IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Pitt Penn Holding Co, *et al.*,	Case No. 09-11475 (BLS)
Debtors.	(Jointly Administered)
Industrial Enterprises of America, Inc.	Adv. No. 11-51868
Plaintiff,	Related to Adv. Docket Nos. 12, 13, 17 & 18
v.	
Robert Burtis, Stacy Cannan, Thomas F. Cannan, Matthew Collyer, Susan Collyer, Ian Engelberg, Richard Mazzuto, Rick Mazzuto, Sarah Mazzuto, William Mazzuto, and Haley Udolf	
Defendants.	

MEMORANDUM ORDER

Upon consideration of the Motion to Dismiss (the "Motion to Dismiss" or the "Motion") filed by Susan and Matthew Collyer ("Susan" and "Matthew," or the "Collyers");[1] the Response filed by Industrial Enterprises of America, Inc. ("IEAM");[2] and the Collyers' Reply;[3] and after due deliberation, the Court hereby FINDS as follows:

[1] Adv. Docket No. 12.
[2] Adv. Docket No. 17.
[3] Adv. Docket No. 18.

1. This adversary proceeding arises out of the ongoing Chapter 11 bankruptcy cases of Pitt Penn Holding Co. and certain of its affiliates, one of which is IEAM, the plaintiff here.

2. The back-story for this case is largely undisputed. It involves a massive fraud perpetrated primarily by two of IEAM's former senior executives—John Mazzuto and James Margulies—both of whom have already been convicted and face many years behind bars.

3. As relevant here, the fraud began in January 2005, when IEAM filed a Form S-8 with the SEC,[4] authorizing the company to issue millions of shares of restricted stock to its employees and outside consultants. Under SEC rules, recipients of such restricted stock cannot publicly trade their shares unless they observe certain holding periods, notice requirements, and trading volume limits. In short, the rules restrict both who can get the stock and how it can be traded. However, the record reflects that Mazzuto and Margulies directed shares to individuals and entities who had never done any work for the company. They also caused the stock to appear to be unrestricted, and thus publicly tradable, when in fact it was not. Doing so allowed the pair to clear the way for share-recipients (and themselves) to profit from quickly selling shares at the higher market price of unrestricted shares.

4. The Complaint places Susan and Matthew Collyer in that group of share-recipients. Susan and Matthew are the widow and son of the late Michael Collyer, who had once been a director of the company that later became IEAM. According to the Complaint, from 2005 through 2007, the Collyers received and then sold "illegally issued" IEAM stock, as follows:

[4] A Form S-8 must be filed with the SEC before a publicly-traded company can issue stock or stock options to its employees under a benefit or incentive plan. *See Form S-8*, Financial Dictionary—The Free Dictionary, (November 29, 2011), http://financial-dictionary.thefreedictionary.com/Form+S-8.

Name	Date Shares Received	No. of Shares Received	Price Per Share	Total Value
Susan	1/27/2005	80.000	$2.50	$200,000.00
Susan	1/31/2007	5,000	$5.38	$26,900.00
Susan	2/6/2007	5,000	$5.43	$27,150.00
Matthew	3/9/2005	5,000	$5.10	$25,500.00

5. In November 2007, several months after the Collyers last received shares, IEAM became the target of a shareholder class action filed in New York alleging damages caused by IEAM senior executives. That lawsuit settled at the end of 2010. As part of the settlement, the class members assigned to IEAM the claims it now asserts against the Collyers.

6. Meanwhile, on May 1, 2009, IEAM voluntarily entered bankruptcy. One year later, on May 24, 2010, Mazzuto and Margulies were indicted on 57 counts, including grand larceny, scheming to defraud and falsifying business records. According to IEAM, that day—May 24, 2010—was when the fraudulent scheme first came to light.

7. IEAM filed the Complaint against the Collyers and others on April 29, 2011. It alleges state law claims for fraud, unjust enrichment, conversion, and conspiracy, as well as Bankruptcy-Code-based claims under §§ 548, 544, and 550. Although the Complaint includes "state law" claims, it does not say which state.

8. The Collyers responded to the Complaint with the Motion to Dismiss. The Motion offers two arguments: IEAM's claims are barred by various statutes of limitation, and the Complaint fails to state a claim entitling IEAM to relief. The Court will discuss each in turn.

The Statute of Limitations Defense Does Not Bar IEAM's State Law Claims at this Time, But IEAM's Claims Under § 548 Must Be Dismissed

9. First, because the statute of limitations is an affirmative defense to an action, it generally cannot be raised in the context of a Rule

12(b)(6) motion. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994). But courts in the Third Circuit will make an exception where "the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Id.*; *Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978) (noting that statute of limitations defense may be raised in a 12(b)(6) motion only if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations").

10. With respect to IEAM's state law claims for fraud, unjust enrichment, conversion, and conspiracy, and its § 544 claim (which simply recognizes IEAM's right to pursue those state law claims in its bankruptcy case), the Court finds that the statute of limitations defense fails at this stage of the proceeding. The most obvious reason why is that IEAM has argued that its claims are eligible for equitable tolling[5] due to the fraud at the company. The Third Circuit had said that resolving questions of equitable tolling "is not generally amenable to resolution on a Rule 12(b)(6)" motion because the inquiry "generally requires consideration of evidence beyond the pleadings." *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 301 (3d Cir. 2010). Thus, when the issue is raised in the context of a motion to dismiss under Rule 12(b)(6) the plaintiff need only "plead the applicability of the doctrine" to overcome the motion. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391-92 (3d Cir. 1994). IEAM has done that. It has also alleged facts regarding the fraud and the timing of its eventual discovery that, if taken as true, could

[5] Equitable tolling is an extraordinary remedy that applies when a plaintiff has "been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 240 (3d Cir. 1999). This occurs most often where (1) the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) the plaintiff has timely asserted his or her rights mistakenly in the wrong forum. *Hedges v. U.S.*, 404 F.3d 744, 751 (3d Cir. 2005).

equitably toll the limitation periods. For instance, IEAM claims that the fraud stayed hidden until Mazzuto and Margulies were indicted in May 2010. The Collyers on the other hand argue that IEAM got a whiff of the fraud when the class action was filed in November 2007 and should have investigated further. Which side is right may well determine whether some or all of IEAM's claims were timely filed. But the Court needs more facts before it can settle that question. As such, IEAM's state law claims (and its §§ 544 and 550 claims) survive the Collyers' statute of limitations defense for now.

11. By contrast, IEAM's § 548 claim will be dismissed. Briefly, the "look-back" period for avoiding fraudulent transfers under § 548 is two years from the petition date. IEAM filed its petition on May 1, 2009, which means the look-back period stretches to May 1, 2007. Yet the Complaint is clear that the last transfer of share to either of the Collyers happened on February 6, 2007, several months outside of the look-back period. As such, § 548 simply does not apply.

IEAM is Granted Leave to Amend its Complaint

12. The Collyers assert that IEAM has failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). They then proceed to argue this point using New York and Rhode Island law. IEAM, rather than responding to the Collyers' arguments on the merits, asks the Court for leave to amend the Complaint so that it can identify the which state's law underpins its claims.

13. The Court will grant that request. Leave to amend is warranted here because of the Court's recent ruling in *IEAM v. Tabor Academy* (*In re Pitt Penn Holdings*), Bankr. No. 09-11475, Adv. No. 11-51879, 2011 WL 4352373 (Bankr. D. Del. Sept. 15, 2011), where the Court dismissed without prejudice IEAM's claims in a similar action for "fail[ing] to allege the applicable state law upon which its .:. claim is grounded." *Id.* at *11. Given that the Complaint here was filed months before the *Tabor* ruling, IEAM will have the chance to amend it to address the problem the Court identified in *Tabor*.

14. The Collyers say that IEAM should not be allowed to amend because it did not "explain how its amendment would cure the deficiencies of the Complaint."[6] But it did: IEAM says that the amendment will "identify state law and, possibly, ... hone certain allegations."[7] Accordingly, the Court will give IEAM 30 days to amend the Complaint.

Accordingly, it is hereby

ORDERED that the Motion to Dismiss is **DENIED** to the extent it seeks dismissal of IEAM's state law and §§ 544 and 550 claims based on the statute of limitations defense; and it is further

ORDERED that the Motion to Dismiss is **GRANTED**, with prejudice, regarding IEAM's § 548 claim; and it is further

ORDERED that IEAM has 30 days from the day this Order is entered to amend the Complaint as discussed above.

BY THE COURT:

Dated: November 28, 2011
Wilmington, Delaware

Brendan Linehan Shannon
United States Bankruptcy Judge

[6] Reply p. 8.
[7] Resp. p 7.