

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OCHRE LLC, a New York Limited
Liability Company,

Plaintiff,

- vs. -

ROCKWELL ARCHITECTURE,
PLANNING AND DESIGN, P.C., *a New
York Professional Corporation*; PROJECT
DYNAMICS, INC., *a Delaware
Corporation*; BRAD H. FRIEDMUTTER—
CA, INC., *a California Corporation Doing
Business as* FRIEDMUTTER GROUP,
NEVADA PROPERTY 1 LLC, *a Nevada
Limited Liability Corporation and wholly-
owned subsidiary of* DEUTSCHE BANK
TRUST COMPANY AMERICAS, *a New
York Corporation,*

Defendants.

CIVIL ACTION NO.

1:12-cv-02837-KBF

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT PROJECT DYNAMMICS, INC.'S FRCP 12(B)(6) MOTION
TO DISMISS THE SECOND AMENDED COMPLAINT

Ronald D. Coleman (RC 3875)
Marcus A. Nussbaum (MN 9581)
GOETZ FITZPATRICK LLP
One Penn Plaza—Suite 4401
New York, New York 10119
(212) 695-8100
rcoleman@goetzfitz.com
mnussbaum@goetzfitz.com
Attorneys for Plaintiff
Ochre, LLC

PRELIMINARY STATEMENT

Plaintiff Ochre LLC (“Ochre”) respectfully submits this memorandum of law in opposition to the motion by defendant Project Dynamics, Inc. (“Project Dynamics”) seeking dismissal of the Second Amended Complaint (the “Complaint”). The Complaint, as the Court will recall, details how defendants deprived Ochre of fair and lawful compensation for its design and other contributions to unique and proprietary lighting fixtures used by defendants in rooms at the Cosmopolitan Hotel, a Las Vegas casino resort.

In doing so, Project Dynamics joins in the arguments already made by defendants Rockwell Architecture, Planning and Design, P.C. (“Rockwell”), Brad H. Friedmutter–CA, Inc. (“Friedmutter”), and Deutsche Bank Trust Company Americas (“Deutsche Bank”). Project Dynamics has adapted the arguments made by its co-defendants that: (1) the Complaint fails to allege any specific wrongdoing on the part of Project Dynamics, (2) the Complaint fails to state a claim for copyright infringement and fraudulent inducement, nor does it sufficiently state a claim for its quasi contract causes of action and promissory estoppel; and (3) plaintiff’s state law claims are preempted by the Copyright Act. As demonstrated below, however, the effect of this adaptation, however, is not to make those arguments any more cogent or effective.

Project Dynamics ignores the fine grain of names, dates and places – the catalog of who, what, when and where – set out in the Complaint, as it must in order to claim that Ochre failed to plead facts specific enough to support its claims. No mental gymnastics are required to comprehend the allegations concerning the level of Project Dynamics’ involvement in the facts and circumstances surrounding defendants’ elaborate “eAuction,” by which the defendants pumped Ochre for technical information – supposedly to “enhance” Ochre’s “bid,” but, as alleged, in fact as part of a scheme to elicit valuable proprietary information to defendants’ intended knockoff manufacturer.

In particular, the Complaint expressly alleges that Project Dynamics was acting as the agent for Nevada Property 1 LLC (“NP1”) with respect to the construction of the Cosmopolitan Hotel, and, that Project Dynamics was the subcontractor responsible for procurement of, among other things, the custom-designed chandeliers for the Cosmopolitan project. Contrary to the assertions made by Project Dynamics, the facts here do not allege a minimal involvement on their part in the activities that caused the harm alleged – they scream out Project Dynamics’ intricate involvement in this scheme like a neon casino sign on the Las Vegas strip, more than adequately meeting the minimal pleading standards to defeat their 12(b)(6) motion.

FACTUAL BACKGROUND

The Court is respectfully referred to plaintiff’s memorandum of law in opposition to the earlier motions by the other defendants for Ochre’s statement of the facts, which is incorporated by reference here. The following facts from the Complaint,¹ however, are highlighted here as they pertain to Project Dynamics’ specific involvement in the sequence of events that ultimately resulted in the acts complained of here:

According to the Model RFQ, which was the documents provided by defendants to Ochre as the basis for its anticipated submission to provide a lighting design for use in the Cosmopolitan model rooms, Project Dynamics was defendant NP1’s agent and was the subcontractor responsible for procurement of, among other things, custom-designed chandeliers for the Cosmopolitan project. ¶32 Ochre subsequently provided detailed, proprietary shop drawings to Project Dynamics, which were in turn transmitted to and used by defendants Rockwell and Friedmutter. ¶45 After reviewing Ochre’s shop drawings and samples of the proposed finish and glass to be utilized in the fixtures, on July 20, 2009 defendant Project

¹ All references to paragraph numbers are references to the Complaint.

Dynamics emailed to Ochre its approvals of the Ochre shop drawings. ¶47 On August 6, 2009, Ochre shipped the model room fixtures to the hotel. The Ochre Arctic Pear samples and specifications were a success, and on October 5, 2009, Project Dynamics emailed bid package forms to Ochre in connection with its engagement as designer, fabricator and provider of customized Arctic Pear chandeliers for the Cosmo Room. ¶49

The remaining allegations in the complaint which follow chronologically from this point deal specifically with the bidding process via which the Complaint alleges the defendants cloaked their scheme to misappropriate Ochre's designs. These allegations both explicitly and implicitly connect Project Dynamics to the "eAuction" mentioned herein, and demonstrate much more than a "minimal involvement" by Project Dynamics, as asserted by said defendant in their motion papers – as if the defense of "minimal involvement" in tortious acts committed by multiple defendants were an appropriate ground for dismissal under Fed. R. 12(b)(6).

On the contrary, it is submitted that these allegations are more than sufficient to support Ochre's causes of action at the pleading stage and are sufficient to permit Ochre to seek discovery against all the defendants and to determine which one knew what and when concerning the allegations, and, as may be appropriate, to establish each defendants' respective shares of liability.

LEGAL ARGUMENT

I. **EACH CAUSE OF ACTION IN THE COMPLAINT SUFFICIENTLY STATES A CLAIM FOR WHICH RELIEF CAN BE GRANTED.**

Project Dynamics relies on its co-defendants' formulaic accusation that the Complaint's allegations are "conclusory" by omitting consideration of Ochre's specific allegations and the case law that establishes the correct legal standard.² As set out in its earlier brief, Ochre has a valid copyright in the Arctic Pear chandeliers as a sculptural work within the meaning of the Copyright Act. Ochre's opposition brief, and the Statement of Facts above, also demonstrate how the Complaint details the defendants' actions resulting in the unauthorized copying of Ochre's lighting fixtures without authorization. Project Dynamics has added little to that discussion not already addressed by its co-defendants and rebutted by Ochre in its opposition brief, including with respect to defendants' defense of copyrightability and copyright preemption. Ochre will not rehearse its legal argument on those matters here.

Regarding Ochre's fraudulent inducement claim, however, Project Dynamics seeks to distinguish itself from its codefendants with a "not me" argument, asserting that the fraudulent inducement claim fails to allege sufficient facts about Project Dynamics in particular to withstand a motion to dismiss. But the Complaint repeatedly details instances where defendants encouraged Ochre to continue to submit proprietary design and technical information it would not otherwise have provided upon assurances, implicit but eminently reasonable under the facts alleged, that Ochre would ultimately be rewarded with the contract to provide chandeliers for the Cosmopolitan. Project Dynamics' defense is hard to square with the allegation, as set forth in

² Ochre incorporates the legal standard of review and all arguments already set forth in its Memorandum of Law in opposition to the motions for dismissal by defendants Rockwell, Friedmutter, and Deutsche Bank.

the Statement of Facts above, that Project Dynamics was the subcontractor responsible for procurement of the custom-designed chandeliers for the Cosmopolitan project – a role which puts it at the center of the events alleged in the Complaint. The far more plausible inference from the facts alleged, and supported by the documents included as exhibits to the Complaint, is not that Project Dynamics had a minimal role, but that it had the most critical, and possibly blameworthy, role of all.

Even ignoring this obvious inference from the facts alleged, the suggestion by Project Dynamics that its own contribution to the acts complained of and the damage done to Ochre was “minimal” is not a ground for dismissal. A defendant may not be excused at the pleading stage from answering for allegations of tort liability merely because it is not named as many times or its actions or omissions are not specified as often as other defendants with whom it is alleged to have acted in concert. Rejecting a similar argument on a motion to dismiss in *Allstate Ins. Co. v. Rozenberg*, 771 F. Supp. 2d 254 (E.D.N.Y. 2011), the court explained as follows:

The Defendants assert that the plausibility that they were involved in the fraud is undermined by the fact that the Amended Complaint contains fewer factual allegations regarding their involvement in the fraud than that alleged as to other defendants, specifically those that were criminally indicted for their role in the scheme. As Artek and Sheynkman correctly note, they are the only defendants without specific allegations of money laundering levied against them. However, **these arguments go to the relative role that the Defendants played in the scheme, not the plausibility of their involvement in the scheme. . . .**

In addition, the Defendants contend that the fact that \$1,243,256.00, the amount received by Artek and Sheynkman from YMA, breaks down to receiving approximately \$150,000 per year, which “amounts to less than the salary of a first year associate at a major law firm on an annual basis ... practically disproves fraud.” However, as even a “first year associate at a major law firm” would know, **there is no profit threshold required to adequately allege fraud.**

Id. at 267 (emphasis added). Just as there is no “profit threshold” for fraud liability, there is no “minimal involvement” standard in an allegation of fraudulent inducement. At this stage Ochre could only speculate about the specific role of Project Dynamics here, such facts being

“peculiarly within the opposing party's knowledge” and hence appropriately subsumed by the general allegations against the plaintiffs. *See, e.g., Colony at Holbrook, Inc. v. Strata G.C., Inc.*, 928 F. Supp. 1224, 1231 (E.D.N.Y. 1996). As the defendant alleged to be responsible for procurement of custom-designed chandeliers for the Cosmopolitan project, however, it is the claim of Project Dynamics of “minimal involvement” that is implausible.


Indeed, even absent the plain and plausible allegation that Project Dynamics’ role was far more than minimal, the allegations against this defendant can also be sustained under the group pleading doctrine, pursuant to which defendants can be pled together under either of two theories, both of which are applicable here. *See, Adelpia Recovery Trust v. Bank of Am., N.A.*, 624 F. Supp. 2d 292, 316 (S.D.N.Y. 2009) (any cause of action that is “rooted in fraud” may utilize the group pleading doctrine); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 263 (S.D.N.Y. 2011) (group pleading doctrine available for any common law fraud-based claims). Here group pleading is appropriate because central to Ochre’s claim is the Group RFP, which is “group-published information” that is “the collective work of those individuals with direct involvement in the everyday business of the company.” *See, King County, Wash. v. IKB Deutsche Industriebank AG*, 09 CIV. 8387 SAS, 2012 WL 1592193 (S.D.N.Y. May 4, 2012). Group pleading is also appropriate when premised on a principal-agent relationship. *Holmes v. Allstate Corp.*, 11 CIV. 1543 LTS DF, 2012 WL 627238 (S.D.N.Y. Jan. 27, 2012), *report and recommendation adopted*, 11 CIV. 1543 LTS DCF, 2012 WL 626262 (S.D.N.Y. Feb. 27, 2012), *quoting, Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984). Ultimately, the specific extent of this defendant’s liability is the purpose of discovery, and is not an issue to be resolved on a motion pursuant to Fed. R. Civ. P. 12(b)(6).

Project Dynamics' arguments for dismissal of Ochre's equitable causes of action are similarly misplaced. Project Dynamics' assertion that it was acting only as a middleman or procurement agent for the other defendants may be an affirmative defense or grounds for a cross-claim, but "an agent may not use the agency relationship to shield himself from liability to a third party for wrongful acts he personally committed not as an agent but as a principal acting on his own behalf." *Cowen & Co. v. Merriam*, 745 F. Supp. 925, 929 (S.D.N.Y. 1990) (denying 12(b)(6) motion). Ochre alleges that the defendants, as a group, advised Ochre that the bidding process was just a formality (thus establishing an implied contract that was later broken) and that **all** of the defendants were unjustly enriched. Project Dynamics has no more claim to dismissal than any other defendant. Here nothing in the pleadings forces, or even suggests, any factual basis to distinguish, at this stage, the actions of Project Dynamics from those of its principal or any other defendant. "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

CONCLUSION

For the foregoing reasons, Ochre respectfully requests that this Court deny Project Dynamics' motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

GOETZ FITZPATRICK LLP

By: 
Ronald D. Coleman (RC 3875)
Marcus A. Nussbaum (MN 9581)
One Penn Plaza—Suite 4401
New York, NY 10119
(212) 695-8100

rcoleman@goetzfitz.com
mnussbaum@goetzfitz.com
Attorneys for Plaintiff
Ochre, LLC

Dated: September 30, 2012