SC93756

IN THE SUPREME COURT OF MISSOURI

JOHN M. ROLWING

Appellant

v.

NESTLÉ HOLDINGS, INC.

Respondent

Appeal from the Circuit Court of the City of St. Louis,
Case No. 1122-CC01256-01,
on transfer from the Missouri Court of Appeals, Eastern District, ED99401

SUBSTITUTE BRIEF OF APPELLANT (DISMISSAL ISSUE)

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Table-of-contents

Pages

Point 3 (petition sufficiently alleges tolling):

The trial court erred in ruling *sua sponte* in its dismissal judgment that Rolwing did not sufficiently allege equitable tolling of the limitation period, and in dismissing the petition with prejudice, because Rolwing's petition sufficiently alleged equitable tolling and Nestlé waived any objection to the sufficiency of that invocation and even corroborated it, in that:

Table-of-authorities

Pages

Cases

Statutes

Rules

Constitutional provisions

Treatises

Jurisdictional statement

This is an appeal from the Circuit Court of the City of St. Louis's final judgment dismissing appellant's petition with prejudice which is appealable per Rule 81.04 and RSMo § 512.020(5), and which was transferred to this Court under Rule 83.01 by order of the Court of Appeals for the Eastern District of Missouri, Division 4.

Statement-of-facts

Overview of the case

a. The petition's allegations

On March 30, 2011, Appellant John Rolwing filed his class action petition in the Circuit Court of the City of St. Louis. A copy of the petition and its attachments is at JLF 10–64. It alleges a Missouri state-law claim for breach of a written contract for the payment of money and seeks a judgment for the payment of money:

Nestlé and Ralston entered into an Agreement and Plan of Merger (a copy of which is attached to the petition at JLF 27–64) where all of Ralston's common stock would be bought for $33.50 a share in cash (petition ¶8); Missouri law applies per § 9.08 of the merger agreement (petition ¶¶2 & 9); Rolwing held 2,400 shares (petition ¶4); Rolwing and the class were third-party beneficiaries (petition ¶10); the merger closed December 12, 2001 and all of Nestlé's outstanding shares

were cancelled and ceased to exist on that day, with Rolwing and the class not holding negotiable stock certificates that could be surrendered, thereby making "no-interest" language in the merger agreement referred to by Nestlé as a basis for dismissal—not applicable to "cash payable upon surrender" of certificates—did not apply to Rolwing and the class (petition ¶¶ 11; 19–31; 39); Nestlé did not pay Rolwing and the class until December 18, 2001 (petition ¶17); which was not timely as required by the merger agreement (petition ¶33). The petition asks for judgment against Nestlé for Nestlé's alleged breach, "representing damages and/or the use value of the money related to defendant's delay in payment (all measured by statutory interest at 9% under Mo. Rev. Stat. § 408.020)—plus interest allowed on that judgment . . ." (petition p. 12).

b. Payment due date

The petition alleges at ¶11:

> At the Effective Time and on the Closing Date, Ralston's common stock ceased to exist legally and was cancelled and converted into the right to receive $33.50 in cash per share per § 2.01(c) of the merger agreement, which said 'each issued share of [Ralston] Common Stock shall be converted into the right to receive $33.50 in cash (the "Merger Consideration")."

There is no dispute the Effective Time was on December 12, 2001. In the hearing on Nestlé's motion to dismiss, Nestlé's lawyer said: "Ralston Purina Company was bought by Nestle back in late 2001. The transaction was . . . a stock for cash transaction in which Nestle paid the Ralston shareholders $33.50 per share for their stock. The transaction closed on December 12, 2001." Tr. 7:13–19.

In his briefing opposing dismissal, Rolwing pointed out that the merger agreement provided at § 2.02(d) that the cash was to be paid to Rolwing and the class "upon conversion" of their shares, and per § 2.01 this "conversion" was "at the Effective Time" and per § 2.01(c) the "conversion" was "into the right to receive $33.50 in cash (the 'Merger Consideration')." *See* JLF 32–33; 620.

Rolwing argued interest was not due under Missouri law until the Paying Agent demanded payment. *See* JLF 467 ("Demand here was on December 14, 2001 and payment was not made until December 18, 2001, therefore statutory interest must be paid to the class" as required by *Stern Fixture Co. v. Layton*, 752 S.W.2d 341 (Mo. App. E.D. 1988) and *Kim v. Conway & Forty, Inc.*, 772 S.W.2d 723 (Mo. App. E.D. 1989)).

The Bambach affidavit (JLF 487–492) attached to Rolwing's brief opposing Nestlé's motion to dismiss states that the Paying Agent demanded payment in writing on December 14, 2001.

Facts and procedural history supporting tolling of the statute-of-limitations here and otherwise showing dismissal was improper

a. Petition expressly alleges tolling

The petition alleged at ¶32, "All statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition." JLF 19.

b. Earlier Ohio litigation

Before this action was filed, there was litigation in Ohio, *John Ruschel, etc. v. Nestle Holdings, Inc.*, which sought recovery on behalf of an identical class for Nestlé's late payment. Before any class was certified, the Ohio trial court granted summary judgment to Nestlé against the Ohio named plaintiff only (a copy of the Ohio trial court's judgment is at JLF 446) and the Ohio appeals court affirmed (a copy of the Ohio appeals court opinion is at JLF 195–205).

c. Nestlé's motion to dismiss argued the earlier Ohio litigation was a basis for dismissal therefore Nestlé's motion provided statements that support Rolwing's tolling argument.

In response to Rolwing's petition, Nestlé moved to dismiss. JLF 181–205. Nestlé made several arguments for dismissal—most notably that the five-year statute-of-limitation under RSMo § 516.120 applied, the Ohio appeals court decision was "controlling precedent," and the Missouri court should "dismiss this

case on the basis of *stare decisis*." JLF 184–187; 189–193. Thus, Nestlé's own motion to dismiss discussed the earlier Ohio litigation.

Rolwing argued the petition was timely-filed on the basis that the applicable statute is ten years under RSMo § 516.110, or if a five-year limit applies, it was tolled by the Ohio litigation and Nestlé's other arguments for dismissal were wrong. JLF 466–503.

Following more briefing (JLF 586–646) the circuit court granted Nestlé's motion to dismiss with prejudice on a finding the petition was barred by the five-year statute and rejected Nestlé's other arguments for dismissal. JLF 662–671.

d. <u>The trial court's finding on tolling was not advanced by any party.</u>

Nestlé never argued the petition was deficient in alleging tolling, but the circuit court *sua sponte* found in its dismissal the petition's tolling allegation was deficient because it "is merely conclusory." JLF 669. Rolwing filed a motion to vacate, alter, or amend the dismissal judgment and asked for leave to file an amended petition. JLF 672–681. Since no answer to the petition was filed, he filed an amended petition the same time as the motion to vacate. JLF 682–699. The amended petition has a new ¶32 alleging much more detail about tolling by virtue of the Ohio litigation. JLF 691–692. The circuit court denied reconsideration and said alleging tolling in more detail would be futile: "Plaintiff

seeks to add an allegation without merit that would not cure the inadequacy of Plaintiff's pleading." JLF 713–716.

e. <u>Statements and admissions by Nestlé used by Rolwing to argue against dismissal because they support tolling or otherwise conflict with Nestlé's arguments for dismissal</u>

i. Effectively saying that at least Rolwing's individual claim was tolled

In the hearing on Nestlé's motion to dismiss, Nestlé stated, "In both [*Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382 (Mo. App. W.D. 1990) and *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974)] the second suit was not a class action, it was a suit brought by individuals and, therefore, would be covered by the tolling rule in *American Pipe*." Tr. 39:20–23.

ii. Giving details about the Ohio litigation

Nestlé concedes that the earlier Ohio litigation "lasted seven years" and had "the identical subject matter, issues, claims, damages, putative class, and party defendant" as this case and "[e]xcept for the substitution of a different named plaintiff, this case is identical to the Ohio action. Plaintiffs in both lawsuits were beneficial owners of Ralston Purina common stock who on December 12, 2001 held their shares in 'book entry' form." JLF 184, 185.

Rolwing argued against *stare decisis* as a basis for dismissal by saying Missouri courts are not bound by the Ohio decision, and neither res judicata nor collateral estoppel apply because Rolwing was not a named plaintiff in Ohio and the issue of class certification was never ruled on. *See* JLF 469–472.

Nestlé made representations to the court that confirm this:

- "On May 15, 2007, the Ohio trial court, Cuyahoga County Ohio, granted Nestlé's Motion for Summary Judgment without deciding the plaintiff's Motion for Class Certification. Counsel appealed. On May 1, 2008, the Ohio Court of Appeals affirmed the judgment of the trial court." Tr. 25:7–12.
- "Plaintiff [Rolwing] is correct that strict principles of *res judicata* or collateral estoppel do not apply in the absence of an order granting class certification, but that doesn't mean he can ignore the *stare decisis* effect of the Ohio decision." JLF 186.
- "Now, it may be technically correct to say that Mr. Rolwing and the class are not bound by the Ohio decision, but that certainly doesn't mean that you shouldn't follow it or that you should ignore it." Tr. 27:22–25.

iii. Statements and evidence in Nestlé's federal removal papers

Nestlé initially removed this case to the United States District Court for the Eastern District of Missouri (JLF 68–69), which remanded it back to the Missouri circuit court for lack of federal jurisdiction (JLF 70).

Nestlé made factual allegations in its Notice of Removal and attached things to its Removal, including the Ohio plaintiff's Ohio briefs opposing summary judgment which included affidavits and other evidentiary materials. JLF 89–180. In compliance with Rule 55.34(b), Rolwing filed with the Missouri circuit court a list of documents Nestlé filed in federal court to be made part of the file in this case and a copy of each. JLF 71–72; 89–180.

Nestlé made the following representations in its Notice of Removal:

> 1. This action, filed as *John M. Rolwing v. Nestle Holdings, Inc.*, Cause No. 1122 CC 01256, in the Circuit Court of the City of St. Louis, is virtually identical to an action filed in Ohio, styled *John Ruschel v. Nestle Holdings, Inc.* . . . on behalf of the same putative class arising out of the same facts and the same applicable law. . . .
>
> 31. . . .
>
> (b) Plaintiff and the putative class in this case were vigorously represented by plaintiff Ruschel in the Ohio Action, and their interests received actual protection; . . .

(d) The plaintiff in the Ohio Action and in this case share common legal representation; and

(e) Through that common representation, plaintiff herein "participated" in the Ohio action . . . .

JLF 89, 99.

Rolwing attached to his brief opposing Nestlé's motion to dismiss the affidavits and some other evidentiary materials Nestlé attached to its Notice of Removal, to show that the Ohio decision was wrong and dismissal is not proper. For example, Rolwing attached the following to his brief opposing Nestlé's motion to dismiss:

- An affidavit by the Paying Agent saying Nestlé delayed paying the cash due on a December 14, 2001 written demand-for-payment until December 18, 2001—*see* Bambach Aff. ¶10—and Exhs. 1a, 1b, and 1c attached to that affidavit. JLF 487–492.
- An affidavit by Carl Hagberg, who detailed his work in securities since 1960, his experience in all-cash mergers, and customs and practices in all-cash mergers involving publicly-traded shares. He expressed opinions about language in some of the documents in this merger, what customs and practices applied and were breached, and concluded, "Based upon my education, training, and experience, it is my professional opinion that, at the

very latest, DTC should have been paid the $8,880,809,766.50 of merger consideration in cash (i.e. in immediately available Federal Funds) on December 14, 2001. . . . [Nestlé's payment] on December 18, 2001 was untimely . . . ." JLF 493–501.

- Nestlé's own financial officer's November 14, 2001 handwritten notes (JLF 485) saying:

  —Theoretically, approval could happen before Thanksgiving [of 2001].

  —Pressure on the FTC to approve quickly, given recent delays in other deals.

  —FTC would not be happy if they knew we were trying to delay until late in the year/next year.

  - Once FTC approves, Nestlé is under contractual obligation to close within 2 business days after FTC approval.

  - Large bulk of the funds—merger consideration—will be needed the day after close.

It is undisputed FTC approved the merger on December 10, 2001 and per the merger agreement the merger was effective, and the close happened, two days later on December 12, 2001.

f. Factual findings by the Ohio appeals court itself used by Rolwing to argue against dismissal

Rolwing argued to the Missouri circuit court that while the Ohio appeals decision (relied on by Nestlé for *stare decisis*) wrongly adopted Nestlé's version of disputed facts over facts established by the Ohio plaintiff, no matter what, the decision itself recited facts showing there was at least one day of wrongful delay in payment (December 17, 2001 until December 18, 2001) and the decision never said why that one day was exempt from Missouri statutory interest. Following is that part of the Ohio decision:

> {¶ 32} On December 14, 2001, DTC instructed its disbursing agent, Continental Stock Transfer & Trust Company ('Continental'), to perform a book-to-book swing, or transfer, of its Ralston shares to Nestle's paying agent, Citibank. Donald Gress, the Vice President and Chief Operating Officer of Continental, stated this in his affidavit. He further stated that on the next business day, Monday, December 17, 2001, Continental effectuated an electronic transaction that confirmed that DTC's Ralston shares were transferred to Citibank. He confirmed that the transfer of shares took place on December 17, 2001.
>
> {¶ 33} Nestle then liquidated mutual funds on December 17, 2001

. . . . On Tuesday, December 18, 2001, Citibank paid DTC, and [plaintiff] was then paid.

Ruschel v. Nestle Holdings, Inc., 2008 WL 1903856 (Ohio App. May 1, 2008), ¶¶32–33. JLF 201.

Points relied on

Point 1

(ten-year limit, not five)

The trial court erred in its judgment dismissing the petition with prejudice by finding the petition is barred by RSMo § 516.120's five-year statute-of-limitations, because RSMo § 516.110's ten-year statute applies, in that the petition is an action on a writing (alleging breach of a written contract), seeks payment of money (i.e., money damages), and Rolwing filed his petition on March 30, 2011—less than 10 years after the closing of the underlying transaction on December 12, 2001.

- *Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615 (Mo. banc 1997)
- *Midwest Division–OPRMC, LLC v. Dept. of Social Servs.*, 241 S.W.3d 371 (Mo. App. W.D. 2007)
- *Zuvers v. Robertson*, 906 S.W.2d 892 (Mo. App. W.D. 1995)
- *Collins v. Narup*, 57 S.W.3d 872 (Mo. App. E.D. 2001)

Point 2

(petition timely because of tolling)

The trial court erred in its judgment dismissing the petition with prejudice by finding the petition is barred by RSMo § 516.120's five-year statute-of-limitations, because even assuming *arguendo* a five-year statute applies, it was tolled and the petition was timely, in that the petition alleged equitable tolling, and Nestlé's own dismissal arguments showed Rolwing's and the class's statute-of-limitations was tolled by the earlier Ohio class litigation which was pending in Ohio for some seven years.

- *Hyatt Corp. v. Occidental Fire & Cas. Co.*,
  801 S.W.2d 382 (Mo. App. W.D. 1990)
- *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974)
- *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)
- *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)

Point 3

(petition sufficiently alleges tolling)

The trial court erred in ruling *sua sponte* in its dismissal judgment that Rolwing did not sufficiently allege equitable tolling of the limitation period, and in dismissing the petition with prejudice, because Rolwing's petition sufficiently alleged equitable tolling and Nestlé waived any objection to the sufficiency of that invocation and even corroborated it, in that:

(a) the petition alleged at ¶32, "All statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition" therefore the petition did not clearly establish on its face and without exception it was barred by a statute-of-limitation defense; and

(b) Nestlé never argued the petition was deficient in any way in alleging tolling; Nestlé's own motion to dismiss even said how long the Ohio class litigation was pending and Nestlé also discussed tolling in detail in the May 22, 2012 hearing on Nestlé's motion to dismiss.

- *Sheehan v. Sheehan*, 901 S.W.2d 57 (Mo. banc 1995)
- *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33 (Mo. 2003)
- *Dietrich v. Pulitzer Publishing Co.*, 422 S.W.2d 330 (Mo. 1968)
- *State ex rel. Harvey v. Wells*, 955 S.W.2d 546 (Mo. banc 1997)

Point 4

(any dismissal should have been without prejudice, with leave to amend)

The trial court erred in its judgment dismissing the petition with prejudice based on its *sua sponte* finding that Rolwing did not sufficiently allege tolling of his statute-of-limitation by earlier Ohio class litigation, because the dismissal with prejudice was improper, in that even assuming *arguendo* the petition did not sufficiently allege tolling, (a) the dismissal should have been without prejudice to allow an amended petition, or (b) the circuit court should have granted Rolwing's motion to vacate, alter, or amend the judgment where—at the same time he filed that motion—he filed an amended petition curing any deficiency in alleging tolling.

- *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33 (Mo. 2003)
- *Dietrich v. Pulitzer Publishing Co.*, 422 S.W.2d 330 (Mo. 1968)
- *State ex rel. Harvey v. Wells*, 955 S.W.2d 546 (Mo. banc 1997)

Point 5

(dismissal improper on Nestlé's other arguments)

The trial court erred in its judgment dismissing the petition with prejudice because the petition was not subject to dismissal based on Nestlé's other arguments, in that Rolwing stated facts supporting a claim upon which relief can be granted and Nestlé and Rolwing even put the same evidentiary materials into the record which counter Nestlé's other arguments for dismissal.

- *Craft v. Philip Morris Companies, Inc.*,

  190 S.W.3d 368 (Mo. App. E.D. 2005)
- *Stern Fixture Co. v. Layton*, 752 S.W.2d 341 (Mo. App. E.D. 1988)
- *Kim v. Conway & Forty, Inc.*, 772 S.W.2d 723 (Mo. App. E.D. 1989)
- *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934 (Mo. 1960)

Argument

Point 1

(ten-year limit, not five)

The trial court erred in its judgment dismissing the petition with prejudice by finding the petition is barred by RSMo § 516.120's five-year statute-of-limitations, because RSMo § 516.110's ten-year statute applies, in that the petition is an action on a writing (alleging breach of a written contract), seeks payment of money (i.e., money damages), and Rolwing filed his petition on March 30, 2011—less than 10 years after the closing of the underlying transaction on December 12, 2001.

De novo standard-of-review

The appellate standard-of-review of a trial court's grant of a motion to dismiss is de novo. *City of Lake St. Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). "Whether the statute of limitations applies to an action is a question of law that is reviewed de novo." *Warren County Concrete, L.L.C. v. Peoples Bank & Trust Co.*, 340 S.W.3d 289, 290 (Mo. App. E.D. 2011).

"When an affirmative defense is asserted, such as a statute of limitation, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. . . . [The court] must allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to

the plaintiff." *Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. banc 1995) (internal quotation marks and citations omitted).

Matters of statutory interpretation and application of a statute to the facts are also reviewed de novo. *Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4, 23 (Mo. App. E.D. 2005).

Missouri law applies

There is no dispute Missouri law applies. Section 9.08 of the merger agreement (undisputedly the controlling document) says, "This Agreement shall be governed by, and construed in accordance with, the laws of the State of Missouri, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof."

Argument

The issue can be summarized as follows:

Missouri law provides that the statute-of-limitation for "[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property" is ten years. Rolwing filed his lawsuit within ten years of Nestlé's alleged breach of a written contract for the payment of money, seeking a judgment that Nestlé did not timely pay Rolwing and the class money Nestlé promised to pay in the contract, and seeking a money judgment. The trial court held that a five-year statute applied and dismissed the case. Was that error?

The ten-year statute applies because this case is about a written contract with a promise by Nestlé to pay money and Rolwing seeks a money judgment against Nestlé for paying late.

The petition was filed on time, based on the following critical facts:

- Nestlé was required to pay Rolwing and the class at least as early as December 14, 2001 under a written contract for the payment of $33.50 a share,
- Nestlé did not pay until December 18, 2001,
- the ten-year statute-of-limitation began to run on December 14, 2001 when the cause-of-action accrued, and
- Rolwing filed his petition on March 30, 2011, which was 9 years, 3 months, and 17 days after the alleged breach.

The circuit court concluded Rolwing's claim was for breach of incidental or implied terms of the merger agreement and thus fell within the "all actions upon contracts" language of the five-year statute, § 516.120(1).

That was wrong because the circuit court ignored the language of § 516.120(1) saying its five-year limit only applies to contracts not "mentioned in § 516.110" and that of § 516.110 itself. RSMo § 516.110(1) applies here because Rolwing seeks money in "an action upon any writing . . ., for the payment of money or property."

Section 516.120 provides: within five years:

> (1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; . . .

Section 516.110 provides: within ten years:

> (1) An action upon any writing, whether sealed or unsealed, for the payment of money or property;
> . . .
>
> (3) Actions for relief, not herein otherwise provided for.

The difference was explained in *Capital One Bank v. Creed*, 220 S.W.3d 874, 877–78 (Mo. App. S.D. 2007):

> One type of action § 516.110 exempts from those otherwise subject to § 516.120 is '[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property.' § 516.110(1). Those actions may be commenced within ten years. . . .
>
> '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.' *Barberi v. University City*, 518 S.W.2d 457, 458 (Mo. App. 1975).

Reading the two statutes together, it is apparent that the five-year limitation applies to actions on oral contracts and quasi-contracts.

Hughes Dev. Co. v. Omega Realty Co., 951 S.W.2d 615 (Mo. banc 1997) moved toward clarifying Missouri law on the issue. Hughes sued Omega for fees it contended Omega owed. Omega obtained summary judgment by invoking the five-year statute § 516.120(1). Hughes appealed and contended § 516.110(1) applied. *Hughes* rejected 150 years of precedent construing Missouri's ten-year statute of limitation, in favor of a plain-language construction of the statute. *Hughes*, 951 S.W.2d at 616–17. After listing many Missouri appellate decisions applying the ten-year § 516.110(1), *Hughes* found: "These cases have in common a rule that any writing containing a promise by the defendant to pay money falls under the ten-year statute of limitations where the plaintiff seeks monetary damages." *Hughes*, 951 S.W.2d at 616–17. *Hughes* applied the ten-year statute to the written contract claim and reversed the summary judgment against Hughes. *Hughes* found at 617 that, under earlier cases applying the five-year limitation of § 516.120(1),

> the rule seems to be that the contractual writing must establish an absolute and fixed liability without resort to extrinsic evidence. The

> language of these cases seems to limit application of the ten-year statute to financial instruments.
>
> Given the state of the case law, we are fully justified in ignoring the precedent in favor of the statute itself. . . . Taken at its plain meaning, section 516.110(1), 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. 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. This is the application of section 516.110(1), admittedly quite broad, that we adopt.

Rolwing's petition alleges:

- a written contract, being the merger agreement, a copy of which is attached to the petition (¶8);
- where Nestlé promised to pay money "promptly" to Rolwing and the class as third-party beneficiaries (¶10, citing § 9.07 of the merger agreement);
- Nestlé promised "to consummate and make effective, in the most expeditious manner practicable" all transactions contemplated by the

contract, including payment (¶13, citing § 6.03 of the merger agreement);

- Nestlé promised to provide to a Paying Agent the cash needed to pay for the shares of former book-entry shareholders promptly after the Effective Date (¶14, citing § 2.02(a) of the merger agreement);
- Nestlé violated the above promises by failing "to timely pay Rolwing and the class as required by the merger agreement" (¶33); and
- Nestlé owes damages in the form of statutory interest based on the late payment (petition p. 12).

(Petition and merger agreement attached to it, at JLF 10–64.) These allegations accordingly bring this action within the coverage of § 516.110(1) and its ten-year limitation period.

The circuit court wrongly relied on *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593, 594 (Mo. App. E.D. 1983) which cited *Silton v. Kansas City*, 446 S.W.2d 129, 132 (Mo. 1969). *Lato* focused on whether the alleged breach was of the "incidental or implied terms of the contract." But because of *Hughes*, *Lato* is no longer good law and represents courts "lurch[ing] unevenly from holding to holding" struggling to find a coherent reading of the two statutes. *Hughes*, 951 S.W.2d at 616. In any event, the circuit court misapplied *Lato*. Rolwing's claim is

that Nestlé breached its promise to pay the cash timely, stated as an amount of money to be paid ($33.50 a share) with promptness requirements, and further, § 2.02(d) of the merger agreement said the $33.50 a share was to be paid to Rolwing and the class "upon conversion" of their shares, and per § 2.01, this "conversion" was "at the Effective Time" which was on December 12, 2001. These were not incidental or implied terms.

In *Midwest Division–OPRMC, LLC v. Dept. of Social Servs.*, 241 S.W.3d 371 (Mo. App. W.D. 2007) two out-of-state hospitals alleged the Missouri Department of Social Services breached written provider agreements by paying those hospitals less than Missouri hospitals for the same services. The trial court ruled the five-year statute applied, limited damages to a five-year period, and said pre-judgment interest was not recoverable. The appeals court reversed on both issues, finding the ten-year statute applied. 241 S.W.3d at 384.

With respect to the claim for interest, the court did not address the statute-of-limitation issue separately but implied the ten-year statute applied to it as well. It held the plaintiffs were entitled to statutory interest and made no suggestion this claim was covered by the five-year statute. In fact, the court remanded to the trial court and expressly directed, "The trial court's application of the five-year statute of limitations and its denial of prejudgment interest are reversed [and it is ordered] that the judgment be modified to apply the ten-year statute of limitations and

include prejudgment interest on the award." 241 S.W.3d at 384–85. *Midwest* thus supports that the ten-year statute applies to a claim for statutory interest based on a written contract for the payment of money.

Also, the promise need not be stated in express terms so long as "the language of the writing, by fair implication, is open to the construction that it contains such a promise." *Zuvers v. Robertson*, 906 S.W.2d 892, 895 (Mo. App. W.D. 1995). And "once the plaintiff shows the fact of a promise, the plaintiff may use extrinsic evidence to show other details, including the exact amount due." *Collins v. Narup*, 57 S.W.3d 872, 874 (Mo. App. E.D. 2001). It does not matter that the ultimate amount to be paid is conditional or to be determined in the future: it is enough that a promise to pay appears on the face of the agreement so that extrinsic evidence is not needed to show the fact of a promise. *Id.*

Nestlé and the Court of Appeals would require that the money sought is that which Nestlé agreed to pay in a written contract. But RSMo § 516.110(1) does not require that. Even if that were the standard, this lawsuit still involves money promised to be paid in a written contract:

Nestlé's written contract agreeing to pay money involves at least two aspects: (1) the *face amount* agreed to be paid and (2) the *time* at which Nestlé agreed to pay it. *See Hemar Ins. Co. of America v. Ryerson*, 108 S.W.3d 90, 95 (Mo. App. E.D. 2003) (noting a cause-of-action for breach does not accrue until

there is "a failure to perform [1] at the time and [2] in the manner contracted"). Nestlé already paid the face amount; Rolwing is suing for Nestlé's failure to honor its *promise to pay money by the time it was due*. Rolwing asserts no special liability. He just wants the usual measure of damages for not paying money when it was due. Indeed, "interest" is simply "the measure of damages for failure to pay money when payment is due." *Denton Constr. Co. v. Missouri State Highway Comm'n*, 454 S.W.2d 44, 59 (Mo. 1970); *Midwest Division*, 241 S.W.3d at 384.

The Court of Appeals here correctly pointed out that *Armistead v. A.L.W. Group*, 60 S.W.3d 25, 27 (Mo. App. E.D. 2001) found that even an action seeking enforcement of a term other than the promise to pay money falls under RSMo § 516.110(1) because it is still an action for enforcement of the contract. The Court of Appeals here also correctly pointed out that *East Hills Condos. L.P. v. Tri-Lakes Escrow, Inc.*, 280 S.W.3d 728, 733–34 (Mo. App. S.D. 2009) found RSMo § 516.110(1) applied to an action for damages arising from a breach of contract that has a promise to pay money, even though the suit did not seek to recover any promised money. There, the appellant promised a landowner that appellant would disburse money to third-party construction contractors upon getting lien waivers. The appellant disbursed the money without the lien waivers, and the landowner sought damages incurred in resolving some contractors' claims that they were not paid. *Id.* at 729–30. The Southern District, citing *Hughes*'s

statement that its interpretation of RSMo § 516.110(1) is "admittedly quite broad" found the petition sought judgment against the appellant "as per the terms of the [a]greement" and therefore the ten-year statute applied. *Id.* at 734 (quoting *Hughes*, 951 S.W.2d at 617). The Court of Appeals here found that the rule in the Southern District seems to be that any suit arising from a writing that meets the threshold requirement (has a promise to pay money) is covered by RSMo § 516.110(1)'s ten-year statute.

The cases relied on by Nestlé and the Court of Appeals to argue for application of the five-year statute do not apply here.

Listed below are the cases Nestlé and/or the Court of Appeals cited as support for applying the five-year statute here. These do not support a five-year statute here for four main reasons:

1. The cases decided before September 30, 1997 pre-date *Hughes* and as such are among the precedents criticized in *Hughes*.

2. *Lackawanna* and *Lonergan* are federal cases that rely on Missouri cases before *Hughes*.

3. None involved statutory interest or have circumstances like here where promised money or property was paid late. By contrast, *Midwest Division*, relied on by Rolwing, involved statutory interest and was decided after *Hughes*.

4. In contrast to this case, none were "an action upon any writing . . . for the payment of money or property" or even promised payment of money or property:

- *Silton v. Kansas City*, 446 S.W.2d 129 (Mo. 1969) (claim against city and locker company for value of property stolen, *id.* at 132)
- *Sam Kraus Co. v. State Highway Comm'n*, 416 S.W.2d 639 (Mo. 1967) (breach-of-warranty based on things like "deficient engineering design and specifications, change order and delays of the defendant," *id.* at 640)
- *Sharpe v. Sharpe*, 243 S.W.3d 414 (Mo. App. E.D. 2007) (no contract in the first place, *id.* at 418)
- *Capital One Bank v. Creed*, 220 S.W.3d 874 (Mo. App. S.D. 2007) ("Plaintiff did not produce a written promise by defendant to pay money," *id.* at 878)
- *Lake St. Louis Cmty. Ass'n v. Oak Bluff Pres.*, 956 S.W.2d 305 (Mo. App. E.D. 1997) (suit for damages for not timely clearing a water channel and properly constructing a marina, *id.* at 309)
- *Hampton Foods Inc. v. Wetterau Finance Co.*, 831 S.W.2d 699 (Mo. App. E.D. 1992) (landlord's breach of covenants to make repairs, *id.* at 701)
- *Superintendent of Ins. of New York v. Livestock Mkt. Ins. Agency, Inc.*, 709 S.W.2d 897 (Mo. App. W.D. 1986) (indemnitor's promise to indemnify

using a complicated formula; no liquidated amount promised, *id.* at 898 & 902)

- *Harrison v O'Dell Equipment Co.*, 706 S.W.2d 908 (Mo. App. W.D. 1986) (failure to plumb house as part of purchase agreement, *id.* at 909)
- *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593 (Mo. App. E.D. 1983) (breach of express and implied warranties; contract was not for payment of money or property, *id.* at 594)
- *Lackawanna Chapter of Ry. & Locomotive Historical Soc'y, Inc. v. St. Louis Cnty.*, 606 F.3d 886 (8th Cir. 2010) (no written contract; instead action was based on replevin for locomotive displayed at St. Louis Museum of Transportation; express or implied bailment; specific performance, *id.* at 890)
- *Lonergan v. Bank of America, N.A., et al.*, 2013 WL 176024 (W.D. Mo. Jan. 16, 2013) (bait-and-switch, conspiracy, fraud; no claim for breach-of-written-contract: "Bank never agreed to pay the Lonergans money in a written contract." *Id.* at **2 & 4)

If anything the petition is timely under § 516.110(3)'s catch-all language.

If this case is not covered by RSMo § 516.110(1), then it is covered by the ten-year catch-all in § 516.110(3) which applies to "[a]ctions for relief, not herein otherwise provided for." This shows the legislature meant to favor a longer statute if there is any question about which applies.

Also, if Rolwing was suing to get paid the $33.50 a share itself, there would be no question that his entitlement to statutory interest would not be barred, so it makes no sense that by suing for statutory interest, his claim is time-barred. *See Midwest Division*, 241 S.W.3d at 384–85 (remand directing, "The trial court's application of the five-year statute of limitations and its denial of prejudgment interest are reversed [and it is ordered] that the judgment be modified to apply the ten-year statute of limitations and include prejudgment interest on the award.").

Point 2

(petition timely because of tolling)

The trial court erred in its judgment dismissing the petition with prejudice by finding the petition is barred by RSMo § 516.120's five-year statute-of-limitations, because even assuming *arguendo* a five-year statute applies, it was tolled and the petition was timely, in that the petition alleged equitable tolling, and Nestlé's own dismissal arguments showed Rolwing's and the class's statute-of-limitations was

tolled by the earlier Ohio class litigation which was pending in Ohio for some seven years.

De novo standard-of-review

The appellate standard-of-review of a trial court's grant of a motion to dismiss is de novo. *City of Lake St. Louis*, 324 S.W.3d at 759. "Whether the statute of limitations applies to an action is a question of law that is reviewed de novo." *Warren County Concrete*, 340 S.W.3d at 290.

"When an affirmative defense is asserted, such as a statute of limitation, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. . . . [The court] must allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff." *Sheehan*, 901 S.W.2d at 59 (internal quotation marks and citations omitted).

Matters of statutory interpretation and application of a statute to the facts are also reviewed de novo. *Boggs*, 164 S.W.3d at 23.

Argument

Even assuming for the sake of argument the five-year statute applies, the petition was timely because of tolling.

The pendency of the Ohio class action tolled the statute-of-limitations for all absent class members. *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d

382, 389 (Mo. App. W.D. 1990)—citing *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974) ("commencement of the original class suit" tolls running of statute-of-limitations "for all purported members of the class" until after denial of the class certification motion, *id.* at 553, or until they "chose not to continue" as a class member, *id.* at 551) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983) ("tolled for all members of the putative class until class certification is denied"). *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) further clarified that *American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class" whether the class was ultimately certified or not. Of note, *Eisen* does not draw an artificial distinction between cases where certification was actually denied and those where the case was ended before class certification was ruled on.

The Missouri legislature recognized class actions by adopting RSMo § 507.070.1—providing that "one or more" class members may sue "on behalf of all." Missouri courts also have Rule 52.08 for class actions.

Nestlé admitted during the May 22, 2012 hearing on its motion to dismiss that tolling from *Hyatt* and *American Pipe* applies at least to individual plaintiffs: "In both [*Hyatt* and *American Pipe*] the second suit was not a class action, it was a suit brought by individuals and, therefore, would be covered by the tolling rule in American Pipe." Tr. 39:20–23.

Thus, Nestlé admitted that Rolwing's individual statute-of-limitation was tolled by the Ohio litigation—because Nestlé admitted that Rolwing was a member of the Ohio class, and the Ohio litigation was pending for seven years. JLF 99, 184. With this in mind, there can be no question but that dismissal was improper at least with respect to the named plaintiff.

As for the rest of the class, Nestlé never sought a dispositive ruling against the class, and none was granted because that would have been wrong in that the circuit court certified a class on the same day it granted Nestlé's motion to dismiss, and no notice was issued to the class.

If Rolwing's own statute-of-limitation was tolled, there can be no dispute that all other class members' statutes were tolled—because any other class member could have—like Rolwing—filed this lawsuit and claimed the benefit of tolling. It is illogical to allow tolling for Rolwing but not other class members. There is no reason to penalize class members who happened not to be the named plaintiff here. Both the United States and Missouri constitutions guarantee equal protection of the laws. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"); Mo. Const. art. I, § 2 ("all persons . . . are entitled to equal rights and opportunity under the law").

Wherever a class action is first filed, a defendant is put on notice of the claims against it. The policies behind statutes-of-limitations are satisfied when

defendants have been "notifie[d] . . . not only of the substantive claims against them, but also of the number and generic identities of the potential plaintiffs." *American Pipe*, 414 U.S. at 555. Nestlé was put on notice of Rolwing's claim by the Ohio case as much as this case, thus "a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations." *Crown, Cork*, 462 U.S. at 352–53.

Also, the response to Nestlé's "sleeping on rights" argument is that if class actions are meant to limit recovery only to plaintiffs who know about and are seeking recovery, then class actions are not needed because all plaintiffs can and will sue individually or in joint actions, not class actions, as named parties. By providing for class actions, the Missouri legislature implicitly rejected Nestlé's proposed limitation.

Most other states which like Missouri have class action rules similar to Fed. R. Civ. P. 23 have followed *American Pipe* and endorsed class-action-tolling—many even citing *Hyatt*. Following is a non-exhaustive list of cases that have endorsed class-action-tolling, from newest to oldest:

- *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 399 (Del. 2013)
- *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 249 (Mont. 2010)
- *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002)

- *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Sup. Ct. App. Div. 1999)
- *Blaylock v. Shearson Lehman Bros., Inc.*, 954 S.W.2d 939, 941 (Ark. 1997)
- *Grimes v. Housing Auth. Of the City of New Haven*, 698 A.2d 302, 306 (Ct. 1997)
- *S.F. Unified Sch. Dist. v. W.R. Grace & Co.*, 44 Cal. Rptr. 2d 305, 317–18 (Cal. Ct. App. 1995)
- *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 531 (Colo. Ct. App. 1994), *aff'd in part and rev'd in part on other grounds*, 908 P.2d 1095 (Colo. 1995)
- *Warren Consol. Sch. v. W.R. Grace & Co.*, 518 N.W.2d 508, 511 (Mich. Ct. App. 1994)
- *Am. Tierra Corp. v. City of W. Jordan*, 840 P.2d 757, 761–62 (Utah 1992)
- *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986)
- *Carlson v. Indep. Sch. Dist. No. 283*, 370 N.W.2d 51, 55 (Minn. Ct. App. 1985)
- *Yollin v. Holland Am. Cruises, Inc.*, 468 N.Y.S.2d 873, 875 (N.Y. App. Div. 1983)
- *Levi v. Univ. of Hawaii*, 679 P.2d 129, 132 (Haw. 1984)

- *Waltrip v. Sidwell Corp.*, 678 P.2d 128, 133 (Kan. 1984)
- *Pope v. Intermountain Gas Co.*, 646 P.2d 988, 1010 n.28 (Idaho 1982)
- *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1041–42 (Alaska 1981)
- *First Baptist Church of Citronelle v. Citronelle–Mobile Gathering, Inc.*, 409 So. 2d 727, 729–30 (Ala. 1981)
- *Campbell v. New Milford Bd. of Educ.*, 423 A.2d 900, 905 n.6 (Conn. Super. Ct. 1980)
- *Arnold v. Dirrim*, 398 N.E.2d 426, 439–40 (Ind. Ct. App. 1979)
- *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 180 (Iowa 1977)
- *Bergquist v. Int'l Realty, Ltd.*, 537 P.2d 553, 561 (Or. 1975)

The Ohio class certification motions were never ruled on thus Nestlé's anti-piggybacking argument against tolling does not apply.

Nestlé argued in its reply brief that *Hyatt* and other tolling cases cited by Rolwing "did not involve the piggybacking of successive class actions" and cases cited by Nestlé "hold that *American Pipe* does *not* toll the statute of limitations when the plaintiff attempts to piggyback class actions." The appealed judgment at p. 9 adopted Nestlé's argument by saying the cases cited by Rolwing "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."

As pointed out in Rolwing's hearing brief filed May 21, 2012, Nestlé's "piggybacking" issue applies only where class certification was denied on the merits in the earlier action (JLF 615–617) (*see* following argument) but Rolwing's case does not involve an earlier denial of class certification or anyone trying to re-litigate the merits of an earlier denial. The Ohio court never ruled on class certification, thus it was never denied on the merits. The reasons for allowing tolling remain intact here and there is no reason for denying tolling for a later "piggy-back" case. As noted in *Crown, Cork,* 462 U.S. at 352–53 (internal citations omitted),

> a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations. . . . Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; [Federal] Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint 'notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.' The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of

> the class. Tolling the statute of limitations thus creates no potential for unfair surprise . . . .

A contrary holding would obliterate the resource-saving rationale behind the U.S. Supreme Court's rulings by making litigants file their own class actions to protect against the possibility of a class action not being certified—for example where the original litigant voluntarily dismisses the case or withdraws the motion for class certification before a ruling. *See, e.g., Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (Easterbrook, J.) ("If Atlas Heating is right, the only way Sawyer and the fax's other recipients could have protected their interests would have been to intervene before Park Bank threw in the towel. . . . The Court's goal of enabling members of a putative class to rely on a pending action to protect their interests can be achieved only if the way in which the first suit ends—denial of class certification by the judge, abandonment by the plaintiff, or any other fashion—is irrelevant."). *See also Great Plains Trust Co. v. Union Pacific R.R.*, 492 F.3d 986, 997 (8th Cir. 2007) (en banc):

> Whether the *American Pipe* rule applies to subsequent class actions . . . depends on the reasons for the denial of certification of the predecessor action. *See Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004) ('[W]here class certification has been denied solely on the basis of the lead plaintiffs' deficiencies . . . not because of the suitability of

the claims for class treatment, *American Pipe* tolling applies to subsequent class actions.') . . .; *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc) (holding that the filing of a previous class action tolled the applicable statute for a later class action where the later action was not an attempt to relitigate the denial of certification or correct a procedural deficiency in the purported class).

The federal appellate decisions cited by Nestlé for its claim that "[p]iggybacking of class actions has been repeatedly rejected" are irrelevant because unlike this case, those plaintiffs wanted tolling from earlier cases where class certification was denied:

- *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (class certification denied in earlier case)
- *Andrews v. Orr*, 851 F.2d 146, 149–50 (6th Cir. 1988) (same)
- *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (same)
- *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (same)
- *Catholic Soc. Servs.*, 232 F.3d at 1147 (same; and still finding earlier class action tolled statute-of-limitations for later class action)
- *Salazar–Calderon v. Presidio Valley Farmer's Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (statutes tolled until class certification denied)

Other anti-piggybacking cases cited by Nestlé do not apply here.

The other authorities relied on by Nestlé likewise do not apply:

- *Bright v. United States*, 2010 WL 1170512 (W.D. Mo. Mar. 23, 2010) conflicts with *Great Plains*, 492 F.3d at 997 ("[W]here class certification has been denied solely on the basis of the lead plaintiffs' deficiencies . . . not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions.") (quoting *Yang*, 392 F.3d at 111)); *see also Sawyer*, 642 F.3d at 563 (which even cites *Korwek*, *Salazar*, *Andrews*, *Griffin*, *Yang*, *Great Plains*, and *Catholic Soc. Servs.*—finding they all ruled that only an earlier denial of class certification stops tolling).

- *Farthing v. United Healthcare of the Midwest, Inc.*, 2000 U.S. Dist. LEXIS 21995 (W.D. Mo. Oct. 24, 2000) was effectively overruled by *Great Plains* and otherwise does not apply here. Although this unappealed trial court decision has some nonbinding *dicta* about "stacking of unsuccessful attempts of a class action upon unsuccessful attempt while continually tolling the statute of limitations" and "tolling indefinitely by successively dismissing cases and re-filing," Rolwing's lawsuit is not one of many later filings and, no matter what, class certification was never denied in the Ohio case.

- *In re Westinghouse Secs. Litig.*, 982 F. Supp. 1031 (W.D. Pa. 1997) was effectively overruled by *Yang*, 392 F.3d at 111 ("[W]here class certification

has been denied solely on the basis of the lead plaintiffs' deficiencies . . . not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions"). Also, although *Westinghouse* has some *dicta* about "abusive manipulations years after the original action was filed" and "*carte blanche* to make any tactical decisions they like . . . without any risk whatsoever" Rolwing's lawsuit is not one of many later filings and, no matter what, class certification was never denied in the Ohio case.

- *Newport v. Dell, Inc.*, 2008 WL 4347311, at *6 (D. Ariz.) and *Barela v. Showa Denko K.K.*, 1996 WL 316544 (D.N.M. Feb. 28, 1996) were effectively overruled by or conflict with *Catholic Soc. Servs.*, 232 F.3d at 1149.

- *Gao v. Mukasey*, 519 F.3d 376, 378 (7th Cir. 2008) and *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990) were effectively overruled by, *e.g.*, *Sawyer*, 642 F.3d at 562.

- *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1331 (8th Cir. 1995) was effectively overruled by *Great Plains*, 492 F.3d at 997.

Nestlé is wrong in saying "*American Pipe* and *Crown, Cork* do not apply to this case" and "the tolling rule of *American Pipe* only applies in the context of *federal* law."

Even assuming *arguendo* the holdings in the federal cases were limited to federal statutes-of-limitations, Missouri adopted the principle stated in these cases.

Hyatt (involving the Hyatt Regency skywalks collapse in 1981) held that the filing of a class action petition (referred to as the *Jacob* petition) on behalf of all rescuers (except policemen and firemen) tolled the Missouri statutes-of-limitations for all those rescuers—including those who later filed their own cases or settled their claims during the pendency of the *Jacob* class action. *Hyatt*, 801 S.W.2d at 389. Not only did *Hyatt* adopt the principle that filing a class action tolls the statute-of-limitations (in that case, a Missouri statute-of-limitation) for all class members, it cited *American Pipe*; *Eisen*; and *Crown, Cork* in support of its holding. Thus, the tolling rule of those three U.S. Supreme Court cases has been adopted in Missouri. *Hyatt*, 801 S.W.2d at 389 (earlier class action complaints "tolled the statutes of limitations on behalf of all putative [class members], including those who subsequently filed their own actions . . . . *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 . . .; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n. 13 . . .; *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 . . . ").

Also, none of these three U.S. Supreme Court cases limited its holding to federal statutes-of-limitations. *See also May v. AC & S, Inc.*, 812 F. Supp. 934, 938–39 (E.D. Mo. 1993) (rejecting argument that *Chardon v. Soto*, 462 U.S. 650 (1983) limits *American Pipe* tolling rule to federal tolling):

> Defendants contend that membership in the *Asbestos School Litigation* class action suit did not toll the running of the applicable Missouri statutes of limitations. . . .
>
> After a thorough reading of the relevant caselaw, this Court finds that plaintiffs' membership in the *Asbestos School Litigation* class action suit did toll the running of the applicable statutes of limitations until such time that plaintiffs opted out of the class. . . .

Nestlé is wrong in arguing cross-jurisdictional tolling cannot be allowed here.

Most recently, the Delaware Supreme Court in *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 399 (Del. 2013) rejected the kinds of arguments made by Nestlé and recognized class-action-cross-jurisdictional-tolling. *Dow* at 395–96 quoted *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 249 (Mont. 2010) which found that, although the defendant said cross-jurisdictional tolling has been

> 'widely rejected,' in reality the doctrine has seldom been squarely addressed, and it is clear that its outlines are still in the process of developing. Many of the cases [defendant] cites as 'rejecting' the doctrine, for example, are merely circuit court decisions looking to existing state law, finding no authority one way or the other, and declining to decide the issue without guidance from the state's high court.

Dow at 397 also held that any distinction between intra-jurisdictional and cross-jurisdictional tolling is fictional and contrary to the reasons for class-action-tolling:

> While *American Pipe* and its progeny all involved class actions and subsequent suits brought in the same jurisdiction, this factual distinction makes no legal difference. . . . [*American Pipe* analysis] is equally sound regardless of whether the original class action is brought in the same or in a different jurisdiction . . . .

Nestlé is wrong in arguing Rolwing had only one year after May 2008 to file his case. Instead RSMo § 516.230 (the Missouri savings statute) operates only "to extend, not to shorten the period of limitation."

"The purpose of § 516.230 is to extend the time for actions otherwise barred by the applicable statute of limitation. The statute operates 'to extend, not to shorten the period of limitation.'" *Dane v. Cozean*, 584 S.W.2d 120, 122 (Mo. App. E.D. 1979) quoting *Valley Farm Dairy Company, Inc. v. Horstmeier*, 420 S.W.2d 314, 316 (Mo. 1967).

Chardon, 462 U.S. at 661 cited by Nestlé does not hold otherwise, because that case (1) involved earlier denial of class certification and (2) merely supplied the *dictum* quoted by Nestlé (not relevant here) saying class members' interests are *further* vindicated (in addition to regular *American Pipe* tolling)—after denial of

class certification—by additionally giving class members the benefit of the state savings statute. Nowhere does *Chardon* claim to shorten any limitation period.

In *Chardon*, there were new class actions filed, with the benefit of tolling from earlier class actions. Despite tolling, the new cases were time-barred because the total time between when the claim first arose and the filing of the first action—plus the time between when class certification was denied and the filing of the new cases—was more than the one-year statute for that claim. The U.S. Supreme Court merely found the plaintiff could not get *more* tolling from any savings statute, because Puerto Rico did not have a savings statute. Thus, the *dictum* quoted by Nestlé is limited in its explanation to where a plaintiff wants to further extend a limit. Rolwing is not seeking to add a year onto his statute by using Missouri's RSMo § 516.230 savings statute.

Nestlé said *Great Plains*, 492 F.3d at 996–98 "concluded that the suit . . . was time-barred because it was filed *after* the period provided by the state savings true [*sic*] had expired." That is a wrong reading of *Great Plains* which merely found the plaintiff could not *further* extend its statute by six months using Kansas's six-month savings statute. The plaintiff filed past Kansas's five-year statute, and even with the benefit of tolling from two earlier piggybacked class actions, its claim was still time-barred. (The Eighth Circuit never found anything wrong with the plaintiff there relying on successive tolling from two earlier class actions and

even cited *Yang*, 392 F.3d at 111 and *Catholic Soc. Servs.*, 232 F.3d at 1149.) *Great Plains* merely said the plaintiff could not "claim that it was unfairly deprived of the ability to sue on account of the previous class actions" (after being given the benefit of tolling from those two successive earlier actions[1]) just because the plaintiff did not qualify for more tolling from Kansas's savings statute.

[1] The Eighth Circuit in *Yang* assumed tolling from the two earlier class actions, but the problem was—even with all that tolling, slightly more than five years (the Kansas statute-of-limitations) had expired. The plaintiff did not qualify for six more months of tolling from the Kansas savings statute because the new (third) lawsuit filed on January 10, 2006 was not filed within six months from January 26, 2004 when the second class action was dismissed. The slightly-more-than-five-years of statute-of-limitations that expired before the last (January 10, 2006) case was filed is calculated as follows:

- about three years from when the claim accrued until the first lawsuit was filed (April 1, 1999–March 28, 2002) +
- about one month from when the first case was dismissed without prejudice until a new one was filed (August 22, 2003–September 23, 2003) +
- about two years between dismissal without prejudice and a new filing (January 26, 2004–January 10, 2006) =
- slightly more than five years.

Flood risks

Nestlé said plaintiffs from across the country will flood Missouri with lawsuits to take advantage of a generous tolling rule. Nestlé listed a few cases from outside Missouri refusing to recognize class-action-cross-jurisdictional-tolling based mostly on flood-risk arguments. Nothing in the record shows any increase in cases filed in Missouri after *Hyatt*, however, and nothing shows ill effects from other states' accepting class-action-tolling. *Vaccariello*, 763 N.E.2d at 163 rejected this argument—saying cross-jurisdictional-class-action-tolling would relieve plaintiffs from having to flood courts with individual protective claims.

Nestlé asserts that cross-jurisdictional-tolling conflicts with a forum's being able to control its own judicial proceedings, courts should not have to handle stale claims, and statutes-of-limitations are a privilege to litigate. But as discussed below in Point 3, a statute-of-limitation is a non-jurisdictional affirmative defense waived if not pleaded by the defendant. Thus a forum is not really in control on this issue, can handle stale claims, and statutes-of-limitations do not create a privilege to litigate.

Point 3

(petition sufficiently alleges tolling)

The trial court erred in ruling *sua sponte* in its dismissal judgment that Rolwing did not sufficiently allege equitable tolling of the limitation period, and in dismissing the petition with prejudice, because Rolwing's petition sufficiently alleged equitable tolling and Nestlé waived any objection to the sufficiency of that invocation and even corroborated it, in that:

(a) the petition alleged at ¶32, "All statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition" therefore the petition did not clearly establish on its face and without exception it was barred by a statute-of-limitation defense; and

(b) Nestlé never argued the petition was deficient in any way in alleging tolling; Nestlé's own motion to dismiss even said how long the Ohio class litigation was pending and Nestlé also discussed tolling in detail in the May 22, 2012 hearing on Nestlé's motion to dismiss.

De novo standard-of-review

The appellate standard-of-review of a trial court's grant of a motion to dismiss is de novo. *City of Lake St. Louis*, 324 S.W.3d at 759. "Whether the statute of limitations applies to an action is a question of law that is reviewed de novo." *Warren County Concrete*, 340 S.W.3d at 290.

"When an affirmative defense is asserted, such as a statute of limitation, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. . . . [The court] must allow the pleading its broadest intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff." *Sheehan*, 901 S.W.2d at 59 (internal quotation marks and citations omitted).

Argument

The trial court's rejection of Rolwing's argument that his statute-of-limitation was tolled by the Ohio litigation was based on the court's *sua sponte* finding that the petition was deficient in alleging tolling because it was "merely conclusory" when it alleged at ¶32, "All statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition." This was error for several reasons.

First, there was not any reason for the original petition to allege tolling as Nestlé might not have raised a statute-of-limitation defense. RSMo § 509.090 and Rule 55.01 require a party to affirmatively plead statute of limitations in "pleading to a preceding pleading." A statute-of-limitation is a non-jurisdictional affirmative defense that is waived if not raised by the defendant. *See* RSMo § 509.400; *Lynch v. Lynch*, 260 S.W.3d 834, 837 (Mo. banc 2008)—citing RSMo § 509.090; *Agnew v. Union Constr. Co.*, 291 S.W.2d 106, 108–09 (Mo. 1956); and Rule 55.08.

Second, a pleader need only plead ultimate facts and need not plead the facts or circumstances by which the ultimate facts will be established. *Scheibel v. Hillis*, 531 S.W.2d 285, 290 (Mo. banc 1976). A petition should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 36 (Mo. 2003). *See also Dietrich v. Pulitzer Publishing Co.*, 422 S.W.2d 330, 334 (Mo. 1968) (with regard to an initial pleading like a petition, to the extent it may be ruled insufficient in any respect, "the party is afforded a reasonable time to file an amended pleading if desired"). Further:

> The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d). Rule 55.27(d) provides:
>
> > 'A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial . . . .'

State ex rel. Harvey v. Wells, 955 S.W.2d 546, 547 (Mo. banc 1997). *See also* RSMo § 509.310 (providing for party to move for more definite statement "of any

matter contained in a petition . . . which is not averred with sufficient definiteness or particularity").

Third, Nestlé never claimed the petition was deficient in alleging tolling. Indeed, in its dismissal briefing, Nestlé cited the Ohio litigation extensively, including details about dates of filing, granting of dispositive motions, etc. (and even put many things into the record from the Ohio case) to support its arguments for dismissal based on *stare decisis*.

Nestlé even admitted during the May 22, 2012 hearing that tolling from *Hyatt* and *American Pipe* apply at least to individual plaintiffs: "In both [*Hyatt* and *American Pipe*] the second suit was not a class action, it was a suit brought by individuals and, therefore, would be covered by the tolling rule in American Pipe." Tr. 39:20–23.

The petition should not have been dismissed in that it stated an exception to being time-barred.

By alleging that "[a]ll statutes of limitations related to this action have been equitably or otherwise tolled by facts and events outside of this Petition" the petition alleged an exception to being time-barred.

"When an affirmative defense is asserted, such as a statute of limitation, the petition may not be dismissed unless it clearly establishes on its face and without exception that it is barred. . . . [The court] must allow the pleading its broadest

intendment, treat all facts alleged as true, and construe the allegations favorably to the plaintiff." *Sheehan*, 901 S.W.2d at 59 (internal quotation marks and citations omitted); *City of Lake St. Louis*, 324 S.W.3d at 759 (court must treat the plaintiff's averments as true and liberally grant the plaintiff all reasonable inferences).

Point 4

(any dismissal should have been without prejudice, with leave to amend)

The trial court erred in its judgment dismissing the petition with prejudice based on its *sua sponte* finding that Rolwing did not sufficiently allege tolling of his statute-of-limitation by earlier Ohio class litigation, because the dismissal with prejudice was improper, in that even assuming *arguendo* the petition did not sufficiently allege tolling, (a) the dismissal should have been without prejudice to allow an amended petition, or (b) the circuit court should have granted Rolwing's motion to vacate, alter, or amend the judgment where—at the same time he filed that motion—he filed an amended petition curing any deficiency in alleging tolling.

Standard-of-review

The standard-of-review for denial of a motion to amend a pleading is abuse of discretion. *Sheehan v. Northwestern Mut. Life Ins. Co.*, 44 S.W.3d 389, 394 (Mo. App. E.D. 2000) but with regard to an initial pleading like a petition, to the

extent it may be ruled insufficient in any respect, "the party is afforded a reasonable time to file an amended pleading if desired." *Dietrich*, 422 S.W.2d at 334.

Argument

If anything, the trial court's judgment should have been without prejudice and allowed Rolwing to file an amended petition to cure any deficiency.

A petition should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. *Grewell*, 102 S.W.3d at 36. *See also* Mo. Sup. Ct. R. 67.06 ("On sustaining a motion to dismiss a claim, . . . the court shall freely grant leave to amend"); *Dietrich*, 422 S.W.2d at 334 (with regard to an initial pleading like a petition, to the extent it may be ruled insufficient in any respect, "the party is afforded a reasonable time to file an amended pleading if desired").

The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d). Rule 55.27(d) provides:

> 'A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party

properly to prepare responsive pleadings or to prepare generally for trial . . . .'

State ex rel. Harvey, 955 S.W.2d at 547. *See also* RSMo § 509.310 (providing for a party to move for a more definite statement "of any matter contained in a petition . . . which is not averred with sufficient definiteness or particularity").

The trial court should have vacated its judgment based on the amended petition filed November 16, 2012.

The court dismissed "this case with prejudice because it is time barred" but pointed out "[u]nder Rule 75.01 this Court retains control over the judgment for thirty days and will vacate, correct or amend this Judgment and Order if Plaintiff shows good cause to do so, in particular if Plaintiff can state a legally sufficient reason that this action is not time barred." Order at p. 9. Rolwing timely moved for reconsideration, and, accordingly, his motion should have been granted under Rule 75.01.

Rolwing cured any deficiency in alleging tolling by filing an amended petition on November 16, 2012 at the same time he filed his motion to vacate, alter, or amend the dismissal.[2] The petition's ¶32 was amended to allege more detail about tolling from the earlier Ohio class litigation. JLF 691–692. Thus, the trial court erred in not granting leave to file an amended petition, and then in not vacating, altering, or amending its judgment where the amended petition more-than-sufficiently alleged tolling.

[2] Rolwing properly filed his amended petition without leave of court because "[a] pleading may be amended once as a matter of course at any time before a responsive pleading is served. . . ." Rule 55.33(a). Nestlé's motion to dismiss was not a "responsive pleading" that took away Rolwing's unilateral right to amend under Rule 55.33(a). *Breeden v. Hueser*, 273 S.W.3d 1, 14 (Mo. App. W.D. 2008); *State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo. banc 2005).

Point 5

(dismissal improper on Nestlé's other arguments)

The trial court erred in its judgment dismissing the petition with prejudice because the petition was not subject to dismissal based on Nestlé's other arguments, in that Rolwing stated facts supporting a claim upon which relief can be granted and Nestlé and Rolwing even put the same evidentiary materials into the record which counter Nestlé's other arguments for dismissal.

Standard-of-review

The dismissal of a petition for failure to state a cause-of-action is reviewed de novo. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. banc 2007).

The appellate court must affirm the dismissal if any ground asserted in the motion to dismiss is proper. *Mobius Mgmt. Sys., Inc. v. W. Physician Search, L.L.C.*, 175 S.W.3d 186, 188 (Mo. App. E.D. 2005).

A motion to dismiss for failure to state a cause-of-action is solely a test of the adequacy of plaintiff's petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). The plaintiff's averments are taken as true and the plaintiff is given all reasonable inferences. *City of Lake St. Louis*, 324 S.W.3d at 759. No attempt is made to weigh any facts alleged. *Nazeri*, 860 S.W.2d at 306. Dismissal is not warranted "unless it appears that the plaintiff can prove no set of facts in

support of the claim that would entitle the plaintiff to relief." *Goe v. City of Mexico*, 64 S.W.3d 836, 839–40 (Mo. App. E.D. 2001). A petition is sufficient if it "invokes substantive principals of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial." *Grewell*, 102 S.W.3d at 36.

Argument

The trial court dismissed based on Nestlé's statute-of-limitation argument and overruled Nestlé's other arguments. Nestlé alleged no error in overruling those arguments, but Rolwing submits this Point 5 should this Court undertake that analysis.

The trial court properly overruled Nestlé's *stare decisis* argument.

Nestlé claimed that an earlier Ohio appeals court decision finding Nestlé not liable to an individual Ohio plaintiff was binding on the Missouri circuit court under a theory of *stare decisis*. Rolwing argued against *stare decisis* as a basis for dismissal by pointing out that Missouri courts are not bound by the Ohio decision, and neither res judicata nor collateral estoppel apply because Rolwing was not a named plaintiff in Ohio and class certification was never ruled on there. *See* JLF 469–472.

Nestlé made statements confirming this:

- "On May 15, 2007, the Ohio trial court, Cuyahoga County Ohio, granted Nestlé's Motion for Summary Judgment without deciding the plaintiff's Motion for Class Certification. Counsel appealed. On May 1, 2008, the Ohio Court of Appeals affirmed the judgment of the trial court." Tr. 25:7–12.
- "Plaintiff [Rolwing] is correct that strict principles of *res judicata* or collateral estoppel do not apply in the absence of an order granting class certification, but that doesn't mean he can ignore the *stare decisis* effect of the Ohio decision." JLF 186.
- "Now, it may be technically correct to say that Mr. Rolwing and the class are not bound by the Ohio decision, but that certainly doesn't mean that you shouldn't follow it or that you should ignore it." Tr. 27:22–25.

Nestlé opposed class certification in Ohio and it was never ruled on—thus Nestlé should not be heard to complain about Rolwing filing this case. The Ohio judgment is binding on the Ohio plaintiff only. *See* Restatement (Second) of Law of Judgments § 41(1)(e) ("A person who is not a party to an action but who is represented by a party is bound by . . . a judgment [where the representative of a class is] . . . [t]he representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member").

Missouri courts agree with this—using analysis directly applicable here, as stated in *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 884–85 (Mo. banc 2008):

> Rule 52.08(b)(1)(B) does not apply here because a loss by one plaintiff in an individual nuisance suit would not impede the ability of a second plaintiff to pursue a separate action. Missouri follows the 'narrow use of offensive collateral estoppel laid down in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–37, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).' *James v. Paul*, 49 S.W.3d 678, 685 n. 5 (Mo. banc 2001). Under that rule, no party can be bound by a judgment unless she was in privity with the parties to that judgment. *See Parklane Hosiery Co.*, 439 U.S. at 327 n. 7, 99 S.Ct. 645 ('It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard'). Therefore, the individual homeowners will not be bound by judgments reached in individual cases.

As stated in *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 376 & 380 (Mo. App. E.D. 2005):

> The parties have also directed us to trial court decisions and unpublished appellate court decisions from other states . . . . These are neither binding nor persuasive precedent in this court. *See State v.*

Goodwin, 43 S.W.3d 805, 814 (Mo. banc 2001).

. . .

Out-of-state appellate decisions do not constitute controlling precedent in Missouri courts. *United Fire & Cas. Co. v. Tharp*, 46 S.W.3d 99, 105 (Mo. App. S.D. 2001).

Nestlé gave a partial quote of non-binding *dictum* from *Smith v. Bayer*, 564 U.S. ___, 131 S. Ct. 2368 (2011) dealing with the federal Anti-Injunction Act to argue in favor of *stare decisis*. But Rolwing's case has nothing to do with the federal Anti-Injunction Act, and most important, Nestlé omitted the rest of the quoted paragraph: "We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment." *Smith*, 131 S. Ct. at 2381. "A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions." *Id.* at 2379. Those exceptions include "an unnamed member of a *certified* class." *Id.* "So in the absence of a certification under [federal Rule 23], the precondition for binding [the absent class member] was not met. Neither a proposed class action nor a rejected class action may bind nonparties." *Id.* at 2380 (pointing out that the U.S. Supreme Court unanimously rejected that "virtual representation" could "bind[] nonparties . . . based on 'identity of interests and some kind of relationship between parties and non-parties'" [citing and quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)]).

Also, the policy concern in *Smith* is not present here. This case does not involve serial relitigation of denial of class certification like in *Smith* (which the Court said a federal injunction could not be issued against anyway).

In any event, the Ohio decision is not persuasive.

Nestlé cited *Triplett v. Shafer*, 300 S.W.2d 528 (Mo. App. 1957) to argue for recognizing *stare decisis*, but this says at 530 that a case must be persuasive in the first place for *stare decisis* even arguably to apply. Rolwing established that the Ohio decision is not persuasive or binding and should be ignored, most notably because:

a. It ignores Nestlé's own payment timeline showing the cash was paid late.

The Ohio decision finding that the December 18, 2001 payment was not late ignored Nestlé's own financial officer's handwritten notes showing the merger cash was due well before December 18, 2001. As detailed above in the statement-of-facts, the notes say FTC could approve before Thanksgiving of 2001, and "Once FTC approves, Nestlé is under contractual obligation to close within 2 business days after FTC approval. Large bulk of the funds—merger consideration—will be needed the day after close." Also as detailed above in the statement-of-facts, the FTC approved the merger on December 10, 2001 and, per the merger agreement, the merger was effective and the close happened two days later on December 12,

2001; per § 2.02(d) of the agreement the $33.50 per share was to be paid to Rolwing and the class "upon conversion" of their shares, and per § 2.01, this "conversion" was "at the Effective Time" and per § 2.01(c), the "conversion" was "into the right to receive $33.50 in cash (the 'Merger Consideration')." JLF 32–33.

b. It ignores *Stern Fixture Co. v. Layton*, 752 S.W.2d 341 (Mo. App. E.D. 1988) and other Missouri cases.

The petition seeks statutory interest based on late payment of a liquidated amount arising out of a written contract for payment of money. Petition ¶¶33–35, 38, and request for relief. Under Missouri law, contractual "without interest" provisions like the one cited by Nestlé in the merger agreement do not prevent recovery of statutory interest for delays in payment. For example, *Stern Fixture Co. v. Layton*, 752 S.W.2d 341 (Mo. App. E.D. 1988) dealt with a promissory note with a "without interest" provision and held that there still was "no discretion but to award" statutory 9% interest from when the liquidated claim became due and payable. *Id.* at 343. "Pre-judgment interest was therefore mandated." *Id.* at 344.

Similarly in *Kim v. Conway & Forty, Inc.*, 772 S.W.2d 723 (Mo. App. E.D. 1989) a construction company (seller) received deposits from buyers under an agreement providing all deposits "shall be retained by Seller without interest." *Id.* at 724. Seller refused to transfer title to buyers. Buyers demanded return of their

earnest-money and other deposits but seller refused. Buyers got a verdict against seller, the trial court added statutory prejudgment interest, and this the appeals court affirmed:

> Sellers contend the trial court erred in awarding prejudgment interest. We disagree. The prejudgment interest statute, Section 408.020, RSMo (1986), permits a trial court to add prejudgment interest from the date of demand until judgment if a party establishes a claim under the demand. *Errante v. Kadean Real Estate Service, Inc.*, 664 S.W.2d 27, 30 (Mo. App. E.D. 1984).
>
> Purchasers made demand on March 13, 1985, the same date they claimed Sellers breached the contract . . . . Therefore, on that date, the contract provisions, including paragraph 18 providing that Seller would retain deposits without interest, were no longer binding upon the parties.

Id. at 727.

Like the plaintiffs in *Kim v. Conway & Forty, Inc.*, here The Depository Trust Company (DTC) as nominee for Rolwing and the class made its demand for payment on December 14, 2001 (*see* Bambach Aff.) and Nestlé delayed payment until December 18, 2001. Under Missouri law, statutory interest must be awarded at 9% per annum for the four days. *See Gary Realty Co. v. Sweeney*, 17 S.W.2d

505, 509 (Mo. 1929). The Ohio appeals court wrongly ignored Missouri's mandatory-interest statute, RSMo § 408.020. "Absent proof that a rate of interest after maturity was agreed upon, the rate provided by law applies. Section 408.020; *Reitz v. Pontiac Realty Co.*, 316 Mo. 1257, 293 S.W. 382, 385." *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 942 (Mo. 1960).

Also, the merger agreement cannot be interpreted to allow Nestlé to benefit from its breach. This is a universally-recognized public policy principle. *Perry v. Strawbridge*, 108 S.W. 641, 643–44 (Mo. 1908). *Malan Realty Investors v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997) cited the public policy exception in enforcing contract terms, expressed in *First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995).

c. The two other Missouri Court of Appeals decisions cited by Nestlé and the Ohio appeals court are not persuasive here.

Nestlé cited *A.C. Jacobs & Co. v. Union Electric Co.*, 17 S.W.3d 579, 585 (Mo. App. W.D. 2000) and *Manfield v. Auditorium Bar & Grill, Inc.*, 965 S.W.2d 262, 269–270 (Mo. App. W.D. 1998) for the proposition that "cases uphold such a 'no interest' provision as in compliance with § 408.020."

These cases are distinguishable, and in any event are contrary to the more well-reasoned *Stern* and *Kim* decisions above. For example, *Jacobs* involved interest sought on voluntary "utility billing adjustments" by a regulated utility,

which the Court did not view as a liquidated claim.[3] Likewise, *Manfield* involved many disputes over amounts owed, and the appeals court recognized in its opinion at 269 that the appellants argued in their briefing that "there was no evidence in the record from which to find if and when the claims became liquidated." Accordingly, the appeals court refused to impose statutory prejudgment interest on amounts awarded by the trial court.

Here the amount is liquidated—making *Jacobs* and *Manfield* easily distinguishable. Moreover *Jacobs* and *Manfield* ignore the principle in *State ex rel. Stern Bros.*, 337 S.W.2d at 942 quoted above that, "Absent proof that a rate of interest after maturity was agreed upon, the rate provided by law applies. [RSMo §] 408.020; *Reitz v. Pontiac Realty Co.*, 316 Mo. 1257, 293 S.W. 382, 385."

[3] "'[I]n the absence of an agreement to the contrary, interest is not recoverable on an unliquidated demand.'" *Bolivar Insulation Co. v. R. Logsdon Builders, Inc.*, 929 S.W.2d 232, 236 (Mo. App. S.D. 1996) quoting *Burger v. Wood*, 446 S.W.2d 436, 443 (Mo. App. 1969). "'In order to be liquidated so as to allow interest, the claim must be fixed and determined or readily determinable, but it is sufficient if it is ascertainable by computation.'" *Id.* quoting *Schnucks Markets, Inc. v. Cassilly*, 724 S.W.2d 664, 668 (Mo. App. E.D. 1987).

d. No rate of interest after demand was agreed upon in the writing. Nestlé and the Ohio appeals court misinterpreted the merger agreement, did not apply the correct Missouri rules of construction, and otherwise were wrong in saying no-interest language in § 2.02 applied to the class here.

Nestlé and the Ohio appeals court relied on the following in § 2.02(b) of the merger agreement (JLF 33) (emphasis added):

> Until *surrendered* as contemplated by this Section 2.02, each *Certificate* shall be deemed at any time after the Effective Time to represent only the right to receive upon such *surrender* the amount of cash, without interest, into which the shares of Company Common Stock theretofore represented by such *Certificate* have been converted pursuant to Section 2.01. No interest shall be paid or accrue on the cash payable upon *surrender* of any *Certificate*.

"Certificate" and no-interest language did not apply to the Ohio plaintiff, Rolwing, or any other book-entry shareholders (who were not even issued certificates). *See Enterprise Bank v. Magna Bank of Missouri*, 894 F. Supp. 1337, 1345 (E.D. Mo. 1995) ("The shares previously represented by these certificates were reissued in uncertificated, book-entry form in the name of Cede & Co.

[nominee for The Depository Trust Company] . . . Thus, no physical stock certificates . . . existed . . . .").

The Ohio appeals court wrongly claimed an "actual stock certificate was held by The Depository Trust Company ('DTC')." *Ruschel v. Nestle* (Ohio App.) at ¶27. JLF 200. That is wrong (and supported by nothing in the record), is contradicted by evidence in the record, and ignores that "surrender" and "Certificate" did not apply to Cede or DTC. *See* Hagberg and Bambach affids. JLF 487–501.

Also, the merger agreement limited no-interest to that "cash payable upon surrender of any Certificate." The Ohio appeals decision wrongly found "the terms of the merger agreement are plain and clear and apply to all shareholders of record [and this] includes the 'without interest' provision." *Ruschel v. Nestle* (Ohio App.) at ¶26. JLF 200. This is wrong because it ignores that when the merger agreement applies to all shareholders, it uses the generic term "shares" instead of the more-specific term "Certificates." For example § 2.02(d) says, "The Merger Consideration paid in accordance with the terms of this Article II *upon conversion* of any *shares* of Company Common Stock shall be deemed to have been paid in full satisfaction of all rights pertaining to such *shares*" (emphasis added). JLF 33. Only holders of surrendered "Certificates" (a subset of all shareholders) were

subject to §§ 2.02(b) and 2.01(c)(2)'s "without-interest" language. Rolwing and the class he represents are not in that subset.

"Without interest" also is never mentioned in the definition of "merger consideration." For example, the agreement says, with no mention of "without interest" that "each issued share of common stock . . . shall be converted into the right to receive $33.50 in cash" (merger agreement at top of p. 1, JLF 31)); "each issued share . . . shall be converted into the right to receive $33.50 in cash (the 'Merger Consideration')" (agreement § 2.01(c)(1), JLF 32)); and "Parent shall cause the Surviving Corporation to provide to the Paying Agent . . . cash necessary to pay for the shares . . . converted into the right to receive cash pursuant to Section 2.01(c)" (agreement § 2.02(a), JLF 33)).

The Ohio appeals court also is wrong at ¶23 when it says "it is clear that the surrender requirement was meant to apply to each issued share of company common stock, regardless of the form in which it was held." *Ruschel v. Nestle* (Ohio App.) at ¶23. JLF 199. All "shares" were automatically cancelled December 12, 2001 and could not be subject to any "surrender" requirement. Instead, the Certificates discussed above represented a subset of "shares": those where negotiable stock Certificates had to be physically surrendered with transmittal letters ("certificate representing *any such shares* . . .") (Ohio appeals opinion at ¶23, emphasis *sic*). This is not the same as saying "certificate

representing any shares." "Such" restricts it to Certificates. The Ohio appeals court was wrong in expanding "surrender" to apply to all "shares." This was made even more clear by the affidavits attached to the Ohio plaintiff's brief opposing Nestlé's motion for summary judgment. *See, e.g.*, Hagberg Aff. quotes above, and Bambach Aff. ¶¶8–10. The Ohio appeals court ignored those affidavits.

The Ohio appeals decision also wrongly says that § 2.02 of the merger agreement addresses "exchange of any outstanding shares." *Ruschel v. Nestle* (Ohio App.) at ¶24. JLF 199. That is wrong because the agreement only talks about exchange of Certificates. And again all "shares" were automatically cancelled and ceased to exist on December 12, 2001.

e. The circuit court rightly rejected Nestlé's argument that custom and practice is irrelevant.

Rolwing attached to his brief opposing dismissal an affidavit by an expert with extensive experience since 1960 in securities and merger-payments. Hagberg Aff. This discussed customs and practices in cash mergers, and said § 2.02 of the merger agreement—where "without interest" is referred to—is a description only of how paying agents pay merger cash to shareholders who are mailed letters of transmittal that have to be filled out and returned with physical stock certificates. Section 2.02 did not apply to book-entry shareholders (Rolwing and the class here). Instead, the custom and practice for paying book-entry shareholders in a

different way was so well established that it was in the paying agent agreement (which was mentioned in the merger agreement at § 2.02(a), JLF 33). Hagberg Aff. ¶27 (JLF 499).

Rolwing and the Ohio plaintiff also provided paying agent testimony about this. *See* Bambach Aff. explaining that § 2.02 of the merger agreement described only the method for paying certificate holders and did not reflect the custom and practice for paying book-entry shareholders. On behalf of book-entry holders, DTC was entitled to a much-quicker electronic payment not involving physical surrender of Certificates with transmittal letters. As shown by the Hagberg and Bambach affidavits, Nestlé did not comply with that custom and practice.

The Ohio appeals court also wrongly ignored that under Missouri law, custom and usage can be evidence of the parties' intentions—and by implication can create provisions or obligations in contracts not there expressly (*see Horner v. David Distributing Co.*, 599 S.W.2d 100, 103 (Mo. App. S.D. 1980)) and can even supply terms left out of a contract. *Dial v. Lathrop R–II School Dist.*, 871 S.W.2d 444, 449 (Mo. banc 1994). The only Missouri Supreme Court decision cited by the Ohio appeals court was *Malan Realty Investors*, 953 S.W.2d at 626–27 which cited *Smith v. Lockwood*, 907 S.W.2d 306, 308 (Mo. App. W.D. 1995) for the proposition that, "If the contract terms are unequivocal, plain, and clear, the court is bound to enforce the contract as written." But the Ohio appeals court ignored

the exception where, as here, even if one party claims the terms are apparently clear on their face, there is a latent ambiguity. As explained by another Missouri Supreme Court opinion:

> Ambiguities in written instruments may be of two kinds: (1) patent, arising upon the face of the documents, and (2) latent. A 'latent ambiguity' arises where a writing on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain.
> . . .
> [Here], a latent ambiguity existed and consideration of external matters was necessary to determine the true intent of the parties.

Royal Banks of Missouri v. Fridkin, 819 S.W.2d 359, 362 (Mo. banc 1991) (citations omitted); *see also Boone County v. Blue Cross*, 526 S.W.2d 853, 857 (Mo. App. 1975) (terms were clear on face but latent ambiguity existed, allowing extrinsic evidence); *Prestigiacamo v. Am. Equitable Assur. Co.*, 221 S.W.2d 217, 221 (Mo. App. 1949) (same).

The Ohio appeals court wrongly refused to apply Missouri's latent ambiguity principle or consider the Ohio plaintiff's extrinsic evidence.

The Ohio appeals court also wrongly ignored that under Missouri law, extrinsic evidence is admissible even without a determination that a contract is ambiguous when submitted for the purpose of "interpreting" as opposed to

"construing" terms. *Monsanto Co. v. Syngenta Seeds, Inc.*, 226 S.W.3d 227, 232–33 (Mo. App. E.D. 2007) ("interpretation" and "construction" are terms of art in contract law, and extrinsic evidence may be admitted to aid in the former but generally not in the latter). This distinction was also discussed in detail in *Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 306 S.W.3d 185, 191–92 (Mo. App. E.D. 2010).

f. Other reasons the Ohio appeals decision was wrong

i. It wrongly found a "deemed" surrender of shares.

It wrongly talks about a "deemed" surrender of "shares" by DTC. *Ruschel v. Nestle* (Ohio App.) at ¶28. JLF 200. There were no "shares" after December 12, 2001 that could be surrendered. Also, all discussion of Mr. Gottlieb's testimony ignored that he said he knew nothing about this merger and his testimony was contradicted by testimony by more competent witnesses who studied the paperwork and other details of the merger. The Ohio appeals court erred in choosing to believe Gottlieb's unsubstantiated testimony and ignoring conflicting testimony (i.e., weighing the evidence). *See* Bambach and Hagberg affidavits.

ii. It wrongly relied on testimony about a "book-to-book swing."

It wrongly found payment was not late because there was testimony about something called a "book-to-book swing." *Ruschel v. Nestle* (Ohio App.) at ¶32.

JLF 201. That came from an officer of Continental Stock Transfer (CST) who said that "on the next business day, December 17, 2001, CST effected an electronic transaction that *confirmed* that the 265,098,799 shares *were* swung to Citibank" (emphasis added). The appeals court wrongly chose to believe this meant that CST's officer "confirmed that the transfer of shares took place on December 17, 2001" (opinion at ¶32). That is not what the CST officer said, and most important, the officer talked about an after-the-fact confirmation of a reconciliation of how many shares were *earlier* reflected in DTC's records.

The appeals court also wrongly ignored the following testimony of Nestlé's Paying Agent that a book-to-book swing was just an after-the-fact accounting entry and not a precondition to payment:

> After a sale or purchase of shares, or, as in a merger, when shares are cancelled, the transfer agent provides a confirmation of the transaction to DTC. A confirmation is not needed to provide authority to a paying agent to release merger consideration from a merger escrow account to DTC. Instead, the SCL [payment demand or presentment] from DTC provides the paying agent with such payment authority.

Bambach Aff. ¶14.

iii. It wrongly ignored the last day of delay.

The appeals court improperly further acted as a fact-finder by finding the final day of delay from December 17, 2001 through December 18, 2001 was something to ignore. *Ruschel v. Nestle* (Ohio App.) at ¶¶33–34. JLF 201. That is wrong because the record had expert and other testimony that payment was indeed late—including the last day. *See*, *e.g.*, Bambach Aff. ¶10 (paying agent received valid demand for payment from DTC before 11:15 a.m. Eastern Time on December 14, 2001 which gave the paying agent immediate authority to pay the merger cash to DTC) (JLF 488–489); Hagberg Aff. ¶34 ("Based upon my education, training, and experience, it is my professional opinion that payment of the $8,880,809,766.50 to DTC on December 18, 2001 was untimely, and should have been paid, at the very latest, on December 14, 2001") (JLF 501). Most important, the Ohio decision never explained why it was ignoring this last day of lateness.

iv. It wrongly paraphrased testimony and ignored that it was contradicted by other testimony.

It inaccurately paraphrased Nestlé's witness's testimony by claiming he said "it is typical to have one, two, or more days pass between the time that DTC provides payment instructions and the date DTC is paid merger consideration." *Ruschel v. Nestle* (Ohio App.) at ¶31. JLF 201. That is not what he said, and no

matter what, it was contradicted by testimony and other evidence showing payment on December 18, 2001 was late by at least four days. *See*, *e.g.*, Bambach Aff. ¶10; Hagberg Aff., last para. Again, the Ohio appeals decision improperly weighed evidence.

v. It wrongly relied on a quote from a proxy statement.

The Ohio decision wrongly argued that language in Ralston's proxy statement supports Nestlé's argument it is not liable to pay interest. But the proxy statement made clear that the proxy statement and the Merger Agreement were two different documents, and the Merger Agreement controlled. *See*, *e.g.*, proxy statement, p. 23 (attachment 9 to Ohio brief opposing summary judgment—JLF 164):

> The following is a summary of the material terms of the merger agreement. The summary is qualified in its entirety by reference to the merger agreement, a copy of which is attached to this proxy statement as Appendix A and is incorporated herein by reference.

The proxy even contradicted Nestlé's arguments in that it omitted without-interest language and said payment would be made "upon consummation of the merger":

> [In the cover letter to shareholders:] you will receive $33.50 in cash for each of your shares of common stock.
>
> [On p. i:] Upon consummation of the merger, you will receive $33.50 in cash for each of your shares of Ralston Purina common stock . . . .

The trial court correctly declined to dismiss based on new arguments made by Nestlé in its reply and surreply dismissal briefs.

a. Nestlé's argument that there was no liquidated amount

Since the petition details at ¶¶12 & 34 how demand for payment was for a liquidated amount, the circuit court correctly disregarded Nestlé's argument that the demand for payment was not for a liquidated amount.

b. Nestlé's argument that there was no due date

The circuit court rightly disregarded Nestlé's argument that the merger agreement had no payment due date. The merger agreement provides a payment due date at § 2.02(d): the Merger Consideration was to be paid "upon conversion" of the shares, and per § 2.01 this "conversion" was "at the Effective Time." JLF 33. There is no dispute the Effective Time was on December 12, 2001. And per § 2.01(c), the "conversion" was "into the right to receive $33.50 in cash (the 'Merger Consideration')" (JLF 32). This is alleged in the Petition at ¶¶11 & 14.

Rolwing concedes under Missouri law Nestlé is not liable for interest until DTC requested payment on December 14, 2001. Rolwing argued to the circuit court that it is really Nestlé that should be making a "custom and practice" argument that payment was not due until December 14, rather than December 12. In any event, custom and practice would merely fill in for what Nestlé says is a purported "complete silence" about when payment was due. *See* petition ¶¶24–31 for custom and practice allegations.

c. Nestlé's no-third-party-beneficiaries argument

The trial court correctly found the "no third-party beneficiaries" language in § 9.07 does not apply to Rolwing because of the Article II (right-to-get-merger-consideration) exception in § 9.07 itself. For example, *Enron Corp.*, 292 B.R. 507 (S.D.N.Y. 2002) found shareholders had standing to sue the acquiring company to enforce rights under a merger agreement because, like here, the merger agreement removed from its no-third-party-beneficiary clause the shareholders' to get merger cash. The right to get merger cash arose under Article 4 of the Enron merger agreement, and the no-third-party-beneficiary clause removed from that limitation the Article 4 right to get merger cash—just as the no-third-party-beneficiary clause in the Nestlé merger agreement removed from its limitation the Article II right to get merger cash.

Also, under § 2.01(c) of the merger agreement here (JLF 32) each share was automatically converted into the right to get $33.50 in cash thus Rolwing and the class became creditors with standing to sue as creditors. *See Alabama By-Products v. Cede & Co.*, 657 A.2d 254, 266 (Del. 1995).

Conclusion

The trial court erred in granting Nestlé's motion to dismiss, and this Court should reverse and remand this cause back to the trial court for further proceedings.

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Certificate of compliance and service

This brief complies with all requirements of Rule 84.06. It was prepared using Microsoft Word with Times New Roman font size 14. Since it was prepared using a proportional type, it complies with Rule 84.06(b) because it has less than 16,211 words which is less than 31,000 words—excluding the cover-page, table-of-contents, table-of-authorities, certificate-of-service, certificate-of-compliance, and appendix. This whole brief, including the cover-page and continuing all the way through the end of this page, has 19,407 words.

I sent a copy of this brief and the appendix to the following by pre-paid first class mail, and by e-mail as pdf attachments, on November 1, 2013:

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