

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

TREVOR MOSS,)	Case No. 10-1634 SC
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	<u>DISMISS</u>
vs.)	
)	
NUI PHAO MINING JOINT VENTURE)	
COMPANY, LTD.; TML ACQUISITIONS)	
LTD; JOHN SHRIMPTON; DRAGON)	
CAPITAL MANAGEMENT LIMITED;)	
ENTERPRISE INVESTMENT MANAGEMENT)	
LIMITED; VIETNAM ENTERPRISE)	
INVESTMENTS LIMITED; TIBERON)	
MINERALS PTE LTD.; VIETNAM GROWTH)	
FUND LIMITED; VIETNAM DRAGON FUND)	
LIMITED; and DOES 1 through 25,)	
inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

Now before the Court is a Motion to Dismiss filed by Defendants Dragon Capital Management Limited, John Shrimpton ("Shrimpton"), Enterprise Investment Management Limited, Vietnam Enterprise Investments Limited, Tiberon Minerals Pte Ltd. ("Tiberon PTE"), Vietnam Growth Fund Limited, Vietnam Dragon Fund Limited, and Nui Phao Mining Joint Venture Company, Ltd. ("Nui Phao") (collectively, the "Defendants"). ECF No. 18 ("Mot."). Plaintiff Trevor Moss ("Plaintiff" or "Moss") filed an Opposition, and Defendants submitted a Reply. ECF Nos. 32 ("Opp'n"), 37 ("Reply").

1 For the reasons stated herein, the Court GRANTS Defendants' Motion
2 to Dismiss.¹

3
4 **II. BACKGROUND**

5 **A. Moss's Allegations**

6 Moss is a mining engineer, providing consulting engineering
7 services, and he resides in Sonoma County, California. ECF No. 1
8 ("Notice of Removal") Ex. A ("Compl.") ¶ 1. Moss was hired to
9 provide consulting services in connection with a mining project in
10 Vietnam. Id. ¶ 14. Moss seeks payment of a bonus allegedly due to
11 him under the terms of an August 2005 Consulting Agreement between
12 Nui Phao and Moss. Id. ¶¶ 14-18; Ex. A ("Consulting Agreement").
13 The agreement states that Moss's annual rate of compensation was
14 \$250,000. Id. § 2(a). It states that "Moss shall participate in
15 the formal bonus plan adopted by the Company. The bonus to Moss is
16 based on predetermined annual objectives agreed upon each year . .
17 . and shall be set at a target of 0 to 75% of Moss's prior twelve
18 (12) month consulting fee with a target of 40% as a bonus." Id.
19 § 2(b). Tiberon Minerals Ltd. ("Original Tiberon") guaranteed
20 performance of the obligations in the Consulting Agreement. Id.
21 ¶ 20, Ex. B ("Guarantee").

22 Plaintiff alleges that TML, a company incorporated in British
23 Columbia, Canada, is the successor-in-interest to Original Tiberon.
24 Id. ¶ 6. Defendants allege that TML no longer exists. Notice of
25 Removal ¶ 3. Plaintiff alleges that all of the assets of TML have

26
27 ¹ Defendants also requested additional time to respond to
28 Plaintiff's Complaint. ECF No. 16. Defendants requested until May
21, 2010, and Defendants filed their Motion to Dismiss on that
date. Plaintiff has not opposed the request. The Court GRANTS
Defendants' request.

1 been transferred to Tiberon PTE, an entity controlled by Dragon
2 Capital Management Limited, Shrimpton, Enterprise Investment
3 Management Limited, Vietnam Enterprise Investments Limited; Vietnam
4 Growth Fund Limited, and Vietnam Dragon Fund Limited (collectively,
5 the "Dragon Defendants"). Id. ¶ 5-7, 20. Plaintiff alleges that
6 Original Tiberon was merged with TML on September 1, 2007. Id.
7 ¶ 7.

8 Plaintiff has sued Nui Phao for breach of contract; TML and
9 Tiberon PTE for breach of the guarantee; Nui Phao, TML and Tiberon
10 PTE for violation of California's Labor Code; and the Dragon
11 Defendants, TML and Tiberon PTE for interference with contract.
12 Id. ¶¶ 13-33.

13 **B. Previous Lawsuits**

14 This case is the third one filed by Moss seeking payment of
15 the bonus. The first case was filed on May 23, 2007. See Case No.
16 07-2732 ("Moss I"). Moss alleged that Original Tiberon breached a
17 contract and violated California's Labor Code. See Defs.' Request
18 for Judicial Notice ("Defs.' RJN") Ex. 1 ("Moss I Compl.").² This
19 Court dismissed that case on forum non conveniens grounds. Defs.'
20

21 ² Defendants request the Court to take judicial notice of documents
22 filed before this Court in the previous lawsuits, and the Ninth
23 Circuit's memorandum affirming this Court's dismissal of Moss's
24 first lawsuit. ECF No. 19. The Court can take judicial notice of
25 facts not subject to reasonable dispute. Fed. R. Evid. 201(b).
26 The Court can take judicial notice of court proceedings that have a
27 direct relation to matters at issue. United States ex rel.
28 Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244,
248 (9th Cir.1992). Although the Court may take judicial notice of
its own records, it cannot take judicial notice of the truth of the
contents of all documents found therein. M/V American Queen v. San
Diego Marine Constr. Corp., 708 F.2d 1483, 1491 (9th Cir. 1983).
The Court GRANTS the request for judicial notice, but only to the
extent that the documents are used to argue the preclusive effect
of the Court's previous forum non conveniens determination.

1 RJN Ex. 5 ("Nov. 1, 2007 Order"). The Consulting Agreement at
2 issue in Moss I is the same agreement at issue here. It states
3 that its provisions "shall be governed by, interpreted, and
4 enforced in accordance with the laws in force in the Province of
5 Ontario." Id. at 2; Consulting Agreement § 11. At the time Moss
6 was hired, Original Tiberon was a Canadian corporation. Nov. 1,
7 2007 Order at 1.

8 This Court found that Ontario, Canada, was an adequate
9 alternative forum, and that the balance of private and public
10 interest factors tipped in favor of dismissal. Id. at 3-8. The
11 Court granted Original Tiberon's motion to dismiss on the condition
12 that it submit to jurisdiction in Canada and waive any statute of
13 limitations defenses. Id. at 12. The Ninth Circuit affirmed this
14 Court's dismissal of Moss I. Defs.' RJN Ex. 6 ("Oct. 14, 2009
15 Ninth Cir. Mem.").

16 Plaintiff filed a second action on January 9, 2009. See Case
17 No. 09-0109 ("Moss II"). Moss filed an Amended Complaint on May 5,
18 2009, against the Dragon Defendants, TML, and Tiberon PTE alleging
19 intentional interference with contract. RJN Ex. 2 ("Moss II Am.
20 Compl."). Moss alleged that these defendants deliberately
21 interfered with the Consulting Agreement and prevented Moss from
22 receiving his bonus. Id. ¶ 25. After defendants in Moss II filed
23 a motion to dismiss, Moss filed a notice of voluntary dismissal on
24 January 29, 2010.

25 On May 1, 2009, Moss filed this action in Sonoma County
26 Superior Court. See Compl. Defendants removed the case to federal
27 court. See Notice of Removal. Defendants are the same as in Moss
28 II, with the addition of Nui Phao, and the claims asserted here

1 combine the claims from Moss I and Moss II. See Compl.; Moss I
2 Compl.; Moss II Am. Compl. Defendants filed a motion to relate
3 this case to the previous two, which the Court granted on April 27,
4 2010. ECF Nos. 4, 12.

5 Defendants move to dismiss this third lawsuit contending that
6 the Court's forum non conveniens ruling precludes this lawsuit.
7 Mot. at 3, 16-19. Defendants also contend the Court lacks personal
8 jurisdiction over them, and that Moss did not properly serve them.
9 Id. 4-16, 20-23.

10
11 **III. LEGAL STANDARD**

12 Courts can dismiss an action on the grounds of preclusion.
13 Hawkins v. Risley, 984 F.2d 321, 324 (9th Cir. 1993); McClain v.
14 Apodaca, 793 F.2d 1031, 1032-33 (9th Cir. 1986). "Collateral
15 estoppel, or issue preclusion, bars the relitigation of issues
16 actually adjudicated in previous litigation between the same
17 parties." Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320
18 (9th Cir. 1992). "Dismissal on forum non conveniens grounds does
19 not establish claim preclusion; . . . but issue preclusion is
20 appropriate if the issue actually remains the same." 18A Wright,
21 Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §
22 4436, at 173-74 (2d ed. 2002). To avoid the preclusive effect of a
23 prior forum non conveniens determination, the plaintiff must show
24 objective facts relevant to the issue that materially alter the
25 considerations underlying the previous resolution. Villar v.
26 Crowley Maritime Corp., 990 F.2d 1489, 1498 (5th Cir. 1993); China
27 Tire Holdings Ltd. v. Goodyear Tire and Rubber Co., 91 F. Supp. 2d
28

1 1106, 1110 (N.D. Ohio 2000); Torreblanca de Aguilar v. Boeing Co.,
2 806 F. Supp. 139, 141-42 (E.D. Tex. 1992).

3
4 **IV. DISCUSSION**

5 Plaintiff contends that when the motion to dismiss was filed
6 in Moss I, Original Tiberon no longer existed, and Plaintiff
7 implies that if the Court was aware of this fact it would have
8 materially altered the considerations underlying the Court's
9 previous forum non conveniens determination. Opp'n at 3, 8.
10 Defendants confirm that Original Tiberon and TML merged on
11 September 1, 2007. Shrimpton Decl. ¶ 4.³ This fact does not
12 materially alter the considerations underlying the Court's previous
13 determination.

14 **A. Canada Is an Adequate Alternative Forum**

15 In its Order dismissing Moss I, this Court noted that the
16 precise location of Original Tiberon's principal place of business
17 was tangential to its holding. See Nov. 1, 2007 Order at 2.
18 Instead, the Court relied on the Consulting Agreement's Governing
19 Law provision, which states that its provisions shall be
20 interpreted in accordance with the laws in force in the Province of
21 Ontario, and the Court relied on Original Tiberon's agreement to
22 submit to jurisdiction in Canada. November 1, 2007 Order at 3.

23 Here, Shrimpton declares that Tiberon PTE has assumed the
24 obligations and liabilities of Original Tiberon. Shrimpton Decl.
25 ¶ 24. David Woodhouse ("Woodhouse"), a Director of Tiberon PTE,

26 ³ Shrimpton's declaration was filed in Moss II. The declaration is
27 attached as Exhibit 3 to Defendants' request for judicial notice,
28 ECF No. 19, and as previously explained, the Court takes judicial
notice of this declaration.

1 also declares that Tiberon PTE has assumed the liabilities of
2 Original Tiberon. Woodhouse Decl. ¶ 5.⁴ Therefore, Plaintiff can
3 assert his breach-of-guarantee claim in Canada against Tiberon PTE.
4 Furthermore, Nui Phao is the party that signed the Consulting
5 Agreement, and hence Moss can assert his breach-of-contract claim
6 in Canada against Nui Phao, a company which continues to exist.
7 See Shrimpton Decl. ¶ 3. Defendants state that:

8 Tiberon Minerals Pte, Ltd. has assumed the
9 contractual obligation, if any, of Original
10 Tiberon to Moss. To the extent that it is
11 therefore standing in the shoes of Original
12 Tiberon, Tiberon Minerals Pte, Ltd. accepts
13 litigating the matter in Canada (or if
14 plaintiff prefers in Vietnam), and accepts the
[sic] meeting the conditions placed on Original
Tiberon by this Court in granting the forum non
conveniens motion. The remaining defendants
also accept the conditions placed on Original
Tiberon in this Court's forum non conveniens
dismissal.

15 Mot. at 4. Because Tiberon PTE is "standing in its shoes of
16 Original Tiberon," and because Nui Phao also accepts submitting to
17 jurisdiction in Canada, it remains the case that Ontario, Canada,
18 is an adequate alternative forum for Moss's efforts to enforce the
19 terms of the Consulting Agreement and Guarantee.

20 **B. The Private and Public Interest Factors**

21 Plaintiff has not drawn the Court's attention to any facts
22 materially altering the Court's previous determine with regard to
23 the public and private interest factors; they still tip in favor of
24 dismissal. Original Tiberon's books and records are still in
25 storage in Canada. Woodhouse Decl. ¶ 6. The Court has not been
26 presented with any reason to question its previous determination
27

28 ⁴ Woodhouse filed a declaration in support of the Motion to
Dismiss. ECF No. 27.

1 concerning the availability of witnesses. It also remains the case
2 that a Canadian court would be able to apply Canadian contract law
3 more efficiently than this Court. See Nov. 1, Order at 5-6.

4 With regard to the public interest factors, it is still true
5 that "the primary issue to be decided in this case, whether Moss
6 met the agreed upon benchmarks and therefore was entitled to a
7 bonus, is governed by Canadian law." Id. at 6. Canadian courts
8 are more familiar with Canadian law than this Court, so the
9 preference for having a forum apply a law with which it is familiar
10 still favors dismissal.

11 **C. Interference with Contract Claim**

12 Plaintiff's Complaint contains a new claim that the Dragon
13 Defendants, TML, and Tiberon PTE interfered with Plaintiff's
14 contract with Nui Phao. Compl. ¶¶ 28-33. Moss alleges that the
15 terms of a December 18, 2006 Pre-Acquisition Agreement prevented
16 Original Tiberon and Nui Phao from paying Moss his bonus. Id. ¶¶
17 29-33; Hanavan Decl. ¶¶ 7-12, Ex. E ("Pre-Acquisition Agreement").⁵
18 Moss alleges that "only DRAGON CAPITAL'S founder and two Tiberon
19 representatives, but no NUI PHAO representatives, purportedly
20 considered the Trevor Moss bonus payment," that "Tiberon's
21 management had agreed . . . not to approve any bonus for Mr. Moss
22 without DRAGON CAPITAL'S prior approval," and that "the DRAGON
23 CAPITAL DEFENDANTS prevented and precluded NUI PHAO's majority
24 owner from honoring NUI PHAO's contractual obligations. . . ."
25 Compl. ¶¶ 30-31.

26 This new interference with contract claim does not materially
27

28 ⁵ James M. Hanavan ("Hanavan"), counsel for Plaintiff, filed a
declaration in support of Plaintiff's Opposition. ECF No. 36.

1 alter the Court's previous determination that Ontario, Canada, is
2 the appropriate forum for Plaintiff's claims. The Pre-Acquisition
3 Agreement contains a Governing Law provision stating that it "shall
4 be governed by and construed in accordance with the laws of the
5 Province of Ontario and the laws of Canada applicable therein."
6 Pre-Acquisition Agreement § 11. Shrimpton declares that Cliff
7 Davis, an independent outside director of Original Tiberon, and
8 Mario Caron, President of Original Tiberon, discussed Moss's bonus
9 request in Toronto, Canada, on February 14, 2007, and that he
10 attended an Original Tiberon Compensation Committee meeting at the
11 same location the next day. Shrimpton Decl. ¶ 11. It therefore
12 appears that the decision not to pay Moss a bonus was made in
13 Toronto, Canada, and interpreting the Pre-Acquisition Agreement
14 would require the Court to apply Canadian law. Therefore, if
15 anything, Moss's new interference with contract claim strengthens,
16 rather than weakens, the Court's previous determination that
17 Ontario, Canada, is the proper forum for resolution of Moss's
18 claims.

19 **D. New Defendants**

20 Finally, Moss argues the present lawsuit is not precluded by
21 collateral estoppel because it is against an entirely different
22 group of defendants. Opp'n at 12. The Defendants in this case can
23 still rely on the preclusive effect of the Court's forum non
24 conveniens determination. Federal courts permit non-mutual issue
25 preclusion, and "defensive use of collateral estoppel precludes a
26 plaintiff from relitigating identical issues by merely 'switching
27 adversaries.'" Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322,
28 329 (1979). "It is well established that collateral estoppel can

1 operate in favor of a party which did not litigate the earlier
2 case, in appropriate circumstances." Columbia Steel Fabricators,
3 Inc. v. Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995) (citing
4 Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383-84 (9th Cir.
5 1978)).

6 Here, Defendants can use collateral estoppel defensively, to
7 prevent Moss from re-litigating the issue of whether California is
8 the appropriate forum for his claims, and to prevent his suit from
9 going forward in this Court. As previously determined, the
10 question of whether Moss should be paid a bonus is a question for a
11 Canadian court to decide. See Nov. 1, 2007 Order. Plaintiff is
12 precluded from bringing suit here, and so the Court does not reach
13 Defendants' contention that this Court has no personal jurisdiction
14 over any of the Defendants, or the contention that Defendants were
15 not properly served.

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

For the reasons stated above, the Motion to Dismiss filed by Defendants Dragon Capital Management Limited, John Shrimpton, Enterprise Investment Management Limited, Vietnam Enterprise Investments Limited; Tiberon Minerals Pte Ltd., Vietnam Growth Fund Limited, Vietnam Dragon Fund Limited, and Nui Phao Mining Joint Venture Company, Ltd. is GRANTED. These Defendants must submit to jurisdiction in Ontario, Canada. As long as Plaintiff Trevor Moss files suit in Canada against these Defendants within two years from the date of this Order, Defendants must waive any statute of limitations defenses. This case is DISMISSED.

IT IS SO ORDERED.

Dated: August 13, 2010


UNITED STATES DISTRICT JUDGE