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United States District Court,
D. Oregon.

Trailers Intl, LLC, a Nevada corporation, and Vincent L. Webb, Plaintiffs,
v.
Mastercraft Tools Florida, Inc., a Florida corporation; Global Equipment Company, Inc., a New York corporation; Home Depot Usa, Inc., a Delaware corporation; K-Mart Corporation, a Michigan corporation; Power Equipment Direct, Inc., a Delaware corporation; Sears, Roebuck and Company, a New York corporation; Sky Distributors of America, Inc., a Florida corporation; Steven F. Resch; Xuefeng Zhang; Zhuhai Sharp-Group Enterprise Co, Ltd., a foreign corporation; and Xiaofei Yang, Defendants.

3:15-cv-00171-BR (Lead Case)
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3:15-cv-00767-BR (Consolidated Cases)
|
Signed January 6, 2016

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OPINION AND ORDER

BROWN, Judge.

***1** These consolidated matters come before the Court on the following Motions:

1. The Motion (#93) to Dismiss Plaintiff's First Amended Complaint or, in the Alternative, Compel Arbitration and Stay Litigation filed by Defendants Mastercraft Tools Florida, Inc.; Global Equipment Company, Inc.; K-Mart Corporation; Sears, Roebuck and Company**;** and Xuefeng Zhang (collectively referred to herein as the Altocraft Defendants);

2. The Motion (#95) to Dismiss Plaintiff's First Amended Complaint or, in the Alternative, to Compel Arbitration and Stay Litigation filed by Defendants Zhuhai Sharp-Group Enterprise Co., Ltd., and Xiaofei Yang (collectively referred to herein as the Jumbo Defendants);

3. The Motion (#98) to Dismiss Claims 1-5 of the First Amended Complaint filed by Defendant Power Equipment Direct, Inc. (PED); and

4. The Motion (#110) for Stay Pending Arbitration filed by Defendant Home Depot USA, Inc.

For the reasons that follow, the Court **DENIES** the Altocraft Defendants' Motion (#93), the Jumbo Defendants' Motion (#95), and Defendant Home Depot's Motion (#110); **GRANTS** PED's Motion (#98) to Dismiss; **DISMISSES** Plaintiffs' Claims 1-5 as to PED **without prejudice**; and grants Plaintiffs leave to amend their Complaint as to PED **no later than February 5, 2016**.

MOTIONS TO DISMISS FILED BY ALTOCRAFT DEFENDANTS (#93) AND JUMBO DEFENDANTS (#95), AND HOME DEPOT'S MOTION (#110) FOR STAY

The Altocraft and Jumbo Defendants move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis that the Court lacks jurisdiction or, in the alternative, these Defendants move to compel arbitration and to stay this matter. Home Depot similarly moves to stay this matter pending the completion of arbitration.

I. Background

The following facts are undisputed and taken from the record on the Motions to Stay filed by the Altocraft and Jumbo Defendants and Home Depot:

On December 1, 2009, Plaintiffs and the Jumbo Defendants entered into a Memorandum of Understanding (MOU) whereby Plaintiffs granted Jumbo an exclusive license to use Plaintiffs' trailer technology; to manufacture the trailers; and to be the worldwide distributor of Plaintiffs' trailers in exchange for, among other things, a $150,000.00 advance on proceeds from trailer sales. The MOU provided the Jumbo Defendants were to submit to Plaintiffs a monthly accounting of all trailers that the Jumbo Defendants sold. The MOU also provided the Jumbo Defendants were to pay Plaintiffs 20% of the actual cost of manufacturing goods associated with "Kit Trailer Sales" and 20% of the selling price of "Cargo Management Products." Under the MOU Plaintiffs licensed the trademark and brand name "UtilityMate" for use by the Jumbo Defendants and Plaintiffs agreed to "extend use of any and all trademarks, patents, copyrights" to the Jumbo Defendants that "assist in the manufacturing and sales of all UtilityMate Products."

The MOU provides in particular:

> ***9. Term and Renewal***
>
> This Agreement shall become effective upon execution of this Agreement by each of the Parties hereto, and shall remain in full force and effect for a period of five (5) consecutive years from the effective date. Thereafter, this agreement shall renew every 24 month basis [*sic*] as the parties agree unless terminated by either party with or without cause, with no less than ninety (90) days notice prior to the anniversary date of this agreement to the other party, unless terminated for cause as outlines in section ten herein.
>
> ****2 10. Default, Cure and Termination***
>
> The parties shall give notice of default and provide opportunity to cure any such default claimed under the Agreement as follows:
>
> (a) If default is claimed by either party, the nature of the default or breach shall be specified in writing by the party claiming default, and may be cured by the party receiving such notice by full performance and cure of the specified default or breach, within (30) days of receipt of written notice of default therefore. If for some reason default is not cured, binding Arbitration will be initiated by the non defaulting [*sic*] party.

The original term of the MOU ran through December 1, 2014. On January 25, 2011, Plaintiffs and the Jumbo Defendants agreed to extend the MOU until December 1, 2015.

In May 2010 Plaintiffs, the Jumbo Defendants, and the Altocraft Defendants entered into an oral agreement to permit the Altocraft Defendants to act as the distributor of UtilityMate trailers on the east coast of the United States and in South America. Accordingly, on May 16, 2011, the Jumbo Defendants entered into an agreement with the Altocraft Defendants to "distribute Utilitymate Trailers in the east coast of US market and Latin America Market." That agreement stated the Jumbo Defendants had a "signed contract with Vince Webb [1] from [Utilitymate], LLC, and has all the rights to use Utilitymate Brand, trademark, manuals, picture and all the materials from the website," and the Jumbo Defendants authorized the Altocraft Defendants to use the same as the distributor.

Plaintiffs and the Jumbo Defendants amended the MOU on September 12, 2010, to require Plaintiffs to "rework the UtilityMate website and sales materials to include Jumbo."

In early 2011 Plaintiffs sent to the Jumbo Defendants a notice of default regarding the Jumbo Defendants' alleged failure to abide by specific terms in the MOU and alleged failure to manufacture trailers to Plaintiffs' standards. Thereafter Plaintiffs sent second and third notices of default to the Jumbo Defendants.

On October 2, 2011, Plaintiffs sent an email to the Jumbo Defendants in which Plaintiffs offered to terminate the

contract for, among other things, a $150,000 payment to the Jumbo Defendants. Webb stated he "spoke to [his] attorney at length regarding this matter, he advised me that we should terminate the agreement immediately and if you are unwilling to agree, I should immediately move to arbitration as outlined in the agreement." The Jumbo Defendants did not immediately respond.

On October 10, 2011, counsel for Plaintiffs sent the Jumbo Defendants a letter notifying them that Plaintiffs were terminating the MOU because the noticed defaults had gone uncured for six months. In that letter Plaintiffs' counsel stated:

> Per the agreement, in the event of a failure to cure, binding arbitration may be demanded by the non-defaulting party. You were noticed on different occasions and refused to acknowledge or participate. Therefore my client is left with no other recourse than to terminate the agreement between the parties effective immediately.

***3** Plaintiffs and the Jumbo Defendants continued to negotiate termination of the MOU in February 2012, but they failed to reach an agreement regarding contract termination. In an email to Plaintiffs dated February 27, 2012, the Jumbo Defendants stated they would "continue to perform [their] contractual duties under said contracts and [would] resort to all means to protect [their] contractual rights under those contracts." Although the Jumbo Defendants continued to manufacture and to distribute trailers using Plaintiffs' intellectual property, they did not report any sales of trailers to Plaintiffs and have not paid Plaintiffs for any trailers that they manufactured or sold. In addition, the Altocraft Defendants continued to sell trailers supplied by the Jumbo Defendants that were identical to those manufactured under the MOU and that continued to bear the UtilityMate mark. The trailers sold by the Altocraft Defendants (and supplied by the Jumbo Defendants) also continued to bear VIN information that included numbers associated with Plaintiffs.

On January 30, 2015, Plaintiffs filed a Complaint (#1) against Defendants in this Court. On May 11, 2015, Plaintiffs filed a First Amended Complaint (#68) (FAC) in which Plaintiffs raise the eight claims against Defendants that are now at issue in the Motions before the Court:

In Claim One Plaintiffs bring a claim against all Defendants for copyright infringement under 17 U.S.C. § 501 on the ground that Defendants have used and continue to use Plaintiffs' copyrighted images in owners' manuals and on their websites.

In Claim Two Plaintiffs bring a claim against all Defendants for trademark infringement under 15 U.S.C. § 1114(1) on the ground that Defendants have used and continue to use Plaintiffs' trademarks in connection with the manufacturing, distribution, and sale of the trailers.

In Claim Three Plaintiffs bring a claim against all Defendants for trademark counterfeiting under 15 U.S.C. § 1114(1) and 1116(d) on the ground that Defendants have used and continue to use trademarks on products that are identical to or substantially indistinguishable from Plaintiffs' trademarks.

In Claim Four Plaintiffs bring a claim against all Defendants for false designation of origin under 15 U.S.C. § 1125(a)(1) on the ground that Defendants have used names identical to or confusingly similar to Plaintiffs' names on products that Defendants have sold.

In Claim Five Plaintiffs bring an unfair-competition claim against all Defendants under 15 U.S.C. § 1125(a)(1) for passing off products that were not manufactured by Plaintiffs as Plaintiffs' products.

In Claim Seven Plaintiffs bring a common-law commercial-disparagement claim against the Altocraft Defendants on the ground that the Altocraft Defendants have represented they make the same products and are the same company as Plaintiffs.

In Claim Nine Plaintiffs bring a common-law conversion claim against the Jumbo Defendants for failure to return all blueprints, tooling, and dies to Plaintiffs after termination of the MOU.

Finally, in Claim Ten Plaintiffs bring a trade-secret misappropriation claim against the Jumbo Defendants for failure to return and continuing to use Plaintiffs' blueprints, tooling, and dies.

II. Standards

Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, written agreements to arbitrate disputes that arise out of transactions involving interstate commerce "shall be valid,

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a court finds the issue involved in a federal action is referable to arbitration under a written arbitration agreement, the court shall, on application of one of the parties, stay the trial of the action until such arbitration has been completed in accordance with the terms of the agreement provided the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. § 3.

"By its terms, the [FAA] 'leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.' " *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)(quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985))(emphasis in original). "The court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Id. See also Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008).

III. Discussion

***4** The Jumbo Defendants contend in their Motion and the Altocraft Defendants and Home Depot agree that Plaintiffs must arbitrate their claims against the Jumbo Defendants under the terms of Section 10 of the MOU. Thus, each of these parties seek to compel arbitration and to have this case either stayed or dismissed pending the results of that arbitration.

Plaintiffs, on the other hand, contend they are not required to arbitrate their claims under the terms of the MOU because (1) Plaintiffs terminated the MOU in October 2011 before the allegedly tortious conduct took place, (2) the arbitration provision is unenforceable because it lacks material terms, (3) the Jumbo Defendants abandoned their rights under the contract by failing to report sales and to make payments to Plaintiffs, and (4) Plaintiffs' claims do not fall within the scope of the arbitration provision. In addition, Plaintiffs contend the Altocraft Defendants cannot enforce the terms of the MOU because they are not parties to the MOU.

A. Termination of the MOU

As noted, Sections 9 and 10 of the MOU provide:

> ***9. Term and Renewal***
>
> This Agreement shall become effective upon execution of this Agreement by each of the Parties hereto, and shall remain in full force and effect for a period of five (5) consecutive years from the effective date. Thereafter, this agreement shall renew every 24 month basis [*sic*] as the parties agree unless terminated by either party with or without cause, with no less than ninety (90) days notice prior to the anniversary date of this agreement to the other party, unless terminated for cause as outlines in section ten herein.
>
> ***10. Default, Cure and Termination***
>
> The parties shall give notice of default and provide opportunity to cure any such default claimed under the Agreement as follows:
>
> (a) If default is claimed by either party, the nature of the default or breach shall be specified in writing by the party claiming default, and may be cured by the party receiving such notice by full performance and cure of the specified default or breach, within (30) days of receipt of written notice of default therefore. If for some reason default is not cured, binding Arbitration will be initiated by the non defaulting [*sic*] party.

Sections 9 and 10 read together, therefore, provide two mechanisms for termination of the MOU. First, a party may terminate the MOU at the end of its natural term with or without cause as long as the terminating party provides notice to the nonterminating party at least 90 days before the end of the natural term of the MOU. Second, a party may terminate the MOU with cause before the end of its natural term if the terminating party (1) provides notice of the alleged default to the nonterminating party, (2) provides the nonterminating party at least 30 days to cure the alleged default, and (3) initiates binding arbitration if the default remains uncured.

As noted, although the original term of the MOU ran through December 1, 2014 (five years after the parties entered into the MOU), Plaintiffs and the Jumbo Defendants agreed on January 25, 2011, to extend the MOU for an additional year through December 1, 2015. Plaintiffs, however, contend their communications to the Jumbo Defendants in October 2011 terminated the MOU for cause as of that date, and, therefore, their claims regarding all of the Defendants' use of Plaintiffs' intellectual property after that date are not subject to the arbitration clause.

***5** The Court notes, however, it is undisputed that Plaintiffs never initiated arbitration as required by the MOU. On this record, therefore, the Court concludes Plaintiffs did not terminate the MOU in October 2011.

B. Enforceability of the Arbitration Provision

Plaintiffs next contend the arbitration provision is unenforceable because it lacks material terms as to the procedure for arbitration. Specifically, it appears Plaintiffs contend the arbitration clause is unenforceable because it did not set out the scope of arbitration or when, how, where, and by whom arbitration was to be conducted.

"Under the FAA ... state law that 'arose to govern issues concerning the validity, revocability, and enforceability of contracts generally' remains applicable to arbitration agreements." *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685-87 (1996)). Under Oregon law "[i]f the parties' communications and actions manifest assent to be bound by promises, they will form a contract unless the promises are 'so indefinite that a court cannot determine what the parties intended.' " *Wieck v. Hostetter*, 274 Or. App. 457, 472 (2015)(quoting *Logan v. D.W. Sivers Co.*, 343 Or. 339, 347 (2007)). To determine whether a contract is sufficiently definite to be enforceable, the court must determine "whether the agreement 'contain[s] an exchange of promises that the parties intended to be binding and that are sufficiently definite to allow a jury or court to determine what is required of each party.' " *Wieck*, 274 Or. App. at 472 (quoting *Logan*, 343 Or. at 347).

Contrary to Plaintiffs' contentions, the default, cure, and termination provision is quite clear: To the extent that any noticed default remains uncured after 30 days, the nondefaulting party "will" initiate binding arbitration to resolve any remaining conflict between the parties and, if necessary, terminate the contract before the end of its natural term. Although the MOU did not contain terms regarding specific details as to how an arbitration would proceed, the Court concludes the lack of such detail is not sufficiently material to render the arbitration clause unenforceable because the Court, nevertheless, can "determine what is required of each party" on the face of the contract. *See Logan*, 343 Or. at 347.

Accordingly, on this record the Court concludes the arbitration provision in Section 10 of the MOU is enforceable.

C. Rescission or Waiver of the Contract

Plaintiffs next contend the Jumbo Defendants waived application of the arbitration provision or otherwise rescinded the MOU when they failed to make any further payments and failed to report sales to Plaintiffs after Plaintiffs stated their intent to terminate the MOU.

A contractual provision may be waived by the unilateral conduct of one of the parties to the contract. *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or. 138, 156 (2001). Such a waiver, however, "must be unequivocal." *Id.* at 157. On the other hand, "[r]escission of a contract must occur 'by agreement of the parties, whether expressed by words or manifested by conduct.' " *Matter of Marriage of Baxter*, 139 Or. App. 32, 37 (1996)(quoting *Edgley v. Jackson*, 276 Or. 213, 218 (1976)). To rescind a contract by conduct, however, the parties' conduct must demonstrate "mutual intent to no longer be bound by its terms." *Matter of Marriage of Baxter*, 139 Or. App. at 37.

***6** The record here does not permit the Court to conclude the Jumbo Defendants waived the arbitration provision in the MOU or otherwise acted in a way that demonstrated an intention not to be bound any longer by the terms of the MOU. To the contrary, the Jumbo Defendants stated on February 27, 2012, that they would "continue to perform [their] contractual duties under said contracts and ... resort to all means to protect [their] contractual rights under those contracts." Moreover, the Jumbo Defendants continued to manufacture and to distribute trailers using the intellectual property that Plaintiffs provided to them under the MOU. Although the Jumbo Defendants' alleged failure to report any further sales or to make any further payments to Plaintiffs may, if true, constitute breaches of the MOU, the Court cannot conclude as a matter of law at this stage of the proceedings that those alleged failures constitute a waiver or rescission of the MOU or the arbitration provision especially in light of the Jumbo Defendants' unequivocal statement that they would continue to avail themselves of the MOU terms and continue to manufacture and to distribute trailers.

Accordingly, on this record the Court concludes Plaintiff has not demonstrated the Jumbo Defendants waived or otherwise demonstrated an intent not to be bound any longer by the terms of the MOU. Because Plaintiffs did not successfully terminate the MOU and because the Jumbo Defendants did not otherwise rescind or waive the MOU, it follows that both Plaintiffs and the Jumbo Defendants remained bound by the terms of the MOU at least until December 1, 2015.

D. Scope of the Arbitration Clause

Finally, Plaintiffs contend their claims fall outside of the scope of the arbitration agreement because these claims do not implicate any breach of the MOU. The Court agrees.

The Jumbo Defendants, the Altocraft Defendants, and Home Depot, on the other hand, assert Plaintiffs' claims fall squarely within the arbitration clause. Specifically, these Defendants emphasize that " 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 922-23 (9th Cir. 2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)). "Courts should thus 'construe ambiguities concerning the scope of arbitrability in favor of arbitration.' " *Cape Flattery Ltd.*, 647 F.3d at 923 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995)).

The arbitration clause in the MOU, however, is not ambiguous and, as noted, it simply provides: "If for some reason default is not cured, binding Arbitration will be initiated by the non defaulting [*sic*] party." By its terms, therefore, the arbitration clause applies only to circumstances in which a party to the MOU seeks to redress an uncured default of the other party's obligations and, if necessary, to terminate the MOU for cause before the end of the MOU's natural term. Plaintiffs' claims, however, are not premised on any specific "default" as described in the MOU. The arbitration provision, therefore, does not apply to Plaintiffs' claims in this action. [2]

Accordingly, on this record the Court concludes Plaintiffs' claims against the Jumbo Defendants, the Altocraft Defendants, and Home Depot do not fall within the scope of the arbitration clause in the MOU, and, therefore, the Court denies the Motions of these Defendants to dismiss or, alternatively, to stay pending arbitration.

PED'S MOTION (#98) TO DISMISS PLAINTIFF'S CLAIMS 1-5

PED moves to dismiss Plaintiff's Claims 1-5 against PED pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

I. Background

The following facts regarding PED are taken from Plaintiffs' FAC and are assumed to be true at this stage of the proceedings [3]:

> 224. PED offers for sale and sells counterfeit utility trailers that are nearly identical to genuine Trailers Intl utility trailers.
>
> ***7** 225. PED advertises the infringing trailers using photographs, brand names, descriptions, and model numbers identical or confusingly similar to those Webb and Trailers Intl use on their websites, and that infringe Webb's registered copyrights and trademarks. *See* Figures 31 and 32.
>
> 226. PED has actual knowledge of Webb's registered trademarks and copyrights.
>
> 227. PED is not authorized to manufacture, import, offer for sale, sell, distribute, or otherwise deal in trailers made from Webb's and Trailers Intl's designs.

FAC (#68) ¶¶ 224-27. In addition, Plaintiffs included in their FAC an image that contains a trailer with the Altocraft brand name below it allegedly captured from PED's website. [4] The following words are beside the image of the trailer: "Buy Factory Direct & Save."

II. Standard

To 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." *Bell Atlantic v. Twombly*, 550 U.S. 544, 545 (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. *Id.* at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Twombly*, 550 U.S. at 546). When a complaint is based on facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). *See also Bell*

Atlantic, 550 U.S. at 555-56. The court, nevertheless, must accept as true the allegations in the complaint and construe them in favor of the plaintiff. *Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013).

The pleading standard under Federal Rule of Civil Procedure 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). *See also* Federal Rule of Civil Procedure 8(a)(2). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (citing *Twombly*, 550 U.S. at 555). A complaint also does not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

III. Discussion

***8** PED contends Plaintiffs' allegations are insufficient to state a claim for copyright infringement (Claim One), trademark infringement (Claim Two), trademark counterfeiting (Claim Three), false designation of origin (Claim Four), or unfair competition as a result of passing off Plaintiffs' marks as those of Altocraft (Claim Five).

The Court agrees Plaintiffs' allegations with respect to PED are sparse and constitute no more than labels and conclusions. It is consequently difficult to determine from the face of Plaintiffs' FAC which facts Plaintiffs rely on to establish the elements of the five separate claims they bring against PED. Although Plaintiffs do not need to provide detailed factual allegations, they cannot leave PED or the Court to guess about the basis for Plaintiffs' claims against PED. *See Iqbal*, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' ")(quoting Fed. R. Civ. P. 8(a)(2)).

On this record, therefore, the Court concludes Plaintiff's allegations do not state a claim against PED in Claims 1-5, and, therefore, the Court grants PED's Motion to Dismiss. In light of the fact that this matter is still at the pleading stage, the Court concludes justice requires Plaintiffs be allowed an opportunity to replead their claims against PED. *See* Fed. R. Civ. P. 15(a)(3).

CONCLUSION

For these reasons, the Court **DENIES** the Altocraft Defendants' Motion (#93), the Jumbo Defendants' Motion (#95), and Home Depot's Motion (#110); **GRANTS** Defendant PED's Motion (#98) to Dismiss; **DISMISSES** Plaintiff's Claims 1-5 as to PED **without prejudice**; and grants Plaintiffs leave to amend their Complaint as to PED **no later than February 5, 2016**. The Court also directs the Altocraft Defendants, the Jumbo Defendants, and Home Depot to file an responsive pleading to Plaintiffs' next form of Complaint **no later than February 19, 2016.**

IT IS SO ORDERED.

All Citations

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Footnotes

1 Plaintiff Webb is the principal of Plaintiff Trailers Intl.

2 The Court need not determine at this stage of the proceedings whether Plaintiffs' failure to terminate the MOU has any effect on Plaintiffs' claims.

3 PED submits the Declaration of David M. Hoch (#99) in support of its Motion. In his Declaration Hoch provides additional information regarding the nature of PED's business, sets out the foundation for many of the arguments PED presents in its Motion, and contradicts some of Plaintiff's allegations regarding PED. "As a general rule 'a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.' " *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)). *See also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). In any event, the Court concludes PED's Motion cannot efficiently be converted to a motion for summary judgment at this stage of the proceedings because Plaintiffs are entitled to discovery before the Court considers any such Motion. Accordingly, the Court's analysis on PED's Motion is constrained to those facts alleged in the FAC.

4 Plaintiffs also include in their FAC an image of one of their own trailers. In their Reply Memorandum (#108), however, Plaintiffs acknowledge that image is not relevant to this action.

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