UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

WHITEWATER WEST INDUSTRIES, LTD., a Canadian corporation,

Plaintiff,

v.

RICHARD ALLESHOUSE, an individual, YONG YEH, an individual, and PACIFIC SURF DESIGNS, INC., a Delaware corporation,

Defendants.

Case No. 17-cv-0501 DMS (NLS)

ORDER DENYING MOTION TO DISMISS

Pending before the Court is Defendants Pacific Surf Designs, Inc. ("PSD"), Richard Alleshouse, and Yong Yeh's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiff Whitewater West Industries, Ltd. ("Whitewater") filed an opposition to the motion, and Defendants filed a reply. For the reasons set forth below, the motion is denied.

I.

BACKGROUND

Wave Loch, Inc. is in the business of designing and manufacturing sheet wave attractions. (FAC ¶ 12.) Sheet waive attractions involve flowing water over a

stationary surface, which recreates the speed of ocean waves in order to "allow ride participants to simulate a surfing experience." (*Id.* ¶ 11.)

In September 2007, Wave Loch employed Alleshouse as an engineer. (*Id.* ¶¶ 13, 18.) Allehouse had broad engineering responsibilities and was privy to Wave Loch's efforts to develop new sheet wave attractions. (*Id.* ¶ 18.) Prior to his employment with Wave Loch, Alleshouse had no experience with designing sheet wave attractions. (*Id.* ¶ 14.)

In September 2008, as a condition of his continued employment with Wave Loch, Alleshouse entered into a "Covenant against Disclosure and Covenant Not to Compete" ("Agreement") with Wave Loch and Wave House Global Pte. Ltd. (FAC ¶ 14, Ex. 1.) Wave Loch and Wave House Global are collectively referred to as "Company" in this Agreement. The Agreement contained the following provision:

> Assignment. In consideration of compensation paid by Company, Employee agrees that all right, title and interest in all inventions, improvements, developments, trade-secret, copyrightable or patentable material that Employee conceives or hereafter may make or conceive, whether solely or jointly with others:
>
> (a) with the use of Company's time, materials, or facilities; or
> (b) resulting from or suggested by Employee's work for Company; or
> (c) in any way connected to any subject matter within the existing or contemplated business of Company
>
> shall automatically be deemed to become the property of Company as soon as made or conceived, and Employee agrees to assign to Company, its successors, assigns, or nominees, all of Employee's rights and interests in said inventions, improvements, and developments in all countries worldwide. Employee's obligation to assign the rights to such inventions shall survive the discontinuance or termination of this Agreement for any reason.

(FAC ¶ 14, Ex. 1.) Whitewater is an assignee of the Agreement.[1]

[1] In April 2014, Wave Loch assigned to Flowrider Surf, Ltd. ("Flowrider"), a

On July 27, 2012, Alleshouse resigned from Wave Loch. (FAC ¶ 23.) Subsequently, Alleshouse and Yeh founded PSD, which, like Wave Loch, also designs and manufactures sheet wave attractions. (*Id.* ¶¶ 24, 28.) On October 13, 2012, less than 90 days after resignation, Alleshouse filed a provisional application for U.S. Patent Nos. 9,044,685 and 9,302,189, which the U.S. Patent and Trademark Office ("USPTO") issued on June 2, 2015. (*Id.* ¶¶ 29, 34.) Subsequently, on October 24, 2012, Alleshouse filed a provisional application for U.S. Patent No. 9,592,433, which the USPTO issued on July 30, 2015. (*Id.* ¶¶ 31, 34.) The asserted inventions relate directly to the type of sheet waive attractions Wave Loch was developing while Alleshouse was employed there.[2] (*Id.* ¶¶ 36–38.) Plaintiff therefore alleges Alleshouse developed the asserted inventions while employed at Wave Loch and/or used information he obtained at Wave Loch to develop the inventions. (*Id.* ¶ 34.) Nevertheless, Alleshouse failed to assign the ownership of those inventions to Wave Loch or its assigns as required under the Agreement. (*Id.* ¶ 39.) Rather, he assigned them to PSD. (*Id.* ¶ 38.)

On March 13, 2017, Whitewater, asserting rights as assignee of the Agreement, filed a Complaint against Alleshouse, Yeh, and PSD. Subsequently on June 23, 2017, Whitewater filed a FAC, alleging the following causes of action: (1) breach of written contract, (2) intentional interference with contract, (3) unfair and unlawful business practices in violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. § 17200 *et seq.*, (4) declaratory relief, (5) correction of inventorship of the '685 patent under 35 U.S.C. § 256, (6) correction of inventorship of the '189 Patent Under 35 U.S.C. § 256, and (7) correction of inventorship of the

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subsidiary of Whitewater, all of its rights and obligations under the Agreement. (FAC ¶ 12.) Subsequently, on February 1, 2016, Florwrider was amalgamated into Whitewater. (*Id.*) As a result, Plaintiff alleges Whitewater assumed all rights and obligations to that assignment. (*Id.*)

[2] These Patents lists Alleshouse and Yeh as the inventors. (FAC ¶¶ 29, 31.)

'433 Patent Under 35 U.S.C. § 256.

II.

DISCUSSION

A. Article III Standing

Defendants move to dismiss, contending the Court lacks subject matter jurisdiction because Plaintiff does not have Article III standing. Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss based on the court's lack of subject matter jurisdiction. "Article III of the Constitution confines the federal courts to adjudication of actual 'Cases' and 'Controversies.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992). "The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing and that claims be 'ripe' for adjudication." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Consequently, a "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (emphasis omitted).

To satisfy Article III's standing requirements, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan*, 504 U.S. at 560–61). When a case is at the pleading stage, "the plaintiff must 'clearly … allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

A Rule 12(b)(1) motion to dismiss for lack of standing may attack the court's subject matter jurisdiction either facially or factually. *Leite v. Crane Co.*, 749 F.3d

1117, 1121 (9th Cir. 2014). A "facial" attack accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In resolving a facial attack, the court, "[a]ccepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, … determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co*., 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). In contrast, a "factual" attack "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id*. (citations omitted). In resolving a factual attack, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone*, 373 F.3d at 1039 (citing *Savage v. Glendale Union High Sch*., 343 F.3d 1036, 1039 n. 2 (9th Cir.2003)).

Defendants contend "it is clear on the face of the Complaint and the Non-Compete Agreement … that Plaintiff lacks standing to bring all of its claims[.]" (Mem. of P. & A. in Supp. of Mot. at 6.) Although Defendants appear to state they are making a facial challenge to subject matter jurisdiction, they do not contend Plaintiff failed to sufficiently plead each requisite element to demonstrate standing. Rather, Defendants argue Plaintiff lacks standing based on the following grounds: (1) Plaintiff was not a party to the Agreement, which was executed between Alleshouse and Wave Loch and Wave House Global,[3] (2) the Agreement is unenforceable as a matter of law, because non-compete covenants are void and unenforceable pursuant to Cal. Bus. & Prof. Code § 1660, and (3) even if the Agreement is enforceable, it is not assignable because it is personal in nature and Alleshouse did not consent to assignment. These grounds, however, do not amount

[3] Plaintiff does not dispute Defendants' argument that it was not a party to the Agreement, which was executed between Alleshouse and Wave Loch and Wave House Global.

to a facial attack on subject matter jurisdiction because they do not challenge the sufficiency of Plaintiff's allegations to show standing. Defendants' arguments also do not amount to a factual attack on subject matter jurisdiction as they do not contest the truth of Plaintiff's factual allegations. For example, Defendants do not dispute whether Plaintiff was assigned rights under the Agreement. Instead, they argue the Agreement is not assignable. These arguments are inappropriate to be resolved on a Rule 12(b)(1) motion. Because the pleadings do not address standing, but the merits of the case, the Court construes the motion under Rule 12(b)(1) as a motion under Rule 12(b)(6). Accordingly, to the extent Defendants' motion to dismiss is filed pursuant to Rule 12(b)(1), it is denied.

B. Failure to State a Claim

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material factual allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). However, a court need not accept all conclusory allegations as true. Rather, it must "examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation omitted); *see Benson v. Ariz. St. Bd. of Dental Exam'rs*, 673 F.2d 272, 275–76 (9th Cir. 1982) (court need not accept conclusory legal assertions). A motion to dismiss should be granted if a plaintiff's complaint fails to contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

Defendants argue, without any analysis, the "Agreement is unenforceable as

a matter of law" because "non-compete covenants with California employees are generally avoid and unenforceable in California" pursuant to Cal. Bus. & Prof. Code § 16600. (Mem. of P. & A. in Supp. of Mot. at 6.) By the plain language of § 16600, only those contracts that prevent "engaging in a lawful profession, trade or business of any kind" are void. Defendants, however, do not argue the Agreement restrained Alleshouse from engaging in any profession.[4] In any event, Defendants' argument is meritless as non-compete agreements may be enforceable in California despite § 16600. *See Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 758 (9th Cir. 2008) ("Under California law, non-competition agreements are unenforceable unless necessary to protect an employer's trade secret."); *Armorlite Lens Co. v. Campbell*, 340 F. Supp. 273, 275 (S.D. Cal. 1972) (non-compete agreements are enforceable to the extent they "relate[ ] to ideas and concepts which were based upon secrets or confidential information of the employer[.]").

Moreover, Defendants argue the Agreement is not assignable because the restrictive covenants in the Agreement are personal in nature and lacks Alleshouse's consent to assignment. (Mem. of P. & A. in Supp. of Mot. at 11.) The provision at issue, however, is not a restrictive covenant. Rather, it is an assignment provision, where Alleshouse agreed to assign Wave Loch and its assigns future rights in inventions made or conceived by him while in Wave Loch's employ. Such a provision affects property rights and is distinguishable from restrictive covenants, which "'hampers a person's ability to earn a living[.]'" *Target Tech. Co., LLC v. Williams Advanced Materials, Inc.*, No. SACV 04-1083 DOCMLGX, 2007 WL

[4] Defendants argue for the first time in the reply brief that the Agreement is void and unenforceable because its restrictive covenants are overbroad and unreasonable. The Court, however, declines to address this argument because Plaintiff was deprived of the opportunity to respond to the argument and the Court does not have the benefit of full briefing. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

6201689, at *9 (C.D. Cal. Feb. 6, 2007) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 910 (3d Cir. 1985)). An assignment of rights in inventions made before the existence of the inventions "may be viewed as an assignment of an expectant interest." *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1572 (Fed. Cir. 1991). An assignment of an expectant interest may be the subject of a valid assignment. *Id.* ("non-existing [personal] property may be the subject of valid assignment") (quoting *Mitchell v. Winslow*, 17 F. Cas. 527, 531–32 (C.C.D. Me. 1843)). Because future rights in inventions are assignable, Defendant's motion to dismiss pursuant to Rule 12(b)(6) is therefore denied.[5]

III.

CONCLUSION

For the reasons stated above, the Court denies Defendants' motion to dismiss.

IT IS SO ORDERED.

Dated: September 7, 2017

[redacted]

[5] Defendants improperly raise a number of new arguments for the first time in their reply brief. For the reasons stated above, the Court declines to address those arguments.