United States Court of Appeals
For the First Circuit

No. 19-2200

ROBERT WHITE,

Plaintiff - Appellant,

v.

KUBOTEK CORPORATION; KUBOTEK USA, INC.; CADKEY CORPORATION,

Defendants - Appellees.

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

CORRECTED ORDER OF COURT*

Entered: July 20, 2020

We have considered the parties' filings. The motion to dismiss the appeal is granted in part and denied in part.

We dismiss the appeal from the district court's August 12, 2019 judgment. We have previously held that an untimely motion for reconsideration does not toll the 30-day limitations period for filing a notice of appeal from the underlying judgment. See Vaqueria Tres Monjitas, Inc. v. Comas-Pagan, 772 F.3d 956, 958 (1st Cir. 2014). Even if we assume, without deciding, that Fed. R. Civ. P. 59(e)'s time limit is a non-jurisdictional, claim-processing rule, "[i]f properly invoked, mandatory claim-processing rules must be enforced[.]" See Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017).

The appeal is timely as to the district court's October 22, 2019 order denying reconsideration. Briefing shall be limited to that order.

*Corrected order issued to amend the text of the order.

By the Court:

Maria R. Hamilton, Clerk

cc:
Robert White
Mark W. Powers

United States Court of Appeals
For the First Circuit

No. 19-2200

ROBERT WHITE,

Plaintiff - Appellant,

v.

KUBOTEK CORPORATION; KUBOTEK USA, INC.; CADKEY CORPORATION,

Defendants - Appellees.

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

ORDER OF COURT

Entered: August 26, 2020

Plaintiffs' motions for reconsideration of this court's July 9, 2020 order (and July 20, 2020 corrected order) are denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Robert White
Mark W. Powers

United States Court of Appeals
For the First Circuit

No. 19-2200

ROBERT WHITE,

Plaintiff - Appellant,

v.

KUBOTEK CORPORATION; KUBOTEK USA, INC.; CADKEY CORPORATION,

Defendants - Appellees.

Before

Howard, Chief Judge,
Lynch, Thompson, Kayatta
and Barron, Circuit Judges.

ORDER OF COURT

Entered: November 24, 2020

Plaintiff-appellant has filed a petition for rehearing en banc of the court's August 26, 2020 order denying plaintiff's motions to reconsider a July 9, 2020 order (and July 20, 2020 corrected order) deeming the appeal timely as to the district court's denial of reconsideration but not timely as to the underlying judgment. Assuming without deciding that en banc review of the court's August 26, 2020 order is permissible, the petition has been submitted to and acted upon by the active judges of this court. The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the matter be heard en banc, it is ordered that the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Robert White
Mark W. Powers

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT WHITE,
Plaintiff,

v. CIVIL ACTION NO. 18-40097-NMG

CADKEY CORPORATION,
KUBOTEK CORPORATION,
KUBOTEK USA,
Defendants.

REPORT AND RECOMMENDATION ON
DEFENDANTS' MOTION TO DISMISS (#13).

KELLEY, U.S.M.J.

I. Introduction.

Plaintiff Robert White seeks to recover royalties from defendants Kubotek Corporation and Kubotek USA (collectively, Kubotek), allegedly owed under a contract he made with defendant Cadkey Corporation (Cadkey). White also contends that Kubotek was unjustly enriched because it failed to pay him those royalties. Kubotek filed a motion to dismiss the two counts of the complaint, Counts II and III, in which those claims are alleged.[1] (#13.) White filed an opposition

[1] Count I is a breach of contract claim against Cadkey, a corporation that White himself alleges "was dissolved by the Massachusetts Secretary of State in 2007 while in bankruptcy and ceased doing business." (#1 ¶ 2.) The docket reflects that a summons issued for Cadkey (#5) and, interestingly, service was effectuated on October 9, 2018. (#10.) Cadkey has never filed an answer or otherwise responded to the complaint, and White has never moved for default under Fed. R. Civ. P. 55.

(#20), and Kubotek replied. (#24).[2] After reviewing the parties' submissions, the court requested briefing on the issue of whether White's claims against Kubotek are barred by the statute of limitations. (#28.) The parties filed supplemental memoranda on this issue. (##29, 36.)[3]

In this Report and Recommendation on Kubotek's motion to dismiss, the court considers the following issues: (1) whether White's claims are barred by the statute of limitations, (2) whether White's claims are barred by res judicata/claim preclusion, (3) whether White has stated a claim for breach of contract claim, and (4) whether White has stated a claim for unjust enrichment.

For the reasons stated below, the court will recommend that the complaint be dismissed because White's claims are barred by the statute of limitations and res judicata. In addition, White has failed to state a claim for which relief may be granted for either breach of contract or unjust enrichment.

II. Facts and Procedural History.

White previously owned the rights to two computer-aided design programs. (#1 ¶ 7.) Cadkey, a now-defunct corporation, was formerly organized under the laws of Massachusetts. *Id.* ¶ 2. Kubotek Corporation is a publicly traded company on the Tokyo Stock Exchange chartered under the laws of Japan. *Id.* ¶ 3. Kubotek USA, a wholly owned subsidiary of Kubotek

[2] Despite being represented by counsel, plaintiff himself filed a motion for leave to file a sur-reply. (#25.) Defendants opposed that motion (#26), and then White's attorney filed a response requesting that the court allow the pro se filing (#27). The motion to file a sur-reply is denied.

[3] On May 24, 2019, White's counsel filed an assented-to motion to withdraw. (#30.) The motion was granted by the court on June 6, 2019, after a hearing during which White verbally assented to counsel's withdrawal. (#44.) Counsel's withdrawal appears to have been occasioned by Kubotek's serving White and his attorney with a Motion for Sanctions on April 30, 2019, later filed in court on June 3, 2019. (#38.) White is now proceeding pro se, apparently undaunted by the prospect of potential sanctions.

Corporation, is a corporation organized under the laws of Massachusetts. *Id.* ¶ 5. Kubotek's primary place of business in the United States is in Marlborough, Massachusetts. *Id.* ¶¶ 4-5.

In April 1998, White entered into a contract with Cadkey for the purchase of two of his computer-aided design programs. *Id.* ¶ 7. The contract required Cadkey to pay White royalties based on the sale of products incorporating White's source code over a seven-year period or up to $5 million, whichever occurred first. *Id.* The contract contained an assignment clause that required a purchaser of Cadkey's assets to assume Cadkey's obligations under the contract. *Id.* Two years before the expiration of the contract, on August 28, 2003, Cadkey filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code.[4] *Id.* ¶ 8.

On August 29, 2003, Cadkey filed a motion with the Bankruptcy Court to sell substantially all its assets under 11 U.S.C. § 363. *Id.* ¶ 9; (#14-2.)[5] Kubotek, the winning bidder at the auction, entered into an Asset Purchase Agreement (the Agreement) with Cadkey. (#14-2.) The terms of

[4] Prior to filing for bankruptcy, Cadkey had never committed a material breach of the contract. (#1 ¶ 8.)

[5] Defendants have filed seven exhibits with their memorandum in support of the motion to dismiss. (#14.) The First Circuit has repeatedly cautioned that in the context of a motion to dismiss, "[o]rdinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein . . . ." *Graf v. Hospitality Mut. Ins. Co.*, 754 F.3d 74, 76 (1st Cir. 2014) (internal citation and quotation marks omitted). That said, "[w]hen . . . a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *Trans-Spec Truck Service, Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (internal citations, quotation marks and alterations omitted), *cert. denied*, 555 U.S. 995 (2008); *Yacubian v. U.S.*, 750 F.3d 100, 102 (1st Cir. 2014); *United Auto., Aerospace, Agr. Implement Workers of America Intern. Union v. Fortuno*, 633 F.3d 37, 39 (1st Cir. 2011). The seven exhibits (##14-1 thru 14-7) fall within the parameters of this exception and may properly be considered. *See*, e.g., *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) ("[C]ourts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to the plaintiffs' claim; or for documents sufficiently referred to in the complaint.").

the Agreement were authorized and approved by the Bankruptcy Court as part of the 2003 Sale Order.[6] *Id.*

The 2003 Sale Order expressly stated that the assets Kubotek purchased from Cadkey "shall be free and clear of any and all Encumbrances, including, without limitation, all claims, if any, arising from the operation of cessation of [Cadkey's] business." (#14-2 at 11.) Effective upon the closing, the 2003 Sale Order specifically prohibited any actions or proceedings against Kubotek challenging the sale. *Id.*

Since the closing of the sale, White has unsuccessfully disputed the 2003 Sale Order by repeatedly litigating the issue in a variety of forums over a period of years.[7] *White*, 487 B.R. at 5. More specifically, in June 2011, White filed claims for fraudulent conveyance and successor liability against Kubotek in Middlesex Superior Court. *See id.* at 5–6. Kubotek removed the case to the Bankruptcy Court, which entered an order dismissing White's complaint "on the grounds that he 'admitted' he was 'once again attempting to relitigate the validity of the Sale Order.'" *Id.*; *see also* (#14 at 9.) Judge Gorton upheld the Bankruptcy Court's decision, concluding that White's

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[6] As Judge Gorton wrote in an earlier decision:

> In 2003, White objected to the Kubotek sale both before and after the transaction occurred, primarily arguing that the sale had been conducted summarily to the sellers's detriment. The Bankruptcy Court dismissed his objections and upheld the sale. White appealed that decision but this Court upheld it. *See In re Cadkey Corp.*, 317 B.R. 19 (D. Mass. 2004). When the First Circuit Court of Appeals affirmed, White filed a petition for writ of *certiorari* to the United States Supreme Court. After that petition was denied, White filed a motion for rehearing and that, too, was denied.

White v. Kubotek Corp., 487 B.R. 1, 5 (D. Mass. 2012). This was but the opening act in the ongoing litany of the litigation over the 2003 Sale Order.

[7] Since 2003, White has initiated numerous suits and filed a multitude of motions and appeals in the Bankruptcy Court, this court and the First Circuit. He has also filed petitions to the U.S. Supreme Court, all of which have been denied. Judge Gorton's decision in *White v. Kubotek Corp.* provides a succinct account of White's successive litigation against Cadkey and Kubotek prior to 2011, which need not be repeated here. *White*, 487 B.R. at 5.

claims were barred by res judicata. *White*, 487 B.R. at 11-12 (noting that plaintiff's claims "unambiguously contradict[ed] the 2003 Sale Order" and that White's claims "arise[] from the same 'nucleus of operative facts' that has been previously litigated"). The First Circuit Court of Appeals affirmed. (*See White v. Kubotek Corp., et al.*, Civil Action No. 11-11828-NMG, #44.) White filed a Petition for a Writ of Certiorari with the U.S. Supreme Court which was denied. (*See White v. Kubotek Corp., et al.*, Civil Action No. 11-11828-NMG, #47.)

On June 11, 2018, White initiated the present litigation against Kubotek, alleging that Cadkey assigned and transferred to Kubotek its contractual obligation to pay him the remaining amount due under his contract. (#1 ¶ 18.) White also alleges that Kubotek has been unjustly enriched by its failure to make royalty payments. *Id.* ¶ 25. White seeks damages in the amount of $3.6 million for the royalties remaining under the contract in addition to interest, costs and attorneys' fees. *Id.* ¶ 26.

III. Standard of Review.

A Rule 12(b)(6) motion to dismiss challenges a party's complaint for failing to state a claim. In deciding such a motion, a court must "'accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences therefrom in the pleader's favor.'" *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (quoting *Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 5 (1st Cir. 2011)). When considering a motion to dismiss, a court "may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Haley*, 657 F.3d at 46 (citing *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003)).

In order to survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007). The "obligation to provide the grounds of [the plaintiff's] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (quotation marks and alteration omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level," and to cross the "line from conceivable to plausible." *Id.* at 555, 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). However, the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). Simply put, the court should assume that well-pleaded facts are genuine and then determine whether such facts state a plausible claim for relief. *Id.* at 679.

IV. Discussion.

A. The Statute of Limitations.

Kubotek contends that White's claims for breach of contract (Count II) and unjust enrichment (Count III) are barred by the statute of limitations. (#29 at 2.) White argues that the statute of limitations does not render the claim time barred due to the automatic stay under the bankruptcy code or, in the alternative, the doctrine of equitable tolling. (#36 at 1–2.)

In Massachusetts, the statute of limitations for a breach of contract claim is six years. Mass. Gen. L. c. 260, § 2; *Creative Playthings Franchising, Corp. v. Reiser*, 463 Mass. 758, 758 (2012); *SiOnyx, LLC v. Hamamatsu Photonics K.K.*, 332 F. Supp. 3d 446, 466 (D. Mass. 2018). "Where an unjust-enrichment claim is contractual in nature, the limitations period for that claim is likewise six years." *SiOnyx*, 332 F. Supp. 3d at 466 (internal citations omitted). The six-year limitations period applies to both claims here since White contends that Kubotek breached its obligations

under the Cadkey contract and became unjustly enriched by failing to pay the allegedly owed royalties. (#1 ¶¶17–26.)

The statute of limitations begins to run from the time the cause of action accrues, which is ordinarily the time of the breach. *Id.* at 466–67; *see also Foisy v. Royal Maccabees Life Ins. Co.*, 356 F.3d 141, 146 (1st Cir. 2004); *Saenger Org., Inc. v. Nationwide Ins. Licensing Assoc., Inc.*, 119 F.3d 55, 64 (1st Cir. 1997). "Massachusetts has a discovery rule that triggers the accrual of the cause of action for the purposes of the statute of limitations when a plaintiff discovers, or any earlier date when [he] should reasonably have discovered, that [he] has been harmed or may have been harmed by defendant's conduct." *In re Sheedy*, 801 F.3d 12, 20 (1st Cir. 2015) (internal citations and quotation marks omitted); *see also Riley v. Presnell*, 409 Mass. 239, 244 (1991) ("A cause of action will accrue when the plaintiff actually knows of the cause of action or when the plaintiff should have known of the cause of action."). Where a plaintiff "has a mere hunch, hint, suspicion, or rumor of a claim," the claim does not accrue, but such suspicions create a duty to inquire into the existence of a possible claim as an exercise of due diligence. *SiOnyx*, 332 F. Supp. 3d at 467 (internal citations omitted). The question of when a cause of action accrued is ordinarily a question of fact. *Riley*, 409 Mass at 240; *see also SiOnyx*, 332 F. Supp. 3d at 468.

Here, Kubotek contends that White was on notice of Kubotek's alleged breach as early as 2003 when White objected to the Bankruptcy Court's 2003 Sale Order, which sold all of Cadkey's assets to Kubotek - including the software that White sold to Cadkey - free of all liens, claims and encumbrances. (#29 at 3.) Kubotek asserts that where no payments were made to White under the disputed contract, the latest time White would be on notice of the alleged breach is the end of the first quarter of 2004, that being the date of the next royalty payment. *Id.* White confirms that, at

the very least, Kubotek's failure to put pay royalties at the end of the first quarter of 2004 put him on notice that the alleged breach of contract had occurred. (#36 at 2 n.1.)[8]

On these facts, White was on notice of the alleged breach of contract in 2004 and the accrual period for his claims against Kubotek began to run. *See In Re Sheedy*, 201 F.3d at 21 (finding claims time barred in 2015 under the applicable four-year statute of limitations where plaintiff told the court "she knew at the time of the 2004 Transaction that her husband did not receive the required disclosures she now claims he should have received."). Unless a tolling doctrine applies, White's contract-based claims are barred by the six-year statute of limitations.

1. Automatic Stay and Tolling Under the United States Bankruptcy Code.

Pursuant to the United States Bankruptcy Code, 11 U.S.C. § 362, the commencement of a debtor's bankruptcy case results in an automatic stay to prevent creditors from asserting claims against the debtor, the property of the debtor, or property of the debtor's bankruptcy estate. 11 U.S.C. § 362(a)(1)-(8). "The automatic stay is one of the fundamental protections that the Bankruptcy Code affords to debtors." *Bankart v. Ho*, 60 F. Supp. 3d 242, 246 (D. Mass. 2014) (quoting *In re Jamo*, 283 F.3d 392, 398 (1st Cir. 2002)). "It is well established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants." *Id.* (quoting *Queenie, Ltd. v. Nygard Int'l.*, 321 F.3d 282, 287 (2d Cir. 2003)). While the automatic stay is extensive and "appl[ies] to almost any type of formal or informal action against the debtor . . . it

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[8] The footnote reads in full:

> Kubotek's Brief (Doc. No. 29) contends the six year statute of limitation on Kubotek's breach (if any) of White's contract began running once Kubotek first failed to pay royalties under White's Contract, at the end of the first quarter of 2004. This date satisfies White's sense of notice when Kubotek's breach occurred. [See Kubotek's Brief, bottom of page 3].

(#35 at 2 n.1.) White also writes in his brief that "the statute of limitations on White's breach of contract claims expired during the pendency of CADKEY's bankruptcy." (#36 at 2.)

does not extend to separate corporate legal entities such as corporate affiliates, partners in debtor partnerships or to codefendants in pending litigation." *In Re Slabicki*, 466 B.R. 572, 580 (1st Cir. BAP 2012).

Since Cadkey filed for bankruptcy in 2003, the automatic stay would have prevented White from initiating claims against Cadkey to collect amounts due under the contract or from placing an attachment or lien on Cadkey's property to secure payment. Although Kubotek has not filed for bankruptcy, White proposes that the automatic stay against Cadkey should apply because "1) White's Complaint involves property of CADKEY's bankruptcy estate subject to the automatic stay, 2) the statute of limitations on White's breach of contract claims expired during the pendency of CADKEY's bankruptcy, and 3) Kubotek is an indispensable party to White's Complaint." (#36 at 2.)

White's argument is flawed. Kubotek Corporation and Kubotek USA are entities legally distinct from Cadkey. There is no reason to presume that Kubotek was somehow subject to any automatic stay applicable to Cadkey. Based on the record and previous litigation, Kubotek was never a debtor under Title 11. Since Kubotek was not subject to § 362's automatic stay, White's claims against Kubotek were not tolled under 11 U.S.C. § 108(c).

2. Equitable Tolling.

White argues that the doctrine of equitable tolling set forth by the U.S. Supreme Court should toll the Massachusetts six-year statute of limitations. (#36 at 5-7.) The equitable tolling test, articulated in *Holland v. Florida*, and clarified in *Menominee Indian Tribe of Wisconsin v. United States Menominee*, provides that "a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"

Menominee Indian Tribe of Wisconsin v. United States, 136 S. Ct. 750, 755–56 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). In applying this test, the Court has "expressly characterized equitable tolling's two components as 'elements,' not merely factors of indeterminate or commensurable weight." *Id.* at 756 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

White's sole reliance on *Menominee* is misplaced. In *Menominee*, the Court stated in a footnote:

> *Holland v. Florida* is a habeas case, and we have never held that its equitable-tolling test necessarily applies outside the habeas context. Nevertheless, because we agree that the Tribe cannot meet *Holland*'s test we have no occasion to decide whether an even stricter test might apply to a nonhabeas case. Nor does the Tribe argue that a more generous test than *Holland*'s should apply here.

Menominee, 136 S. Ct. at 756 n.2 (internal citations omitted). It is debatable if the *Holland/Menominee* test applies here, but even if it does, White fails to meet the required elements.

White's persistent litigation since the 2003 Sale Order could be said to meet the diligence prong of the test. *See Holland*, 560 U.S. at 654–55; *see also White*, 487 B.R. at 5 ("White has burdened the federal courts with an unrelenting succession of cases and appeals over the past eight years challenging the asset sale to Kubotek"). The extraordinary circumstances prong "is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control." *Menominee*, 136 S. Ct. at 756. White has suggested no circumstances that meet this standard.[9] Even if the *Holland/Menominee* test was applicable, equitable tolling is not warranted here.

[9] White argues that the Bankruptcy Code's automatic tolling provisions, costs of litigation, sanctions from the court, appeals court decisions, fear of more sanctions, evolving Supreme Court precedent, and related litigation served as extraordinary circumstances preventing him from filing his claims within the six-year statute of limitations. (#36 at 7.) According to the Supreme Court opinion cited by White, this sort of argument, focused on typical hardships of litigating, fails because "it is common for a litigant to be confronted with significant costs to litigation, limited financial resources, an uncertain outcome based upon

B. Res Judicata/Claim Preclusion.

Even if White's claims were not barred by the statute of limitations, his complaint is barred by res judicata. Under the doctrine of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action." *Hatch v. Trail King Indus., Inc.*, 699 F.3d 38, 45 (1st Cir. 2012) (internal quotation marks and citation omitted); *Windham v. J.P. Morgan Chase, NA*, No. CV 18-10402-FDS, 2018 WL 2739967, at *2 (D. Mass. Apr. 20, 2018). "To establish claim preclusion, the defendant must show that '(1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related.'" *Metzler Asset Mgmt. GmbH v. Kingsley*, - F.3d -, No. 18-1369, 2019 WL 2635619, at *3 (1st Cir. June 27, 2019) (quoting *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010)). The parties are the same in this round of litigation as they were when the court barred White's fraudulent conveyance and successor liability claims, so the second requirement is met. The court need only consider whether there was a prior final judgment on the merits, and whether the causes of action are sufficiently identical.

1. Prior Final Judgment on the Merits.

For claim preclusion purposes, the Bankruptcy Court's order approving the 2003 Sale Order constitutes a valid final judgment on the merits. *White*, 487 B.R. at 11 ("The Bankruptcy Court's approval of the 2003 Sale Order was a valid final judgment."). Moreover, Judge Gorton's Order dismissing of White's fraudulent conveyance and successor liability claims against Kubotek

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an uncertain legal landscape, and impending deadlines. These circumstances are not extraordinary." *Menominee*, 136 S. Ct. at 757.

by virtue of res judicata also constitutes a valid, final judgment on the merits.[10] *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *See generally White*, 487 B.R. at 1–12. Therefore, the first element of claim preclusion is satisfied.

2. Identical or Related Claims.

As Judge Gorton has explained:

> In determining whether the second prong of the *res judicata* doctrine is met, the court must apply the transactional approach, in which the court considers whether the underlying factual bases for the causes are related in time, space origin or motivation. In other words, there is a sufficiently close relationship between the relevant facts in both suits if the claims in both facts derive from a common nucleus of operative facts.

White, 487 B.R. at 11 (internal quotation marks and citations omitted). White argues he is bringing claims separate and distinct from his previous successor liability and fraudulent conveyance claims, and that he is not seeking to circumvent the 2003 Sale Order. (#20.)

In 2012, Judge Gorton found that White's initial challenge to the 2003 Sale Order and White's 2011 claims arose from a common nucleus of operative facts, and therefore his 2011 claims were barred by res judicata. *White*, 487 B.R. at 11–12. Here, despite White's contentions to the contrary, his new claims are clearly based on the same transaction - Kubotek's purchase of Cadkey's assets - and arise out of the same nucleus of operative facts as the 2003 Sale Order

[10] White appears to contend that Judge Gorton's decision erroneously applied the law and so is not a valid final judgment. The dismissal was upheld by the First Circuit and the Supreme Court denied certiorari. Even if, *arguendo,* Judge Gorton's application of the law was faulty or the law was later reinterpreted, the 2012 dismissal remains a valid final judgment on the merits for preclusion purposes. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action. We have observed that the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." (internal citations and quotation marks omitted)).

litigation and his previously dismissed claims from 2011. White's claims for breach of contract (Count II) and unjust enrichment (Count III) are precluded by res judicata and should be dismissed.

C. Failure to State a Breach of Contract Claim.

In addition to being barred by *res judicata*, White fails to state a valid breach of contract claim. "To demonstrate a breach of contract, the plaintiff must prove that a valid, binding contract existed, the defendant breached the terms of the contract, and the plaintiff sustained damage as a result of the breach." *Young v. Wells Fargo Bank, N.A.*, 828 F.3d 26, 32 (1st Cir. 2016) (internal quotation marks and citations omitted). Here, the record shows White's contract with Cadkey was not assumed and assigned to Kubotek, and no contract existed between White and Kubotek. (#14-2.)[11] White argues that the assignment clause in his contract with Cadkey remained legally actionable against Kubotek after Cadkey's bankruptcy closed, a contention directly contradicted by the 2003 Sale Order. (#14-2 at 11.) White fails to state an actionable breach of contract claim.

D. Failure to State an Unjust Enrichment Claim.

"To succeed with an unjust enrichment claim under Massachusetts law, a plaintiff must show that the defendant, received, was aware of, and accepted or retained a benefit conferred by the plaintiff under circumstances which make such acceptance or retention inequitable." *Lass v. Bank of Am., N.A.*, 695 F.3d 129, 140 (1st Cir. 2012) (internal citations and quotation marks omitted). Regardless of how White describes his claims, the clear terms of the 2003 Sale Order[12]

[11] On January 9, 2003, Cadkey filed a Motion for an Order Authorizing: (1) The Assumption and Assignment of Certain Executory Contracts to Kubotek; and (2) The Rejection of Certain Executory Contracts in the Bankruptcy Court. (#14-6.) On January 27, 2004, the Bankruptcy Court entered an order authorizing the assumption and assignment of certain executory contracts to Kubotek, and the rejection of certain executory contracts. (#14-7.) White's contract was identified as a contract that Cadkey proposed to reject, and therefore was not assumed and assigned to Kubotek. (#14-6 at 10.)

[12] The 2003 Sale Order states that the assets Kubotek purchased from Cadkey: "Shall be free and clear of any and all encumbrances, including, without limitation, all claims, if any arising from the operation or

divested him of any expectation that he would receive payments from Kubotek pursuant to his contract with Cadkey. White fails to state an actionable claim for unjust enrichment.

V. Recommendation.

For the foregoing reasons, I RECOMMEND that Defendants' Motion to Dismiss (#13) be GRANTED and the complaint be dismissed with prejudice.

VI. Review by the District Judge.

The parties are hereby advised that any party who objects to this recommendation must file specific written objections with the Clerk of this Court within 14 days of service of this Report and Recommendation. The objections must specifically identify the portion of the recommendation to which objections are made and state the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) shall preclude further appellate review. *See Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

July 8, 2019

/s/ M. Page Kelley
M. Page Kelley
United States Magistrate Judge

cessation of [Cadkey's] business, whether arising prior or subsequent to the commencement of [Cadkey's] case under chapter 11 of the Bankruptcy Code." (#14-2 at 11.)

UNITED STATES DISTRICT COURT
for the
District of Massachusetts

Robert White,

Plaintiff;

v.

CADKEY Corporation, Kubotek Corporation, and Kubotek USA,

Defendants.

Civil Case No.1:cv-18-40097-NMG

PLAINTIFF'S MOTION TO RECONSIDER DISMISSAL OF DEFENDANT CADKEY CORPORATION FROM THIS CIVIL ACTION

1. Plaintiff, Robert White - *pro se* (hereafter "White"), hereby requests this Court to amend its Order of Dismissal, dated August 12, 2019 (Docket #56), adopting by endorsement (hereafter "Endorsed Recommendation", Docket #55) Magistrate Judge Page Kelley's Report and Recommendation (hereafter "R&R", Docket #47) to grant defendant Kubotek's Motion to Dismiss (Docket #13) White's Complaint (Docket #1).

2. White asks this Court to rescind its Order of Dismissal in regards to defendant CADKEY Corporation (hereafter "CADKEY"). CADKEY defaulted in this civil action by not answering or making an appearance (see Endorsed Recommendation, Docket #55, footnote 1, page 1) and White still has a right and interest in seeking a default judgment against CADKEY. Judge Kelley's R&R acknowledged that defendant Kubotek only sought dismissal of White's Causes of Action (#s II & III) against Kubotek, not White's Cause of Action # I against CADKEY (see Endorsed Recommendation, page 1); yet this Court dismissed White's entire complaint as to all defendants.

Motion denied. s/ NM Gorton, USDJ 10/22/19

Additional material from this filing is available in the Clerk's Office.