

EXHIBIT 11

2009 WL 10673374

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

Joe JUNEAU, an individual, Plaintiff,

v.

Phillip A. KENNER, et al., Defendants

No. CV 08–08284 CBM(PJWx)

|
Signed 05/14/2009**Attorneys and Law Firms**[Becky Hsiao](#), [Carol A. Dwyer](#), [Michael L. Meeks](#), Buchalter Nemer LLP, Irvine, CA, for Plaintiff.[Morris Steven Getzels](#), Morris S. Getzels Law Offices, Tarzana, CA, [Kevin K. Fitzgerald](#), Jones Bell Abbott Fleming and Fitzgerald LLP, Los Angeles, CA, for Defendants.ORDER GRANTING MOTION TO DISMISS
THE COMPLAINT AS TO DEFENDANT
ECSEER HOLDING CORPORATION[CONSUELO B. MARSHALL](#), UNITED STATES
DISTRICT JUDGE

*1 The matter before the Court is Defendant Ecser Holding Corporation's ("Ecser") motion to dismiss the first amended complaint for lack of personal jurisdiction, improper venue, and failure to state a claim for which relief can be granted pursuant to [Federal Rules of Civil Procedure 12\(b\)\(2\)](#), [12\(b\)\(3\)](#), and [12\(b\)\(6\)](#).

Upon consideration of the papers submitted and arguments presented, the Court GRANTS the motion pursuant to [Rule 12\(b\)\(3\)](#).

JURISDICTION

This Court has jurisdiction pursuant to [28 U.S.C. § 1332](#).

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Joe Juneau brings this action against his financial advisor Phillip Kenner and various business entities (including Ecser) alleging a series of "investment scams." Ecser is a corporation formed in Delaware with its principal place of business in New York. Plaintiff alleges that Defendants Kenner and Standard Advisors¹ recommended that Plaintiff invest in Ecser and represented that Ecser had "valuable patents and was entering into highly profitable agreements involving the use of recycled rubber for specific purposes" and represented that an investment in Ecser would result in "substantial profit within two to three years." Complaint, ¶ 42. Additionally, Plaintiff alleges that Kenner made these representations at the direction of Ecser and that Kenner, Ecser and Gutman (Ecser's principal) worked together to conceal the substantial loss suffered from Plaintiff's investment in Ecser. *Id.*, ¶¶ 43–45.

Plaintiff purchased ten shares of Ecser for \$100,000 in September 2003 and alleges that his total investment is now worth \$0.00.² At the time Plaintiff purchased Ecser's stock, Plaintiff and Ecser entered into a Stock Purchase Agreement ("Agreement") that contained the following forum selection clause:

... any action, proceeding or claim against it arising out of, or relating in any way to, this Agreement shall be brought and enforced in the courts of the State of New York located in New York City or of the United States of America for the Southern District of New York, and all parties hereto irrevocably submit to such jurisdiction which jurisdiction shall be exclusive. All of the parties hereto hereby irrevocably waive any objection to such exclusive jurisdiction or inconvenient forum.

Shorenstein Decl., Exh. A at 11.

Ecser brings the instant motion to dismiss on the grounds that: (1) the forum selection clause in the Agreement requires Plaintiff to commence this action in New York; (2) there is no personal jurisdiction over Ecser because it does not have contacts with California; and (3) the complaint fails to state a

claim for fraud, constructive trust/appointment of a receiver, and unjust enrichment.

DISCUSSION

A. Ecser's Evidentiary Objections

The Court SUSTAINS Ecser's objections to Exhibits A, B, C, D, and E to the declaration of Michael Meeks because Meeks has not established that he has personal knowledge and/or fails to lay a foundation for the subject e-mails. [Fed. R. Evid. 602](#). Meeks is neither the sender, nor the recipient, of any of the subject communications.

B. Motion to Dismiss for Improper Venue

*2 [Rule 12\(b\)\(3\)](#) permits a defendant to seek dismissal based on improper venue. [Fed. Rule Civ. P. 12\(b\)\(3\)](#). Venue in a diversity action is proper in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." [28 U.S.C. § 1391\(a\)](#).

When an action concerns a contract between parties containing a forum selection clause, the Court should respect the parties' right to enter into contractual obligations and give great deference to the provision as evidence of the express intentions of the parties. [Pelleport Investors Inc. v. Budco Quality Theatres Inc.](#), 741 F.2d 273, 280 (9th Cir. 1984). In the Ninth Circuit, federal law governs the validity and effect of forum selection clauses. [Mannetti-Farrow, Inc. v. Gucci Am., Inc.](#), 858 F.2d 509, 513 (9th Cir. 1988). Under federal law, forum selection clauses are presumed to be valid "absent some compelling and countervailing reason." [Bremen v. Zapata Off-Shore Co.](#), 407 U.S. 1, 15 (1972). The party opposing enforcement of the clause bears a "heavy burden" of showing that the clause was (1) the product of fraud, undue influence or overwhelming bargaining power, *Id.* at 12–13, (2) the selected forum is so "gravely difficult" that enforcement would effectively deprive the opposing party of their day in court, *Id.* at 18, or (3) where enforcement would contravene a strong public policy in the forum in which the suit is brought. *Id.* at 15. Courts have liberally enforced broad forum selection clauses in an effort to uphold the parties' right to contract. [Schoenduve Corp. v. Lucent Technologies, Inc.](#), 442 F.3d 727, 732 (9th Cir. 2006), *citing* [Valentine Sugars, Inc. v. Donau Corp.](#), 981 F.2d 210, 213 (5th Cir. 1993) (where parties included language in the forum selection clause agreeing to arbitrate "any dispute relating or arising out of the

agreement" it was found that the parties "intended the clause to reach all aspects of the relationship").

Here, there is no dispute that Plaintiff signed the Agreement which sets forth the terms of his \$100,000 investment with Ecser and mandates that Plaintiff's claims be litigated in New York. Plaintiff argues, however, that the claims in the complaint do not arise out of the Agreement and are not subject to the forum selection clause because the alleged fraud and misrepresentations took place *after* the execution of the Agreement (including Plaintiff's subsequent purchase of securities in the amount of \$200,000 from Ecser's parent company, BSD, who is not a party to this lawsuit).

The Court finds that Plaintiff has failed to carry his "heavy burden" to successful defeat enforcement of the forum selection clause for several reasons. First, Plaintiff concedes that the scope of Agreement relate to the initial investment of \$100,000 with Ecser, therefore, Plaintiff's claims with respect to this investment are subject to the forum selection clause. Second, Ecser's alleged misrepresentations that caused Plaintiff to subsequently investment \$200,000 in BSD "arise out of" and/or "relate to" the Agreement. Thus, Plaintiff's subsequent investment is also within the scope of the Agreement. Finally, Ecser's parent company, BSD, is not a named defendant in this lawsuit therefore Plaintiff cannot avoid his duty to arbitrate his claims against Ecser by referring to any potential claim he may have against BSD.

*3 Thus, the Court GRANTS Ecser's motion to dismiss for improper venue.

C. Motion to Dismiss for Lack of Personal Jurisdiction and/or Failure to State a Claim

Ecser also seeks dismissal of Plaintiff's complaint pursuant to [Rule 12\(b\)\(2\)](#) for lack of personal jurisdiction and [Rule 12\(b\)\(6\)](#) for failure to state a claim. Given that the Court finds that dismissal is appropriate under [Rule 12\(b\)\(3\)](#) for improper venue, the Court declines to reach the issues of personal jurisdiction and failure to state a claim.

CONCLUSION

Based on the foregoing, the Court GRANTS the motion to dismiss for improper venue without prejudice for the action to be filed in the courts contemplated by the forum selection clause in the Agreement, which are located in the "State of

Juneau v. Kenner, Not Reported in Fed. Supp. (2009)

2009 WL 10673374

New York located in New York City or of the United States of America for the Southern District of New York New York.”

All Citations

IT IS SO ORDERED.

Not Reported in Fed. Supp., 2009 WL 10673374

Footnotes

- 1 It is unclear whether Plaintiff is referring to Standard Advisors, Inc. or Standard Advisors, LLC or both.
- 2 Plaintiff also alleges that he invested an additional \$200,000 with “BSD” (Ecser’s off-shore parent company who is not a named party). *Id.* 149.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.