By order of the Court, Presiding Judge Roberto C. Naraja

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IMPERIAL PACIFIC INTERNATIONAL (CNMI), LLC, **Plaintiff,** **v.** **SKYWALKER COMMUNICATIONS GROUP, LLC,** **Defendant.**	**CIVIL ACTION NO. 16–0148** **ORDER** **DENYING TAO XING'S MOTION TO DISMISS;** **GRANTING IN PART AND DENYING IN PART IMPERIAL'S MOTION FOR MISJOINDER; AND** **GRANTING IN PART AND DENYING IN PART IMPERIAL'S MOTION TO STRIKE**
SKYWALKER COMMUNICATIONS GROUP, LLC, **Counter–Plaintiff,** **v.** **IMPERIAL PACIFIC INTERNATIONAL (CNMI), LLC and TAO XING,** **Counter–Defendants.**	

I. INTRODUCTION

THIS MATTER came before the Court on December 12, 2016, at 9:30 a.m. in Courtroom 202A, for a motions hearing. Attorneys Michael Dotts and Claire Kelleher–Smith represented Imperial Pacific International (CNMI), LLC ("Imperial") and Tao Xing. Attorney Charity Hodson

represented Skywalker Communications Group, LLC ("Skywalker"). The Court heard arguments on three motions: (1) Tao Xing's motion to dismiss pursuant to NMI R. CIV. P. 12(b)(6); (2) Imperial's motion for misjoinder pursuant to NMI R. CIV. P. 21; and (3) Imperial's motion to strike pursuant to NMI R. CIV. P. 12(f).

Based on the submissions of the parties, oral arguments, and the relevant law the Court **DENIES** Tao Xing's motion to dismiss; **GRANTS** in part and **DENIES** in part Imperial's motion for misjoinder; and **GRANTS** in part and **DENIES** in part Imperial's motion to strike. The Court will address each motion in turn.

II. TAO XING'S MOTION TO DISMISS

The Court first addresses Tao Xing's motion to dismiss pursuant to NMI R. CIV. P. 12(b)(6).

A. Legal Standard.

A NMI R. CIV. P. 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a NMI R. CIV. P. 12(b)(6) motion to dismiss, a "complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *In re Adoption of Magofna*, 1 NMI 449, 454 (1990) (citations omitted). This standard ensures that a pleading party pleads enough direct and indirect allegations to provide "fair notice of the nature of the action." *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 19 (citing *Magofna*, 1 NMI at 454). In deciding a motion to dismiss under NMI R. CIV. P. 12(b)(6), the court must assume as true all factual allegations in the challenged pleading and construe them in a light most favorable to the non-moving party. *Cepeda v. Hefner*, 3 NMI 121, 127–28 (1992); *Govendo v. Marianas Pub. Land Corp.*, 2 NMI 482, 490 (1992).

B. Discussion.

Tao Xing argues: (1) the counterclaim against him is improper because it provides mere legal conclusions with no factual support; (2) since he is an agent of Imperial it is improper for Skywalker to bring contractual interference claims against him; and (3) the request for punitive damages is improper as the facts merely point to a garden variety breach of contract case making punitive damages improper.

Skywalker responds that its counterclaim sets out sufficient facts to put Tao Xing on notice of the nature of the action. Specifically, Skywalker argues that its counterclaim and its attached exhibits set out that Tao Xing was involved with the negotiation, signing, and eventual collapse of the agreement between the parties. Skywalker also argues that it is too early to address the issues of whether as a corporate officer Tao Xing can be sued under interference causes of action and/or be sued for punitive damages because Imperial's arguments rely on contested facts.

1. Sufficiency of Factual Support in Skywalker's Counterclaims.

NMI R. CIV. P. (8)(a)(2) states that a pleading shall contain "a short plain statement of the claim showing that the pleader is entitled to relief." In order to survive Tao Xing's motion to dismiss Skywalker's counterclaim must contain enough facts to provide Tao Xing with "fair notice of the nature of the action." *Syed*, 2012 MP at ¶ 19 (citing *Magofna*, 1 NMI at 454). In *Syed* the NMI Supreme Court articulated a standard whereby as long as the pleading sets out a clear assertion of the claims then dismissal is improper. *Id.* Put simply, *Syed* stands for the proposition that as long as a pleading sets out the appropriate legal standards with strands of facts contextualizing the claims then the pleading survives a motion to dismiss. *Id.*

Here, Skywalker has claimed that Tao Xing committed the torts of interference with contractual relations and interference with prospective economic advantage. In the Commonwealth

when a claim has not been expressly recognized then 7 CMC § 3401 is invoked to determine the scope of Commonwealth law. 7 CMC § 3401 provides:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

In the Commonwealth no written law or local custom speaks to the torts of interference with contractual relations or interference with prospective economic advantage. As such, the Court looks to the Restatements of Law as approved by the American Law Institute. *See* 7 CMC § 3401.

Interference with contractual relations is set forth in RESTATEMENT (SECOND) OF TORTS § 766 (1979), which provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Skywalker's other cause of action, interference with prospective economic advantage, is articulated in RESTATEMENT (SECOND) OF TORTS § 766B, which states:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

The key distinction between interference with contractual relations and interference with prospective economic advantage is that the former requires the existence of a valid contract and the latter covers situations where there may not be a valid contract. *See Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 861 (9th Cir. 1995) (citing *Buckaloo v. Johnson*, 537 P.2d 865, 869 (Cal. 1975)).

In its counterclaims, Skywalker has alleged that Tao Xing was intimately involved with the agreements at issue. Specifically, Skywalker alleges that Tao Xing improperly provided Skywalker with notice that the contracts would be summarily terminated because of allegedly insufficient performance by Skywalker. Numerous paragraphs of the Counterclaim articulate Tao Xing's alleged conduct and state that it is Skywalker's contention that Tao Xing engaged in tortious conduct by flagrantly ignoring contractual terms his employer had agreed to. While it is certainly true that some of Skywalker's pleadings are a bit conclusory it still can carry its pleading burden because the pleading standard to survive a NMI R. CIV. P. 12(b)(6) motion in the Commonwealth is low. *See Syed*, 2012 MP at ¶ 17–23. In *Syed* the NMI Surpreme Court expressly rejected the "plausibility" standard posited by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), because the NMI Supreme Court determined that "weighing evidence should be left to a point after discovery when there is additional evidence to weigh." *Syed*, 2012 MP at ¶ 18. Here, while it is entirely possible that Skywalker's claims against Tao Xing will eventually be shown to be baseless, at this stage, Skywalker carries its pleading burden because its counterclaim puts Tao Xing on general notice of the claims and facts underlying those claims. Moreover, the torts claimed by Skywalker both center on a third party interfering in the contractual relationship between other parties. In the Court's view the Counterclaim alleges exactly that, with references to the specific timeline of how Tao Xing was involved with the agreements in question. For the foregoing reasons, the Court rejects Tao Xing's argument that Skywalker has not met the pleading standard in the Commonwealth.

2. Tortious Interference Claims Against a Corporate Agent.

Under NMI R. CIV. P. 12(b)(6) all doubts and factual disputes are resolved in favor of the non-moving party. *Cepeda*, 3 NMI at 127–28; *Govendo*, 2 NMI at 490. When a NMI R. CIV. P. 12(b)(6) motion relies on the Court interpreting or viewing facts in favor of the moving party then

denial is the appropriate result. *See Cepeda*, 3 NMI at 127–28; *Govendo*, 2 NMI at 490. Essentially, if a legal issue presented hinges on contested facts then dismissal under NMI R. CIV. P. 12(b)(6) is improper.

Here, Tao Xing argues that Skywalker's counterclaim should be dismissed because as a corporate agent his alleged conduct took place within the scope of his employment with Imperial. Tao Xing correctly articulates the general rule that a corporate agent's actions within the scope of his or her employment are generally considered to be the actions of his principal, the corporation. *See, e.g., Latch v. Gratty, Inc.*, 107 S.W.3d 543, 545 (Tex. 2003). Further, Tao Xing correctly notes that both of the torts alleged by Skywalker require that some third party interferes with a contractual relationship or a prospective relationship and that an agent acting within the scope of his employment would not be considered to be a third person. *See, e.g., McReady v. O'Malley*, 804 F. Supp. 2d 427, 445 (D. Md. 2011).

Yet, Tao Xing's argument fails because it relies on contested facts. In Tao Xing's view there is no question that he was acting within the scope of his employment as a corporate officer for Imperial. In Skywalker's view Tao Xing, while a corporate officer, acted outside the scope of his employment when he dealt with Skywalker. It is contested whether the reason Tao Xing acted as he did was because he was pursuing Imperial's interests or whether he was attempting to advance his own interests.

Thus, dismissal at this early juncture would be improper because Skywalker is entitled to have the opportunity to proceed to discovery and then must carry its burden to prove up its case. *See Syed*, 2012 MP at ¶ 18 (discussing how dismissal under NMI R. CIV. P. 12(b)(6) is generally disfavored in the Commonwealth because a court should only start to weigh the sufficiency of facts after allowing the parties to conduct discovery). Skywalker will eventually have to concretely

demonstrate that Tao Xing's conduct fell outside the scope of his employment, which will likely be a heavy burden.

3. Request for Punitive Damages.

Finally, since the Court has ruled that Skywalker's tort claims can proceed the motion to dismiss Skywalker's request for punitive damages is moot because a claimant can request punitive damages in a tort case. *See generally* RESTATEMENT (SECOND) TORTS § 908(2). Further, it is generally up to the trier of fact to determine whether the facts support an award of punitive damages. *See Tang v. Peji*, Civ. No. 14–0238 (NMI Super. Ct. Mar. 15, 2016) (Order Denying D. Royal Crown's Mot. to Dismiss at 7).

C. Conclusion as to Tao Xing's Motion to Dismiss.

In sum, the Court **DENIES** Tao Xing's motion to dismiss in its entirety because Skywalker has satisfied its pleading burden; Tao Xing's corporate agent argument relies on contested facts; and it is premature to rule out the possibility of punitive damages against Tao Xing.

III. IMPERIAL'S MOTION FOR MISJOINDER

The Court now turns to the second motion before the Court, Imperial's motion for misjoinder.

A. Legal Standard.

Pursuant to NMI R. CIV. P. 13(h) "[p]ersons of than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." NMI R. CIV. P. 20 provides:

> All persons may be joined in one action as defendants *if there is asserted against them jointly, severally, or in the alternative, any right to relief* in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Conversely, NMI R. CIV. P. 21 provides: "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any state of the action and on such terms as are just . . . ."[1]

B. Discussion.

Imperial, in its motion for misjoinder under NMI R. CIV. P. 21, argues that Skywalker has improperly joined Best Sunshine International Limited ("BVI Parent Company") and Tao Xing. In opposition, Skywalker contends that BVI Parent Company has not been joined and that joinder of Tao Xing is appropriate because the counterclaims against him arise from the same set of transactions as the claims between Imperial and Skywalker.

1. BVI Parent Company Has Not Been Joined.

As a threshold matter the Court rejects Imperial's argument that BVI Parent Company has been joined to this action. Nothing in Skywalker's counterclaims suggest that it is bringing an action against BVI Parent Company; instead, the counterclaims merely refers to BVI Parent Company in order to contextualize the transactions at issue in this case. At this time, the Court considers it prudent to **DENY** Imperial's motion for misjoinder as to BVI Parent Company.

2. Tao Xing Has Been Improperly Joined.

The primary joinder issue before the Court is whether Tao Xing was properly joined to the present action. NMI R. CIV. P. 13(h) does not allow a party to join another party by counterclaim when the claims asserted are solely brought against a third party who was not a party to the original action. *See, e.g.*, *Old Republic Nat'l Title Ins. Co. v. First Am. Title Ins. Co.*, 2015 U.S. Dist. LEXIS

[1] The Court did not address NMI R. CIV. P. 19, dealing with indispensible parties, because the parties did not argue it and it was evident on the face of the pleadings that Tao Xing would not qualify as an indispensable party.

37746, 3 (M.D. Fla. Mar. 25, 2015). The weight of case law interpreting Fed. R. Civ. P. 13(h)[2] posits that:

> Rule 13(h) only authorizes the court to join additional persons in order to adjudicate a counterclaim or cross-claim that already is before the court or one that is being asserted at the same time the addition of a nonparty is sought. This means that a counterclaim or cross-claim may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party. If it is not directed to an existing party, neither the counterclaim nor the party to be added will be allowed in the action.

Old Republic, 2015 U.S. Dist. LEXIS at 3 (citing Charles Wright, Arthur Miller, and Mary Kane, *Federal Practice and Procedure*, 6 Fed. Prac. & Proc. Civ. § 1435 (3d ed. 2010) (extrapolating the rule from multiple cases across multiple jurisdictions)); *see also AllTech Comm., LLC v. Brothers,* 601 F. Supp. 2d 1255, 1260-61 (N.D. Okla. 2008); *Stonecrest Partners, LLC v. Bank of Hampton Rds.*, 2011 U.S. Dist. LEXIS 92742, 7-11 (E.D.N.C. 2011).

NMI R. CIV. P. 20(a) supports this reading of NMI R. CIV. P. 13(h) because NMI R. CIV. P. 20(a) states:

> All persons may be joined in one action as defendants *if there is asserted against them jointly, severally, or in the alternative, any right to relief* in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Here, Skywalker contends that NMI R. CIV. P. 13(h) and NMI R. CIV. P. 20(a) allows a party to add another party by way of counterclaim so long as the facts and chain of events underlying the causes of action against the third party are the same as those underlying the primary claims in the original suit. Further, Skywalker correctly notes that NMI R. CIV. P. 20(a) is a very permissive standard, which encourages courts to entertain the broadest possible scope of claims in order to foster justice and judicial economy. *See United Mine Workers of Amer. v. Gibbs*, 383 U.S. 715, 724

[2] As NMI R. CIV. P. 13(h) is patterned after FED. R. CIV. P. 13(h) the Court looks to the federal interpretation for guidance. *See Markoff v. Lizama*, 2016 MP 7 footnote 2 (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60).

(1966); *Save Lake Tahoe v. Reg. Plan. Agency*, 558 F.2d 914, 917 (9th Cir. 1977); *Alila-Katita v. U.S. Bank Nat'l Ass'n*, 2017 U.S. Dist. LEXIS 9123, 3 (N.D. Cal. 2017).

While Skywalker is correct that NMI R. CIV. P. 20(a) is an extremely accommodating standard its arguments nonetheless fail because the correct reading of NMI R. CIV. P. 13(h) and NMI R. CIV. P. 20(a) requires that the counterclaim[s] in question must also be alleged against the original plaintiff, Imperial. In this case, it would be impossible for Imperial to be liable for the two interference claims alleged by Skywalker because Imperial is not a third party to its own agreements. *See generally McReady*, 804 F. Supp. 2d at 445 (articulating that a party to a contract cannot tortiously interfere with its own contract[s]).

Further, Skywalker's citation to cases such as *Dynamic Measurements Group, Inc. v. U. of Oregon*, 121 F. Supp. 3d 1047 (9th Cir. 2015), is inapposite because the cases Skywalker cites all involve situations where the counterclaim[s] alleged against a third party[s] were also brought against the original plaintiff[s]. Skywalker correctly states that joinder need not exclusively be achieved by motion, but misses the broader standard governing NMI R. CIV. P. 13(h) and NMI R. CIV. P. 20(a); to bring a counterclaim against a third party who is not an original party the cause of action[s] must also have already or simultaneously been brought against an original plaintiff.[3] *See, e.g., Old Republic*, 2015 U.S. Dist. LEXIS at 3.

C. Conclusion as to Imperial's Motion for Misjoinder.

Overall, while it is certainly true that the facts underlying the claims in the original action as well as Skywalker's interference claims overlap to a considerable extent, Skywalker's counterclaim is procedurally defective. NMI R. CIV. P. 21 empowers the Court to drop a party when they have not been appropriately joined to an action, such is the case here. For the abovementioned reasons,

[3] The Court notes that Imperial's original argument, in its filings and at oral argument, that the only way to join a third party is by motion to the Court is incorrect, evidenced by its own argument that NMI R. CIV. P. 13(h) allows a party to be joined by counterclaim in certain situations.

Imperial's motion for misjoinder as to Tao Xing is **GRANTED**. In order for Skywalker to bring its claims against Tao Xing it will have to file a separate action, joinder in this action is procedurally inappropriate.

IV. IMPERIAL'S MOTION TO STRIKE

Finally, the Court considers Imperial's motion to strike.

A. Legal Standard.

NMI R. CIV. P. 12(f) provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Courts have wide discretion under NMI R. CIV. P. 12(f) to strike material in a pleading, which is deemed to be non-essential to the matter at hand. *See Maratita v. Fitial*, Civ. No. 12-0194 (NMI Super. Ct. Dec. 28 2012) (Order Partially Granting and Denying Defendants' Motion to Dismiss and Strike at 7-8); *see also Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000).

B. Discussion.

Imperial argues that any reference to BVI Parent Company and Tao Xing should be stricken because in Imperial's view they are immaterial. Skywalker counters that the references to BVI Parent Company and Tao Xing should not be stricken because BVI Parent Company is listed in the contracts at issue and Tao Xing is a properly joined party.

1. References to BVI Parent Company Should Not Be Stricken.

The Court finds that Skywalker's counterclaim merely states that there may be a relevant relationship between Imperial and BVI Parent Company. Further, it is alleged that BVI Parent Company is the entity that entered the contracts at issue, which may be relevant. The exact scope of

BVI Parent Company's involvement, if any, with this matter is unclear, but the Court finds that there are facts in the pleadings that make striking references to BVI Parent Company unwarranted.

2. References to Tao Xing Should Be Stricken.

As discussed above, Tao Xing was improperly joined to this action. As Tao Xing has no place in this action, other than as a possible witness, the Court finds that the portions of Skywalker's counterclaims directed against Tao Xing are immaterial.

C. Conclusion as to Imperial's Motion to Strike.

For the foregoing reasons, Imperial's motion to strike references to BVI Parent Company is **DENIED**. As to references of Tao Xing, the Court **GRANTS** Imperial's motion to strike because the Court has determined that Tao Xing was improperly joined. Specifically, the Court **ORDERS** that paragraphs 5 and 57-71 of Skywalker's counterclaim as well as paragraph 2 of Skywalker's prayer for relief be stricken pursuant to NMI R. CIV. P. 12(f) as immaterial.[4]

V. CONCLUSION

In sum, the Court **DENIES** Tao Xing's motion to dismiss pursuant to NMI R. CIV. P. 12(b)(6). The Court **GRANTS** Imperial's motion for misjoinder as to Tao Xing, but **DENIES** Imperial's motion as to BVI Parent Company. Finally, the Court **GRANTS** Imperial's motion to strike as to Tao Xing, but **DENIES** Imperial's motion as to BVI Parent Company.

IT IS SO ORDERED this 14th day of February, 2017.

/s/
ROBERTO C. NARAJA
Presiding Judge

[4] Since Tao Xing has been dropped from the present action the only causes of action remaining are in contract. Punitive damages are unavailable in contract cases making a punitive damages request improper. *See generally Pangelinan v. Itaman*, 4 NMI 114, 118-19 (1994).