IN THE
SUPREME COURT OF MISSOURI

NO. SC93756

JOHN M. ROLWING,
Plaintiff-Appellant,

v.

NESTLE HOLDINGS INC.,
Defendant-Respondent,

Appeal from the Circuit Court of the City of St. Louis
Honorable Steven Ohmer

On Transfer By Order of Court of Appeals
For the Eastern District
Pursuant to Rule 83.02

SUBSTITUTED BRIEF OF DEFENDANT-RESPONDENT NESTLE HOLDINGS INC. (DISMISSAL ISSUE)

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TABLE OF CONTENTS

Page

APPELLANT'S POINT FIVE

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

POINTS RELIED ON

APPELLANT'S POINT ONE

1. The Trial Court Correctly Dismissed The Petition For The Reason That Plaintiff's Breach of Contract Claim Was Barred By The Five-Year Statute of Limitations Set Forth In R.S.Mo. §516.120.

***Community Title Co. v. Stewart Title Guar. Co.*, 977 S.W.2d 501 (Mo. banc 1998).**

***Sam Kraus Co. v. State Highway Comm'n*, 416 S.W.2d 639 (Mo. 1967).**

***Martin v. Potashnick*, 217 S.W.2d 379 (Mo. 1949).**

***Parker-Washington Co. v. Dennison*, 267 Mo. 199, 183 S.W. 1041 (1916).**

APPELLANT'S POINT TWO

2. The Trial Court Correctly Dismissed The Petition For The Reason That The Five-Year Statute of Limitations Was Not Tolled During The Pendency of The Ohio Action.

***Cooper v. Minor*, 16 S.W.3d 578 (Mo. banc 2000).**

***DeRousse v. PPG Indus., Inc.*, 598 S.W.2d 106 (Mo. banc 1980).**

***Black v. City Nat'l Bank & Trust Co.*, 321 S.W.2d 477 (Mo. 1959).**

***Portwood v. Ford Motor Co.*, 701 N.E.2d 1102 (Ill. 1998).**

APPELLANT'S POINT THREE

3. The Trial Court Did Not Err In Its Order And Judgment of Dismissal In Concluding That Plaintiff Had Failed To Allege Any Legally Cognizable Basis For Tolling.

Rule 55.27(d), Mo. R. Civ. P.

***State ex rel. Henley v. Bickel*, 285 S.W.3d 327 (Mo. banc 2009).**

***ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993).**

***State ex rel. State Tax Comm'n v. Briscoe*, 451 S.W.2d 1 (Mo. banc 1970).**

APPELLANT'S POINT FOUR

4. The Trial Court Did Not Err In Dismissing The Petition With Prejudice And In Denying Plaintiff's Motion to Vacate, Alter, or Amend The Judgment For The Reason That Plaintiff's Allegations Did Not Set Forth Any Legally Cognizable Basis For Tolling.

Rule 67.01, Mo. R. Civ. P.

***Farwig v. City of St. Louis*, 499 S.W.2d 388 (Mo. 1973).**

***George v. Lemay Bank & Trust Co.*, 618 S.W.2d 671 (Mo. App. E.D. 1980).**

***Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309 (Mo. App. E.D. 2010).**

APPELLANT'S POINT FIVE

5. The Judgment Below Should Also Be Affirmed For The Reason That The Decision of The Ohio Court of Appeals In *Ruschel v. Nestle Holdings Inc.* Was Entitled To *Stare Decisis* And Comity Effect.

***Ruschel v. Nestle Holdings Inc.*, 2008 WL 1903856 (Ohio App. May 1, 2008).**

***Smith v. Bayer Corp.*, –U.S.–, 131 S. Ct. 2368 (2011).**

***Cherry Manor, Inc. v. American Health Care, Inc.*, 797 S.W.2d 817 (Mo. App. S.D. 1990).**

***Triplett v. Shafer*, 300 S.W.2d 528 (Mo. App. K.C. 1957).**

STATEMENT OF FACTS

1. The Allegations of The Petition

Plaintiff John M. Rolwing brought this case as a putative class action on behalf of certain former shareholders of Ralston Purina Company who received payment for their shares in connection with Defendant Nestle's acquisition of Ralston's outstanding stock in 2001. The petition, filed March 30, 2011, asserts a one-count breach of contract claim, claiming that Nestle violated its merger agreement with Ralston by making late payment of the $33.50 per share merger consideration to Ralston's "book entry" shareholders (JLF 10, 20-21). The petition sought the recovery of interest on behalf of the class from the time payment was allegedly due until the date payment was actually made (JLF 16, 20-21).

The petition alleged that (1) Nestle and Ralston entered into the merger agreement on January 15, 2001; (2) the closing date of the merger was "before December 18, 2001"; (3) plaintiff and the class were entitled to receive cash for their Ralston shares "before December 18, 2001"; (4) plaintiff and the class did receive payment for their stock on December 18, 2001; (5) Missouri law applies to this lawsuit; and (6) Nestle breached the merger agreement, of which plaintiff and the class are purported third party beneficiaries, by failing to pay them until December 18, 2001 (JLF 13, 14, 15, 16, 20). Plaintiff contends that payment of the merger consideration was due on December 14, 2001, but was not made until four

days later, on December 18, 2001 (Pltf's Opening Brief in this Court ("Pl.Br.") at 3; Pltf's Opening Brief in Court of Appeals ("Pl.Br.CA") at 3).

Paragraphs 8, 11, 12, 16, 17, 18, 34, and 36 of the petition disclose that all relevant conduct, including the alleged breach, occurred in 2001 (JLF 4-7, 11). Paragraph 32 of the petition states that "[a]ll statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition" (JLF 10, 19). Plaintiff attached a copy of the Ralston/Nestle merger agreement as an exhibit to his petition (JLF 27-64), and it thus became part of the petition for all purposes. Rule 55.12, Mo. R. Civ. P.

Section 2.01(c)(2) of the merger agreement provides that, upon conversion of the Ralston common stock, those shares shall cease to exist, and the shareholders shall cease to have any rights in those shares, except the right to receive the merger consideration "without interest" (JLF 32). Section 2.02(b) refers to the right of those shareholders to receive "cash, without interest" and provides that "no interest shall be paid or accrue on the cash payable upon surrender of any certificate." (JLF 33).

The petition anticipates that Nestle would raise these "no-interest" provisions and pleads custom-and-practice as the basis to avoid that. The petition alleges that custom-and-practice required payment of interest for late payment of merger consideration to "book-entry" shareholders such as plaintiff but that it does

not require the payment of interest to other shareholders (JLF 10, 17-19, ¶¶24-30). It states: "Per custom and usage, only certificated shareholders were subject to the merger agreement's §2.02 stock certificate surrender requirement and its no-interest language" (JLF 18).

2. The Course of Proceedings And Disposition Below

(a) Circuit Court

Nestle moved to dismiss the petition (JLF 181-82). One ground for its motion was that "[t]he Petition, on its face, is barred by the five-year statute of limitations set forth in R.S.Mo. §516.120(1)" (JLF 181). Another ground was the *stare decisis* effect of *Ruschel v. Nestle Holdings Inc.*, 2008 WL 1903856 (Ohio App. May 1, 2008), a case brought by the same counsel, based upon the same facts, and making the same claim as in this case and that was decided in favor of Nestle. In opposing that motion, plaintiff asserted that his petition was timely because of the tolling effect of that Ohio action, "pending from early 2002 and continuing into 2008" (JLF 466, 483).

By its Order and Judgment dated November 8, 2012, the Circuit Court granted Nestle's motion and dismissed the petition with prejudice (JLF 662-71). The principal basis for its decision was that "the Petition clearly establishes on its face and without exception that it is [time-]barred" (JLF 669). The Court also observed that "Plaintiff cites several cases in support of his argument that the

statute of limitations was tolled, however none of these cases are on point. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974), *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 389 (Mo. App. W.D. 1990). These cases do not involve the tolling of a statute of limitations during the pendency of an uncertified purported class action for a later filed class action" (JLF 670). On the same date, the Circuit Court granted plaintiff's motion for class certification, thereby rejecting Nestle's claim that plaintiff and his counsel were inadequate class representatives because of their disabling conflict of interest with class members (JLF 647-661).

On November 16, 2012, plaintiff moved to vacate, alter, or amend the judgment of dismissal (JLF 672-81). In connection with that motion, plaintiff asked for leave to file an amended petition, in which his only proposed change was a new paragraph 32, alleging specific facts concerning the earlier *Ruschel* action in Ohio.

By order dated November 30, 2012, the Circuit Court denied plaintiff's motion to vacate, alter, or amend the judgment (JLF 713-16). That order reiterated that the petition was "governed by the five year statute of limitations set out in Section 516.120 R.S.Mo." (JLF 715). It stated that "this Court found, in its November 8, 2012 Order and Judgment, that the Ohio lawsuit did not toll the statute of limitations herein" and "will not reconsider its ruling in this matter." *Id*.

Plaintiff filed his Notice of Appeal from the judgment of dismissal on December 14, 2012 (JLF 717-735). Nestle filed its Notice of Appeal from the grant of class certification on December 19, 2012 (JLF 736-754). Nestle's cross-appeal is conditional upon appellate reversal of the judgment below (JLF 739). *See*, *e.g.*, *Fox v. Burton*, 402 S.W.2d 329, 333 (Mo. 1966).

(b) Court of Appeals

By order dated February 11, 2013, the Eastern District Court of Appeals consolidated plaintiff's appeal and Nestle's cross-appeal. The Court acknowledged the conditional nature of Nestle's appeal: "If the judgment dismissing the petition is affirmed, then Nestle's appeal is moot. If the judgment dismissing the petition is reversed, then the appeal will address the class certification appeal as well" (Court of Appeals Record on Appeal, docket entry dated 2/11/13).

On October 15, 2013, an Eastern District panel, acting pursuant to Rule 83.02, issued its opinion and order transferring the case to this Court. It ordered the transfer so that this Court could resolve a perceived inconsistency between its own precedents and a decision from the Southern District in the application of the ten-year statute of limitations, §516.110(1). *Rolwing v. Nestle Holdings Inc.*, 2013 WL 5629430, at *6 (Mo. App. E.D. Oct. 15, 2013).

The Eastern District panel repeatedly pointed out that, based on that court's own precedent, it would affirm the judgment of dismissal on the basis of R.S.Mo. § 516.120, Missouri's five-year statute of limitations. *Id.* at **2, 4, 5, 6. The panel also rejected plaintiff's claims (1) that the five-year statute was tolled during the pendency of the *Ruschel* action in Ohio against Nestle, and (2) that principles of equitable tolling applied in this case. It pointed out that, in Missouri, statutes of limitations are tolled only on the basis of legislative tolling exceptions, none of which are applicable here. *Id*. at *5.[1/]

[1/] Because plaintiff's appeal and Nestle's cross-appeal were consolidated by the Eastern District, both fall within the transfer order. The panel stated that "[b]ecause we would affirm the trial court's dismissal of Rowling's [sic] petition, we need not consider whether the class was properly certified. Thus, we would dismiss Nestle's cross-appeal as moot." *Id.* at *2.

Nestle's position remains the same. It will withdraw its appeal from the grant of class certification if plaintiff's appeal from the judgment of dismissal is affirmed because, in that event, it would not be aggrieved. Nestle seeks this Court's resolution of its cross-appeal only if the judgment of dismissal on plaintiff's appeal were to be reversed. Nestle stands on its briefs filed in the Eastern District on its class certification appeal.

ARGUMENT

According to the petition, Nestle's alleged breach of contract occurred more than nine years prior to the filing of this case. Plaintiff maintains that his claim is governed by the ten-year statute of limitations, R.S.Mo. §516.110(1) or, alternatively, that the five-year statute, R.S.Mo. §516.120, was tolled during the pendency of the *Ruschel* action against Nestle in Ohio. Section 516.110(1) is applicable only in "[a]n action upon any writing . . . for the payment of money." At least a century of uniform jurisprudence from this Court and the Courts of Appeals holds that the five-year rather than the ten-year statute governs when the promise-sued-upon is not the promise for the payment of money contained in the writing. Those decisions are buttressed by principles of statutory construction. Here the promise-sued-upon is interest for the late payment of the merger consideration. The only promise for the payment of money in the merger agreement is the $33.50 per share for the Ralston stock – the merger consideration paid back in December, 2001. Accordingly, the five-year statute governs here.

The Ohio litigation tolled nothing. Plaintiff's tolling theory is based upon a federal, court-created doctrine inconsistent with Missouri's requirement of a *legislative* basis for tolling. The Circuit Court correctly concluded that the two cases plaintiff relies upon are legally and factually inapposite. There is no basis for either the equitable tolling or the cross-jurisdictional class action piggybacking

plaintiff advocates. As a matter of law, this action was untimely, and plaintiff's offer to allege additional facts on a theory that had been properly rejected by the Circuit Court was futile.

Finally, plaintiff's counsel spearheaded the *Ruschel* Ohio litigation, identical in every relevant respect to this case. The decision of the Ohio Court of Appeals affirming judgment in favor of Nestle was not just another out-of-state decision. In the circumstances of this case – where the facts, issues, class, governing law, and defendant were all identical and where sound public policy repudiates this effort to re-litigate a claim already fully adjudicated in favor of Nestle – this Court should also affirm on grounds of *stare decisis* and comity.

POINT ONE

1. THE TRIAL COURT CORRECTLY DISMISSED THE PETITION FOR THE REASON THAT PLAINTIFF'S BREACH OF CONTRACT CLAIM WAS BARRED BY THE FIVE-YEAR STATUTE OF LIMITATIONS SET FORTH IN R.S.MO. §516.120.

(a) The Petition Demonstrates That Plaintiff's Cause of Action Arose More Than Five Years Prior To The Filing of This Case.

Dismissal is proper when the petition discloses on its face that the claim asserted is barred by the statute of limitations. *Berry v. Dagley*, 484 S.W.2d 182, 185 (Mo. 1972); *Gianella v. Gianella*, 234 S.W.3d 526, 530 (Mo. App. E.D. 2007);

D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P., 129 S.W.3d 25, 28 (Mo. App. W.D. 2004). Here the petition expressly stated that Nestle's alleged breach of contract occurred in December, 2001 (JLF 10-22, ¶¶ 9, 10, 11, 12, 17(c) and 33-38). The petition was not filed, however, until March 30, 2011 – more than nine years after the alleged breach. If, as both the Circuit Court and the Court of Appeals concluded, the applicable statute of limitations was five years, the petition was clearly time-barred.

(b) Nestle Made No Promise In The Merger Agreement To Pay Interest.

Section 516.110(1) states that "[a]n action upon any writing . . . for the payment of money"[2/] shall be commenced within ten years. Plaintiff says the Ralston/Nestle merger agreement, repeatedly referenced in the petition, is a "writing for the payment of money" because that contract required that Nestle pay $33.50 for each share of stock held by the Ralston shareholders.

The problem is that the $33.50 per share merger consideration is not "the payment of money" plaintiff seeks in this case. In fact, paragraph 17(c) of the

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[2/] Like the Eastern District, Nestle recognizes that §516.110(1) addresses writings "for the payment of money *or property*," but we address only the promise to pay money "as that is the relevant portion of the statute given the facts here." 2013 WL 5629430, at *2 n.4.

petition acknowledges that the $33.50 per share was paid to the class on December 18, 2001 (JLF 16). The "payment of money" sought here is the *interest* upon the allegedly late payment of that merger consideration.

There are at least four different reasons why plaintiff's claim of a promise for the payment of interest in the merger agreement is groundless. First, no such promise appears there. Second, the agreement itself affirmatively states that interest will not be paid. Third, the petition relies upon an extra-contractual "custom-and-practice" as the basis for requiring payment of interest. Fourth, plaintiff's claim for interest is statutory rather than contractual.

(i) The Merger Agreement Contains No Promise For The Payment of Interest. Despite plaintiff's rhetoric, there is no promise to pay interest in the merger agreement. Indeed there is not even a due date or deadline for paying the $33.50 per share set forth in that contract. Plaintiff says that §9.07 of that agreement requires that Nestle "promptly" pay the merger consideration (Pl.Br. at 22). But §9.07 is an integration/no third-party-beneficiary provision that says nothing of the kind (JLF 63). He also cites §2.02 of the agreement for the proposition that payment of the merger consideration was to be made upon "conversion," which is "at" the "Effective Time" (Pl.Br. at 3). But §2.02(a) actually says that Nestle is to pay the paying agent "after" the Effective Time, not "at" the Effective Time (JLF 33). Section 6.03, the "reasonable best efforts"

clause also invoked by plaintiff (Pl.Br. at 22-23), does not set forth a time for paying the merger consideration (JLF 52), much less promise interest for late payment or make any other promise for the payment of money. While it does set an "Outside Date" for performing certain obligations, "Outside Date" is elsewhere defined as on or before December 31, 2001 (JLF 59). The December 18, 2001 payment of the merger consideration occurred almost two weeks before that.

(ii) The Merger Agreement Affirmatively States That Interest Will Not Be Paid. To the extent the merger agreement addresses the subject of interest for late payment at all, it states three times that interest will *not* be paid. Section 2.02(b) describes the right to receive "cash, without interest," and it expressly states that "[n]o interest shall be paid or accrue on the cash upon surrender." JLF 33. Section 2.01(c)(2) refers to "the right to receive Merger Consideration upon surrender . . . without interest." JLF 32.

(iii) Plaintiff's Allegations Rest Upon A Non-Contractual "Custom-And-Practice." The petition repeatedly relies upon a "custom-and-practice" that is wholly extrinsic to the merger agreement. It alleges that custom-and-practice requires payment of interest for late payment to "book-entry" shareholders like plaintiff but that custom-and-practice does not require the payment of interest to other shareholders (JLF 10, 17-19, ¶¶ 24-30). In fact, "custom-and-practice" is plaintiff's device to avoid the express "no-interest" provisions of the merger

agreement (JLF 17-19). Plaintiff acknowledges there is nothing in the merger agreement about custom-and-practice, contending that "custom-and-practice would fill in for what Nestle claims is a 'complete silence' about when payment was due." (Pl.Br.CA. at 69)

(iv) Plaintiff Alleges That Nestle's Duty To Pay Interest Is Statutory In Nature. According to plaintiff, the source of Nestle's alleged obligation to pay interest is statutory rather than contractual. In opposing Nestle's motion to dismiss, plaintiff emphasized that the petition prays for "damages . . . related to defendant's delay in payment (all measured by statutory interest at 9% under Mo.Rev.Stat. §408.020)" (JLF 474). He stated that "the Petition seeks damages in the form of statutory interest," and he relied upon cases that construe §408.020 as grounds for late payment (JLF 474, 476).

Plaintiff has stated time after time that he is suing for statutory interest (Pl.Br. at 3, 23; Pl.Br.CA, at 26, 54, 55, 56). The Eastern District panel determined his claim was one for statutory interest: "[t]he petition requested statutory interest for the late payment," 2013 WL 5629430, at **1, 5; and "we would affirm the trial court's conclusion that the ten-year statute does not apply in this action for damages in the form of statutory interest." *Id*. at *5.

A statutory duty to pay interest is far different from a contractual promise for the payment of interest. In *Silton v. Kansas City*, 446 S.W.2d 129, 132 (Mo.

1969), this Court pointed out that "[t]he promise must be contained within the writing and may not be shown by extrinsic evidence *or consist of an obligation imposed by law from the facts*" (emphasis added). To the same effect, see *Capital One Bank v. Creed*, 220 S.W.3d 874, 878 (Mo. App. S.D. 2007); *Collins v. Narup*, 57 S.W.3d 872, 874 (Mo. App. E.D. 2001); *Hampton Foods, Inc. v. Wetterau Fin. Co.*, 831 S.W.2d 699, 701 (Mo. App. E.D. 1992); *Oberle v. Monia*, 690 S.W.2d 840, 844 (Mo. App. E.D. 1985).

The Western District's decision in *Midwest Division-OPRMC LLC v. Department of Social Services*, 241 S.W.3d 371 (Mo. App. W.D. 2007), cited by plaintiff, is not to the contrary. The ten-year statute was applicable there because the plaintiff hospitals were suing to recover reimbursement due them under the express terms of their service contracts with the defendant. In other words, the plaintiff in *Midwest Division* was suing on an express contractual promise for the payment of money. In contrast to this case where the interest sought is the very basis for the breach of contract claim, the *Midwest Division* plaintiff was merely seeking pre-judgment interest upon a breach of contract claim that was independently governed by the ten-year statute.

Because the breach of contract claim in the petition is not based on the sole provision in the merger agreement that calls for the payment of money (i.e., payment of the $33.50 merger consideration), plaintiff is forced to contend that the

payment of interest can be derived from that agreement by "fair implication." But the "fair implication" cases decided by the Courts of Appeals involved contract language that was tantamount to an express promise to pay money. In *Collins*, the words were: "I understand and agree that health and accident insurance policies are an arrangement between the carrier and myself, and that I am personally responsible for all services rendered to me." 57 S.W.3d at 873. In *Zuvers v. Robertson*, 906 S.W.2d 892, 894 (Mo. App. W.D. 1995), the word "loan" appeared as a memorandum on a check.

Contrast those cases with this one. Far from allowing any fair implication that Nestle would pay interest for late payment of merger consideration, the merger agreement here states three times that interest will *not* be paid (JLF 32, 33). Plaintiff concedes at paragraphs 30 and 39 of his petition that §2.02 of the merger agreement is a "no-interest" provision (JLF 10, 12). Because the payment of interest is expressly excluded, there is no conceivable way that a promise to pay interest can be fairly implied.

(c) *Hughes Development v. Omega Realty* Is Inapplicable.

(i) *Hughes* Dealt With Proof of The Amount Due, Not With A Promise For The Payment of Money.

In *Hughes Development Co. v. Omega Realty Co.*, 951 S.W.2d 615, 616-17 (Mo. banc 1997), this Court had to resolve an irreconcilable conflict between

(1) one line of cases holding that the ten-year statute only applied when the "contractual writing . . . establish[ed] an absolute and fixed liability without resort to extrinsic evidence," 951 S.W.2d at 617 (e.g., suits on "financial instruments" such as promissory notes, guarantees, surety bonds, or insurance policies), and (2) another line of cases holding that resort to extrinsic evidence to determine the amount due did not prevent application of the ten-year statute. *Hughes* resolved that conflict, concluding that application of the ten-year statute did not depend upon whether proof of the amount due was intrinsic or extrinsic to the contract: "Section 516.110(1) imposes no requirement that *the amount the defendant owes* as a result of the written contract be determinable without resort to extrinsic evidence and neither shall we." 951 S.W.2d at 617 (emphasis added).

Whereas *Hughes* held that the ten-year statute may apply even when extrinsic evidence is required to determine the *amount due*, it did not suggest, much less hold, that the ten-year statute governs where, as here, the promise alleged in the petition ("the promise-sued-upon") is not the promise "for the payment of money" set forth in the writing. To the contrary, *Hughes* specifically confirmed that, in order for the ten year statute to apply, the plaintiff in the breach of contract action must "*seek[] a judgment . . . for payment of money the defendant agreed to pay in a written contract*." *Id*. (emphasis added)

We do not question *Hughes*. We agree that nothing in §516.110(1) requires that "the contractual writing must establish an absolute and fixed liability without resort to extrinsic evidence." *Id*. at 617. Likewise, that statute says nothing about any particular source, whether intrinsic or extrinsic to the contract, for proving the amount due. On the other hand, §516.110(1) does facially require "[a]n action upon any writing . . . for the payment of money." Unlike *Hughes*, the language at issue in this case appears within the statute itself.

(ii) Unlike *Hughes*, There Is No Split of Authority Here.

In further contrast to *Hughes*, this case involves no conflict in the case law. A century of unanimous precedent from this Court and the Courts of Appeals makes clear that the ten-year statute only applies when the promise-sued-upon is the promise "for the payment of money" within the contract. Here there is no conflict in the case law and no issue to re-visit.

The following decisions demonstrate that, prior to *Hughes*, this Court had repeatedly held that, in order for the ten-year statute to apply, the promise-sued-upon must be the promise for the payment of money in the contract: *Parker-Washington Co. v. Dennison*, 267 Mo. 199, 183 S.W. 1041 (1916); *Herwick v. Rhodes*, 327 Mo. 29, 34 S.W.2d 32 (1931); *Nicholas v. First Nat'l Bank in St. Louis*, 188 S.W.2d 822 (Mo. 1945); *Martin v. Potashnick*, 217 S.W.2d 379, 381

(Mo. 1949); *Sam Kraus Co. v. State Highway Comm'n*, 416 S.W.2d 639 (Mo. 1967); and *Silton v. Kansas City*, 446 S.W.2d 129 (Mo. 1969).

1. In *Parker-Washington*, the plaintiff, a manufacturer and seller of asphalt, sought monies it would have earned if the defendant asphalt purchaser had acted in good faith to obtain paving contracts with the City of Kansas City. The contract, however, only required defendant to pay plaintiff based upon asphalt paving actually laid and after its completion. The *Parker-Washington* Court, resting upon nineteenth-century precedents from this Court, held that the five-year rather than the ten-year statute applied because plaintiff was not suing for the payment of money under the terms of the contract:

> "In order to bring an 'action upon any writing for the payment of money or property,' it must appear in the statement of the cause of action that the money or property sued for is promised to be paid or given by the language of the writing, and that such promise does not arise only upon proof of extrinsic facts. That nothing else meets the requirements of the statute has been uniformly held whenever it has been under review."

183 S.W. at 1042.

2. In *Herwick*, plaintiff buyer sued for damages based upon defendant's failure to deliver a deed of trust required by the parties' contract. That agreement

contained a promise that the deed of trust would be delivered to plaintiff, but there was no promise that the defendant would pay money for its failure to do so. Citing *Parker-Washington*, this Court held that the five-year statute applied: "To come within the ten-year statute, . . . it must appear in the statement of the cause of action that the money sued for is promised to be paid by the language of the writing sued upon." 34 S.W.2d at 33.

3. In *Nicholas*, plaintiff depositor sued for damages based on a bank's failure and refusal to liquidate, redeem, or account for his securities. Relying on *Parker-Washington* and *Herwick*, this Court held the action was barred by the five-year statute: "[t]he breach charged is not a failure to pay the money or property, if any, promised to be paid by the writing, but for other alleged breaches of the written contract." 188 S.W.2d at 825.

4. In *Martin*, plaintiff sued his former partner nine years after the break-up of their partnership to recover the total amount of certain disputed items. Their agreement contained a mandatory arbitration provision, but the defendant refused to submit to arbitration. Plaintiff argued that the ten-year statute applied because the agreement contained an affirmative promise to pay an amount that would be determined by arbitration, the only contingency being the arbitrator's decision. This Court held that the action was barred by the five-year statute because the

obligation plaintiff sought to enforce was not a promise "for the payment of money" set forth in the writing. 217 S.W.2d at 381-82.

5. In *Sam Kraus*, a contractor sued the Highway Commission to recover the amount it had paid to a property owner for damages sustained when the contractor was building a highway. The contract between the plaintiff and the Highway Commission contained a provision for the payment of money – a specified sum for the labor and materials the contractor furnished to the State in connection with highway construction. Plaintiff sued the Highway Commission for breach of a warranty provision in the contract regarding engineering design and specifications, but the contract contained no promise to pay money in that event. Citing *Parker-Washington*, this Court again held that the action was barred by the five-year statute: "[T]here is no question but that the contract provides for the payment of money by defendant to plaintiff but there is no contention that defendant agreed therein to pay any item such as that claimed in plaintiff's petition." 416 S.W.2d at 642.

6. In *Silton*, plaintiff sued a city and locker company for the value of property that disappeared after he placed it in an airport terminal locker. Relying on *Herwick* and *Sam Kraus*, this Court held that an agreement for security services between the city and locker company did not constitute a written obligation for payment of money within the ten year statute. 446 S.W.2d at 132.

This unbroken line of precedent has been followed by the Courts of Appeals. Decisions from the Eastern District include *Bisesi v. Farm & Home Savings & Loan Association*, 78 S.W.2d 871, 873 (Mo. App. St.L. 1935) ("But where evidence *aliunde* must be sought to establish such promise, . . . the cause of action is governed by the five-year statute of limitation); *Lato v. Concord Homes Inc.*, 659 S.W.2d 593, 594 (Mo. App. E.D. 1983) ("Section [516.110(1)] applies only in instances in which an express written obligation provides for the payment of money . . . and that the money . . . sued for is that money . . . promised by the language of the writing"); *Hampton Foods,* 831 S.W.2d at 701 ("it must appear in the statement of the cause of action that the money . . . sued for is promised to be paid or given by the language of the writing, and that such promise does not arise only upon proof of extrinsic facts. That nothing else meets the requirements of the statute has been uniformly held whenever it has been under review") (quoting *Parker-Washington*, 183 S.W. at 1042); *Sharpe v. Sharpe*, 243 S.W.3d 414, 418 (Mo. App. E.D. 2007) (post-*Hughes* decision quoting *Lato*).[3/]

[3/] This Court need not consider "the distinction between enforcement and breach" made in some Eastern District cases. *See* 2013 WL 5629430, at *4. The cases the Eastern District cited – *Armistead v. A.L.W. Group*, 60 S.W.3d 25, 27 (Mo. App. E.D. 2001); *Lake St. Louis Community Association v. Oak Bluff Preserve*, 956 S.W.2d 305, 309 (Mo. App. E.D. 1997); and *Oberle,* 690 S.W.2d at

Among the Western District cases to the same effect are *Harrison v. O'Dell Equipment Co.*, 706 S.W.2d 908, 909 (Mo. App. W.D. 1986) (quoting *Lato*) and *Superintendent of Insurance of New York v. Livestock Market Insurance Agency, Inc.*, 709 S.W.2d 897, 901-02 (Mo. App. W.D. 1986) ("[T]o constitute *a promise for the payment of money*, 'the money sued for' must be that money promised by the language of the writing . . . ."). [4/] *Superintendent of Insurance* relied upon *Martin* for the proposition that, in order for the ten-year statute to apply, "the

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842 – turned on whether the underlying claim was equitable or legal. The ten year statute governed the equitable claims in *Armistead* (enforcement of contract provisions for dissolution and accounting upon the withdrawal of a partner) and in *Oberle* (specific performance). The five year statute was applied to the legal claim in *Lake St. Louis Community Association* (damages only). The only claim in the case at bar is for money damages. This Court's consideration of the "enforcement-breach" distinction is for another day.

[4/] In *Superintendent of Insurance*, the Western District traced the history of the promise-sued-upon rule, pointing out that the only decision that "strayed from" *Parker-Washington* (i.e. *Missouri, K. & T. Ry. Co. v. American Surety Co.*, 291 Mo. 92, 236 S.W. 657 (banc 1921)), represented a "lapse [that] was only momentary" and "has not been followed." 709 S.W.2d at 901-02.

writing must be not only for the payment of money, but also must contain a 'promise to pay money.'" *Id.* at 900.[5/]

Although the Eastern District's transfer order concludes otherwise, we believe the Southern District is in accord. In *Van Stratten v. Friesen*, 841 S.W.2d

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[5/] Plaintiff tries to write off some of the cited decisions from this Court and the Courts of Appeals on the grounds that "none were 'an action upon any writing for the payment of money or property' or even promised payment of money or property." (Pl.Br. at 28). *Sam Kraus* itself demonstrates that this is wrong: "As we have indicated there is no question but that the contract provides for the payment of money by defendant to plaintiff but there is no contention that defendant agreed therein to pay any item such as that claim in plaintiff's petition." 416 S.W.2d at 642. *See*, *e.g.*, *Harrison*, 706 S.W.2d at 909 (contract to do plumbing for not more than $14,000).

As to other cases, plaintiff assumes there was no promise for the payment of money because *no such provision was recited in the decision*. But except in the unlikely event that the parties were working for free, there had to have been a promise to pay money for the purchase of the newly constructed home in *Lato*, 659 S.W.2d at 594; in the contract for installation of lockers in *Silton*, 446 S.W.2d at 130; and in the Licensing Agreement that included the construction and maintenance of the marina in *Lake St. Louis Community Ass'n*, 956 S.W.2d at 307.

750 (Mo. App. S.D. 1992), the contract involved the purchase of a funeral home. It provided that the buyer would perform funerals for seller's clients at an agreed price and that buyer would be paid a percentage of that price from a Trust Fund the seller controlled. Seller later told the buyer that no monies would be distributed to buyer from the Trust Fund, and buyer then refused to perform the funerals on grounds of anticipatory breach. Seller thereafter sued the buyer for damages based on buyer's failure to perform. Holding that seller's breach of contract claim was barred by the five-year statute, the Southern District was quite clear: "[o]nce that obligation [to pay money] is found from the writing, the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence – **but not the promise itself**." 841 S.W.2d at 752 (emphasis added) (quoting *Superintendent of Ins.*, 709 S.W.2d at 900). *See Capital One Bank*, 220 S.W.3d at 878 ("Generally, in order to constitute a promise to pay money within the meaning of §516.110(1), the writing must contain a promise to pay money and the promise or obligation to pay the money must arise from the writing itself and may not be shown by extrinsic evidence").

In its transfer order, the Eastern District interpreted the Southern District's ruling in *East Hills Condominiums Limited Partnership v. Tri-Lakes Escrow, Inc.*, 280 S.W.3d 728 (Mo. App. S.D. 2009) to mean that "any suit arising from a writing that meets the threshold requirement, containing a promise to pay money,

falls under Section 516.110(1)'s ten year statute of limitations." 2013 WL 5629430, at *5. Indeed, that interpretation of *East Hills* appears to be the primary basis for the transfer. But what the Southern District actually said was far different from the Eastern District's reading of that case: "the ten-year statute of limitations applies to every breach of contract action in which the plaintiff seeks a judgment from the defendant for payment of money the defendant agreed to pay in a written contract," 280 S.W.3d at 734 (quoting *Hughes*, 951 S.W.2d at 617), and the "petition sought judgment against [defendant] as per the terms of the Agreement." *Id*. (Of course, even if the Eastern District were correct in its interpretation, *East Hills* is not binding here).

(iii) This Court's *Community Title* Decision Confirms That The Pre-*Hughes* Precedent Upholding The Promise-Sued-Upon Rule Remains Good Law.

Plaintiff maintains that *Hughes* impliedly overruled all these cases. But *Hughes* itself belies that assertion, recognizing that the ten-year statute requires that the plaintiff in a breach-of-contract action "seek[] a judgment . . . for payment of money the defendant agreed to pay in a written contract." 951 S.W.2d at 617.

If there were any remaining doubt, a post-*Hughes* decision from this Court confirms that the promise-sued-upon rule is alive and well. In *Community Title Co. v. Stewart Title Guaranty Co.*, 977 S.W.2d 501, 502 (Mo. banc 1998), decided

a year after *Hughes*, this Court reiterated that "once it is shown that the writing is for the payment of money and that the writing contains a promise to pay money, the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence – **but not the promise itself**." (emphasis added).

Community Title dispels any argument that *Hughes* repudiated *Parker-Washington*, *Martin* and *Superintendent of Insurance* on the issue presented in this case. To the contrary, *Community Title* specifically relied upon *Martin* and *Superintendent of Insurance* for the proposition that the five-year statute is applicable whenever extrinsic evidence is necessary to establish the promise-sued-upon—as opposed to the amount due. 977 S.W.2d at 502.

In footnote 7 of its transfer decision, the Eastern District panel correctly observed that "*Hughes* did not list most of the earlier precedent we discussed here." 2013 WL 5629430, at *3 n.7. It went on to note that, because *Martin* and *Superintendent of Insurance* were rejected in *Hughes* but later relied upon in *Community Title*, "[t]he *Hughes* court did not intend to overrule any of those cases except to the extent they conflicted with *Hughes's* holding." *Id.* As with *Martin* and *Superintendent of Insurance*, *Hughes* criticized *Parker-Washington* only to the

extent that decision had upheld the application of the five-year statute on the grounds that extrinsic evidence was necessary to establish the amount due.[6/]

(iv) Long-standing Precedent Demands Affirmation of The Promise-Sued-Upon Rule.

Respect for precedent is the cornerstone of our judicial system. Without it, the outcome of every case would rest on judicial whim and caprice. As we have just seen, generations of judges on this Court have held that §516.110(1) only applies when the promise-sued-upon is the promise for the payment of money contained in the writing. Nothing has occurred that would change that conclusion. *Hughes* pointed out that these five- and ten-year statutes have been on the books since 1835 and that "[b]y 1849, the statutes contained the language now employed, without change, in the current law. 1849 LAWS OF MO. 74." 951 S.W.2d at 616. (Vernon's Annotated Statutes lists the prior versions of both statutes, and they are

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[6/] *Parker-Washington* had declined to apply the ten year statute when extrinsic evidence was necessary to prove *either* the promise-sued-upon or the amount of payment. *See* 183 S.W. at 1042-43 (promise-sued-upon was not the contract's promise to pay money) and *id*. at 1043-44 (describing action as one in implied *assumpsit* to pay damages caused to plaintiffs). *See Atkins v. Clark*, 644 S.W.2d 365, 367 (Mo. App. W.D. 1982) ("In *Parker*, . . . [t]he amount *and* determination of payment relied solely upon 'proof of extrinsic facts'") (emphasis added).

set forth in the appendix to this brief). So there has been no substantive change in these limitations statutes for more than one hundred and fifty years. The 1857, 1889, 1899, 1909, 1919, 1929, and 1939 (current) versions are all the same.

There is no basis to conclude that all the jurists on this Court who consistently adjudicated this issue over the years got it wrong. It is hubristic for plaintiffs to contend otherwise. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), Justice O'Connor summed it up well:

> "With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."

(d) Section 516.110(3) Has Nothing To Do With This Case.

Finally, plaintiff erroneously invokes §516.110(3) on the theory that this is an "[a]ction[] for relief, not herein otherwise provided for." (Pl.Br. at 30). This is a breach-of-contract action for damages. The issue is whether §516.110(1) *or* §516.120, both of which deal with contract claims seeking monetary relief, governs here. Those two statutes, taken together, encompass all possible money

claims based on contract. That is why plaintiff is unable to cite any authority for applying this catch-all, *Sharpe*, 243 S.W.3d at 417, and the argument is thus deemed abandoned under Rule 84.04(d). *Green v. Lebanon R-III Sch. Dist.*, 87 S.W.3d 365, 368 (Mo. App. S.D. 2002).

(e) Rules of Construction Preclude Application of The Ten-Year Statute.

Even if this Court were writing on an empty rather than a full slate, rules of statutory construction would compel affirmance.

An important tenet of construction is that different statutory sections should be considered in *pari materia* to arrive at the true meaning. *Harpagon Mo, LLC v. Bosch*, 370 S.W.3d 579, 584 (Mo. banc 2012). Section 516.120(1) states that "[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in Section 516.110" must be brought "[w]ithin five years." In other words, the five-year statute represents the general rule ("[a]ll actions upon contracts, obligations or liabilities, express or implied"), and the ten-year statute is the exception ("except those mentioned in section 516.110").

Plaintiff wants the exception to swallow the rule. Virtually every commercial contract contains some promise for the payment of money or property. If the mere presence of such a provision, without more, required application of the ten-year statute, there would be almost nothing left for the five-year statute.

Plaintiff so recognizes, arguing that application of §516.120 is relegated to suits on oral contracts and quasi-contracts (Pl.Br. at 21). But that has never been the law. This Court has long held that §516.120 applies "to a suit for breach of a written contract. *Sam Kraus Company v. State Highway Commission, Mo.*, 416 S.W.2d 639." *Ballwin Plaza Corp. v. H.B. Deal Constr. Co.*, 462 S.W.2d 687, 689 (Mo. 1971). In fact, the vast majority of cases cited in the Eastern District's transfer order and in this brief were based upon a *written* contract. Plaintiff wants to relegate §516.120, which is supposed to be the general rule, to the scrap heap.

Another canon of construction is that, in the absence of a statutory definition, words in a statute should be given their plain and ordinary meaning as derived from the dictionary. *State ex rel. MoGas Pipeline LLC v. Missouri Pub. Serv. Comm'n*, 366 S.W.3d 493, 498 (Mo. banc 2012). With all due respect to the Eastern District, we do not believe that the meaning of "an action" in § 516.110(1) is in serious doubt. The first dictionary definition of "action" is "the initiating of a proceeding in a court of justice by which one demands or enforces one's right." Merriam Webster's Collegiate Dictionary, Tenth Edition; and that is what it means here. The critical term in §516.110(1) is the word that follows "action": i.e. "upon". That word should not be trivialized as a mere preposition because, when interpreting a statute, courts must give meaning to every word or phrase of the

legislative enactment. *Gurley v. Missouri Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 413 (Mo. banc 2012).

"Upon" is the statutory link between "an action" and "any writing for the payment of money." The required "common sense and practical interpretation" (*Concord Publ'g House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 194 (Mo. banc 1996)) of an action "upon" any writing for the payment of money is that, in order for the ten-year statute to apply, the claim must be based on the writing's promise for the payment of money. It would be improper to substitute words such as "involving," "referring to," "mentioning" or plaintiff's "about" (Pl.Br. at 19) in lieu of "upon." Courts must give effect to statutes as they are written, *State ex rel. Stinson v. House*, 316 S.W.3d 915, 919 (Mo. banc 2010), and cannot add words under the auspices of statutory construction. *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (quoting *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002)).

Lastly, plaintiff's interpretation of §516.110(1) violates the rule of construction against absurd results. *See State v. Liberty*, 370 S.W.3d 537, 553 (Mo. banc 2012); *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012). "[A]ny writing . . . for the payment of money" is the gateway to §516.110(1), but plaintiff would render that phrase irrelevant. In his view, so long as there is some promise for the payment of money somewhere in the

writing, any plaintiff would be entitled to the benefit of the ten-year statute simply by mentioning that agreement in her pleading but resting the claim upon an unrelated provision or something entirely extrinsic. We ask rhetorically: Why would the legislature intend such a non-sensical result? The only thing that makes sense is to construe the ten year statute in a manner that directly ties the "action" to the promise "for the payment of money" through the use of "upon."

POINT TWO

2. THE TRIAL COURT CORRECTLY DISMISSED THE PETITION FOR THE REASON THAT THE FIVE-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED DURING THE PENDENCY OF THE OHIO ACTION.

(a) Introduction And Summary

This Court has firmly established the principles governing the tolling of statutes of limitations in this state. Some of them are mentioned in the Eastern District transfer order. 2013 WL 5629430, at **5-6. To summarize:

(1) Statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995); *Black v. City Nat'l Bank & Trust Co.*, 321 S.W.2d 477, 480 (Mo. 1959); *Hunter v. Hunter*,

237 S.W.2d 100, 104 (Mo. 1951); *Shelby County v. Bragg*, 135 Mo. 291, 36 S.W. 600, 602 (Mo. 1896).

(2) The statute of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the Legislature. *Shelter Mut. Ins. Co. v. Director of Revenue*, 107 S.W.3d 919, 923 (Mo. banc 2003); *Cooper v. Minor*, 16 S.W.3d 578, 582 (Mo. banc 2000).

(3) Statutory exceptions are strictly construed and are not to be enlarged by the courts upon consideration of apparent hardship. *Butler*, 895 S.W.2d at 20; *Black*, 321 S.W.2d at 480; *Hunter*, 237 S.W.2d at 104; *Woodruff v. Shores*, 190 S.W.2d 994, 996 (Mo. 1945).

(4) Plaintiff bears the burden of presenting evidence that his claim comes within the exception to the statute of limitations. *White v. Zubres*, 222 S.W.3d 272, 276 (Mo. banc 2007).

In disregard of these principles, plaintiff invokes a tolling theory that is not recognized in any Missouri statute, that is judge-made rather than legislative, that applies to federal rather than state courts, and that has been repeatedly rejected by other courts in circumstances like this. Plaintiff also takes out of context the only Missouri case he cites in support of his view. His tolling theory does not rest upon or seek a reasonable extension of existing Missouri law. Instead, plaintiff

advocates a radical departure from the narrow, carefully circumscribed grounds for tolling set forth in the statutes of this state.

(b) Plaintiff's Cases Are Off The Mark.

As the Circuit Court stated, plaintiff's two cases – *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Hyatt Corp. v. Occidental Fire & Casualty Co.*, 801 S.W.2d 382 (Mo. App. W.D. 1990) – "do not involve the tolling of a statute of limitations during the pendency of an uncertified purported class action for a later filed class action." (JLF 662, 670). The Circuit Court and the Eastern District were both correct in concluding those two cases are legally and factually inapposite.

American Pipe arose out of a conspiracy to restrain trade in the steel and concrete pipe industries. The U.S. government first filed a criminal antitrust case in federal court against several sellers of those products. Shortly thereafter, it brought a civil action in federal court against the same defendants, which ended in a consent decree. After that civil litigation had concluded, the State of Utah instituted a class action in federal court on behalf of some of its towns, cities, water districts, and sewer districts against the same defendants, alleging the same price-fixing conspiracy under the federal anti-trust laws. The court denied Utah's class certification motion because the requisite numerosity of class members was

lacking. A number of the towns and districts that had been putative class members then moved to intervene as individual plaintiffs in Utah's action.

The U.S. Supreme Court held that, while these intervenors' claims would otherwise have been untimely, the running of the statute of limitations was tolled on these individual claims until Utah's motion for class certification was denied. The Court reasoned that, if tolling were denied during the pendency of the class action motion, *individual* class members would be required to protect themselves by personally asserting their own claims – resulting in a proliferation of individual claims that would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. *American Pipe* does not hold, or even suggest, that the filing of a putative class action tolls the statute of limitations during the pendency of that case for any class member who subsequently files an identical *class action*.

Plaintiff says that the Western District's decision in *Hyatt* establishes *American Pipe* as Missouri law and makes it applicable to successive class actions such as the *Ruschel* Ohio action and this case. *Hyatt* is not binding here and, in any event, it did nothing of the kind. The Western District only mentioned tolling for class members "who subsequently filed their *own* actions or settled *individual* claims during the pendency of the . . . class action." 801 S.W.2d at 389 (emphasis

added). In other words, the subsequent suit would have to be an individual rather than a class action in order to fall within *American Pipe*.

Moreover, every first-year law student learns the perils of taking isolated statements from judicial opinions out of context and without regard to the surrounding facts and issues. Contextual analysis is necessary in order to determine whether the single sentence citing *American Pipe* was the holding of the *Hyatt* Court, *obiter dictum*, or just a passing remark.

Hyatt was one of many lawsuits arising from the collapse of the skywalks at the Kansas City Hyatt Regency Hotel in 1981. One group of plaintiffs in the personal injury/wrongful death litigation that followed were the rescuers who sustained injuries while trying to save others. A class action on behalf of those rescuers was filed in federal court ("the *Jacobs* rescuer case"). After settling the rescuers' claims, the insureds (the hotel and related entities) brought the *Hyatt* case, an individual (not class) action against their insurers to recover amounts they had paid to settle with the rescuers. The insurers raised many defenses against policy coverage, one of which was that the insureds could have defended the *Jacobs* rescuer case by raising the statute of limitations but that they waived it by settling with the rescuers instead.

In contrast to this case, the *Hyatt* defendants did not even raise the statute of limitations. They merely claimed, in order to defeat coverage, that the insureds

should have raised that defense in the *Jacobs* rescuer case. The Western District's sole reference to *American Pipe* related to an argument the insureds could have made but waived in the earlier *federal* case (*i.e., Jacobs*), not to the *Hyatt* litigation then pending in state court. The isolated sentence which plaintiff cites is pure dictum. *City of Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416, 421 (Mo. App. W.D. 1998).

American Pipe and *Hyatt* do not address the issue presented here. In addition to the factual disparities, each of those decisions invoked a court-created tolling rule unavailable in Missouri courts. Each involved a subsequent individual action rather than an attempt to piggyback successive class actions. Neither sanctioned tolling across different jurisdictions. As is demonstrated below, these are additional critical differences.

(c) *American Pipe*, As A Federal Court-Created Tolling Doctrine, Is Contrary To The Missouri Rule That Exceptions To The Statute Of Limitations Can Only Be Made By The Legislature.

American Pipe expresses a federal rather than a state rule of tolling. It addresses tolling only within the federal court system in federal question class actions. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 213 (2d Cir. 1987); *Bunnell v.*

Department of Corr., 76 Cal. Rptr. 2d 58, 66 (Cal. App. 1998); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex. App. 1995).

The U.S. Supreme Court has itself made clear that *American Pipe* only expresses federal law: "In *American Pipe*, federal law defined the basic limitations period, federal procedural policies supported the tolling of the statute during the pendency of the class action, and a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period. No question of state law was presented." *Chardon v. Fumero Soto*, 462 U.S. 650, 660-61 (1983).

When the limitations period depends on state law, that state law also determines the tolling effect of a class claim: "[T]he chronological length of the limitation period is interrelated with provisions regarding tolling . . . ." *Id*. at 657 & n.8 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 485-86 (1980), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), cited by plaintiff, turned on federal law as well. *Sawyer* cited *Chardon* for the proposition that "when the statute of limitations depends on state law, then state rules determine the tolling effect of a class suit." 642 F.3d at 563.[7/]

[7/] In *May v. AC & S, Inc.*, 812 F. Supp. 934, 939 (E.D. Mo. 1993), the federal district court did state that *Hyatt* "adopted the principle set down" in *American*

In addition to being a federal rule, *American Pipe* is a *court-created* tolling doctrine. The Supreme Court expressly stated that its "judicial tolling of the statute of limitations" was simply a matter of "recognizing judicial power" to do so. 414 U.S. at 558 & n.29. "In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground." *Id*. at 558.

At this point it bears re-emphasizing that this Court has consistently rejected tolling the statute of limitations on grounds not expressly set forth in a legislative enactment:[8/]

(1) In *Cooper*, an inmate challenged a judgment dismissing his petition against certain prison officials as time-barred. Plaintiff argued that the statute was tolled while he was pursuing administrative remedies. The Missouri Prisoner Litigation Reform Act did require exhaustion of administrative remedies prior to

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Pipe. But "*May* is a decision of the United States District Court for the Eastern District of Missouri and, as such, is not binding on this Court." *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409, 416 (Mo. App. W.D. 1996).

[8/] The fixing of a time period to bring suit is more appropriate for the fact-finding machinery and policy-making authority of legislators. As Judge Henry Friendly once stated, the "selection of a period of years [is] not . . . the kind of thing judges do." *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961).

filing a civil suit, but it did not provide for tolling while the administrative remedies were being pursued. Despite plaintiff's attempt to create a tolling exception by cobbling together other statutes, this Court affirmed the dismissal as untimely. 16 S.W.3d at 582.

(2) In *DeRousse v. PPG Industries, Inc.*, 598 S.W.2d 106 (Mo. banc 1980), the issue was whether the employer's failure to file a report of an employee's injury operated to toll the running of the statute of limitations for workers' compensation claims. There was a statutory requirement that the employer file a report of injury, but the statute only specified a fine or imprisonment as the sanction for non-compliance and did not provide for tolling. This Court concluded:

> "The legislature's omission of tolling from the sanctions authorized for the employer's failure to comply with §287.380, R.S.Mo. 1978, indicates that tolling is not an appropriate sanction for such failure, absent fraud. 'Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within an exception.'"

598 S.W.2d at 111-12 (citation omitted).

(3) In *Black*, a prisoner had sent a letter to the probate court that purported to be a petition for will contest. Under the applicable law, a will contest

had to be filed in the circuit court within a year after the will was admitted to probate. This Court rejected plaintiff's claim of tolling based on his imprisonment because there was no tolling provision for imprisonment within the statute of limitations applicable to will contests. 321 S.W.2d at 480.

(4) In *Woodruff*, plaintiff sought damages against her doctor on the grounds that he had fraudulently issued a certificate of her insanity, by virtue of which she was committed to a mental hospital. While alleging she was sane, plaintiff sought to justify her failure to file within the applicable two-year statute of limitations on grounds of a disability ("insane") tolling provision. This Court affirmed the judgment of dismissal on grounds of untimeliness: "The Legislature of Missouri did not broaden the language of the excepting section to include a *sane* person, who notwithstanding is in fact disabled because wrongfully committed and confined as insane, from bringing an action . . . ." 190 S.W.2d at 996 (emphasis added).

The Courts of Appeals have again followed this Court's lead. *See Krutz v. Van Meter*, 313 S.W.3d 138, 139-40 (Mo. App. W.D. 2010) (dismissal affirmed as untimely because there was no statutory exception to the running of the statute of limitations on grounds of estate's personal representative failing to file inventory on time or sending copy of inventory to plaintiff); *Graham v. McGrath*, 243 S.W.3d 459, 465-66 (Mo. App. E.D. 2007) (no tolling because mental incapacity

tolling provision relied on by plaintiff did not apply to childhood sexual abuse claim contained within another statutory chapter); *Freesmeier v. Hunt*, 530 S.W.2d 1, 2-3 (Mo. App. St.L. 1975) (dismissal affirmed as untimely because statute provided that suits were instituted by service of process upon delivery of writ to sheriff for service and, while plaintiff filed suit within five-year statute, writ was not delivered to sheriff until five years plus twelve days had passed).[9/]

The lesson of all these decisions is that the courts of this state will not toll the running of the statute of limitations unless there is a legislative basis for doing so that is squarely on point.

The Missouri General Assembly has enacted only a few narrow grounds for tolling: (1) R.S.Mo. § 516.170 – minority status and mental incapacity; (2) R.S.Mo. § 516.200 – absence of resident defendant until he returns to the state; (3) R.S.Mo. § 516.210 – aliens during wartime; and (4) R.S.Mo. § 516.280 – some "improper act" by the defendant that prevents the commencement of the action. That's it. There is no statutory tolling exception for intervening litigation, whether

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[9/] Other jurisdictions have similarly expressed an unwillingness to establish "by judicial fiat" a tolling exception that emasculates the legislatively-enacted limitations scheme. *See Portwood v. Ford Motor Co.*, 685 N.E.2d 941, 944 (Ill. App. 1997), *aff'd*, 701 N.E.2d 1102 (Ill. 1998); *Thoubboron v. Ford Motor Co.*, 624 A.2d 1210, 1213 (D.C. 1993).

in this state or in another jurisdiction, whether class action or otherwise. The only statute plaintiff cites to support tolling is R.S.Mo. §507.070 (Pl.Br. at 32), an enactment that recognizes class actions but says nothing at all about tolling. The absence of any applicable tolling statute in this case is dispositive.[10/]

(d) *American Pipe* States A Rule of Equitable Tolling Inapplicable To Plaintiff's Claim.

Plaintiff repeatedly characterizes *American Pipe* as a rule of "equitable tolling" (Pl.Br. at iv, v, 13, and 30). *American Pipe* is indeed an equitable tolling rule. *Young v. United States*, 535 U.S. 43, 49-50 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990); *Bridges v. Department of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006); *Veltri v. Building Serv. 32B-J*

[10/] The Eastern District (but not this Court) has referred to a "litigation exception" applicable when plaintiff can establish that he was "prevented from exercising his legal remedy by the pendency of legal proceedings." *Follmer's Mkt., Inc. v. Comprehensive Accounting Serv. Co.*, 608 S.W.2d 457, 460 (Mo. App. E.D. 1980). Plaintiff Rolwing has not alleged that he was "prevented from exercising his legal remedy by the pendency of legal proceedings." Nor could he. Nestle did nothing to prevent him from filing suit earlier. The *Ruschel* action in Ohio was brought against Nestle, not by Nestle; and Mr. Rolwing was always free to sue in Missouri, irrespective of the pendency of the *Ruschel* action.

Pension Fund, 393 F.3d 318, 322-23 (2d Cir. 2004); *Ellis v. City of San Diego*, 176 F.3d 1183, 1189 n.3 (9th Cir. 1999); *Youngblood v. Dalzell*, 925 F.2d 954, 959 n.3 (6th Cir. 1991); *California Rest. Mgmt. Sys. v. City of San Diego*, 126 Cal. Rptr. 3d 160, 162 (Cal. App. 2011); *Hromyak v. Tyco Int'l Ltd.*, 942 So. 2d 1022, 1023 (Fla. App. 2006); *Butler v. Deutsche Morgan Grenfell, Inc.*, 140 P.3d 532, 537-38 (N.M. App. 2006); *O'Hara v. Bayliner*, 679 N.E.2d 1049, 1054-55 (N.Y. 1997); *Bossey v. Al Castrucci, Inc.*, 664 N.E.2d 1301, 1303 (Ohio App. 1995); *Hosogai v. Kadota*, 700 P.2d 1327, 1331 (Ariz. banc 1985); *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co.*, 937 P.2d 855, 862 (Colo. App. 1996).

But this Court has recognized equitable tolling only when the defendant has misled the plaintiff regarding the cause of action; the plaintiff has been prevented from asserting his or her rights; or the plaintiff brought the action in the wrong forum. *See*, *e.g.*, *Ross v. Union Pac. R.R. Co.*, 906 S.W.2d 711, 713 (Mo. banc 1995). None of those things is alleged to have happened here. "Courts do not forgive late filings [on grounds of equitable tolling] where the fault for missing the statutory deadline is more directly attributable to the plaintiff." *Id*. at 713. The fault for failure to sue within the five-year statute of limitations in this case is plaintiff's, not Nestle's.

(e) *American Pipe* Does Not Sanction Class Action Piggybacking.

Plaintiff seeks tolling of the five-year statute for this class action during the pendency of the *Ruschel* action in Ohio, also brought as a class action. Such class action piggybacking goes far beyond anything envisioned by *American Pipe*. *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), explains why:

> "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class. This simply cannot be what the *American Pipe* rule was intended to allow, and we decline to embrace such an extension of that rule."

139 F.3d at 11.

If the statute of limitations could be tolled by stacking successive class actions, timeliness would never be a bar. There could be as many class actions as

there are class members. A tolling rule like that would effectively eliminate the statute of limitations and deprive the defendant of any defense against stale claims.

Thus, *American Pipe* has not been applied to toll successive class actions. *See*, *e.g.*, *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 386 (3d Cir. 2002) ("[S]uccessive attempts to certify a previously rejected class would sanction an endless succession of class filings"); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) ("This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the *Griffin* lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation even further"); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("The Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints"); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (extending *American Pipe* to successive class actions "has been squarely rejected by several courts"); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any."); *Jackson v. American Family Mut. Ins. Co.*, 258 P.3d 328, 333 (Colo. App.

2011) ("the filing of successive class actions cannot serve to perpetually toll the running of the statute of limitations"); *Smith v. Cutter Biological*, 770 So. 2d 392, 408 (La. App. 2000) ("*American Pipe* did not involve a multiplicity of class action filings such as are urged upon this Court by the plaintiffs in the instant case"). *See* 7B Wright, Miller & Kane, Federal Practice & Procedure § 1795, at 51-52 (3d ed. 2005) (discussing bar against tolling of successive class actions).

Plaintiff attempts to distinguish this long line of precedent on the theory that class certification had been denied in those cases but was never ruled upon by the Ohio court in *Ruschel* (Pl.Br. at 36-39). It would be more logical, however, to conclude that the failure of the Ohio court to rule upon class certification takes the case out of the *American Pipe* framework entirely. As the Eighth Circuit stated in *Great Plains Trust Co. v. Union Pacific Railroad Co.*, 492 F.3d 986, 997 n.3 (8th Cir. 2007), a dismissal without a class certification ruling "does not include the typical circumstances that trigger the *American Pipe* rule." In any event, the result should not depend on whether the court in the first action denies class treatment or whether it makes no class ruling. In each instance, there is no class.

In *Farthing v. United Healthcare of the Midwest, Inc.*, 2000 U.S. Dist. LEXIS 21995 (W.D. Mo. Oct. 24, 2000), the plaintiff claimed her class action lawsuit was timely based on alleged tolling during the pendency of two previous class suits that asserted the same cause of action against the same defendant. Like

this case, the same lawyer brought both class actions. Like this case, the prior litigation in *Farthing* was dismissed with no ruling on plaintiff's motion for class certification. Relying on *Basch*, the court held that the prior proposed class litigation did not toll the statute of limitations:

> "This Court is left to ponder how many bites at the apple Plaintiff's counsel believe they are entitled to? . . . [T]o allow stacking of unsuccessful attempts of a class action upon unsuccessful attempt while continually tolling the statute of limitations, belies the entire purpose of such a statute. By this logic, a plaintiff's counsel could toll the statute of limitations indefinitely by successively dismissing cases and re-filing, while continually groping in the dark for a viable representative plaintiff. This Court refuses to endorse such a practice." *Id.* at **25-26.

Other cases rejecting *American Pipe* tolling when there was no class determination in the prior action include *In re Westinghouse Secs. Litig.*, 982 F. Supp. 1031, 1034 (W.D. Pa. 1997) ("[a]n interpretation of the *American Pipe* tolling doctrine that would permit such abusive manipulations years after the original action was filed should not be countenanced" and "I decline to adopt a rule that . . . 'give[s] counsel in any uncertified class action *carte blanche* to make any

tactical decisions they like . . . without any risk whatsoever'") and *Newport v. Dell, Inc.*, 2008 WL 4347311, at *6 (D. Ariz.), adopted at 2008 WL 4629987 (D. Ariz. Oct. 17, 2008) (same rationale applied to reject tolling when first action was concluded without any ruling on class certification action).

Because of the prohibition against class action piggybacking, plaintiff Rolwing seeks to transmogrify this lawsuit by urging that he has an individual claim; that he should thus be able to invoke *American Pipe*; and that, if he can do that, so can all the individual class members (Pl.Br. at 32-33). This is sophistry. In contrast to *American Pipe*, plaintiff and the other former Ralston shareholders are not bringing a series of individual cases. This is a class action, and Mr. Rolwing is suing as a class representative. As a result, he crashes headlong into all the cases that reject the stacking of successive class actions.

Finally, plaintiff cites some twenty-three cases from other jurisdictions that, he says, "have endorsed class action tolling." (Pl.Br. at 34-36). But a close examination of those decisions reveals that, with but one exception (*First Baptist Church v. Citronelle-Mobile Gathering, Inc.*, 409 So. 2d 727 (Ala. 1981)), the second suit was either an individual action rather than a class action or that there was no second suit at all.

(f) *American Pipe* Does Not Sanction Cross-Jurisdictional Tolling.

The purpose of the *American Pipe* rule is to promote economy and efficiency in litigation. The U.S. Supreme Court's concern was that, if class members were not assured that their claims were protected during the pendency of a class certification motion, they would feel compelled to file individual actions and thus bring about the very multiplicity of actions the class device was intended to prevent. The whole purpose of the class action would be frustrated "because . . . the sole means by which members of the class could assure their participation in the judgment . . . would be to file . . . individual motions to join or intervene as parties — precisely the multiplicity of activity which [the federal class action rule] was designed to avoid." 414 U.S. at 551.

This rationale makes sense on an *intra*-jurisdictional level. For instance, federal courts have an interest in preserving economy and efficiency within the federal system. Likewise, Missouri, on an intra-jurisdictional basis, has a strong interest in promoting the economy and efficiency of its own courts and avoiding a multiplicity of class actions. But that reasoning falls apart across different jurisdictions – in this case, Ohio as the situs of the first action and Missouri as the forum for the second. Missouri courts have no interest whatever in how Ohio or

any other state deals with its case management issues. *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999).

In fact, cross-jurisdictional tolling is inconsistent with the economy and efficiency class actions are designed to achieve. In *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102 (Ill. 1998), the Illinois Supreme Court explained why. After noting that only a few states allowed cross-jurisdictional tolling, the Court explained that any such forum would become a magnet for every dissatisfied lawyer who had lost his class action in another state:

> "Tolling a state statute of limitations during the pendency of a . . . class action [in another forum] . . . 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 [other] courts have refused to certify as class actions after the statute of limitations has run."

701 N.E.2d at 1104.

Other courts have followed *Portwood*. *See Easterly v. Metropolitan Life Ins. Co.*, 2009 WL 350595, at *5 (Ky. App. Feb. 13, 2009) ("We . . . conclude the tolling of federal claims as contemplated under *American Pipe* does not apply cross-jurisdictionally to toll state law claims in the Commonwealth"); *Ravitch v. PriceWaterhouse*, 793 A.2d 939, 944 (Pa. Super. 2002) ("We find this reasoning [of *Portwood*] persuasive . . . ."); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) ("Litigants who ordinarily would have filed in other states' courts would file in Tennessee solely because our cross-jurisdictional tolling doctrine would have effectively created an overly generous statute of limitations"). *See Wade*, 182 F.3d at 287 ("[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").

In addition, if cross-jurisdictional tolling were permitted, Missouri's five-year statute of limitations would be dramatically extended – solely because of the failure of an Ohio trial court to decide plaintiff's class certification motion during the several years the *Ruschel* case was pending. Missouri courts would be required to adjudicate claims, clearly time-barred under Missouri law, solely because a

court in some other state didn't do its job. *Portwood* addressed that problem as well: "[I]t 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." 701 N.E.2d at 1104. *See Adedje v. Westat, Inc.*, 75 A.3d 401, 418 (Md. Ct. Spec. App. 2013) ("[I]f we recognized an exception, our Courts would be at the mercy of other jurisdictions, waiting on them to rule on the cases"); *Quinn v. Louisiana Citizens Prop. Ins. Corp.*, 118 So. 3d 1011, 1022 (La. 2012) ("*Portwood*[] underscore[s] 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").

Cross-jurisdictional tolling would grant the courts of Ohio or any other jurisdiction the power to decide when Missouri's statute of limitations begins to run. That is contrary to the Missouri General Assembly's exclusive power to adopt statutes of limitations and their limited tolling exceptions.[11/]

[11/] Those few courts that have sanctioned cross-jurisdictional tolling – *e.g.*, *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002);

(g) Application of *American Pipe* Tolling To This Case Would Be An Abuse Of That Decision.

Justice Blackmun, concurring in *American Pipe*, warned that the opinion "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983), the three concurring Justices repeated Justice Blackmun's admonition and then pointed out that the *American Pipe* tolling rule "invite[es] abuse." Other cases echo those concerns. *See Cunningham v. Insurance Co. of N. Am.*, 530 A.2d 407, 410 (Pa. 1987); *Basch*, 139 F.3d at 12; *Korwek*, 827 F.2d at 877; *Salazar-Calderon*, 765 F.2d at 1351.

This action exemplifies that abuse. Here "[t]he dangers which Justice Blackmun warned against in his concurring opinion in *American Pipe* are vividly demonstrated by plaintiff's theory." *Basch*, 139 F.3d at 12. Plaintiff Rolwing's counsel brought the Ohio action against Nestle in the name of his father, John Ruschel, as named plaintiff and class representative. He litigated the Ohio case for six years and lost it at every stage. The Ohio trial court granted Nestle's motion

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Staub v. Eastman Kodak Co., 726 A.2d 955, 965-66 (N.J. App. Div. 1999) – dealt with individual suits rather than successive class actions. None of them involved an attempt at class action piggybacking.

for summary judgment (JLF 445-46). In a lengthy opinion, the Ohio Court of Appeals affirmed. *Ruschel v. Nestle Holdings Inc.*, 2008 WL 1903856 (Ohio App. May 1, 2008). The Ohio Supreme Court declined further review. *Ruschel v. Nestle Holdings Inc.*, 894 N.E.2d 1244 (Ohio 2008).

But because the Ohio trial court granted summary judgment in favor of Nestle before ruling on plaintiff Ruschel's motion for summary judgment, the merits decision in that case lacked *res judicata* or collateral estoppel effect on the putative class members. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 884-85 (Mo. banc 2008). For that reason, plaintiff's counsel decided that, if he filed the same action with a new class representative in a different jurisdiction, he might litigate *ab initio* the exact same claim he had already lost in Ohio. So in early 2011, he placed an ad in the *St. Louis Post-Dispatch* soliciting a Missouri plaintiff to act as class representative to pursue the claim he had lost in Ohio (JLF 235-40, 285-86). Mr. Rolwing responded to that ad and agreed to act in that capacity (*Id.*). This case was filed on March 30, 2012, almost three years after the Ohio litigation had ended and nearly a decade after the events upon which the case is based. As plaintiff's proposed amended petition concedes, this case "rais[es] the same issues, and su[es] over the same late payment on behalf of a substantially identical class" (JLF 682, 691-92).

Now plaintiff's counsel would utilize *American Pipe* to wipe out his defeats and start all over as if nothing had happened. He invokes that case as an end-run around Missouri's narrow tolling statutes. He tries to extend a rule intended solely for the benefit of individual litigants to successive class actions that would never be time-barred and that could continue until he finds a jurist somewhere who agrees with him. He takes a doctrine intended to preserve economy and efficiency within a single court system and tries to expand it into something that would justify re-litigation of a case already decided against him in another court system. This is precisely the type of abuse that Justice Blackmun and other jurists have warned against, and it should not be sanctioned here.

(h) In Any Event, The Pendency of The Ohio Action Would Not Have Provided The Tolling Effect Plaintiff Needs.

If – despite everything we have said – this Court were to conclude that the *Ruschel* Ohio action did toll the running of the five-year Missouri statute, the effect of that tolling would remain to be decided. "Tolling effect" refers to the method of calculating the amount of time available to file suit after the tolling has ended. *Chardon*, 462 U.S. at 652 n.1.

There are three different types of tolling effect: (1) suspension, (2) extension, and (3) renewal. Suspension means that the plaintiff must file suit

within the amount of time left in the limitation period. Extension establishes a fixed period during which the plaintiff may file suit, without regard to the length of the original limitation period or the amount of time left when the tolling began. Renewal provides the plaintiff with a whole new period as long as the original statute of limitations. *Id*.

There could be no basis to argue for renewal. In *Chardon*, the local law of Puerto Rico provided that the statute of limitations started to run anew when the tolling ceased. 462 U.S. at 655. But Missouri has no renewal statute that would afford plaintiff the full length of the limitations period again after the tolling ended. In addition, "a defendant's affirmative act during or even after the running of the limitation period is [typically] necessary to trigger renewal." Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto And Alice In Wonderland*, 60 Notre Dame L. Rev. 686, 690 (1985). Again, plaintiff makes no contention that Nestle itself ever took any affirmative action that would toll the five-year statute – no fraudulent concealment, no affirmative misrepresentation, nothing.

So it would have to be either suspension or extension. Missouri does have suspension statutes, i.e. those previously discussed that halt the running of the limitations during a plaintiff's disability (infancy, mental incapacity, etc.); but plaintiff Rolwing has not asserted and does not claim any such disability.

Chardon confirms that the right answer for this case is extension, i.e. the period provided by Missouri's one-year savings statute, R.S.Mo. § 516.230. *Chardon* holds that the interest protected by *American Pipe* tolling is satisfied by allowing the plaintiff "*as much time to . . . file* a separate action . . . under *a state savings statute* applicable to a party whose action has been dismissed for reasons unrelated to the merits." 462 U.S. at 661 (emphasis added). Where, as in Missouri, the relevant limitations scheme includes a savings statute but does not include a renewal or extension statute, the fixed period provided by the savings statute applies. *Great Plains Trust Co.*, 492 F.3d at 997-98.

Because plaintiff concedes that the *Ruschel* Ohio action ended on May 12, 2008 (*See* ¶ 32 of proposed amended petition; JLF 691-92, n.1) and because this case was not filed until March 30, 2011, this action does not fall within the one-year savings statute and thus would be time-barred in any event.

There is a second reason to reject the tolling effect plaintiff seeks here. As we have demonstrated, *American Pipe* is a rule of equitable tolling. A plaintiff who uses equitable tolling to suspend the statute of limitations is required to bring suit within a reasonable time after he has obtained or by due diligence could have obtained the necessary information to do so. Equitable tolling "does not reset the clock." *Gao v. Mukasey*, 519 F.3d 376, 378 (7th Cir. 2008). In *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990), the Court concluded that

equitable tolling should not "bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. It is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant the protection of the statute of limitations." (Citation omitted.) *See Amini v. Oberlin Coll.*, 259 F.3d 493, 501-02 (6th Cir. 2001).

Although the *Ruschel* action in Ohio ended on May 12, 2008, plaintiff Rolwing and his counsel did not file this case until the end of March, 2011 – almost three years later. They didn't need three more years to bring this lawsuit. Plaintiff's counsel had masterminded the *Ruschel* action for his father, was familiar with every detail of that lawsuit and, through the exercise of reasonable diligence, could have filed this case in Missouri shortly after *Ruschel* was concluded. The failure of plaintiff and his counsel to exercise the required due diligence is one more reason to reject the tolling effect they seek.

POINT THREE

3. THE TRIAL COURT DID NOT ERR IN ITS ORDER AND JUDGMENT OF DISMISSAL IN CONCLUDING THAT PLAINTIFF HAD FAILED TO ALLEGE ANY LEGALLY COGNIZABLE BASIS FOR TOLLING.

In his Point 3, plaintiff maintains that paragraph 32 of the petition sufficiently alleged equitable tolling to overcome his factual averments in that pleading that the alleged contract breach occurred nearly a decade before the filing of this case. Paragraph 32 merely stated: "All statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition."

First, plaintiff maintains he was not required to allege tolling at all because "Nestle might not have raised a statute of limitations defense." (Pl.Br. at 49). But that is an abstract proposition wholly divorced from the facts of this case. Plaintiff did include paragraph 32 in his pleading, and he clearly did so out of concern that his case would be dismissed on limitations grounds.

Second, plaintiff argues that Nestle's remedy was a motion for more definite statement rather than a motion to dismiss. But Rule 55.27(d) provides that a party may seek a more definite statement of allegations "to enable the party properly to prepare responsive pleadings or to prepare generally for trial." Those were not

Nestle's concerns. Nestle's position was not that insufficient facts were alleged but that those that were alleged mandated dismissal.

Third, Mr. Rolwing contends that, because Nestle did not challenge his tolling allegation as a legal conclusion, the trial court should not have so found *sua sponte*. But the Court's review of a motion to dismiss *requires* "disregarding those allegations which are nothing more than the legal conclusions of the pleader." *State ex rel. State Tax Comm'n v. Briscoe*, 451 S.W.2d 1, 3 (Mo. banc 1970). This is a fact-pleading state, not a notice pleading state. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). As this Court concluded in *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009):

> "[T]o allow a suit to proceed, without meeting the most minimal level of fact pleading, is a waste to the system and an unjust expense to the parties that cannot be repaired on appeal and is subject to a writ for abuse of judicial discretion to avoid irreparable harm and prevent unnecessary litigation and expense."

As the gatekeeper on pleadings and motions, the Circuit Court had a duty, not just a right, to sift the wheat from the chaff – to consider only well-pleaded facts, not legal conclusions like those alleged in paragraph 32 of the petition.

POINT FOUR

4. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PETITION WITH PREJUDICE AND IN DENYING PLAINTIFF'S MOTION TO VACATE, ALTER, OR AMEND THE JUDGMENT FOR THE REASON THAT PLAINTIFF'S ALLEGATIONS DID NOT SET FORTH ANY LEGALLY COGNIZABLE BASIS FOR TOLLING.

In his Point 4, plaintiff contends that the trial court erroneously dismissed his petition with prejudice and improperly denied his motion to vacate, alter, or amend the judgment. Both rulings were entirely proper. Rule 67.01, Mo. R. Civ. P., states that "[a] dismissal without prejudice permits the party to bring another civil action for the same cause, *unless the civil action is otherwise barred*" (emphasis added). Because this action was barred by limitations, a dismissal without prejudice would not have allowed plaintiff to re-file.

This Court's decision in *Farwig v. City of St. Louis*, 499 S.W.2d 388, 389 (Mo. 1973) is directly on point. There the trial court sustained a motion to dismiss on the grounds that the petition was facially barred by the statute of limitations. The dismissal was *with* prejudice. This Court rejected plaintiff's tolling allegation as legally insufficient and concluded that "[t]he trial court properly sustained the motions to dismiss on the grounds of bar of the statute of limitations."

The Circuit Court also properly overruled the motion to vacate, alter, or amend the judgment. That motion was based upon the amended petition plaintiff sought to file (JLF 672-81). But the only difference between his petition and his proposed amended petition was the more extended tolling allegation in ¶ 32. Whereas ¶ 32 of the petition had merely stated in conclusory fashion that "[a]ll statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition" (JLF 10, 19), the counterpart paragraph in the amended petition alleged that the *Ruschel* action tolled the statute from the date of its filing on January 3, 2002 until the Ohio Court of Appeals affirmed the grant of summary judgment in favor of Nestle on May 12, 2008 (JLF 682, 691-92). In denying that motion, the Circuit Court correctly concluded that "[t]his Court found in its November 8, 2012 Order and Judgment that the Ohio lawsuit did not toll the statute of limitations herein. The Court will not reconsider its ruling in this matter." (JLF 713-16).

Because the proposed new ¶ 32 merely repeated what the court had already properly rejected, the amendment would have been futile. *George v. Lemay Bank & Trust Co.*, 618 S.W.2d 671, 675 (Mo. App. E.D. 1980) (the amendment, as here, "was sought after judgment had been entered and thus came too late;" and, while the proposed amended petition would "more clearly state the facts," it would not change the legal result and, as a result, plaintiff was not prejudiced); *Diehl v. Fred*

Weber, Inc., 309 S.W.3d 309, 327 (Mo. App. E.D. 2010) (leave to amend denied, in part, because it was futile in light of the Court's previous rulings); *Yocum v. Piper Aircraft Corp.*, 738 S.W.2d 145, 147 (Mo. App. E.D. 1987) (because plaintiff's pleading would have been futile, there was no prejudice in the refusal to grant leave to amend). *See* Rule 84.13(b), Mo. R. Civ. P. ("No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action").

POINT FIVE

5. THE JUDGMENT BELOW SHOULD ALSO BE AFFIRMED FOR THE REASON THAT THE DECISION OF THE OHIO COURT OF APPEALS IN *RUSCHEL V. NESTLE HOLDINGS INC.*, WAS ENTITLED TO *STARE DECISIS* AND COMITY EFFECT.

Except for the substitution of a different named plaintiff, this case is a copycat of the *Ruschel* Ohio action. Plaintiffs in both lawsuits were beneficial owners of Ralston common stock who held their shares in "book entry" form (i.e. street name). Plaintiffs in both cases sought to represent a class defined as "[a]ll beneficiaries or book-entry owners of Ralston Purina common stock just before that stock was cancelled on December 12, 2001 – where the record owner was Cede & Co., as nominee for the Depository Trust Co. (DTC)." Plaintiffs in both cases claimed breach of the January 15, 2001 merger agreement between Ralston

and Nestle. Both plaintiffs alleged that Ralston's common stock legally ceased to exist and was converted into the right to receive $33.50 a share in cash at the closing of the merger on December 12, 2001. Both contended that Missouri law governs. Both predicated liability on a breach-of-contract theory. Both invoked § 2.02(a) of the merger agreement. Both alleged that Nestle breached the merger agreement by making late payment of the $33.50 cash payment to the plaintiff and the members of the putative class. The defendant in both cases is the same. The plaintiff's lawyer in both cases is the same. (Compare JLF 10-22 with JLF 384-96). In summary, the *Ruschel* action and this case shared the identical subject matter, issues, claims, damages, putative class and defendant.

Even though Mr. Rolwing and the other class members in *Ruschel* are not bound under principles of *res judicata* or collateral estoppel, the disposition of that Ohio action nevertheless required dismissal here. In *Smith v. Bayer Corp.*, – U.S. –, 131 S. Ct. 2368, 2379 (2011), the U.S. Supreme Court agreed that, when no class had been certified in the first action, the putative class in the second case was not bound by the outcome of the first action under usual preclusion principles. But in addressing the concern that plaintiff's counsel would "mount a series of repetitive lawsuits" with different plaintiffs until he obtained a favorable result, the Court announced the way to prevent that: "[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes

substantial costs of similar litigation brought by different plaintiffs." 131 S. Ct. at 2381.

The Circuit Court denied any *stare decisis* effect (JLF 662, 667). It recognized the difference between binding and non-binding precedent and pointed out that "[o]ut-of-state appellate decisions do not constitute *controlling* precedent in Missouri courts" (JLF 667 (emphasis added)). But after stating that undeniable proposition, the Court stopped. Once it decided that it was *not bound* to follow the decision of the Ohio Court of Appeals under principles of *res judicata* or collateral estoppel, the Circuit Court failed to consider whether it *should* do so based on prudential considerations, such as discussed in *Smith v. Bayer Corp*.

This Court has decided cases based upon out-of-state precedent in circumstances far less compelling that those presented here. *See*, *e.g.*, *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 128 (Mo. banc 2010); *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 329 (Mo. banc 1982); *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 542 (Mo. banc 1976). Our courts have not expressed any particular aversion to decisions from the Buckeye State. *See Hamid v. Kansas City Club*, 293 S.W.3d 123, 127 (Mo. App. W.D. 2009) (following Ohio law). Even though decisions by courts in sister states are not controlling, Missouri courts consider them persuasive when the facts are similar. *Cherry Manor, Inc. v. American Health Care, Inc.*, 797 S.W.2d 817, 821

(Mo. App. S.D. 1990) (citing *Triplett v. Shafer*, 300 S.W.2d 528, 530 (Mo. App. K.C. 1957)). Because such decisions should be followed when the facts are similar, they should be deemed controlling when the facts are identical.

The irony is that, while the Circuit Court might well have followed an out-of-state precedent involving *other* parties and *different* facts that set forth a legal principle relevant to the disposition of this case, it gave no weight whatever to the decision of the Ohio Court of Appeals in *Ruschel* – even though it is the proverbial "spotted cow" case, identical in every respect to this one. Because *Ruschel* was not entitled to *preclusive* effect, the Circuit Court gave it *no* effect. Having stated that the Ohio decision is "at best persuasive" (JLF 667), the Court then refused to consider it at all.

Plaintiff spends more than twenty-two pages trying to argue that the Ohio Court of Appeals was wrong (Pl.Br. 56-78). We do not intend to fall into the trap of re-litigating, point by point, a case already decided by a court of competent jurisdiction. After all, the whole point of *stare decisis* is to respect precedent, not to second-guess it.

The reason for respecting *stare decisis* in this case is stronger than ever. It is the one advanced by *Smith v. Bayer Corp.*: the "policy concerns" that arise when class counsel makes repeated efforts to certify the same class "by the simple expedient of changing the named plaintiff in the caption of the complaint." 131

S.Ct. at 2381. If *Ruschel* is not followed, then plaintiff's counsel may continue to run around the country, filing identical class actions in the names of different class representatives until he obtains a favorable result. He could roll the dice as many times as he pleases until he wins. Based upon the laws of probabilities alone, some judge somewhere at some time is likely to agree with him. Nestle, which would have to incur the expenses of defending against all these cases, would reap no credit for winning them because, according to the position advanced by plaintiff's counsel, one positive result for him trumps all of defendant's favorable outcomes. The way to stop this is to adhere to *Ruschel* and uphold the judgment of dismissal on the basis of the *stare decisis* effect of that decision, in addition to the bar of limitations.

The claim of *stare decisis* and comity that we make here is an exceedingly narrow one, limited to circumstance such as those presented here. Courts of this state should not have to re-litigate a claim involving the same facts, the same issue, the same class, and the same defendant that has already been fully adjudicated up and down the entire court system of another sovereign state. Such a rule is necessary to prevent gamesmanship and abuse.

CONCLUSION

For all the reasons stated, the judgment of dismissal with prejudice entered by the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06. It was prepared using Microsoft Word with Time New Roman size 14 font. It has 18,505 words, which is less than 27,900 words, excluding the cover page, certificate of service, certificate of compliance, signature block, and appendix. The file has been scanned for viruses and is virus-free.

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