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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KYKO GLOBAL INC. AND KYKO GLOBAL GMBH, Plaintiff-Appellant, v. OMKAR BHONGIR, Defendant-Appellee.	No. 20-17526 D.C. No. 20-cv-04136 MEMORANDUM* (Filed Oct. 26, 2021)

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted October 21, 2021**
San Francisco, California

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,*** District Judge.

Plaintiff Kyko Global Inc. and Kyko Global GmbH ("Kyko") appeals the district court's dismissal of its Second Amended Complaint ("SAC"). In 2011, Kyko entered into a business agreement ("the agreement")

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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 panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

with Prithvi Information Solutions Limited ("PISL"). In 2013, Kyko discovered that the agreement was fraudulent. *Id.* It then brought a case in the Western District of Washington and received a judgment against PISL. *Id.* Kyko now seeks damages against Defendant Omkar Bhongir ("Bhongir") for his alleged involvement in the agreement while he served as a board member of PISL. The district court dismissed Kyko's complaint with leave to amend and then dismissed Kyko's subsequent amended complaint without leave to amend. This appeal follows.

We have jurisdiction under 28 U.S.C. § 1291. "We review de novo the district court's dismissal based on the statute of limitations." *Mills v. City of Covina*, 921 F.3d 1161, 1165-66 (citing *Johnson v. Lucent Techs.*, Inc., 653 F.3d 1000, 1005 (9th Cir. 2011)). We review dismissal for failure to state a claim de novo. *Whitaker v. Tesla Motors, Inc.* 985 F.3d 1173, 1175 (9th Cir. 2021) (citing *Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010)). Likewise, "intertwined issue[s] of statute of limitations and choice of law questions" are reviewed de novo. *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 996 (9th Cir. 2006).

The district court was correct in applying California law to Kyko's breach of fiduciary duty claims. In cases transferred "to cure a lack of personal jurisdiction . . . . it is necessary to look to the law of the transferee state. . . ." *See Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). In choice of law questions, where a conflict exists between two jurisdictions, California law directs courts to "determine what interest,

if any, the competing jurisdictions have in the application of their respective laws." *Cooper v. Tokyo Elec. Power Co.*, 960 F.3d 549, 559 (9th Cir. 2020). Here, the district court correctly concluded that because "the forum is in California, and the only defendant is a California resident," "[o]nly California ha[d] an interest in having its statute of limitations applied."[1] *Nelson*, 716 F.2d at 645.

Applying California's statute of limitations, eight of nine of Kyko's claims are time barred.[2] The district court correctly decided that Kyko's injuries began to toll in 2013. "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110 (1998). The "[a]ggrieved parties

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[1] Because the court finds that California law applies, it need not address Kyko's claim that Bhongir waived his statute of limitations defense in Pennsylvania. It also need not address in detail the claim that Kyko was denied an opportunity to be heard before its fiduciary duty claims were dismissed under Pennsylvania law. The district court applied California law in its first order and dismissed the complaint with leave to amend. Plaintiff had notice and an opportunity to respond.

[2] Under California law, fraud claims are governed by a three-year statute of limitations, *see* Cal. Civ. Proc. Code § 338(d), conversion claims are governed by a three-year statute of limitations, *see* Cal. Civ. Proc. Code. § 338(c), negligence claims are subject to a two-year statute of limitations, *see* Cal. Civ. Proc. Code §§ 335-335.1, and breach of fiduciary duty claims are governed by a four-year statute of limitations, *see* Cal. Civ. Proc. Code § 343, except when that claim is based on fraud, then it is governed by a three-year statute of limitations. *See Thomas v. Canyon*, 198 Cal. App. 4th 594, 606-07 (2011).

generally need not know the exact manner in which their injuries were effected, nor the identities of all parties who may have played a role therein." *Bernson v. Browning-Ferris Industries*, 7 Cal. 4th 926, 932 (1994) (internal quotation marks omitted); *see also id.* (noting that "the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statue"). Kyko knew about its injury in 2013 when it discovered the fraudulent accounts. It did not need to know the exact legal claim it could bring against a specific defendant. Rather, it was enough that it had knowledge of the injury that gave rise to the claim. Any liability it now claims against Bhongir is derived from that injury in 2013.

The district court was also correct in holding that equitable estoppel does not bar the statute of limitations defense. While "a defendant may be equitably estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity," *Bernson*, 7 Cal. 4th at 936, a plaintiff is still expected to "exercise reasonable diligence" to discover the defendant's identity. *Id.* Denial of legal liability alone is insufficient to allege estoppel. *See Lantzy v. Centex Homes*, 31 Cal. 4th 363, 384 n.18 (2003). Instead, a defendant's actions "must amount to a misrepresentation bearing on the *necessity* of bringing a timely suit." *Id.* Equitable estoppel "requires . . . showing defendants' conduct 'actually and reasonably induced plaintiffs to forbear suing' within the limitations period." *Bergstein*

v. Stroock & Stroock & Lavan LLP, 236 Cal. App. 4th 793, 820 (2015) (quoting *Lantzy*, 31 Cal. 4th at 385). Kyko has not pleaded any facts to demonstrate that Bhongir's actions extended beyond denials of liability. It also has not demonstrated due diligence, nor does it explain why it waited two years to bring a suit after discovering Bhongir's involvement. Finally, Kyko has not demonstrated that Bhongir's denials "actually induced" a delay in filing a suit.

The only claim not time barred under California law, breach of fiduciary duty, was correctly dismissed by the district court. In general, directors do not owe a fiduciary duty to creditors. *See Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1046 (2009). A limited exception exists when a corporation is insolvent. *Id.* at 1032. In those instances, directors have a duty to not "divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors claims. This would include acts that involve self-dealing. . . ." *Id.* at 1041 (emphasis omitted). Here, Kyko failed to allege Bhongir engaged in self-dealing. *Cf. id.* at 1032, 1041-43; Cal. Corp. Code § 5233(b)(1) (providing that fixing the compensation of a director does not constitute self-dealing in the nonprofit corporations context); *see also In re Brocade Communications Systems, Inc. Derivative Litig.*, 615 F. Supp. 2d 1018, 1047 (N.D. Cal. 2009) (noting that to allege self-dealing "a plaintiff must plead that the defendants either (1) stood on both sides of a transaction and dictated its terms in a self-dealing way or (2) received a personal benefit that was not enjoyed by the shareholders

generally"). Kyko has not pleaded specific facts to demonstrate that Bhongir was engaged in self-dealing. While Bhongir's compensation was tied to his equity in PISL, Kyko does not allege how an increase in equity is of a special benefit to Bhongir and not shared among all shareholders generally. Furthermore, Kyko fails to allege any circumstance in which Bhongir stood on both sides of a transaction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYKO GLOBAL INC., et al.,

Plaintiffs,

v.

OMKAR BHONGIR,

Defendant.

Case No. 20-cv-04136-MMC

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING SECOND AMENDED COMPLAINT WITHOUT FURTHER LEAVE TO AMEND; VACATING HEARING

(Filed Dec. 11, 2020)

Before the Court is defendant Omkar Bhongir's ("Bhongir") Motion, filed November 6, 2020, "to Dismiss Plaintiffs' Second Amended Complaint." Plaintiffs Kyko Global, Inc. and Kyko Global GmbH (collectively, "Kyko") have filed opposition, to which Bhongir has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for determination on the parties' respective written submissions, VACATES the hearing scheduled for December 18, 2020, and rules as follow.

BACKGROUND

In the operative complaint, the Second Amended Complaint ("SAC"), Kyko alleges that, from 2005 to 2009, Bhongir "served as a Director" of Prithvi Information Solutions Ltd. ("Prithvi"), an Indian corporation

described by Kyko as an "international information technology company." (See SAC ¶¶ 12, 21.) According to Kyko, at some point during Bhongir's term as a Director, Bhongir, "along with other Prithvi executives and directors, created fake and phony accounts receivable on Prithvi's books and records,"[1] which "fake and phony accounts receivable" Kyko refers to as the "Five Fake Customers" and "Additional Fake Customers." (See SAC ¶¶ 31, 32, 34.)[2] Subsequently, on a date not disclosed in the SAC, but after Bhongir was no longer a Director, Prithvi allegedly "transmitted the Five Fake Customers to induce Kyko to enter into a loan factoring agreement" (see SAC ¶ 62), and, in November 2011, Kyko, believing the Five Fake Customers "to actually be legitimate," entered into "an accounts receivable factoring agreement with Prithvi" (see SAC ¶¶ 64).[3]

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[1] In the alternative, Kyko alleges that Bhongir (1) "provided assistance" to others who created the assertedly fake and phony accounts receivable, (2) "knew of their existence and failed to prevent them from being disseminated," or (3) "did not know of their existence but failed to discover their existence before they were disseminated." (See SAC ¶¶ 35-37.)

[2] Kyko alleges that the names of the "Five Fake Customers" were "chosen to closely resemble legitimate entities conducting business under almost identical names" (see SAC ¶ 33), and that the "Additional Fake Customers" were "other non-existent customers" (see SAC ¶ 34).

[3] Under the agreement, "Prithvi would identify certain of its customer accounts receivable for [its] services and would authorize direct payment on those customer accounts receivable to be made to Kyko in exchange for a portion of the amount outstanding from its customers to be paid immediately by Kyko." (See SAC ¶ 65.)

Kyko alleges that, although payments to Kyko were initially made by Prithvi, "the Five Fake Customers subsequently stopped making payment under the Factoring Agreement." (See SAC ¶¶ 66-57.) Kyko further alleges that, "[t]o continue its ruse, Prithvi supplied Kyko with the Additional Fake Customers with the intent to not have Kyko declare a default" (see SAC ¶ 68), but Prithvi "continued to fail to make the required payments under the Factoring Agreement" (see SAC ¶ 69). According to Kyko, it "discovered," in March 2013, "that the Five Fake Customers and Additional Fake Customers were bogus and illegitimate" (see SAC ¶ 70), and, in June 2013, filed in the Western District of Washington a lawsuit against Prithvi and "others," although not Bhongir, and ultimately obtained a judgment in the amount of $134,318,640 plus interest (see SAC ¶¶ 73, 80-81).

In the instant action, initially filed February 14, 2017, in the Western District of Pennsylvania, Kyko asserts against Bhongir nine Counts, titled, respectively, "Fraud," "Fraudulent Concealment," "Fraud by Omission," "Aiding and Abetting Fraud," "Aiding and Abetting Conversion," "Negligence," "Negligent Misrepresentation," "Breach of Fiduciary Duty," and "Aiding and Abetting Breach of Fiduciary Duty."

LEGAL STANDARD

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be based on the lack of a cognizable legal theory or the absence of sufficient facts

alleged under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief." See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." See id. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

DISCUSSION

By order filed September 30, 2020 ("September 30 Order"), the Court granted Bhongir's motion to dismiss the First Amended Complaint ("FAC"), which pleading contained the same nine Counts now asserted in the SAC. In particular, the Court found, with one exception, each of Kyko's Counts was barred by the applicable statute of limitations and that Kyko had failed to plead sufficient facts to support a finding that an exception to the statute of limitations existed. With respect to the one claim that was not time-barred, the Court found Kyko had failed to plead sufficient facts to support a cognizable claim. Kyko was afforded leave to amend, and subsequently filed the SAC. By the instant motion, Bhongir argues Kyko has failed to cure the deficiencies identified by the Court in its September 30 Order.

A. Statute of Limitations

Under California law, fraud claims are subject to a three-year statute of limitations, see Cal. Civ. Proc. Code § 338(d), conversion claims are subject to a three-year statute of limitations, see Cal. Civ. Proc. Code § 338(c), negligence claims are subject to a two-year statute of limitations, see Cal. Civ. Proc. Code § 335.1, and breach of fiduciary duty claims are subject to a four-year statute of limitations, see Cal. Civ. Proc. Code § 343; Thomson v. Canyon, 198 Cal. App. 4th 594, 606 (2011), with the exception that where a breach of

fiduciary claim is based on fraud, it is subject to a three-year statute of limitations, see id. at 607.

In its September 30 Order, the Court found Kyko's claims against Bhongir accrued in March 2013 (see September 30 Order at 5:17-25), and, because the initial complaint was filed February 14, 2017, Kyko's claims, with the exception of a portion of Count VIII, were not filed within the applicable limitations period (see id. at 4:25-5:16, 5:24-26). As to the claims not filed within the limitations period, the Court further found that, although Kyko, in an effort to avoid the time bar, sought to rely on a theory of "fraudulent concealment," Kyko failed to allege in the FAC sufficient facts in support thereof. (See id. at 5:27-7:3.)

In the SAC, Kyko again relies on a theory of fraudulent concealment (see SAC ¶ 98) and, in support thereof, first raises a theory not set forth in the FAC or in its opposition to Bhongir's motion to dismiss the FAC. Specifically, Kyko now alleges it "obtained information and documents from a third-party in March 2015 that demonstrated Bhongir's knowledge and involvement in the loan factoring receivable fraud" and "confronted Bhongir with this information," but that Bhongir "denied having any knowledge of the loan factoring receivable fraud" and "denied having any information regarding the loan factoring receivable fraud." (See SAC ¶¶ 48, 50-52.) Based on these new allegations, Kyko contends Bhongir is "equitably estopped from raising the statute of limitations as a defense." (See Pls.' Opp. at 14:4-5.)

The Ninth Circuit has held a plaintiff may base an equitable estoppel theory on a defendant's denial that he engaged in the act of which he is accused. See Estate of Amaro v. City of Oakland, 653 F.3d 808, 813-15 (9th Cir. 2011) (holding doctrine of equitable estoppel applies "where a plaintiff believes she has a 42 U.S.C. § 1983 claim but is dissuaded from bringing the claim by [the defendant's] affirmative misrepresentations" as to "the circumstances of" the incident on which liability is based).[4] [5] To succeed on such theory, however, the plaintiff must be "actually and reasonably induced" to "forbear suing within the [limitations] period," see Lantzy, 31 Cal. 4th at 385; in other words, where, as here, the defendant denies engaging in the act of which he is accused, the plaintiff must, at a minimum, "believe the[ ] denials," see Bergstein v. Stroock & Stroock & Lavan LLP, 236 Cal. App. 4th 793, 820 (2015). In this

[4] The holding in Amaro is implicitly based on California law. See Hardin v. Straub, 490 U.S. 536, 539 (1989) (holding "[l]imitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules") (internal quotation and citation omitted).

[5] Although, as Bhongir point outs, the California Supreme Court has held a "defendant's mere denial of legal liability does not set up an estoppel," see Lantzy v. Centex Homes, 31 Cal. 4th 363, 384 (2003) (emphasis in original), here, Kyko alleges Bhongir denied a fact on which Kyko bases its claims, not that Bhongir stated his disagreement with any legal theory on which Kyko relies, see Vu v. Prudential Residential Property & Casualty Ins. Co., 26 Cal. 4th 1142, 1151-52 (2001) (distinguishing cases in which the defendant disagreed with "legal theories supporting the complainant's claims," on which no claim of estoppel can be based, from cases in which the defendant made a "misrepresentation of fact," on which a claim of estoppel can be based).

instance, Kyko has offered, with its opposition, evidence to which no objection has been raised and in which Kyko makes clear it did not believe Bhongir's denial of any knowledge of or participation in Prithvi's fraudulent scheme. (See Pls.' Opp. Ex D (stating "the comments made in your letter are contrary to the facts we have" and "[w]e view your decision to remain on the Board . . . as condoning the illegal activities of [Prithvi] and therefore making you liable for the losses suffered by [Kyko]").) Under such circumstances, Kyko cannot establish Bhongir is, as a result of his denials, equitably estopped from relying on the statute of limitations as a defense. See Bergstein, 236 Cal. App. 4th at 820.

Alternatively, Kyko continues to rely on the theory it asserted in the FAC and in its opposition to dismissal of the FAC, specifically, that it is entitled to equitable tolling for the period beginning in March 2013, when it allegedly first learned it had claims against Prithvi, until March 2015, when it allegedly first learned it had claims against Bhongir. In particular, Kyko alleges, Bhongir, or persons acting on his behalf, "conceal[ed] his role with the Five Fake Customers and Additional Fake Customers." (See SAC ¶ 59.) In its September 30 Order, the Court found Kyko's reliance on such theory, as alleged in the FAC, unavailing, for the reason that Kyko failed to "'plead with particularly the circumstances surrounding the concealment" or to allege "'facts showing [its] due diligence in trying to uncover the facts." (See September 30 Order at 6:7-24 (quoting Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978).)

For the reasons set forth in its September 30 Order, the Court finds the SAC remains deficient. First, Kyko again fails to allege with any particularity facts to support its conclusory assertion that Bhongir, or persons on his behalf, "conceal[ed] his role" in the claimed fraud. (See SAC ¶¶ 59-61.) Additionally, Kyko again fails to set forth what information it obtained about Bhongir in March 2015 (see SAC ¶ 48), much less to allege any facts to support a finding that it could not have learned such information earlier.

Accordingly, with the exception of the one claim discussed below, each of Kyko's claims is barred by the applicable statute of limitations.

B. Negligent Breach of Fiduciary Duty Claim

Kyko's breach of fiduciary duty claim, asserted in the SAC as Count VIII, is in part based on fraud and in part on negligence. As explained in the September 30 Order, Count VIII, to the extent based on a theory of negligence, is not barred by the applicable four-year statute of limitations, as Kyko's initial complaint was filed within four years of the date the claim accrued.

In support of its claim that Bhongir negligently breached its asserted fiduciary duties, Kyko alleges Bhongir "failed to discover" that other individuals at Prithvi had created false accounts receivable (see SAC ¶ 37), and/or that Bhongir "failed to take action" to have those fictitious accounts "withdrawn" after they were "transmitted" to "third-parties" (see SAC ¶ 41).

Under California law, the "general rule" is that a director owes "no duty . . . to creditors." See Berg & Berg Enterprises, LLC v. Boyle, 178 Cal. App. 4th 1020, 1039 (2009). A limited exception to the general rules exists, specifically, that directors of an "insolvent" corporation owe creditors a fiduciary duty not to engage in "actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors," such as "acts that involve self-dealing or the preferential treatment of creditors." See id. at 1041.

In its September 30 Order, the Court dismissed the negligent breach claim, as asserted in the FAC, because, inter alia, Kyko failed to allege any facts from which it could be inferred that Bhongir was involved in self-dealing or engaged in some other conduct that would give rise to a fiduciary duty to Kyko. In the SAC, Kyko has now added the allegations that, "[a]s part of his compensation, Prithvi provided Bhongir equity shares in Prithvi" (see SAC ¶ 184), and that "Bhongir was engaged in self-dealing because his involvement with the Five Fake Customers and Additional Fake Customers . . . artificially inflated the value of Prithvi which in turn artificially inflated the value of Bhongir's equity shares in Prithvi" (see SAC ¶ 185). Bhongir argues the new allegations in the SAC fail to cure the earlier-identified deficiencies in the claim. As set forth below, the Court agrees.

In arguing its new allegations suffice to support a claim that Bhongir engaged in self-dealing, Kyko relies on In re Brocade Communications Systems, Inc. Derivative Litig., 615 F. Supp. 2d 1018 (N.D. Cal. 2009), in

which the district court held that a plaintiff, by alleging facts demonstrating the defendant "received a personal benefit that was not enjoyed by the shareholders generally," could state a claim for "self-dealing." See id. at 1047. Here, however, even assuming Prithvi's value was increased by Bhongir's "involvement" with the allegedly false accounts receivable (see SAC ¶ 185), such benefit would have been "enjoyed" equally by all shareholders, see Brocade, 615 F. Supp. 2d at 1047.[6] Moreover, to the extent Kyko relies on Prithvi's allegedly having provided shares to Bhongir as "part of his compensation" (see SAC ¶ 184), such transaction is not, as a matter of law, a "self-dealing transaction." See Cal. Corp. Code § 5233(a) (providing general definition of "self-dealing transaction"); Cal. Corp. Code § 5233 (b)(1) (exempting from general definition lamn action of the board fixing the compensation of a director as a director").

Accordingly, to the extent Count VIII is based on a theory of negligence, it is subject to dismissal for failure to allege sufficient facts to state a cognizable claim.

C. Leave to Amend

As Kyko has not cured the deficiencies previously identified and has not, in its opposition, indicated it could add any factual allegations that would cure those deficiencies or the deficiencies discussed herein, Kyko's

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[6] Kyko does not allege Bhongir sold any shares he may have received, let alone that he did so under circumstances that might suggest self-dealing.

claims will be dismissed without further leave to amend.

CONCLUSION

For the reasons stated above, Bhongir's motion to dismiss is hereby GRANTED, and the Second Amended Complaint is hereby DISMISSED without further leave to amend.

IT IS SO ORDERED.

Dated: December 11, 2020 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYKO GLOBAL INC., et al., Plaintiffs, v. OMKAR BHONGIR, Defendant.	Case No. 20-cv-04136-MMC **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DISMISSING FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND** (Filed Sep. 30, 2020))

Before the Court is defendant Omkar Bhongir's ("Bhongir") Motion, filed August 27, 2020, "to Dismiss First Amended Complaint." Plaintiffs Kyko Global, Inc. and Kyko Global GmbH (collectively, "Kyko") have filed opposition, to which Bhongir has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

In the First Amended Complaint ("FAC"), Kyko alleges that, from 2005 to 2009, Bhongir "served as a Director" of Prithvi Information Solutions Ltd. ("Prithvi"). (See FAC ¶¶ 12, 21.) According to Kyko, "Bhongir, along with other Prithvi executives and directors, created fake and phony accounts receivable on

[1] By order filed September 25, 2020, the Court took the matter under submission.

Prithvi's books and records,"[2] which "fake and phony accounts receivable" Kyko refers to as the "Five Fake Customers" and "Additional Fake Customers." (See FAC ¶¶ 31, 32, 34.)[3] Subsequently, on a date not disclosed in the FAC, but after Bhongir was no longer a Director, Prithvi allegedly "transmitted the Five Fake Customers to induce Kyko to enter into a loan factoring agreement" (see FAC ¶ 52), and, in November 2011, Kyko, believing the Five Fake Customers "to actually be legitimate," entered into the agreement (see FAC ¶¶ 54, 134).[4]

Kyko alleges that, although payments to Kyko were initially made, "the Five Fake Customers subsequently stopped making payment under the Factoring Agreement." (See FAC ¶¶ 56-57.) Kyko further alleges that, "[t]o continue its ruse, Prithvi supplied Kyko with

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[2] Kyko alleges, in the alternative, that Bhongir (1) "provided assistance" to others who created the assertedly fake and phony accounts receivable, (2) "knew of their existence and failed to prevent them from being disseminated," or (3) "failed to discover their existence before they were disseminated." (See FAC ¶¶ 35-37.)

[3] Kyko alleges that the names of the "Five Fake Customers" were "chosen to closely resemble legitimate entities conducting business under almost identical names" (see FAC ¶ 33), and that the "Additional Fake Customers" were "other non-existent customers" (see FAC ¶ 34).

[4] Under the agreement, "Prithvi would identify certain of its customer accounts receivable for [its] services and would authorize direct payment on those customer accounts receivable to be made to Kyko in exchange for a portion of the amount outstanding from its customers to be paid immediately by Kyko." (See FAC ¶ 55.) In other words, Prithvi essentially sold the receivables to Kyko at a discount.

the Additional Fake Customers with the intent to not have Kyko declare a default." (See FAC ¶ 58.) According to Kyko, it "discovered" the "scheme" in March 2013 (see FAC ¶ 60, 62), and, in June 2013, filed in the Western District of Washington a lawsuit against Prithvi and "others," although not Bhongir, and obtained a judgment in the amount of $134,318,640 plus interest (see FAC ¶¶ 63, 70, 72).

In the instant action, initially filed February 14, 2017, in the Western District of Pennsylvania, Kyko asserts against Bhongir nine Counts, titled, respectively, "Fraud," "Fraudulent Concealment," "Fraud by Omission," "Aiding and Abetting Fraud," "Aiding and Abetting Conversion," "Negligence," "Negligent Misrepresentation," "Breach of Fiduciary Duty," and "Aiding and Abetting Breach of Fiduciary Duty."

DISCUSSION

In his motion to dismiss, Bhongir argues that each of the nine Counts is barred by the applicable statute of limitations, and, in the alternative, that Kyko fails to allege sufficient facts to state a cognizable claim.

A. Statute of Limitations

Bhongir argues that, under California law, each of Kyko's claims is time-barred.

At the outset, the Court addresses Kyko's argument that Pennsylvania law applies to Counts VIII and IX, alleging, respectively, "Breach of Fiduciary

Duty and "Aiding and Abetting Breach of Fiduciary Duty."[5] As the Court has diversity jurisdiction over the above-titled action (see FAC ¶¶ 1-3, 6), and as Kyko's initial complaint was transferred from the Western District of Pennsylvania to the Northern District of California for lack of personal jurisdiction (see Order, filed June 15, 2020 (Doc. No. 115-1)), the "substantive law" of California, "including its choice of law rules," applies. See Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983) (holding, where case is transferred "to cure a lack of personal jurisdiction in the district where the case was first brought," the "laws of the transferee state" apply). The Court next considers whether, under California's choice of law rules, the California statute of limitations or the Pennsylvania statute of limitations applies to Kyko's breach of fiduciary duty claims.

Under California law, where a conflict exists between the laws of two jurisdictions, but only one of those jurisdictions has an interest in having its laws applied to the issue in question, the court applies the law of that jurisdiction. See id. at 644. Kyko identifies no conflict between California and Pennsylvania law as to the statute of limitations applicable to breach of fiduciary duty claims. See Bernhard v. Harrah's Club, 16 Cal. 3d 313, 317-18 (1976) (holding party seeking to "invoke the law" of non-forum state has burden to demonstrate other state's law applies). Even if the laws of the two states differ in some manner, however,

[5] There is no dispute that California law applies to Counts I-VII.

"[o]nly California has an interest in having its statute of limitations applied" where, as here, "the forum is in California, and the only defendant is a California resident." See Nelson, 716 F.2d at 645; (see also FAC ¶ 3 (alleging "Bhongir is a California citizen")). Consequently, the Court finds California's statute of limitations applies to the breach of fiduciary duty claims.

The Court next considers whether the claims in the FAC are barred by California's statute of limitations.

Under California law, fraud claims are subject to a three-year statute of limitations, see Cal. Civ. Proc. Code § 338(d), conversion claims are subject to a three-year statute of limitations, see Cal. Civ. Proc. Code § 338(c), negligence claims are subject to a two-year statute of limitations, see Cal. Civ. Proc. Code § 335.1, and breach of fiduciary duty claims are subject to a four-year statute of limitations, see Cal. Civ. Proc. Code § 343; Thomson v. Canyon, 198 Cal. App. 4th 594, 606 (2011), with the exception that where a breach of fiduciary claim is based on fraud, it is subject to a three-year statute of limitations, see id. at 607.

Here, each of Kyko's claims is based on the theory that Bhongir is, in some manner, responsible for Kyko's having been fraudulently induced by Prithvi to enter into the factoring agreement, which, as noted, occurred in November 2011. (See FAC ¶ 54.) Bhongir contends Kyko's claims against him accrued in March 2013, the month in which Kyko alleges it learned the "Five Fake Customers" and "Additional Fake Customers" were

"bogus and illegitimate." (See FAC ¶ 60.) Kyko contends its claims against Bhongir did not accrue until March 2015, the month in which it alleges "evidence emerged that showed Bhongir's involvement" in the scheme. (See FAC ¶ 71.)

As noted, however, Kyko's initial complaint against Bhongir was filed on February 14, 2017, less than four years after March 2013. Consequently, even under Bhongir's theory of accrual, Kyko's breach of fiduciary duty claims are not time-barred unless those claims are based on fraud. The Court thus turns to the allegations underlying Counts VIII and IX.

Count VIII, by which Kyko asserts a claim that Bhongir allegedly breached his fiduciary duties to Kyko, is based on two different theories: (1) "intentional[" conduct (see FAC ¶ 169), i.e., Bhongir's allegedly having created or assisted others in creating the fictitious accounts receivable, with the intent "to induce lenders to loan money to Prithvi" (see FAC ¶¶ 31-35); and (2) "negligent[ ]" conduct (see FAC ¶ 169), i.e., Bhongir's alleged "fail[ure] to discover" that others had created fictitious accounts receivable and "fail[ure] to take action to have the [fictitious accounts receivable] withdrawn after they were publicly transmitted and directly transmitted to third-parties" such as Kyko (see FAC ¶¶ 36, 42). Although the first of these two alternatives is, in essence, based on an allegation of fraud, and, consequently, is subject to a three-year statute of limitations, the second pleads a claim of negligence, and, consequently, is subject to a four-year statute of limitations. Count IX, by which Kyko asserts a claim

that Bhongir aided and abetted Prithvi in Prithvi's alleged breach of its fiduciary duty to Kyko, is, like the first of the above two alternative claims, based on a theory of fraud, as it is wholly premised on the allegation that Bhongir "assisted" other executives and directors in creating the above-referenced fictitious accounts receivable (see FAC ¶ 177), and, consequently, is subject to a three-year statute of limitations. Accordingly, with the exception of Kyko's claim that Bhongir negligently breached his fiduciary duty, the question remains as to whether Kyko's breach of fiduciary claim and other claims are time-barred.

Under California law, "the statute of limitations begins to run when the plaintiff suspects or should suspect that [its] injury was caused by wrongdoing, that someone has done something wrong to [it]." See Bernson v. Browning-Ferris Industries, 7 Cal. 4th 926, 932 (1994) (internal quotation and citation omitted). "[I]gnorance of the identity of the defendants is not essential to a claim and therefore will not toll the statute." Id. Here, Kyko alleges it knew, in March 2013, it had been injured as a result of its reliance on the "Five Fake Customers" and "Additional Fake Customers," and the claims asserted against Bhongir in the instant action are wholly based on that injury. Under such circumstances, Kyko's claims against Bhongir all accrued in March 2013, and, other than the one claim identified above, are, in the absence of an exception, time-barred.

Relying on a theory of fraudulent concealment, Kyko cites, as one such exception, equitable estoppel. Under California law, "a defendant may be equitably

estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity." See id. at 936. The rule of equitable estoppel includes, however, "the requirement that the plaintiff exercise reasonable diligence" in attempting to learn the defendant's identity. See id. For example, "[w]here the identity of at least one defendant is known, . . . the plaintiff must avail [itself] of the opportunity to file a timely complaint naming Doe defendants and take discovery." See id. at 937. Moreover, at the pleading stage, a plaintiff seeking to rely on fraudulent concealment "must plead with particularity the circumstances surrounding the concealment and state facts showing [its] due diligence in trying to uncover the facts." See Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978).

Here, Kyko alleges that, on an undisclosed date, "Bhongir undertook action to hide and conceal his role with the Five Fake Customers and Additional Fake Customers by, without limitation, destroying, removing, and concealing documents" or, "alternatively," that he "directed Prithvi's executives and other directors to destroy evidence and otherwise undertake action to hide and conceal his role with the Five Fake Customers and Additional Fake Customers." (See FAC ¶¶ 48-49.) Such allegations are insufficient to plead with particularity the circumstances surrounding the concealment. See Rutledge, 576 F.2d at 250 (holding a plaintiff "cannot rely upon conclusory statements to avoid the bar of limitations").

As to due diligence, although Kyko alleges it discovered "Bhongir's involvement with the Five Fake Customers and Additional Fake Customers" in "March 2015 when evidence emerged that showed Bhongir's involvement" (see FAC ¶ 71), it fails to allege what facts it uncovered in March 2015, and, more importantly, why it could not have uncovered that information earlier. Further, in 2013, as noted, Kyko filed a lawsuit against Prithvi and others in the Western District of Washington. Although Kyko alleges "Bhongir was not made a party to the Washington federal litigation because Kyko believed that the Washington federal court lacked personal jurisdiction over Bhongir" (see FAC ¶ 72), Kyko fails to allege the basis for such belief, nor does it allege why, after learning of Bhongir's involvement in the scheme, Kyko waited approximately two years to file the instant action, and, in addition, did so in a district that found it lacked personal jurisdiction over him.

Accordingly, other than its claim based on negligent breach of fiduciary duty, Kyko's claims against Bhongir are subject to dismissal as time-barred.

B. Negligent Breach of Fiduciary Duty

As discussed above, the only claim not time-barred is Kyko's claim that Bhongir negligently breached his alleged fiduciary duties to Kyko, specifically, its claim that Bhongir, while a director, "failed to discover" that others had created fictitious accounts receivable (see FAC ¶ 37), and that, following his resignation, he

"failed to take action" to have those fictitious accounts "withdrawn" after they were "transmitted" to "third-parties" (see FAC ¶ 41). Bhongir argues that the FAC lacks any facts to support a finding that he owed a fiduciary duty to Kyko.

In response, Kyko points to its allegations that it is a "creditor" of Prithvi and that Prithvi was "insolvent" when the "Five Fake Customers and Additional Fake Customers" were created, as well as when Kyko entered into the factoring agreement (see FAC ¶¶ 166-67), which allegations, Kyko argues, are sufficient to support a finding that Bhongir owed it a fiduciary duty.

Under California law, the "general rule" is that a director owes "no duty . . . to creditors." See Berg & Berg Enterprises, LLC v. Boyle, 178 Cal. App. 4th 1020, 1039 (2009).[6] A limited exception to the general rules exists, however, when the corporation is insolvent. Specifically, although "there is no broad, paramount fiduciary duty of care or loyalty that directors of an insolvent corporation owe the corporation's creditors solely because of a state of insolvency," see id. at 1041, directors of an insolvent corporation do owe creditors a fiduciary duty not to engage in "actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors," such as "acts that

[6] Although, in its FAC, Kyko alleges "the law of Pennsylvania applies" to its breach of fiduciary duty claims (see FAC ¶ 165; see also FAC ¶ 173), Kyko fails to make any argument, or otherwise support such allegation.

involve self-dealing or the preferential treatment of creditors." See id.

Here, however, Kyko fails to plead any facts to support its conclusory allegation that Prithvi was, at the relevant times, "insolvent" (see FAC ¶ 167); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding courts "are not bound to accept as true a legal conclusion couched as a factual allegation") (internal quotation and citation omitted), nor has Kyko alleged any facts from which it can be inferred that Bhongir was involved in self-dealing, or that his alleged failures to act involved the diversion or dissipation of corporate assets.

Accordingly, to the extent Count VIII is based on a theory of negligence, it is subject to dismissal for failure to allege sufficient facts to state a cognizable claim.

CONCLUSION

For the reasons stated, Bhongir's motion to dismiss is hereby GRANTED, and the FAC is hereby DISMISSED. If Kyko wishes to amend to cure the deficiencies identified above, it shall file a Second Amended Complaint no later than October 23, 2020. In any such amended pleading, however, Kyko shall not add new claims for relief or defendants, unless Kyko first obtains leave of court. See Fed. R. Civ. P. 15(a)(2).

IT IS SO ORDERED.

Dated: September 30, 2020 /s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KYKO GLOBAL, INC., a Canadian corporation; KYKO GLOBAL GMBH, a Bahamian corporation, Plaintiffs-Appellants, v. OMKAR BHONGIR, an individual, Defendant-Appellee, v. SYBASE, INC., Movant.	No. 20-17526 D.C. No. 3:20-cv-04136-MMC Northern District of California, San Francisco ORDER (Filed Dec. 8, 2021)

Before: BADE and BUMATAY, Circuit Judges, and SESSIONS,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Bade and Bumatay have voted to deny the petition for rehearing en banc, and Judge Sessions has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc (Dkt. 34), are DENIED.

Cal.Corp.Code § 2116.
Directors; liability; enforcement

The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for the making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other violation of official duty according to any applicable laws of the state or place of incorporation or organization, whether committed or done in this state or elsewhere. Such liability may be enforced in the courts of this state.

15 Pa.C.S.A. § 402. Governing law
Formerly cited as PA ST 15 Pa.C.S.A. § 4142; PA ST 15 Pa.C.S.A. § 6142; PA ST 15 Pa.C.S.A. § 8581; PA ST 15 Pa.C.S.A. § 8589

Effective: February 21, 2017

(a) General rule. – The laws of the jurisdiction of formation of a foreign association governs the following:

(1) The internal affairs of the association.

(2) The liability that a person has as an interest holder or governor for a debt, obligation or other liability of the association.

(3) The liability of a series or protected cell of a foreign association.

(b) Effect of differences in law. – A foreign association is not precluded from registering to do business in this Commonwealth because of any difference between the laws of the jurisdiction of formation of the foreign association and the laws of this Commonwealth.

(c) Limitations on domestic associations applicable. – Registration of a foreign association to do business in this Commonwealth does not authorize the foreign association to engage in any activities and affairs or exercise any power that a domestic association of the same type may not engage in or exercise in this Commonwealth.

(d) Equal rights and privileges of registered foreign associations. – Except as otherwise provided

by law, a registered foreign association, so long as its registration to do business is not terminated or canceled, shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties now in force or hereafter imposed on domestic entities, to the same extent as if it had been formed under this title. A foreign insurance corporation shall be deemed a registered foreign association except as provided in subsection (e).

(e) Foreign insurance corporations. – A foreign insurance corporation shall, insofar as it is engaged in the business of writing insurance or reinsurance as principal, be subject to the laws of this Commonwealth regulating the conduct of the business of insurance by a foreign insurance corporation in lieu of the provisions of subsection (d) regarding its rights, privileges, liabilities, restrictions and duties and the penalties to which it may be subject.

(f) Agricultural lands. – Interests in agricultural land shall be subject to the restrictions of, and escheatable as provided by, the act of April 6, 1980 (P.L. 102, No. 39); referred to as the Agricultural Land Acquisition by Aliens Law.

(g) Defense of usury. – A foreign association shall be subject to section 1510 (relating to certain specifically authorized debt terms) with respect to obligations, as defined in that section, governed by the laws of this Commonwealth or affecting real property situated in this Commonwealth, to the same extent as if

the foreign association were a domestic business corporation.

4.3.a. Memoranda Dispositions

Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a concise explanation of this Court's decision. Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result. Accordingly, all that is necessary is a statement such as the following:

> Defendant's statements were volunteered rather than made in response to police questioning, and were therefore admissible. United States v. Cornejo, 598 F.2d 554, 557 (9th Cir. 1979). AFFIRMED.
