No. ———

In The Supreme Court of the United States

BRENT ANDREW BRACKETT ARBOGAST,

Petitioner,

v.

PFIZER, INC., as successor to Wyeth Pharmaceuticals; SHEEHAN, PHINNEY, BASS & GREEN, P.A.; JOHN BRACK; KERRI LEWANDOWSKI; LEIGH COWDRICK; MICHAEL J. LAMBERT; THOMAS M. CLOSSON,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Brent Arbogast,
9 Maple St. Apt. C
Exeter, NH 03833
Telephone: 603-706-0559
BrentArbogast@gmail.com
Pro Se Petitioner

May 14, 2025

TABLE OF CONTENTS TO THE APPENDIX

Electronic Order, ECF No. 34

Case 1:22-cv-10156-vDJC, *Arbogast v. Pfizer et al.*

Filed 04/20/2022 at 11:52 AM EDT

Judge Denise J. Casper: ELECTRONIC ORDER entered re: [9] Motion for More Definite Statement. Having considered the Defendants' motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e) and memorandum in support of same, D. 9-10, Plaintiff's opposition, D. 16, and having considered the 178-page complaint, D. 1, the Court ALLOWS the motion. Accordingly, the present complaint, D. 1, is struck, and Plaintiff has until May 11, 2022 to file a complaint that complies with the applicable Federal Rules of Civil Procedure, including Rule 8(a)(2) that the amended complaint contain "a short and plain statement of the claim[s] showing that the pleader is entitled to relief" and the applicable Local Rules of this Court, including L.R. 5.1(a)(2) that provides in relevant part that all documents, including pleadings "shall be double-spaced except for the identification of counsel, title of the case, footnotes, quotations and exhibits." (Hourihan, Lisa)

Electronic Order, ECF No. 37

Case 1:22-cv-10156-DJC, *Arbogast v. Pfizer et al.*

Filed 04/21/2022 at 12:24 PM EDT

Judge Denise J. Casper: ELECTRONIC ORDER entered re: [36] Motion for Extension of Time to File Response/Reply to 6/1/2022, [27] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , [29] MOTION for More Definite Statement ; re: [19] Motion for More Definite Statement; re: [27] Motion to Dismiss for Failure to State a Claim; re: [29] Motion for More Definite Statement. Consistent with the Court's ruling in D. 34, the Court DENIES D. 19 as moot, strikes D. 22, the amended complaint that suffers the same problems as the original complaint, see D. 34, DENIES the motion to dismiss the amended complaint, D. 27 without prejudice and, having done so, DENIES Plaintiff's motion for extension of time to respond to the MTD, D. 36. (Hourihan, Lisa)

Nunc Pro Tunc Order, ECF No. 55

Case 1:22-cv-10156-DJC, *Arbogast v. Pfizer et al.*

Filed 06/10/2022 at 8:56 AM EDT

Judge Denise J. Casper: ELECTRONIC ORDER entered granting [42] MOTION for Extension of Time to Amend Complaint nunc pro tunc (Hourihan, Lisa)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 22-CV-10156-DJC

BRENT ANDREW BRACKETT ARBOGAST,
Plaintiff,

v.

PFIZER, INC., as successor to Wyeth Pharmaceuticals; SHEEHAN, PHINNEY, BASS & GREEN, P.A.; JOHN BRACK; KERRI LEWANDOWSKI; LEIGH COWDRICK; MICHAEL J. LAMBERT; THOMAS M. CLOSSON,

Defendants.

MEMORANDUM AND ORDER

Casper, J. **February 9, 2023**

I. Introduction

Plaintiff Brent Arbogast ("Arbogast") has filed this lawsuit *pro se* against Defendants Pfizer, John Brack, Kerri Lewandowski and Leigh Cowdrick (collectively, "Wyeth Defendants"), Thomas Closson ("Closson"), Michael Lambert ("Lambert") and the law firm Sheehan, Phinney, Bass & Green, P.A. ("Sheehan P.A.") alleging various claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Counts I–VI), a claim under 42 U.S.C. § 1983 against Closson, Lambert and Sheehan (Count VII), fraudulent inducement against Pfizer, Brack

and Cowdrick (Count VIII), fraudulent misrepresentation against Closson, Lambert and Sheehan (Count IX) and against Pfizer and Lewandowski (Count X), a claim under the Massachusetts Civil Rights Act, Mass. Gen. L. c. 12, § 11I, against Pfizer, Closson, Lambert and Sheehan (Count XI) and intentional infliction of emotional distress against all Defendants (Count XII). D. 43. Wyeth Defendants, D. 44, Closson, D. 46, and Lambert and Sheehan P.A., D. 50, have moved to dismiss for failure to state a claim upon which relief can be granted. For the reasons stated below, the Court ALLOWS Wyeth Defendants' motion to dismiss, D. 44, ALLOWS Closson's motion to dismiss, D. 46, and ALLOWS Lambert and Sheehan P.A.'s motion to dismiss, D. 50.

II. Standard of Review

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must determine if the facts alleged "plausibly narrate a claim for relief." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (citation omitted). Reading the complaint "as a whole," the Court must conduct a two-step, context-specific inquiry. García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must perform a close reading of the claim to distinguish the factual allegations from the conclusory legal allegations contained therein. Id. Factual allegations must be accepted as true, while conclusory legal conclusions are not entitled credit. Id. Second, the Court must determine whether the factual allegations present a "reasonable inference that the

defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (citation omitted). In sum, the complaint must provide sufficient factual allegations for the Court to find the claim "plausible on its face." García-Catalán, 734 F.3d at 103 (citation omitted). The Court remains mindful that a *pro se* plaintiff is entitled to a liberal reading of his allegations, no matter how unartfully pled. See Haines v. Kerner, 404 U.S. 519, 520–21 (1972); Rodi v. New Eng. Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004).

III. Factual Background

The Court draws the following factual allegations from Arbogast's second amended complaint, D. 43, and accepts them as true for purposes of resolving the motions to dismiss. Arbogast began working at Wyeth Pharmaceuticals ("Wyeth") in Massachusetts in March 2004. See id. ¶¶ 1, 48, 180. Pfizer is the successor company to Wyeth, while John Brack, Kerri Lewandowski and Leigh Cowdrick worked for Wyeth's human resources department during the relevant period. See id. ¶¶ 5–8. While employed at Wyeth, Arbogast complained that his position was misclassified as being exempt from the overtime compensation requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213. See id. ¶¶ 12–14, 30–32, 35–38. Wyeth terminated Arbogast from his position on June 30, 2004. Id. ¶¶ 39, 61.

Following his termination, in late 2004, Arbogast sought to bring legal claims against Wyeth and asked Closson to represent him. See id. ¶ 100. Closson initially declined because he was not licensed to practice law in Massachusetts but later

agreed to represent Arbogast and "stated that a friend was going to sponsor him so he could practice law in Massachusetts." Id. As alleged, Closson "persuaded [Arbogast] to assign him control of his legal claims against Wyeth" in March 2005 and "directed [Arbogast] not to communicate with anyone except him regarding the Wyeth issue and to forward him all inquiries regarding the matter." Id. ¶ 120.

In February 2006, Closson drafted a complaint and contacted the law firm Sheehan PA to serve as local counsel in representing Arbogast in his claims against Wyeth. Id. ¶ 90. Attorney Lambert and Sheehan P.A. filed the complaint in this district on Arbogast's behalf despite Arbogast's allegation that he had not authorized it. Id. ¶¶ 89, 126. That complaint alleged that Wyeth failed to pay Arbogast overtime compensation and retaliated against him by terminating his employment because he complained "about his misclassification as an exempt employee and the corresponding requirement that he continue to work overtime without receiving the additional compensation required by the Fair Labor Standards Act." Arbogast v. Wyeth, No. 06-cv-10333- PBS, D. 1 ¶¶ 21, 28 (D. Mass. Feb. 23, 2006). Closson provided Arbogast with a copy of the complaint in Closson's office on or around March 21, 2006. D. 43 ¶ 129. Closson also presented Arbogast with a contingent fee agreement, which Arbogast signed. See id. ¶¶ 91, 129.

On or around June 8, 2006, Closson called Arbogast and told him that the Court required him to present a settlement offer to Wyeth. Id. ¶ 136; see Arbogast v. Wyeth, No. 06-cv-10333- PBS, D. 8 (D. Mass. Apr. 19, 2006) (noticing parties of June 21,

2006 scheduling conference); D. Mass. L.R. 16.1(c) (stating that "the plaintiff shall present written settlement proposals to all defendants no later than 14 days before the date for the scheduling conference").[1] Lambert filed a statement in that action certifying that he and Arbogast had conferred about establishing a budget for the full course of litigation and "the resolution of the litigation through the use of alternative dispute resolution programs" and, as alleged by Arbogast, such statement "contained a forgery of [Arbogast]'s signature." D. 43 ¶¶ 103, 139; see Arbogast v. Wyeth, No. 06-cv-10333-PBS, D. 12 (D. Mass. June 16, 2006). After a scheduling conference, Lambert called Arbogast "urging him to settle his claims because both he and the judge believed they lacked merit and the judge wanted the case settled quickly." D. 43 ¶ 104. Closson participated in negotiations with Wyeth, including a "court annexed mediation" in Massachusetts that Arbogast also attended. See id. ¶¶ 101, 146; Arbogast v. Wyeth, No. 06-cv-10333-PBS, D. 9/22/06 entry (D. Mass. Sept. 22, 2006) (noting "[m]ediation with principals present set for 10/11/2006"); Arbogast v. Wyeth, No. 06-cv-10333-PBS, D. 15 (D. Mass. Oct. 17, 2006) (reporting results of mediation).

On November 2, 2006, Wyeth served Closson an offer of judgment, which Arbogast alleges was improperly not sent to Lambert, and which Closson withheld from Arbogast. D. 43 ¶ 149. Arbogast met

---

[1] The Court may take judicial notice of court filings in the resolution of a motion to dismiss. See Watterson v. Page, 987 F.2d 1, 3–4 (1st Cir. 1993); E.I. Du Pont de Nemours & Co. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986).

with Closson in his office to discuss settlement in December 2006. Id. ¶ 152. "Closson informed [Arbogast] that he was fortunate to receive a settlement for his overtime claim because it did not have much merit." Id. ¶ 208; see id. ¶ 149 (alleging that Closson "threatened [Arbogast] that he would end up owing Wyeth money if he did not settle his claims in accordance with their settlement offer"). On January 22, 2007, Lambert filed a stipulation of dismissal that Arbogast alleges that he did not authorize and materially differed from a stipulation to which Arbogast had agreed, namely by stating that both sides paid their own legal fees, which Arbogast alleges was false. Id. ¶¶ 18, 106, 153; see Arbogast v. Wyeth, No. 06-cv-10333-PBS, D. 16 (D. Mass. Jan. 22, 2007). Further, "Closson deceived [Arbogast] into believing [that the stipulation of dismissal] 'with prejudice' meant prejudice against Wyeth." D. 43 ¶ 115.

As alleged, in December 2018, Arbogast obtained several documents that he suggests were previously withheld from him, including his Wyeth personnel file, Wyeth's answer to the complaint in the prior action, Wyeth's offer of judgment, initial disclosures filed by Closson on Arbogast's behalf, and a confidential mediation statement prepared by Closson. See, e.g., id. ¶¶ 33, 61, 112–14, 149. Arbogast, further, alleges that Closson and Lambert previously failed to inform him that the Wage and Hour Division of the United States Department of Labor had investigated Wyeth and determined that Wyeth owed back wages to him as well as one hundred fifty similarly situated individuals. See id. ¶¶ 27, 109, 124. According to Arbogast, such documents and information revealed to him that

Wyeth Defendants, Closson, Sheehan PA and Lambert had acted in furtherance of a conspiracy to defraud Arbogast by "unlawfully procuring control of his legal claims against Wyeth" through Closson "with the intention of preventing [Arbogast] from retaining competent legal representation" or "benefitting from cooperating with law enforcement in relation to their investigation and adjudication of Wyeth's illegal labor practices in 2005." See id. ¶ 87.

IV. Procedural History

Arbogast commenced this action on February 1, 2022, D. 1, and later filed an amended complaint, D. 22. The Court thereafter allowed Defendants' motion for a more definite statement, D. 9, and ordered Arbogast to file a complaint in compliance with the Federal Rules of Civil Procedure. D. 34; see D. 37. Arbogast subsequently filed a second amended complaint ("SAC"). D. 43. Wyeth Defendants, Closson and Lambert and Sheehan have moved to dismiss the SAC for failure to state a claim upon which relief can be granted. D. 44; D. 46; D. 50.[2] The Court heard the parties on the pending motions and took the matters under advisement. D. 65.

---

[2] After the Court scheduled a hearing on Defendants' motions to dismiss, D. 58, Arbogast filed—without leave from the Court—a third amended complaint, D. 59. Given Arbogast's failure to obtain leave to file a further amended complaint as required by Rule 15 of the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 15(a), the Court struck the third amended complaint, D. 65, and DENIES as moot Closson, Lambert and Sheehan's motion to strike same, D. 61.

V. Discussion

A. Wyeth Defendants' Motion to Dismiss

Wyeth Defendants argue that the SAC should be dismissed as to them under the doctrine of claim preclusion. D. 45 at 5–10. "Federal claim preclusion law applies to determine the preclusive effect to be given a prior federal court judgment" and "bars parties from relitigating claims that could have been made in an earlier suit." Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 14 (1st Cir. 2010) (noting that the doctrine bars "not just claims that were actually made"). "Claim preclusion applies if (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." Id. Claim preclusion "cannot be applied against a plaintiff unless the plaintiff had a full and fair opportunity to litigate all its claims in the original action." Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 39 (1st Cir. 1998). "[A]s long as a prior federal court judgment is procured in a manner that satisfies due process concerns, the requisite 'full and fair opportunity' existed." Id. (calling this standard "quite permissive").

As Wyeth Defendants argue, D. 45 at 5–10, the elements of claim preclusion are satisfied here. First, the earlier suit resulted in a "final judgment on the merits." For claim preclusion purposes, "a voluntary dismissal with prejudice is a final judgment on the merits." United States v. Raytheon Co., 334 F. Supp. 3d 519, 524 (D. Mass. 2018) (citing United States v. Cunan, 156 F.3d 110, 114 (1st Cir.

1998)). Such is true "even if the dismissal is made in conjunction with a settlement." Id. (citing Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995)). In the prior action, the case terminated upon the parties' joint stipulation of dismissal with prejudice on January 22, 2007. Arbogast v. Wyeth, 06-cv-10333-PBS, D. 16 (D. Mass. Jan. 22, 2007). The prior action, therefore, resulted in a "final judgment on the merits."

Second, the "causes of action" asserted in the earlier and later suits are sufficiently identical or related. The First Circuit "uses a transactional approach to determine whether the asserted causes of action are sufficiently identical or related for claim preclusion purposes." Airframe Sys., 601 F.3d at 15. "A 'cause of action' in this context includes 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" Id. (quoting Cunan, 156 F.3d at 114). "This inquiry does not turn on the labels the plaintiff attaches to its various claims, but rather 'boils down to whether the causes of action arise out of a common nucleus of operative facts.'" Id. (quoting Mass. Sch. of Law, 142 F.3d at 38). Such depends upon factors including "whether the facts are related in time, space, origin or motivation," "whether they form a convenient trial unit," and "whether treating them as a unit 'conforms to the parties' expectations.'" Id. (quoting In re Iannochino, 242 F.3d 36, 46 (1st Cir. 2001)). Here, Arbogast's claims arise from the same nucleus of operative facts. The allegations as to Wyeth Defendants are "related in time, space, origin or motivation," as both the prior and present actions arise from Arbogast's employment at and termination from Wyeth in 2004—specifically

Wyeth's alleged misclassification of Arbogast under the FLSA and its retaliatory conduct toward him after he made complaints. Compare Arbogast v. Wyeth, 06-cv- 10333-PBS, D. 1 (D. Mass. Feb. 23, 2006) with D. 43; see Fagan v. Mass Mut. Life Invs.' Servs., Inc., No. 15-cv-30049-MAP, 2015 WL 3630277, at *4 (D. Mass. June 10, 2015) (concluding there was claim preclusion where the prior claims relating to plaintiff's employment with and termination from defendant arose from common nucleus of operative facts). Thus, the "causes of action" are sufficiently identical or related.

Third, the parties in the two suits are sufficiently identical or closely related. "Claim preclusion does not merely bar a plaintiff from suing the same defendant for the same claims in a different action; under certain circumstances, a defendant not a party to an original action may also use claim preclusion to defeat the later suit." Airframe Sys., 601 F.3d at 17. "[P]rivity is a sufficient but not a necessary condition for a new defendant to invoke a claim preclusion defense. . . . [C]laim preclusion applies if the new defendant is 'closely related to a defendant from the original action—who was not named in the previous law suit,' not merely when the two defendants are in privity." Id. (quoting Negrón-Fuentes v. UPS Supply Chain Sols., 532 F.3d 1, 10 (1st Cir. 2008)). Here, Pfizer is successor-in-interest to Wyeth, a named defendant in the prior action. See D. 43 ¶ 5. Further, Brack, Lewandowski and Cowdrick are "closely related" to Wyeth as employees of the company whom Arbogast contends participated in its alleged effort to misclassify him, deprive him of overtime and retaliate against him for complaining about it. See id. ¶¶ 6–8; Silva v. City of

New Bedford, 660 F.3d 76, 80 (1st Cir. 2011) (concluding that city and two city police officers were sufficiently "closely related" for claim preclusion purposes); Fagan, 2015 WL 3630277, at *5 (concluding same with respect to seven additional defendants employed by the defendant company named in first action); Steele v. Ricigliano, 789 F. Supp. 2d 245, 249 (D. Mass. 2011) (concluding same with respect to "directors, managers, employees or affiliates" added in second action who allegedly "act[ed] in concert with the defendants named in [first action]"). All Wyeth Defendants, therefore, are sufficiently identical or closely related to the defendants in the prior action.

Arbogast responds that he "did not have a full and fair opportunity to litigate his claims" in the prior action "in large part due to the Wyeth Defendants' fraudulent and unlawful conduct." D. 53 at 1, 15–16. Nevertheless, a plaintiff's "assertion that [he] was denied a full and fair opportunity in the prior adjudication to litigate the [issues] because of fraud is not sufficient to bar application of . . . claim preclusion." Pactiv Corp. v. Dow Chem. Co., 449 F.3d 1227, 1233–34 (Fed. Cir. 2006) (noting that, to the extent a plaintiff seeks to set aside a previous judgment based upon fraud, the plaintiff is required to challenge that judgment in a Rule 60(b) motion filed in the original proceeding). Moreover, Arbogast does not sufficiently allege facts that he was denied due process in the prior action. See D. 53 at 15–16; Mass. Sch. of Law, 142 F.3d at 39. Accordingly, Counts I–IV, VIII and X and Counts VI, XI and XII

as to Wyeth Defendants are dismissed under the doctrine of claim preclusion.[3]

B. Closson, Lambert and Sheehan's Motions to Dismiss

1. Statute of Limitations

Closson, Sheehan PA and Lambert argue that Arbogast's claims against them are time barred. D. 47 at 7–9; D. 51 at 5–8. Arbogast responds that the doctrine of fraudulent concealment tolled his claims such that he filed this action within the applicable statutes of limitations. D. 54 at 9–11; D. 56 at 9.

Civil RICO claims are subject to a four-year statute of limitations. Lares Grp., II v. Tobin, 221 F.3d 41, 43–44 (1st Cir. 2000) (citing Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987)). Under the "injury discovery accrual rule," the clock starts to run "when a plaintiff knew or should have known of his injury." Id. (citing Rotella v. Wood, 528 U.S. 549, 553 (2000)). "[D]iscovery of the injury, not discovery of the other elements of a claim, is what starts the clock." Id. (quoting Rotella, 528 U.S. at 555). Arbogast's remaining claims are subject to a three-year statute of limitations and also follow the discovery rule for accrual: such is true for Arbogast's tort claims, see Mass. Gen. L. c. 260, § 2A; Szulik v. State St. Bank & Tr. Co., 935 F. Supp. 2d 240, 273 (D. Mass. 2013), his claim under 42 U.S.C. § 1983, see Ouellette v. Beaupre, 977 F.3d 127, 135–36 (1st Cir. 2020);

---

[3] Given the conclusion above, the Court need not reach Wyeth Defendants' alternative arguments for dismissal. See D. 45 at 10–14.

Nieves v. McSweeney, 241 F.3d 46, 51 (1st Cir. 2001), and his claims under the Massachusetts Civil Rights Act, Mass. Gen. L. c. 12, § 11I, see Almeida v. Duclos, No. 20-cv-10142-PBS, 2021 WL 3706849, at *1 (D. Mass. July 15, 2021); Sampson v. Town of Salisbury, 441 F. Supp. 2d 271, 275–76 (D. Mass. 2006).

Under the doctrine of fraudulent concealment, however, "the statute of limitations may be temporarily tolled during such time that the perpetrator purposefully and successfully conceals his or her misconduct from its victim." Álvarez-Mauras v. Banco Popular of P.R., 919 F.3d 617, 626 (1st Cir. 2019). For a statute of limitations to be tolled under the doctrine of fraudulent concealment, the defendant must establish "[1] wrongful concealment by defendants of their actions; and [2] failure of the claimant to discover, within the limitations period, the operative facts which form the basis of the cause of action; [3] despite the claimant's diligent efforts to discover the facts." Id. Thus, the doctrine of fraudulent concealment applies "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part." Salois v. Dime Sav. Bank of N.Y., FSB, 128 F.3d 20, 25 (1st Cir. 1997) (citations and internal quotation marks omitted); see J. Geils Band Emp. Ben. Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1255 (1st Cir. 1996) (stating that "sufficient storm warnings" must "alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved" to "trigger their duty to investigate in a reasonably diligent manner" (citation omitted)); Gagnon v. G.D. Searle & Co., 889 F.2d 340, 343 (1st Cir. 1989) (stating that the doctrine "postpones the

statute only until the plaintiff knows or should know of her injury and its probable cause"). "Silence 'can be fraudulent concealment by a person, such as a fiduciary, who has a duty to disclose.'" Demars v. Gen. Dynamics Corp., 779 F.2d 95, 98 (1st Cir. 1985) (quoting Jamesbury Corporation v. Worcester Valve Co., 443 F.2d 205, 209 (1st Cir. 1971)); see Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 519 (1997) (stating that "[w]here a fiduciary relationship exists, the failure adequately to disclose the facts that would give rise to knowledge of a cause of action constitutes fraudulent conduct and is equivalent to fraudulent concealment"). Still, "[a] fiduciary's lie or failure to disclose significant information is relevant only if it actually conceals an injury from the plaintiff." Hodas v. Sherburne, Powers & Needham, P.C., 938 F. Supp. 60, 64 (D. Mass. 1996) (citation omitted), aff'd, 114 F.3d 1169 (1st Cir. 1997). "The burden rests squarely on the party pleading fraudulent concealment." Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir. 1984). Massachusetts has codified a fraudulent concealment rule substantially similar to the federal rule. See Demoulas, 424 Mass. at 519 (citing Mass. Gen. L. c. 260, § 12).

Here, Arbogast's claims are barred unless they were tolled under the doctrine of fraudulent concealment, in which case they would not have accrued until December 2018 (i.e., when Arbogast alleges he discovered facts previously concealed to him by Closson, Lambert and Sheehan). As a preliminary matter, Closson, Lambert and Sheehan argue that, even assuming such tolling occurred, Arbogast's claims subject to a three-year limitations period would have expired before he filed his initial

complaint in February 2022, D. 1. The Supreme Judicial Court, however, issued an order tolling all civil statutes of limitations from March 17, 2020 through June 30, 2020 due to the COVID-19 pandemic, see Shaw's Supermarkets, Inc. v. Melendez, 488 Mass. 338, 341 (2021), which would have extended the three-year statute of limitations for Arbogast's state-law claims past the date of the complaint's filing had it not expired before that time. Such tolling order also would have applied to Arbogast's § 1983 claim. See Silva v. City of New Bedford, No. 20-cv- 11866-WGY, 2022 WL 1473727, at *3 (D. Mass. May 10, 2022) ("hold[ing] that the Supreme Judicial Court's tolling orders apply to section 1983 actions"). At any rate, whether any of Arbogast's claims expired before he filed his complaint in February 2022 depends upon whether the fraudulent concealment doctrine applies.

Closson, Lambert and Sheehan P.A. argue that Arbogast knew or should have known of his supposed claims by 2006. D. 47 at 7–9; D. 51 at 6–8. For support, they note that, even as alleged by Arbogast, he knew Closson and Lambert allegedly had filed the complaint in the prior action without Arbogast's authorization. D. 47 at 7; D. 51 at 6; D. 57-1 at 5; see D. 43 ¶ 89. They also contend that, even as alleged by Arbogast, he knew by early 2005 that Closson was not licensed to practice law in Massachusetts. D. 57-1 at 5; D. 43 ¶ 95, 100.

Even viewing the facts in the light most favorable to Arbogast, these allegations suggest that Arbogast was or should have been on notice of any alleged fraud perpetrated by Closson, Lambert and Sheehan during the litigation of the prior action. In

addition to having knowledge of the "trigger[ing]" alleged fraud of Closson and Lambert filing the unauthorized complaint, see J. Geils Band Emp. Ben. Plan, 76 F.3d at 1255; D. 43 ¶ 89, Arbogast participated in the mediation, Arbogast v. Wyeth, No. 06-cv-10333-PBS (D. Mass. Sept. 22, 2006); Arbogast v. Wyeth, No. 06- cv-10333-PBS, D. 15 (D. Mass. Oct. 17, 2006), allegedly knew that Closson held a negative view toward the merits of his claim, see D. 43 ¶ 208, and allegedly knew that a stipulation of dismissal terminating the prior action would be filed, see id. ¶¶ 18, 106, 153. These allegations would be sufficient to "alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved" and thus "trigger their duty to investigate in a reasonably diligent manner." See J. Geils Band Emp. Ben. Plan, 76 F.3d at 1255.

Accordingly, Arbogast fails plausibly to plead that the doctrine of fraudulent concealment tolled his claims until December 2018, so the applicable statutes of limitations expired by the time he filed the original complaint in this action in 2022, D. 1.

2. Sufficiency of the Allegations

Even assuming *arguendo* that the applicable statutes of limitations did not expire by the time Arbogast filed his complaint, he has failed to state a claim in each of the counts brought against Closson, Lambert and Sheehan.

a) RICO Claims (Counts V and VI)

Closson, Lambert and Sheehan PA argue that Arbogast fails to state a RICO claim against them. D.

47 at 9–14; D. 51 at 8–11. To succeed in a civil RICO action, a plaintiff must establish "(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity." Giuliano v. Fulton, 399 F.3d 381, 386 (1st Cir. 2005) (quoting Kenda Corp. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 233 (1st Cir. 2003)). To constitute an "enterprise" under RICO, "the group must have '[1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose.'" United States v. Rodríguez-Torres, 939 F.3d 16, 24 (1st Cir. 2019) (quoting Boyle v. United States, 556 U.S. 938, 946 (2009)) (noting that "[t]he group need not have some decision making framework or mechanism for controlling the members"). "'Racketeering activity' means any act that violates one of the federal laws specified in the RICO statute, including the mail and wire fraud statutes." Giuliano, 399 F.3d at 386 (internal citations omitted). To show a "pattern," a plaintiff must allege "two acts of racketeering activity," "within ten years of each other," that are "related" and "amount to or pose a threat of continued criminal activity." Id. A plaintiff may show that the wrongful activity at issue satisfies the continuity requirement in two ways: the "closed-ended" approach, which requires a plaintiff show "a series of related predicates extending over a substantial period of time" that amount to "a threat of continued criminal activity," and the "open-ended" approach, which requires a plaintiff to show "a specific threat of repetition extending indefinitely into the future" or as "part of an ongoing entity's regular way of doing business." Id. at 387 (citation omitted).

Here, even assuming Arbogast plausibly alleges an enterprise between Closson, Lambert and Sheehan PA, see D. 43 ¶¶ 84–85, 90–91, Arbogast has not alleged any "pattern of racketeering activity" under the statute. Factors courts consider in assessing continuity include "whether the defendants were involved in multiple schemes, as opposed to 'one scheme with a singular objective'; whether the scheme affected many people, or only a 'closed group of targeted victims'; and whether the scheme had the potential to last indefinitely, instead of having a 'finite nature.'" Home Orthopedics Corp. v. Rodriguez, 781 F.3d 521, 529 (1st Cir. 2015) (quoting Efron v. Embassy Suites (P.R.), Inc., 223 F.3d 12, 18–19 (1st Cir. 2000)). The First Circuit "firmly rejects RICO liability where the alleged racketeering acts . . . , taken together, . . . comprise a single effort to facilitate a single financial endeavor." Efron, 223 F.3d at 19 (internal quotation marks and citations omitted) (collecting cases stating that a scheme directed at a single or limited goal and few victims cannot support RICO liability). "[T]he fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims" is "highly relevant" to the continuity inquiry. Id. at 18. "[W]here . . . 'a closed-ended series of predicate acts . . . constitute[s] a single scheme to accomplish one discrete goal, directed at one individual with no potential to extend to other persons or entities,' RICO liability cannot attach under a theory of a closed pattern of racketeering." Home Orthopedics, 781 F.3d at 530 (internal citation omitted) (quoting Efron, 223 F.3d at 19).

Thus, even accepting Arbogast's allegations against Closson, Lambert and Sheehan PA as true,

the alleged enterprise's unlawful acts, taken together, comprise a single effort to facilitate a single financial endeavor against a single victim (i.e., to defraud Arbogast in his attempt to recover against Wyeth for unpaid wages and retaliatory conduct). Although Arbogast alleges conclusory statements suggesting collaboration with Wyeth Defendants, see D. 43 ¶¶ 53, 73, 79, 86, he does not allege specific facts plausibly to suggest a broader effort by Closson, Lambert and Sheehan PA to defraud other individuals. See D. 54 at 18 (speculating that "[i]t is possible that Closson's racketeering activity could be described as engaging in the operations of Brack's [e]nterprise, Wyeth, . . . or some other associate-in-fact enterprise"); Méndez Internet Mgmt. Servs., Inc. v. Banco Santander de P.R., 621 F.3d 10, 16 (1st Cir. 2010). Arbogast, therefore, fails to state a RICO claim against Closson, Lambert or Sheehan PA, so Counts V and VI are dismissed as to them.

b) Section 1983 Claim (Count VII)

Closson, Lambert and Sheehan argue that Arbogast fails to state a claim under § 1983 because he has not alleged conduct by any person acting under color of state law. D. 47 at 15–16; D. 51 at 11. "Section 1983 supplies a private right of action against a person who, under color of state law, deprives another of 'any rights, privileges, or immunities secured by the Constitution and [federal] laws.'" Gray v. Cummings, 917 F.3d 1, 7–8 (1st Cir. 2019) (alteration in original) (quoting 42 U.S.C. § 1983). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because

the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

The Supreme Court has also "made clear that if a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.'" West, 487 U.S. at 49 (alteration in original) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982)); Cruz-Arce v. Mgmt. Admin. Servs. Corp., 19 F.4th 538, 543 (1st Cir. 2021) (stating that "Section 1983's 'under color of state law' requirement has long been regarded as functionally equivalent to the 'state action' requirement of the Fourteenth Amendment").

However, "[i]t is well settled that private attorneys do not act under color of state law and are not state actors simply by virtue of their state-issued licenses to practice law." Grant v. Hubert, No. 09-cv-1051 (JBW), 2009 WL 764559, at *1 (E.D.N.Y. Mar. 20, 2009) (citing Polk County v. Dodson, 454 U.S. 312, 319 (1981)). Thus, although it is unclear on what basis Arbogast claims Closson, Lambert and Sheehan PA acted under color of state law, to the extent Arbogast argues that they acted under color of state law by virtue of their being governed by state rules of professional conduct or by virtue of their state-issued licenses to practice law, see D. 43 ¶¶ 162– 68, such argument fails. See Grant, 2009 WL 764559, at *1. Accordingly, Arbogast fails to state a claim under § 1983 against Closson, Lambert or Sheehan PA at least on this basis, so Count VII is dismissed.

c) Fraudulent Misrepresentation (Count IX)

Closson, Lambert and Sheehan PA argue that Arbogast fails to allege any statement that could be construed as a false representation of material fact. D. 47 at 17–18; D. 51 at 12. A plaintiff alleging fraudulent misrepresentation "must show the defendant (1) made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act on this representation, (4) which the plaintiff justifiably relied on as being true, to her detriment." Sullivan v. Five Acres Realty Tr., 487 Mass. 64, 73 (2020) (quoting Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012)). However, "[d]eception need not be direct to come within reach of the law.

A plaintiff alleging fraud and deceit must plead facts "with particularity" under Mass. R. Civ. P. 9(b). See Equip. & Sys. For Indus., Inc. v. Northmeadows Const. Co., 59 Mass. App. Ct. 931, 931–32 (2003) (noting that Rule 9(b) "heightens the pleading requirements placed on plaintiffs who allege fraud and deceit"). "At a minimum, a plaintiff alleging fraud must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where and when it took place." Id. at 931–32. The plaintiff also must "specify the materiality of the misrepresentation, its reliance thereon, and resulting harm." Id. at 932.

Here, Arbogast alleges that Closson, Lambert and Sheehan PA knowingly misrepresented the nature of their representation of him, including that Lambert would provide Arbogast with legal

representation not limited in scope, and "withheld a myriad of records from [Arbogast] that Wyeth provided [Closson] with the intention of helping Wyeth to continue to fraudulently conceal them from [Arbogast] and prevent their use in official proceedings," such as: Wyeth's answer to the complaint, Wyeth's offer of judgment, initial disclosures sent by Closson to Wyeth, and a confidential mediation statement prepared by Closson. D. 43 ¶¶ 110–14. Arbogast, further, alleges that "Closson and Lambert failed to inform [him] that the [United States Department of Labor, Wage and Hour Division,] conducted an investigation into Wyeth and determined he along with over 150 similarly situated employees were owed back wages." Id. ¶ 109.

Even accepting these allegations as true, Arbogast has failed to satisfy his burden to plead this claim sounding in fraud "with particularity." See Equip. & Sys. For Indus., 59 Mass. App. Ct. at 931. Indeed, Arbogast has not specified the contents of each alleged misrepresentation, where and when it took place, how the alleged misrepresentation was material and how he relied upon such alleged misrepresentation to his detriment. See id. at 932. Arbogast, therefore, has not met the "heighten[ed]...pleading requirements placed on plaintiffs who allege fraud and deceit." See id. Accordingly, the Court dismisses Arbogast's fraudulent misrepresentation claim as to Closson, Lambert and Sheehan PA, Count IX.

d) Massachusetts Civil Rights Act Claim (Count XI)

Closson, Lambert and Sheehan PA argue that Arbogast's allegations do not plausibly state a claim under the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. L. c. 12, § 11I. D. 47 at 18; D. 51 at 12. "Under the MCRA, . . . the [plaintiff] must show that 'his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth' was either 'interfered with, or attempted to be interfered with' through 'threats, intimidation or coercion.'" Finamore v. Miglionico, 15 F.4th 52, 58–59 (1st Cir. 2021) (quoting Bally v. Northeastern Univ., 403 Mass. 713, 717 (1989) (quoting Mass. Gen. L. c. 12, § 11H)). Unlike § 1983, the MCRA does not require state action, Barbosa v. Conlon, 962 F. Supp. 2d 316, 332 (D. Mass. 2013), but does require "threats, intimidation or coercion," see Finamore, 15 F.4th at 58–59. The Supreme Judicial Court has defined "threat" in this context as "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm," "[i]ntimidation" as "putting one 'in fear for the purpose of compelling or deterring conduct,'" and "[c]oercion" as "the application to another of force 'to constrain him to do against his will something he would not otherwise have done.'" Kennie v. Nat. Res. Dep't of Dennis, 451 Mass. 754, 763 (2008) (quoting Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474 (1994)).

Coercion "may rely on physical, moral, or economic coercion." Id. (collecting cases). Still, "the exception for claims based on non-physical coercion remains a narrow one." Thomas v. Harrington, 909

F.3d 483, 492–93 (1st Cir. 2018) (quoting Nolan v. CN8, 656 F.3d 71, 77–78 (1st Cir. 2011)) (stating that "[i]t is rare for a MCRA claim to involve no physical threat of harm"). This exception, therefore, "should not be invoked unless the record 'resembl[es] the sort of physical, moral, or economic pressure that courts have found sufficient to support a claim under this statute.'" Id. at 493 (alteration in original) (quoting Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009)). "Massachusetts courts have required 'a pattern of harassment and intimidation' to support a finding of non-physical coercion under the MCRA." Id. (quoting Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 594 (2001)).

Because none of Closson or Lambert's alleged conduct appears to constitute "threats" or "intimidation," the Court only considers whether Arbogast sufficiently alleges "coercion" under the MCRA. Here, Arbogast alleges that his choices in litigating the prior action, such as agreeing to settle the case, were influenced by Closson and Lambert's fraudulent conduct. See, e.g., D. 43 ¶ 106. Even if true, however, the SAC does not contain allegations indicating "a pattern of harassment and intimidation" to support a finding of non-physical coercion under the MCRA. See Thomas, 909 F.3d at 493. Accordingly, the Court dismisses Arbogast's claim under the MCRA, Count XI.

e) Intentional Infliction of Emotional Distress (Count XII)

A plaintiff alleging a claim of intentional infliction of emotional distress must establish (1) that the defendant intended to inflict emotional distress or knew or should have known that

emotional distress was the likely result of the conduct, (2) that the conduct was "extreme and outrageous," (3) that the defendant's actions caused the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe. Agis v. Howard Johnson Co., 371 Mass. 140, 144–45 (1976). "The standard for making a claim of intentional infliction of emotional distress is very high." Polay v. McMahon, 468 Mass. 379, 385 (2014) (quoting Doyle v. Hasbro, Inc., 103 F.3d 186, 195 (1st Cir. 1996)). "Conduct qualifies as extreme and outrageous only if it 'go[es] beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community.'" Id. at 386 (alterations in original) (quoting Roman v. Trs. of Tufts Coll., 461 Mass. 707, 718 (2012)). "Liability cannot be predicated on 'mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.'" Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (quoting Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987) (stating that "nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort") (citation and internal quotation marks omitted)).

Even just considering the second element, Arbogast fails to show that Closson, Lambert or Sheehan PA's actions rise to the level of extreme or outrageous conduct. Arbogast alleges that Closson, Lambert and Sheehan conspired to conceal the Wage and Hour Division investigation from him and to file the unauthorized complaint in the prior action. D. 43

¶ 207. Arbogast further alleges that "Closson informed [him] that he was fortunate to receive a settlement for his overtime claim because it did not have much merit" and "told [him] that Wyeth had a right to terminate him because he acted like a belligerent jerk and disrupted Wyeth's workplace for no good reason." Id. ¶ 208. Even if true, however, such conduct does not go "beyond all possible bounds of decency" and cannot be "regarded as [so] atrocious, and utterly intolerable in a civilized community" as to support an IIED claim. See Polay, 468 Mass. at 386 (quoting Roman, 461 Mass. at 718). Arbogast's conclusory argument to the contrary, see D. 54 at 19, does not compel a different result. Accordingly, the Court dismisses Arbogast's claim for intentional infliction of emotional distress, Count XII.

VI. Conclusion

For the foregoing reasons the Court ALLOWS the Wyeth Defendants' motion to dismiss, D. 44, ALLOWS Closson's motion to dismiss, D. 46, and ALLOWS Lambert and Sheehan PA's motion to dismiss, D. 50.[4]

So Ordered.

/s/ Denise J. Casper

United States District Judge

---

[4] Following the hearing on Defendants' motions to dismiss, Arbogast filed a motion for leave to amend the second amended complaint. D. 66. Having considered the proposed amended pleading, D. 66-2, and the opposition to same, D. 73, 75, and Arbogast's reply briefs, D. 77, 79, the Court denies the motion to amend. See D. 75 at 4-5; Gonzalez–Gonzalez v. United States, 257 F.3d 31, 37 (1st Cir. 2001).

United States Court of Appeals
For the First Circuit

Nos. 23-1481
23-1591

BRENT ANDREW BRACKETT ARBOGAST,

Plaintiff - Appellant,

v.

PFIZER, INC., as successor to Wyeth Pharmaceuticals; SHEEHAN, PHINNEY, BASS & GREEN, P.A.; JOHN BRACK; KERRI LEWANDOWSKI; LEIGH COWDRICK; MICHAEL J. LAMBERT; THOMAS M. CLOSSON,

Defendants - Appellees.

Before

Kayatta, Howard and Rikelman, Circuit Judges.

JUDGMENT

Entered: June 20, 2024

These appeals, now consolidated, follow dismissal of a complaint, filed in the United States District Court for the District of Massachusetts, as time-barred and otherwise insufficient. Appeal 23-

1481 concerns the district court's dismissal of the underlying action and the rulings leading thereto, and Appeal 23-1591 concerns the district court's disposal of post-judgment motions.

We begin with Appeal 23-1481 concerning the district court's dismissal based on relevant statutes of limitations. "Where the dates included in the complaint show that the limitations period has been exceeded and the complaint fails to sketch a factual predicate that would warrant the application of either a different statute of limitations period or equitable estoppel, dismissal is appropriate." See Santana-Castro v. Toledo-Davila, 579 F.3d 109, 114 (1st Cir. 2009) (internal quotation marks omitted). Our review of the district court's application of these principles is de novo. See id. at 113.

Plaintiff-appellant Brent Arbogast worked at a drug company (a predecessor to defendant appellee Pfizer, Inc.) for approximately fourteen weeks in 2004. The company categorized him as a salaried employee exempt from statutory overtime-pay requirements. Arbogast disputed this categorization and, after the company terminated his employment, he consulted with defendant appellee Thomas Closson, a New Hampshire lawyer. Closson ultimately agreed to represent Arbogast and enlisted as local counsel defendant-appellee Michael Lambert, another New Hampshire attorney who had been admitted to the Massachusetts Bar.

From the allegations that Arbogast makes in the several iterations of his complaint, and the

voluminous materials he attaches as exhibits, as well as the items available on the federal courts' own dockets, certain facts about the overtime-pay litigation (hereinafter, "the Original Action") can be ascertained. A complaint was filed on Arbogast's behalf, with Lambert as counsel of record, asserting an overtime-wage claim against Arbogast's former employer. After a mediation session, the employer made an offer under Fed. R. Civ. P. 68 for $5,320. The case was settled soon thereafter for $10,000, one fifth of which went to Closson and Lambert as a contingency fee. The case was, by stipulation, dismissed "with prejudice" in December 2007.

In December 2018, Arbogast returned to Closson's office to review the materials in the litigation file. Arbogast's review led him to conclude that his lawyers had deliberately colluded with his former employer to sabotage his case and avoid any larger initiative against the former employer's illegal pay practices. In early December 2022, Arbogast returned to federal court pro se, seeking in the Original Action relief from the December 2007 judgment of dismissal. Shortly thereafter, he initiated a new action, filing a complaint to allege, inter alia, civil RICO violations by his lawyers and former employer (hereinafter, "the 2022 Action"). In the Original Action, Arbogast was denied relief from judgment. No appeal followed that denial. In the 2022 Action, the complaint, as amended, was dismissed as time barred under the applicable statutes of limitations, as to the attorney defendants, and was dismissed as barred by res judicata, as to the employer defendants. (The district court also

held, in the alternative, that, with his complaint, despite all attempts at curative amendment, Arbogast failed to state claims against the attorney defendants on which relief could be granted.) Appeal 23-1481 followed.

Arbogast argues that his claims against the employer defendants are not barred by res judicata because the wage suit was really a "sham" brought by his former attorneys in collusion with his former employer. Arbogast also argues that his claims against his former attorneys are not time barred because he is protected by the "discovery rule" and did not have the awareness necessary in order for his claims to accrue until he had revisited his litigation file in December 2018. The attorney defendants argue, inter alia, that the district court's determination that the claims were untimely is correct. The employer defendants argue that the district court correctly applied res judicate [sic] principles in dismissing the claims against them, and, echoing an argument made in the district court, they argue that the claims against them also were barred by the applicable statutes of limitations.

The parties do not dispute that the limitations periods applicable to Arbogast's claims are either four years long (civil RICO) or three years long (state tort claims), and must have expired several years before the 2022 Action was filed absent a valid legal basis for viewing matters otherwise.

A federal civil RICO claim generally accrues, triggering the start of the limitations clock, when the

plaintiff knows or should know of his injuries. See Lares Grp., II v. Tobin, 221 F.3d 41, 44-45 (1st Cir. 2000).

In relation to the state-law claims, Massachusetts courts have recognized a similar "discovery rule" that "prescribes as crucial the date 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 the defendant's conduct." Bowen v. Eli Lilly & Co., 408 Mass. 204, 205-06 (1990). This rule has been applied with some frequency in relation to claims brought against attorneys by their clients. See, e.g., Williams v. Ely, 423 Mass. 467 (1996) (discussing relevant precedent and concepts); see also Lyons v. Nutt, 436 Mass. 244 (2002); Cantu v. St. Paul Cos., 401 Mass. 53 (1987). However, even under this rule, the statute-of-limitations clock begins to run when a plaintiff knows or should know that he or she has sustained appreciable harm as a result of the lawyer's conduct. This discovery rule does *not* delay the running of the statute-of-limitations clock until the client is aware of the full "nature and extent" of the harm suffered, see Cantu, 401 Mass. at 268, nor does the rule require that the lawyer's negligence be apparent in order for the clock to begin to run, see Lyons, 436 at 249.

We agree with the district court that, based on the principles set out above and others related thereto, Arbogast's federal and state-law claims were barred under relevant statutes of limitations. Despite any assertions to the contrary, by the time

the Original Action had concluded in 2007, or shortly thereafter, Arbogast reasonably could not have been without knowledge of the period of his employment and the pay he received, of the existence of the Original Action, of the dollar amount of the settlement reached in relation to the Original Action, or of the final termination of the Original Action via the settlement. Thus, Arbogast knew or reasonably should have known of his injuries around the time the Original Action concluded, and it thus cannot be said that the claims Arbogast sought to pursue in the 2022 Action accrued, as Arbogast insists, in 2018. Accordingly, in light of the applicable three- or four-year limitations period, the district court correctly deemed the claims time barred. The mere accusation that his lawyer recommended to him a "cheap" settlement does not alter the claim-accrual analysis, nor does rank speculation that counsel was acting in collusion with the opposing side. This time-bar analysis applies with equal force to Arbogast's claims against his former attorneys and his claims against his former employer, rendering it unnecessary to address additional issues and arguments such as the district court's application of res judicata principles. Based on the foregoing, affirmance of the district court's dismissal is in order. See Freeman v. Town of Hudson, 714 F.3d 29, 35 (1st Cir. 2013) (reviewing court is "free to affirm an order of dismissal on any basis made apparent from the record").

Turning to Appeal 23-1591, following dismissal, Arbogast filed a series of post-judgment motions, seeking, among other things, relief from judgment and recusal of the presiding judge. We

review the denial of these motions for abuse of discretion, which includes de novo review of embedded questions of law. See Groden v. N&D Transportation Co., Inc., 866 F.3d 22, 26 (1st Cir. 2017). We conclude that Arbogast's post-judgment motions were not meritorious, and the district court did not abuse its discretion when denying them. Cf. Panzardi-Alvares v. United States, 879 F.2d 975, 984 (1st Cir. 1989) ("Prior adverse rulings alone cannot, of course, be the basis for a motion to recuse."). In accordance with the foregoing, the rulings of the district court are **AFFIRMED**.

By the Court:
Maria R. Hamilton, Clerk

cc:
Brent Andrew Brackett Arbogast
Stephen T. Paterniti
Benjamin R. Davis
Charles M. Waters
Edwin F. Landers Jr.
Linda M. Smith

United States Court of Appeals
For the First Circuit

Nos. 23-1481
23-1591

BRENT ANDREW BRACKETT ARBOGAST,

Plaintiff - Appellant,

v.

PFIZER, INC., as successor to Wyeth Pharmaceuticals; SHEEHAN, PHINNEY, BASS & GREEN, P.A.; JOHN BRACK; KERRI LEWANDOWSKI; LEIGH COWDRICK; MICHAEL J. LAMBERT; THOMAS M. CLOSSON,

Defendants - Appellees.

Before

Barron, Chief Judge, Howard, Kayatta, Gelpí, Montecalvo, Rikelman, and Aframe, Circuit Judges.

ORDER OF COURT

Entered: October 4, 2024

Following entry of judgment in this matter on June 20, 2024, Appellant Brent Arbogast has filed a "Motion for Reconsideration and Correction of the

Record," an "Emergency Motion to Correct the Record," and a "Petition for Rehearing En Banc."

The motion to reconsider and correct is DENIED.

The "emergency" motion is DENIED.

The "Petition for Rehearing En Banc" is construed as a petition for panel rehearing and rehearing en banc. See 1st Cir. Internal Operating Procedure X(C) (directing that a petition for rehearing en banc also be treated as a petition for rehearing before the original panel); 1st Cir. Rule 35.0(b) (petitions for rehearing and rehearing en banc must be combined in a single document).

The petition for rehearing having been denied by the panel of judges who decided the case, and 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 case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be DENIED.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Brent Andrew Brackett Arbogast
Stephen T. Paterniti
Benjamin R. Davis
Charles M. Waters
Edwin F. Landers Jr.
Linda M. Smith

18 U.S. Code § 1964 - Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

28 U.S. Code § 473 – Content of civil justice expense and delay reduction plans

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—
©controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion;

28 U.S. Code § 1367 – Supplemental jurisdiction

(a) Except as provided in subsections (b) and(c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

29 U.S. Code § 159 - Representatives and elections

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

29 U.S. Code § 207 - Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S. Code § 213 – Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);

29 U.S. Code § 215 - Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the

production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Secretary issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

29 U.S. Code § 216 – Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal

or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such

unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.

Mass. Gen. Laws ch. 260, § 12: Fraudulent concealment; commencement of limitations

Section 12. If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

Federal Rules of Civil Procedure

DECEMBER 1, 2020

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions;

Waiving Defenses; Pretrial Hearing

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(6) failure to state a claim upon which relief can be granted;

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

Rule 60. Relief from a Judgment or Order

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(3) set aside a judgment for fraud on the court.

Case Law

"An actual knowledge standard applies to a plaintiff who argues that a breach of fiduciary duty of disclosure constitutes fraudulent concealment under G. L. c. 260, § 12. Such a plaintiff need only show that the facts on which the cause of action is based were not disclosed to him by the fiduciary. *Puritan Medical Ctr., Inc.*, *supra* at 176-177. The plaintiff is not required to have made an independent investigation. *Stetson v. French*, supra at 199. See *Sanguinetti* v. *Nantucket Constr. Co.*, 5 Mass. App. Ct. 227, 237-238 (1977) (claim not barred where attorney fraudulently concealed through failure fully

to disclose, and client lacked actual knowledge of facts)." *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 519 (Mass. 1997)

"We also reject the defendants' argument, that, for purposes of applying G. L. c. 260, § 12, the reasonable diligence standard should be followed to determine when the moment of "discovery" of a fraudulent concealment occurs. The defendants contend that such an approach would be consistent with the use of the same standard in our cases applying the discovery rule, as well as its use in Federal cases involving the fraudulent concealment doctrine. See, e.g., *J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253, 1259 (1st Cir.), cert. denied, 117 S.Ct. 81 (1996)...However, we consider the discovery rule and the fraudulent concealment doctrine as distinct theories that address separate issues and impose different requirements for extending the period within which an action may be brought. Consequently, the Federal application of the fraudulent concealment doctrine is not necessarily equivalent to our law and may produce dissimilar outcomes." *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 521 n.26 (Mass. 1997)