UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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| Case No. | SACV 08-00668-JVS (RNBx) | Date | November 2, 2009 |
| Title | U.S.A. v. Comco Management Corp., et al. | | |

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| Present: The Honorable | James V. Selna |

| Karla J. Tunis | Sharon Seffens |
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| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
| Andrew Pribe, AUSA<br>Daniel Layton, AUSA | Neil Goteiner<br>Deepak Gupta |

**Proceedings:** **Defendants' Motion to Dismiss (Fld 8-24-09)**

**Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court DENIES the defendants motion and rules in accordance with the tentative ruling as follows:**

Defendants Comco Management Corp., Concord Funding Co., LLC, Metco Management Corp., Monex Credit Co., Monex Deposit Co., Newport Service Corp., and PCCE, Inc. (collectively, "Defendants") move to dismiss the Plaintiff United States of America's ("Plaintiff") Fourth Count of the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6). In the alternative, Defendants move for a more definite statement under Rule 12(e), or to strike portions of the Fourth Count pursuant to Rule 12(f). Plaintiff opposes.

I. Legal Standard

A. Motion to Dismiss

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009).

In resolving a 12(b)(6) motion, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Nor must the Court "accept as true a legal conclusion couched as a factual allegation." Id.

(quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

A plaintiff alleging fraud must plead "with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The pleadings must "be specific enough to give defendants notice of the particular misconduct." Bly-Magee v. Calif., 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)). This requires the plaintiff to plead the "'who, what, when, where, and how' of the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003). However, assertions of fraudulent intent or state of mind may be alleged generally. Fed. R. Civ. P. 9(b).

B. Motion for a More Definite Statement

Under Rule 12(e), if a complaint is so vague or ambiguous that the opposing party cannot reasonably frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. Fed. R. Civ. P. 12(e). "A motion for a more definite statement is used to attack unintelligibility, not mere lack of detail, and a complaint is sufficient if it is specific enough to apprise the defendant of the substance of the claim asserted against him or her." San Bernardino Pub. Employees Ass'n v. Stout, 946 F. Supp. 790, 804 (C.D. Cal. 1996).

C. Motion to Strike

Under Rule 12(f), a party may move to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). The grounds for a motion to strike must appear on the face of the pleading under attack, or from matters which the Court may take judicial notice. SEC v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995). The essential function of a 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993).

II. Discussion

Plaintiff's Fourth Count alleges that Defendants, referred to collectively in the Complaint as the "New Monex Entities,"[1] were the fraudulent conveyees of the entire business enterprise of Monex International. (Compl. ¶ 78.) Plaintiff contends that Monex International conveyed all its assets, employees, work space, phone numbers, and goodwill to the New Monex Entities with the intent to prevent Plaintiff from reaching its assets to satisfy outstanding tax liabilities. (Compl. ¶ 79.) Plaintiff also alleges that the New Monex Entities did not pay reasonably equivalent value for the conveyance. (Compl. ¶¶ 80-81.)

Defendants contend that Plaintiff has failed to adequately state a claim under either Rule 8 or Rule 9, because it has failed to identify "the who, what, when, and how" of the alleged fraudulent conveyance.[2] Defendants also seek a more definite statement, or to strike portions of the Complaint. The Court will consider each argument in turn.

A. The Who

Under Rule 9(b), a plaintiff may not simply lump together multiple defendants without specifying the role of each defendant in a fraud. Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). "The plaintiff who pleads fraud must 'reasonably notify the defendants of their purported role in the scheme.'" Vicom, Inc. v. Harbridge Merchant Servs., Inc., 20 F.3d 771, 778 (7th Cir. 1994); accord Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.1989). However, there is no requirement that the plaintiff plead that each defendant participated in each step of the scheme. Swartz, 476 F.3d at 764. It is sufficient if the pleadings put each defendant on notice of its alleged role in the scheme. Id. at 764-65.

Plaintiff does not make separate allegations against each of the individual Defendants. Rather, Plaintiff's Complaint alleges that the New Monex Entities "are the alter egos of and

[1] "New Monex Entities," as defined in the Complaint, does not refer to PCCE, Inc., the alleged successor of Monex International. (Compl. ¶ 14.) Although PCCE joined this motion because it felt that the Fourth Count could be read to include a claim against it, it is apparent on the face of that Count that Plaintiff seeks only judgment against the New Monex Entities, and not against PCCE. (See id. ¶¶ 78, 82.)

[2] Plaintiff alleges both actual fraud and constructive fraud in its Complaint. (See Compl. 79-81.) The actual fraud claim must meet the particularity requirements of Rule 9, while the constructive fraud claim need only satisfy the liberal Rule 8 standards. Because the Court finds that Plaintiff's Complaint meets the stricter Rule 9 requirements, the Court does not consider the Rule 8 question.

constitute a single enterprise with Monex International." (Compl. ¶ 26.) It backs up this assertion with allegations that all the New Monex Entities share the same address, (Id. ¶¶ 4-11, 61), have the same owner, (Id. ¶¶ 27, 56), have many of the same employees, (Id. ¶¶ 57, 59), and are held out to the public as "affiliate companies," or the "Monex group of companies." (Id. ¶¶ 64, 66, 70.)

Plaintiff also alleges that each of the New Monex Entities inherited some operational aspect of Monex International. Monex International was "engaged in the leveraged sales of precious metals to the general public." (Id. ¶ 46.) Monex Deposit Company ("MDC") engages in retail sales of precious metals, with Comco Management Company ("CMC") as a general partner. (Id. ¶¶ 49, 54.) Monex Credit Company ("MCC") provides financing to MDC customers, with Metco Management Company ("MMC") as a general partner. (Id. ¶¶ 50, 55.) Newport Service Company ("NSC") provides the other New Monex Entities with "administrative, data processing, personnel, accounting, legal, purchasing and other operational services." (Id. ¶ 51.) Concord Funding Company ("CFC") "is integrally tied . . . through various agreements" with other New Monex Entities. (Id. ¶ 52, 53.)

Defendants contend that, by lumping them all together with the phrase "New Monex Entities," and alleging fraudulent conveyance against them as a whole, Plaintiff has not met the pleading requirements of Rule 9. They argue that the Complaint is unclear as to which claims apply to which Defendants.

The Court disagrees. The purpose of Rule 9 is to provide adequate notice to Defendants of the factual basis for the fraud claims against them. Moore, 885 F.2d at 540. Rule 9 does not require perfect factual pleading, Walling v. Beverly Enterprises, 476 F2d 393, 397 (9th Cir. 1973), especially when the plaintiff cannot be expected to know relevant facts within the opposing parties' knowledge. Glen Holly Entertainment, Inc. v. Tektronic, Inc., 100 F. Supp. 2d 1086, 1095 (C.D. Cal. 1999).

Here, the Complaint is quite specific as to each Defendant's role in the allegedly fraudulent scheme. MDC took over the retail sales for Monex International. MCC took over customer financing. NSC took care of all the administrative work. CMC and MMC are the general partners of MDC and MCC. CFC is controlled by MDC and MCC, and has integral business relationships with the rest. According to Plaintiff's allegations, all the Defendants received some part of the Monex International's business enterprise, without paying full compensation and with the fraudulent purpose of evading tax liabilities. The Court finds that

each of the above Defendants has adequate notice of the claim against it.[3]

The Complaint is sufficient on the separate ground that Plaintiff has adequately alleged facts, taken as true, to support a finding that the Defendants were not actually separate at all. To prove alter ego, Plaintiff would have to show (1) that the Defendants have not treated the New Monex Entities as separate identities, (2) that recognition of the separateness of the entities would result in injustice, and (3) that there was fraudulent intent behind the organization of entities. Operating Engineers Pension Trust v. Reed, 726 F.2d 513, 515 (9th Cir. 1984). The facts alleged in the Complaint, taken as true, show that the New Monex Entities are in fact a single defendant, with common ownership and common place of business, comprising all the operational aspects of the previous organization. Recognition of separateness would allow this single organization to unjustly escape tax liability. Further, it is sufficiently alleged that the New Monex Entities were organized as such to precisely avoid this tax liability.

Therefore, Defendants' objections to "lumping" are inapplicable because Plaintiff has adequately alleged that they should not be treated as separate defendants.[4]

The Court also finds that a more definite statement is not warranted here. The Defendants have adequate notice of the substance of the claim against them.

B. The What

[3] Indeed, as Plaintiff has pointed out, Defendants have summarized the claim in one sentence: "[Plaintiff] is alleging that the old Monex International's business of leveraged sale of precious metals was transferred to a new set of entities and therefore the new entities should pay Monex International's old tax liability." (Mot. Br. 3.)

[4] Defendants' cited cases are unavailing on this point. In Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948 (S.D. Cal. 1996), the complaint was ambiguous as to which claims were asserted against which defendants despite-not because of-an alter-ego allegation applying to some of the defendants. Id. at 960-61. In Arikat v. JP Morgan Chase & Co., 430 F. Supp. 2d 1013 (N.D. Cal. 2006), the court dismissed the complaint on the ground that the plaintiff had not sufficient alleged a conspiracy. Id. at 1021 n.11. The Complaint here makes a sufficient allegation that the New Monex Entities are not separate entities and, even then, specifies with sufficient particularity the role of each of the Defendants within the alleged fraudulent scheme.

Defendants allege that Plaintiff has not sufficiently alleged exactly what was fraudulently transferred. They argue that the "Monex Enterprise" is too vaguely defined to satisfy Rule 9. They also argue that Monex International employees and the Monex location cannot constitute property under the California Uniform Fraudulent Transfer Act, Cal. Civ. Code § 3439 et seq., ("CUFTA").

Under CUFTA, "property" is "anything that may the subject of ownership." Cal. Civ. Code § 3439.01(h). In attempting to define the scope of "property" as it is used in CUFTA, the Court may look to case law on the Bankruptcy Code. In re AFI Holding, Inc., 525 F.3d 700, 703 (9th Cir. 2008) ("Where state statutes are similar to the Bankruptcy Code, cases analyzing the Bankruptcy Code provisions are persuasive authority.") The Ninth Circuit has found that "California's fraudulent transfer statutes are similar in form and substance to the Bankruptcy Code's fraudulent transfer provisions." Id. (quoting Wyle v. C.H. Rider & Family (In re United Energy Corp.), 944 F.2d 589, 594 (9th Cir. 1991)).

Several Circuits, including the Ninth, have held that the good will of an ongoing business is property that can be recovered by a trustee in bankruptcy if fraudulently conveyed. For example, in Stoumbos v. Kilimnik, 988 F.2d 949 (9th Cir. 1993), the Ninth Circuit held that the good will of a company has value separate from its tangible assets, and this value could be the subject of a fraudulent transfer claim. Id. at 963-64. In Stoumbos, the president and chairman of AAM, in a bid to thwart creditors, incorporated a second company, AAM Aerospace, and began to transition intangible assets to Aerospace:

> Aerospace took over AAM's facilities, and all AAM's employees became Aerospace employees. AAM's phone lines were moved to the small office that had been rented in July. A temporary employee was hired to answer the phone; she would take messages from AAM customers and deliver them to what was now Aerospace. Aerospace would then take the customer orders.

Id. at 953. AAM then proceeded into bankruptcy. Id. The Ninth Circuit held that AAM's facilities, employees, and customers had value which was recoverable by the bankruptcy trustee. Id. at 963-64.

Similarly, in In re Watman, 458 F.3d 26 (1st Cir. 2006), the First Circuit held that the intangible assets of an ongoing enterprise, such as "[office] space, [customer] records, employees, and good will" are property that can be fraudulently transferred. Id. at 33. In Watman, the defendant, under pressure from a creditor, resigned from his solo dental practice, Children's Dental, terminated his office lease, and filed for bankruptcy. Id. at 29. However, the defendant continued the dental practice under his own name, using the same office, same

furniture and equipment, and hired the same employees on the same terms. Id. After a week, he incorporated under the name Lowell Dentistry. Id. Most of his former patients became customers of the new practice. Id. at 30.

The First Circuit held that the assets that had been transferred had actual value–indeed, the defendant "transferred these assets . . . precisely because they had value." Id. at 33. The court noted that

> If [defendant] had walked away from Childrens Dental, he would have had to expend resources to find a new location for his practice, buy new equipment, hire new employees, find new patients or encourage his old patients to follow him despite changes in location and employees, and develop new patient records or enter into some arrangement to get the old records. Instead, [he] simply transferred by possession these assets of Childrens Dental to Lowell Dentistry.

Id.

The Court thinks that Stoumbos and Watman are on point in this case. Plaintiff is alleging that Monex International transferred the "Monex Enterprise," the going concern which consisted of the Monex employees, location, phone numbers, and good will. These assets have value, as recognized by the Stoumbos and Watman courts, and can be the subject of a fraudulent conveyance action. If they did not have any value, Defendants would have hired and trained new employees, gotten new telephone lines, moved into a new space, and would not advertise its affiliation with Monex International. Plaintiff's Complaint states a valid cause of action for the fraudulent conveyance of these intangible assets.

Defendants contend that employees cannot be the subject of a fraudulent conveyance action because people cannot be "owned." A trained, experienced, and familiar workforce can be a valuable asset to a business, as recognized in Stoumbos and Watman. However, employees are not necessarily assets that can be transferred separate from the business. See In re 3dfx Interactive, Inc., 389 B.R. 842, 880-81 (N.D. Cal. 2008). Where one company terminates its employees and sells its assets, and the purchaser proceeds to hire many of the terminated employees, courts are generally hesitant to find that the employees are assets or embodied the good will of the former employer. See id. at 881; Orthotec, LLC v. REO Spineline, LLC, 438 F.Supp.2d 1122, 1129-30 (C.D. Cal. 2006); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 365 (9th Cir. 1997).

3dfx, Orthotec, and Atchinson are not applicable here, however. Taking Plaintiff's allegations as true and construing them in a favorable light, Plaintiff is alleging the transfer of

employees as a part of the going concern. There is nothing to indicate that the Monex International employees were fired and later hired by the New Monex Entities. Thus, the Court finds that Plaintiff has adequately stated a claim for the fraudulent transfer of Monex International's workforce.

In addition, to the extent that Defendants request a more definite statement, the Court denies this relief on the grounds that they are sufficiently apprised of that which Plaintiff is alleging was trasferred.

C. The When

Defendants also allege that the Complaint does not state the times and dates of the alleged fraudulent transfers with sufficient particularity. The Court does not agree. The Complaint alleges the following:

> Beginning in the late 1980s and continuing through the early 1990s, the Principals of the Monex Enterprise transferred the operation of the Monex Enterprise from Monex International to the New Monex Entities in an effort to avoid exposure of the proceeds from the Monex Enterprise to outstanding federal tax liabilities.

(Compl. ¶ 47.) The Complaint goes on to explain that MDC and MCC were formed in 1987, and gives an example of how Monex International employees were shifted over the course of several years to several of the New Monex Entities:

> 57. Beginning in 1988, employees of Monex International were shifted to Newport Service Corporation.
>
> 58. By 1990, Monex International had no employees.
>
> 59. During and around 1991 many of the employees were shifted from Newport Service Corporation to Monex Deposit Corporation.

(Id. ¶¶ 57-59.)

The Complaint explains how the New Monex Entities all use the same office space and telephone number as Monex International. (Id. ¶¶ 60-61.) And to support the allegation that good will was transferred, the Complaint provides specific dates where the New Monex Entities held themselves out as carrying on the same business of Monex International. (Id. ¶¶ 65-70.)

Rule 9(b) does not require that Plaintiff list the specific date and time of each alleged transaction, especially as Defendants are the only ones likely to have access to this information at this time. See Glen Holly, 100 F. Supp. 2d at 1095. The Complaint is only required to give Defendants sufficient notice of the allegations against them such that they can meaningfully respond. Moore, 885 F.2d at 540. The Court finds that the Complaint meets this burden.

D. The How

Finally, Defendants make a cursory assertion that the Complaint fails to allege "how" the fraudulent transfers took place. Defendants argue that the Complaint does not specify whether the New Monex Entities are the first transferees or subsequent transferees. The Court finds this argument without merit. As explained above, the Complaint goes through in some detail how the transfer of the Monex business enterprise from Monex International to the New Monex Entities was carried out.

As for the failure to distinguish between first and subsequent transferees, the Court finds it unnecessary at this point for Plaintiff to plead such a distinction. CUFTA provides the same remedy against first transferees as against subsequent transferees who did not take assets in good faith. Cal. Civ. Code § 3439.08(b). It is clear that Plaintiff is alleging that none of the New Monex Entities took in good faith. (Compl. ¶ 79.) Moreover, to the extent that Plaintiff is alleging that the New Monex Entities are actually a single entity under an alter ego theory, the Complaint makes clear that Plaintiff is alleging that the New Monex Entities are the first transferees, or not transferees at all but simply part of Monex International.

E. Recovery Under CUFTA

Defendants claim that Plaintiff's request for relief goes beyond what is allowed under CUFTA, because it requests the "proceeds" from the transferred assets.

CUFTA allows creditors to recover "the value of the asset [fraudulently] transferred, . . . or the amount necessary to satisfy the creditor's claim, whichever is less." Cal. Civ. Code § 3439.08(b). The creditor can attach "the asset transferred or its proceeds." Id. § 3439.07(a)(2). "If the judgment . . . is based upon the value of the asset transferred, the judgment shall be for the amount equal to the value of the asset at the time of transfer, subject to adjustment as the equities may require." Id. § 3439.08(c).

Thus, CUFTA makes clear that there is no problem with Plaintiff's request to attach the assets and proceeds. If Plaintiff is unable to satisfy its judgment with the assets, which may be the case here given their intangible nature, they may seek the proceeds of those assets.

Defendants also argue that recovery under CUFTA is improper as a matter of law because Plaintiff does not distinguish between the individual Defendants comprising the New Monex Entities.

Defendants cite Forum Ins. Co. v. Devere Ltd., 151 F. Supp. 2d 1145 (C.D. Cal. 2001), for the proposition there is no remedy under CUFTA for aiders and abetters of a fraudulent transfer who did not actually receive assets themselves. Id. at 1150. That proposition is entirely inapplicable to the Complaint here because Plaintiff clearly alleges that the New Monex Entities received assets.

Defendants also cite Elliot v. Glushon, 390 F.2d 514 (9th Cir. 1967), for support. However, Elliot's holding is exactly the same as Forum Ins.'s, only this time applied to the Bankruptcy Code–that a creditor cannot recover from a party that did not receive property. Id. at 517. Again, that is inapplicable here because Plaintiff alleges that Defendants did receive property.

In fact, Ninth Circuit precedent suggests a long-standing rule that joint and severally liability is appropriate "where parties acting in concert have received property of a bankrupt and have intermixed that property with their own" making individual identification impossible. Jackson v. Star Sprinkler Corp. of Fla., 575 F.2d 1223, 1235 (9th Cir. 1978); Brainard v. Cohn, 8 F.2d 13, 15 (9th Cir. 1925). The Court finds that the same principles apply here, where Plaintiff has alleged a tight-knit single entity, making it impossible to determine which assets were transferred to which Defendant, at least at the pleading stage.

Accordingly, the Court finds that Plaintiff has sufficiently stated a claim of fraudulent transfer under CUFTA.

## III. Conclusion

For the foregoing reasons, Defendants' motion is DENIED.

IT IS SO ORDERED.

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