CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This petition has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. This petition complies with the page – or type – volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 11,142 words.

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The adoption of cross-jurisdictional, class action tolling would effectively eviscerate NRS 11.500. Therefore, the doctrine must be rejected out of deference to the Nevada Legislature's authority over periods of limitation and repose.

CONCLUSION

For the foregoing reasons, Petitioners request that the Nevada Supreme Court vacate the District Court's order applying cross-jurisdictional, class action tolling and order the District Court to reconsider Petitioners' motion to dismiss in light of such a decision.

DATED this 1st day of December, 2016.

DICKINSON WRIGHT, PLLC

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), the undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 1st day of December, 2016, she served a copy of the foregoing **PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS** by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Reno, Nevada, said envelope addressed to:

Honorable Joe Hardy
Eighth Judicial District Court
Dept. XV
200 Lewis Avenue
Las Vegas, NV 89155

Stephen R. Hackett, Esq.
Johnathon Fayeghi, Esq.
Sklar Williams, Esq
Sklar Williams PLLC
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An Employee of DICKINSON WRIGHT PLLC

RENO 68665-5 11653v2

EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION; PAUL W. LOWDEN; AND SUZANNE LOWDEN,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOSEPH HARDY, JR., DISTRICT JUDGE,
Respondents,
and
STEPHEN HABERKORN, AN INDIVIDUAL,
Real Party in Interest.

No. 71802

FILED

JAN 12 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DIRECTING ANSWER

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss. Having reviewed the petition, we conclude that an answer would assist this court in resolving the petition. The appendix, however, is incomplete in that petitioners have failed to provide their motion to dismiss or any transcript from the hearing. Petitioners shall have 10 days from the date of this order in which to file and serve a supplement to their appendix with their motion to dismiss and any transcripts or other documents that they deem necessary to our consideration of this matter. Real party in interest, on behalf of respondents, shall have 30 days from service of the supplemental appendix to file and serve an answer, including authorities, against issuance of the requested writ. NRAP 21(b)(1). Petitioners shall have 15 days from service of the answer to file and serve any reply.

It is so ORDERED.

_____, A.C.J.

17-01279

SUPREME COURT
OF
NEVADA

(O) 1947A

cc: Hon. Joseph Hardy, Jr., District Judge
Dickinson Wright PLLC
Sklar Williams LLP
Eighth District Court Clerk

EXHIBIT 4

EXHIBIT 4

1998 WL 35142932 (N.Y.Sup.) (Trial Pleading)
Supreme Court, New York County, New York.
New York County

Joyce RABOUIN, individually and on behalf of all others similarly situated, Plaintiff,
v.
METROPOLITAN LIFE INSURANCE COMPANY, Defendant.

Civil Action Index No. 11135598.
June 24, 1998.

Class Action Complaint

Plaintiff, by her attorneys, alleges the following based on personal knowledge as to her own acts, and as to all other matters on information and belief based upon an investigation by her counsel.

INTRODUCTION

1. This is a class action seeking redress for defendant's misapplication of the premiums paid by whole life insurance policyholders.

2. During a time period, the exact dates of which are presently unknown to plaintiff, but including at least the period 1989-1992 ("Class Period"), defendant manipulated the income and assets purchased with the premiums paid on defendant's whole life insurance policies. As a result, the pool of assets and earnings on the pool allocated to whole life insurance policies, as well as the income and dividends of whole life policies in force during that time, were reduced.

3. Plaintiff Joyce Rabouin ("plaintiff") resides in Mattapan, Massachusetts. During the period 1989-92, she owned one whole life insurance policy issued by defendant Metropolitan Life Insurance Company ("MetLife").

4. Defendant MetLife is a mutual insurance company organized under New York law, with its principal place of business located at One Madison Avenue in New York, New York. MetLife is the second largest life insurance company in the United States.

5. MetLife must be maintained and operated for the benefit of its members under Section 1211 of the Insurance Law.

6. Plaintiff purchased a whole life insurance policy (#804-304-259-A) with a face amount of $10,000 from defendant on March 17, 1980.

7. As a MetLife policyholder, plaintiff is a member of the corporation under Section 1211, entitled to vote at any regular or special meeting of the corporation and to receive payment of a fair and equitable share of the dividends declared by MetLife's Board of Directors.

8. MetLife receives premiums paid by plaintiff and other policyholders and represents that it pools those monies in order to invest them for the policyholders' benefit.

9. Under the Insurance Law and the regulations promulgated thereunder, insurance policies and annuity contracts issued by

MetLife must be self-supporting on reasonable assumptions as to mortality, investment income and expenses.

10. In allocating income and expenses among different lines ??ness, MetLife is required by law and regulation to use only such ?? will produce a suitable and equitable distribution of income and ??s of business.

?? MetLife failed to allocate to plaintiff and other class ??itable share of the income earned by premiums they paid. Instead, MetLife transferred policyholders' income to subsidize payments on annuity contracts under a scheme in which bad or lower yielding investments were allocated to life insurance policies. The conduct constitutes breach of contract, breach of fiduciary duty, conversion of policyholders' funds and related causes of action. Further, because the conduct was undertaken secretly, without notice to policyholders or regulators, it constitutes fraud and deceit.

CLASS ACTION ALLEGATIONS

12. This action is brought on behalf of plaintiff individually, and as a class action on behalf of all persons (the "Class") who owned MetLife whole life insurance policies during the Class Period, regardless of when such policies were purchased.

13. This action is properly brought as a class action under CPLR § 901 for the following reasons:

a. The Class consists of millions of persons and is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable.

b. There are questions of law or fact common to the Class which predominate over any questions affecting only individual members, including:
i. Whether MetLife violated the Insurance Law and regulations promulgated thereunder;

ii. Whether MetLife transferred bad or lower yielding investments and allocated income and expenses so as to use premiums paid by policyholders to subsidize payments under annuity contracts and other products;

iii. Whether MetLife's transfer of policyholder monies to subsidize annuity contracts and other products constitutes a dividend that should have been paid to the Class;

iv. Whether MetLife misappropriated and converted monies belonging to the Class;

v. Whether the Class is entitled to an accounting of the premiums paid;

vi. Whether plaintiff and the members of the Class sustained damages and the proper measure of damages; and

vii. Whether MetLife concealed the misconduct alleged in this complaint.

c. The claims asserted by plaintiff are typical of the claims of the members of the Class.

d. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained attorneys experienced in class and complex litigation as her counsel.

e. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:
i. Most individual members of the Class are unaware of MetLife's conduct because it was carried out in secrecy;

ii. The logistics and financial burden of prosecuting an action on an individual basis are so great that a policyholder has little interest in prosecuting an individual action;

iii. When the liability of MetLife has been adjudicated, claims of all members of the Class can be determined by the Court;

iv. This action will cause an orderly and expeditious administration of the Class claims, foster economies of time, effort and expense, and ensure uniformity of decisions; and

v. This action presents no difficulties that would impede its management by the Court as a class action.

FACTUAL ALLEGATIONS

14. MetLife sells life insurance, annuities and other financial products. It has about 20 million life insurance policies outstanding in about 15 million households nationwide.

15. In the sale and administration of its products, MetLife is divided into departments, including the Personal Insurance Department which sells life insurance and the Pension Department which sells annuities.

16. At all times relevant to this action, MetLife represented that it paid dividends on its whole life policies based upon the investment, expense and mortality experience of those policies.

17. MetLife also represented that it applied the whole life premiums it received to create a separate pool of assets supporting those policies that was separate from the pool of assets supporting other lines of business, such as annuities.

18. MetLife also represented in public filings that it does not transfer assets between different lines of business, *i.e.*, that the assets from the whole life pool of assets were not transferred to and/or from the annuity pool of assets.

19. MetLife did not represent anywhere in the sales literature, policy or illustrations given to plaintiff that dividends would be reduced by using her and other policyholders' premiums to subsidize payments on annuities.

20. Despite these representations, MetLife did in fact transfer assets between the whole life and the annuity pool of assets.

21. Beginning during the 1980's, the actual date being unknown to plaintiff, MetLife wanted to show better investment performance on its annuity pool of assets in order to offer higher payments on annuity contracts and analogous products.

22. MetLife's Pension Department sold annuities that guaranteed a rate of return set to meet the returns offered by its competitors. MetLife needed earnings on annuity assets that would pay the returns it guaranteed. But MetLife had invested in poorer performing real estate and other lower yielding investments, with the result that the pool of assets available to the Pension Department was not producing earnings sufficient to produce these returns.

23. In contrast, MetLife sold whole life insurance policies based upon rates of return over which it had substantial discretion. For example, an illustration for a whole life policy might use a current dividend scale of 9%, but have a guaranteed rate of only 4.5%.

24. Under the contractual terms of a whole life policy, MetLife could decrease the illustrated dividend scale for in force policies (so long as it did not go below the guaranteed rate on whole life policies). For annuities, MetLife could not sell the annuities, except at rates of return that could not decrease after issuance without breaching the annuity contracts. As a result,

MetLife decided to shift income and higher yielding assets from the whole life pool of assets to the annuity pool of assets as a scheme to subsidize annuity rates of return.

25. During the Class Period, MetLife transferred lower yielding real estate and other investments originally allocated to the Pension Department's pool of annuity assets from the Pension Department to the Personal Insurance Department and higher yielding assets from the Personal Insurance Department to the Pension Department.

26. MetLife's allocation of investments in this manner substantially reduced the assets, income and dividends for whole life policyholders. In addition, the build-up of cash value in each whole life policy was reduced.

Fraudulent Concealment

27. The premiums paid by plaintiff and the Class, and the assets acquired with the premiums, are under MetLife's management and control. MetLife is a fiduciary with respect to those monies and, among other things, has the duty to use those monies exclusively for the benefit of plaintiff and the Class, and to disclose how it allocates and invests those monies.

28. MetLife failed to disclose to existing policyholders or to purchasers of life insurance policies that their premium payments were or would be used to purchase investments whose earnings would be paid to annuity holders.

29. Even if it had no fiduciary duty to plaintiff and/or the Class to disclose its manipulation of assets, MetLife made affirmative misstatements in its annual publicly filed responses to insurance regulators that failed to disclose that assets were allocated to reduce the monies available to pay dividends on whole life insurance policies.

30. But for MetLife's omissions or misstatements, plaintiff and/or the Class in the exercise of due diligence would have discovered the wrongful conduct described herein. Plaintiff and/or the Class had no knowledge of MetLife's scheme and unlawful conduct, or any of the facts which might have led to the discovery of its wrongdoing with the exercise of reasonable due diligence prior to some time reasonably close to the filing of this complaint.

31. As a result of its fraudulent concealment, MetLife is estopped from asserting the statute of limitations as a defense to this action. MetLife made fraudulent and false statements to state regulators that prevented plaintiff and/or the class from discovering the matters alleged herein until a time reasonably proximate to the filing of this action.

32. Plaintiff has exercised due diligence in bringing this claim within a reasonable period after she learned of MetLife's wrongful acts.

FIRST CAUSE OF ACTION BY THE CLASS: *AGAINST METLIFE FOR BREACH OF CONTRACT*

33. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 32 as if fully set forth herein.

34. The agreement between MetLife and the Class includes the insurance policies, interpreted and enforced in accordance with applicable insurance laws and regulations.

35. In each policy, MetLife promises to use the earnings from the investment of the policyholders' premium payments exclusively for their benefit, and to allocate income and expenses fairly and equitably in determining those earnings.

36. MetLife breached the agreement with plaintiff and the Class to generate better earnings in the Pension Department. Each act of diversion of funds by MetLife was a separate and independent breach of contract.

37. As a result, plaintiff and the Class have been injured in an amount to be determined at trial, plus prejudgment interest. Plaintiff and the Class are also entitled to punitive damages because MetLife's conduct was knowing and willful.

SECOND CAUSE OF ACTION BY THE CLASS: *AGAINST METLIFE FOR BREACH OF FIDUCIARY DUTY*

38. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 32 as if fully set forth herein.

39. MetLife represented that it would manage policyholders' monies in their best interest, MetLife had sole control over their monies, and MetLife possessed sole knowledge of what it did with their monies. MetLife therefore held policyholders' premium payments and the earnings thereon as a fiduciary and, as such, owed the Class a high duty of care and of the utmost good faith and loyalty.

40. MetLife's allocation of assets, to the detriment of plaintiff and the members of the Class, breached its fiduciary duty and injured the Class in the amount to be determined at trial, plus prejudgment interest. Plaintiff and the Class are also entitled to punitive damages because MetLife's conduct was knowing and willful.

THIRD CAUSE OF ACTION BY THE CLASS: *AGAINST METLIFE FOR UNFAIR BUSINESS PRACTICES*

41. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 32 as if fully set forth herein.

42. MetLife falsely stated and represented to plaintiff and the Class that their premium payments would be invested and used exclusively for their benefit.

43. MetLife's use of policyholders' monies for the benefit of others violated these representations, and constituted deceptive acts and practices in violation of General Business Law Section 349.

44. As a result, MetLife is liable to plaintiff and the Class for the actual damages they sustained, plus prejudgment interest and reasonable attorneys' fees.

FOURTH CAUSE OF ACTION BY THE CLASS: *AGAINST METLIFE FOR AN ACCOUNTING*

45. Plaintiff repeats and realleges the allegations in Paragraphs 1 through 32 as if fully set forth herein.

46. Plaintiff and the Class are entitled to an accounting of the premiums they paid, the earnings from those premiums, the assets acquired and the expenses charged against their monies.

WHEREFORE, plaintiff demands judgment against MetLife for herself and the Members of the Class as follows:

A. Determining that the action may proceed as a class action maintainable under CPLR § 901 on behalf of the Class, as defined in paragraph 13;

B. Awarding plaintiff and the Class damages and punitive damages to the extent such damages may be awarded under the causes of action alleged;

C. Awarding plaintiff and the Class the costs and disbursements of this action, and reasonable attorneys' fees, expert witness

fees, and other costs; and

D. Granting such other and different relief as the Court deems just and proper.

End of Document

EXHIBIT 5

EXHIBIT 5

1999 WL 34748246 (N.Y.Sup.) (Trial Motion, Memorandum and Affidavit)
Supreme Court, New York County, New York.
New York County

Joyce RABOUIN, individually and on behalf of all others similarly situated, Plaintiff,
v.
METROPOLITAN LIFE INSURANCE COMPANY, Defendant.

Civil Action Index No. 111355/98.
November 12, 1999.

Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss

Stamell & Schager, LLP, Jared B. Stamell, Richard J. Schager, Jr., One Liberty Plaza, 35th Floor, New York, New York 10006-1404, (212) 566-4047, Attorneys for Plaintiff Joyce Rabouin.

Of Counsel: Berman, DeValerio, Pease & Tabacco, Joseph J. Tabacco, Jr., Jennifer Abrams, 425 California Street, Suite 2025, San Francisco, California 94104-2205, Berman DeValerio & Pease, LLP, Glen DeValerio, John Peter Zavez, One Liberty Square, Boston, Massachusetts 02109, Law Offices of Richard J. Vita, Esq., Richard J. Vita, Esq., Two Oliver Street, Boston, Massachusetts 02109.

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CASES

PRELIMINARY STATEMENT

In its motion to dismiss plaintiff's complaint, defendant Metropolitan Life Insurance Co. ("MetLife") agrees that section 4231 of the Insurance Law requires an equitable allocation of divisible surplus, and that in making such an allocation the board of directors must not act with bad faith, willful neglect or abuse of discretion. (Deft. Brf. at 2).[1] What MetLife argues is that the arbitrary reallocation of surplus and transfer of assets from the whole life line of business to the annuity line, to compensate for the poor design and underwriting of the annuity line, as a matter of law does not violate these standards. The short-changed whole life policyholder, however, has a statutory right to an equitable allocation and distribution of divisible surplus. Equitable allocation" does not permit these arbitrary reallocations and transfers and simply cannot be read out of the statute as easily as MetLife pretends.

Defendant also fails to address in any way the Complaint's allegation (deemed true for purposes of this motion) that, while representing in public filings that it did not do so, defendant transferred lower-yielding investments from the annuity line of business to the whole life line in exchange for higher yielding assets. The purpose of such transfers was to try to make the annuity line of business look more profitable than it really was. The focus of this lawsuit is on the damage done to whole life policyholders by the effort.

Defendant's motion to dismiss should be denied in all respects.

FACTS

MetLife is a mutual life insurance company organized under New York law and with its principal place of business in this county. Cplt. ¶ 4.[2] Under section 1211 of the Insurance Law it must be maintained and operated for the benefit of its members. Cplt. ¶ 5. Plaintiff Rabouin bought her policy from MetLife in 1980, and as a MetLife policyholder she pays premiums annually and is entitled to a member's fair and equitable share of the surplus developed thereby. Cplt. ¶¶ 3, 6-8. Contrary to MetLife's statement of facts, plaintiff Rabouin does not contend that MetLife was to use earnings from her premium payments exclusively for her individual benefit. Plaintiff alleges that MetLife has promised "to use earnings from the investment of *the policyholders'* premium payments exclusively for *their* benefit, and to allocate income and expenses fairly and equitably in determining those earnings." Cplt. ¶ 35 (emphasis added). Her Complaint also alleges that "MetLife failed to allocate to plaintiff and other class members the fair and equitable share of the income earned by premiums they

paid." Cplt. ¶ 11.

MetLife receives premiums from its policyholders and represents that it pools these monies in order to invest them for the policyholders' benefit. Beginning in the 1980's, however, MetLife designed and underwrote an annuity line of business, which was not self-supporting based on reasonable assumptions of mortality, investment income and expense. To subsidize payments to annuity holders and to show better investment performance on the annuity pool of assets, MetLife reallocated surplus and transferred assets from the whole life line of business to the annuity line. Cplt. ¶¶ 2, 8-11, 20-21.

The Complaint states that the reason the inequitable allocation was necessary is that the annuities were underwritten with guaranteed rates of return, but the funds backing these annuities had been invested poorly in real estate assets that failed to produce such rates. Cplt. ¶ 22. Because the whole life insurance policies were issued with relatively low *guaranteed* rates of return, surplus could be reallocated and assets could be transferred from those lines of business without causing the rate of return to fall below the guaranteed rate. Such reallocations and transfers were accomplished for the benefit of the annuity line. Cplt. ¶¶ 23-26. Lower yielding assets were transferred back to the whole life insurance lines of business in exchange, so that in effect the higher-yielding assets that should have produced divisible surplus for the whole life line of business instead subsidized the annuity line of business. Cplt. ¶ 11.

MetLife never disclosed to members of the class that surplus produced by and assets purchased with their premium payments were being used to support the annuity line of business. Cplt. ¶ 27-28. MetLife also made affirmative misstatements in its annual reports to insurance regulators that omitted disclosure of the reallocations of surplus and transfers of assets away from the whole life lines of business, which misstatements and omissions concealed facts that with reasonable diligence might have led to the earlier discovery of the wrongdoing. Cplt. ¶¶ 18, 29-31.

This class action lawsuit seeks redress for holders of MetLife's whole life policies, each of whom received lower dividends than he or she would have received without the manipulative reallocations and transfers described above. At all relevant times MetLife represented that it paid dividends on its whole life policies based on the investment, expense and mortality experience of those policies (Cplt. ¶ 16), consistent with the "equitable apportionment" rules that have been part of the New York Insurance Law for nearly a century. The reallocations and transfers at issue here deprived plaintiff and the class of the fair and equitable share of the income earned by their premium payments, and resulted in a reduction in the assets, income and dividends supporting or relating to their policies, and a reduction in their cash value, in violation of the Insurance Law and the underlying insurance policies. Cplt. ¶¶ 11, 25-26.

ARGUMENT

I. New York Law Disfavors Motions To Dismiss.

Under New York law, a complaint will defeat a motion to dismiss if any cause of action can be derived from its allegations by implication or through liberal construction. *Robert H. Law, Inc. v. Samuel Kosoff & Sons, Inc.*, 46 A.D.2d 724, 725, 360 N.Y.S.2d 125 (4th Dep't 1974). The allegations in the Complaint are deemed to be true, and the plaintiff is entitled to the benefit of all favorable inferences and is deemed to have alleged whatever may reasonably be implied. *Underpinning & Foundation Constructors v. Chase Manhattan Bank*, 46 N.Y.2d 459, 462, 414 N.Y.S.2d 298, 299 (1979). If the court finds that the plaintiff is entitled to recover under any reasonable view of the stated facts, its inquiry is complete and it must declare the Complaint to be legally sufficient. *Cavanaugh v. Doherty*, 243 A.D.2d 92, 675 N.Y.S.2d 143, 1998 N.Y. App. Div. LEXIS 6462 (3d Dep't 1998); *219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 508, 414 N.Y.S.2d 889 (1979). A complaint should *not* be dismissed simply because it suggests a novel theory of recovery. *Park v. Chessin*, 88 Misc. 2d 222, 223-24, 387 N.Y.S.2d 204, 205-06 (Sup. Ct., Queens Co. 1976), modified on other grounds, 60 A.D.2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977), 46 N.Y.2d 401, 413 N.Y.S.2d 895 (1978) (on appeal, motion to dismiss novel complaint brought by parents of a deformed infant for physician's negligent failure to advise of pregnancy risks found to have been properly denied). As

described below, the Complaint here sets forth a well-established claim for relief, and the motion to dismiss should be denied.

II. Policyholders of a Mutual Insurance Company Have a Property Interest in Its Surplus and the Right to Sue for an Accounting and an Equitable Apportionment and Distribution of the Surplus.

MetLife's basis for moving for dismissal is that its management has "broad discretion" over the management of its assets and the apportionment and distribution of surplus. This argument was rejected by the New York Legislature over 90 years ago, however, and we have over a century of New York insurance jurisprudence recognizing policyholders' property interest in surplus and a right to an equitable apportionment and distribution thereof. As stated by the Appellate Division in 1942, citing precedent going back 54 years earlier,

> The policyholders [of a mutual life insurance company] are entitled ... to participate in the annual surplus of the company (Ins. L. § 216, subd. (1) [now Ins. L. § 4231(a)(1)]). If there be an inequitable distribution of surplus, a policyholder may sue to obtain his proportionate share. *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421, at 432, 17 N.E. 363, at 366, 4 Am. St. Rep. 482 (1888); *Rhine v. New York Life Ins. Co.*, 273 N.Y. 1, 6 N.E.2d 74, 108 A.L.R. 1197 (1936).... The policyholder of a mutual life insurance company, therefore, has a property interest in surplus and a voice in the management.

Clifford v. Metropolitan Life Ins. Co., 264 App. Div. 168, 169-70, 34 N.Y.S.2d 693, 695-96 (2nd Dep't 1942). Subsections (1) and (3) of Insurance Law § 4231(a), containing a more stringent version of the rule stated in the 1888 *Uhlman* case, *require* that the directors of a mutual life insurance company apportion and distribute surplus, annually and equitably (part A). Case law has long rejected analogies to dividends by B.C.L. corporations, and authorized policyholders to enforce their right to such an equitable apportionment (parts B & C). These statutory policyholder rights were not abrogated by the grant of authority to the Superintendent of Insurance to obtain information in annual statements (part D).

A. N.Y. Ins. Law §§ 4231(a)(1) & (3) Require an Annual and Equitable Apportionment of Surplus.

New York Insurance Law § 4231(a)(1) requires that

> every domestic life insurance company *shall ascertain and distribute* annually, and not otherwise, the proportion of any surplus accruing upon every participating insurance policy .... [Emphasis added.]

Subsection (a)(3) of the same section requires "every such company" to set aside from surplus sums in reserve for future claims and stockholder dividends (if the insurer is a stock company), and after establishing these reserves

> every such company shall thereupon apportion the remainder of such earnings, if any, derived from participating policies and contracts, equitably to all policies or contracts entitled to participate therein ....

Ins. L. § 4231(a)(3). This statutory language has been a part of the New York Insurance Law since 1906, as section 83 from 1906 to 1939, and as section 216 from 1939 to the last recodification in 1984.

A distant predecessor to section 4231 might have reserved for insurers the unfettered discretion claimed by MetLife here. Laws 1872, c. 100 provided insurers with the legal power "to ascertain ... the portion of surplus accruing to each policy ..., and to distribute the portion found to be equitable ...." This discretionary approach was continued in the 1892 codification, which stated that New York life insurance companies "*may ascertain* ... the portion of surplus accruing to each policy ..., and *may distribute* the portion found to be equitable ...." Laws 1892, c. 690, § 83 (emphasis added). The emphasized language

supports some of the more deferential language in the *Uhlman* decision on which MetLife relies (discussed in more detail below),[3] but even in *Uhlman* the Court of Appeals rejected the view that an insurer's apportionment "is absolutely and, in all events, conclusive upon the policyholders." 109 N.Y. at 432, 67 N.E. at 366.

In any case, the law was changed in 1906 to limit the deference due to insurers' determinations and allocations. Thereafter the Insurance Law required that any policy issued after January 1, 1907 "*shall provide* ... that the portion of the surplus accruing upon said policy *shall be ascertained* and distributed annually ..." Laws 1906, c. 326, § 23 (amending Laws 1892, c. 690, § 83, quoted above).[4] The language requiring mandatory determination and distribution of surplus survives in subdivisions (a)(1) and (a)(3) of section 4321 of the present Insurance Law.

The legislative history of Laws 1906, c. 326 emphasizes that this new language was enacted with careful consideration. In 1906 the legislature had before it Assembly Doc. 41, Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of Life Insurance Companies (1906) (the "Armstrong Report").[5] "Ascertainment and Distribution of Surplus" was sufficiently important to warrant a special section in the Report, which recommended amending the Insurance Law to require an annual determination and distribution of surplus. *Metropolitan Life Ins. Co. v. Durkin*, 301 N.Y. 376, 382, 93 N.E.2d 897, 900 (1950).[6]

Noting that a "mutual [life insurance] company is based upon the operation of the law of averages," the Armstrong Committee described how mutual companies establish an expected mortality rate and an expected investment return, and then take into account anticipated expenses, a reserve for contingencies and a contingent fund for possible investment losses. Armstrong Report at 418-20. In recommending the remedial legislation that amended section 83 of the then-existing Insurance Law,[7] the Committee stated:

It is manifest that all gains or surplus in excess of such contingent fund should, in equity, be returned to the holders of participating policies at such appropriate times as may be practicable for their ascertainment. This return should be effected in such a manner that the policy holders will share *in the proportions in which, through their payments, they have contributed to the gains.*

Armstrong Report at 420 (emphasis added).

The Armstrong Committee reviewed several policies issued by insurers that did not determine and allocate surplus annually, and found substantial differences in returns for the insureds. Based on this review, the Committee was critical of the existing statutes permitting insurance companies to retain surplus without accounting for it.
The disappointing returns upon these policies ... [have] been more largely due to the wasteful methods of the companies, which have been made possible by the vast accumulations permitted by this form of insurance [policies not requiring annual distributions]. For the most part companies have denied any legal or equitable obligation with referenced to these accumulations prior to actual apportionment, and they have been available to provide means for lavish expense ... which would have been checked by a suitable system of accounting. Thus the huge surpluses of the companies have encouraged extravagance and facilitated corruption.

It is the opinion of the Committee that dividends should be distributed annually, being applied either in reduction of premiums or to the purchase of additional insurance or paid in cash, at the option of the insured.

Armstrong Report at 423-24.

Finally, in a section entitled "Remedies of Policy Holders, or Right to Resort to the Courts," the Armstrong Committee criticized the view that policyholders not be permitted access to the courts to seek relief for insurers' "secret and largely arbitrary methods of computation" of distributions. *Id.* at 430. After critically reviewing a prior statute and several Court of Appeals decisions, including *Uhlman v. New York Life*, that restricted the rights of policyholders,[8] the Committee concluded: "Policy holders should *have free access to the courts* to have their rights determined." *Id.* at 430-33 (emphasis added).

This discretionary language that existed prior to 1906 was the basis for *Uhlman*, and also for *Greeff v. Equitable Life Assur. Soc.*, 160 N.Y. 19, 54 N.E. 712 (1899). These two decisions were both criticized in the Armstrong Report (at pp. 430-34), and on the degree of discretion they allowed in the allocation and distribution of surplus they were effectively overruled by the 1906 amendments to the Insurance Law. *Equitable Life Assur. Soc. v. Brown* relied heavily on *Uhlman* and *Greeff* and failed to consider the important statutory amendments that followed them. 213 U.S. 25, 43 & 46-47 (1909). The case was commenced in 1905, 213 U.S. at 42, and it is likely that the 1906 amendments were not part of the record.[9]

The statutory language is unambiguous and is fully supported by the legislative history. Insurers have a statutory obligation to allocate and distribute surplus annually and equitably. Based on the statutory language alone, MetLife's motion to dismiss should be denied.

B. The Business Corporation Law Rules on Dividends Do Not Apply to Mutual Insurers.

The statutory language of section 4231(a)(1) & (3) and the legislative history demonstrate why the general corporate law authorities such as *Auerbach v. Bennett*[10] are inapplicable here. MetLife is not simply a business corporation organized under the Business Corporation Law; it is a mutual insurance company organized under article 12 of the Insurance Law. The Insurance Law incorporates by reference the B.C.L.,[11] but it also expressly makes inapplicable to mutual insurers the provisions of the B.C.L. dealing with corporate finance and dividends (B.C.L. Art. 5).[12]

MetLife should be complimented on its artful editing of Couch on Insurance 3d (1996). Its brief quotes a statement from section 80:53 to the effect that directors of an insurer have the same discretion over dividends that corporate directors have over dividends out of corporate earnings (Deft. Brf. at 7 & 11), but drops the opening clause of the sentence, stating "In the absence of a provision to the contrary," which of course is what Ins. L. § 4231 is. MetLife's brief also omits the immediately following sentence:

> Observation: The rights and obligations of directors are generally regulated by both the law of corporations and insurance regulations of a particular jurisdiction. Both sources should be referenced to determine whether a director has the power to declare dividends.

Couch on Insurance 3d, §80.53 (1996). Couch also notes, later in the same section:

> The directors of a life insurance company, which is not a pure stock company, *do not have the option* whether, or to what extent, to declare dividends of the so-called surplus.

Id. (emphasis added).

In Rhine v. New York Life Ins. Co., 273 N.Y.1, 6 N.E.2d 74 (1936), the Court of Appeals confirmed that the "purpose and effect" of policyholder dividends is to "reduce [] *pro tanto* the cost of insurance to the holder of the policy," and that the Insurance Law (then section 83, now section 4231) required this distribution as, in effect, a return of

> the excess of premium over cost of furnishing the insurance, or in other words, the amount [that policyholder] *has contributed to the surplus.*

Rhine, 273 N.Y. at 13 & 16-17, 6 N.E.2d at 78 & 79.[13]

Since the *Rhine* decision in 1936, the New York courts consistently have rejected MetLife's argument that insurers have the same degree of discretion over dividends as corporate boards have over dividends distributed by standard business

corporations. Because policyholder dividends are essentially a distribution of "divisible surplus" created by policyholders' payments in excess of the cost of insurance, there simply is no analogy to dividends out of earned surplus produced by standard business corporations organized under the B.C.L. As the First Department explained:
While the annual return to the policyholder of part of the premium he has paid is generally called a "dividend", it is not analogous to the distribution of profits to stockholders of a profit-making corporation. The initial premium paid a mutual insurance company represents the estimated cost of the policy, with an adequate margin for reserves and charges. When the sums have been more definitively ascertained at the end of a year of operations, the company is required by section 216 of the Insurance Law [now section 4231] to return the excess premium to the policyholder, in the form of a distribution of "divisible surplus."

"The declaration of a dividend on a policy reduces *pro tanto* the cost of insurance to the holder of the policy. That is its purpose and effect." *Rhine v. New York Life Ins. Co.*, 273 N.Y. 1, 13, 6 N.E.2d 74, 78 .... The annual distribution of surplus, then, is not akin to a division of profits among stockholders of record at the year's end. It is in actuality an adjustment of the premium ... between the amount estimated at the year's beginning to be ample to cover all contingencies and the amount found actually to have been necessary in retrospect.

Kern et al. v. John Hancock Mutual Life Ins. Co., 8 A.D.2d 256, 259, 186 N.Y.S.2d 992, 996-97 (1st Dep't 1959).

The Third Department reached the same conclusion. *Prudential Ins. Co. v. Ward Products*, 57 A.D.2d 259, 260, 394 N.Y.S.2d 480, 482 (3d Dep't 1977) (insurer obligated under Ins. L. § 216 (now § 4231) to return excess premium after year-end determination of requisite reserves and changes, citing *Rhine* and *Kern*). Lower courts agree. *Scholem v. Prudential Ins. Co. of America*, 172 Misc. 664, 665, 15 N.Y.S.2d 947, 948 (Sup. Ct., N.Y. Co. 1939) (the annual policyholder dividend "is in fact, not a dividend, but the excess payment of premium over actual cost given annually as required by statute under the provisions of our insurance law," citing *Rhine*), *Menin v. New York Life Ins. Co.*, 188 Misc. 870, 871, 69 N.Y.S.2d 523, 525 (Sup. Ct., N.Y. Co. 1939) (holding it "well recognized that the so-called dividend payable upon a mutual life insurance contract bears no relation to a dividend upon a stock of a stock corporation," citing *Rhine*); *Fidelity & Casualty Co. of New York v. Metropolitan Life Ins. Co.*, 42 Misc. 2d 616, 624, 248 N.Y.S.2d 559, 566 (Sup. Ct., N.Y. Co. 1963) (a mutual company is operated for the benefit of its policyholders and to provide insurance at cost, "the company is required to return to its policyholders the excess premium," and "[t]he distribution of divisible surplus is in reality an adjustment of the premium in retrospect of the amount found to have been actually necessary to cover the contingencies which materialized and it effects a reduction of the cost of the insurance," citing *Rhine*, *Kern*, *Scholem* and *Menin*).

Accordingly, while section 510 of the Bus. Corp. Law may not require business corporations to distribute all of their unreserved surplus, it provides no guidance here where section 4231 of the Insurance Law contains a directly contrary mandate. Section 4231 also requires the determination and allocation of that surplus to be equitable. One class of policyholders cannot get a free ride at the expense of the others.

C. Courts Have Uniformly Enforced Insurers' Obligations Under N.Y. Ins. Law §§ 4231(a)(1) & (3) In Suits Brought By Policyholders.

As demonstrated above, Chapter 326 of Laws 1906 effected a dramatic change in the insurance law by making mandatory an annual determination and distribution of divisible surplus. *Uhlman v. N.Y. Life Ins. Co.*, 109 N.Y. 421, 17 N.E. 363 (1888), was decided under section 83 of the Insurance Law (the predecessor to the old section 216 and the present section 4231) *before* that section was amended by Laws 1906. While the case is still cited for the view that policyholders are entitled to an equitable allocation of surplus, it does not have the persuasive authority attributed to it by MetLife (Defs. Brf. at 9-10). The Armstrong Report, while approving *Uhlman's* concept of equitable apportionment, was in fact critical of the decision for its restrictive view of policyholders' rights to challenge directors and to demand an accounting. Armstrong Report at 430-35."

As indicated by the passage quoted from *Clifford v. Metropolitan Life Ins. Co.* at the beginning of this Argument I, *Uhlman* (with the statutory modification of Ins. L. § 4231(a)) and *Rhine* together form the central authority for the view that policyholders have a property interest in the divisible surplus held by their insurers, and an enforceable right to have that surplus equitably apportioned on the basis of how they contributed to it.

The facts of *Rhine v. New York Life* are illustrative. A certain group of policyholders had life insurance policies coupled with disability coverage; a second group had identical life insurance, but without the disability cover. 273 N.Y. at 6 & 11, 6 N.E.2d at 75 & 77. After several years had passed during which a loss experience developed, the dividend on the "life * disability" policies was reduced. The plaintiff in the case, who held a "life * disability" policy, complained that the reduced dividend was an inequitable allocation. Construing section 83 of the Insurance Law, the predecessor section to section 4231(a), the Court of Appeals rejected the argument that the holders of policies with disability coverage had been treated inequitably by the allocation of a smaller dividend to them.

> [W]hen the divisible surplus is apportioned to all the policies, *each should receive* the excess of premium over cost of furnishing the insurance, or in other words, *the amount it has contributed to the divisible surplus*. Then a factor of risk and cost present in one policy and not in another *[i.e.,* the disability coverage] may produce a great difference in the amount of the dividends which are apportioned to each and the comparative size of the premiums will have proved a faulty measure of the actual cost of the insurance.

Rhine v. New York Life, 273 N.Y. at 16-17, 6 N.E.2d at 79-80 (emphasis added). The *Rhine* plaintiff's position was what MetLife's *annuity* holders' position would be if they complained that the reallocation of surplus and transfer of assets to support their annuities was stopped (with the fundamental difference, of course, that a policyholder has an interest in the mutual company and its surplus but an annuity holder does not.) The Court of Appeals' analysis of how dividends are allocated was consistent with the views expressed by the Armstrong Committee (see footnote 5 above and accompanying text). "Policies of life insurance may contain provisions for benefits based on varying risks," the Court said, and the premium for each policy "is always based on a calculation of the anticipated costs of providing the promised insurance or benefits." *Rhine*, 273 N.Y. at 16, 6 N.E.2d at 79.

What *Rhine* contemplates is what the Armstrong Committee contemplated in fashioning the predecessor to section 4231: An apportionment of surplus is to give back to the policyholder his or her contribution to that surplus. The premium charged for a given policy is to cover the cost of insurance plus a margin for contingencies. 273 N.Y. at 8-10, 6 N.E.2d at 76-77. "If each member receives back the excess payment he has made, then apportionment must be based" on the actual cost of insurance.

> Accordingly the defendant company and all other mutual companies, in apportioning divisible surplus, use the "contribution" method which aims to distribute the divisible surplus amongst policyholders *in the same proportion as the policyholders by their payments have contributed to that surplus.*

273 N.Y. at 10, 6 N.E.2d at 76-77 (emphasis added). The insurer is permitted a reasonable amount of discretion, necessary from a practical, administrative point of view, due to the number of classes or groups. *Id.* However, where surplus earned by and assets purchased with whole life policyholders' premium payments are arbitrarily reallocated and transferred to an underperforming line of business, then that discretion has been abused. Where such reallocations and transfer are accomplished while representing otherwise in public filing, there also is bad faith.

MetLife's reliance on *Rebbert v. The New England Mutual Life Ins. Co.*[9] is a puzzling use of authority. In *Rebbert* the plaintiff policyholder complained that no dividend had been allocated to his policy, but did not allege any wrongdoing or unfairness in the defendant's allocation of surplus. Slip Op. at 3. Without addressing plaintiff Rabouin's allegations that MetLife wrongfully reallocated surplus and transferred assets and misrepresented to state regulators what it was doing, defendant draws from *Rebbert* the conclusion that plaintiff Rabouin has not alleged bad faith, willful neglect or abuse of discretion. Complaint Brf. at 12. If necessary plaintiff can amend the Complaint to add the words in which MetLife finds

talismanic significance, but the arbitrary reallocations and transfers and the misrepresentations in its annual filings more than sufficiently allege *facts* showing MetLife's abuse of discretion and bad faith.

Further, contrary to MetLife's arguments, *Rebbert* in no way supports the view that a life insurer's discretion in the allocation of its assets and declaration of dividends is virtually unbounded. Since 1906 New York courts have consistently reviewed policyholder challenges to insurers' apportionment of surplus. All these decisions, including *Rebbert* and *Rhine*, express the view that insurers should allocate surplus to lines of business that have contributed to it. (Slip Op. at 3, citing *Rhine*.) Here, plaintiff has alleged that MetLife's allocation of surplus during the relevant time period was inequitable in that annuity holders received far more from surplus than the assets backing their annuities contributed to surplus. The life insurance policyholders received less than their contribution. This is *prima facie* inequitable because, under the contribution method approved in *Rebbert* and other decisions described herein, "[d]ividends are not allocated to any class of policy which does not contribute to the surplus, or actually reduces it." *Rebbert*, Slip Op. at 3, citing *Cohen v. Prudential Ins. Co.*, 58 N.J. Super. 37, 155 A.2d 304 (N.J. Super., Chancery Div. 1959).

The plaintiff in *Rebbert* brought a class action against The New England because the company failed to pay any dividends to its disability income insurance policyholders during one year. The court explicitly approved The New England's apportionment of dividends, which was based on the "contribution method": Plaintiff's claim in this case is entirely consistent with the holding in *Rebbert* because she also seeks to have surplus apportioned by the contribution method. As the Complaint makes clear, MetLife arbitrarily reallocated surplus and transferred productive assets from the insurance portfolio in exchange for unproductive assets in the annuity portfolio. The result was that the earnings on the whole life portfolio were reduced, and in turn the dividends paid to whole life policyholders, including plaintiff *Rabouin*, were less than they would have been if such arbitrary reallocations and transfers had not occurred. This asset-swapping constituted a departure from the contribution method because whole life policyholders did not receive dividends in proportion to their contribution to surplus. In effect, MetLife's whole life policyholders involuntarily subsidized the annuity line of business.

Justice Cahn's decision in *Rebbert* is noteworthy to the *Rabouin* Complaint because it denied to plaintiffs an interest in surplus to which they did not contribute. Slip Op. at 4. The decision's citation to *Cohen* is also noteworthy because the *Cohen* plaintiffs were claiming entitlement to a share of the divisible surplus notwithstanding "that none of the plaintiffs' policies had made a contribution to divisible surplus, but were in fact in a deficit position." 58 N.J.Super. at 42, 45, 155 A.2d at 306, 308. The *Cohen* plaintiffs' position, like that of *Rhine* plaintiffs, was the same as MetLife's annuity holders, for whose benefit surplus was reallocated and assets transferred from the whole life line of business. The holding of the New Jersey Chancery Court in Cohen, relying on the New York Court of Appeals decision in *Rhine*, was:

> If there has been no contribution to divisible surplus, there is no dividend allocated.

58 N.J. Super. at 43, 155 A.2d 307, citing *Rhine v. New York Life Ins. Co.*, 273 N.Y. at 10, 6 N.E.2d at 77. The *Rabouin* plaintiffs ask for no more.

MetLife has cited no case in which a New York court has approved as equitable the type of departure from the contribution method at issue in this case. As the First Department noted in its opinion in *Rhine v. New York Life Ins. Co.*:

> It is of the very essence of the contribution method that no member or class of members shall be made to pay for the insurance furnished to any other member or class of members; that the cost of insurance shall not be increased to any individual or class because of the insurance of any other individual or class.

248 App. Div. 120, 127, 289 N.Y.S. 117, 125 (1st Dep't 1936) (quoting Daniel H. Wells, Papers and Transactions Actuarial Society of America, Vol. II, p. 361). Here, MetLife has done precisely what *Rhine* proscribed: forced insurance policyholders to pay for the returns furnished to annuity holders, thus decreasing dividends and increasing the cost of insurance to the policyholders.

D. Policyholders' Private Rights to Enforce N.Y. Ins. Law §§ 4231(a)(1) & (3) Supplement Any Enforcement Action by the Superintendent of Insurance.

For purposes of the present motion, it also is important to note that the *Rhine* court held specifically against the defendant insurance company on the issue of whether a plaintiff can plead a cause of action for inequitable apportionment. While the court found on the merits that the challenged allocation was equitable, it unambiguously recognized the policyholder's right to plead the cause of action. 273 N.Y. at 14, N.E.2d at 78-79. Numerous cases since *Rhine* have concluded the same.

Barnett v. Metropolitan Life Ins. Co., 258 App. Div. 241, 16 N.Y.S.2d 198 (1st Dep't 1939), like *Rhine*, involved a challenge by a policyholder who had ceased receiving a dividend due to the loss experience on his policy series. MetLife had issued policies of ordinary life insurance containing accidental death benefits, an area in which the company then had little experience. Nearly 20 years later, when MetLife concluded it had sufficient experience, it required holders of policies with accidental death benefits to contribute to a contingency reserve and eliminated the dividend on those policies. 258 App. Div. at 244, 16 N.Y.S.2d at 200-01. The First Department found that MetLife had fixed its annual dividend rate in accordance with the "contribution" method approved in the *Rhine* case and held that the allocation was equitable, but once again found there was no basis for the insurer's claim that the plaintiff had no right to challenge it.

MetLife's argument that section 4239 of the Insurance Law and related regulations make the Superintendent of Insurance the only appropriate party to investigate and challenge an insurer's allocation of income and expenses is clearly wrong. Section 4233 of the Insurance Law is the statutory provision requiring insurers active in New York State to file "annual statements" with the Superintendent of Insurance. Section 4239 authorizes the Superintendent to prescribe standards for the equitable allocation of income and expenses. Regulation 33, 11 NYCRR Parts 90-91, follows the same pattern: Part 90 provides for the reporting of income and expenses in the annual statements, and Part 91 sets forth regulations for such reporting, including allocations among "annual statement lines of business" such as Ordinary Life, Group Life and Group Annuities. 11 NYCRR § 91.2. While it is true that section 91.1(a) of the Regulations states that "the equitable allocations of income and expenses of a life insurer is the responsibility of its management," this statement is followed by six pages of detailed regulations for the determination and apportionment of divisible surplus and the annual reporting thereof.

Exercise of the authority granted to the Superintendent of Insurance to enforce the insurer's compliance with these equitable appointment rules depends in the first instance on the insurers' reports being in compliance with the disclosure regulations. MetLife's reports are not. Cplt. ¶ 16, 18, 29-31. Further, there simply is no suggestion, express or implied, that Ins. Law §§ 4233 and 4239 and Regulation 33 were intended to limit in any way the policyholder's right to challenge the insurer under Ins. L. § 4231. MetLife bold statement that the appropriate party to challenge an insurer's income allocation "is the Superintendent of Insurance, not a private litigant" (Deft. Brf. at 7) is without citation for good reason -- there is simply no authority for it, either in the Insurance Law, in the Superintendent's regulations thereunder, or in the case law.

In all the authorities cited in MetLife's Memorandum of law, only *Klonick* and *New York Hotel Trades Council* provides post-1906 authority for the proposition that policyholders have no standing to sue for an accounting.[4] Once again there is good reason for this paucity of 20th Century authority. In 1890 the New York legislature enacted what was then section 56 of the Insurance Law, which expressly denied to policyholders the right to sue their insurers for an accounting. Laws 1890, c. 400. The enactment was short-lived. The 1906 Armstrong Report told the legislature that the insurance industry "misled the Legislature in procuring the enactment of Section 56 ... to aid their policy of concealment and to facilitate ... the continuance of their improper methods of administration." Armstrong Report at 434.

In the light of the disclosures of the investigation, the Committee favors the repeal of the requirement of section 56 that action by the attorney-general should be a condition precedent to an order, judgment or decree for an accounting. *Policyholders should have free access to the courts to have their rights determined.*

Armstrong Report at 433 (emphasis added). As described above, Section 56 was then repealed by Laws 1906, c. 326, § 15.

The legislature clearly contemplated a private right of action for an accounting, and saw no conflict between such a private

right and the "annual statement" requirement. The insurance industry had complained that responding to an accounting action was burdensome. The Armstrong Committee noted that the insurers' had legal departments for that purpose, and also that the insurers had to compile the information for their annual statements anyway, so the legal departments were not put to any added burden.

> The proposed repeal [of Ins. L. § 56] is also to be taken in connection with the recommendations as to the annual filing of statements showing the methods of calculating dividends which will put the companies to the necessity of exposing these methods and *should be supplemented by a suitable opportunity to the policy holder without the intervention of any State officer* to obtain any needed redress. Armstrong Report at 434 (emphasis added). As the emphasized language indicates, the legislature viewed the Superintendent's enforcement powers and policyholders' private rights as supplementing each other.

Against this statutory history *Klonick* and *New York Hotel Trades Council provide* weak authority for the proposition that plaintiff Rabouin does not have standing to demand an accounting here. *Klonick* relies on cases not involving policyholders in mutual life companies, except for *Uhlman*, a case that preceded the repeal of the "no-standing rule" in 1906." *New York Hotel Trades Council* involved disability insurance issued by stock companies, not life insurance issued by mutual life companies to policyholder-members, and the policyowners did not have the interest in divisible surplus discussed in the *Clifford v. Metropolitan Life* case at the outset of Argument I."

III. MetLife Owed a Fiduciary Duty to its Policyholders; Its Argument to the Contrary Creates a Question of Fact for Trial.

The essential facts of this action are that plaintiff and others similarly situated are policyholder-members of defendant mutual insurer MetLife, with a property interest in the divisible surplus, which was made by their excess premium payments and managed by MetLife. As described above, the law changed substantially after the *Uhlman* decision in 1888. The insurer-insured relationship may still be in large part contractual, but the law has developed in the last 110 years, and the influence of older decisions that refused to recognize a fiduciary relationship has faded:

> Some decisions, perhaps influenced by a "dog eat cat" philosophy, would have the parties dealing at arms' length, but this is out of step with current concepts. Particularly is this approach outmoded when television advertising repeatedly refers to "the good hands" of the insurer or how it is "like a good neighbor," implying an ability to place trust and reliance upon the broad shoulders of the kindly company.

12 John A. Appleman & Jean Appleman, Insurance Law and Practice § 7004 (1981). The MetLife advertising slogan "get Met - It Pays" is in the same category.

The issue presented by plaintiff Rabouin's Complaint is whether MetLife properly handled and distributed funds in which the law recognizes the property interest of plaintiff and others similarly situated. A federal court in this district, in analogous circumstances and under New York law, recently found that the issue of whether a fiduciary relationship exists between an insurer and an insured is a question of fact for the fact finder to determine on a case by case basis. *Dornberger v. Metropolitan Life Ins. Co.*, 961 F. Supp. 506, 546-47 (S.D.N.Y. 1997). Here, when Plaintiff and other class members paid their premiums to MetLife, they surrendered all control over those funds to the company. They thereby placed great trust in MetLife to manage their money in their best interests, a trust that MetLife accepted and then violated.

Under such fact-intensive circumstances, plaintiff is entitled to put before a jury the question of whether MetLife had led her to rely on it to perform in a fiduciary capacity. As stated in *Dornberger*,

> New York courts do not follow a *per se* rule prohibiting the recognition of a fiduciary relationship in the

> insurance context -- rather, New York courts will permit a jury to assess the circumstances of the relationship to determine if it is one of trust and confidence.

Dornberger, 961 F. Supp. at 546-47. Whenever "the relationship between insurer and insured [is] imbued with elements of trust and confidence which render the relationship more than a mere arm's-length association," a fiduciary relationship is created. *Id.* at 546.

There is perhaps no clearer example of a fiduciary relationship than the one that existed between the Plaintiff and MetLife with respect to amounts paid to MetLife in excess of the cost of covering insurance and other expenses. For whole life insurance, the policyholder's premiums are set at an amount that exceeds the cost of providing insurance for the policyholder. The policyholder relinquishes all control over the surplus amount in excess of the cost of insurance, and relies entirely on MetLife to invest and distribute those monies in his or her best interests. MetLife does not disclose or explain to policyholders its methods for determining dividends or allocating assets. Policyholders simply receive an annual statement that states the dividends that have been credited to the policyholder, without explanation of how MetLife arrived at that figure, or of how MetLife apportioned its surplus among its various classes of products. In other words, policyholders must trust MetLife completely with respect to their money that MetLife holds in trust.

The older decisions regarding the relationship between insurer and insured must be considered in the context of these facts and MetLife's statutory responsibility to determine and equitably allocate divisible surplus. This case is not about a stock insurer that issues pure risk-shifting Disability Benefits Law policies as in *New York Hotel Trades Council v. Prudential Ins. Co.*, 1 Misc. 2d 245, 144 N.Y.S.2d 303. Nor is it about stock company that issues annuities to holders' not having an interest in assets and surplus comparable to that of mutual company policyholders. *Rochester Radiology Associates v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 986, 988 (W.D.N.Y. 1985). Furthermore, New York is recognized as having an "expansive concept of fiduciary duty." *United States v. Brennan*, 938 F.Supp. 1111, 1120 (W.D.N.Y. 1996) (existence of a fiduciary duty of insurer to insureds presents a jury question).

> Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another.

Penato v. George, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, 904-05 (2d Dep't 1976) (citations omitted), *appeal dismissed*, 42 N.Y.2d 908, 397 N.Y.S.2d 1004 (1977).

"[T]he existence of a fiduciary relationship is normally determined by the jury," *United States v. Brennan*, 938 F.Supp. at 1120-21, and the facts alleged here present an issue for jury determination. MetLife's relationship to its policyholders with respect to the surplus that policyholders pay in excess of the cost of insurance most closely resembles that of a trustee, the classic example of fiduciary. There is no "arm's length" relationship at all with respect to that surplus. MetLife does not explain or disclose the analysis behind its decisions. There is no bargaining process, and plaintiff has no bargaining power or means for discovering MetLife internal asset allocation short of this suit. Question of fact regarding the nature of the relationship between plaintiff and MetLife, with respect to MetLife's management of her premium payments, are for a jury to decide.

IV. The Causes In The Complaint Are Timely On Their Face; MetLife's Statute of Limitations Arguments Improperly Rely On Resolving Facts In MetLife's Favor.

The Complaint alleges that the reallocation of surplus and transfer of assets by MetLife occurred at least during the period 1989 through 1992, and that these reallocations and transfers damaged policyholders through reduced dividend. Although it is obvious that a breach of contract claim and other claims are timely at least for transfers in 1992 and later, MetLife treats the Complaint as alleging misconduct solely in 1989. (Deft. Brf. at 18.)[19] In applying the statute of limitations, the Complaint must be read for what it alleges, not what MetLife wishes it alleges, and as pleaded the causes of action are timely.[20]

For breach of contract, the First Cause of Action, the limitations period is six years from the date of the breach. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 599 N.Y.S.2d 501 (1993). For this reason, claims based upon reallocations and transfers in 1992 and later are timely. In addition, MetLife's obligations with respect to dividends and surplus are continuing ones. Where a contract provides for continuing performance over time, such as the duty to pay dividends on surplus, each breach of duty begins the running of the statute of limitations anew, so that accrual of a cause occurs continuously. *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606, 415 N.Y.S.2d 817 (1979); *Alrco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 430 N.Y.S.2d 179 (4th Dep't 1980). Moreover, before any discovery, the dates of MetLife's breaches are a question of fact and simply cannot be resolved on a motion to dismiss before discovery or trial. *Cerulean Land Developers Corp. v. Colon Development Corp.*, 144 A.D.2d 615, 535 N.Y.S.2d 35 (2d Dep't 1988).

For breach of fiduciary duty, the Second Cause of Action, MetLife recognizes (Dft. Brf. at 20-21) that the limitations period under CPLR § 213(8) for a fraud cause of action applies by arguing the law of fraudulent concealment. But MetLife argues that a three-year statute of limitations applies to breach of fiduciary duty. A six-year period applies, calculated "from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it." *Loengard v. Santa Fe Industrial, Inc.*, 70 N.Y.2d 262, 519 N.Y.S.2d 801 (1987) (six years limitations period); *Erbe v. Lincoln Rochester Trust Co.*, 2 A.D.2d 247, 154 N.Y.S.2d 184 (4th Dep't 1956), *aff'd* 3 N.Y.2d 842, 166 N.Y.S.2d 81 (1957) (same). *See Elghanayan v. Amir Victory*, 196 A.D.2d 358, 596 N.Y.S.2d 35 (1st Dep't 1993) (in a fiduciary claim limitations period commences from discovery of facts disclosing claim). *See also* CPLR § 203(g) (where limitations period commences from actual or imputed discovery of facts, action must be commenced within two years or as otherwise provided, "whichever is longer").

MetLife asserts that a three year limitations period applies under CPLR § 214(4) to breach of fiduciary duty based on a case in which the underlying claim was conversion by "wrongfully collected and retained insurance proceeds which belong to the plaintiff." *See Gold Sun Shipping Ltd. v. Ionian Transport Inc.*, 245 A.D.2d 420, 666 N.Y.S.2d 677, 1997 N.Y. App. Div. LEXIS 13071 (2d Dep't 1997). MetLife nowhere explains why its conduct constitutes a conversion - the Complaint does not allege that MetLife wrongfully collected and retained policyholders' monies, but rather that MetLife wrongfully handled plaintiffs' monies that it had the right to collect and retain. This is classic misbehavior by a fiduciary. In *Gold Sun Shipping*, the court concluded that fraud, breach of fiduciary duty and constructive trust claims were "merely incidental" to the conversion cause of action, and therefore were governed by the conversion statute of limitations period, because "the legal remedy for conversion would have afforded the plaintiffs full and complete relief." *Id.* This analysis is simply inapplicable to MetLife's misconduct here.[21]

MetLife, also attacks the allegations of the Complaint on fraudulent concealment and equitable tolling as "conclusory," and assert that they do not satisfy plaintiff's burden of alleging fraud. But MetLife does not move to strike these allegations as inadequate. Under this circumstance, the allegations of concealment should be accepted as establishing that the breach of fiduciary duty claim is timely.

MetLife attacks on fraudulent concealment and equitable tolling depend on its argument that no fiduciary relationship existed, but as explained above, a fiduciary relationship did exist, and MetLife's argument to the contrary simply raises an issue of fact for discovery and trial. MetLife recognizes that, if a fiduciary relationship existed, either affirmative conduct preventing plaintiff from discovering MetLife's wrongful conduct or a fiduciary relationship is sufficient to estop MetLife from asserting a statute of limitations defense. *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 340.

New York law further recognizes that equitable estoppel will bar assertion of the statute of limitations in circumstances resulting "from [1] representations or conduct which have induced a party to postpone bringing suit on a known cause of

action, *or* [2] from fraudulent concealment of an action which is unknown to a party." *Parsons v. Dep't of Trans.*, 74 Misc. 2d 828, 832, 344 N.Y.S.2d 19, 24 (Sup. Ct., Suffolk Co. 1973) (emphasis added). *Gleason v. Spata*, 194 A.D. 2d 764, 765, 599 N.Y.S.2d 297, 298 (2d Dep't 1993).[2] Both types of concealment are alleged here.

First, plaintiff alleges that MetLife fraudulently concealed the scheme whereby it diverted assets between the whole life portfolio and the annuity portfolio, by misrepresenting facts in its public filings with the Superintendent of Insurance. *See* Complaint ¶¶ 29 & 32. Second, plaintiff alleges that MetLife owes fiduciary duties to her as a whole life policyholder and that MetLife failed to inform her (or any other putative Class members) of the surplus reallocations and asset transfers underlying her claims. *See* Complaint ¶ 28. Third, plaintiff alleges that MetLife's fraudulent concealment and/or breach of its fiduciary duty to inform her of the underlying facts delayed her in bringing suit. *See* Complaint ¶ 31 at 7-8.

As alleged, MetLife made affirmative misstatements in its public filings that omitted disclosure of its reallocation of surplus and transfer of assets away from its whole life line of business. In determining whether tolling or equitable estoppel is appropriate, "the plaintiff's ability to discover the mistake" is of critical importance. *Goodbody v. Stern*, 93 Misc. 2d 109, 111, 402 N.Y.S.2d 167, 168 (Sup. Ct., N.Y.Co., 1978); *Metropolitan Life Ins. Co. v. Oseas*, 261 App. Div. 768, 772, 27 N.Y.S.2d 65, 69 (1st Dep't 1941). MetLife's affirmative misstatements in the face of a fiduciary duty to disclose estop it from asserting the statute of limitations as a defense.[3] *Knaysi v. A. H. Robins Co.*, 679 F.2d 1366, 1369, *rehearing denied* 688 F.2d 852 (11th Cir. 1982). MetLife argues that failures to disclose did not constitute "affirmative misstatements" (Dft. Brf. at 20), but the regulatory filings imposed on MetLife an affirmative duty to disclose reallocation of surplus or transfers of assets that would injure policyholders. In any event, this Court cannot determine in a motion to dismiss whether MetLife breached its duty to disclose or (as MetLife contends) made no affirmative misstatements, because that would go beyond the pleadings into issues for discovery and trial.

For unfair business practices, the Third Cause of Action, MetLife argues that a three-year statute of limitations governs the G.B.L. § 349 claim. Because of MetLife's *scienter*, plaintiff contends that the six year limitations period rule applicable to fraud should apply. Moreover, MetLife's argument, even if accepted, would simply restrict the period to recover damages under G.B.L. § 349 to the period three years before the filing of the Complaint; it is not a basis to dismiss this cause of action.

At most, MetLife's statute of limitations argument constitutes a claim that policyholders should be barred from recovering damages for conduct arising during certain time periods. Based upon the allegations of the Complaint, however, there is no basis to limit policyholders' recovery or to dismiss any cause of action based upon the statute of limitations.

CONCLUSION

Against a general policy that motions to dismiss are disfavored, the denial of the motion here is particularly appropriate because defendant has simply ignored statutory language, drawn analogies to inapplicable statutory law, and relied on language from cases either overruled by legislation or taken out of context. Further, defendant's conclusory statute of limitations arguments fail to address in any way the allegations that it concealed in its public filings the surplus reallocations and asset transfers that are central to the Complaint, allegations that justify both a tolling of and estoppel from the statute of limitations.

For the reasons set forth in this Memorandum, plaintiff Rabouin respectfully requests that the motion to dismiss be denied and that MetLife be directed to file and serve and Answer.

Footnotes

1 "Deft. Brf." refers to Defendant's Memorandum of Law in Support of its Motion to Dismiss Each Cause of Action in Plaintiff's Complaint, August 17, 1998.

2 "Cplt." refers to the Complaint in this action dated June 24, 1998.

3 109 N.Y. 421, 17 N.E. 363 (1888).

4 The date January 1, 1907 still appears at the end of Ins. L. § 4231(a)(1).

5 Transmitted to the Legislature on February 22, 1906 by a joint committee appointed by the Assembly and Senate. The Report is referred to as the "Armstrong Report," after State Senator William W. Armstrong, the senior Senator on the joint committee. The Report is 442 pages. Portions discussed in this Memorandum and the table of contents are attached as Exhibit A hereto.

6 The First Department also has found the Armstrong Report to provide useful guidance in Ins. L. § 4231 (then section 216). *Kern v. John Hancock Mut. Life Ins. Co.*, 8 A.D.2d 250, 261, 186 N.Y.S.2d 992, 998 (1st Dep't 1959). Part of the reason for the Armstrong Report's continued influence may be that Charles Evans Hughes was counsel for the Armstrong Committee. Armstrong Report, note 5 *supra*, at p. 2; *see Metropolitan Life Ins. Co. v. Durkin*, 301 N.Y. at 387-88, 93 N.E.2d at 903 (Conway, J., dissenting) (describing the work of the Armstrong Committee and noting Justice Hughes's participation).

7 Laws 1906, c. 326, § 23, amending Laws 1892, c. 690, § 83.

8 The decisions criticized were *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421, 17 N.E. 363 (1888), *Swan v. Mutual Reserve Fund Life Ass'n*, 155 N.Y. 9, 49 N.E. 258 (1898), and *Greeff v. Equitable Life Assurance Soc.*, 160 N.Y. 19, 54 N.E. 712 (1899).

9 In any case, the U.S. Supreme Court is not the most influential source for New York law, particularly where the Court admitted that there may have been no federal jurisdiction at all. 213 U.S. at 41.

10 47 N.Y.2d 619, 419 N.Y.S.2d 920 (1979), cited at p. 7 & 8 of Defendant's Memorandum of Law.

11 Ins. L. § 108(a).

12 Ins. L. § 108(d)

13 See *Methodist Hospital v. State Ins. Fund*, 64 N.Y.2d 365, 375-76, 486 N.Y.S.2d 905, 909-10 (1985) (distinguishing the State Insurance Fund from mutual life companies, the latter having annual dividends mandated by statute and having policyholders with a property interest in surplus (unlike holders of policies issued by the SIF).

14 The Armstrong Report (at 433) also criticized *Greeff v. Equitable Life Assur. Co.*, 160 N.Y. 19, 54 N.E. 712 (1899), although that decision seems to have been guided by section 56 of the then existing Insurance Law, which deprived policyholders of the right to an accounting. The 1899 *Greeff* decision was effectively overruled by Laws 1906, c. 326, § 15, which amended the Insurance Law by repealing this section 56.

15 Index No. 600457/97, Sup. Ct, N.Y.Co., Apr. 7, 1998 (attached as Exhibit 2 to MetLife's Memorandum of Law).

16 *Klonick v. Equitable Life Assur. Soc.*, 77 Misc. 2d 246, 353 N.Y.S.2d 372 (Sup. Ct., Monroe Co. 1974); *New York Trades Council v. Prudential Ins. Co.*, 1 Misc.2d 245, 144 N.Y.S.2d 303 (Sup. Ct., N.Y.Co. 1955).

17 77 Misc. 2d at 248, 353 N.Y.S.2d at 374-75.

18 1 Misc. 2d 245, 248-49, 144 N.Y.S.2d 303, 306-07.

19 Courts recognize "the general precept that a motion to dismiss should not be used to prune a cause of action if any portion of the cause of action is valid." *Ackerman, et al., v. Price Waterhouse*, 156 Misc. 2d 865, 870, 591 N.Y.S.2d 936, 940 (Sup. Ct. N.Y.Co. 1992) (Lebedeff, J.), *aff'd*, 198 A.D.2d 1, 604 N.Y.S.2d 721 (1st Dep't 1993), *rev'd* 84 N.Y.2d 535, 620 N.Y.S.2d 318 (1994), motion to amend remittitur denied, 85 N.Y.2d 836, 624 N.Y.S.2d 364 (1995). The *Ackerman* case provides a good if unintended illustration of the wisdom of this precept. In the 1992 decision the trial court provided a statute of limitations analysis even though a portion of the claims were conceded to satisfy the limitations period. 156 Misc. 2d at 870, 591 N.Y.S.2d at 940. The decision was

affirmed at the First Department and ultimately reversed by the Court of Appeals (citations above). Before appeal to the Court of appeals the Complaint was amended, and on a motion to amend the remittitur the Court of Appeals confirmed that the decision did not address the amended complaint. 185 N.Y.2d 836, 624 N.Y.S.2d 364. While the Court of appeals held that claims for all but the most recent of the years at issue were time-barred (85 N.Y.2d at 543, 620 N.Y.S.2d at 322), on remand the trial court denied a motion for summary judgment on the amended complaint. The denial was based on the concealment of material facts, as pleaded in the amended complaint and developed in discovery, which justified the tolling of the statute of limitations. Slip Op. at 35, reported at N.Y.L.J., May 13, 1997 (Gammerman, J.).
In effect, the premature effort to prune a cause of action resulted in a substantial waste of judicial resources on an appeal that was moot when taken. Rabouin has established beyond doubt that she has a contract cause of action for 1992. *Ackerman* demonstrates that the Court should be satisfied that the claims are not time-barred.

20 Although MetLife's argument heading (Defl. Brf. at 18) asserts that "each cause of action ... is time-barred," MetLife does not make any claim in its brief that the Fourth Cause of Action for an accounting is time-barred.

21 Furthermore, as *Gold Sun Shipping* explains, by pleading an implied contract, the statute of limitations for conversion effectively becomes six years: "[T]he plaintiff may waive the conversion cause of action and proceed on a breach of an implied contract theory to which a six-year statute of limitations period is applicable.

22 Both the Second Circuit and the Eleventh Circuit have reviewed New York law on equitable estoppel and have found its application to be warranted under circumstances such as those here. *Renz v. Berman*, 589 F.2d 735 (2d Cir. 1978); *Knaysi v A. H. Robins Co.*, 679 F.2d 1366, *rehearing denied* 688 F.2d 852 (11th Cir. 1982). The 11th Circuit concluded as follows:
Renz involved a diversity action by the beneficiaries of a trust for imposition of a constructive trust on shares of stock purchased by the trustee in an act of alleged self-dealing. In addressing whether the trustee could "be estopped from pleading the statute of limitations because of his conduct after the breach (of fiduciary duty) occurred," the Second Circuit canvassed New York law on equitable estoppel and, like the New York Supreme Court in *Parsons*, determined that two types of circumstances could give rise to equitable estoppel. [cited above] at 750. First, estoppel may occur *"when the defendant's affirmative misconduct,* after his initial (wrong giving rise to the cause of action), 'produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.' " *Id.* (quoting *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 340 (1966))... The second type of equitable estoppel occurs "when affirmative fraudulent statements are made which *conceal from the plaintiffs facts essential to make out the cause of action.*" *Id.* (citing *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49, 406 N.Y.S.2d 259 (1978); *General Stencils v. Chiappa*, 18 N.Y.2d 125, 272 N.Y.S.2d 337 (1966) (cover-up of criminal acts); *Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 214 N.Y.S.2d 849 (1961), appeal dismissed, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962) (false statement by fiduciary that it had legal right to purchase part of trust res); *Dodds v. McColgan*, 229 A.D. 273, 241 N.Y.S. 584 (1930) (elaborate hoax involving false disavowal of property ownership, misrepresentation of status as executrix of defunct estate, and execution of sham settlement).
679 F.2d at 1368 n.3 (emphasis added).

23 A trustee may not take advantage of the statute of limitations when the trust beneficiaries have been misled regarding a breach of trust. *Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961). In this case, the relationship between MetLife and the Plaintiff is most closely analogous to that of a trustee and beneficiary. *See* Argument III above.

End of Document

EXHIBIT 6

EXHIBIT 6

1. First D.M.V., Inc. v. Blaya
District Court of Appeal of Florida, Third District. December 21, 1993 630 So.2d 206 1993 WL 530846

Advanced Rent. Upon breach and termination of leasehold interest, advanced rent belonged to lessor.

...to the determination that the lessor could not maintain a claim for rent accruing after the March 1, 1988 date of sale, we affirm on authority of Gray v. Callahan, 143 Fla. 673, 197...

2. Parkridge Associates, Ltd v. Ledcor Industries, Inc.
Court of Appeals of Washington, Division 1. September 23, 2002 113 Wash.App. 592 54 P.3d 225

REAL PROPERTY - Contractors and Developers. Controlling date for statute of repose was date subcontractor terminated services, not substantial completion date.

...statute of repose applies to Ledcor Industries, Inc.'s equitable indemnity claim and that claim accrued more than six years after both the substantial completion date of the project and the...
...Inc., d/b/a Roy Freeman Roofing Co. (Freeman), we affirm the trial court's summary dismissal of that claim. We affirm...

3. Gale v. First Franklin Loan Services
United States Court of Appeals, Ninth Circuit. July 12, 2012 701 F.3d 1240 2012 WL 3764700

REAL PROPERTY - Mortgages and Deeds of Trust. Liability for not responding to borrower's correspondence attached only to those servicers who were also assignees of loan.

...his abode. Although Congress recognized the importance of such information after Gale's claim accrued, see Dodd–Frank Wall Street Reform and Consumer Protection Act...
...information), Gale cannot claim liability under this provision and we affirm dismissal of his claims arising from Franklin's failure to respond...

4. Brown v. Latin American Music Co., Inc.
United States Court of Appeals, First Circuit. August 07, 2007 498 F.3d 18 2007 WL 2253543

COPYRIGHTS - Music. Music company did not establish requisite threshold elements for proceeding with suit for copyright infringement.

...of this title unless it is commenced within three years after the claim accrued." see generally Otero v. P.R. Indus. Comm'n, 441 F.3d 18, 20 (1st Cir.2006) (the appellate court may affirm the judgment on any basis supported by the record). III...

5. Baillie Lumber Co. v. A.L. Burke, Inc.
Supreme Court, Erie County, New York. February 08, 2006 11 Misc.3d 1082(A) (Table, Text in WESTLAW), Unreported Disposition 819 N.Y.S.2d 848

This matter comes before the Court upon the motion of Defendants, Robertson–Ceco Corporation and Star Building Systems, for an order granting summary judgment and dismissing Plaintiff, Baillie Lumber Co.'s complaint and all pending cross-claims. Defendant and Third–Party Plaintiff, A.L. Burke, Inc., moves for

summary judgment dismissing the claims...

...not filed and served until 2003, more than six years after accrual of the claims (some of which had a three year statute of limitations...
...must be dismissed as time-barred (see CPLR 214 ; Gandy Affirm. Exhibit K [Order & Judgment, with attached Decision of Makowski, J...

6. Ashley v. Lamar
District Court of Appeal of Florida, Fifth District. May 02, 1985 468 So.2d 433 10 Fla. L. Weekly 1084

Individual filed a complaint against sheriffs and deputy sheriffs of two counties, alleging that they had used excessive force in effecting her arrest. The Circuit Court, Orange County, Frank N. Kaney, J., dismissed the complaint. Individual appealed. The District Court of Appeal, Sharp, J., held that complaint, which alleged...

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
..768.31, it shall be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

7. Shoshone Indian Tribe of Wind River Reservation v. U.S.
United States Court of Appeals, Federal Circuit. April 07, 2004 364 F.3d 1339 2004 WL 736687

NATIVE AMERICANS - Mineral Rights. Indian tribes' action for mismanagement of resources was not subject to statute of limitations.

..7 , permits the Tribes to bring their trust management claims after they receive an accounting—regardless of when such claims accrued —this court affirms the Court of Federal Claims' decision on direct appeal. We limit, however, the claims that may be brought to...

8. Pettigrew v. Zavaras
United States Court of Appeals, Tenth Circuit. July 30, 2014 574 Fed.Appx. 801 2014 WL 3733975

CIVIL RIGHTS - Prisons. Prison officials were not deliberately indifferent to prisoner's mental health in violation of Eighth Amendment.

...if we were to agree with Mr. Pettigrew that his claim did not accrue until after August 2009 (when his confinement conditions changed), and thus the...
...claim was not time-barred, we would be obliged to affirm on the alternative ground of qualified immunity. See, e.g., United...

9. Andrews v. Freemantlemedia N.A., Inc.
United States District Court, S.D. New York. November 20, 2014 Not Reported in F.Supp.3d 2014 WL 6686590

Plaintiffs, former contestants on the "American Idol" talent competition, bring this action against American Idol's production companies, broadcasting companies, and certain of its executive producers and sponsors. Plaintiffs allege violations of 42 U.S.C. § 1981, 42 U.S.C. § 1985, and Title VII, as well as four causes of...

..diligence-discovery rule governs. Thus, Second Circuit precedent-notably decided after City of Pontiac-expressly affirms that discrimination claims accrue at the time of the discriminatory conduct, not when plaintiffs...

10. De Yaranon v. U.S.
United States District Court District of Columbia. May 22, 1957 152 F.Supp. 644
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Action by mother of soldier, who died while in service of United States Army during World War II, to recover gratuitous National Service Life Insurance benefits. The District Court, Keech, J., held that under statutes providing that no application for insurance payments under statute providing that soldiers who die in line of duty shall be deemed...

...for insurance, unless filed in veterans' administration within seven years after date of death and that no suit shall be allowed unless brought within six years after right accrued for which claim is made, complaint filed May 23, 1955, by mother for benefits after final denial by board of veterans' appeals on December 23, 1952, of her claim filed with veterans...
...National Service Life Insurance, to be filed within seven years after date of death and providing that no suit shall be allowed unless brought within six years after right accrued for which claim is made, complaint filed May 23, 1955, by mother after final denial by board of veterans' appeals on December 23, 1952, of her claim filed with Veterans...

11. Smith v. Campbell
United States Court of Appeals, Second Circuit. April 01, 2015 782 F.3d 93 2015 WL 1449499

CIVIL RIGHTS - Limitations. Accrual of motorist's retaliatory prosecution claim was not delayed until after her trial or appeal.

...violation of his constitutional rights; (2) motorist's retaliatory prosecution claim accrued when she was served with traffic tickets; and (3) accrual of motorist's retaliatory prosecution claim was not delayed until after her trial or appeal. Affirmed in part, vacated in part, and remanded. West Headnotes...
...state police department, arising out of trooper's alleged harassing conduct after traffic stop and issuance of traffic tickets after she complained of his conduct, was not delayed until after her trial or appeal; the claim accrued prior to any conviction, and rule of Heck v. Humphrey...

12. Wagatha v. City of Satellite Beach
District Court of Appeal of Florida, Fifth District. January 23, 2004 865 So.2d 620 2004 WL 119356

GOVERNMENT - Tort Claims. Plaintiff failed demonstrate that she provided required pre-suit notice of claim against city.

.. writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency...
...768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

13. Ferguson v. Ferguson
Supreme Court of Appeals of Virginia September 23, 1937 169 Va. 77 192 S.E. 774

Appeal from Circuit Court, Scott County; E. T. Carter, Judge. Suit by C. M. Ferguson and others against H. B. Ferguson and others to contest the will of Ida J. Ferguson, deceased. From a decree setting the will aside,

named defendant appeals. Affirmed.

...of limitations applies to all rights or causes of action after its passage, leaving all rights or causes of action existing... ...the operation of prior limitations, unless otherwise provided. Therefore, rights accrued, claims arising, proceedings instituted, orders made under the former law, or...

14. Majette v. O'Connor
United States Court of Appeals, Eleventh Circuit, March 06, 1987 811 F.2d 1416
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Arrestee brought §1983 civil rights action seeking damages for alleged acts of police brutality against city, three members of city police department, deputy sheriff of county, chief of police of city, and sheriff of county. Sheriff filed motion to dismiss complaint for failure to comply with notice provisions of Florida law....

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it shall be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

15. Laconti v. Principi
United States Court of Veterans Appeals. December 22, 1992 3 Vet.App. 550 1992 WL 381743

JURISDICTION. veteran's son's claim for accrued benefits had not been subject of prior valid notice of disagreement so as to preclude jurisdiction.

...Steinberg , J., held that court had jurisdiction over a son's claim for accrued benefits based on veteran's claim for service-connected disability benefits, which remained pending at the...
...accrued benefits was predicated upon an accrued benefits application filed after the veteran's death, and thus the claim had not been...

16. Orange County v. Gipson
Supreme Court of Florida. September 07, 1989 548 So.2d 658 1989 WL 104500

City cross-claimed against county and school board when county failed to contribute to two $100,000 settlements in wrongful death action brought by estates of two children who drowned on county property. At trial, county was found 25% negligent and city was found 75% negligent. The Circuit Court, Orange County, Emerson R. Thompson, Jr., J., entered...

...In writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it shall be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

17. Kahyaoglu v. Caritas Carney Hosp.
Appeals Court of Massachusetts. August 15, 2013 84 Mass.App.Ct. 1107 (Table, Text in WESTLAW), Unpublished Disposition 992 N.E.2d 401

The plaintiff appeals from the dismissal of her amended complaint, which asserts various causes of action arising from her termination as a medical resident. Largely on statute of limitations grounds, a Superior Court judge allowed the defendants' motion to dismiss, and we affirm. "We review the allowance of a motion to dismiss de novo,...

...defendants informed Dr. Kahyaoglu that she was being denied reinstatement, after appeal, in February 2004" is sufficient to take this case outside the general rule that a breach of contract claim accrues at the time of the breach, see Berkshire Mut. Ins,..

18. Owens v. White
United States Court of Appeals Ninth Circuit. March 12, 1965 342 F.2d 817
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Action by patient against physicians and hospital for alleged malpractice arising from removal of patient's breast and surrounding tissue following defendants' alleged negligence in diagnosing a benign tumor as being cancerous. The United States District Court for the District of Idaho, Southern Division, Chase A. Clark, J., dismissed patient's...

...State had not had occasion to consider the question. Shortly after this appeal was taken, however, the Idaho court, in the case of...
...contention urged upon it by the defendant that such a claim accrues at the time of the negligent act, regardless of the...

19. Villa Maria Nursing and Rehabilitation Center, Inc. v. South Broward Hosp. Dist.
District Court of Appeal of Florida, Fourth District. April 08, 2009 8 So.3d 1167 2009 WL 928461

LITIGATION - Dismissal. Equitable subrogation claim should not have been dismissed with prejudice.

...writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency...
..768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

20. Vig v. New York Hairspray Co., L.P.
Supreme Court, Appellate Division, First Department, New York. March 22, 2012 93 A.D.3d 565 940 N.Y.S.2d 615

LABOR AND EMPLOYMENT - Limitations. Discrimination claims accrued when employee was informed that his employment would be terminated as of specified date.

...N.Y. §8-502[d]). (2) Plaintiff's contention that his claims did not accrue until November 16, 2004, when he reported back to the theater after being medically approved to return to work, is unavailing (see...
...216 A.D.2d 469, 470, 628 N.Y.S.2d 379 [1995], appeal dismissed 87 N.Y.2d 893, 640 N.Y.S.2d 873, 663...

21. Zaldivar v. United States Department of Veterans Affairs
United States District Court, D. Arizona. October 27, 2015 Not Reported in F.Supp.3d 2015 WL 6468207

Plaintiff Jose Adalberto Zaldivar, Sr., who is currently confined in Arizona State Prison Complex-Eyman, brought

this pro se civil rights case pursuant to 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986, as well as Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Freedom of Information Act...

...Id. § 552(a)(6)(A)(i) Thus, a FOIA claim accrues either (1) when an agency fails to meet the 20-day deadline after receiving a FOIA request or an appeal from a denial of a FOIA request, or (2) when an agency makes a timely response to an appeal from a timely adverse determination of an initial FOIA request...
...OGC argue that the cause of action on this FOIA claim accrued on or about April 1, 2008, 20 business days after OGC acknowledged receipt of the appeal on March 4, 2008. (Doc. 21 at 4.) C. Discussion...

22. O'Donnell v. Metropolitan Life Ins. Co.
United States District Court, S.D. New York. February 20, 2009 Not Reported In F.Supp.2d 2009 WL 884699

TO THE HONORABLE CATHY SEIBEL, United States District Judge: On February 4, 2008, plaintiff Barbara D. O'Donnell commenced this pro se action seeking relief pursuant to the Employee Retirement Income Security Act of 1974, ("ERISA"), as amended, 29 U.S.C. § 1001, et seq. Plaintiff alleges that defendants Metropolitan Life Insurance...

...discord throughout the Second Circuit as to whether an ERISA claim accrues at the first denial of benefits or after the appeals process is completed. See Burke v. PriceWaterhouseCoopers LLP Long Term...

23. Pirez v. Brescher
Supreme Court of Florida. August 29, 1991 584 So.2d 993 1991 WL 165229

Suit was brought against county sheriff's office. The Circuit Court, Broward County, Robert C. Abel, Jr., J., dismissed for failure to give proper notice, and appeal was taken. The District Court of Appeal, 566 So.2d 577, affirmed, and certified question. The Supreme Court, McDonald, J., held that notice of claim against...

...In writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it shall be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

24. Hupp v. Shinseki
United States Court of Appeals for Veterans Claims. August 31, 2009 23 Vet.App. 242 2009 WL 3297818

Before the Court is Sandra K. Hupp's appeal, through counsel, of a July 14, 2003, Board of Veterans' Appeals (Board) decision that denied her claims for accrued benefits under 38 U.S.C. §5121 and service connection for the cause of her veteran-husband's death for the purpose of 38 U.S.C. §1310 dependency and indemnity...

...2007, the Court affirmed the Board's denial of Mrs. Hupp's accrued benefits claim after concluding that Mrs. Hupp had abandoned her appeal of that claim because she had raised no specific assertion...

25. McCreedy v. Local Union No. 971, UAW
United States Court of Appeals, Sixth Circuit. January 23, 1987 809 F.2d 1232 124 L.R.R.M. (BNA) 2508

Former employees filed "hybrid section 301" cause of action alleging that employer had breached collective bargaining agreement and that union had breached duty of fair representation. Union filed cross claim against

employer seeking to compel arbitration. Employer moved for summary judgment on both claims. Union moved for summary judgment on its...

...that: (1) employees' hybrid cause of action arose seven days after receipt of employer's letter responding to employees' grievances, when union failed to appeal unsettled grievance or seek arbitration; (2) limitation period of six...
...and (3) union's claim against employer, seeking to compel arbitration, accrued seven days after employees' claims were denied, where union took no appeal from employer's denial of employee's grievances. Affirmed in part, reversed...

26. Lopez v. Prager
District Court of Appeal of Florida, Third District. August 31, 1993 625 So.2d 1240 1993 WL 331422

Notice. Plaintiff failed to notify Department of Insurance of claim against county.

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

27. Colman v. Wendover Funding, Inc.
United States Court of Appeals, Tenth Circuit. June 12, 1996 89 F.3d 849 (Table, Text in WESTLAW), Unpublished Disposition 1996 WL 316460

Plaintiffs Earl and Dorothy Colman appeal the summary judgment entered in favor of defendant Wendover Funding, Inc. (Wendover). Plaintiffs originally filed this action in state court seeking a declaratory judgment to declare the terms of the mortgage and loan modification agreement which Wendover is allegedly responsible for servicing. Plaintiffs...

...RTC in late 1990. Further, it is arguable that the claim did not actually accrue until after Earl Colman's discharge in bankruptcy, at which time his retention...
...RTC. Although we find it unnecessary to conclusively determine on appeal when the claim for declaratory relief accrued, we have little doubt that it did so after the...

28. Mills v. Brown
United States Court of Veterans Appeals. December 02, 1996 15 Vet.App. 159 (Table, Text in WESTLAW), Unpublished Disposition 1996 WL 695233

On April 16, 1996, the appellant filed a Notice of Appeal (NOA) from a February 8, 1996, Board of Veterans' Appeals (BVA or Board) decision finding that new and material evidence had not been submitted to reopen the appellant's deceased veteran husband's claim for service connection for coronary artery disease; and that entitlement to service...

...to decide the merits of a veteran's disability-compensation claim after the death of the veteran; and (3) to adjudicate an accrued-benefits claim as part of an appeal relating to a compensation claim. Landicho, 7 Vet.App. at 44...

29. Orange County v. Gipson
District Court of Appeal of Florida, Fifth District. March 02, 1989 539 So.2d 526 1989 WL 16630

Decedents' estates brought action against city and county after one decedent drowned in county's drainage

canal after falling from city's sewer pipes, and other decedent drowned while attempting to rescue. After city and its insurer settled with estates, city and its insurer filed cross claim for contribution against county and school board. The...

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it shall be so presented within 6 months after the judgment against the tort-feasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

30. Samaritan Health Center v. Simplicity Health Care Plan
United States District Court, E.D. Wisconsin. September 17, 2007 516 F.Supp.2d 939 2007 WL 2704237

LABOR AND EMPLOYMENT - Benefit Plans. The care provided to a health care plan participant by a skilled nursing facility constituted custodial care.

...for performance of contract. An ERISA benefits cause of action accrues when the claim for benefits is finally denied, such as a denial after appeal. Employee Retirement Income Security Act of 1974, §502(a...
...824 [4] [5] [6] An ERISA benefits cause of action accrues when the claim for benefits is finally denied, such as a denial after appeal. Daill v. Sheet Metal Workers' Local 73 Pension Fund, 100...

31. Best v. Newton
United States District Court, S.D. New York. September 28, 2016 Slip Copy 2016 WL 5416505

Pro se Plaintiff Hilary Best brings this action against Defendants Warden Clarence Newton ("Warden Newton"), Captain Morris ("Morris"), and Captain Martin ("Martin") for alleged violations of his constitutional rights during disciplinary proceedings that took place while Plaintiff was confined at the Otis Bantum...

...was timely because he filed it less than three years after he received a final decision on his grievance); see also...
...S.D.N.Y. June 1, 2015) (finding a prisoner's procedural due process claims accrued no later than the date on which the director confirmed...

32. Bradley v. U.S.
United States District Court, E.D. Michigan, Southern Division. October 02, 2012 Not Reported in F.Supp.2d 2012 WL 4513792

This is a medical malpractice case brought under the Federal Tort Claims Act, 28 U.S.C. § 1346, et seq (FTCA). Plaintiff Beverly Bradley (plaintiff), personal representative of the estate of Milford Douglas Reed (Reed), is suing the defendant United States of America (defendant), claiming that Reed's death was caused by Dr. Ahmer Rehman's...

...begin to run until the autopsy report was released. Id. After Garrett, however, the court of appeals in Chomic clarified that the date of death is not necessarily when a claim accrues. In Chomic, James Gorjup slipped and fractured his hip while...

33. Majette v. Butterworth
United States District Court, S.D. Florida. April 25, 1988 699 F.Supp. 882 1988 WL 122492

Pretrial detainee brought §1983 action against former sheriff with respect to conditions of his detention. Upon sheriff's motion to dismiss, and detainee's motion to strike and motion for default judgment, the District Court,

Paine, J., held that: (1) detainee was not entitled to grant of his motions on basis that...

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it shall be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

34. Hall v. Shinseki
United States Court of Appeals for Veterans Claims. July 01, 2013 Not Reported in Vet.App. 2013 WL 3293986

On April 24, 2012, this Court issued a memorandum decision vacating and remanding a July 14, 2010, Board of Veterans' Appeals decision denying the appellant's claim for entitlement to service connection for the death of her husband, a veteran. Judgment issued on June 18, 2012, and this Court's mandate issued on August 17, 2012 . On November 21,...

...2013, the Court ordered the appellant's estate, within 45 days after the date of the order, to inform the Court whether Starlette Hall has filed an accrued benefits claim at the regional office or show cause why the July...
...14, 2010, Board decision should not be vacated and this appeal dismissed. The appellant's estate has failed to file a response...

35. Drahaus v. State
Supreme Court of Iowa. September 23, 1998 584 N.W.2d 270 1998 WL 650870

Minor's adoptive parents brought action against state alleging its negligence in failing to properly investigate the alleged prior abuse of minor. The District Court, Polk County, Robert A. Hutchison, J., granted summary judgment in favor of State, on statute of limitations grounds, and parents appealed. The Supreme Court, McGiverin, C.J., held...

...Tort Claims Act is "forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter." 3 Thus, before filing a petition...
...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit...

36. Myers v. County of Orange
Court of Appeal, Fourth District, Division 2, California. April 16, 1970 6 Cal.App.3d 626 86 Cal.Rptr. 198

Action by widow of county employee seeking damages for alleged wrongful discharge. The Superior Court, Orange County, Claude M. Owens, J., dismissed the case, and appeal was taken. The Court of Appeal, Kaufman, J., held that one-year claim period was tolled, in widow's action seeking damages for wrongful discharge of her husband from county...

...year claim period and thus satisfied the purposes of the claims statutes, so that, assuming accrual of causes of action on August 22, 1966, when letter...
...claim filed February 14, 1968 was well within one year after accrual in each instance, as extended by time consumed during hearings before Appeal Board and mandate proceeding, a total of 240 days. Reversed...

37. Tholke v. Unisys Corp.
United States District Court, S.D. New York. April 16, 2002 Not Reported in F.Supp.2d 2002 WL 575650

Plaintiff, Andrea Tholke ("Tholke"), brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., challenging the denial of long-term disability benefits under her employer's benefit plan. The parties filed cross-motions for summary judgment. For the following reasons, the plaintiff's motion is...

...is disagreement within the Circuit, however, as to whether a claim accrues on the date of the initial denial of benefits or the date of the final denial of benefits after plaintiff has exhausted the appeals process. See Yuhas v. Provident Life and Cas. Ins. Co...

38. Padgett v. Shinseki
United States Court of Appeals for Veterans Claims. December 16, 2009 23 Vet.App. 306 2009 WL 4828974

VETERANS - Service Connection. Widow was prevailing party entitled to attorney fee award, under Equal Access to Justice Act, only on behalf of veteran.

...behalf of veteran as prevailing party for service connection and accrued disability benefits claim prior to his death, was not per se unreasonable compared to $58,525 received on accrued benefits claim, fee request would be reduced to $27,888.67, under EAJA's...
...fees award for work on claim in her own capacity after veteran's death, but only for work on behalf of deceased veteran in progression of his appeal. 28 U.S.C.A. §2412(d) Before GREENE , Chief Judge, and...

39. Tautkus v. Saunders
Court of Appeals of Michigan. November 19, 2015 Not Reported In N.W.2d 2015 WL 7370101

Plaintiffs appeal by right the trial court's order granting summary disposition to defendants and dismissing plaintiffs' legal malpractice action. We affirm. This action arose out of the settlement of plaintiff Dennis Tautkus's workers' compensation case. Tautkus had been employed by the City of Albion until he received a duty disability retirement...

...2006) When an attorney fails to send a discontinuation letter after the resolution of the matter for which he was retained... ...Court suggested that the result is that the legal malpractice claim accrues on the expiration of the appeal period for the matter. Id. at 8 n. 2. Some...

40. Diba Family Ltd. Partnership v. Ross
United States Court of Appeals, Second Circuit. June 04, 2015 606 Fed.Appx. 628 2015 WL 3498658

Plaintiffs–Appellants Diba Family Limited Partnership and 170 East 75th LLC (collectively, "Diba") appeal from the October 27, 2014 memorandum opinion and order and October 28, 2014 judgment of the United States District Court for the Southern District of New York (Schofield, J.) granting Defendants–Appellees David Ross and...

...absence of the present proceeding. Second, Diba states that its " claim for legal fees accrued after judgment in the eviction case" (Plaintiffs' brief on appeal at 16), a judgment that was entered on October 15...

41. English v. Shinseki
United States Court of Appeals for Veterans Claims. September 30, 2011 Slip Copy (Table, Text in WESTLAW). Unpublished Disposition 2011 WL 4525990

On June 7, 2010, appellant Isidra D. English, wife of deceased Veteran Alfredo English, filed a Notice of Appeal from a May 3, 2010, Board of Veterans' Appeals (Board) decision. On November 1, 2010, the Court received notice, with an accompanying death certificate, that Ms. English died on September 11, 2010. On December 16, 2010, Ms. English's...

...the Court ordered that Ms. English Padilla, within 20 days after the date of the order: (1) inform the Court whether she has filed an accrued benefits claim at the regional office (RO); (2) submit evidence that she...
...3, 2010, Board decision should not be vacated and this appeal dismissed. On April 19, 2011, the movant's counsel filed a...

42. Lederer v. Orlando Utilities Com'n
District Court of Appeal of Florida, Fifth District. April 18, 2008 981 So.2d 521 2008 WL 1752222

GOVERNMENT - Tort Claims. City utilities commission was not a municipality or a city department for purposes of notice requirement of immunity-waiver statute.

...in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies...
...768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

43. Maggio v. Florida Dept. of Labor and Employment Security
Supreme Court of Florida. March 24, 2005 899 So.2d 1074 2005 WL 673677

LABOR AND EMPLOYMENT - Public Employment. Civil rights claims were not subject to presuit notice requirements for waiver of sovereign immunity in tort action.

...writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency...
...768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

44. Skiptunas v. State
Supreme Court, Appellate Division, Third Department, New York. January 24, 2002 290 A.D.2d 868 736 N.Y.S.2d 767

EDUCATION - Administrators. Suit against Department of Education was untimely.

...the Panel to dismiss all charges. Accordingly, the Court of Claims found that the claim accrued on November 27, 1996, when the parties received notice of the report five days after its issuance and did not appeal or seek review in the 30 day period thereafter. We...

45. Kaplan v. Shure Bros., Inc.
United States Court of Appeals, Seventh Circuit. August 11, 1998 153 F.3d 413 1998 WL 462061

Illinois land trust beneficiary, to whom real estate purchaser had allegedly assigned its interest, sued vendor and law firm that represented him during purchase and related matters. Beneficiary alleged that vendor breached warranties and representations contained in land sales contract, and that beneficiary was injured when law firm failed to have...

...205 The district court determined that Kaplan's failure-to-assign claim accrued after January 1, 1991, and applied the provisions of section 5/13–214.3(b) and (c) ; on appeal, Kaplan asserts that his claim accrued in 1987, not 1991 (or thereafter), and that the five...

46. Blanco v. American Tel. & Tel. Co.
Court of Appeals of New York. November 25, 1997 90 N.Y.2d 757 689 N.E.2d 506

PRODUCTS LIABILITY - Limitations. Repetitive stress claim against keyboard manufacturer accrues for limitations purposes with onset of symptoms or last use of keyboard, whichever is earlier.

...as modified 223 A.D.2d 156, 646 N.Y.S.2d 99. After permission to appeal was granted, the Court of Appeals Wesley , J., held that: (1) general tort statute of limitations...
...applies to RSI claims against keyboard manufacturers, and (2) RSI claim against keyboard manufacturer accrues for limitations purposes with onset of symptoms or last use...

47. Fern v. U S
United States Court of Appeals, Ninth Circuit. May 18, 1954 15 Alaska 31 213 F.2d 674

Action was brought against the United States under the Contract Settlement Act. The District Court for the Territory of Alaska, Fourth Division, Harry E. Pratt, District Judge, entered an order dismissing the second amended complaint, on ground that cause of action was barred by statute of limitations, and plaintiffs appealed. The Court of Appeals,...

...actions against the United States, running from the date the claim accrues; and Sec. 13(d)(2) of the Act, providing for... ...ninety-day period during which an action may be commenced after unfavorable action by the Appeal Board. Since the claim arose when the Army cancelled the...

48. Barger v. McCoy Hillard & Parks
Court of Appeals of North Carolina. May 07, 1996 122 N.C.App. 391 469 S.E.2d 593

TORTS - Professional Malpractice. Claim against accounting firm sounded in negligent misrepresentation and not in accounting malpractice.

...2d 252, affirmed in part, reversed in part, and remanded. After motion for rehearing was granted, the Court of Appeals John C. Martin , J., held that: (1) claim sounded in...
...accountant, and (2) fact issue as to when negligent misrepresentation claim accrued precluded summary judgment. Affirmed in part, reversed in part, and...

49. Williams v. Shinseki
United States Court of Appeals for Veterans Claims. May 10, 2010 Slip Copy (Table, Text in WESTLAW), Unpublished Disposition 2010 WL 1841941

In an order issued on April 5, 2010, this Court noted that in January 2009, Annice F. Williams, the asserted surviving spouse of the veteran, filed pro se, on behalf of the veteran, a Notice of Appeal (NOA) and advised that the veteran had died on December 15, 2008, a few days after issuance of a decision of the Board of Veterans' Appeals in the...

...is ORDERED that the Secretary, not later than 14 days after the date of this order, file a supplemental response, (1...

...do not constitute, as a matter of law, an informal claim for accrued benefits based on an intent to carry on the appeal or claims of the deceased veteran; and (2) informing the...

50. Lindsey v. Board of Ed. of Mt. Morris Central School Dist.
Supreme Court, Appellate Division, Fourth Department, New York. July 13, 1978 64 A.D.2d 856 407 N.Y.S.2d 350

Dismissed teacher brought special proceeding seeking reinstatement with tenure to full-time teaching position and back salary. The Livingston Supreme Court, Andrew V. Siracuse, J., ruled in favor of teacher, and appeal was taken. The Supreme Court, Appellate Division, Fourth Department, held that where no verified claim was presented to board of...

...claim was presented to board of education within three months after claim accrued and where, although issue was not specifically raised at special term, there was no indication in briefs on appeal or record that dismissed teacher could have taken legal countersteps ..
...be considered by Appellate Division of the Supreme Court on appeal. [2] 141E Education 141EII Public Primary and Secondary Schools 141Ell...

51. Wallace v. City of Chicago
United States Court of Appeals, Seventh Circuit. March 08, 2006 440 F.3d 421 2006 WL 549008

CIVIL RIGHTS - Arrest and Detention. Unlawful arrest claim accrued for limitations purposes at time of arrest.

...initially conceded that the claim was time-barred because the claim accrued for limitations purposes at the time of his arrest, where...
...notified the district court that he changed his position immediately after Court of Appeals issued decision in Gauger v. Hendle , that would support accrual of unlawful arrest claim at time conviction was overturned. U.S.C.A. Const.Amend. 4 42 U.S.C.A...

52. Doe v. Cedar Rapids Community School Dist.
Iowa District Court. February 23, 2004 Not Reported In N.W.2d 2004 WL 3361982

Hearing was held on February 20, 2004, on the Defendant's motion for summary judgment. At the time of hearing, the following appeared: Thad Collins for the defendant; Todd Becker and Roxanne Conlin for the plaintiffs. Plaintiffs filed this municipal tort claim against the Cedar Rapids Community School District, seeking damages for abuse allegedly...

...this chapter shall be forever barred, unless within two years after such claim is accrued, the claim is made in writing to the state appeal board under this chapter. The court held "that the tolling...

53. Weingartner v. Township of Deptford
Superior Court of New Jersey, Appellate Division. June 01, 2007 Not Reported In A.2d 2007 WL 1574546

On Wednesday, March 30, 2005, Sarah Weingartner, who was twenty-two years old and nearly eight months pregnant, was driving in Deptford Township (the Township) when she stopped to make a left-hand turn. Her vehicle was struck by a vehicle operated by Deptford Police Officer Michael Taylor, who was responding to a 911 call and was traveling...

...permit a late filing "at any time within one year after the accrual of" the claimant's claim, N.J.S.A. 59:8-9 , the grant or denial

of permission...
... discretion of the trial court, and will be sustained on appeal in the absence of a showing of an abuse thereof...

54. Morris v. City of Orlando
United States District Court, M.D. Florida, Orlando Division. November 09, 2010 Not Reported in F.Supp.2d 2010 WL 4646704

This case comes before the Court on the following: 1. Motion to Dismiss Complaint by Defendant City of Orlando (Doc. No. 29, filed Oct. 1, 2010); 2. Objection to Defendant City of Orlando's Motion to Dismiss Complaint by Plaintiff Larry L. Morris, Jr. (Doc. No. 31, filed Oct. 15, 2010); 3. Motion to Dismiss Complaint by Defendant Finley Johnson...

...writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency...
...768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such...

55. McGruder v. State
Supreme Court of Iowa. March 16, 1988 420 N.W.2d 425 1988 WL 22592

Automobile accident victim brought tort claim against State, and appeal board denied claim. Victim appealed. The District Court for Polk County, Ray Hanrahan, J., sustained State's special appearance, and victim appealed. The Supreme Court, Larson, J., held that claim was not "made" within meaning of state tort claims act until it was filed, and...

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The issue in this case is ...

56. Reeves v. Shinseki
United States Court of Appeals, Federal Circuit. June 14, 2012 682 F.3d 988 2012 WL 2149395

VETERANS - Disability Benefits. Board of Veterans' Appeals' failure to apply statutory combat presumption was clear and unmistakable error.

...a surviving spouse, had standing to be substituted for decedent, after notice of appeal was filed, in action seeking veterans' benefits; even if standing...
...could be established only if a surviving spouse filed an accrued-benefits claim, wife's motion to be substituted for her husband qualified as an informal claim for accrued benefits. F.R.A.P.Rule 43(a)(1), 28 U.S.C.A [3] 1708 Federal...

57. Kontrick v. Ryan
Supreme Court of the United States January 14, 2004 540 U.S. 443 124 S.Ct. 906

BANKRUPTCY - Discharge. Claim that objection to discharge was untimely was forfeited.

...unless presented "to the appropriate Federal agency within two years after [the] claim accrues " or civil action "is begun within six months after notice of final denial of the claim by the agency...
...2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action...

58. Commercial Logistics Corp. v. ACF Industries, Inc.
United States Court of Appeals, Seventh Circuit. March 17, 2009 316 Fed.Appx. 499 2009 WL 722618

LITIGATION - Limitations. Statute of limitations on statutory claim did not begin to run until the statute took effect.

...directly on point. See Id., at *3. Roughly nine months after the district court's decision, the Indiana Court of Appeals likewise concluded that a claim under the ELA accrued with the preenactment discovery of contamination. Cooper Indus., LLC v...

59. International Union of Bricklayers and Allied Craftworkers, Local 5 v. Banta Tile & Marble
United States District Court, M.D. Pennsylvania. December 15, 2009 Not Reported in F.Supp.2d 2009 WL 4906525

LABOR AND EMPLOYMENT - Arbitration. There was no compelling reason to reconsider an arbitrator's award to a health and welfare fund.

...In these principal claims are identified by Local 5 as claims which accrued in November 2008, after the district court upheld the arbitrator's decision, and following Banta's appeal of this ruling. Thus, these additional obligations accrued during the...
...$89,930.80 in interest are identified by Local 5 as claims which accrued in November 2008, after the district court upheld the arbitrator's decision, and following Banta's appeal of this ruling, a time frame when Banta neglected to...

60. Mallory v. State
Supreme Court, Appellate Division, Third Department, New York. September 23, 1993 196 A.D.2d 925 601 N.Y.S.2d 972

Notice of Intention to File Claim. Claimant's failure to timely provide Attorney General with notice of intention to file claim deprived Court of Claims of jurisdiction over claim.

...a)) Because that did not occur until the 91st day after accrual of the claim, the Court of Claims lacked jurisdiction over the case and...
...2d 501, 450 N.Y.S.2d 1023, 435 N.E.2d 679, appeal dismissed 56 N.Y.2d 568, 450 N.Y.S.2d 185, 435...

61. Urban v. Shinseki
United States Court of Appeals for Veterans Claims. January 05, 2011 Slip Copy (Table, Text in WESTLAW), Unpublished Disposition 2011 WL 30760

Mrs. Jennie G. Urban appeals, pro se, a May 14, 2008, Board of Veterans' Appeals (Board) decision that denied her various claims for VA accrued benefits derived from her deceased veteran husband's service-connected disabilities and claims pending at the time of his death. She argues that her husband should have been awarded a 100% schedular rating...

...511-12 (2006) Thus, in view of the foregoing, and after considering the positions of the parties, and the entire record...
...that the Board did not err in denying, all for accrued benefits purposes, the claims presented here on appeal. The Board provided an adequate statement of reasons or bases...

62. Affholder, Inc. v. Preston Carroll Co., Inc.
United States Court of Appeals, Sixth Circuit. June 22, 1994 27 F.3d 232 1994 WL 272484

Subcontractor on waste water treatment project brought action against general contractors for delay costs allegedly incurred as result of deficient plans. General contractors filed third-party complaint against sewer district, engineers who supplied the plans, and others for indemnity. After remand, 866 F.2d 881, the United States...

...J., entered summary judgment for engineers, and general contractors appealed. After certifying questions to the Supreme Court of Kentucky, the Court of Appeals held that: (1) general contractors had claim for indemnity against... ...subject to five-year statute of limitations; and (3) indemnity claims accrued when subcontractor filed claim. Reversed and remanded. West Headnotes [1] 208 Indemnity 208III Indemnification...

63. Richardson v. Shinseki
United States Court of Appeals for Veterans Claims. June 28, 2013 Not Reported in Vet.App. 2013 WL 3282955

On September 26, 2012, the Board of Veterans' Appeals (Board) issued a decision dismissing George T. Richardson's claim because Mr. Richardson had died earlier that month. In its decision, the Board noted that the appeal was not being adjudicated on the merits and instead was being dismissed for lack of jurisdiction as result of the death of Mr....

...and subsequently granted by the agency of original jurisdiction (AOJ) after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. See VA Fast Letter 10–30 at 3 (Aug. 10...

64. Miller v. McDonald
United States Court of Appeals for Veterans Claims. June 05, 2015 Not Reported in Vet.App. 2015 WL 3541473

On September 22, 2014, Joan S. Miller, spouse of veteran James M. Miller, filed what the Court accepted as a Notice of Appeal (NOA) as to a January 23, 2014, Board of Veterans' Appeals (Board) decision. The Board's decision reflects that the veteran died in December 2013 and that the Board dismissed his appeal without prejudice, noting that its...

...filed and subsequently granted by the agency of original jurisdiction after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. 38 C.F.R. § 20.1302(a) "If the agency of...

65. Harrison v. West
United States Court of Appeals, for Veterans Claims. July 21, 2000 17 Vet.App. 390 (Table, Text in WESTLAW), Unpublished Disposition 2000 WL 1228704

Mrs. Geraldine Harrison appeals, pro se, a December 14, 1998, Board of Veterans' Appeals (Board) decision that determined that she had not filed a timely Substantive Appeal. The Court has jurisdiction under 38 U.S.C. § 7252(a). The Secretary filed a motion for summary affirmance of the Board's decision. Summary disposition is appropriate. See...

...the appeal to the RO was dated February 1, 1998. After issuing a Supplemental SOC, the RO advised Mrs. Harrison that her Substantive Appeal was not timely filed and, consequently, that the RO decision denying her claim for accrued benefits was final. R. at 363. She filed an NOD...

66. Haefner v. Lancaster County
United States District Court, E. D. Pennsylvania. August 11, 1981 520 F.Supp. 131

https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Proceeding was instituted on motion of defendants to dismiss civil rights complaint. The District Court, Troutman, J., held that: (1) **claims** for unlawful arrest and for physical and mental abuse during police custody most nearly resembled state tort actions for assault and battery, false arrest and imprisonment, and since plaintiff knew of injury...

...merit in Pennsylvania law required institution of suit for such **claims** within two years of **accrual**, and (2) where state court declared a mistrial **after** jury could not reach a verdict and, on **appeal**, Superior Court of Pennsylvania held that trial court's premature discharge...

67. Ramirez v. Barsanti
United States Court of Appeals, Seventh Circuit. June 30, 2016 654 Fed.Appx. 822 2016 WL 3619362

CIVIL RIGHTS - Prisons. Immediate dismissal of inmate's **appeal** was warranted as sanction under Prison Litigation Reform Act.

...prisoner from proceeding without prepayment of filing and docketing fees **after** accruing three "strikes" resulting from actions or **appeals** dismissed as frivolous or for failure to state **claim**, since inmate had **accrued** more than three strikes, and had deceived district court and...

68. Nixon v. State
Supreme Court of Iowa. September 30, 2005 704 N.W.2d 643 2005 WL 2398232

EDUCATION - Limitations. **Claims** against state accrued when subjects discovered that they had been subjects of professor's stuttering experiment.

...this chapter shall be forever barred, unless within two years **after** such **claim accrued**, the **claim** is made in writing to the state **appeal** board under this chapter. Iowa Code §669.13 (2005...
...chapter shall be forever barred, unless within two (2) years **after** such **claim accrued** or prior to July 1, 1967, whichever is later, the claim is made in writing to the state **appeal** board under this Act and a suit is begun under...

69. Perry v. State
Supreme Court, Appellate Division, Third Department, New York. July 27, 1978 64 A.D.2d 799 408 N.Y.S.2d 154

Appeal was taken from an order of the Court of **Claims** denying claimant's motion for an order deeming filed document a **claim** against the State. The Supreme Court, Appellate Division, held that where alleged notice of **claim** against State was not served upon Attorney General until 91st day after accident giving rise to **claim**, court lacked jurisdiction...

...not been served on the Attorney General within 90 days **after** the **accrual** of the **claim** (see Court of Claims Act, s 10 , subd. 3, s...
...11), the Court of Claims denied the motion, and this **appeal** ensued. [1] We hold that the order appealed from should...

70. Baker v. Ancient Order of Hibernians
Supreme Court, Appellate Division, First Department, New York. December 30, 1915 170 A.D. 844 156 N.Y.S. 619

Appeal from Trial Term, New York County. Action by Hyman D. Baker against the Ancient Order of Hibernians. Judgment for plaintiff, and defendant appeals. Reversed. McLaughlin and Scott, JJ., dissenting.

...In general. (Formerly 233k129(1) Where an agreement to pay lessee's accrued claim for liquidated damages under lease provided for retention of part of each month's rent by lease after termination of an action pending, the right to retain did not accrue while appeal was pending in such action. 192 Cornelius J. Earley, of...

71. Acorn Decorating Corp. v. U.S.
United States Court of Claims. July 13, 1959 146 Ct.Cl. 394 174 F.Supp. 949

Action by painting contractor against the United States for alleged increased costs incurred by it in performance of government contract. Upon government's alternative motions for judgment on the pleadings and for summary judgment, the Court of Claims, Laramore, J., held that, where contractor had completed work called for under contract, had...

...of limitations for failing to bring suit within six years after the time its claim first accrued or is barred by the finality of the Corps of Engineers Claims and Appeals Board's decision for failure to appeal such decision to the Secretary of the Army as required. .

72. Purnell v. Shinseki
United States Court of Appeals for Veterans Claims. March 28, 2014 Not Reported in Vet.App. 2014 WL 1259728

M. Ann Purnell, widow of veteran James A. Purnell, appeals through counsel from a November 26, 2013, Board of Veterans' Appeals (Board) decision dismissing her husband's appeal for benefits for an acquired psychiatric disorder and a right hip disability, and denying his request to reopen his claim for benefits for necrosis of the left hip. For the...

...and subsequently granted by the agency of original jurisdiction (AOJ) after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. See VA Fast Letter 10–30 at 3 (Aug. 10...

73. Taylor v. Shinseki
United States Court of Appeals for Veterans Claims. May 08, 2014 Not Reported in Vet.App. 2014 WL 1810706

Veteran Charles H. Kimball died in June 2013, while his claim for entitlement to service connection for a low back disability and a request for a total disability rating based on individual unemployability due to service-connected disabilities was pending before the Board of Veterans' Appeals (Board). Subsequently, on August 26, 2013, the Board...

...and subsequently granted by the agency of original jurisdiction (AOJ) after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. See VA Fast Letter 10–30 at 3 (Aug. 10...

74. Auburn Regional Medical Center v. Sebelius
United States Court of Appeals, District of Columbia Circuit. June 24, 2011 642 F.3d 1145 2011 WL 2507853

HEALTH - Medicare. Equitable tolling was available under Medicare statute.

...statute required all claims to "be submitted within 6 years after the accrual of the claim " see also Irwin, 498 U.S. at 94–96, 111 S.Ct...

...equitable tolling permissible where statute provided that "within 60 days after the date on which [the complaint] is filed, the complainant may elect to appeal except that in no event may any such appeal be brought before the 61st day after the date on...

75. Hansen v. State
Supreme Court of Iowa. November 12, 1980 298 N.W.2d 263
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Husband and wife appealed from determination of the Johnson District Court, Ansel J. Chapman, J., sustaining state's motion for summary judgment on tort claim based on failure to bring timely suit. The Supreme Court, Schultz, J., held that in view of legislative intent that predecessor rules defining commencement of suit specified event which would...

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit...

76. Babcock v. Culver
Supreme Court of Vermont. February 01, 1874 46 Vt. 715 1874 WL 6575

Discontinuance. Record of Justice of Peace. Tender. Payment. In a suit returnable before a justice, the plaintiff died before the return day, and the case was continued five times, without any suggest on of the plaintiff's death upon the record. Two of said continuances were because of the inability of the justice to attend, and the others were at...

...verdict for the plaintiff. It was conceded that some time after judgment had been rendered by the justice, and before the appeal was entered in the county court, the defendant tendered to the plaintiff's attorney upon the plaintiff's claim and accrued costs, the sum of $10, which the attorney received, and...

77. Farnum v. G.D. Searle & Co., Inc.
Supreme Court of Iowa. October 19, 1983 339 N.W.2d 392
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Wife, allegedly injured in taking birth control pills, sought with her husband and children to recover against drug manufacturer on a theory of products liability and against physicians employed by county hospital, on a theory of negligence in prescribing pills. The District Court, Polk County, George W. Bergeson, J., entered order...

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit...

78. Smith v. Shinseki
United States Court of Appeals for Veterans Claims. October 11, 2012 Not Reported in Vet.App. 2012 WL 4829032

Veteran Alfred W. Smith died in October 2011 while his claim for service connection for an acquired psychiatric disorder, to include post-traumatic stress disorder (PTSD), was pending before the Board of Veterans' Appeals (Board). Accordingly, on November 12, 2011, the Board dismissed his appeal. On February 21, 2012, Nellie B.

Smith, the veteran's...

...and subsequently granted by the agency of original jurisdiction (AOJ) after the appeal has been dismissed by the Board, the appeal will be reinstated for the purpose of furthering the accrued benefits claim. See VA Fast Letter 10-30 at 3 (Aug. 10...

79. Faldowski v. Eighty Four Min. Co.
Commonwealth Court of Pennsylvania. December 11, 1998 725 A.2d 843 1999 WL 89295

ENERGY AND UTILITIES - Mining. Commonwealth Court lacked jurisdiction over declaratory judgment action regarding mining damage.

...the mine operator fails to repair or compensate for damage after exhausting its right of appeal, the department shall pay the escrow deposit made with respect to the particular claim involved and accrued interest to the owner of the damaged building. 52 P.S...

80. Couzens v. Fortis Ins. Co.
United States District Court, D. Arizona. July 13, 2009 Not Reported in F.Supp.2d 2009 WL 2072009

Plaintiffs Mary and James Couzens filed this action against defendants in the Superior Court of Arizona in Maricopa County alleging various state law claims against defendants Time Insurance Company, formerly known as Fortis Insurance Company dba Assurant Health, ("Time") and Edward and Marsha Oakes (collectively, the...

...by the statute of limitations. Plaintiffs contend, however, that their claims did not accrue until Time definitively denied coverage in 2007 after negotiations and appeal. FN1. Plaintiffs' false advertising and consumer fraud claims are subject...

81. Lisea v. Sherman
United States District Court, E.D. California. September 08, 2014 Not Reported in F.Supp.3d 2014 WL 4418632

Petitioner is a state prisoner proceeding with counsel with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2011 conviction for attempted murder and related charges. (ECF No. 1 ("Ptn.").) Petitioner was the driver of a car from which a shooter shot a victim in a gang-related incident....

...9 and 10. Id. at 16-17.) He asserts that Claim 11 did not accrue until after his appeal was complete. Id. at 17) Claim 12: The cumulative effect...

82. Global Financial Corp. v. Triarc Corp.
Court of Appeals of New York. June 10, 1999 93 N.Y.2d 525 715 N.E.2d 482

LITIGATION - Limitations. Nonresident plaintiff's contract claim did not accrue in New York for purposes of borrowing statute.

...time-barred. Corporation appealed. The Supreme Court, Appellate Division, affirmed. After granting corporation leave to appeal, the Court of Appeals Kaye , C.J., held that corporation's claims accrued in jurisdiction in which it sustained economic impact of alleged...

83. Johnson v. Federal Exp. Corp.
United States District Court, M.D. Pennsylvania. February 10, 2014 996 F.Supp.2d 302 2014 WL 509152

LABOR AND EMPLOYMENT - Discrimination. Employer was not entitled to summary judgment on African-American employee's claims of racially disparate compensation.

...consider whether Ledbetter still applies to the Section 1981 claim after the FPA, but analyzing the alleged pay-setting decisions under...
...F.3d 1020, 1026 (7th Cir.2011) (extending the paycheck accrual rule to equal protection claims under 42 U.S.C. §1983 because the FPA "removed...

84. Lockett v. I.N.S.
United States Court of Appeals, Tenth Circuit. February 26, 2001 245 F.3d 1126 2001 WL 184225

IMMIGRATION - Deportation. Aliens were not eligible for suspension of deportation or cancellation of removal.

...level. (Formerly 24k54.3(1) Aliens failed to preserve for appellate review claims that they accrued an additional period of seven years' continuous physical presence in the United States after they were served with deportation charging documents, and that Board of Immigration Appeals' (BIA) delay in processing their applications for suspension of deportation...

85. Boeschenstein v. Burde
St. Louis Court of Appeals, Missouri. May 04, 1926 284 S.W. 202
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Appeal from St. Louis Circuit Court; Victor H. Falkenhainer, Judge. "Not to be officially published." Action by Albert E. Boeschenstein against Charles J. Burde. From a judgment on demurrer for defendant, plaintiff appeals. Reversed, and cause remanded.

...costs of sale, advertising, and all other lawful charges. That after said deed of trust had been executed as aforesaid plaintiff...
...of the estate of said Emil R. Wittig, who died after plaintiff's said claim accrued, and said cause was entitled 'Albert E. Boeschenstein, Plaintiff, v...

86. Williams v. Rohm and Haas Pension Plan
United States District Court, S.D. Indiana, New Albany Division. October 17, 2005 Not Reported in F.Supp.2d 45 Employee Benefits Cas. 2683

In March of 1997, Gary Williams left the employ of Rohm and Haas. As as a participant in the Rohm and Haas Pension Plan (the "Plan"), a defined benefit pension plan under § 3(35) of ERISA, he sought payment of his accrued benefits in a lump sum pay-out, and received a check in the amount of $47,850.71, representing the Plan's calculation of the...

...had its own 90-day limitations period for filing suit after the denial of an appeal and that limitations period was in place when Williams filed his internal claim. Consequently, Williams's claim accrued at the moment his appeal was denied and his filing...

87. Slaughter v. Martin
Court of Appeals of Alabama November 13, 1913 9 Ala.App. 285 63 So. 689

Appeal from Circuit Court, Baldwin County; A.E. Gamble, Judge. Assumpsit by A.D. Slaughter against George Martin. From judgment for defendant, plaintiff appeals. Reversed and remanded.

...Pleading Set-Offs and Counterclaims. Defendant cannot set off a claim which accrued after judgment for plaintiff in justice court, and appeal to the circuit court; the purely statutory right to plead...

88. McPhail v. Nicholson
United States Court of Appeals for Veterans Claims. February 25, 2005 19 Vet.App. 30 2005 WL 453136

VETERANS - Appeal. Equitable tolling issue was not properly before the Court of Appeals for Veterans Claims on appeal.

...statute of limitations ought to be tolled indefinitely, stating that accrual of claim will be tolled if party makes good-faith attempt to...
..good cause shown" and requiring that where extension is requested after expiration of time limit, "the action required of the claimant...

89. Harden v. State
Supreme Court of Iowa. January 25, 1989 434 N.W.2d 881 1989 WL 4861

Plaintiff brought action against state for personal injuries which allegedly occurred when plaintiff was minor. The District Court, Buchanan County, Alan L. Pearson, J., dismissed action, and plaintiff appealed. The Supreme Court, Andreasen, J., held that: (1) two-year statute of limitations for actions brought against State...

...this chapter shall be forever barred, unless within two years after such claim is accrued, the claim is made in writing to the state appeal board under this chapter. Iowa Code section 614.8 provides...

90. Blakey v. Caterpillar, Inc.
United States District Court, C.D. Illinois. March 08, 2010 Not Reported in F.Supp.2d 2010 WL 2089292

Plaintiff pursues ERISA claims regarding the denial of her application for surviving spouse benefits. Before the Court is Defendants' motion to dismiss, which the Court recommends be granted in part and denied in part. Plaintiff's husband was an employee of Caterpillar, Inc., and a beneficiary of the Caterpillar Retirement Income Plan (the "Plan)....

...Cash Balance Plan, 667 F.Supp.2d 850, 887 (N.D.Ill.2009) (claim for benefits accrued after final appeals denied, not when alleged underpayment was made)(applying Pennsylvania's four...

91. American Spirit Graphics Corp. v. Toshiba Mach. Co., Ltd.
United States Court of Appeals, Eighth Circuit. June 23, 1994 27 F.3d 363 1994 WL 275516

Employer brought subrogation action against manufacturer of printing press to recover for worker's compensation benefits paid to employee injured by press. The United States District Court for the District of Minnesota, Paul A. Magnuson, J., granted summary judgment for manufacturer and employer appealed. The Court of Appeals held...

...parties agree that ASG filed suit more than two years after its claim accrued, the only issue on appeal is whether the printing press was an improvement to real...

92. Bensley v. State
Supreme Court of Iowa. April 17, 1991 468 N.W.2d 444 1991 WL 58321

Estates of three passengers killed in automobile accident filed second wrongful death action against State for its alleged negligent maintenance of road after their claims were denied by state appeal board and first suit was dismissed on grounds that estates had not exhausted their administrative remedies. State's motion for summary judgment was...

...claims act] shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin suit under...

93. Art v. Montana Dept. of Labor and Industry ex rel. Mason
Supreme Court of Montana. December 19, 2002 313 Mont. 197 60 P.3d 958

LABOR AND EMPLOYMENT - Hours and Wages. Court lacked subject matter jurisdiction to review Department of Labor and Industry's decision.

...administrative appeals process. Section 26, Ch. 442, L.1999. For claims accruing on or after April 23, 1999, an appeal of the decision resulting from a contested case hearing may...

94. Escalante v. Township of Cinnaminson, Cinnaminson Memorial Park
Superior Court of New Jersey, Appellate Division. August 01, 1995 283 N.J.Super. 244 661 A.2d 837

TORTS - Tort Claims Act. Trial court abused its discretion in finding that claimant's ignorance of filing deadline constituted sufficient reason to allow late filing; and that municipality would not be substantially prejudiced by allowing late filing.

...permission to file a late claim within one year period after accrual of tort claim is matter left to the sound discretion of trial judge which will be sustained on appeal in the absence of a showing of abuse thereof. N.J.S.A...

95. Appeal of Jones
Supreme Court of Pennsylvania. February 05, 1883 1 Chest. 582 14 Lanc.B. 185

1. Under the Act of April 9th 1872 (P. L. 47), growing crops, the products of agriculture, in the hands of a receiver of an insolvent firm, where there has been a severance by sale or otherwise of the growing grain before the land itself is sold, go to wages claimants (as specified in the Act) in preferance to prior judgment lien creditors. 2. A...

...grass crop which in an agricultural sense was wholly grown after the claims for wages had accrued and while the land was in the hands of the...
...Reiff v. Reiff, 14 P. F. Smith 134; Bausman's Appeal, 9 Norris 178, and other cases, very properly drew a...

96. Vachon v. State
Supreme Court of Iowa. March 23, 1994 514 N.W.2d 442 1994 WL 94060

Patient and his wife brought action against state of Iowa, alleging medical malpractice under theory of respondeat superior and seeking damages for loss of consortium. The District Court, Johnson County, Paul J. Kilburg, J., granted summary judgment in favor of state. Plaintiffs appealed and state cross-appealed. The Supreme Court, Snell, J., held...

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter." Iowa Code §669.13 The...

97. Holcombe v. US Airways, Inc.
United States Court of Appeals, Fourth Circuit. March 05, 2010 369 Fed.Appx. 424 2010 WL 750086

BANKRUPTCY - Claims. Employee claims arising from discriminatory acts or omissions after confirmation date were not discharged and remained open.

...1) employee's claim was not a single, unitary "continuing violation" claim which accrued preconfirmation and persisted into postconfirmation period, so her failure to file proof of claim after receiving notice in airline's first bankruptcy case meant that her...
...2) any claims arising from discriminatory acts and omissions occurring after confirmation date had not been discharged and remained open for...

98. Vassilev v. City of New York
United States District Court, S.D. New York. August 12, 2014 Not Reported in F.Supp.3d 2014 WL 3928783

Plaintiff Anton Vassilev ("Vassilev"), a public school teacher at Intermediate School 291 ("IS 291") who was terminated from that position in 2010, sues the City of New York ("City"), the New York City Department of Education ("DOE"), and former DOE Chancellor Dennis Walcott (collectively,...

...Tracy Decl., Dkt. 18 Ex. 1.) Plaintiff argues that his claims did not accrue on the date of his termination, and instead should have accrued only after he received a final determination for his appeal. (Pl. Reply Mem. at 11.) This argument is unsupported. Under...

99. Nationwide Ins. Co. v. Ohio Dept. of Transp.
Court of Claims of Ohio. February 21, 1990 61 Ohio Misc.2d 761 584 N.E.2d 1370

After insurer filed property damage claim against state, state filed motion to transfer case to administrative docket. The Court of Claims, Russell Leach, J., sitting by assignment, held that statute raising ceiling on amount of claims against state that could be resolved administratively could be given prospective application to claims...

...on claims against state that could be resolved administratively to claims accruing before but filed after statute's effective date did not work retroactive effect upon any...
...would violate State Constitution; substitution of administrative determination and limited appeal for full trial and appeal to all higher state courts did not affect cause of...

100. Robinson v. State
Supreme Court of Iowa. October 06, 2004 687 N.W.2d 591 2004 WL 2238803

GOVERNMENT - Limitations. Date State Appeals Board drafted notice denying inmate's claim did not constitute date notice was mailed, for limitations purposes.

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit...

101. Allen v. White
United States District Court, E.D. California. July 29, 2005 Not Reported in F.Supp.2d 2005 WL 1836933

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is 1) defendant's February 24, 2005 motion, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint as barred by the statute of limitations to which plaintiff filed an opposition on March 24, 2005; and 2) plaintiff's June 6, 2005...

...barred by the statute of limitations whether his First Amendment claim is deemed to have accrued at the time that he sets forth that he became aware of the AEDPA deadline, 297 days after the enactment of that statute, or in March of 1997... .. June 28, 2002 or February 20, 2002, when his subsequent appeals were dismissed. MTD, pp. 3-5. Based on the record...

102. Callahan v. State
Supreme Court of Iowa. December 19, 1990 464 N.W.2d 268 1990 WL 207365

Mother brought action against State under Tort Claims Act and § 1983 for abuse of her child while he was student at state-operated school. The District Court for Pottawattamie County, Paul H. Sulhoff, J., dismissed, and mother appealed. The Supreme Court, Larson, J., held that: (1) discovery rule applied to statute of limitations governing claims...

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit...

103. In re Time Sales Finance Corp.
United States Court of Appeals, Third Circuit. February 07, 1974 491 F.2d 841
https://www.westlaw.com/Search/Results.html?query=fl%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

A creditor's claim for interest accruing after the date that a petition was filed for an arrangement under the Bankruptcy Act was disallowed by the referee, and the referee's order was affirmed by the United States District Court for the Eastern District of Pennsylvania, Thomas J. Clary, J. The creditor appealed. The Court of Appeals, Adams,...

...Judges. OPINION OF THE COURT ADAMS, Circuit Judge. A creditor's claim for interest accruing after the date a petition was filed for an arrangement under the Bankruptcy Act prompts this appeal. On April 5, 1968, Time Sales Finance Corporation (the bankrupt...

104. Robinson v. Brice
Court of Appeals of Texas, Austin. March 08, 1995 894 S.W.2d 525 1995 WL 91545

Prejudgment interest. Letter requesting payment and inquiring as to when next lost wages check was due

constituted written notice of claim under prejudgment interest statute.

...and awarded prejudgment interest accruing on date action was filed. After driver appealed portion of judgment awarding prejudgment interest on future...
...appealed regarding determination of accrual date, and the Court of Appeals, Powers , J., held that: (1) passenger was not required to perfect independent appeal; (2) accident report submitted by passenger to employer's insurer shortly after accident did not constitute written notice of claim as would accrue claim for prejudgment interest; but (3) letter sent two months after...

105. Williams v. Richland County
Supreme Court of South Carolina. July 13, 1901 61 S.C. 80 39 S.E. 967

Appeal from common pleas circuit court of Richland county; Townsend, Judge. Action by R. B. Williams, sheriff of Richland county, against Richland county. From an order reversing the judgment of the county board of commissioners disallowing the claim, the county appeals. Reversed.

...whereas, it appearing that all of the items of said claim accrued after the order changing the venue from Richland county to Kershaw...
...said Richland county, and, so holding, should have dismissed the appeal." We have determined, for the reasons set out in the...

106. Borich v. Life Ins. Co. of North America
United States District Court, N.D. Illinois, Eastern Division. April 25, 2013 Not Reported in F.Supp.2d 2013 WL 1788478

Plaintiff Lillian Borich alleges that defendant Life Insurance Company of North America ("LINA") wrongfully denied her long-term disability ("LTD") insurance claim. Borich brings suit under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), seeking to recover LTD benefits,...

...C 2247, 2010 WL 1005030, *7 (N.D.Ill. Mar.11, 2010) " claims for benefits accrue when the plan denies a formal appeal" Young v. Verizon's...
...2d 850, 887 (N.D.Ill.2009) "an ERISA action logically accrues after the final administrative appeal is denied in writing" And the Seventh Circuit has upheld...

107. Hall v. Clinton
United States District Court, District of Columbia. March 28, 2001 143 F.Supp.2d 1 2001 WL 425877

LABOR AND EMPLOYMENT - Public Employment. Court lacked jurisdiction over tort action brought by former White House employee against First Lady.

...the Department of Justice (DOJ) from representing the first lady. After the Court of Appeals, 235 F.3d 202, upheld District Court's dismissal of prior...
...1) DOJ could represent First Lady; (2) prior Court of Appeals decision that district court lacked subject matter jurisdiction was binding...

108. B & M Coal Corp. v. United Mine Workers of America
Court of Appeals of Indiana, First District. July 08, 1985 480 N.E.2d 227
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Judgment creditor brought action to recover interest which accrued on judgment debtor's appeal bond and which was retained by county clerk. The Circuit Court, Spencer County, Edward C. Theobald, Special Judge, entered judgment against judgment creditor, and judgment creditor appealed. The Court of Appeals, Ratliff, P.J., held that...

...M) appeals from an adverse decision of the trial judge, after a bench trial, denying its claim for interest which accrued on an appeal bond. We reverse. FACTS The present dispute is between Spencer...

109. Montano v. Wells Fargo Bank N.A.
United States District Court, S.D. Florida. October 23, 2012 Not Reported in F.Supp.2d 2012 WL 5233653

THIS CAUSE comes before the Court pursuant to Defendant Wells Fargo Bank N.A.'s ("Wells Fargo") motion to dismiss, filed August 24, 2012 [DE 13]. Plaintiffs responded on September 10, 2012 [DE 15]. Wells Fargo replied on September 20, 2012 [DE 19]. This motion is ripe for adjudication. Plaintiffs own their primary residence, which is...

...only applies to servicerassignees. On August 31, 2012, a week after Defendant filed its Motion to Dismiss, the Ninth Circuit Court of Appeals filed an amended opinion, Gale v. First Franklin Loan Services...
...he cannot rely on amendments Congress made after his action accrued to bolster his claim." Id at * 1. In May 2009, TILA was amended to. .

110. Lee v. Town Bd. of Town of Ellicott, N.Y.
United States District Court, W.D. New York. July 12, 2004 Not Reported in F.Supp.2d 2004 WL 1591229

The Lees filed this section 1983 action on January 17, 2002. On April 26, 2004 the Lees filed a motion to extend the discovery deadline by amending this Court's Scheduling Order dated January 14, 2004. On April 26, 2004 defendant Van Every filed a motion for summary judgment. On April 27, 2004 the Town of Ellicott and its Town Board ("the Town...

...violation theory as a basis for finding that plaintiffs' discrimination claims accrued after their disciplinary proceedings concluded, the court of appeals held that the decision to file charges was the allegedly...

111. Taylor v. Ford Motor Co.
United States Court of Appeals, Third Circuit. May 09, 1985 761 F.2d 931 119 L.R.R.M. (BNA) 2413

After remand, 703 F.2d 738, the United States District Court for the District of New Jersey, Harold A. Ackerman, J., dismissed employee's action against employer and union as time-barred. The Court of Appeals, James Hunter, III, Circuit Judge, held that six-month limitation period of National Labor Relations Act applied to hybrid action to...

...the gravamen of the complaint will be the union's conduct after the arbitration process is complete, and the claim will not accrue until the futility of further union appeals becomes apparent or should have become apparent. Scott v. Local...

112. Montano v. Browning
Court of Appeals of Arizona, Division 2, Department A. June 20, 2002 202 Ariz. 544 48 P.3d 494

LITIGATION - Limitations. Statute of limitations was not tolled until minor driver reached age of majority.

...dismiss, and defendant sought special action relief from that ruling. After accepting special jurisdiction, the Court of Appeals Brammer , P.J., held that, in a matter of first impression...
...period was not tolled while driver was a minor, and claim accrued at the time of the accident. Reversed West Headnotes [1...

113. Maslan v. American Airlines, Inc.
United States District Court, S.D. New York. May 03, 1995 885 F.Supp. 90 1995 WL 259295

California resident, who was member of airline's private club, brought breach of contract suit against airline, whose principle place of business was in Texas. The District Court, Sweet, J., held that, under various tests used to apply New York's borrowing statute, claim was time barred. So ordered.

...Tefel, 626 F.Supp. 314, 316 (S.D.N.Y.1986) Only three years after Martin the Court of Appeals for this Circuit apparently approved the more traditional "place-of...
...interest analysis for use in determining whether or not a claim accrued outside of New York State. See Stafford v. Int'l Harvester...

114. Forbes v. Harrington
Supreme Judicial Court of Massachusetts, Worcester. June 07, 1898 171 Mass. 386 50 N.E. 641

Report from supreme judicial court, Worcester county; Oliver Wendell Holmes, Judge. Suit by one Forbes against Leonard Harrington and William T. Harrington. There was a decree for defendants, and plaintiff appealed, and the case was reported to the full court. Reversed.

...fully administered," for the retention of sufficient assets to satisfy claims which do not accrue within two years from the time of giving the administration...
...and an action may be brought within one year after the claim becomes payable, or within one year after the final determination of the proceedings on appeal, against the executor or administrator if they are ordered to...

115. Tyco Intern., Ltd. v. Kozkowski
United States District Court, S.D. New York. May 24, 2011 Not Reported in F.Supp.2d 2011 WL 2038763

Plaintiffs Tyco International, Ltd. and Tyco International, Inc. ("Tyco") sue on numerous claims against their former Chief Executive Officer and Chairman, Dennis Kozlowski, including fraud, breach of fiduciary duty, and breach of contract. On December 1, 2010, this court issued an opinion ruling on the parties' cross-motions for...

...Kozlowski argues that since the court dismissed all of his claims based on unpaid benefits accrued after September 1995, the disposition as to those claims is final...
...delay because judicial efficiency is best served by an immediate appeal. Tyco opposes both the request for leave to file an...

116. Moorhead v. Dodd
Supreme Court of Kentucky. September 18, 2008 265 S.W.3d 201 2008 WL 4286535

COMMERCIAL LAW - Judgment. Res judicata did not apply to an action for post-judgment and appellate attorney fees.

.. In underlying breach of contract action in which she prevailed, claim did not accrue until after the judgment was entered in the underlying action and defendant brought post-judgment motions and filed appeal, in which plaintiff also prevailed. [6] 228 Judgment 228XIII Merger...

117. Board of Regents v. Oglesby
Court of Appeals of Georgia. November 21, 2003 264 Ga.App. 602 591 S.E.2d 417

EDUCATION - Torts. Daughter's claims against university for displaying mother's remains arose before sovereign immunity was waived.

...and for summary judgment, and university sought interlocutory appeal. Holdings: After granting interlocutory appeal, the Court of Appeals Barnes , J., held that: (1) claims of daughter accrued when mother died, for purposes of determining whether causes of...

118. Kearney v. Foley and Lardner
United States District Court, S.D. California. March 28, 2011 Not Reported in F.Supp.2d 2011 WL 1119020

Defendants Foley & Lardner, Gregory V. Moser, and Larry L. Marshall (collectively "Foley defendants") move to dismiss plaintiff's second amended complaint ("SAC"). The motion has been fully briefed and considered without oral argument. For the reasons set forth below, the Court enters the following decision. Plaintiff is the...

...that the limitation's period did not begin to run until after all the appeals of her eminent domain case were completed, i.e., "Plaintiff's claim did not accrue until she incurred appreciable and actual damages." (Opp at 11...

119. People v. Metropolitan Surety Co.
Supreme Court, Appellate Division, Third Department, New York. November 15, 1916 175 A.D. 43 161 N.Y.S. 616

Appeal from Special Term, Albany County. In the matter of the Metropolitan Surety Company. From an order of the Supreme Court, confirming the report of a referee, and allowing the United States Fidelity & Guaranty Company one-half of its claim of $8,182.60, to be paid from any surplus remaining after all legal and proved claims whch accrued against...

...of $8,182.60, to be paid from any surplus remaining after all legal and proved claims whch accrued against the Metropolitan Surety Company on or prior to January...
...have been fully paid, the United States Fidelity & Guaranty Company appeals. Modified and affirmed. In November, 1901, the appellant, the United...

120. Kennecott Copper Corp. v. Chavez
Court of Appeals of New Mexico. January 14, 1992 113 N.M. 504 828 P.2d 416

Employer appealed from order of Workers' Compensation Administration denying claim against Subsequent Injury Fund. The Court of Appeals, Apodaca, J., held that: (1) finding that worker had not suffered subsequent injury was not supported by evidence, and (2) employer's claim was not time barred. Reversed and remanded.

...because this section applies only to causes of action accruing after its effective date of March 8, 1988, see Consolidated Freightways...
...N.M. 201, 793 P.2d 1354 (Ct.App.1990) , and employer's claim accrued before that date, the four-year limitations period provided for...

121. Kearney v. Foley and Lardner
United States District Court, S.D. California. March 28, 2011 Not Reported in F.Supp.2d 2011 WL 1119047

Defendant Michael T. McCarty moves to dismiss the two causes of action alleged against him in plaintiff's SAC. The motion has been fully briefed. The Court finds this matter suitable for determination on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). Plaintiff is the former owner of a 52.06 acre parcel of...

...that the limitation's period did not begin to run until after all the appeals of her eminent domain case were completed, i.e., "Plaintiff's claim did not accrue until she incurred appreciable and actual damages." (Opp at 11...

122. Myrick v. Discover Bank
United States District Court, D. Delaware July 16, 2013 Not Reported in F.Supp.2d 2013 WL 3784158

The plaintiff Aneka Myrick ("Myrick"), who proceeds pro se, filed this lawsuit on June 11, 2012, alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e–5. (D.I. 2.) The court has jurisdiction pursuant to 28 U.S.C. §1331. Before the court is the...

...allows a court to stop the limitations period from running after a claim has accrued, both the Supreme Court and the United States Court of Appeals for the Third Circuit have recognized that the doctrine should...

123. Lindahl v. Supreme Court I.O.F.
Supreme Court of Minnesota. January 25, 1907 100 Minn. 87 110 N.W. 358

Appeal from District Court, Ramsey County; William Louis Kelly, Judge. Action by Ingeborg Lindahl against the Supreme Court Independent Order of Foresters. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

...order, denying the right to resort to the courts until after remedies within the order are exhausted, impose unreasonable burdens and restrictions, they are ineffective, and, where they require an appeal to the highest tribunal of the order, which meets in ...
...a foreign country three years from the time when the claim accrued, they are void. 190 217 Insurance 217XXXI Civil Practice and...

124. Balam-Chuc v. Banfi
Court of Appeals of Washington, Division 1. September 17, 2012 Not Reported in P.3d 170 Wash.App. 1036

This appeal arises from a legal malpractice action brought by Jose and Rebekah Balam–Chuc and their two children against Jose and Rebekah's former attorney, Gabriel Banfi. The action is based on Banfi's alleged failure to timely file Jose's immigration petition with the United States Immigration and Naturalization Service. The...

...depends on when they accrued. The Balam–Chucs argue their claims accrued when Jose was required to leave the country in November 2009, after his appeals failed. Banfi argues they accrued in July 2002 when Jose...

125. Certain Underwriters at Lloyd's, London v. Johnson & Bell, Ltd.
United States District Court, N.D. Illinois, Eastern Division. August 25, 2011 Not Reported in F.Supp.2d 2011 WL 3757179

Plaintiff Certain Underwriters at Lloyd's, London has sued defendant law firm Johnson & Bell, Ltd. and two Johnson & Bell attorneys, alleging state law claims for malpractice relating to two underlying insurance cases. Defendants have moved to dismiss plaintiff's complaint on the basis of Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For...

...N.E.2d at 60 The court held that the plaintiff's claim accrued when she paid replacement counsel to bring the briefs into compliance with court rules rather than after the appellate court adjudicated her appeal. Id. at 595–96, 213 Ill.Dec. 426, 659 N.E.2d...

126. Murphy v. Smith
Supreme Judicial Court of Massachusetts, Bristol. October 07, 1991 411 Mass. 133 579 N.E.2d 165

Purchasers brought legal malpractice action against attorney, alleging he negligently certified good record title to real property. The Superior Court Department, Bristol County, Andrew G. Meyer, J., granted attorney's motion for summary judgment. The Superior Court Department, John M. Xifaras, J., entered separate final judgment...

...J., entered separate final judgment dismissing complaint, and purchasers appealed. After transferring appeal, the Supreme Judicial Court, Liacos , C.J., held that: (1) legal malpractice claim accrued when purchasers received letter from neighbors' attorney informing them that...

127. Mitchell v. Shearson Lehman Bros., Inc.
United States District Court, S.D. New York. May 27, 1997 Not Reported in F.Supp. 1997 WL 277381

Charla Mitchell sues Shearson Lehman Brothers, Inc. ("Shearson"), her former employer, Smith Barney Shearson, Inc. ("Smith Barney"), Shearson's successor, and First UNUM Life Insurance Co., Shearson's insurer, for improper denial of disability benefits. Plaintiff filed suit initially in New York State Supreme Court,...

.. of his internal remedies and the denial of his claim [after appeal] constitute a clear repudiation of his claim, commencing the statute ..
...limitations." see also Daill, 100 F.3d at 66, 67 (claim accrued when fund denied plaintiff's appeal, not upon initial denial); Stevens v. Employer–Teamsters Joint Council...

128. Hagerman v. United Transp. Union
United States Court of Appeals, Tenth Circuit. March 04, 2002 281 F.3d 1189 2002 WL 335514

LABOR AND EMPLOYMENT - Transportation Workers. District court lacked jurisdiction over employees' claims that railroad breached agreement.

...merger, and District Court thus lacked jurisdiction over employees' contract claims; (2) latest possible accrual date for claim that first union breached duty of fair representation was when...
...representation by failing to continue to negotiate regarding seniority districts after arbitration and appeal to Surface Transportation Board Affirmed West Headnotes [1] 231H Labor...

129. Christie v. Jeney
Supreme Court of New Jersey. May 15, 2001 167 N.J. 509 772 A.2d 361

LEGAL SERVICES - Malpractice. Applicability of Affidavit of Merit statute is not determined by accrual of claim.

...AMS). The Superior Court, Law Division, Somerset County, granted motion. After granting client leave to appeal, the Supreme Court Zazzali , J., held that: (1) critical inquiry...
...took place before effective date of AMS, rather than whether claim " accrued " after that date, and (2) legally-significant facts in instant...

130. Padgett v. Nicholson
United States Court of Appeals for Veterans Claims. September 07, 2005 19 Vet.App. 334 2005 WL 2175933

VETERANS - Appeal. Death of veteran pending appeal warranted vacation of Board decision and dismissal of appeal

...accrued benefits where, as here, the veteran died on or after December 16, 2003), thus calling into question the concerns raised by the U.S. Court of Appeals for the Federal Circuit that a successful accrued-benefits beneficiary...
...substituted for the veteran rather than proceeding with a separate claim for accrued benefits. See Richard v. West, 161 F.3d 719, 722...

131. Wyatt v. Keating
United States Court of Appeals, Third Circuit. April 12, 2005 130 Fed.Appx. 511 2005 WL 834462

CIVIL RIGHTS - Malicious Use of Process. Court would not have to abstain from hearing insurance agent's §1983 claims during pendency of state license proceedings.

...District Court's orders. First, he argues that his §1983 claims did not accrue until after the completion of his state appeals because he had a duty to exhaust his available state...

132. In re Fraternal Composite Service, Inc.
United States Bankruptcy Court, N.D. New York. October 16, 2003 315 B.R. 247 2003 WL 23833178

BANKRUPTCY - Case Administration. Chapter 11 petition filed on eve of entry of state court judgment was filed in bad faith.

...transferred assets or placed them beyond the reach of creditors after the judgment; (3)is the case a two party dispute...
...the debtor exhausted its state court remedies in attempting to appeal without paying a bond and has the debtor examined the...

133. Lansford v. Harris
Court of Appeals of Arizona, Division 1, Department A. October 20, 1992 174 Ariz. 413 850 P.2d 126

Former client brought malpractice claim against attorney, alleging inadequacy of representation in bankruptcy proceedings, which led to debt being declared nondischargeable. The Superior Court, Maricopa County, Cause No. CV–89–19836, John Foreman, J., entered summary judgment in favor of attorney, finding that client's legal...

...for malpractice in litigation until the litigation is complete, the claim cannot accrue until after the judgment becomes final, that is upon the final appellate decision or the expiration of any available appeals period. Accordingly, the court concluded that the statute of limitations ..

134. Kalyanaram v. American Ass'n of University Professors at New York Institute of Technology, Inc.
United States Court of Appeals, Second Circuit. February 03, 2014 742 F.3d 42 2014 WL 349918

Background: Employee brought action alleging that his union breached its duty of fair representation (DFR). The United States District Court for the Southern District of New York, Batts, J., dismissed action as untimely. Employee appealed. Holdings: The Court of Appeals, Droney, Circuit Judge, held that: 4(1)employee's claim...

...UPGWA), although the Tenth Circuit held that a plaintiff's DFR claim accrued only after he was notified that the district court dismissed his union's...
...on the merits of his grievance" by pursuing a judicial appeal. 46 F.3d 1047, 1054 (10th Cir.1995) There is...

135. Saratoga Trap Rock Co. v. Standard Accident Ins. Co.
Supreme Court, Appellate Division, Third Department, New York. March 08, 1911 143 A.D. 852 128 N.Y.S. 822

Submission of controversy under Code Civ. Proc. §§ 1279–1281, by the Saratoga Trap Rock Company, as plaintiff, and the Standard Accident Insurance Company, as defendant. Judgment for defendant.

...for loss actually sustained and paid in money by it after actual trial of the issue, interest on a judgment for $5,000 for an employe against assured accruing pending an appeal from the judgment taken by the insurer is not recoverable...
...the insurer, not being part of the costs, and assured's claim not accruing till after its payment of the judgment against it, which was not till after affirmance on the appeal of such judgment. 190 217 Insurance 217XVII Coverage—Liability Insurance...

136. Loomis v. Blades
United States District Court, D. Idaho. August 08, 2006 Not Reported in F.Supp.2d 2006 WL 2265260

Pending before the Court in this habeas corpus action is Respondent's Motion for Summary Dismissal (Docket No. 12), Petitioner's Request for Admissions (Docket No. 16), and Petitioner's Request for Hearing (Docket No. 20). All parties have consented to the jurisdiction of a United States Magistrate Judge (Docket No. 8). Having reviewed the record...

...parole denials, but challenges his sentence. As a result, this claim would have accrued forty-two days after his April 1982 conviction, because he did not file a direct appeal. See Wixom v. Washington, 264 F.3d 894 (9th Cir...

137. Padgett v. Shinseki
United States Court of Appeals, Federal Circuit. June 30, 2011 643 F.3d 950 2011 WL 2573359

VETERANS - Attorney Fees. Surviving spouse of veteran could obtain fees under EAJA for attorney hours expended on veteran's claim after veteran's death.

...can survive his death. Where, as here, a veteran dies after his case has been submitted to the Veterans Court, but before the court has entered judgment on his claim, a qualified accrued benefits claimant can substitute on appeal in order to obtain a judgment on the veteran's claim...

138. Sheets v. Terhune
United States District Court, E.D. California. April 28, 2004 355 F.Supp.2d 1138 2004 WL 1059815

CIVIL RIGHTS - Prisons. State prisoner failed to exhaust available administrative remedies prior to filing civil rights suit.

...this claim. Plaintiff has set forth no evidence demonstrating that after his access claim accrued (at such time as he suffered the "actual injury"), he submitted an appeal grieving the denial of access to the courts. [2] Further...

139. Ludwig v. Liberty Mut. Fire Ins. Co.
United States District Court, M.D. Florida, Fort Myers Division. June 03, 2013 Not Reported in F.Supp.2d 2013 WL 2406320

This matter comes before the Court on the Plaintiff, Christopher Ludwig's Motion to Remand and for an Award of Costs and Attorney's Fees (Doc. # 18) filed on April 11, 2013. The Defendant Liberty Mutual filed its Response in Opposition (Doc. # 25) on April 29, 2013. The Motion is fully briefed and now ripe for the Court's review. On June 14, 2008,...

...removal to federal court was timely because the bad faith claim did not accrue until after the Second District Court of Appeals had decided the appeal on the underlying UM claim. However, there is authority in...

140. Ortega v. Arnold
United States District Court, S.D. New York. March 21, 2016 Slip Copy 2016 WL 1117585

Plaintiff Moises Ortega, proceeding pro se, brings this action alleging that Defendants failed to provide him with (1) a sign language interpreter when he sought dental treatment at the New York University College of Dentistry (the "College"), and (2) adequate representation and translation services during a hearing before the New York...

. that the limitations period did not begin to run until after the dismissal of his Article 78 appeal and the Court finds no authority to support this view.Plaintiff's claims still would have accrued no later than July 14, 2008. Plaintiff, however, did not...

141. Kershaw County v. Richland County
Supreme Court of South Carolina. July 12, 1901 61 S.C. 75 39 S.E. 263

Appeal from common pleas circuit court of Richland county; Townsend, Judge. Claim by Kershaw county against Richland county for costs and expenses of murder trial. From decree of circuit court reversing order of board of commissioners of Richland county disallowing the claim, Richland county appeals. Reversed.

...whereas, it appearing that all of the items of said claim accrued after the order changing the venue from Richland county to Kershaw...
...said Richland county, and, so holding, should have dismissed the appeal. (3) Because his honor erred in ordering and decreeing that...

142. Marsh v. St. Croix County Sup'rs
Supreme Court of Wisconsin. August 01, 1877 42 Wis. 355 1877 WL 3632

These are cross appeals from the same judgment. The action is to recover money paid on void tax certificates. The plaintiffs are dissatisfied with the judgment because the amount recovered was less than they claimed; the county is dissatisfied because there was any recovery. The objections to any recovery will first be considered. The first error...

...court. By leave of the circuit court, against plaintiffs' objection, after the cause had come on for trial, and a jury...
..the same. 2. That more than six years had elapsed after the cause of action mentioned in the complaint accrued, before said claim was presented to the board of supervisors of said county...

143. Hook v. Lippolt
Supreme Court of Iowa. August 29, 2008 755 N.W.2d 514 2008 WL 3982653

GOVERNMENT - Tort Claims. For limitations purposes, motorist was charged with knowledge of claim against state on date of collision with state volunteer.

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter. The time to begin a suit ..

144. Valdez ex rel. Donely v. U.S.
United States Court of Appeals, Second Circuit. February 29, 2008 518 F.3d 173 2008 WL 553541

LITIGATION - Limitations. Fraudulent concealment is not essential to equitable tolling of statute of limitations.

...5) Because she filed the administrative claim within sixty days after the dismissal of the complaint and refiled an amended complaint...
...months of that denial, the first step in resolving this appeal is fixing the point in time at which the cause of action accrued. [1] A claim under the Federal Tort Claims Act accrues on the date...

145. Behring Intern., Inc. v. Imperial Iranian Air Force
United States Court of Appeals, Third Circuit. February 09, 1983 699 F.2d 657 35 Fed.R.Serv.2d 1261

In litigation arising out of a freight-forwarding contract between American corporation and two instrumentalities of Iran, the corporation made a motion seeking to recover storage charges out of a Trust Account established by the parties' pre-existing Settlement Agreement which had been previously ratified by the district court. The United...

...American corporation to draw on trust account to satisfy its claim for storage charges accruing after January 19, 1981, the date Iranian hostage crisis was settled...
...the residue of the account returned to Iran, since the appeal of defendants was not timely filed. [8] 170B Federal Courts...

146. Taylor v. State Farm Mut. Auto. Ins. Co.
Court of Appeals of Arizona, Division 1, Department E. September 22, 1994 182 Ariz. 39 893 P.2d 39

Insurer brought bad faith claim against automobile liability insurer. The Superior Court, Maricopa County, Cause No. C-550146, Frederick J. Martone and Howard V. Peterson, JJ., entered judgment for insured. Appeal was taken. The Court of Appeals reversed and, on appeal, the Supreme Court, 175 Ariz. 148, 854 P.2d 1134,...

...if we were to adopt the approach that bad faith claims do not accrue until after the appeal of the underlying judgment is final, an insured in Taylor's...
...be forced to wait years (three years passed from the appeal of the Rings' judgment until it was affirmed) before beginning...

147. Whitley's Elec. Service, Inc. v. Sherrod
Supreme Court of North Carolina. November 11, 1977 293 N.C. 498 238 S.E.2d 607

Action was brought by electrical subcontractor against general construction contractor for "services rendered." The Superior Court, Wilson County, Bradford Tillery, J., entered judgment for plaintiff, and defendant appealed. The Court of Appeals, 32 N.C.App. 338, 232 S.E.2d 223, reversed, and appeal was taken. The Supreme Court, Exum, J., held...

...was tolled only as to those items which had accrued after 14 May 1968, that the trial court's judgment included recovery for claims which had accrued prior to that date, that plaintiff has not proved successive...
...on these earlier claims, and that therefore the Court of Appeals correctly reversed and remanded for new trial on these issues...

148. The Interstate No. 1
Circuit Court of Appeals, Second Circuit. April 16, 1923 290 F. 926 1923 A.M.C. 1116

Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by James Shewan & Sons, Inc., and others, against the steam tug Interstate No. 1. From the decree, Burns Bros., colibelants, appeal. Affirmed.

...against the above vessel, which at the times when the claims accrued was a harbor tug, engaged in towing in the harbor...
...it is further ordered that the clerk of this court, after paying the fees of the officers of this court, pay...

149. Agolli v. Office of Inspector General, U.S. Department of Justice
United States District Court, District of Columbia. August 31, 2015 125 F.Supp.3d 274 2015 WL 5139379

GOVERNMENT - Records. FOIA claim accrued 20 business days after requester filed last administrative appeal.

...Colleen Kollar-Kotelly , J., held that: (1) requester's FOIA claim accrued, for purposes of six-year statute of limitations, 20 business days after she filed last administrative appeal, and (2) OIG's search for responsive records was adequate...

150. Bell v. Hummel
Court of Appeal, Second District, Division 3, California. October 26, 1982 136 Cal.App.3d 1009 186 Cal.Rptr. 688

Former client appealed from a judgment of the Superior Court, Los Angeles County, Alfred L. Margolis, J., dismissing his legal malpractice action following the sustaining of his former attorneys' demurrer without leave to amend. The Court of Appeal, O'Brien, J., assigned, held that: (1) former client had no right to voluntarily...

...1) former client had no right to voluntarily dismiss action after demurrer had already been sustained without leave to amend and order of dismissal filed and thus notice of appeal from order of dismissal was intact; (2) running of statute...
...damages arising from attorneys' alleged negligent failure to assert such claims had not fully accrued and statute of limitations was tolled. Affirmed. West Headnotes (1...

151. Wyatt v. Avoyelles Parish School Bd.
Court of Appeal of Louisiana, Third Circuit. October 31, 2001 799 So.2d 1197 2001 WL 1337556

EDUCATION - Labor and Employment. School district employees were entitled to payment of unused accrued leave on retirement.

...used at end of each year was invalid; (2) no claims for unused, accrued leave would have been viable prior to retirement, and thus claims that which were brought after retirement had not prescribed; (3) former employee, who had also...
..entitled award of additional attorney fees upon successful defense against appeal. Affirmed as amended. West Headnotes [1] 231H Labor and Employment ..

152. Fraternal Composite Services, Inc. v. Karczewski
United States District Court, N.D. New York. September 21, 2004 315 B.R. 253 2004 WL 2106611

BANKRUPTCY - Case Administration. Chapter 11 petition filed by solvent debtor was not in good faith.

...transferred assets or placed them beyond the reach of creditors after the judgment; (3) whether the case was a two-party...
..the debtor exhausted its state-court remedies in attempting to appeal without paying a bond and whether the debtor had examined...

153. Pyles v. Young
Court of Appeals of Texas, Dallas. July 01, 2009 Not Reported in S.W.3d 2009 WL 1875581

Tony Pyles appeals the traditional summary judgment granted in favor of Loren and Louise Young on their affirmative defense of res judicata. In three issues, Pyles contends the district court erred in granting Youngs' motion for summary judgment because his fraud, unjust enrichment, and statutory damages claims were not compulsory counterclaims...

...not cite any applicable authority supporting his contention that a claim for unjust enrichment cannot accrue until after a suit determining the right to possession is affirmed on appeal. Accordingly, we conclude Pyles's argument presents nothing for this Court's...

154. Dorman v. Osmose, Inc.
Court of Appeals of Indiana. September 25, 2007 873 N.E.2d 1102 2007 WL 2769768

LITIGATION - Jury. Trial court's failure to replace juror, who was upset he would lose income while on jury, was not an abuse of discretion.

..statement in a previously filed brief that Trustee could bring claims accruing on or after September 20, 1987 was a judicial admission by the Trustee...
...a case upon which it was relying was pending on appeal was a judicial admission of that fact), vacated by 435...,

155. Henderson v. Zrellak
United States District Court, W.D. Washington, at Tacoma. September 04, 2007 Not Reported in F.Supp.2d 2007 WL 2570447

Plaintiff claims that Defendants violated his civil rights by withholding certain pre-trial hearing transcripts in violation of a court order, and Defendants moved for summary judgment. Magistrate Judge Karen L. Stromborn recommends that Defendants' motion should be granted because Plaintiff's claims are time barred. Plaintiff filed objections to...

..claims are still time-barred. Plaintiff argues, however, that his claims did not accrue until after he exhausted his appeals of the denial of his habeas corpus petition in this...

156. Callaro v. State Farm Mut. Auto. Ins. Co.
United States District Court, M.D. Florida, Fort Myers Division. May 05, 2014 Not Reported in F.Supp.3d 2014 WL 1779265

This matter comes before the Court on the Plaintiff, Frances A Callaro's Motion to Remand for an Award of Costs, Including Attorney's Fees (Doc.# 5) filed on May 10, 2014. The Defendant State Farm Automobile Insurance Company, filed its Response in Opposition (Doc.# 11) on April 24, 2014. The Motion is now fully briefed and ripe for the Court's...

...removal to federal court was timely because the bad faith claim did not accrue until after the Second District Court of Appeals had decided the appeal on the underlying UM claim. There is authority in both...

157. United Cities Gas Co. v. Brock Exploration Co.
United States District Court, D. Kansas. November 13, 1997 984 F.Supp. 1379 1997 WL 716142

Natural gas local distribution company (LDC) brought action in state court against gas producer, seeking damages arising from producer's unlawful sales of natural gas to industrial customers within company's certificated territory. Producer removed action to federal court. Parties cross-moved for partial summary judgment, and...

...The District Court Van Bebber , Chief Judge, held that (1) after 1995 amendments eliminating its treble damages provision, Kansas Public Utilities...
...year limitations period on date that state court denied producer's appeal of Kansas Corporation Commission's (KCC) order in company's administrative complaint...

158. Padgett v. Nicholson
United States Court of Appeals, Federal Circuit. January 05, 2007 473 F.3d 1364 2007 WL 29954

VETERANS - Parties. Justice and fairness to parties weighed in favor of substituting widow nunc pro tunc for veteran when veteran died.

...substituting widow nunc pro tunc for veteran when veteran died after his case had been submitted for decision but before favorable...
...continuing relevance and preclusive effect that issues decided in veteran's appeal had for widow's accrued-benefits claim. 38 U.S.C.A. §5121(a) [8] 34 Armed Services 34III...

159. McCammon v. Oldaker
Supreme Court of Appeals of West Virginia. June 01, 1999 205 W.Va. 24 516 S.E.2d 38

LITIGATION - Limitations. Claim for tort of outrage arising from underlying case accrued when trial court finalized its judgment.

...who represented patient in underlying medical malpractice action against physician, claim accrued, for statute of limitations purposes, no later than date upon which trial court denied patient's post-trial motions after judgment was entered on jury verdict for physician, rather than when such judgment was affirmed on appeal; in appealing underlying judgment, attorneys were simply exercising their client's...

160. Anderson v. Chesley
United States District Court, E.D. Kentucky, Northern Division., at Covington. November 16, 2010 Not Reported in F.Supp.2d 2010 WL 4736833

Pro se Plaintiffs Christine Anderson and Candace Wenger were members of a state court class action styled: John Doe, et al. v. Roman Catholic Diocese of Covington, et al., Commonwealth of Kentucky, Boone Circuit Court, No. 03–CI–181 (hereafter, "the Catholic Diocese litigation"). The action settled in January 2006 with the...

...May 28, 2009. 6 However, under Kentucky case law, their claims did not accrue until after the plaintiffs were unsuccessful in getting additional payments awarded by the Appeals Special Master and after the challenges to the rulings of...

161. Wilks v. Chater
United States District Court, N.D. Illinois, Eastern Division. March 31, 1997 Not Reported in F.Supp. 1997 WL 158328

Plaintiff Weader Wilks, who suffers from back and leg problems, depression, and substance abuse, applied for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Sections 1611 and 1614 of the Social Security Act ("Act"), 42 U.S.C. §1381a, 1382a. The Commissioner...

...work. (R. at 38–46.) The instant action involves Plaintiff's claim for only those benefits accruing after January 29, 1993; Plaintiff does not contest that the prior decision is res judicata for purposes of this appeal. (R. at 14.) FN2. All references are to the Certified...

162. Snyder v. Blue Cross and Blue Shield of Mich.
United States District Court, E.D. Michigan, Northern Division. July 18, 2007 Not Reported in F.Supp.2d 2007 WL 2050812

Now before the Court are cross-motions for judgment on the administrative record of a plan administrator's decision, under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., to deny Plaintiff Sandra Snyder's claim for benefits. Plaintiff has made no showing, based in the administrative record, that the plan...

...A, II.G. That provision bars filing suit until 30 days after the exhaustion of the appeals procedure; this fact militates in favor of concluding that the accrual date for Plaintiff's claim could fall no earlier than that time frame permits. If...

163. Hood v. Ford Motor Co.
United States District Court, E.D. Michigan, Southern Division. August 19, 2011 Not Reported in F.Supp.2d 2011 WL 3651322

Plaintiffs Finnie Hood, Corine Elam, and Burton Hood have filed this proposed class action ERISA case against

Defendants to recover allegedly unpaid benefits that Plaintiffs argue that they are entitled to under collective bargaining agreements entered into by the parties. Plaintiffs also request that the Court enjoin Trust from failing to pay...

...representative thereof for entitlement to benefits under the Plan, until after the claims and appeals procedures of the Plan have been exhausted and, unless a...
...provided under ERISA, no later than two years after such claim has accrued. No other actions may be brought against the Plan more...

164. Nemes v. Korngut
United States District Court, D. New Jersey. December 24, 2008 Not Reported In F.Supp.2d 2008 WL 5401609

Plaintiff, Jeffrey Nemes, a prisoner confined at the Mid-State Correctional Facility, Wrightstown, New Jersey, brings this civil rights action, pursuant to 42 U.S.C. § 1983. At this time, the Court must review the complaint pursuant to 28 U.S.C. § 1915A to determine whether it should be dismissed as frivolous or malicious, for failure to state a...

...action. Plaintiff must raise these claims through a habeas petition after exhaustion of state court remedies; any 1983 case regarding these claims has not yet accrued as Plaintiff's conviction has not been overturned on appeal or through the habeas procedure. Plaintiff's claims regarding retaliation are...

165. McGee v. Schoolcraft Community College
United States Court of Appeals, Sixth Circuit. January 18, 2006 167 Fed.Appx. 429 2006 WL 126735

EDUCATION - Torts. Community college was entitled to absolute immunity as to former student's state tort claims.

...request to the Board to hear her step seven appeal after she had been repeatedly notified that her time to file such an appeal had expired cannot extend the accrual of her claims. See Stewart v. United States Veterans Admin., 722 F.Supp. 406...

166. Com., State Public School Bldg. Authority v. Noble C. Quandel Co.
Commonwealth Court of Pennsylvania. January 14, 1991 137 Pa.Cmwlth. 252 585 A.2d 1136

State Public School Building Authority appealed order of Board of Claims, No. 1192–1987, in favor of prime construction contractor on claims to recover cost of providing temporary heat and redoing site preparation. The Commonwealth Court, No. 2404 C.D. 1989, Pellegrini, J., held that: (1) Authority was estopped from asserting...

...that Quandel's site preparation claim is not barred because the claim accrued during the 30–day period after the Executive Director rendered his adverse decision and Quandel thereafter filed its appeal within the statutory six-month period. Paragraph 75 provides, in...

167. Cranpark, Inc. v. Rogers Group, Inc.
United States Court of Appeals, Sixth Circuit. April 22, 2016 821 F.3d 723 2016 WL 1612825

LITIGATION - Parties. Asset sale could affect real-party-in-interest status, not Article III standing.

...of appropriate amount of pre- and postjudgment interest was appropriate, after the Court of Appeals reversed judgment as matter of law entered by district court...

...based on losses that occurred over span of years, and claims for certain losses arguably accrued at different times. [33] 219 Interest 219III Time and Computation...

168. U.S. v. Bank of Celina
United States Court of Appeals, Sixth Circuit. February 25, 1986 823 F.2d 911 60 A.F.T.R.2d 87-5324

Bank appealed from judgment of the United States District Court, Middle District of Tennessee, L. Clure Morton, Chief Judge, in favor of United States in action originally brought to foreclose on tax liens and to enforce levy. The Court of Appeals, 721 F.2d 163, affirmed. Dispute subsequently arose as to amount of postjudgment interest owing on...

...and bank appealed from District Court's decision awarding such interest. After issuing unpublished opinion, 786 F.2d 1168, the Court of Appeals, Contie, Circuit Judge, held that: (1) postjudgment interest accrued on Government's tax claim at same rate applicable in all civil cases; (2) postjudgment...

169. Government Technical Services LLC v. U.S.
United States Court of Federal Claims. December 29, 2009 90 Fed.Cl. 522 2009 WL 5185383

GOVERNMENT CONTRACTS - Performance and Breach. Army Corps of Engineers' decision not to exercise contract's renewal option was not procurement action under Tucker Act.

...file a written claim with the CO within six years after the accrual of the claim and that claim were denied, this court would have jurisdiction to entertain a timely appeal of the denial. See id. §§605 609 see also...

170. Manterola v. Farmers Ins. Exchange
Court of Appeals of Arizona, Division 2, Department A. August 28, 2001 200 Ariz. 572 30 P.3d 639

INSURANCE - Limitations. Bad faith claim was time barred prior to declaratory judgment action on coverage.

...period on Manterola's bad faith claim. At the latest, that claim accrued in May 1996, thirty days after the entry of final judgment in her PI action against the Eliases, with no appeal therefrom having been filed. Because Manterola filed her bad faith...

171. McDade v. Siazon
Supreme Court of New Jersey. December 22, 2011 208 N.J. 463 32 A.3d 1122

GOVERNMENT - Tort Claims. Discovery rule did not apply to plaintiff's failure to file timely notice of claim against public entity.

...they were advised of the identity of the pipe's owner. After granting leave to appeal, the Appellate Division reversed the denial of summary judgment, holding that the discovery rule did not toll the accrual of plaintiffs' claims in the absence of an order granting leave to file...

172. In re Residential Capital, LLC
United States District Court, S.D. New York. September 21, 2016 558 B.R. 77 2016 WL 5137840

BANKRUPTCY - Claims. Contract-based attorney fee claims grounded in prepetition agreements also arose

prepetition.

...against the Trust's claims. Finally, in a recent decision decided after the Bankruptcy Court issued its Order, the Court of Appeals for the Ninth Circuit acknowledged that broad application of the...
...is inconsistent with the Ninth Circuit's fair contemplation test for claim accrual and, in an effort to reconcile the two, explained that...

173. Cody v. Missouri Bd. of Probation and Parole
United States District Court, W.D. Missouri, Western Division. April 10, 1979 466 F.Supp. 431
https://www.westlaw.com/Search/Results.html?query=fl%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

On order directing habeas corpus petitioner to show cause why the action should not be dismissed as an abuse of the writ, the District Court, Russell G. Clark, J., held, inter alia, that: (1) where the evidence showed that, with respect to the four claims raised in motion to amend habeas petition, the petitioner withheld them from consideration by...

...a different footing, however. As petitioner properly notes, the credit claim did not first accrue until approximately the same time as his first federal habeas corpus petition, long after he had pursued his direct state appeal. While the preferable procedure would have been dismissal of No...

174. Phillips v. Shinseki
United States Court of Appeals, Federal Circuit. September 25, 2009 581 F.3d 1358 2009 WL 3051793

VETERANS - Disability Benefits. Survivors were eligible to be substituted as accrued-benefits claimants and EAJA-claimants upon death of veteran-claimants.

...fathers was appropriate, on grounds that veteran-claimants had died after disability benefits claims were submitted to Court of Appeals for Veterans Claims and denial of substitution would adversely affect accrued-benefits claims, where court's decisions removed significant roadblock from daughters' paths to...

175. Luke v. IKON Office Solutions Inc.
United States District Court, D. Minnesota. August 01, 2002 Not Reported in F.Supp.2d 2002 WL 1835645

Plaintiff L. Dean Luke, for himself and on behalf of others similarly situated, brings this class action against defendants IKON Office Solutions Inc. ("IKON") and the IKON Office Solutions 1991 Deferred Compensation Plan (the "Plan") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to recover benefits...

...litigation. The Court thus concludes that the general rule for claim accrual applies and therefore Luke's filing of the complaint three months after the denial of his administrative appeal was timely. ORDER Based upon the foregoing, the submissions of...

176. Anderson v. U.S.
United States Court of Federal Claims. December 12, 2002 54 Fed.Cl. 620 2002 WL 31778676

MILITARY LAW - Personnel. Servicemember was entitled to back pay for period of erroneous forfeiture.

...747 (2002) (holding that because "ultimate liability to pay plaintiff after his contractual discharge date depends exclusively on the outcome of his appeals, and because those appeals are not concluded, defendant's motion to dismiss plaintiff's claim for active-duty pay accrued after [expiration of enlistment] is granted" see also Knight, 26...

177. County of Los Angeles v. Superior Court (Crystal B., Steven G., Anita G.)
Court of Appeal, Second District, Division 3, California. August 29, 2001 91 Cal.App.4th 1303 111 Cal.Rptr.2d 471

FAMILY LAW - Child Protection. Minors' claims against county for abuse in foster care did not accrue, for late-filing purposes, with appointment of independent counsel to represent them.

...from claim-filing requirements. County petitioned for writ of mandate. After granting alternative writ and issuing stay of proceedings, the Court of Appeal Croskey , J., held that minors' claims accrued, for purposes of application to file late claims, on date...

178. Weston County Hosp. Joint Powers Bd. v. Westates Const. Co.
Supreme Court of Wyoming. November 20, 1992 841 P.2d 841 1992 WL 337036

Company filed motion for order confirming arbitration award in its favor and against County Hospital Joint Powers Board. The District Court of Laramie County, Nicholas G. Kalokathis, J., after ruling that Board was not a "political subdivision" and that company's claim first accrued when American Arbitration Association entered...

...The District Court of Laramie County Nicholas G. Kalokathis , J., after ruling that Board was not a "political subdivision" and that company's claim first accrued when American Arbitration Association entered its award, denied Board's motion... ...judgment for company in amount determined by Arbitration Board of Appeal. Appeal was taken. The Supreme Court, Thomas , J., held that...

179. Minor v. State
Supreme Court of Iowa. June 15, 2012 819 N.W.2d 383 2012 WL 2161486

CIVIL RIGHTS - Immunity. Social worker had qualified immunity on §1983 claim involving investigation leading to child in need of assistance proceeding.

...this chapter shall be forever barred, unless within two years after such claim accrued, the claim is made in writing to the state appeal board under this chapter." Id. §669.13 9 FN7...

180. JJK Group, Inc. v. VW Intern., Inc.
United States District Court, D. Maryland. March 27, 2015 Not Reported in F.Supp.3d 2015 WL 1459841

This matter is before the Court on a Motion for Partial Summary Judgment filed by prime contractor Plaintiff JJK Group, Inc. ("JJK"), and cross Motions for Summary Judgment filed by subcontractor Defendant VW International, Inc. ("VWI") and its surety, Defendant First National Insurance Company of America ("First...

.. unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision (i) The...
. .contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any...

181. Back River LLC v. Jablon
Court of Special Appeals of Maryland. November 07, 2016 Not Reported in A.3d 2016 WL 6664893

Judicial tolling is a narrow and disfavored doctrine, rarely invoked and even more rarely affirmed. Overreliance on judicial tolling can "turn a legislative judgment as to a filing deadline into judicial balancing of competing equities, conferring on the judicial branch broad discretion to ameliorate the stern commands of the legislative...

...opinion, contradicted itself as to whether the limitations period began after the decision of the County Board of Appeal, or after this Court's decision in Back River I. The disputed sentence reads: "By this court's calculation, the Plaintiffs' claim accrued during Back River I, when the Baltimore County Board of Appeals first denied the variances and found the tower to be...

182. Back River, LLC v. Jablon
Court of Special Appeals of Maryland. December 02, 2016 Not Reported in A.3d 2016 WL 7077675

Judicial tolling is a narrow and disfavored doctrine, rarely invoked and even more rarely affirmed. Overreliance on judicial tolling can "turn a legislative judgment as to a filing deadline into judicial balancing of competing equities, conferring on the judicial branch broad discretion to ameliorate the stern commands of the legislative...

...opinion, contradicted itself as to whether the limitations period began after the decision of the County Board of Appeal, or after this Court's decision in Back River I. The disputed sentence reads: "By this court's calculation, the Plaintiffs' claim accrued during Back River I, when the Baltimore County Board of Appeals first denied the variances and found the tower to be...

183. Paalan v. U.S.
United States Court of Federal Claims. March 04, 2002 51 Fed.Cl. 738 2002 WL 304314

MILITARY LAW - Personnel. Former Navy member failed to state a claim for military pay based on transfer to Fleet Reserve.

...at 1093. Because the Navy's ultimate liability to pay plaintiff after his contractual discharge date depends exclusively on the outcome of his appeals, and because those appeals are not concluded, defendant's motion to dismiss plaintiff's claim for active-duty pay accrued after November 28, 1995, is granted. 4. Entitlement to compensation...

184. Environmental Safety Consultants, Inc. v. U.S.
United States Court of Federal Claims. February 11, 2011 97 Fed.Cl. 190 2011 WL 488685

GOVERNMENT CONTRACTS - Limitations. Contractor's claims stemming from Navy's termination for default on contract were time-barred.

...the federal government to a contracting officer "within 6 years after the accrual of the claim " compare 41 U.S.C. §605(c)(5) "Any failure by...
...denying the claim and will authorize the commencement of the appeal or suit on the claim with Pub.L. No. 111–350...

185. Spurlock v. Whitley
United States District Court, M.D. Tennessee, Nashville Division. July 17, 1997 971 F.Supp. 1166 1997 WL 431152

Plaintiffs, whose convictions on reprosecution for murder were subsequently vacated, sued for wrongful

investigation, prosecution, conviction, incarceration and reprosecution based on alleged fabricated evidence and perjured testimony by city and county officers and attorneys, and brought claims under §§1981, 1983, and state law...

...of limitations, until their convictions were vacated and prosecutions terminated; claims did not accrue after convictions were overturned on appeal where state did not abandon its prosecution after appeal and one plaintiff was retried and other resolved charges by...

186. Greco v. United Technologies Corp.
Supreme Court of Connecticut. February 28, 2006 277 Conn. 337 890 A.2d 1269

ENVIRONMENTAL LAW - Hazardous Substances. Wrongful death statute barred claims arising from exposure to hazardous substances that occurred at employer's facilities.

...strike claims related to wrongful death, and plaintiffs appealed. Holdings: After transferring appeal, the Supreme Court Palmer , J., held that: (1) wrongful...
...in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) governing accrual date of claims resulting from exposure to hazardous substances did not preempt Connecticut...

187. Castellano v. Shinseki
United States Court of Appeals for Veterans Claims. December 22, 2011 25 Vet.App. 146 2011 WL 6415348

VETERANS - Appeals. Board of Veterans' Appeals did not violate its duty on remand to readjudicate claim.

...2011. Decided Dec. 22, 2011. Background: Surviving spouse who filed accrued benefits claim after veteran's death appealed decision of the Board of Veterans' Appeals that denied entitlement to service connection for bipolar disorder, service...

188. DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund
United States District Court, S.D. New York. January 07, 1997 975 F.Supp. 258 1997 WL 562005

Administrator of Employee Retirement Income Security Act (ERISA) pension plan beneficiary's estate sued plan and plan's Board of Trustees, for alleged violations of ERISA and the Taft Hartley Act. On cross-motions for summary judgment, the District Court, Lowe, J., held that: (1) limitations period on nonfiduciary ERISA claim began to run...

...supra, FN7. Plaintiff argues that the actual date of the accrual of this claim is July 1989—or sixty days after Defendants effectively denied Plaintiff's appeal by failing to render a decision on the appeal. See Pl.'s Reply Mem. at 17 (citing 29 C.F.R. §§...

189. Shell Oil Company v. United States
United States Court of Federal Claims. January 06, 2017 — Fed.Cl. — 2017 WL 75856

GOVERNMENT - United States. It was reasonably foreseeable that oil producers would invoke aviation fuel production contracts to cover the cost of acid waste cleanup under CERCLA.

...per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date...
...if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed...

190. Bailey Lumber Co. v. Mason
Supreme Court of Mississippi. May 20, 1981 401 So.2d 696
https://www.westlaw.com/Search/Results.html?query=fi%3A&transitionType=Search&contextData=%28sc.Default%29&VR=3.0&RS=cblt1.0

Employer and its workers' compensation insurer appealed from decision of the Circuit Court, Harrison County, J. Ruble Griffin, J., reversing order of Workmen's Compensation Commission sustaining employer and insurer's motion to dismiss worker's petition to reopen compromise settlement. The Supreme Court, Bowling, J., held that Commission made...

...operation of Section 9(i) has been explained as follows: ' After a claim has accrued, a release of benefits is invalid except as approved by the Commission or by the court on appeal. Approval by the Commission is limited to certain types of...

191. Rowe v. Gary, Williams, Parenti, Watson & Gary, P.L.L.C.
United States District Court, N.D. Georgia, Atlanta Division. March 31, 2016 181 F.Supp.3d 1161 2016 WL 3390493

TORTS - RICO. Concert promoters failed to plausibly or particularly allege a pattern of racketeering activity predicated on a scheme to commit fraud.

...the Complaint in the light most favorable to Plaintiffs, the claims began to accrue on October 2, 2006, when the Supreme Court denied the plaintiff's petition for certiorari after the Second Circuit Court Appeals affirmed Judge Patterson's summary judgment order. Therefore, because the federal...

192. Moore v. Haviland
United States District Court, N.D. Ohio, Eastern Division. February 28, 2007 476 F.Supp.2d 768 2007 WL 632682

CRIMINAL JUSTICE - Habeas Corpus. Habeas petitioner did not validly waive his right to counsel at trial.

...General 197 603 Limitations, Laches or Delay 197 603 . 5 k. Accrual. (Formerly 197k603 Claims that prisoner sought to add to habeas petition by amendment began to accrue ninety days after state supreme court dismissed prisoner's delayed appeal of conviction, and thus were time-barred, since new claims...

193. Kwai Fun Wong v. Beebe
United States Court of Appeals, Ninth Circuit. October 09, 2013 732 F.3d 1030 2013 WL 5539621

GOVERNMENT - Tort Claims. FTCA statute of limitations was equitably tolled based on district court delay.

...be barred unless the petition is filed within six years after such claim first accrued," is jurisdictional); Bowles, 551 U.S. at 213, 127 S.Ct. 2360...
...U.S.C. §2107(a) and (c) , which provide that "no appeal shall bring any judgment, order or decree in an action...

194. Adams v. Robertson
Supreme Court of Alabama. December 22, 1995 676 So.2d 1265 1995 WL 756680

Insureds brought class action against health insurer to recover for fraud causing them to switch cancer

insurance policies. The Circuit Court, Barbour County, No. CV–92–021,William H. Robertson, J., approved settlement. Objecting class members appealed. The Supreme Court, Kennedy, J., held that: (1)...

...from the date of this Order; or (iii) one year after entry of judgment or final order by the Alabama Supreme...
...Court, without regard to whether any petition for certiorari or appeal to the United States Supreme Court is filed with respect...

EXHIBIT 7

EXHIBIT 7

1. Pricasplan Development Corp. v. Total S.A.
United States Court of Appeals, Second Circuit. October 21, 2010 397 Fed.Appx. 673 2010 WL 4136610

LITIGATION - Limitations. Colorado's accrual provisions for an unjust enrichment claim were applicable under New York's borrowing statute.

...2009 WL 4163513, dismissed the complaint. Holdings: The Court of Appeals held that: (1) cause of action for unjust enrichment accrued when French corporation allegedly misappropriated developer's confidential information, and (2) Colorado's accrual provisions for an unjust enrichment claim were applicable, under New York's borrowing statute. Affirmed West...

2. Natimir Restaurant Supply Ltd. v. London 62 Co.
Supreme Court, Appellate Division, First Department, New York. May 26, 1988 140 A.D.2d 261 528 N.Y.S.2d 564

Tenant brought action against landlord to recover excess amounts paid on electric bill. The Supreme Court, New York County, Ethel Danzig, J., denied landlord's motion for summary judgment, and appeal was taken. The Supreme Court, Appellate Division, held that tenant seeking to recover from landlord, upon discovery that tenant had been charged for...

...of dismissing so much of plaintiffs' breach of contract and unjust enrichment claims as accrued prior to March 21, 1980, and the order is otherwise affirmed, without costs. The facts of this case, as relevant herewith ...

3. Pomeroy v. Schwartz
Court of Appeals of Ohio, Eighth District, Cuyahoga County. November 07, 2013 Slip Copy 2013 WL 5970404

INSURANCE - Health. Six-year statute of limitations for breach of contract began to run on date of last payment by insurance agency.

...favor of client, and plaintiffs appealed. Holdings: The Court of Appeals, Tim Mccormack , J., held that: (1) plaintiffs' claims for...
...of oral contract claim; and (3) plaintiffs' claim for unjust enrichment accrued, and six-year statute of limitations began to run, on...

4. Swafford v. Schweitzer
District Court of Appeal of Florida, Fourth District. July 20, 2005 906 So.2d 1194 2005 WL 1681923

REAL PROPERTY - Vendor and Purchaser. Prospective purchasers who made improvements in contemplation of purchasing property stated claim for unjust enrichment.

...dismiss counterclaim. Prospective purchasers appealed. Holdings: The District Court of Appeal held that: (1) prospective purchasers' allegations that they made...
...purchasing it stated claim for unjust enrichment, and (2) unjust enrichment claim accrued on dates improvements were made. Reversed and remanded. West Headnotes...

5. Evanston Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.
United States District Court, E.D. Texas. July 19, 2010 Not Reported in F.Supp.2d 2010 WL 2854289

Pending before the court is Defendant National Union Fire Insurance Company of Pittsburgh, Pa.'s ("National Union") Motion for Reconsideration (# 12). National Union requests that the court reconsider the ruling in its Memorandum and Order (# 11) dated April 5, 2010, in which the court denied National Union's motion to dismiss as to...

...point in time at which Evanston's claims for contribution and unjust enrichment accrued —when the Texas Court of Appeals held that Evanston was obligated to provide coverage for the...

6. Royal Forest Condominium Owners's Ass'n v. Kilgore
Missouri Court of Appeals, Eastern District, Division Four. December 24, 2013 416 S.W.3d 370 2013 WL 6818186

LITIGATION - Limitations. Cause of action for unjust enrichment arising from allegedly improper condominium fee credits accrued upon final credit.

...remaining claims. Former president appealed. Holding: The Court of Appeals, Gary M. Gaertner, Jr., J., held that cause of action for unjust enrichment accrued, for limitations purposes, on first day of month following month...

7. Grilli v. Smith
Court of Appeals of Ohio, Fifth District, Fairfield County. December 26, 2012 Slip Copy 2012 WL 6712091

{¶ 1} Defendants-appellants Virginia Smith, Diana Camden, Grilli Real Estate Corporation and Valerio's, Inc., appeal a judgment of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of plaintiffs-appellees the Estate of Robert V. Grilli by and through Virginia Grilli, the Executor and Administrator and Virginia Grilli in her...

...AP–1326, 2002–Ohio–4395, the Franklin County Court of Appeals found a claim for unjust enrichment accrues on the date on which the money is wrongfully obtained...

8. U.S. v. Stebbins
U.S. Court of Appeals for the Armed Forces. August 30, 2005 61 M.J. 366 2005 WL 2095760

MILITARY LAW - Sentencing. Fine of $75,000 was not excessive in violation of the Eighth Amendment.

...1981) (noting that there "is no legal requirement that such [unjust] enrichment accrue before a fine can be legitimately imposed" and upholding a...
...States v. Kehrli, 44 C.M.R. 582, 584–85 (A.F.C.M.R.1971) (affirming a fine of $15,000 for drug-related offenses); United States...

9. Pyles v. Young
Court of Appeals of Texas, Dallas. July 01, 2009 Not Reported in S.W.3d 2009 WL 1875581

Tony Pyles appeals the traditional summary judgment granted in favor of Loren and Louise Young on their affirmative defense of res judicata. In three issues, Pyles contends the district court erred in granting Youngs' motion for summary judgment because his fraud, unjust enrichment, and statutory damages claims were not

compulsory counterclaims...

...any applicable authority supporting his contention that a claim for unjust enrichment cannot accrue until after a suit determining the right to possession is affirmed on appeal. Accordingly, we conclude Pyles's argument presents nothing for this Court's...

10. U.S. v. Erie County Medical Center
United States District Court, W.D. New York. October 30, 2002 Not Reported in F.Supp.2d 2002 WL 31655004

United States brought action against county medical center, alleging that medical center submitted fraudulent Medicare claims for reimbursement, in violation of the False Claims Act (FCA) and asserting related fraud and contract claims. Medical center moved to dismiss. The District Court, Elfvin, J., held that: (1) medical center was sui juris; (2)...

...See Blusal Meats, at 831. The Second Circuit Court of Appeals has held that "an unjust enrichment claim accrues upon occurrence of the wrongful act giving rise to the...

11. News World Communications, Inc. v. Thompsen
District of Columbia Court of Appeals. July 14, 2005 878 A.2d 1218 2005 WL 1653864

COMMERCIAL LAW - Limitations. Unjust enrichment claim accrued at time last service was rendered.

...unjust enrichment claim. Newspaper appealed. Holding: The Court of Appeals Schwelb , J., held that unjust enrichment claim accrued at time idea proposer's last service was rendered and she...

12. Renee Unlimited, Inc. v. City of Atlanta
Court of Appeals of Georgia. November 20, 2009 301 Ga.App. 254 687 S.E.2d 233

LITIGATION - Limitations. Evidence was sufficient to support finding unjust enrichment claim had not accrued more than four years before city brought claim.

...$731,409, and maker and owner appealed. Holdings: The Court of Appeals Miller , C.J., held that: (1) loan maker and owner...
...(2) evidence was sufficient to support finding that unjust enrichment claim had not accrued more than four years prior to city bringing claim for...

13. Pero v. Knowlden
Court of Appeals of Utah. September 18, 2014 336 P.3d 55 2014 WL 4636701

LITIGATION - Limitations. Cause of action for constructive trust concerning son's failure to reconvey property accrued under discovery rule more than four years before mother filed complaint.

...entered judgment for son. Mother appealed. Holdings: The Court of Appeals, Pearce , J., held that: (1) remand for additional findings...
...and (2) causes of action for constructive trust and unjust enrichment accrued under discovery rule more than four years before mother filed...

14. Palm Beach Co. v. Dun & Bradstreet, Inc.
Court of Appeals of Ohio, First District, Hamilton County. August 30, 1995 106 Ohio App.3d 167 665 N.E.2d 718

Limitations. Customer's fraud and unjust enrichment claims against credit reporting service was barred by limitations.

...service on limitations grounds, and customer appealed. The Court of Appeals held that: (1) four-year limitations period applicable to customer's...
...and was subject to same limitations period; and (3) customer's unjust enrichment claim accrued at end of last subscription year in which service allegedly...

15. Sherer v. Sherer
Court of Appeals of Texas, Texarkana. January 04, 2013 393 S.W.3d 480 2013 WL 50249

ESTATE PLANNING AND PROBATE - Trusts. Initial judgment which required an accounting was interlocutory and unappealable until subsequent judgment awarded damages.

...in attorney fees. Step-mother appealed. Holdings: The Court of Appeals, Carter , J., held that: (1) first judgment, which required ,...
...damages and attorney fees; (2) grandchildrens' cause of action accrued when their unjust enrichment cause of action accrued, not when the trial court imposed a constructive trust; and...

16. Johnston-Tombigbee Furniture Mfg. Co., Inc. v. Berry
Court of Civil Appeals of Alabama. January 06, 2006 937 So.2d 1047 2006 WL 101963

BUSINESS ORGANIZATIONS - Officers and Directors. Claims against former president of corporation were not tolled during period before former president sold his interest.

...reversed and remanded. Holdings: On remand, the Court of Civil Appeals held that: (1) claims against former president alleging breach of fiduciary duty, conversion, and unjust enrichment accrued, for limitations purposes, when corporation paid for purchase of real...

17. Moskovits v. Aldridge Pite, LLP
United States Court of Appeals, Eleventh Circuit. January 24, 2017 --- Fed.Appx. ---- 2017 WL 343519

Pro se plaintiff Alexander Moskovits filed a putative class-action suit in the Southern District of Florida against twenty-three defendants, alleging that defendants engaged in a widespread conspiracy to fraudulently foreclose on mortgaged properties throughout the state of Florida. Plaintiff appeals from the district court's sua sponte dismissal...

. .But Plaintiff alleges no facts in his complaint or on appeal from which we might infer that an unjust enrichment claim began to accrue within this narrow and crucial timeframe. Indeed, none of the...

18. Great Plains Trust Co. v. Union Pacific R. Co.
United States Court of Appeals, Eighth Circuit. June 29, 2007 492 F.3d 986 2007 WL 1855643

COMMERCIAL LAW - Debt Collection. Under Missouri borrowing statute, claims for unpaid interest on debentures accrued in Kansas and were time barred.

...claims as time-barred. Holder appealed. Holdings: The Court of Appeals Bowman , Circuit Judge, held that: (1) holder was not...
...year statute of limitations for unjust enrichment applied; (5) unjust enrichment claim accrued in Kansas when issuer received improper benefit by failure to ...

19. Vila v. Inter-American Investment, Corp.
United States Court of Appeals, District of Columbia Circuit. June 19, 2009 570 F.3d 274 2009 WL 1709217

INTERNATIONAL LAW - Foreign Sovereigns. International commercial lending organization waived immunity from banking consultant's unjust enrichment claim.

...claim was timely filed. Lender appealed. Holdings: The Court of Appeals Rogers , Circuit Judge, held that: (1) lender waived IOIA...
...and (2) remand was warranted to determine date of accrual of unjust enrichment claim under statute of limitations. Affirmed and remanded. Williams , Senior...

20. Jason v. National Loan Recoveries, LLC
Court of Special Appeals of Maryland. April 01, 2016 227 Md.App. 516 134 A.3d 421

COMMERCIAL LAW - Limitations. Debtor's collateral challenge to judgment as void was not required to be filed within three-year statute of limitations for civil actions.

...as time barred. Debtor appealed. Holdings: The Court of Special Appeals, Meredith , J., held that: (1) debtor's collateral challenge, through...
...actions on judgment, applied to unjust enrichment claim; (3) unjust enrichment claim accrued when purchaser received funds to satisfy judgment; and (4...

21. Northern Natural Gas Co. v. Nash Oil & Gas, Inc.
United States Court of Appeals, Tenth Circuit. May 19, 2008 526 F.3d 626 2008 WL 2080562

ENERGY AND UTILITIES - Oil and Gas. Continuing-tort exception to statute of limitations did not apply to conversion and unjust enrichment claims.

... not decide the issue and assume for purposes of this appeal that both the claim for conversion and the claim for unjust enrichment accrued when Northern's injury became "reasonably ascertainable." [1] [2] [3] "The...

22. Patel v. Krisjal, L.L.C.
Court of Appeals of Ohio, Tenth District, Franklin County. March 28, 2013 Slip Copy 2013 WL 1287344

TORTS - Limitations. Any unjust enrichment claim arising out of transfer of corporate assets to LLC accrued at the time of transfer.

...and terminated the case. Administrators appealed. Holdings: The Court of Appeals, Connor , J., held that: (1) any unjust enrichment claim accrued at the time of the transfer of funds; (2...

23. Freebird, Inc. v. Merit Energy Co.
United States District Court, D. Kansas. August 01, 2012 883 F.Supp.2d 1026 2012 WL 3143870

ENERGY AND UTILITIES - Oil and Gas. Royalty payments for gas lease were not made through open accounts, as would toll statute of limitations.

...no authority for applying the discovery rule to delay the accrual of unjust enrichment claims, but noted that the Tenth Circuit assumed for the sake of the appeal that the discovery rule applied. Leathers, 2010 WL 1936137, at...

24. Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP
District Court of Appeal of Florida, Third District. March 26, 2014 137 So.3d 1081 2014 WL 1230326

REAL PROPERTY - Condominiums. Condominium association's claim to enjoin unauthorized use of facilities accrued when unauthorized use began.

...doctrine of laches. Association appealed. Holdings: The District Court of Appeal held that: (1) association's claim for injunctive relief barring...
...the four corners of the complaint; (3) date of accrual of association's unjust enrichment claims arising out of payments made by condominium unit owners...

25. JPMorgan Chase Bank, N.A. v. Maurer
United States District Court, S.D. New York. February 10, 2015 Not Reported in F.Supp.3d 2015 WL 539494

This case pits two groups of individuals against each other for the rights to an Individual Retirement Account ("IRA") that was owned by the late Jack Maurer ("Mr.Maurer") and is presently in the custody of the interpleader plaintiff, JPMorgan Chase Bank, N.A ("JPMorgan Chase"). During his lifetime, Mr. Maurer...

...plaintiff sued in 1995 to recoup those interest payments. On appeal, the Second Circuit held that the plaintiff's claim for unjust enrichment accrued on the dates (1991–95) when the FDIC wrongfully paid...

26. Grynberg v. Total S.A.
United States Court of Appeals, Tenth Circuit. August 26, 2008 538 F.3d 1336 2008 WL 3906535

TORTS - Breach of Fiduciary Duty. Claim accrued when defendant's participation in exploratory consortium to exploit oil fields in question became public.

...argument in both cases that his cause of action for unjust enrichment may not yet have accrued; both these arguments were raised for the first time on appeal. See Carpenter, 456 F.3d at 1198 n. 2 (we...

27. Ver Brycke v. Ver Brycke
Court of Appeals of Maryland. February 13, 2004 379 Md. 669 843 A.2d 758

ESTATE PLANNING AND PROBATE - Gifts. Parents could recover $200,000 to help son and daughter-in-law buy adjacent house and live there.

...would begin to run? III. Did the Court of Special Appeals err in holding as a matter of law that the...

...established the date that the Plaintiffs' causes of action for unjust enrichment and detrimental reliance accrued? b.Did the trial court and the Court of Special Appeals err in failing to apply Maryland precedent from this Court...

28. Leathers v. Leathers
United States District Court, D. Kansas. May 13, 2010 Not Reported in F.Supp.2d 2010 WL 1936137

REAL PROPERTY - Deeds. Under Kansas law, equity principles required that a quit claim deed containing a mutual mistake be reformed to reflect the original intent of the grantor and grantee.

...this proposition." The Court assumed for the purposes of the appeal that the claim for unjust enrichment accrued when the injury became "reasonable ascertainable." The Court relied on...

29. Rich v. Simoni
United States District Court, N.D. West Virginia. September 30, 2014 Not Reported in F.Supp.3d 2014 WL 4978442

Before the Court are the Proposed Findings of Fact and Recommendation for Disposition ("R & R") of the Honorable John S. Kaull, United States Magistrate Judge (dkt. no. 213). Also pending for consideration are cross-motions for summary judgment filed by (I) the plaintiffs, Gary W. Rich ("Rich") and the Law Office of Gary W....

...of the recovery" As noted above, the Supreme Court of Appeals has not yet determined whether quantum meruit and unjust enrichment claims accrue on the date services are last rendered or whether the...

EXHIBIT 8

EXHIBIT 8

List of 45 results for adv: "breach of fiduciary duty" /5 accrul /s appeal affirm

1. Menezes v. WL Ross & Co., LLC
Supreme Court of South Carolina. May 22, 2013 403 S.C. 522 744 S.E.2d 178

BUSINESS ORGANIZATIONS - Limitations. Shareholder's breach of fiduciary duty claim accrued when surviving corporation voted to approve merger.

...TOAL Brian P. Menezes (Petitioner) argues that the court of appeals erred in its analysis of when a claim for breach of fiduciary duty accrues under Delaware law. We disagree. The court of appeals performed...
...584, 709 S.E.2d 114 (Ct.App.2011) The court of appeals noted the recent trend in Delaware law favoring the view that a claim for breach of fiduciary duty accrues as soon as the wrongful act occurs, and that whether...

2. Angell v. John Hancock Life Ins. Co.
United States Court of Appeals, Eighth Circuit. March 22, 2007 223 Fed.Appx. 527 2007 WL 866239

LABOR AND EMPLOYMENT - Limitations. ERISA claims accrued no later than date by which plan participant knew that fiduciary was withholding portion of pension.

...2d 1168, dismissed action. Participant appealed. Holding: The Court of Appeals held that causes of action for breach of fiduciary duty and co-fiduciary duty accrued under three-year limitations period no later than date by...

3. Techner v. Greenberg
United States Court of Appeals, Sixth Circuit. January 15, 2014 553 Fed.Appx. 495 2014 WL 169073

BUSINESS ORGANIZATIONS - Limitations. Member was entitled to equitable tolling of limitations period for fraudulent concealment as to her breach of fiduciary claim against manager of limited liability company.

...of $59,391.28. Parties cross-appealed. Holdings: The Court of Appeals, Martha Craig Daughtrey , Circuit Judge, held that: (1) sections. .
...statutes of limitations, not statutes of repose; (2) member's breach of fiduciary duty claim accrued when the harm was suffered by member from failure to...

4. Mackenzie v. Leonard, Collins and Gillespie, P.C.
United States District Court, D. Arizona. January 04, 2010 Not Reported in F.Supp.2d 2010 WL 46789

LEGAL SERVICES - Malpractice. A trustee's malpractice claims did not become fixed under Arizona law until an underlying appeal became final.

...2d 538 (1986) DISCUSSION Plaintiff's claims for legal malpractice and breach of fiduciary duty did not accrue until Plaintiff's underlying appeal in the Deeds litigation was completed. See Amfac Distrib. Corp...
.. CONCLUSION The Court holds that Plaintiff's claims for malpractice and breach of fiduciary duty did not accrue until the underlying appeal became final. IT IS THEREFORE ORDERED that the Berry Defendants...

5. Menezes v. WL Ross & Co. LLC
Court of Appeals of South Carolina. March 23, 2011 392 S.C. 564 709 S.E.2d 114

BUSINESS ORGANIZATIONS - Settlements. Shareholder's breach of fiduciary duty claim likely accrued before he signed release in employment action.

...of release. Investment firm appealed. Holding: The Court of Appeals, Konduros , J., held that issue of whether shareholder's breach of fiduciary duty claim accrued before he signed release in employment action could not be...
...for rehearing of this ruling, arguing the single issue on appeal (accrual of the breach of fiduciary duty claim) would determine all the points addressed in the circuit...

6. USACM Liquidating Trust v. Deloitte & Touche
United States Court of Appeals, Ninth Circuit. April 22, 2013 523 Fed.Appx. 488 2013 WL 1715532

LITIGATION - Limitations. Bankruptcy litigation trust's action against former auditor for accounting malpractice was time-barred.

...favor of former auditor, Trust appealed. Holdings: The Court of Appeals held that: (1) two-year Nevada statute of limitations...
...statute of limitations on Nevada claims for aiding and abetting breaches of fiduciary duty accrued on date auditor terminated its services with debtor. Affirmed. West...

7. Weinberg v. Weinberg
District Court of Appeal of Florida, Fourth District. August 09, 2006 936 So.2d 707 2006 WL 2265216

TORTS - Venue. Venue was appropriate in county where cause of action for breach of trust and breach of fiduciary duty accrued.

...venue, and trustee appealed. Holding: The District Court of Appeal Warner , J., held that venue was appropriate in county where cause of action for breach of trust and breach of fiduciary duty accrued. Affirmed West Headnotes [1] 401 Venue 401I Nature or Subject...

8. Simon v. Nadler, Nadler & Burdman Co., L.P.A.
United States Court of Appeals, Sixth Circuit. August 03, 2005 142 Fed.Appx. 894 2005 WL 1869518

LEGAL SERVICES - Malpractice. Cause of action for legal malpractice accrued when client read antenuptial agreement drafted by law firm.

...for summary judgment and client appealed. Holdings: The Court of Appeals held that: (1) cause of action for legal malpractice...
...drafted by law firm; (2) cause of action for breach of fiduciary duty accrued when antenuptial agreement was negotiated and drafted; and (3...

9. Patten v. Winderman
District Court of Appeal of Florida, Fourth District. September 26, 2007 965 So.2d 1222 2007 WL 2782549

LEGAL SERVICES - Attorney-Client Relationship. Delayed discovery doctrine did not apply to claimant's

breach of fiduciary duty claim against attorney.

...favor of attorney. Claimant appealed. Holdings: The District Court of Appeal Hazouri , J., held that: (1) cause of action for breach of fiduciary duty accrued, and four-year statute of limitations period began to run...

10. Mizuho Corporate Bank (USA) v. Cory & Associates, Inc.
United States District Court, N.D. Illinois, Eastern Division. January 10, 2005 Not Reported in F.Supp.2d 2005 WL 61466

This case is before the court on remand from the Seventh Circuit Court of Appeals, 341 F.3d 644 (2003), which includes a full discussion of the case. The Court of Appeals' remand requires this court to adjudicate only Count IV of the third-party complaint originally filed by Cory & Associates, Inc. ("Cory") against Swett & Crawford of Illinois,...

...claim not subject to a statute of limitations defense. On appeal, however, the Seventh Circuit rejected IBJW's argument, overturned the district...
...the indemnification cases and concluded that Count IV is a breach of fiduciary duty claim that accrued in the fall of 1995. After the Seventh Circuit held...

11. Moore Inv. Co., Inc. v. Michell, Williams, Selig, Gates & Woodyard
Court of Appeals of Arkansas, Division I. May 18, 2005 91 Ark. App. 102 208 S.W.3d 803

LEGAL SERVICES - Malpractice. Client failed to create a genuine issue of material fact sufficient to preclude summary judgment on conflict of interest claim.

...firm summary judgment. Former client appealed. Holdings: The Court of Appeals, Terry Crabtree , J., held that: (1) cause of action,...
...signed by former client, (2) cause of action for breach of fiduciary duty or conflict of interest accrued from the date law firm represented former client and second...

12. Mid-South Iron Workers Welfare Plan v. Harmon
United States Court of Appeals, Tenth Circuit. April 13, 2016 645 Fed.Appx. 661 2016 WL 1445067

LABOR AND EMPLOYMENT - Limitations. Cause of action for breach of fiduciary duty under ERISA accrued when employee benefit plans stated in separate action that employer did not make contributions.

...remanded remaining claims. Plans appealed. Holding: The Court of Appeals, Monroe G. McKay , J., held that plans' cause of action for breach of fiduciary duty under ERISA accrued, and three-year statute of limitations period began to run...

13. Kurz v. Philadelphia Elec. Co.
United States Court of Appeals, Third Circuit. October 01, 1996 96 F.3d 1544 1996 WL 555243

Class of retirees brought action against employer under Employee Retirement Income Security Act (ERISA), claiming employer breached its fiduciary duty under ERISA by making material misrepresentations regarding its intent to increase benefits under pension plan. Summary judgment, 1992 WL 187107, was entered in favor of employer, and retirees...

...retired after such date. Appeal was taken. The Court of Appeals Roth , Circuit Judge, held that: (1) employer first gave

serious...
...retirees' breach of fiduciary duty claim under ERISA; (3) retireos' breach of fiduciary duty claim under ERISA accrued on date employer announced it was increasing pension benefits, and...

14. Dolmetta v. Uintah Nat. Corp.
United States Court of Appeals, Second Circuit. June 28, 1983 712 F.2d 15 Fed. Sec. L. Rep. P 99,260

Liquidators of bank brought diversity action to recover shares of stock allegedly purchased with funds embezzled from bank. The United States District Court for the Southern District of New York, Charles L. Brieant, J., dismissed all causes of action as barred by applicable statutes of limitations, and appeal was taken. The Court of...

...statutes of limitations, and appeal was taken. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) claim for constructive trust ..
...conspiring with embezzler and that they aided and abetted embezzler's breach of fiduciary duty accrued at time of embezzlement, and thus were barred by six...

15. Suter v. University of Texas at San Antonio
United States Court of Appeals, Fifth Circuit. October 26, 2012 495 Fed.Appx. 506 (Table, Text in WESTLAW), Unpublished Disposition 2012 WL 5285108

EDUCATION - Labor and Employment. University did not violate Equal Pay Act.

.. summary judgment for defendants. Professor appealed. Holdings: The Court of Appeals held that: (1) professor's failure to move for leave...
...rule applied; (4) claims for breach of contract and breach of fiduciary duty accrued when start-up funding for research laboratory was not available ..

16. Bramel v. Brandt
Court of Appeals of Oregon. November 13, 2003 190 Or.App. 402 79 P.3d 375

LEGAL SERVICES - Malpractice. Failure to allege damages arising from attorneys' alleged fraud barred fraud claim.

.. statute of limitations grounds. Former clients appealed. The Court of Appeals Armstrong , J.. held that: (1) clients' cause of action for breach of fiduciary duty accrued when they were warned by independent counsel of potential conflict...

17. Coulter v. Grant Thornton, LLP
Court of Appeals of Arizona, Division 1. January 03, 2017 --- P.3d ---- 2017 WL 24606

Background: Taxpayers brought action against accounting firm, alleging breach of fiduciary duty, professional negligence, negligent misrepresentation, common law fraud, aiding and abetting, racketeering, fraudulent concealment, breach of contract, and breach of implied covenant of good faith and fair dealing. The Superior Court, Maricopa...

...to the remaining claims. Taxpayers appealed. Holdings: The Court of Appeals, Kent E. Cattani , J., held that: (1) as matter...
...facts establishing them; (2) fact issues remained as to accrual date of claims for breach of fiduciary duty, professional

negligence, and negligent misrepresentation; (3) fact issue remained...

18. Wells v. C.J. Mahan Const. Co.
Court of Appeals of Ohio, Tenth District, Franklin County. April 11, 2006 Not Reported in N.E.2d 2006 WL 951444

Background: Wife, who was executor of deceased shareholder's estate, brought action against company asserting claims of breach of contract and frustration of purpose after company refused to pay for husband's shares at value sought by wife, and also asserted fraud and breach of fiduciary duty claims alleging that founding shareholder paid himself...

...denied in part. Company brought appeal. Holdings: The Court of Appeals McGrath , J., held that: (1) shareholder's estate impermissibly received...
...on impermissible testimony; (3) shareholder's cause of action for breach of fiduciary duty accrued when founder received the unequal distribution; (4) evidence was...

19. Union Sav. Bank v. Lawyers Title Ins. Corp.
Court of Appeals of Ohio, Tenth District, Franklin County. December 28, 2010 191 Ohio App.3d 540 946 N.E.2d 835

REAL PROPERTY - Mortgages and Deeds of Trust. Mortgage lender's tort claims against escrow agent arising from agent's failure to ensure priority of lender's loan, accrued, for limitations purposes, at loan closing.

... of escrow agent, and lender appealed. Holdings: The Court of Appeals Sadler , J., held that: (1) lack of formal agreement... ... existed for an implied contract, but (3) negligence and breach of fiduciary duty claims accrued, for purposes of running of four-year statute of limitations...

20. Cantor Fitzgerald Inc. v. Lutnick
United States Court of Appeals, Second Circuit. December 16, 2002 313 F.3d 704 2002 WL 31812433

BUSINESS ORGANIZATIONS - Partnerships. Plaintiffs were on inquiry notice such that fraudulent concealment did not toll limitations period.

...WL 111200, dismissed claims, and plaintiffs appealed. The Court of Appeals John M. Walker, Jr. , Chief Judge, held that: (1) under New York's borrowing statute, cause of action for breach of fiduciary duty accrued in either Nevada or California; (2) plaintiffs sufficiently alleged damage...

21. Curtis v. Kellogg & Andelson
Court of Appeal, Second District, Division 4, California. July 12, 1999 73 Cal.App.4th 492 86 Cal.Rptr.2d 536

BANKRUPTCY - Claims. Bankrupt corporation's legal malpractice claim could not be assigned to its sole shareholder.

...sustaining demurrer by defendants. Shareholder appealed, and the Court of Appeal Curry , J., held that: (1) accounting malpractice, and breach of contract and breach of fiduciary duty claims, accrued for limitations purposes when Internal Revenue Service (IRS) issued notice...

22. New York State Workers' Compensation Bd. v. Consolidated Risk Services, Inc.
Supreme Court, Albany County, New York. August 26, 2013 40 Misc.3d 1232(A) (Table, Text in WESTLAW), Unreported Disposition 977 N.Y.S.2d 668

This action is brought by the State of New York Workers' Compensation Board ("WCB") in its capacities as the governmental entity charged with the administration of the Workers' Compensation Law and as successor in interest to three group self-insured trusts: The Manufacturing Industry Workers' Compensation Self–Insurance Trust...

...was intended to alter settled law of the Court of Appeals holding that a claim for breach of fiduciary duty accrues when damages are sustained (IDT, 12 N.Y.3d at 140...

23. Estate of Eng
Court of Appeal, Second District, Division 1, California. January 29, 2016 Not Reported in Cal.Rptr.3d 2016 WL 369751

Amelia Eng appeals the trial court's denial of her petition for redress and the court's order awarding attorney fees to the respondents in this protracted dispute over her parents' wills. We affirm. Amelia is one of five children of Edward and Frances Eng. The other children are Michael Eng, Susan Madjar, Margaret Eng, and...

...for breach of fiduciary duty by Edward is barred. On appeal, Amelia argues (as she did at trial) that her claim for breach of fiduciary duty did not accrue until after Edward died in October 2008, when she testified...

24. Vinecourt Landscaping v. Kleve
Court of Appeals of Ohio, Eleventh District, Geauga County. December 31, 2013 Slip Copy 2013 WL 6875468

INSURANCE - Limitations. Insureds' claims for professional negligence accrued and limitations period began to run at the time insureds sustained damages.

...judgment for defendants, and insureds appealed. Holdings: The Court of Appeals, Cynthia Westcott Rice , J., held that: (1) insureds' cause...
...insureds' cause of action against insurance agency and agent for breach of fiduciary duty accrued, and the applicable four-year statute of limitations began to...

25. Rademeyer v. Farris
United States Court of Appeals, Eighth Circuit. March 13, 2002 284 F.3d 833 2002 WL 386402

LITIGATION - Limitations. Missouri statute tolling limitations period when defendant leaves state is unconstitutional.

...that claims were time-barred. Plaintiff appealed. The Court of Appeals Morris Sheppard Arnold , Circuit Judge, held that: (1) because plaintiff...
...claim accrued only when plaintiff actually discovered fraud; but (2) breach of fiduciary duty claim accrued when a second minority shareholder told plaintiff that he did...

26. Catlin Specialty Insurance Company v. Tegol, Inc.
United States District Court, W.D. North Carolina, Charlotte Division. January 19, 2017 Slip Copy 2017 WL 252290

THIS MATTER is before the Court on Plaintiff Catlin Specialty Insurance Company's Motion for Summary Judgment (Doc. No. 53), Third Party Defendant Sentinel Insurance Company's Motion for Judgment on the Pleadings (Doc. No. 51), and Third Party Defendant Consolidated Marketing Group Inc.'s Motion for Judgment on the Pleadings (Doc. No. 49)....

...1992) When considering this issue, the North Carolina Courts of Appeals have frequently determined that "[b]reach of fiduciary duty claims accrue upon the date when the breach is discovered and are...

27. Maxson v. Travis County Rent Account
Court of Appeals of Texas, Austin. August 26, 1999 21 S.W.3d 311 1999 WL 644743

BUSINESS ORGANIZATIONS - Partnerships. Limited partners' fiduciary duty claims were subject to two-year statute of limitations.

...of general partners, and limited partners appealed. The Court of Appeals, Jones , J., held that: (1) limited partners' knowledge of prior...
...subject to two-year statute of limitations; (3) claim for breach of fiduciary duty accrued when partnerships were dissolved; and (4) compensation for partnership interests...

28. DiMaggio v. Rosario
Court of Appeals of Indiana. April 07, 2016 52 N.E.3d 896 2016 WL 1377970

COMMERCIAL LAW - Contracts. Evidence established defendant's abandonment of oral contract relating to creation and purpose of closely-held corporation.

...majority shareholder. Former minority shareholder appealed. Holdings: The Court of Appeals, Darden , Senior Judge, held that: (1) evidence supported existence...
...that he was abandoning corporation; and (4) action for breach of fiduciary duty accrued when majority shareholder notified minority shareholder via written letter that...

29. Johnston-Tombigbee Furniture Mfg. Co., Inc. v. Berry
Court of Civil Appeals of Alabama. January 06, 2006 937 So.2d 1047 2006 WL 191963

BUSINESS ORGANIZATIONS - Officers and Directors. Claims against former president of corporation were not tolled during period before former president sold his interest.

...reversed and remanded. Holdings: On remand, the Court of Civil Appeals held that: (1) claims against former president alleging breach of fiduciary duty, conversion, and unjust enrichment accrued, for limitations purposes, when corporation paid for purchase of real...

30. Treuil v. Treuil
Court of Appeals of Texas, Beaumont. April 08, 2010 311 S.W.3d 114 2009 WL 6327398

LITIGATION - Limitations. Ex-wife's cause of action for portion of ex-husband's retirement benefits accrued from date of ex-wife's constructive notice of withdrawal.

...of ex-wife. Ex-husband appealed. Holdings: The Court of Appeals, Hollis Horton , J., held that: (1) ex-wife's injury...
...ex-wife's failure to timely file action; and (4) breach of fiduciary duty claim accrued at time of ex-wife's conversation with daughter. Reversed and...

31. Cohen v. State Street Bank and Trust Co.
Appeals Court of Massachusetts, Suffolk. September 15, 2008 72 Mass.App.Ct. 627 893 N.E.2d 425

SECURITIES REGULATION - Investment Advisors. Causes of action for breach of fiduciary duty began to accrue when investor received monthly statements showing substantial losses.

...manager's motion for summary judgment, and investor appealed. Holdings: The Appeals Court, Grainger , J., held that: (1) causes of action for breach of fiduciary duty began to accrue at the latest when investor began receiving monthly statements which...

32. Piles v. Allstate Ins. Co.
Court of Appeals of North Carolina. December 04, 2007 187 N.C.App. 399 653 S.E.2d 181

INSURANCE - Limitations. Date that limitations period began to run on insured's fraud and negligence claims against insurer was question of fact.

...suit as time barred. Insured appealed. Holdings: The Court of Appeals Wynn , J., held that: (1) claims of bad faith...
...began to run, when insurer denied UIM coverage; (2) breach of fiduciary duty claim accrued, when insured allegedly discovered that her policy did not include...

33. Mizuho Corp. Bank (USA) v. Cory & Associates, Inc.
United States Court of Appeals, Seventh Circuit. August 29, 2003 341 F.3d 644 2003 WL 22024244

INSURANCE - Agents and Brokers. Wholesale broker was not insurer's agent.

...broker appealed, and retail broker cross-appealed. The Court of Appeals Diane P. Wood , Circuit Judge, held that: (1) claim for breach of fiduciary duty accrued before effective date of Illinois Insurance Placement Liability Act (IPLA...

34. Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC
Court of Appeals of Kentucky. June 06, 2008 277 S.W.3d 255 2008 WL 2312737

FINANCE AND BANKING - Accounts. Bank could not recover losses from its customer's check conversion scheme from accounting firm that bank had hired.

...motions and dismissed complaint. Bank appealed. Holdings: The Court of Appeals, Wine , J., held that: (1) no evidence existed to...
...(3) plaintiff's causes of action for professional negligence and breach of fiduciary duty accrued, and one-year limitations period began to run, no earlier...

35. Padrick v. Lyons
Court of Appeals of Oregon. April 13, 2016 277 Or.App. 455 372 P.3d 528

TORTS - Joint and Several Liability. Evidence did not support finding of joint liability for bankruptcy debtor's former attorney.

.. In favor of defendants. Trustee appealed. Holdings: The Court of Appeals, DeVore , J., held that: (1) cause of action for breach of fiduciary duty accrued, and two-year limitations period began to run, no later...

36. Doe v. Harbor Schools, Inc.
Supreme Judicial Court of Massachusetts, Essex. March 14, 2006 446 Mass. 245 843 N.E.2d 1058

GOVERNMENT - Limitations. Three-year limitations period governing breach of fiduciary duty suit accrued when State ward knew that sexual relationship with supervisor was wrong.

...826 N.E.2d 228 (2005) See note 4, supra. The Appeals Court held that the proper standard to apply to that...
...knowledge standard," which provides that "a cause of action for breach of fiduciary duty does not accrue until the beneficiary has actual knowledge of the fiduciary's breach...

37. Florida Gamco, Inc. v. Fontaine
District Court of Appeal of Florida, Fourth District. August 10, 2011 68 So.3d 923 2011 WL 3477081

COMMERCIAL LAW - Venue. Florida corporation resided in county in which it had its principal place of business, not in county in which it merely conducted business.

...denied motion and defendants appealed. Holdings: The District Court of Appeal, Taylor , J., held that: (1) venue for action against...
...in county in which it merely conducted business; (3) breach of fiduciary duty claim accrued in county in which corporation had its sole office and...

38. Thomas v. Carnahan Thomas, LLP
Court of Appeals of Texas, Dallas. February 04, 2014 Not Reported in S.W.3d 2014 WL 465818

LEGAL SERVICES - Malpractice. Client's breach of fiduciary duty claim against attorneys did not relate back to his earlier filed legal malpractice claim.

..and different transaction. In response to the motion and on appeal, Thomas argued the trial court erred, because the Attorneys: (1...
...District case; 11 (2) did not conclusively prove that the breach of fiduciary duty accrued in September 2006; and (3) fraudulently concealed their breach of...

39. Consolidated Edison, Inc. v. Northeast Utilities
United States District Court, S.D. New York. May 15, 2004 318 F.Supp.2d 181 2004 WL 1105972

BUSINESS ORGANIZATIONS - Mergers and Acquisition. Shareholders on date of merger default could sue for merger premium.

...1) Based on this provision, the New York Court of Appeals has held that accrued breach of fiduciary duty claims against indenture trustees were automatically transferred to subsequent bondholders...

40. Larson v. Northrop Corp.
United States Court of Appeals, District of Columbia Circuit. April 29, 1994 21 F.3d 1164 1994 WL 151377

Participant in employee pension benefit plan brought action against plan sponsors/fiduciary alleging breach of fiduciary duty. The United States District Court for the District of Columbia, Thomas F. Hogan, J., held that action was time barred. Participant appealed. The Court of Appeals, Levin H. Campbell, Senior Circuit...

...that action was time barred. Participant appealed. The Court of Appeals Levin H. Campbell , Senior Circuit Judge, sitting by designation, held...
...Income Security Act (ERISA) six-year statute of limitations for breach of fiduciary duty accrued when sponsor, after terminating plan, acquired annuity which allegedly was...

41. Thomas v. Barton Lodge II, Ltd.
United States Court of Appeals, Fifth Circuit. May 12, 1999 174 F.3d 636 1999 WL 246719

Limited partner of partnership formed to construct and own an apartment project brought derivative action against individual partner of entity serving as partnership's general partner, together with other parties, alleging claims including breach of fiduciary duty and fraud in connection with sale of partnership's principal asset to entities...

...a no damages order. Appeal was taken. The Court of Appeals E. Grady Jolly , Circuit Judge, held that: (1) breach of fiduciary duty claim accrued for limitations purposes when limited partners received letter announcing sale...

42. In re Unisys Corp. Retiree Medical Benefits ERISA Litigation
United States District Court, E.D. Pennsylvania. March 10, 1997 957 F.Supp. 628 1997 WL 115390

Retirees brought class action against former employer, as planadministrator, under Employee Retirement Income Security Act (ERISA), seeking postretirement medical benefits. Following affirmance of reinstatement of retirees' claims for breach of fiduciary duty, 57 F.3d 1255, retirees moved for summary judgment, and administrator moved for...

...551-52 (9th Cir.1990) , the Ninth Circuit Court of Appeals specifically held that actual financial harm need not occur for a breach of fiduciary duty cause of action to accrue. In Ziegler, the defendant executed an investment agreement containing provisions...

43. Catler v. Arent Fox, LLP
Court of Special Appeals of Maryland. May 30, 2013 212 Md.App. 685 71 A.3d 155

LEGAL SERVICES - Malpractice. Law firm did not fraudulently conceal letter of intent from developer.

...k. Insufficient discussion of objections. Client failed to brief on appeal issue of when claims for legal malpractice and breach of fiduciary duty accrued, and thus, client waived on appeal any claim that trial court erred in granting law firm...

44. Dernick Resources, Inc. v. Wilstein
Court of Appeals of Texas, Houston (1st Dist.). December 31, 2009 312 S.W.3d 864 2009 WL 5174171

REAL PROPERTY - Mineral Rights and Interests. Public records filing of field sale did not give venturers constructive notice of sale of interest for limitations purposes.

...Nebraska interest, investors and company appealed. Holdings: The Court of Appeals, Evelyn V. Keyes , J., held that: (1) company owed...
...for limitations purposes; (3) investors' cause of action for breach of fiduciary duty regarding Nebraska field accrued when investors received audit of interest in field, (4...

45. Sands v. Menard
Court of Appeals of Wisconsin. September 20, 2016 372 Wis.2d 127 887 N.W.2d 94

LEGAL SERVICES - Conflict of interest. Attorney's failure to give disclosures before agreeing to provide services in exchange for ownership interest barred attorney's equitable claims.

...Attorney appealed and business cross-appealed. Holdings: The Court of Appeals, Stark , P.J., held that: (1) attorney lacked clean hands...
...failed to allege valid and enforceable contract; and (3) breach of fiduciary duty counterclaim accrued more than two years before attorney filed suit. Affirmed. West...

EXHIBIT 9

EXHIBIT 9

ELECTRONICALLY SERVED
04/08/2016 03:16:46 PM

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DAN RAIDER, an individual,
on his own behalf and on
behalf of others similarly situated

DISTRICT COURT

CLARK COUNTY, NEVADA

DAN RAIDER, an individual on his own behalf and on behalf of others similarly situated, Plaintiff, v. ARCHON CORPORATION, a Nevada corporation; PAUL W. LOWDEN, an individual; and SUZANNE LOWDEN, an individual, Defendants. _____/	Case No.: A-15-712113-B Dept. No.: XII PLAINTIFF DAN RAIDER'S RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES TO PLAINTIFF DAN RAIDER (Nev. R. Civ. Pro., Rule 33)

Plaintiff, Dan Raider, by his attorneys, Steven E. Goren, of GOREN, GOREN & HARRIS, P.C.; and Steven J. Parsons, of LAW OFFICES OF STEVEN J. PARSONS, hereby responds and answers Defendants' First Set of Interrogatories to Plaintiff Dan Raider.

Dated: Friday, April 8, 2016.

STEVEN E. GOREN
GOREN, GOREN & HARRIS, P.C.; and
LAW OFFICES OF STEVEN J. PARSONS

/s/ Steven J. Parsons
STEVEN J. PARSONS
Nevada Bar No. 363

Attorneys for Plaintiff
DAN RAIDER, an individual on his own behalf and on behalf of others similarly situated

PROOF OF SERVICE

Within NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that service of the foregoing Plaintiff Dan Raider's Responses to Defendants' First Set of Interrogatories to Plaintiff Dan Raider was made upon Defendants' counsel, John P. Desmond, Justin J. Bustos and Kenneth K. Ching, of DICKINSON WRIGHT PLLC by e-filing with the Court's electronic filing system.

Dated: April 8, 2016.

/s/ Nick Loll
An Employee of LAW OFFICES OF STEVEN J. PARSONS

GENERAL OBJECTIONS

Plaintiff objects to the Defendants' Interrogatories to the extent they are preceded by nearly seven (7) pages of so-called *Instructions and Definitions*, which are not provided for in Nev. R. Civ. Pro., Rule 33, and which objectionable inserts and conditions are Defendants' inappropriate attempt to enlarge the duties of Plaintiff beyond the provisions of Nev. R. Civ. Pro., Rule 33.

INTERROGATORY NO. 1:

Identify each and every purchase or sale by Plaintiff of Archon Exchangeable Preferred Stock, including the trade date, the number of shares, the price, and the settlement date.

RESPONSE TO INTERROGATORY NO. 1:

By my lawyers: Objection, Defendant has access to this information in its own records.

However, without waiving the objection and in the spirit of cooperation: All the trade confirmation documents in my possession are being produced contemporaneously.

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INTERROGATORY NO. 2:

State whether Plaintiff was a holder of record of Archon Exchangeable Preferred Stock on August 31, 2007, and describe in detail any supporting documentation of Plaintiff's status as a record holder of Archon Exchangeable Preferred Stock.

RESPONSE TO INTERROGATORY NO. 2:

By my lawyers: Objection, Defendant has access to this information in its own records.

However, and without waiving the objection and in the spirit of cooperation: Yes, I was a holder of record on August 31, 2007 and was paid (less than I should have been paid) for 7,000 shares.

INTERROGATORY NO. 3:

If you contend that Plaintiff was a holder of record of Archon Exchangeable Preferred Stock on January 9, 2015, describe in detail any facts and supporting documentation of Plaintiff's status as a record holder of Archon Exchangeable Preferred Stock.

RESPONSE TO INTERROGATORY NO. 3:

By my lawyers: Objection, Defendant has access to this information in its own records, and the phrase "holder of record" is not defined and is probably ambiguous in this context.

However, and without waiving the objection and in the spirit of cooperation: As I still have an unfulfilled claim for payment from earlier, I am not certain. As I understand the phrase "holder of record" the answer is: "no," but that does not mean that I believe I was duly paid what I was owed or that the rights I have under the Certificate of Designation were fulfilled and met.

INTERROGATORY NO. 4:

If you contend that Plaintiff is currently a holder of record of Archon Exchangeable Preferred Stock, describe in detail any facts and supporting documentation of Plaintiff's status as a record holder of Archon Exchangeable Preferred Stock.

RESPONSE TO INTERROGATORY NO. 4:

Please see my answer and response to Interrogatory No. 3, above.

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INTERROGATORY NO. 5:

Identify all derivative, option, call, put, straddle, short, synthetic or other similar portions held by you whose value is related to, dependent on, or synchronous with the value of Archon Exchangeable Preferred Stock, including but not limited to Archon Corporation common stock, and for each such position identify when the position was entered into, the cost of any contract or agreement related to the position identified, and the terms of each position (i.e., call date, strike price, etc.).

RESPONSE TO INTERROGATORY NO. 5:

None.

INTERROGATORY NO. 6:

For each purchase, sale or position related to Archon Exchangeable Preferred Stock identified in response to Interrogatories Nos. 1 and 5, identify the exchange or market in which each transaction was executed and the executing broker.

RESPONSE TO INTERROGATORY NO. 6:

By my lawyers: Objection, irrelevant and unduly burdensome.

However, in the spirit of cooperation and without waiving the objection, please see the trade confirmations, produced contemporaneously.

INTERROGATORY NO. 7:

For each transaction in Archon Exchangeable Preferred Stock identified in response to Interrogatories Nos. 1 and 5, identify the person or persons responsible for making the decision to buy, sell or otherwise enter into any position ("investment decision") in or relating to Archon Exchangeable Preferred Stock and state with particularity the basis upon which each identified investment decision was made, including identification of (a) all documents reviewed in connection with the investment decision, (b) all persons consulted in connection with the investment decision, and (c) all models or calculations used or consulted in connection with the investment decision.

...

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RESPONSE TO INTERROGATORY NO. 7:

By my lawyers: Objection, irrelevant and unduly burdensome and vague and poorly defined.

However, in the spirit of cooperation and without waiving the objection, I made the investment decisions. I find the rest of your questions vague and difficult to answer with precision and accuracy. I did speak with my friend Eric vander Porten about Archon. Before investing I read the Certificate of Designation and some SEC filing, but I no longer recall which SEC filing or filings I read. I did not use any formal model and do not recall whether I did any calculations. I have no records of any calculations.

INTERROGATORY NO. 8:

State whether Plaintiff or any employee, agent or anyone acting on the individual Plaintiff's behalf read or reviewed the Certificate of Designation of the Archon Exchangeable Redeemable Preferred Stock of Sahara Gaming Corporation, and if so, state the first date such reading or review occurred.

RESPONSE TO INTERROGATORY NO. 8:

Yes, I reviewed the Certificate of Designation before my first investment on March 5, 2007, but I don't recall the date on which I did.

INTERROGATORY NO. 9:

Identify each Archon SEC filing that Plaintiff reviewed, read or consulted prior to making an investment decision with respect to Archon Exchangeable Preferred Stock.

RESPONSE TO INTERROGATORY NO. 9:

I do not recall which SEC filings I reviewed and have no records of such things.

INTERROGATORY NO. 10:

Identify any and all communications relating to any investment decision made by Plaintiff relating to Archon Exchangeable Preferred Stock made prior to any communications with counsel in connection with this lawsuit.

...

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RESPONSE TO INTERROGATORY NO. 17:

I learned of all three of the other Archon cases while they were pending, but I do not recall the date I first learned of the cases.

INTERROGATORY NO. 18:

Describe Plaintiff's participation in any legal action against Archon Corporation, including but not limited to *David Rainero v. Archon Corporation*, Case No. 2:07-cv-1553-GNM-PAL.

RESPONSE TO INTERROGATORY NO. 18:

I have not participated in any legal action against Archon, other than this case. I understand I could possibly have been a member of the class in *Rainero*, had the class been certified.

INTERROGATORY NO. 19:

Identify each shareholder vote or proxy returned to the Company in connection with the election of any special directors pursuant to Paragraph 5(c) and (d) of the Certificate of Designation for Archon's Exchangeable Preferred Stock; and for each vote or proxy, state the identity of any individuals for whom Plaintiff voted in favor of electing to the Archon Board of Directors.

RESPONSE TO INTERROGATORY NO. 19:

By my lawyers: Objection, irrelevant and unduly burdensome given defendant Archon should have this information.

However, without waiving the objection, I do not have any recollection of returning any proxy or otherwise becoming a voting shareholder.

INTERROGATORY NO. 20:

State the date when Plaintiff Dan Raider first became aware of the Redemption described in paragraph 9 of the Complaint.

RESPONSE TO INTERROGATORY NO. 20:

I do not recall, but it was prior to the date of redemption.

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INTERROGATORY NO. 21:

State the basis of Plaintiff Dan Raider's financial ability to maintain this lawsuit.

RESPONSE TO INTERROGATORY NO. 21:

By my lawyers: Objection, irrelevant and not a matter for discovery. Defendant should advance the cost of notice in this matter, but if the Court does not order that to occur, Plaintiff's counsel is able and willing to do so.

INTERROGATORY NO. 22:

State the basis of Plaintiff Dan Raider's attorneys' ability to manage this lawsuit in light of "the difficulties likely to be encountered in the management of a class action." See NRCP 23(3)(D).

RESPONSE TO INTERROGATORY NO. 22:

By my lawyers: Objection, this is vague, not a question of fact properly addressed in an interrogatory, and to the extent it relies on probing the thoughts of plaintiff or plaintiff's attorneys regarding matters such as "the difficulties likely to be encountered in the management of a class action," this question may infringe on work product and attorney client privilege.

Nonetheless, the client is able to assert that he has hired experienced attorneys who have been battling Archon with vigor and skill for quite some time.

INTERROGATORY NO. 23:

State the date when Plaintiff Dan Raider first made contact with his attorneys in this lawsuit.

RESPONSE TO INTERROGATORY NO. 23:

By my lawyers: Objection, this is irrelevant and infringes on attorney-client privilege.

Without waiving the objection: I do not recall the exact date.

INTERROGATORY NO. 24:

State the entire factual basis for "COUNT VI - BREACH OF FIDUCIARY DUTY" in the Complaint at pages 13-20.

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RESPONSE TO INTERROGATORY NO. 24:

The factual basis is carefully set forth in the complaint which spans 22 pages plus an additional exhibit. It is incorporated by reference and will not be repeated here. Thus, suffice it to say that the Lowdens had a controlling interest and put their own interests ahead of the preferred shareholders. Despite a final judicial determination that the amount paid for redemption was not correct, the Lowdens have refused to authorize appropriate payment.

The Lowdens allowed the payment of one redemption price to one universe of preferred shareholders (e.g., the stockholders in *Leeward Capital* and *D.E. Shaw* cases) but have failed to pay the same redemption to others, such as me and others, similarly situated.

However, discovery is ongoing, and Plaintiff reserves the right to supplement this response as other information becomes available, particularly upon the depositions of Defendants PAUL W. LOWDEN, and SUZANNE LOWDEN.

INTERROGATORY NO. 25:

State the basis for Plaintiff's allegation and calculation in paragraph 6(b) of Plaintiff's Complaint that "[t]he members of the putative class on whose behalf this action has been brought collectively owned a total of at least 1,432,270 shares of Archon's preferred stock."

RESPONSE TO INTERROGATORY NO. 25:

By my lawyers: Objection, this total comes originally from Defendant and thus is unduly burdensome. Defendant obviously has access to this information in its own records.

However, without waiving that objection, in its Motion to Dismiss in *Rainero v. Archon* (Docket No. 69), Archon represented that 1,439,270 shares were held by shareholders other than Archon's officers and directors and the plaintiffs in *D.E. Shaw v. Archon* and *Leeward Capital v. Archon*. Mr. Raider owned 7,000 shares. Therefore, the members of the putative class collectively owned a total of at least 1,432,270 shares.

INTERROGATORY NO. 26:

State the basis of Plaintiff's allegation in paragraph 34 of Plaintiff's Complaint that '[t]here are over five hundred sixty (560) members of the Class."

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RESPONSE TO INTERROGATORY NO. 26:

By my lawyers: Objection, this calculation of the total class members comes originally from Defendant and thus, the interrogatory is unduly burdensome. Defendant obviously has access to this information in its own records.

Without waiving that objection, according to Archon's interrogatory answers in *Rainero v. Archon*, there were 580 shareholders listed as shareholders of record. The number of class members is at least at least 580 less the eleven (11) plaintiffs in *D.E. Shaw v. Archon* and *Leeward Capital v. Archon* and the four (4) officers and directors identified as shareholders by Archon in its interrogatory answers.

INTERROGATORY NO. 27:

State whether Plaintiff tendered any shares of Archon Exchangeable Preferred Stock to Archon, and if so, the date such shares were tendered and how many shares were tendered.

RESPONSE TO INTERROGATORY NO. 27:

By my lawyers: Objection, Defendant has access to this information and its request is thus unduly burdensome. Also, the language "tendered" is vague.

However, and in not waiving the objection and in the spirit of cooperation, I was paid a less-than appropriate amount for 7,000 shares which payment I received on or about February 1, 2008.

INTERROGATORY NO. 28:

State whether Plaintiff conducted any investigation of the Redemption described in paragraph 9 of the Complaint prior to contacting his attorneys in this lawsuit.

RESPONSE TO INTERROGATORY NO. 28:

By my lawyers: Objection, irrelevant, work product and attorney client privilege. What Plaintiff knows now after consultation with an attorney, compared to what he knew before, is not a relevant or appropriate subject for discovery. Furthermore, what is meant by "conducted any investigation of the Redemption" is somewhat vague and open to different interpretations.

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However, without waiving the objections, and in the spirit of cooperation, I believe the best answer to your question is "Yes."

INTERROGATORY NO. 29:

Describe the circumstances that led Plaintiff to file this lawsuit.

RESPONSE TO INTERROGATORY NO. 29:

By my lawyers: Objection, irrelevant, work-product and attorney-client privilege. What Plaintiff knows now after consultation with an attorney, compared to what he knew before, is not a relevant or appropriate subject for discovery. It may invade the attorney-client privilege and work product privilege.

However, without waiving the objection, I believe the best answer to your question is set forth in the Complaint itself.

INTERROGATORY NO. 30:

Describe how Plaintiff first made contact with his attorneys in this lawsuit.

RESPONSE TO INTERROGATORY NO. 30:

By my lawyers: Objection to the extent the interrogatory infringes on attorney-client privilege or work-product privilege. Furthermore, whether the first contact was by phone, email or U.S. Mail or in any other manner is not a relevant fact.

However, without waiving the objection, Plaintiff does certify that he made the first contact with his attorneys in this lawsuit and that he was not solicited.

Dated: Friday, April 8, 2016.

STEVEN E. GOREN
GOREN, GOREN & HARRIS, P.C.; and
LAW OFFICES OF STEVEN J. PARSONS

/s/ Steven J. Parsons
STEVEN J. PARSONS
Nevada Bar No. 363

Attorney for Plaintiff
DAN RAIDER, an individual on his own behalf and on behalf of others similarly situated

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POST AUGUST 31, 2007 DIVIDEND ACCRUAL

A	B	C	D	E
dividend payment date	annual dividend rate	unpaid and accrued dividends to which periodic dividend rate is to be applied	dividend for period ending on dividend payment date	accrued and unpaid dividends including dividend payable on dividend payment date
		E preceding row	dividend rate x C	C + D
8/31/2007	16%			$3.4490
9/30/2007	16%	$3.4490	$0.0460	$3.4950
3/31/2008	16%	$3.4950	$0.2796	$3.7746
9/30/2008	16%	$3.7746	$0.3020	$4.0766
3/31/2009	16%	$4.0766	$0.3261	$4.4027
9/30/2009	16%	$4.4027	$0.3522	$4.7549
3/31/2010	16%	$4.7549	$0.3804	$5.1353
9/30/2010	16%	$5.1353	$0.4108	$5.5461
3/31/2011	16%	$5.5461	$0.4437	$5.9898
9/30/2011	16%	$5.9898	$0.4792	$6.4690
3/31/2012	16%	$6.4690	$0.5175	$6.9865
9/30/2012	16%	$6.9865	$0.5589	$7.5454
3/31/2013	16%	$7.5454	$0.6036	$8.1490
9/30/2013	16%	$8.1490	$0.6519	$8.8010
3/31/2014	16%	$8.8010	$0.7041	$9.5050
9/30/2014	16%	$9.5050	$0.7604	$10.2655
3/31/2015	16%	$10.2655	$0.8212	$11.0867
9/30/2015	16%	$11.0867	$0.8869	$11.9736
3/31/2016	16%	$11.9736	$0.9579	$12.9315
9/30/2016	16%	$12.9315	$1.0345	$13.9660
3/31/2017	16%	$13.9660	$1.1173	$15.0833
9/30/2017	16%	$15.0833	$1.2067	$16.2900
			$12.8410	

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE Respondents. *and* STEPHEN HABERKORN, an individual, Real Parties in Interest,	Supreme Court No. 71802 State Court Case No. A-16-732619-B

PETITIONERS' APPENDIX TO REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS
VOL. IV – PRA0504-PRA0725

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Document	Date	Volume	Bates Range
Exhibits 5-20 of Dan Raider v. Archon Corporation, Paul W. Lowden, and Suzanne Lowden, Raider's Reply in Support of Motion for Partial Summary Judgment and Opposition to Defendants' Counter-Motion for Summary Judgment	2/1/2017	II	PRA 0238-PRA 0456
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D.E. Shaw Laminar Portfolios, LLC, et al v. Archon Corporation, Order	12/22/2010	I	PRA 0067-PRA 0077

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DAN RAIDER, an individual on his own behalf and on behalf of others similarly situated, Plaintiff, vs. ARCHON CORPORATION, a Nevada corporation; PAUL W. LOWDEN, an individual; and SUZANNE LOWDEN, an individual, Defendants.	CASE NO. A-15-712113-B DEPT. XIII **Hearing Date:** **Hearing Time:**

REPLY IN SUPPORT OF DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

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Defendants Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden (collectively, "Defendants"), by and through their attorneys of record, Dickinson Wright PLLC, hereby file this Reply in Support of Their Counter-Motion for Summary Judgment ("Counter-Motion"). This Reply is supported by the attached memorandum of points and authorities, the pleadings and papers on file herein, the Declaration of Justin J. Bustos as **Exhibit 1**, and any other material this Court may choose to consider.

DATED this 23rd day of February, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As a threshold matter, Defendants object to the Court resolving any of the pending motions for summary judgment prior to a decision regarding class certification. Indeed, it is settled that the trial court in a class action proceeding should first decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the lawsuit. Here, to the extent Plaintiff intends to proceed with this case as a class action, it is entirely premature for the Court to consider the merits of the summary judgment motions prior to deciding whether this action will proceed as a class action.

Turning to the merits of the case, this is a case about Mr. Raider wanting to have everything both ways. Mr. Raider did nothing to pursue his claims for eight years (by his own admission), yet he denies having sat on his rights. He wants the statute of limitations on his claims tolled by *Rainero*, but he denies his case is the same action as *Rainero*. He did not want to participate in *Leeward*, but he now wants the benefit of *Leeward*. He admits he wanted to "wait and see" whether *Leeward* would be successful before filing his own claims, but denies being a "wait and see" plaintiff. He wants to rely on the United States Supreme Court's holding in *Parklane* to assert non-mutual, offensive collateral estoppel, but he also wants to deny that *Parklane* is binding on this Court to the extent *Parklane* prohibits a "wait and see" plaintiff from using non-mutual, offensive collateral estoppel.[1] He wants damages fixed by Judge Pro's orders in *Leeward* and *D.E. Shaw*,[2] but he denies the explicit basis of those orders, that the Redemption of the EPS occurred – past-tense – on August 31, 2007 (despite the fact that Judge Pro said this at least three times). He wants the method of calculating damages fixed by Judge Pro's orders, yet he also wants to use a completely different method of calculating damages than Judge Pro use (resulting in much larger damages – almost ten times more – than the previous cases). He wants to use this entirely different method of calculating damages than Judge Pro used so

[1] Astonishingly, Mr. Raider argues that Nevada courts have never adopted the "wait and see" doctrine from *Parklane Hosiery Co. v. Shore*. Opposition at 32:6-19. He also argues that *Parklane* does not give Nevada trial courts the discretion to determine whether or not offensive collateral estoppel should be applied. *Id.* Yet, *Parklane* is the very case that gave rise to the doctrine of non-mutual offensive collateral estoppel, which Mr. Raider relies on for his argument for applying collateral estoppel to this case.

[2] Judge Pro's Orders stand in direct conflict with the Prospectus, letters to the SEC describing the rate of return on the EPS, two fairness opinions and fourteen years of audited financial statements from national accounting firms and local accounting firms in Las Vegas.

he can get an annualized return for himself of 115 percent, and he also wants to prevent Defendants from arguing that the interpretation of the EPS Certificate is a matter of contract interpretation and that dividends on the same are capped at 16 percent annually.

Straddling these wholly inconsistent positions is not easy. To do so, Mr. Raider must manipulate, mangle, and distort Nevada's statute of limitations, his own claims, Judge Pro's orders, the law and reasoning from *Parklane*, and his own testimony. However, his convoluted (and often transparently incorrect) arguments fail to conceal a much simpler reality: Mr. Raider is trying to avoid the consequences of having the same class action (i.e. *Rainero*) filed in the wrong court, namely, the dismissal of this case because it is plainly barred by Nevada's statute of limitations and NRS 11.500.

Mr. Raider freely admits he knew of his allegations in 2007, which were that he disagreed with Archon's calculation of the EPS and that he believed he was underpaid. He considered filing claims against Archon, but decided such claims were not worth incurring attorneys' fees. He considered his case to be the very same as *Rainero* and he claims to have relied on *Rainero*. Unfortunately, the *Rainero* action was filed in the wrong court and was ultimately dismissed in 2015. This was undoubtedly a blow for the class action suit, not only because it was dismissed in federal court, but because the class's claim for breach of contract had gone stale in Nevada's state courts and was plainly time-barred. The solution was to substitute Mr. Raider as the named class representative and to split Mr. Raider's eight-year-old breach of contract cause of action into "new" claims which were designed to evade Nevada's statute of limitations.

One new theory was that dividends on the EPS continue to accrue indefinitely as "installment payments," which Mr. Raider claims could restart the statute of limitations in perpetuity. The problem with this theory is that it is contrary to law: dividend payments are not installments, nor do accruing dividends constitute a continuing breach of a contract. Another new theory was that Defendants had breached a fiduciary duty by not paying Mr. Raider on the same terms as the plaintiffs in *Leeward* or *D.E. Shaw* (despite the fact that Mr. Raider specifically declined to participate in *Leeward*). However, for this theory to help Mr. Raider get around his statute of limitations problem, this new claim had to accrue within three years of the filing of Mr. Raider's Complaint. So Mr. Raider asserts that this

claim accrued *not* when Defendants allegedly underpaid Mr. Raider for his shares of EPS, and not when Judge Pro decided *Leeward* and *D.E. Shaw* (those dates were all outside the statute of limitations), but instead this claim supposedly accrued when the Ninth Circuit affirmed *Leeward* and *D.E. Shaw* in 2012. But this theory also suffers from fatal flaws: no court in the United States has ever found that a claim accrues upon appellate affirmation of a lower court's decision, but many courts have held that such a claim would have accrued, if ever, at the initial alleged breach in 2007. (This same analysis also applies directly to Mr. Raider's unjust enrichment claim).

Thus, what becomes clear when analyzing Mr. Raider's contradictory arguments and his blatantly incorrect statements of law and fact is that he is desperately trying to get around Nevada's statute of limitations and NRS 11.500. Mr. Raider's arguments fail. Mr. Raider's claims all arise from his allegation that Defendants underpaid him for his shares of the EPS at the time of redemption in 2007. Mr. Raider was well-aware of this allegation in 2007 and thus any claims he had accrued in 2007. He failed to file this case until 2015, and his claims are now stale, time-barred, and must be dismissed.

II. FACTS

Mr. Raider concedes the following facts which are fatal to his claims:

- Mr. Raider was fully aware that he disagreed with Archon's calculation of the Redemption price of the EPS in 2007.[3]
- In 2008, Mr. Raider was invited to join an earlier case against Archon, *Leeward*, but he declined to do so because he did not want to pay for an attorney.[4]
- Mr. Raider implicitly concedes that his breach of contract claim is stale, unless it can be saved by the controversial doctrine of cross-jurisdictional tolling, which has not been adopted by the Nevada Supreme Court. Opposition at 19:1-7.
- Mr. Raider waited to see whether *Leeward* was successful before bringing his claims.[5]

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[3] Counter-Motion at 6:4.

[4] Counter-Motion, Ex. 4 at 105 (emphasis added).

[5] Counter-Motion, Ex. 4 at 118. Mr. Raider testified that he was intentionally awaiting the results of *Leeward* to decide whether to file his own lawsuit: "[T]here could have been an outcome in *Leeward* which would have disinclined me to file a lawsuit or which would have made me – made it very improbable that I would have – that I would have filed a lawsuit."

- Mr. Raider did nothing to pursue any claims against Defendants until filing the instant case in 2015.[6]
- Mr. Raider's decision to delay filing his own lawsuit until January 9, 2015 was entirely voluntary, and in no way caused by Defendants.[7]
- Mr. Raider's complaint was filed more than 5 years after *Rainero* was commenced.
- Mr. Raider's complaint was filed more than 90 days after *Rainero* was dismissed.
- Mr. Raider is seeking different damages from what was awarded in *D.E. Shaw* and *Leeward*.[8]
- Mr. Raider concedes that his claim for declaratory relief should be dismissed.
- Mr. Raider concedes that his claim for constructive trust should be dismissed.

III. DISCUSSION

A. Defendants Object to the Court Resolving Any of the Pending Motions for Summary Judgment Prior to a Decision Regarding Class Certification.

As a threshold matter, it is premature for the Court to issue a decision on any of the pending motions for summary judgment until the Court makes a determination as to whether this action is to proceed as a class action. And, Defendants hereby expressly object to the hearing on this matter proceeding at this time and to the Court issuing any decision on any pending motion for summary judgment prior to a decision regarding class certification.

"A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action." *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1074, 155 P.3d 268, 271 (2007) (citing *Green v. Obledo*, 29 Cal.3d 126, 146, 172 Cal.Rptr. 206, 624 P.2d 256 (1981)). Indeed, to allow a motion for class certification after a finding of liability would be to confer a "gratuitous benefit" on persons who have not been parties and were not exposed to the risk of an

(continued)

Id. at 118:15-19.

[6] Counter-Motion, Ex. 3, No. 18 ("I have not participated in any legal action against Archon, other than this case.").

[7] Counter-Motion, Ex. 4 at 118.

[8] Opposition, at 36:26.

adverse adjudication. *O'Hara v. Del Bello*, 47 N.Y.2d 363, 369, 391 N.E.2d 1311 (1979); *In re Cablevision Sys. Corp. Shareholders Litig.*, 21 Misc. 3d 419, 430, 868 N.Y.S.2d 456 (Sup. Ct. 2008), *rev'd on other grounds by Louisiana Mun. Employees' Ret. Sys. v. Cablevision Sys. Corp.*, 74 A.D.3d 1291, 904 N.Y.S.2d 492 (2010). Proceeding in this sequence promotes judicial efficiency and ensures that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings. *Fireside Bank*, 40 Cal. 4th at 1074, 155 P.3d at 271. This rule prevents what has come to be known as "'one-way intervention,' whereby not-yet bound absent plaintiffs may elect to stay in a class after favorable merits rulings but opt out after unfavorable ones." *Id.*

The law on this point is fairly settled. The Federal Rules of Civil Procedure dealt with the problem of one-way intervention by requiring that class issues be resolved "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(C)(1)(A); *Fireside Bank*, 40 Cal. 4th at 1079, 155 P.3d at 274. Similarly, the Nevada Rules of Civil Procedure require that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." NRCP 23(c)(1).

Here, Plaintiff filed this action on January 9, 2015. (Compl., on file herein.) However, despite the fact that this action has been pending for more than two years, Plaintiff has made no effort to seek a ruling to determine whether this action is to be maintained as a class action.

Instead, Plaintiff filed his Motion for Partial Summary Judgment on November 16, 2015. (Mot. for Partial Summ. J., on file herein.) In response to Plaintiff's Motion, Defendants filed their Counter-Motion for Summary Judgment and their Motion for Partial Summary Judgment Regarding the Maximum Dividend Rate Per Annum Per Share on the EPS.

However, it would be entirely premature for the Court to resolve any of the pending motions for summary judgment as there has been no determination as to whether this case may proceed as a class action. The California Supreme Court colorfully described such a situation as follows:

> One way intervention left a defendant open to being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success. This sort of sequence, too, would waste resources; it also could make the minority (and therefore presumptively inaccurate) result the binding one.

Fireside Bank, 40 Cal. 4th at 1078, 155 P.3d at 274.

For this reason, Defendants expressly object to the Court resolving any of the pending motions for summary judgment until a ruling has been made regarding class certification. The three pending motions for summary judgment should all be held in abeyance pending such a decision on certification, to the extent Plaintiff still intends to pursue this action as a class action.

B. **Mr. Raider's claims are time-barred and must be dismissed.**

The following sections demonstrate that each of Mr. Raider's claims have been brought outside the statute of limitations and must be dismissed. It is also demonstrated that Mr. Raider truly only has one claim, and that is for breach of contract based on the allegation that Archon underpaid him for his shares of EPS in 2007. Although Mr. Raider has asserted six claims, all he has really done is engage in claim-splitting to try to evade and manipulate the statute of limitations, something that is prohibited by Nevada law. Analysis of relevant case law shows that each of his claims, in fact, can only be found to arise from his basic breach of contract cause of action and must have accrued, if ever, in 2007. Thus, all of his claims are barred by the statute of limitations and must be dismissed.

1. Declaratory Relief

Mr. Raider's Opposition does not respond to Defendants' Motion that his claim for declaratory relief should be dismissed as untimely (*see* Opposition at 18-19), and therefore Mr. Raider concedes the same. *See* DCR 13(3) ("Failure of the opposing party to serve and file his written opposition may be construed as an admission that the motion is meritorious and a consent to granting the same."); *see also*, *Smith v. FJM Corp.*, No. 207-CV-1417-KJD-GWF, 2009 WL 703482, at *5 (D. Nev. Mar. 16, 2009) ("[B]y failing to respond to Defendant's Motion regarding retaliation, Plaintiff concedes Defendant's argument."); *Tatum v. Schwartz*, 2007 U.S. Dist. LEXIS 10225, 2007 WL 419463, *3 (E.D. Cal. 2007) (finding that the plaintiff "tacitly concede[d][a] claim by failing to address defendants' argument in her opposition."); *Ardente, Inc. v. Shanley*, 2010 U.S. Dist. LEXIS 11674, 2010 WL 546485 (N.D. Cal. Feb. 9, 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence."). Mr. Raider's Opposition nowhere argues that his first claim for declaratory relief is not barred by Nevada's statute of limitations, and therefore this claim should be dismissed.

Mr. Raider's claim for declaratory relief accrued as soon as he knew of his dispute with Archon regarding the Redemption price of the EPS. "A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties . . . . A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights." *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774, 776, 958 N.Y.S.2d 440, 442–43 (2013) (internal citations and quotation marks omitted). Thus, Mr. Raider's claim for declaratory relief may have accrued even before his breach of contract claim accrued, as he testified that he anticipated litigation with Archon even prior to the Redemption. Counter-Motion, Ex. 4 (Raider Depo. Trans.), at 71-72; *see United Pacific–Reliance Ins. Co. v. DiDomenico*, 173 Cal.App.3d 673, 676, 219 Cal.Rptr. 119 (1985) ("The cause of action for declaratory relief may accrue, in the sense that an action may be maintained, before any breach occurs. That is the very purpose of the remedy.").

By his own admission, Mr. Raider knew of his dispute regarding the Redemption Price even before the August 31, 2007 Redemption. Counter-Motion, Ex. 3, Interrogatory Response Number 20; Ex. 4, Raider Depo. Trans. at 44:18-21, 71-72. Thus, his claim for declaratory relief accrued more than seven years before his Complaint was filed on January 9, 2015. In Nevada, the statute of limitations for a claim for declaratory relief is six years. *Job's Peak Ranch Cmty. Ass'n, Inc. v. Douglas Cty.*, No. 55572, 2015 WL 5056232, at *4 (Nev. Aug. 25, 2015) (citing NRS 11.190(1)(b)). Mr. Raider's claim for declaratory relief was filed on January 9, 2015, more than seven years after his claim accrued. Therefore, Mr. Raider's claim for declaratory relief must be dismissed as untimely.

2. The statute of limitations for Mr. Raider's breach of contract claim was not tolled.

Mr. Raider readily concedes that his breach of contract claim accrued on August 31, 2007 and is outside Nevada's six-year statute of limitations;[9] however, he argues that this claim should be saved by the controversial doctrine of cross-jurisdictional tolling, which has not been adopted by the

[9] *Job's Peak Ranch Cmty. Ass'n, Inc.*, 2015 WL 5056232, at *4.

Nevada Supreme Court and has been rejected by courts in Virginia, Pennsylvania, Tennessee, Illinois, Louisiana, and Texas.[10] *See* Opposition at 19:1-7.

Mr. Raider's discussion of "class action tolling" is wholly deficient and fails to analyze the doctrine as applied to the circumstances of this case. He fails to address that there is a significant difference between the "class action tolling" described in the cases of *American Pipe* and *Jane Roe Dancer* (*see* Opposition at 13-14) and the type of tolling he would need to save his stale claims, namely, **cross-jurisdictional, class-action tolling**. The tolling discussed and allowed in *American Pipe* and *Jane Roe Dancer* is class-action tolling *within* the same court system (i.e., tolling within the federal court system by a federal class action). It is commonly referred to as *intra-jurisdictional* tolling. However, the tolling Mr. Raider seeks is *inter-jurisdictional* (tolling within a state court system based on a federal class action), and such "cross-jurisdictional" class action tolling has been sharply distinguished and rejected by many courts and commentators.

None of the cases Mr. Raider cites in support of his position address cross-jurisdictional, class action tolling. Opposition at 13-14. Yet, this is not because Mr. Raider is unaware of the controversial doctrine, as he cites the same in his brief when he notes that Judge Hardy recently applied "cross jurisdictional tolling . . . ." Opposition at 15:12. Thus, Mr. Raider fails to demonstrate or identify any basis to toll his claims and fails to recognize that numerous courts have rejected cross-jurisdictional tolling because of the doctrine's negative implications for state courts and legislatures.

It is true that Judge Hardy recently stated in the *Haberkorn v. Archon* case that "under these circumstances, cross-jurisdictional also applies." However, it should be noted that Judge Hardy's order offers no analysis of the doctrine of cross-jurisdictional, class action tolling. *Archon* has filed a Petition for Writ of Prohibition or Mandamus with the Nevada Supreme Court, and the Nevada Supreme Court has ordered briefing on the issue and has indicated that it intends to consider the issue on the merits. **Exhibit 2**, December 2, 2016 Petition for Writ of Prohibition or Mandamus; **Exhibit 3**,

[10] *See Portwood v. Ford Motor Co.*, 183 Ill.2d 459, 465–67, 233 Ill.Dec. 828, 701 N.E.2d 1102, 1104–05 (1998) (rejecting cross-jurisdictional tolling), *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) (same), *Bell v. Showa Denko K.K.*, 899 S.W.2d at 758 (Tex.App.Amarillo 1995) (same), *Casey v. Merck & Co.*, 283 Va. 411, 722 S.E.2d 842 (2012) (same), *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa.Super.Ct.2002) (same), and *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 (same).

January 12, 2017 Order Directing Answer. Defendants submit that it is likely that the Nevada Supreme Court will join courts in in Virginia, Pennsylvania, Tennessee, Illinois, Louisiana, and Texas and reject the doctrine of cross-jurisdictional tolling.

Defendants have comprehensively briefed the issue of whether Nevada should reject the doctrine of cross-jurisdictional class action tolling, and their brief is attached to this Reply. **Exhibit 2,** December 2, 2016 Petition. A summary of this same argument follows.

Only a small minority of courts in the United States allows cross-jurisdictional class action tolling; the large majority has not adopted the doctrine, and several courts have sharply criticized and rejected the doctrine on policy grounds identical to those adopted by the Nevada Legislature.[11]

Courts rejecting cross-jurisdictional, class action tolling have observed that the adoption of cross jurisdictional tolling exposes a state's court system to a flood of filings from forum-shopping plaintiffs, who possibly bring only stale claims. Further, the doctrine of cross-jurisdictional tolling would cause Nevada's statutes of limitation and repose to be subject to indefinite suspension, forcing a Nevada state court to await the outcome of class certification as to any litigant in any putative class action filed in any federal court in the United States. This policy would undermine the Nevada Legislature's prerogative to determine periods of limitation and repose, as well as any tolling of the same. Indeed, Defendants submit that the adoption of cross-jurisdictional tolling would contravene the Nevada Legislature's specific intent in enacting NRS 11.500 and establishing a bright-line statute of repose not subject to judicial extension. For these reasons, Nevada should reject the doctrine of cross-jurisdictional, class action tolling.

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[11] *See Portwood v. Ford Motor Co.*, 183 Ill.2d 459, 465–67, 233 Ill.Dec. 828, 701 N.E.2d 1102, 1104–05 (1998) (rejecting cross-jurisdictional tolling), *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) (same), *Bell v. Showa Denko K.K.*, 899 S.W.2d at 758 (Tex.App.Amarillo 1995) (same), *Casey v. Merck & Co.*, 283 Va. 411, 722 S.E.2d 842 (2012) (same), *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa.Super.Ct.2002) (same), and *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 (same); *but see Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 395 (Del. 2013) (adopting cross-jurisdictional tolling), *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App. 364, 370, 384 N.W.2d 165, 168 (1986) (same), *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo.Ct.App.W.Dist.1990) (same), *Stevens v. Novartis Pharm. Corp.*, 358 Mont. 474, 486–91, 247 P.3d 244, 253–56 (2010) (same), *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 382–83, 390, 763 N.E.2d 160, 163, 168-69 (2002) (plurality of two out of seven justices and partial concurrence of two additional justices) (same).

a. *Cross-jurisdictional tolling should be rejected in Nevada as its adoption would increase the burden on Nevada's courts.*

It has been frequently observed that the adoption of *intra-jurisdictional* class action tolling (class action tolling within the same court system, such as in *American Pipe* and *Jane Roe Dancer*) does not necessarily support the adoption of "cross-jurisdictional" class action tolling.[12] And the reasons for rejecting cross-jurisdictional tolling arise because of problems specifically created by tolling statutes of limitation and repose *across* federal and state jurisdictions, as opposed to within the same court system.

When two actions are brought in different court systems:

> Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run . . . . Given this state of affairs, it is clear that adoption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping.

Portwood v. Ford Motor Co., 183 Ill. 2d 459, 464–65, 701 N.E.2d 1102, 1104 (1998). The situation described in *Portwood* remains largely unchanged today, as only six states[13] have adopted cross-

[12] "The doctrine allowing tolling within the federal court system in federal question class actions does not require cross-jurisdictional tolling (i.e. tolling based on a prior class action filed in a different jurisdiction) as a matter of state procedure. California and New York have rejected *American Pipe*'s application to cross-jurisdictional actions." 1 McLaughlin on Class Actions § 3:15 (13th ed.).

[13] Cases in which courts have recognized such cross-jurisdictional tolling include *Stevens v. Novartis Pharmaceuticals Corp.*, 358 Mont. 474, 247 P.3d 244 (2010); *Vaccariello v. Smith & Nephew Richards*, 94 Ohio St.3d 380, 763 N.E.2d 160 (2002); *Staub v. Eastman Kodak Co.*, 320 N.J.Super. 34, 726 A.2d 955 (App.Div.1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382 (Mo.Ct.App.1990); and *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App. 364, 384 N.W.2d 165 (1986); *Patrickson v. Dole Food Co., Inc.*, 137 Haw. 217, 226, 368 P.3d 959, 968 (2015), as corrected (Nov. 18, 2015).

jurisdictional tolling, while six have rejected it, and others such as California and New York have refused to adopt cross-jurisdictional tolling despite being presented with the opportunity to do so.[14]

Thus, if Nevada were to adopt cross-jurisdictional tolling, it would be one of a very few jurisdictions to give forum-shopping plaintiffs certainty that any time limit on their claims has been tolled during their failed attempts to obtain class certification in a federal District Court. Other courts have recognized that such a situation provides no benefit to a state like Nevada.[15] Adopting the doctrine of cross-jurisdictional tolling would make Nevada one of a few clearinghouses for untimely claims that should have been initiated in other jurisdictions – but cannot be – because more than forty other states do not embrace cross-jurisdictional tolling. Inviting forum-shopping plaintiffs to Nevada's courts simply provides no benefit to the state and goes against the State policy that issues of repose are decided by the Legislature.

Montana, one of the few states, that has adopted cross-jurisdictional tolling, acknowledged the likelihood that the doctrine would burden its courts with forum-shopping plaintiffs. "[W]e acknowledge that our holding today may indeed encourage plaintiffs with 'no relationship to Montana' to file suit in our courts, if their claims are stale elsewhere." *Stevens*, 358 Mont. at 490, 247 P.3d at 256. Nevertheless, the Montana Supreme Court adopted cross-jurisdictional tolling *only because* it was required to do so by the Montana Constitution: "Our state's policy is plainly stated in the Montana Constitution: '[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.' Mont. Const. art. II, § 16. The right of access to our court

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[14] *See* footnote 3, *supra*.

[15] The situation would be precisely what Fourth Circuit Judge Luttig determined would be undesirable for the Commonwealth of Virginia:

[I]f Virginia were to adopt a cross-jurisdictional tolling rule, Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule, a rule that would be shared by only a few other states . . . . "[T]he Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state." *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999).

system is 'unrestricted by reference to residence or citizenship,' and an out-of-state plaintiff has 'the same rights and duties as a citizen of this state.'" *Id.* Thus, even in one of the few states to adopt cross-jurisdictional tolling, the burden on the state courts is acknowledged, and that burden is only accepted in Montana because it was required by the Montana Constitution. However, the Nevada Constitution has no such language, nor does Nevada have a policy that its courts be open to every person regardless of citizenship. Indeed, Nevada's policy, as set forth in NRS 11.500, is just the opposite. If Nevada were to consider adopting a policy that opened its courts to forum-shopping plaintiffs, such a policy should be weighed and enacted by the Nevada Legislature, which, as discussed below, has instead clearly indicated that it would reject cross-jurisdictional tolling.

Those in favor of cross-jurisdictional tolling argue that the doctrine may provide some efficiency for states which adopt it by reducing "protective filings": claims which supposedly would be filed by plaintiffs seeking to prevent their claims from becoming stale during the pendency of class-certification proceedings in federal court. However, both in theory and in fact, it is likely that the burden of any protective filings would be outweighed by the burden of filings that would be made by those who had failed to timely have their claims brought in a different jurisdiction and subsequently seek a jurisdiction that had promised to toll the statute of limitations or repose on their otherwise stale claims. Mr. Raider's instant case is instructive: Mr. Raider did not file a "protective filing"; instead, he filed suit only after *Rainero* was dismissed. Thus, Mr. Raider's actions support the predictions of the courts which have rejected cross-jurisdictional tolling due to the burdens it would place on their state court systems. As the Illinois Supreme Court stated:

> Plaintiffs contend that our rejection of cross-jurisdictional tolling will necessitate numerous protective filings in Illinois by plaintiffs who have class actions pending in other jurisdictions, thus burdening our state court system and inconveniencing the affected litigants. We are convinced, however, that any potential increase in filings occasioned by our decision today would be far exceeded by the number of new suits that would be brought in Illinois were we to adopt the generous tolling rule advocated by plaintiffs. By rejecting cross-jurisdictional tolling, we ensure that the

> protective filings predicted by plaintiffs will be dispersed throughout the country rather than concentrated in Illinois.

Portwood, 183 Ill. 2d at 466–67, 701 N.E.2d at 1105. Here, during the pendency of *Rainero*, no "protective filings" were made by Mr. Raider. Instead, it was only after *Rainero*'s federal court complaint was dismissed for lack of subject matter jurisdiction that Mr. Raider filed his untimely claims in Nevada's state courts, and it is precisely these types of filings that cross-jurisdictional tolling encourages.

Further, even if rejecting cross-jurisdictional tolling would encourage "protective filings," that is a problem more easily solved than hosting the claims of former putative class members whose claims were dismissed or whose classes were rejected by federal courts across the country. First, "protective filings" would be distributed across all other state jurisdictions, diminishing the potential burden on Nevada's state courts. Second, as the Tennessee Supreme Court explained in its decision rejecting cross-jurisdictional tolling:

> We understand that our ruling may promote "protective" filings by plaintiffs who wish to preserve their right to file suit in Tennessee while they seek class certification elsewhere. **Any administrative burdens Tennessee courts will suffer from those protective filings are greatly outweighed by the burdens presented by the mass exodus of rejected putative class members from federal court to Tennessee.** Any risk of duplicative litigation resulting from the protective filings may be avoided by grant of a stay by the state court until the federal ruling on class certification is made.

Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 808–09 (Tenn. 2000) (emphasis added). Therefore, even if rejecting cross-jurisdictional tolling encouraged "protective filings" in Nevada (which it did not here), such cases would be fairly distributed across all state jurisdictions, and then could easily be stayed during the litigation in federal court, avoiding any duplicative litigation.

However, there is no easy way to alleviate the burden imposed on a state's courts which have adopted cross-jurisdictional tolling, which essentially invites litigants from different jurisdictions to

use Nevada as a forum of last resort after their cases have been dismissed or their putative classes have been rejected:

> If certification is ultimately denied, the forum state may find itself with an avalanche of individual filings, precisely because its statute was tolled, thereby undermining the efficiency that the class action vehicle was designed to promote. It would therefore appear that whatever the forum state gains in efficiency by tolling its statute of limitations based on an extra-jurisdictional class action is outweighed by the risk of an avalanche of filings should the class not be certified.

David Bober, *Cross-Jurisdictional Tolling: When and Whether A State Court Should Toll Its Statute of Limitations Based on the Filing of A Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617, 642 (2002). Thus, on this controversial question-of-first impression, the burden that it would place on Nevada's courts is reason enough for rejecting cross-jurisdictional tolling.

b. *Cross-jurisdictional tolling would make Nevada's statutes of limitation and repose depend on the actions of every federal District Court in the United States, contrary to the expressed intent of the Nevada Legislature.*

An additional reason for rejecting cross-jurisdictional tolling is that it would require Nevada's legislatively determined statutes of limitations and repose to depend on the actions of literally any and every federal District Court in the United States. This is another reason states such as Illinois have declined to adopt cross-jurisdictional tolling:

> [B]ecause state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.

Portwood, 183 Ill. 2d at 466, 701 N.E.2d at 1104.

The unnecessary injection of uncertainty and delay into Nevada's legislative scheme of limitations and repose is an important reason to reject cross-jurisdictional tolling. Nevada's statutes of limitation and repose represent a legislative determination that legal claims must be subject to strict time limits in order to promote predictability and finality. "Statutes of limitation rest upon the premise

that the right to be free of stale claims in time comes to prevail over the right to prosecute them . . . . Statutes of limitation thus promote predictability and finality." *Portwood*, 183 Ill. 2d at 463, 701 N.E.2d at 1103.

Nevada would not benefit from having the running of its statutes of limitations and repose depend on the actions of courts in other jurisdictions, which would be the necessary result of adopting cross-jurisdictional tolling. This is yet another reason the doctrine is controversial and should be rejected.[16]

c. *Cross-jurisdictional tolling would undermine the authority and intent of the Nevada Legislature.*

The Nevada Legislature has specifically addressed the outer-most time limits when certain claims are viable in Nevada state courts, and the adoption of cross-jurisdictional tolling would directly undermine the period of repose that has been established by NRS 11.500 which provides that:

> 1. Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:
>
> (a) The applicable period of limitations; or
>
> (b) Ninety days after the action is dismissed;
> whichever is later.
>
> 2. An action may be recommenced only one time pursuant to paragraph (b) of subsection 1.

[16] *See Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 ("We believe the rationale of the courts rejecting "cross-jurisdictional tolling" is the one most consistent with our interpretation of the provisions of Louisiana's tolling statute, La. C.C.P. art. 596, and is the rationale which most effectively balances the twin concerns of judicial efficiency and protection against stale claims. These cases, and particularly *Portwood*, underscore the unfairness to defendants, and to the state itself, of permitting another jurisdiction's laws and the efficiency (or inefficiency) of its operations to control the commencement of a statute of limitations, potentially suspending it indefinitely into the future and, in the process, undermining the very purpose of statutes of limitation. As the *Portwood* court noted, any resultant blow to judicial efficiency occasioned by the necessity of protective filings in state court pending the resolution of the certification issue in federal court can be ameliorated by measures available to the state courts: "[E]arly filings in state court by plaintiffs who are pursuing a class action elsewhere could not be entirely undesirable, as such filings would put that state's court system on notice of the potential claim. If necessary, the state suit could be stayed pending proceedings elsewhere.").

> 3. An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced.
> ....

In NRS 11.500, the Nevada Legislature enacted a saving statute, which grants a plaintiff a specific defined time beyond the statute of limitations to refile an action, and a statute of repose, which sets the mandatory outer time-limit to refile such an action. The Legislature made a statutory determination that, when a plaintiff recommences an action, a statute of limitations can be extended by 90 days, but no extension is permitted for actions that are recommenced more than five years after the commencement of the original action. NRS 11.500. The Legislative history of NRS 11.500 demonstrates that the Legislature contemplated a specific time frame for the recommencement of certain actions.

During hearings before the Assembly Committee on Judiciary, Nevada's Solicitor General explained that NRS 11.500 "provided in essence a statute of repose." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). In Senate discussions, Senator Terry Care stated that the bill "allows a plaintiff whose case has been dismissed in federal court for lack of jurisdiction to recommence the action in State district court as long as it is done within 90 days[17] after dismissal from the federal court. The refiling must still begin within five years [of the date of filing the original action]." Minutes of the Senate Committee on Judiciary on S.B. 266, 73rd Leg. (Nev., April 15, 2005) (emphasis added). So, on one hand, the Legislature intended to give certain plaintiffs the opportunity to re-file claims that had been dismissed because of a lack of subject matter jurisdiction. On the other hand, the Legislature also understood that "statutes of limitations were

[17] Ninety days was a meaningful period of time to the Nevada Legislature: it deliberately contemplated and debated the appropriate amount of days for an extension, amending the bill before it was finalized to reflect extensions of six months, 30 days, and 90 days. See Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (discussing a six-month extension); Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 25, 2003) (discussing whether the statute should allow for a six-month, 30-day, or 90-day extension).

fundamental to the judicial system" and that NRS 11.500 sets a time limit for the recommencement of certain claims. Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). By enacting NRS 11.500, the Legislature exercised its authority to create a savings statute as well as a statute of repose.

Statutes of repose and limitation fall particularly within the province of the Legislature.[18] This well-established principle was specifically recognized by the United States Supreme Court in relation to class action tolling. "The proper test [for whether the legislature intended a statute of limitations to be tolled] is . . . whether tolling the limitation in a given context is consonant with the legislative scheme." *Am. Pipe*, 414 U.S. at 557–58, 94 S. Ct. at 768. Petitioners submit that the adoption of cross-jurisdictional tolling would be wholly inconsistent with the legislative intent evinced by the Nevada Legislature's enactment of NRS 11.500 and the legislative history thereto.

The adoption of cross-jurisdictional tolling would effectively eviscerate the Legislature's determination by causing the time-limit on a plaintiff's claims to be tolled indefinitely. This is clearly contrary to both the explicit language of NRS 11.500 and its legislative history, in which the Legislature stated that statutes of limitation and repose cannot be tolled indefinitely. For example, the Office of the Attorney General testified that, under NRS 11.500, "**in no event would a case proceed** 11.5 years after it had originally been filed." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (emphasis added). It was further observed that statutes of limitation "should not be tampered with lightly." *Id.* Yet, cross-jurisdictional tolling clearly could cause Nevada's statutes of limitation and repose to be tolled indefinitely depending on the actions of the federal District Courts. Such a scenario was never contemplated or approved by the Legislature,

[18] *Farber v. Lok-N-Logs*, Inc., 270 Neb. 356, 369, 701 N.W.2d 368, 378 (2005) (repose); *Molloy v. Meier*, 660 N.W.2d 444, 456 (Minn. Ct. App. 2003), *aff'd*, 679 N.W.2d 711 (Minn. 2004) (repose); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1006 (Ala. 1982) (repose) *Lambert v. Commonwealth Land Title Ins. Co.*, 228 Cal. App. 3d 1569, 269 Cal. Rptr. 256, 258 (Ct. App.) (statute of limitations) (reversed on other grounds); *Miller By & Through Sommer v. Kretz*, 191 Wis. 2d 573, 580, 531 N.W.2d 93, 96 (Ct. App. 1995) (statutes of limitation); *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007) (limitation).

and the legislative history of NRS 11.500 strongly suggests that the Legislature would have rejected such a result. Therefore, because cross-jurisdictional tolling is inconsistent with the Nevada Legislature's intent as demonstrated in NRS 11.500 and its legislative history, the doctrine of cross-jurisdictional tolling must be rejected.

Courts which have declined to adopt cross-jurisdictional tolling have noted that relevant state law was inconsistent with cross-jurisdictional tolling. As the Fourth Circuit observed:

> Virginia has no statute providing that the statute of limitations in a subsequently filed state action should be equitably tolled during the pendency of either a state or a federal class action, and no Virginia court has ever applied such a rule.

Wade, 182 F.3d at 286. Likewise, Nevada has no statute tolling a putative class's claims during the pendency of a federal District Court action, except NRS 11.500, which positively provides an absolute time-limit for the filing of claims in Nevada state courts, regardless of the circumstances. Further, the principle that tolling must be consonant with Nevada's legislative scheme is even more important when considering a statute of repose, which creates a substantive right in a defendant to be free of liability, and thus falls outside the ambit of *American Pipe* class action tolling. As one leading commentator has expressed:

> A growing number of thoroughly reasoned decisions, including by the Sixth and Second Circuit Courts of Appeal (which abrogated numerous district court decisions allowing tolling of statutes of repose) have determined that a federal statute of repose using categorical language foreclosing maintenance of a suit after a certain time period must be enforced according to its plain meaning and therefore is not subject to American Pipe tolling. A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose, in contrast, creates a substantive right to be free from liability definitively once the prescribed period expires; it does not merely bar a remedy, it extinguishes the underlying cause of action.

1 McLaughlin on Class Actions § 3:15. Here, NRS 11.500 is the very face of the statute of repose referred to and establishes a substantive right in defendants to have claims extinguished after certain periods of time, an intent and result discussed explicitly by the Nevada Legislature. But the adoption

of cross-jurisdictional tolling could prolong certain claims indefinitely, allowing the actions of the courts of different jurisdictions to undermine the plain language and clear intent of the Nevada Legislature in enacting NRS 11.500.

Even when applied only to statutes of limitation, and not to a statute of repose like NRS 11.500, the Tennessee Supreme Court found such an outcome potentially offensive to principles of federalism:

> [T]he practical effect of our adoption of cross-jurisdictional tolling would . . . . grant to federal courts the power to decide when Tennessee's statute of limitations begins to run. Such an outcome is contrary to our legislature's power to adopt statutes of limitations . . . and would arguably offend the doctrines of federalism . . . . **If the sovereign state of Tennessee is to cede such power to the federal courts, we shall leave it to the legislature to do so.**

Maestas, 33 S.W.3d at 809 (emphasis added). Far from ceding its power to determine periods of limitation and repose to the federal courts, the Nevada Legislature has positively asserted its authority to determine the outer time-limits of certain claims by enacting NRS 11.500. The adoption of cross-jurisdictional tolling would undermine the Legislature's authority and intent by causing Nevada's periods of limitation and repose to depend on the actions of the federal District Courts across the country.

The adoption of cross-jurisdictional, class action tolling would effectively eviscerate NRS 11.500. Therefore, the doctrine must be rejected out of deference to the Nevada Legislature's authority over periods of limitation and repose and its enactment of NRS 11.500.

d. *Mr. Raider cannot qualify for equitable tolling.*

Mr. Raider continues to take the position that his claims were tolled by equitable tolling, yet he forgoes literally any analysis of the standards for whether equitable tolling should apply. Perhaps this is because he clearly fails any such test.

Defendants have already demonstrated that Mr. Raider cannot avail himself of equitable tolling because he was entirely aware of his claims since 2007 and he strategically chose not to bring them. Counter-Motion at 12-14. Mr. Raider has responded only with frivolous arguments. He asserts that he

did not file his claims earlier because his potential recovery of $24,143 did not justify the attorneys' fees he would have incurred. Opposition at 17:17-22. In other words, Mr. Raider is saying that he had a *good reason* for not filing his claims earlier. Perhaps he did, but such circumstances do not justify equitable tolling; rather, such circumstances mean that Mr. Raider cannot avail himself of equitable tolling because he was well-aware of his claims and simply chose not to bring them. *See City of N. Las Vegas v. State, EMRB*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011) (holding that equitable tolling will extend a statute of limitations if a reasonable plaintiff **would not have known of the existence of their claim** within the limitations period). Equitable tolling does not apply to a plaintiff who deliberately chooses not to pursue his claims.

Relatedly, Mr. Raider argues that he was not a "wait and see" plaintiff because his maximum recovery in *Leeward* of $24,143 was below the $75,000 jurisdictional threshold and therefore he might have been unable to easily join *Leeward*. This argument is untenable. Mr. Raider was invited to join *Leeward*, which sought damages of more than $200,000.[19] Thus, with or without Mr. Raider, *Leeward* clearly met the jurisdictional threshold, and Mr. Raider's claimed damages would have been counted together with those sought in *Leeward* for purposes of the $75,000 jurisdictional threshold. *E.g.*, *Haskell v. State Farm Mut. Auto. Ins. Co.*, 69 Fed. App'x 877, 878 (9th Cir. 2003). Mr. Raider simply has no good excuse for his delay in filing his case and is raising frivolous arguments in an effort to exercise his delay. Mr. Raider is the very definition of a "wait and see" plaintiff, and as such he must be denied the use of equitable tolling or estoppel.

Mr. Raider must also concede that his delay in filing his case was entirely his own fault and was in no way caused by Defendants. This, too, is fatal to his argument for applying equitable tolling. "Equitable tolling allows a plaintiff to sue after the expiration of the statute of limitations if the plaintiff has been prevented from filing suit due to fraudulent concealment or other inequitable circumstances." *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998). Further, to benefit from equitable tolling a "plaintiff must establish that subsequent and specific actions were taken by defendants, separate from those that provide the factual basis for the underlying cause of

[19] *E.g.*, Opposition, Ex. 8, at 10:15.

action, and that these subsequent actions by defendants somehow kept plaintiff from timely bringing suit." *De Sole v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 387, 423 (S.D. N.Y. 2015) (internal punctuation omitted); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240–41 (9th Cir. 1996) ("To establish that equitable tolling applies, a plaintiff must prove the following elements: fraudulent conduct by the defendant resulting in concealment of the operative facts . . . ."); *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 673 P.2d 490 (1983) (factors to be considered in determining whether the doctrine of equitable tolling should apply in a given case include claimant's reliance on authoritative statements by administrative agency that misled claimant about nature of claimant's rights and any deception or false assurances on part of employer against whom claim is made).

At no juncture has Mr. Raider asserted that Defendants in any way prevented him from filing his claims. The only person responsible for his untimely filing is himself, as he declined to join *Leeward* in 2008 and waited to see whether *Leeward* would be successful before filing his own claims. Such circumstances cannot possibly justify applying equitable tolling to Mr. Raider's claims.

e. *Conclusion regarding Mr. Raider's breach of contract claim*

This lengthy discussion of cross-jurisdictional and equitable tolling was necessitated by Mr. Raider's assertion that those doctrines could be applied to preserve his claim for breach of contract based on Archon's Redemption of the EPS in 2007. Those tolling doctrines do not apply, and Mr. Raider's breach of contract claim is clearly time-barred by Nevada's six-year statute of limitations and must be dismissed. It should also be noted that in the following briefing, Defendants will demonstrate that each and every one of Mr. Raider's other claims are, in fact, not separate claims from Mr. Raider's stale breach of contract claim, but instead are only distortions of that same time-barred claim asserted to try to manipulate the statute of limitations.

3. Breach of contract for post-2007 dividends.

Mr. Raider's third claim represents perhaps his clearest attempt to manipulate the statute of limitations. Like his second claim, Mr. Raider's third claim is also for breach of contract. The contract at issue in both claims is the Certificate. Complaint, on file herein, ¶¶ 57, 64. In other words, both Mr. Raider's second and third claims are for breach of the same contract. However, having recognized that his basic primary breach of contract claim is time-barred, Mr. Raider has tried to split

his breach of contract claim into multiple claims in a transparent attempt to avoid the statute of limitations. Thus, Mr. Raider asserts in his third claim that dividends have continued to accrue on the EPS (which clearly contradicts Judge Pro's orders) and that such accruing dividends are "installment" payments. Opposition at 19:24. This position is contrary to law and requires Mr. Raider to contradict and ignore portions of Judge Pro's Orders.

Mr. Raider's precise theory, that allegedly accruing dividends trigger new claims, has been considered and rejected before. In *Rabouin v. Met. Life. Ins. Co.*, 699 N.Y.S.2d 655 (1999), the plaintiff was the holder of a whole life insurance policy and alleged that the insurer breached its contract with her by replacing high-yielding investments with lower quality investments, allegedly decreasing the dividends to which she was entitled. *Id.* at 658. The insurer's alleged mismanagement of the fund occurred between 1989 and 1992. *Id.* However, the plaintiff's complaint was filed on June 28, 1998. **Exhibit 4**, Class Action Complaint. It was noted that plaintiff's breach of contract claim may have been filed outside New York's six-year statute of limitations. *Rabouin*, 699 N.Y.S.2d at 660. Thus, the plaintiff asserted that where a contract provided for a "continuing performance, such as the duty to pay dividends on surplus, each breach of duty begins the running of the statute of limitations anew, so that accrual of a cause occurs continuously." **Exhibit 5**, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss. The Court summary rejected this argument:

> Plaintiff's claim is limited by the Statute of Limitations. The Statute of Limitations on an action for breach of contract is six years, measured from the date of the breach, regardless of when the damage is felt . . . . **Plaintiff is wrong when she argues that the present action is an example of continuing contractual breaches, in which new, timely claims continue to arise . . . The acts of which plaintiff complains are alleged to have occurred during a discrete period of time, and it is irrelevant for purposes of the Statute of Limitations that plaintiff may continue to be damaged as a result of those acts.**

Rabouin v. Met. Life. Ins. Co., 699 N.Y.S.2d at 660 (emphasis added). Several other cases have reached similar conclusions. *Fish v. Folley*, 1843 WL 4619 (N.Y. Sup. Ct. 1843) (court rejected argument that a contract for a continual supply of water that was unperformed for nine years gave rise to multiple causes of action: "To allow a recovery again, would be splitting up an entire cause of action, in violation of established principles."); *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 50, 118

P. 425, 428–29 (1911) (breach of contract claim for failure to sell land was a "single cause of action [and] could not be so split as to afford warrant for two or more actions," despite alleged depreciation to land that occurred after failure to sell the same); *Commerce Exch. Natl. Bank v. Blye*, 78 Sickels 132 (1890) (withholding of bonds constituted a single cause of action, and a second cause of action could not be stated for depreciation in value to the bonds during time when they were withheld). "This is the necessary result of the application of the well settled principle that **an entire claim arising either upon a contract or from a wrong cannot be divided and made the subject of several suits.**" *Abbott*, at 161 Cal. at 48 (emphasis added).

Rabouin is analogous to the instant situation. The acts Mr. Raider complains of "occurred during a discrete period of time" – in 2007 when Archon allegedly miscalculated the redemption price of the EPS. Mr. Raider cannot maintain separate causes of action for each dividend he believes he is entitled to subsequent to the Redemption. He had one cause of action for breach of contract, and that claim accrued in 2007. His attempt to split his claim into many causes of action is nothing but a transparent attempt to evade the conclusion that his basic breach of contract claim is untimely.

Mr. Raider's claim for post-2007 dividends accrued as soon as he believed he was underpaid for his shares of EPS. Claims for dividends accrue "[a]t the time defendants first failed to account to plaintiff for his 'fair share' of profits . . ., plaintiff had a true cause of action and the limitations period began to run." *Bohanon v. Nat'l Basketball Players Ass'n*, No. B145000, 2001 WL 1656587, at *5 (Cal. Ct. App. Dec. 27, 2001) (citing *Brown v. Cosby*, 433 F. Supp. 1331, 1342 (E.D. Pa. 1977)). Thus, Mr. Raider's "third" claim for post-2007 dividends was merely part of the same cause of action based on the alleged miscalculation of the redemption price; his claim for post-2007 dividends is simply a further allegation of damages arising out the August 31, 2007 Redemption. That claim is untimely and must be dismissed, as is Mr. Raider's breach of contract claim for post-2007 dividends.

Mr. Raider's theory that dividends continue to accrue is also directly contrary to Judge Pro's Orders, which shows the bad faith of Mr. Raider's assertion that Judge Pro's orders should be applied to this case via collateral estoppel. (Similar bad faith is demonstrated by Mr. Raider's attempt to both rely on the *Parklane* case to benefit himself while attempting to distinguishing the exact same case to the extent it would benefit Defendants. *See* footnote 1). Mr. Raider wants to use Judge Pro's orders to

prevent Defendants from litigating the merits of his calculation of the EPS dividends, even though he admits he seeks substantially greater damages than were awarded by Judge Pro. *See* Counter-Motion at 24. However, to accomplish this, Mr. Raider must contradict Judge Pro's Orders by asserting that "the federal district court did not determine that a redemption did in fact occur." Opposition at 38:16-17. To the contrary, Judge Pro based his orders on the redemption having occurred, writing at least three times "Archon redeemed the EPS on August 31, 2007 for $5.241 per share." Opposition, Ex. 6, August 6, 2008 Order at 4:2; Opposition, Ex. 7, December 22, 2010 Order at 4:8; Opposition Ex. 8, December 22, 2010 Order at 4:4. Mr. Raider simply denies Judge Pro's words.

To be clear, these Orders which Mr. Raider is now explicitly contradicting are the same Orders that he claims should be applied via collateral estoppel. This is nothing but brazen manipulation, both to avoid the statute of limitations and to claim unfair and unsupported sums of money from Defendants. The reason Mr. Raider must deny that the Redemption of the EPS occurred is because if it did occur, then the Certificate explicitly states that dividends cease to accrue. And if dividends cease to accrue, Mr. Raider cannot maintain his (incorrect) position that such dividends were installment payments. And if the dividends were not installment payments, no new statute of limitations began to run on the dividends, and Mr. Raider is limited to his basic breach of contract claim, which he admits accrued in 2007, are outside the statute of limitations.

Mr. Raider's position on post-2007 dividends contradicts Judge Pro's orders in another way as well. Judge Pro's orders awarding dividends were issued in 2010. If he believed that dividends continued to accrue after 2007, he would have awarded such dividends through 2010. Instead, he only awarded dividends through August 31, 2007. Opposition, Ex. 7, December 22, 2010 Order (*D.E. Shaw*) at 8:11; Opposition, Ex. 8, December 22, 2010 Order (*Leeward*) at 6:6. After August 31, 2007, the plaintiffs were only entitled to pre-judgment interest. So, on one hand Mr. Raider wishes to have Judge Pro's orders applied to Defendants via non-mutual, offensive collateral estoppel; on the other hand, he takes a position regarding post-2007 dividends contrary to those very same Orders in an attempt to manipulate the statute of limitations and seek much larger damages against Defendants.

Setting aside Mr. Raider's legally and factually incorrect arguments, the truth of the matter is that any claim Mr. Raider had for dividends accrued on August 31, 2007. It was at that time Archon

redeemed the EPS at a price with which Mr. Raider disagreed. His claim that dividends continued to accrue after 2007 is not a separate claim from the alleged miscalculation, but only a continuation of the damages he allegedly suffered due to the miscalculation. As this claim accrued in 2007, it was untimely when filed in 2015 and must be dismissed.

4. Unjust enrichment

Mr. Raider's fourth claim for unjust enrichment is yet another manipulated claim clearly designed to avoid having Mr. Raider's entire case dismissed as untimely. Mr. Raider argues that "[w]hat is particularly important for the Court to understand is that Counts IV, V, and VI arise out of events that only occurred after the judgments in *D.E. Shaw* and *Leeward* became final, after they were affirmed by the Ninth Circuit . . . ." Opposition at 9:25-10:1. However, an analysis of this claim demonstrates that it accrued (if ever) outside of Nevada's statute of limitations and must be dismissed.

Mr. Raider takes the position that his unjust enrichment claim (as well as his breach of fiduciary duty claim, discussed below) did not accrue until *D.E. Shaw* and *Leeward* were affirmed by the Ninth Circuit. This position is completely unsupportable, and Mr. Raider does not cite a single case in which a claim was found to have accrued when an appellate court affirmed a lower court's decision. This is because such cases do not exist and the theory is entirely unsupportable. Defendants' counsel has reviewed 194 cases and found none in which *any type of claim* was found to accrue only upon appellate affirmation. Exhibit 6, Westlaw - List of 194 results. Likewise, the Court of Appeals of Texas also noted a dearth of authority for such a proposition. *Pyles v. Young*, No. 05-08-00663-CV, 2009 WL 1875581, at *6 (Tex. App. July 1, 2009) ("Pyles does not cite any applicable authority supporting his contention that a claim for unjust enrichment cannot accrue until after a suit determining the right to possession is affirmed on appeal."). Defendants' counsel also found no cases in which a claim for unjust enrichment specifically was found to accrue upon the appellate affirmation of an underlying decision. Exhibit 7, Westlaw List of 29 results.

This is clearly a case about whether a contract, the Certificate, was breached. No one denies the existence of a contract in this case, making the quasi-contractual claim of unjust enrichment inapplicable. As Nevada District Judge Susan Johnson has written:

> Plaintiffs' claim for unjust enrichment is without basis as both parties admit the existence of a contract and unjust enrichment only applies where no contract exists. 66 Am. Jur. 2d Restitution § 11 (1973); *see Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles."); *Lease Partners Corp v. Robert L. Brooks Trust dated Nov. 12, 1975*, 113 Nev. 747, 756,942 P.2d 182 (1997).

Monroe v. Sin City Performance, Inc., 2011 WL 6008210, June 7, 2011 Order. Here, the only real dispute is whether Archon followed the terms of the Certificate when it Redeemed the EPS for $5.241 per share. Mr. Raider alleges he was underpaid for his shares of EPS, giving rise only to his (untimely) breach of contract claim. He cannot also state a claim for unjust enrichment on the same basic theory that he was not paid enough for his shares, and his attempt to do so is just another instance of claim-splitting to avoid the statute of limitations.

Even if he could state a claim for unjust enrichment, such a claim is clearly untimely. A cause of action accrues when "the aggrieved party knew, or reasonably should have known, of the facts giving rise to the damage or injury." *FDIC v. Rhodes*, 130 Nev. Adv. Op. 88, 336 P.3d 961, 965 (2014). Mr. Raider would have known that Defendants were not going to pay him more than $5.241 per share on August 31, 2007 at the latest. It was at that time he knew that Defendants were not going to pay him money to which he believed he was entitled. Even if he could have stated an unjust enrichment claim, he would have been required to do so within four years of that date, as "[t]he statute of limitation for an unjust enrichment claim is four years. NRS 11.190(2)(c)." *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011). Instead, he failed to do so until January 9, 2015, more than seven years after any claim would have accrued, and such a claim is untimely and now must be dismissed.

5. Constructive trust

Mr. Raider's Opposition does not respond to Defendants' Motion that his "claim" for constructive trust should be dismissed as untimely, and therefore Mr. Raider concedes the same. *E.g.*, *Smith v. FJM Corp.*, No. 207-CV-1417-KJD-GWF, 2009 WL 703482, at *5 (D. Nev. Mar. 16, 2009) ("[B]y failing to respond to Defendant's Motion regarding retaliation, Plaintiff concedes Defendant's

argument."); *Tatum v. Schwartz*, 2007 U.S. Dist. LEXIS 10225, 2007 WL 419463, *3 (E.D.Cal.2007) (finding that the plaintiff "tacitly concede[d][a] claim by failing to address defendants' argument in her opposition."); *Ardente, Inc. v. Shanley*, 2010 U.S. Dist. LEXIS 11674, 2010 WL 546485 (N.D.Cal. Feb. 9, 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence."); *see also* DCR 3.20(c) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting of the same"). Mr. Raider's Opposition nowhere argues that his "Count V – Constructive Trust and Other Equitable Relief" is within Nevada's statute of limitations, and therefore this claim should be dismissed.

Mr. Raider likely does not make such arguments because he realizes that constructive trust is not a cause of action, but a remedy. *See Bemis v. Estate of Bemis*, 114 Nev. 1021, 1027, 967 P.2d 437 (1998). "A constructive trust is, in proper circumstances, imposed as an equitable remedy to prevent unjust enrichment." *Balish v. Farnham*, 92 Nev. 133, 139, 546 P.2d 1297, 1300 (1976). Given that Mr. Raider's request for unjust enrichment fails, as described above, his request for a constructive trust should be denied. Even if "constructive trust" were a cause of action, Mr. Raider's claim for the same suffers from the same defects as his other claims, as it would have accrued on August 31, 2007 and was untimely when filed on January 9, 2015.

6. Breach of fiduciary duty

The analysis of Mr. Raider's breach of fiduciary duty claim overlaps with all of his other claims. Primarily, this claim is yet another attempt to bypass the statute of limitations problems with his breach of contract claim based on his allegations that he was underpaid for his shares of EPS. *See* Complaint, on file herein, ¶¶ 90(a), 90(c), 91(b), 92(a), 92(c), 93(b), 94(c), 96(b), and 97. As discussed above, Mr. Raider's breach of contract claim cannot be split into separate claims in order to avoid the statute of limitations. Mr. Raider knew that Archon intended to pay him $5.241 per share of EPS in 2007; he cannot claim that the fact he was not so paid in 2015 somehow gives rise to a separate claim for relief.

Even if Mr. Raider's breach of fiduciary duty claim could be stated separately from his breach of contract claim, it still would have accrued in 2007 and be untimely in 2015 when he filed his

Complaint. And as with his unjust enrichment claim, his breach of fiduciary duty claim relies on the legally incorrect premise that a cause of action might accrue only upon affirmation of a lower court ruling by an appellate court. Mr. Raider provides no authority for this position, and Defendants' counsel has found no cases in which a breach of fiduciary duty claim was found to accrue upon affirmation of a lower court decision by an appellate court. **Exhibit 8**, Westlaw List of 45 results.

Further, the proposition that the alleged accruing of dividends post-2007 triggers new causes of action has been rejected. Thus, any breach of fiduciary duty claim that Mr. Raider might have stated must have accrued in 2007, when Archon redeemed the EPS for $5.241 per share, as such a claim accrues not upon appellate affirmation, but at the time of the initial alleged breach. *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 550, 744 S.E.2d 178, 193 (2013) (" . . . [B]reach of fiduciary duty accrues at the time of the breach, and that a plaintiff need not show damages in order to bring her claim. In the merger context, this breach takes place when the directors fix or adopt the terms of a merger contract. The facts of the instant case demonstrate that any alleged breach occurred when the SCI Board adopted and publicly announced the terms of the merger with FITG."); *Techner v. Greenberg*, 553 F. App'x 495 (6th Cir. 2014) (member's breach of fiduciary duty claim accrued when the harm was suffered by member from failure to receive proper distributions); *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996) (retirees' breach of fiduciary duty claim under ERISA accrued on date employer announced it was increasing pension benefits); *Wells v. C.J. Mahan Const. Co.*, 2006-Ohio-1831 (Shareholder's cause of action for breach of fiduciary duty, which breach occurred when company's founder received a share distribution that was not pro rata with shareholder's, accrued when founder received the unequal distribution, rather than when shareholder was able to discover that such distributions were unequal).

Accordingly, if Mr. Raider had a breach of fiduciary duty claim, it accrued in 2007. In Nevada, the statute of limitations for a claim for breach of fiduciary duty is three years. *Job's Peak Ranch Cmty. Ass'n, Inc. v. Douglas Cty.*, No. 55572, 2015 WL 5056232, at *4 (Nev. Aug. 25, 2015) (citing NRS 11.190(3)(d)). Therefore, such a claim was untimely when it was filed in 2015 and must now be dismissed.

Further, Mr. Raider's breach of fiduciary duty claim must be dismissed for another reason. Defendants' Counter-Motion asserted that Mr. Raider has presented no evidence in support of this claim. Counter-Motion at 12 and 29. Yet, in his Opposition, Mr. Raider not only failed to provide any such evidence, he did not even claim such evidence existed. Thus, once again, Mr. Raider has conceded this point. *E.g.*, *Smith v. FJM Corp.*, No. 207-CV-1417-KJD-GWF, 2009 WL 703482, at *5 (D. Nev. Mar. 16, 2009) ("[B]y failing to respond to Defendant's Motion regarding retaliation, Plaintiff concedes Defendant's argument."); *Tatum v. Schwartz*, 2007 U.S. Dist. LEXIS 10225, 2007 WL 419463, *3 (E.D. Cal.2007) (finding that the plaintiff "tacitly concede[d][a] claim by failing to address defendants' argument in her opposition."); *Ardente, Inc. v. Shanley*, 2010 U.S. Dist. LEXIS 11674, 2010 WL 546485 (N.D.Cal. Feb. 9, 2010) ("Plaintiff fails to respond to this argument and therefore concedes it through silence."). It was Mr. Raider's burden in his Opposition to provide some evidence of breach of fiduciary duty, and he failed to do so. *Celotex Corp. v. Catlett*, 477 U.S. 317, 322 (1986) (opponent to summary judgment needs to make a showing sufficient to establish the existence of those elements necessary to the case). Mr. Raider has conceded that there is no evidence supporting his breach of fiduciary duty claim, and for this reason his claim should be dismissed.

7. Because this action is the same as *Rainero*, it is untimely under NRS 11.500.

Mr. Raider's claims are also untimely and must be dismissed pursuant to NRS 11.500. Mr. Raider does not deny that his claims are outside the time frames provided by that statute, as he filed his Complaint more than five years after *Rainero* was commenced and more than 90 days after *Rainero* was dismissed. Thus, he is forced to take the position that his case is not the same action as *Rainero*. However, the conclusion that Mr. Raider's case is the same action as *Rainero* is evident for numerous reasons.

Mr. Raider completely ignores the standard for determining whether two cases are the same action. Whether two cases are the same action is a matter of "substance" not "technical legal form." *See Shreve v. Chamberlin*, 66 Wash. App. 728, 734, 832 P.2d 1355, 1358 (1992). "[T]he same-action requirement is satisfied when the relief requested is based on substantially the same set of facts. The key inquiry for the same-action requirement is whether both arise out of the same transaction or occurrence, and not whether the legal theory, issue, burden of proof, or relief sought materially differs

between the two actions." *In re Estate of LaPlume*, 2014 IL App (2d) 130945, ¶ 36, 24 N.E.3d 792, 801.

> The same action requirement, however, refers not only to claims actually litigated but includes all claims arising out of the same transaction or underlying events which could have been litigated in the first proceeding. Where there is an essential similarity of the underlying events giving rise to the various legal claims, the two actions are generally deemed the same. The key factor is whether the wrong for which redress is sought is the same in both actions. Other factors to be considered include 'whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same.

Int'l Hobby Corp. v. Rivarossi S.p.A., No. CIV. A. 98-4964, 1999 WL 566793, at *2 (E.D. Pa. Aug. 3, 1999), *aff'd*, 216 F.3d 1076 (3d Cir. 2000) (internal citations omitted).

As demonstrated above, all of Mr. Raider's claims arise out of his basic breach of contract claim, which is exactly the same as the sole claim made in *Rainero*. Of course, Mr. Raider's counsel has gone to great lengths to make this case appear different from *Rainero*. However, these efforts are unavailing. For example, courts have specifically rejected Mr. Raider's notion that merely substituting himself as class representative in place of Mr. Rainero makes this case a new action. *Berry v. Volkswagen of Am., Inc.*, No. 05-1158CVWODS, 2006 WL 344774, at *1 (W.D. Mo. Feb. 15, 2006) ("substituting a new class representative does not commence a new action"); *Hammes v. Frank*, 579 N.E.2d 1348, 1356 (Ind. Ct. App. 1991) ("We disagree with the trial court's conclusion that Maibens was a separate case from Hamilton Brothers for the purposes of accounting. The essence of each is nearly identical, Frank's protestations nothwithstanding. We agree with Dein and Hammes that a substitution of a class representative due to mootness of the representative's claim does not create a separate action.").

Mr. Raider asks "How can this action be a 'recommencement' of an action (*Rainero*) that has continued to be pending?" Opposition at 26. The answer is simple: Mr. Raider and Mr. Rainero share the same attorneys, and those attorneys, after the dismissal of *Rainero*, re-filed the same class action in state court and simply identified a new class representative to replace Mr. Rainero in an attempt to portray this as a new action.

In order to perpetuate this scheme, Mr. Raider has engaged in absurd double-speak. He claims he was not a party in *Rainero* because that class was never certified, while also claiming that he was timely and diligently pursuing his claims through *Rainero*. Opposition at 17:12-16. 26:9-10. He cannot have it both ways. He cannot have been diligently pursuing his claims via *Rainero* while denying that his case is not the same action as *Rainero*. The reality is clear: Mr. Raider's action is the same as *Rainero*, and the only reason this case was filed was to substitute Mr. Raider as the class representative after *Rainero* was dismissed for lack of subject matter jurisdiction.

Similarly, Mr. Raider takes the position that this is not the same action because *Rainero* included Leeward Capital as a member of its putative class. This position is contrary to law, as even a "significant change" in a class definition does not make *Rainero* a new action. *See Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805 (7th Cir. 2005) (purported significant change to class definition occurring after Act's effective date did not constitute "commencement" of new action). Removing Leeward Capital, which had concluded its own individual case, from the class definition does not make this case a new action as it does not change the fact that both *Rainero* and this case are based on the same allegation that the redemption price of the EPS was miscalculated.

Additionally, it has been noted that reliance on the same documents by two cases suggests that the actions are in fact the same. *See Int'l Hobby Corp. v. Rivarossi S.p.A.*, No. CIV. A. 98-4964, 1999 WL 566793, at *2 (E.D. Pa. Aug. 3, 1999), *aff'd*, 216 F.3d 1076 (3d Cir. 2000). Here, Mr. Raider specifically relies on the discovery from *Rainero* to support his case, again demonstrating that this case and *Rainero* are in substance the same action. Exhibit 9, Response to Interrogatory No. 26.

Mr. Raider also attempts to distinguish this case from *Rainero* by spinning off new claims and adding Paul and Suzanne Lowden individually as defendants. This brief has discussed extensively how these "new claims" (breach of contract for post-2007 dividends, unjust enrichment, and breach of fiduciary duty) are, in fact, just instances of Mr. Raider's attempt to split a single breach of contract cause of action into multiple claims in order to avoid the statute of limitations. The same analysis applies to whether Mr. Raider's claims are barred by NRS 11.500. Mr. Raider takes the position that this is not the "same action" as *Rainero*, but the truth is that the substance of Mr. Raider's claim is exactly the same as *Rainero*, and that is the allegation that Mr. Raider was

underpaid for his shares of EPS in 2007. His claim for post-2007 dividends is not a separate cause of action, but at best a continuation of alleged damages arising from his basic breach of contract claim. His unjust enrichment claim is not a separate cause of action, but just a quasi-contractual reiteration of his claim that he was underpaid at the 2007 Redemption. His breach of fiduciary duty claim is not a new cause of action, but yet another way of saying he was underpaid at the 2007 Redemption. Mr. Raider's efforts to state other claims do not pass legal muster and are transparent attempts to avoid having all of his claims deemed untimely.

IV. CONCLUSION

In 2007, Mr. Raider believed he had a dispute with Archon about the Redemption price of the EPS. He anticipated litigation with Archon, and he discussed the same with his friend Eric Von der Porten, co-manager of Leeward Capital. In 2008, Mr. Von der Porten invited Mr. Raider to join the *Leeward* lawsuit against Archon. Mr. Raider declined, citing his desire not to incur legal fees, and also citing his belief that he could "ride along" with *Rainero*.

Between 2008 and 2015, Mr. Raider monitored *Leeward* and *Rainero*. He has testified that he wanted to wait and see what the outcome of *Leeward* would be before deciding whether to file his own suit. Counter-Motion at 7. He says that he would not have filed this case if *Leeward* had been unsuccessful.

When *Rainero* was dismissed in 2015, Mr. Raider's lawyers scrambled to try to save his case by substituting the class representative and refiling the case in state court. Clearly the putative class was aware that if they filed suit in Nevada, they would have timeliness problems based on the statute of limitations and NRS 11.500. The longest statute of limitation in Nevada is six years, and the challenged redemption had occurred almost eight years prior. Additionally, NRS 11.500 expressly prohibited the re-filing of *Rainero* more than five years after the original commencement or more than 90 days after the dismissal, and Mr. Raider filed his Complaint outside of both deadlines. The only way for them to save their case was to come up with new claims that they could argue were not time barred.

Thus, they endeavored to transform Mr. Raider's single breach of contract action challenging the 2007 Redemption into other causes of action that they could argue accrued more recently. They

decided to argue dividends on the EPS had continued to accrue indefinitely, and that such dividends were "installment payments." The obvious purpose of this claim (in addition to magnifying Mr. Raider's claimed damages) was to have new claims accrue indefinitely, saving themselves from the statute of limitations bar. Unfortunately for Mr. Raider, this position is not only contrary to law (dividends are neither installment payments, nor do they constitute a "continuous breach"), but requires him to contradict Judge Pro's Orders – the same Orders on which he claims to rely for collateral estoppel.

Mr. Raider also decided to claim unjust enrichment and breach of fiduciary duty against the Lowdens. However, again, he had to escape the statute of limitations, and so he took a position that these claims accrued only when *D.E. Shaw* and *Leeward* were affirmed by the Ninth Circuit in 2012. Again, this is not the law: no court in the United States ever held that claims for unjust enrichment or breach of fiduciary duty (or any other claim) accrue when a lower court decision is affirmed on appeal. What courts have held is that such claims accrue at the initial breach, which here was in 2007, making Mr. Raider's claims for unjust enrichment and breach of fiduciary duty untimely.

Thus, any claims Mr. Raider had were based on his allegation that he was underpaid for his shares of the EPS. This claim accrued in 2007 and is time-barred by Nevada's statute of limitations and NRS 11.500. For the foregoing reasons, after this Court makes a determination of whether this case will proceed as a class action (assuming Plaintiff still intends to proceed as a class action), Defendants respectfully request that their Counter-Motion for Summary Judgment be granted, and that all of Mr. Raider's claims be dismissed.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 23rd day of February, 2017.

DICKINSON WRIGHT PLLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of **REPLY IN SUPPORT OF DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT** on the following parties via email and the Eighth Judicial District Court's Odyssey File & Serve system and by email.

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DATED this 23rd day of February, 2017.

/s/ Whitney M. Jones
An Employee of DICKINSON WRIGHT, PLLC

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EXHIBIT 1

EXHIBIT 1

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Archon Corporation,
Paul W. Lowden, and
Suzanne Lowden

DISTRICT COURT

CLARK COUNTY, NEVADA

DAN RAIDER, an individual on his own behalf and on behalf of others similarly situated, Plaintiff, vs. ARCHON CORPORATION, a Nevada corporatic PAUL W. LOWDEN, an individual; and SUZANNE LOWDEN, an individual, Defendants.	CASE NO. A-15-712113-B DEPT. XIII

DECLARATION OF JUSTIN J. BUSTOS IN SUPPORT OF DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' COUNTER MOTION FOR SUMMARY JUDGMENT

I, Justin J. Bustos, pursuant to NRS 53.045, declare and state as follows:

1. I am a duly licensed attorney in the State of Nevada and am an attorney at the law firm of DICKINSON WRIGHT PLLC, attorneys of record for Defendants ARCHON

CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN (collectively, "Defendants") in the above-captioned matter.

2. I have personal knowledge of and am competent to testify concerning the facts stated herein.

3. Attached to Defendants' Reply in support the Counter- Motion for Summary Judgment ("Reply") as **Exhibit 2** is a true and correct copy of the December 2, 2016 Petition for Writ of Prohibition or Mandamus filed in *Archon Corp. vs. The Eight District Court of the State of Nevada, in and for the County of Clark, et al*, Case No. A-16-732619-B.

4. Attached to the Reply as **Exhibit 3** is a true and correct copy of the January 12, 2017 Order Directing Answer, which was entered by the Supreme Court in *Archon Corp. vs. The Eighth District Court of the State of Nevada, in and for the County of Clark, et al*, Case No. A-16-732619-B.

5. Attached to the Reply as **Exhibit 4** is a true and correct copy of the June 24, 1998 Class Action Complaint filed in *Rabouin v. Met. Life. Ins. Co.* 699 N.Y.S2d 655 (1999).

6. Attached to the Reply as **Exhibit 5** is a true and correct copy of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss filed in *Rabouin v. Met. Life. Ins. Co.* 699 N.Y.S2d 655 (1999).

7. Attached to the Reply as **Exhibit 6** is a true and correct copy of the list of 194 results regarding no cases found in relation to a claim having accrued when an appellate court affirmed a lower court's decision.

8. Attached to the Reply as **Exhibit 7** is a true and correct copy of the list of 29 results regarding no cases found in relation to a claim of unjust enrichment specifically found to have accrued upon the appellate affirmation of an underlying decision.

9. Attached to the Reply as **Exhibit 8** is a true and correct copy of the list of 45 results regarding no cases found in relation to a claim of breach of fiduciary duty being found to accrue upon affirmation of a lower court's decision by an appellate court.

10. Attached to the Reply as Exhibit 9 is a true and correct copy of Plaintiff Dan Raider's Responses to Defendants' First Set of Interrogatories to Plaintiff Dan Raider electronically served on April 8, 2016

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 23rd of February, 2017

JUSTIN J. BUSTOS

RENO 65655-4 13944v1

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE Respondents, *and* STEPHEN HABERKORN, an individual, Real Party in Interest.	Supreme Court No. State Court Case No. A-16-738346-B Electronically Filed Dec 02 2016 10:06 a.m. Elizabeth A. Brown Clerk of Supreme Court

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Archon Corporation ("Archon") is a Nevada corporation with no parent or subsidiary. No publicly held company owns ten percent or more of Archon's stock.

2. Paul W. Lowden and Suzanne Lowden are individuals.

3. Petitioners are currently represented by the law firm of Dickinson Wright PLLC in both the District Court and in this Court.

DATED this 1st day of December, 2016.

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OTHER AUTHORITIES

Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden (collectively, "Petitioners"), by and through their counsel of record, Dickinson Wright PLLC, hereby petition this Court for a writ of prohibition or mandamus. This Petition is made pursuant to NRAP 21 and is supported and verified by the attached affidavit of Mr. Lowden and Petitioners' Appendix, which are being submitted concurrently.

ROUTING STATEMENT

Petitioners' writ petition does not fall into one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request that the Court grant this writ petition and issue a decision that (1) vacates the District Court's decision applying cross-jurisdictional tolling; and (2) directs the District Court to reconsider Petitioners' Motion to Dismiss without applying cross-jurisdictional tolling.

STATEMENT OF ISSUE PRESENTED

Did the District Court err by applying the doctrine of cross-jurisdictional tolling when that doctrine is not recognized in Nevada and conflicts with Nevada statutes?

FACTUAL AND PROCEDURAL BACKGROUND

1. The Parties

Archon, formerly known as Sahara Gaming Corporation, is a Nevada

corporation with its principal place of business in Clark County, Nevada. Petitioners' Appendix ("PA") 019 ¶ 12. Paul W. Lowden is a director and the President of Archon. PA 020 ¶ 4. Suzanne Lowden is a director, the Secretary, and Treasurer of Archon. *Id.* ¶ 6.

Plaintiff Stephen Haberkorn is an individual who claims to have been the beneficial owner of 2,254 shares of Archon's Exchangeable Redeemable Preferred Stock ("EPS") prior to the time it was redeemed on August 31, 2007. *See* PA 019 ¶ 1; PA 022 ¶¶ 16, 17. Haberkorn also claims to be the beneficial owner of 40,000 shares of Archon's common stock. *Id.* ¶ 16.

2. Archon's Redemption of its EPS

In 1993, Archon adopted a resolution creating nine million shares of EPS. PA 021 ¶ 12. The rights of the holders of Archon's EPS, including dividends, redemption and voting rights are described in, among other documents, the 1993 Certificate of Designation of Exchangeable Redeemable Preferred Stock (the "Certificate"). PA 022 ¶ 13 and PA 038-045. Pursuant to the Certificate, the shares had no maturity date or mandatory redemption date. *Id.* Pursuant to the express terms of the Certificate, Archon elected to pay dividends in the form of additional shares of preferred stock for the first six dividend dates, ending September 30, 1996. PA 092-093 ¶ 27. Thereafter, Archon never declared dividends. PA 093 ¶ 29. As such, Archon accrued dividends. PA 092-093 ¶¶ 25-31.

On July 31, 2007, Archon issued a Notice of Redemption announcing that it would redeem the outstanding Preferred Stock on August 31, 2007, at the redemption price of $5.241 per share. PA 022 ¶17. The redemption price of $5.241 per share was calculated in accordance with Archon's audited financial statements and SEC filings. On July 31, 2007, Archon gave notice that it would redeem the outstanding EPS on August 31, 2007, and the shares were redeemed on that day. *Id.*

3. Archon's corporate actions following Redemption of the EPS

The *Haberkorn* Complaint contains several allegations regarding Archon's corporate actions following the redemption of Archon's EPS, including the following:

- During the quarter ended June 30, 2008, Archon offered to purchase up to 600,000 shares of its common stock at a price of $40.00 per share. PA 023 ¶ 20.
- In December 2008 and June 2010, Paul Lowden and Suzanne Lowden approved of plans for Archon to make periodic open market purchases of its common stock. PA 023 ¶ 21. Archon ultimately purchased a total of 225,000 shares on November 3, 2010. *Id.*
- In March of 2011, Archon implemented a reverse stock split. *Id.* ¶ 22. As a result of this split, stockholders who had fewer than 250 shares were paid the market value of their shares of stock as of the close of trading on February 15, 2011. *Id.* ¶ 23. A forward split then restored the remaining stockholders to their pre-reverse-split holdings. *Id.* ¶ 22. This action was intended to reduce the number of shareholders below three hundred, which in turn would eliminate Archon's obligation to file certain periodic financial reports with the Securities and Exchange Commission. *Id.*

- On March 31, 2011, Archon filed a Form 15 with the SEC, which resulted in the termination of Archon's registration with the SEC and suspended Archon's duty to file periodic financial reports with the SEC. *Id.* ¶ 24.

These factual allegations are unique to the *Haberkorn* Complaint and do not appear in any of the actions discussed below, namely, *Rainero*, *Raider*, *D.E. Shaw* or *Leeward*.

4. **2007 lawsuits challenging the redemption price**

Following the redemption of the EPS, three actions were instituted against Archon by preferred shareholders in the United States District Court for the District of Nevada challenging the redemption price: (1) an August 27, 2007, Complaint filed by a group of hedge funds, D.E. Shaw Laminar Portfolios, LLC et al., case number 2:07-cv-01146-PMP-(LRL) ("*D.E. Shaw*"); (2) a November 20, 2007, Complaint filed by David Rainero on behalf of himself and all preferred shareholders including Mr. Haberkorn, case number 2:07-cv-01553-GMN-(PAL) ("*Rainero*"); and (3) a January 2, 2008, Complaint filed by another hedge fund, Leeward Capital, LP, case number 2:08-cv-00007-PMP-(LRL) ("*Leeward*").

In 2010, the federal District Court granted summary judgment in favor of the plaintiffs in the *D.E. Shaw* and *Leeward* actions, determining that the EPS redemption price should have been $8.69 per share. PA 024 ¶ 27. This

determination was affirmed by the Ninth Circuit Court of Appeals on September 19, 2012. PA 024 at ¶ 28.

Two years after the Ninth Circuit's affirmance in *D.E. Shaw* and *Leeward*, on September 29, 2014, the federal District Court dismissed the *Rainero* action for lack of subject matter jurisdiction after the parties briefing on the issue. PA 054:19-23. Mr. Rainero has appealed the Court's Order to the Ninth Circuit Court of Appeals, and the appeal has been argued and is fully briefed and pending. *Id.*

5. **Mr. Haberkorn files this lawsuit.**

After *Rainero* was dismissed, Mr. Haberkorn initiated this case on February 29, 2016. In very limited ways, Mr. Haberkorn asserted similar claims to those made in *Rainero*. Even though contrary to fourteen years of accounting audits and GAAP standards, both *Haberkorn* and *Rainero* alleged that Archon did not properly calculate the redemption price of the EPS, claiming that the redemption price should have been $8.69 per share instead of $5.241. PA 003 ¶ 13, 005 ¶ 26; PA 022-023 ¶¶ 17-19. On the basis of such factual allegations, both *Haberkorn* and *Rainero* alleged damages of $3.45 per share of EPS. PA 007 ¶ 42; PA 027 ¶ 46-47.

However, *Haberkorn* also asserted numerous factual allegations and legal claims that were never asserted in *Rainero*. Unlike *Rainero*, *Haberkorn* challenged Archon's decision to offer to purchase 225,000 shares of Archon's common stock in 2010, *claiming that this purchase was a breach of the*

Certificate. PA 023 ¶ 21; PA 028 ¶ 52. *Haberkorn* challenged Archon's 2011 reverse stock split, claiming the split violated the terms of the Certificate and constituted a breach of fiduciary duty. PA 023 ¶ 22; PA 026 ¶ 41; PA 028 ¶ 53, and PA 032 ¶ 77. Finally, *Haberkorn* challenged the termination of Archon's de-registration with the SEC in 2011, claiming that the de-registration of Archon with the SEC constituted a breach of fiduciary duty. PA 023 ¶ 24; PA 025 ¶ 38; PA 031-032 ¶¶ 75-78. None of these allegations or claims were asserted in *Rainero*. Indeed, the *Rainero* Complaint made no mention of Archon's common stock, and Mr. Rainero never owned any shares of Archon's common stock.

6. **The District Court finds that cross-jurisdictional tolling applies to the *Haberkorn* lawsuit.**

On April 6, 2016, Petitioners filed a motion to dismiss the *Haberkorn* Complaint, arguing that the District Court should dismiss the action because it was untimely and filed outside the statute of limitations period found in NRS 11.190. Petitioners argued that because Mr. Haberkorn knew or should have known of his claims against Archon on or about August 31, 2007, his Complaint filed in 2016 was clearly untimely. In response, Mr. Haberkorn did not dispute that his claims were filed beyond the six-year limitations period but argued that the running of the statute of limitations on his claims was tolled based on the doctrine of class action tolling as articulated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Mr. Haberkorn argued that his claims were

"substantially the same claims" as were asserted in *Rainero*, and that Nevada should adopt the doctrine of cross-jurisdictional tolling, in which the filing of a class action in a federal District Court would toll the statute of limitations for Mr. Haberkorn's state law claims in Nevada's state courts. PA 059:3-26.

Petitioners noted that no court, including this Court, had found that Nevada would adopt cross-jurisdictional, class action tolling. PA 119-120. Petitioners further argued that the District Court should reject Haberkorn's request to adopt cross-jurisdictional tolling as the doctrine is controversial and has been rejected by many jurisdictions. PA 121-122. Petitioners noted that cross-jurisdictional tolling should be rejected because it (1) would increase the burden on Nevada's state court system without providing any benefit to Nevada; (2) would cause the commencement of Nevada's statute of limitations to depend on the determinations of other state and federal courts; and (3) was contrary to the Nevada Legislature's authority and intent in enacting certain statutes of limitations and repose. PA 121-123.

The District Court denied Petitioners' Motion to Dismiss without prejudice. The District Court noted that although Mr. Haberkorn's claims would not be tolled by the doctrine of equitable tolling, his claims could be tolled by the doctrine of cross-jurisdictional tolling. PA 160-161. The District Court stated that it would deny Petitioners' motion to dismiss "based primarily on (its prediction that) . . . the Nevada Supreme Court would (adopt cross-jurisdictional tolling)."

(parenthetical statement added). Thus, the District Court found that "(1) general class action tolling applies; (2) under these circumstances, cross jurisdictional tolling also applies . . . ." PA 161:1-2.

SUMMARY OF ARGUMENT

This Petition challenges the District Court's finding that the controversial doctrine of cross-jurisdictional, class action tolling applies in this case. That doctrine has been adopted by only a small minority of courts, and it has been rejected by others because it (1) increases the burden on a state's court system while providing no benefit to the state; (2) causes the running of a state's statutes of limitation and repose to depend on the actions of every federal District Court in the United States; and (3) undermines the authority and intent of the Nevada Legislature to determine periods of limitation and repose. All of these reasons for rejecting the doctrine of cross-jurisdictional tolling are implicated in this case.

Further, Mr. Haberkorn's allegations and claims are especially inappropriate for any type of tolling, including cross-jurisdictional tolling. An essential element of tolling is that defendants were put on notice of any claims against them by an earlier action asserting the same claims. This requires that any claims that are purportedly tolled must be the same claims as those made in an earlier action against the defendants: otherwise, the defendants will not have been put on notice of those claims by the earlier action, making tolling an unjust violation of the principles of repose. Here, in his 2016 Complaint, Mr. Haberkorn

alleges many facts and claims that were never made in the 2007 case, *Rainero*, which Mr. Haberkorn argues tolled the statutes of limitation and repose for his current claims. Indeed, a review of Mr. Haberkorn's Complaint reveals that his claims are very different than those made in the *Rainero* action. Thus, regardless of the merits of cross-jurisdictional tolling, Mr. Haberkorn cannot avail himself of that doctrine to assert new claims against Petitioners. In fact, even those few jurisdictions which have adopted cross-jurisdictional tolling have been careful to emphasize that a plaintiff, like Mr. Haberkorn, who did not provide notice of his claims to a defendant via an earlier class action cannot use cross-jurisdictional tolling. Notice is absolutely essential to any form of class action tolling, and Mr. Haberkorn provided no notice of his claims to Petitioners.

For these reasons, Petitioners request that the Nevada Supreme Court reject the doctrine of cross-jurisdictional tolling and direct the District Court to reconsider Petitioners' Motion to Dismiss in light of such a decision.

ARGUMENT

1. Propriety of extraordinary relief

This Court has original jurisdiction to issue writs of mandamus, prohibition, and certiorari. Nev. Const. Art. 6 § 4. The petitioner bears the burden of demonstrating extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

This Court has determined that extraordinary relief is appropriate when a petition presents an issue of law of statewide importance requiring clarification, and sound judicial economy and administration favor the granting of the petition. *See, e.g.*, *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39-40, 175 P.3d 906, 908 (2008); *Child v. Lomax*, 124 Nev. 600, 605, 188 P.3d 1103, 1107 (2008); *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4–5, 200 P.3d 509, 511 (2009); *MountainView Hosp. v. Dist. Ct.*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864–65 (2012) ("Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but ... may do so where ... the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."). All of these policy considerations are present in this Petition.

This writ petition presents the issue of whether the District Court erred by applying the doctrine of cross-jurisdictional tolling even though that doctrine is not recognized in Nevada and conflicts with Nevada statutes. Many state supreme courts have expressly rejected this doctrine because of its likely adverse impact on a state's court system. The doctrine is considered not only to incentivize forum-shopping, but also to invite plaintiffs with stale claims to take advantage of a generous tolling doctrine which the large majority of other states have not adopted.[1] Thus, the question presented by this writ petition will affect courts and

[1] States that have considered it are split on the doctrine of cross-jurisdictional tolling. *See Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 395 (Del. 2013) (adopting cross-jurisdictional tolling), *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App.

litigants throughout Nevada, as the current ruling by the District Court may expose Nevada courts, citizens, and entities to excessive, untimely claims. Further, this issue affects not only Nevada state courts, but also federal courts in Nevada, which would likely wait to receive guidance from the Nevada Supreme Court on this issue before applying cross-jurisdictional tolling. *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (noting several federal courts have declined to permit cross-jurisdictional tolling absent state law addressing the subject); *see also Schwartz v. Pella Corp.*, No. 2:14-CV-00556-DCN, 2014 WL 7264948, at *5 (D.S.C. Dec. 18, 2014) ("The Fourth Circuit has been reluctant to read cross-jurisdictional tolling into state law where it is otherwise silent.").

The Nevada Supreme Court recently considered a similar writ petition in *PN II, Inc. v. Eighth Judicial Dist. Court of State ex rel. Johnson*, No. 63474, 2014 WL 1679042, at *1 (Nev. Apr. 23, 2014) and only declined to issue a

(continued)
364, 370, 384 N.W.2d 165, 168 (1986) (same), *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo.Ct.App.W.Dist.1990) (same), *Stevens v. Novartis Pharm. Corp.*, 358 Mont. 474, 486–91, 247 P.3d 244, 253–56 (2010) (same), *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 382–83, 390, 763 N.E.2d 160, 163, 168–69 (2002) (plurality of two out of seven justices and partial concurrence of two additional justices) (same); *but see Portwood v. Ford Motor Co.*, 183 Ill.2d 459, 465–67, 233 Ill.Dec. 828, 701 N.E.2d 1102, 1104–05 (1998) (rejecting cross-jurisdictional tolling), *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) (same), *Bell v. Showa Denko K.K.*, 899 S.W.2d at 758 (Tex.App.Amarillo 1995) (same), *Casey v. Merck & Co.*, 283 Va. 411, 722 S.E.2d 842 (2012) (same), *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa.Super.Ct.2002) (same), and *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 (same).

decision because there were unresolved fact issues in the record. There, the petition presented "the question of whether the class-action tolling doctrine . . . can toll a statute of repose." *PN II, Inc. v. Eighth Judicial Dist. Court of State ex rel. Johnson*, No. 63474, 2014 WL 1679042, at *1 (Nev. Apr. 23, 2014). The petitioner asked the Supreme Court to order the District Court to enter summary judgment in its favor, however the Supreme Court declined because, *inter alia*,

> [T]he applicability of these statutes to real parties in interest's claims **requires factual determinations** that are unique as to each real party in interest. **Because the district court did not make any of these factual determinations** in denying summary judgment, the record before this court is inadequate to meaningfully consider the overarching issues presented by this writ petition.

Id. (emphasis added). Despite the presence of those unresolved factual issues, Justice Hardesty, in dissent, stated that the issue presented by the writ of whether the class-action tolling doctrine tolled a statute of repose should be heard "on the basis that this court's intervention is warranted to clarify an important and recurring issue of law." *Id.* Justice Hardesty noted that:

> [T]his class-action tolling issue is not simply one that is isolated to the underlying litigation, but is a recurring issue arising in many construction defect cases in this state's court system . . . . Thus, I disagree with my colleagues' decision to deny interlocutory writ relief and require the parties to wait to have this court address the important and recurring issue presented here. This delay increases the cost of this litigation to the parties and fails to promote judicial economy.

Id. Here, in contrast to *PN II*, the issue of cross-jurisdictional, class action tolling presents no factual issues, but only a pure question of law. *See Rader v. Greenberg Traurig, LLP*, 352 P.3d 465, 467 (Ariz. Ct. App. 2015) (whether Arizona should permit cross-jurisdictional tolling is a "purely legal issue"). Regardless of any factual determinations or discoveries that may be made by the District Court in the future, the discrete legal issue presented in this writ petition, whether Nevada should adopt the doctrine of cross-jurisdictional tolling, will remain exactly the same. Thus, there is nothing to gain from waiting until the completion of the case for this Court to decide this issue. In fact, a decision by the Supreme Court on this controversial question-of-first-impression will promote judicial economy in several ways.

First, judicial economy will be promoted in the instant case by allowing the parties to proceed with litigation without the underlying uncertainty of whether Mr. Haberkorn's claims are time-barred. The Nevada Supreme Court recently considered a petition because "resolving this writ petition may affect the course of the litigation, thus promoting sound judicial economy and administration." *See John Peter Lee, Ltd. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 66465, 2016 WL 327869, at *1 (Nev. Jan. 22, 2016). This is especially true here. The District Court's primary basis for not dismissing Mr. Haberkorn's claims was that it believed this Court would adopt cross-jurisdictional tolling. Therefore, the consideration of this writ petition will clearly affect the course of

the *Haberkorn* litigation. Further, it would be a waste of resources for this action to proceed in the District Court if the Nevada Supreme Court is likely to conclude that Mr. Haberkorn's claims are time-barred because Nevada should not, in fact, adopt or recognize cross-jurisdictional tolling.

Second, this is at least the second time[2] since 2015 that this same issue has been raised in the Supreme Court as well as a Nevada District Court in actions against Petitioners, and thus it is clear that the uncertainty about whether Nevada would adopt cross-jurisdictional tolling is already burdening Nevada courts and litigants. A decision from the Supreme Court on the issue presented in this petition would resolve this uncertainty and reduce litigation in both these cases as well as any other pending cases that involve cross-jurisdictional tolling.

Third, a decision from this Court on the merits of this petition would create certainty throughout Nevada and the United States on the issue of whether Nevada accepts cross-jurisdictional tolling and thereby reduce future litigation over this currently uncertain area of law.

The Supreme Court's consideration of this Petition would be similar to its answering a question of law certified to it by a federal court as described in NRAP 5(a). Many federal courts have considered whether a particular state

[2] *See generally*, Case No.: 68995, *Archon Corporation, et al. vs. The Eighth Judicial Court of the State of Nevada, et al*, (Petitioners' Petition for Writ of Prohibition, Mandamus and/or Certiorari at 35).

would be likely to adopt the doctrine of cross-jurisdictional tolling,[3] and given that there is currently no precedential guidance on the issue of cross-jurisdictional tolling, the question would likely be certified if it were presented by a federal court to the Nevada Supreme Court. There is no reason in principle for the Supreme Court to abstain from answering the question because it is presented in a writ petition, particularly since the Supreme Court has original jurisdiction over questions of law of statewide importance. Thus, Petitioners respectfully submit that they are entitled to have their petition considered by this Court at this time.

2. Nevada should reject cross-jurisdictional tolling.

This Petition presents an issue-of-first impression: whether the District Court erred by applying the doctrine of cross-jurisdictional tolling even though that doctrine is not recognized in Nevada and conflicts with Nevada statutes. Petitioners submit that the Nevada Supreme Court should join courts in Virginia,

[3] *See Wade v. Danek Med.*, Inc., 182 F.3d 281, 287 (4th Cir. 1999); *see also* 1 McLaughlin on Class Actions § 3:15, n. 23 (13th ed.) (citing *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1187 (9th Cir. 2009) (noting that "California has not adopted ... American Pipe tolling where the class action was filed in a foreign jurisdiction" and that cross-jurisdictional tolling has been rejected because "[u]nless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run."); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (same); *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation*, 995 F. Supp. 2d 291, 311 (S.D.N.Y. 2014) ("New York currently does not recognized tolling where that class action is filed outside New York state court (so-called 'cross-jurisdictional tolling.')"); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 1092293, *4 (N.D. Cal. 2014); *Wang v. Bear Stearns Companies LLC*, 2014 WL 1512032, *11 (S.D.N.Y. 2014).)

Pennsylvania, Tennessee, Illinois, Louisiana, and Texas and reject the doctrine of cross-jurisdictional tolling.[4]

These courts have observed that the adoption of cross jurisdictional tolling exposes a state's court system to a flood of filings from forum-shopping plaintiffs, who possibly bring only stale claims. Further, the doctrine of cross-jurisdictional tolling would cause Nevada's statutes of limitation and repose to be subject to indefinite suspension, forcing a Nevada state court to await the outcome of the class certification as to any litigant in any putative class action filed in any federal court in the United States. This would undermine the Nevada Legislature's prerogative to determine periods of limitation and repose, as well as any tolling of the same. Indeed, Petitioners submit that the District Court's adoption of cross-jurisdictional tolling contravenes the Nevada Legislature's specific intent in enacting NRS 11.500. For these reasons, Nevada should reject the doctrine of cross-jurisdictional, class action tolling.

a. **Mr. Haberkorn does not qualify for any form of class action tolling because his claims are different than those in *Rainero*.**

Before considering the compelling policy reasons why Nevada should reject cross-jurisdictional tolling, it should be observed that the statutes of limitation and repose on Mr. Haberkorn's claims cannot possibly be tolled by any form of class action tolling, let alone the controversial doctrine of cross-jurisdictional

[4] *See* footnote 1.

tolling. This is because his primary claims are different from those asserted in *Rainero*, and consequently *Rainero* did not provide Petitioners with notice of Mr. Haberkorn's claim. Notice is essential to any form of tolling, and its absence in this case means that Mr. Haberkorn's claims cannot be deemed tolled by his purported reliance on *Rainero*.

The doctrine of class action tolling was announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756 (1974). There, the United States Supreme Court held that the filing of a class action in federal district court tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the federal court has found the suit inappropriate for class action status. *Id.*, at 553, 766. Subsequently, the United States Supreme Court extended *American Pipe* by holding that the filing of a class action in a federal district court tolls the statute of limitations not just for those who move to intervene in the original suit after class status is denied, but also for those who subsequently file their own individual suits in federal court. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 2395-96 (1983). The *American Pipe* rule is often described as "class action tolling."[5] The Nevada Supreme Court applies a similar rule, as class actions filed pursuant to NRCP 23 "toll the statute of limitations on all potential unnamed

[5] *See Madani v. Shell Oil Co.*, No. CV081283GHKJWJX, 2008 WL 7856015, at *1 (C.D. Cal. July 11, 2008), *aff'd*, 357 F. App'x 158 (9th Cir. 2009).

plaintiffs' claims." *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 34, 176 P.3d 271, 275 (2008).

However, class action tolling cannot be applied to claims such as Mr. Haberkorn's because, as described above, Mr. Haberkorn makes many allegations and claims that were never asserted in *Rainero*, and thus Petitioners were never put on notice of Mr. Haberkorn's claims by *Rainero*. The following chart summarizes major differences between *Haberkorn* and *Rainero*.

	Haberkorn **Claims & Supporting Allegations PA 019-037**		**Parallel Claims & Supporting Allegations in *Rainero* PA 001-018**
	FIRST CLAIM FOR RELIEF (Declaratory Relief)		**CLAIM FOR RELIEF**
¶33	Pursuant to the Certificate, the Liquidation Preference (and hence the redemption value) of the Preferred Stock as of August 31, 2007 was not $5,241 per share, but rather $8.69 per share.	¶39	Defendant Archon calculated the Liquidation Preference was $5.241 per share.
¶34	Archon failed, as of August 31, 2007, to set aside (or deposit) in trust such funds as were necessary for the redemption of the Preferred Stock at a redemption price of $8.69 per share.	¶40	Defendant Archon did not calculate the Liquidation Preference in the manner required by the Resolution and the Certificate
¶37	The March 23, 2011 reverse stock split/forward split was	¶41	Calculated in the manner required by the Resolution and the Certificate, the Liquidation Preference is $8.69 per share.

¶38	invalid because the holders of the Preferred Stock were not afforded their right to vote on the stock splits separately as a class, as provided for in the Certificate. Archon's subsequent de-registration with the SEC was invalid as the number of shareholders of record exceeded the Securities and Exchange Commission's limit of three hundred share-holders.		
	SECOND CLAIM FOR RELIEF **(Breach of Contract)**		
¶52	Archon's purchase of 225,000 shares of its common stock constituted a breach of Section 2(b)(ii) of the Certificate.		
¶53	Archon's March 2011 payments to the Archon stockholders who held fewer than 250 shares of Archon common stock before the reverse stock split constituted a breach of Section 2(b)(ii) of the Certificate.		

	THIRD CLAIM FOR RELIEF (Breach of Fiduciary Duty - Unequal Treatment of Preferred Stockholders)		
¶57	Pursuant to NRS 78.195, as Archon officers and directors, the Individual Defendants had a statutory and fiduciary duty to treat all holders of the Preferred Stock, including Plaintiff Haberkorn, equally.		
¶58	Defendants breached their statutory and fiduciary duty to treat all holders of the Preferred Stock equally by discriminating against Plaintiff Haberkorn by causing Archon to pay the unpaid balance of the redemption price to certain large institutional holders of the Preferred Stock, but failing to cause Archon to pay the unpaid balance of the redemption price to Plaintiff Haberkorn.		
¶62	The conduct of the Individual Defendants, as described above, was despicable conduct which was engaged in with conscious disregard of the rights of Plaintiff Haberkorn and the Individual Defendants are otherwise		

	guilty of oppression, fraud, malice and bad faith, entitling Plaintiff Haberkorn to punitive and/or exemplary damages pursuant to NRS 42.005.		
	FIFTH CLAIM FOR RELIEF (Breach of Fiduciary Duty -Wrongful Deregistration)		
¶77	Archon's purported de-registration with the SEC was invalid as the number of shareholders of record exceeded the Securities and Exchange Commission's limit of three hundred shareholders.		
¶78	The Individual Defendants have breached their fiduciary duties owed to Plaintiff in that their conduct resulted in the invalid deregistration of Archon's shares, which has adversely affected Plaintiff because said deregistration has curtailed the national market for Archon's shares and adversely affected Plaintiffs ability to liquidate his shares at a fair price.		
	NINTH CLAIM FOR RELIEF (Injunctive Relief)		
¶105	Defendants' conduct, alleged herein, has and will continue		

	to cause harm and irreparable damage to Plaintiff Haberkorn.			
¶106	Plaintiff Haberkorn respectively requests that Archon be required to hold a separate class vote for the holders of the Preferred Stock to elect two special directors to the Archon Board of Directors as provided in the Certificate.			
¶107	Injunctive relief is appropriate as monetary damages are insufficient to protect the rights and privileges of Plaintiff Haberkorn to vote to elect two special directors to the Archon Board of Directors			

This chart demonstrates that *Haberkorn* contains numerous allegations and claims that never appeared in the earlier class action *Rainero*, and consequently *Rainero* did not give Petitioners any notice of such claims. Indeed, the *Rainero* Complaint presented a single breach of contract claim whereas the *Haberkorn* Complaint includes nearly a dozen separate claims.

An essential element of class action tolling is that the initial filing of the class action put defendants on notice of the claims against them in the subsequent action, yet, here, a large majority of *Haberkorn*'s allegations and claims were never made in *Rainero* and have no relationship to the single claim

in *Rainero*. Therefore, *Rainero* provided Petitioners with no notice of *Haberkorn*'s claims, making the application of class action tolling to such claims wholly inappropriate and unjust.

"[T]he underpinning of the tolling rule is a defendant's awareness that claims are being asserted against it." 1 McLaughlin on Class Actions § 3:15. When defendants are not aware of the claims now being asserted against them, it is unfair to allow an earlier, unrelated action to toll the statute of limitations on the unrelated claims. "The tolling rule of American Pipe is a generous one, inviting abuse . . . . The rule should not be read, however, as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Crown, Cork & Seal Co.*, 462 U.S. at 354, 103 S. Ct. at 2398 (Powell, J., concurring).

This is precisely what Mr. Haberkorn is attempting to do: use *American Pipe* tolling to raise different or peripheral claims against Petitioners which were never alleged in *Rainero*. On one hand, *Rainero* was filed on November 20, 2007 and raised a single claim that Petitioners had miscalculated the price of the EPS at $5.241. On the other hand, in his suit filed on February 29, 2016, almost nine years after *Rainero*, Mr. Haberkorn, through nine separate causes of action, challenges: (1) Archon's offer to purchase 225,000 shares of Archon's common stock; (2) Archon's 2011 reverse stock split; and (3) the termination of Archon's registration with the SEC in 2011. PA 023 ¶¶ 21, 22, 24; PA 025 ¶ 38; PA 026 ¶

41; PA 028 ¶¶ 52, 53; and PA 031-32 ¶¶ 75-78. Literally, none of these allegations was made in *Rainero*. Yet, Haberkorn seeks to have the periods of limitation and repose on his unique claims tolled based on the 2007 filing of *Rainero*.

Mr. Haberkorn's position violates *American Pipe*'s purpose and progeny. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights . . . ." *Crown, Cork & Seal Co.*, 462 U.S. at 354, 103 S. Ct. at 2398 (Powell, J., concurring). Justice Powell warned that the *American Pipe* rule should not be abused by allowing plaintiffs to toll the statute of limitations for peripheral claims on the basis of the filing of an earlier class action. *Id.* Yet, this is exactly what Mr. Haberkorn is seeking to do. He seeks to toll the statute of limitations for his 2016 claims based on the 2007 filing of *Rainero*, yet *Rainero* provided no notice to Petitioners of Mr. Haberkorn's 2016 claims.

The fact that *Haberkorn* asserts completely different allegations and claims than *Rainero* makes this case particularly inappropriate for the application of the controversial doctrine of cross-jurisdictional, class action tolling. In subsequent sections of this brief, Petitioners will argue why, as a matter of general policy, the Nevada Supreme Court should join those jurisdictions which have rejected cross-jurisdictional tolling. However, Petitioners emphasize that even those few states which have adopted cross-jurisdictional tolling would reject the

application of that doctrine to the facts of the case because *Rainero* in no way provided Petitioners with notice of Mr. Haberkorn's allegations and claims.

The small minority of states that have adopted cross-jurisdictional tolling have uniformly emphasized that cross-jurisdictional tolling can only apply if a defendant was put on notice of a plaintiff's claims by a prior class action. For example, in applying cross-jurisdictional tolling, the Supreme Court of Delaware stated that "[f]irst, all of the defendants to be bound by the ultimate decision in this case were clearly on notice of the action at the outset." *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 394 (Del. 2013). Similarly, the Court of Appeals of Michigan observed that "defendants received notice of the state claims against them four years prior to the filing of this action." *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich. App. 364, 368, 384 N.W.2d 165, 167 (1986). The Supreme Court of Ohio has stated that "a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations [which are] intended to put defendants on notice of adverse claims . . . ." *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380, 382, 763 N.E.2d 160, 162 (2002) (quoting *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 352, 103 S.Ct. at 2397).

Thus, even in the few jurisdictions where cross-jurisdictional tolling has been adopted, it is clear that tolling would be utterly inappropriate in this case because Petitioners were not put on notice of *Haberkorn*'s new allegations and claims by the complaint filed in the *Rainero* class action. The Supreme Court of

Montana, adopting cross-jurisdictional tolling for limited circumstances, noted that it would not extend cross-jurisdictional tolling to a plaintiff who had not put a defendant on notice of its claims: "We recognize that in some instances a class action suit may not fairly put the defendants on notice. Our adoption of the rule is therefore limited to situations in which defendants are fairly put on notice of the substantive claims against them." *Stevens v. Novartis Pharm. Corp.*, 358 Mont. 474, 491, 247 P.3d 244, 256 (2010). The Montana Court noted that tolling could only be extended to allegations that were "the same or substantially similar." *Id.* at 485, 253.

Haberkorn's allegations are not in any way the same or substantially similar to *Rainero*'s. The only overlap between these two cases is the allegation that the EPS was miscalculated by $3.45 per share. PA 007 ¶ 42; PA 025 ¶ 33. Yet, this claim regarding the EPS is not the core of Mr. Haberkorn's claims. Mr. Haberkorn only alleges that he owned 2,254 shares of the EPS, meaning that he claims Archon underpaid him for his shares of EPS by about $7,776. However, Mr. Haberkorn also alleges that he owns 40,000 shares of Archon common stock, and that Petitioners damaged the value of these 40,000 shares by reducing public demand for them when Archon de-registered with the SEC. PA 022 ¶ 16; PA 031 ¶ 74; PA 032 ¶ 78. Mr. Haberkorn has not specified his alleged damages for his 40,000 shares of common stock, but clearly such alleged damages would be substantially larger than the $7,776 in damages he claims related to his EPS,

as such claimed damages would likely be in the range of $1,000,000. Thus, Mr. Haberkorn's primary claims are *not based* on his 2,254 shares of EPS, which is the only overlap between *Haberkorn* and *Rainero*. Thus, *Haberkorn* and *Rainero* are not "the same or substantially similar," and *Haberkorn* is ineligible for any form of class action tolling.

It is also important to note that *Haberkorn*'s claims regarding the EPS essentially have no relationship to his other claims regarding Archon's decision to offer to purchase 225,000 shares of its common stock in 2010, the 2011 reverse stock split, or the 2011 de-registration with the SEC. PA 023 ¶¶ 21, 22, 24; PA 025 ¶ 38; PA 026 ¶ 41; PA 028 ¶¶ 52, 53; and PA 031-032 ¶¶ 75-78. These claims do not arise "from a common nucleus of operative fact." *Cf. Kalinauskas v. Wong*, 808 F. Supp. 1469, 1472 (D. Nev. 1992) (discussing federal court supplemental jurisdiction). *Haberkorn*'s claims are not based on an "interlocked series of transactions": each challenged transaction happened years apart and was independent of the others, and thus the claims are "separate and independent." *Cf. Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14, 71 S. Ct. 534, 540 (1951) (discussing separate causes of action under 28 U.S.C. § 1441).

Because the claims in *Haberkorn* and *Rainero* regarding the EPS are essentially unrelated to *Haberkorn*'s other claims, which clearly predominate his Complaint, Mr. Haberkorn absolutely cannot avail himself of any type of class action tolling because the claims in *Rainero* did not put Petitioners on notice of

the gravamen of *Haberkorn*'s claims. Even those few courts which have adopted cross-jurisdictional tolling have stressed that a defendant must have been put on notice of a plaintiff's claims by the earlier class action; otherwise, the fundamental purpose of statutes of limitation and repose – to protect defendants from untimely claims – is defeated. Here, Mr. Haberkorn gave Petitioners no such notice, and he cannot use class action tolling to revive his stale claims.

b. **Cross-jurisdictional tolling should be rejected in Nevada as its adoption would increase the burden on Nevada's courts.**

In addition to the specific reasons why *Haberkorn* is ineligible for any form of class action tolling, there are compelling policy reasons for Nevada to reject cross-jurisdictional tolling in general. It has been frequently observed that the adoption of *intra-jurisdictional* class action tolling (class action tolling within the same court system, such as in *American Pipe* and *Jane Roe Dancer*) does not necessarily support the adoption of "cross-jurisdictional" class action tolling.[6] And the reasons for rejecting cross-jurisdictional tolling arise because of problems specifically created by tolling statutes of limitation and repose *across* federal and state jurisdictions, as opposed to within the same court system.

[6] "The doctrine allowing tolling within the federal court system in federal question class actions does not require cross-jurisdictional tolling (i.e. tolling based on a prior class action filed in a different jurisdiction) as a matter of state procedure. California and New York have rejected *American Pipe*'s application to cross-jurisdictional actions." 1 McLaughlin on Class Actions § 3:15 (13th ed.).

"Tolling the statute of limitations for individual actions filed after the dismissal of a class action is sound policy when both actions are brought in the same court system. In such instances, failing to suspend the limitation period would burden the subject court system with the protective filings described by the Supreme Court in *American Pipe* . . . ." *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 464–65, 701 N.E.2d 1102, 1104 (1998). However, when two actions are brought in different court systems:

> Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run . . . . Given this state of affairs, it is clear that adoption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping.

Id. The situation described in *Portwood* remains largely unchanged today, as only six states[7] have adopted cross-jurisdictional tolling, while six have rejected it, and

[7] Cases in which courts have recognized such cross-jurisdictional tolling include *Stevens v. Novartis Pharmaceuticals Corp.*, 358 Mont. 474, 247 P.3d 244 (2010); *Vaccariello v. Smith & Nephew Richards*, 94 Ohio St.3d 380, 763 N.E.2d 160

others such as California and New York have refused to adopt cross-jurisdictional tolling despite being presented with the opportunity to do so.[8]

Thus, if Nevada were to adopt cross-jurisdictional tolling, it would be one of a very few jurisdictions to give forum-shopping plaintiffs certainty that any time limit on their claims has been tolled during their failed attempts to obtain class certification in a federal District Court. The situation would be precisely what Fourth Circuit Judge Luttig determined would be undesirable for the Commonwealth of Virginia:

> [I]f Virginia were to adopt a cross-jurisdictional tolling rule, Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule, a rule that would be shared by only a few other states . . . .

Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999). Adopting the doctrine of cross-jurisdictional tolling would make Nevada one of a few clearinghouses for untimely claims that should have been initiated in other jurisdictions – but cannot be – because more than forty other states do not embrace cross-jurisdictional tolling. As Judge Luttig observed, "[T]he

(continued)
(2002); *Staub v. Eastman Kodak Co.*, 320 N.J.Super. 34, 726 A.2d 955 (App.Div.1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382 (Mo.Ct.App.1990); and *Lee v. Grand Rapids Bd. of Educ.*, 148 Mich.App. 364, 384 N.W.2d 165 (1986); *Patrickson v. Dole Food Co., Inc.*, 137 Haw. 217, 226, 368 P.3d 959, 968 (2015), as corrected (Nov. 18, 2015).

[8] *See* footnote 3, *supra*.

Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state." *Id.* Likewise, inviting forum-shopping plaintiffs to Nevada's courts simply provides no benefit to the state.

Montana, one of the few states, that has adopted cross-jurisdictional tolling, acknowledged the likelihood that the doctrine would burden its courts with forum-shopping plaintiffs. "[W]e acknowledge that our holding today may indeed encourage plaintiffs with 'no relationship to Montana' to file suit in our courts, if their claims are stale elsewhere." *Stevens*, 358 Mont. at 490, 247 P.3d at 256. Nevertheless, the Montana Supreme Court adopted cross-jurisdictional tolling because it was required to do so by the Montana Constitution: "Our state's policy is plainly stated in the Montana Constitution: '[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.' Mont. Const. art. II, § 16. The right of access to our court system is 'unrestricted by reference to residence or citizenship,' and an out-of-state plaintiff has 'the same rights and duties as a citizen of this state.'" *Id.* Thus, even in one of the few states to adopt cross-jurisdictional tolling, the burden on the state courts is acknowledged, and that burden is only accepted because it was required by the Montana Constitution. However, the Nevada Constitution has no such language, nor does Nevada have a policy that its courts be open to every

person regardless of citizenship. Thus, if Nevada were for some reason to consider adopting a policy that opened its courts to forum-shopping plaintiffs, such a policy must be weighed and enacted by the Nevada Legislature, which, as discussed below, has instead clearly indicated that it would reject cross-jurisdictional tolling.

Those in favor of cross-jurisdictional tolling argue that the doctrine may provide some efficiency for states which adopt it by reducing "protective filings"; claims which supposedly would be filed by plaintiffs seeking to prevent their claims from becoming stale during the pendency of class-certification proceedings in federal court. However, both in theory and in fact, it is likely that the burden of any protective filings would be outweighed by the burden of filings that would be made by those who had failed to timely have their claims brought in a different jurisdiction and subsequently sought a jurisdiction that had promised to toll the statute of limitations or repose on their otherwise stale claims. First, this case, as well as the *Raider*[9] case brought against Petitioners just this year, is instructive: neither Mr. Haberkorn nor Mr. Raider made "protective filings"; instead, they both filed suit after *Rainero*'s case was dismissed, and they did so knowing that their claims were plainly time-barred under Nevada law. This evidence supports the predictions of the courts which have rejected cross-

[9] *Raider v. Archon Corporation, et al.*, Case No. A-15-712113-B, District Court, Clark County, Nevada.

jurisdictional tolling due to the burdens it would place on their state court systems. As the Illinois Supreme Court stated:

> Plaintiffs contend that our rejection of cross-jurisdictional tolling will necessitate numerous protective filings in Illinois by plaintiffs who have class actions pending in other jurisdictions, thus burdening our state court system and inconveniencing the affected litigants. We are convinced, however, that any potential increase in filings occasioned by our decision today would be far exceeded by the number of new suits that would be brought in Illinois were we to adopt the generous tolling rule advocated by plaintiffs. By rejecting cross-jurisdictional tolling, we ensure that the protective filings predicted by plaintiffs will be dispersed throughout the country rather than concentrated in Illinois.

Portwood, 183 Ill. 2d at 466–67, 701 N.E.2d at 1105. Fourth Circuit Judge Luttig reasoned similarly:

> Although, in the absence of a cross-jurisdictional tolling rule, in-state plaintiffs would engage in "protective" filing before the statute of limitations expires, thus leading to some increase in the amount of litigation, any such increase would presumably be smaller than the increase in filings that would result from a cross-jurisdictional tolling rule, because out-of-state plaintiffs would simply engage in "protective" filing in their own states' courts (provided their states lacked cross-jurisdictional tolling rules themselves).

Wade, 182 F.3d at 287. Here, during the pendency of *Rainero*, no "protective filings" were made by Mr. Haberkorn or Mr. Raider. Instead, it was only after *Rainero*'s federal court complaint was dismissed for lack of subject matter

jurisdiction that they filed their time-barred claims in Nevada's state courts, and it is precisely these types of filings that cross-jurisdictional tolling encourages.

Further, even if rejecting cross-jurisdictional tolling would encourage "protective filings," that is a problem more easily solved than hosting the claims of former putative class members whose claims were dismissed or whose classes were rejected by federal courts across the country. First, "protective filings" would be distributed across all other state jurisdictions, diminishing the potential burden on Nevada's state courts. Second, as the Tennessee Supreme Court explained in its decision rejecting cross-jurisdictional tolling:

> We understand that our ruling may promote "protective" filings by plaintiffs who wish to preserve their right to file suit in Tennessee while they seek class certification elsewhere. Any administrative burdens Tennessee courts will suffer from those protective filings are greatly outweighed by the burdens presented by the mass exodus of rejected putative class members from federal court to Tennessee. Any risk of duplicative litigation resulting from the protective filings may be avoided by grant of a stay by the state court until the federal ruling on class certification is made.

Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 808–09 (Tenn. 2000). Therefore, even if rejecting cross-jurisdictional tolling encouraged "protective filings" in Nevada (which it did not here or in *Raider*), such cases would be fairly distributed across all state jurisdictions, and then could easily be stayed during the litigation in the federal court, avoiding any duplicative litigation.

However, there is no easy way to alleviate the burden imposed on a state's courts which have adopted cross-jurisdictional tolling, which essentially invites litigants from different jurisdictions to use Nevada as a forum of last resort after their cases have been dismissed or their putative classes have been rejected:

> If certification is ultimately denied, the forum state may find itself with an avalanche of individual filings, precisely because its statute was tolled, thereby undermining the efficiency that the class action vehicle was designed to promote. It would therefore appear that whatever the forum state gains in efficiency by tolling its statute of limitations based on an extra-jurisdictional class action is outweighed by the risk of an avalanche of filings should the class not be certified.

David Bober, *Cross-Jurisdictional Tolling: When and Whether A State Court Should Toll Its Statute of Limitations Based on the Filing of A Class Action In Another Jurisdiction*, 32 SETON HALL L. REV. 617, 642 (2002). Thus, on this controversial question-of-first impression, the burden that it would place on Nevada's courts is reason enough for rejecting cross-jurisdictional tolling.

c. **Cross-jurisdictional tolling would make Nevada's statutes of limitation and repose depend on the actions of every federal District Court in the United States, contrary to the expressed intent of the Nevada Legislature.**

An additional reason for rejecting cross-jurisdictional tolling is that it would require Nevada's legislatively determined statutes of limitations and repose to depend on the actions of literally any and every federal District Court in the

United States. This is another reason states such as Illinois have declined to adopt cross-jurisdictional tolling:

> [B]ecause state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.

Portwood, 183 Ill. 2d at 466, 701 N.E.2d at 1104.

The unnecessary injection of uncertainty and delay into Nevada's legislative scheme of limitations and repose is an important reason to reject cross-jurisdictional tolling. Nevada's statutes of limitation and repose represent a legislative determination that legal claims must be subject to time limits in order to promote predictability and finality. "Statutes of limitation rest upon the premise that the right to be free of stale claims in time comes to prevail over the right to prosecute them . . . . Statutes of limitation thus promote predictability and finality." *Portwood*, 183 Ill. 2d at 463, 701 N.E.2d at 1103.

The Fourth Circuit reasoned that "if Virginia were to allow cross-jurisdictional tolling, it would render the Virginia limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period varying depending on the efficiency (or inefficiency) of courts in those jurisdictions." *Wade*, 182 at 288. Nevada would not benefit from having

the running of its statutes of limitations and repose depend on the actions of courts in other jurisdictions, which would be the necessary result of adopting cross-jurisdictional tolling. This is yet another reason the doctrine is controversial and should be rejected.[10]

d. **Cross-jurisdictional tolling would undermine the authority and intent of the Nevada Legislature.**

The Nevada Legislature has specifically addressed the outer-most time limits when certain claims are viable in Nevada state courts, and the adoption of cross-jurisdictional tolling would directly undermine the period of repose that has been established by NRS 11.500 which provides that:

> 1. Notwithstanding any other provision of law, and except as otherwise provided in this section, if an action that is commenced within the applicable period of limitations is dismissed because the court lacked jurisdiction over the subject matter of the action, the action may be recommenced in the court having jurisdiction within:

[10] *See Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 2012-0152 (La. 11/2/12), 118 So. 3d 1011, 1022 ("We believe the rationale of the courts rejecting "cross-jurisdictional tolling" is the one most consistent with our interpretation of the provisions of Louisiana's tolling statute, La. C.C.P. art. 596, and is the rationale which most effectively balances the twin concerns of judicial efficiency and protection against stale claims. These cases, and particularly *Portwood*, underscore the unfairness to defendants, and to the state itself, of permitting another jurisdiction's laws and the efficiency (or inefficiency) of its operations to control the commencement of a statute of limitations, potentially suspending it indefinitely into the future and, in the process, undermining the very purpose of statutes of limitation. As the *Portwood* court noted, any resultant blow to judicial efficiency occasioned by the necessity of protective filings in state court pending the resolution of the certification issue in federal court can be ameliorated by measures available to the state courts: "[E]arly filings in state court by plaintiffs who are pursuing a class action elsewhere could not be entirely undesirable, as such filings would put that state's court system on notice of the potential claim. If necessary, the state suit could be stayed pending proceedings elsewhere.").

(a) The applicable period of limitations; or

(b) Ninety days after the action is dismissed;
whichever is later.

2. An action may be recommenced only one time pursuant to paragraph (b) of subsection 1.

3. An action may not be recommenced pursuant to paragraph (b) of subsection 1 more than 5 years after the date on which the original action was commenced.

....

Thus, the Legislature enacted a saving statute, which grants a plaintiff a specific time beyond the statute of limitations to refile an action, and a statute of repose, which sets the mandatory outer time-limit to refile such an action. The Legislature made a statutory determination that, when a plaintiff recommences an action, a statute of limitations can be extended by 90 days, but no extension is permitted for actions that are recommenced more than five years after the commencement of the original action. NRS 11.500. The Legislative history of NRS 11.500 demonstrates that the Legislature contemplated a specific time frame for the recommencement of certain actions.

During hearings before the Assembly Committee on Judiciary, Nevada's Solicitor General explained that NRS 11.500 "provided in essence a statute of repose." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). In Senate discussions, Senator Terry Care stated that the bill "allows a plaintiff whose case has been dismissed in federal court for lack of jurisdiction to recommence the action in State district court as long as it is done

within 90 days[11] after dismissal from the federal court. The refiling must still begin within five years [of the date of filing the original action]." Minutes of the Senate Committee on Judiciary on S.B. 266, 73rd Leg. (Nev., April 15, 2005) (emphasis added). So, on one hand, the Legislature intended to give certain plaintiffs the opportunity to re-file claims that had been dismissed because of a lack of subject matter jurisdiction. On the other hand, the Legislature also understood that "statutes of limitations were fundamental to the judicial system" and that NRS 11.500 would set an absolute time limit for the recommencement of certain claims. Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003). By enacting NRS 11.500, the Legislature exercised its authority to create a savings statute as well as a statute of repose.

Statutes of repose and limitation fall particularly within the province of the legislature.[12] This well-established principle was specifically recognized by the United States Supreme Court in relation to class action tolling. "The proper test

[11] Ninety days was a meaningful period of time to the Nevada Legislature: it deliberately contemplated and debated the appropriate amount of days for an extension, amending the bill before it was finalized to reflect extensions of six months, 30 days, and 90 days. See Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (discussing a six-month extension); Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 25, 2003) (discussing whether the statute should allow for a six-month, 30-day, or 90-day extension).

[12] *Farber v. Lak-N-Logs*, Inc., 270 Neb. 356, 369, 701 N.W.2d 368, 378 (2005) (repose); *Molloy v. Meier*, 660 N.W.2d 444, 456 (Minn. Ct. App. 2003), *aff'd*, 679 N.W.2d 711 (Minn. 2004) (repose); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1006 (Ala. 1982) (repose) *Lambert v. Commonwealth Land Title Ins. Co.*, 228 Cal. App. 3d 1569, 269 Cal. Rptr. 256, 258 (Ct. App.) (statute of limitations) (reversed on other grounds); *Miller By & Through Sommer v. Kretz*, 191 Wis. 2d 573, 580, 531 N.W.2d 93, 96 (Ct. App. 1995) (statutes of limitation); *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007) (limitation).

(for whether the legislature intended a statute of limitations to be tolled) is . . . whether tolling the limitation in a given context is consonant with the legislative scheme." *Am. Pipe*, 414 U.S. at 557–58, 94 S. Ct. at 768 (parenthetical statement added). Petitioners submit that the adoption of cross-jurisdictional tolling would be inconsistent with the legislative intent evinced by the Nevada Legislature's enactment of NRS 11.500 and the legislative history thereto.

The adoption of cross-jurisdictional tolling would effectively eviscerate the Legislature's determination by causing the time-limit on a plaintiff's claims to be tolled indefinitely. This is clearly contrary to both the explicit language of NRS 11.500 and its legislative history, in which the Legislature stated that statutes of limitation and repose cannot be tolled indefinitely. For example, the Office of the Attorney General testified that, under NRS 11.500, "**In no event would a case proceed** 11.5 years after it had original been filed." Minutes of the Assembly Committee on Judiciary on A.B. 40, 72nd Leg. (Nev., Feb. 13, 2003) (emphasis added). It was further observed that statutes of limitation "should not be tampered with lightly." *Id.* Yet, cross-jurisdictional tolling clearly could cause Nevada's statutes of limitation and repose to be tolled indefinitely depending on the actions of the federal District Courts. Such a scenario was never contemplated or approved by the Legislature, and the legislative history of NRS 11.500 strongly suggests that the Legislature would have rejected such a result. Therefore, because cross-jurisdictional tolling is inconsistent with the Nevada Legislature's

intent as demonstrated in NRS 11.500 and its legislative history, the doctrine of cross-jurisdictional tolling must be rejected.

Courts which have declined to adopt cross-jurisdictional tolling have noted that relevant state law was inconsistent with cross-jurisdictional tolling. As the Fourth Circuit stated observed:

> Virginia has no statute providing that the statute of limitations in a subsequently filed state action should be equitably tolled during the pendency of either a state or a federal class action, and no Virginia court has ever applied such a rule.

Wade, 182 F.3d at 286. Likewise, Nevada has no statute tolling a putative class's claims during the pendency of a federal District Court action, except NRS 11.500, which positively provides an absolute time-limit for the filing of claims in Nevada state courts, regardless of the circumstances. Further, the principle that tolling must be consonant with Nevada legislative scheme is even more important when considering a statute of repose, which creates a substantive right in a defendant to be free of liability, and thus falls outside the ambit of *American Pipe* class action tolling. As one leading commentator has expressed:

> A growing number of thoroughly reasoned decisions, including by the Sixth and Second Circuit Courts of Appeal (which abrogated numerous district court decisions allowing tolling of statutes of repose) have determined that a federal statute of repose using categorical language foreclosing maintenance of a suit after a certain time period must be enforced according to its plain meaning and therefore is not subject to

> American Pipe tolling. A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose, in contrast, creates a substantive right to be free from liability definitively once the prescribed period expires; it does not merely bar a remedy, it extinguishes the underlying cause of action.

1 McLaughlin on Class Actions § 3:15. Here, NRS 11.500 establishes a substantive right in defendants to have claims extinguished after certain periods of time, an intent and result discussed explicitly by the Nevada Legislature. But the adoption of cross-jurisdictional tolling could prolong certain claims indefinitely, allowing the actions of the courts of different jurisdictions to undermine the clear intent of the Nevada Legislature in enacting NRS 11.500.

Even when applied only to statutes of limitation, and not to a statute of repose like NRS 11.500, the Tennessee Supreme Court found such an outcome potentially offensive to principles of federalism:

> [T]he practical effect of our adoption of cross-jurisdictional tolling would . . . . grant to federal courts the power to decide when Tennessee's statute of limitations begins to run. Such an outcome is contrary to our legislature's power to adopt statutes of limitations . . . and would arguably offend the doctrines of federalism . . . . **If the sovereign state of Tennessee is to cede such power to the federal courts, we shall leave it to the legislature to do so.**

Maestas, 33 S.W.3d at 809 (emphasis added). Far from ceding its power to determine periods of limitation and repose to the federal courts, the Nevada

Legislature has positively asserted its authority to determine the outer time-limits of certain claims by enacting NRS 11.500. The adoption of cross-jurisdictional tolling would undermine the Legislature's authority and intent by causing Nevada's periods of limitation and repose to depend on the actions of the federal District Courts across the country.

In one of the few jurisdictions where cross-jurisdictional tolling has been accepted, this outcome occasioned strong dissent:

> A class action filed in a court system outside Ohio should not toll the Ohio statute of limitations so that an otherwise stale suit may be filed in an Ohio court. Ohio law does not support cross-jurisdictional class action tolling, and it would not promote the purposes of Ohio's statutes of limitations. Statutes of limitations are exclusively matters of state law. . . . They are legislatively created periods of time in which an injured party may assert a claim in a court in Ohio. Once expired, the statute forecloses the claim and provides repose for potential defendants. . . . Tolling rules are also a matter of state, not federal, law . . . . The General Assembly has elected not to enact a tolling rule that applies to class actions. Ohio law provides for another form of tolling that extends, rather than suspends, a statute of limitations. R.C. 2305.19, known as the savings statute, gives a plaintiff who timely filed an action that was dismissed on procedural grounds a specific amount of time in which to file a second action. If a plaintiff has commenced or attempted to commence an action in Ohio, and the plaintiff fails otherwise than on the merits, and if the applicable limitation period for the action has expired, R.C. 2305.19 permits the plaintiff to commence a new action (provided that it is the

> same as the original action) within one year. R.C. 2305.19. . . . The savings statute is Ohio's tolling mechanism that is available for putative class members who want to file an individual action when class certification is denied in a proposed class action filed in Ohio.

Vaccariello v. Smith & Nephew Richards, Inc., 94 Ohio St. 3d at 391–93, 763 N.E.2d at 170–71 (Stratton, J., dissenting).

This reasoning applies with great force to the question of whether Nevada should adopt cross-jurisdictional, class action tolling. Periods of limitation and repose are particularly within the province of the Nevada Legislature, and the Legislature has spoken definitively on both of these issues, particularly in its adoption of NRS 11.500, in which the Legislature has affirmatively granted plaintiffs such as Mr. Haberkorn a certain, fixed time period to recommence an action, while also granting defendants such as Petitioners a substantive right to repose by establishing an outer time-limit for when such an action can be recommenced. The Legislature has not enacted any other tolling or saving statute that is consonant with cross-jurisdictional, class action tolling, and therefore NRS 11.500 directly conflicts with the potential adoption of cross-jurisdictional tolling and as such, this Court should reject the doctrine and remand this action to the District Court to reconsider Petitioners' motion to dismiss.

The adoption of cross-jurisdictional, class action tolling would effectively eviscerate NRS 11.500. Therefore, the doctrine must be rejected out of deference to the Nevada Legislature's authority over periods of limitation and repose.

CONCLUSION

For the foregoing reasons, Petitioners request that the Nevada Supreme Court vacate the District Court's order applying cross-jurisdictional, class action tolling and order the District Court to reconsider Petitioners' motion to dismiss in light of such a decision.

DATED this 1st day of December, 2016.

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AFFIDAVIT OF PAUL W. LOWDEN

STATE OF NEVADA)

COUNTY OF CLARK)

I, Paul W. Lowden, declare and state as follows:

1. I am over the age of 18 years and have personal knowledge of each of the matters stated herein and could testify competently to the same if called upon by this Court.

2. I make this affidavit in support of my Petition for Writ of Prohibition and/or Mandamus as required by NRS 34.030.

3. I am a citizen and resident of the State of Nevada, and the President and a Director of Archon Corporation.

4. I have read the contents of the present Petition for Writ of Prohibition and/or Mandamus, and they are true and correct to the best of my knowledge. The Petition is being filed in good faith.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this _____day of November, 2016.

Paul W. Lowden

PAUL W. LOWDEN

State of Nevada
County of Clark

SUBSCRIBED and SWORN to before me
This 20th day of November, 2016, by
Paul W. Lowden.

Agnieszka K. Parker

NOTARY PUBLIC

AGNIESZKA K. PARKER
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 00-64827-1
My Appt. Expires August 4, 2018