I. INTRODUCTION

This is Plaintiff's response to Defendants' motion to dismiss.[1] The Court should deny Defendants' motion for the following reasons:

- Defendants failed to consult with Plaintiff before filing their motion to dismiss in violation of Local Rules 7-3 and 7-4.

- Defendants concede their alter ego relationships in earlier litigation (judicial estoppel) and in their motion to dismiss.

- Korea is an impractical venue because the current lawsuit is Defendants' backyard and all parties reside in the U.S., Defendants litigated in Orange County on facts nearly identical to the current lawsuit, Defendants would not suffer and have not suffered any prejudice from litigating in the U.S. In contrast, Plaintiff knows from experience that getting justice in Korea is not possible.

- Defendants' preclusion arguments are contradictory and are a straw man (i.e., challenge positions that Plaintiff does not take). Furthermore, the Korean litigation is irrelevant to Plaintiff's causes of action, compulsory counterclaims do not apply to earlier litigation in a foreign country.

[1] Defendants filed two motions to dismiss, the first on February 29, 2024 and the second on March 2, 2024. Except for the date of hearing found in the second motion, the two motions appear to be identical and have identical names/titles. *See* Docket No. 135-1 and 138-1.

- The statute of limitations has not run because Plaintiff's causes of action Plaintiff's Fourth Amended Complaint relies on transactions that occurred much later than 2016 and that continue through today.

- The Korean litigation made no findings related to Plaintiff's interference causes of action, and those causes of actions are well plead in Plaintiff's Fourth Amended Complaint and are not speculative.

- Defendants owed a fiduciary duty to Plaintiff whether that duty was mentioned in the written agreement between the parties.

- Plaintiff's fraud and fraudulent inducement causes are pleaded with sufficient particularity and are not barred by the statute of limitations.

II. LEGAL STANDARD

In its Tentative Ruling, this Court wrote:

> [T]he Court likewise also has grave doubts that motions to dismiss are "viewed with disfavor and rarely granted." Plaintiff's reliance on Fifth Circuit opinions pre-dating *Twombly* and *Iqbal* does nothing to make the Court question this stance, although it does raise a question as to Plaintiff's counsel's legal research abilities.[2]

Plaintiff's counsel's legal research abilities were just fine. Even after *Twombly* and *Iqbal*, the courts both in the 5th Circuit and the 9th Circuit continue to disfavor

[2] Docket No. 132, at 4.

motions to dismiss and rarely grant them.[3] This strong presumption against dismissal along with the facts and authorities in Plaintiff's brief overwhelmingly warrant denial of Defendants' motion to dismiss.

III. ARGUMENT

A. Defendants Violated Local Rules 7-3, 7-4, and

The Court should not entertain Defendants' motion to dismiss because the Defendants violated Local Rule 7-3 and Local Rule 7-4. As to Local Rule 7-3,[4] Defendants' counsel did not confer or even try to confer with Plaintiff's counsel

[3] *Ernst and Hass Management v. Hiscox, Inc.*, 23 F. 4th 1195, 1199 (9th Cir. 2022); *Ploof v. Arizona* (9th Cir. 2003), 2023 U.S. App. LEXIS 8837, fn 3; *IberiaBank Corp. v. Illinois Union Insurance,* 953 F.3d 399 (5th Cir. 2020); *Hodge v. Engleman*, No. 22-11210, https://caselaw.findlaw.com/court/us-5th-circuit/115713400.html, (5th Cir. Jan. 16, 2024); *Besser v. Tex. Gen. Land Office*, No. 18-50291, https://caselaw.findlaw.com/court/us-5th-circuit/1909234.html (5th Cir. Nov. 3, 2020); *Fine v. Kansas City Life Insurance Company*, 627 F.Supp.3d 1153 (C.D. Cal. 2022); *Peña v. International Medical Devices*, Slip Copy, 2023 WL 5667568 (C.D. Cal. April 17, 2023); *Advanced Rsch. Ctr v. Eisai*, 2023 U.S. Dist. LEXIS 52955 (C.D. Cal. Jan. 4, 2023); *McAdams v. El Dorado County*, 2021 WL 6052277 (E.D. Calif. Dec. 21, 2021); *Doe v. MD Cancer Center*, 653 F. Supp. 3d 359, 370 (S.D. Tex 2023); *Canadian Breaks v. JP Morgan Chase*, 2022 WL 1131172 (N.D. Tex. March 28, 2022); *Bank of NY Mellon v. Osborn*, 2023 WL 2025246 (N.D. Tex. Jan. 27, 2023); *Marusak v. Semi*, 2021 WL 6135429 (N.D. Tex. Dec. 28, 2021); *Valderama v. BBVA Compass*, 2021 WL 6065825 (N.D. Tex. Nov. 22, 2021); *Novack v. Rice108*, 2018 WL 7135190 (N.D. Tex. Dec. 27, 2018); *McGraw v. Heaton*, 2017 WL 1157221 (N.D. Tex. March 9, 2017).

[4] L.R. 7-3 Conference of Counsel Prior to Filing of Motions. In all cases not listed as exempt in L.R. 16-12, and except in connection with discovery motions (which are governed by L.R. 37-1 through 37-4) and applications under F.R.Civ.P. 65 for temporary restraining orders or preliminary injunctions, counsel contemplating the filing of any motion must first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference must take place at least 7 days prior to the filing of the motion.If the parties are unable to reach a resolution that eliminates the necessity for a hearing, counsel for the moving party must include in the notice of motion a statement to the following effect: "This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on (date)."

prior to filing Defendants' motion to dismiss[5] and did not include or sign the requisite certification statement.[6] Defendants also violated Local Rule 7-4 by not including a notice of motion.[7] Defendants also violated Local Rule 11-6.1 by not certifying to the word length of their motion to dismiss/brief. These violations are in addition to the violations of the Local Rules that the Court warned Defendants about in its March 1, 2024 notification.[8] The Court should deny Defendants' motion to dismiss because of their disregard for the Local Rules.

B. Defendants Concede That They Are Each Other's Alter Ego

Defendants challenge Plaintiff's alter ego argument without mentioning, much less challenging, its key component: the lawsuit that they earlier filed in Orange County, of which the Court may take judicial notice.[9] To secure jurisdiction in Orange County, Defendant S&B Global, Inc. and Defendant S&B Global America, Inc. claimed and established that they are alter egos of each other. Judicial estoppel prevents Defendants from denying that alter ego relationship in

[5] Mr. Barrs, Defendants' counsel, did not confer or try to confer with Oscar Gonzalez, Plaintiff's counsel, before filing Defendants' motion to dismiss. Two days later and after the Court chided Defendants for violating the Local Rules, Mr. Barrs emailed Mr. Gonzalez. *See Docket No. ___, Exhibit ___, at __,* and left a voicemail requesting Mr. Gonzalez's approval to filing a motion for extension of time to allow the Defendants to respond to Plaintiff's Fourth Amended Complaint, but Mr. Barrs's email and voice message came very late on a Friday and filed Defendant's amended motion to dismiss the next day on a Saturday. Defendants did not file the motion for extension of time that Mr. Barrs mentioned and did not provide Plaintiff the seven days notice required by L.R. 7-3.

[6] Docket No. 135-1; see *SS Miller 1P v. Sugar Beets*, Case No. CV 22-2576-GW-SHKx (C.D. Calif. Oct. 21, 2022) (Local Rule 7-3's failure to confer requirement applied to motion to dismiss).

[7] "The notice of motion shall contain a concise statement of the relief or Court action the movant seeks."

[8] Docket Nos. 135 and 137.

[9] Appendix; Docket No. _____; Fed. R. Ev. 201(c).

this litigation and relieves Plaintiff of the responsibility of having to produce additional evidence to establish the alter ego relationship.

That is not the only time Defendants concede Plaintiff's alter ego argument. Plaintiff made the following allegation in its Fourth Amended Complaint:

> Defendants Sung Jae Hwang and Bo Yoon Choi are a married couple who have operated and continue to operate the three corporate defendants (S&B Global, Inc., S&B Global America, Inc., and Sage Aerospace, Inc.) from their home in Newport Beach California.[10]

Defendants do not challenge, or even mention, Plaintiff's allegation in their motion to dismiss. Not only does Plaintiff's unrebutted statement fortify its alter ego argument, but it also enhances its argument that California, and not Korea, is the correct venue to hear Plaintiff's lawsuit.

There is even still another concession by Defendants of Plaintiff's alter ego claim. The Defendants filed a Consolidated Motion To Dismiss. Defendants dropped the pretense that they possess separate identities, separate interests, separate defenses, separate arguments, or separate legal counsel.

Defendants' own testimony undermines their position. Defendants filed an affidavit from Defendant Sung Jae Hwang to try to disassociate himself from Defendant S&B Global America, Inc.[11] Defendant Hwang fails to mention in that

[10] Docket No. 134, at ¶ 3.
[11] Docket No. 135-2 and 138-2, at 58, ¶ 4.

affidavit that he signed and filed the articles of incorporation both as the incorporator and the agent for service of process for Defendant S&B Global America, Inc.[12] Equally revealing is that Defendant Bo Yoon Choi does not deny in her affidavit that she owns or is an officer of all three corporate Defendants.[13] Moreover, the affidavits for Defendants Sung Jae Hwang and Bo Yoon Choi are in the present tense, e.g., "I am neither an officer nor a director of S&B Global America, Inc."[14] Leaving out "nor have I ever been" raises suspicions concerning Defendants' ownership interests and controlling roles in the three corporate Defendants.

C. This Lawsuit Is In Defendants' Own Backyard

All parties in this litigation[15] are in the U.S. This Court is just forty-three miles from Defendants' Newport Beach mansion. And yet, Defendants somehow think that moving this lawsuit from their own backyard to Korea makes sense.

What makes Defendants' position even more dubious is that they are accustomed to litigating in their backyard. Two years before Plaintiff sued them, Defendants sued True Steel and Cutting in the Superior Court of California, Orange County.[16] Defendants' Orange County lawsuit is strikingly similar to the

[12] Appendix; Docket No. _____.
[13] Docket No. 138-2, at 170, Exhibit P.
[14] *Id.* at 58, ¶ ¶ 4 and 5, Exhibit E.
[15] Yes, including Defendant S&B Global, Inc., as explained throughout this brief, that company operates from wherever Defendants Hwang and Choi are found, and they are found in Newport Beach.
[16] *Supra* at ____.

current lawsuit. From California, S&G Global, Inc. and S&B Global America, Inc. brokered deals on behalf of True Steel and Cutting, an American company, to sell aircraft parts to Korean companies. S&G Global, Inc. and S&B Global America, Inc. sued to collect commissions on those sales. For nearly three years until the parties settled, Defendants litigated, performed discovery, had the court issue dozens of orders, filed hundreds of pleadings, and negotiated a settlement on the eve of trial. In other words, Defendants litigated fully in California. Defendants offer various justifications (none of them compelling) to convince the Court to dismiss Plaintiff's lawsuit to allow the parties to litigate in Korea. But those exact same justifications existed in the Defendants' Orange County lawsuit and the Defendants were perfectly fine with litigating in California.

Beyond the self-defeating precedent that the Defendants set with their Orange County lawsuit, there are additional reasons for this Court to reject their arguments. Defendants have been litigating the current lawsuit in the U.S. for over a year without any prejudice to their defense, or Defendants at least do not mention any such prejudice in their motion to dismiss.[17] In contrast, Plaintiff would be severely prejudiced if forced to litigate in Korea, just as he was prejudiced before.[18] Furthermore, as the hefty Appendix to their motion to dismiss

[17] Docket Nos. 135-2 and 138-2.
[18] Docket No. __, Appendix at ___.

demonstrates,[19] Defendants have no problem producing and translating documents from Korea. As for access to primary witnesses, Plaintiff considers Defendants Sung Jae Hwang and Bo Yoon Choi as the primary witnesses needed for discovery and trial, and both individuals are in Newport Beach. In addition, the headquarters for Adept Fasteners Headquartered is in Valencia, California.

The Honorable Judge Pittman, the judge who presided over this lawsuit in the Northern District of Texas, agreed with Plaintiff that litigating in Korea was not a good idea, otherwise he would have dismissed the lawsuit rather than transfer it to the Central District of California.[20]

D. Defendants' Compulsory Counterclaim And Preclusion Arguments Make No Sense

Defendants' collateral estoppel and *res judicata* arguments (i.e., preclusion) cannot be reconciled with their compulsory counterclaim argument. Defendants claim that the Korean courts rejected the causes of action that Plaintiff is now asserting in the Central District of California.[21] At the same time, Defendants maintain that Plaintiff failed in the Korean litigation to counterclaim the causes of action that it raises in its current lawsuit.[22] In other words, according to Defendants, the Korean courts somehow rejected Plaintiff's causes of action that

[19] Docket Nos. 135-2 and 138-2.
[20] Docket No. 101.
[21] Docket No. 138-2, at 6-8.
[22] *Id.*

Plaintiff never raised. The reality is that neither of Defendants' mutually exclusive contentions are true. The Court should reject Defendants' incoherent and contradictory arguments and their fabricated account of the Korean litigation.

Defendants preclusion and comity arguments are a straw man. Plaintiff has never challenged the preclusive effect of the Korean judgment. Indeed, Plaintiff would urge this Court to give full faith and credit to that judgment if it had any relevance to the instant lawsuit. The Korean judgment has nothing to do whatsoever with Plaintiff's causes of action. The Korean judgment only settled how much sales commissions that Plaintiff allegedly owed to Defendant S&B Global, Inc. Those commissions are not at issue in the causes of action before this Court. Plaintiff's current causes of action were not resolved by and are nowhere mentioned in the Korean judgment.

Defendants make their compulsory counterclaim argument, not under Fed.R.Civ.P. 13(a), but under Section 426.30 of California's Code of Civil Procedure.[23] However, Section 426.30 is generally available only when the earlier lawsuit between the parties was filed in state court, not, as here, when the earlier lawsuit is in a foreign country.[24]

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[23] Docket No. 138-1, at 6.

[24] *Maldonado v. Harris,* 370 F.3d 945, 951 (9th Cir. 2004) ("Section 426.30 requires a defendant in ***a state court action*** in California to raise any related causes of action which he has against the plaintiff in that action.") (emphasis added); see also *Laguna Beach Sober Living v. City of Dana Point*, 2020 WL 947946 (C.D. Calif. Jan. 6, 2020) ("California Code of Civil Procedure Section 426.30 governs whether a

There are compelling reasons, especially in this instance, why compulsory counterclaims do not generally apply to earlier lawsuits in a foreign country. Barriers to culture, language, practice, tradition, and law may be impossible to overcome. It is just not feasible to swap out American causes of action and remedies (even if they appear similar) with Korean ones. In contrast to our common and adversarial law system, Korea employs a civil system that relies completely on a judge, or panel of judges, to determine every aspect of the litigation. Discovery is extremely limited and there is no *stare decisis* or jury trial to guide or limit a Korean court's discretion or help it interpret a civil code.

In a *forum non conveniens* case, the local interest, among other things, in having localized controversies decided at home must be given priority.[25] Plaintiff knows from experience that counterclaiming in Korea would have been futile. Korea can be alien and hostile to U.S. litigants while granting preferential treatment, whether conscious or not, to native parties. Plaintiff finds Korean civil

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federal claim should've been asserted as a compulsory counterclaim in an earlier-filed ***state court action***.") (emphasis added); *Sourdough & Co., vs. WCSD,* 2024 U.S. Dist. LEXIS 35534, *6 (E.D. Calif. Feb 29, 2024) ("Whether Plaintiff's claims in its FAC are compulsory counterclaims that should have been pled in ***the earlier state court action*** is a question of state law.") (citations omitted) (emphasis added); *Vagaro v. Miller*, 2023 U.S. Dist. LEXIS 130244; 2023 WL 4828682 (N.D. Calif. July 27, 2023) (whether earlier state court action required a section 426.30 compulsory counterclaim); *Payward vs. Runyon*, 2021 U.S. Dist. LEXIS 14638, *14-18 (N.D. Calif. Jan. 25, 2021) (when § 426.30(a) is appropriate in light of earlier state court judgment); *Neighborhood House Ass'n v. Children of the Rainbow Head Start,* 2011 U.S. Dist. LEXIS 145796, *10, 2011 WL 6399467 (S.D. Calif. Dec. 19, 2011) ("[C]ounterclaims would not become compulsory unless and until an answer is filed in ***state court***.") (emphasis added).

[25] *Imran v. Vital Pharms., Inc*., 2019 WL 1509180, at *6 (N.D. Cal. Apr. 5, 2019) (quoting *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)); *Apple vs. NSO Group Technologies*, Case No. 3:21-cv-09078-JD, t.ly/lV1Yz (N.D. Calif. Jan. 23, 2024).

procedure to be opaque and confounding and the judgments from Korean courts to be nonsensical. Defendants are fluent in English and have no problem litigating in California. This is not surprising for residents of Newport Beach who represent US companies. In contrast, Joseph Pavlov, President of Plaintiff, cannot speak or read in Korean. To serve that end, Plaintiff would be at an extreme disadvantage in Korea and knows that the impartiality and justice that it seeks can only be found in this Court.

E. The Statute Of Limitations

Defendants contend that the statute of limitations has run on Plaintiff's causes of action because of events that happened in 2015 or 2016, including an email that Joseph Pavlov, President of Plaintiff, from 2016.[26] The flaw in Defendants' argument is that Plaintiff's Fourth Amended Complaint relies on transactions that occurred much later than 2016. Defendants' argue as if the financial injuries that they inflicted upon Plaintiff and that are at the core of Plaintiff's causes of action matured or ceased by the time the Korean judgment was entered. As Plaintiff's Fourth Amended Complaint makes clear, Defendants' misdeeds continued long after this and continue through today.

F. Plaintiff's Interference Causes of Action

Defendants argue:

[26] Docket Nos. 135-2 and 138-2, at 9.

> First and foremost, the claim of interference was addressed in Korean Lawsuit and invalidated as a credible defense to its contract obligation to pay commissions to S&B Global.[27]

Defendants misrepresent the Korean litigation. Neither of the two judgments from the Korean litigation that the Defendants cite to address any interference claim from Plaintiff, much less "invalidate" it. As we have seen thus far, from Defendants' disdain of the Local Rules to their incoherent arguments and inconsistent positions, there is an overabundance of justifications to deny Defendants' motion to dismiss. Misrepresenting the Korean lawsuit adds more weight to the scale that is already heavily tilted in Plaintiff's favor.

But there are still more reasons to deny Defendants' motion to dismiss. Defendants also misrepresent the controlling dates and, thus, wrongly interpret and apply the statute of limitations. As Plaintiff repeatedly explains in its Fourth Amended Complaint, Plaintiff is suing for damages that it suffered from Defendants' activities that happened within the statute of limitations, including contracts with Korean Airlines from 2019-2022 and 2022-2024. Defendants' bad-mouthed Plaintiff to Korean Airlines and Adept Fasteners and thereby interfered with Plaintiff's bids, but also throughout the terms of these contracts. Defendants

[27] Docket Nos. 135-1 and 138-1, at 16.

harmed and continue to harm Plaintiff's business relationships and prospective contracts.

Defendants' claim that Plaintiff's interference claims are too speculative,[28] but Plaintiff's Fourth Amended Complaint explains that Plaintiff learned of Defendants' interference through its in-house employees at Korean Airlines. Plaintiff verified the presence of Defendants' interference by submitting a bid with telltale figures. These are concrete facts, not speculation, the context and details of which Plaintiff should be allowed to further explore in discovery. Moreover, as Defendants' admit,[29] Plaintiff was awarded contracts with Korean Airlines. The plunge in sales and profits that Plaintiff experienced as a result of Defendants' misdeeds establish the damages that Plaintiff suffered.

Defendants also assert:

> Defendants were free to compete in a bidding process with any customer in the market. Responding to an open tender in the market advertised by an international airline is an open process for free and fair competition to submit bids; a bid submission or award is not contractual interference.[30]

If not for straw men, Defendants would have no arguments at all. Plaintiff does not contend that submitting a competing bid by itself constituted contractual interference by Defendants. Defendants maligned Plaintiff's good name to both

[28] *Id*. at 16-17.
[29] *Id.*
[30] *Id.* at 18.

Korean Airlines and Adept Fasteners, with whom Plaintiff had existing contractual relationships that would have continued to flourish if not for Defendants' interference and their misuse of Plaintiff's proprietary information that they used to place their competing bids.

G. Breach of Fiduciary Duty

Defendants argue:

> The Representative/Agency Agreement between S&B Global and First Call is clear and unambiguous. This agreement makes no reference to a duty of loyalty or proprietary information. Plaintiff fails to allege the existence of a fiduciary duty, and it also fails to articulate the requisite elements to establish a claim under Korean law. Therefore, Plaintiff fails to state a claim under FRCP 12(b)(6).[31]

Whether or not the Representative/Agency Agreement mentioned a duty of loyalty, Defendants S&B Global, Inc. and Defendant Sung Jae Hwang agreed to be and acted as the agent and broker for Plaintiff and thus owed a fiduciary duty to Plaintiff. As for "Plaintiff fails to allege the existence of a fiduciary duty," Defendants seemed to have overlooked the following allegation from Plaintiff's Fourth Amended Complaint:

> Defendant S&B Global, Inc., through Defendant Sung Jae Hwang, acted as a fiduciary under the Representative/Agency Agreement with Plaintiff. Defendant S&B Global, Inc., throughout its business relationship with Plaintiff, had pledged its loyalty to

[31] *Id.* at 13 (footnote omitted).

Plaintiff and had agreed never to use Plaintiff proprietary information to hurt Plaintiff financially.[32]

H. Fraud And Fraudulent Inducement

Defendants' challenge Plaintiff's fraud and fraudulent inducement causes of action mostly on statute of limitations ground. As stated above, Defendants mischaracterize the relevant dates undergirding Plaintiff's causes of action. Defendants also claim that Plaintiff failed to plead with sufficient particularity. Plaintiff provided more than sufficient details. The "who, what, when, where, and how" are found in the relevant section of Plaintiff's Fourth Amended Complaint,[33] albeit in summary form. Deeper explanations are offered throughout Plaintiff's Fourth Amended Complaint.[34]

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss

March 21, 2024

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[32] Docket No. 134, ¶ 7, at 9.
[33] *Id*. at 9, ¶¶ 52 and 53.
[34] *Id.* at 4-6, ¶¶ 24 - 41.

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CERTIFICATE OF SERVICE

As counsel for Plaintiff, I filed this pleading with the clerk of the court using the CM/ECF system thereby ensuring that the pleading is served on all counsel of record in this action.

March 21, 2024 s/ Oscar Gonzalez

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

The undersigned, counsel of record for Plaintiff, certifies that this brief contains approximately 3,900 words, which complies with the word limit of L.R. 11-6.1.

March 21, 2024 s/ Oscar Gonzalez