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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**

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 Prithvi's books and records,"² which "fake and phony accounts receivable" Kyko refers to as the "Five Fake Customers"

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

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.)

1 and "Additional Fake Customers." (See FAC ¶¶ 31, 32, 34.)³ Subsequently, on a date
2 not disclosed in the FAC, but after Bhongir was no longer a Director, Prithvi allegedly
3 "transmitted the Five Fake Customers to induce Kyko to enter into a loan factoring
4 agreement" (see FAC ¶ 52), and, in November 2011, Kyko, believing the Five Fake
5 Customers "to actually be legitimate," entered into the agreement (see FAC ¶¶ 54, 134).⁴

6 Kyko alleges that, although payments to Kyko were initially made, "the Five Fake
7 Customers subsequently stopped making payment under the Factoring Agreement."
8 (See FAC ¶¶ 56-57.) Kyko further alleges that, "[t]o continue its ruse, Prithvi supplied
9 Kyko with the Additional Fake Customers with the intent to not have Kyko declare a
10 default." (See FAC ¶ 58.) According to Kyko, it "discovered" the "scheme" in March
11 2013 (see FAC ¶ 60, 62), and, in June 2013, filed in the Western District of Washington a
12 lawsuit against Prithvi and "others," although not Bhongir, and obtained a judgment in the
13 amount of \$134,318,640 plus interest (see FAC ¶¶ 63, 70, 72).

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

19 DISCUSSION

20 In his motion to dismiss, Bhongir argues that each of the nine Counts is barred by
21 the applicable statute of limitations, and, in the alternative, that Kyko fails to allege
22

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

26 ⁴ Under the agreement, "Prithvi would identify certain of its customer accounts
27 receivable for [its] services and would authorize direct payment on those customer
28 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.

1 sufficient facts to state a cognizable claim.

2 **A. Statute of Limitations**

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

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

16 Under California law, where a conflict exists between the laws of two jurisdictions,
17 but only one of those jurisdictions has an interest in having its laws applied to the issue in
18 question, the court applies the law of that jurisdiction. See id. at 644. Kyko identifies no
19 conflict between California and Pennsylvania law as to the statute of limitations
20 applicable to breach of fiduciary duty claims. See Bernhard v. Harrah's Club, 16 Cal. 3d
21 313, 317-18 (1976) (holding party seeking to "invoke the law" of non-forum state has
22 burden to demonstrate other state's law applies). Even if the laws of the two states differ
23 in some manner, however, "[o]nly California has an interest in having its statute of
24 limitations applied" where, as here, "the forum is in California, and the only defendant is a
25 California resident." See Nelson, 716 F.2d at 645; (see also FAC ¶ 3 (alleging "Bhongir
26 is a California citizen")). Consequently, the Court finds California's statute of limitations

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

1 applies to the breach of fiduciary duty claims.

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

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

12 Here, each of Kyko's claims is based on the theory that Bhongir is, in some
13 manner, responsible for Kyko's having been fraudulently induced by Prithvi to enter into
14 the factoring agreement, which, as noted, occurred in November 2011. (See FAC
15 ¶ 54.) Bhongir contends Kyko's claims against him accrued in March 2013, the month in
16 which Kyko alleges it learned the "Five Fake Customers" and "Additional Fake
17 Customers" were "bogus and illegitimate." (See FAC ¶ 60.) Kyko contends its claims
18 against Bhongir did not accrue until March 2015, the month in which it alleges "evidence
19 emerged that showed Bhongir's involvement" in the scheme. (See FAC ¶ 71.)

20 As noted, however, Kyko's initial complaint against Bhongir was filed on February
21 14, 2017, less than four years after March 2013. Consequently, even under Bhongir's
22 theory of accrual, Kyko's breach of fiduciary duty claims are not time-barred unless those
23 claims are based on fraud. The Court thus turns to the allegations underlying Counts VIII
24 and IX.

25 Count VIII, by which Kyko asserts a claim that Bhongir allegedly breached his
26 fiduciary duties to Kyko, is based on two different theories: (1) "intentional[]" conduct
27 (see FAC ¶ 169), i.e., Bhongir's allegedly having created or assisted others in creating
28 the fictitious accounts receivable, with the intent "to induce lenders to loan money to

1 Prithvi" (see FAC ¶¶ 31-35); and (2) "negligent[]" conduct (see FAC ¶ 169), i.e.,
2 Bhongir's alleged "fail[ure] to discover" that others had created fictitious accounts
3 receivable and "fail[ure] to take action to have the [fictitious accounts receivable]
4 withdrawn after they were publicly transmitted and directly transmitted to third-parties"
5 such as Kyko (see FAC ¶¶ 36, 42). Although the first of these two alternatives is, in
6 essence, based on an allegation of fraud, and, consequently, is subject to a three-year
7 statute of limitations, the second pleads a claim of negligence, and, consequently, is
8 subject to a four-year statute of limitations. Count IX, by which Kyko asserts a claim that
9 Bhongir aided and abetted Prithvi in Prithvi's alleged breach of its fiduciary duty to Kyko,
10 is, like the first of the above two alternative claims, based on a theory of fraud, as it is
11 wholly premised on the allegation that Bhongir "assisted" other executives and directors
12 in creating the above-referenced fictitious accounts receivable (see FAC ¶ 177), and,
13 consequently, is subject to a three-year statute of limitations. Accordingly, with the
14 exception of Kyko's claim that Bhongir negligently breached his fiduciary duty, the
15 question remains as to whether Kyko's breach of fiduciary claim and other claims are
16 time-barred.

17 Under California law, "the statute of limitations begins to run when the plaintiff
18 suspects or should suspect that [its] injury was caused by wrongdoing, that someone has
19 done something wrong to [it]." See Bernson v. Browning-Ferris Industries, 7 Cal. 4th 926,
20 932 (1994) (internal quotation and citation omitted). "[I]gnorance of the identity of the
21 defendants is not essential to a claim and therefore will not toll the statute." Id. Here,
22 Kyko alleges it knew, in March 2013, it had been injured as a result of its reliance on the
23 "Five Fake Customers" and "Additional Fake Customers," and the claims asserted
24 against Bhongir in the instant action are wholly based on that injury. Under such
25 circumstances, Kyko's claims against Bhongir all accrued in March 2013, and, other than
26 the one claim identified above, are, in the absence of an exception, time-barred.

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

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

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

20 As to due diligence, although Kyko alleges it discovered "Bhongir's involvement
21 with the Five Fake Customers and Additional Fake Customers" in "March 2015 when
22 evidence emerged that showed Bhongir's involvement" (see FAC ¶ 71), it fails to allege
23 what facts it uncovered in March 2015, and, more importantly, why it could not have
24 uncovered that information earlier. Further, in 2013, as noted, Kyko filed a lawsuit
25 against Prithvi and others in the Western District of Washington. Although Kyko alleges
26 "Bhongir was not made a party to the Washington federal litigation because Kyko
27 believed that the Washington federal court lacked personal jurisdiction over Bhongir" (see
28 FAC ¶ 72), Kyko fails to allege the basis for such belief, nor does it allege why, after

1 learning of Bhongir's involvement in the scheme, Kyko waited approximately two years to
2 file the instant action, and, in addition, did so in a district that found it lacked personal
3 jurisdiction over him.

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

6 **B. Negligent Breach of Fiduciary Duty**

7 As discussed above, the only claim not time-barred is Kyko's claim that Bhongir
8 negligently breached his alleged fiduciary duties to Kyko, specifically, its claim that
9 Bhongir, while a director, "failed to discover" that others had created fictitious accounts
10 receivable (see FAC ¶ 37), and that, following his resignation, he "failed to take action" to
11 have those fictitious accounts "withdrawn" after they were "transmitted" to "third-parties"
12 (see FAC ¶ 41). Bhongir argues that the FAC lacks any facts to support a finding that he
13 owed a fiduciary duty to Kyko.

14 In response, Kyko points to its allegations that it is a "creditor" of Prithvi and that
15 Prithvi was "insolvent" when the "Five Fake Customers and Additional Fake Customers"
16 were created, as well as when Kyko entered into the factoring agreement (see FAC
17 ¶¶ 166-67), which allegations, Kyko argues, are sufficient to support a finding that
18 Bhongir owed it a fiduciary duty.

19 Under California law, the "general rule" is that a director owes "no duty . . . to
20 creditors." See Berg & Berg Enterprises, LLC v. Boyle, 178 Cal. App. 4th 1020, 1039
21 (2009).⁶ A limited exception to the general rules exists, however, when the corporation is
22 insolvent. Specifically, although "there is no broad, paramount fiduciary duty of care or
23 loyalty that directors of an insolvent corporation owe the corporation's creditors solely
24 because of a state of insolvency," see id. at 1041, directors of an insolvent corporation do
25 owe creditors a fiduciary duty not to engage in "actions that divert, dissipate, or unduly

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

1 risk corporate assets that might otherwise be used to pay creditors," such as "acts that
2 involve self-dealing or the preferential treatment of creditors." See id.

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

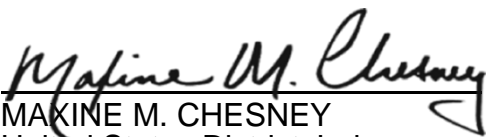
10 Accordingly, to the extent Count VIII is based on a theory of negligence, it is
11 subject to dismissal for failure to allege sufficient facts to state a cognizable claim.

12 **CONCLUSION**

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

18 **IT IS SO ORDERED.**

19
20 Dated: September 30, 2020


MAXINE M. CHESNEY
United States District Judge