



Eventbrite, Inc. v. M.R.G. Concerts Ltd. et al

2020 | Cited 0 times | N.D. California | November 27, 2020

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

EVENTBRITE, INC.,

Plaintiff, v. M.R.G. CONCERTS LTD., et al.,

Defendants.

Case No. 20-cv-04040-SI ORDER DENYING PLAINTIFF/COUNTERCLAIM- DEFENDANT
EVENTBRITE, INC.'S MOTION TO DISMISS AND TO STRIKE Re: Dkt. No. 30

On November 20, 2020, the Court held a hearing over videoconference regarding s motion to dismiss and to strike affirmative defenses. 1 For the reasons set forth below, the Court DENIES counterclaims and DENIES motion to strike affirmative defenses.

BACKGROUND I. Factual and Procedural Background

Counter-Complaint, which the Court treats as true for the purposes of this motion to dismiss. MRG is a Canadian-based, concert promotion company that produces and markets over eight hundred shows a year. Dkt. No. 22 (Countercl.) at 12, ¶ 7. 2

Eventbrite is a ticketing and event promotion company that offers services to assist with

1 Eventbrite, Inc. is the plaintiff/counterclaim-defendant and M.R.G Concerts Ltd. is the defendant/counterclaim-plaintiff. The Court will refer to the , respectively.

2 For ease of reference: (1) citations to page numbers refer to the ECF branded number in the upper right corner of the page; (2) citations to Docket Number 22 will include page and -Complaint.

planning, promoting, and producing live events. Id. at 12, ¶ 8. Eventbrite is based in California, with offices around the world. Id.

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on December 5, 2019, and executed Amendment #1 to the ESA on January 13, 2020 (collectively, Id. at



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13, ¶ 11. MRG alleges it entered into the Contract with Eventbrite, in part, due to its ability to meet its monetary commitment to its contractual partner. Id. at 13, ¶ 12. MRG alleges that among the services agreed upon under the Contract, Eventbrite agreed to make advance funds available to MRG within a certain number of written request. Id. at 13, ¶ 13. Furthermore, MRG alleges the Contract entitled MRG to [Other Payments] Id. at 13, ¶ 14.

MRG alleges that on March 23, 2020, MRG sent a written request to Eventbrite for a fund along with the information required for the issuance of the advance pursuant to the Contract. 4

Id. at 13, ¶ 15. MRG contractual obligations to

breached its obligation under the Contract Id. at 13, ¶ 16. 5

Additionally, MRG alleges that on March 11, 2020, unbeknownst to MRG and before MRG made the Advance Request, Eventbrite made a global policy change to suspend its advance payouts program as a result of COVID- Id. at 14, ¶ 17. MRG alleges

3 The parties interchangeably refer to this agreement as 4 Eventbrite asserts that MRG made the request on March 30, 2020. Although the difference between these two dates may be material to resolution of issues later in this case, this difference

5 Although the counter- Request, Eventbrite represented at the hearing, and MRG did not refute, that this occurred in actions regarding when the Advance Request should have been paid.

receive circumstances. Id. Request based on the COVID- Id. at 14, ¶ 18. However,

of its shows, scheduled for Canadian venues, remain scheduled and were merely postponed. MRG intends to honor tickets sold either on their original or rescheduled dates or as otherwise agreed with its customers. Id. at 14, ¶ 19. on Eventbrite and its ability to meet Id. at 14, ¶ 22. On April 21, 2020, at 4, ¶ 17.

On June 18, 2020, Eventbrite filed a complaint against MRG and Matthew Gibbons. Dkt. No. defendants materially breached the contract between Eventbrite and defendants when: (1) MRG terminated the contract before the termination period; (2) MRG used other vendors for the goods and services that were exclusively reserved to Eventbrite; and (3) MRG failed to pay additional payments required by the contract. Id. ¶¶ 17, 19, 21, 24, 26.

On August 11, 2020, MRG filed an Answer and Counter-Complaint against Eventbrite for: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) unfair -56. MRG alleges Eventbrite breached its obligation under the contract when Eventbrite refused to make advance funds available to MRG upon request and to make additional payments due to MRG pursuant to the



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Contract. Countercl. at 13, ¶¶ 13-16.

On October 1, 2020, Eventbrite filed the present - Complaint and to strike Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, Twelfth, and 6

6 Although MRG cites to various decisions from Delaware courts for its interpretation of one of the contract terms, the parties appear to agree that California law applies to the instant action. See Dkt. No. 35-7 (Ex. A Cashman Decl. ISO Mot. Standard Terms and Conditions) at 9, ¶ 7.

II. Contract Language 7

Relevant to the motion at bar are the following provisions from the Amendment to the ESA: 8

1. Replenishing Advance. Eventbrite hereby establishes . . . a Replenishing Advance the principal amount of the Advance Limit (as defined below). . . . 2. Advances. Eventbrite agrees to make funds available under this Replenishing Advance within [redacted] request; however, requests made during the last three (3) business days of a calendar month will be processed during the first five (5) business days of the following calendar month. Subject to the terms and conditions of the Agreement, as amended hereunder, any request for an Advance may be made from time to time and in such amounts as Organizer may choose, provided, however, any requested Advance will not (i) when added to the outstanding principal balance of all previous Advances, exceed the Advance Limit or (ii) exceed an -of-pocket expenses to promote events. Requests for Advances must be made in writing, delivered to Eventbrite by such officer of Organizer authorized by it to request such Advances. Until such time as Eventbrite may be notified otherwise, Organizer hereby authorizes Shea Dahl to request Advances. Requests for Advances must be made no later than September 1, 2023. For each Advance properly requested, Eventbrite shall advance an amount equal to the Advance amount to Organizer may refuse to make any requested Advance if an Event of Default has occurred and is continuing hereunder either at the time the request is given or the date the Advance is to be made, or if an event has occurred or condition exists which, with the giving of notice or passing of time or both, would constitute an Event of Default hereunder as of either such date. 3. Diligence. Each Advance must be requested for, and used exclusively to fund the out-of- promotion of one or more new Events, provided that for the first Advance, it is permissible for the Event(s) to already be on-sale. Each request for an Advance must include the following information (the Advance Diligence a. The requested amount of the Advance (total and per-Event, if the request pertains to multiple Events);

7 As discussed in further detail below, the Court may consider the contract language on a Rule 12(b)(6) motion to dismiss because the contract, namely, the ESA and the Amendment, are -complaint. See Dkt. No. 22 at 13, ¶ 11 (alleging that see also id. at 13, des that its terms are confidential, MRG has not appended it



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b. If Eventbrite requests, the offer sheet for each relevant Event (which includes relevant details such as performer, date, venue, and expected pricing and sales) . . . 5. Conditions Precedent. Organizer agrees Eventbrite will not be obligated to pay any Advance unless (each of the following, a Condition Precedent a. All documents required by Eventbrite, [sic] have been duly executed and delivered to Eventbrite and are in full force and effect; b. Organizer has not failed to repay an Advance by the due date described above; c. Eventbrite has had a reasonable opportunity to review and is reasonably satisfied with the Advance Diligence; d. Organizer has not materially breached the Agreement, as amended hereunder; e. No Event of Default (as defined below) has occurred, subject to applicable cure periods, and no condition exists or event has occurred which, with the passing of time or the giving of notice or both, would constitute an Event of Default hereunder; and f. discretion, a material adverse change in the operations, business, assets or liabilities or the ability of Organizer to perform its obligations under the Agreement, as amended hereunder. . . . Dkt. No. 35-9 (Cashman Decl., Ex. C) at 2-3.

LEGAL STANDARDS I. Rule 12(b)(6) Motion

12(b)(6). Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must

Bell Atl. Corp. v. Twombly, o allege facts Ashcroft v. Iqbal

Twombly Iqbal, 556 U.S. at 678

(quoting Twombly Id. (quoting Twombly

conclusions can provide the framework of a complaint, they must be supported by factual Id. at 679.

In reviewing a Rule 12(b)(6) motion, courts must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the non-moving party. See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, courts are not required to accept as In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted).

If a court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth amend the pleading was made, unless it determines that the pleading could not possibly be cured by

Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations and internal quotation marks omitted).

II. Rule 12(f) Motion

Federal Rule of Civil Procedure 12(f) prov P. 12(f). The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money



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that arises from litigating spurious issues by dispensing of those issues before trial. See *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), , 510 U.S. 517, 114 S. Ct. 1023, 127 L.Ed.2d 455 (1994). A motion to strike may be appropriate where it will streamline the ultimate resolution of the action. See *Fantasy*, 984 F.2d at 1528. However, motions to strike are generally disfavored. *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). In *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

DISCUSSION I. Request for Judicial Notice As a threshold matter, the Court must deal with the twenty-four exhibits that Eventbrite attaches to its briefs and that it seeks to have judicially noticed. See Dkt. Nos. 30, 37. As a general rule, the Court may not consider materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). However, pursuant to Federal Rule of Evidence 201, the court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. attached to the complaint [and] documents incorporated by reference in the complaint . . . without

converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Court hereby rules as follows. The Court will consider Exhibits A and C, which are the ESA and Amendment that make up the contract at issue in this lawsuit. Neither party disputes that Exhibits A and C are collectively the contract in question, and the counter-complaint clearly references these two documents, identifying them by name and date. See Dkt. No. 22 at 13, ¶ 11. The Court DENIES, without prejudice, the request for judicial notice of Exhibit B. Exhibit B is a print- as Eventbrite says in

contract and it is therefore an inappropriate subject for judicial notice. The Court DENIES, without prejudice, the request f (not counsel in this action) to Eventbrite regarding the Advance Request and contract termination. Eventbrite apparently seeks to have these documents judicially noticed to support its statements regarding the timeline of events in this case. MRG objects to judicial notice of these documents, see Dkt. No. 33 at 12, and the Court finds Exhibit D to be an inappropriate subject for judicial notice. however, the Court does not take judicial notice of any disputed facts contained therein. 9 The remaining exhibits are orders issued by various Canadian provinces and their public health officers in response to the COVID-19 pandemic. Eventbrite attaches these exhibits in support

Canadian government prohibiting live events such as concerts and imposing limits on the number of people who could gather in one space. MRG objects to judicial notice of these exhibits but does not dispute that the exhibits are what they purport to be. To the extent that Eventbrite seeks judicial notice of the fact that various Canadian provinces issued public health orders on certain dates in March 2020, the Court will take judicial notice of Exhibits E, F, H, K, L, M, O, P, S, T, U, and V; the Court does not take judicial notice as to the truth of any disputed facts contained therein. The Court DENIES, without prejudice, the request for judicial notice of Exhibits G, I, J, N, Q, R, and W. These



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public health orders were issued in May and June 2020 and thus have little relevance to and that Eventbrite denied in April 2020.

II. Motion to Dismiss Counterclaims A. Breach of Contract In California, the elements of a cause of action for breach of contract are: (1) the existence breach; and (4) resulting damages to the plaintiff. Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th

811, 821 (2011).

The first, second, and forth elements First, MRG has adequately pled the existence of a valid contract, that is, the Eventbrite Services Agreement (ESA) executed on December 5, 2019 and Amendment executed on January 13, 2020. See Countercl. at 13, ¶ 11. The existence of the ESA and Amendment are not challenged by either

9 This document is incorporated by reference -complaint. See Countercl. at 14, ¶ 17.

party, nor do the parties disagree the ESA and Amendment govern the dispute at issue. Second, MRG alleges it fully performed its obligations under the Contract. Id. at 16, ¶ 34. MRG admitted it terminated the contract on April 2 however, MRG alleges it did so after Answer at 3-4, ¶¶ 16-17. As

pled, the counter-complaint indicates MRG was performing in accordance with its obligations under the Fourth, MRG adequately pleads damages as a , where MRG has been denied the benefits of the Contract, which it says rom Eventbrite to MRG. Countercl. at 16, ¶ 37. Regarding the third element for breach of contract whether Eventbrite breached MRG alleges Eventbrite breached its material obligations under the Contract when Eventbrite declined Countercl. at 13, ¶ 15-16, & 16, ¶ 35. Eventbrite disputes that it breached, citing to Section 5(f) of the Amendment, which states not be obligated to pay [the] Advance unless . . . [MRG] has not experienced, reasonable discretion, a material adverse change in the operations, business, assets or liabilities or

the ability of [MRG] to perform its obligations under the Agreement, as amended hereunder. at 13-14; Dkt. No. 35- llions of dollars

to M.R.G. after concluding that the global COVID-19 pandemic and resulting indefinite government-mandated ban on concerts and other large gatherings constituted a material adverse 6 (emphasis omitted). Eventbrite contends the Canadian government-mandated shutdowns were declared weeks before MRG requested the advance and that independent concert promoter Id. at 13 (citation

omitted). As such, Eventbrite argues that under Section 5(f) of the Amendment Eventbrite did not have an obligation to make the advance payment to MRG. Id.; Dkt. No. 35-9 (Cashman Decl., Ex. C) at 3. MRG counters that this is a factual dispute inappropriate for resolution on a motion to



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dismiss. In the counter-complaint, MRG alleges that it did not experience a material adverse change to its operations or business but hy despite COVID- because Countercl. at 14, ¶ 19; see also

-19. MRG alleges, MRG, when MRG made the Advance Request on March 23, 2020, Eventbrite had already

- 10

Countercl. at 14, ¶ 17. MRG therefore argues that there are disputed facts as to whether Eventbrite exercised its discretion at all, whether that discretion was reasonable, and whether MRG in fact experienced a material adverse change as of the time Eventbrite made the decision to deny the Advance Request.

Eventbrite replies that MRG has conflated (which Eventbrite defines as ticket-) with the Replenishing Advance, which is money (i.e., loans) [advanced] to organizers like M.R.G. at 5.

filing that MRG references suspended advances under the former program but not the latter. Id. at 9-10 (citing Dkt. No. 37-2 (Cashman Reply Decl., Ex. X) at 57-58).

The Court stage for the counterclaim to survive a motion to dismiss. Both parties agree that the dispute turns

on Section 5(f) of the Amendment. Whether Eventbrite exercised its reasonable discretion to determine that a as of late March/early April 2020 is largely a factual dispute. Even if Eventbrite is correct that it did not suspend its Replenishing Advance program in March 2020 (and that in itself is a question the parties 10

As support for this statement in its counter-complaint, MRG cites to the August 7, 2020 Prospectus Supplement that Eventbrite filed with the SEC; this is the same document Eventbrite attaches to its reply as Exhibit X.

e Request was unreasonable. It is important to keep in mind that the alleged breach occurred in early April 2020. despite COVID- See Countercl. at 14, ¶ 19. It also alleges that all of its shows, set for Canadian

venues, have been postponed or rescheduled, and that Canada has fared much better than the United States in its COVID-19 case rate. Id. at 14, ¶ 19 & 15, ¶ 27. And if the Court is to wade into Ev Eventbrite states it did not, then it stands to reason that at least some event creators were sufficiently operational to continue to receive Replenishing Advances. boundaries of plausibility, but on balance, drawing all reasonable inferences in the light most



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favorable to MRG, Further discovery may illuminate this dispute, and it may be that the question of contract breach

will be suitable for disposition on summary judgment. At this stage, the Court is simply finding that MRG has adequately alleged a breach of contract counterclaim in the pleadings.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

and fair dealing whe

the Contract by, among other things, failing to provide payments to MRG as contemplated by the ¶ 43. California law implies a covenant of good faith and fair dealing in every contract. Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1 (1995) imposes certain obligations on contracting parties as a matter of law specifically, that they will Mundy v. Household Fin. Corp., 885 F.2d 542, 544 (9th Cir. 1989) (citation omitted) one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. [Citation.] The covenant thus cannot be endowed with an existence Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 349 (2000) (internal citations and quotation marks omitted).

expressly Advance Request. Mot.

at 14. Given the government-mandated shutdowns in Canada, Eventbrite argues it was not only Id. at 15. In essence, Eventbrite restates its arguments made in support of its motion to dismiss the

breach of contract claim.

For the same reasons set forth in Section II.A above, the Court finds MRG has adequately pled sufficient facts to state a claim for breach of implied covenant of good faith and fair dealing. reading of Section 5(f) The Court will not interpret the Contract

in such a fashion at this stage, where MRG has alleged, with factual support, that Eventbrite both did not exercise its discretion and that its decision was not reasonable.

C. Unfair Competition

Unfair Competition Law, Business and Professional Code Section 17200, et seq. MRG alleges Eventbrite has been unjustly ¶ 48. Under Section 17200, no business act or practice . . . Cal. Bus. Prof. Code § 17200. in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are

unlawful, or unfair, or Schvartz v. Budget Group, Inc., 81 Cal. App. 4th 1153, 1159 (2000) (quoting



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Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647 (1996)). In its See -15.

As Eventbrite acknowledges, courts have employed various tests for determining whether conduct is unfair under the UCL. See Reply at 16. Under one of Unfair simply means any practice whose harm to the victim outweighs its benefits. Saunders v. Superior Court, 27 Cal. App. 4th 832, 839 (1994).

MRG has alleged that it Case 3:20-cv-04040-SI Document 45 Filed 11/27/20 Page 12 of 15 representations regarding its abilities and standings as an industry leader in planning, promoting, Countercl. at 13, ¶ 12. Part of the benefit of that Contract was that Eventbrite would make certain request and that Eventbrite would additionally make millions of dollars in other payments to MRG.

Id. at 13 ¶¶ 13-14. MRG has good on those advance payments, depriving MRG of millions of dollars that MRG understood itself

to be entitled to under the Contract. At this stage, th

D. Declaratory Relief

In its fourth claim for relief, MRG seeks a judicial declaration that: (1) Eventbrite breached the Contract, (2) Eventbrite is liable to MRG for the breach, (3) MRG is entitled to damages and Eventbrite under the Contract. Countercl. at 18, ¶ 56. The Declaratory Judgment Act provides that,

... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether The dispute, however, must be MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007). A district

substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory j Id. (citations omitted).

grounds it moves to dismiss the previous counterclaims: it argues MRG has not adequately pled that Section 5(f) of the Amendment when it denied

In its counter-complaint, MRG alleges sufficient facts to indicate a real controversy with express adverse legal interests exist between the parties. There is a contractual disagreement between Eventbrite and MRG as to the performance, or lack of performance, pursuant to a contractual obligation where MRG alleges a breach and Eventbrite argues it was not obligated to pay an advance pursuant to discretionary power granted in the Contract. the same reason previously articulated factual dispute between the parties regarding the application of Section 5(f) of the Amendment. fourth counterclaim at this stage.



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III. Motion to Strike Affirmative Defenses

Eventbrite also moves to strike Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, Twelfth, and Thirteenth affirmative defenses, arguing that these affirmative defenses rest on the gfully by exercising its discretion under the Services

at 17. Again, the motion to strike the affirmative defenses relies on a factual determination of whether Eventbrite exercised its reasonable discretion and whether MRG experienced a material adverse change under Section 5(f) of the Amendment. This is the same argument Eventbrite asserts in support of its motion to dismiss. At this stage, and for the reasons stated above, the Court cannot reach this conclusion. As such, the Court DENIES the motion to strike the affirmative defenses.

CONCLUSION For the foregoing reasons and for good cause shown, the Court hereby DENIES motion to dismiss counterclaims and DENIES Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, Twelfth, and Thirteenth affirmative defenses.

The Initial Case Management Conference is continued to December 11, 2020, at 3:00 p.m. and will be held via AT&T conference call. The parties need not file an updated joint case

management statement unless their positions have changed since the filing of the prior statement, see Dkt. No. 43.

IT IS SO ORDERED. Dated: November 27, 2020

_____ SUSAN ILLSTON United States District Judge

