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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CHANGSHA METRO GROUP CO.,  
LTD.,

Plaintiff and Respondent,

v.

PENG XUENG et al,

Defendants and Appellants.

E072596

(Super.Ct.No. CIVDS1823603)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed.

Thomas Ogden for Defendants and Appellants.

Skadden, Arps, Slate, Meagher & Flom, Jack P. Dicanio, Lance A. Etcheverry, Caroline Van Ness and Julia M. Nahigian for Plaintiff and Respondent

Changsha Metro Group Co., Ltd. (Changsha) sued Peng Xueng (Peng) and Jia Siyu (Jia) for (1) breach of fiduciary duty; (2) constructive fraud; (3) aiding and abetting; (4) unjust enrichment; and (5) a constructive trust. Peng and Jia (collectively,

defendants) filed an anti-SLAPP motion. (Code Civ. Proc., § 425.16.)<sup>1</sup> The trial court denied the anti-SLAPP motion and concluded Changsha was entitled to an award of attorneys’ fees. Defendants raise two issues on appeal. First, defendants assert Changsha lacks standing. Second, defendants contend the proper procedures were not followed for awarding attorneys’ fees. We affirm the order.

## **FACTUAL AND PROCEDURAL HISTORY**

### A. COMPLAINT

Changsha’s complaint provides, “This case is brought by Changsha, a company that provides transportation and urban construction services within the Hunan Province of the People’s Republic of China (‘PRC’).” “Changsha is responsible for the construction of subway lines, roads, and other infrastructure-related projects in the city of Changsha, the capital of the Hunan Province in the south of the PRC. According to the city’s statistics bureau, in 2015, the city of Changsha had over 7.3 million residents.”

“Changsha is a Chinese company doing business in the PRC. Changsha is wholly owned and regulated by the Financial Bureau of the Changsha Municipal Government, which is a PRC government entity.” “Pursuant to its articles of incorporation, Changsha is run by a Board of Directors with 5 members: a chairman, a deputy chairman, and three directors. The Board exercises immense power over the

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<sup>1</sup> All subsequent statutory references will be to the Code of Civil Procedure unless otherwise indicated.

business activities of Changsha and is responsible for approving Changsha's business policies and investments.”

Peng served as chairman of Changsha from August 2010 to March 2017. Jia was Peng's wife. Changsha alleged that, from August 2010 to March 2017, Peng accepted bribes totaling \$18,987,025 “in return for plum construction contracts from Changsha.” Changsha asserted that Peng “repeatedly circumvented and violated Changsha's open and transparent bidding process to ensure that people who rewarded him . . . with bribes were awarded very favorable, high-value contracts in exchange. Peng's abuse of his role and fiduciary duties harmed the integrity of the decision-making process employed by Changsha to award its services contracts and caused Changsha to pay higher contract prices for at least one project, rather than simply awarding those contracts to the best bid.” Changsha alleged, “Peng and Jia now reside in San Bernardino County.”

B. ANTI-SLAPP MOTION

Defendants filed an anti-SLAPP motion. Defendants contended, “Changsha Metro is a 100% Chinese State Owned Enterprise (SOE) that is engaged in China's leading edge weapons program. Executives at Changsha Metro operate under strict laws that do not allow them to unilaterally engage a U.S. law firm to file suit. Only the central government of China could authorize this suit. It is China/[the Central Commission on Discipline Inspection] that pulls the strings here and is directing [Changsha's law firm] to use Changsha Metro's name in order to compel [Peng] and [Jia] to return to China.” Defendants contended, “[I]t is improper to think a Chinese

100% SOE is comparable to a U.S. company. Top management at Changsha Metro is instructed daily by the government on what to do.”

Defendants asserted, “The complaint leads one to think Changsha Metro is a simple municipal subway mass transit utility. Actually, Changsha Metro is a centrally planned component of China’s military industrial complex involved in developing magnetic levitation military weapons.” Defendants asserted, “Understanding that Changsha Metro is at the heart of China’s maglev weaponization complex provides a substantial clue about [Peng’s] importance. China’s issue with [Peng] isn’t money. It’s the fact he holds in his head the core maglev technology that China intends to use should war with the U.S. ever break out.”

Defendants asserted China wanted to force Peng’s return to China because Peng “is a communist party official and one of China’s leading engineers responsible for weaponizing magnetic levitation technology.” Defendants contended they have asylum claims pending in the United States, and Changsha’s lawsuit was “retaliat[ion] for the exercise of first amendment rights.” Defendants asserted Changsha’s lawsuit arose from defendants’ protected activity of petitioning United States immigration officials and the immigration court.

C. OPPOSITION

Changsha opposed defendants’ anti-SLAPP motion. Changsha asserted its complaint arose from Peng’s alleged corruption—not from Peng’s alleged petition for asylum. Changsha asserted, “A party’s subjective intent in bringing the lawsuit is irrelevant,” and the only issue is whether the wrong complained of in the lawsuit is a

protected activity. Changsha noted that defendants' failed to attached their asylum petitions to the motion to support their assertion that they filed such petitions.

Further, Changsha asserted it had a probability of prevailing on its lawsuit because it had declarations from seven witnesses establishing Peng's acceptance of bribes. Changsha asserted that defendants' anti-SLAPP motion was frivolous and solely intended to cause delay, so Changsha should be awarded its attorneys' fees and costs. Changsha requested an award of fees of \$88,823 plus "additional fees and costs incurred through the hearing."

D. REPLY

Defendants replied to Changsha's opposition. Defendants asserted Peng's declaration that defendants applied for asylum was sufficient evidence to establish that defendants have pending asylum cases. Defendants contended Changsha failed to rebut defendants' assertion "that only the government of China could've instigated the lawsuit."

Defendants asserted their anti-SLAPP motion was not frivolous because "the matter is unprecedented" in that Changsha waived sovereign immunity as a fully state-owned entity to sue defendants. Defendants contended that if their anti-SLAPP motion were found to be frivolous then they "object to the short time to respond."

E. RULING

On April 3, 2019, the trial court held a hearing on the anti-SLAPP motion. The motion was argued. The trial court denied the motion. The trial court awarded attorneys' fees to Changsha. The trial court explained that it could not determine the

amount of fees to award based upon the block billing provided, so the trial court set a further hearing on June 4 to determine the amount of the attorneys' fees.

## DISCUSSION

### A. STANDING

Defendants contend Changsha lacks standing to sue defendants because the People's Republic of China (China) is the real party in interest.

“ ‘[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.’ ” (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233.) “ ‘[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. [Citations.] At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.’ ” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 327.)

“Every action must be prosecuted in the name of the real party in interest.” (§ 367.) “A person who invokes the judicial process lacks standing if he, or those whom he properly represents, ‘does not have a real interest in the ultimate adjudication because [he] has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.’ ” (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707; see also *Chao Fu, Inc v. Chen* (2012) 206 Cal.App.4th 48, 57.)

“Chinese corporate law continues to make improvements in fleshing out the fiduciary duties of directors. The Company Law revisions in 2005 introduced the obligation of loyalty and described a number of actions that it would forbid, such as bribery, misappropriation of company funds, and usurpation of business opportunities.” (Morrissey, *Managing the Wealth of Nations: What China and American May Have to Teach Each Other About Corporate Governance* (Summer 2015) 68 SMU L. Rev. 831, 840.) “Article 147 of China’s Company Law, last amended in 2018, sets forth that directors owe the duty of loyalty and the duty of diligence to the company.” (Li, *Activist Investors and Under-Enforced Fiduciary Duties: A Reflection on China’s Takeover Regulation in the Aftermath of the Baoneng/Vanke Takeover* (2019) 19 Hous. Bus. & Tax L. J. 167, 205.)

In its complaint, Changsha alleged, “As Chairman, Peng was a fiduciary of Changsha and therefore bound by the duties of loyalty and diligence to Changsha pursuant to the Company Laws of [China].” The foregoing allegation reflects Peng had a fiduciary relationship with Changsha due to Peng’s position as chairman of Changsha.

Also in its complaint, Changsha alleged, “Peng’s abuse of his role and fiduciary duties harmed the integrity of the decision-making process employed by Changsha to award its services contracts, and caused Changsha to pay higher contract prices for at least one project, rather than simply awarding those contracts to the best bid.” The foregoing allegation reflects Peng injured Changsha by causing Changsha to pay more than necessary for “at least one project.”

In sum, Changsha alleged that Peng had a fiduciary relationship with Changsha, and Peng injured Changsha. Changsha's allegations reflect it has a real interest in the case in that Changsha has suffered an injury that will allow it to adequately present all the facts and issues. (See *Schmier v. Supreme Court*, *supra*, 78 Cal.App.4th at p. 707.) Accordingly, we conclude Changsha has met its burden, at this stage, of establishing standing.

Defendants assert Changsha is not the real party in interest because the "State Council takes possession of all criminally confiscated proceeds." This is a civil case, not a criminal case. Accordingly, we are not persuaded by defendants' reliance on criminal procedures.

Defendants assert, "[A] Chinese court made a confiscation order to the benefit of State Council and to the detriment of [defendants] regarding the same facts, property, and assets that are alleged in the complaint. The remedy is in the nature of a claw-back just like what remedy [Changsha] seeks in this suit." Defendants' argument demonstrates that China's State Council may try to take any money that Changsha might receive from a judgment in this case; however, it does not explain why Changsha was insufficiently injured to have standing. In other words, the assertion that Changsha may not be permitted to retain its remedy does not mean Changsha was not injured.

In conclusion, Changsha asserted it was injured by Peng's alleged breach of his fiduciary duty, and that allegation is sufficient to establish standing at this stage of the proceedings.

B. ATTORNEYS' FEES

Defendants contend the trial court erred by not following the proper procedure for awarding attorneys' fees. For this court to review an order, the order must be final. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298.) The order from which defendants are appealing does not order defendants to pay Changsha any particular sum of money. The order from which defendants are appealing reflects the trial court set a further hearing for determining the amount of attorneys' fees. As a result, the order awarding attorneys' fees is not final. Consequently, we cannot review the order. (*Northern Trust Bank v. Pineda* (1997) 58 Cal.App.4th 603, 607-608 [“because there were only factual findings but . . . no sum of money to be charged . . . , the appeal must be dismissed”].)

C. MOTIONS

1. *SANCTIONS*

Changsha moves this court to sanction defendants due to defendants' appeal being frivolous and solely intended to cause delay. Changsha's motion for sanctions is denied.

2. *DISMISSAL*

Changsha moves this court to dismiss defendants' appeal because the appeal is frivolous and solely intended to cause delay. Changsha's motion to dismiss is denied.

3. *JUDICIAL NOTICE*

Defendants request this court take judicial notice of five documents related to China, including China's criminal laws. China's company laws are relevant to

Changsha’s complaint, i.e., laws related to fiduciary duties. Defendants do not include China’s company laws in their request for judicial notice. (Evid. Code, § 452, subd. (f).) Because the documents in the request for judicial notice are not relevant, the request for judicial notice is denied. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 [“any matter to be judicially noticed must be relevant to a material issue”].)

**DISPOSITION**

The order is affirmed. Respondent is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MILLER J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.