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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAJAJCO, INC. dba ANCHOR DRUGS
PHARMACY,

Plaintiff,

v.

LEADER DRUG STORES, INC., et al.,

Defendants.

No. C 12-05703 PJH

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

The motion to dismiss filed by defendants InformedRx, SXC Health Solutions, Inc., Catamaran PBM of Illinois, Inc., Catamaran Corporation and Catamaran, Inc., came on for hearing before the court on March 6, 2013. Defendants appeared by their counsel, James Higgins; plaintiff Jajco, Inc. dba Anchor Drugs Pharmacy (Anchor) did not make an appearance and did not explain its absence from the motion hearing. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court GRANTS the motion to dismiss with leave to amend. Upon further considering the briefs, the court has determined that leave to amend beyond that granted at the hearing is warranted.

InformedRx, SXC and the Catamaran defendants move to dismiss the second cause of action for breach of contract alleged in the second amended complaint (SAC). The SAC alleges that InformedRx, acting as the agent of former defendant HPSM, breached the Leader-HPSM contract. SAC ¶ 67. InformedRx moves to dismiss the breach of contract claim based on this alleged agency, citing authority that "under California law it is settled that a personal judgment for damages for breach of contract may not be obtained against a known agent of a disclosed principal." Reply at 3 (citing *Sackett v. Wyatt*, 32 Cal. App. 3d

1 592, 597 (1973)). Anchor does not address or distinguish this authority at all, and seems to
2 have abandoned its agency theory from its breach of contract claim. The court therefore
3 dismisses with prejudice the breach of contract claim based on an agency theory.

4 In its opposition brief, Anchor asserts a third party beneficiary theory of liability
5 against defendants on the ground that Anchor is a third party beneficiary of the Leader-
6 InformedRx contract and the InformedRx-HPSM contract. Opp. at 3-4. Under California
7 law, “[a] contract, made expressly for the benefit of a third person, may be enforced by him
8 at any time before the parties thereto rescind it.” *Arata v. Bank of Am. Nat. Trust & Sav.*
9 *Ass’n*, 223 Cal. App. 2d 199, 205 (1963) (quoting Cal. Civ. Code § 1559.) “The test for
10 determining whether a contract was made for the benefit of a third person is whether an
11 intent to benefit a third person appears from the terms of the contract.” *Id.* (quoting
12 *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.*, 160 Cal. App. 2d 290, 297 (1958) (internal
13 citation omitted)). The operative complaint does not include allegations that Anchor is an
14 intended third party beneficiary of the InformedRx contracts or facts supporting this theory,
15 and therefore fails to state a plausible claim for relief against InformedRx, SXC and/or the
16 Catamaran defendants for breach of contract. Because amendment does not appear to be
17 futile, the breach of contract claim (the second cause of action) is dismissed with leave to
18 amend to allege a third party beneficiary claim against InformedRx, and against SXC
19 and/or the Catamaran defendants if Anchor can allege a basis for alter ego or successor
20 liability, as discussed further below. To satisfy federal pleading standards, Anchor must
21 amend its complaint to allege that the terms of the contracts express an intent to benefit
22 third parties such as Anchor, rather than only incidentally or remotely benefitting Anchor.
23 *Kaiser Engineers v. Grinnell Fire Prot. Sys. Co.*, 173 Cal. App. 3d 1050, 1055 (1985)
24 (internal citations omitted); *Le Ballister v. Redwood Theatres*, 1 Cal. App. 2d 447, 449
25 (1934) (“From a reading of the agreement before us, we believe that the intent to benefit
26 appellant clearly appears from its terms.”). Anchor must also identify what relevant
27 contractual provisions were allegedly breached.

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1 SXC and the Catamaran defendants also move to dismiss the claims against them
2 on the ground that the SAC fails to plead facts to support a basis for liability against them,
3 whether as successors in interest to InformedRx, or under an alter ego or agency theory.
4 The SAC has no allegations about the role of SXC or the Catamaran defendants in the
5 alleged transactions or breaches by InformedRx, and makes only conclusory agency and
6 alter ego allegations that “defendants, and each of them, were an owner, co-owner, agent,
7 representative, partner, and/or alter ego of its co-defendants, or otherwise acting on behalf
8 of each and every remaining defendant. . . .” SAC ¶ 17. These allegations do not satisfy
9 the pleading standards under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“the pleading
10 standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands
11 more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (quoting *Bell*
12 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

13 In opposition to the motion to dismiss, Anchor does not provide any basis to support
14 an agency theory of liability, and admits that the SAC only vaguely refers to InformedRx's
15 “successors-in-interest” because Anchor “does not know the exact names.” Opp. at 5. To
16 support its theory of successor liability, Anchor cites deposition testimony to show that
17 InformedRx no longer exists and that SXC bought another Pharmacy Benefit Manager and
18 merged the two companies to create Catamaran Corp. Klein Decl., Ex. A (Feliciani Depo.).
19 Furthermore, defendants concede that InformedRx changed its name to Catamaran PBM
20 of Illinois, Inc., that SXC changed its name to Catamaran Inc., and that Catamaran
21 Corporation is the parent corporation of Catamaran Inc. (f/k/a/ SXC) and Catamaran PBM
22 (f/k/a InformedRx). Reply at 3-4 and n.2; Disclosure Statement, doc. no. 9. To state a
23 plausible claim against SXC and/or the Catamaran defendants, however, Anchor must not
24 only show that InformedRx's assets were transferred to another corporation, but must also
25 allege a basis for successor liability. To determine whether a corporation purchasing the
26 principal assets of another corporation assumes the other's liabilities, California law
27 ordinarily applies the rule that the purchaser does not assume the seller's liabilities unless
28 (1) there is an express or implied agreement of assumption, (2) the transaction amounts to

1 a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere
2 continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent
3 purpose of escaping liability for the seller's debts. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28
4 (1977). *See Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1230 (C.D.
5 Cal. 2012) (“An exception to the well-settled rule against successor liability is triggered
6 when the purchaser expressly or implicitly agrees to assume liability.”) (citation and internal
7 quotation marks omitted). Because amendment does not appear futile, the court grants
8 leave to amend the claims against SXC, Catamaran PBM of Illinois, Inc., Catamaran
9 Corporation and Catamaran, Inc. to add factual allegations to support a basis for successor
10 liability, but not agency.

11 To support its alter ego theory, Anchor argues that the CFO of the Catamaran
12 defendants, Jeff Park, was directly involved with the efforts to withdraw funds from
13 Anchor's Central Pay accounts. Opp. at 5; SAC 16. The SAC also alleges, in a conclusory
14 fashion, that “[t]here exists . . . a unity of interest in ownership between certain defendants
15 and other certain defendants such that any individuality and separateness between the
16 certain defendants has ceased and these defendants are the alter ego of the other certain
17 defendants and exerted control over those defendants.” SAC ¶ 13. Under California law,
18 alter ego is an extreme remedy which requires that two conditions be met: “First, there
19 must be such a unity of interest and ownership between the corporation and its equitable
20 owner that the separate personalities of the corporation and the shareholder do not in
21 reality exist. Second, there must be an inequitable result if the acts in question are treated
22 as those of the corporation alone.” *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App.
23 4th 523, 538-39 (2000). The SAC fails to state a plausible basis for alter ego liability to
24 support the claims against SXC or the Catamaran defendants, which claims are dismissed
25 with leave to amend.

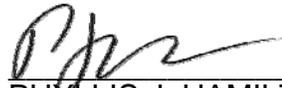
26 For the reasons set forth above and stated on the record, defendants' motion to
27 dismiss the second cause of action for breach of contract in the SAC against all moving
28 defendants is GRANTED WITH LEAVE TO AMEND to allege a third party beneficiary claim

1 for breach of contract; the motion to dismiss the second, third, fourth, fifth, sixth and
2 seventh causes of action in the SAC against SXC and the Catamaran defendants is
3 GRANTED WITH LEAVE TO AMEND the successor liability and/or alter ego allegations.
4 The motion to dismiss is GRANTED WITH PREJUDICE with respect to the agency theories
5 of liability against all moving defendants.

6 Anchor shall file any amended complaint **within 28 days** of the filing date of this
7 order. Defendants shall have 21 days thereafter by which to respond to the amended
8 complaint. Leave to amend is limited to curing the deficiencies identified herein, and
9 Anchor may not add new claims or parties without complying with Federal Rule of Civil
10 Procedure 15.

11 **IT IS SO ORDERED.**

12 Dated: March 7, 2013



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14 PHYLLIS J. HAMILTON
15 United States District Judge
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