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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Marc A. Wichansky,

10 Plaintiff,

11 v.

12 David T. Zowine, et al.,

13 Defendants.
14

No. CV-13-01208-PHX-DGC

ORDER

15 Defendants move for reconsideration on two issues addressed by the Court's
16 December 11, 2015 order (Doc. 310). Doc. 314. Specifically, Defendants ask this Court
17 to grant reconsideration on (1) whether the statute of limitations bars Wichansky's claim
18 that Zowine breached his fiduciary duties by failing to prevent billing fraud at MGA, and
19 (2) whether the Superior Court's valuation judgment precludes Wichansky from
20 recovering Receiver's fees. Because Defendants have failed to identify any error in the
21 Court's order, let alone the type of "manifest error" that would justify reconsideration
22 (*see* LRCiv. 7.2(g)), the motion will be denied.

23 **1. Statute of Limitations.**

24 In its previous order, the Court denied Defendant's motion for summary judgment
25 on Wichansky's claim that Zowine breached his fiduciary duties by failing to prevent
26 billing fraud at MGA. Doc. 310 at 5-9, *see id.* at 15-17. Defendants ask the Court to
27 reconsider this ruling with respect to any breach of fiduciary duty claim based on
28 Zowine's alleged failure to implement proper billing and accounting procedures at MGA,

1 arguing that Wichansky claims to have known before the onset of the limitations period
2 that Zowine was in control of MGA and that MGA was experiencing billing issues.
3 Doc. 314 at 2.

4 As the Court explained in its order, the limitations period for a breach of fiduciary
5 duty claim “begins to run when the plaintiff discovers the cause of action – that is, when
6 the plaintiff knows, or reasonably should know, that he has been harmed, that the harm
7 was caused by the defendant, and that the act or omission which caused the harm was
8 wrongful.” Doc. 310 at 5 (citing *Walk v. Ring*, 44 P.3d 990, 996 (Ariz. 2002); *Doe v.*
9 *Roe*, 955 P.2d 951, 961 (Ariz. 1998)). Defendants’ motion for summary judgment on the
10 breach of fiduciary duty claim did not address when Wichansky knew or should have
11 known of Zowine’s alleged failure to implement proper procedures. Defendants focused
12 instead on when Zowine’s duty to implement such procedures arose:

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14 If Zowine had a duty to stop billing fraud, that duty would have arisen no
15 later than 2010. Similarly, if Zowine was in charge of medical billing
16 “long before” 2010 (Doc. 160 ¶ 59), his duty to investigate and institute
17 policies to prevent fraud would have been triggered then. A breach of
18 fiduciary duty claim premised on the Medical Billing Theories is therefore
19 time-barred.

20 Doc. 275 at 3 (legal citations omitted).

21 Defendants argue in their motion for reconsideration that “if Wichansky was
22 aware of medical billing issues, regardless of whether he knew who was responsible for
23 creating those issues, he was on notice that the absence of anti-fraud policies and
24 procedures might be a problem at the company – which would have been Zowine’s
25 responsibility as the person in ‘complete managerial control of [MGA’s] billing
26 processes.’” Doc. 314 at 3. This argument focuses on Wichansky’s knowledge rather
27 than Zowine’s duty and therefore differs from the argument made in the summary
28 judgment motion. Motions for reconsideration are not the place to make arguments that
could have been made in the original briefing. *Nw. Acceptance Corp. v. Lynnwood*

1 *Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988).

2 In addition, Defendants' original motion did not show that knowledge of medical
3 billing issues is tantamount to knowledge that proper accounting procedures have not
4 been implemented. Surely even businesses with proper procedures sometimes encounter
5 billing problems. The fact that procedures are implemented does not mean that they will
6 always be followed by every employee, nor does it mean that the manager will always be
7 aware when procedures are not followed. Defendants failed to show in their motion that
8 Wichansky's pre-limitations-period knowledge included the fact that Zowine had failed
9 to implement proper billing and accounting procedures.

10 **2. Receiver's Fees.**

11 The previous order declined to accept Wichansky's argument that this Court
12 should impose a penalty for Defendants' failure to comply with the state court order,
13 noting that enforcement of the state court order is the province of the state court.
14 Doc. 310 at 13. The Court also noted, without deciding, that it likely would be improper
15 for the Court to address alleged defects in the state court judgment. Doc. 310 at 12 n. 11.
16 Defendants ask the Court to extend these observations to preclude Wichansky from
17 recovering from Defendants the portion of the Receiver's fees assigned to Wichansky in
18 the state court valuation proceeding, suggesting that doing so would re-litigate a matter
19 "already addressed by the Superior Court." Doc. 314 at 4.

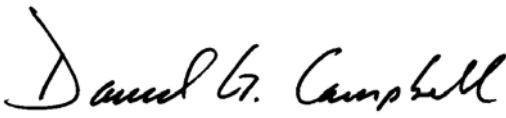
20 The Court does not agree with Defendants' characterization of the state court
21 decision. The state court's task was to determine the fair value of Wichansky's share in
22 the company as of the date he petitioned for dissolution. *See* A.R.S. § 10-1434(D).
23 Following this statutory directive, Judge Oberbillig deducted a portion of the Receiver's
24 fee from each of the company's owners in proportion to their ownership. Doc. 276-2 at
25 41-43. Judge Oberbillig explicitly disclaimed any intention to rule on either party's
26 fiduciary duty claims, explaining that his valuation ruling would not have preclusive
27 effect on these claims. Doc. 292-1 at 187-88 ("I'm not here on a fair value hearing to
28 determine the other counts in the complaint. Breach of fiduciary duty, whatever those

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might be. . . . I don't think there's going to be preclusive effect.”). Thus, permitting Wichansky to recover his portion of the Receiver's fee in this case as damages for breach of fiduciary duty will not re-litigate any matter decided by the state court.

IT IS ORDERED that Defendants' motion for reconsideration (Doc. 314) is **denied**.

Dated this 13th day of January, 2016.



David G. Campbell
United States District Judge