LEXSEE 2006 U.S. DIST. LEXIS 97393

STREAMCAST NETWORKS, INC., Plaintiff, vs. SKYPE TECHNOLOGIES, S.A., et al., Defendants.

CV 06-391 FMC (Ex)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 97393

September 14, 2006, Decided
September 14, 2006, Filed, Docketed and Entered

SUBSEQUENT HISTORY: Claim dismissed by, Motion denied by, Moot *Streamcast Networks, Inc. v. Skype Techs., S.A., 547 F. Supp. 2d 1086, 2007 U.S. Dist. LEXIS 96582 (C.D. Cal., Jan. 18, 2007)*

PRIOR HISTORY: *Streamcast Networks, Inc. v. Skype Techs., S.A., 2006 U.S. Dist. LEXIS 97392 (C.D. Cal., Sept. 14, 2006)*

COUNSEL: **[*1]** For StreamCast Networks Inc, Plaintiff: Charles S Baker, David L Burgert, Eric D Wade , LEAD ATTORNEYS, Porter & Hedges, Houston, TX; Daniel J Woods, Gary S Sedlik, Matthew P Lewis, LEAD ATTORNEYS, White & Case, Los Angeles, CA.

For Skype Technologies S A, eBay Inc, Defendants: Benjamin F Chapman, Joseph S Leventhal, Michael G Rhodes, Philip C Tencer, LEAD ATTORNEYS, Cooley Godward Kronish, San Diego, CA.

For Niklas Zennstrom, Kazaa BV, Mark Dyne, Defendants: Lance A Etcheverry, Peter Bradley Morrison, LEAD ATTORNEYS, Skadden Arps Slate Meagher and Flom, Los Angeles, CA; Thomas J Nolan, LEAD ATTORNEY, Skadden Arps Slate Meagher and Flom LLP, Los Angeles, CA.

For Janus Friis, Defendant: Thomas J Nolan, LEAD ATTORNEY, Skadden Arps Slate Meagher and Flom LLP, Los Angeles, CA.

For Joltid Ltd, Defendant: James A Sedivy, LEAD ATTORNEY, Jeffrey P Alpert, Gershkaplan, Encino, CA; Jeffrey F Gersh, Gersh Law Firm, Encino, CA.

For Joltid Ou, Brilliant Digital Entertainment Inc, Kevin Bermeister, Altnet Inc, Defendants: James A Sedivy, LEAD ATTORNEY, Jeffrey P Alpert, Gershkaplan, Encino, CA; Jeffrey F Gersh, LEAD ATTORNEY, Gersh Law Firm, Encino, CA.

For LA Galiote BV, Indigo Investment BV, Defendants: **[*2]** Jeffrey P Alpert, LEAD ATTORNEY, Gershkaplan, Encino, CA; Jeffrey F Gersh, LEAD ATTORNEY, Gersh Law Firm, Encino, CA.

For Sharman Networks Ltd, Lef Interactive Pty Ltd, Defendants: Mark A Albert, Roderick G Dorman, Hennigan Bennett & Dorman, Los Angeles, CA.

For Murray Markiles, Defendant: Marc Morris, Mark A Albert, Roderick G Dorman, LEAD ATTORNEYS, Henningan Bennett and Dorman, Los Angeles, CA.

JUDGES: FLORENCE-MARIE COOPER, Judge.

OPINION BY: FLORENCE-MARIE COOPER

OPINION

ORDER GRANTING DEFENDANTS MARK DYNE, MURRAY MARKILES, AND ALTNET, INC'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS

This matter is before the Court on Defendants Mark Dyne, Murray Markiles, and Altnet, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint on Statute of Limitations Grounds (docket no. 41), filed on August 1, 2006. The Court has read and considered the moving, opposition and reply documents submitted in connection with the Motion, and deems the matter appropriate for decision without oral argument. *See Fed. R. Civ. P. 78*; *Local Rule 7-15*. Accordingly, the hearing set for Sep-

tember 18, 2006 is removed from the Court's calendar. For the reasons and in the manner set forth below, Defendants' **[*3]** Motion is GRANTED.

FACTUAL BACKGROUND

Plaintiff, StreamCast Networks, Inc. ("Streamcast") seeks relief for injuries arising out of Defendants' purported orchestration of "an elaborate over-seas shell game in an attempt to steal and wrongfully profit from technology that rightfully belongs to StreamCast." The relevant facts, as alleged in the First Amended Complaint ("FAC"), are as follows:

StreamCast is in the business of, among other things, developing, marketing, promoting and distributing a free peer-to-peer ("P2P") search and file sharing software application called Morpheus, which allows end users to search for, find, and download almost any type of digital file through one or more P2P networks over the Internet. FAC P28.

When StreamCast first entered the P2P file-sharing business in 2000, it utilized an open source software program called OpenNap. *Id.* P29. StreamCast became increasingly unhappy with the performance of OpenNap and, in the early part of 2001, began to shop around for a replacement software package. During its search, it came across a software application called FastTrack, the rights to which were wholly owned by Kazaa, B.V. ("Kazaa"), a Netherlands company. *Id.* PP 6, 29-30. **[*4]** FastTrack "was an innovative, decentralized P2P software application that allowed its users to exchange different types of digital files over the Internet" and, at the time (i.e., early 2001), "there was no other, comparable software application in existence. . . ." *Id.* P29.

Recognizing what it believed to be an ideal business opportunity, StreamCast approached Kazaa's owners, Niklas Zennstrom and Janus Friis, regarding possible purchase, by StreamCast, of the rights to the FastTrack P2P software application. *Id.* P30. Zennstrom and Friis refused to sell their rights, but agreed to grant StreamCast a license for the FastTrack P2P software, in exchange for, among other things, a royalty. *Id.*

On March 22, 2002, StreamCast and Kazaa entered into a License Agreement, whereby Kazaa licensed all of its rights in and to the FastTrack technology to StreamCast. The License Agreement also contained a provision providing a right of first refusal in favor of StreamCast to purchase any technology or other assets of Kazaa if any other party sought to acquire any of Kazaa's technology or other assets. *Id.* P31. [1]

1 The License Agreement is not attached to the FAC. StreamCast represents that this is because **[*5]** it contains a confidentiality clause which necessitates an entry of a protective order, an action that has not been accomplished to date.

Pursuant to the License Agreement, Kazaa delivered to StreamCast, in Los Angeles, California, working copies of the FastTrack P2P software. *Id.* P 32. StreamCast promptly began distributing FastTrack P2P software over the internet under the name Morpheus and its efforts were met with almost immediate success, with millions of downloads in a very short period of time. *Id.*

In June 2001, StreamCast officials met again with Zennestrom and Friis to try to negotiate the purchase, by StreamCast, of Kazaa and/or the right to the FastTrack P2P technology. *Id.* P 33. StreamCast hired Murray Markiles ("Markiles") to serve as its counsel in these negotiations, to whom StreamCast divulged confidential information about its relationship with Kazaa and its business plans with the Fast Track technology. Once again, StreamCast's purchase efforts were unsuccessful. *Id.*

In August 2001, StreamCast learned that Zennstrom, Friis, Kazaa and others may have secretly incorporated a "disabling" feature or other technology into the FastTrack P2P software provided to StreamCast, **[*6]** which would allow these individuals/entities to block Morpheus users from utilizing the Morpheus FastTrack network. *Id.* P34. StreamCast sought and obtained written assurances from Kazaa, Friis and Zennstrom, in the form of an amendment to the License Agreement, that no such "disabling" feature existed. *Id.* P 35.

Some time thereafter, StreamCast was approached by Kevin Bermeister and Mark Dyne, acting on behalf of Brilliant Digital Entertainment, Inc. ("BDE"), *Id.* P 39. Dyne and Bermeister represented that they wanted to "bundle" BDE's 3D digital media tool with StreamCast's Morpheus application; Dyne also proposed to invest in StreamCast, using funds from his company, EuroCapital Advisors. *Id.* StreamCast, represented by counsel Markiles, met with Dyne and Bermeister on several occasions, and disclosed to them "numerous, confidential items about StreamCast, the Fast Track P2P software, and its relationship with Zennstrom, Friis, and Kazaa, including that StreamCast held the right of first refusal in the underlying FastTrack technology." *Id.*

As a result of StreamCast's disclosures, Bermeister and Dyne became aware that Kazaa, Zennstrom and/or Friis actually owned the underlying FastTrack **[*7]** P2P technology and they [Bermeister and Dyne] began formulating a scheme to purchase the same, through a third party. *Id.* Specifically, Markiles, Bermeister and Dyne, unbeknownst to StreamCast, approached Kazaa, Zennstrom and Friis and together they "concocted a plan to sell and otherwise transfer Kazaa's FastTrack P2P technology in violation of StreamCast's right of first refusal"

and with the goal of destroying StreamCast as a competitor. *Id.* In furtherance of this plan, Bermeister and Dyne enlisted the help of a former business colleague, Nicole Hemming, to form Sharman Networks, Ltd., a corporation incorporated under the laws of Vanuatu. *Id.* P 40.

Although unaware of the burgeoning scheme between Markiles, Bermeister, Dyne, Zennstrom and Friis, StreamCast nonetheless became concerned about the integrity of the FastTrack P2P License Agreement due to Zennstrom, Friis and Kazaa's failure to produce certain "key documentation" relating to the operation and composition of the software, as specifically required by the Agreement. FAC P 41. StreamCast notified Zennstrom, Friis and Kazaa that it would withhold its monthly royalty payments commencing in December, 2001, until such time as **[*8]** the documentation was produced. *Id.*

On January 20, 2002, StreamCast received an email from Zennstrom, stating that Kazaa intended to sell and otherwise transfer ownership of Kazaa and its FastTrack P2P technology to Sharman Networks. *Id.* P 43. StreamCast immediately notified Zennstrom that it was invoking its right of first refusal under the License Agreement and offered to match Sharman's offer price. Zennstrom never responded. *Id.*

On February 25, 2002, StreamCast received a letter from Kazaa which purported to terminate the License Agreement and demanded that StreamCast return all versions of the FastTrack software to Kazaa. *Id.* P 44. Virtually simultaneously, and before StreamCast had the chance to respond, Zennstrom, Friis, Kazaa and other individuals and entities (Hemming, BDE, Bluemoon OU, Altnet, Inc., and LEF Interactive PTY, Ltd.), activated a disabling feature in the FastTrack software--of the nature that they had previously represented did not exist--that allowed them to shut down StreamCast's Morpheus FastTrack network. Overnight, StreamCast's entire user base of over 28 million people was "funneled" to Sharman Networks, which now used the Kazaa/FastTrack P2P technology. *Id.*

At **[*9]** about this same time, Zennstrom and Friis also transferred the "source code" and "the core FastTrack P2P technology" to Blastoise, Ltd., a company organized under the laws of the British Virgin Islands or the Isle of Jersey. *Id.* PP 10, 45. Blastoise later became "Joltid" or "Joltid OU." *Id.* P 45.

At some date later in 2002, Zennstrom and Friis, with assistance from Markiles, Bermeister, Dyne and unknown others, formed a Luxembourg company called Skype Technologies ("Skype"). These same individuals then orchestrated a transfer of Joltid's P2P software to Skype. Today, Skype uses P2P technology to offer internet-based voice communications ("VOIP") services to consumers worldwide. *Id.* PP 46-47. It has over fifty-four million registered users, with over three million users on the network at any one time. *Id.* P 47.

On September 5, 2005, eBay, Inc. ("eBay") purchased Skype for a price in excess of $ 4.1 billion. *Id.* P 48. During the purchase negotiations, eBay became concerned about Zennstrom and Friis' "illicit and questionable past dealings." *Id.* P 49. It therefore required Zennstrom and Friis to represent and warrant that they had no dealings with Kazaa and Sharman Networks, which Zennstrom **[*10]** and Friis did. *Id.*

PROCEDURAL HISTORY

This action commenced on January 20, 2006, with the filing of Plaintiff StreamCast's Original Complaint for Damages for (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (2) breach of contract; (3) civil conspiracy; (4) unfair competition (*Cal. Bus. & Prof. Code ß 17200 et seq.*); (5) fraudulent transfer under *Cal. Civ. Code ß 3439.01 et seq.*; (6) unjust enrichment; (7) constructive trust; (8) declaratory judgment; (9) interference with contract; (10) interference with prospective economic advantage; and (11) conversion. The following individuals and entities were named as Defendants: (1) Skype Technologies, S.A.; (2) Niklas Zennstrom; (3) Janus Friis; (4) Kazaa, B.V.; (5) Joltid, Ltd., (6) Joltid OU; (7) Blastoise, Ltd.; (8) Bluemoon OU; (9) LA Galiote, B.V.; (10) Indigo Investment, B.V.; (11) Brilliant Digital Entertainment, Inc.; (12) Sharman Networks, Ltd.; (13) Kevin Bermiester; and (14) John Does 1-10 inclusive. With respect to the "Doe" defendants, the Complaint simply alleged, "StreamCast is ignorant of the true names or capacities of all the defendants sued herein under the fictitious names DOE ONE through **[*11]** TEN inclusive." Compl. P16.

Streamcast filed the FAC on May 22, 2006, adding additional Defendants Mark Dyne; Altnet, Inc.; Fasttrack, B.V.; Consumer Empowerment, B.V.; Murray Markiles; LEF Interactive PTY, Ltd.; Eurocapital Advisors, LLC; and Nicole Hemming. The FAC also added new causes of action for (1) violation of the RICO; (2) conspiracy to restrain trade in violation of *ß 1* of the Sherman Act and *ßß 4* and *16* of the Clayton Act; and (3) conspiracy to monopolize, attempt to monopolize and monopolization in violation of *ß2* of the Sherman Act and *ßß 4* and *16* of the Clayton Act.

By means of the instant motion, Defendants Dyne, Markiles and Altnet, Inc. (the "Moving Defendants") seek to dismiss the First through Fourth and the Sixth through Fourteenth claims for relief filed against them in the FAC, on the grounds that they are barred by the applicable statutes of limitations. [2]

2 The Fifth Claim for relief in the FAC is the breach of contract claim, and is asserted only against Defendants Consumer Empowerment, FastTrack and Kazaa.

STANDARD OF LAW

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon **[*12]** which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle him to relief. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *see also Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998)*. All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004)* ("The general rule for *12(b)(6)* motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff") (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000))*. However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)* (internal citations omitted).

"Dismissal on statute of limitations grounds can be granted pursuant to *Fed.R.Civ.P. 12(b)(6)* **[*13]** 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999)* (quoting *Vaughan v. Grijalva, 927 F.2d 476, 478 (9th Cir. 1991))* (additional quotations omitted).

DISCUSSION

I. Whether the Claims Asserted in the FAC Relate Back to the Date of Plaintiff's Original Complaint

As a threshold matter, the parties dispute whether the claims asserted against the Moving Defendants in the FAC "relate back" to the date of the Original Complaint (i.e., January 20, 2006), pursuant to *Fed. R. Civ. P. 15(c)*. [3] *Rule 15(c)* provides, in full:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set form or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided **[*14]** by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment
>
> > (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and
> >
> > (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P.15(c)(2006).

3 As discussed in section II, *infra,* whether the claims in the FAC "relate back" to the date of the original Complaint is critical to determining the timeliness of at least six of StreamCast's thirteen causes of action as asserted against the Moving Defendants, including those under the RICO and Sherman/Clayton Acts.

A. Which subsections of *Rule 15(c)* Are Applicable to This Case?

The Moving Defendants maintain that the *subsection (3)* is the only provision of *Rule 15(c)* which is applicable to this case, given that they were added to the FAC as entirely new parties. Mot. at 11. However, StreamCast argues that the Court's inquiry should more appropriately be directed to *subsection (1)*, because California law affords a plaintiff who names various "Doe" defendants in its original complaint **[*15]** "three years from the commencement of the action within which to discover

the identity of the defendant[s] and amend the complaint." Opp'n at 12; *see also Cal. Code Civ. Proc. ßß 474*, *583.210*, *Kreines v. United States, 959 F.2d 834, 837 (9th Cir. 1992)* At least one federal court has recognized that, where California law provides the applicable statute of limitations (e.g., in actions under *42 U.S.C. ß 1983*), *Rule 15(c)(1)* should apply to allow for "relation back" of an amendment of a complaint to add "Doe" defendants under *Cal. Code Civ. Proc. ß 474*. *See, e.g., Motley v. Parks, 198 F.R.D. 532, 534-535 (C.D. Cal. 2000)*; *cf. Lindley v. General Electric Co., 780 F.2d 797, 802* ("[T]he absence of a federal pleading mechanism comparable to [*Cal. Code Civ. Proc.] ß 474* should not deprive a plaintiff of the extension of the limitations period provided under California Doe practice."). [4]

> 4 As the parties recognize, *Lindley* was decided prior to the 1991 amendment to *Rule 15(c)* that added the provisions of *section (c)(1)*. Thus, the Court did not specifically address the issue of the scope of *Fed. R. Civ. P. 15(c)(1)*. However, the majority of other circuits that have considered the issue have held **[*16]** that *Rule 15(c)(1)* broadly "incorporates the relation-back rule of the law of a state when that state's law provides the statute of limitations." *Saxton v. ACF Indus., 254 F.3d 959, 963 (11th Cir. 2001)* (collecting cases); *see also Fed. R. Civ. P. 15*, Commentary, 1991 Amendment (*Paragraph (c)(1)*) ("Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim.").

Nevertheless, given the facts of this case, Plaintiff is not correct in its position vis a vis the unequivocal applicability of *Rule 15(c)(1)*. While it is true that *Rule 15(c)(1)* permits relation back where controlling *state* limitations law is more forgiving than *Rule 15(c)(3)*, the FAC involves both California state law claims and federal claims--i.e., the RICO and antitrust claims--for which the applicable statutes of limitations are provided by *federal* law. *See 15 U.S.C ß 15b* (supplying four-year statute of limitations for Clayton Act claims); *Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)* (adopting "4-year statute of limitations **[*17]** for Clayton Act actions, *15 U.S.C. ß 15b*," as the "most appropriate limitations period for RICO actions."); *see also Fed. R. Civ. P. 15*, Advisory Committee Note to 1991 Amendment (*Paragraph (c)(1)*) (recognizing that, "[i]n some circumstances, the controlling limitations law may be federal law."). Thus, with respect to StreamCast's federal claims, the Court must apply the relation-back provisions of *Rule 15(c)(3)*.

With respect to the state law claims, the Court need not reach the question of the applicability of *Rule 15(c)(1)* to the allow for the "relation back" of substitution of Doe defendants under *Cal. Code Civ. Proc. ß 474* because the FAC fails to specifically identify *any* of the Moving Defendants as replacements for the previously named "John Doe" defendants. [5] As California Courts have long recognized, "[a]mong the requirements for application of the *section 474* relation back doctrine is that the new defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the original complaint." *Woo v. Superior Court, 75 Cal. App. 4th 169, 176, 89 Cal. Rptr. 2d 20 (1999)* (citing *Streicher v. Tommy's Electric Co., 164 Cal. App. 3d 876, 880-881, 211 Cal. Rptr. 22 (1985)*; *see also Scherer v. Mark, 64 Cal. App. 3d 834, 843, 135 Cal. Rptr. 90 (1976)* **[*18]** (statute of limitations should apply to bar action "where no effort is made to identify the newly named defendant as one of those named as Doe in the original complaint"); *cf. Anderson v. Allstate Ins. Co., 630 F.2d 677, 683 (9th Cir. 1980)* ("Under California law, if a defendant is added to an amended complaint as a new defendant, and not as a Doe defendant, the amendment does not relate back to the time of the original complaint."). Although California courts do not always require strict compliance with the procedural substitution requirements of *section 474*, they have repeatedly noted that "'[s]ome discipline in pleading is still essential to the efficient process of litigation.'" *Woo, 75 Cal. App. 4th at 177-78* (quoting *Ingram v. Superior Court, 98 Cal. App. 3d 483, 491, 159 Cal. Rptr. 557 (1979))*. As the Woo Court explained:

> The courts of this state have considered noncompliance with the party substitution requirements of *section 474* as a procedural defect that could be cured and have been lenient in permitting rectification of the defect. We conclude that Zarabi would be permitted to allege that Woo is a defendant substituted for a fictitious Doe defendant named in her original complaint and therefore **[*19]** do not hold that her noncompliance with the procedural requirements of *section 474* forecloses consideration of her *section 474* relation-back contention. However, in other cases the courts may well require strict compliance and counsel are advised to follow the simple correct procedure for substituting a named defendant for a fictitious Doe defendant.

Id.

5 Nor is the fact of substitution clear from the allegations of the original Complaint or the returned summons. As set forth above, the original Complaint did not endeavor to describe the potential identities of the Doe defendants (i.e., whether they were individuals, entities, etc.).

This case is clearly one in which requiring strict compliance with the substitution procedure would not be inappropriate. StreamCast is a sophisticated corporate party that might be presumed to have knowledge of the requirements of *Cal. Code Civ. Proc. ß 474*. Moreover, this case was filed in federal court in the first instance, rather than removed from state court, such that the use of Doe defendants is generally "disfavored." *See, e.g., Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)* ("As a general rule, the use of 'John Doe' to identify a defendant **[*20]** is not favored."). Without any allegations pertaining to any possible connection between Moving Defendants and the prior Doe defendants, the Court simply cannot adopt StreamCast's argument and conclude that the former are in fact substitutes for the latter, rather than entirely new defendants altogether. *See, e.g., Lopez v. General Motors Corp., 697 F.2d 1328, 1332 (9th Cir. 1983)*. [6]

6 Indeed, the FAC still makes reference to "unknown others"--possibly the prior Does--who conspired with Zennestrom, Fris, Markiles, Bermeister, and Dyne to "steal" the FastTrack technology. *See* FAC PP 44, 46.

Because the Court finds that Moving Defendants are "new" defendants rather than "substituted" Doe defendants, *Fed. R. Civ. P. 15(c)(3)*, not *(c)(1)*, supplies the applicable law regarding relation-back, even with respect to the state-law claims.

B. Whether the Requirements of *Rule 15(c)(3)* Have Been Met

As set forth above, *Fed. R. Civ. P. 15(c)(3)* permits a claim brought against a new party to relate back only when the new party "knew or should have known that, but for a mistake concerning the identity of the proper party," the claim would have been asserted against the new party. *Fed Rule Civ. P. 15(c)(3)(B)*. **[*21]** "This factor has two elements, both of which must be satisfied: (1) a mistake of identity, and (2) knowledge or constructive knowledge that the action would have been brought against the party but for the mistake." James Wm. Moore, 3 *Moore's Federal Practice ß 15.19[3][d]* (Matthew Bender 3d ed.); *see also Louisiana-Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993)*.

In the instant case, StreamCast fails to establish that its failure to name Moving Defendants in the original Complaint was due to a mistake of identity. Rather, StreamCast has alleged only that it did not "know the true names or capacities of all the defendants sued" at the time it filed its original Complaint. "While the Ninth Circuit has yet to rule on whether a lack of knowledge of the identity of an individual at the time of the filing of a complaint is a 'mistake' regarding her identity for purposes of *Rule 15(c)*, the courts of appeal that have confronted the issue are in near-unanimity that lack of knowledge is not a 'mistake.'" *Butler v. Robar Enters., 208 F.R.D. 621, 623 (C.D. Cal. 2002)* (collecting cases); *see also 3 Moore's Federal Practice ß 15.19[3][d]* ("Most courts have held that a lack of knowledge **[*22]** regarding the identity of a proper party does not constitute mistake.").

It is also not apparent that Moving Defendants knew, or reasonably could have known that, but for any mistake in their identity, the action would have been brought against them in the first instance. Indeed, the allegations in the FAC regarding StreamCast's extensive contacts with Moving Defendants Markiles and Dyne in mid-to-late 2001 support a contrary inference--i.e., that StreamCast simply made a "conscious choice of whom to sue" at the outset, then later changed its mind. *Compare, Louisiana-Pacific Corp., 5 F.3d at 435*.

Accordingly, the Court concludes that the claims asserted in the FAC against the Moving Defendants do not relate back to the date of StreamCast's original Complaint under *Fed. R. Civ. P. 15(c)(3)*.

II. Whether StreamCast's Claims Are Time-Barred

A. Claims With Four-Year Statutes of Limitations

1. RICO claims

It is well-established that the statute of limitations for claims under the RICO is four years. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)*. The Ninth Circuit follows the "injury discovery rule" such that the statute **[*23]** begins to run "when a plaintiff knows or should know of the injury that underlies his cause of action." *Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996)* (internal quotations omitted); *see also Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990)* ("The limitations period begins to run when a plaintiff knows or should know of the injury which is the basis for the action."); *Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 275 (9th Cir. 1988)* (holding that civil RICO claim accrues "when [the plaintiff has] actual or constructive knowledge of the fraud.").

Moving Defendants maintain that, based on the allegations in the FAC, StreamCast knew or should have known of the injury that underlies its RICO claims against them no later than February 25. 2002. The Court agrees. The FAC alleges that the last fraudulent act committed by Moving Defendants (Dyne, Markiles, and Altnet, Inc.) that resulted in injury to StreamCast--i.e., "the activation of the disabling feature or other technology to shut down the network accessed by uses of StreamCast's Morpheus and re-direct all Morpheus users to the Sharman Networks/Kazaa website"--took place "on or about February 25, 2002." FAC P59j. **[*24]** Because the FAC was not filed until May 22, 2006. and because the allegations contained therein against Moving Defendants do not relate back to the filing of the original complaint, StreamCast's RICO claims are time-barred as they relate to Moving Defendants. Compare *Grimmett, 75 F.3d at 512* ("Given these allegations, it is clear that Siragusa knew in May 1989 that she had suffered injury. Thus, she had until May 1993 to file her claim; because it was filed thereafter, it was properly dismissed.").

2. Sherman/Clayton Act Claims

The statute of limitations for StreamCast's claims under the Sherman and Clayton Acts is also four years, which neither party disputes. *See 15 U.S.C. ß 15b* ("Any action to enforce any cause of action under section 4, 4A, or 4C [*15 USCS ßß 15*, *15a*, *15c*] shall be forever barred unless commenced within four years after the cause of action accrued."). "As a general rule, a cause of action accrues when a defendant commits an act that injures the plaintiff." *Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1189-1190 (9th Cir. 1984)*.

Once again, the "act" that StreamCast alleges caused it injury was the expropriation, by Moving Defendants and others, of StreamCast's rights **[*25]** to the FastTrack P2P technology, along with its entire customer user base, on February 25, 2002. FAC PP 68, 83. Accordingly, the Court finds that StreamCast's Third and Fourth Causes of action are also time barred. [7]

> 7 In its Opposition, StreamCast makes no argument as to why February 25, 2002 is not the operative date of injury, as it focuses all of its attention on its argument that *Fed. R. Civ. P. 15(c)(1)* should apply to bring the claims within the statute even assuming a February 2002 accrual date.

3. Unfair Competition/Fraudulent Transfer Act

Finally, both StreamCast's unfair competition claim under *California Bus. & Prof. Code ß 17200, et seq.*, and fraudulent transfer claim under *Cal. Civ. Code ß 3439.01*, are governed by four-year statutes of limitations. *See Cal. Bus. & Prof. Code ß 17208* ("Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued."); *Cal. Civ. Code ß 3439.09* (claim must be commenced "within **[*26]** four years [from the time] the transfer was made or the obligation was incurred or if later, within one year after the transfer obligation was or could reasonably have been discovered by the claimant."). Like the RICO and antitrust claims, these claims are rooted in Defendants' alleged activation of "disabling features they had inserted into the FastTrack P2P technology license to StreamCast, shutting down the network accessed by users of Morpheus . . . ." on February 25, 2002. FAC P 102e. Thus, they, too, are time-barred. [8]

> 8 To the extent that StreamCast also purports to state a claim for false advertising under *Cal. Bus. & Prof. Code ß 17500*, that claim is subject to a three-year statute of limitations and would likewise be barred. *See Cal. Code Civ. Proc. ß 338(a)*.

B. Claims With Two and Three-Year Statutes

1. Conversion

The parties agree that the conversion claim is subject to the three-year statute of limitations under *Cal. Code Civ. Proc. ß 338(c)*. *See* Mot. at 14; Opp'n at 13. However, StreamCast maintains that the statute was tolled due to Defendants' "fraudulent concealment" of the facts underlying the claim. StreamCast is correct that California courts have recognized that, under **[*27]** the judicially-created doctrine of fraudulent concealment, a "defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations." *Regents of Univ. of Cal. v. Superior Court, 20 Cal. 4th 509, 533, 85 Cal. Rptr. 2d 257, 976 P.2d 808 (1999)* (internal quotation and citations omitted). Nevertheless, in order to invoke the doctrine in the first instance, a plaintiff "must plead with particularity the facts which give rise to the claim . . . ." *Guerrero v. Gates, 442 F.3d 697, 707 (9th Cir. 2006)*; *see also Conerly v. Westinghouse Elec. Corp., 623 F.2d 117, 120-21 (9th Cir. 1980)* ("Under either California or federal authority, the plaintiff must plead with particularity the facts which give rise to the claim of fraudulent concealment in order to toll the statute of limitations.").

The single paragraph in the FAC which purports to address Defendants' "fraudulent concealment," and the only paragraph to which StreamCast makes reference in its Opposition, wholly fails to satisfy the particularity requirement, as it simply alleges:

> Until recently, because of defendants' efforts to conceal their actions, StreamCast could not determine the true nature and extent of the wrongful actions of the various **[*28]** defendants. In fact, StreamCast currently does not know the full extent of the wrongful actions performed by defendants and unknown others.

FAC P 50. In addition, even assuming arguendo that Defendants have taken actions to conceal their conduct, the myriad additional allegations in the FAC belie any finding that StreamCast was not in fact "on notice" of the facts underlying its legal claims. As Moving Defendants point out in their Reply, StreamCast affirmatively pleads that: (1) on January 20, 2002, it received an email from Zennstrom stating that Kazaa intended to sell itself and the rights to the FastTrack technology to Sharman Networks; (2) on February 25, 2002, it received a letter in which Kazaa asserted that it was terminating the License Agreement; and (3) on that same day (February 25, 2002), its entire user base of over 28 million people evaporated and was "funneled" to Sharman Networks. Accordingly, StreamCast has effectively "pleaded its way out" of any fraudulent concealment defense to the statute of limitations. *See, e.g., Snapp & Associates Ins. Services, Inc. v. Robertson, 96 Cal. App. 4th 884, 891, 117 Cal. Rptr. 2d 331 (2002)* ("The fraudulent concealment doctrine does not come into play, **[*29]** whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.") (internal quotations omitted).

2. Intentional Interference With Contract/Economic Advantage

Once again, the parties agree as to the applicable limitations period--two years pursuant to *Cal. Code Civ. Proc. ß 339(1)*. *See* Mot. at 16; Opp'n at 15. However, StreamCast maintains that the period did not begin to run until well after February of 2002, pursuant to the operation of the "discovery rule." Like the fraudulent concealment doctrine, the "discovery rule" is a type of equitable tolling mechanism, in that it "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 807, 27 Cal. Rptr. 3d 661, 110 P.3d 914 (2005)* (internal citations omitted). Unlike the fraudulent concealment doctrine, the applicability of the "discovery rule" turns not on the existence of affirmative acts of fraud by the defendant, but rather on the reasonableness of the plaintiff's lack of knowledge of facts giving rise to the elements of a cause of action. *See id.* ("Under the discovery rule, suspicion of one or more **[*30]** of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period."); *see also Galen v. Mobil Oil Corp., 922 F. Supp. 318, 322 (C.D. Cal. 1996)* ("A plaintiff invoking the discovery rule defense must 'establish[] facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.'") (quoting *Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 437, 159 P.2d 958 (1945))* (alterations in original).

The allegations in the FAC, even when read with the utmost liberality, fail to establish that StreamCast lacked the requisite knowledge of the facts underlying its claims for intentional interference with contract/economic advantage because, as set forth above, StreamCast affirmatively pleads knowledge of the January 20, 2002 email and February 25, 2002 letter from Kazaa, indicating Kazaa's intent to terminate the Licensing Agreement and transfer the underlying technology to Sharman Networks, in violation of StreamCast's alleged right of first refusal. The fact that StreamCast may have been ignorant of the identities of **[*31]** some of the individuals involved in the transfer scheme is not sufficient to implicate the discovery rule. *Accord Fox, 35 Cal. 4th at 807* ("The discovery rule . . . allows accrual of the cause of action even if the plaintiff does not have reason to suspect the defendant's identity, [citation]. The discovery rule does not delay accrual in that situation because the identity of the defendant is not an element of a cause of action.") (citations omitted).

C. Remaining Claims for Civil Conspiracy, Unjust Enrichment, Constructive Trust and Declaratory Relief

With respect to the civil conspiracy and unjust enrichment claims, the parties dispute whether the applicable limitations periods are two, three, or four years. However, the Court need not resolve this dispute, since, as discussed above, even those claims with four-year statutes of limitations are barred due to fact that the allegations in the FAC which pertain to the Moving Defendants do not "relate-back" to the date of the original Complaint. In addition, for the reasons previously discussed, neither the fraudulent concealment doctrine nor the discovery rule apply. [9]

> 9 Also unpersuasive is StreamCast's argument that the "last overt act" **[*32]** in furtherance of the conspiracy "occurred after February 2002." Opp'n at 17. It is abundantly clear from StreamCast's own pleading that the ultimate "overt act" which resulted in injury was "the transfer of the FastTrack P2P technology and the disabling of

> the network accessed by users of Morpheus along with the hijacking of the Morpheus user base," on February 25, 2002. *See, e.g.,* FAC P95.

Because all of StreamCast's substantive claims for relief are time-barred, its claims for declaratory relief and the imposition of a constructive trust are likewise barred. *See, e.g., Howard Jarvis Taxpayers Assn. v. City of La Habra, 25 Cal. 4th 809, 821, 107 Cal. Rptr. 2d 369, 23 P.3d 601 (2001)* ("[D]eclaratory judgment [is a remedy] available to enforce a variety of obligations; choice of the statute of limitations applicable to [this remedy] depends on the right or obligation sought to be enforced, and the statute's application generally follows its application to actions for damages or injunction on the same rights and obligations."); *Davies v. Krasna, 14 Cal. 3d 502, 515-516, 121 Cal. Rptr. 705, 535 P.2d 1161 (1975)* ("Since [a] constructive trust is not a substantive device but merely a remedy to compel a person not justly entitled to property to transfer it **[*33]** to another who is entitled thereto, an action seeking to establish a constructive trust is subject to the limitation period of the underlying substantive right.") (internal quotations omitted); *Embarcadero Mun. Improvement Dist. v. County of Santa Barbara, 88 Cal. App. 4th 781, 793, 107 Cal. Rptr. 2d 6 (2001)* ("A constructive trust is not a substantive device but merely a remedy, and an action seeking to establish a constructive trust is subject to the limitation period of the underlying substantive right. If that substantive right is barred by the statute of limitations, the remedy necessarily fails.") (citing *Davies, 14 Cal. 3d at 516*).

CONCLUSION

Based on the foregoing, Defendants Mark Dyne, Murray Markiles, and Altnet, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint on Statute of Limitations Grounds (docket no. 41) is GRANTED. Plaintiff StreamCast's First through Fourth and Sixth through Fourteenth causes of action are hereby DISMISSED as to said Defendants.

IT IS SO ORDERED.

September 14, 2006

/s/ Florence-Marie Cooper

FLORENCE-MARIE COOPER, Judge

UNITED STATES DISTRICT COURT