

**FILED**

JUN 19 2018

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>CHINACAST EDUCATION CORPORATION,</p> <p style="text-align: center;">Plaintiff-Appellant,</p> <p>v.</p> <p>ZHUOGUO CHEN, Erroneously sued as Chen Zhou Guo and HUAN WANG,</p> <p style="text-align: center;">Defendants-Appellees.</p>
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No. 17-55447

D.C. No. 2:15-cv-05475-AB-E

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Andre Birotte, Jr., District Judge, Presiding

Argued and Submitted June 7, 2018  
Pasadena, California

Before: D.W. NELSON and CHRISTEN, Circuit Judges, and SHEA,\*\* District Judge.

On June 3, 2010, Plaintiff Chinacast Education Corp. issued stock to Motivation International Investment Co. Ltd, an entity wholly owned by

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

Defendants Zhuoguo Chen (Chen) and Huan Wang. Chinacast claims it never received consideration for these shares and instituted a diversity suit in California federal district court to recover their value.<sup>1</sup> Defendants raised a statute of limitations defense and moved for summary judgment. The district court reasoned that Chinacast's causes of action arose in China because the "round-trip" deposits creating the illusion of payment for Chinacast's stock were executed through Chinese bank accounts in China. And because Chinacast's claims were untimely under Chinese law, California's borrowing statute precluded them from being brought in California. Cal. Civ. Proc. Code § 361. The district court accordingly dismissed Chinacast's complaint. Chinacast timely appeals.<sup>2</sup> We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.

California's borrowing statute provides that a cause of action that "has arisen" in a foreign country may not be prosecuted in California if it "cannot there be maintained against a person by reason of the lapse of time."<sup>3</sup> § 361.

"[A]pplication of [the borrowing statute] generally is straightforward in a case

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<sup>1</sup> The complaint accused Chen of fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and alleged causes of action against the Defendants for unjust enrichment, conversion, and money had and received. Only the last three claims are relevant to this appeal.

<sup>2</sup> As the parties are familiar with the facts, we do not recount them here.

<sup>3</sup> Save for one exception not relevant here.

involving, for example, a typical automobile accident—in which the allegedly tortious conduct, the resulting injury, and compensable damage all occur at the same time and in the same place . . . .” *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 85-86 (2010). Complications arise, however, where the dispute involves a commercial transaction spanning multiple jurisdictions. “Section 361 does not define the term ‘has arisen.’” *Zacher v. Robinson Helicopter Co.*, No. B279673, 2017 WL 6333908 at \*3 (Cal. Ct. App. December 12, 2017). Courts applying borrowing statutes have generally “h[e]ld that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred, *i.e.*, the jurisdiction in which injury was received[,]” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (quoting John W. Ester, *Borrowing Statutes of Limitation and Conflict of Law*, 15 U. Fla. L. Rev. 33, 47 (1962)) (internal quotation marks omitted); *see also Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1191 (2013).

The round-trip deposits implicated in this case were completed by June 1, 2010. Using the slips generated from these transactions as proof of consideration, on June 2, 2010, Chinacast’s then-CFO instructed Continental Stock Transfer & Trust Co. to issue 2,482,758 shares to Motivation in Hong Kong. The round-trip deposits were therefore not the last act establishing liability for conversion, money

had and received, and unjust enrichment because Plaintiff's claims only arose after Motivation received and wrongfully exercised dominion over Chinacast's shares.

Defendants argue that Chen took possession of the stock certificate from Chinacast's ex-CEO, Ron Chan (Chan), in China. Motivation, they strenuously insist, never maintained a place of business in Hong Kong. The Hong Kong address listed on the stock certificate was nominally ascribed to Motivation but "regularly used by Chan for numerous other purposes." Be that as it may, we are obliged at this stage of the proceedings to construe all the evidence in the light most favorable to the non-moving party, Chinacast. *Narayan v. EGL*, 616 F.3d 895, 899 (9th Cir. 2010). Chinacast alleged "collusion" between Chen and Chan. Given the numerous red flags surrounding the HIUBC purchase, a rational jury could believe that the two men were acting in cahoots to loot the company. Furthermore, a rational jury could decide that while Chan "receive[d] the [stock] certificate[] in Hong Kong and then deliver[ed] them to . . . Chen in Hubei," he did so as Chen's co-conspirator and not as a corporate officer of Chinacast. On these facts, Chen, through his agent Chan, wrongfully exercised dominion over the certificate in Hong Kong.

Viewing the evidence in the light most favorable to Chinacast, Plaintiff's causes of action against the Defendants arose in Hong Kong. Because these claims

were not untimely under Hong Kong law, they are not barred by California's borrowing statute.

**REVERSED and REMANDED.**

## United States Court of Appeals for the Ninth Circuit

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### **Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### **Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### **Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

#### **Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

#### **(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### **B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

## BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
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<b>Opening Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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<b>Reply Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b> \$ <input type="text"/>			

\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk