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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ASIAN AMERICAN ENTERTAINMENT CORPORATION, LIMITED, Plaintiff, v. LAS VEGAS SANDS, INC., VENETIAN CASINO RESORT, LLC, VENETIAN VENTURE DEVELOPMENT, LLC, Defendants.	Case No. 2:07-cv-144-JCM-PAL **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12(b)(6) OR FOR MORE DEFINITE STATEMENT AND TO STRIKE UNDER RULES 12(e) AND 12(f)**

INTRODUCTION

Plaintiff has not provided a single allegation of any act of breaching conduct within the applicable time period but wants to proceed with protracted and expensive discovery to see what may turn up. This is precisely what the Supreme Court has forbidden in *Iqbal*.

After the Ninth Circuit decided that this lawsuit would be limited to alleged breaching conduct that occurred before January 15, 2002, the Supreme Court decided *Iqbal*, which clarified the pleading requirements applicable in all civil actions. In light of both decisions, Defendants requested that Plaintiff voluntarily amend its complaint to remove its numerous irrelevant allegations and to plead its surviving claim (if any existed) in accordance with *Iqbal*'s standards. Plaintiff refused, and Defendants filed this motion.

Although Plaintiff has responded with the time-honored accusations that this motion is part of a "litigation strategy to delay and harass" (Opp. 3), and contains some unspecified "misrepresentations" (Opp. 15), Defendants have done nothing to delay this case. Plaintiff neglects to inform the Court that in fact Defendants have participated in the Rule 26(f) conference, agreed on a discovery schedule, and approved a joint discovery plan—*see* Docket No. 79 (July 13, 2009)—despite Defendants' belief that such actions will ultimately prove unnecessary given the state of the pleadings.

Plaintiff now tries to distract the Court from its complaint's many deficiencies by throwing out misguided (and inconsistent) procedural arguments. And, although Plaintiff urges that Defendants ask the Court to ignore the Ninth Circuit's opinion, it is Plaintiff who seeks to re-litigate already-decided issues on remand in an attempt to nullify the Circuit's dismissal of most claims. All of Plaintiff's arguments are without merit and fall generally into the category

of "give us a chance to take discovery and we will find something." Defendants request that the Court schedule oral argument on this motion at the Court's earliest convenience.[1]

ARGUMENT

Because the issues raised in the instant motion to dismiss were not previously argued and, indeed, could not have been raised earlier, this Court has the power to consider Defendants' motion to dismiss the remaining allegations of the Complaint. As we explained in our opening brief, what is left of the Complaint falls far short of what the Supreme Court made clear must be pled in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and the Complaint therefore should be dismissed. If, however, the Court is not inclined to dismiss the Complaint outright, it should order Plaintiff to provide intelligible allegations and should strike all irrelevant and prejudicial material from the Complaint.

I. Neither Rule 12(g) Nor The Ninth Circuit's Decision Bars This Court's Consideration Of Defendants' Motion To Dismiss

Plaintiff's argument that procedural impediments prevent the Court's consideration of Defendants' motion is both internally inconsistent and legally flawed. To invoke Rule 12(g), Plaintiff takes the position that Defendants previously failed to object to the Complaint's surviving allegations as deficient. Opp. 4; *see* FED. R. CIV. P. 12(g)(2) (limiting successive pre-answer motions where defenses or objections were available "but omitted"). Yet at the same time, Plaintiff contends that the Ninth Circuit has already considered and rejected Defendants'

[1] Plaintiff claims that the parties had an "agreement" whereby Defendants would file an Answer to the complaint by June 26, 2009. Opp. 5. No such agreement was ever reached. LVS counsel wrote to Plaintiff's counsel on June 9th, proposing dates for filing an answer and dates for conducting the Rule 26(f) meet-and-confer, and explicitly stated that he awaited a response. *See* Pl. Ex. A. Plaintiff's counsel never responded.

arguments. *See* Opp. 4, 5, 7, 10. Plaintiff cannot have it both ways, and neither of its arguments is convincing.

A. First, Plaintiff is incorrect that the Ninth Circuit has already rejected Defendants' contention that the Complaint fails to adequately plead wrongful conduct before January 15, 2002. Indeed, no party or court has analyzed the issues raised by Defendants' motion in any meaningful way, because it was previously unnecessary to do so. In the first motion to dismiss, Defendants argued—and this Court agreed—that the parties' entire contract was, for legal purposes, an oral contract and therefore Nevada's four-year statute of limitations barred all breach of contract claims. (In fact, the Court determined that all allegations were barred on statute of limitations grounds.) Thus, prior to remand, it was unnecessary to parse the Complaint's allegations into pre-oral extension and post-oral extension claims.

The specific issue before the Court now—whether Plaintiff has sufficiently pled a breach of the written contract that expired on January 15, 2002—was neither "decided explicitly or by necessary implication in [the] previous disposition" by the Ninth Circuit. Opp. 11 (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)). The Ninth Circuit framed the two issues for decision as: (1) whether "the district court should have applied the statutes of limitations of Macau" and (2) whether "the district court applied the incorrect Nevada statute of limitations to the contract claim." Def. Ex. 3 at 2. It decided only those issues.

Although Plaintiff claims that the Ninth Circuit explicitly sustained the viability of the Complaint (Opp. 10), the language Plaintiff quotes from the Ninth Circuit's decision is not nearly so precise. The court's statement that the Complaint "can be read" to allege "some" breaching conduct does not substitute for a full consideration of Rule 8's requirements. And, the

court's statement explicitly discussing the mandate on remand is even less favorable to Plaintiff's position, noting that a six-year limitations period should be applied to a breach of contract claim "*insofar as* it is premised upon pre-extension conduct." (emphasis added). This language simply does not presume the existence of a well-pled contract claim. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1170 (1986) ("insofar as" means "in such measure as" or "to such extent or degree as").[2]

B. Plaintiff also is wrong that Rule 12(g) prohibits consideration of the instant motion. Rule 12(g) bars only motions based on defenses that were *available* at the time the first motion to dismiss was filed. Because the Complaint as originally pled did allege sufficient detail to give Defendants notice of the basis of Plaintiff's claims, Defendants had no reason to file a motion to dismiss for failure to comply with Rule 8. But, now that the Ninth Circuit has confirmed that all of the specific breaching conduct alleged in the Complaint is outside the statute of limitations, the Complaint is now—and only now—deficient.

In that regard, *Jewett v. IDT Corp.*, Civ. A. No. 04-1454, 2008 WL 508486 (D.N.J. Feb. 20, 2008), cited in Defendants' opening brief (Def. Br. 4 n.2) is persuasive, and Plaintiff has not meaningfully distinguished the case. There, the court permitted a second motion to dismiss plaintiff's claim for intentional infliction of emotional distress ("IIED"), even though that claim relied upon the same statements as plaintiff's defamation claim, which had been dismissed by the first motion. *Id.* at 2. The court did not require defendant to have argued in its first motion that,

[2] Even if the Ninth Circuit had explicitly decided this issue (which it did not), law-of-the-case doctrine would not limit this Court's power, but rather guide its discretion. A court may depart from the law of the case where, *inter alia*, the original decision was clearly erroneous, an intervening change in law has occurred, or a manifest injustice would otherwise result. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

if the court dismissed the defamation claim, it should dismiss the IIED claim as well. *Id.* Similarly, in this case, Defendants were not required to have argued that, if the court agreed that Nevada's statute of limitations applied, but disagreed that the entire contract should be treated as an oral contract, it should then sever the allegations and assess whether Plaintiff had adequately pled a pre-January 15th breach. Defendants simply were not required to take that alternative (and less favorable) position in their motion to dismiss.[3]

In any event, the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (May 18, 2009) provides a new ground for dismissing Plaintiff's allegations. *Iqbal* held that the Court's recently-announced "flexible plausibility" pleading standard under Rule 8 applied in *all* civil cases. 129 S. Ct. at 1953. *Iqbal* was decided after the Ninth Circuit's decision in this case, and therefore was not available as a defense when Defendants' initial motion to dismiss was briefed and argued. *Cf. Diaz v. Rutter*, No. 2:05-cv-239, 2007 WL 2683532, at *4 (W.D. Mich. Sept. 7, 2007) (denying motion to strike under Rule 12(g) because affirmative defense of failure to exhaust administrative remedies was available only after intervening Supreme Court decision).

Moreover, Rule 12(g)'s consolidation requirement serves little purpose here. As Plaintiff's own cases demonstrate, the Rule is almost always invoked to bar defendants from raising jurisdictional, process, or venue objections in an untimely manner. *See, e.g., Sears Petroleum & Transport Corp. v. Ice Ban Am., Inc.*, 217 F.R.D. 305, 307 (N.D.N.Y. 2003) (personal jurisdiction objection untimely where defendants had already served answer); *Keefe v.*

[3] Plaintiff laments Defendants' supposed lack of Rule 12(g) precedent involving cases where an appellate court has reversed, in part, a Rule 12(b)(6) motion and the defendant has brought a second Rule 12(b)(6) motion on different grounds. *See* Opp. 9. It appears that this situation arises quite infrequently because most parties in Plaintiff's situation amend their complaint on remand.

Derounian, 6 F.R.D. 11, 12-13 (N.D. Ill. 1946) (defendant waived service of process objection omitted from earlier 12(b)(6) motion). But motions for failure to state a claim under Rule 12(b)(6) are not waivable and therefore often are treated differently. *See, e.g., SCO Group, Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1151 (D. Utah 2005) (deciding second Rule 12(b)(6) motion triggered by court's decision on first motion to dismiss: "Even if there was some factual basis for the motion when the prior motion was brought, the motion does not appear to be brought for purposes of delay."); *Strandell v. Jackson County*, 648 F. Supp. 126, 129 (S.D. Ill. 1986) (deciding successive Rule 12(b)(6) motion where motion was "not interposed for delay" and "disposition of the case on the merits [would] be expedited by so doing"); *In re Westinghouse Sec. Litig.*, No. Civ. A. 91-354, 1998 WL 119554, at *6 (W.D. Pa. Mar. 12, 1998) (listing cases where court permitted subsequent Rule 12(b)(6) motion "as a means of preventing unnecessary delay"). Indeed, some courts, relying on Rule 12(h)(2)'s language, have held that Rule 12(b)(6) motions are exempt from Rule 12(g)'s consolidation requirement altogether. *See, e.g., Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141 (5th Cir. 2007) (affirming decision to grant second Rule 12(b)(6) motion on statute of limitations grounds); *Rowland v. Prudential Fin., Inc.*, No. CV04-2287PHX-EHC, 2007 WL 1893630, at *1 n.2 (D. Ariz. July 2, 2007) (defense of failure to state a claim is excepted from Rule 12(g)'s consolidation requirement). Plaintiff can hardly claim prejudice in Defendants raising these objections sooner rather than later.

II. Plaintiff Fundamentally Misunderstands Post-*Iqbal* Pleading Standards

In its discussion of pleading standards in connection with Defendants' motion to dismiss, Plaintiff cites only one case, but unfortunately that citation is to a case that actually involved a

motion for summary judgment. *See* Opp. 11 (citing *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008)). Defendants maintain that the appropriate standard can be found in *Iqbal* itself, where the Court stated that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 129 S. Ct. at 1949. "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.'" *Id.*

Plaintiff's *post hoc* attempts to transform its existing Complaint into a pleading that plausibly alleges breaching conduct prior to January 15, 2002 are courageous, if not entirely successful. The only surviving theory of recovery is that Defendants breached the 2001 letter agreement by violating either the exclusivity or confidentiality provisions in that agreement prior to its expiration on January 15th. Plaintiff primarily argues that paragraphs 33 and 34 of its Complaint incorporate such allegations. Opp. 12-13. But those paragraphs cannot possibly bear the weight that Plaintiff assigns to them. Paragraph 33 alleges that, "[t]hroughout the tender process," Defendants (i) engaged in negotiations with Macau officials without Plaintiff present, and (ii) were solicited to abandon Plaintiff and merge with other tenderers. Even if true, these are not allegations of breaching conduct on the part of Defendants. In addition, the paragraph is completely void of any allegations concerning the disclosure of Plaintiff's confidential information. Moreover, Plaintiff's allegation that these actions occurred "throughout" or "during" the tender process, which lasted through February 2002, does not satisfy the requirement that Plaintiff allege facts supporting an inference of a breach occurring before January 15th.

Paragraph 34 fares no better. There, Plaintiff alleges no timeframe at all for its allegations, except to note that Galaxy had been eliminated from the tender process after its January 4th presentation. In fact, the next paragraph specifically alleges that Defendants engaged in secret negotiations at the end of January, thus further negating a "plausible inference" that such negotiations took place prior to January 15th. Cplt. ¶ 35; *see also* ¶ 30 (alleging that Tender Commission's January 22nd announcement set off a flurry of merger activity, including Defendants' contact of other Las Vegas casinos). And finally, like paragraph 33, paragraph 34 says nothing about the alleged misuse of Plaintiff's confidential information. Plaintiff's other examples of supposedly well-pled allegations are equally insufficient. *See, e.g.*, Cplt. ¶¶ 24-26 (alleging that Defendants' representatives were in Macau prior to January 15th).

All of these allegations fall far short of what *Iqbal* requires. Under *Iqbal*, "[a] claim has facial plausibility when the plaintiff pleads *factual content* that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (emphasis added). A complaint may not simply contain "'naked assertion[s] devoid of 'further factual enhancement.'" *Id.* Even a cursory review of the Complaint makes evident just how far Plaintiff is from meeting *Iqbal*'s standard.

Plaintiff makes an unsuccessful effort to excuse its complete lack of "factual enhancement" by pointing to the supposed "secretive" nature (Opp. 4, 6) of Defendants' actions. Certainly, if any plaintiff were entitled to claim that a defendant's concealment of its alleged wrongdoing entitled the plaintiff to leniency in pleading, it would have been Iqbal himself, a Pakistani Muslim detained under restrictive conditions by federal officials in connection with the government's September 11th investigations. 129 S. Ct. at 1943. Surely, Iqbal was in a far

inferior position to obtain information about U.S. government officials' conduct than Plaintiff here is vis-à-vis its former business partner. The Court did not relax Rule 8's pleading standards in that case, nor should those standards be relaxed here. The Complaint should be dismissed.

III. Alternatively, The Court Should Require Plaintiff To Provide A More Definite Statement And Should Strike Its Many Immaterial And Prejudicial Allegations

Plaintiff's arguments opposing Defendants' alternative motion are equally misguided. If the Court does not dismiss Plaintiff's Complaint outright, it should require Plaintiff to provide a more definite statement and should strike from the Complaint all immaterial allegations.

A. Plaintiff's opposition to Defendants' Rule 12(e) motion is based on blatant mischaracterizations of Defendants' arguments. Contrary to Plaintiff's representation (Opp. 14), Defendants absolutely *do* contend that they are unable to frame a responsive pleading to the Complaint as it currently stands. *See* Def. Br. 9. Although Defendants can identify at least some allegations that are certainly no longer relevant to Plaintiff's claims, it is unclear which remaining allegations—if any—relate to conduct within the statute of limitations. Defendants cannot fairly prepare an answer admitting or denying particular allegations when it is unclear what remains in the case.

Moreover, Defendants have *not* moved for a more definite statement "in order to obtain information at the pleading stage that may bolster their statute of limitations affirmative defense." Opp. 14. There are no longer any statute of limitation issues in the case because Plaintiff's time-barred claims have already been dismissed. Similarly, Defendants do not contend that the Complaint need set forth "specific dates upon which conduct occurred." Opp. 13. All Defendants ask—as *Iqbal* demands—is that Plaintiff plead "a short and plain statement of the claim showing that the pleader is entitled to relief." 129 S. Ct. at 1949 (quoting FED. R.

CIV. P. 8(a)(2)). In this particular instance, that means alleging an act of breach prior to the "specific date" of January 15th. *See Doyle v. Illinois Cent. R.R. Co.*, No. CV F 08-0971, 2008 WL 4964774, *2-3 (E.D. Cal. Nov. 18, 2008) (granting motion for more definite statement on breach of contract claim in absence of allegations concerning, *inter alia*, the "nature and circumstances of [defendant's] alleged breach"). Plaintiff has failed to do so.[4]

B. With regard to Defendants' motion to strike, Plaintiff's argument only confirms that its Complaint is also "replete with irrelevant and extraneous matter." *See* Opp. 17 (quoting *Rose v. Kinevan*, 115 F.R.D. 250, 251 (D. Colo. 1987)). Plaintiff argues that the paragraphs Defendants seek to strike from its complaint are "integral to the breach of contract claim" and that "striking them serves no purpose." Opp. 18. But Defendants have no intention of striking allegations—such as those discussing the background of the parties' October agreement or its November amendment—relevant to Plaintiff's surviving claim. To the contrary, Defendants request that the Court strike only those allegations relating to claims that have been dismissed. Thus, the Court should strike allegations relating to the individual defendants, who have been

[4] In their opening brief, Defendants quoted the Wright & Miller treatise as persuasive authority for the notion that courts have been more inclined to grant Rule 12(e) motions when such motions have the potential to end the case. Def. Br. 9. Plaintiff's reaction to this argument in its opposition is misguided and unnecessarily inflammatory. *See* Opp. 14-15. Plaintiff first suggests that Defendants have misrepresented the quotation itself, even though Defendants' citation is verifiable and accurate. Plaintiff then accuses Defendants of misrepresenting the quotation's meaning. Defendants stand by their interpretation of this authority and all other representations made to the Court. The treatise explores both the advantages and disadvantages of granting a Rule 12(e) motion to dismiss, but ultimately concludes: "Thus, motions for a more definite statement should be strictly limited to those few instances in which a significant advancement of the litigation will result from a grant of the defendant's motion." That is exactly the situation here. Plaintiff's quoted excerpts (Opp. 15) do not compel a different conclusion, because Defendants are *not* insisting that "plaintiff plead a little more than the rules require," nor are they, as explained above, merely seeking to "unearth" an affirmative defense.

dismissed, and the breach of fiduciary duty claims, which likewise have been dismissed.[5] Similarly, the Court should strike all allegations of breaching conduct after January 15th, as those claims have been dismissed as time-barred.[6] Plaintiff's argument—that all of these allegations are "integrally related" to its remaining claims (Opp. 19)—is little more than a back-door attempt to re-impose upon Defendants the burden of litigating claims that the Ninth Circuit has already held are outside the statute of limitations. The Court should not entertain Plaintiff's efforts; doing so would require Defendants to answer (and presumably conduct discovery on) issues that are clearly outside the case.

In particular, Plaintiff makes no attempt to defend its continued requests for attorney fees and punitive damages.[7] "Where a plaintiff seeks damages that are not recoverable as a matter of law, the Court may strike the prayer for relief." *Pelayo v. Home Capital Funding*, No. 08-CV-2030, 2009 WL 1459419, at *8-9 (S.D. Cal. May 22, 2009); *see also Boles v. Merscorp, Inc.*, No. CV 08-1989, 2009 WL 734135, at *3-4 (C.D. Cal. Mar. 18, 2009) (striking requests for punitive damages and attorney fees on breach of contract claim). Even Plaintiff's own case law supports granting a motion to strike those allegations as "immaterial" or "impertinent." *E.g.*, *Saylor v. Zeenat, Inc.*, No. Civ.S02-864, 2002 WL 33928621, at *4-5 (E.D. Cal. Aug. 13, 2002) (granting motion to strike request for "damages" of attorney fees available only by statute, and request for damages on claim where only injunctive relief and restitution were available); *Keefe v. Derounian*, 6 F.R.D. 11, 12 (N.D. Ill. 1946) (affirming prior decision to strike conspiracy

[5] *See* Cplt. ¶¶ 3, 8, 9, 22, 59-65, 66-73.

[6] *See* Cplt. ¶¶ 19, 26, 27-32, 35-36, 40-44.

[7] *See* Cplt. ¶¶ 3, B, D.

allegations where co-conspirators were not joined as defendants). And while Plaintiff cites an utterly irrelevant case for its contention that Defendants must show prejudice or bad faith to succeed on a motion to strike—*see* Opp. 19 (citing *Hogan v. Runyon*, 15 Fed. App'x 458 (9th Cir. 2001) (no error in refusing to strike a *motion*))—Defendants would no doubt be prejudiced by the additional, unnecessary discovery that would go along with Plaintiff's legally impermissible demands.

CONCLUSION

For the foregoing reasons, as well as those stated in Defendants' opening brief, the Court should grant Defendants' motion to dismiss the complaint. In the alternative, the Court should require Plaintiff to provide a more definite statement of its allegations and should strike all immaterial and impertinent matters. Defendants request that the Court schedule oral argument on this motion at its earliest convenience.

Respectfully submitted this 27th day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2009, I electronically transmitted **Defendants' Reply In Support Of Motion To Dismiss Under Rule 12(b)(6) Or For More Definite Statement And To Strike Under Rules 12(e) And 12(f)** to the Clerk of Court via the ECF system for filing and transmittal of a Notice of Electronic Filing (NEF) to registered ECF participants.

/s/ Samuel S. Lionel
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