No. 20-___

In The
Supreme Court of the United States

ARROW HIGHWAY STEEL, INC.,
Petitioner,
v.
ROBERT DUBIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO A PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF CALIFORNIA
MINUTES
WEDNESDAY, FEBRUARY 10, 2021
SAN FRANCISCO, CALIFORNIA

S265889
B303289 Second Appellate District, Div. 2

ARROW HIGHWAY STEEL, INC. v. DUBIN (ROBERT)

Petition for review denied.

Cuéllar, J., is of the opinion the petition should be granted.

APPENDIX B

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 2

ARROW HIGHWAY STEEL, INC., Plaintiff and Appellant, v. ROBERT DUBIN, Defendant and Respondent.	B303289 (Los Angeles County Super. Ct. No. EC068969)

Filed October 29, 2020

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

Law Offices of Matthew C. Mickelson and Matthew C. Mickelson for Plaintiff and Appellant.

Alpert Barr & Grant and David M. Almaraz for Defendant and Respondent.

* * * * * *

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988) 486 U.S. 888 (*Bendix*), the United States Supreme Court held that an Ohio statute that tolled

the statute of limitations while a defendant is out of state impermissibly burdened interstate commerce and was accordingly unconstitutional. (*Id.* at pp. 891-895.) California has a similar tolling statute—Code of Civil Procedure section 351—that, as relevant here, applies when a defendant "departs from the State" "after [a] cause of action accrues." (Code Civ. Proc., §351.)[1]

In this case, a creditor sued in 2018 to enforce a 1997 judgment against a judgment debtor who departed California in 1998 to start a new business in Nevada. Because this lawsuit is timely only if section 351 applies, this case squarely presents the question: Does section 351 impermissibly burden interstate commerce—and hence violate the so-called "dormant Commerce Clause"—when it is used to toll the statute of limitations against a judgment debtor who moved away from California to engage in commerce after the judgment was entered? We conclude that the answer is "yes." This is the answer most consistent with California case law. The creditor urges us to follow a recent Sixth Circuit case that charts a different path than this California precedent, *Garber v. Menendez* (6th Cir. 2018) 888 F.3d 839 (*Garber*), but we find *Garber* to be unpersuasive.

Accordingly, we affirm the trial court's grant of summary judgment to the debtor on the ground that the creditor's lawsuit is time-barred.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Between 1967 and 1994, Arrow Highway Steel, Inc. (Arrow) hired Robert Dubin (Dubin) to do its bookkeeping and to obtain credit financing for its operations. Both Arrow and Dubin were, during that time, based in California. Dubin obtained Arrow's credit financing from out-of-state lenders, and many of Dubin's other clients were located outside California.

In the early 1990s, Dubin embezzled money from Arrow. For his crimes, Dubin was convicted of bankruptcy fraud in federal court and served time in federal prison between 1995 and 1998, and after a brief period of parole, in 1998 and 1999.

In March 1994, Arrow and its principals—Seymour and Henrietta Albert—sued Dubin and others to recover the money Dubin embezzled from Arrow.[2] On February 27, 1997, Arrow and Dubin entered into a stipulated judgment pursuant to which Dubin agreed to pay Arrow $937,000.

Dubin moved to Nevada after he was released from federal prison (the first time) in 1998. After his final release from prison, Dubin founded a new accounting, bookkeeping and tax business that currently has clients all around the United States and around the world.

At no point since 1997 did Arrow "renew" its judgment against Dubin.

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[2] Arrow sued others as well, but they are not relevant to this appeal.

II. Procedural Background

On July 3, 2018, Arrow filed a complaint seeking to enforce its 1997 judgment against Dubin, along with interest and attorney fees. Dubin filed a motion for summary judgment on the ground that Arrow's lawsuit was time-barred because section 351, the tolling statute Arrow relies upon to render its action timely, violated the dormant Commerce Clause as applied to Dubin.[3]

Following further briefing, and a hearing, the trial court granted summary judgment on the ground that Arrow's lawsuit was time- barred because section 351 was unconstitutional. The court reasoned that the dormant Commerce Clause was, as a threshold matter, implicated in this case because "Dubin [had] . . . engaged in interstate commerce while he performed accounting services for Arrow . . . ." To decide whether section 351 violated the dormant Commerce Clause as applied in this case, the court engaged in a two-part inquiry by (1) "assess[ing] the burden section 351 would impose on interstate commerce under the circumstances," and (2) "determin[ing] whether the burden is counterbalanced by state interests supporting section 351." As to the first part, the court found that section 351 imposed an "unreasonable burden on interstate commerce" because it "force[d]" a "'nonresident individual engaged in interstate commerce'" "'to choose between [abandoning his Nevada business and returning to] California for several years'" in order to run down the limitations period or staying in Nevada to maintain his business

[3] Dubin also argued that Arrow, as a dissolved corporation, lacked standing to enforce the lawsuit. This second ground (which the trial court rejected) is not before us in this appeal.

but forfeiting his limitations defense and remaining "'subject to suit in California in perpetuity.'"

As to the second part, the court found that California's interests did not "outweigh [this] burden" because the justification for tolling lawsuits against out-of-state defendants was largely undermined by "California['s] . . . long-arm statute," which "would permit service on a[n out-of-state] defendant like Dubin." Balancing these factors, the court found that applying section 351 "to this case would impermissibly burden interstate commerce and thereby violate the [dormant] Commerce Clause as applied to Dubin."

Following the entry of judgment, Arrow filed this timely appeal.

DISCUSSION

Arrow argues that the trial court erred in granting summary judgment for Dubin because, in its view, section 351 does not run afoul of the dormant Commerce Clause on the facts of this case. As a result, Arrow continues, its action against Dubin has been tolled since 1998, and thus its 2018 lawsuit on the 1997 judgment is still timely.

A party in a civil case is entitled to summary judgment if, among other things, he can show that the undisputed facts "establish[] an affirmative defense" "as a matter of law." (§ 437c, subds. (c) & (o)(2).) Thus, summary judgment is appropriate where the undisputed facts establish that a claim is barred by the statute of limitations. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.) We independently review a trial court's grant of summary judgment. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)

California's Enforcement of Judgments Law (§ 680.010 et seq.) grants judgment creditors seeking to extend the enforceability of a final judgment two options: (1) they can file an application with the court that issued the judgment to renew that judgment for another 10 years (§§ 683.110, 683.120), or (2) they can file an action to enforce the judgment, and as long as that action is timely filed, the creditors are entitled to enforcement (§ 683.050 [authorizing such actions]; *Green v. Zissis* (1992) 5 Cal.App.4th 1219, 1222-1223 (*Green*) [entitlement to relief automatic]; {expndtw-1 Trend v. Bell (1997) 57 Cal.App.4th 1092, 1098 [same]). (See generally *Kertesz v. Ostrovsky* (2004) 115 Cal.App.4th 369, 372-373 (*Kertesz*) [detailing two options]; *Pratali v. Gates* (1992) 4 Cal.App.4th 632, 637-638 (*Pratali*) [same].)

If the judgment creditor pursues the latter option, it must file its action within 10 years of the final entry of judgment or its last renewal of judgment, whichever comes later. (§§ 337.5, subd. (b) [setting 10-year limitations period for such actions], 683.220 [renewal extends time for such actions].) Section 351 is an exception to all statutes of limitations in California, including this one. It provides:

> "[1] If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and [2] if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." (§ 351.)

As the bracketed numbers indicate, section 351 tolls the limitations period in two different situations—namely, (1) when the defendant is outside California at the moment the plaintiff's cause of action accrues, and (2) when the defendant is present in California at the moment the cause of action accrues, but he subsequently "departs" the state. (*Kohan v. Cohan* (1988) 204 Cal.App.3d 915, 920 (*Kohan*).) This second clause applies whether the departure is temporary (*Green*, *supra*, 5 Cal.App.4th at p. 1223) or permanent (*Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 761 (*Heritage*)).

In this case, Arrow's stipulated judgment against Dubin was finally entered on the day it was signed—February 27, 1997. (See *Cadle Co. II, Inc. v. Sundance Financial, Inc.* (2007) 154 Cal.App.4th 622, 624 [generally, "[a] stipulated judgment
. . . becomes final when entered"].) As a consequence, Arrow had 10 years—until February 27, 2007—to bring its enforcement action. Arrow did not do so until July 3, 2018. The only way that Arrow's enforcement action is timely is if section 351 applies, which occurs only if it withstands the dormant Commerce Clause challenge leveled by Dubin. The constitutionality of a statute is a question of law we independently review. (*In re Taylor* (2015) 60 Cal.4th 1019, 1035.)

III. The Law of the Dormant Commerce Clause

A. *Generally*

The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." (U.S. Const., art. I, § 8, cl. 3.) By entrusting *Congress* with this power, the clause implies that the *states* lack that power. (*McBurney v. Young* (2013) 569 U.S. 221, 235 (*McBurney*) ["the Court has long inferred that the Commerce Clause itself imposes certain implicit limitations on state power"]; *Dep't of Revenue v. Davis* (2008) 553 U.S. 328, 337 (*Davis*) [same]; see also *Pac. Merch. Shipping Ass'n. v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, 1177 (*Pacific Merchant*) ["the whole objective of the dormant Commerce Clause doctrine is to protect Congress's latent authority from state encroachment"].) This "negative implication" of the clause is commonly referred to as the "dormant Commerce Clause." (*Davis*, at pp. 337-338.) In defining the contours of the dormant Commerce Clause, the courts have sought to preclude states from engaging in "economic protectionism" (that is, from adopting laws "designed to benefit in-state economic interests by burdening out-of-state competitors") while at the same time allowing the states to retain one of the chief attributes reserved to them as members of our federalist system of government (that is, the ability to operate as semi-autonomous laboratories able to experiment and innovate in regulating their own affairs and economies). (*New Energy Co. v. Limbach* (1988) 486 U.S. 269, 273-274; *Davis*, at p. 337-338; *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n* (2015) 576 U.S. 787, 817

["'recogniz[ing] the role of the States as laboratories for devising solutions to difficult legal problems' [citation]"].)

In assessing whether a state law violates the dormant Commerce Clause, courts are to ask two questions: (1) Does the state law "discriminate[] against interstate commerce," and if not, (2) Does the state law nevertheless incidentally burden interstate commerce? (*Davis*, *supra*, 553 U.S. at p. 338; *McBurney*, *supra*, 569 U.S. at p. 235.) A state law discriminates against interstate commerce if its purpose or "'practical effect'" is to discriminate against interstate commerce by giving local interests or residents a leg up on out-of-state interests or residents. (*Maine v. Taylor* (1986) 477 U.S. 131, 138 (*Maine*); *Pacific Merchant*, *supra*, 639 F.3d at p. 1178.)

Such a discriminatory state law is valid only if it "'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" (*Or. Waste Sys., Inc. v. Dep't of Envtl. Quality* (1994) 511 U.S. 93, 100-101 (*Oregon Waste*).) A state law that "'regulates evenhandedly'" but nevertheless has "'"incidental effects" on interstate commerce'" is valid as long as its burden on interstate commerce is not "'clearly excessive in relation to [its] putative local benefits.'" (*Oregon Waste*, at p. 99; *Pike v. Bruce Church* (1970) 397 U.S. 137, 142.)

B. *The Bendix case*

State laws that toll the statute of limitations on civil actions for out-of-state defendants (but not in-state defendants) are not uncommon. The leading case examining whether they run afoul of the dormant Commerce Clause is *Bendix*, *supra*, 486

U.S. 888.

Bendix examined an Ohio law that tolled the statute of limitations for any person or corporation not "present" in the state. (*Bendix*, *supra*, 486 U.S. at p. 889.) In that case, a Delaware corporation sued an Illinois corporation in Ohio and sought to avoid the applicable four-year statute of limitations by invoking the Ohio tolling law on the ground that the Illinois corporation was not present in Ohio because it had not appointed an agent for service of process in Ohio. (*Id.* at pp. 889-890.) As a threshold matter, *Bendix* held that review under the dormant Commerce Clause is warranted if a state "denies w-1 ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce." (*Id.* at p. 893.) This threshold was satisfied because Ohio's statute denied the Illinois corporation the right to rely on the statute of limitations defense due to its out-of-state status.

"[C]hoos[ing]" to treat the Ohio law as a nondiscriminatory state law that incidentally burdened interstate commerce, *Bendix* examined (1) "[t]he burden the tolling statute places on interstate commerce," and (2) the state's "putative interests" supporting the law. (*Bendix*, *supra*, 486 U.S. at pp. 891-892.) *Bendix* found that the tolling law placed a "significant" burden on interstate commerce because it "forces" an out-of-state "corporation to choose between exposure to the general jurisdiction of Ohio courts" (by effectively becoming an Ohio resident by designating an agent for service of process), on the one hand, and "forfeiture of the limitations defense[and] remaining subject to suit in Ohio in perpetuity" (by remaining out of state), on the other hand. (*Id.* at p. 893.) At the same time, Ohio's putative interest in the

tolling law was weak: The law was meant to "protect[]" Ohio "residents from corporations who become liable for acts done within the State but later withdraw from the jurisdiction," but this interest was not appreciably advanced by the tolling law because a very similar protection was already provided by Ohio's "long-arm statute," which "would have permitted service" on the Illinois corporation "throughout the period of limitations." (*Id.* At p. 894.) *Bendix* consequently held that "the burden imposed on interstate commerce by the tolling statute exceed[ed] any local interest that the State might advance." (*Id.* at p. 891.)

C. *Analytical framework*

In light of the general law governing the dormant Commerce Clause, and the specific application of that law to tolling statutes aimed at out-of-state defendants in *Bendix*, analyzing whether section 351 violates that clause is a three-step process. First, the court must determine whether the defendant—here, Dubin—was engaged in interstate commerce. If not, then section 351 does not satisfy *Bendix*'s threshold requirement that the state law "den[y]" an "ordinary legal defense[] or like privilege[]" to an "out-of-state person[] or corporation[] *engaged in commerce*." (*Bendix*, *supra*, 486 U.S. at p. 893, italics added.) Second, and if Dubin was engaged in interstate commerce, then the court must determine whether section 351 discriminates against interstate commerce—either by purpose or in practical effect. (*Davis*, *supra*, 553 U.S. at p. 338; *Maine*, *supra*, 477 U.S. at p. 138.) Third, and if Dubin was engaged in interstate commerce but section 351 does not discriminate against interstate commerce, then the court must determine whether the burdens that

tolling under section 351 places on interstate commerce are "'clearly excessive'" in relation to the statute's "'putative local benefits.'" (*Oregon Waste*, *supra*, 511 U.S. at p. 99; *Bendix*, at pp. 891-892.)

IV. Analysis

A. *Was Dubin engaged in interstate commerce?*

In setting forth its threshold requirement that the out-of- state defendant be "engaged in [interstate] commerce," *Bendix* did not specify whether the defendant had to be so engaged at the time of the underlying transaction giving rise to the lawsuit or, instead, at some point thereafter. (*Bendix*, *supra*, 486 U.S. at p. 893.) Most of the cases examining section 351 have looked solely to whether the out-of-state defendant was engaged in interstate commerce *at the time of the underlying transaction*. (E.g., *Dan Clark Family Limited Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, 232 (*Dan Clark*) [examining whether underlying transaction sought to be tolled was an "interstate commercial transaction"]; *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 392 [same]; cf. *Kohan*, *supra*, 204 Cal.App.3d at p. 924 [same, but concluding that transaction occurring in Iran did not involve interstate commerce]; *Pratali*, *supra*, 4 Cal.App.4th at p. 643 [same, but concluding that a "single amicable loan" transaction between two California residents did not involve interstate commerce]; *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 122 [same, but concluding that underlying automobile altercation involving two California residents as private parties did not involve interstate commerce].) We need not decide whether the time of

the underlying transaction should be the *sole* focus because it is undisputed in this case that Dubin was involved in interstate commerce *both* at the time he embezzled money from Arrow (which is what gave rise to the stipulated judgment in this case) *and* currently, in his interstate and international accounting, bookkeeping and tax practice.

Thus, the answer to this first question is "yes."

B. *Does section 351 discriminate against interstate commerce in purpose or practical effect?*

Section 351 does not discriminate against interstate commerce by treating local interests or residents more favorably than out-of-state interests or residents. (*Maine*, *supra*, 477 U.S. at 138.) Section 351 is not facially discriminatory because it "makes no distinction between residents and nonresidents for purposes of tolling." (*Pratali*, *supra*, 4 Cal.App.4th at p. 641; *Dan Clark*, *supra*, 193 Cal.App.4th at p. 232, fn.9.) Section 351 also does not have a discriminatory purpose because, as originally enacted in 1872, its purpose was to stop the statute of limitations from running against out-of-state defendants who were otherwise not amenable to service of process (*Dew v. Appleberry* (1979) 23 Cal.3d 630, 634 (*Dew*)), and not for some broader economic protectionist purpose. And section 351 does not have the "practical effect" of treating local interests or residents more favorably. Section 351's tolling provisions may be invoked by plaintiffs regardless of their residency, and it applies against defendants regardless of their residency or at what point in time they left the State of California. Although, as a practical matter, section 351 will by definition be applied only against entities who are out

of state during the period of tolling, this reality does not equate to a discriminatory effect because the statute nevertheless "regulate[s] evenhandedly . . . without regard to whether the [parties to the lawsuit or the underlying transaction giving rise to the lawsuit came] from outside the State." (*CTS Corp. v. Dynamics Corp. of Am.* (1987) 481 U.S. 69, 88; *Minn. v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471-472; accord, *Garber*, *supra*, 888 F.3d at p. 843 [so holding, as to a similar tolling statute].)

Thus, the answer to this second question is "no."

C. *Does section 351 place burdens on interstate commerce that are clearly excessive in relation to its putative local benefits?*

Like the state tolling law at issue in *Bendix*, section 351 places a "significant" burden on interstate commerce because it "force[s] defendants . . . to choose between remaining in [or returning to] California until the limitations period expire[s], or [remaining outside of California but] forfeiting the limitations defense and [thereby] remaining 'subject to suit in California in perpetuity.'" (*Dan Clark*, *supra*, 193 Cal.App.4th at p. 233; *Heritage*, *supra*, 160 Cal.App.4th at p. 764; *Abramson*, *supra*, 897 F.2d at p. 392 [for these reasons, "[s]ection 351 imposes a significant burden"].) This significantly burdens interstate commerce if the defendant who is forced to make this choice has "travel[ed]" out of state to "facilitat[e] . . . interstate commerce" because, in that situation, section 351 creates the incentive for the out-of-state defendant—and his commercial activity—to remain in state rather than out of state. (*Filet Menu, Inc. v. Cheng* (1999) 71

Cal.App.4th 1276, 1283-1284 (*Filet Menu*); *Heritage*, at p. 760. [4]

This is certainly the case here, where Dubin has set up an entire new interstate—and international—business in Nevada. And like the putative state interest underlying the Ohio tolling law in *Bendix*, the putative state interest advanced by section 351 is weak. Like the law at issue in *Bendix*, section 351 was initially designed to prevent defendants who left the state— and thereby became beyond the reach of process—from escaping liability altogether. (*Dew*, *supra*, 23 Cal.3d at pp. 636-637.) Like the law at issue in *Bendix*, the advent of long-arm statutes and their validity as a matter of due process (see *Int'l Shoe Co. v. Wash.* (1945) 326 U.S. 310, 316) mean that out-of-state defendants are now subject to process, such that section 351's original function is largely a quaint relic of the bygone era. To be sure, section 351 is not entirely purposeless these days: By tolling the statute

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[4] Because this incentive itself creates a significant burden on interstate commerce, we need not decide whether the disincentive that section 351 places on *any* "travel across state lines" – whether or not commerce-related – also constitutes a significant burden. The California courts appear split on this point. (Compare *Filet Menu*, at pp. 1283-1284 [section 351 burdens interstate commerce only when the out-of-state "travel [is] for the facilitation of interstate commerce"] with *Heritage*, at p. 764 [suggesting that "creating disincentives to travel across state lines . . . limits the exercise of the right to freedom of movement"].) Although courts have generally concluded that section 351 does not violate the federal right to interstate travel (*Dew, supra*, 23 Cal.3d at pp. 636-637), this conclusion appears to be analytically distinct form whether the incentives section 351 creates regarding whether to travel to conduct one's business significantly burden interstate commerce under the federal dormant Commerce Clause.

of limitations for out-of-state defendants, section 351 "ease[s] the burden—however small—of locating and serving out-of-state defendants" by stopping the clock. (*Dew*, at pp. 636-637; *Pratali*, *supra*, 4 Cal.App.4th at pp. 641-642.) Although this residual function may be sufficiently rational to withstand equal protection scrutiny (*Dew*, at pp. 636-637), *Bendix* and all of the cases applying *Bendix* to section 351 make clear that this function is too weak to justify the "excessive burden" that section 351 otherwise places on interstate commerce. (*Heritage*, *supra*, 160 Cal.App.4th at p. 763 [""[T]he state's interest in aiding its residents' efforts to litigate against non- resident defendants d[oes] not justify denying non-residents the protections of the statute of limitations, particularly when long- arm service of process [is] available[]" [citation]'"]; *Dan Clark*, *supra*, 193 Cal.App.4th at pp. 233-234 [same]; *Filet Menu*, *supra*, 71 Cal.App.4th at p. 1283 p. 393 ["Because th[e state's interest] did not support the corresponding burden created by the Ohio tolling statute in *Bendix*, it also cannot support the burden created by [section] 351"].)

Thus, the answer to the third question is "yes," and section 351 violates the dormant Commerce Clause as applied to a defendant who moved out of state to operate a business engaged in interstate commerce.

V. Arrow's Arguments

Arrow proffers three main reasons why the analysis set forth above is incorrect: (1) that analysis is out of step with the Sixth Circuit's recent decision in *Garber*, *supra*, 888 F.3d 839, (2) that analysis is different—and comes out in Arrow's favor—when

section 351 is used to toll an action to enforce a judgment, and (3) section 351 still serves a rational purpose.

A. *Garber*

In 2018, the Sixth Circuit held that the Ohio tolling law found to violate the dormant Commerce Clause in *Bendix* did *not* run afoul of it as applied to an Ohio resident who moved out of state to retire before being sued. (*Garber*, *supra*, 888 F.3d at pp. 840, 844-845.) Like *Bendix*, *Garber* recognized that Ohio's tolling law put defendants to a choice—stay in Ohio and run down the statute of limitations clock, or move away and remain subject to suit indefinitely. (*Garber*, at p. 844.) But *Garber* viewed this forced choice as being no different from a myriad of other state laws that "provide benefits to residents that the residents put in jeopardy if they move" out of state. (*Ibid.*) What is more, *Garber* regarded such state laws—that is, laws aimed at "attract[ing] and retain[ing] residents through policy choices"—as being "a healthy byproduct of the laboratories of democracy in our federalism-based system of government, not a sign of unconstitutional protectionism." (*Ibid.*) For support, *Garber* drew upon *McBurney*, *supra*, 569 U.S. 221. *McBurney* held that a Virginia law that made all public records "'open to inspection and copying'" to Virginia residents (but not to nonresidents) did not violate the dormant Commerce Clause because it "merely provide[d] a service to local citizens that would not otherwise be available *at all*"; because Virginia itself had "created" the "'market' for public documents in Virginia," *McBurney* held, its law restricting access to in-state residents did not "'interfere[] with the natural functioning of the

interstate market.'" (*McBurney*, at pp. 223, 235, italics added.) *Garber* read *McBurney* as declaring that there is no dormant Commerce Clause defect with state laws that "discourage[] [in-state residents] from moving to other States because they would lose" a benefit. (*Garber*, at p. 844.) *Garber* went on to assume that the Ohio tolling law might violate the dormant Commerce Clause if the defendant had introduced "proof of real burdens" imposed by the law (*id.* at p. 845), but found that the defendant in that case had not done so. *Garber* distinguished *Bendix* on the ground that the tolling law, when applied to a defendant who had once been a resident of Ohio, "merely creates a benefit for residents of Ohio." (*Id.* at p. 846.)

Were the slate blank, we may well agree with *Garber's* analysis. But the slate is anything but blank.

As Arrow itself recognizes, *Garber* is inconsistent with how the California courts have applied the dormant Commerce Clause to section 351. If, as *Garber* suggests, tolling laws are valid when applied to in-state residents who move out of state, then *Heritage*—which also involved a defendant who moved out of state but concluded that section 351 was constitutionally invalid—was wrongly decided. (*Heritage*, *supra*, 160 Cal.App.4th at pp. 757-758.) What is more, subsequent cases have cited *Heritage* with approval. (E.g., *Dan Clark*, *supra*, 193 Cal.App.4th at pp. 230, 233.) "Where out-of-state authority is at odds with California law, it lacks even persuasive value," particularly when that authority is a lone voice in the woods. (*Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 35, citing *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 63; cf. *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 321 [noting that the decisions

of lower federal courts "on a federal question" are particularly persuasive where they are "'both numerous and consistent'"].)

What is more, *Garber* appears to be in tension—if not downright inconsistent—with *Bendix* itself. As explained above, *Bendix* concluded that the very same Ohio tolling law imposed a "significant" burden on interstate commerce by "forc[ing]" a defendant who is out of the state after a lawsuit is filed "to choose between" moving back to Ohio (in order to run down the statute of limitations clock) or to remain out of state (and6 thus remain subject to suit "in perpetuity" and thereby lose the statute of limitations defense). (*Bendix*, *supra*, 486 U.S. at p. 893.) That choice—and its resulting burden on interstate commerce by providing an incentive for the commerce-engaged defendant to re- locate to Ohio—remains the same whether or not that defendant *started out* as an Ohio resident. *Garber*'s attempt to distinguish *Bendix* on this ground is, for that reason, unpersuasive.

Further, *Garber*'s chief rationale appears to conflate two separate strands of dormant Commerce Clause analysis. *Garber* analogizes the Ohio tolling law to state laws that deny benefits to residents who leave a state and finds them constitutionally valid because such laws are "not a sign of unconstitutional protectionism" (*Garber*, *supra*, 888 F.3d at p. 844), but the dormant Commerce Clause inquiries into a discriminatory purpose on the one hand, and into an excessive burden on interstate commerce on the other, are distinct. (*Davis*, *supra*, 553 U.S. at pp. 338-339.) *Garber*'s conclusion that the Ohio tolling law, as a state law denying benefits to residents who move away, has no discriminatory purpose does not undermine *Bendix*'s wholly independent holding that

the very same law imposes an unconstitutionally excessive burden on interstate commerce. Nor does *McBurney* cast any doubt (or, for that matter, any shade) on *Bendix* because, as *McBurney* itself acknowledged, it involved a public records access law that *created* a wholly new market but limited access to that market, whereas the tolling law at issue in *Bendix* created an excessive burden on the already existing interstate commerce marketplace.

Because we conclude that *Garber* is inconsistent with California law and with *Bendix* itself, we decline to follow it.

A. *Actions to enforce judgments*

By its plain text, section 351's tolling rule applies to *all* out- of-state defendants, regardless of the nature of the plaintiff's claim against them. (§ 351.) Arrow argues that the nature of the claim alters the dormant Commerce Clause inquiry into whether section 351 imposes an excessive burden on interstate commerce, at least when the plaintiff is seeking to enforce a judgment. As {fs26 noted above, outside of California (but be subject to tolling—and hence suit—indefinitely). (*Dan Clark*, *supra*, 193 Cal.App.4th at p. 233; *Heritage*, *supra*, 160 Cal.App.4th at p. 764; *Abramson*, *supra*, 897 F.2d at p. 392.) Arrow argues that the out-of-state defendant's decisional calculus is different when the plaintiff is bringing a claim to enforce a in judgment because California law makes judgments "endlessly and effortlessly renewable." As a result, Arrow continues, an out- of-state defendant in such case gains no advantage from returning to California (because the statute of limitations clock is irrelevant in light of the power of the plaintiff to renew the judgment). Because section 351 in this situation

creates no incentive to return to California, Arrow concludes, it does not excessively burden interstate commerce.

Arrow's argument takes an impermissible "alternate timeline" approach to constitutional analysis. As noted above, Arrow is correct that judgment creditors have the statutory right to renew their judgments if they do so within 10 years. (§§ 683.110, 683.120.) But renewing a judgment is an "*alternative*" to suing to enforce a judgment. (*Pratali*, *supra*, 4 Cal.App.4th at pp. 637-638; *Kertesz*, *supra*, 115 Cal.App.4th at p. 373.) Indeed, the decision to pursue the latter indicates a decision *not* to pursue the former. More to the point, it is undisputed that Arrow chose *not* to renew the judgment and to sue to enforce the judgment. Because Arrow waited 21 years to take any action, it is now too late for Arrow to renew its judgment. Dubin consequently faces the same incentives under section 351 as any other out-of-state defendant facing suit in California: Return to California to run down the applicable limitations period (here, 10 years in actions to enforce a judgment), or remain out-of-state but subject to indefinite tolling under section 351.

Because the dormant Commerce Clause analysis in this case turns on what actions Arrow actually took— rather than what actions Arrow might have taken—the fact that the judgment against Dubin might have been subject to infinite renewals in an alternate timeline is irrelevant.

B. *Rationality of section 351*

Although our Supreme Court has upheld section 351 against equal protection challenges as continuing

to serve a legitimate and rational state objective (*Dew*, *supra*, 23 Cal.3d at pp. 636-637; see also *G.D. Searle & Co. v. Cohn* (1982) 455 U.S. 404, 405-410 [upholding a similar New Jersey tolling statute on equal protection grounds]), this finding says nothing about section 351's validity—or, more to the point, invalidity—under the dormant Commerce Clause as applied to the facts of this case. (*Bendix*, *supra*, 486 U.S. at pp. 893-894 ["[S]tate interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny"].)

DISPOSITION

The judgment of dismissal is affirmed. Dubin is entitled to his costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ

APPENDIX C

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES,
NORTH CENTRAL DISTRICT

ARROW HIGHWAY STEEL, INC., a California corporation, Plaintiff, vs. ROBERT DUBIN, an individual; and DOES 1-50, inclusive, Defendants.	CASE NO. EC068969 [*Assigned for all purposes to the Hon. John J. Kralik – Dept B*] ~~[PROPOSED]~~ JUDGMENT Hearing Date: October 11, 2019 Time: 8:30 a.m. Dept: B **RES. ID: 391952817565** Complaint Filed: July 3, 2018 Trial Date: None Set

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On October 11, 2019, the Court granted Defendant Robert Dubin's ("Dubin") Motion for Summary Judgment pursuant to Code of Civil Procedure §437(c) for an order that judgment be entered for Dubin and against Plaintiff Arrow Highway Steel, Inc. ("Plaintiff") on Plaintiff's Complaint on the grounds that there are no triable issues of fact on any of Plaintiff's causes of action set forth in its Complaint.

NOW, THEREFORE, IT IS ORDERED, ADJUDICATED, AND DECREED THAT:

1. Plaintiff takes nothing on its Complaint against Dubin; and
2. Dubin shall have and recover from Plaintiff all costs, fees and disbursements permitted by Code of Civil Procedure §1033.5.

THE CLERK IS ORDERED TO ENTER THE JUDGMENT.

Dated: 10/29/2019

Hon. John J. Kralik/Judge

APPENDIX D

DAVID M. ALMARAZ (State Bar No. 198888)
ALPERT, BARR & GRANT
A Professional Law Corporation
6345 Balboa Boulevard, Suite I-300
Encino, California 91316-1523
PHONE: (818) 881-5000; FAX: (818) 881-1150

Attorneys for Defendants.

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES,
NORTH CENTRAL DISTRICT

ARROW HIGHWAY STEEL, INC., a California corporation, Plaintiff, vs. ROBERT DUBIN, an individual; and DOES 1-50, inclusive, Defendants.	CASE NO. EC068969 [*Assigned for all purposed to the Hon. John J. Kralik – Dept. B*] **NOTICE OF RULING ON DEFENDANT ROBERT DUBIN'S MOTION FOR SUMMARY JUDGMENT** Hearing Date: October 11, 2019 Time: 8:30 a.m.

Dept: B
Res. ID:
391952817565

Complaint filed:
July 3, 2018
Trial Date:
None Set

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that on October 11, 2019, at 8:30 a.m. in Courtroom B of the Los Angeles Superior Court, Burbank Courthouse, located at 300 East Olive Avenue, Burbank, California 91502, Defendant Robert Dubin's ("Dubin") Motion for Summary Judgment came on regularly for hearing before the Honorable John J. Kralik. David M. Almaraz Esq., of Alpert Barr &Grant APLC appeared on behalf of Dubin. Matthew Mickelson Esq. of the Law Offices of Matthew Mickelson appeared for the Plaintiff Arrow Highway Steel, Inc.

After considering all moving papers, all opposition papers, all reply papers, hearing oral argument of counsel and after considering the Court's file, the Court ruled as follows:

1. Dubin's Motion for Summary Judgment is granted. Copies of the Court' Tentative Ruling which was adopted as the Court's final ruling and Minute Order are attached as Exhibits "A" and "B."
2. Dubin is ordered to submit a Proposed Judgment within 10 days of service of the Court's Minute Order.
3. Dubin to give Notice.

Dated: October 22, 2019

ALPERT, BARR & GRANT
A Professional Law Corporation

By: DAVID M. ALMARAZ
Attorneys for Defendant

EXHIBIT A

Superior Court of California
County of Los Angeles
North Central District

Department B

ARROW HIGHWAY STEEL, INC.,	Case No.: EC068969
Plaintiff,	Hearing Date: October 11, 2019
vs.	
ROBERT DUBIN,	[TENTATIVE] ORDER RE:
Defendant.	MOTION FOR SUMMARY JUDGMENT

BACKGROUND

A. Allegations of Complaint

The complaint in this action, filed July 3, 2018, alleges a single cause of action, which is an action on the judgment.

Plaintiff Arrow Highway Steel, Inc. ("Arrow") alleges that Defendant Robert Dubin ("Dubin") was a defendant and judgment debtor in the case entitled *Arrow Highway Steel, Inc, et al. v. Robert Dubin, et al.*

(LACS Case No. BC101768) (First Action"). Arrow alleges that Dubin stipulated to a judgment against him in that action, and the judgment was entered on February 27, 1997 in favor of Arrow, Seymour Albert, and Henrietta Albert in the amount of $937,000.00. Dubin was the accountant of Arrow and the judgment was a result of fraud and embezzlement against him.

Arrow alleges that this Court has personal jurisdiction over Dubin for purposes of an independent action to enforce the judgment, even if Dubin had no additional contacts with California between the time of the First Action and the subsequent enforcement action. Dubin moved to Nevada around 2000.

Thereafter, on June 30, 2015, Shelley Albert and Craig Albert, as trustees of the Seymour Albert and Henrietta Albert Revocable Trust ('Trust") sued Dubin in LASC Case No. BC586724 ("Second Action"), to enforce the judgment entered in the First Action. The Trust argued that it was the successor-in-interest to the judgment after the Alberts had passed away. The court in the Second Action granted a motion for summary judgment in Dubin's favor on June 14, 2016. On January 31, 2018, the Court of Appeal affirmed the judgment in the Second Action on the ground that the Trust lacked standing to bring the Second Action to enforce the First Action judgment because the First Action's judgment had no been formally transferred to the Trust in a probate proceeding.

B. Motion for Summary Judgment

On July 26, 2019, Dubin filed a motion for summary judgment in his favor on the following grounds:

- The Complaint is barred by the applicable statute of limitations set forth in CCP §377.5; and
- Arrow does not have legal capacity to sue because it lacks standing because it is a 20-year dissolved corporation that has no more assets, and thus cannot assert any claims. (CCP §430.10(b).)

On September 25, 20190, Arrow filed an opposition to the motion. Dubin filed a reply brief on October 4, 2019.

REQUEST FOR JUDICIAL NOTICE

Arrow requests judicial notice of the unpublished opinion by the Court of Appeal in *Shelly Albert v. Dubin* (Appeal No. B277826), dated January 31, 2018. (Arrow RJN, Ex. A.) The request is granted. (Evid. Code, §452(d).)

EVIDENTIARY OBJECTIONS

Arrow submits evidentiary objections to Dubin's declaration at paragraphs 12 and 21, wherein he states that he was engaged in interstate commerce on behalf of his clients, including Arrow and Mr. Albert. The evidentiary objections are sustained to objection nos. 1 and 2 as they amount to improper legal conclusions.

Dubin submits evidentiary objections to the declaration of Gary Albert, which are overruled. The Court notes that the ruling on the evidentiary objections of Mr. Albert's declaration has no affect on the ruling of this motion.

DISCUSSION

A. Undisputed Material Facts

The following facts are essentially undisputed by the parties.

Dubin has an accounting degree. (Def.'s Separate Statement Fact ["DSSF"] 1.)

In 1964, he did accounting work for Gold Mason and Wilder in 1964, and frequently traveled outside of California for work (Def.'s Separate Statement Fact ["DSSF"] 2-4)

Dubin then worked for Rooten, Getz and Co. where he did similar work and completed his hours to obtain a CPA license. (DSSF 5-7.) At Rootenberg, Dubin met Seymour Albert ("Mr. Albert"), who owned Arrow, both of whom were clients of Rootenberg (DSSF 8-9.) Dubin represented Arrow and Mr. Albert and performed general accounting work, including general bookkeeping, accounting services, preparing federal/state/local/sales tax, and worker's compensation audits (DSSF 10.) Dubin handled worker's compensation audits for Arrow, which required him to communicate with insurance companies across state lines, until he stopped representing them in 1995. (DSSF 11-12.)

In 1967, Dubin received his CAP license. (DSSF 13.) Soon thereafter, Dubin started his own company, Robert Dubin CPA, which was a full-service accounting firm that represented clients all over the United States. (DSSF 14-15, 17.) During this time, Robert Dubin CPA facilitated and obtained credit financing for Arrow across state lines, performed Arrow and Mr. Albert's accounting work, and allegedly falsified checks at a national bank. (DSSF 17-18.)

Dubin was convicted of bankruptcy fraud, which arose in part out of Arrow and Mr. Albert's complaint. (DSSF 21.)

In December 1997, Arrow filed a Certificate of Dissolution with the California Secretary of State. (DSSF 32.) The certificate stated that Mr. Albert was the sole director, Arrow had been completely wound up, Arrow's known debts and liabilities had been paid, Arrow's known assets had been distributed to the persons entitled thereto and Arrow had been dissolved (DSSF 33.)

In 1998, Dubin permanently moved to Nevada to start a new business. (DSSF 22.) In 1999, he started Answerman Tax Services. (DSSF 23-24.) Answerman does general accounting work and represents clients all over the United States and outside the United States. (DSSF 25.)

In 2007, Dubin became an Enrolled Agent for the IRS, which is a federally authorized tax practitioner who has technical expertise in the field of taxation and may represent taxpayers before all administrative

levels of the IRS. (DSSF 26-27.) Since moving to Nevada, Dubin has represented clients all over the United States. (DSSF 28.)

The judgment has not been renewed. (DSSF 30.) Within 10 years of judgment being entered, Arrow has not filed an action on the judgment. (DSSF 31.)

B. Legal Capacity, Standing

The Court first addresses whether Arrow has the legal capacity as a dissolved corporation to bring this action.

Corporations Code, §2010 states:

(a) A corporation which is dissolved nevertheless continues to exist for the purposes of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof.
(b) No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof.

(c) Any assets inadvertently or otherwise omitted from the winding up continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation and on realization shall be distributed accordingly.

(Corps. Code, §2010.)

The effect of a corporation's dissolution is not so much a change in its status, as a change in its permitted scope of activity (*Penasquitos v. Superior Court* (1991) 53 Cal.3d 1180, 1190.) "Thus, a corporation's dissolution is best understood not as its death, but merely as its retirement from active business" (Id.) "[A] dissolved corporation maintains considerable corporate powers to conduct whatever business is required to wind up its affairs-including prosecuting actions and enforcing judgments." ("*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1368-69; *Fladeboe v. Am. Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 55 [commenting that even though corporation had filed a certificate of dissolution, it was not deprived of standing under section 2010 to wind up affairs, so long as it is not a continuation of its business].)

Dubin argues that after the judgment had been entered in February 1997, Arrow filed its Certificate of Dissolution in December of 1997. (DSSF 21, 32; MSJ Evid., Ex H [Certificate of Dissolution of Arrow].) It is undisputed that the certificate states Mr. Albert is the sole director of Arrow, Arrow has been completely wound up"' Arrow's "known assets have been distributed to the person entitled thereto"' and Arrow is dissolved. (DSSF 33.)

Though Arrow may be a dissolved corporation, Corporations Code, §2010(a) expressly allows a corporation to exist to wind up its affairs and to prosecute actions to collect obligations. Subsection (b also states that no action abates merely because the

corporation has dissolved. Further, Dubin has not provided case law showing that a dissolved corporation is prevented from taking any further actions to wind up its affairs or pursue/defend litigations.

Moreover, even if the certificate states that Arrow's known assets have been distributed, "[a]ny assets inadvertently or otherwise omitted from the winding up continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation and on realization shall be distributed accordingly." (Corp. Code, §2010©.) Dubin has not shown by way of this motion that Mr. Albert's omission of any assets (i.e., the judgment) was inadvertent or not.

The Court does not find that Dubin has upheld his initial burden in summary judgment on the issue of lack of capacity or standing of Arrow to bring this action. Thus, the motion for summary judgment will not be granted on this basis.

C. Statute of Limitations

Dubin moves for summary judgment, arguing that the complaint: (1) is barred by the applicable statute of limitations set forth in CCP §337.5 and (2) is not tolled by the provisions of CCP §351.

CCP §683.020 states that upon the expiration of 10 years after the date of entry of a money judgment, the judgment may not be enforced, all enforcement procedures shall cease, and any lien created by an enforcement procedure is extinguished. Within 10

years, an action may be filed upon a judgment in any state within the United Stated. (CCP §337.5(b).)

However, the 10 year limitations period is tolled while the defendant (judgment debtor) is outside of California. (Trend v. Bell (1997) 57 Cal.App.4th 1092, 1098.) CCP §351 provides: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action."

It is undisputed that the judgment in the First Action was entered on February 27, 1997. (DSSF 21.) The judgment has not been renewed and Arrow did not file an action on the judgment within 10 years of the judgment being entered (DSSF 30-31.) Based on these undisputed facts, Dubin has established that the 10-year state of limitation has run on Arrow's claim.

Thus, next, the Court must determine whether CCP §351's tolling provision applies to the facts of this case. Dubin argues that he has performed accounting services for Arrow that implicated interstate commerce and that when he moved to Nevada to stary a new accounting business, his new business also implicated the interstate commerce. Dubin argues that if interstate commerce is implicated, the tolling provision of CCP §351 cannot be applied towards him as it would be unconstitutional. The cases Dubin cites for this proposition are *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988) 486 U.S. 888[1];

Heritage Marketing and Insurance Services, Inc. v. Chrustawka (2008 160 Cal.App.4th754; *Abramson v. Brownstein* (9th Cir. 1989) 8907 F.2d389, *Pratali v. Gates* (1992) 4 Cal.App.4th 632; *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th1276; and *Dan Clark Family Ltd. P'Ship v. Miramontes* (2011) 193 Cal.App.4th 219.

Dubin provides evidence that he performed accounting services for Arrow and Mr. Albert while Dubin was employed under Rootenberg and his own accounting firm, from around 1967 to 1994 when the First Action was commenced. (DSSF 14-18.) It is also undisputed that Dubin's accounting firm, Robert Dubin CPA, had accounting clients from all over the United States and that he facilitated and obtained credit financing for Arrow across state lines. (DSSF 16-17.) Thereafter, Dubin permanently moved to Nevada in 1998 to start Answerman Tax Services, which does general accounting work and performs services for clients all over the United States and outside the United States. (DSSF 22-25.) Dubin also states that he performs tax services for clients all over the United States. (DSSF 26-28.)

Thus, Dubin has established his initial burden in showing that he engaged in interstate commerce while he performed accounting services for Arrow and Mr. Albert, he continues to do so today at his accounting firm in Nevada and in his role as an Enrolled Agent with the IRS, and his continued absence from California is for the facilitation of interstate commerce. (*See Filet Menu, supra*, 71 Cal.App.4th at 1283.) He has also established that his permanent domicile is located in Nevada, as of 1998 –

a year after the judgment in the First action was entered.

Next, based on the undisputed facts of this case, the Court finds that applying CCP §351's tolling provision to this case would impermissibly burden interstate commerce and thereby violate the Commerce Clause as applied to Dubin. To determine whether section 351 would amount to an impermissible burden on interstate commerce, the Court: (1) assesses the burden section 351 would impose on interstate commerce under the circumstances (i.e., examine the extent to which section 351 restricts the flow of interstate commerce in a manner not applicable to local business and trade), and then (2) determine whether the burden is counterbalanced by state interests supporting section 351. (*Filet Menu, supra*, 71 Cal.App.4th at 1282.)

First, applying section 351 to Dubin would amount to an unreasonable burden on interstate commerce as a nonresident of California because section 351 would force "a nonresident individual engaged in interstate commerce to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity" (Heritage, supra, 160 Cal.Ap.4th at 760 quoting *Abramson v. Brownstein* (9th Cir 1990) 897 F.2d 389, 392.) In other words, such a choice would essentially force Dubin to "either become [a] resident [] of California or be subject to suit in California in perpetuity", which would be an untenable choice under the Commerce Clause. (Dan Clark, supra, 193 Cal.App.4th at 233.) [2] Second, the state's interest in applying section

351's tolling provision does not outweigh the burden on interstate commerce because California has a long-arm statute that would permit service on a foreign defendant like Dubin (*See id*. at 233-234.)

In opposition, Arrow argues that the dormant commerce clause does not bar this action and relies upon *Garber v. Menedez* (6th Cir. 2018) 888 F. 3d 839. However, this is out-of-state federal case was decided in the Sixth Circuit Court and is thus non-binding precedent, particularly in light of the numerous cases determined by the California courts.

Next, Arrow argues that this case is similar to *Pratali v. Gates* (1992) 4 Cal.App.4th 632 and *Kohan v. Cohen* (1988) 204 Cal.App.3d 915.

In *Pratali*, Pratali sued Gates (both California residents) on a promissory note that was executed in Nevada. The Court of Appeal held that the limitations period was tolled under section 351 because the section was not unconstitutionally invalid on its face or as applied to the facts of the specific case. "[W]hile section 351's tolling provision may violate the commerce clause as applied to a defendant engaged in interstate commerce, there is no showing the statute violates the commerce clause when applied to a noncommercial defendant not engaged in interstate commerce." (*Pratali, supra*, 4 Cal.App.4th at 643.) In *Pratali*, both parties were local residents, the alleged injury did not involve interstate commerce, and thus there was no interaction between section 351 and the commerce clause such that no conflict arose. (*Id*.) While the loan was made in Nevada and payable in California, there was no evidence that Pratali was in

the business of making loans or was otherwise engaged in commerce, nor was there any evidence that Gates used the loan proceeds in a commercial venture in another state. (*Id.*) "In any event, we question whether a single amicable loan between California acquaintances while visiting in Las Vegas can rise to the level of interstate commerce within the meaning of the commerce clause-however the proceeds are used." (*Id.*) Under the particular facts of the case, section 351's tolling provision did not violate the commerce clause. (*Id.*)

The Court finds *Pratali* to be distinguishable. As summarized in *Filet Menu*, *Pratali* involved a "single amicable noncommercial loan between California residents arranged in Las Vegas and payable in San Francisco [which] does not implicate interstate commerce, and thus applying section 351 in [a] lawsuit arising out of a loan does not violate [the] commerce clause." (*Filet Menu, supra* 71 Cal.App.4th at 1283 [emphasis added].) In contrast to *Pratali,* here, Dubin is in the business of providing accounting services (on an ongoing and commercial basis) and Dubin's provisions of accounting services to Arrow and Mr. Albert was not a "single amicable noncommercial" transaction.

The Court also does not find that Kohan applies to this case. Kohan involved brothers who were natives of Iran and had transacted business together in accumulating real and personal property in their names. The Court of Appeal held: "That acts giving rise to the causes of action herein occurred in Iran while defendants were residents of that country does not affect wither interstate commerce or commerce

between the United States and Iran, nor does it establish that defendants were engaged in interstate commerce by any definition of that term." (Kohan v. Cohan (1988) 204 Cal.App.3d 915, 924.)

Finally, Arrow provides additional material facts ("AMF") in the separate statement, but these facts do not raise a triable issue of material fact. The AMF include facts that in the mid-1990s, Dubin executed a fraudulent scheme and embezzled money from Arrow (a California corporation), which financially devastated Arrow. (PL's AMF 35, 37, 38, 40; see also ruling on Evidentiary Objections.) Dubin was California resident from 1967 to 1998, and he was Arrow's sole CPA for 26 years. (Pl.'s AMF 36, 39.) The First Action's judgment has not been appealed, reserved, vacated, modified, stayed, or set aside, and Dubin has not made any payments towards this judgment. (Pl.'s AMF 41-42.) After Mr. & Mrs. Albert died in 2009 and 2012, respectively, the Trust brought suit against Dubin, but the Superior Court granted Dubin's motion for summary judgment on the ground the tolling provision of section 351 was preempted by the commerce clause (Pl.'s AMF 44-45.) The Trust appealed, and the Court of Appeal affirmed the judgment on the ground that Trust lacked standing to bring the action, but did not rule on the constitutional issue. (Pl.'s AMF 46.) However, none of these facts raise a triable issue of material fact disputing whether Dubin was or was not engaged in interstate commerce and whether section 351's tolling provisions applies.

Thus, the Court finds that Dubin has upheld his initial burden in summary judgment and Arrow has failed to raise a triable issue of material fact.

Accordingly, Dubin's motion for summary judgment is granted.

CONCLUSION AND ORDER

Dubin's motion for summary judgment is granted. Dubin is ordered to electronically lodge/file with the Court and serve on Arrow a proposed judgment within 10 days.

Dubin shall give notice of this order.

[1] In *Bendix*, Bendix (Delaware corporation with principal place of business in Ohio) sued Midwesco (Illinois corporation) for breach of contract in Ohio. Midwesco argued that under the Ohio statute of limitations, while Bendix argued that the statutory period had not elapsed based on tolling of claims against entities that are not within Ohio and have not designated an agent for service of process. The district court dismissed the action finding that the Ohio tolling statute constituted an impermissible burden on interstate commerce, which the Sixth Circuit court and Supreme Court affirmed. The Supreme Court found that the burden imposed on interstate commerce by the tolling statute exceeded any local interest that the State might advance. (*Bendix, supra*, 486 U.S. at 891.) The Court found that the tolling statute placed a significant burden on interstate commerce because it would force Midwesco to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts (*Id.* at 891-92.j) "The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio

courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity. Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden." (*Id.* at 893)

[2] *Dan Clark* (Ct. App. 4th Dist): Dan Clark (Texas LP) sued the Miramonteses (Mexico residents) for conversion of 3 vehicles. The Court of Appeal affirmed the trial court's order sustaining the Miramontes' demurrer on the basis that the action was time barred and the action was not tolled based on section 351 while they were out of state. The Court found that the underlying conduct of Dan Clark's claims was an interstate commercial transaction and that applying section 351 to the case would deny the Miramonteses the ordinary legal defenses of the statute of limitations and would place an impermissible burden on commerce (*Dan Clark, supra*, 193 Cal.App.4th 232.) The statute imposed a burden because it inhibited the flow of goods interstate and would force the Miramonteses to choose between remaining in California until the limitations period expired, or returning to their place of residence and forfeit the limitations defense and remain subject to suit in California in perpetuity—which would discourage interstate travel and burden any commerce during those travels (*Id.* at 233.)

CASE NUMBER: EC069221
Hearing Date: October 11, 2019
Dept: NCB

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGLES
Civil Division
North Central District,
Burbank Courthouse, Department B

EC068969 October 11, 2019
ARROW HIGHWAY STEEL, INC., 1:56 PM
VS. ROBERT DUBIN

Judge: Honorable John J. Kralik CSR: None
Judicial Assistant: W. Delgado ERM: None
Courtroom Assistant: P. Booker Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 10/11/2019, now rules as follows: Dubin's motion for summary judgment is granted. Dubin is ordered to electronically lodge/file with the Court and serve on Arrow a proposed judgment within 10 days.

Based upon the above ruling, the Court vacates the trial date.

On the Court's own motion, the Final Status conference scheduled for 01/23/2020, and Jury Trial

scheduled for 02/03/2020 are advanced to this date and vacated.

Non-Appearance Case Review re: Receipt of Judgment for MSJ is scheduled for 11/06/2019 at 09:00 AM in Department B at Burbank Courthouse.

Counsel for defendant is ordered to give notice.