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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIABENJAMIN CHANG,
Plaintiff,

v.

INTERACTIVE BROKERS LLC,
Defendant.

Case No. 21-cv-05967-NC

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS WITH LEAVE TO
AMEND**

Re: ECF 21

Plaintiff Benjamin Chang brings this case on behalf of himself, and other victims of a Ponzi scheme devised by Haena Park and conducted on Defendant Interactive Brokers LLC's trading platform. Chang alleges that IBKR aided and abetted Park in facilitating her fraudulent scheme and breaching her fiduciary duties to her investors, resulting in the loss of over \$14 million of investor contributions. IBKR moves to dismiss this complaint on the grounds that Chang's claims are time-barred and do not sufficiently plead IBKR's knowledge of Park's scheme. After reviewing the complaint and briefing, the Court GRANTS IBKR's motion and GRANTS Chang leave to amend.

I. BACKGROUND

As alleged in the complaint, Chang is a victim of a Ponzi scheme devised by Park. ECF 1 at ¶ 1. Defendant Interactive Brokers LLC (IBKR) is a registered SEC broker-dealer and CFTC futures commission merchant and one of the world's largest brokers, with over a million client accounts and approximately 2.5 million traders per day. *Id.*

1 Park, who is not a defendant in this case, was a self-employed home trader who used the
2 Interactive Broker platform to misuse funds solicited from Chang and others “for her own
3 gains and to make phony dividend payments to other investors caught up in the scheme.”
4 *Id.* at ¶¶ 1, 28.

5 Between January 2010 and May 2016, Park collected at least \$23 million from fifty
6 investors, deposited \$19 million of that sum into her IBKR account, and misappropriated
7 the remaining \$4 million. *Id.* at ¶ 30. Park continued to solicit funds until November
8 2016. *Id.* at ¶ 31. From 2010 to 2016, Park’s trading account “consistently showed
9 significant losses.” *Id.* at ¶ 33. As of 2016, her account lost \$17.5 million and another
10 \$1.5 million in cash was withdrawn. *Id.* Despite the losses, Park continued making
11 deposits into her IBKR account, depositing several million dollars per year despite
12 showing no sources of income. *Id.* at ¶ 35. Many of the deposits were so large that they
13 were manually reviewed and processed by IBKR analysts. *Id.*

14 Through its compliance department’s observance of Park’s trading activity
15 irregularities, IBKR was aware that she was engaged in an investment scheme. *Id.* at ¶ 36.
16 From 2014 to 2016, Park’s account appeared on five IBKR surveillance reports. *Id.* Park
17 also appeared more than ten times on an internal IBKR report that identified account
18 holders with losses exceeding a percentage of their stated net worth. *Id.* at ¶ 37. IBKR
19 analysts manually reviewed the reports and Park’s trading activity and continued to
20 process Park’s transactions “without escalation, additional oversight, or intervention.” *Id.*
21 at ¶¶ 37, 36. Based on these red flags, IBKR knew Park was pooling third-party funds, but
22 rather than escalate the account to compliance officers, report the activity, or restrict the
23 account, IBKR “committed acts and omissions that furthered the fraud.” *Id.* ¶ 38.

24 As a broker-dealer, IBKR derives revenue from commissions on all transactions
25 executed on its platform and interest from assets held in its accounts. *Id.* at ¶¶ 23-25.
26 These revenues and profits motivated IBKR to facilitate Park’s suspicious transactions,
27 ignoring its red flag reports. *Id.* at ¶¶ 26, 40.

28 In 2016, Park’s Ponzi scheme was reported to authorities, and they brought criminal

1 charges against her. *Id.* at ¶¶ 41-42. In 2020, the CFTC charged IBKR in relation to the
2 scheme and required it to pay over \$12 million in penalties and disgorgement. *Id.* at ¶ 42.

3 On August 2, 2021, Chang brought this class action suit against IBKR for aiding
4 and abetting fraud and breach of fiduciary duty and violations of California’s Unfair
5 Competition Law (UCL). ECF 1. On October 1, 2021, IBKR brought this motion to
6 dismiss and a corresponding request for judicial notice. ECF 21; ECF 22. All parties have
7 consented to magistrate judge jurisdiction under 28 U.S.C. § 636(c). ECF 11; ECF 16.

8 **II. LEGAL STANDARD**

9 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
10 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To
11 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
12 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
13 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When
14 reviewing a 12(b)(6) motion, a court “must accept as true all factual allegations in the
15 complaint and draw all reasonable inferences in favor of the non-moving party.” *Retail*
16 *Prop. Trust v. United Bd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir.
17 2014). A court, however, need not accept as true “allegations that are merely conclusory,
18 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Secs.*
19 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A claim is facially plausible when it “allows
20 the court to draw the reasonable inference that the defendant is liable for the misconduct
21 alleged.” *Id.*

22 Rule 9(b) imposes a heightened pleading standard for claims based on fraud,
23 requiring a plaintiff to “state with particularity the circumstances constituting fraud or
24 mistake” including an account of the “time, place, and specific content of the false
25 representations.” Fed. R. Civ. P 9(b); *Swartz*, 476 F.3d at 764 (internal citations omitted).

26 If a court grants a motion to dismiss, leave to amend should be granted unless the
27 pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203
28 F.3d 1122, 1127 (9th Cir. 2000).

1 **III. DISCUSSION**

2 **A. Judicial Notice & Incorporation by Reference**

3 “When ruling on a motion to dismiss, a court may generally consider only
4 allegations contained in the pleadings, exhibits attached to the complaint, and matters
5 properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.
6 2007). If additional documents are presented, the court must either exclude them or
7 convert the motion into a Rule 56 motion for summary judgment. Fed. R. Civ. P. 12(d).

8 Here, IBKR requests incorporation by reference of Exhibit G: CFTC’s Order from
9 its investigation of IBKR. Upon a defendant’s request, a court may incorporate a
10 document by reference if the plaintiff “refers extensively” to the document or if “the
11 document forms the basis of the plaintiff’s claim.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th
12 Cir. 2003). The Court grants IBKR’s request over Chang’s objection because the
13 allegations in the complaint are based on the CFTC Order. *See* ECF 30 at 5; *see also In re*
14 *Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (finding incorporation by
15 reference of SEC filings appropriate where the plaintiff stated that her allegations were
16 based in part on a review of the filings).

17 IBKR also requests judicial notice of ten other Exhibits. ECF 22. Federal Rule of
18 Evidence 201 allows a court to take judicial notice of “a fact that is not subject to
19 reasonable dispute” because it is “generally known” within the court’s jurisdiction or can
20 be “accurately and readily determined from sources whose accuracy cannot be reasonably
21 questioned.” Accordingly, the Court can take judicial notice of: (1) Exhibits A through F–
22 complaints, judgments, and an indictment filed by the CFTC, SEC, and U.S. Attorney’s
23 Office against Haena Park—for the limited purpose of establishing their existence, and (2)
24 Exhibits H through K–press releases announcing the agencies’ enforcement actions—for the
25 limited purpose of demonstrating what was in the public realm at the time they were
26 published. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Court
27 dismisses the complaint on other grounds, so IBKR’s argument that Chang could have
28 discovered information about IBKR’s involvement before 2020 is moot. *See* n.1. Thus,

1 because the timing argument is moot, the Court DENIES IBKR’s request for judicial
 2 notice, finding the Exhibits irrelevant. *See Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d
 3 386, 399 n.7 (9th Cir. 2000) (denying a request for judicial notice when the documents are
 4 not relevant to any issue before the court).

5 **B. Aiding and Abetting Claims**

6 Contrary to Chang’s assertion, because the aiding and abetting claims alleged in the
 7 complaint are both grounded in the fraudulent scheme, the Rule 9(b) heightened pleading
 8 standard applies. ECF 28 at 11; *see Lynwood Invs. CY Ltd. v. Konovalov*, Case No. 20-cv-
 9 03778-LHK, 2021 U.S. Dist. LEXIS 58501, at *38 (N.D. Cal. Mar. 25, 2021) (citing *Vess*
 10 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). To state a claim for
 11 aiding and abetting a tort, a plaintiff must show that the defendant either: “(a) knows the
 12 other’s conduct constitutes a breach of duty and gives substantial assistance or
 13 encouragement to the other to so act or (b) gives substantial assistance to the other in
 14 accomplishing a tortious result and the person’s own conduct, separately considered,
 15 constitutes a breach of duty to the third person. *Casey v. U.S. Bank Nat. Assn.*, 127 Cal.
 16 App. 4th 1138, 1144 (Cal. Ct. App. 2005). And “to state a claim for aiding and abetting a
 17 tort under California law, the plaintiff must allege that the defendant had actual knowledge
 18 of the tort.” *Lynwood Invs. CY Ltd.*, 2021 LEXIS 58501, at *44 (citing *Neilson v. Union*
 19 *Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1118-19 (C.D. Cal. 2003)); *see also Casey*, 127
 20 Cal. App. 4th at 1146 (stating that aiding and abetting “necessarily requires a defendant to
 21 reach a *conscious decision to participate in tortious activity* for the purpose of assisting
 22 another in performing a wrongful act” (emphasis in original)).

23 The allegations in the complaint fall short of this standard. Chang provides a bullet
 24 point list of the “factual allegations supporting IBKR’s actual knowledge,” but the Court
 25 disagrees with the conclusion Chang draws from the list. *See* ECF 28 at 14. The
 26 allegations that address IBKR’s actual knowledge—IBKR knew that Park’s account was
 27 incurring staggering losses, IBKR knew that Park continued to make enormous deposits,
 28 IBKR knew that Park had withdrawn \$1.5 million in cash—do not demonstrate IBKR’s

1 actual knowledge of the primary violations of fraud or breach of fiduciary duty. And the
2 allegations that speak to the primary violations—IBKR knew that Park was trading investor
3 money, IBKR knew that investor money was improperly comingled with Park’s personal
4 funds—require the Court to jump to unsupported conclusions. In the end, even viewing the
5 allegations in the light most favorable to Chang, the complaint fails to allege that IBKR
6 actually knew that Park was committing fraud and breaching her fiduciary duties. Thus,
7 the claims for aiding and abetting fraud and breach of fiduciary duty are dismissed. These
8 claims may be cured by further allegations regarding Chang’s efforts at discovering
9 information about IBKR’s involvement, so the Court also grants leave to amend.

10 **1. Statutes of Limitations**

11 IBKR argues that Chang’s claims for aiding and abetting fraud and breach of
12 fiduciary duty should be dismissed because they are time-barred. ECF 21 at 19.

13 The first question for the Court is: what is the statute of limitations for these claims?
14 “The statute of limitations for a cause of action for aiding and abetting a tort generally is
15 the same as the underlying tort.” *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.
16 App. 4th 1451, 1478 (Cal. Ct. App. 2014). The first underlying tort is breach of fiduciary
17 duty, and “the statute of limitations for breach of fiduciary duty is three years or four years,
18 depending on whether the breach is fraudulent or nonfraudulent.” *Id.* at 1479. Here,
19 Chang’s breach of fiduciary duty is based on the fraudulent scheme, so the three year
20 limitation applies. The second underlying tort is fraud; the statute of limitations for a fraud
21 claim is three years. Cal. Civ. Proc. Code § 338. Thus, the answer to the first question is
22 three years.

23 The next question for the Court is: when does the statute of limitations begin to run?
24 Generally, the statute of limitations begins to run when all elements of a cause of action
25 are complete. *See Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999). However, a
26 plaintiff can invoke the discovery rule, which tolls the statute of limitations until a plaintiff
27 suspects, or has reason to suspect, a factual basis for the elements of a cause of action as to
28 a defendant. *Id.* at 393. A plaintiff invoking the discovery rule “must specifically plead

1 facts which show (1) the time and manner of discovery and (2) the inability to have made
2 earlier discovery despite reasonable diligence.” *CAMSI IV v. Hunter Tech. Corp.*, 230 Cal.
3 App. 3d 1525, 1536 (Cal. Ct. App. 1991). “Mere conclusory assertions that delay in
4 discovery was reasonable are insufficient.” *Id.* at 1536-37.

5 IBKR asserts that “at the absolute latest, any cause of action for Plaintiff and other
6 similarly situated investors accrued by November of 2016.” ECF 21 at 19. However,
7 Chang invokes the discovery rule and alleges that he “did not discover, and exercising
8 reasonable diligence could not have discovered the facts establishing IB[KR]’s
9 participation in Park’s fraud scheme until the CFTC made public its findings . . . in August
10 2020.” ECF 1 at ¶ 55. Chang sufficiently alleges the time and manner of his discovery,
11 but even viewing the allegations in the light most favorable to him, he has not
12 “specifically” pled facts that show that he was unable to discover IBKR’s involvement
13 prior to 2020 or that he attempted to exercise reasonable diligence. *See CAMSI IV*, 230
14 Cal. App. 3d at 1536.¹ Instead, the complaint relies on conclusory assertions that
15 “exercising reasonable diligence could not have discovered the facts.” ECF 1 at ¶ 55.

16 In the alternative, Chang argues that the doctrine of equitable tolling applies.
17 “Equitable tolling is a judicially created, nonstatutory doctrine that suspends or extends a
18 statute of limitations as necessary to ensure fundamental practicality and fairness.” *Saint*
19 *Francis Mem’l Hosp. v. State Dep’t of Pub. Health*, 9 Cal. 5th 710, 719 (2020) (internal
20 quotations and citations omitted). Equitable tolling should be applied “occasionally” “in
21 special situations” and only where all three elements are present: “(1) timely notice, (2)
22 lack of prejudice to the defendant, and (3) reasonable and good faith conduct on the part of
23 the plaintiff.” *Id.* at 719, 724. Although Chang asserts that equitable tolling applies, he

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25 ¹ IBKR argues that “an overwhelming amount of public information put Plaintiff on notice
26 of Park’s wrongful conduct as early as June of 2016.” ECF 21 at 20-21. Although the
27 Court reaches the conclusion of dismissal, it is unpersuaded by this argument. The fact that
28 regulatory agencies filed complaints, press releases, and eventually, judgments does not
mean that Chang was aware of this information. Further, Chang’s claims are against
IBKR, not Park, so the regulatory investigations into Park, without further explanation
about IBKR’s involvement, do not persuade the Court that Chang was on notice of IBKR’s
alleged aiding and abetting.

1 fails to demonstrate the application of these elements to the complaint. Thus, the Court
2 declines to apply equitable tolling.

3 Because the complaint fails to sufficiently allege the application of the discovery
4 rule and equitable tolling, the answer to the second question—when does the statute of
5 limitations begin to run—is November 2016, when Park allegedly stopped soliciting funds
6 from investors and IBKR stopped aiding and abetting her. ECF 1 at 9; *see Norgart*, 21
7 Cal. 4th at 397. Applying the three-year statutes of limitations starting November 2016,
8 the aiding and abetting claims are time-barred. Accordingly, the Court dismisses these
9 claims. Because these deficiencies may be cured with further allegations the Court grants
10 Chang leave to amend.

11 **C. Unfair Competition Law Claim**

12 IBKR argues that Chang’s UCL claim is not viable because it is predicated on his
13 aiding and abetting claims, which are not adequately pled. ECF 21 at 18. Unfair
14 competition is “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. &
15 Prof. Code § 17200. In his opposition, Chang concedes that he “do[es] not allege
16 fraudulent business practices under the UCL.” ECF 28 at 23. Chang further asserts that
17 his unlawful business practices claim stems from his allegations that IBKR “aided and
18 abetted common law fraud and breach of fiduciary duty” and that his unfair business
19 practices claim is “tethered” to his “adequately pled . . . aiding and abetting claims.” *Id.* at
20 22-23. Thus, because the Court dismisses the aiding and abetting claims, it must dismiss
21 the UCL claim based on unlawful and unfair business practices. Accordingly, this claim is
22 dismissed, with leave to amend.

23 **1. Statute of Limitations**

24 A claim under the UCL must be brought “within four years after the cause of action
25 accrued.” Cal. Bus. & Prof. Code § 17208. Because Chang’s UCL claim is predicated on
26 the aiding and abetting claims related to the fraudulent scheme, the same accrual date—
27 November 2016—applies here. Thus, as alleged, this claim is also time-barred. The Court
28 dismisses Chang’s UCL claim, with leave to amend.

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IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IBKR’s motion to dismiss the complaint. The Court also GRANTS Chang leave to amend the complaint to fix the deficiencies identified in this order. Chang may not add any new parties or claims without further leave of court. Chang must file a first amended complaint or notify the Court that he does not wish to amend by **December 23, 2021**. If Chang does not act by December 23, the Court will dismiss the complaint.

IT IS SO ORDERED.

Dated: November 24, 2021



NATHANAEL M. COUSINS
United States Magistrate Judge