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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 REPLY BRIEF OF APPELLANT (DISMISSAL ISSUE)

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Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

Table-of-contents

Pages

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

Table-of-authorities

Pages

Cases

Statutes

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

REPLY BRIEF

A. Many of Nestlé's factual representations are wrong and improperly argumentative.

1. "No-interest" and "surrender" issue

The statement-of-facts in the SUBSTITUTED BRIEF OF DEFENDANT-RESPONDENT NESTLE HOLDINGS (DISMISSAL ISSUE) (D.Br.) improperly cherry-picks when quoting from the merger agreement and is improperly argumentative about what those sections say. For example, Nestlé says in its D.Br. at 5:

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

But as already discussed in Rolwing's opening brief in this Court (Pl.Br.) at 66–69, the above is not a complete or accurate statement and fails to mention that § 2.01(c)(1) defining the Merger Consideration does not have "no-interest" language: "each issued share of Company Common Stock shall be converted into

the right to receive $33.50 in cash (the 'Merger Consideration')." Although Nestlé discusses a later § 2.01(c)(2) "no-interest" provision, Rolwing showed in his Pl.Br. at 66–69 that language only applied to "cash payable upon surrender" of certificates, "surrender" did not apply to Rolwing and the class, no-interest does not apply to the cash paid to Rolwing and the class; and also § 2.01(b) makes clear no-interest is limited to "the cash payable upon surrender of any Certificate."

Also, since Rolwing seeks statutory interest for late payment after the December 14, 2001 demand (not before) and the contract's language says "without interest" applies only "until surrender" of physical certificates (not after), no-interest does not apply after a "surrender" even assuming there was a December 14 or December 17 surrender. *See* Pl.Br. at 62–64 and 66–67.

Nestlé continues this argument in its D.Br. at 14 and 17 and gives incomplete quotes from the merger agreement. Nestlé's D.Br. at 17 claims Rolwing concedes in his petition at ¶¶30 & 39 "that § 2.02 of the merger agreement is a 'no-interest' provision" but Nestlé improperly ignores that the petition in those paragraphs and elsewhere makes it clear that the "without interest" language did not apply to Rolwing and the class. Thus Nestlé also is wrong in its D.Br. at 17 in saying, "Because the payment of interest is expressly excluded, there is no conceivable way that a promise to pay interest can be fairly implied." All of this is explained for example in Pl.Br. at 62–69.

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

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2. Nestlé is wrong about custom-and-practice.

Nestlé misrepresents the following as fact in its D.Br. at 5:

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

Nestlé continues this in its D.Br. at 14–15 by for example arguing " 'custom-and-practice' is plaintiff's device to avoid the express 'no-interest' provisions of the merger agreement . . . ."

Simply stated, Rolwing does not argue custom-and-practice to avoid "no-interest" provisions but argues "surrender" and its no-interest language did not apply to him and the class in the first place—based on the merger agreement itself. *See* Pl.Br. at 62–69; Pl. Appellate Court Reply Br. at 5.

3. Nestlé is wrong about damages.

Nestlé tries in its D.Br. at 15 to mischaracterize Rolwing's petition by saying Rolwing is arguing "the source of Nestlé's alleged obligation to pay interest is statutory rather than contractual." That is wrong. The petition seeks "damages 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)." JLF 21; 474.

4. Nestlé mischaracterizes Rowling's position as to which statute governs.

Nestlé's D.Br. at 10 says Rolwing is saying his claim is governed by R.S.Mo. § 516.110(1) or alternatively tolling applies. This ignores that Rolwing also argues alternatively that R.S.Mo. § 516.110(3) applies.

5. Nestlé's recitation of the procedural history likewise is incomplete.

Nestlé suggests in its D.Br. at 6 that in opposing Nestlé's motion to dismiss "plaintiff asserted that his petition was timely because of the tolling effect of [the] Ohio action . . . ." This ignores that Rolwing also said his petition was timely because R.S.Mo. § 516.110's 10-year statute-of-limitations applies. JLF 481–482.

6. Nestlé's claim of a failure to exercise "required due diligence" is wholly unsupported.

Nestlé makes assertions in its D.Br. at 61 about a lack of "reasonable diligence" and "required due diligence" by Rolwing and his counsel in not filing this case "shortly after *Ruschel* was concluded." Nestlé does not, however, make any citations to the record about this, nor does Nestlé elaborate on the manner in which Rowling and his counsel were purportedly derelict.

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7. Nestlé is wrong that there was no payment-due-date.

Nestlé says in its D.Br. at 13 the merger agreement does not have any due date or deadline for paying the $33.50 per share. The merger agreement does have a payment-due-date at § 2.02(d) where (1) it says the cash was to be paid "upon conversion" of the shares, (2) per § 2.01, this "conversion" was "at the Effective Time," and (3) there is no dispute the Effective Time was on December 12, 2001. *See* Pl.Br. at 3, 76. Nestlé also promised at § 6.03 "to consummate and make effective, in the most expeditious manner practicable" all transactions contemplated by the merger agreement. Pl.Br. at 22–23. Nestlé did not comply with these.

8. Nestlé's misleading mention of an "Outside Date"

Nestlé in its D.Br. at 14 for the first time mentions a December 31, 2001 Outside Date in the merger agreement and insinuates the merger agreement allowed until then for payment of the cash. Simply stated, the Outside Date had nothing to do with a due date for paying the cash but instead the merger agreement's §8.01(b)(1) made clear the Outside Date was instead a deadline for completion of the merger, where the merger agreement "may be terminated . . . if the Merger is not consummated on or before December 31, 2001 (the "Outside Date")." JLF 59.

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

B. Missouri's 10-year statute-of-limitations applies.

1. Nestlé's authorities are readily distinguishable because, in this case, Rolwing and the class were only paid $33.50 of the $33.533041[1] due them under the contract.

Nestlé's suggestion in its D.Br. at 17 that "there is no conceivable way that a promise to pay interest can be fairly implied" is wrong. Section 9.08 of the merger agreement 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." It is a fundamental rule that the laws that exist at the time and place of its making, including statutory provisions and judicial precedents, are as much a part of the contract as though they were expressly referred to and incorporated in its terms. *See Sharp v. Interstate Motor Freight System*, 442 S.W.2d 939, 945 (Mo. banc 1969) (citing numerous Missouri cases).

The merger agreement did not state an interest rate for money due to Rolwing and the class, thus R.S.Mo. § 408.020 provided the rate:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after

[1] $33.50 x 9% x 4 days ÷ 365 days = $0.033041;

$33.50 + $0.033041 = $33.533041.

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> they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made . . . .

Rolwing argued the demand was made—and thus interest became due—starting on December 14, 2001. *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).").

Under Missouri law, which was a part of the merger agreement, 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); *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 942 (Mo. 1960) ("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."). Thus, Nestlé as a party agreed in the merger agreement to pay this.

A promise implied by law from whatever is written, is a written contract within the ten-year statute-of-limitations. In *Orthwein v. Nolker*, 234 S.W. 787 (Mo. 1921), for example, this Court looked at an endorsement on a note and found there was an obligation implied by law from the written endorsement itself, which could not be varied by parol evidence. The following language from a Missouri

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statute was read by the Court into the promissory note: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Thus the person who signed in blank on the back, not as a maker, drawer, or acceptor, was found to be an endorser, and this could not be changed by evidence of a separate oral or written agreement.

In *Parker–Washington Co. v. Dennison*, 183 S.W. 1041 (Mo. 1916), cited by Nestlé, this Court required that the promise to pay money or property does not arise *only* on proof of extrinsic facts. In contrast, the interest sued for here does not arise only on proof of extrinsic facts. There is a written contract for the payment of money, which was paid four days late.

2. Nestlé's attempt to add requirements to R.S.Mo. § 516.110(1) by discussing some principles of statutory construction is unavailing.

R.S.Mo. § 516.110(1) addresses "[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property." Rolwing's case is covered by this statute no matter how it is read: Rolwing is suing on a written contract, he is suing for the payment of money, and the written contract is one for the payment of money.

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

Unsatisfied with the result of R.S.Mo. § 516.110(1)'s simple and broad language, Nestlé discusses some principles of statutory construction to try to make it seem this ten-year statute should be somewhat restrictive. Nestlé improperly wants to rewrite the statute and add language to require that a plaintiff must be seeking a judgment only for the payment of money the defendant literally and actually agreed to pay in a written contract, or "that the money or property sued for is promised to be paid or given by the language of the writing sued upon." D.Br. at 21, quoting *Herweck v. Rhodes*, 34 S.W.2d 32, 33 (Mo. 1931). That is improper. First, *Herweck*, 34 S.W.2d at 33 mentions an easier fair-implication standard:

> Our courts hold that though the language of the writing sued on does not contain a promise in express terms to pay the money sued for, yet if by fair implication such promise arises from the language of the writing itself, the ten-year statute applies.

As stated earlier in *Reyburn v. Casey*, 29 Mo. 129 (Mo. 1859):

> The broad and comprehensive language of the statute [which provides a ten-year period for 'an action upon any writing, whether sealed or unsealed, for the payment of money or property'] evidently embraces all kinds of written instruments, without regard to their mere form or phraseology, which imply a promise or agreement to pay money, and is not restricted to such as have the requisites of promissory notes or

> to such instruments as contain an express promise or agreement upon their face to pay. It is sufficient if the words import a promise or agreement, or that this can be inferred from the terms employed.

Further, this Court otherwise has rejected attempts to restrict the kind of written contracts covered by R.S.Mo. § 516.110(1):

> While the rule in this State is that statutes of limitation are looked upon with favor, unless clearly unreasonable . . . yet, it is also a well known rule that a statute of limitations should not be applied to cases not clearly within its provision and its application should not be extended by construction. . . .

Macon County v. Farmers' Trust Co. of Macon, 29 S.W.2d 1096, 1098 (Mo. 1930).

> [The ten-year statute] is more expressive in its breadth than its length. It is attenuated by no qualifying word such as 'direct,' or 'unconditional,' but includes every action for money or property founded upon a 'writing.' The contingency upon which it is to be paid or delivered does not enter into the construction of this short and expressive clause.
>
> . . .

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> It makes no difference . . . whether the suit be in debt for the amount due upon a contract, or in covenant to recover unliquidated damages for its breach. Both are alike on the contract; and if the contract is 'for the payment of money or property' it fills the requirement of the provisions of the Statute of Limitations we have quoted.

Knisely v. Leathe, 166 S.W. 257, 261 (Mo. 1914).

> Defendants claim that an instrument for the payment of money or property, such as is meant by the ten-year Statute of Limitations, should acknowledge an obligation to pay which is neither conditional nor contingent; one which admits an existing debt, and which to enforce does not require evidence *aliunde*.
>
> If this position be correct, then all instruments other than notes, bonds, bills of exchange and other written promises or obligations to pay, unconditionally, specified sums of money, would be embraced by the five-year Statute of Limitations. To this we are unable to assent.

State ex rel. Enterprise Milling Co. v. Brown, 106 S.W. 630, 631 (Mo. 1907).

3. Rolwing argued alternatively that R.S.Mo. § 516.110(3) applies.

Nestlé's D.Br. at 30–31 glosses over this by arguing Rolwing does not "cite any authority for this catch-all." No cite is needed as the statute itself is clear and controlling—the Missouri legislature said § 516.120(1)'s five-year limit does not

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apply to contracts, obligations or liabilities, express or implied that are "mentioned in § 516.110" and did not limit this to § 516.110(1).

C. The claims of Rolwing and the class were tolled.

Nestlé draws an artificial distinction between tolling for class suits and tolling for individual suits, but never explains why there should be one. Nestlé claims in its D.Br. at 55:

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

In Missouri, however, case law (and not statute) often determines when a statute-of-limitation begins to run, and Nestlé never explains why Rolwing individually could have tolling but not other class members.

If anything, the protest here should be against the wrongness of the Ohio courts' rulings and Nestlé's avoiding paying the class the $0.0333041 per share owed. Everything Nestlé argues is to allow Nestlé to benefit from its breach. Preventing a party from benefitting from its breach is a universally-recognized public policy principle. *Perry v. Strawbridge*, 108 S.W. 641, 643–44 (Mo. 1908). *See also Malan Realty Investors v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997)

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which cites 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).

D. *Stare decisis* does not apply here.

1. The Ohio decision is not persuasive.

As Rolwing explained in his P.Br. at 53–68, the Ohio decision is not persuasive. Nestlé's D.Br. at 68–69 cites *Cherry Manor, Inc. v. American Health Care, Inc.*, 797 S.W.2d 817, 821 (Mo. App. S.D. 1990) which cites *Triplett v. Shafer*, 300 S.W.2d 528, 530 (Mo. App. 1957). *Triplett*, however, says at 530 a case must first be persuasive for *stare decisis* even arguably to apply:

> Plaintiffs cite and rely on a number of decisions of foreign jurisdictions, but only two Missouri decisions are cited by them. One of those . . . is also relied on by defendants. If the law, as declared in that decision, is applicable to the facts in this case, and is the latest pronouncement of the Supreme Court on the subject, then this court will follow it. Decisions by the courts of other states, in cases wherein the facts are similar, may be persuasive but they are not controlling.

Nestlé in its D.Br. at 68 cites four examples of Missouri courts relying on out-of-state precedent but those courts took the required first step of finding the cited non-Missouri cases to be persuasive:

Electronically Filed - SUPREME COURT OF MISSOURI - December 04, 2013 - 02:10 PM

- *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 128 (Mo. banc 2010): in interpreting a version of UCC § 2-210 identical to Missouri's, where Missouri courts never addressed this UCC issue, finding "the case law in other jurisdictions is persuasive."
- *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 329 (Mo. banc 2010): "In upholding Missouri's sovereign immunity statute against equal protection challenges, we find persuasive the decisions of other states confirming similar statutes in the face of like claims."
- *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 542 (Mo. banc 1976): "We are not convinced that such interpretation of § 379.203 is correct. We find more persuasive the reasoning and result in cases construing similar statutes in other states [discussing in detail the uninsured-motorists/stacking statutes and decisions in Florida, Alabama, Texas, Virginia, and Georgia].
- *Hamid v. Kansas City Club*, 293 S.W.3d 123, 127 (Mo. App. W.D. 2009): "[W]e find the reasoning employed in two cases outside of Missouri to be persuasive on this issue. . . ."

Nestlé in its D.Br. at 67–68 relies on a partial quote of non-binding *dictum* from *Smith v. Bayer*, 564 U.S. ___, 131 S. Ct. 2368, 2381 (2011) dealing with the federal Anti-Injunction Act to argue in favor of *stare decisis* but as pointed out in Rolwing's Pl.Br. at 60–61, *Smith* does not apply here and Nestlé improperly did

not quote the rest of the paragraph it quotes from and left out other language from the case.

2. Nestlé's arguments about unfairness of multiple lawsuits miss the mark.

Nestlé urges this Court to find "a strong policy reason to respect *stare decisis* in this case" which is if "*Ruschel* is not followed, then plaintiff's counsel may continue to run around the country, filing identical class actions in the names of different class representatives until he obtains a favorable result. . . ." Nestlé opposed class certification in Ohio and it was never ruled on thus Nestlé should not be heard to complain about being sued here. Nestlé also never says how another plaintiff could sue Nestlé in another state or why a plaintiff should be prevented from "obtain[ing] a favorable result" in the Missouri court system where the applicable contract is governed by Missouri law and an earlier plaintiff improperly had summary judgment entered against him in Ohio which was improperly affirmed on appeal there.

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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 3,270 words which is less than 7,750 words—excluding the cover-page, table-of-contents, table-of-authorities, certificate-of-service, and certificate-of-compliance. The whole brief, including the cover-page and continuing all the way through the end of this page, has 4,071 words.

I sent a copy of this brief to the following by pre-paid first class mail, and by e-mail as a pdf attachment, on December 4, 2013:

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