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United States District Court, C.D. California.

Justice LAUB
v.
Nicholas HORBACZEWSKI, et al.

Case No. LA CV17-6210 JAK (KS)
|
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Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT (DKT. 17)

JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

I. Introduction

***1** On July 10, 2017, Justice Laub ("Laub") brought this action against Nicholas Horbaczewski ("Horbaczewski") and Drone Racing League, Inc. ("DRL") (collectively, "Defendants") in the Los Angeles Superior Court ("Superior Court"). Complaint, Dkt. 1-1. The Complaint advanced claims for breach of contract, common count, fraud and breach of fiduciary duty. On August 22, 2017, Defendants removed this action. Dkt. 1.

On September 27, 2017, Daniel Kanes ("Kanes") and Laub (collectively, "Plaintiffs") filed the First Amended Complaint ("FAC"). Dkt. 13. It advances claims for breach of oral contract, breach of written contract, fraud, breach of fiduciary duty and intentional interference with prospective economic advantage against Horbaczewski and claims for breach of implied contract and common count against all Defendants. *Id.*

On October 25, 2017, Defendants filed a motion to dismiss the FAC ("Motion" (Dkt. 17)). In support of the Motion, Defendants contend that the FAC fails adequately to state certain claims and that some are time-barred. In the alternative, Defendants request a stay of this action while parallel proceedings go forward among the same parties in an action now pending in a Supreme Court in New York. DRL also moves to dismiss for lack of personal jurisdiction. Plaintiffs filed an opposition to the Motion (Dkt. 31), and Defendants filed a reply. Dkt. 33. A hearing was conducted on the Motion on February 12, 2018, and the matter was taken under submission. For the reasons stated in this Order, the Motion is **GRANTED IN PART**.

II. Factual Background

A. The Parties

Laub resides in Los Angeles, California. FAC ¶ 6. Kanes resides in Santa Clarita, California. *Id.* ¶ 7. Horbaczewski resides in New York City. *Id.* ¶ 8. DRL is a Delaware corporation. *Id.* ¶ 9. Plaintiffs contend that, according to filings by DRL with the California Secretary of State, it has a "Principal Executive Office" in New York City, another one in West Hills, California and a "Principal Business Office in California" in Santa Cruz, California. *Id.* ¶ 9.

Defendants make the following assertions: (i) DRL was incorporated in April 2015; (ii) DRL's headquarters is in New York City; (iii) DRL has 27 employees, most of whom work in New York; (iv) DRL has five employees in California, none of whom worked for DRL prior to May 2016; and (v) DRL does not own any real estate or have any bank accounts with institutions in California. Declaration of Nicholas Horbaczewski ("Horbaczewski Decl."), Dkt. 17-5 ¶¶ 5-10.

B. New York Proceedings

On June 30, 2017, Laub's counsel sent a letter to Defendants claiming that Laub was a founder and part owner of DRL and that Laub was entitled to one-third ownership of DRL. Horbaczewski Decl. ¶ 34. On July 11, 2017, Horbaczewski responded and suggested the discussion of a potential resolution of the dispute. *Id.* ¶ 35. On July 13, 2017, counsel for Defendants and Plaintiffs spoke about a possible resolution. Declaration of Kenneth A. Kuwayti ("Kuwayti Decl."), Dkt. 17-2 ¶ 3. No agreement was reached, and Laub's counsel did not mention that this action had already been filed in the Superior Court. *Id.*

***2** On July 14, 2017, Defendants initiated civil proceedings in the Supreme Court of New York by filing a summons with notice. *Id.* ¶ 5. On July 21, 2017, Defendants filed a complaint there in which Laub is named as a defendant. The complaint seeks declaratory relief in the form of a determination that Defendants did not breach any contract, make any fraudulent representation or breach any fiduciary duty to Laub. Dkt. 17-3. It also asserts claims for injunctive relief, defamation and injury to business reputation. *Id.* On July 24, 2017, Laub was served with the complaint. Dkt. 17-1 at 12.

After the FAC was filed in this action, Defendants filed a complaint against Kanes in the Supreme Court of New York. It seeks declaratory relief in the form of a determination that Kanes is not entitled to any ownership interest in DRL. Dkt. 17-4. That complaint also asserts claims for injunctive relief, defamation and injury to business reputation. *Id.* Both of the actions in New York (collectively, the "New York Actions") are pending before Justice Saliann Scarpulla. Kuwayti Decl. ¶ 8. On January 24, 2018, Justice Scarpulla stayed the New York Actions "pending the resolution of whether or not California is going to retain jurisdiction over the action that was filed in California." Dkt. 36-2 at 19. Justice Scarpulla further stated that "[i]f the California Court finds that it doesn't have jurisdiction over you, come back and litigate here. If the California Court finds that it does have jurisdiction over the parties, then I'm going to stand by the 'first filed' rule and you can litigate in California." *Id.* at 10.

C. Allegations in the FAC

The FAC alleges that Plaintiffs conceived a televised drone racing league in 2014. FAC ¶ 16. It is alleged that, in order to implement this idea, they started meeting with potential partners and seeking investors in early 2015. *Id.* ¶ 17. The FAC alleges that, in early January 2015, Plaintiffs presented their ideas to Blank Paige Productions ("Blank Paige"), a television production company located in Los Angeles. *Id.* It is also alleged that, on January 22, 2015, Matthew Mazzeo ("Mazzeo"), a venture capitalist who resides in California, introduced Plaintiffs to Horbaczewski as a potential investor. *Id.* ¶ 18.

The FAC next alleges that Plaintiffs and Horbaczewski "corresponded and talked on the phone numerous times" over the following weeks and conducted another in-person meeting in Los Angeles on March 11-12, 2015. *Id.* ¶ 19. It also alleges that "during these meetings and phone calls," Plaintiffs and Horbaczewski "orally agreed to be partners in and co-founders of the DRL, with each owning a third of the company." *Id.* ¶ 20. In February 2015, Plaintiffs and Horbaczewski allegedly "jointly drafted" a business plan that "documented this agreement." *Id.* ¶ 21. It also allegedly stated that the company's cap structure would be as follows: "At this Time we are thinking 33% Dan [Kanes], 33% Justice [Laub], and 33% Nick [Horbaczewski]. We want to give Matt [Mazzeo] the additional 1% for introducing us." *Id.* It is also alleged that continuing to Fall 2015, Plaintiffs "performed substantial work for Horbaczewski and the yet-to-be-formed DRL to help get it off the ground." *Id.* ¶¶ 25, 37; *see id.* ¶¶ 26-33.

It is alleged that on February 9, 2015, Plaintiffs received a written offer from Blank Paige for a one-year exclusive deal to develop a televised drone racing show. *Id.* ¶ 24. Plaintiffs sought Horbaczewski's advice on the offer. *Id.* On February 16, 2015, it is alleged that Horbaczewski urged them to reject the offer so that their company could retain all television rights. *Id.* It is alleged that Plaintiffs followed this suggestion and rejected the offer. *Id.*

***3** It is next alleged that, during a March 11-12, 2015 meeting in Los Angeles, Plaintiffs and Horbaczewski "finalized and agreed to" the arrangement outlined in the business plan. *Id.* ¶ 21. During this meeting, Horbaczewski allegedly stated his intention to serve as CEO, invest $250,000 as seed money and work on business development and to reject Kanes's offer to provide further seed funding because "Plaintiffs had already done their part by bringing Horbaczewski into the venture and providing all of their ideas." *Id.* ¶ 22.

Horbaczewski then allegedly requested that Plaintiffs provide their biographies and other personal information, which he then used "to identify Plaintiffs as co-founders of the DRL in pitch decks shown to one or more potential investors." *Id.* ¶ 34. It is alleged that, between April and June 2015, Plaintiffs and Horbaczewski met in Los Angeles two or three times. *Id.* ¶ 35. It is alleged that, during these meetings, Plaintiffs "repeatedly asked ... for more formal documentation of their co-ownership of the DRL," but that "Horbaczewski repeatedly dodged the issue, claiming that it could not be done until the company was formed." *Id.*

The FAC next alleges that Horbaczewski incorporated DRL in Delaware on April 17, 2015 without notifying Plaintiffs and without providing them with any ownership in the company. *Id.* ¶ 36. It is alleged that Horbaczewski stopped communicating with Plaintiffs late in Fall 2015. *Id.* ¶ 38. It is also alleged that "Horbaczewski never had any intent of performing [the agreement reached in early 2015]" because he always "intended to steal Plaintiffs' ideas and then the entire DRL for himself." *Id.* ¶ 23. It is alleged that Horbaczewski "concealed his true intentions from Plaintiffs for many months while they worked on behalf of the DRL." *Id.*

D. Declarations of Plaintiffs and Horbaczewski

Declarations by Horbaczewski and each of the Plaintiffs have been submitted in connection with the Motion. The contents of these declarations is summarized in the following discussion.

1. Declaration of Justice Laub

On February 5 and 11, 2015, Horbaczewski electronically shared with Plaintiffs initial drafts of the business plan. He requested that they fill in details. Declaration of Justice Laub ("Laub Decl."), Dkt. 31-19 ¶ 9. Plaintiffs worked together to add to the proposed plan. They then exchanged emails with Horbaczewski regarding their proposed additions on or around February 12, 19, 23 and 24, 2015. *Id.* On April 8, 2015, Plaintiffs met with Horbaczewski in Los Angeles to "continue our work on the DRL." *Id.* ¶ 19. In May 2015, Plaintiffs spoke with Horbaczewski by telephone, and exchanged numerous emails with him regarding the first video and event to launch the DRL. *Id.* On June 18, 2015, Plaintiffs met with Horbaczewski in Los Angeles during a video shoot to film crash footage for a DRL promotional video. At that time Plaintiffs provided creative direction. *Id.* ¶ 23.

On June 22, 2015, Horbaczewski returned to Los Angeles to meet with Plaintiffs and their attorney to discuss ownership of, and potential additional investment in, the DRL. *Id.* ¶ 24. During this meeting, Horbaczewski requested that Plaintiffs invest $250,000 in the DRL on the same terms as other potential investors. Plaintiffs asked why they should have to invest before receiving equity, given the prior ownership agreement. They also asked why any such investment should be on the same terms as other investors and not the terms that applied to Horbaczewski. *Id.* They did not reach an agreement as to these issues, but agreed to continue discussing them. *Id.* Because Plaintiffs assumed that the issues would be resolved among the parties, they continued to provide services to Defendants. *Id.*

2. Declaration of Daniel Kanes

***4** Kanes incorporates Laub's statements and makes other ones. They include that, Plaintiffs and Horbaczewski "corresponded and talked on the phone dozens of times" between the January 22, 2015 and March 11-12, 2015 meetings in Los Angeles. Declaration of Daniel Kanes ("Kanes Decl."), Dkt. 31-20 ¶ 6. Kanes

traveled to New York in May 2015 to meet with Horbaczewski to discuss the intellectual property associated with the DRL and other related matters. *Id.* ¶ 15. In May 2015, Horbaczewski sent an email to Plaintiffs in which he proposed that they serve as "Co-Creative Directors" of the DRL and "suggested for the first time that [Plaintiffs] also provide money to the company as convertible debt." *Id.* ¶ 18. Through "late June and July 2015," Kanes "worked closely with the DRL's advertising agency ... based in Los Angeles, and an early DRL employee in California, Tony Budding." *Id.* ¶ 20.

3. Declaration of Nicholas Horbaczewski

DRL currently has 27 employees. Five of them work in leased office space in Santa Cruz and almost all of the others work in the New York headquarters. Horbaczewski Decl. ¶¶ 6-7. All of DRL's California employees joined the company between May 2016 and May 2017. DRL had no employees in California in 2015. *Id.* ¶ 7. Plaintiffs inserted the language in the February 2015 alleged business plan regarding one-third ownership for them, and Horbaczewski neither drafted this provision nor agreed to it. *Id.* ¶ 14.

III. Analysis

A. Personal Jurisdiction

1. Legal Standards

a) Overview

A party may move to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). The party asserting jurisdiction bears the burden of establishing it. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). If the court does not require an evidentiary hearing, a plaintiff need make only a prima facie showing of personal jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). 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." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Boschetto*, 539 F.3d at 1015. However, a court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011).

To establish personal jurisdiction, a party must show both that the long-arm statute of the forum state confers personal jurisdiction over an out-of-state defendant, and that the exercise of jurisdiction would be consistent with federal due process requirements. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990). The California long-arm statute is coextensive with federal due process requirements. Cal. Civ. Proc. Code § 410.10; *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991). Personal jurisdiction may be exercised over a nonresident party who has "minimum contacts" with the forum state, such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v.*

Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). Depending on the nature of the contacts between such a party and the forum state, personal jurisdiction may be general or specific.

b) General Jurisdiction

General jurisdiction is established when a defendant's contacts with the forum state are "'so continuous and systematic' as to render [it] essentially at home in the forum state." *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). "The paradigmatic locations where general jurisdiction is appropriate over a corporation are its place of incorporation and its principal place of business." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015) (citing *Daimler*, 134 S. Ct. at 760). "The exercise of general jurisdiction is not limited to these forums; in an 'exceptional case,' a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State.' " *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler*, 134 S. Ct. at 761 n.19). Where there is general jurisdiction, a party may "be haled into court in the forum state to answer for any of its activities anywhere in the world." *Schwarzenegger*, 374 F.3d at 801.

c) Specific Jurisdiction

***5** A person who is not subject to general jurisdiction may still be subject to jurisdiction in actions that arise from that person's specific forum-related activities. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993). The Ninth Circuit has established a three-part test for determining specific jurisdiction:

> (1) the defendant must purposefully avail himself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws;
>
> (2) the claim must arise out of or result from the defendant's forum-related activities; and
>
> (3) exercise of jurisdiction must be reasonable.

Id.; *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985). The party asserting jurisdiction bears the burden of satisfying the first two prongs of this test. *Schwarzenegger*, 374 F.3d at 802. If it does so, then the burden shifts to the party contesting jurisdiction to "present a compelling case" that the third prong of reasonableness has not been satisfied. *Id.*

The first element of the test for specific jurisdiction may be satisfied "by either purposeful availment or purposeful direction, which, though often clustered together under a shared umbrella, 'are, in fact, two distinct concepts.' " *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006)). Courts generally apply the purposeful availment analysis in connection with contract

claims and the purposeful direction analysis in tort actions. *Schwarzenegger*, 374 F.3d at 802. "Evidence of availment is typically action taking place in the forum that invokes the benefits and protections of the laws in the forum. Evidence of direction generally consists of action taking place outside the forum that is directed at the forum." *Pebble Beach*, 453 F.3d at 1155 (citation omitted).

Because Plaintiffs have alleged claims for breach of implied-in-fact contract and common count against DRL, the purposeful availment framework applies. "To have purposefully availed itself of the privilege of doing business in the forum, a defendant must have 'performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.' " *Boschetto*, 539 F.3d at 1016 (quoting *Sher v. Johnson,* 911 F.2d 1357, 1362 (9th Cir. 1990)). A court is to be "practical and pragmatic" and "not rigid and formalistic" in its analysis of whether an out-of-state defendant has satisfied this prong. *Id.*; *see also* *Burger King,* 471 U.S. at 479 ("[W]e have emphasized the need for a highly realistic approach that recognizes that a contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.") (internal quotation marks and citation omitted). "[T]he formation of a contract with a nonresident defendant is not, standing alone, sufficient to create jurisdiction." *Boschetto*, 539 F.3d at 1017. Further, "the fact that a contract envisions one party discharging his obligations in the forum state cannot, standing alone, justify the exercise of jurisdiction over another party to the contract." *Picot v. Weston*, 780 F.3d 1206, 1213 (9th Cir. 2015). However, this prong is satisfied when a defendant, in the context of its "interstate contractual obligations, ... reach[es] out beyond one state and create[s] continuing relationships and obligations with citizens of another state." *Burger King*, 471 U.S. at 473 (internal quotation marks and citation omitted). "[P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" are among the factors to be considered in this analysis. *Id.* at 479.

2. Application

a) General Jurisdiction

***6** Plaintiffs do not contend that DRL is headquartered or incorporated in California. Rather, they argue that this is an "exceptional case." Thus, they claim that general jurisdiction is appropriate because DRL has an office in Santa Cruz and that a significant percentage of its employees work in California. Dkt. 31 at 15-16.

These arguments are unpersuasive. Only five of DRL's 27 full-time employees work in California. Further, DRL does not own any property or have any bank accounts here. An "exceptional case" recognized in *Daimler* is *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-49 (1952). There, a mining company in the Philippines temporarily moved its principal place of business to Ohio during World War II because its mines had been

occupied by Japanese military forces. No similar facts have been alleged or shown here.

For these reasons, Plaintiffs have not established that there is general jurisdiction over DRL in California.

b) Specific Jurisdiction

(1) Horbaczewski

Although the Motion "only addresses specific jurisdiction over DRL," Horbaczewski "contends that the [FAC] is insufficient to establish specific jurisdiction over" him. Dkt. 17-1 at 15 n.1. Horbaczewski states that he "reserves the right to challenge specific jurisdiction once Plaintiffs' claims are better defined." *Id.* Because that jurisdictional issue is not presented, it is not ripe for adjudication, and is not addressed in this Order.

(2) DRL

(a) Purposeful Availment

Plaintiffs argue that there is personal jurisdiction over DRL because it "was formed pursuant to agreements negotiated ... almost exclusively in California." Dkt. 31 at 17. Plaintiffs contend that the breach of implied-in-fact contract and common counts claims arise from Horbaczewski's two meetings with Plaintiffs in January and March 2015. That is, when they allegedly reached the agreement to co-found and share equity in DRL. *Id.* Defendants respond that these contacts are irrelevant to the jurisdictional analysis because they occurred prior to April 2015, when DRL was incorporated. Thus, the core of the dispute is whether conduct by Horbaczewski prior to the incorporation of DRL can be attributed to it as part of assessing personal jurisdiction.

As a general matter, "the acts of the promoters," *i.e.,* those who "undertake to form a corporation, to procure for it the rights, instrumentalities, and capital to effectuate the purposes specified in its charter, and to establish it as fully able to do business ..., do not bind the corporation prior to its organization, for until it comes into existence it cannot be a principal." WITKINS CORPORATIONS §§ 60, 63 (2017). Therefore, a corporation is bound to pre-incorporation contracts formed by its promoter only if "it adopts or ratifies them, either by provisions in the articles or by acceptance of the contracts' benefits." *Id.* § 63. "The acts of ratification relate back to the time of the original activities and establish an agency relationship permitting the acts of the promoter to constitute, in effect, acts done by the corporation." *Rees v. Mosaic Techs., Inc.*, 742 F.2d 765, 769 (3d Cir. 1984) (citing 3 AM. JUR. 2D AGENCY § 160). "Agency relationships ... may be relevant to the existence of specific jurisdiction." *Daimler*, 134 S. Ct. at 759 n.13 (emphasis removed); *c.f. Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1024 (9th Cir. 2017) (concluding that *Daimler* "reserved judgment on the viability of agency theory as a general concept" and therefore "[a]ssuming ... that some standard of agency continues to be" pertinent to the jurisdictional analysis). *But see Epic Commc'ns, Inc. v. Richwave*

Tech., Inc., 179 Cal. App. 4th 314, 329-30 (2009) ("But local substantive law concerning liability does not control the jurisdictional analysis, which at bottom is concerned with 'fair play and substantial justice.' " (quoting *Int'l Shoe*, 326 U.S. at 316)). DRL has not provided any authority that would support the conclusion that the corporation-promoter relationship is excluded from the "agency relationships" relevant to the jurisdictional analysis.

***7** Under these principles, DRL is bound by contracts or parallel agreements by Horbaczewski prior to April 17, 2015, that it later adopted or ratified. The FAC alleges and Plaintiffs' declarations assert that DRL received the benefits of Plaintiffs' creative contributions and other services through the summer of 2015. They argue that this was pursuant to the alleged agreement between Horbaczewski and Plaintiffs. Thus, there is a sufficient showing for jurisdictional purposes that DRL is bound by this agreement because it ratified it by accepting its benefits. In this context, it has been sufficiently shown that Horbaczewski's contacts with California related to the formation of this alleged agreement, *i.e.*, his meetings in California with Plaintiffs, are imputed to DRL.

Plaintiffs also contend that there is personal jurisdiction over DRL because the alleged contract was "performed almost exclusively in California." Dkt. 31 at 17. Plaintiffs argue that they "kept providing, and Defendants kept requesting and accepting, these services long after" DRL was incorporated in April 2015. *Id.* Laub contends that Plaintiffs met with Horbaczewski in Los Angeles twice in June 2015. He adds that as part of these meetings Plaintiffs provided creative direction for a DRL promotional video shoot and discussed their ownership rights in the DRL. Laub Decl. ¶¶ 23-24. Kanes contends that in June and July 2015 he worked closely with a DRL employee in California and DRL's California-based advertising agency. Kanes Decl. ¶ 20. Horbaczewski responds that DRL did not have any employees in California at this time and their meetings in June 2015 did not include any discussion of Plaintiffs' alleged ownership stake in DRL. Horbaczewski Decl. ¶¶ 7, 17-18. However, "[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor," so that any such disputed statements advanced by Plaintiffs are accepted as true for the purposes of this analysis. *Schwarzenneger*, 374 F.3d at 800.

A review of the evidence and allegations as to DRL's conduct, including Horbaczewski's role and performance as promoter prior to its incorporation, shows that, for purposes of the Motion, Plaintiffs have shown that DRL "performed some type of affirmative conduct which allows or promotes the transaction of business" within California. *Boschetto*, 539 F.3d at 1016. This includes the showing that Horbaczewski acted as a representative of DRL when he met with Plaintiffs in California because it was later shown that his actions were taken on behalf of and for the benefit of DRL. These actions included several meetings during which the terms of the agreement were discussed, Plaintiffs requested verification of such terms, and Plaintiffs performed. Plaintiffs have submitted evidence that Kanes worked with a DRL employee in California in June and

July 2015 and provided further services to DRL pursuant to the agreement.

For these reasons, for purposes of the Motion, Plaintiffs have demonstrated that DRL purposefully availed itself of the "privilege of conducting activities in the forum and invoking the benefits and protections of its laws."

(b) Arise out of or Relate to Defendant's Forum-Related Activities

The FAC advances only two claims against DRL: breach of implied-in-fact contract and common counts. As stated above, DRL's alleged contacts in California relate to the formation of the alleged agreement and Plaintiffs' alleged work with DRL employees here. For these reasons, Plaintiffs have demonstrated that DRL's contacts with California arise out of or relate to DRL's forum-related activities.

(c) Reasonableness

***8** Once a plaintiff establishes the first two elements of the specific jurisdiction test, a presumption of reasonableness arises. The burden then shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477; *Menken v. Emm*, 503 F.3d 1050, 1057 (9th Cir. 2007). The determination of this issue requires the balancing of seven factors: (i) the extent of the defendant's purposeful availment of and presence in the forum; (ii) the burden on the defendant; (iii) conflicts of law between the forum state and the defendant's state; (iv) the forum's interest in adjudicating the dispute; (v) judicial efficiency; (vi) the plaintiff's interest in convenient and effective relief; and (vii) the existence of an alternative forum. *See* *Roth*, 942 F.2d at 623-25. In light of these factors and their application, there has been no showing by Defendants that the exercise of jurisdiction over DRL in California would be unreasonable.

* * *

For the foregoing reasons, because specific jurisdiction over DRL has been established, the Motion is **DENIED** as to this issue.

B. Fed. R. Civ. P. 12(b)(6)

1. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action[ ]." *Id.* at 545. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of

entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

2. Application

a) Statute of Limitations

(1) Legal Standards

"In a federal diversity action brought under state law, the state statute of limitations controls." *Bancorp Leasing & Fin. Corp. v. Augusta Aviation Corp.*, 813 F.2d 272, 274 (9th Cir. 1987). State law governs not only as to the length of the limitations period, but also as to when and how a claim accrues. *See Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 900 (9th Cir. 2006); *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002). Under California law, claims for breach of oral contract, implied contract, common counts and tortious interference are subject to a two-year statute of limitations. In California, a statute of limitations starts to run upon the accrual of a cause of action. Cal. Code Civ. Proc. § 312. "A cause of action accrues 'upon the occurrence of the last element essential to the cause of action.' " *Seelenfreund v. Terminix of N. Cal., Inc.*, 84 Cal. App. 3d 133, 136 (1978) (quoting *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 187 (1971)).

***9** Under California law, "[a]n exception to the general rule for defining the accrual of a cause of action ... is the discovery rule," which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008). "[A] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." *Grisham v. Philip Morris USA, Inc.*, 40 Cal. 4th 623, 638 (2007) (internal quotation marks and citation omitted). Courts regularly dismiss claims for failing to meet this pleading requirement on a motion to dismiss. *See, e.g., Plumlee v. Pfizer, Inc.*, 664 F. App'x

651, 652-53 (9th Cir. 2016); *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1051-52 (9th Cir. 2008). However, it is proper to do so only "when the running of the statute is apparent on the face of the complaint ... [and] it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (internal quotation marks and citation omitted).

(2) Application

Defendants contend that the breach of oral contract, breach of implied contract, common counts and tortious interference claims are time-barred. Defendants argue that it is apparent on the face of the FAC that, without the benefit of the discovery rule, each of these claims accrued more than two years before Plaintiffs brought this action and that the FAC fails sufficiently to plead facts setting forth the time and manner of discovery and Plaintiffs' inability to have done so earlier through the exercise of reasonable diligence.

The FAC alleges that an oral contract was breached in "November-December 2015" when Horbaczewski "fail[ed] to provide Plaintiffs with any ownership stake in the DRL." FAC ¶¶ 41, 54. The FAC does not specifically state what occurred in November or December 2015 that constituted the alleged breach, but generally alleges that "around November-December, Horbaczewski cut off all further contact with Plaintiffs." *Id.* ¶ 38.

Defendants argue that this claim accrued on April 17, 2015, when Horbaczewski allegedly breached the oral contract by incorporating DRL without providing Plaintiffs with any ownership shares. The FAC alleges that the implied contract was breached in "November-December 2015" when Horbaczewski "fail[ed] to provide Plaintiffs with any ownership stake in the DRL." FAC ¶¶ 41, 54. Plaintiffs argue that this claim accrued in "late 2015" because Plaintiffs continued to provide services to Defendants until then. The common counts claim is derivative of these breach of contract claims, and Plaintiffs argue that this claim also accrued in "late 2015" because Plaintiffs continued to provide services until then.

The FAC alleges that Horbaczewski interfered with Plaintiffs' prospective relationship with Blank Paige in February 2014 by convincing Plaintiffs to reject its offer for a television contract and falsely promising that Plaintiffs would benefit financially by retaining the television rights. Defendants argue that this claim accrued no later than April 17, 2015, when Horbaczewski incorporated the DRL without assigning any ownership interest to Plaintiffs. Plaintiffs do not advance any specific, contrary arguments, but contend the claim rests upon Horbaczewski's alleged fraudulent concealment that continued until Fall 2014.

Because it is not "beyond doubt that [Plaintiffs] can prove no set of facts that would establish the timeliness of the[se] claims," the Motion is not a means to determine that the claims are time-barred. *Von Saher*, 592 F.3d at 969. Therefore, the Motion is **DENIED**. Because the allegations in the FAC as to

the alleged accrual dates of each claim, time and manner of their discovery and Plaintiffs' exercise of reasonable diligence lack specificity, and in light of the need for Plaintiffs to file an amended complaint in this action for independent reasons, party and judicial efficiency will be served by requiring that, any such amended complaint shall set forth specific allegations as to the alleged timeliness of the claims that are being advanced.

b) Breach of Written, Oral and Implied Contracts: First, Second and Third Causes of Action

(1) Legal Standards

***10** "A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008), *as modified on denial of reh'g* (Feb. 5, 2008). "A written contract may be pleaded either by its terms — set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference — or by its legal effect," which also requires allegations as to "the substance of its relevant terms." *Haskins v. Symantec Corp.*, No. 13-CV-1834-JST, 2013 WL 6234610, at *10 (N.D. Cal. Dec. 2, 2013) (internal quotation marks and citation omitted). "[I]t is unnecessary for a plaintiff to allege the terms of the alleged contract with precision," but "the Court must be able generally to discern at least what material obligation of the contract the defendant allegedly breached." *Langan v. United Servs. Auto. Ass'n,* 69 F. Supp. 3d 965, 979 (N.D. Cal. Sept. 23, 2014).

Under Cal. Civ. Code § 1621, "[a]n implied contract is one, the existence and terms of which are manifested by conduct." Such a contract "must be founded upon an ascertained agreement of the parties to perform it," and such agreement "may be inferred from the conduct ... of the parties." *Friedman v. Friedman*, 20 Cal. App. 4th 876, 887 (1993).

(2) Application

The FAC advances claims for breach of written contract, oral contract and implied contract. The premise for these claims is that Horbaczewski and Plaintiffs agreed to be co-founders of the DRL with each to hold a one-third ownership of the DRL, and that Horbaczewski subsequently breached that agreement. To be sure, "we allow pleadings in the alternative—even if the alternatives are mutually exclusive." *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 (9th Cir. 2007). However, when a complaint sets forth alternative theories without distinguishing them or providing clear allegations as to the elements of each of them, whether each has been adequately alleged cannot be determined.

The FAC refers to a single written instrument, *i.e.*, the alleged business plan jointly drafted by the parties in February 2015. It refers only to one element of that instrument, *i.e.*, "Cap Structure: [ ] At this Time we are thinking 33% Dan [Kanes], 33% Justice [Laub], and 33%

Nick [Horbaczewski]. We want to give Matt [Mazzeo] the additional 1% for introducing us." FAC ¶ 21. The FAC alleges that a written contract was formed in March 2015, but does not specify whether this written instrument is its basis.

The claim for breach of implied contract is also without any specific allegations as to when it was allegedly formed. The FAC alleges that Horbaczewski offered to provide $250,000 in seed funding for the venture, but none of the claims specify whether this alleged commitment was included in the written, oral or implied agreements. The FAC further alleges that the written, oral, and implied contracts were breached in "November-December 2015" when "Horbaczewski ... fail[ed] to provide Plaintiffs with any ownership stake or shares in the DRL." FAC ¶¶ 41, 46, 54. These conclusory allegations fail to state a plausible basis for a breach seven months after Horbaczewski allegedly incorporated DRL in violation of the terms of the alleged agreements. Finally, the FAC fails to set forth any specific allegations as to the circumstances of the offer and acceptance of the alleged written and oral agreements. *See Cmty. Infusion Servs. Inc. v. Nat'l Org. for Rare Disorders Inc.*, No. 11-CV-719-JVS (MLGx), 2011 WL 2420224, at *4 (C.D. Cal. June 14, 2011).

For the foregoing reasons, the Motion is **GRANTED** without prejudice as to the claims for breach of written, oral and implied contract.

c) Common Counts for Services Rendered: Fourth Cause of Action

***11** "A common count is not a specific cause of action, however; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness." *McBride v. Boughton*, 123 Cal. App. 4th 379, 394 (2004). The elements of a common count claim are statement of indebtedness in a certain sum, consideration and nonpayment. *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 460 (1997). "California courts [have] held that when a common count is used as an alternative claim seeking the same recovery demanded in a specific cause of action based on the same facts, the common count may be dismissed if the cause of action is dismissed." *In re Apple In–App Purchase Litig.*, 855 F. Supp. 2d 1030, 1042 (N.D. Cal. 2012) (citing *McBride,* 123 Cal. App. 4th at 394-95).

The common counts claim is based on the allegations and theory of recovery set forth as to the breach of contract claims. Therefore, the common counts claim is a more generalized way of alleging these other claims. *See* 4 WITKIN CALIFORNIA PROCEDURE § 553 (5th ed. 2008) (common counts is a "series of generalized forms consisting in part of legal conclusions," and serves as generalized pleading of a theory of indebtedness and recovery); *Benson Elec. Co. v. Hale Bros. Assocs., Inc.*, 246 Cal. App. 2d 686, 697 (1966) (when seeking a monetary recovery for claims under an express contract, a plaintiff may plead common counts instead of breach, but the underlying cause of action is the same).

Defendants argue that this claim fails for the same reasons the breach of contract claims fail.

Plaintiffs respond that a claim for common counts is the same as a claim for *quantum meruit*, and that "[t]o recover in *quantum meruit*, a party need not prove the existence of a contract" and it must only "show the circumstances were such that the services were rendered under some understanding or expectation of both parties that compensation was therefore to be made." *E.J. Franks Constr., Inc. v. Sahota*, 226 Cal. App. 4th 1123, 1127-28 (2014) (emphasis added) (internal quotation marks and citation omitted).

Plaintiffs have not cited any authority to support the argument that its claim for common counts may be construed as a claim for *quantum meruit* or that the elements of the two claims are substantially similar. Nor have Plaintiffs cited any authority to support the suggestion that a claim for common counts can survive as a matter of law when an alleged co-founder of an entity seeks remuneration in the amount of his purported equity in that entity.

Because the FAC fails to allege a plausible claim for breach of written, oral and implied contract, it necessarily fails to allege a plausible claim for common counts. Therefore, the Motion is **GRANTED** without prejudice as to the common counts claim.

d) Fraud: Fifth Cause of Action

(1) Legal Standards

Fed. R. Civ. P. 9(b) requires that a plaintiff "state with particularity the circumstances constituting fraud or mistake." "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* Rule 9(b) requires a plaintiff to allege specific details about the fraud "including 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 v. KPMG LLP,* 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted). Allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* (internal quotation marks omitted); *see also Kearns v. Ford Motor Co.,* 567 F.3d 1120, 1126 (9th Cir. 2009) (a plaintiff must "articulate the who, what, when, where, and how of the misconduct alleged").

***12** The elements of fraud are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996).To allege fraud by omission or concealment, any such omission "must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006).

(2) Application

The FAC alleges that that Plaintiffs and Horbaczewski "jointly drafted" a "business

plan" in February 2015 that included an agreement which stated: "Cap Structure: [ ] At this Time we are thinking 33% Dan [Kanes], 33% Justice [Laub], and 33% Nick [Horbaczewski]. We want to give Matt [Mazzeo] the additional 1% for introducing us." FAC ¶ 21. The FAC alleges that Plaintiffs and Horbaczewski met on March 11-12, 2015, and that "Horbaczewski said he would invest $250,000 as seed money, serve as CEO, and work on business development" and "refused [Kanes's offer to invest $250,000] and insisted that Plaintiffs had already done their part by bringing Horbaczewski into the venture and providing all of their ideas." *Id.* ¶ 22.

The FAC further alleges that during "meetings and phone calls in January-March 2015 ... [Plaintiffs and Horbaczewski] orally agreed to be partners in and co-founders of the DRL, with each owning a third of the company." *Id.* ¶ 20. The FAC also alleges that in "April-June 2015, including at 2-3 more meetings in Los Angeles, California ... Horbaczewski repeatedly ... claim[ed] that [formal documentation of Plaintiffs' ownership] could not be done until the company was formed and took in outside investment." *Id.* ¶ 35. The FAC further alleges that "[u]nbeknownst to [Plaintiffs] at that time, Horbaczewski never had any intent of performing his agreement with and promises to them" because "he intended to steal Plaintiffs' ideas and then the entire DRL for himself." *Id.* ¶ 23. These allegations are sufficient to allege the "who, what, when, where and how" of the alleged fraudulent misrepresentations. The general allegation as to Horbaczewski's state of mind is also sufficient.

The FAC also adequately states a claim of fraudulent concealment. It alleges that Horbaczewski fraudulently concealed "his intent to steal Plaintiffs' ideas and the DRL," as well as the incorporation of DRL in April 2015, during his communications with Plaintiffs. To be actionable any such omission "must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." *Daugherty*, 144 Cal. App. 4th at 835. The allegation that Horbaczewski did not disclose that he had incorporated DRL, and owned it, is sufficient to state a claim that he previously made contrary statements to Plaintiffs. Horbaczewski concedes that the incorporation of DRL would be a "material fact that Mr. Horbaczewski was obligated to disclose if there was an agreement or promise to provide Plaintiffs with a one-third ownership interest." Dkt. 17-1 at 27. The FAC includes allegations that are sufficient as to whether an agreement had been formed.

For these reasons, the Motion is **DENIED** as to the claim for fraud.

e) Breach of Fiduciary Duty: Sixth Cause of Action

(1) Legal Standards

"The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach." *Mosier v. S. Cal. Physicians Ins. Exch.*, 63 Cal. App. 4th 1022, 1044 (1998).

For a fiduciary duty to exist, a person "must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008). "Examples of such relationships are a joint venture, a partnership, or an agency." *Id.*

(2) Application

***13** The FAC does not allege that Horbaczewski knowingly undertook to act on behalf and for the benefit of Plaintiffs. Rather, it alleges that he had the intent to deceive and manipulate Plaintiffs from the outset of their relationship. Thus, the remaining question is whether the FAC sufficiently alleges a relationship between Horbaczewski and Plaintiffs from which a fiduciary duty arose.

The FAC alleges that "Horbaczewski was partners with [Plaintiffs] in the DRL." FAC ¶ 73. Under California law, "the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership." Cal. Civ. Code § 16202(a). The FAC alleges that Plaintiffs and Horbaczewski were to operate as co-owners of DRL, a business that would operate for profit. Defendants' argument that the FAC's allegations that Plaintiffs "*would* be co-founders and equal partners" preclude the conclusion that the FAC alleged an existing partnership is unpersuasive.

For these reasons, the Motion is **DENIED** as to the claim for breach of fiduciary duty.

f) Intentional Interference with Prospective Economic Advantage: Seventh Cause of Action

(1) Legal Standards

The elements of a claim for intentional interference with prospective economic advantage are as follows:

> (1) [a]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Swipe & Bite, Inc. v. Chow, 147 F. Supp. 3d 924, 935 (N.D. Cal. 2015) (citing *Youst v. Longo*, 43 Cal. 3d 64, 71 n.6 (1987)). Such a claim also requires an independently wrongful act outside of merely interfering with a contract. *See* *Kor. Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1157-58 (2003). Unlike the tort of interference with contractual relations, the existence of a valid

contract need not be alleged to state a claim for interference with prospective economic advantage. *Id.*

(2) Application

The FAC alleges that Horbaczewski interfered with Plaintiffs' prospective relationship with Blank Paige, a media production company, to produce a drone racing program. FAC ¶¶ 24, 77-83. Defendants argue that the FAC fails to state a claim for intentional interference with prospective economic advantage. Thus, they argue that it does not allege that Horbaczewski contacted Blank Paige, but instead that he convinced Plaintiffs to reject Blank Paige's offer by telling Plaintiffs that they would do better financially with a one-third ownership in DRL. The parties agree that the alleged fraud discussed above is the alleged "independently wrongful act" asserted for this claim. Because the FAC adequately states a claim for fraud, it also adequately states a claim for intentional interference with prospective economic advantage.

For these reasons, the Motion is **DENIED** as to the claim for intentional interference with prospective economic advantage.

C. *Colorado River* Abstention

1. Legal Standards

A federal court may stay or dismiss an action when a parallel state court proceeding is pending that involves the same parties and presents the same core, legal issues. *See* *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976). This doctrine is premised on the need for "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 817. "To decide whether a particular case presents the exceptional circumstances that warrant a *Colorado River* stay or dismissal, the district court must carefully consider 'both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise.' " *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978 (9th Cir. 2011) (quoting *Colo. River*, 424 U.S. at 818).

***14** The Ninth Circuit has "recognized eight factors for assessing the appropriateness of a *Colorado River* stay or dismissal: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court." *Id.* at 978-79.

2. Application

a) Inconvenience of Federal Forum

This factor concerns whether the inconvenience of the federal forum is so great that abstention is warranted, not whether the federal forum is a better or more convenient one. *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368 (9th Cir. 1990). Defendants argue that the New York forum is more convenient because DRL is headquartered there, and Horbaczewski and all DRL employees whose knowledge is relevant to this dispute reside in New York. Dkt. 17-1 at 19. Plaintiffs reside in California and contend that there are DRL employees here who likely will be witnesses in this action. Dkt. 31 at 22. Plaintiffs also contend that Blank Paige is located here and that its employees will likely be witnesses in this action. There are witnesses in both locations. Therefore, it has not been shown that one forum is materially more convenient than the other. Thus, this factor is neutral.

b) Piecemeal Litigation

"Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *R.R. St.*, 656 F.3d at 979 (quoting *Am. Int'l Underwriters, (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988)). Both this action and those pending in New York are based on the same underlying factual allegations. If these actions were to proceed simultaneously, both courts would likely address the same or very similar issues. This would result in an unnecessary and inappropriate use of judicial resources that could also lead to inconsistent results. However, Justice Scarpulla has stayed the New York Actions to permit this action to proceed. This will prevent the foregoing risks. For these reasons, this factor weighs slightly against a stay.

c) Order of Jurisdiction

This factor "must be applied in a pragmatic, flexible manner, so that priority is not measured exclusively in terms of which complaint was filed first, but rather in terms of how much progress was actually made in the state and federal actions." *Am. Int'l Underwriters*, 843 F.2d at 1258. When "cases ha[ve] progressed equivalent amounts" and "neither court had resolved any foundational legal claims," "this factor does not weigh in favor of abstention." *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 843 (9th Cir. 2017).

Laub commenced this action on July 10, 2017, and Defendants started the proceeding in New York on July 21, 2017. On July 24, 2017, Laub served the Complaint and Summons on Defendants. On September 27, 2017, Kanes joined Laub as a plaintiff in the FAC, and Defendants then brought an action against Kanes in New York. Plaintiffs contend that little progress has been made in the New York Actions and that discovery in those actions was "tabled" until mid-January 2018. Dkt. 31 at 23. Discovery in this action has been ongoing since October 2017. The parties have exchanged initial disclosures, written discovery and certain documents. *Id.* Defendants respond that the only discovery that has occurred in this action is as to jurisdiction. Defendants argue that the New York Actions are more advanced

than this one because a motion to dismiss was argued in mid-January. Dkt. 33 at 6.

***15** There is no basis to conclude that any of the actions is more advanced. Accordingly, this factor is neutral.

d) Rule of Decision on the Merits

All of the claims raised in this action and the New York Actions are brought under state law. The Parties agree that this factor is neutral.

e) Adequacy of State Court Proceedings

"A district court may not stay or dismiss the federal proceeding if the state proceeding cannot adequately protect the rights of the federal litigants. For example, if there is a possibility that the parties will not be able to raise their claims in the state proceeding, a stay or dismissal is inappropriate." *R.R. St.*, 656 F.3d at 981. The Ninth Circuit has recently clarified that this factor focuses on whether "the state court might be unable to enforce federal rights." *Seneca*, 862 F.3d at 845. There are no federal claims in this action. Further, to the extent that this factor involves an assessment of the adequacy of a state proceeding to protect the state law claims, Plaintiffs do not contend that they would be unable to bring the claims brought here in the New York Actions. The Supreme Court of New York is an adequate forum for the resolution of the claims advanced in this action. Accordingly, this factor is neutral.

f) Forum Shopping

The question is whether forum shopping is "readily apparent" from the federal plaintiff's actions. *R.R. St.*, 656 F.3d at 981. "[F]orum shopping weighs in favor of a stay when the party opposing the stay seeks to avoid adverse rulings made by the state court or to gain a tactical advantage from the application of federal court rules." *Travelers*, 914 F.2d at 1371. Defendants argue that Plaintiffs' conduct is suggestive of forum shopping, *i.e.*, filing suit shortly after issuing a demand letter, withholding information about filing of this action during settlement discussions and initiating service only after the first suit was filed in New York several weeks later. However, "[i]t typically does not constitute forum shopping where a party 'acted within his rights in filing a suit in the forum of his choice,' even where '[t]he chronology of events suggests that both parties took a somewhat opportunistic approach to th[e] litigation.' " *Seneca*, 862 F.3d at 846 (first quoting *Travelers*, 914 F.2d at 1371; and then quoting *R.R. St.*, 656 F.3d at 981).

There is no showing that Plaintiffs have sought any tactical advantage by filing this action. Although Defendants were not served with the Complaint and Summons until after the New York Actions started, this action was filed first. Accordingly, this factor is neutral.

g) Parallel Suits

"The final factor ... is whether the state court proceeding sufficiently parallels the federal proceeding." *R.R. St.*, 656 F.3d at 982. "Considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' may counsel granting a stay when there are concurrent state proceedings involving the same matter as in the federal district court." *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912 (9th Cir. 1993) (citing *Colo. River*, 424 U.S. at 817). Exact parallelism is not necessary; it is enough if two proceedings are "substantially similar." *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).

***16** This action and the New York Actions are substantially similar. As noted, all involve allegations as to the formation and ownership of DRL. The resolution of the issues presented in the New York Actions will likely have a substantial effect on the issues presented here. Accordingly, this factor weighs in favor of a stay.

* * *

"To determine whether a stay is warranted, the relevant factors must be balanced, 'with the balance heavily weighted in favor of the exercise of jurisdiction.' " *Travelers*, 914 F.2d at 1372 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)). The Ninth Circuit has explained that "in nearly every instance of concurrent state and federal suits where state law provides the rule of decision," the following factors justify abstention: "the parallel proceedings will involve piecemeal disposition of the issues, [ ] state law provides the rule of decision, and [ ] the state proceeding is better suited to promote resolution of all the issues among the parties." *Seneca*, 862 F.3d at 847. Such concerns "do not create the exceptional circumstances required for *Colorado River* deference because they are present to this degree in many instances of parallel federal-state litigation." *Id.* (quoting *Travelers*, 914 F.2d at 1372).

The application of these principles shows that this action and the New York Actions are "parallel disputes occurring in multiple for a [ ] concerning substantially the same issues" and "[n]othing about this case is 'exceptional' so as to warrant disregarding the 'virtually unflagging obligation' of a federal court to exercise its jurisdiction." *Id.* Therefore, a balancing of all of the relevant factors shows that a stay of this action is not warranted. Consequently, the Motion is **DENIED** as to the request for a stay under *Colorado River*.

IV. Conclusion

For the reasons stated in the Order, the Motion is **GRANTED IN PART**. The request to dismiss DRL for lack of personal jurisdiction is **DENIED**. The request to dismiss certain claims as time-barred is **DENIED**. The request to dismiss for failure to state a claim is **GRANTED**, without prejudice, as to the claims for breach of written contract, breach of oral contract, breach of implied contract and common counts, but **DENIED** as to the claims for fraud, breach of fiduciary duty and intentional interference with prospective economic advantage. The request to stay the action under *Colorado River* is **DENIED**.

Plaintiffs shall file any amended complaint no later than March 30, 2018.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 5880950