No. 20-6219

In the Supreme Court of the United States

SASCHA LYNCH,

Petitioner / Plaintiff,

v.

ALLEN Y. CHAO, ET AL.

Respondents / Defendants.

On Petition for Writ Of Certiorari to the California Court Of Appeal, Second Appellate District, Division 3

CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

RULE 44.2 GOOD FAITH CERTIFICATION REGARDING PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 44.2, I hereby certify that this Petition for Rehearing is limited to "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented," sufficient to warrant rehearing of the order denying certiorari in Sascha Lynch's case. The grounds **not specifically previously presented** include pending petitions raising the same issue and legal arguments referred to herein and is made in good faith and not for delay.

Submitted this February 1, 2021

Sascha Lynch

Sascha Lynch
In Pro Per

CERTIFICATE OF COMPLIANCE

No. 20-6219

SASCHA LYNCH,

Petitioner / Plaintiff,

v.

ALLEN Y. CHAO, ET AL.

Respondents / Defendants.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Rehearing contains 1,497 words, excluding the parts exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 1, 2021

Sascha Lynch

Sascha Lynch
In Pro Per

VERIFICATION

State of California)

County of Los Angeles)

I, Sascha Lynch, verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct representations of the CERTIFICATE OF SERVICE and PETITION FOR REHEARING.

Executed on February 1, 2021

Sascha Lynch

Sascha Lynch

On _____, 20_____ before me personally came to me known to be the person(s) described in and who executed the foregoing instrument. Such person(s) duly swore to such instrument before me and duly acknowledged that she executed the same.

Certificate Attached for California Notary Wording

Notary Public
Commission expires on:

CALIFORNIA ALL-PURPOSE
CERTIFICATE OF ACKNOWLEDGMENT
(CALIFORNIA CIVIL CODE § 1189)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
COUNTY OF Los Angeles)

On 02/01/2021 before me, Russell J. Gonzalez-Notary Public
(*Date*) (*Here Insert Name and Title of the Officer*)

personally appeared Sascha Rose Lynch,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public (Notary Seal)

RUSSELL GONZALEZ
Notary Public - California
Los Angeles County
Commission # 2299049
My Comm. Expires Jul 27, 2023

ADDITIONAL OPTIONAL INFORMATION

Description of Attached Document

Title or Type of Document: Verification Document Date: 02/01/2021

Number of Pages: 1 Signer(s) Other Than Named Above: _____

Additional Information: _____

revision date 01/01/2015

RA Exhibit

1 of 2

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No. 20-6219

Title:	**Sascha Lynch, Petitioner** **v.** **Allen Y. Chao, et al.**
Docketed:	November 5, 2020
Lower Ct:	Court of Appeal of California, Second Appellate District
Case Numbers:	(B296755)
Decision Date:	June 8, 2020
Rehearing Denied:	June 24, 2020
Discretionary Court Decision Date:	August 12, 2020

DATE	PROCEEDINGS AND ORDERS
Oct 29 2020	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 7, 2020) **Motion for Leave to Proceed in Forma Pauperis** **Petition** **Appendix** **Proof of Service**
Nov 24 2020	Waiver of right of respondent McKesson Corporation to respond filed. **Main Document**
Dec 23 2020	DISTRIBUTED for Conference of 1/8/2021.
Jan 11 2021	Petition DENIED.

NAME	ADDRESS	PHONE

Attorneys for Petitioner

RA Exhibit

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Party name: McKesson Corporation

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Blue Rose <timeless2t@gmail.com>

RE: Supreme Court Submission

PIO NoReply <PIONoReply@supremecourt.gov>
To: timeless2t@gmail.com <timeless2t@gmail.com>

Thu, Jan 7, 10:40 AM

Dear Sascha,

We are writing in response to your email to the Supreme Court of the United States. You may wish to contact the Clerk's Office at (202) 479-3011. Please push "5" in response to the automated message to speak with an analyst. Additionally, you may wish to the write the Clerk's Office at the following address:

Supreme Court of the United States

The Office of the Clerk

One First Street, NE

Washington, DC 20543

We hope this information will be helpful to you.

Public Information Office

Supreme Court of the United States

Thank you for your submission, it has been received and should it require any other information we will contact you at this e-mail address. - Public Information Officer, U.S. Supreme Court

Sent to: Public Information Office	Form Data
Name	**Sascha Lynch**
EMail Address	timeless2t@gmail.com
Subject	**Writ of Certiorari Filing Fee – Docket No. 20-6219**

Originated 2603:8000:c73e:d1dc:cc44:3bbb:2001:4dd7, 184.51.206.174, 184.51.101.230

Message

Hello and good morning to the SCOTUS Clerk's Office:

In my Motion for Leave to Proceed in Forma Pauperis filed October 29, 2020 and in contacting your office via the Public Information Office website on November 30, 2020, I inquired about my request to pay the filing fee in installments.

This inquiry is no longer necessary as I received $300 as a Christmas gift and would like to use it to pay the filing fee. Unfortunately, since I am proceeding in pro per, I do not know if 10 copies of my Petition, Appendix, etc. are required to accompany the filing fee or should I just mail the payment? If your office would provide guidance on the process going forward, I would greatly appreciate it. Please advise. Happy New Year!

Gmail

Blue Rose <timeless2t@gmail.com>

Supreme Court Submission

2 messages

<PIONoReply@supremecourt.gov>
To: <timeless2t@gmail.com>

Mon, Dec 28, 2020, 8:11 AM

Thank you for your submission, it has been received and should it require any other information we will contact you at this e-mail address. - Public Information Officer, U.S. Supreme Court

<PIONoReply@supremecourt.gov>
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Mon, Dec 28, 2020, 8:59 AM

[Quoted text hidden]

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Account #: [redacted]
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Receipt #: 050659
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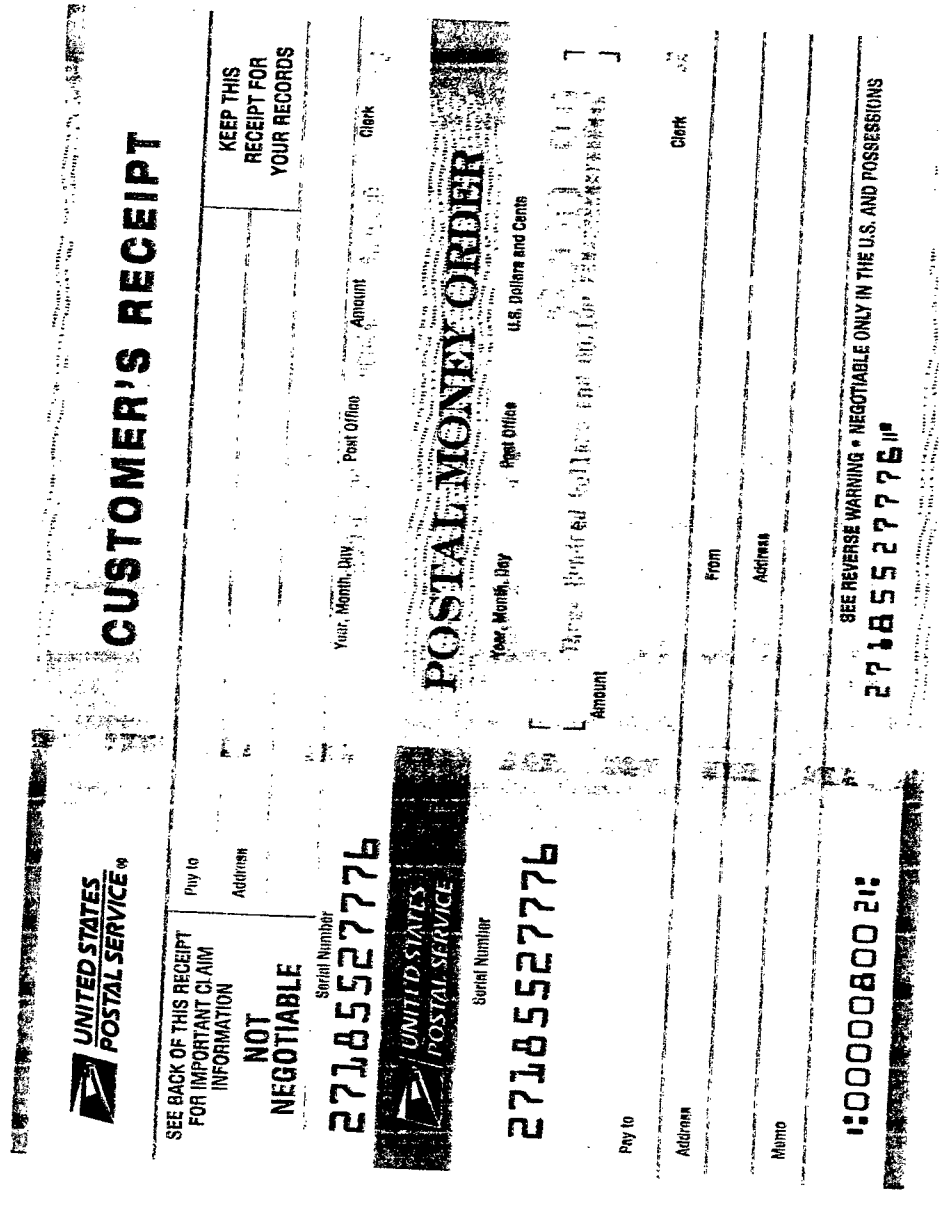

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

No. B296755

SASCHA LYNCH,
Plaintiff and Appellant,

v.

ALLEN Y. CHAO, PhD, et al.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES
SUPERIOR COURT CASE NO. BC 703 496
HONORABLE RAMONA G. SEE

APPELLANT'S REPLY BRIEF

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Appellant
Self-Represented

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I. INTRODUCTORY REMARKS

In *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (69 S.Ct. 1233, 93 L.Ed 1520) (1949), our United States Supreme Court makes clear federal court must follow state law writing:

> "[W]e look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found **only** in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See *Cities Service Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939); *Palmer v. Hoffman*, 318 U.S. 109, 117, 63 S.Ct. 477, 482, 87 L.Ed. 645, 144 A.L.R. 719 (1943). It accrues and comes to an end when local law so declares. *West v. American Tel. & T. Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956 (1940); *Guaranty Trust Co. v. York*, supra.[1] Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins*[2] is transgressed."

The case before this Court is to determine whether these important criteria has been met in this matter:

- If California law was adhered to in Sascha Lynch's case ("APPELLANT" or "LYNCH") filed within the statutory period in federal court on December 9, 2015 and tolled during *Lynch II* and equitably tolled to file in state court?
- Does the application of Federal Rule of Civil Procedure, Rule 3 alleged in LYNCH's opening brief correlate to tolling of the statute of limitations in California law?

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[1] *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079, 160 A.L.R. 1231 (1945).

[2] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).

- Is the trial court's reliance on the federal court's interpretation of a hypothetical injury pursuant to California Code of Civil Procedure, section 335.1 (AOB at pp. 3, 10, 17) and not on APPELLANT's "concrete" separate and qualitatively distinct delayed discovery injury in 2014 pursuant to California Code of Civil Procedure, section 340.8 (AOB[3] at pp. 10, 22-26) rulings on which our California Supreme Court has given clarity to such claims, a misplacement and error in judgment? *Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996) ("When interpreting state law, federal courts are bound by decisions of the state's highest court.")
- Whether *Lynch II*'s timely filed good faith remedy equitably tolled her claims?[4] (AOB at p. 21.) "[W]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." (*Elkins .v. Derby*, 12 Cal. 3d, 411, 414 (1974)) "Any diversity jurisdiction case can be filed in State Court instead of Federal court. But, if the case is worth less than $75,000, you must file it in State court," and

[3] Appellant's Opening Brief is designated throughout as "AOB," and the Respondents' briefs as Pfizer, et al. "PB" and McKesson "MB" at p. ___."

[4] Equitable tolling, in turn, may suspend or extend the statute of limitations when a plaintiff has reasonably and in good faith chosen to pursue one among several remedies and the statute of limitations' notice function has been served. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99-100.)

- Whether RESPONDENTS' are equitably estopped from asserting a defense against LYNCH's claims?

Had this matter made its way before the California Supreme Court as APPELLANT attempted to do by filing her Petition for Review on December 15, 2017, Case No. TEMP-G8XBV2SQ **[RJN ¶ 5, Exhibit E])** and mail served on this Court of Appeal the same day **[RJN ¶ 6, Exhibit F]**, for the court to give clarity on its rulings in latent personal injury cases, the Ninth Circuit would have had to adhere to binding state Supreme Court decisions (*Lawrence Tractor Co. v. Carlisle Ins. Co.* (1988) 202 Cal.App.3d 949, 954), and follow state law as outlined in *Ragan*. (Supreme Court decisions bind all lower courts – and this is true no matter how old the Supreme Court opinion might be.)

Pursuant to sections 452, 453, 459 and 623 of the California Evidence Code and Rule 3.1113(1) of the California Rules of Court, Appellant Sascha Lynch respectfully request that the court take judicial notice of the documents referred to herein and are attached to Appellant's Motion Requesting Judicial Notice in Support of Her Reply Brief; Memorandum of Points and Authorities; Declaration of Sascha Lynch and [Proposed] Order filed concurrently with this Reply Brief.

II. ARGUMENT

A. Respondents' Are Equitably Estopped from Asserting a Statute Of Limitations Defense

On October 23, 2018, when the Honorable Yolanda Orozco ruled this matter as complex litigation, she was not kidding! The complexity of California state law interpretation of varying opinions on the same subject matters in the same jurisdiction and sometimes even the same division is like trying to understand the ordinances in the Old

Testament – it can be very confusing to a layperson, particularly when the litigant is in pro per and held to the same standard as attorneys; but courts are not as forgiving when mistakes are made.

Until she is able to obtain legal representation to litigate this matter, she begs this court's patience as her understanding of state law expands over time. However recently, while researching legal arguments for her Reply Brief, one thing became abundantly clear – RESPONDENTS' are equitably estopped from asserting a defensive bar to any of her claims.

With new information consistently being uploaded to the Internet, LYNCH was able to ascertain Monsanto, its' subsidiaries **[1CT 33-35]** and Dr. Chao's **[1CT 29-31]** liability attributed to her latent endometrial cancer injury regarding the Copper 7 ("CU-7" or "IUD") intrauterine prescription drug and she filed her state court complaint and first amended complaint including their names and other alter egos associated with RESPONDENTS' PFIZER, et al. **[1CT 111-112; 2CT 212, 343; 3CT 435.]** SEARLE LABORATORIES, SEARLE PHARMACEUTICALS, INC. and its employee DR. ALLEN Y. CHAO are subsidiaries under RESPONDENT MONSANTO, the alter ego responsible for misleading LYNCH triggering the doctrine of equitable estoppel. **[2CT 212.]**

1. Respondent Monsanto's former counsel misled Appellant by false representation prior to the filing of *Lynch I*

In 2002, after complaining of painful intercourse with her then husband, an in-office visit to their family practice doctor performed an ultrasound examination that revealed a 7-shaped object inside her. A

referral to a hospital for a second ultrasound, confirmed the CU-7 implanted in LYNCH sometime in 1984 or 1985 was still inside her and had remained so for approximately 17+ years. Dr. Emmanuel Mba, an obstetrician/gynecologist specializing in woman's reproductive tract and fertility **[2CT 248-249]** surgically removed the CU-7 in 2002 and upon further examination in 2003, informed LYNCH of her infertility.

In 2004, she reached out to Monsanto about her injury to which Monsanto's former counsel John B. Winski, Esq. told APPELLANT, "I believe you should contact Pfizer Corporation, ***rather than Monsanto Company***, regarding your concerns." He went on to say that Monsanto "is a supplier of agricultural products and solutions, and ***had nothing to do with the manufacture or sale of the Cooper 7 product***." [Email dated Tuesday, May 11, 2004 filed concurrently with this Reply Brief as **RJN ¶1, Exhibit A.**] This communication is so profoundly relevant to this issue LYNCH presents before the Court, the absence of which would invoke a manifest injustice. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 65, fn 8 ["... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]..."].

On May 11, 2004, counsel for Monsanto misled LYNCH into believing it had no liability whatsoever and pointed to Pfizer Inc. and Pharmacia Corporation. Four days later, on May 15, 2004, an employee from Pfizer's litigation department, Maureen Tripp mailed a letter to APPELLANT. **[RJN ¶ 4, Exhibit D.]** Communication from May 15th until later in the year demonstrated LYNCH was ignorant of the true state of the facts that RESPONDENT MONSANTO had liability

attached to its' involvement with the CU-7 related to the devastating endometrial cancer injury it caused. **[1CT 37-39, 151-153.]** The infertility injury she suffered **[1CT 147-149]** is not before this court.

On November 5, 2004, *Sascha Henderson v. G.D. Searle & Co.*, et al., Case No. BC324095 was filed listing Pfizer Inc., G.D. Searle and Co., and Pharmacia Corporation as defendants. Contrary to the trial court's statement in its Minute Order, there was no ruling in that case upon which to base its' sustaining of a demurrer without leave to amend. **[3CT 554.]** In *Henderson* the infertility injury caused by the CU-7 was removed from state court to federal court on December 15, 2004.

On February 8, 2005 "before the opposing party serves either an answer or a motion for summary judgment" pursuant to Federal Rule of Civil Procedure, Rule 41 ("Rule 41"), the matter was voluntarily dismissed. The effect of this dismissal is one without prejudice and equivalent to California Code of Civil Procedure, section 581, sub. (c), which did not bar LYNCH from filing suit again on the same cause of action.

Lynch I came about by filing her case in the United States District Court Southern District of New York against RESPONDENT PFIZER. Monsanto was not listed as a defendant in *Lynch I* based on its misleading conduct **[RJN ¶ 2, Exhibit B; RJN ¶ 3, Exhibit C.]** One need only look at the face pages of the 2005 complaint and the first amended complaint for confirmation. The Ninth Circuit Court of Appeal decision face page provides further confirmation of this fact. **[2CT 352.]** In 2005, LYNCH made a passing reference to this in her amended complaint "Plaintiff did not discover that defendant Pfizer Inc. was the current owner of the subsidiary until May 11, 2004, when plaintiff

received an email response from Monsanto's in-house corporate counsel, John B. Winski, Esq. regarding plaintiff's inquiry." **[RJN ¶ 3, Exhibit C, p. 4.]** She made the same passing reference to Mr. Winski's statement during the *Lynch I* appeals process demonstrating LYNCH believed it was true and acted thereupon.

2. Respondent Monsanto's false representation in 2004 was not revealed before the filing of *Lynch II*

In 2014, after suffering a devastating latent "separate and distinct" and "qualitatively different" injury of endometrial cancer from the CU-7, while RESPONDENT MONSANTO and its subsidiaries' liabilities still remained hidden, *Lynch II* was filed in 2015 in federal court against one defendant, RESPONDENT PFIZER. **[2CT 268.]** Again, to her detriment LYNCH relied on the false representation stated by John B. Winski, Esq. in 2004.

She alleged a delayed discovery in *Lynch II* and that California Code of Civil Procedure, section 340.8 governed since the manifestation of the cancer was not made known until a healthcare provider informed her of her injury in January 2014 **[3CT 405]** to which LYNCH alleges this injury occurred from the 17+ years toxic exposure to the CU-7. In spite of this documented proof, the superior court judge erroneously based its determination on the decision of the federal court along with respondents' demurrers that California Code of Civil Procedure, section 335.1 governed based on a non-concrete hypothetical theory of the federal court **[2CT 268-270]**, which issued a technical procedural termination on the statute of limitations.

The Ninth Circuit Court of Appeals affirmed the district court's decision. **[2CT 306-307.]** (*Warrington v. Charles Pfizer & Co.* (1969) 274

Cal. App. 2d 564, 570; "Case law also justifies application of the discovery rule in certain pharmaceutical and product defect cases involving imperceptible injuries when the victim 'as a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of [the cause of injury].)

At the time when the Ninth Circuit denied her petition for rehearing and rehearing en banc, unbeknownst to LYNCH of the appellate process misstep she filed a Petition for Review to the California Supreme Court. **[RJN ¶ 5, Exhibit E]**, learning later the next step was to file a writ of certiorari to the United States Supreme Court. She filed an as-applied challenge to the constitutionally of California Code of Civil Procedure, section 335.1 being applied to her latent toxic exposure personal injury claim.

The Supreme Court did not take up the matter, again on a technicality – as the sole defendant RESPONDENT PFIZER waived right to respond. LYNCH filed a petition for rehearing, which was denied May 14, 2018, but before the decision was rendered on the rehearing, she filed her California state complaint.

3. Respondents' are equitably estopped from benefiting from false representation in Lynch's State Action filed April 24, 2018 and First Amended Complaint filed July 30, 2018

On April 24, 2018, APPELLANT filed a complaint in the Los Angeles Superior Court and then on July 30, 2018 the operative first amended complaint ("FAC") alleging the following California Code of Civil Procedure statutes for 1) a latent toxic exposure injury (section 340.8), 2) fraudulent concealment of the scientific knowledge their product causes cancer (section 338), and 3) not placing this warning on

the label (Business & Professions Code § 17200; see Bus. & Prof. Code § 17208). In response to LYNCH's FAC and 14 years after Monsanto's former counsel John B. Winski, Esq. made the false representation, on September 4, 2018, the truth came to light in RESPONDENT PFIZER, et al. demurrer, writing, "Monsanto's human pharmaceutical assets and responsibilities, which previously had **responsibility** for the Cu-7, remained with Pfizer even after it was spun off in 2016. **[AUG DEMURRERS, PFIZER, Page 7, lines 17- 25.]**

In stark contradiction to 2004, RESPONDENT MONSANTO pointed to "Pfizer Corporation" and "Pharmacia Corporation" as entities having "the **responsibility** for claims such as yours" **[RJN ¶ 1, Exhibit A.]** According to RESPONDENT PFIZER, et al.'s demurrers, RESPONDENT MONSANTO and its' alter egos, had an active role involved with the CU-7 and remained with the parent company until 2016. LYNCH's FAC contains Exhibit H **[2CT 212]**, which disputes the "spun off in 2016" statement alleged in RESPONDENT PFIZER et al.'s demurrers. What --- in 2016?

The court will see as of at least May 8, 2018, (see article heading titled, "Takeda/Shire Deal Stands Fifth Largest in Biopharma M&A") **[2CT 212]**, RESPONDENTS' MONSANTO, SEARLE LABORATORIES and SEARLE PHARMACUTICALS, INC. (Dr. Allen Y. Chao a former **Searle Pharmaceutical, Inc.** employee overseeing the "device design and [packaging] development" of the CU-7 **[1CT 29-31; 143-143]**) were listed as subsidiaries as of that date and certainly after LYNCH's filed her state complaint April 24, 2018.

In going over the demurrers in preparation of filing her reply brief, she was struck by RESPONDENT PFIZER, et al. counsel's

emphasis of privity as to only RESPONDENT MONSANTO and RESPONDENT DR. ALLEN Y. CHAO. Counsel for Pfizer, et al. writing,

> "Dr. Chao is a former employee of Pfizer and is being sued by the Plaintiff for his alleged role in causing her injuries during his employment at Pfizer. While Monsanto is no longer a part of Pfizer, it was the prior parent company of the Pfizer predecessor-in-interest that marketed and developed the Cu-7. Monsanto's human pharmaceutical assets and responsibilities, ***which previously had responsibility for the Cu-7***, remained with Pfizer even after it was spun off in 2016."

[AUG DEMURRERS, PFIZER, et al., Page 7, lines 17- 25.] By any definition of the word "responsibility" means "culpability and liability."

LYNCH was unaware of the untruthfulness of the concealed material fact told to her in 2004 until the facts alleged in RESPONDENT PFIZER's demurer brought the contradiction of those "facts" to light. *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 652. (estoppel applied when defendant's conduct, relied on by the plaintiff, induced the plaintiff to postpone filing the legal action until after the statute of limitations had run). Evidence Code section 623, which codifies the doctrine, provides, "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383)

In all due respect to this Court and counsel, LYNCH had completely forgotten about the communication from John B. Winski, Esq. **[RJN ¶1, Exhibit A]**, which took place some 16 years ago and she remembered it while preparing her reply brief. She assures the court and counsel, not raising this issue sooner was completely inadvertent.

However, the absence of which would be manifestly unfair to LYNCH and hope this explanation shows good cause as to why it was not raised sooner. It took some time for this connection to click, and now that it has, it provides a very bright spotlight on a bar to their defenses including the statute of limitations and is a pure question of law. As a reminder to this Court, a passing reference to this communication was made to Pfizer's counsel in *Lynch I*. There was no mention of it in *Lynch II* because she did not remember the event until preparing her reply brief.

From May 11, 2004 until April 24, 2018, RESPONDENT MONSANTO and its' subsidiaries SEARLE LABORATORIES, SEARLE PHARMACEUTICALS, INC.'S and as well as RESPONDENT DR. ALLEN Y. CHAO, Director of Pharmaceutical Technology and Packaging Development of the CU-7 **[1CT 106]** benefitted from not being held liable for its misrepresentation and now all RESPONDENTS' seek this court's approval to continue to benefit from the deliberately misleading conduct.

The California Supreme Court addressed the doctrine of equitable estoppel stating "A defendant should not be permitted to lull his adversary into a false sense of security, cause the bar of the statute of limitations to occur and then plead in defense the delay occasioned by his own conduct." (*Carruth v. Fritch* (1950) 36 Cal. 2d 426, 433.) If RESPONDENT PFIZER's demurrer statement is correct **[AUG DEMURRERS, PFIZER, Page 7, lines 17- 25]**, LYNCH is being denied her full and fair opportunity to litigate this matter on the merits before a jury. Based on reliance of privity as to Monsanto, its' alter egos and Dr. Chao, RESPONDENTS' are estopped from alleging a claim

preclusion, issue preclusion and statute of limitations defense to LYNCH'S claims. **[RJN ¶ 1, Exhibit A.]**

4. Respondents' McKesson and AmerisourceBergen are equitably estopped from benefiting from Monsanto's false representation in Lynch's State Action filed April 24, 2018 and First Amended Complaint filed July 30, 2018

Now at this stage, RESPONDENTS' MCKESSON and AMERISOURCEBERGEN (distributor defendants) along with RESPONDENT PFIZER et al. and its' alter egos seek to benefit from LYNCH being misled and being "ignorant of the true state of the facts," in which "[s]he relied upon the conduct to her injury." These two essential elements of the doctrine of equitable estoppel have been met as to the impact on her. (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37; *Lantzy, supra,* 31 Cal.4th 363.) The first two elements on defendants' conduct as explained in this Reply Brief are self-evident.

RESPONDENT MONSANTO and its' subsidiaries are culpable and should be estopped from profiting by their own wrong to the extent that it hindered LYNCH in her diligence from discovering her cause of action against them sooner – much sooner. In fact, what made its' culpability clear is RESPONDENT PFIZER, INC, et al.'s demurrers despite its attempt at **shell game** liability. **[2CT 227 fn.]** This court can see by the misrepresentation of defendant's statements, she was induced to refrain from bringing a timely action against Monsanto by yet another fraud perpetrated on her by these defendants.

This prevented LYNCH from adding any fictitious Doe defendants as she relied on Monsanto counsel's misleading and deceptive assertion that those two entities were responsible. **[AUG SUR-REPLY,**

MCKESSON, Page 2, lines 17- 20.] RESPONDENT AMERISOURCEBERGEN all but states its involvement of liability of LYNCH's injury where in its October 23, 2018 demurrer it states, "Plaintiff is suing Amerisource [sic] due to its role in distributing the Cu-7 product for Pfizer's predecessor-in-interest, the producer of the Cu-7, in southern California during Plaintiff's implantation." **[AUG DEMURRERS, AMERISOURCEBERGEN, Page 7, lines 21- 23.]**

According to RESPONDENTS' AMERISOURCEBERGEN, MCKESSON and PFIZER, et al.'s demurrers along with the trial court's assertion of "privity with Pfizer, Inc." in its Minute Order, these companies engaged in suit related conduct that created a substantial connection with this forum state and gives both specific jurisdiction and general jurisdiction over this matter.

5. Respondents' argument of doctrine of mutuality of parties in privity in state action fails

RESPONDENT MCKESSON seems to suggest an agreement of privity with RESPONDENT PFIZER et al. as outlined in the trial court's Minute Order. **[3CT 555;** MB at p. 5.] The determination of privity depends upon the fairness of binding a party with the result obtained in earlier proceedings in which it did not participate. This is the argument RESPONDENT MCKESSON makes citing *Bernhard v. Bank of America Nat. Trust & Savings Assn.* (1942) 19 Cal. 2d 807, alleging this "privity with Pfizer" is also a res judicata and collateral estoppel bar. (MB at p. 8; PB at pp. 25-26.) There is another bar to privity when it comes to the product at issue here. California recognizes an exception to the privity requirement pertaining to food or drug

products and the CU-7 is a prescription drug. *Gottsdanker v. Cutter Labs*, 182 Cal. App. 2d 602, 606-607 (1960).

In light of the doctrine of equitable estoppel argument put forth in this brief, and the due process consideration not afforded to LYNCH, whether there is any merit to their collateral estoppel argument is a matter left up to this court.

RESPONDENTS' MONSANTO, DR. ALLEN Y. CHAO, SEARLE LABORATORIES, SEARLE PHARMCEUTICALS, INC., PFIZER, INC. et al., MCKESSON and AMERISOURCEBERGEN should not be allowed to benefit from Monsanto's former counsel misleading LYNCH and preventing her from holding them liable for her latent toxic exposure CU-7 injury in her state action currently before this court.

B. Statute of Limitations Extraordinary Proposition Applicable to Lynch's Claims

RESPONDENT PFIZER, et al. counsel asserts, "There is no authority for the extraordinary proposition that the statute of limitations is 'suspended' or 'equitably tolled' during the very period that a plaintiff pursues a federal diversity jurisdiction lawsuit that is ultimately dismissed on statute of limitations grounds and affirmed on appeal." (PB at p. 9.) Despite this belief, there is state case law and a California code that challenges their assertion. California decisional law does provide for "equitable tolling" which, in extraordinary circumstances, might arguably be used to extend the tolling period. (See *Kolani v. Gluska* (1998) 64 Cal. App.4th 402, 411.)] The equitable tolling doctrine fosters the policy of the law of this state which favors avoiding forfeitures and allowing good faith litigants their day in court." *Addison v. State of California* (1978) 21 Cal.3d 313, 320-321. (AOB at p. 29.)

Further, under section 1049 of the Code of Civil Procedure, "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." *McKee v. National Union Fire Ins. Co.* (1993) 15 Cal. App. 4th 282, 288. RESPONDENTS' seem to have taken exception to LYNCH's argument that Federal Rule of Civil Procedure, Rule 3 stops the running of the statute. (AOB at p. 16-21; PB at p. 20; MB at p. 8). However, LYNCH is not alone in her assessment, there is case law in support of her argument.

Two California Supreme Court rulings in fact, *Jones v. Mortimer* (1946) 28 Cal.2d 627, 636 ["the commencement of plaintiff's action tolled the running of the statute . . . ."] and *McDougald v. Hulet* (1901) 132 Cal. 154, 160-161 ["filing of the complaint suspended the running of the statute of limitations . . . ."] provide authority for circumstances in which the statute of limitations are "suspended" or "equitably tolled."

C. Lynch's Good Faith Remedy Equitably Tolled Her Claims

In her opening brief, LYNCH argued equitable tolling applied to suspend or extended the statute of limitations when she reasonably and in good faith chose one of several remedies (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 102) to file her claim. (AOB at p. 21). LYNCH respectfully requests the court to take judicial notice of the Superior Court of California Overview of the State Court System where it states: "Any diversity jurisdiction case can be filed in State court instead of Federal court. But, if the case is worth less than $75,000, you **must** file in State court." **[RJN ¶ 7, Exhibit G.]** LYNCH

in good faith chose to file in federal court although an alternative legal remedy to file in state court was also available.

The California Supreme Court states, "(R)egardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled '(w)hen an injured person has several remedies and reasonably and in good faith pursues one.' " (*Elkins v. Derby* (1974) 12 Cal.3d 410, 414.) [AOB at p. 21; MB at p. 8; PB at p. 20.]

The California Supreme Court decision in *McDonald, supra,* 45 Cal.4th 88 at p. 99 also applies a "suspension" or "extension" approach to the statute of limitations writing: "Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.'" *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363. (AOB at p. 13.)

1. The *McClain* proposition that prior statute of limitations rulings are collateral estoppel fails

RESPONDENTS' allege in their brief the two federal court dismissals on the statute of limitations is in and of itself a collateral estoppel bar to LYNCH's claims. (PB at p. 9.) To this end RESPONDENTS' rely on *McClain v. Rush* (1989) 216 Cal.App.3d 18, 28-29 ("[H]olding that the merits of a matter is 'actually litigated' for purposes of collateral estoppel where the matter has been dismissed on the basis of the statute of limitations.") *McClain* is inapposite for the following reasons.

First, public policy considerations may warrant an exception to the claim preclusion aspect of res judicata, at least where the issue is a question of law rather than of fact. (*Roos v. Red* (2005) 130 Cal.App.4th

870, 878; *Sahadi v. Schaeffer* (2007) 155 Cal. App.4th 704, 714 [whether a cause of action is time-barred is a question of law).]

Second, the California Supreme Court, responding to a request from the Ninth Circuit Court of Appeals, offered this analysis. In *Murray v. Alaska Airlines*, 237, P. 3d 565 (2010) it held, "[T]he United States Supreme Court 'has explained that the focus of our inquiry should be on whether the party against whom issue preclusion is being sought had an adequate opportunity to litigate the factual finding or issue in the **prior** administrative proceeding [citing *United States v. Utah Construction Co.*, 384 U.S. 394 (1966)].'" LYNCH filed a petition for review to the California Supreme Court related to *Lynch II* addressing the inadequate opportunity to litigate on an as-applied challenge to the state statute erroneously applied to her case. **[RJN ¶ 5, Exhibit E.]**

The Ninth Circuit's construction of California law is wrong, holding that LYNCH's injury did not fall under the delayed discovery rule pursuant to the latent toxic exposure statute, California Code of Civil Procedure, section 340.8. (*Jenkins v. County of Riverside*, 138 Cal.App.4th 593, 621–622 (2006).) The federal court did not align itself with the *Ragan* rule, and therefore the doctrine of collateral estoppel should not be applied to preclude litigation of the proper interpretation of state law. (*Gottschall v. Crane Co.*, 230 Cal. App. 4th 1115 (2014).)

D. Full And Fair Opportunity Is Yet To Be Had

LYNCH is struck by the blindness or more so the insensitivity in RESPONDENTS' assertion that, "Ms. Lynch does not claim, and cannot claim, that she did not have a "full and fair" opportunity to litigate the

statute of limitations issue." (PB at p. 26.) Blind because this is the very issue she has been challenging all along, including the trial court's Minute Order decision. When a federal court[5] presented with a latent toxic exposure injury case appropriately falling under California Code of Civil Procedure, section 340.8 is given the edict to follow California state law as in *Ragan*, but decides a case on a hypothetical, absent the elements of a concrete injury-in-fact, ignoring a decision contrary to United States Supreme Court ruling in *Spokeo v. Robins*, 136 S. Ct. 1540, 1458 (2016), and then RESPONDENTS' choosing not to argue their "solid well-founded" position before this same court on this same issue, which would have brought clarity to this case, is hardly a full and fair opportunity! No, "she did not have a 'full and fair' opportunity," and the **coziness** between the trial court and RESPONDENTS' is a continuation of this unfairness.

A sound policy is for a party to have one fair trial on an issue [or cause of action] to litigate their claims and defenses. LYNCH has yet to receive that "one fair trial," as her complaint was more than sufficient to withstand a statute of limitations bar based on a fair assessment of state law. The substance of her underlying claim was never tried or determined, instead the outcome was reached on procedural or technical grounds that did not resolve or depend on the claim's merits. This

[5] The Ninth Circuit asked this Court to address this question, "When multiple distinct personal injuries allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on a later injury?"" The California Supreme Court decided that claims arising from separate injuries caused by the same wrongdoing may accrue on different dates according to when the plaintiff discovered each injury. *Pooshs v. Phillip Morris USA, Inc.*, 51 Cal.4th 788, 250 P.3d 181, 123 Cal. Rptr 3d 578 (Cal. 2011).

reasoning is not lost on our Supreme Court in *Lackner v. LaCroix*, 25 Cal.3d 747 (1979), writing; "[Termination of an action by a statute of limitations defense must be deemed a technical or procedural as distinguished from a substantive termination].)"

This Court of Appeals, and this division, also ruled in conjunction with our Supreme Court in *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 777 on this issue, that a fair opportunity was not had [noting ""the purpose served by dismissal on limitations grounds is in no way dependent on nor reflective of the merits—or lack thereof—in the underlying action""]); *Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591,1596 ["[t]ermination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination"].... "a judgment based on a statute of limitations defense does not constitute a judgment on the merits so as to bar subsequent litigation of the same cause of action." (AOB at p. 32.) And still the trial court and RESPONDENTS' erroneously rely on a statute of limitations bar. (PB at 7-8, 10-11, 12-14, 23-26 and MB at p. 7.)

Lynch II was filed in federal court as a first legal remedy under a latent toxic exposure endometrial cancer injury from the CU-7 which remained inside her for 17+ years (its normal use cycle was three years), and she filed the second "similar" claim in state court after the first remedy was pursued under the alternative second claims tolling rule. (*Collier v. City of Pasadena* (1983) 142 Cal. App. 3d 917, 924-926.) And on this note RESPONDENTS' appear to need some clarification on a statement LYNCH made that has been referred to by them, her "is related to and one and the same" comment. The remedy sought in *Lynch*

II is the injury litigated in this state action; they are one and the same.... endometrial cancer caused by the CU-7 prescription drug. There is nothing unambiguous about it, nor her effort to pursue it.

E. Respondents' Focus On Res Judicata And Collateral Estoppel As A Bar To Lynch's Claims Fails To Address Relevant Arguments In Lynch's Opening Brief

1. Respondents' fails to refute the triable issue of material fact that the Litton Report shows Willful Misconduct

Willful misconduct having been established by LYNCH that RESPONDENTS' knowledge from the Litton Bionetics report [AOB at p. 36; **2CT 198- 203**], outlined in a Business Week article published in October 1985 attached to her FAC [**1CT 38-39**], as well as a Wall Street Journal article published October 9, 1985 also attached to her FAC [**2CT 264**] is proof text they had direct knowledge of the cause of cancer prior to placing the CU-7 on the market ... and still did it ... demonstrates malice in their decision and willful misconduct. (*G.D. Searle & Co. v. Superior Court*, 49 Cal. App.3d 27 (1975).

2. Respondents' fail to address the impropriety of the trial court presiding over this matter

Counsel for RESPONDENTS' did not raise an argument or even mention for that matter any challenge regarding the concerns LYNCH raised about the trial court presiding over this matter. In her Amended Opposition, she addressed a concern regarding the Honorable Ramona G. See presiding over this matter in light of her association as chairman of the American Bar Association and RESPONDENT PFIZER, et al.'s participation in its activities during that time. If there is even a hint of impropriety present a judge should recuse himself or herself from the

case. LYNCH's concern is well founded given the trial court sided with the federal court against established California state law as to equitable tolling extending the statute of limitations of her good faith legal remedy.

F. Appellant Provided an Adequate Record to the Court of Appeals for Review

RESPONDENTS' put forth a proposition that LYNCH has not provided an adequate record for this court to review. (MB at p. 8; PB at p. 9.) They allege "The appellate record submitted by Ms. Lynch consists principally of the first amended operative complaints, her demurrer opposition, and the trial court's order.'" (PB at p. 16.) Contrary to their assertion LYNCH provided an adequate record, which not only includes the operative complaints, her oppositions, the court reporter's transcript, it also contained their noticed motions and replies all of which were augmented to the record.

On May 22, 2019, the Second Court of Appeal, Division Seven, granted LYNCH's timely filed motion to augment the record on appeal, yet RESPONDENTS' allege an inadequate record omitting these documents. (PB at p.16; MB at p. 8.) Their demurrers and replies were appropriately cited to in Appellant's Corrected Opening Brief and there were no mistaken or misleading citations to materials in the record that were not before the trial court at the time of decision. Furthermore, she never received notice of any deficiency and RESPONDENTS' did not opposed her motion to augment the record on appeal. (See Ct. Appl., Second District, Local Rules of Court, rule 2(b), Augmentation of record.)

G. Respondents' 60-Day Extension

On September 11, 2019, the court granted permission to accept Appellant's Corrected Opening Brief. On October 3, 2019, RESPONDENT MCKESSON requested an extension of time to respond stating they filed a proposed judgment and "anticipate that a judgment of dismissal may be entered before December 10, 2019," and that "no party would be prejudiced." The trial court has yet to sign the judgment. Their request also alludes to LYNCH's Notice of Appeal being "premature." On October 7, 2019, RESPONDENT PFIZER, et al., followed suit with pretty much the same language contained in their 60-day extension request.

Out of an abundance of caution, APPELLANT filed an Opposition to Respondents' Use of Application for 60-day Extension bringing to the court's attention wording that appeared to infer the minute order was not a final judgment (albeit not on the merits) and therefore did not meet the threshold of appellate court review when it disposed of all LYNCH's claims, which is necessary for appellate review. And now, she raises an argument for the elements of the doctrine of equitable estoppel barring respondents' defenses on the statute of limitations, claim and issue preclusion to her claims are before this Court.

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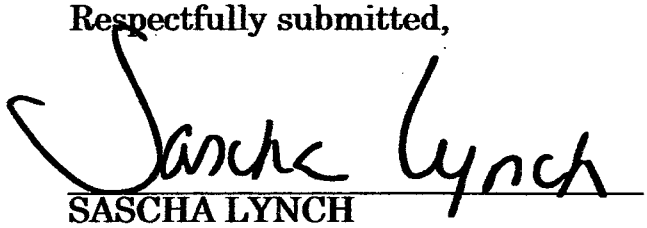
III. CONCLUSION

For the reasons stated above, Appellant respectfully ask that the trial court judgment be reversed, and that judgment in favor of appellant be entered.

Dated: February 27, 2019

Respectfully submitted,



SASCHA LYNCH
In Pro Per

CERTIFICATE OF COMPLIANCE

(Rule 8.204, California Rules of Court)

Pursuant to California Rule of Court 8.204©(1), I hereby certify that the foregoing APPELLANT'S REPLY BRIEF is proportionately spaced, has a Century Schoolbook typeface of 13 points or more and contains 6,122 words.

Dated: February 27, 2019

Sascha Lynch

SASCHA LYNCH

RA-35

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	:	19 Civ. 4355 (LGS)(GWG)
v.	:	ORDER
COLLECTOR'S COFFEE, INC., et al. Defendants.	:	

LORNA G. SCHOFIELD, District Judge:

Before the Court is a November 23, 2020, request by Defendant Mykalai Kontilai, that I recuse myself from this action. On November 30, 2020, Intervenor Plaintiffs and Intervenor Defendant, The Jackie Robinson Foundation, Inc., filed letters in opposition to Mr. Kontilai's request, and on December 3, 2020, Plaintiff filed a letter in opposition to Mr. Kontilai's request. Mr. Kontilai's request is construed as a motion for recusal pursuant to 28 U.S.C. § 455. While there is currently no conflict based on which my "impartiality might reasonably be questioned," *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000), for the reasons discussed herein, including the avoidance of any appearance of impropriety, the motion is granted.

I. Background

A. The Temporary Restraining Order and Asset Freeze

This case was filed on May 14, 2019. Dkt. No. 1. Two days later, the Court issued a temporary restraining order (the "Temporary Restraining Order" or "TRO"), which froze "[t]he assets, funds, or other property held by or under the direct or indirect control of Defendants Collectors Café or Mykalai Kontilai, whether held in any of their names or for their direct or indirect beneficial interests, wherever located, up to the amount of $46,121,649.68" (the "Asset Freeze"). Dkt. No. 12, p. 3.

Mr. Kontilai has previously requested that this Court clarify the scope of the Temporary Restraining Order. On November 1, 2020, Mr. Kontilai filed a pre-motion letter requesting that the Court clarify whether the Asset Freeze "prevent[s] Kontilai from using any untainted funds earned or received and/or using untainted funds for hiring criminal defense and extradition counsel and criminal defense experts of his choice." Dkt. No. 612, p. 1. Mr. Kontilai sought to use funds subject to the Asset Freeze to hire criminal defense counsel in connection with two criminal cases against him -- one in the District of Colorado and one in the District of Nevada. The Court issued an Order indicating that the Asset Freeze covers all of "[t]he assets, funds, or other property held by or under the direct or indirect control of Defendants Collectors Café or Mykalai Kontilai . . . up to the amount of $46,121,648.68," but gives Mr. Kontilai the opportunity to "seek leave from [the] order upon a proper showing." Dkt. No. 12, pp. 3, 5. The Court denied Mr. Kontilai's request to use untainted funds to hire defense counsel, on the ground that his November 1, 2020, request did not make a proper showing. Dkt. No. 658. The request neither demonstrated that Mr. Kontilai's Sixth Amendment right to counsel had attached, nor that the funds Mr. Kontiali intended to use were untainted.

B. Involvement of Debevoise & Plimpton, LLP

Debevoise & Plimpton LLP ("Debevoise & Plimpton") has not appeared in this case as an attorney or party. On June 24, 2019, Plaintiff filed a Notice of Anticipated Witness, stating that in connection with a discovery dispute, the "SEC may present a witness at the hearing scheduled for June 27, 2019, Andrew Ceresney of Debevoise [&] Plimpton LLP, who may have a prior professional relationship with Your Honor." Dkt. No. 50, p. 1. Plaintiff's Notice of Anticipated Witness explained that the SEC served a testimony subpoena on Debevoise & Plimpton attorney Andrew Ceresney. Mr. Cereseny, along with his firm, had "represented Defendants during a portion of the SEC's investigation in this matter." *Id.* at 1. The SEC sought

testimony on discovery issues related to certain documents described in paragraphs 31, 40 and 94-102 of the Complaint (the "Documents"). Receipt of Plaintiff's Notice of Anticipated Witness was the first time the Court learned of any potential involvement of Debevoise & Plimpton in this case. On June 24, 2019 -- the same day the SEC filed the Notice of Anticipated Witness -- the Court issued an Order of Reference to a Magistrate Judge, referring this matter to Judge Gorenstein for general pretrial supervision. Dkt. No. 51. Judge Gorenstein then resolved the dispute regarding the Documents and any related issues stemming from a June 11, 2020, subpoena that Collector's Coffee, Inc. served on Debevoise & Plimpton. *See* Dkt. No. 655.

On October 17, 2020, Defendants initiated a separate malpractice suit against Debevoise & Plimpton in the District of Columbia ("D.C."). *Collector's Coffee Inc., et al. v. Debevoise & Plimpton LLP, et al.*, No. 20 Civ. 2988 (D.D.C., filed Oct. 17, 2020). On October 23, 2020, Mr. Kontilai filed in this case a letter with a copy of the verified complaint filed in the D.C. case (the "D.C. Verified Complaint"). Dkt. No. 601. The letter states:

> It is [] defendants' position that the Verified Complaint has nothing to do with the scope of the Temporary Restraining Order (TRO), issued by Your Honor ex parte on May 15, 2019, nor anything to do with any assets under that TRO. Namely, the Verified Complaint is for damages, based on allegations of malpractice by these defendants' prior counsel Debevoise & Plimpton LLP, up to October 18, 2018. The relevant events had taken place at least *7 (seven) months before* this action was filed and the TRO was issued. . . Furthermore, that action in DCD is also irrelevant for the TRO purposes, because neither Collector's Coffee Inc. nor [Mr.] Kontilai are paying any legal fees or costs in that action. That action in the District of Columbia is based on contingency, in line with the typical arrangements for most of malpractice actions. The legal team for that action in the District of Columbia is in the process of being assembled based on the existing contingency arrangement, reduced to the valid engagement letter, providing contingency only. . . the SEC's counsel have been advised that the action is brought on contingency, in line with the typical arrangements for malpractice actions. Therefore, there is no relationship to the assets being frozen under the TRO, whatsoever.

Id. at 2. The letter also requested that the Court consider the D.C. Verified Complaint as admissible evidence in this action. On October 29, 2020, the Court issued an endorsement

clarifying that the letter required no action by me and that this case previously had been referred to Judge Gorenstein for general pretrial supervision. Dkt. No. 608.

C. Motion for Recusal

The motion for recusal argues that disqualification is necessary because "the SEC made clear in meet-and-confer calls that they view the malpractice claims against Debevoise and [Mr.] Ceresney as part of the" Asset Freeze and, as a result, Mr. Kontilai will need the Court's approval before malpractice claims against Debevoise & Plimpton can proceed. Dkt. No. 661, p. 2. The motion contends that my work experience as an associate and partner at Debevoise & Plimpton and associations with the firm's attorneys preclude an impartial review of any such application for approval. Plaintiff's responsive letter indicates that the SEC contends "Defendants violated the [A]sset [F]reeze [] by filing the [malpractice suit against Debevoise & Plimpton] without Court approval," and states that "the only issue to resolve is how and when the Defendants should be permitted to pursue a cause of action subject to the TRO's [A]sset [F]reeze." Dkt. No. 695, p. 2.

II. Legal Standard

Pursuant to the Code of Judicial Conduct for United States Judges, "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and "should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." Code of Judicial Conduct for United States Judges, Canon 2(A)-(B). To protect the impartiality of the judiciary and avoid any appearance of impropriety a federal judge may recuse herself. "The decision whether to grant or deny a recusal motion . . . is a matter confided to the district court's discretion." *Apple v. Jewish Hosp. and Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987);

accord Weston Capital Advisors, Inc. v. PT Bank Mutiara Tbk., No. 13 Civ. 6945, 2019 WL 6002221, at *2 (S.D.N.Y. Sept. 20, 2019).

The standard for recusal is set out in 28 U.S.C. § 455(a), which requires recusal, "in any proceeding in which [a federal judge's] impartiality might reasonably be questioned." The ultimate inquiry under § 455(a) is whether "an objective disinterested observer fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *Cox v. Onondaga Cnty. Sheriff's Dep't*, 760 F.3d 139, 150 (2d Cir. 2014) (quoting *United States v. Yousef*, 327 F.3d 56, 169 (2d Cir. 2009); *accord Straw v. Dentons US LLP*, No. 20 Civ. 3312, 2020 WL 4004128, at *1 (S.D.N.Y. July 15, 2020). In addition, 28 U.S.C. § 455(b)(1) requires recusal where a federal judge has "a personal bias or prejudice concerning a party." "[A]dverse rulings without more, do not provide a reasonable basis for questioning a judge's impartiality." *United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); *accord Sun v. New York City Police Dep't*, No. 18 Civ. 11002, 2020 WL 6820824, at *1 (S.D.N.Y. Oct. 9, 2020).

A motion for recusal must be timely. "To ensure that a party does not hedge its bets against the eventual outcome of a proceeding, a party must move for recusal at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *United States v. Amico*, 486 F.3d 764, 773 (2d Cir. 2007) (citing *Apple*, 829 F.2d at 333-34). To evaluate timeliness, courts consider whether: "(1) the movant has participated in a substantial manner in trial or pre-trial proceedings; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant can demonstrate good cause for delay." *Amico*, 486 F.3d at 773; *accord Muller-Paisner v. TIAA*, No. 03 Civ. 6265, 2014 WL 148595, at *1 (S.D.N.Y. Jan. 15, 2014).

III. Analysis

There is no conflict at present. Debevoise & Plimpton is not a party to this case and never has been. The firm's involvement in this case is limited to that of a third-party recipient of a document subpoena. While there were discovery disputes regarding the firm's production of documents, Judge Gorenstein has resolved any related outstanding issues. In addition, the motion for recusal asserts that I have "ruled and continue[] to rule on discovery related decisions involving [my] prior law firm Debevoise including, but not limited to, the stipulated orders and extensions relating to key discovery in this case." Dkt. No. 661, p. 2. Mr. Kontilai offers no specific examples of such rulings. Further, Mr. Kontilai's assertion is incorrect. The June 24, 2020, Order of Reference to a Magistrate Judge referred this case to Judge Gorenstein for general pre-trial supervision. Dkt. No. 51. Pursuant to that Order, Judge Gorenstein has handled and will continue to handle any motions that fall within the scope of that referral, including discovery-related motions. Finally, Mr. Kontilai's motion includes a list of allegedly adverse rulings or delays but makes no attempt to tie these rulings to the purported cause of impartiality. These rulings – which do not relate to Debevoise & Plimpton – "do not provide a reasonable basis for questioning [my] impartiality." *See Colon*, 961 F.2d at 44 (explaining that "adverse rulings" alone are not enough).

However, to protect the public's regard for the impartiality of the judiciary and avoid *any* appearance of impropriety, Mr. Kontilai's motion for recusal is granted based on the circumstances of this case. Despite the absence of any conflict up until this point, it appears that a conflict situation could develop. Plaintiff contends that Defendants violated the Asset Freeze by filing the separate malpractice suit against Debevoise & Plimpton, and further, that the Court will need "to resolve [] how and when the Defendants should be permitted to pursue a cause of action subject to the TRO's [A]sset [F]reeze." Dkt. No. 695, p. 3. Such a ruling would require

me to consider whether the Asset Freeze prohibits Defendants from pursuing a separate cause of action against my prior law firm. This could lead to an appearance of impartiality.

My connections to Debevoise & Plimpton are more significant than those of Judge Gorenstein, who will continue to supervise this case. I worked as an attorney at the firm between 1988 and 2011 and was a partner there the last 20 years of my tenure (but, to clarify, I did not serve as Chair of the Litigation Department). I also know the Debevoise & Plimpton attorneys referenced in Mr. Kontilai's motion for recusal. These connections, under the circumstances, could lead an objective disinterested observer to question impartiality on a ruling regarding the scope of the Asset Freeze.

Although Mr. Kontilai delayed in making this motion, there are factors that mitigate against a finding that the motion is untimely. First, there has been no final entry of judgment in this case. Second, there will be no waste of judicial resources or delay in day-to-day proceedings as a result of reassignment because the case continues to be under the supervision of Judge Gorenstein. Accordingly, Mr. Kontilai's motion for recusal is granted.

The case shall be assigned to another judge by the Court's random selection process.

Dated: December 9, 2020
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

EVIDENCE CODE - EVID

DIVISION 5. BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND INFERENCES [500 - 670] *(Division 5 enacted by Stats. 1965, Ch. 299.)*

CHAPTER 3. Presumptions and Inferences [600 - 670] *(Chapter 3 enacted by Stats. 1965, Ch. 299.)*

ARTICLE 2. Conclusive Presumptions [620 - 624] *(Article 2 enacted by Stats. 1965, Ch. 299.)*

623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

(Enacted by Stats. 1965, Ch. 299.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

January 26, 2021

Sascha Lynch
P.O Box 1424
Inglewood, CA 90308

RE: Petition for Rehearing
No: 20-6219

Dear Ms. Lynch:

The petition for rehearing in the above-entitled case was postmarked January 19, 2021 and received January 25, 2021 and is herewith returned for failure to comply with Rule 44 of the Rules of this Court. The petition must briefly and distinctly state its grounds and must be accompanied by a certificate stating that the grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

There is no docket fee required for this petition. Therefore, your money order in the amount of $200.00 is herewith returned.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 15 days of the date of this letter, the petition will not be filed. Rule 44.6.

Please note that you are permitted to submit one copy of the corrected petition.

Sincerely,
Scott S. Harris, Clerk
By:
Lisa Nesbitt
(202) 479-3038

Enclosures