

1 HONORABLE RONALD B. LEIGHTON
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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 BANCROFT LIFE & CASUALTY, ICC,
10 LTD,

11 Plaintiff,

12 v.

13 CESAR SCOLARI,

14 Defendant.
15

No. 3:11-cv-05017-RBL

ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION
[Dkt. #83]

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17 THIS MATTER comes before the Court on Plaintiff's Motion for Reconsideration [Dkt.
18 #83]. Because Plaintiff has failed to show manifest error in the prior ruling or introduce
19 previously unavailable facts or legal authority, the motion is DENIED.

20 **I. BACKGROUND**

21 Plaintiff Bancroft Life & Casualty, ICC, Ltd. ("Bancroft") is a licensed captive insurance
22 company organized under the laws of Saint Lucia, an island country in the eastern Caribbean
23 Sea. Pl.'s Mot. to Dismiss at 1 [Dkt. #47]. In 2005, Defendant Cesar Scolari enrolled in
24 Bancroft's "Premium Lite" insurance program. *Id.* at 2. The program enabled Scolari to borrow
25 back a portion of his insurance premiums, amounting to a loan of approximately \$5 million,
26 whereby Bancroft issued Scolari two promissory notes memorializing the loan obligations.
27 Order at 3 [Dkt. #76].

28 When the parties' relationship soured, Scolari discontinued payment, and Bancroft sued
on the notes, which provided for enforcement in the United States. *Id.* Scolari counterclaimed

1 for a declaratory judgment granting him equitable ownership of the promissory notes on the basis
2 of fraud, misrepresentation, and breach of contract. Def.'s Answer at 16–19 [Dkt. #12].

3 Bancroft moved to dismiss Scolari's counterclaims for improper venue under Fed. R.
4 Civ. P. 12(b)(3), arguing forum selection clauses in the insurance agreement required
5 adjudication in Saint Lucia, or in the alternative to dismiss for failure to state a claim upon which
6 relief can be granted. Pl.'s Mot. to Dismiss at 1 [Dkt. #47]. The Court, after reviewing the
7 record and hearing oral argument, denied the motion because Bancroft's 2005 forum selection
8 clause, signed in conjunction with the application for insurance, does not govern Scolari's
9 counterclaims, and Bancroft's forum selection clause in the General Master Policy was never
effectuated. Order at 6 [Dkt. #76].

10 Bancroft now moves for reconsideration of the Court's order denying the motion to
11 dismiss for improper venue. Bancroft requests that the Court either vacate its prior order or hold
12 an evidentiary hearing to further develop the material facts of this case.

13 **II. AUTHORITY**

14 Local Civil Rule 7(h) controls motions for reconsideration: "Motions for reconsideration
15 are disfavored. The court will ordinarily deny such motions in the absence of a showing of
16 manifest error in the prior ruling or a showing of new facts or legal authority which could not
17 have been brought to its attention earlier with reasonable diligence." CR 7(h)(1).

18 **III. DISCUSSION**

19 Bancroft cites five separate grounds for reconsideration: (1) the Court's order is based on
20 incorrect factual conclusions; (2) the Court's order misapprehends Bancroft's motion to dismiss;
21 (3) the Court's order overlooks legal authority governing fraud and forum selection clauses; (4)
22 the forum selection clause should be enforced regardless of whether Bancroft's claims are
23 inextricably linked to Scolari's counterclaims; and (5) the Court's order fails to address
24 Bancroft's alternate motion to dismiss for failure to state a claim upon which relief can be
25 granted. Pl.'s Mot. for Recons. at 2–6 [Dkt. #83].

26 *A. Incorrect Factual Conclusions*

27 In a motion to dismiss for improper venue predicated on a forum selection clause, "the
28 trial court must draw all reasonable inferences in favor of the non-moving party and resolve
factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d

1 1133, 1138 (9th Cir. 2004). The decision to hold an evidentiary hearing is within the sound
2 discretion of the trial court. *Id.* at 1139.

3 The Court did not purport to articulate the truth or falsity of the facts as presented by
4 either party; it properly resolved factual conflicts in favor of Scolari, and it properly drew all
5 reasonable inferences in favor of Scolari. The Court’s interpretation of the facts in the light most
6 favorable to the non-moving party is consistent with Ninth Circuit case law and does not
7 constitute manifest error.

8 *B. Misapprehension of the Plaintiff’s Motion*

9 Bancroft argues the Court misapprehended its motion, which relied on *both* the forum
10 selection clause in the 2005 insurance application *and* the forum selection clause in Bancroft’s
11 Group Master Policy, because the Court “[did] not address the application of the forum selection
12 clause found in the Group Master Policy . . . other than in passing in footnote 4.” Pl.’s Mot. for
13 Recons. at 4 [Dkt. #83]. This argument is puzzling; not only did the Court cite to the text of the
14 broader Group Master Policy clause, but it expressly rejected this clause because Bancroft
15 unilaterally modified the language without Scolari’s knowledge, or at a minimum without
16 Scolari’s consent. *See* Order at 4, 6 [Dkt. #76].

17 The Court concluded the 2005 clause was the only executed clause in effect when Scolari
18 repudiated the contract, and this clause was not broad enough to control Scolari’s fraud claims.
19 *Id.* at 6. Footnote 4 rejects the separate argument that Scolari is a third party beneficiary to the
20 contract. *Id.* The Court did not misapprehend the motion.

21 *C. Overlooking Relevant Legal Authority*

22 Next, Bancroft argues the Court overlooked relevant legal authority, specifically, the rule
23 that a party seeking to set aside a forum selection clause on the basis of fraud must show that the
24 forum selection clause resulted from fraud or coercion. Pl.’s Mot. for Recons. at 4 [Dkt. #83]
25 (citing *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1296–97 (9th Cir. 1998)). Bancroft
26 contends Scolari is bound to the broader forum selection clause because Scolari has not alleged
27 that the clause itself was the product of fraud or coercion. Bancroft advanced this argument in its
28 original motion to dismiss [Dkt. #47], so the principle does not constitute “new . . . legal
authority which could not have been brought to [the Court’s] attention earlier with reasonable
diligence.” CR 7(h)(1). Thus, in order for Bancroft to prevail, it must rely on a showing of
manifest error.

1 In *Richards*, the court upheld choice of law and choice of forum clauses against more
2 than 600 “Names” participating in the Lloyd’s insurance syndicate. 135 F.3d at 1291–92. The
3 Names advanced three arguments for repudiating the clauses, including the argument that
4 Lloyd’s obtained the clauses by fraud. *Id.* at 1292. The court found the argument unpersuasive,
5 however, because the allegations concerned the “contract as a whole, with no allegations as to
6 the inclusion of the choice clauses themselves.” *Id.* at 1297. The Names failed to allege “that
7 Lloyd’s misled them as to the legal effect of the choice clauses,” or “that Lloyd’s fraudulently
8 inserted the clauses without their knowledge.” *Id.* “For a party to escape a forum selection
9 clause on the grounds of fraud, it must show that ‘the inclusion of that clause in the contract was
10 the product of fraud or coercion.’” *Id.* (emphasis omitted) (citing *Prima Paint Corp. v. Flood &*
Conklin Mfg. Co., 388 U.S. 395 (1967)).

11 While Scolari did not set out allegations of fraud with respect to forum selection in his
12 counterclaims, *see* Def.’s Answer at 17–18 [Dkt. #12], Scolari responded to Bancroft’s motion
13 with specific allegations of fraud related to the clause itself, *see* Def.’s Resp. at 6–11 [Dkt. #49].
14 Unlike in *Richards*, where the Names never argued Lloyd’s inserted or altered the clauses
15 without their knowledge, Scolari alleges Bancroft concealed the terms of the General Master
16 Policy from Scolari and his agent. Def.’s Resp. at 6–11 [Dkt. #49]. Scolari further alleges that
17 Bancroft secretly, unilaterally, and retroactively changed the terms of the original clause. *Id.*
18 Because Scolari has stated a plausible case for fraud related specifically to the execution of the
19 forum selection clause in the General Master Policy, Bancroft has failed to show manifest error
20 in the Court’s prior ruling.

21 *D. Enforcement Regardless of Whether the Claims are Inextricably Linked*

22 In its order denying Bancroft’s motion, the Court stated, “[t]he action to collect on the
23 promissory notes and the claims regarding the return of premiums are inextricably linked[] and
24 should be tried together.” Order at 6 [Dkt. #76]. Bancroft argues this reasoning constitutes error
25 “to the extent that the Court is relying on a conclusion that Bancroft has waived its ability to
26 enforce the forum selection clause . . . because the counterclaims are compulsory.” Pl.’s Mot. for
27 Recons. at 5 [Dkt. #83].

28 A counterclaim defined as “compulsory” under Fed. R. Civ. P. 13(a) is not immune from
dismissal when the counterclaim is controlled by an enforceable forum selection clause. *See,*
e.g., Publicis Commc’n v. True N. Commc’ns, Inc., 132 F.3d 363 (7th Cir. 1997). Nothing in the

1 Court's order contravenes this authority. The Court did not conclude Bancroft waived its ability
2 to enforce the clause against Scolari's counterclaims because the counterclaims were
3 compulsory; it determined the 2005 forum selection clause, the only executed clause in effect,
4 was not broad enough to govern Scolari's counterclaims. *See* Order at 6 [Dkt. #76]. Bancroft's
5 assertion is rejected.

6 *E. Failure to Address Plaintiff's 12(b)(6) Motion*

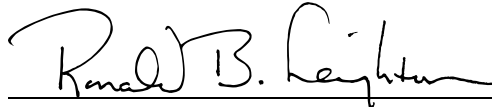
7 Finally, Bancroft argues the Court failed to address its alternate motion. A plaintiff's
8 complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v.*
9 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). Scolari's counterclaims constitute more than "labels and
10 conclusions" or a mere "recitation of the elements" of fraud. *Bell Atl. Corp. v. Twombly*, 550
11 U.S. 544, 555 (2007). The Court expressly stated Scolari's "allegations of fraudulent conduct
12 are plausible," thereby defeating Bancroft's alternate motion to dismiss under Fed. R. Civ. P.
13 12(b)(6). Order at 2 [Dkt. #76].

14 **IV. CONCLUSION**

15 For the reasons stated above, Plaintiff's Motion for Reconsideration [Dkt. #83] is
16 DENIED.

17 **IT IS SO ORDERED.**

18 DATED this 14th day of February, 2012.

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20 RONALD B. LEIGHTON
21 UNITED STATES DISTRICT JUDGE
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