

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**PRODUCTS AND VENTURES
INTERNATIONAL,**

Plaintiff,

vs.

**AXUS STATIONARY (SHANGHAI) LTD., ET
AL.,**

Defendants.

CASE NO. 16-cv-00669-YGR

**ORDER GRANTING IN PART PLAINTIFF’S
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

Re: Dkt. No. 195

ROBERTA TRADING CORPORATION,

Counterclaimant,

vs.

**PRODUCTS AND VENTURES
INTERNATIONAL; AND CARLOS FAIRBANKS**

Counterclaim Defendants.

Plaintiff Products and Ventures International brings this action against defendants¹ for alleged breaches of contract and tort claims relating to a wooden pencil distribution agreement. The Court previously dismissed the complaint for lack of personal jurisdiction, but granted leave to amend and provided a period for jurisdictional discovery. (Dkt. No. 72.) Plaintiff filed its amended complaint on September 19, 2016 (Dkt. No. 100, “FAC”), and defendants again brought a motion to dismiss. The Court granted in part and denied in part defendants’ motion, dismissing defendants Axus HK, Highton, Howin, and Noblesse for lack of personal jurisdiction, and dismissing Counts One and Two against Kenpark and Mr. Viegas and Counts Three and Four

¹ The defendants in this action are as follows: Axus Stationery (Hong Kong) Ltd. (“Axus HK”); Andrew Viegas, Highton Ltd.; Roberta Trading Corporation; Kenpark Ltd.; Howin Investments Ltd.; Noblesse (Hong Kong) Limited; Axus Stationery (Shanghai) Ltd. (“Axus Shanghai”); Shanghai Marco Stationery Co.; Shanghai Laikesheng Pen Material Co. Ltd. (“Shanghai Lexon”), and Brian Peifeng Xu.

1 against Kenpark and Roberta Trading for failure to state a claim. (Dkt. No. 144 at 2.) As such,
2 the only remaining claims were Counts One and Two against Roberta Trading and Counts Three
3 and Four against Viegas.² The Court denied plaintiff’s request for leave to amend, but permitted
4 plaintiff to file a later motion for leave to amend should further development of the record warrant
5 such request, due to several thousands of documents produced after the close of jurisdictional
6 discovery.

7 Currently before the Court is plaintiff’s motion for leave to file a second amended
8 complaint, which plaintiff claims is based on its review of late-produced documents. (Dkt. No.
9 195.) Specifically, plaintiff seeks to amend the complaint as follows: (i) re-allege claims against
10 the defendants dismissed for lack of personal jurisdiction based on new documents refining
11 plaintiff’s theory of alter ego liability; (ii) re-allege claims dismissed for failure to state a claim;
12 and (iii) add a claim for fraudulent transfer against Kenpark and Shanghai Marco and a claim for
13 civil conspiracy against Kenpark.

14 Having carefully reviewed the pleadings, the proposed second amended complaint, and the
15 papers and exhibits submitted on this motion, and for the reasons set forth more fully below, the
16 Court **GRANTS IN PART** plaintiff’s motion for leave to file a second amended complaint, as
17 described herein.³

18 I. LEGAL FRAMEWORK

19 Under the Federal Rules of Civil Procedure, courts are to grant leave to amend “when
20 justice so requires.” Fed. R. Civ. P. 15(a)(2). The rule is “to be applied with extreme liberality.”
21 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001); *see also Morongo*
22 *Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Generally, a court should
23 determine whether to grant leave indulging “all inferences in favor of granting the motion.”
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25 ² Since the Court’s order on the motion to dismiss, defendants in the People’s Republic of
26 China, namely Axus Shanghai, Shanghai Marco, Shanghai Lexon, and Mr. Xu (collectively, the
“PRC Defendants”), have been served.

27 ³ The Court adopts the Background in its order on defendants’ motion to dismiss, dated
28 January 18, 2017 (Dkt. No. 144 at 2–4), and adds facts and allegations relevant to the instant
motion, as necessary.

1 *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). That said, “leave to amend is
2 not to be granted automatically.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.
3 1990).

4 The Court weighs the following factors in ruling on a motion for leave to amend: (1) bad
5 faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment; and (5)
6 whether the movant has previously amended its pleadings. *Foman v. Davis*, 371 U.S. 178, 182
7 (1962); *see also Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). Of these factors, “the
8 consideration of prejudice to the opposing party [] carries the greatest weight.” *Eminence*
9 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “Courts may decline to grant
10 leave to amend only if there is strong evidence of ‘undue delay, bad faith or dilatory motive on the
11 part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
12 prejudice to the opposing party . . . , [or] futility of amendment’” *Sonoma Cty. Ass’n of*
13 *Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (quoting *Foman*, 371 U.S. at
14 182). Ordinarily, however, “courts will defer consideration of challenges to the merits of a
15 proposed amended pleading until after leave to amend is granted and the amended pleading is
16 filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

17 II. DISCUSSION

18 Plaintiff seeks leave to file a second amended complaint essentially to include three
19 categories of allegations and claims: (i) re-allege claims against the defendants dismissed for lack
20 of personal jurisdiction based on new documents refining plaintiff’s theory of alter ego liability;
21 (ii) re-allege claims dismissed for failure to state a claim; and (iii) allege additional claims for
22 fraudulent transfer against Kenpark and Shanghai Marco and for civil conspiracy against Kenpark.
23 The Court addresses each category separately, below.

24 A. Claims Against Defendants Dismissed for Lack of Personal Jurisdiction

25 The Court previously dismissed defendants Axus HK, Highton, Howin, and Noblesse for
26 lack of personal jurisdiction. Plaintiff argued that these companies should be subject to personal
27 jurisdiction here based on an alter ego theory. A plaintiff must make a *prima facie* showing that
28 the following criteria are met to survive a Rule 12(b)(2) motion on an alter ego theory: (1) treating

1 the corporations as separate entities would result in inequity or injustice; and (2) a unity of interest
2 and ownership between the corporations such that their separate personalities do not actually exist.
3 *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (citing *Doe v. Unocal*, 248 F.3d 914, 926
4 (9th Cir. 2001)). The Court found that plaintiff failed to satisfy the “inequity or injustice” prong
5 of the test. Specifically, the Court explained that difficulty in enforcing a judgment or collecting a
6 debt does not alone satisfy the requirement of an inequitable act. *See Axon Sols., Inc. v. San Diego*
7 *Data Processing Corp.*, No. 09-CV-2543-JM, 2010 WL 1797028, at *2–3 (S.D. Cal. May 4, 2010)
8 (applying alter ego theory based on allegation that the city intended to dissolve an agency to
9 “avoid [wrongfully] liability for the monies owed to [plaintiff]”); *see also Las Palmas Assocs. v.*
10 *Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249 (1991) (applying alter ego where there was
11 “substantial evidence to support that [defendants] formed a single enterprise *for the purpose of*
12 committing a continuing fraud against buyers” (emphasis supplied)).

13 Plaintiff has proposed new allegations, which it claims demonstrates that Viegas and Xu
14 have actively sought to avoid liability and potential judgment by repeatedly transferring assets
15 among the various corporate defendants. For instance, plaintiff seeks to allege that after Viegas
16 expressed concerns about plaintiff’s incipient lawsuit in 2014, he began to transfer approximately
17 \$1.5 million in assets from Shanghai Marco to Kenpark, which then distributed this money to
18 other corporate defendants, including Highton and Axus HK. (*See* Dkt. No. 195-2 ¶¶ 164, 260–
19 62.) Additionally, plaintiff seeks to allege that many of the actions undertaken by the corporate
20 defendants were done not only to avoid taxes in China, but also to “obtain an unfair competitive
21 advantage because they could aggressively price their finished pencils at artificially low prices,
22 and some of those prices were so low that they attracted PVI’s customers away from PVI.” (*Id.* ¶
23 172.) According to plaintiff, the new allegations in its proposed second amended complaint are
24 sufficient to state an alter ego theory of liability.

25 Defendants have primarily raised two arguments: (i) that the proposed amendments would
26 be futile because plaintiff still cannot allege any inequitable result and (ii) the dismissed
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1 defendants would face undue prejudice as a result of having to re-litigate the claims.⁴ The Court
2 agrees. The Court provided plaintiff with several months of jurisdictional discovery to allege facts
3 sufficient to demonstrate that each of these dismissed defendants were alter egos of each other and
4 the defendants upon whom personal jurisdiction is independently appropriate. In granting in part
5 defendants’ motion to dismiss certain entities for lack of personal jurisdiction, the Court found that
6 plaintiff had failed to establish the inequity prong of the alter ego analysis. Plaintiff’s new
7 proposed allegations still fail to explain how plaintiff could satisfy the “inequity” prong of the
8 alter ego inquiry. This is particularly so given that the Court denied dismissal as to some claims
9 against Viegas and Roberta Trading, and other foreign defendants, who appear to be more central
10 to plaintiff’s claims, have now been served.

11 Thus, further amendment of the operative complaint to re-allege alter ego claims against
12 the defendants already dismissed for lack of personal jurisdiction would be futile. Accordingly,
13 the Court **DENIES** plaintiff’s motion for leave to file a second amended complaint as to the same.

14 **B. Claims Dismissed for Failure to State a Claim**

15 The Court dismissed Counts One and Two against Kenpark and Mr. Viegas and Counts
16 Three and Four against Kenpark and Roberta Trading for failure to state a claim, in part because it
17 rejected plaintiff’s arguments regarding alter ego liability. Plaintiff seeks to re-plead these claims
18 based largely on their new allegations related to alter ego liability. With regard to the tort claims
19 in Counts Three and Four, however, plaintiff also alleges additional actions committed by
20 defendant Kenpark, which may state a claim for tortious interference. Thus, while the Court finds
21 that that leave to amend these claims based on additional alter ego allegations would be futile,
22 leave to amend the tortious interference claims as to Kenpark based on the proposed new
23 allegations is appropriate. Accordingly, the Court **GRANTS IN PART** plaintiff’s leave to amend
24 Counts Three and Four as to Kenpark, but otherwise **DENIES** plaintiff’s motion with respect to
25 these counts.

26 _____
27 ⁴ Defendants also devoted several pages of their opposition to argue that plaintiff’s motion
28 for leave to amend should be deemed as a motion for reconsideration. The Court declines to do
so, and addresses plaintiff’s motion as presented based on the appropriate legal standards for the
same.

