IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OYSTER OPTICS, LLC, Plaintiff, v. INFINERA CORPORATION, CORIANT NORTH AMERICA, LLC, CORIANT OPERATIONS, INC., CORIANT (USA) INC., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. 2:19-CV-00257-JRG **FILED UNDER SEAL**

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants Infinera Corporation ("Infinera"), Coriant (USA) Inc., Coriant North America, LLC, and Coriant Operations, Inc.'s (collectively, "Coriant") (together with Infinera, "Defendants") Motion to Dismiss Plaintiff's Fraud and Concealment Claims Under Rule 12(b)(6) (the "Motion to Dismiss"). (Dkt. No. 42). In the Motion to Dismiss, Defendants ask the Court to dismiss Counts II and III of Plaintiff Oyster Optics, LLC's ("Oyster" or "Plaintiff") First Amended Complaint ("FAC") (Dkt. No. 33). For the reasons stated below, the Court **GRANTS** the Motion to Dismiss and dismisses those claims without prejudice.

I. BACKGROUND

In 2016, Oyster filed complaints for patent infringement in this Court against Coriant, Infinera, and other defendants. See Oyster Optics, LLC v. Coriant Am. Inc., No. 2:16-cv-1302-JRG (E.D. Tex. 2016) (the "2016 Litigation"). The cases were consolidated for pretrial purposes. (See Case No. 2:16-cv-1302-JRG, Dkt. No. 23). Oyster filed another patent infringement suit against Infinera in 2018. Oyster Optics, LLC v. Infinera Corp., No. 2:18-cv-206-JRG (E.D. Tex. 2018) (the "2018 Litigation"). The Court then severed Oyster's claims against Infinera from the 2016

Litigation and consolidated them into the 2018 Litigation. (See Case No. 2:18-cv-206-JRG, Dkt. No. 13).

In June of 2018, Oyster and Coriant agreed to settle their disputes in the 2016 Litigation and executed a settlement and license agreement (the "Agreement"). (Mot. Ex. 12, Dkt. No. 44-1). Per the Agreement, Oyster "provide[d] a release to each of the Coriant Defendants and their Affiliates" and "grant[ed] to each of the Coriant Defendants, their Affiliates, a non-exclusive, non-transferable, non-assignable . . ., royalty-free, irrevocable, perpetual, and fully paid-up license" to the patents-in-suit. (Agreement ¶¶ 3.1, 4.1). The Agreement defined "Affiliate" as including "any Person, now or in the future, which . . . has Control of a Party hereto." (Id. ¶ 3.1).

Infinera acquired Coriant in October of 2018. (FAC ¶ 47). Based on this acquisition, Infinera argued that it was now an "Affiliate" of Coriant. Infinera amended its answer in the 2018 Litigation to include a defense of license and release and moved for summary judgment. (Case No. 2:18-cv-206-JRG, Dkt. Nos. 35, 39). The parties agreed and the Court found that the Agreement was "clear and unambiguous." (See id., Dkt. No. 86 ("Summary Judgment Order"), at 7). Applying New York contract law, the Court found that Infinera was an "Affiliate" of Coriant under the Agreement. (Id. at 9). The Court concluded that the license and release applied to Infinera, and granted summary judgment in Infinera's favor. (Id. at 17, 19, 21).

Oyster filed the above-captioned matter, accusing the Defendants of infringing U.S. Patent No. 6,665,500 (the "'500 Patent"), in July of 2019. (Dkt. No. 1). Oyster then amended its complaint to include counts of fraud and concealment.[1] (Dkt. No. 33 at ¶¶ 22, 54). Oyster alleges that Coriant engaged in a "fraudulent scheme" by making false representations about the scope of the license

[1] Oyster initially filed the fraud and concealment claims in California state court, but dismissed those claims and joined them to this case. (See Mot. Ex. 22, Dkt. No. 42-20).

while in secret negotiations to be acquired by Infinera. (Id. ¶¶ 29–41). Oyster also alleges that Coriant failed to disclose material facts during the settlement negotiations with an intent to deceive Oyster about the planned acquisition. (Id. ¶¶ 54–60).

Defendants now move to dismiss Oyster's fraud and concealment claims under Rule 12(b)(6). They advance five principal arguments: (1) the FAC does not meet the heightened pleading standards for fraud claims under Rule 9(b); (2) Oyster fails to plead a duty to disclose for its concealment claim; (3) Oyster fails to allege injury; (4) Oyster cannot establish justifiable reliance as a matter of law; and (5) Oyster's claims are barred by res judicata. The Court ultimately finds Defendants' first two arguments persuasive and consequently does not reach the others. Additionally, the Court is of the opinion that Oyster should be permitted to amend its complaint to more adequately plead those claims, and therefore dismisses those claims without prejudice.

II. LEGAL STANDARDS

A. Stating a Claim for Relief

Under Federal Rule of Civil Procedure 12(b)(6), a court can dismiss a complaint that fails to state a claim upon which relief can be granted. To survive dismissal at this early stage, a complaint must state enough facts such that the claim to relief is plausible on its face. Thompson v. City of Waco, 764 F.3d 500, 502 (5th Cir. 2014) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the plaintiff pleads enough facts to allow the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged. Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The Court accepts well-pleaded facts as true, and views all facts in the light most favorable to the plaintiff, but is not required to accept the plaintiff's legal conclusions as true. Id.

The Court must limit its review "to the contents of the pleadings." Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498–99 (5th Cir. 2000); see also Lohr v. Gilman, 248 F. Supp. 3d 796, 810 (N.D. Tex. 2017) ("[M]atters or theories raised in a response are not part of the pleadings."). However, documents attached to a defendant's motion to dismiss are considered a part of the pleadings if they are referred to in the complaint and are central to the claim. Collins, 224 F.3d at 498–99. The Court therefore can appropriately consider the Agreement, which is cited in the FAC and is central to Oyster's fraud and concealment claims.

Federal Rule of Civil Procedure 9(b) imposes a heightened pleading standard for claims of fraud. Where a plaintiff is alleging fraud, the plaintiff must further "state with particularity the circumstances constituting fraud." FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Benchmark Elecs., Inc. v. J.M. Huber Corp., 343 F.3d 719, 724 (5th Cir. 2003). In essence, Rule 9(b) requires "the who, what, when, where, and how" of the plaintiff's fraud claim to be stated in the complaint. Id. The Fifth Circuit applies Rule 9(b) "with 'bite' and 'without apology.'" United States ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 185 (5th Cir. 2009).

B. Applicable Law

Federal district courts hearing state law claims apply the conflicts-of-laws rules of the states in which they sit. See Realogy Holdings Corp. v. Jongebloed, 957 F.3d 523, 532 (5th Cir. 2020) (citing Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). Texas courts hold that choice-of-law clauses that are limited to "interpretation and enforcement" do not encompass tort claims. Stier v. Reading & Bates Corp., 992 S.W.2d 423, 433 (Tex. 1999); see also Benchmark, 343 F.3d 719,

726–27 (5th Cir. 2003) (clause stating that the contract "shall be governed by, and construed in accordance with, the internal laws of the State of New York" did not apply to tortious fraud).

The Agreement in this case contains a choice-of-law clause stating that it shall be "governed by and interpreted in accordance with the laws of the State of New York without reference to choice of law rules or principles that may otherwise refer interpretation or construction of this Agreement to the substantive law of another jurisdiction." (Agreement ¶ 9). This clause, like the clauses in Stier and Benchmark, is limited to governance and interpretation. For issues of contract interpretation, this Court turned to New York law in the 2018 Litigation. (See Summary Judgment Order at 4–6). However, Oyster's fraud and concealment claims themselves, being tortious in nature, arise under Texas law. Accordingly, to survive dismissal, Oyster must adequately plead fraud and concealment under Texas law.

C. Fraud and Concealment Under Texas Law

Texas law recognizes both common law fraud and concealment. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 337 (Tex. 2011); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997). The elements of fraud are (1) a material representation; (2) the representation was false; (3) at the time the representation was made, the speaker either knew it was false, or made it recklessly without knowledge of its truth and as positive assertion; (4) the speaker intended that the other party should act upon the representation; (5) the other party acted in reliance on the representation; and (6) the other party thereby suffered injury. Italian Cowboy, 341 S.W.3d at 337. "An actionable representation is one concerning a material fact; a pure expression of opinion will not support an action for fraud." Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 276 (Tex. 1995).

Concealment, or fraud by non-disclosure, "is simply a subcategory of fraud because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts." Schlumberger, 959 S.W.2d at 181. Concealment is only actionable if the plaintiff proves the defendant was silent when under a duty to disclose. Id.; Bombardier Aerospace Corp. v. SPEP Aircraft Holdings LLC, 572 S.W.3d 213, 219 (Tex. 2019). Therefore, to state a claim for concealment, the plaintiff must allege with particularity that the defendant was under duty to disclose, along with specific facts giving rise to the duty. Tornado Bus Co. v. Bus & Coach Am. Corp., 2015 WL 11120584, at *5 (N.D. Tex. 2015); TXI Ops., LP v. Pittsburg & Midway Coal Mining Co., 2004 WL 2088911 (N.D. Tex. 2004).

Texas courts recognize a duty to disclose in five situations: (1) a fiduciary relationship; (2) a confidential relationship; (3) a voluntary disclosure of information, giving rise to a duty to disclose the whole truth; (4) a partial disclosure that conveys a false impression; and (5) upon discovery of new information that makes a prior representation false or misleading. Bombardier, 572 S.W.3d at 219.

III. DISCUSSION

A. Oyster Fails to Plead its Fraud Claim with Particularity

Defendants argue that Oyster has failed to plead a material misrepresentation with the level of particularity demanded by Rule 9(b). (Mot. at 9). They argue that Oyster's allegations are too general, and that in many cases, Oyster does not even allege that the representations are false. (Id. at 9–10). In response, Oyster identifies Paragraphs 29, 31, 34–38, and 44 as alleging material misrepresentations with particularity. (Response, Dkt. No. 57, at 9–10). After reviewing each, the Court is persuaded that the paragraphs identified by Oyster do not sufficiently allege affirmative misrepresentations of fact as Rule 9(b) requires.

Paragraph 29 of the FAC alleges that "[t]hroughout the 2016 Coriant Litigation," Defendants represented through discovery and settlement negotiations that "there was no overlap between the Coriant Accused Products and the products of the other defendants . . . such as Infinera." (FAC ¶ 29). This paragraph alleges representations generally across a broad period of time, but does not identify them with particularity; it does not identify the speaker, time, or place of any specific representation of fact.

Paragraph 31 of the FAC alleges that "Coriant confirmed that it understood Oyster insisted that the settlement price depended on market share and negotiated with Oyster on that basis. Coriant made use of its claimed market share of 8-10% in the relevant market to negotiate a settlement with Oyster." (FAC ¶ 31). This paragraph does not identify any representations of fact with particularity. Coriant's confirming that it understood Oyster's negotiating position is not a representation of fact. Although this paragraph does identify a fact allegedly used by Coriant in negotiation—it's market share—Paragraph 31 does not allege that Coriant falsely represented this fact, and it does not identify any particular affirmative statements of this fact, who made the statements, or when and where they was made.

Paragraph 34 alleges that Coriant "made specific references to the market share of other infringers" and argued that its "price to settle should be reduced because it was 'half the size' of Infinera." Paragraph 34 does not identify any of the "specific references" by way of time, place, or speaker, and does not allege that any of these specific references falsely represented material facts. Defendants do allege that Coriant stated it was "half the size" of Infinera, but again this statement is not alleged to be a false representation of present fact. Coriant's statement that it should settle for less because it was half the size of Infinera is more properly categorized as a statement of opinion.

Paragraph 35 of the FAC identifies a Memorandum of Understanding ("MOU") concerning the settlement and emails exchanged between Oyster's and Coriant's outside counsel agreeing to the same. (FAC ¶ 35). That paragraph identifies statements characterizing the settlement as a "settlement of the current case" and a "significant one-time discount." (Id.) The speaker of these statement is not identified, but it appears that they are contained in the MOU—hence, they are likely attributable to both Oyster's and Coriant's outside counsel. Although the context of these statements is not provided, they appear to be expressing the opinions of counsel on the nature of the settlement. In any event, they do not clearly suggest a misrepresentation of fact.

Paragraph 36 alleges that throughout the process, Coriant "stayed silent and kept their negotiations with Infinera hidden from Oyster." (FAC ¶ 36). While this paragraph might properly allege silence or omission, it does not allege any affirmative representations, no less ones of fact.

Paragraph 37 alleges that "from before their MOU was signed" until after the "final executed longform settlement agreement," Coriant "actively stated their intent to only settle the 2016 Coriant Litigation." (FAC ¶ 37). However, Oyster does not identify any particular statements in this broad period to that effect. Paragraph 37 also alleges that Coriant "did not just remain silent" but stated that they would be willing to discuss potentially assisting Oyster in "another assertion campaign, before the International Trade Commission" against the other defendants in the 2016 Litigation in exchange for a quick settlement. (FAC ¶ 37). This statement, if any certainty can be ascribed to it at all, is one of future intentions—not one of present fact.

Paragraph 38 alleges that Coriant knew the aforementioned statements were false, but again fails to identify any particular representations of fact. Paragraph 38 also alleges that Coriant "knowingly and intentionally misstated the revenue of products that would be covered" by the settlement by comparing its own revenue to Infinera's "and implying that Infinera's revenues

would not be covered." (FAC ¶ 38). Yet Paragraph 38 does not identify any particular statements, speakers, times, or places for these alleged misrepresentations.

In Paragraphs 41, Oyster cites emails exchanged between Oyster's and Coriant's counsel in April of 2018. (FAC ¶ 41). Oyster alleges that Coriant provided a redlined draft of the Agreement and characterized its revisions as not actually "extensive." (Id.). Beyond the word "extensive," Oyster does not otherwise provide the content or context of the alleged misrepresentation. Oyster also does not explain how this representation is fraudulent beyond noting that Coriant did not "communicat[e] the hidden secret information" it possessed (Id.)—perhaps an omission, but not a representation.

In both Paragraphs 41 and 44, Oyster cites a May 30, 2018 email sent by Coriant's counsel to Oyster's counsel. (FAC ¶¶ 41, 44). Oyster characterizes this email as attempting to "quell any concerns that they were 'increas[ing] the scope of rights conveyed' in the MOU." (FAC ¶ 44).[2] Fairly read in context, however, this email does not support Oyster's claims of fraud. This statement appeared in the context of discussing the rights of Oyster's suppliers and customers. Further, an earlier email in the chain *sent by Oyster's counsel* clearly indicates that this conversation discussed the rights of Coriant's suppliers and customers in terms of "rights beyond those granted to the Coriant defendants/affiliates." (email from R. Mirzaie to T. Meece, May 29, 2018) (emphasis added)). Since Infinera claimed the benefit of the Agreement as an Affiliate of

[2] This email was not attached to the FAC or even to Oyster's briefing in opposition to the Motion to Dismiss; rather, Oyster directs the Court to an exhibit attached to a filing in the 2018 Litigation. (Case No. 2:18-cv-206-JRG, Dkt. No. 84-12). Assuming that this email is nonetheless properly before the Court by its reference in the FAC, see Collins, 224 F.3d at 498–99, the full context of the statement makes clear that it not quite the misrepresentation of fact Oyster purports it to be.

Coriant, it is not clear how this ancillary discussion of the rights of Coriant's suppliers and customers can support the instant claims of fraud.

In sum, none of the paragraphs Oyster identifies pleads material misrepresentations of fact with the level of particularity required by Rule 9(b). The Court, after reviewing the FAC as a whole, has not found any other allegations that meet this bar. The Court is therefore not persuaded that Oyster has met the Rule 9(b) standard to state a claim for fraud. The FAC is populated with general averments of statements, communications, and representations. However, it lacks any specifically identifiable, affirmative representations of fact that are alleged to have been false at the time when made. To be sure, Oyster does aver that Coriant was silent during the settlement talks about the negotiations with Infinera that were allegedly ongoing, but an omission is not a representation. The Court concludes the FAC fails to plead a material misrepresentation of fact with the requisite particularity demanded by Rule 9(b). Therefore, Oyster fails to state a claim for common law fraud.

B. Oyster Fails to Plead a Duty to Disclose for its Concealment Claim

Defendants argue that Oyster's concealment should be dismissed because the FAC does not plead a duty to disclose. (Mot. at 11–12). In response, Oyster argues that a duty to disclose arose based on Coriant's conduct in the settlement negotiations. (Mot. at 11–12). Since Coriant first disclosed that the Agreement would cover only Coriant's products, Oyster argues, the later negotiations with Infinera rendered that representation untrue, giving rise to a duty to disclose that information. (Id.).

As between parties negotiating at arm's length, Texas law recognizes a duty to disclose information in three circumstances: (1) a voluntary disclosure of information, giving rise to a duty to disclose the whole truth; (2) a partial disclosure that conveys a false impression; and (3) upon

discovery of new information that makes a prior representation false or misleading. Bombardier, 572 S.W.3d at 219.

Oyster contends that the representations identified in Paragraphs 30, 31, 34, and 41 were rendered false or misleading based on new information available to Coriant after it allegedly entered into negotiations with Infinera. Paragraph 30 identifies only statements made or beliefs held by Oyster. Paragraphs 31 and 34, as discussed above, do not identify with particularity any representations of fact. Paragraph 41 alleges that Coriant characterized certain redlines as "not actually 'extensive,'" and refers to the May 30, 2018 email concerning the rights of Coriant's suppliers and customers. Even if these paragraphs did adequately plead factual representations, nowhere—either in the identified paragraphs or in the concealment-specific allegations—does Oyster plead how later information obtained by Coriant rendered them false.

After reviewing the FAC, the Court is not persuaded that Oyster has adequately pleaded that Coriant had a duty to disclose the alleged ongoing talks with Infinera. Oyster has not identified with particularity the facts giving rise to such a duty. See Tornado Bus Co. v. Bus & Coach Am. Corp., No. 3:14-cv-3231-M, 2015 WL 11120584 (N.D. Tex. Dec. 15, 2015); TXI Ops. v. Pittsburg & Midway Coal Mining Co., No. 3:04-CV-1146-H, 2004 WL 2088911 (N.D. Tex. Sept. 8, 2004). Even if Coriant was under a duty to disclose, as Oyster argues in its briefing, that matter is not adequately pleaded in the FAC. Accordingly, the Court concludes that Oyster has failed to state a claim for concealment.

IV. CONCLUSION

The Court concludes that Oyster's FAC fails to state a claim for either fraud or concealment. Having so concluded, the Court need not reach Defendants' other arguments. However, the Court is of the opinion that Oyster should be afforded an opportunity to replead its

claims with more specificity. See FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend the pleadings] when justice so requires."); Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002) ("district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable").

Accordingly, the Motion to Dismiss is **GRANTED**. It is hereby **ORDERED** that Counts II and III of the First Amended Complaint are **DISMISSED WITHOUT PREJUDICE**. Oyster shall have **twenty-one (21) days** from the issuance of this Order to amend its fraud and concealment claims through the filing of a subsequently amended complaint. Failure to amend, within twenty-one days or any extended period with leave of the Court, shall constitute a waiver of such claims by Oyster, and as a result prejudice shall attach thereto preventing any later assertion of the same.

So ORDERED and SIGNED this 29th day of September, 2020.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE