

31 of 72 DOCUMENTS

**STREAMCAST NETWORKS, INC., Plaintiff, vs. SKYPE TECHNOLOGIES, S.A.,  
et al., Defendants.****CV 06-391FMC (Ex)****UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF  
CALIFORNIA***2006 U.S. Dist. LEXIS 97391***September 14, 2006, Decided****September 14, 2006, Filed, September 15, 2006, Docketed and Entered**

**SUBSEQUENT HISTORY:** Claim dismissed by, Motion granted by *Streamcast Networks, Inc. v. Skype Techs., S.A., 2006 U.S. Dist. LEXIS 97392 (C.D. Cal., Sept. 14, 2006)*

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**JUDGES:** FLORENCE-MARIE COOPER, Judge.

**OPINION BY:** FLORENCE-MARIE COOPER

**OPINION**

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS BRILLIANT DIGITAL ENTERTAINMENT INC. AND KEVIN BERMIESTER'S MOTION TO DISMISS THE FIRST THROUGH FOURTEENTH CLAIMS FOR RELIEF ALLEGED IN PLAINTIFF'S FIRST AMENDED COMPLAINT

This matter is before the Court on Defendants Brilliant Digital Entertainment Inc. and Kevin Bermiester's Motion to Dismiss the First through Fourteenth Claims for Relief Alleged in Plaintiff's First Amended Complaint (docket no. 48), filed on August 2, 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 September [\*3] 18, 2006 is removed from the Court's calendar. For the reasons and in the manner set forth below, Defendants' Motion is GRANTED in part and DENIED in part.

## 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 [\*4] 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. 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 [\*5] of Kazaa's technology or other assets. *Id.* P31. <sup>1</sup>

1 The License Agreement is not attached to the FAC. StreamCast represents that this is because 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 Zennstrom 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 [\*6] and others may have secretly incorporated a "disabling" feature or other technology into the FastTrack P2P software provided to StreamCast, 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 [\*7] of StreamCast's disclosures, Bermeister and Dyne became aware that Kazaa, Zennstrom and/or Friis actually owned the underlying FastTrack 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, ap-

proached 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 [\*8] Zennstrom, Friis and Kazaa that it would withhold its monthly royalty payments commencing in December, 2001, until such time as 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 [\*9] user base of over 28 million people was "funneled" to Sharman Networks, which now used the Kazaa/FastTrack P2P technology. *Id.*

At 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, Bermiester, 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 [\*10] required Zennstrom and Friis to represent and warrant that they had no dealings with Kazaa and Sharman Networks, which Zennstrom 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 § 17200 et seq.*); (5) fraudulent transfer under *Cal. Civ. Code § 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 Galote, 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.

Streamcast filed the FAC on May 22, 2006, adding additional Defendants Mark [\*11] 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 § 1 of the Sherman Act and §§4 and 16 of the Clayton Act; and (3) conspiracy to monopolize, attempt to monopolize and monopolization in violation of §2 of the Sherman Act and §§4 and 16 of the Clayton Act.

By means of the instant motion, Defendants Bermeister and BDE, Inc. (the "Moving Defendants") seek to dismiss each and every claim alleged in the FAC, on the grounds that they are barred by the applicable statutes of limitations.

## 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 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). [\*12] 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)* 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *TwoRivers 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. Claims With Four-Year [\*13] Statutes of Limitations

Moving Defendants concede that StreamCast's First through Fourth (RICO and antitrust), Fifth (breach of contract), Seventh (unfair competition), Eighth (fraudulent transfer) and Eleventh (declaratory judgment) causes of action are subject to four-year statutes of limitations and that they accrued as late as February 26, 2002. See Reply at 20, n.10. However, they argue that StreamCast's failure to serve them with process within the 120-day period under *Fed. R. Civ. P. 4(m)* should operate to toll the statute as of the date of the filing of the FAC (i.e., May 22, 2006), rather than the date of filing of the original Complaint (i.e., January 20, 2006).

This same argument was considered and summarily rejected by the Ninth Circuit in its recent decision in *Mann v. American Airlines*, 324 F.3d 1088 (9th Cir. 2003). Like the Moving Defendants in this case, the defendant in *Mann* sought dismissal of the plaintiffs claims on statute of limitations grounds. In reversing the district

court's decision granting dismissal, the Court explained that, contrary to the district court's reasoning, a plaintiff's compliance with the statute of limitations is not "linked to service of [\*14] process within the 120-day period set out in *Rule 4(m)* ...." *Id. at 1089*. The Court clearly and succinctly set forth its holding as follows:

First, we address whether Mann's failure to serve process within the initial 120-day period prescribed by *Fed. R. Civ. P. 4(m)* caused the statute of limitations to start to run again. We conclude that it did not. Once a complaint is filed, the statute of limitations is tolled unless and until the district court dismisses the action.

*Id. at 1090* (citing 4 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil 3d* § 1053 (3d ed. 2002)).<sup>2</sup> Accordingly, the Court finds that the applicable statute(s) of limitations in this case were tolled as of the filing of the original Complaint, such that StreamCast's First through Fourth, Fifth, Seventh, Eighth and Eleventh causes of action are timely.<sup>3</sup>

2 Moving Defendants' representation that their arguments regarding the interplay between "*Rules 3 and 4(m)*" involve still-emerging questions of law (see Mot. at 10) is extremely disingenuous.

3 While it is true that the district court has discretion to dismiss an action "upon motion or its own initiative after notice to the plaintiff due to failure [\*15] to comply with *Fed. R. Civ. P. 4(m)*", the Court finds that the exercise of that discretion would not be appropriate here. As courts and commentators have repeatedly noted, the fact that the applicable statute(s) of limitations might bar refiling of the claim constitutes "good cause" for granting an extension of the time for service rather than dismissal of the action. See, e.g., *Mann*, 324 F.3d at 1090-91; *Matasareanu v. Williams*, 183 F.R.D. 242, 247 (C.D. Cal. 1998) ("Although the running of the statute of limitations does not require the District Court to extend time for service of process, it is a factor to consider in determining whether to extend such time.") (internal quotations omitted); *Fed. R. Civ. P. 4*, Advisory Committee Note to 1993 Amendments, Subdivision(m) ("Relief may be justified, for example, if the applicable statute of limitations would bar the re-filed action....").

## II. Remaining Claims

### A. Conversion

The parties agree that the conversion claim is subject to the three-year statute of limitations under *Cal. Code Civ. Proc.* § 338(c). See Mot. at 8; Opp'n at 7. As a general rule, the statute "is triggered by the act of wrongfully taking property." *Bono v. Clark*, 103 Cal. App. 4th 1409, 1433, 128 Cal. Rptr. 2d 31 (2002) [\*16] (citing *Strasberg v. Odyssey Group, Inc.* 51 Cal.App.4th 906, 915-916, 59 Cal. Rptr. 2d 474 (1996)).

In the instant case, it is clear that the date of the alleged "wrongful taking"--i.e., Defendants' transfer of the rights in the FastTrack P2P technology to Sharman Networks in violation of StreamCast's alleged right of first refusal--was January 30, 2002. See, e.g., FAC P 43 ("Upon information and belief, Kazaa did in fact transfer certain rights in Kazaa and its FastTrack P2P technology to Sharman Networks on or about January 30, 2002,"). StreamCast does not dispute this point but rather 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 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 quotations 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 [\*17] . . . ." *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 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 set forth above, StreamCast affirmatively [\*18] 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 "tunneled" 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, 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).

## **B. 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.* § 339(1). See Mot. at 5-6; Opp'n at 6. As with the conversion claim, the conduct giving rise to StreamCast's claims for intentional interference [\*19] with contract/economic advantage (the breach of the License Agreement and concomitant transfer of the rights in the FastTrack technology to Sharman Networks) took place no later than early 2002. However, StreamCast asserts that the limitations period did not begin to run until well after that, 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 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) [\*20] ("A plaintiff invoking the discovery rule defense must 'estab-

lish[] 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 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 [\*21] 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. Civil Conspiracy

"Under California law, a civil conspiracy is not itself a tort." *Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1170 (N.D. Cal. 1989) (citing *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 787 n.4, 157 Cal. Rptr. 392, 598 P.2d 45 (1979)). Accordingly, "[t]he applicable statute of limitations is the statute of limitations for the underlying tort." *Id.* (citations omitted); see also *FilmService Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.*, 208 Cal. App. 3d 1297, 1309, 256 Cal. Rptr. 735 (1989) ("Whether or not a cause of action for conspiracy is timely must be determined by reference to the statute of limitations applicable to the underlying cause of action.").

In the instant case, the allegations of conspiracy are clearly rooted in Defendants' fraud, intentional interference with contract/economic advantage, and conversion (i.e., their "hijacking of the Morpheus user base" on February 25, 2002), thus necessitating application of a three-year statute of limitations at a maximum. See *Cal. Code Civ. Proc.* § 338(d) [\*22] (fraud); see also sections II.A and B, *supra*.<sup>4</sup> In addition, for the reasons set forth above, neither the fraudulent concealment doctrine nor the discovery rule apply.<sup>5</sup> Thus, the conspiracy claim is time-barred.

4 StreamCast argues, without citing a single authority, that because the conspiracy "involves . . . the transfer of the FastTrack P2P technology in violation of StreamCast's rights under the licence agreement," the Court should apply California's four-year statute of limitations for breach of contract. Opp'n at 3. However, as set forth above, "conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a *tort* themselves, share with the immediate *tortfeasors* a common plan or design in its perpetration." *Kasparian v. County of L.A.*, 38 Cal. App. 4th 242, 263, 45 Cal. Rptr. 2d 90 (1995) (internal quotations and citations omitted) (emphases added). Thus, StreamCast's conspiracy claim can only be properly premised on Defendants' commission of various torts, not breach of contract. *Id.* ("Conspiracy] must be activated by the commission of an actual tort.").

5 Equally unpersuasive is StreamCast's argument that the "last overt act" in furtherance [\*23] of the conspiracy "occurred after February 2002." Opp'n at 4. 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. . .," on February 25, 2002. See, e.g., FAC P95.

### D. Unjust Enrichment

Like the civil conspiracy claim, StreamCast's unjust enrichment claim is grounded in Defendants' fraudulent expropriation of the FastTrack P2P technology. Thus, it, too, is subject to a three-year limitations period and time-barred as set forth above. See, e.g., *First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1670, 15 Cal. Rptr. 2d 173 (1992) ("A quasi-contract action, in the form of a common count for money had and received, to recover money obtained by fraud (waiver of tort) or mistake, is governed by the fraud statute [of limitations].").<sup>6</sup>

6 As Moving Defendants point out, many courts have recognized that there is in fact no independent claim for "unjust enrichment" under California law. See, e.g., *McBride v. Boughton*, 123 Cal. App. 4th 379, 387, 20 Cal. Rptr. 3d 115 (2004) ("Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general [\*24] principle, underlying various legal doctrines and remedies . . . . It is synonymous with restitution.") (internal quotations and citations omitted). However, to the extent that it may be alleged as a separate cause of action, the Court

finds that the three-year limitations period properly applies.

### E. Constructive Trust

"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 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." *Davies v. Krasna*, 14 Cal. 3d 502, 515-516, 121 Cal. Rptr. 705, 535 P.2d 1161 (1975) (internal quotations omitted) (alterations in original); see also *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).

Moving Defendants maintain that, [\*25] once again, the allegations underlying StreamCast's right to imposition of a constructive trust sound entirely in fraud/breach of trust, such that the three-year limitations period under *Cal. Code Civ. Proc.* § 338(d) applies to bar the claim. Once again, the Court agrees, as StreamCast essentially alleges that Defendants Bermeister and others misrepresented their intentions to collaborate with StreamCast on a specific project, thereby gaining confidential information that they in turn used to formulate their scheme to eliminate StreamCast as a competitor. See, e.g., *Security First Nat'l Bank v. Ross*, 214 Cal. App. 2d 424, 429-430, 29 Cal. Rptr. 538 (1963) ("Where the gist of an action is fraud, regardless of its form, the three-year period prescribed by section 338 subdivision 4 of the Code of Civil Procedure applies . . . [citation]. This fact has been applied to an action to establish a constructive trust") (internal citations omitted); see also *Day v. Greene*, 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385 (1963) ("Constructive fraud is the substantive basis of the action to impose a constructive trust in the present case, and where constructive fraud is the gravamen of the action the three-year period prescribed in section 338, subdivision 4, [\*26] of the Code of Civil Procedure applies."); 3 *Witkin Cal. Proc. Actions* § 621 (4th Ed. 1996) (collecting additional cases).

### III. Applicability of *Cal. Code Civ. Proc.* § 351

As a final basis for tolling the relevant statutes of limitations against individual Defendant Bermeister, StreamCast attempts to invoke the provisions of *Cal. Code Civ. Proc.* § 351. Opp'n at 4-5. *Cal. Code Civ. Proc.* § 351 provides as follows:

If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

*Cal. Code Civ. Proc.* § 351 (2006).

By its plain terms, *Cal. Code Civ. Proc.* § 351 serves to toll the relevant limitations period(s) when a defendant is out of state. Here, StreamCast maintains that Defendant Bermeister is clearly subject to the provisions of § 351 because he has admitted to being a resident of Australia. Specifically, StreamCast references a declaration submitted by Mr. Bermeister in support of his Motion to Quash Service and [for] Dismissal [\*27] of Action for Lack of Personal Jurisdiction, which is currently pending before the Court.

Moving Defendants counter by pointing out that, in its decision in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), the Ninth Circuit Court of Appeals held that held that *Cal. Code Civ. Proc.* § 351 violated the (dormant) *Commerce Clause* as applied to a defendant whose conduct outside the state affected interstate commerce, because the it "forces a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California perpetuity." *Id.* at 392. They argue that § 351 is similarly unconstitutional as applied to Defendant Bermeister, because Bermeister's only travel to California occurs while he is acting in his capacity as Chief Executive Officer of Co-Defendant BDE. However, the Court need not reach this issue, as the FAC contains no allegations regarding the length of Bermeister's absence from California during the relevant time period; instead, it affirmatively alleges that he a California resident. Compare, e.g., *Filet Menu, Inc. v. Cheng*, 71 Cal. App. 4th 1276, 1284, 84 Cal. Rptr. 2d 384 (Cal. Ct. App. 1999) [\*28] (applying *Cal. Code Civ. Proc.* § 351 where complaint alleged that defendant "was absent from California for periods sufficient to toll the running of the applicable statutory period."). Whatever the contents of Mr. Bermeister's declaration submitted in support of his separate motion to quash service, it is not appropriate for consideration with respect to the instant motion. See, e.g., *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 (9th Cir. 2003) (noting long-standing rule that "a court must generally refrain from considering extrinsic evidence in deciding a 12(b)(6) motion . . .").

**CONCLUSION**

Based on the foregoing, Defendants Brilliant Digital Entertainment Inc. and Kevin Bermiester's Motion to Dismiss the First through Fourteenth Claims for Relief Alleged in Plaintiff's First Amended Complaint (docket no. 48) is GRANTED in part and DENIED in part. Plaintiff StreamCast's Sixth (civil conspiracy), Ninth (unjust enrichment), Tenth (constructive trust), Twelfth (intentional interference with contract), Thirteenth (intentional interference with prospective economic ad-

vantage) and Fourteenth (conversion) causes of action are hereby DISMISSED as to said Defendants.

IT IS SO [\*29] ORDERED.

September 14, 2006

/s/ Florence-Marie Cooper

FLORENCE-MARIE COOPER, Judge

UNITED STATES DISTRICT COURT



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