NW*
28 *Bell Telephone Co.*, 492 U.S. 229, 241–242 (1989).

