

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

WANG & WANG LLP, a California  
Limited Liability Partnership,

Civil No. 2:06-CV-00761-JAM-KJM

ORDER GRANTING DEFENDANT RUBENS  
AMARAL'S MOTION TO DISMISS  
THIRD AMENDED COMPLAINT

v.

BANCO DO BRASIL, S.A., a  
Brazilian business entity;  
RUBENS VIEIRA DO AMARAL, an  
Individual; DOES 1 through 10,  
inclusive,

## Defendants.

This matter is before the Court on Defendant Rubens Amaral's ("Amaral") motion to dismiss Plaintiff Wang & Wang LLP's ("Wang") complaint for failure to state a claim pursuant

to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below<sup>1</sup>, Defendant's motion is GRANTED.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On February 4, 2004, Banco initiated arbitration before the Bar Association of San Francisco ("BASF") to resolve an attorney-client fee dispute between attorney Wang and client Banco. After the BASF arbitration was initiated, Plaintiff filed its Original Complaint in this matter on September 4, 2004, in the Superior Court of Sacramento County for breach of contract, fraud, and common counts, naming Rubens Amaral and Banco do Brasil, S.A. ("Banco") as defendants. The case was removed to this Court, on April 7, 2006, under the Foreign Sovereign Immunities Act. Docket ("Doc.") # 1.

On April 27, 2006, Plaintiff dropped Amaral as a defendant from its First Amended Complaint ("FAC") naming only Banco and Does 1 through 10 as defendants. Doc. # 6. Despite Plaintiff's decision to drop Amaral as a defendant, Plaintiff continued to allege that Amaral made fraudulent representations to Plaintiff. FAC ¶¶ 24, 52. Plaintiff filed its Second Amended Complaint ("SAC") on April 25, 2007. Again, the complaint named only Banco and Does 1 through 10 as defendants, but continued to make

<sup>1</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

1 allegations regarding acts by Amaral. SAC ¶¶ 62-64, 69. Then  
2 on August 14, 2008, more than two years after Wang dropped  
3 Amaral as a defendant, Wang filed its Third Amended Complaint  
4 ("TAC") adding Amaral as a defendant. The TAC does not add any  
5 additional facts regarding Amaral's involvement with allegedly  
6 fraudulent acts other than those facts already contained within  
7 the SAC. TAC ¶¶ 63, 65, 70.

8  
9 In the instant motion, Amaral seeks to dismiss Wang's  
10 complaint against him for failure to state a claim before the  
11 applicable statute of limitations expired. Doc. # 65. In  
12 opposition, Wang argues the time for bringing an action against  
13 Amaral for fraud was extended for two years pursuant to a stay  
14 and equitable tolling by the BASF arbitration. Plaintiff also  
15 contends that the relation back doctrine applies to the claims  
16 against Amaral. Doc. # 70.

17  
18 II. OPINION

19  
20 A. Legal Standard

21 On a motion to dismiss, the allegation of the complaint  
22 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322  
23 (1972). The court is bound to give plaintiff the benefit of  
24 every reasonable inference to be drawn from the "well-pleaded"  
25 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
26  
27 Schermerhorn, 373 U.S. 746, 753 n. 6 (1963). Thus, the  
28

1 plaintiff need not necessarily plead a particular fact if that  
2 fact is a reasonable inference from facts properly alleged. Id.

3 Nevertheless, it is inappropriate to assume that the  
4 plaintiff "can prove facts which it has not alleged or that the  
5 defendants have violated . . . the laws in ways that have not  
6 been alleged." Associated Gen. Contractors of Calif., Inc. v.  
7 Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).  
8 Moreover, the court "need not assume the truth of legal  
9 conclusions cast in the form of factual allegations." United  
10 States ex. rel. Chunie v. Ringrose, 788 F.2d 638, n. 2 (9th Cir.  
11 1986).

14 Ultimately, the court may not dismiss a complaint in which  
15 the plaintiff alleged "enough facts to state a claim to relief  
16 that is plausible on its face." Bell Atlantic Corp. v. Twombly,  
17 127 S.Ct. 1955, 1973 (2007). Only where a plaintiff has not  
18 "nudged [his or her] claims across the line from conceivable to  
19 plausible," is the complaint properly dismissed. Id. "[A]  
20 court may dismiss a complaint only if it is clear that no relief  
21 could be granted under any set of facts that could be proved  
22 consistent with the allegations." Swierkiewicz v. Sorema N.A.,  
23 534 U.S. 506, 514 (2002) (quoting Hishon v. King & Spalding, 467  
24 U.S. 69, 73 (1984)).

27 B. Statute of Limitations

1       The applicable statute of limitations governing Wang's  
2 fraud claims is Cal. Code Civ. Proc. § 338(d), which provides a  
3 three year statute of limitations for bringing "an action on the  
4 ground of fraud or mistake." Cal. Code Civ. Proc. § 338(d).  
5  
6 Both parties agree that such claims are governed by the three-  
7 year statute of limitations.

8       Under California statutory law, a cause of action for fraud  
9 or mistake "is not to be deemed to have accrued until the  
10 discovery, by the aggrieved party, of the facts constituting the  
11 fraud or mistake." Cal. Code Civ. Proc. § 338(d). Courts,  
12 however, have "read into the statute a duty to exercise  
13 diligence to discover the facts." See Parsons v. Tickner, 31  
14 Cal. App. 4th 1513, 1525 (1995). The California Supreme Court  
15 has held, in a suit alleging claims for fraud and negligent  
16 misrepresentation, that inquiry notice is sufficient to trigger  
17 the running of the statute of limitations set forth in § 338(d).  
18 See Miller v. Bechtel Corp, 33 Cal. 3d 868, 875 (1983) (noting  
19 that if plaintiff therein "became aware of facts which would  
20 make a reasonably prudent person suspicious, she had a duty to  
21 investigate further, and she was charged with knowledge of  
22 matters which would have been revealed by such an  
23 investigation").

24  
25       Here, it is clear from the pleadings that Wang had  
26 sufficient knowledge of Amaral's purportedly fraudulent acts,

1 such that Wang was able to file a compliant against Amaral on  
2 September 24, 2004 alleging Amaral's participation in a  
3 fraudulent scheme. See Original Complaint. Despite this  
4 knowledge, Wang intentionally dropped Amaral from litigation on  
5 April 27, 2006 upon filing its FAC. Wang does not contest that  
6 a claim for fraud accrues upon "discovery" of facts constituting  
7 the fraud. Cal. Code Civ. Proc. § 338(d). By Wang's own  
8 admission, it discovered knowledge of Amaral's involvement in  
9 the alleged fraud, within the three years prior to filing the  
10 Original Complaint on September 24, 2004. FAC ¶ 74.  
11 Consequently, the statute of limitations for fraud claims  
12 against Amaral started running, at the latest, upon the filing  
13 of Wang's Original Complaint on Sept. 24, 2004.  
14

15 The effect of dropping Amaral from litigation was that, for  
16 the purposes of computing time under the statute of limitations,  
17 Amaral is treated as if he had never been in the litigation at  
18 all. See Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896  
19 F.2d 1542, 1546 (9th Cir. 1989). "The fact that a party was  
20 named in the original complaint is irrelevant; an amended  
21 pleading supersedes the original." Id.; see also Loux v. Rhay,  
22 375 F.2d 55, 57 (9th Cir. 1967). After dropping Amaral from  
23 litigation, Wang had until September 24, 2007 under the three  
24 year statute of limitations to bring Amaral back into  
25 litigation. Wang added Amaral as a defendant only in its TAC,  
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1 filed August 14, 2008. By this time, the statute of limitations  
2 had already run. Accordingly, Plaintiff has failed to bring  
3 Amaral into litigation within the requisite three year period.  
4 Unless Plaintiff can prove to the Court a valid reason  
5 supporting why its fraud claims against Amaral are not time-  
6 barred, Amaral must be dismissed as a defendant.  
7

8 **C. Statutory and Equitable Tolling**

9 Wang contends that the time for filing its fraud claims  
10 against Amaral was tolled when Banco initiated arbitration over  
11 its fee disputes with Wang. Pl's Opp. 8:12-19. Plaintiff bases  
12 its argument on the provisions of the California fee arbitration  
13 statute Cal. Bus. & Prof. Code §§ 6200 *et seq.*, and on equitable  
14 tolling principles. *Id.* 9:10, 10:24. However, the fee  
15 arbitration statute on which Plaintiff's argument relies is  
16 limited in scope to fee disputes between attorneys and their  
17 clients, and none of the facts alleged by Plaintiff permit this  
18 Court to apply equitable tolling principles.  
19

20 The provisions of Cal. Bus. & Prof. Code §§ 6200 *et seq.*  
21 specifically deal with arbitration of attorney-client disputes  
22 concerning "fees, costs, or both." Cal. Bus. & Prof. Code §  
23 6200(a). The provisions are limited in their application to fee  
24 disputes between "attorneys and their clients to whom they have  
25 rendered professional services." *National Union Fire Ins. Co.*  
26 *v. Stites Prof. Law Corp.*, 235 Cal. App. 3d 1718, 1727 (1991).  
27  
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1 The statute was "designed to provide a speedy and inexpensive  
2 method for determining solely the amount of fees that an  
3 attorney is entitled to charge the client." Liska v Arns Law  
4 Firm, 117 Cal. App. 4th 275, 287 (2004). It does not encompass  
5 arbitration of non-fee dispute claims, such as malpractice  
6 claims against an attorney, or other claims related to  
7 professional misconduct. Cal. Bus. & Prof. Code § 6203(a).  
8 Fraud claims against an attorney or client cannot be resolved in  
9 BASF arbitration proceedings. Liska, 151 Cal. App. 3d at 288.  
10 Fraud claims are separate claims, to which the statute of  
11 limitations applies. Id. at 289.

12 Here, Wang misapplies the statute's tolling provision to  
13 its renewed claims against Amaral. The statute "limits the  
14 scope of arbitration that the client may demand to the amount of  
15 reasonable fees (or costs) to which the attorney is entitled."  
16 Id. at 282. Wang's fraud claims against Amaral, a non-client  
17 and a non-fee dispute claim, are not subject to arbitration  
18 under the statute. Only Wang's civil action for legal fees  
19 against Banco was tolled until completion of the arbitration.  
20 The time for filing an action for fraud against Banco and Amaral  
21 was not tolled by the statute. Thus on February 4, 2004, when  
22 Banco exercised its right as a client to demand BASF arbitration  
23 over the fee dispute, the fee dispute was arbitrated and tolled  
24 until completion. There were no fraud claims asserted or

1 arbitrated in the BASF arbitration proceeding, nor could there  
2 have been because Wang's fraud claims against Amaral were not  
3 subject to arbitration under the statute. Liska, 151 Cal. App.  
4 3d at 288. Accordingly, the time for filing an action for fraud  
5 against Amaral was not tolled by Cal. Bus. & Prof. Code § 6206.

6 Plaintiff also argues that Banco's request for arbitration  
7 "superseded and stayed" the Original Complaint filed by Wang in  
8 September 2004, a complaint filed more than six months after the  
9 arbitration was initiated. Pl's Opp. 8:10-27. Plaintiff  
10 contends that the statutory stay covered the entire action and  
11 precluded it from proceeding against any defendant in the  
12 action, including Amaral. Id. 9:1-27, 10:12-24.

13 Here, as discussed above, the stay provisions apply only to  
14 a civil action to recover fees as to which a client has a right  
15 to demand arbitration. Liska, 151 Cal. App. 3d at 288. The  
16 stay would not apply to a claim for fraud brought by Wang  
17 against Amaral, a non-client and a non-fee dispute claim.

18 Furthermore, the record demonstrates that Wang possessed  
19 information that would have permitted it to bring timely claims  
20 against Amaral. Wang could have kept Amaral in the case, rather  
21 than intentionally dropping him, or Wang could have brought  
22 Amaral into the case again before the applicable three year  
23 statute of limitations expired in September 2007. The Original  
24 Complaint and subsequent complaints show that Wang was aware of  
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1 Amaral's identity and potential liability for fraud. The  
2 statute is not tolled while a plaintiff searches for evidence to  
3 make out its case. Once the suspicion exists, which was  
4 evidenced here in September 2004 in Plaintiff's Original  
5 Complaint, Plaintiff must formalize its claims within the  
6 statutory period. Ervin v. County of Los Angeles, 848 F.2d  
7 1018, 1020 (9th Cir. 1988). Where, as is the case here, the  
8 plaintiff had this knowledge and information and failed to bring  
9 its claims until the statutory period had passed, equitable  
10 tolling will not apply, and a motion to dismiss is proper. Id.  
11 Accordingly, the facts and law before the Court show that  
12 neither the tolling provisions of Cal. Bus. & Prof. Code § 6206  
13 nor the principles of equitable tolling apply to Wang's fraud  
14 claims against Amaral.

15 D. Relation Back Doctrine

16 Wang contends Amaral's motion to dismiss fails because it  
17 relies on evidence that goes beyond the face of the TAC and that  
18 factual issues preclude this Court from deciding whether  
19 relation back would apply to Wang's claims against Amaral. Pl's  
20 Opp. 11:1-28, 12:1-26. To obtain "relation back" under Fed. R.  
21 Civ. Proc. 15(c)(1)(c) a plaintiff must satisfy all the  
22 provisions of the rule, and show: (1) that the amended claims  
23 arise out of the "conduct, transaction or occurrence" pleaded in  
24 the original complaint; (2) that the new defendant had such

1 notice of these claims that it would not be prejudiced in  
2 defending the action; (3) that defendant had such knowledge that  
3 it would have been sued earlier, but for plaintiff's mistake  
4 regarding the "proper party's identity;" and (4) that the  
5 "notice" and "knowledge of mistake" factors had been satisfied  
6 within the period for service prescribed by Rule 4(m). If  
7 plaintiff fails to show that any one of these provisions is  
8 satisfied, then relation back cannot be applied.

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10 Relation back was not meant to apply where plaintiff made  
11 an intentional choice not to sue a defendant, and then sought to  
12 bring that defendant back into litigation after the statutory  
13 period had passed. Nelson v. Adams, 529 U.S. 460, 467 n.1  
14 (2000). Where a plaintiff is aware of defendant's identity and  
15 potential liability, but has made a conscious choice to sue  
16 certain defendants but not others, then the required element of  
17 "mistake" is not present, and the omitted defendant cannot be  
18 joined after the statute of limitations has passed. Louisiana-  
19 Pacific Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993).  
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22 Here, Wang was aware of Amaral's identity, and as the  
23 complaints demonstrate, aware of Wang's potential liability for  
24 fraud well within the statute of limitations. FAC ¶ 74. Wang,  
25 by his own admission, intentionally chose not to pursue  
26 litigation against Amaral. Pl's Opp. 3:20-27. Thus, Plaintiff  
27 has not satisfied the third prong of the relation back inquiry  
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because there was no mistake as to Amaral's identity or involvement. Wang made a conscious decision not to sue Amaral and now seeks to rejoin Amaral after the statute of limitations has passed. Because Wang cannot satisfy the "mistake" requirement of the relation back rule, relation back will not apply. Accordingly, the facts and law before the Court show that the statute of limitations had run by the time Wang filed its TAC and that relation back does not apply to Wang's fraud claims against Amaral.

### III. ORDER

For the reasons set forth above, Defendant Amaral's motion to dismiss Plaintiff Wang's third amended complaint is GRANTED with prejudice.

It is so ORDERED.

Dated: November 25, 2008

*John A. Mendez*  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE