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

RESULTS BYIQ LLC,)	Case No. C 11-0550-SC
)	
Plaintiff,)	ORDER DENYING DEFENDANTS'
)	MOTION FOR SUMMARY JUDGMENT
v.)	AND MOTION TO CONTINUE
)	<u>TRIAL</u>
NETCAPITAL.COM LLC, NETWIRE INC.,)	
NETMOVIES INC., and DOES 1-20,)	
inclusive,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Plaintiff Results ByIQ LLC ("Results ByIQ") brings this action against Defendants NetCapital.com LLC, Netwire Inc., and Netmovies Inc. (collectively "Defendants") for breach of contract and fraud in the inducement, among other things. ECF No. 4 ("Am. Compl."). The crux of Results ByIQ's Amended Complaint is that Results ByIQ performed work for Defendants pursuant to a written agreement and was never compensated for that work. Defendants now move for summary judgment on the grounds that (1) Results ByIQ lacks standing to bring this action and (2) Results ByIQ's claims are

1 time-barred. ECF No. 61 ("MSJ"). The Motion is fully briefed, ECF
2 Nos. 72 ("Opp'n"), 76 ("Reply"), and appropriate for determination
3 without oral argument per Civil Local Rule 7-1(b). Also before the
4 Court is Defendants' motion to continue the trial in this matter
5 from June 10, 2013 to sometime in July 2013. ECF No. 78 (Motion to
6 Continue ("MTC")). For the reasons set forth below, both motions
7 are DENIED.

8
9 **II. BACKGROUND**

10 Plaintiff Results ByIQ alleges that non-party ByIQ LLC
11 ("ByIQ") entered into a Consulting Agreement with Defendants
12 NetCapital.com LLC, Netwire Inc., and NetMovies Inc. in or around
13 October 25, 2006. Am. Compl. ¶ 19.¹ Paul Charlton signed the
14 agreement on behalf of ByIQ, and John Fanning signed on behalf of
15 NetCapital.com. Id. Ex. B. Between October 2006 and early 2008,
16 ByIQ allegedly performed work pursuant to the Consulting Agreement.
17 Id. ¶¶ 21-24.

18 On November 30, 2006, ByIQ submitted an invoice to
19 "NetCapital, LLC" for \$10,500, which was due on that same date.
20 Id. Ex. D. In November 2007 and December 2008, Mr. Fanning and his
21 chief operating officer allegedly acknowledged and affirmed
22 Defendants' outstanding debt for services provided by ByIQ and
23 requested that ByIQ perform additional services. Id. ¶¶ 22, 28.
24 In December 2010, Mr. Charlton emailed Mr. Fanning to request that
25

26 ¹ Though this is a motion for summary judgment, the parties briefed
27 it as if it were a motion for judgment on the pleadings. For
28 example, Defendants' statement of facts, ECF No. 62, primarily
references Results ByIQ's original complaint and the documents
attached thereto.

1 Defendants pay their outstanding bills. Id. Ex. H. Mr. Fanning
2 responded: "This is a netmovies bill. I am not sure how this would
3 be handled." Id. Ex. I. In January 2011, Mr. Charlton again
4 emailed Mr. Fanning to demand payment. Id. Ex. K. Results ByIQ
5 alleges that Mr. Fanning did not respond. Id. ¶¶ 35-36.

6 In a declaration filed with the Court, Mr. Charlton claims
7 that he and several other members of ByIQ elected to cash out their
8 interests in ByIQ and wind down the business in 2009 or 2010. ECF
9 No. 74 ("Charlton Decl.") ¶ 5. Mr. Charlton also claims that he
10 formed Plaintiff Results ByIQ in or around 2010 and that Results
11 ByIQ became the successor-in-interest to ByIQ and the assignee of
12 ByIQ's claims and causes of action. Id. ¶ 6. This transaction was
13 purportedly memorialized in a written agreement, but Mr. Charlton
14 has yet to locate a copy of that agreement. Charlton Decl. ¶ 6.

15 Results ByIQ filed this action on February 7, 2011 and amended
16 its Complaint three days later. The Amended Complaint asserts
17 causes of action for (1) violation of the Racketeer and Corrupt
18 Organizations Act, 18 U.S.C. § 1964; (2) fraud in the inducement;
19 (3) fraudulent conveyance; (4) breach of contract; (5) account
20 stated; and (6) open book account.

21

22 **III. LEGAL STANDARD**

23 Entry of summary judgment is proper "if the movant shows that
24 there is no genuine dispute as to any material fact and the movant
25 is entitled to judgment as a matter of law." Fed. R. Civ. P.
26 56(a). Summary judgment should be granted if the evidence would
27 require a directed verdict for the moving party. Anderson v.
28 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]

1 mandates the entry of summary judgment . . . against a party who
2 fails to make a showing sufficient to establish the existence of an
3 element essential to that party's case, and on which that party
4 will bear the burden of proof at trial." Celotex Corp. v. Catrett,
5 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be
6 believed, and all justifiable inferences are to be drawn in his
7 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence
8 of a scintilla of evidence in support of the plaintiff's position
9 will be insufficient; there must be evidence on which the jury
10 could reasonably find for the plaintiff." Id. at 252.

11

12 **IV. DISCUSSION**

13 Defendants move to dismiss on standing and statute of
14 limitations grounds.² The Court addresses each of these arguments
15 below. Additionally, the Court addresses Defendants' motion to
16 continue the trial.

17 **A. Standing**

18 Defendants argue that Results ByIQ lacks standing because it
19 is not the real party in interest to this suit. MSJ at 2-3.
20 Specifically, Defendants contend that all of Results ByIQ's claims
21 are predicated on injuries to ByIQ. Id. Results ByIQ responds
22 that it has standing as successor-in-interest to ByIQ and assignee
23 of ByIQ's claims and causes of action. Opp'n at 4. Mr. Charlton
24 has filed a declaration with the Court asserting that Results ByIQ

25 _____
26 ² Defendants also move to dismiss Results ByIQ's wire fraud claim
27 on the ground that 18 U.S.C. § 1343 does not grant a private right
28 of action. The fundamental flaw in this argument is that Results
ByIQ is no longer asserting a claim for wire fraud. The claim was
asserted in Results ByIQ's original complaint, but abandoned when
the complaint was amended. Compare ECF No. 1 ("Compl.") with Am.
Compl.

1 is ByIQ's successor-in-interest, but Results ByIQ has yet to
2 produce the legal document memorializing this arrangement.
3 Defendants assert that Results ByIQ's inability to produce this
4 document warrants summary judgment since it amounts to a complete
5 failure of proof concerning an essential element of Results ByIQ's
6 case. Reply at 4.

7 In the absence of a legal document memorializing the
8 assignment of ByIQ's rights, the Court is left with Mr. Fanning's
9 representations concerning the existence and terms of the
10 assignment. The Court cannot dismiss Mr. Fanning's declaration
11 without making a credibility determination, which would be
12 inappropriate at this state of the litigation. Further, Rule 56(d)
13 provides that the Court may deny a motion for judgment if a
14 nonmovant shows, "for specified reasons, that it cannot present
15 facts essential to justify its opposition." Here, the declaration
16 of Results ByIQ's counsel indicates that Defendants first raised
17 the issue of Results ByIQ's standing in the instant motion and that
18 no discovery has been taken on this matter. See ECF No. 73
19 ("Battista Decl.") ¶¶ 4-5.

20 Accordingly, the Court declines to grant summary judgment on
21 standing grounds.

22 **B. Statute of Limitations**

23 Under California law, the statute of limitations for an
24 action upon any contract and an action for relief on the ground of
25 fraud are four years and three years, respectively. Cal. Civ.
26 Proc. Code § 337, 338(d). Defendants argue that Results ByIQ's
27 contract claims are time-barred because Results ByIQ's first
28 invoice was due on November 30, 2006 and this action was not filed

1 until February 7, 2011. MSJ at 4. Defendants also contend that
2 Results ByIQ's claim for fraud in the inducement is time-barred
3 because it accrued on October 25, 2006, the date on which ByIQ and
4 Defendants entered into the Consulting Agreement.³ Id. at 4-5.

5 With respect to the contract claims, Results ByIQ responds
6 that triable issues of fact exist as to when the November 30, 2006
7 invoice was received by Defendants and when payment was expected.
8 Opp'n at 5. Results ByIQ points out that the invoice was sent by
9 U.S. Mail on November 30, 2006, meaning that Defendants would have
10 received it sometime after the November 30, 2006 due date. Id.
11 (citing Battista Decl. Ex. 2 at 15-16). Results ByIQ further
12 argues that no reasonable business person expects that an invoice
13 will be paid the instant that it is received. Id.

14 Under California Code of Civil Procedure section 337, the
15 statute of limitations for an action to recover on an "account
16 stated" based on an account of more than one item does not begin to
17 run until the date of the last item. Likewise, the statute of
18 limitations for a "book account" begins as of the last entry of the
19 book account.⁴ R.N.C. Inc. v. Tsegeletos, 231 Cal. App. 3d 967,
20 971-72 (Cal. Ct. App. 1991). A book account does not remain open
21 indefinitely for the purposes of calculating the statute of
22 limitations. Id. at 972. "[T]he 'open' or 'closed' nature of a
23

24 ³ Although Defendants suggest that all of Results ByIQ's fraud
25 claims are time-barred, they do not directly address Results ByIQ's
26 claim for fraudulent conveyance. Accordingly, the Court declines
27 to find that the fraudulent conveyance claim is time-barred.

28 ⁴ A book account is defined as "a detailed statement which
constitutes the principal record of one or more transactions
between a debtor and a creditor arising out of a contract or some
fiduciary relation . . . [that] is kept in a reasonably permanent
form and manner." Cal. Code Civ. Proc. § 337a.

1 book account turns not on the account balance per se, but on the
2 parties' expectations of possible future transactions between them
3 [on that account]." Id. (quoting Gross v. Recabaren, 206 Cal. App.
4 3d 771, 778 (Cal. Ct. App. 1988). "An open account results where
5 the parties intend that the individual items of the account shall
6 not be considered independently, but as a connected series of
7 transactions, . . . and where . . . there is but one single and
8 indivisible liability." Id. (quoting 1 Am. Jur. 2d Accounts and
9 Accounting, § 4 at 373-74).

10 In this case, the Court cannot find that Results ByIQ's
11 contract claims are time-barred based on the evidence before it.
12 As an initial matter, Defendants have failed to address whether
13 their account with ByIQ remained open or closed after November 30,
14 2006, and thus have failed to carry their burden. Further, the
15 facts before the Court suggest that the account remained open well
16 after November 30, 2006. According to facts alleged in the
17 Complaint, which Defendants do not appear to dispute, ByIQ
18 continued to render services under the Consulting Agreement through
19 sometime in early 2008. Am. Compl. ¶¶ 21-24. Further, as late as
20 December 2008, Defendants and ByIQ had conversations about ByIQ
21 performing additional work for Defendants. See id. ¶ 29.

22 As to the fraud in the inducement claim, Results ByIQ argues
23 that it did not discover the fraud until at least December 2010.
24 Results ByIQ points out that it has alleged that Defendants
25 acknowledged their debt in November 2007 and December 2008 and
26 requested additional service be performed under the Consulting
27 Agreement. Opp'n at 7. Results ByIQ further argues that the first
28 indication that Defendants had no intention of paying their bills

1 came on December 7, 2010, when Mr. Fanning responded to Mr.
2 Charlton's demand for payment by saying: "This is a netmovies bill.
3 I am not sure how this would be handled." Id.

4 Under California law, the discovery rule "postpones accrual of
5 a cause of action until the plaintiff discovers, or has reason to
6 discover, the cause of action, until, that is, he at least
7 suspects, or has reason to suspect, a factual basis for its
8 elements." Norgart v. Upjohn Co., 21 Cal. 4th 383, 389 (Cal.
9 1999). A plaintiff has reason to discover when he has "notice or
10 information of circumstances to put a reasonable person on
11 inquiry." Id. at 398 (internal quotations omitted). Defendants
12 argue that, based on the facts alleged in the Amended Complaint,
13 Results ByIQ should have discovered the alleged fraud by December
14 2007. Reply at 9. It is not altogether clear why, but Defendants
15 appear to be relying on Results ByIQ's allegation that it had
16 provided \$41,550 in services by December 2007.

17 The Court finds that the undisputed evidence does not support
18 summary judgment on Results ByIQ's fraud in the inducement claim.
19 In fact, there is little evidence before the Court other than
20 Results ByIQ's own pleading. That pleading suggests that ByIQ
21 repeatedly demanded payment from Defendants from November 2006
22 through January 2011 and that, during this period, Defendants never
23 denied their payment obligations or otherwise indicated that they
24 would refuse to pay. Defendants do not appear to dispute any of
25 these facts. In this case, determining exactly when a reasonable
26 person would have discovered that Defendants had no intention of
27 fulfilling their alleged obligations is matter of fact best left to
28 the jury.

1 For these reasons, and the reasons set forth in Section IV.B,
2 Defendants' motion for summary judgment is DENIED.

3 **C. Motion to Continue the Trial**

4 The trial in this matter is currently set for June 10, 2013.
5 On May 1, 2013, Defendants moved to continue the trial to sometime
6 in July. Results ByIQ has opposed the motion. ECF No. 80.

7 Defendants argue that a continuance is warranted because
8 justice requires that they be given an opportunity to conduct
9 discovery on the assignment agreement discussed in Section IV.A,
10 supra. MTC at 5-6. However, it is unclear why Defendants have
11 waited until now to conduct discovery on this purportedly central
12 issue. Defendants also argue that Mr. Fanning will be unavailable
13 to be deposed by Results ByIQ until June because his home city of
14 Boston is on "lockdown." Id. at 3-4. While sensitive to the
15 recent tragedy in Boston, the Court takes judicial notice of the
16 fact that Boston has not been on lockdown for some time. In any
17 event, Results ByIQ has indicated that it is prepared to move
18 forward with the trial as scheduled. Finally, Defendants contend
19 that their new counsel, Maria Crimi Speth, is unavailable due to
20 scheduling conflicts. MTC at 3. As Results ByIQ points out, Ms.
21 Speth is not counsel of record in this action, is not admitted to
22 practice law in California, and has yet to file an application for
23 pro hac vice admission. Further, there is no indication that
24 Defendants' current counsel is unavailable for trial or intends to
25 withdraw as counsel of record.⁵

26 _____
27 ⁵ Defendants also contend that there should be more time between
28 the hearing on their motion for summary judgment and the due date
for the parties' pre-trial briefs. This argument is also
unpersuasive. Defendants have been aware of the trial date (and

1 In sum, the motion to continue the trial is DENIED. This case
2 has been pending before the Court since February 7, 2011, and the
3 current trial date has been set since August 31, 2012. ECF No. 53.
4 The Court is not inclined to grant a continuance at this late date.

5

6 **V. CONCLUSION**

7 For the foregoing reasons, Defendants NetCapital.Com LLC,
8 Netwire Inc., and Netmovies Inc.'s motion for summary judgment is
9 DENIED. Defendants' motion to continue the trial is also DENIED.

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11 IT IS SO ORDERED.

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13 Dated: May 7, 2013

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UNITED STATES DISTRICT JUDGE

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27 the possibility of required pre-trial filings) for several months
28 and, in spite of this, chose to file their motion for summary
judgment after the last day for motions to be filed in this matter.
See ECF No. 64.