Abokasem et al v. Royal Indian Raj Int'l Corp. et al Doc. 53

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOHAMED ABOKASEM, et al.,

Plaintiffs,

v.

ROYAL INDIAN RAJ INTERNATIONAL CORP., et al.,

Defendants

_____/

No. C-10-01781 MMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; GRANTING LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE

Before the Court is defendants Royal Indian Raj International Corp. ("RIRIC"), Royal Indian Raj International Holdings Corp. ("RIR Holdings"), Royal Indian Raj International Real Estate Fund Ltd. ("RIR Real Estate"), Royal Garden Villas Resort Corp. ("Royal Garden"), Manoj C. Benjamin, Anjula Benjamin, Maya Benjamin, and Janet MacFarlane's (collectively, "RIRIC defendants") motion, filed October 12, 2010, to dismiss plaintiffs Mohamed Abokasem, Rathnakumar Badhan, Vinay Dilawri, Ashley Gilson, Greg Gilson, Krishna Kudva, Vidya Kudva, Archana Kudva, Sujoy Majumdar, Anil Mital, Ajith Nair, Jiji Nair, Radhika Nair, Ranjit Nair, Ravinder Prakash, Hemant Prakash, Indrajit Roy, Sushma Roy, Madhumita Sarkar, Kirshna Shankar, Radhika Shankar, Manonmani Thangapandian, Dhiraj Tyagi, and Jyoti Tyagi's (collectively, "plaintiffs") First Amended Complaint ("FAC"). Plaintiffs have filed opposition, to which the RIRIC defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court

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rules as follows.[1]

BACKGROUND

As alleged in the FAC, the instant action arises out of a RIRIC project to construct "a $3 billion European-style sub-city development named Royal Garden City between downtown Bangalore and the new Bangalore International Airport" in southern India (see FAC ¶ 36), and, in particular, plaintiffs' down payments for housing units in a "residential resort community named Royal Garden Villas & Resort" ("RGVR Project"), marketed as an "exclusive, high-end development that would feature all of the amenities traditionally associated with a five-star resort; including world-class spa, state-of-the-art fitness center, luxurious clubhouse and pool pavilion, Tuscan-style village square and international shops and restaurants, supermarkets, movie theaters, chateau winery, equestrian center, tennis center affiliated with Indian tennis star Vijay Amritraj and a Jack Nicklaus Signature 18-hole championship golf course" (see FAC ¶ 38).

Plaintiffs allege that, between June 2006 and November 2007, they signed booking agreements with Royal Garden City Enterprises Private Ltd. ("RGCEPL") and paid a deposit toward a housing unit in the above-described development (see FAC ¶¶ 49, 60, 67, 77, 92, 98, 106, 121, 130, 138, 146, 154, 162, 170);[2] that each said booking agreement contained a clause providing the right to a refund of the deposit in the event that the project did not receive necessary clearances from the Indian government (see FAC ¶¶ 54, 64, 72, 81,103, 111, 126, 135, 143, 151, 159, 167, 175), and, as to seven of the plaintiffs, an additional requirement that the deposit be held in "an escrow account under the name of RGCEPL" (see FAC ¶ 119); that, when the project failed to receive the necessary government clearances within the period specified, each plaintiff, between March 2008 and

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[1] On February 1, 2011, the Court took the matter under submission and vacated the hearing scheduled for February 4, 2011.

[2] Plaintiffs allege that, with the exception of defendant Manoj Benjamin, the signatories for RGCEPL, which is not a party to the instant motion, were officers of RIRIC and not of RGCEPL. (See FAC ¶¶ 49, 60, 67, 77, 92, 98, 121, 130, 138, 146, 154, 162, 170.)

August 2009, exercised his/her right under the booking agreement and requested a refund of the deposit (see FAC ¶¶ 55, 65, 73, 90, 96, 104, 112, 127, 136, 144, 152, 160, 168, 176); that, as to two plaintiffs, RIRIC executed a promissory note agreeing to pay a total refund by January 2, 2009 (see FAC ¶ 116); and that, as of the date of the filing of the FAC, no portion of any deposit has been refunded to plaintiffs (see FAC ¶¶ 59, 66, 76, 91, 97, 105, 117, 129, 137, 145, 153, 161, 169, 177).

Plaintiffs further allege that defendants made various false or misleading statements regarding RIRIC and the RGVR Project that induced them to invest the project, specifically, statements (1) misrepresenting "RIRIC's land holdings in India"; (2) misrepresenting "RIRIC's capital base, its access to construction financing for the RGVR Project and its purported plans to seek a listing on a major stock exchange"; (3) misrepresenting "the status of RIRIC's effort to obtain approval from [the Indian Government] for the RGVR Project"; (4) "[p]roviding dates for construction of the RGVR Project to begin that were known to be unrealistic and unattainable"; (5) "[e]xagerating sales volume of units in the RGVR Project"; (6) "[u]sing the names and images of celebrities in marketing for the RGVR Project without ever obtaining consent and/or after such endorsements had been withdrawn"; (7) misrepresenting "the status of RIRIC's relationships with its business projects"; (8) misrepresenting "the personal background and professional experience of RIRIC's management"; and (9) making "[f]alse promises . . . that [plaintiffs'] deposits would be held in an escrow account, and would not be accessed until 'all conditions of sale had been met'" (see FAC ¶183, see also id. ¶¶ 184-258.)

On the basis of the above allegations, plaintiffs assert, as against all defendants, claims for (1) "breach of contract: failure to refund payments upon request as required by booking agreements," (2) "breach of contract: Tyagi Promissory Note," (3) "breach of contract: failure to hold funds in escrow as required by booking agreements," (4) "negligence: performance as escrow holder," (5) "breach of fiduciary duty: performance as escrow holder," (6) "fraud: inducement to sign booking agreements," and (7) "negligent misrepresentation: inducement to sign booking agreements"; and, as against all defendants

except RGCEPL, (8) "unjust enrichment, receipt of money paid pursuant to booking agreements." (See FAC ¶¶ 291-354.)

DISCUSSION

The RIRIC defendants move to dismiss the FAC on the following grounds: (1) pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, for lack of personal jurisdiction, (2) for forum non conveniens, (3) pursuant to Rule 12(b)(3), for improper venue, on the basis of the booking agreement's forum selection clause, and (4), as to plaintiffs' claims of fraud and negligent misrepresentation, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

I. Personal Jurisdiction

The RIRIC defendants contend this Court does not have jurisdiction over any of them, and, in the alternative, that the Court does not have jurisdiction over any of the individual defendants on either an alter ego or agency theory. (See Mot. 3:7-11:2). Personal jurisdiction may be either "general," see Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.9 (1984), or "specific," see Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 801-02 (9th Cir. 2004). Plaintiffs argue the FAC alleges sufficient uncontroverted facts to support the Court's exercise of specific personal jurisdiction over the defendants, either directly or on the basis of alter ego or agency.[3] (See Opp. 6:11-14:6).

Where no federal statute governing personal jurisdiction is applicable, a district court "applies the law of the state in which the district court sits." Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). Under California law, personal jurisdiction may be exercised "on any basis not inconsistent with the Constitution of this state or of the United States," see Cal. Code Civ. Proc. § 410.10, which provision is "coextensive with federal due process requirements," Dole Food, 303 F.3d at 1110. Specific personal jurisdiction may be

[3] General jurisdiction typically requires "continuous and systematic general business contacts" with the forum. Helicopteros, 406 U.S. at 416. Plaintiffs do not argue the RIRIC defendants are subject to general personal jurisdiction.

exercised over a nonresident defendant when the following conditions are met:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Id. at 1111.

The plaintiff "bear[s] the burden of demonstrating that jurisdiction is appropriate." Id. at 1108. Where the question of jurisdiction is resolved "based on written submissions rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts." Id. (internal quotation and citation omitted). "In such cases, we only inquire into whether the plaintiff's pleadings and affidavits make a prima facie showing of personal jurisdiction"; "uncontroverted allegations in the complaint must be taken as true" and "[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." Id. (internal quotations and citations omitted). Nonetheless, "mere 'bare bones' assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading burden." Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th Cir. 2007) (finding allegations that defendants "directed communication into" forum and "otherwise conducted business therein sufficient to establish minimum contacts" insufficient to plead personal jurisdiction).

A. Purposeful Availment

Where, as here, the complaint alleges an intentional tort, the district court, to determine whether a defendant purposefully availed himself of the privileges and protections of the forum state, applies the "effects" test derived from Calder v. Jones, 465 U.S. 783 (1984). See Dole Food, 303 F.3d at 1111. "[T]he 'effects' test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."

Id.

1. Corporate RIRIC Defendants

The FAC sufficiently alleges RIRIC committed intentional acts that were expressly aimed at California and which caused harm RIRIC knew was likely to be suffered in California. Specifically, plaintiffs allege that RIRIC maintained a website that was accessible to the California plaintiffs and by which it advertised the RGVR Project, and that RIRIC published other project-related advertising available to California plaintiffs (see FAC ¶¶ 50, 61, 68, 99, 107, 171); the website and marketing materials contained misrepresentations and misleading statements by RIRIC known by RIRIC to be false (see, e.g., FAC ¶¶ 184, 188, 191, 199, 202, 204); RIRIC reiterated its misrepresentations in telephone conversations and written correspondence with plaintiffs, including California plaintiffs (see FAC ¶ 185; Decl. of Krishna Kudva in Opp. to Defs.' Mot. to Dismiss ("Kudva Decl.") ¶ 4); four California plaintiffs met with a sales representative of RIRIC in California to discuss investing in the project (see FAC ¶¶ 68, 107); two California plaintiffs met with defendants Manoj Benjamin and Collins Benjamin, both officials of RIRIC, in California (see FAC ¶¶ 22, 23,171); an agent of RIRIC had a booking agreement sent by courier to the home of at least one California plaintiff (Kudva Decl. ¶ 6, Ex. C); the California plaintiffs entered into booking agreements, signed by agents of RIRIC (see FAC ¶¶ 49, 60, 67, 98, 106, 170); and RIRIC executed a promissory note for the benefit of two California plaintiffs, incurring an obligation to refund their deposits (see FAC ¶ 115). Further, plaintiffs sufficiently allege that RIRIC, through such contacts, induced the California plaintiffs to rely on RIRIC's misrepresentations and enter into contracts that were at least partially negotiated in California, and that the resulting breach of those contracts caused harm RIRIC knew was likely to be suffered in California.

Accordingly, plaintiffs have met their burden to show that RIRIC purposefully availed itself of the benefits and protections of California's laws. See Calder, 465 U.S. at 790 (finding personal jurisdiction where defendant "knowingly cause[d] the injury in California"); Rio Properties v. Rio Int'l Interlink, 284 F.3d 1007, 1020 (9th Cir. 2002) (holding personal

jurisdiction over operator of passive website satisfied where operator engages in "something more," e.g., radio and print advertising in forum state); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1088 (9th Cir. 2000) (holding requirement of "express aiming" satisfied where "defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state"); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1320 (9th Cir. 1998) (holding, in finding personal jurisdiction on contract claim satisfied, "[c]ontract negotiations are classic examples of the sort of contact that can give rise to in personam jurisdiction" (emphasis in original)); Data Disc., Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1288 (9th Cir. 1977) ("The inducement of reliance in California is a sufficient act within California to satisfy the requirement of minimum contacts where the cause of action arises out of that inducement.").

Plaintiffs contend purposeful availment is shown as to the remaining corporate RIRIC defendants because they are alter egos or agents of RIRIC. (See Opp. 9:11-10:13, 13:18-6); see also Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1134 (9th Cir. 2003) (noting, "a subsidiary's contacts may be imputed to the parent where the subsidiary is the parent's alter ego, or where the subsidiary acts as the general agent of the parent"). The RIRIC defendants do not controvert the FAC's alter ego and agency allegations as to the other corporate RIRIC defendants, nor do they otherwise counter plaintiffs' assertions of personal jurisdiction on the basis of alter ego or agency.

Accordingly, plaintiffs likewise have sufficiently shown that RIR Holdings, RIR Real Estate, and Royal Garden purposefully availed themselves of the benefits and protections of California's laws.

2. Individual RIRIC Defendants

The four individual RIRIC defendants, Manoj C. Benjamin, Anjula Benjamin, Maya Benjamin, and Janet MacFarlane, argue that plaintiffs have not made a sufficient showing of personal jurisdiction over them, either directly or under a theory of alter ego or agency. As set forth below, the Court finds plaintiffs have made a sufficient showing as to

defendants Manoj Benjamin and Anjula Benjamin, but not as to the remaining two individual defendants.

a. Manoj Benjamin and Anjula Benjamin

Plaintiffs' allegations, uncontroverted by the RIRIC defendants, show: Manoj Benjamin is Chairman of the Board and CEO of RIRIC, as well as an officer and director of RGCEPL and the sole director and officer of the other corporate RIRIC defendants (see FAC ¶ 22); he supervised the booking agreement negotiations with at least four of the California plaintiffs (see FAC ¶¶ 108, 172); he traveled to California and held discussions with two of the California plaintiffs (see FAC ¶ 171); he signed the booking agreement with two of the California plaintiffs (see FAC ¶ 106); he executed the above-referenced promissory note (see FAC ¶ 115); and he made misleading or false statements about the land owned by RIRIC and the volume of sales in the RGVR Project, on which the California plaintiffs relied (see FAC ¶¶ 184, 191,198, 220, 223). Plaintiffs sufficiently show Manoj Benjamin, through these contacts, induced the California plaintiffs to rely on his misrepresentations and enter into contracts at least partially negotiated in California, and that the resulting breach of those contracts caused harm Manoj Benjamin knew would likely be suffered in California.

Next, plaintiffs' have submitted a declaration showing that Anjula Benjamin was the "primary contact" of at least one plaintiff, Krishna Kudva ("Kudva"). (See Kudva Decl. ¶ 4; see also Comp. ¶ 61.) Specifically, Kudva asserts that Anjula Benjamin was "in regular e-mail contact" with Kudva (see Kudva Decl. ¶ 4), forwarded allegedly fraudulent RIRIC marketing materials to Kudva (see id.), personally made allegedly fraudulent or negligent misrepresentations to Kudva regarding the RGVR Project that "were essential to [Kudva's] decision to purchase a unit in the" RGVR Project (see id. ¶¶ 5, 9, 10, 11), and had the booking agreement sent to Kudva's address in California (see id. ¶ 6). Although, as the RIRIC defendants note, these contacts were made on behalf of her employer, Anjula Benjamin's "status as [an] employee[] does not somehow insulate [her] from jurisdiction"; rather, "[e]ach defendant's contacts with the forum State must be assessed individually."

See Calder, 465 U.S. at 790 (finding personal jurisdiction in California over employees residing in Florida for actions taken within scope of their employment). Plaintiffs have sufficiently shown that Anjula Benjamin, through the above contacts, induced at least one California plaintiff to rely on her misrepresentations and enter into contracts at least partially negotiated in California, and that the resulting breach of those contracts caused harm Anjula Benjamin knew was likely to be suffered in California.

Accordingly, plaintiffs have sufficiently shown that Manoj Benjamin and Anjula Benjamin purposefully availed themselves of the benefits and protections of California's laws.

b. Maya Benjamin and Janet MacFarlane

Plaintiffs fail to show, however, the exercise of personal jurisdiction over the remaining individual RIRIC defendants, Janet MacFarlane ("MacFarlane") and Maya Benjamin, would be appropriate. First, with respect to MacFarlane, a sales associate, although plaintiffs dispute MacFarlane's assertion that she "never had any interactions with any of the Plaintiffs" (Decl. of Diane McFadin ("McFadin Decl.") Ex. E (Aff. of Janet MacFarlane)), plaintiffs' evidence shows only a single communication, by email, between MacFarlane and one plaintiff, Krishna Kudva (see Kudva Decl. ¶¶ 16, 17). Although Kudva declares said communication was false (see Kudva Decl. ¶ 19), plaintiffs do not allege facts or provide evidence showing MacFarlane was aware Kudva resided in California, see Bancroft, 223 F.3d at 1088 (holding "express aiming" sufficiently shown where defendant "knows [plaintiff] to be a resident of the forum state"). Nor does Kudva assert that she relied in any manner on any representation by MacFarlane; indeed, Kudva entered into her booking agreement and paid the full amount due more than two years before the asserted communication with MacFarlane (see FAC ¶¶ 60, 63); see also Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 913 (9th Cir. 1990) (noting, "[o]nly contacts occurring prior to the event causing the litigation may be considered" in evaluating personal jurisdiction).

Plaintiffs' showing as to Maya Benjamin, who, according to her uncontroverted

affidavit, was an administrative secretary during the relevant period (see McFadin Decl. Ex. C ¶ 4 (Aff. of Maya Benjamin)), is even less persuasive, the sole uncontroverted allegation specific to said defendant being her familial relationship to other defendants (see FAC ¶ 179). Nor are the FAC's conclusory allegations regarding defendants' contacts with California, or those in support of plaintiffs' alter ego and agency theories, sufficient to support a finding that either MacFarlane or Maya Benjamin purposefully availed herself of the benefits and protections of California's laws. (See e.g., FAC ¶ 179 (alleging Janet MacFarlane "participated" in fraud); FAC ¶ 322 (alleging "[a]ll defendants knowingly participated in the RIRIC Fraud"); FAC ¶ 272 (alleging "Corporate Defendants and Individual Defendants disregarded their separate existence by assuming liability for each other's debts").)

Accordingly, as plaintiffs fail to make a sufficient showing to warrant the exercise of personal jurisdiction over either such defendant, the RIRIC defendants' motion to dismiss the action will be granted as to Maya Benjamin and Janet MacFarlane.[4]

B. Relationship of Claim to Contacts

"The second requirement for specific jurisdiction is that the contacts constituting purposeful availment be the ones that give rise to the current suit." Bancroft, 223 F.3d at 1088 ("We measure this requirement in terms of 'but for' causation."); see also Dole Food, 303 F.3d at 1114 (finding claims arose from defendants' contacts with forum where "contacts between [defendants] and the forum state [were] integral and essential parts of the alleged fraudulent scheme on which [plaintiff] base[d] its suit"). Here, but for the RIRIC defendants' contacts with plaintiffs in California, plaintiffs would not have relied upon

[4] Plaintiffs fail to provide sufficient evidence to warrant a continuance of the motion for the purpose of conducting additional jurisdictional discovery as to either Maya Benjamin or Janet MacFarlane. See Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1160 (9th Cir. 2006) (holding "[w]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery" (internal quotation and citation omitted)). If, however, in the course of discovery or otherwise during the pendency of the above-titled action, plaintiffs develop new facts with respect to either defendant, plaintiffs may seek relief from this order by way of appropriate motion.

defendants' alleged misrepresentations, entered into the booking agreements, or made deposits on homes in the RGVR Project.

Accordingly, with respect to those RIRIC defendants as to whom the Court has found purposeful availment, the Court further finds plaintiffs claims against said defendants arise from said defendants' contacts with the forum state.

C. Reasonableness

"Once it has been decided that a defendant purposefully established minimum contacts with a forum, 'he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable' in order to defeat personal jurisdiction." Dole Food, 303 F.3d at 1114 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)).

> In determining whether the exercise of jurisdiction comports with "fair play and substantial justice," and is therefore "reasonable," [courts] consider seven factors under [Ninth Circuit] case law: (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id.

Here, the RIRIC defendants do not argue, let alone "present a compelling case," that jurisdiction is unreasonable, nor is there anything in the record sufficiently demonstrating that the exercise of personal jurisdiction would be unreasonable in this instance. Indeed, to the extent the record contains evidence pertaining to the above-referenced factors, those factors weigh in favor of the Court's exercise of jurisdiction.

Accordingly, the RIRIC defendants fail to show the exercise of personal jurisdiction would be unreasonable.

D. Conclusion: Personal Jurisdiction

For the reasons state above, the Court finds it appropriate to exercise personal jurisdiction over each of the RIRIC defendants with the exception of Janet MacFarlane and

Maya Benjamin.

II. Forum Non Conveniens

The RIRIC defendants seek dismissal of the action on the basis of forum non conveniens, contending alternate forums exist in either Bangalore, India, where the RGVR Project is located, or Vancouver, British Columbia, where the majority of the defendants reside. To prevail on a motion to dismiss on grounds of forum non conveniens, however, a defendant must show not only "that there is an adequate alternative forum," but also "that the balance of private and public interest factors favor dismissal." Dole Food, 303 F.3d at 1118. "The plaintiff's choice of forum will not be disturbed unless the 'private interest' and 'public interest' factors strongly favor trial in the foreign county." Id. "When a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient." Carijano v. Occidental Petroleum Corp., 626 F.3d 1137, 1148-49 (9th Cir. 2010) (rejecting, for forum non conveniens analysis, proposition that where "both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic choice of forum is somehow lessened").

Here, plaintiffs' choice of forum is the Northern District of California, in which a plurality of plaintiffs reside. (See FAC ¶¶ 1-14.) Although Manoj Benjamin on behalf of himself and the RIRIC corporate defendants has consented to jurisdiction in either Bangalore or Vancouver (see Mot. 12:1; McFadin Decl. Ex. F ¶ 8 (Aff. of Manoj Benjamin)), Anjula Benjamin, who remains part of this action, has not so consented (see id. at n.4), nor have the nonmoving defendants, two of whom reside in Bangalore and four of whom reside in Vancouver (see FAC ¶¶ 18, 23, 24, 28, 29, 30). In other words, the RIRIC defendants have failed to show that either the courts of Bangalore or Vancouver can hear plaintiffs' claims against all of the defendants named in this action. Consequently, the RIRIC defendants fail to show the existence of an adequate alternative to plaintiffs' chosen forum, obviating the need for the Court to balance the public and private interests involved. Cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (noting, "ordinarily, [the alternative forum] requirement will be satisfied when the defendant is 'amenable to process'

in the other jurisdiction").

Accordingly, the Court will deny the RIRIC defendants' motion to dismiss on the basis of forum non conveniens.

III. Venue: Forum Selection Clause

The RIRIC defendants argue the action must be dismissed because each plaintiff's booking agreement contains a forum selection clause specifying Bangalore as the forum in which disputes arising from the agreement are to be heard. In particular, the clause provides: "All disputes and settlements will be subject to Bangalore Jurisdiction."[5] Plaintiffs contend the clause is permissive, i.e., allowing suit to be brought in Bangalore, but not mandatory, i.e., requiring suit be brought only in Bangalore.

"The question whether the forum selection clause is mandatory or permissive is a matter of contract interpretation." N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036 (9th Cir. 1995). "To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one." Id. at 1037.

In that regard, the Court finds instructive the Ninth Circuit's opinion in Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75 (9th Cir. 1987). In Hunt, the Ninth Circuit considered a forum selection clause that provided: "The courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or interpretation of this contract." Id. at 77. In finding the clause permissive rather than mandatory, the Ninth Circuit observed:

> The language says nothing about Orange County courts having exclusive jurisdiction. The effect is merely that the parties consent to the jurisdiction of the Orange County courts. Although the word 'shall' is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction. . . . Such consent to jurisdiction, however, does not mean that the same subject matter cannot be litigated in any other court. In other words, the forum selection clause in this case is permissive rather

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[5] The RIRIC defendants have not submitted a copy of each booking agreement; rather, they submit the booking agreement of one plaintiff, Greg Gilson (see Decl. of Diane McFadin Ex. B), and a declaration stating "all of the plaintiffs agreed to a similar provision (see id. Ex. F ¶ 6). With their opposition, plaintiffs submit the booking agreement of plaintiff Krishna Kudva, which likewise contains the above-quoted clause. (See Kudva Decl. Ex. B ¶ 26.)

than mandatory.

Id.

The language at issue here is substantially similar to the language the Ninth Circuit in Hunt held to be permissive. There is no material distinction between the word "will" in the instant action and the word "shall" in the clause at issue in Hunt, and, as in Hunt, its use "mandates nothing more than that the [noted forum's] courts have jurisdiction." See id. Moreover, the use of "subject to" in the instant action further indicates the parties only intended the possibility, but not necessity, of suit in Bangalore. See Black's Law Dictionary 1562 (9th ed. 2009) (defining "subject to litigation" as being "susceptible to a lawsuit" (emphasis added)); cf. Radian Int'l, LLC v. Alpina Ins. Co., No. C-04-4537 (SC), 2005 WL 1656884, at *2 (N.D. Cal. July 14, 2005) (finding clause requiring "any resolution to a dispute . . . shall be held in Beirut, Lebanon" to be mandatory). In sum, the forum selection clause contained in plaintiffs' booking agreements does not preclude litigation in other forums.

Accordingly, as the subject forum selection clause is permissive rather than mandatory, the RIRIC defendants are not entitled to dismissal based thereon.

IV. Failure to State A Claim: Fraud and Negligent Misrepresentation

Lastly, the RIRIC defendants move under Rule 12(b)(6) to dismiss the FAC's allegations of fraud and negligent misrepresentation as alleged against defendants RIR Holdings, RIR Real Estate, Royal Garden, Janet MacFarlane, Maya Benjamin, and Anjula Benjamin.[6] Specifically, the RIRIC defendants argue that plaintiffs "have failed to sufficiently particularize their allegations of fraud, pursuant to Rule 9(b)." (See Mot. 22:10-11.)

Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory

[6] As discussed above, the Court will dismiss defendants Maya Benjamin and Janet MacFarlane for lack of personal jurisdiction; consequently, the Court does not address herein the RIRIC defendants' arguments under Rule 9(b) with respect to those two defendants. The Court notes, however, that the FAC contains no particularized allegations of fraud or negligent misrepresentation as to either such defendant.

or the absence of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 129 S. Ct. at 1950 (internal quotation and citation omitted).

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," Fed R. Civ. P. 9(b), and requires "an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations,'" Swartz, 476 F.3d at 764. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

Here, the FAC identifies with the requisite specificity the allegedly fraudulent statements made by Manoj Benjamin and RIRIC (see, e.g., FAC ¶¶ 184, 199, 227), as well as said defendants' scienter (see, e.g., FAC ¶¶ 191, 203, 236), and, as discussed above, includes uncontroverted allegations that RIR Holdings Corp., RIR Real Estate, and Royal Garden are the alter egos of RIRIC, thus making all said corporate entities equally liable.

As to Anjula Benjamin, the FAC alleges that certain of the plaintiffs spoke with said defendant (see FAC ¶¶ 62, 93), but the FAC identifies no particular false statement made by her.[7] Rather, plaintiffs, in their opposition, argue Anjula Benjamin is liable for RIRIC's

[7] Although, as discussed above in connection with the issue of personal jurisdiction, the Kudva's declaration includes allegations of fraudulent or misleading statements made by Anjula Benjamin (see Kudva Decl. ¶¶ 5, 9-11), such material may not be considered to determine the sufficiency of plaintiffs' fraud and negligent misrepresentation claims, as

fraudulent statements because they "acted as a group in preparing and releasing some of the fraudulent statements, e.g., the fraudulent press releases and marketing materials." (See Opp. 27:21-23.) In Wool v. Tandem Computers, Inc., 818 F.2d 1433 (9th Cir. 1987), the Ninth Circuit held:

> In cases of corporate fraud where the false or misleading information is conveyed in . . . press releases, or other "group published information," it is reasonable to presume that these are the collective actions of the officers. Under such circumstances, a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations.

See id. at 1440 (citations omitted) (applying presumption to "narrowly defined group of officers who had direct involvement not only in the day-to-day affairs of [defendant company] in general but also in [defendant company's] financial statements in particular"); see also Swartz, 476 F.3d at 764 (holding "there is no absolute requirement that where several defendants are sued in connection with an alleged fraudulent scheme, the complaint must identify false statements made by each and every defendant" (emphasis in original)). To meet the requirements of Rule 9(b), however, "a plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme." Id. at 765.[8]

Although the FAC alleges that Anjula Benjamin was an officer of RIRIC (see FAC ¶ 25), the FAC contains only the most conclusory allegations regarding said individual defendant's involvement in the creation of RIRIC's press releases and marketing materials, and in the day-to-day affairs of RIRIC (see, e.g. FAC ¶ 341 (alleging "each of the [d]efendants authorized and directed the preparation of false and misleading RIRIC press releases and marketing materials"); FAC ¶ 288 (alleging "Individual Defendants" exercised "control of" corporate defendants). Consequently, the FAC fails to allege a sufficient basis

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"[g]enerally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any material beyond the complaint," see Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

[8] Defendants question whether the "group pleading" doctrine survived the passage of the Private Securities and Litigation Reform Act ("PSLRA"). (See Reply 12:2-5.) The PSLRA's pleading requirements, however, are applicable exclusively to "securities fraud actions." See 15 U.S.C. § 78u-4(b).

to warrant application of the "group published information" presumption.

Accordingly, plaintiffs fraud and negligent misrepresentation claims are subject to dismissal as against defendant Anjula Benjamin.

CONCLUSION

For the reasons stated above:

1. The RIRIC defendants' motion to dismiss is GRANTED in part and DENIED in part, as follows:

a. To the extent the motion seeks dismissal of the FAC for lack of personal jurisdiction as to Maya Benjamin and Janet MacFarlane, the motion is hereby GRANTED;

b. To the extent the motion seeks dismissal of the FAC's fraud and negligent misrepresentation claims against Anjula Benjamin, the motion is hereby GRANTED; and

c. In all other respects, the motion is hereby DENIED.

2. To the extent plaintiffs request leave to amend their pleadings to cure the above-noted deficiencies in their fraud and negligent misrepresentation claims, such leave is hereby GRANTED.

3. Plaintiff's Second Amended Complaint, if any, shall be filed no later than February 25, 2011.

4. The Case Management Conference scheduled for February 18, 2011 is hereby CONTINUED to April 1, 2011.

IT IS SO ORDERED.

Dated: February 11, 2011

MAXINE M. CHESNEY
United States District Judge