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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-CKD
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.)

_____)

1 Defendants filed a motion to dismiss Plaintiff's Third Amended
2 Complaint ("TAC") under Federal Rule of Civil Procedure ("Rule")
3 12(b)(1), arguing, *inter alia*, Plaintiff lacks Article III standing and
4 the Court lacks diversity jurisdiction over Plaintiff's state claims.
5 (Defs.' Mot. to Dismiss TAC for Lack of Jurisdiction ("Defs.' 12(b)(1)
6 Mot."); ECF No. 111.) Plaintiff opposes the motion, arguing it has
7 properly alleged standing. (Pl.'s Opp'n to Defs.' Mot. to Dismiss
8 ("Pl.'s 12(b)(1) Opp'n"); ECF No. 116.)

9 Defendants also filed a motion to dismiss Plaintiff's TAC
10 under Rules 12(b)(6) and 12(b)(2), arguing "Plaintiff cannot state a
11 valid claim for relief[and] . . . cannot allege facts sufficient to
12 establish personal jurisdiction over any Defendant." (Defs.' Mot. to
13 Dismiss TAC Pursuant to Rule 12(b)(6) and Rule 12(b)(2) ("Defs.'
14 12(b)(6) Mot.") 1:5-6; ECF No. 109.) Plaintiff opposes the motion,
15 arguing it has "adequately stated" its federal and state law claims.
16 (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Pl.'s 12(b)(6) Opp'n") 1:25-
17 2:3; ECF No. 113.)

18 Further, Defendant Steven Vestbirk filed a motion to dismiss
19 Defendants' TAC under Rule 12(b)(2), arguing Plaintiff has not alleged
20 sufficient contacts with California to establish personal jurisdiction
21 over Vestbirk. (Def.'s Mot. 1:22-24; ECF No. 112.) Plaintiff opposes the
22 motion, arguing it is duplicative of Defendants' 12(b)(2) motion to
23 dismiss. (ECF No. 117.)

24 For the reasons stated below, Defendants' 12(b)(1) motion to
25 dismiss is granted in part and denied in part; Defendants' 12(b)(6)
26 motion to dismiss is granted in part and denied in part; and Defendants'
27 12(b)(2) and Defendant Vestbirk's 12(b)(2) motions are denied as moot.

28 ///

1 **I. STANDING**

2 Defendants argue in their 12(b)(1) dismissal motion that
3 Plaintiff lacks Article III standing, since "Plaintiff, the uninjured
4 investment advisor to the allegedly harmed underlying investor [MVP Fund
5 of Funds Ltd. ('MVP')], simply cannot allege a valid assignment of MVP's
6 purported claims to [MVP Asset Management (USA) LLC ('MVPAM')]." (Defs.'
7 12(b)(1) Mot. 1:6-8.) Defendants argue:

8 Plaintiff alleges little else new [in the TAC],
9 except that it was a "non-written agreement." As
10 the agreement was not documented in any fashion,
11 and did not result from oral communications between
12 MVP and MVPAM, Plaintiff is left only with this coy
13 characterization; the alleged agreement to assign,
14 in other words, apparently exists only in the mind
15 of MVPAM's principal: Michael Stratford.

16 Id. 8:13-17 (quoting TAC ¶ 87). Plaintiff opposes the motion, contending
17 "MVPAM has specifically alleged that, pursuant to its management
18 authority, it caused MVP to assign its claims against Defendants to
19 MVPAM for collection." (Pl.'s 12(b)(1) Opp'n 2:17-19.) Defendants rejoin
20 that Plaintiff's allegations are merely legal conclusions; specifically,
21 Defendants argue "no *fact* concerning any purported manifestation is
22 alleged. All that is alleged is that MVPAM 'caused' an assignment, *ergo*
23 there was an assignment." (Pl.'s Reply to Defs.' 12(b)(1) Opp'n 3:24-
24 3:25.)

25 "A suit brought by a plaintiff without Article III standing is
26 not a 'case or controversy,' and an Article III federal court therefore
27 lacks subject matter jurisdiction over the suit. In that event, the suit
28 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

1 conjectural or hypothetical; (2) the injury is
2 fairly traceable to the challenged action of the
3 defendant; and (3) it is likely, as opposed to
merely speculative, that the injury will be
redressed by a favorable decision.

4 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528
5 U.S. 167, 180-81 (2000). Plaintiff has the burden of establishing
6 jurisdiction. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377
7 (1994).

8 "A Rule 12(b)(1) jurisdictional attack may be facial or
9 factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.
10 2004). Here, Defendants challenge subject matter jurisdiction based on
11 a facial attack. (Defs.' 12(b)(1) Mot. 9:17.) "In a facial attack, the
12 challenger asserts that the allegations contained in a complaint are
13 insufficient on their face to invoke federal jurisdiction." Safe Air for
14 Everyone, 373 F.3d at 1039. "[I]n reviewing a Rule 12(b)(1) motion to
15 dismiss for lack of jurisdiction, we take the allegations in the
16 plaintiff's complaint as true . . . and draw all reasonable inferences
17 in [Plaintiff's] favor." Wolfe v. Strankman, 392 F.3d 358, 362 (9th
18 Cir. 2004) (internal quotation marks and citations omitted).

19 Here, the parties dispute whether a valid assignment occurred,
20 which is a question of state law. See Dolch v. United Cal. Bank, 702
21 F.2d 178, 181 (9th Cir. 1983) ("The nature and scope of renewal rights,
22 as well as their assignability, are federal questions, but the
23 conditions for valid assignment are not.") Since the parties agree that
24 California law applies for purposes of the 12(b)(1) motion only, the
25 Court will apply California law. (Defs.' 12(b)(1) Mot. 3:1 n.1.; Pl.'s
26 12(b)(1) Opp'n 4:3-9; see also 21X Capital, Ltd. v. Werra, 2008 WL
27 753907, at *2 (N.D. Cal. Mar. 19, 2008) ("The parties agree that, for
28 purposes of this motion, California law applies."))

1 Under California law, "[a] thing in action, arising out of the
2 violation of a right of property, or out of an obligation, may be
3 transferred by the owner." Cal. Civ. Code § 954. "While no particular
4 form of assignment is necessary, the assignment, to be effective, must
5 include manifestation to another person by the owner of his intention to
6 transfer the right, without further action, to such other person or to
7 a third person." Cockerell v. Title Ins. & Trust Co., 42 Cal. 2d 284,
8 291 (1954); see also Cal. Ins. Guarantee Ass'n v. Workers' Comp. Appeals
9 Bd., 203 Cal. App. 4th 1328, 1335 (2012) (same). "[I]n the absence of a
10 statute requiring that an assignment be in writing it is immaterial
11 whether it is made orally or by writing." Swing v. Lingo, 129 Cal. App.
12 518, 523 (1933).

13 Plaintiff alleges the following concerning the assignment of
14 its claims:

15 Plaintiff . . . is a Limited Liability Company
16 organized and existing under the laws of the State
17 of Delaware with its principal place of business
18 until August 2009 in Tahoe City, California and
19 since September 2009 in San Francisco, California.
20 At all relevant times mentioned herein, MVPAM has
21 been the investment manager to [MVP], an Investment
22 Company organized and existing under the laws of
23 the British Virgin Islands. On or about March 23,
24 2004, MVP and MVPAM entered into an Investment
25 Management Agreement ("IMA") (a true and correct
26 copy of which is attached hereto as Exhibit A and
27 incorporated herein). Under the IMA, MVP, pursuant
28 to MVP's Memorandum and Articles of Association
("M&A") (a true and correct copy of which is
attached hereto as Exhibit B and incorporated
herein), delegated to MVPAM a general power of
attorney including all powers and discretions to
manage the business and affairs of MVP. Under the
IMA MVPAM, as attorney in fact for MVP, was and is
entitled generally to exercise such powers and
discretions as may be necessary in order to perform
the duties delegated to it by MVP's directors
including, among other things:

(a) "[to] manage the investment and
reinvestment of the assets of [MVP] with power
on behalf of and in the name of [MVP] to

1 purchase, subscribe or otherwise acquire
2 investments and to sell, redeem, exchange,
vary or transpose the same”;

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

7 (c) “[to] enter into, make and perform such
8 contracts, agreements and other undertakings
9 as may in the opinion of [MVPAM] be necessary
10 or advisable or incidental to the carrying out
of the functions, duties, powers and
11 discretions conferred on it pursuant to [the
IMA] and its role as Investment Manager of
[MVP]”;

12 In making each of the investments, investment
13 decisions and decisions relating to the investments
14 alleged herein, MVPAM was acting pursuant to its
15 authority to manage the business and affairs of
MVP. MVPAM brings this action as assignee pursuant
to an assignment by MVP for collection as alleged
in more detail below.

16 . . .

17 In or around February 28 2009 [sic] at Tahoe City,
18 California, MVPAM and MVP entered into a non-
19 written agreement under which MVP assigned its
20 claims arising out of and relating to the Ark
21 Discovery Fund (“MVP Claims”) to MVPAM for
22 collection in California in return for MVPAM’s
agreement to account to MVP for any recovery
obtained, net of the cost of prosecuting the MVP
Claims (the “Assignment”). As a result of the
Assignment, MVPAM holds legal title and MVP holds
beneficial title to the assigned MVP Claims.

23 A. MVPAM caused MVP to enter into the Assignment
24 in or around February 28 2009 [sic] at Tahoe City,
25 California pursuant to MVPAM’s authority under the
26 IMA as alleged in Paragraph 3 of this TAC,
27 including its power and discretion to manage MVP’s
28 business and affairs, its power and discretion to
manage the investment and reinvestment of the MVP’s
assets with power on behalf of and in the name of
MVP to sell, redeem, exchange, vary or transpose
MVP’s investments, its power and discretion to sell
(or otherwise dispose of) and invest money and
other assets for the account of the Company, and,

1 its power and discretion to enter into, make and
2 perform such contracts, agreements and other
3 undertakings it deemed necessary or advisable or
4 incidental to the carrying out of the functions,
5 duties, powers and discretions conferred on it
6 pursuant to the IMA to its role as the manager of
7 MVP's business and affairs, and pursuant to its
8 general power of attorney for MVP.

9
10 B. In or around February 28, 2009 at Tahoe City,
11 California, Stratford, as the sole voting
12 shareholder of MVP, with the authority under the
13 M&A to delegate the management powers of MVP's
14 Board of Directors, confirmed and approved on
15 behalf of MVP the Assignment to MVPAM of the MVP
16 Claims.

17 C. By resolution dated May 27, 2011 (a true and
18 correct copy of which is attached hereto as Exhibit
19 C and incorporated herein), MVP's Board of
20 Directors (i) unanimously ratified, confirmed,
21 approved and adopted in all respects the Assignment
22 and (ii) agreed to be bound by any judgment entered
23 in this Action.

24 D. MVPAM has genuine commercial interest in the
25 enforcement of the MVP claims. As the manager of
26 MVP's business affairs, with power over MVP's
27 assets and investments, MVPAM has a legitimate
28 commercial interest in fulfilling its fiduciary
responsibility to MVP by taking actions for the
benefit of MVP including pursuing the MVP Claims.
MVPAM, as MVP's investment manager, made the
decisions to invest in the Ark Discovery shares at
issue and caused MVP to purchase the shares. MVPAM
has a genuine commercial interest in recovering the
lost Ark Discovery investments because, under the
IMA, MVPAM's compensation is based on the value of
MVP's assets and on the performance of MVP's
investments.

E. By bringing this action in California based on
Defendants' violations of California law and the
federal securities laws, MVPAM is performing the
Assignment in California.

(TAC ¶¶ 3, 87.)

Defendants' argument centers on the manifestation requirement
of an assignment; specifically, Defendants contend Plaintiff's failure
to allege oral communications or documentation supports drawing the
inference that there was no manifestation of intent. However, "no

1 particular form of assignment is necessary" as long as there is a
2 "manifestation to another person by the owner of his intention"
3 Cockerell, 42 Cal. 2d at 291. Plaintiff alleges that it was the same
4 person, Stratford, who had the authority to assign the claims and the
5 authority to approve the assignment. Plaintiff also alleges sufficient
6 facts to permit drawing a reasonable inference that it was the intent of
7 both entities to effectuate this assignment, and that this transaction
8 occurred on February 28, 2009, in Tahoe City, California.

9 The case relied upon heavily by Defendants, Property Asset
10 Management, Inc. v. Chicago Title Insurance Co., Inc., 173 F.3d 84 (2d
11 Cir. 1999), concerns the proof required at summary judgment in order for
12 Plaintiff to meet its burden. Id. at 87; see also Cockerell, 42 Cal. 2d
13 at 292 (explaining a plaintiff's burden concerning assignments is as
14 follows: "the evidence must not only be sufficient to establish the fact
15 of assignment when that fact is in issue, . . . but the measure of
16 sufficiency requires that the evidence of assignment be clear and
17 positive to protect an obligor from any further claim by the primary
18 obligee"). However, "at this stage of the pleading, [Plaintiff] need
19 only show that the facts alleged, if proved, would confer standing upon
20 [it]." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140 (9th
21 Cir. 2003). Therefore, Plaintiff's allegations are sufficient to state
22 an assignment.

23 II. FEDERAL CLAIMS

24 Defendants seek dismissal of Plaintiff's Securities and
25 Exchange Act of 1934 ("SEC Act") claims under Rule 12(b)(6). Plaintiff's
26 first claim alleges a violation of Section 10(b), and its second claim
27 alleges control person liability under Section 20(a). (TAC ¶¶ 88-98.)
28 Defendants argue "Section 10(b) does not have extraterritorial reach,

1 and controlling United States Supreme Court authority bars Plaintiff's
2 claims, which are based upon offshore transactions." (Defs.' 12(b)(6)
3 Mot. 21:15-17.) Further, Defendants argue, "Plaintiff's Section 20(a)
4 claim falls along with the underlying Section 10(b) claim." Id. 21:20-
5 21. Plaintiff opposes the motion, contending the "transactions at issue
6 are almost entirely domestic in nature[, and] are governed by the
7 domestic securities law." (Pl.'s 12(b)(6) Opp'n 11:13-15.)

8 "In reviewing the dismissal of a complaint, we inquire whether
9 the complaint's factual allegations, together with all reasonable
10 inferences, state a plausible claim for relief." Cafasso, U.S. ex rel.
11 v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1054 (9th Cir. 2011) (citing
12 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The material allegations
13 of the complaint are accepted as true and all reasonable inferences are
14 drawn in favor of the plaintiff. Al-Kidd v. Ashcroft, 580 F.3d 949, 956
15 (9th Cir. 2009). However, this tenet "is inapplicable to legal
16 conclusions." Iqbal, 556 U.S. at 678. Further, "[a] pleading that offers
17 'labels and conclusions' or 'a formulaic recitation of the elements of
18 a cause of action will not do.' Nor does a complaint suffice if it
19 tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id.
20 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)).
21 "In sum, for a complaint to survive a motion to dismiss, the
22 nonconclusory 'factual content,' and reasonable inferences from that
23 content, must be plausibly suggestive of a claim entitling the plaintiff
24 to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.
25 2009).

26 "To state a claim under § 10(b) . . . , a plaintiff must show
27 that the securities transaction at issue was a securities transaction
28 that is covered by the Exchange Act." Cascade Fund, LLP v. Absolute

1 Capital Mgmt. Holdings Ltd., No. 08-cv-01381-MSK-CBS, 2011 WL 1211511,
2 at *3 (D. Colo. Mar. 31, 2011). "Section 10(b) reaches the use of a
3 manipulative or deceptive device or contrivance only in connection with
4 the purchase or sale of a security listed on an American stock exchange,
5 and the purchase or sale of any other security in the United States."
6 Morrison v. Nat'l Austl. Bank Ltd., 558 U.S. ---, 130 S. Ct. 2869, 2888
7 (2010). Therefore, "the focus of the Exchange Act is not upon the place
8 where the deception originated, but upon purchases and sales of
9 securities in the United States." Id. at 2884.

10 Plaintiff alleges, and this motion to dismiss concerns,
11 domestic transactions of securities not listed on an American stock
12 exchange. "[T]ransactions involving securities that are not traded on a
13 domestic exchange are domestic if irrevocable liability is incurred or
14 title passes within the United States." Absolute Activist Value Master
15 Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012).

16 [I]n order to adequately allege the existence of a
17 domestic transaction, it is sufficient for a
18 plaintiff to allege facts leading to the plausible
19 inference that the parties incurred irrevocable
20 liability within the United States: that is, that
the purchaser incurred irrevocable liability within
the United States to take and pay for a security,
or that the seller incurred irrevocable liability
within the United States to deliver a security.

21 Id. at 68. It is also sufficient "for the plaintiff to allege that title
22 to the shares was transferred within the United States." Id.

23 Plaintiff makes the following allegations concerning the
24 alleged transactions:

25 At all times relevant hereto Verwaltungs- und
26 Privat-Bank Aktiengesellschaft ("VP Bank") served
as the Custodian Bank for MVP. Citco Global Custody
27 NV ("Citco") is a custodial service based in the
Netherlands. VP Bank maintains with Citco Account
28 Number 190023 in which, as MVP's Custodian Bank, VP
Bank holds on behalf of MVP the assets of MVP. All
of MVP's investments in the Ark Discovery Fund

1 alleged herein are held, and have been held at all
2 times since they were purchased, for the benefit of
3 MVP in VP Bank's Account Number 190023 with Citco.
4 Pursuant to its power of attorney for MVP, MVPAM
5 caused MVP to make the investments in the Ark
6 Discovery Fund alleged herein through MVP's
7 custodian, Citco. On or about April 1, 2008,
8 Plaintiff caused MVP, through Citco, to purchase
9 10,000 shares of the Ark Discovery Fund (Offshore)
10 Ltd. for \$1 million. MVP's purchase was consummated
11 when MVP's purchase funds were wired by Citco from
12 its bank account at HSBC Bank in New York which, in
13 turn, completed the purchases by wiring the funds
14 to the Ark Discovery Fund's account at JP Morgan
15 Chase in New York. Plaintiff is informed and
16 believes, and thereupon alleges, that the \$1
17 million purchase funds never left the United States
18 but, instead, were held in New York on Ark
19 Discovery Fund's account at JP Morgan Chase in New
20 York until disbursed in the United States to make
21 the loans to Petters which constituted Ark
22 Discovery Fund's asset portfolio.

13 . . .

14 On or about July 1, 2008, Plaintiff caused MVP,
15 through Citco, to purchase 5,000 shares of the Ark
16 Discovery Fund (Offshore) Ltd. for \$500,000. MVP's
17 purchase was consummated when MVP's purchase funds
18 were wired from Citco's bank account at HSBC Bank
19 in New York which, in turn, completed the purchases
20 by wiring the funds to the Ark Discovery Fund's
21 account at JP Morgan Chase in New York. Plaintiff
22 is informed and believes, and thereupon alleges,
23 that the \$500,000 purchase funds never left the
24 United States but, instead, were held in New York
25 on Ark Discovery Fund's account at JP Morgan Chase
26 in New York until disbursed in the United States to
27 make the loans to Petters which constituted Ark
28 Discovery Fund's asset portfolio.

22 . . .

23 On or about August 1, 2008, Plaintiff caused MVP,
24 through Citco, to purchase 5,000 shares of the Ark
25 Discovery Fund (Offshore) Ltd. for \$500,000. MVP's
26 purchase was consummated when MVP's purchase funds
27 were wired from Citco's bank account at HSBC Bank
28 in New York which, in turn, completed the purchases
by wiring the funds to the Ark Discovery Fund's
account at JP Morgan Chase in New York. Plaintiff
is informed and believes, and thereupon alleges,
that the \$500,000 purchase funds never left the
United States but, instead, were held in New York
on Ark Discovery Fund's account at JP Morgan Chase
in New York until disbursed in the United States to

1 make the loans to Petters which constituted Ark
2 Discovery Fund's asset portfolio.

3 (TAC ¶¶ 51, 59, 71.) Plaintiff's allegations concerning the
4 transactions, that certain funds were transferred in between New York-
5 based banking institutions, are insufficient to establish the existence
6 of a domestic transaction, as required under Section 10(b). See Cascade
7 Fund, LLP, 2011 WL 1211511, at *3 ("That leaves the final fact urged by
8 Cascade: that the funds to complete the transaction were wired (at least
9 initially) to New York. This assertion does not amount to a conclusion
10 that the transaction was completed in New York").

11 Further, Defendants seek dismissal of Plaintiff's § 20(a)
12 control person liability claim. "Congress has established liability in
13 § 20(a) for every person who, directly or indirectly, controls any
14 person liable for violations of the securities laws." Janus Capital Grp.
15 v. First Derivative Traders, 564 U.S. ---, 131 S. Ct. 2296, 2304 (2011).
16 Therefore, Plaintiff's "control person claims under Section 20(a) are
17 'necessarily predicated on a primary violation of securities law.' . . .
18 Because Plaintiff['s] primary claim[] under Section 10(b) . . . [is]
19 dismissed, 'these secondary claims must also be dismissed.'" In re
20 Societe Generale Sec. Litig., No. 08 Civ. 2495, 2010 WL 3910286, at *9
21 (S.D.N.Y. Sept. 29, 2010); see also Morrison, 130 S. Ct. at 2876 n.2.
22 ("Liability under § 20(a) is obviously derivative of liability under
23 some other provision of the Exchange Act.").

24 For the stated reasons, the portion of Defendants' motion to
25 dismiss concerning Plaintiff's federal claims is GRANTED. Further, for
26 the reasons stated below, the portion of Defendants' motion to dismiss
27 concerning Plaintiff's state claims is DENIED.

28 ///

III. DIVERSITY JURISDICTION

1
2 In their 12(b)(1) motion to dismiss, Defendants argue “[i]f
3 the Court . . . only dismisses the federal claims pursuant to the
4 arguments raised in the Rule 12(b)(6) motion . . . , the entire action
5 should nonetheless be dismissed because the Court will lack diversity
6 jurisdiction over the remaining state law claims.” (Defs.’ 12(b)(1) Mot.
7 19:9-12.) Specifically, Defendants argue “federal law bars district
8 courts from exercising jurisdiction over a civil action where a party
9 has used an improper or collusive assignment to join a party for
10 purposes of creating jurisdiction[.]” Id. 19:13-15. Plaintiff rejoins,
11 arguing “the allegations of the [TAC] establish[] legitimate business
12 reasons for MVP’s assignment to MVPAM[.]” (Pl.’s 12(b)(1) Opp’n 15:5-7.)

13 “The existence of federal jurisdiction is a matter of federal,
14 not state law[, and] an assignment [can] be improperly or collusively
15 made even though binding under state law[.]” Kramer v. Caribbean Mills,
16 Inc., 394 U.S. 823, 829 (1969) (internal quotation marks and citations
17 omitted). Under 28 U.S.C. § 1359, “[a] district court shall not have
18 jurisdiction of a civil action in which any party, by assignment or
19 otherwise, has been improperly or collusively joined to invoke the
20 jurisdiction of such court.” Attorneys Trust v. Videotape Computer
21 Prods., Inc., 93 F.3d 593, 597 (9th Cir. 1996).

22 In determining whether an assignment is collusive, “the main
23 focus is usually upon the reality of the transaction itself. . . . [I]s
24 the assignee truly a real party in interest or just a strawman for all
25 practical purposes? If the latter, an assignment which creates
26 jurisdiction will be dubbed improper.” Id. at 597.

27 [C]ourts have set out a number of factors which are
28 to be considered in deciding whether an assignment
is improper or collusive. Among them are: were
there good business reasons for the assignment; did

1 the assignee have a prior interest in the item or
2 was the assignment timed to coincide with
3 commencement of litigation; was any consideration
4 given by the assignee; was the assignment partial
or complete; and was there an admission that the
5 motive was to create jurisdiction.

6 Id. at 595-96. Further, "where an assignment is partial, the courts are
7 very likely to find that there is an improper or collusive transfer
8 because the prior owner still has an interest." Id. at 597.
9 Specifically, "research has not disclosed a single case where an
10 assignment for collection (however framed or disguised) has been held to
be anything but collusive." Id.

11 Plaintiff alleges an assignment for collection between itself
12 and MVP. (TAC ¶¶ 3, 87; TAC, Ex. C.) At the time of the assignment, both
13 entities were under the control of MVPAM. Id. "Courts presume that an
14 assignment is collusive in situations where the relationship between
15 assignor and assignee is close and provides an excellent opportunity for
16 manipulation, as in transfers between corporations and its subsidiaries
17 or officers." Arsape S.A. v. JDS Uniphase Corp., No. C 03-4535, 2004 WL
18 2663180, at *4 (N.D. Cal. July 29, 2004). "To overcome this presumption,
19 the party asserting diversity must show a legitimate business reason for
20 the transfer." Yokeno v. Mafnas, 973 F.2d 803, 810 (9th Cir. 1992).
21 "Simply articulating a business reason is insufficient; the burden of
22 proof is with the party asserting diversity to establish that the reason
23 is legitimate and not pretextual." Id.

24 Plaintiff does not oppose Defendants' argument that Plaintiff
25 alleges a partial assignment, or that there is a close relationship
26 between MVP and MVPAM; however, Plaintiff argues it has sufficiently
27 alleged a business reason for the assignment. (Pl.'s 12(b)(1) Opp'n
28 15:1-21.) Plaintiff's business reason comprises the following

1 allegations:

2 MVPAM has genuine commercial interest in the
3 enforcement of the MVP claims. As the manager of
4 MVP's business affairs, with power over MVP's
5 assets and investments, MVPAM has a legitimate
6 commercial interest in fulfilling its fiduciary
7 responsibility to MVP by taking actions for the
8 benefit of MVP including pursuing the MVP Claims.
9 MVPAM, as MVP's investment manager, made the
10 decisions to invest in the Ark Discovery shares at
11 issue and caused MVP to purchase the shares. MVPAM
12 has a genuine commercial interest in recovering the
13 lost Ark Discovery investments because, under the
14 IMA, MVPAM's compensation is based on the value of
15 MVP's assets and on the performance of MVP's
16 investments.

17 (TAC ¶ 87.) These allegations are insufficient to overcome the
18 presumption of collusion. See Yokeno, 973 F.2d at 811 ("Disposing of a
19 clouded property interest to increase financial attractiveness is not a
20 legitimate business purpose that would overcome the presumption of
21 collusiveness if, once the cloud is removed, the assignor stands to reap
22 the benefits of the assignee's success.").

23 Further, since the issue concerning whether the assignment was
24 collusive remains unresolved, and the "manufacture of [f]ederal
25 jurisdiction was the very thing which Congress intended to prevent when
26 it enacted § 1359[,]" the Court declines to address the portion of the
27 motions challenging the state claims since it is questionable whether
28 Plaintiff will be able to state viable federal claims or a basis for
29 diversity jurisdiction at this stage in the proceedings. Kramer v.
30 Caribbean Mills, Inc., 394 U.S. 823, 828-29 (1969). Therefore,
31 Defendants' motion to dismiss Plaintiff's state claims for lack of
32 jurisdiction is granted.

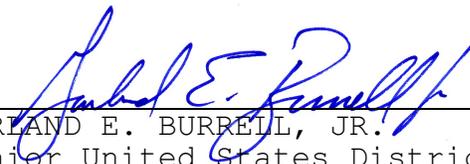
33 **IV. CONCLUSION**

34 For the stated reasons, Defendants' 12(b)(1) motion to dismiss
35 is granted in part and denied in part; Defendants' 12(b)(6) motion to

1 dismiss is granted in part and denied in part; and Defendants' 12(b)(2)
2 and Defendant Vestbirk's 12(b)(2) motions are denied as moot, because of
3 rulings on the other motions.

4 Plaintiff is granted ten (10) days from the date on which this
5 order is filed to file a Fourth Amended Complaint addressing the
6 deficiencies of Plaintiff's pleading discussed in this order. Further,
7 Plaintiff is notified that this action may be dismissed with prejudice
8 under Federal Rule of Civil Procedure 41(b) if Plaintiff fails to file
9 an amended complaint within the prescribed time period.

10 Dated: July 11, 2012

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14 GARLAND E. BURRELL, JR.
15 Senior United States District Judge
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