APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERWIN A. BROOK, an Illinois resident, as Trustee of the David North II Trust, successor to the assets of Cortina Financial, Inc., Plaintiff-Appellant, v. J. LAWRENCE MCCORMLEY, an Arizona resident; TIFFANY & BOSCO, PA, an Arizona professional corporation, Defendants-Appellees.	No. 19-17289 D.C. No. 2:18-cv-01530-JAS MEMORANDUM* (Filed Nov. 20, 2020)

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Submitted November 16, 2020**
Phoenix, Arizona

Before: BYBEE, MURGUIA, and BADE, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff-Appellant Sherwin A. Brook (Brook) appeals the dismissal of his diversity action alleging legal malpractice, breach of fiduciary duty, and breach of contract by Defendants-Appellees J. Lawrence McCormley (McCormley) and Tiffany & Bosco, P.A. (T&B) (collectively, Defendants). The district court dismissed Brook's complaint for lack of subject matter jurisdiction. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the grant of the motion to dismiss, *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1151 (9th Cir. 2017) (citation omitted), and we affirm.

Brook is an Illinois resident and trustee of the David North II Trust, which is the successor to the assets of Cortina Financial, Inc. (Cortina)—a dissolved Arizona corporation. McCormley, an Arizona resident and an attorney at Arizona law firm T&B, previously represented Cortina in litigation concerning real property owned by Cortina in Arizona. Based on a magistrate judge's Report and Recommendation, the district court held that Cortina was the real party in interest and must be named as plaintiff. Because doing so would destroy complete diversity between the parties, the district court dismissed Brook's action without prejudice.

Brook argues that the district court abused its discretion by failing to conduct a de novo review of his objections to the Report and Recommendation. He contends that the district court "summarily denied all of [his] timely objections, without discussion," and asserts that the district court "stopped reading beyond page 10." These arguments lack support. The district court conducted a de novo review of Brook's objections

in accordance with 28 U.S.C. § 636(b)(1)(C), after expressly setting forth the standard of review in footnote one of its order. Although Brook points to the order's comment that "Plaintiff does not present any meritorious argument for the Court to consider, especially not in the first ten pages of the objection" as an indication that the district court only read the first ten pages of his oversized brief, this comment instead confirms that the court reviewed all of Brook's objections—beyond the first ten pages—and found that they lacked merit. The district court's apparent frustration with Brook's refusal to adhere to page limitations does not mean that the court failed its obligation to conduct the required review—a review that it said it conducted.

Where, as here, the district court's order adopting the magistrate judge's Report and Recommendation explicitly notes that it "has made a de novo determination," this circuit has found "no reason to question the de novo review." *Wang v. Masaitis*, 416 F.3d 992, 1000 (9th Cir. 2005). As 28 U.S.C. § 636(b)(1)(C) provides "for a 'de novo determination' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (citation omitted). We have no reason to question the district court's reliance on the magistrate judge's findings and recommendations, especially considering the district court's order contains sufficient language confirming that it met its de novo review obligation.

Brook relies on *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000), to argue that the district court "failed to exercise *any* discretion in deciding whether to consider Brook's motion for certification to the Arizona Supreme Court." In *Howell*, this Court concluded that "a district court *has discretion, but is not required*, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *Id.* at 621 (emphasis added).

Here, the district court made clear that it was exercising its discretion to not address Brook's new arguments. After acknowledging that Brook moved for certification to the Arizona Supreme Court, the district court indicated that Brook's "novel arguments" "should have been presented to the Magistrate." The district court did not want to "provide [Brook] a second bite at the apple," and noted that Brook gave "no explanation as to why [he] could not bring all arguments before the Magistrate." *See Greenhow v. Sec'y of Health & Hum. Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds, United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) ("[T]he Magistrates Act was [not] intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court."). As a result, the district court concluded that it would "not consider the novel arguments put forth by Plaintiff." This was not an abuse of discretion.

Brook next contends that the district court erred in adopting the magistrate judge's recommendation to dismiss Brook's case because Defendants were

collaterally estopped from relitigating subject-matter jurisdiction as Brook's status as the real party in interest under Federal Rule of Civil Procedure 17(a) was "necessarily determined" in prior litigation in the Northern District of Illinois. But that court dismissed Brook's suit for lack of personal jurisdiction over Defendants without reaching whether there was complete diversity between the parties and without examining whether Brook or Cortina was the real party in interest. The Seventh Circuit affirmed and did not discuss the diversity of the parties. *See Brook v. McCormley*, 873 F.3d 549, 553 (7th Cir. 2017). Because whether Cortina was the real party in interest required to bring suit under Rule 17(a) was never "actually litigated and decided," collateral estoppel did not apply to bar Defendants' contention that the required joinder of Cortina, the real party in interest, destroys complete diversity. *Janjua v. Neufeld*, 933 F.3d 1061, 1065-66 (9th Cir. 2019).

Brook also contends that the district court erred in adopting the magistrate judge's finding that Cortina was the real party in interest, arguing that he may bring suit asserting Cortina's claims without any assignment pursuant to Ariz. Rev. Stat. § 10-1405 and Arizona appellate decisions interpreting that statute. But under Arizona law, a "dissolved corporation continues its corporate existence," *id.* § 10-1405(A), and retains the ability to commence a lawsuit in its corporate name, *id.* § 10-1405(B)(5). Although Brook contends that section 10-1405(B)(5) permits him to sue on Cortina's claims without an assignment, section

10-1405 expressly addresses the "[e]ffect of dissolution" of a corporation, and its plain language indicates that dissolution does not modify any of the rights attendant to corporations, officers, directors or shareholders—as set forth in other statutes—to bring suit or be sued. *See*, *e.g.*, Ariz .Rev. Stat. § 10-302(1) (authorizing corporation to bring suit "in its corporate name"); Ariz. Rev. Stat. §§ 10-740 to 10-747 (addressing when shareholders may bring derivative actions); Ariz. Rev. Stat. § 10-846 (addressing suits against officers and directors).

Brook's citations to *Coleman v. New York Merchs. Protective Co., Inc.*, No. 1-CACV 09-0411, 2010 WL 2602051 (Ariz. Ct. App. June 29, 2010), *Norton v. Steinfeld*, 288 P. 3 (Ariz. 1930), *Thomas v. Harper*, 481 P.2d 510 (Ariz. Ct. App. 1971) (per curiam), and *North v. City of Bullhead (In re North)*, No: 2:03-bk-15266-RJH (Bankr. D. Ariz. March 28, 2007), are similarly inapposite. Not only is *Coleman* an unpublished, non-citable decision under Ariz. R. Sup. Ct. 111(c), but the court there did not decide whether the plaintiff's administratively-dissolved company was a necessary party, determining only that the plaintiff—an individual doing business as that company—had capacity to sue and was the real party in interest. *Coleman*, 2010 WL 2602051, at *4. And, unlike the individual plaintiff in *Coleman*, Brook is not asserting his own claim, but, rather, is attempting to assert a claim that belongs solely to a dissolved corporation. *Id.*

In contrast to *Norton* and *Thomas*, which were decided under now outdated Arizona statutes and

common law rules providing that a corporation's property passed to its stockholders upon dissolution subject to payment of the corporation's debts, *Norton*, 288 P. at 6; *Thomas*, 481 P.2d at 511, current Arizona law provides that the corporation retains ownership over its property after dissolution. *See* Ariz. Rev. Stat. § 10-1405(B)(1) ("Dissolution of a corporation does not . . . [t]ransfer title to the corporation's property."). Brook's citation to *In re North* is similarly unhelpful to his argument, as the bankruptcy court there plainly concluded that "ownership of a corporation's assets does not automatically transfer to the shareholders upon dissolution, both under current Arizona statutes and those in effect in 1993."

The magistrate judge also properly concluded that Cortina was the real party in interest under Rule 17(a) because Cortina was the client to which Defendants owed a fiduciary duty relating to the litigation concerning Cortina's ground lease. The March 2013 letter of engagement indicating that Defendants were to investigate claims specifically "relating to a lease of real property . . . by and between Cortina Financial, Inc., as lessor and Susan Landon Harris as lessee" provides a signature block for "Cortina Financial, Inc." as client—not Brook. A February 2014 letter from Defendants discusses the risks "if Cortina is not the prevailing party in the litigation," and the May 2014 engagement letter expanding the scope of Defendants' services to include the initiation of a trustee's sale pursuant to the deed of trust (under which Cortina is the beneficiary), contains a signature block for "Cortina Financial, Inc."

and is signed by Brook as Cortina's "Sec Treasurer." In addition, Cortina originally brought suit in the Northern District of Illinois and Brook only substituted in as plaintiff after questions regarding diversity were raised. Thus, these facts establish that Brook's insistence that T&B "was representing him as trustee of the Trust that was Cortina's sole shareholder" lacks merit.

Brook next contends that the district court erred in concluding that the malpractice claims are not assignable under Arizona law. The Arizona Court of Appeals has held that "[m]alpractice claims are regarded as personal injury claims, and personal injury claims are not assignable in Arizona." *Botma v. Huser*, 39 P.3d 538, 541 (Ariz. Ct. App. 2002).[1] "Decisions by the state courts of appeals provide guidance and instruction and are not to be disregarded in the absence of convincing indications that the state supreme court would hold otherwise." *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1424 (9th Cir. 1991).

The district court properly exercised its discretion in declining to consider whether Illinois law should apply to resolve the issue of assignability of the legal malpractice claims, and whether the magistrate judge erred in failing to make any determination as to

[1] In any event, Brook did not produce any documentation demonstrating that he is an assignee of Cortina's legal malpractice claims. Because Arizona law precludes assignment of legal malpractice claims, *Botma*, 39 P.3d at 541-43, Brook's arguments that he should have been allowed to obtain assignment of Cortina's claims or demonstrate that Cortina ratified his suit under Rule 17(a)(3) also lack merit.

whether Arizona or Illinois law applies, because Brook failed to raise them before the magistrate judge. *Howell*, 231 F.3d at 621.

Because we affirm the dismissal for lack of subject-matter jurisdiction, we do not consider whether Brook's attempt to pursue Cortina's claims violates the federal anti-collusion statute, 28 U.S.C. § 1359.

We deny Brook's request that this court certify two questions concerning section 10-1405(B)(5) and the assignment of legal malpractice claims to the Arizona Supreme Court. By statute, certification is authorized where "it appears to the certifying court there is no controlling precedent in the decisions of the supreme court *and the intermediate appellate courts of this state.*" Ariz. Rev. Stat. § 12-1861 (emphasis added). But where the existing state appellate court decisions provide adequate guidance, certification is unnecessary. *See Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 884 (9th Cir. 2011); *Louie v. United States*, 776 F.2d 819, 823-24 (9th Cir. 1985). Here, neither the disputed statutory language (Ariz. Rev. Stat. § 10-1405(B)(5)) nor the doctrine prohibiting assignment of legal malpractice claims is "too uncertain to be determined and applied by the federal court," *Louie*, 776 F.2d at 823, and there are state appellate court decisions directly on point resolving the issues.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Sherwin A. Brook, Plaintiff, v. J. Lawrence McCormley, et al., Defendants.	No. CV-18-01530-PHX-JAS **ORDER** (Filed Oct. 15, 2019)

Pending before the Court is a Report and Recommendation issued by Magistrate Judge Maria S. Davila. (Doc. 25) In the Report and Recommendation, Magistrate Judge Davila recommends that Defendants' Motion to Dismiss (Doc. 13) be granted and that this action be dismissed without prejudice. Plaintiff filed a timely objection.[1]

Rule 7.2(e)(3) of the Local Rules of Civil Procedure for the District of Arizona states "Unless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."[2] A review of the record does

[1] The Court reviews de novo the objected-to portions of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected-to portions of the Report and Recommendation. *See Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also Conley v. Crabtree*, 14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

[2] The Court notes that even in the Northern District of Illinois, where Plaintiff's counsel practices, objections to report and

not show that the Court permitted any extension of this page limit. Limits, such as these, are intended to encourage litigants to use their and the Court's resources efficiently. *See In re MacIntyre*, 181 B.R. 420, 422 (B.A.P. 9th Cir. 1995), *aff'd*, 77 F.3d 489 (9th Cir. 1996), *and aff'd*, 79 F.3d 1153 (9th Cir. 1996) (ordering monetary sanctions for attempts to circumvent page limits as "page limits are important to maintain judicial efficiency and ensure fairness to opposing parties"); *United States v. Sierra Pac. Indus.*, No. CIV S-09-2445 KJM, 2012 WL 175071, at *1 (E.D. Cal. Jan. 20, 2012) (explaining how page limits help to preserve a court's resources). In Plaintiff's objection, Plaintiff correctly states, "[d]etailed background facts are provided in the Complaint, the parties' memoranda supporting and opposing dismissal, and in the Magistrate's Report." (Doc. 26 at 3.) Plaintiff then devotes four-and-a-half pages to the background of the claims and two-and-a-half pages on "The Proceedings to Date." Plaintiff even spends a paragraph speculating on, and erroneously asserting, the motives of this case's transfer to Judge Soto. For the sake of accuracy and clarity, this matter was transferred to Judge Soto, not to the Tucson Division as asserted in the objection. If this matter had gone to trial it would have taken place in Phoenix. Further, it was not transferred due to a conflict of interest or a recusal; this is baseless speculation on the part of Plaintiff, which only serves to waste valuable space in his limited objection. Plaintiff

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recommendations are limited to 15 pages absent prior approval. LR 7.1.

also questions why this case was referred to different magistrates once with Judge Soto; the Court will explain. Magistrate Judge Bernardo P. Velasco retired at the end of March 2019 and his cases were transferred prior to his retirement. Sometime later, Magistrate Judge Maria S. Davila was appointed as a full time United States Magistrate Judge for the District of Arizona to replace Magistrate Judge Velasco and eventually received most, if not all, of his cases. (*See* GO 19-08).

Plaintiff does not present any meritorious argument for the Court to consider, especially not in the first ten pages[3] of the objection. As the Court finds that the Report and Recommendation appropriately resolved Defendant's Motion to Dismiss (Doc. 13), the objections are denied.

Accordingly, IT IS HEREBY ORDERED as follows:

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[3] The Court acknowledges that Plaintiff also moves for certification to the Arizona Supreme Court. The local rules provide a limit of seventeen pages for motions. LRCiv 7.2(e)(1). This motion or argument should have been presented to the Magistrate. The Court will not provide Plaintiff a second bite at the apple. *See Friends of the Wild Swan v. Weber*, 955 F. Supp. 2d 1191, 1194 (D. Mont. 2013), *aff'd*, 767 F.3d 936 (9th Cir. 2014). There is no explanation as to why Plaintiff could not bring all arguments before the Magistrate. Therefore, the Court will not consider the novel arguments put forth by Plaintiff and will treat the filing solely as an objection to the R+R.

(1) Magistrate Judge Davila's Report and Recommendation (Doc. 25) is accepted and adopted.

(2) Defendant's Motion to Dismiss (Doc. 13) is granted.

(3) This case is dismissed without prejudice.

(4) The Clerk of the Court shall enter judgment and close this case.

Dated this 11th day of October, 2019.

/s/ James A. Soto
Honorable James A. Soto
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Sherwin A. Brook, Plaintiff, v. J. Lawrence McCormley, et al., Defendants.	No. CV-18-01530-PHX-JAS (MSD) **REPORT AND RECOMMENDATION** (Filed May 21, 2019)

Pending before the Court is Defendant J Lawrence McCormley and Tiffany & Bosco PA's Motion to Dismiss. (Doc. 13.) The motion is fully briefed. (Docs. 16, 20.) For the following reasons, the Court recommends that the motion be granted and that this case be dismissed for lack of subject-matter jurisdiction.

I. Background

A. Factual Allegations

The Complaint contains the following allegations: Plaintiff Sherwin Brook, a citizen of Illinois, is trustee of the David North II Trust (the "Trust"). (Doc. 1, ¶ 9.) The Trust owned 100% of the shares of Cortina Financial, Inc. ("Cortina"), a now dissolved Arizona corporation. (*Id.*) Defendant McCormley is an Arizona citizen, and Defendant Tiffany & Bosco PA ("T&B") is an Arizona professional association. (*Id.* ¶¶ 10–11.)

In 1996, Cortina acquired four lots of land in Scottsdale, Arizona and, shortly thereafter, sold one of the lots to Susan Landon Harris. (*Id.* ¶¶ 14–17.) Cortina and Harris also entered into a ground lease under which Harris would lease a driveway adjacent to the conveyed lot. (*Id.* ¶ 18.) The ground lease was secured by the lot conveyed to Harris. (*Id.* ¶ 20.) In 2000, Harris stopped making payments on the lease and filed suit against Cortina, asserting that she had acquired sole ownership of the driveway. (*Id.* ¶ 22.)

Defendants were retained to defend Cortina and file counterclaims against Harris. (*Id.* ¶ 23.) Harris's lawsuit was dismissed in 2002 without prejudice. (*Id.* ¶ 24.) Defendants were engaged again in 2005 to analyze potential claims relating to the ground lease. (*Id.* ¶ 26.) Defendants prepared a legal memorandum on the issue. (*Id.* ¶¶ 26, 28.)

Harris sold the lot in 2011 without paying the amount due under the defaulted ground lease. (*Id.* ¶ 29.) In March 2013, Defendants were engaged to analyze the viability of a nonjudicial foreclosure on the deed of trust. (*Id.* ¶ 30.) In February 2014, Defendants advised Cortina to initiate a trustee's sale. (*Id.* ¶¶ 31–33.) In May 2014, Defendants were retained to carry out the trustee's sale. (*Id.* ¶¶ 34, 36.)

In July 2014, McCormley notified Brook that T&B would not initiate the trustee's sale due to T&B's unwillingness to expose itself to legal liability or to involve itself in the creation of law adverse to its other clients. (*Id.* ¶¶ 44–45.) Defendants searched for outside

parties to initiate the trustee's sale but were unable to find a replacement. (*Id.* ¶¶ 48–49.)

B. Procedural History

In 2016, Cortina filed suit against Defendants in the U.S. District Court for the Northern District of Illinois, alleging claims of legal malpractice and breach of fiduciary duty. (Doc. 16 at 67.) After the Illinois district court questioned whether the parties were diverse—because Cortina is a dissolved Arizona corporation and Defendants are Arizona citizens—an amended complaint was filed, substituting Brook in place of Cortina. (*Id.*) The Illinois district court subsequently dismissed the case for lack of personal jurisdiction. (*Id.* at 67–68.) The Seventh Circuit Court of Appeals affirmed in an opinion issued on October 11, 2017. *See Brook v. McCormley*, 873 F.3d 549 (7th Cir. 2017).

On May 18, 2018, Brook filed suit in this district "as Trustee of the David North II Trust, successor to the assets of Cortina Financial, Inc." (Doc. 1 at 1 (caption).) He alleges this Court has diversity jurisdiction under 28 U.S.C. § 1332 because he, an Illinois citizen, is diverse from Defendants, both Arizona citizens, and the amount in controversy exceeds $75,000. (*Id.* ¶ 12.)

Defendants filed their Motion to Dismiss on September 4, 2018. (Doc. 13.) They contend that the Court lacks subject-matter jurisdiction because (1) Cortina, not Brook, is the real party in interest and must be joined because Arizona law precludes the assignment of legal-malpractice claims, and (2) the substitution of

Brook in this action for Cortina violates 28 U.S.C. § 1359, under which the Court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke . . . jurisdiction. . . ."

II. Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) may raise either a "facial" or "factual" challenge to the plaintiff's jurisdictional allegations. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Here, Defendants raise a factual challenge, which "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Id.* (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). The plaintiff bears the burden of producing "competent proof" establishing that subject-matter jurisdiction exists. *Id.* (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010); *Harris v. Rand*, 682 F.3d 846, 851 (9th Cir. 2012)).

III. Discussion

A. Real Party in Interest

Defendants argue that Cortina is the real party in interest and must therefore be joined. The Court agrees. Because Cortina is an Arizona citizen, like Defendants, joinder would destroy diversity between the

parties; consequently, this Court lacks subject-matter jurisdiction.

When examining whether the parties are diverse for purposes of jurisdiction under 28 U.S.C. § 1332, the Court "must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Bates v. Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012) (quoting *Navarro Say. Ass'n v. Lee*, 446 U.S. 458, 461 (1980)); *see* Fed. R. Civ. P. 17(a)(1) (requiring that actions "be prosecuted in the name of the real party in interest"). State substantive law governs whether a party to a diversity action is the real party in interest under Rule 17(a)(1). *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093–94 (9th Cir. 2004), *as amended*.

Although the Arizona Supreme Court has refused to address the issue, *see Webb v. Gittlen*, 174 P.3d 275, 278 (Ariz. 2008), the Arizona Court of Appeals has clearly held that legal-malpractice claims belong to the aggrieved client, and that such claims may not be assigned. *Botma v. Huser*, 39 P.3d 538, 541 (Ariz. Ct. App. 2002). This is because:

> the relationship between attorney and client is of a uniquely personal nature, giving rise to a "fiduciary relation of the very highest character" and . . . considerations of public policy require that actions arising out of such a relationship not be relegated to the market place and converted to a commodity to be exploited and transferred to economic bidders.

Id. (quoting *Schroeder v. Hudgins*, 690 P.2d 114, 118 (Ariz. Ct. App. 1984)).

The record demonstrates that Cortina—not Brook—was Defendants' client: Cortina was the lessor in the ground lease and the beneficiary of the deed of trust (Doc. 1 at 25–26); a May 2005 legal memorandum prepared by Defendants discusses potential claims that could be brought by or against Cortina (*id.* at 23–33); Defendants were engaged in March 2013 to investigate claims specifically "relating to a lease of real property . . . by and between Cortina Financial, Inc., as lessor and Susan Landon Harris as lessee. . . ." (*id.* at 35); the signature block in the March 2013 letter is for "Cortina Financial, Inc.," not Brook (*id.* at 40); a February 21, 2014 letter from Defendants focuses on the risks "if Cortina is not the prevailing party in the litigation" (*id.* at 43); Defendants were engaged in May 2014 to initiate a trustee's sale pursuant to the deed of trust (under which Cortina is the beneficiary) (*id.* at 54); the parties' May 2014 engagement letter contains a signature block for "Cortina Financial, Inc." and is signed by Brook as Cortina's "Sec Treasurer" (*id.* at 59); and the legal-malpractice claim raised in this lawsuit was originally brought by Cortina (*id.* at 67). Furthermore, although it appears Brook tried to phrase his allegations carefully, many of them indicate that Cortina was Defendants' client. (*See*, *e.g.*, *id.* ¶ 31 ("Defendants advised Cortina to initiate a trustee's sale to foreclose on the Deed of Trust. . . .").)

As the aggrieved client to which Defendants owed a fiduciary duty, Cortina is the only party that can

assert a legal-malpractice claim arising from Defendants' handling of the ground lease. *See Botma*, 39 P.3d at 542–43. Thus, Cortina is the real party in interest and must be named as plaintiff under Federal Rule of Civil Procedure 17(a)(1). Because the inclusion of Cortina would destroy diversity between the parties, the Court lacks subject-matter jurisdiction over this action. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005) (stating the longstanding rule that "the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action"); *Allstate Ins. Co.*, 358 F.3d at 1094–95 (remanding with instructions to dismiss for lack of subject-matter jurisdiction where joining the real party in interest would destroy diversity).

Brook raises several counterarguments, none of which are availing. First, he contends that the Illinois district court has already decided the diversity issue and that this Court is bound to that determination by the doctrine of collateral estoppel. This argument borders on the frivolous because although the parties briefed the issue extensively, the Illinois district court *clearly* refused to decide it:

> Defendants have moved to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. On the latter point, they argue that diversity of citizenship—the cited basis for federal jurisdiction—was lacking at the time the suit was filed. The original plaintiff was Cortina, a now-dissolved Arizona

> corporation. After the Court questioned its jurisdiction, an amended complaint was filed that substituted Brook, an Illinois citizen, for Cortina. The parties dispute whether, if diversity was lacking at the time the suit was filed, the substitution of a different plaintiff may cure the original jurisdictional defect.
>
> The Court need not address that issue, however, because it concludes that personal jurisdiction over defendants is lacking in Illinois.

(Doc. 16 at 67-68)[1] The express avoidance of the diversity issue necessarily means that the issue was not decided, and that resolution of the issue was not essential to the judgment. *See Novak v. State Parkway Condo. Ass'n*, 141 F. Supp. 3d 901, 906 (N.D. Ill. 2015) (stating the elements of collateral estoppel under Illinois law, including that there was a final decision on the merits of the issue and that resolution of the issue was essential to the judgment).[2] Consequently, collateral estoppel does not apply.

Brook next argues that he is "a" real party in interest.[3] He relies on Ariz. Rev. Stat. § 10-1405(B)(5),

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[1] Nor did the Seventh Circuit address the issue. *See Brook*, 873 F.3d at 551–53.

[2] Federal courts sitting in diversity "determine the preclusive effect of a state court judgment by applying that state's preclusion principles." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 760 (9th Cir. 2014).

[3] Even if Brook is a real party in interest (which he is not), that does not change the fact that Cortina is also a real party in interest that must be named as plaintiff. *See Allstate Ins. Co.*, 358

which provides that "[d]issolution of a corporation does not. . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name or any officers, directors or shareholders or affect applicable statutes of limitation." Defendants argue that this statute does not affirmatively grant shareholders the right to personally assert the claims of a dissolved corporation; rather, they contend, it states merely that dissolution does not interfere with any preexisting right a shareholder may possess to initiate litigation. Brook disagrees, arguing that the statute "expressly allows officers and shareholders to sue on a dissolved corporation's claims without an assignment."

The Court agrees with Defendants. The clear import of § 10-1405(B) is that dissolution of a corporation does not affect the status quo regarding certain preexisting circumstances, interests, and rights. *See id.* § 10-1405(B)(1) (providing that dissolution does not transfer title to the corporation's property), (B)(2) (providing that dissolution does not prevent transfer of the corporation's stock shares), (B)(6) (providing that dissolution does not interfere with already pending litigation involving the corporation). Nothing in the statute indicates (expressly or impliedly) that generally applicable legal principles—e.g., that a corporation is separate and distinct from its shareholders, *see Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App. 1972), or that

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F.3d at 1095 ("Allstate contended at oral argument that both itself and the Ellstroms were the real parties in interest. Even if we were to accept this contention, the Ellstroms' mandatory inclusion in the matter would destroy diversity jurisdiction. . . .").

an aggrieved client is the real party in interest to a legal-malpractice claim, *see Botma*, 39 P.3d at 542–43—are no longer applicable.

Brook's case citations do not convince the Court otherwise. He relies heavily on *Coleman v. New York Merchants Protective Co.*, No. 1-CACV 09-0411, 2010 WL 2602051 (Ariz. Ct. App. June 29, 2010), for the proposition that § 10-1405(B)(5) permits shareholders to assert a dissolved corporation's claims. As explained above, the statute does not have that effect. Furthermore, *Coleman* is plainly distinguishable. In that case, the Arizona Court of Appeals relied on evidence showing that the shareholder was the real party in interest; in other words, the shareholder was asserting his own claim, not a claim that belonged to the dissolved corporation. *See Coleman*, 2010 WL 2602051, at *4. The shareholder in that case did not contend, as Brook does here, that § 10-1405(B)(5) permits shareholders to assert a claim that belongs solely to a dissolved corporation, nor did the *Coleman* court so hold. *See Coleman*, 2010 WL 2602051, at *4.

Brook also engages in a confusing discussion about why dissolved corporations are never necessary parties. His argument is fundamentally flawed, however, because it rests on case law that applies outdated statutory law. He relies on *Norton v. Steinfeld*, 288 P. 3, 6 (Ariz. 1930), and *Thomas v. Harper*, 481 P.2d 510, 511 (Ariz. Ct. App. 1971) (per curiam), both of which applied the since-changed rule that, upon dissolution, the corporation's property transferred to the shareholders; being the owners of the corporation's claims, the

shareholders thus could assert the claims without joining the corporation as a party. Under the current law, however, the corporation retains ownership over its property after dissolution. Ariz. Rev. Stat. § 10-1405(B)(1).

Thus, the underlying justification for the *Norton* and *Thomas* holdings is gone. Brook nevertheless argues that the new statute somehow adopted the rule in *Norton* and *Thomas* that a dissolved corporation is not a necessary party to lawsuits filed after dissolution. He asserts that this rule has been carried through to the present by an "unbroken line of authorities" that includes *In re North* (an unpublished bankruptcy case in which Brook unsuccessfully advanced a similar argument (*see* Doc. 16 at 211–35)) and *Coleman*. Neither *In re North* nor *Coleman* are binding, and, furthermore, neither stand for the proposition advanced here by Brook. *See Coleman*, 2010 WL 2602051, at *4 (citing *Thomas* for the proposition that shareholders of a dissolved corporation could assert the corporation's claim "*because* on dissolution, legal title to the property of the corporation passes to" the shareholders (emphasis added)).

Next, Brook argues that even if Cortina is the real party in interest, dismissal is prohibited under Federal Rule of Civil Procedure 17(a)(3) because Cortina has "ratified" Brook's filing of the Complaint.[4] This

[4] Federal Rule of Civil Procedure 17(a)(3) provides:

> The court may not dismiss an action for failure to prosecute in the name of the real party in interest until,

argument is also without merit. Brook does not identify the act by which Cortina has ratified his filing of the Complaint, nor is it apparent how Cortina could do so given that the legal-malpractice claim is non-assignable. *Cf. Hugh Kelly Enters. v. Ferry-Morse Seed Co.*, 577 P.2d 1, 2 (Ariz. Ct. App. 1978) (applying Arizona's analogue to Rule 17(a)(3) and holding that assignment of the account after litigation commenced was a ratification by the real party in interest). Moreover, "[t]he purpose of [Rule 17(a)(3)] is 'to prevent forfeiture of a claim when an honest mistake was made.'" *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017) (quoting *Goodman v. United States*, 298 F.3d 1048, 1054 (9th Cir. 2002)). There was no mistake here: the legal-malpractice claim in question was initially brought by Cortina (which makes sense because, as explained above, Cortina was Defendants' client), and Brook only subbed in after the Illinois district court recognized that Cortina is not diverse from Defendants.

Brook alternatively argues that the legal-malpractice claim is attached to the deed of trust, and that he can prosecute this action if Cortina transfers the deed of trust to him. Unsurprisingly, he fails to offer any authority supporting this proposition, which if true would permit him to easily circumvent the rule against

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> after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

assignment of legal-malpractice claims. In light of the policy concerns underlying the non-assignability rule, the Court disagrees that transferring the deed of trust would have such an effect. *See Botma*, 39 P.3d at 543 ("To allow the present lawsuit, which was born out of that [improper] assignment agreement, to proceed in Botma's name would be to wink at the rule against assignment of legal malpractice claims.").

Finally, Brook makes a pragmatic argument that, because he is Cortina's only officer and the person with whom Defendants communicated, the rationale for disallowing the assignment of legal-malpractice claims does not apply. Although his argument is superficially appealing, it ignores that corporations are treated as distinct legal entities unless there is a reason for not doing so. *Dietel*, 492 P.2d at 457. Brook has not provided any reason to ignore Cortina's corporate separateness. *Cf. Leppaluoto v. Nazarian*, 895 F.2d 1417, at *1–2 (9th Cir. 1990) (unpublished table decision) (applying California law and finding that the corporation, and not the corporation's shareholders, was the client and real party in interest to a legal-malpractice claim).

Cortina is the real party in interest and must be named as plaintiff. Since doing so would destroy diversity between the parties, this action must be dismissed for lack of subject-matter jurisdiction. *See Allstate Ins. Co.*, 358 F.3d at 1095.

B. Collusive Joinder

Defendants argue in the alternative that the substitution of Brook violates the anti-collusion statute, which provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. This issue need not be reached because Brook and Cortina have failed to successfully "invoke the jurisdiction" of this Court.[5]

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Accordingly,

IT IS RECOMMENDED that Defendants' Motion to Dismiss (Doc. 13) be **granted**.

IT IS FURTHER RECOMMENDED that this action be **dismissed without prejudice** for lack of subject-matter jurisdiction.

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[5] There does appear to be a clear "jurisdictional motive" for having Brook, and not Cortina, initiate this lawsuit. Brook, who is diverse from Defendants, became involved in this lawsuit only after the Illinois district court recognized that Cortina is not diverse from Defendants. However, it is not clear that this motive, standing alone, is sufficient to find collusion. *See Yokeno v. Mafnas*, 973 F.2d 803, 809–11 (9th Cir. 1992) (explaining that motive may be relevant to whether an *assignment* was collusive under § 1359).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the District Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which to file responses to any objections. Filed objections should use the following case number: No. CV-18-01530-PHX-JAS.

Failure to file timely objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to file timely objections to any factual determination of the Magistrate Judge may be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 21st day of May, 2019.

/s/ Maria Davila
Maria Davila
United States Magistrate Judge

APPENDIX D

Coleman v. New York Merchs. Protective Co.

Court of Appeals of Arizona, Division One, Department D

June 29, 2010, Filed

1 CA-CV 09-0411

Counsel: Davis Limited, by Greg R. Davis, Scottsdale, Attorneys for Appellant.

Bell Law PLC, by Emilie Bell, Scottsdale, Attorneys for Appellee.

Judges: SHELDON H. WEISBERG, Judge. MICHAEL J. BROWN, Presiding Judge, JON W. THOMPSON, Judge, concurring.

Opinion by: SHELDON H. WEISBERG

Opinion

MEMORANDUM DECISION

WEISBERG, Judge

P1 New York Merchants Protective Company, Inc. ("Merchants") appeals from a judgment granted against it in favor of Joseph Coleman dba Secure Opportunities Group ("Coleman") For reasons that follow, we affirm.

BACKGROUND

P2 On October 11, 2007, Coleman filed a complaint against Merchants. Coleman alleged that he was doing

business as Secure Opportunities Group ("Secure"); that he entered into a contract with Merchants to act as a broker for alarm monitoring accounts; and that Merchants breached the contract by failing to pay half the commissions due him. The agreement for services dated January 25, 2007 between Secure and Merchants, was signed by Coleman as director of Secure, and by the president of Merchants. Coleman requested damages in the amount of $44,727.66, prejudgment and post-judgment interest, costs and attorney's fees.

P3 On November 27, 2007, Merchants filed an answer denying that it owed Coleman any amount under the contract. It raised the affirmative defenses of accord and satisfaction, fraud in the inducement, and failure to state a claim upon which relief could be granted.

P4 In a joint arbitration statement, dated May 20, 2008, Coleman and Merchants agreed as an undisputed fact that "Joseph Coleman does business as Secure Opportunities Group. Secure Opportunities Group was an Arizona corporation that was administratively dissolved last year." Merchants did not allege, either in its answer or in the joint arbitration statement, that Coleman lacked capacity to sue. After an arbitration hearing, the arbitrator entered an award in favor of Coleman for $44,727.66, plus pre-judgment interest of $3,835.52, and attorney's fees and costs of $18,384.07 for a total award of $66,947.25.

P5 Merchants sought a trial de novo in the superior court.[1] The parties filed a joint pre-trial statement. The parties agreed as an undisputed fact deemed material by both parties that "On January 25, 2007, Merchants and Secure Opportunities Group, Inc. . . . entered into an Agreement for Services . . . " For the first time, Merchants alleged as an issue deemed material by it, but disputed by Coleman, that "[Coleman] does not have standing to bring this lawsuit because Joseph Coleman and Merchants have never had a Contractual relationship. The Contract is between Secure and Merchants."

P6 After trial, the court found for Coleman and adopted his proposed findings of fact and conclusions of law, including that "Joseph Coleman is an Arizona resident and does business as Secure Opportunities Group." Coleman filed an application for attorney's fees in which he noted that Merchants retained new counsel who "developed and offered new defenses and theories." The court entered a final judgment in favor of Coleman dba Secure Opportunities Group and against Merchants in the amount of $44,727.66, plus prejudgment interest of $7,425.94 and attorney's fees and costs of $38,832.43 for a total judgment of $90,986.03, plus post judgment interest at the statutory rate of ten percent per annum. Merchants timely appealed. We have jurisdiction pursuant to *Arizona Revised Statutes*

[1] Prior to trial, Merchant's counsel withdrew from further representation. New counsel appeared for Merchants with co-counsel, a New York attorney, appearing pro hac vice.

("A.R.S.") sections 12-120.21(A)(1) (2003) and *12-2101(B)* (2003)

DISCUSSION

P7 The sole argument Merchants makes on appeal is that Coleman did not have standing or capacity to sue and was not a proper party plaintiff. It alleges that the contract was entered into between "two" corporations and sometime between the execution of the contract and filing of the complaint, Secure ceased doing business, wound up its affairs and "without notifying Merchants," simply "morphed into Joseph Coleman d/b/a/ Secure Opportunities Group." Merchants argues that Coleman was not a party to the contract; there was no evidence of an assignment of the cause of action from the corporation to Coleman; no evidence as to the identity of the shareholders of the corporation; no evidence as to whether Coleman or the corporation suffered damages; and that the complaint was never amended to conform to the evidence. Merchants claims the trial court erred by not dismissing the action. Coleman claims the evidence was sufficient to support the trial court's findings.

P8 In a trial to the court, we will not set aside findings of fact unless they are clearly erroneous; we are not bound by the court's conclusions of law or by findings that present mixed questions of fact and law. *Ariz. R. Civ. P. 52(a)*; *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc., 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991).* At trial, Coleman testified that Secure is "just a name

I operate in the marketplace. It's me doing business as Secure Opportunities." He answered affirmatively when asked, "So when it [the contract] says Secure will perform, that means Joe Coleman?"

P9 On cross-examination, counsel asked Coleman if the corporation was in existence at the time the parties entered the contract, and Coleman responded that he did not believe it was. When counsel asked, "what if I tell you that it wasn't dissolved until February 15, 2007," Coleman responded that "the process had already begun." He indicated that the corporation was not formally dissolved, but that "[he] just let it go." Coleman admitted that some money received from Merchants in August 2007 went into the corporation's bank account.

P10 After Coleman rested, Merchants made an oral motion to dismiss, which was denied. Merchants argued that the corporation, not Coleman entered into the contract with Merchants, and that the proper party was not before the court. Coleman responded that Secure was a corporation owned by Coleman, that at the time Merchants breached the contract, it had dissolved, and that Coleman was doing business as Secure. Merchants replied that a right to sue is not transferred from a corporation to its shareholders.

P11 The judge stated that "purely as a matter of law, purely as the case exists now, it might be that [Merchants] has a valid claim with respect to who the proper . . . party plaintiff is." The judge noted however, that if he were to dismiss the matter, he would do so

without prejudice to refiling the complaint and because the statute of limitations had not run, "we would be doing this all over again. Everybody would be starting again . . . " Merchants' counsel indicated he had no objection to the complaint being dismissed without prejudice. The judge noted that Coleman could seek to amend the complaint to conform to the evidence, but defense counsel objected that Merchants would be prejudiced by such an amendment. In that regard, he remarked that "unfortunately, [Merchants] believes that the arbitration was ineffectually handled by its counsel."

P12 Coleman's attorney pointed out that no one objected to Coleman's capacity to sue at the arbitration hearing. He also indicated that the contract was between Secure, "without any indication of its status," and Merchants. The court found that "as a matter of law, the document presented as the contract between the parties simply doesn't reflect it was a corporation in the process." The court denied Merchants' motion "in the interest of judicial economy."

P13 Under *Arizona Rule of Civil Procedure 17(a)* ("Rule"), "[e]very action shall be prosecuted in the name of the real party in interest." The Rule further provides that an action shall not be dismissed because it is not brought in the name of the real party in interest "until a reasonable time has been allowed *after objection* for ratification of commencement of the action by, or joinder or substitution of, the real party in interest[.]" (Emphasis added.) The Rule makes it clear that "an initial mistake in identifying the proper plaintiff

will not be fatal to the action . . . " and that the Rule is "intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." *Toy v. Katz, 192 Ariz. 73, 87, 961 P.2d 1021, 1036 (App. 1997)* (quoting State Bar Comm. Notes).

P14 We note that although the parties frame the issue as one of standing, the concept of standing technically rests on whether there is a "justiciable controversy." *Citibank (Ariz.) v. Miller & Schroeder Fin., Inc., 168 Ariz. 178, 181, 812 P.2d 996, 999 (App. 1990).* Because the Arizona Constitution has "no counterpart to the 'case or controversy' requirement in the federal constitution[,]" the issue of standing in Arizona is one of judicial restraint to insure that courts do not render mere advisory opinions or decide moot issues. *Id. at 181-82, 812 P.2d at 999-1000* (quoting *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Serv.s in Ariz., 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985)).* However, where as here, whether an action should be pursued in the name of a corporation, its shareholders, or another individual or entity, concerns who is the real party in interest under *Rule 17(a)*, not a standing issue. *See Toy, 192 Ariz. at 87, 961 P.2d at 1036.*

P15 Because the defense that a plaintiff is not the real party in interest and lacks capacity to sue is not jurisdictional, it can be waived if not asserted in a timely manner *See Hurt v. Superior Court of Ariz., 124 Ariz. 45, 48-49, 601 P.2d 1329, 1332-33 (1979); Safeway Ins. Co. v. Collins, 192 Ariz. 262, 266, ¶ 21, 963 P.2d 1085, 1089 (App. 1998).* Under *Rule 9(a)*, as interpreted

by our courts, the issue of whether a party is the real party in interest under *Rule 17(a)* must be raised either by motion before the answer is filed or by way of an affirmative defense in the answer, and if not then raised, any objection to capacity to sue is waived. *Ballard v. Lawyers Title of Ariz., 27 Ariz. App. 168, 169, 552 P.2d 455, 456 (1976).*

P16 We have previously held that because a "pretrial stipulation in the context of a joint pretrial statement has the effect of amending the pleadings," an issue regarding capacity to sue may properly come before the court even if a party may not have raised such issue in an answer or by motion prior to filing the answer. *Lake Havasu Cmty. Hosp. v. Ariz. Title Ins. & Trust, 141 Ariz. 363, 370-71, 687 P.2d 371, 378-79 (App. 1984), disapproved of on other grounds in Barmat v. John and Jane Doe Partners, A-D, 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987).* There, the defendant claimed the plaintiff/hospital lacked capacity to bring the action because it had transferred its assets and had assigned all rights of recovery from the action to another entity. It did not, however, raise this defense in its answer or by motion prior to filing the answer, but raised it in a joint pretrial statement. *Id. at 370, 687 P.2d at 378.* This court noted, however, that the hospital did not stipulate to this as an issue of fact and law that was material; only the defendant deemed it material. Therefore, the answer was not amended, and defendant waived any objection to the hospital's capacity to bring the suit. *Id. at 371, 687 P.2d at 379.* We also noted that, even assuming there was a stipulation on this issue,

the defendant's statement regarding lack of capacity to sue was inadequate under *Rule 9(a)* because it did not contain a "specific negative averment" and "supporting particulars."

P17 Similarly, Merchants did not raise the capacity to sue issue in its answer or by motion prior to filing its answer. The issue was raised for the first time in the joint pretrial statement. However, as in *Lake Havasu Community Hospital*, Coleman did not stipulate that this issue was material; only Merchants deemed it material. Further, Merchants failed to comply with the specificity requirements of *Rule 9(a)* and merely alleged that "Plaintiff does not have standing to bring this lawsuit because Joseph Coleman and Merchants never had a Contractual relationship. The Contract is between Secure and Merchants." It did not set forth particular circumstances regarding why Coleman dba Secure lacked capacity to sue. We conclude that this issue has been waived. Although the trial court denied Merchants' motion on its merits, we will affirm the trial court if it is correct for any reason. *City of Phoenix v. Geyler, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).*

P18 Waiver aside, the evidence presented at trial supported the trial court's findings and conclusion that Coleman had the capacity to sue. Although Coleman signed the contract as director of Secure and the parties agreed in the joint pretrial statement that Merchants entered into an agreement with Secure Opportunities Group, Inc., Secure was not designated in the contract as an Arizona corporation. Coleman testified that the corporation was in the process of

dissolving at the time Secure entered into the contract with Merchants. He further testified that Secure is Coleman doing business under that name and that when the contract states that Secure will perform, it means that Coleman will perform. Coleman's counsel also stated that the corporation was defunct when Merchants breached the contract with Coleman and when Coleman filed his complaint There was sufficient evidence for the trier of fact to conclude that Coleman was a real party in interest under *Rule 17(a). See A.R.S. § 10-1405(B)(5)(2004)* ("Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name or any officers, directors or shareholders . . . "); *Thomas v. Harper, 14 Ariz. App. 140, 141, 481 P.2d 510, 511 (1971)* (holding that under former Arizona statute giving dissolved corporation right to sue, plaintiffs who were stockholders of a defunct corporation could bring an action to collect on a promissory note of the corporation because on dissolution, legal title to property of the corporation passes to stockholders). The trial court did not err in denying Merchants' request to dismiss the action.

P19 Both parties have requested attorney's fees pursuant to *A.R.S. § 12-341.01.* As the prevailing party in this appeal, Coleman is entitled to his costs and his reasonable attorney's fees upon compliance with *Arizona Rule of Civil Appellate Practice 21(c).*

CONCLUSION

P20 For the foregoing reasons, we affirm the judgment of the trial court.

/s/ SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ MICHAEL J. BROWN, Presiding Judge

/s/ JON W. THOMPSON, Judge

APPENDIX E

SIGNED.

[SEAL]

Dated: March 26, 2007

Randolph J. Haines
RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re GERALD D. W. NORTH, Debtor.	Chapter 11 CASE NO: 2:03-bk-15266-RJH
GERALD D. W. NORTH; NORTH & CO., INC., formerly an Arizona coporation; SHERMAN BROOK, as Trustee of the David North II Trust,, and CERES INVESTMENTS LIMITED PARTNERSHIP, Plaintiffs, v. THE CITY OF BULLHEAD CITY, an Arizona municipality, SHEPHEN A. KOHNER; and JAMES F. POLESE, Defendants.	ADVERSARY NO: 2:05-ap-00655-RJH ORDER GRANTING BULLHEAD CITY'S MOTION TO DISMISS

The issue before the Court is whether the involuntary dissolution of an Arizona corporation automatically transfers corporate assets to the shareholders. The Court concludes that ownership of the corporation's assets does not automatically transfer to the shareholders upon dissolution, both under current Arizona statutes and those in effect in 1993.

Background Facts

North & Co., Inc. was involuntarily, administratively dissolved on December 10, 1993 by the Arizona Corporation Commission. North & Co. then owned approximately 206 of the 237 acres that were subsequently acquired by Bullhead City. Gerald D.W. North, Debtor herein, and David North II Trust were two of the shareholders of North & Co.

On April 17, 2000 Bullhead City's Superintendent of Streets placed the subject property for sale and "struck off" the property to Bullhead City as purchaser for alleged unpaid special assessment installments. On May 18, 2001, Bullhead City made an attempt to notify all interested parties by certified letter that the redemption period had passed and that interested parties had until June 18, 2001 to redeem the property. The letter stated, among other things, that unless the property is redeemed by June 18, 2001, a deed to the property will be issued to Bullhead City as the purchaser. The property was not redeemed, and the deed was issued to Bullhead City. Subsequently, Bullhead City initiated a quiet title action to terminate any

adverse claims to the property it had acquired. Again, the North & Co. shareholders claim they did not receive notice of this quiet title action, and Bullhead City received judgment by default.

The Debtor has filed this adversary proceeding against Bullhead City in an attempt to reverse the taking of the property by Bullhead City and set aside the allegedly improper default quiet title judgment and the City's acquisition of the property. Debtor argues that Bullhead City acquired the property unlawfully and for a small fraction of its alleged $12 million value. Debtor also states that the acquisition of the property occurred while the Debtor was engaged in his former Chapter 11 Bankruptcy case, and was therefore in violation of the automatic stay in place at that time. All of these arguments hinge on the premise that when North & Co. was administratively dissolved legal title to its property passed to the stockholders, subject to payment of the debts of the corporation. *Thomas v. Harper*, 481 P.2d 510 (Ariz. App. 1971).

Applicable Statutes

Title 10 of the Arizona Revised Statutes was amended and renumbered in 1994, with an effective date of January 1, 1996. The current statute is clear that dissolution does not automatically transfer a corporation's assets.[1] But the former version of the

[1] The Court does note that in amending the statutes in 1994, the Arizona Legislature removed any ambiguity or doubt as to the effect of a dissolution of a corporation on the corporation's assets.

statutes in effect on December 10, 1993 governed the dissolution of North & Co. The statutes in effect in 1993 were enacted in 1976 and include Arizona Revised Statutes §§ 10-082 through 10-105 (West 1990) (hereinafter referred to as "A.R.S.").[2] A corporation may be dissolved either voluntarily or involuntarily.

Under the 1976 statute, a voluntary dissolution may be initiated in one of three ways: 1) by the original incorporators before stock has been issued and before the corporation has commenced business; 2) by written consent of all of the shareholders; and 3) by adoption of a resolution to dissolve by the board of directors with a vote by shareholders approving the dissolution.[3] The dissolution is then carried out by the corporation itself and involves the filing of a statement of intent to dissolve, the collection and liquidation of its assets, the payment and satisfaction of its liabilities, and the transfer of any remaining assets to its shareholders.[4] Once the voluntary dissolution process has been completed by the corporation, the corporation must then draft and file articles of dissolution with the Arizona

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"Dissolution of a corporation does not: 1. Transfer title to the corporation's assets." A.R.S. § 10-1405 (West 2004) (added by Laws 1994, Ch. 223, § 4, eff. Jan. 1, 1996).

[2] Unless otherwise indicated all references to the Arizona Statutes will be to the 1976 version of the statutes in place on the date of the dissolution of North & Co., which is cited as: A.R.S. § XX-XXX (West 1990).

[3] A.R.S. §§ 10-082, 10-083, and 10-084.

[4] A.R.S. § 10-087.

Corporation Commission and provide the necessary notice thereof.[5]

Involuntary dissolution of a corporation and the liquidation of its assets were governed by A.R.S. §§ 10-094 through 10-105. Either the Attorney General of Arizona or the Arizona Corporation Commission could initiate proceedings for an involuntary dissolution of a corporation.[6] If the Arizona Corporation Commission initiates the involuntary dissolution, the process is conducted within the Commission and is called a revocation of the articles of incorporation.[7] If a corporation meets any one of the six conditions listed, the Commission must issue a certificate of revocation, file a copy of the certificate in its office, and mail a copy of the certificate of revocation to the corporation.[8] Upon the issuance of the certificate of revocation, the existence of the corporation shall terminate, subject to a timely application for reinstatement filed by the corporation within six months of the certificate of revocation.[9]

A.R.S. § 10-097 provides jurisdiction for the superior court to liquidate the assets and business of a corporation in an action by a shareholder, an action by a creditor, if the corporation makes an application to have its liquidation under the supervision of the court as part of its intention to dissolve, or in an action filed

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[5] A.R.S. §§ 10-092 & 10-093.

[6] A.R.S. §§ 10-094 or 10-095.

[7] See A.R.S. § 10-095.

[8] A.R.S. § 10-095(C).

[9] A.R.S. § 10-095(D).

by the Attorney General. There is no mention in the statutes of any proceeding that may be filed by the Arizona Corporation Commission for an involuntary liquidation of the corporation's assets, or any proceeding that takes place automatically to wind-up and liquidate the corporation's assets upon the issuance of a certificate of revocation by the Commission.

None of the statutes in effect on the date of the involuntary dissolution of North & Co., Inc. specifically indicates an automatic disposition of the assets of a corporation upon an involuntary dissolution; they only provide that an action that may be filed by a shareholder, creditor, or the Attorney General, or for the corporation to conduct a voluntary liquidation of the assets either with or without the state court's assistance.

Nor do the remaining statutes support Debtor's theory of an automatic transfer of the assets to the shareholders.

A.R.S. § 10-004(A)(2), defines the general substantive powers of valid corporations, including the power to sue, be sued, complain, and defend in its corporate name. A.R.S. § 10-105 provides that when a corporation is dissolved by: 1) the issuance of a certificate of dissolution by the Arizona Corporation Commission; 2) a judgment of a court that has not liquidated the assets and business of the corporation; 3) issuance of a certificate of revocation of the articles of incorporation by the Commission; or, 4) the expiration of a corporation's stated duration, the dissolution will not take

away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to the dissolution. In short, even after dissolution, the corporation continues to have the right to sue or be sued in its corporate name for any claim or liability that was incurred before the dissolution.

A.R.S. § 10-101 provides for the discontinuance of a liquidation action filed in state court. The provision states "The liquidation . . . may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists." Once this cause has been established, the court is required to dismiss the liquidation proceedings and "direct the receiver to redeliver **to the corporation** all its remaining property and assets." (Emphasis added) Thus the liquidation of the corporation's assets is not necessarily simultaneous with dissolution. They may occur at the same time, or as part of the same proceeding, but there is no requirement that both take place as part of the same transaction. Under A.R.S. § 10-097, a liquidation proceeding may be instituted by a shareholder or a creditor without dissolving the corporation. Likewise, the corporation could be dissolved due to an expiration of its duration, or a failure to file the appropriate documents, or pay the annual fee, without a liquidation action commencing.

Finally, A.R.S. § 10-104 provides for the deposit with the state treasurer of any portion of the assets distributable to a creditor or shareholder who is unknown, cannot be found, or is under disability without

a legally competent person available to receive the proposed distribution. This provision suggests that some entity must conduct a collection of the corporation's assets and make the distributions to the creditors and eventually to shareholders. This provision would be meaningless if there were an automatic transfer of the corporation's assets to its shareholders upon the involuntary dissolution.

One main theme of the dissolution and liquidation process is that the liabilities of the corporation to creditors are to be paid before any distribution is made to the shareholders. An automatic transfer of the corporation's assets to the shareholders without payment of the debts of the corporation is simply not provided for in the statutes and it would be illogical for a creditor to have to chase the individual stockholders of a corporation, who may or may not be identified in the filings with the Arizona Corporation Commission,[10] to satisfy the debts of the corporation simply because the corporation was involuntarily or administratively dissolved.

The Court therefore concludes that the statutory scheme in place at the time of the dissolution of North & Co., Inc. **did not** provide for the automatic transfer of assets of a dissolved corporation to its shareholders.

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[10] The Corporation Commission does not track the shareholders of corporations per se, although some of the documents filed with the Corporation Commission may list some of the owners of a corporation. For example, the annual report requires the corporation to list shareholders or owners with a twenty percent or more share of any class of stock or who holds a twenty percent ownership in the corporation.

Under these statutes, there were only two means for a corporation's assets to be distributed upon dissolution, and neither was automatic. First, the corporation could voluntarily dissolve and conduct its own winding up and distribution of assets to creditors, with any remaining assets to be distributed to shareholders. Second, the assets could be liquidated through the use of a state court action filed by the parties authorized under the statutes. Here there was neither a voluntary dissolution by the corporation nor a state court action to liquidate the assets.

Case Law

Debtor relies on *Thomas v. Harper* for the proposition that "[upon] dissolution, the legal title to the property of the corporation passes to the stockholders subject to the payment of the debts of the corporation."[11] *Thomas* is distinguishable from the present case on a number of grounds.

First, *Thomas* was decided under a law that was no longer in effect at the time of the dissolution of North & Co., Inc.[12]

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[11] *Thomas v. Harper*, 481 P2d 510, 511 (Ariz. App. 1971) (citing *Gardiner v. Automatic Arms Co.*, 275 F. 697 (D.C. 1921); and 19 C.J.S. Corporations § 1730, p. 1489).

[12] The Court notes that the *Thomas* case was decided in 1971, the statute referred to in *Thomas*, A.R.S. § 10-365(B) (1956), was repealed and replaced in 1976 with renumbered statutes. The history of A.R.S. § 10-087 shows that it was derived from former A.R.S. §§ 10-362, 10-364 to 10-366. A.R.S. § 10-087 provides for the procedure to be taken in a voluntary dissolution

Second, the *Thomas* case addressed whether after a corporation is involuntarily dissolved by the Arizona Corporation Commission, its shareholders may sue to collect the balance due on a promissory note owed to the corporation, or whether the corporation is an indispensable party and the shareholders are improper parties. But A.R.S. § 10-105 was subsequently enacted in 1976, and there is no historical reference to the prior statute. Section 10-105 specifically provides that after the dissolution, any remedy available to or against the corporation existing at the time of the dissolution shall continue. Further, "[t]he shareholders, directors, and officers shall have the power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim." A.R.S. § 10-105. This specific

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after the filing of a statement of intent to dissolve. This statute allows for the corporation to continue to exist after filing the statement of intent to dissolve in order for the corporation to wind-up its affairs, make distributions to creditors, and finally to distribute the remainder of any assets to shareholders. Although the corporation continues in existence, upon the filing of a statement of intent to dissolve, it is prohibited from conducting any business, except insofar as may be necessary for the winding up of the corporation. A.R.S. § 10-086. A.R.S. § 10-105 does not show the same historical origins as § 10-087. A.R.S. § 10-105 does not show any historical connection to the previous statutes, and its historical note merely indicates that it was added by Laws 1975, Ch. 69 § 2, eff. July 1, 1976. A.R.S. § 10-105 provides that the involuntary dissolution of a corporation by the commission, by a judgment of the state court, if the state court has not liquidated the assets of the corporation, or by expiration of the corporation's duration does not take away or impair any remedy available to or against such corporation existing at the time of the dissolution. In short, the corporation may continue post-dissolution to sue and be sued.

grant of power to the shareholders in the 1976 statutes resolves the only issue decided in *Thomas*.

Third, the direct holding in *Thomas* is that "A defunct corporation is a proper party under A.R.S. § 10-365, subsec. B [(1956)], but is not a necessary or indispensable party **where there exist no debts on the part of the corporation**. . . . This is because on dissolution the legal title to the property of the corporation passes to the stockholders **subject to payment of the debts of the corporation**."[13] *Thomas* does not hold that the transfer of title to the stockholders is automatic and without any further action by either the corporation or the state courts, as this Court has found is required under the statutes in effect from 1976. The holding in *Thomas* is entirely in accord with the theme of the 1976 statutes as summarized above, *i.e.* that in the dissolution and liquidation process, the assets of the corporation are brought together and the liabilities to creditors are paid, and any remaining assets are to be distributed to the shareholders. That liquidation process is not automatic and requires some action by either the corporation if the liquidation is voluntary or the state court if the liquidation is involuntary.

Fourth, the present case and *Thomas* are distinguishable for the simple reason that North & Co. had creditors. North & Co. held title to real property that was accruing tax debt. The reason that Bullhead City "struck off" the property and effectuated the eventual

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[13] *Thomas*, 481 P.2d at 511 (Emphasis added and citations omitted).

sale of the property was to foreclose and collect the liability for alleged unpaid special assessments against the real property.

Finally, this case and *Thomas* are distinguishable because of the type of property involved. In *Thomas*, the issue was whether shareholders could sue on the balance of a note owed to the corporation, or was the corporation an indispensable party to the lawsuit. Here the subject property is real property in which the corporation held the recorded legal title. This case does not involve personal property, such as a desk or a promissory note, that could be transferred without formality. Instead, this case concerns real property, which can be transferred only by a deed that is properly recorded.[14]

The Court concludes that, at least after 1976, *Thomas v. Harper* does not stand for the proposition that the assets of the recently dissolved corporation are automatically transferred to the shareholders. Instead, *Thomas* merely stands for the proposition that the shareholders, by virtue of their ownership in the corporation, will be the eventual owners of any remaining corporate assets after the corporation is liquidated and the corporate liabilities are paid. *Thomas* also stood for the proposition that the shareholders, under the 1954 statutes, could sue on a promissory note of the dissolved corporation and it was not an indispensable

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[14] See A.R.S. § 33-412; and *Valley Nat'l Bank v. Hay*, 474 P.2d 46 (Ariz. App. 1970).

party. This idea was later adopted in A.R.S. § 10-105, which became effective in 1976.

Additional cases support this Court's conclusion that an involuntary dissolution by the Arizona Corporation Commission does not effect an automatic transfer of the corporation's assets to the shareholders. In *Ruck Corp. v. Woudenberg*[15], a contractor operating as an Arizona corporation entered into a contract for the construction of a commercial building. Upon learning that financing had not been secured by the owners, the contractor stopped working on the project and filed notice and claim of lien on the property for the work performed. The contractor sued for $17,500 and for foreclosure of its lien. The owners filed a counterclaim alleging that the contractor had breached the contract. The trial court awarded the contractor $16,000 as the reasonable value of labor and materials furnished, ordered foreclosure and denied the owners relief on their counterclaim. On appeal, the owners claimed that the trial court erred when it failed to grant their motion to join the stockholders of the contractor corporation as indispensable parties because the contractor had gone out of business prior to the filing of the state court complaint. The court of appeals held this claim to be without merit due to A.R.S. § 10-105, which provides that after dissolution the corporation can sue or be sued in its corporate name.[16]

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[15] 611 P.2d 106 (Ariz. App. 1980).

[16] *Id*. at 108; *see also United States v. High Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (Court rejected argument

The Arizona Court of Appeals has addressed the provisions allowing a corporation to continue in existence after it has been involuntarily dissolved under the Arizona statutes. In *Goldfield Mines, Inc. v. Hand*[17] the corporate charter of Goldfield I provided for a corporate existence of only twenty-five years; the charter was not renewed, and it expired in 1974.[18] Within a few weeks of the Arizona Corporation Commission's revocation of Goldfield I's charter in 1980, the directors and officers of the defunct Goldfield I formed a new corporation with the same name, "Goldfield II." It was intended that Goldfield II would be a continuation of Goldfield I, and toward that end, they executed a quitclaim deed purporting to convey the assets of Goldfield I to one of the officers of Goldfield II, backdating the deed to 1974, a date prior to the expiration of Goldfield I's charter. Goldfield II then resolved to accept a quitclaim deed of the property back from the officer. The

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that the corporation was "non-existent" and cannot be sued because the United States' claim survived the corporation's dissolution).

[17] 711 P.2d 637 (Ariz. App. 1985).

[18] The Court notes that the expiration of the stated corporate duration occurred in 1974, which was prior to the effective date of the 1976 amendments. Once the 1976 amendments did become effective, newly enacted A.R.S. § 10-105 provided that if a corporation was dissolved by the expiration of its stated corporate duration, the corporation may amend its articles of incorporation at any time within five years of the expiration of the period of duration. Goldfield I made no attempt to comply with renewal provision allowed in § 10-105, and the corporate charter of Goldfield I was revoked by the Arizona Corporation Commission in 1980. The Court also notes that appellant Hand's activities concerning the subject mining claims began in 1981.

Court of Appeals did not rule on the issue of whether Goldfield II was the successor of Goldfield I, and instead remanded that matter back to the trial court. However, as to the issue of whether Goldfield I had met the filing requirements for the fifteen unpatented mining claims, the Court of Appeals determined that it could decide that issue. If Goldfield I did not meet the filing requirements, then it would not matter who the successor-in-interest was, if any, because the unpatented mining claims would have been abandoned under federal law, and Hand would have a right to take these unpatented mining claims as his own.

The Federal Land Policy and Management Act (FLPMA, 43 U.S.C. §§ 1701, *et seq*., enacted in 1976) for the first time imposed a federal filing requirement for unpatented mining claims. The Act required the owner of an unpatented mining claim to file a copy of the certificate of notice and either an affidavit of assessment work or notice of intent to hold the claim with the local office of the Bureau of Land Management. For claims existing prior to October 21, 1976, including the fifteen claims purportedly held by Goldfield I, the deadline for filing the initial compliance was October 21, 1979. Failure to file by the date required under the Act would conclusively be deemed as an abandonment of the claim.

The crux of Hand's argument was that the expired corporation could not validly take action to comply with FLPMA requirements, and therefore the filing made on behalf of Goldfield I in 1979, while complete and timely, was null and void. Hand argued that A.R.S.

§ 10-105, the statute that Goldfield II relied upon as validating the actions of Goldfield I, was inapplicable because the statute was enacted two years after Goldfield I was dissolved for failure to renew its charter.

The Court of Appeals held that the result would be the same under either the 1956 or the 1976 statutes. A.R.S. § 10-364 (1956) permitted corporations whose charters had expired to continue to act for the purpose of winding up the corporate affairs. The Court held that while the corporation could not carry on new business, it could still hold and dispose of its property, collect its assets and discharge its obligations, but only for purposes of closing its affairs.[19] "Corporations may, as part of the winding up process, file documents required to protect rights in corporate assets. . . . We conclude that Goldfield I had the power, in winding up its affairs, to file the requisite FLPMA documents in order to preserve its assets."[20] The Court of Appeals also concluded that the new statute, A.R.S. § 10-105, which was in effect in 1979 when Goldfield I made the federal filings, "gave the directors and officers of Goldfield I the power to make the FLPMA filings in the exercise of their authority to take such action as might be appropriate **to protect the rights of the corporation**."[21] The Court of Appeals held that the officers and directors of Goldfield I were authorized under the old statute and the new statute to act to preserve the assets or

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[19] *Id*. at 642.

[20] *Id*. (Citations omitted).

[21] *Id*. (Emphasis added).

interests of the corporation. If the assets or interests of the corporation had automatically transferred to the shareholders upon the dissolution, then the Court of Appeals' holding that the officers and directors were allowed to take appropriate action to protect the rights of the corporation would make no sense. The corporation would have had no assets to protect if they had been automatically transferred in 1 974 when the corporation was dissolved.

In *United Bank v. Sun Valley*,[22] a corporation's line of credit had been renewed after its charter was revoked, and the corporation subsequently executed a deed of trust to secure the line of credit. The trial court granted summary judgment on the bank's foreclosure and the corporation's creditors appealed. Their initial argument is that after the corporation's charter was revoked, A.R.S. § 10-105 did not authorize the Bank to use *any* reasonable remedy to resolve its claim, but only authorized a lawsuit on the pre-dissolution obligation. The Bank argued that a lawsuit was not the sole remedy allowed by the statute and that the taking of a deed of trust to secure repayment of a pre-dissolution obligation is a remedy that should be allowed within A.R.S. § 10-105. The Court of Appeals held that nothing in § 10-105 specifically limited the available remedy solely to a lawsuit, and the language of the statute suggesting a lawsuit is neither mandatory nor exclusive. The Court allowed the use of the deed of

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[22] *United Bank of Arizona v. Sun Valley Door & Supply, Inc.*, 716 P.2d 433 (Ariz. App. 1986).

trust to settle the pre-dissolution claims that the Bank had against the corporation.

The appellants next argued that the trial court erred because the winding up provisions allowed in A.R.S. §§ 10-086 and 10-087 do not apply to the involuntary revocation of a corporation's charter. Those provisions apply only in a voluntary dissolution, so there were no post-revocation powers that the corporation could exercise and any such post-revocation acts are void. They relied on A.R.S. § 10-095(D), which provides that upon the issuance of a certificate of revocation, "the existence of such corporation shall terminate, . . . "

The Court of Appeals rejected appellants' argument and found that even with an involuntary dissolution, the corporation continues to have rights that allow it to windup its affairs and dispose of the claims against the corporation. The Court held:

> While we agree that upon the issuance of a certificate of revocation the corporate entity ceases to exist, we cannot agree that this terminates a dissolved corporation's limited statutory rights to 'wind up' its affairs even when the dissolution is otherwise involuntary. *See* A.R.S. § 10-087 and A.R.S. § 10-105.
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> . . . .
>
> [The] corporate powers remained unimpaired to the extent that it exercised its statutory rights after revocation. Since it is within the power of a dissolved corporation to give a note for a debt which existed before the dissolution,

> we conclude that the execution of the deed of trust by [the corporation] in favor of United Bank was proper.[23]

Thus the property of a dissolved corporation does not automatically transfer to its shareholders upon the dissolution, but any remaining property may eventually be distributed to shareholders, after the corporation has wound up its affairs, and paid its creditors.

Conclusion

The Court concludes that upon the involuntary dissolution of North & Co., Inc. the assets of the defunct corporation did not automatically transfer to its shareholders. An involuntary dissolution of the corporation and the liquidation of a corporation's assets are two distinct actions that may occur at or near the same time, but there is no requirement that they do take place at the same time.

The assets of the corporation that are not otherwise transferred by an affirmative act of the corporation, or by a judgment of a state court, continue to remain as assets of the defunct corporation and they do not automatically transfer to the shareholders of the corporation.

Because the real property held by North & Co., Inc. did not automatically transfer to the shareholders, it did not become property of this bankruptcy estate under 11 U.S.C. § 541. Notice to the shareholders of the

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[23] *United Bank*, 716 P.2d at 437-38.

tax sale was not required. Accordingly, Bullhead City's motion to dismiss is granted.

DATED AND SIGNED ABOVE

Copy of the foregoing e-mailed
this 26th day of March, 2007, to:

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APPENDIX F

EXCERPT FROM PLAINTIFF'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION AND MOTION FOR CERTIFICATION OF QUESTIONS TO ARIZONA SUPREME COURT PURSUANT TO RULE 27, ARIZ.RULES.S.CT., June 4, 2019, pp. 30-31 ("CONCLUSION"):

The Magistrate's Report should be rejected and Tiffany & Bosco's motion to dismiss should be denied with respect to all of the claims in suit. In the alternative, it should be denied with respect to the breach of written contract claim, and the following questions should be certified to the Arizona Supreme Court:

(1) Does A.R.S. § 10-1405(B)(5) continue the common law rule of *Norton v. Steinfeld*, 36 Ariz. 536, 288 P. 3 (1930), as incorporated in previous iterations of the dissolution statute, and allow shareholders, officers, and directors of a dissolved corporation to assert claims belonging to the dissolved corporation in their own name without joining the dissolved corporation?

(2) Does the general rule against assignment of legal malpractice claims apply where the assignment is from a corporation that was administratively dissolved before the attorney-client relationship began, to a trust that, at all times, was the corporation's sole shareholder, where the trustee of the trust was, at all times, the corporation's sole officer and director, such that all of the interactions between the attorney and the corporation, including all confidential communications and all client decisions, were made between the

lawyer and the trustee; where the trust, as assignee of the claims, is thus not a stranger to the attorney-client relationship; and where the personal relationship between the client and attorney remains exactly the same personal relationship after the assignment as it was before?