

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MVP ASSET MANAGEMENT (USA) LLC,)
a Delaware Limited Liability) 2:10-cv-02483-GEB-CMK
Company,)

Plaintiff,) ORDER

v.)

STEVEN VESTBIRK, JEFF BALLIET,)
ALLISON HANSLIK, JIM GRANT, ARK)
ROYAL ASSET MANAGEMENT, LTD., a)
Bermuda Limited Company,)
VESTBIRK CAPITAL MANAGEMENT,)
LTD., a Bermuda Limited Company,)
ARK ROYAL ASSET MANAGEMENT, LLC,)
a Nevada Limited-Liability)
Company, ARK DISCOVERY, LLC, a)
Business Entity of Unknown Form,)
ARK ROYAL HOLDINGS, LLC, a)
Nevada Limited-Liability)
Company, ARK ROYAL SERVICES,)
LLC, a Nevada Limited-Liability)
Company, ARK ROYAL CAPITAL, LLC,)
a Nevada Limited-Liability)
Company, ARK ROYAL CAPITAL)
FUNDING, LLC, a Nevada Limited-)
Liability Company, ARK ROYAL)
CAPITAL, INC., a Nevada)
Corporation, ARK ROYAL)
RESOURCES, LLC, a Nevada)
Limited-Liability Company, ARK)
ROYAL ASSURANCE LLC, a Nevada)
Limited-Liability Company, and)
ARK ROYAL INVESTMENTS, LLC, a)
Nevada Limited-Liability)
Company,)

Defendants.)

Defendants move for dismissal of Plaintiff's Second Amended Complaint ("SAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(1), arguing Plaintiff "did not have Article III standing at the time this action was filed." (Defs.' Mot. to Dismiss Under Rule 12(b)(1) ("Defs.' Mot.") 1:5-6; ECF No. 82.) Defendants also seek dismissal of Plaintiff's SAC under Rules 12(b)(2) and 12(b)(6). (ECF No. 83.) Plaintiff opposes the motions.

I. LEGAL STANDARD

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit. In that event, the suit should be dismissed under Rule 12(b)(1)." Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) (citation omitted).

[T]o satisfy Article III's standing requirements, a plaintiff must show that (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 Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). Plaintiff has the burden of establishing jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Defendants argue their 12(b)(1) motion is a facial attack on subject matter jurisdiction. (Defs.' Mot. 7:11.) "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for

1 Everyone, 373 F.3d at 1039. Therefore, the factual allegations in
 2 Plaintiff's SAC are assumed to be true, and all reasonable inferences
 3 capable of being drawn therefrom are drawn in Plaintiff's favor. Wolfe
 4 v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). However, "the tenet
 5 that a court must accept as true all of the allegations contained in a
 6 complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 129
 7 S. Ct. 1937, 1949 (2009).

8 **II. ALLEGATIONS IN SAC**

9 Plaintiff MVP Asset Management (USA) LLC ("MVPAM") alleges it
 10 is "the investment manager to the MVP Fund of Funds Ltd. ('MVP'), an
 11 Investment Company organized and existing under the laws of the British
 12 Virgin Islands," and it "brings this action as assignee pursuant to an
 13 assignment by MVP for collection[.]" (SAC ¶ 3.) Plaintiff further
 14 alleges:

15 On or about March 23, 2004, MVP and MVPAM entered
 16 into an Investment Management Agreement ("IMA").
 17 Under the IMA, MVP, pursuant to MVP's Memorandum
 18 and Articles of Association ("M&A") . . . ,
 19 delegated to MVPAM a general power of attorney
 20 including all powers and discretions to manage the
 21 business and affairs of MVP. Under the IMA MVPAM,
 22 as attorney in fact for MVP, was and is entitled
 23 generally to exercise such powers and discretions
 24 as may be necessary in order to perform the duties
 25 delegated to it by MVP's directors including, among
 26 other things:

27 (a) [to] manage the investment and reinvestment of
 28 the assets of [MVP] with power on behalf of and in
 the name of [MVP] to purchase, subscribe or
 otherwise acquire investments and to sell, redeem,
 exchange, vary or transpose the same;

(b) to . . . purchase (or otherwise acquire), sell
 (or otherwise dispose of) and invest money and
 other assets for the account of the Company and
 effect foreign exchange transactions in connection
 with any such purchase, acquisition, sale or other
 disposal;

(c) [to] enter into, make and perform such
 contracts, agreements and other undertakings as may

1 in the opinion of [MVPAM] be necessary or advisable
2 or incidental to the carrying out of the functions,
3 duties, powers and discretions conferred on it
pursuant to [the IMA] and its role as Investment
Manager of [MVP.]

4 In making each of the investments, investment
5 decisions and decisions relating to the investments
6 alleged herein, MVPAM was acting pursuant to its
authority to manage the business and affairs of
MVP.

7 Id. (internal quotations omitted). Plaintiff also alleges:

8 In February 2009, MVPAM, pursuant to authority
9 under the IMA . . . , including its power and
discretion to manage MVP's business and affairs,
10 its power and discretion to manage the investment
and reinvestment of . . . MVP's assets with power
11 on behalf of and in the name of MVP to sell,
redeem, exchange, vary or transpose MVP's
12 investments, its power and discretion to sell (or
otherwise dispose of) and invest money and other
13 assets for the account of the Company, and, its
power and discretion to enter into, make and
14 perform such contracts, agreements, and other
undertakings it deemed necessary or advisable or
15 incidental to the carrying out of the functions,
duties, powers and discretions conferred on it
16 pursuant to the IMA to its role as the manager of
MVP's business and affairs, and pursuant to its
17 general power of attorney for MVP, caused MVP to
enter into an agreement with MVPAM under which MVP
18 assigned its claims arising out of and relating to
the Ark Discovery Fund ("MVP Claims") to MVPAM for
19 collection in return for MVPAM's agreement to
account to MVP for any recovery obtained, net of
20 the cost of prosecuting the MVP Claims. Stratford,
as the sole voting shareholder of MVP, with the
21 authority under the M&A to delegate the management
powers of MVP's Board of Directors, confirmed and
22 approved on behalf of MVP the assignment of the MVP
Claims for collection to MVPAM. By resolution dated
23 May 27, 2011, . . . MVP's Board of Directors
unanimously ratified, confirmed, approved and
24 adopted in all respects the assignment of the MVP
Claims for collection to MVPAM. As a result of the
25 assignment, MVPAM holds legal title and MVP holds
beneficial title to the assigned MVP Claims.

26 Id. ¶ 87.

27 **III. DISCUSSION**

28 Defendants seek dismissal of Plaintiff's SAC, arguing "the

1 facts that are alleged establish only that there was, at most, a
2 specific power of attorney that was insufficient to provide MVPAM with
3 the authority to assign MVP's claims to itself." (Defs.' Mot. 1:15-17.)
4 Specifically, Defendants argue "the only authority granted was that
5 relevant to management of MVP's investments, and nothing more." Id. 9:4-
6 5. Further, Defendants argue the description of Investment Manager in
7 MVP's Articles of Association, "[t]he person from time to time appointed
8 by the Company to be responsible for the management of the Company's
9 investments[,] " is "consistent with a construction of MVPAM's powers as
10 limited to investment management, and not extending to the assignment of
11 claims[.]" Id. (internal citations omitted).

12 Plaintiff counters, arguing it alleges that under the IMA,
13 "MVP granted MVPAM the power to act, in MVP's name, to sell or dispose
14 of MVP's assets, including MVP's causes of action, and to enter into
15 contracts, such as assignments, that MVPAM believed are necessary,
16 advisable or incidental to its management of MVP's assets, including
17 MVP's causes of action." (Pl.'s Opp'n 7:17-21.) Specifically, Plaintiff
18 argues MVP "delegated to MVPAM the general powers and discretions
19 necessary to manage the business affairs of MVP and the specific powers
20 necessary to manage MVP's assets and investments." Id. 6:2-4.

21 The British Virgin Islands Business Companies Act of 2004
22 ("Business Companies Act") provides:

23 (1) Subject to its memorandum and articles, a
24 company may, by an instrument in writing appoint a
25 person as its attorney either generally or in
relation to a specific matter.

26 (2) An act of an attorney appointed under
27 subsection (1) in accordance with the instrument
28 under which he was appointed binds the company.

1 Business Companies Act § 106(1)-(2) (emphasis added).¹ Here, MVPAM's
 2 alleged power of attorney is specific to managing MVP's money and assets
 3 and entering into and performing contracts and agreements. Under the
 4 Business Companies Act, the term "'asset' includes money, goods, [and]
 5 things in action, . . . whether present or future or vested or
 6 contingent, arising out of, or incidental to, property." *Id.* § 2.
 7 Therefore, since claims are considered assets under British Virgin
 8 Islands law, Plaintiff has sufficiently alleged the specific power of
 9 attorney for MVPAM to manage MVP's assets, including causes of action.

10 Defendants further argue "the assignment as alleged by
 11 [Plaintiff] is invalid and unlawful" under British Virgin Island law.
 12 (Defs.' Mot. 9:11-12.) Plaintiff rejoins, arguing "California law
 13 governs MVP's assignment to pursue claims in California because the
 14 assignment was made and is being performed in California." (Pl.'s Opp'n
 15 8:11-12.) Plaintiff also argues, "[u]nder California law, there is no
 16

17 ¹ Defendants request that the Court take judicial notice of the
 18 law of the British Virgin Islands as set forth in certain sections of
 19 the Business Companies Act and as set forth in the Declaration of James
 20 Corbett QC. (Defs.' Amended Request for Judicial Notice ("RJN") 3:7-14;
 21 ECF No. 86.) Plaintiff requests that the Court take "judicial notice of
 22 the law of the British Virgin Islands as set forth in the . . .
 23 Declaration of Arabella di Iorio." (Pl.'s RJN 2:2-3; ECF No. 90.) While
 24 the Court can take judicial notice of the laws of a foreign country, the
 25 Court will not take judicial notice of those laws as interpreted by the
 26 declarant. *See MCA, Inc. v. U.S.*, 685 F.2d 1099, 1104 n.12 (9th Cir.
 27 1982) ("Under [Rule] 44.1, when the parties have given written notice of
 28 intent to raise an issue of foreign law, a federal court may take
 judicial notice of the laws of a foreign country."). Since MVP is
 "organized and existing under the laws of the British Virgin Islands,"
 the Court takes judicial notice of the Business Companies Act, "[a]n Act
 to provide for the incorporation, management and operation of different
 types of companies, [and] for the relationships between companies and
 their directors[.]" (SAC ¶ 3; British Virgin Islands Business Companies
 Act c o f 2 0 0 4 ,
<http://www.bvifsc.vg/LegislationLibrary/tabid/211/DMXModule/626/Default.aspx?EntryId=55> (follow "BVI Business Companies Act, 2004 (with 2005
 Amendments)" and view page 13 of pdf document).)

1 requirement that an assignment be in writing." Id. 9:2 n.5.

2 "[A]t this stage of the pleading, [Plaintiff] need only show
3 that the facts alleged, if proved, would confer standing upon [it]."
4 Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th Cir.
5 2003). However, as argued by Defendants in their reply brief, the SAC
6 "fails to include any allegation demonstrating that California law
7 should apply to the construction of the purported assignment"; rather,
8 it is only offered as an argument in Plaintiff's opposition brief.
9 (Defs.' Reply 14:3-4.) Therefore, the Court cannot assume as true that
10 the assignment was made and is being performed in California.

11 Further, "[i]n an action involving an assignment, a court must
12 ensure that the plaintiff-assignee is the real party in interest with
13 regard to the particular claim involved by determining: (1) what has
14 been assigned; and (2) whether a valid assignment has been made." In re
15 Brooms, 447 B.R. 258, 265 (9th Cir. 2011). However, Plaintiff's bare
16 allegation that "[i]n February 2009, MVPAM . . . caused MVP to enter
17 into an agreement with MVPAM under which MVP assigned its claims arising
18 out of and relating to the Ark Discovery Fund . . . to MVPAM for
19 collection" is insufficient to determine whether a valid assignment has
20 been made. (SAC ¶ 87; Cf. In re Brooms, 447 B.R. at 264 (stating the
21 court "did not err when it ordered Carter to produce documents
22 reflecting the terms of the assignment between Carter and Jorgenson.").)

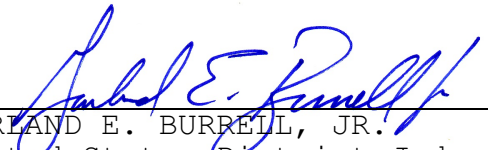
23 IV. CONCLUSION

24 Therefore, Defendants' 12(b)(1) motion to dismiss each of
25 Plaintiff's claims for lack of subject matter jurisdiction is GRANTED.
26 Since all claims against Defendants are dismissed, Defendants' 12(b)(6)
27 and 12(b)(2) motion to dismiss is DENIED as moot.

28 Plaintiff is granted ten (10) days from the date on which this

1 order is filed to file a Third Amended Complaint addressing the issues
2 raised in this order. Further, Plaintiff is notified that this action
3 may be dismissed with prejudice under Federal Rule of Civil Procedure
4 41(b) if Plaintiff fails to file an amended complaint within the
5 prescribed time period.

6 Dated: January 6, 2012

7
8 
9 GARLAND E. BURRELL, JR.
United States District Judge