2d Civil No. B208440

COURT OF APPEAL STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAVID B. LOCKTON,

Plaintiff and Appellant,

v.

MICHAEL O'ROURKE, et al.,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles County
Case No. BC 361629, Honorable Mary Thornton House

RESPONDENTS' BRIEF

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Roxanna A. Manuel (SBN 209894)
865 S. Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000 // Facsimile: (213) 443-3100

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow (SBN 51126)
Kent J. Bullard (SBN 176194)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811 // Facsimile: (310) 276-5261

Attorneys for Defendants and Respondents
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP AND
RICHARD A. SCHIRTZER

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES

[To be added.]

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 3

A. In 1998, Lockton Is Ousted From A Company He Founded When Another Company Takes It Over. 3

B. In 1999, Lockton Hires Defendants To Sue TCI, Certain Interactive Directors, Cotchett, And—Allegedly—MoFo. 5

1. MoFo allegedly defames Lockton while representing Interactive before the SEC and in the bankruptcy court. 5

2. Lockton enters into a written legal services agreement with OM&M to sue the directors and Cotchett.6

3. Lockton enters into a written legal services agreement with Quinn Emanuel to serve as local counsel.7

C. In August 1999, OM&M and Quinn Emanuel File A Complaint Against TCI, The Directors, And Cotchett. 8

D. In Response To Lockton's Request To Immediately Add The MoFo Defendants To The Federal Action In December 2001, O'Rourke Tells Him He Should Instead Hire Another Attorney To File A State Court Action Against Them. 9

E. In 2002, Following O'Rourke's Advice, Lockton Hires Different Counsel—Guy Kornblum—To File A State- Court Action Against The MoFo Defendants. 10

F. In March 2003, The State Trial Court Partially Dismisses Lockton's State Court Action Against The MoFo Defendants. 11

G. In August 2003, Lockton Settles And Dismisses His Federal Court Action Against The Directors And Cotchett. 13

STATEMENT OF THE CASE 14

A. In 2004, Lockton Files A Complaint And First Amended Complaint For Legal Malpractice, But Does Not Serve Either One. 14

B. Nearly Two Years Later, Lockton Files—And Finally Serves—A Second Amended Complaint. 14

C. In 2007, Lockton Files *Verified* Third And Fourth Amended Complaints. 15

D. In Response To The Trial Court's Giving Him An Opportunity To Overcome An Apparent Statute-Of- Limitations Bar, Lockton Files A Fifth Amended Complaint—This Time *Not* Verified. 17

1. The trial court orders supplemental briefing on the statute of limitations and allows Lockton another opportunity to amend his complaint. 17

2. Lockton files an *unverified* Fifth Amended Complaint that changes key allegations in the two prior verified complaints. 19

E. The Trial Court Sustains Demurrers To The Fifth Amended Complaint Without Leave To Amend And Enters Judgment; Lockton Appeals. 20

STANDARD OF REVIEW 23

ARGUMENT 24

I. THE TRIAL COURT DID NOT IMPROPERLY RELY ON UNPLEADED FACTS—RATHER, LOCKTON IGNORED, AND CONTINUES TO IGNORE, HIS OWN VERIFIED PLEADINGS. 24

II. THE TRIAL COURT CORRECTLY DETERMINED THAT SECTION 340.6'S ONE-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED BY "CONTINUOUS REPRESENTATION" AND THEREFORE BARS THIS ACTION. 28

A. It Is Undisputed That Section 340.6's One-Year Limitations Period Governs This Action And Was Triggered More Than One Year Before Lockton Sued. 28

B. The Limitations Period Was Not Tolled By "Continuous Representation." 30

1. "Continuous representation" is limited to the "specific subject matter" in which the alleged malpractice occurred. 30

2. Defendants did not represent Lockton in his claims *against the MoFo defendants* during the one-year limitations period. 31

a. The written legal services agreements did not include suing the MoFo defendants. 31

b. Following O'Rourke's advice, Lockton hired *new*, *separate* counsel to file claims against the MoFo defendants. 33

c. Nothing defendants did during the one-year limitations period tolled the statute. 37

3. None of Lockton's authorities permits a "continuous representation" finding here. 39

4. The purposes of the "continuous representation" rule do not support tolling here. 42

C. Lockton Has Failed To Satisfy His Burden Of Showing That Another Amendment—It Would Be His Sixth—Could Cure The Timeliness Defect. 46

CONCLUSION 48

CERTIFICATION 49

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

American Advertising & Sales Co. v. Mid-Western Transport
(1984) 152 Cal.App.3d 875 25-26

Baright v. Willis
(1984) 151 Cal.App.3d 303 31-32

Barnett v. Fireman's Fund Ins. Co.
(2001) 90 Cal.App.4th 500 23

Beal Bank, SSB v. Arter & Hadden, LLP
(2007) 42 Cal.4th 503 23, 35-37, 43-45

Blank v. Kirwan
(1985) 39 Cal.3d 311 23-25, 48

City of Dinuba v. County of Tulare
(2007) 41 Cal.4th 859 23

Crouse v. Brobeck, Phleger & Harrison
(1998) 67 Cal.App.4th 1509 30, 33

Evans v. City of Berkeley
(2006) 38 Cal.4th 1 23

Foxborough v. Van Atta
(1994) 26 Cal.App.4th 217 30, 33, 41

Gold v. Weissman
(2004) 114 Cal.App.4th 1195 41

Gonzalez v. Kalu
(2006) 140 Cal.App.4th 21 41, 47

Gurkewitz v. Haberman
(1982) 137 Cal.App.3d 328 42

Hensley v. Caietti
(1993) 13 Cal.App.4th 1165 33
Holland v. Morse Diesel Internat., Inc.
(2001) 86 Cal.App.4th 1443 23, 25

Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison
(1998) 18 Cal.4th 739 45, 47

Laird v. Blacker
(1992) 2 Cal.4th 606 42

Levin v. Graham & James
(1995) 37 Cal.App.4th 798 28

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort
(2001) 91 Cal.App.4th 875 41

Maddox v. Burlingame
(1994) 205 Mich.App.2d 446 [517 N.W.2d 816] 34

Nielsen v. Beck
(2007) 157 Cal.App.4th 1041 22, 35, 39-40

O'Neill v. Tichy
(1993) 19 Cal.App.4th 114 35-36, 39-40, 46

Padilla v. Rodas
(2008) 160 Cal.App.4th 742 29

Quintilliani v. Mannerino
(1998) 62 Cal.App.4th 54 28

Reichert v. General Ins. Co.
(1968) 68 Cal.2d 822 26

Page

Satten v. Webb
(2002) 99 Cal.App.4th 365 23

Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.
(2000) 78 Cal.App.4th 847 27

Shapero v. Fliegel
(1987) 191 Cal.App.3d 842 33

Stoll v. Superior Court
(1992) 9 Cal.App.4th 1362 28

Von Rott v. Johnson
(1983) 148 Cal.App.3d 608 33

Worthington v. Rusconi
(1994) 29 Cal.App.4th 1488 30, 33, 35, 47

Statutes and Rules

California Rules of Court
rule 8.1115 13

Civil Code
section 47 1, 12

Code of Civil Procedure
section 1008 21
section 340.6 2, 17, 20, and *passim*
section 425.16 11, 17, 22

Labor Code
section 1050 11

Page

Other Authority

1 Schwing, California Affirmative Defenses
(2008) § 25:43 30

3 Mallen & Smith, Legal Malpractice
(2009) § 23:13 31

INTRODUCTION

Because Lockton's Fifth Amended Complaint alleges only time-barred claims, his opening brief presents no basis for reversal.

The background: In 1999, Lockton—a sophisticated businessman and erstwhile litigation attorney—filed defamation claims against the directors of a company he founded for statements made in connection with SEC and bankruptcy proceedings in 1998 and 1999, while the company was represented by Morrison & Foerster. In 2001, Lockton asked his counsel to add MoFo as a defendant. Counsel told him that they didn't want to do that and that he should hire another lawyer to file a separate lawsuit against MoFo.

Lockton did hire separate counsel, who filed a separate lawsuit against MoFo in September 2002 and who, without any involvement by original counsel, litigated the action against MoFo. MoFo filed an anti-SLAPP motion arguing that the claims arose from protected speech and would fail because they were barred both by the statute of limitations and by the privileges of Civil Code section 47. The trial court partially granted the motion in March 2003, striking two of Lockton's defamation claims.

This case: Lockton then waited more than a year, until April 2004, to file this malpractice action against his original counsel for their alleged failure to timely sue MoFo. Almost four years later, after Lockton had filed six iterations of his complaint—including unexplained changes in key verified

allegations—the trial court sustained demurrers without leave to amend because the claims were barred by the one-year malpractice statute of limitations.

Lockton's sole appellate argument is that the statute of limitations was tolled under the "continuous representation" rule (Code Civ. Proc., § 340.6, subd. (a)(2)), and the sole basis for this argument is that defendants continued to represent Lockton in the original action until that action concluded less than a year before plaintiff filed this action. But Lockton's verified allegations bar this argument.

For continuous representation to toll the statute of limitations, counsel must continue to represent the plaintiff in the *same* specific subject matter as the action in which the alleged malpractice occurred. Lockton's verified allegations undeniably establish that defendants did *not* continue to represent Lockton in his claims against MoFo at any time during the one-year limitation period. Just the opposite: They told him to get a new lawyer to handle those claims. And he did.

Lockton's arguments to the contrary rest on a serious mischaracterization of his own pleadings and on inapplicable policy arguments. He still provides no explanation for his changing allegations and alleges no facts showing that yet another—seventh—version of his complaint would overcome the timeliness bar.

Enough is enough. This Court should bring an end to Lockton's decade-long proliferation of derivative claims against counsel.

STATEMENT OF FACTS

The facts are taken from the allegations of the complaint, including prior verified complaints, exhibits attached to the complaint, and matters subject to judicial notice. (See Standard of Review and Argument Section I*, post.*) Unless otherwise noted, citations in the Statement of Facts are to the operative Fifth Amended Complaint and exhibits attached to that complaint.

A. In 1998, Lockton Is Ousted From A Company He Founded When Another Company Takes It Over.

Lockton is a well-educated and successful businessman, with an undergraduate degree from Yale University, a law degree from University of Virginia Law School, an MBA from Stanford University Business School, and decades of experience as a successful entrepreneur. (7 CT 1715, ¶¶ 7-8.) He also allegedly has substantial litigation experience as a practicing attorney. (8 CT 1750, ¶ 33; see also 2 CT 259-261 [Indiana roll of attorneys]; 2 CT 262-263 [request for judicial notice].)

In 1987, Lockton founded Interactive Network, Inc. (Interactive). Exploiting Lockton's patented technology, the company developed interactive television programming, and Lockton successfully ran the company as its CEO for several years. (7 CT 1715-1716, ¶¶ 9-10.) In 1994, a large investor—TCI, short for Tele-Communications, Inc. (8 CT 1743)—began an attempt to take control of Interactive (7 CT 1716, ¶ 13). In 1995, Lockton and Interactive hired Morrison & Foerster LLP (MoFo) to represent Interactive's interests (*ibid.*) and allegedly hired Joseph Cotchett, of Cotchett, Pitre and Simon to sue TCI in Alameda County Superior Court. (8 CT 1748, ¶ 27.) Lockton allegedly devoted himself full-time to the ensuing litigation, "draft[ing] the factual allegations of the complaint, identif[ying] witnesses, wr[iting] detailed deposition outlines of

witnesses, identif[ying] documents for production and manag[ing] many other aspects of the litigation." (8 CT 1748-1750, ¶¶ 28-29, 33.)

During the dispute, Cotchett and MoFo attorneys Marshall Small and Adam Lewis allegedly conspired with certain TCI and Interactive board members to settle the litigation on terms unfavorable to Interactive's other shareholders, to isolate Lockton from Interactive's affairs, and to remove him as CEO. (7 CT 1716-1718, ¶¶ 14, 18-19; see also 8 CT 1750-1758, ¶¶ 36, 50, 62-65.) MoFo also filed bankruptcy proceedings for Interactive "in a strategy to seek court approval for [the] fraudulent settlement." (7 CT 1717, ¶ 16.) Allegedly interfering with Lockton's contractual relations and prospective economic advantages (8 CT 1751, ¶¶ 37-38), TCI's counsel asserted that Lockton should not be entitled to any of the settlement proceeds because he had "established a pattern of consistently placing his own economic and personal goals ahead of the interest of [Interactive's] shareholders." (8 CT 1779.) And, in a letter that allegedly presented a "knowingly false scenario of alleged fiduciary breaches by Lockton" (8 CT 1752, ¶ 41), TCI's counsel asserted that "much of Lockton's repetition of 'advice' he purportedly received from other lawyers [was] at very best, nothing more than a mixture of half-truths applied against inapplicable facts" and that the board members "deserve[d] better" (8 CT 1782-1783).

B. In 1999, Lockton Hires Defendants To Sue TCI, Certain Interactive Directors, Cotchett, And—Allegedly—MoFo.

1. MoFo allegedly defames Lockton while representing Interactive before the SEC and in the bankruptcy court.

To protect his own interests and the interests of other Interactive equity shareholders, Lockton hired attorneys Bruce Prescott and Daniel O'Rourke, who advised him to sue the MoFo attorneys. (7 CT 1716-1717, ¶ 16.)[1] The proposed gravamen of his allegations against the MoFo attorneys was that, during the dispute, they defamed him in documents that, among other things, were filed with the Securities and Exchange Commission and in Interactive's bankruptcy proceedings. (7 CT 1716-1719, ¶¶ 14-15, 17, 19; see also 8 CT 1757-1761, ¶¶ 62, 69-73.)

[1] Daniel O'Rourke is defendant Michael O'Rourke's brother. (See 7 CT 1719, ¶ 21.) We refer to Daniel O'Rourke by his full name and to defendant Michael O'Rourke as either Michael O'Rourke or simply O'Rourke.

In March 1999, Prescott wrote a letter to the MoFo attorneys charging that they had made false and defamatory statements in Interactive's SEC and bankruptcy court filings. (7 CT 1717-1719, ¶¶ 17, 19; 8 CT 1793-1801.) The letter also asserted that TCI and certain Interactive board members had carried out a secret agreement to deprive Lockton of compensation and oust him from Interactive. (7 CT 1718, ¶ 18.) Prescott advised Lockton to hire counsel to sue the relevant Interactive board members, TCI, MoFo, and the MoFo attorneys.[2] (7 CT 1719, ¶ 20.) Daniel O'Rourke referred Lockton to his brother, defendant Michael O'Rourke, a partner in the Chicago-based defendant law firm of O'Rourke, McCloskey & Moody (OM&M). (7 CT 1719, ¶ 21; see also 7 CT 1714, ¶ 2.)

2. Lockton enters into a written legal services agreement with OM&M to sue the directors and Cotchett.

In June 1999, Lockton entered into a written legal services agreement with OM&M. (8 CT 1723, ¶ 33; see also 8 CT 1802-1805.) It specified the scope of OM&M's representation as follows: "claims against Joseph Cotchett, the individual directors of [Interactive] (including Messers. [*sic*] Bauer, Graham and Bohrer) and TCI (Gary Howard) arising out of their concerted conduct to use the settlement of the Alameda County litigation to gain control of [Interactive] and the subject patent, and force [Lockton's] ouster without compensation from the company." (8 CT 1723, ¶ 33.)

In July 1999, the agreement was revised to reflect that defendant Richard Schirtzer, a partner in defendant Quinn Emanuel Urquhart Oliver & Hedges, LLP (Quinn Emanuel), located in Los Angeles, had agreed to act as local counsel.

---

[2] We refer collectively to MoFo and attorneys Small and Lewis as the MoFo defendants.

(2 CT 350-352 [revised agreement, attached as Exhibit C to Third Amended Complaint]; 7 CT 1714, ¶ 3.)

3. Lockton enters into a written legal services agreement with Quinn Emanuel to serve as local counsel.

In early August 1999, Lockton entered into a written legal services agreement with Quinn Emanuel. (8 CT 1723, ¶ 34; see also 8 CT 1806-1814.) It specified the scope of representation as follows: to "act as local counsel to [OM&M], in prosecuting claims against Interactive Network, Inc.'s directors, Joseph Cotchett, Tele-Communications, Inc., and one or more of its directors." (8 CT 1723, ¶ 34.)

Neither the OM&M nor the Quinn Emanuel written agreement mentioned MoFo or the MoFo attorneys as potential defendants, and Lockton expressly alleges that the scope of representation was as stated in the written agreements. (8 CT 1723, ¶¶ 33-34.) Nevertheless, Lockton alleges that from his initial meetings with O'Rourke and Schirtzer, Lockton informed them that he viewed the MoFo defendants "as the prime defendants in the proposed lawsuit." (7 CT 1719, ¶ 23; see also 7 CT 1714, ¶ 3.) Although Lockton concedes that Schirtzer said "he was reluctant to *initially* name Morrison & Foerster without providing this large and prestigious law firm the opportunity to show that it was, itself, misled, by its clients" (7 CT 1720, ¶ 24, emphasis in original), Lockton alleges that O'Rourke and Schirtzer said that the complaint would be drafted to include Doe defendant allegations so as to allow "the later and timely addition of [the MoFo defendants] should discovery support such addition" (8 CT 1724, ¶ 37; see also 7 CT 1719-1720, ¶¶ 23-24).

C. In August 1999, OM&M and Quinn Emanuel File A Complaint Against TCI, The Directors, And Cotchett.

On August 2, 1999, OM&M and Quinn Emanuel filed a complaint on Lockton's behalf in Los Angeles County Superior Court. (8 CT 1724, ¶ 38;

8 CT 1742.) It named the company that had recently acquired TCI (AT&T Broadband & Internet Services), Cotchett, and certain Interactive directors, as well as Doe defendants. (8 CT 1742.) The complaint asserted several causes of action, including interference with contractual relations and defamation. (*Ibid.*)

The complaint did not name the MoFo attorneys as defendants, but it contained allegations that they "aided and abetted the other defendants," advocated "spurious" positions against Lockton in the bankruptcy proceedings, and falsely accused Lockton of mismanagement and other improprieties. (8 CT 1757-1758, ¶ 62; 8 CT 1761, ¶ 73; 8 CT 1772-1773, ¶¶ 141-144.) Lockton alleges that there was an understanding that the MoFo defendants would be added later as defendants if discovery supported that action, as allegedly reflected in correspondence from O'Rourke to MoFo in early August 1999 and in communications from Lockton to O'Rourke and Schirtzer from August through October 1999. (8 CT 1724-1728, ¶¶ 38-54.)

In September 1999, the action was removed to federal court. (8 CT 1727, ¶ 52.) It was later transferred from the Central District of California to the Northern District of California. (See 8 CT 1853.)

D. In Response To Lockton's Request To Immediately Add The MoFo Defendants To The Federal Action In December 2001, O'Rourke Tells Him He Should Instead Hire Another Attorney To File A State Court Action Against Them.

The case was heavily litigated in federal court for the next two years. (See 8 CT 1853-1864.) Lockton alleges that multiple communications from Lockton to O'Rourke and Schirtzer from January to October 2001 continued to give them notice that he considered the MoFo defendants to be key defendants; O'Rourke and Schirtzer allegedly did not inform him that they were not

protecting his interests against the MoFo defendants. (See 8 CT 1728-1730, ¶¶ 57-63.)

During October and December 2001, O'Rourke deposed MoFo attorney Small. (8 CT 1730, ¶ 64.) O'Rourke elicited testimony that, Lockton alleges, conclusively established that Small had defamed Lockton by filing false statements with the SEC. (*Ibid*.) After the October portion of the deposition, Lockton sent a memo to O'Rourke and Schirtzer, saying that in Lockton's opinion the deposition clearly "create[d] a cause of action" against Small and suggesting that they move forward with naming him as a defendant. (8 CT 1730, ¶ 65.)

At the conclusion of the Small deposition in December 2001, Lockton allegedly asked O'Rourke to immediately name the MoFo defendants in the federal court action. (8 CT 1731, ¶ 70.) O'Rourke responded, "'Oh we don't want to do that now, at this late date it will anger the judge. You have a great suit and you should just get another attorney and sue them in state court,' or words to that effect." (2 CT 401, ¶ 38; see also 4 CT 816, ¶ 70.)[3] O'Rourke allegedly also told Lockton that "since he had just discovered the deliberate tortious actions of the Morrison defendants, the statute of limitations would be 'tolled' until such discovery." (4 CT 816-817, ¶ 70; see also 8 CT 1731, ¶ 70.)

Lockton alleges that unbeknownst to him but as defendants knew, the statute of limitations against the MoFo defendants actually had expired during the period between the case's removal to federal court in September 1999 and the

---

[3] As we explain in the Statement of the Case and in Argument Section I, *post*, Lockton's allegations as to what O'Rourke told him changed between his *verified* Third and Fourth Amended Complaints, quoted above, and his *unverified* Fifth Amended Complaint—with no explanation for the change. We demonstrate in Argument section I, *post*, that the trial court and this Court can and should rely on the earlier, verified allegations.

Small deposition in December 2001. (8 CT 1733, ¶¶ 78-79; see also 8 CT 1731, ¶ 69.)

E. In 2002, Following O'Rourke's Advice, Lockton Hires Different Counsel—Guy Kornblum—To File A State- Court Action Against The MoFo Defendants.

In June 2002, "because defendant herein, and his lawyer at the time, Michael O'Rourke advised him to do so," Lockton hired "other legal counsel to sue the [MoFo] defendants in state court[.]" (8 CT 1733, ¶ 80.) Lockton alleges that a letter from O'Rourke to MoFo in July 2002 shows that O'Rourke and Schirtzer continued to represent him against the MoFo defendants in the federal action. (8 CT 1734, ¶ 80 [letter saying that Lockton has decided to pursue claims against MoFo defendants and that "[w]e contemplate moving before Judge Henderson to amend the pending federal court suit to include those claims"].)

In September 2002, however, Lockton's newly-retained counsel—Guy Kornblum of Guy Kornblum & Associates—filed an action against the MoFo defendants in Santa Clara County Superior Court. (8 CT 1962 [Kornblum complaint]; 8 CT 1959-1961 [request for judicial notice]; see also 8 CT 1733-1734, ¶ 80.) The complaint alleged four causes of action based on the claim that the MoFo defendants defamed Lockton in 1998 and 1999: libel per se; libel per quod; slander; and violations of Labor Code section 1050 (misrepresentations attempting to prevent a former employee from obtaining employment). (See 8 CT 1962 to 9 CT 1988 [Kornblum complaint].)

F. In March 2003, The State Trial Court Partially Dismisses Lockton's State Court Action Against The MoFo Defendants.

In January 2003, the MoFo defendants made an anti-SLAPP motion to strike Lockton's state court complaint under Code of Civil Procedure section 425.16. (10 CT 2223-2241 [MoFo anti-SLAPP motion]; 9 CT 2022-2023 [request for judicial notice].) On the probability-of-success prong, they argued

that Lockton's claims were time-barred under applicable one-year statutes of limitation because they were based on statements made in 1998 and 1999. (10 CT 2227.) The MoFo defendants alternatively argued that all the statements at issue were privileged under Civil Code section 47. (10 CT 2227-2228.)[4] Kornblum filed opposition in February 2003. (10 CT 2242 [Kornblum opposition to anti-SLAPP motion]; 9 CT 2022-2023 [request for judicial notice].)

On March 14, 2003, the Santa Clara County Superior Court granted the MoFo defendants' anti-SLAPP motion as to the libel claims, determining that Lockton failed to prove a probability of prevailing at trial on those claims. (10 CT 2272-2273 [Santa Clara County Superior Court order]; 8 CT 1959-1961 [request for judicial notice].) On the slander and Labor Code claims, the court denied the motion on the ground that the defendants did not make the required prima facie showing that the claims arose from defendants' exercise of protected speech. (10 CT 2273.)

---

[4] Specifically, the MoFo defendants argued that the statements Lockton challenged were:

> "absolutely privileged under Civil Code section 47(b) because they were made in connection with official proceedings before the SEC and the Bankruptcy Court";
> "protected by the qualified privilege of Civil Code section 47(c) because they were made to interested persons, *viz* the SEC, the Bankruptcy Court, and [Interactive's] shareholders"; and
> "protected by the qualified privilege of *New York Times v. Sullivan* [(1964) 376 U.S. 254] applicable to public figures."
> (10 CT 2227-2228).

The Sixth District Court of Appeal later affirmed the ruling granting the anti-SLAPP motion as to the libel claims, but reversed the ruling on the slander and Labor Code claims. (9 CT 1999, 2004-2006 [Court of Appeal opinion]; 8 CT 1959-1961 [request for judicial notice][5].) The court determined that defendants made the requisite showing for purposes of the anti-SLAPP statute that all the claims arose from defendants' constitutionally protected speech and petition rights and that Lockton failed to establish a probability of prevailing because all the claims were time-barred. (*Ibid*.) The court declined to decide MoFo's privilege claims. (9 CT 2004.) The court therefore remanded the matter to the trial court with instructions to grant the anti-SLAPP motion to strike all four causes of action. (9 CT 2006.)

G. In August 2003, Lockton Settles And Dismisses His Federal Court Action Against The Directors And Cotchett.

Meanwhile, the federal court action continued to be heavily litigated until a settlement was reached in July 2003. (See 8 CT 1871-1874.) On August 20, 2003, a stipulation and order were entered dismissing the case with prejudice. (8 CT 1874.) OM&M and Quinn Emanuel were still representing Lockton in the case when it settled. (8 CT 1734-1735, ¶ 82, citing 8 CT 1874.)

[5] We cite the Sixth District Court of Appeal's nonpublished opinion only for purposes of explaining the factual background of the instant case and do not cite or rely on it as precedent or authority for purposes of rule 8.1115(a) of the California Rules of Court.

STATEMENT OF THE CASE

A. In 2004, Lockton Files A Complaint And First Amended Complaint For Legal Malpractice, But Does Not Serve Either One.

On April 23, 2004, Lockton filed his original complaint in San Francisco County Superior Court. (1 CT 14.) It named Daniel O'Rourke, OM&M, Schirtzer, and Quinn Emanuel as defendants, and asserted four causes of action based on the failure to timely assert a claim against the MoFo defendants: legal malpractice; breach of fiduciary duty; negligent misrepresentation; and breach of written contract. (1 CT 14, 18.)

In early May 2004, Lockton filed his First Amended Complaint, naming the same defendants and asserting the same causes of action. (1 CT 22.) He later said that he filed this amended complaint to supply certain pages that were inadvertently omitted from the original complaint. (1 CT 195.)

Lockton did not serve either complaint. (See 1 CT 96, fn. 1; 5 CT 1126; 9 CT 2009, ¶ 3.)

B. Nearly Two Years Later, Lockton Files—And Finally Serves—A Second Amended Complaint.

Almost two years later, in March 2006, Lockton filed his Second Amended Complaint. (1 CT 56.) This version of the complaint asserted the same four causes of action as the first two versions, but it changed one defendant from Daniel O'Rourke to Michael O'Rourke. (*Ibid*.) This time, in late March, Lockton served the complaint on defendants. (9 CT 2009, ¶ 3; see also 1 CT 96, fn. 1.)

The case was later transferred to Los Angeles County Superior Court. (1 CT 104-105.)

C. In 2007, Lockton Files *Verified* Third And Fourth Amended Complaints.

Defendants demurred to the Second Amended Complaint, and the trial court sustained the demurrers with leave to amend in February 2007. (2 CT 264-266.) Among other things, the court explained that Lockton's written retainer agreements with OM&M and Quinn Emanuel, which he attached to the operative complaint, "do not establish that the demurring defendants agreed to represent plaintiffs in suit against anyone other than Interactive and TCI, their directors, and Joseph Cotchett." (2 CT 266.) The court instructed Lockton that "[i]f for some reason the scope of the written retainer agreements was enlarged, [he] must state facts which so establish." (*Ibid.*)

In March 2007, Lockton filed his Third Amended Complaint, asserting the same four causes of action against the same four defendants. (2 CT 283-292; see also 2 CT 391-404 ["errata pages" to Verified Third Amended Complaint].) Unlike the first three versions of his complaint, this one was verified. (2 CT 293, 405 [verification].)

This verified pleading alleged that at the conclusion of Small's deposition on December 14, 2001, which Lockton attended, he "instructed Mr. O'Rourke, who conducted the deposition, to name the Morrison defendants as Doe defendants" and that "[i]n response, O'Rourke said to plaintiff, 'Oh we don't want to do that now, at this late date it will anger the judge. You have a great suit and you should just get another attorney and sue them in state court,' or words to that effect." (2 CT 401, ¶ 38.)

Defendants demurred again. (2 CT 406, 455.) This time, plaintiff responded by moving for leave to amend his complaint a fourth time. (2 CT 492.) In August 2007, the court permitted Lockton to file his Fourth Amended Complaint (see RT 7-8), which added causes of action for intentional misrepresentation and breach of implied contract. (4 CT 792-821.) This complaint also was verified. (4 CT 822.) Referring to the conclusion of the

Small deposition in December 2001, Lockton again alleged that he asked O'Rourke to add the MoFo defendants and that O'Rourke responded, "'Oh we don't want to do that now, at this late date it will anger the judge.' 'You have a great suit and you should just get another attorney and sue them in state court,' or words to that effect." (4 CT 816-817, ¶ 70.) And this time Lockton added that O'Rourke further told him "that since he had just discovered the deliberate tortious actions of the Morrison defendants, the statute of limitations would be 'tolled' until such discovery." (*Ibid*.)

D. In Response To The Trial Court's Giving Him An Opportunity To Overcome An Apparent Statute-Of- Limitations Bar, Lockton Files A Fifth Amended Complaint—This Time *Not* Verified.

1. The trial court orders supplemental briefing on the statute of limitations and allows Lockton another opportunity to amend his complaint.

Defendants demurred to the Fourth Amended Complaint. (5 CT 1011, 1034.) In October 2007, the trial court requested briefing on whether the action was barred by the statute of limitations for legal malpractice claims in Code of Civil Procedure section 340.6 (section 340.6). (5 CT 1109, 1113.) Among other things, the court pointed out that:

- The MoFo defendants' conduct occurred in 1999;
- The gravamen of each claim is legal malpractice, and therefore the one-year statute of limitations under section 340.6 applies;
- The fraud claims, if properly alleged, might extend the period, but Lockton did not adequately allege fraud;
- The complaint did not explain why Lockton did not become aware of the alleged misrepresentations at the latest as of September 10, 2002—the date his other counsel filed the state court action against the MoFo defendants; and
- The complaint did not explain when defendants' representation of Lockton ended, though he was represented by other counsel when he sued the MoFo defendants. (5 CT 1011.)

In November 2007, after further briefing and oral argument, the court sustained the demurrers but again gave Lockton leave to amend. (7 CT 1676-1681; see also RT 13-21.) The crux of the court's ruling was that by September 2002, when Kornblum filed the state court action against the MoFo defendants, there was no concurrent representation of Lockton as to those claims

by OM&M and Quinn Emanuel. (7 CT 1680-1681.) In allowing Lockton a sixth try at pleading his claims, the court listed the following "obvious obstacles to this suit" that Lockton would have to overcome:

> (1) the Morrison defendants' misconduct occurred in 1999; (2) plaintiff knew of the misconduct when it occurred in 1999; (3) plaintiff was represented by the defendants in this action in 1999; (4) defendants in this action informed plaintiff in 1999 that they would not sue the Morrison defendants; (5) plaintiff retained new counsel prior to September 2002; (6) plaintiff's new counsel sued the Morrison defendants for misconduct they allegedly committed in 1999; (7) the lawsuit in 2002 against the Morrison defendants for conduct occurring in 1999 was dismissed, in part because of the running of the statute of limitations as plaintiff knew of the Morrison defendants' misconduct in 1999; (7) [*sic*] plaintiff did not file this suit until April of 2004; (8) plaintiff has not alleged fraud by the defendants in this action; and, (9) plaintiff has not alleged why plaintiff believes that defendants' representation continued until 2003; (10) plaintiff has not alleged why the attorney [Kornblum] that filed CV810963 [the state court action against the MoFo defendants] did not raise all matters arising out of the Morrison defendants' purported 1999 misconduct in that suit; and, (11) plaintiff has not alleged why the attorney filing the suit in CV810963 should not be considered successive counsel, and why defendants in this action were no longer liable due to the successive representation of the attorneys filing CV810963. (7 CT 1680-1681.)[6]

The court warned Lockton that the above list was "not exhaustive" and that he "must address these problems by pleading facts, and not legal conclusions, which adequately establish this suit is not time-barred." (7 CT 1681.)[7]

---

[6] The court's list appears to enumerate eleven obstacles but lists two separate obstacles numbered (7).

[7] Notwithstanding the court's ruling expressly identifying at least a dozen obstacles Lockton would have to overcome to avoid a time bar, Lockton's

2. Lockton files an *unverified* Fifth Amended Complaint that changes key allegations in the two prior verified complaints.

opening brief argues that by the time of this order he had "satisfied the court that the statute of limitations was not an issue." (Appellant's Opening Brief (AOB) 16.)

In December 2007, Lockton filed his Fifth Amended Complaint. (7 CT 1713.) This complaint eliminated his causes of action for written contract, intentional misrepresentation, and negligent misrepresentation, but added a cause of action for constructive fraud. (See 7 CT 1713, 1722.) Unlike the previous two complaints, this version was not verified. (See 7 CT 1713.) This time, Lockton *changed his allegation* as to what O'Rourke told him when Lockton asked him, at the conclusion of Small's deposition, to name the MoFo defendants in the federal action. This time, Lockton alleged that instead of saying "we don't want" to add the MoFo defendants, O'Rourke said "you don't want" to do that, and instead of saying "get another attorney and sue them in state court," O'Rourke said "[w]hy don't' [*sic*] you file a state court claim." (8 CT 1731, ¶ 70.)[8] Lockton again alleged that O'Rourke told Lockton that he had just "discovered" the facts giving rise to a cause of action and told him that a state court action would be "protected by the discovery rule." (*Ibid*.)

E. The Trial Court Sustains Demurrers To The Fifth Amended Complaint Without Leave To Amend And Enters Judgment; Lockton Appeals.

Defendants again demurred. (See 8 CT 1875-1895, 1896-1919.) The trial court heard oral argument on the demurrers in January 2008. (RT 28-32.) In March 2008, it sustained the demurrers without leave to amend, determining that Lockton's claims were time-barred. (11 CT 2463-2471.) The court rejected Lockton's contention that the statute of limitations was tolled under section 340.6,

---

[8] The following redline shows the changes from the Fourth Amended Complaint to the Fifth Amended Complaint: "'Oh ~~we~~Dave, you don't want to do that~~ now, at this late date it will just anger the judge.' 'You have a great suit and you should just get another attorney and sue them in state court.'~~; It would anger the Judge to bring them in so late in the proceedings. Why don't' [*sic*] you file a state court claim.'" (8 CT 1731, ¶ 70, redlining added.)

subdivision (a)(2) during the time that defendants continued to represent him in the federal action against TCI, Interactive's directors, and Cotchett. (11 CT 2471; see also 11 CT 2464.) The court explained:

> [T]he plaintiff was specifically told by the defendants that they would not bring suit against the Morrison defendants. The Quinn defendants by specifically informing plaintiff of their decision not to file suit against the Morrison defendants defined the parameters of their representation. The ambiguity present in suits where tangential matters are arguably sufficiently within the scope of an attorney's representation is not present here as the pleadings in this matter make clear that plaintiff was well aware that the Quinn defendants would not name the Morrison defendants and that he was informed to obtain new counsel for that purpose, and that he did so. Plaintiff was also made aware, as of March 2003, that he could not maintain a cause of action against the Morrison defendants due to the statute of limitations. (11 CT 2470; see also 11 CT 2464.)

Lockton therefore "was well aware of any potential wrongdoing by the Quinn defendant's [*sic*], any consequential injuries, and the limited scope of their representation by March 19, 2003." (11 CT 2471.)[9]

[9] The trial court's reference to "March 19, 2003" is to the date of the Santa Clara County Superior Court's order partially granting the MoFo defendants' anti-SLAPP motion. The date of that order was actually March 14, 2003 (10 CT 2272), but the Fifth Amended Complaint alleges the date was March 19, 2003 (8 CT 1735, ¶¶ 83-84).

Lockton objected to entry of judgment and moved for reconsideration on the basis of supposed "new or different" facts and law under Code of Civil Procedure section 1008, subdivision (a). (11 CT 2507-2508, 2530-2532.) As defendants pointed out, however, the facts Lockton cited—principally that defendants never "specifically told plaintiff that they would not bring suit against the Morrison defendants" (11 CT 2531)—were not new or different at all. Just as he does in his opening brief (see Argument Section I, *post*), Lockton was simply ignoring his earlier verified pleadings alleging that O'Rourke had told him "we don't want to do that [add the MoFo defendants] now" and that he "should just get another attorney and sue them in state court" (11 CT 2617, citing 2 CT 401, ¶ 38 and 4 CT 816, ¶ 70; see also 11 CT 2550-2551, 2558-2559, 2618-2620).[10] As defendants explained, the other "new or different" fact identified by Lockton—that the trial court mistakenly cited November 2006, when the case was transferred from San Francisco to Los Angeles (1 CT 104-105), as the action's filing date (11 CT 2531)—made no difference as the court had previously recognized that the action was filed in April 2004, which still was after the one-year limitation period expired. (11 CT 2620, citing 7 CT 1679; see also 11 CT 2551-2552, 2559.) Defendants also pointed out that the opinion that Lockton cited as new law—*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041—had actually been published in December 2007, *before* the court heard and decided the demurrers to the Fifth Amended Complaint, and that

---

[10] In fact, as defendants pointed out, nothing in Lockton's declaration in support of his motion for reconsideration (11 CT 2509-2515) constituted new facts that he could not previously have presented in the preceding several years of litigation, and the declaration was not even signed under penalty of perjury and was therefore inadmissible (11 CT 2617, 2621-2622).

it did not, in any event, constitute new law. (11 CT 2550, 2555-2558, 2617, 2623-2625.)

On May 1, 2008, a judgment of dismissal with prejudice was entered (11 CT 2536-2538), with notice of entry of judgment served on May 7, 2008 (11 CT 2628-2632). On June 5, 2008, Lockton filed a notice of appeal. (11 CT 2692-2693.)

STANDARD OF REVIEW

In an appeal from the sustaining of a demurrer, the court accepts as true the properly pleaded facts in the complaint. (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505, fn. 1 (*Beal Bank*) [upholding sustaining of demurrer on ground that statute of limitations barred legal malpractice claim].) The court also considers matters that may be judicially noticed (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6) and exhibits attached to the complaint (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 (*Holland*); *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375 ["This consideration of facts includes those evidentiary facts found in recitals of exhibits attached to a complaint"]). "If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence." (*Holland, supra*, 86 Cal.App.4th at p. 1447; accord, *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"].)

Lockton correctly states that a trial court's denial of leave to amend is reviewed for abuse of discretion. (AOB 17, citing *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) However, he ignores that "[t]he burden of proving [a] reasonable possibility [of curing a defective pleading] is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

ARGUMENT

II.

THE TRIAL COURT DID NOT IMPROPERLY RELY ON UNPLEADED FACTS—RATHER, LOCKTON IGNORED, AND CONTINUES TO IGNORE, HIS OWN VERIFIED PLEADINGS.

Lockton's lead argument depends entirely on a misstatement of the record and a misunderstanding of the law governing demurrers. He contends that the trial court based its ruling on "'facts' that do not appear on the face of the Complaint" and that the ruling is therefore "contrary to the law governing demurrers." (AOB 18.) Challenging the trial court's statement that he was "'specifically told by the defendants that they would not bring suit against the Morrison defendants'" (*ibid*.), he says that the "nearest approximation to such a statement that [he] has been able to locate" is the Fifth Amended Complaint's allegation that at the conclusion of Small's deposition, O'Rourke allegedly told Lockton, "[y]ou don't want to do that [i.e., add the MoFo defendants to the federal action]," and "[w]hy don't' [*sic*] you file a state court claim." (AOB 18-19.) Further, he claims, "each of his several Complaints on file in the underlying action" stated the above allegations. (AOB 18.)

This just isn't true. The Verified Third Amended Complaint and the Verified Fourth Amended Complaint—both filed *before* the trial court asked for supplemental briefing on the statute of limitations—alleged that O'Rourke told Lockton that "'*we* don't want to do that now [i.e., add the MoFo defendants to the federal action],'" and that Lockton should "'*get another attorney* and sue them in state court[.]'" (2 CT 401, ¶ 38, emphasis added; 4 CT 816-817, ¶ 70.) In other words, *after* the trial court identified the timeliness hurdles Lockton faced, Lockton tried to erase the language that raised these hurdles: He replaced "*we*

don't want to do that now" with "*you* don't want to do that" and replaced "*get another attorney and* sue them in state court" with "*why don't you* file a state court claim." (Compare *ibid*. with 8 CT 1731, ¶ 70.)

The law does not require courts to blindly accept such unexplained changes in factual allegations. The rule is just the opposite: If an amended complaint contradicts or omits facts pleaded in earlier complaints, a court should "take judicial notice of the earlier complaints and disregard inconsistent allegations, absent an explanation for the inconsistency." (*Holland, supra*, 86 Cal.App.4th at p. 1447.) Indeed, "[t]he well-established rule is that a proposed amendment which contradicts allegations in an earlier pleading *will not be allowed* in the absence of 'very satisfactory evidence' upon which it is 'clearly shown that the earlier pleading is the result of mistake or inadvertence.'" (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879 (*American Advertising*), emphasis added.) But instead of explaining the changed allegations, the Fifth Amended Complaint cryptically dropped any reference to O'Rourke's telling Lockton that defendants did not want to add the MoFo defendants and that he should "get another attorney." (See 8 CT 1731, ¶ 70.) Not even in his deficient motion for reconsideration did Lockton give any explanation for these pleading changes. (See 11 CT 2474-2532.)

Here there is all the more reason to disregard Lockton's final pleading: His two earlier pleadings were *verified*. As our Supreme Court has explained, "[w]here a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation." (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 836 (*Reichert*), quotation marks and citation omitted.) "In such a

case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer." (*Ibid*., internal quotation marks and citation omitted.)

The lack of an explanation for deviating from two prior verified pleadings is particularly glaring because the key allegations concerned something that Lockton personally observed; they were not legal conclusions or inferences about which he might have been mistaken. (Cf. *American Advertising, supra*, 152 Cal.App.3d at p. 879 ["Courts are understandably suspicious of a party's belated claim of mistaken admission of facts where the party has had unrestricted access to the facts, presumptive knowledge of what occurred, and several opportunities to present the correct facts"].)

Most revealing is that when Lockton lets his guard down, the truth comes out: Defendants absolutely *did* tell him to "get another lawyer."

- In his Fifth Amended Complaint, Lockton alleges, "[d]uring or about June 2002, plaintiff did retain other legal counsel to sue the Morrison defendants in state court[.] . . . The reason plaintiff did so was because defendant herein, and his lawyer at the time, Michael O'Rourke advised him to do so." (8 CT 1733, ¶ 80.)
- In oral argument on the demurrers, Lockton's counsel stated that O'Rourke "suggested that Mr. Lockton hire another attorney and file that case." (RT 30.)
- Later in his opening brief, Lockton states, "[a]s has been shown, what actually happened was that appellant's counsel, for tactical reasons, *advised him to retain other counsel* and to pursue his claims against the Morrison defendants in another venue." (AOB 25, emphasis added.)

Despite all of this, Lockton accuses the trial court of having made a "strained" and even "spurious" interpretation of O'Rourke's statement.

(AOB 19, 20.) Far from it. It is Lockton's failure to acknowledge his own unexplained changes in pleading that is spurious.

Given that Lockton has been well aware of the need for an explanation since at least when defendants filed oppositions to his motion for reconsideration (11 CT 2558, 2621), this Court should decline to consider any explanation he may offer for the first time in his reply brief. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 (*Shade*) [points raised in reply brief for first time will not be considered, unless good reason is shown for failure to present them before].)

III.

THE TRIAL COURT CORRECTLY DETERMINED THAT SECTION 340.6'S ONE-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED BY "CONTINUOUS REPRESENTATION" AND THEREFORE BARS THIS ACTION.

A. It Is Undisputed That Section 340.6's One-Year Limitations Period Governs This Action And Was Triggered More Than One Year Before Lockton Sued.

Section 340.6 provides that any action "shall be commenced within *one year* after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (§ 340.6, subd. (a), emphasis added.) Lockton has conceded that the one-year period in section 340.6 applies to all his claims here. (10 CT 2393 [opposition to demurrer: "[d]efendants rightly assert that, CCP 340.6 sets forth the Statute of Limitations applicable to this case and that it mandates a one (1) year statute of limitations"]; AOB 22-23 [citing only section 340.6 and underscoring language "*shall be commenced within one year*"].)[11]

[11] Section 340.6 applies to any claims by clients against their attorneys short of actual fraud, a cause of action not asserted in the Fifth Amended Complaint. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 57, 70; *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805; *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1366.)

Because Lockton filed his original malpractice complaint in this action on April 23, 2004 (though he waited until March 2006 to serve defendants) (1 CT 14; 9 CT 2009, ¶ 3), his lawsuit is time-barred if the statute of limitations began running before April 23, 2003. Lockton's own pleadings and submissions demonstrate that he knew "the facts constituting the [alleged] wrongful act[s] or omission[s]" (§ 340.6, subd. (a)) before that date—in fact, he discovered the alleged malpractice at the very latest on March 14, 2003, when his state-court libel claims against the MoFo defendants were dismissed. (8 CT 1735, ¶ 83.)[12]

Accordingly, Lockton's claims are time-barred unless the statute of limitations was tolled. Lockton asserts only one basis for tolling— defendants' purported "continuous representation" of him under section 340.6, subdivision (a)(2). (See AOB 22 [argument heading that trial court's ruling is "contrary to" section 340.6, subdivision (a)(2)]; AOB 22-29 [argument section citing only subdivision (a)(2)].) This argument has no merit, as we now explain.[13]

---

[12] While the complaint says Lockton discovered the "facts constituting this cause of action on a date not before" that date (8 CT 1735, ¶ 83), nothing in his various complaints alleges that he discovered the requisite facts any time *after* that date.

[13] Lockton has waived reliance on any other tolling provisions by failing to raise them in his opening brief. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, fn. 2.)

B. The Limitations Period Was Not Tolled By "Continuous Representation."

1. "Continuous representation" is limited to the "specific subject matter" in which the alleged malpractice occurred.

Section 340.6 provides that the limitations period "shall be tolled during the time that . . . [t]he attorney continues to represent the plaintiff *regarding the specific subject matter* in which the alleged wrongful act or omission occurred . . . ." (§ 340.6, subd. (a)(2), emphasis added.) Thus, "continuous representation" tolling "is not triggered by the mere existence of an attorney-client relationship." (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 228 (*Foxborough*).) It applies to only "a particular phase of such a relationship—representation regarding a specific subject matter." (*Id.* at p. 229.)

"One critical element of this tolling provision is that continued representation in other matters is irrelevant, even if the other matters bear some relationship to the matter in which the alleged malpractice occurred." (1 Schwing, Cal. Affirmative Defenses (2008) § 25:43, p. 1555.) The continuous work must concern the *same* "specific subject matter" in which the malpractice occurred. (§ 340.6, subd. (a)(2).) "The test for whether the attorney has continued to represent a client on the same specific subject matter is objective." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528 (*Crouse*); accord, *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497-1498 (*Worthington*).)

2. Defendants did not represent Lockton in his claims *against the MoFo defendants* during the one-year limitations period.

a. The written legal services agreements did not include suing the MoFo defendants.

"Determining continuity of representation begins with analyzing the attorney's engagement. The usual starting point is the written engagement agreement." (3 Mallen & Smith, Legal Malpractice (2009) § 23:13, p. 447.) Absent from the scope of Quinn Emanuel's representation, as delineated in the written legal services agreement that Lockton signed in August 1999, is any mention of claims against the MoFo defendants. (8 CT 1723, ¶ 34.) The agreement states only that Quinn Emanuel would represent Lockton in claims against Cotchett, TCI, and certain directors—no one else. (*Ibid*.) The Quinn Emanuel agreement was consistent with the original agreement and the revised agreement Lockton had recently signed with OM&M, which likewise did not mention claims against the MoFo defendants. (8 CT 1802-1805; 2 CT 350-352.) Lockton even alleges that Schirtzer told him he was "reluctant to *initially* name" MoFo as a defendant. (7 CT 1720, ¶ 24, emphasis in original.)

The expressly limited scope of the agreement here contrasts starkly with broad agreements to pursue recovery of all damages arising from an occurrence. For example, in *Baright v. Willis* (1984) 151 Cal.App.3d 303, 307, the plaintiff retained the defendant "to represent him as his attorney in an action to recover all damages provided by law for the injuries he suffered" in an accident. The defendant timely filed plaintiff's workers' compensation claim, but neglected to file a personal injury action against non-employer tortfeasors also responsible for plaintiff's injuries. Relying specifically on the agreement's broad scope of "*all damages provided by law*," the Court of Appeal concluded that the "'specific

subject matter' of their agreement encompassed not only plaintiff's workers' compensation claim, but also any third-party lawsuits plaintiff may have had against nonemployer parties responsible for his injuries." (*Id.* at p. 309.) Whereas the *Baright* court had to accept as true the plaintiff's allegation that the agreement was to pursue "all damages provided by law" (*ibid.*, emphasis omitted), here the written agreement attached to Lockton's complaint demonstrates that the parties identified specific parties against whom claims would be made.

The plaintiff in *Baright* further alleged that he was not even aware of the potential claims against third parties until he hired new counsel, and that the defendant had told him no other lawsuit could be filed on his behalf. (*Baright, supra*, 151 Cal.App.3d at p. 310.) Lockton, in contrast, admittedly knew of the existence of potential claims against the MoFo defendants, yet he signed the Quinn Emanuel agreement the day after the complaint—which did not name the MoFo defendants—was filed. (8 CT 1742, 1806.) And Lockton was no legal neophyte—he was a former practicing litigator and had allegedly managed years of complex litigation between Interactive and TCI. (8 CT 1748-1750, ¶¶ 28-29, 33; see also 2 CT 259-261.) The agreement plainly shows that the scope of representation did not include suing the MoFo defendants.

b. Following O'Rourke's advice, Lockton hired *new*, *separate* counsel to file claims against the MoFo defendants.

"[O]rdinarily the representation is on the same subject matter until the agreed tasks have been completed or events inherent in the representation have occurred." (*Crouse*, *supra*, 67 Cal.App.4th at p. 1528; accord, *Worthington*, *supra*, 29 Cal.App.4th at p. 1497.) An attorney need not formally withdraw for representation to end for tolling purposes. (*Worthington*, *supra*, 29 Cal.App.4th

at p. 1497; accord, *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 846-849.) Here, defendants cannot be faulted for not formally withdrawing from something they did not agree to do in the first place—suing the MoFo defendants.

But even if defendants ever represented Lockton on claims against the MoFo defendants, that representation objectively terminated when Lockton followed O'Rourke's advice and hired new, separate counsel to file claims against the MoFo defendants in state court. (*Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1173 [continuous representation tolling ended when plaintiff asked new lawyer to serve as replacement counsel for defendant, who had allegedly committed malpractice by inducing plaintiff to enter into unfavorable marital settlement agreement]; see also *Foxborough, supra*, 26 Cal.App.4th at p. 229 [defendant attorney's representation of Foxborough in matter against Daon ended "no later than" the date by which, among other things, "Foxborough had retained the Caputo firm to represent it in an action against Daon, and the Caputo firm had filed the Daon suit as Foxborough's counsel of record"]; *Von Rott v. Johnson* (1983) 148 Cal.App.3d 608, 613 [no continuous representation by attorney who drafted sale transaction documents when, among other things, client had "secured new counsel to represent her interests in regard to the sale of the business"].) As one court put it, "[r]etention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client." (*Maddox v. Burlingame* (1994) 205 Mich.App.2d 446, 450 [517 N.W.2d 816].)

As we explained in Section I, *ante*, Lockton's own pleadings make clear that: (a) in late 2001, O'Rourke told Lockton that defendants did not want to add the MoFo defendants in the federal action and that Lockton should get another attorney to file a state court action against them (2 CT 401, ¶ 38; 4 CT 816, ¶ 70); (b) in June 2002, expressly "because" O'Rourke advised him to do so, Lockton hired new, different counsel— Kornblum—to file a lawsuit against the MoFo

defendants in state court (8 CT 1733, ¶ 80); (c) Kornblum filed that lawsuit in September 2002 (8 CT 1733-1734, ¶ 80; see also 8 CT 1962); (d) Kornblum proceeded to litigate the claims against the MoFo defendants in the state court, which partially granted an anti-SLAPP motion in March 2003 (8 CT 1735, ¶ 83; see also 10 CT 2242, 2272-2273); and (e) Kornblum then represented Lockton in his ensuing appeal (9 CT 1989).

In contrast, Lockton does not allege that defendants did *anything at all* with respect to his claims against the MoFo defendants after Kornblum began litigating those claims. This is not a case in which a plaintiff has consulted with another lawyer but continued to use original counsel on the same matter within the year before suing them for malpractice. (See *Worthington, supra*, 29 Cal.App.4th at p. 1498 [plaintiff lost confidence in defendant and consulted another lawyer but evidence showed defendant provided further legal advice on the same matter until 11 months before suit was filed].) Rather, Kornblum was the only lawyer pursuing the claims against MoFo, beginning in September 2002 at the latest.

Unlike cases on which Lockton attempts to rely, Lockton cites no facts showing *any* involvement by defendants, even tangential, in claims against the MoFo defendants after that time. In *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 120 (*O'Neill*), the lawyers continued to advise and bill the clients for work done on the specific subject matter in which the alleged wrongful act or omission occurred until the date of their formal discharge. Here, there is no allegation that anyone at Quinn Emanuel did so much as pick up the phone regarding MoFo. (*O'Neill, supra*, 19 Cal.App.4th at pp. 118-119.) The very latest allegation of any connection between defendants and the MoFo claims occurred in July 2002, about two months *before* Kornblum filed the state court action against MoFo. (8 CT 1733-1734, ¶ 80; 8 CT 1844-1845 [O'Rourke letter to MoFo].) The same

distinction applies to Lockton's supposedly best case—*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041—as we explain further in Section II.B.3., *post*.

The Supreme Court's decision in *Beal Bank* forecloses any claim of continuous representation. There, the court held that where an attorney leaves a firm and takes a client with him, tolling for ongoing matters does not continue for claims against the former firm. (*Beal Bank, supra*, 42 Cal.4th at p. 505.) Just as in *Beal Bank*, here the client left the law firm to go with another lawyer. Since Kornblum was never affiliated with Quinn Emanuel at all, Lockton's facts present an a fortiori case. As the Supreme Court said, "representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Id.* at p. 509.)

Lockton nevertheless argues that "the advice was given to him by his legal counsel in the hope of taking advantage of what our courts have referred to as a client's innate disadvantage to be able, '*to question the reason for the tactics employed or the manner in which the tactics are executed*.'" (AOB 20, quoting *O'Neill, supra*, 19 Cal.App.4th at p. 120, emphasis in AOB.) This argument doesn't help Lockton, a former practicing attorney who alleged that he directly managed the TCI litigation for years. (8 CT 1748-1750, ¶¶ 28-29, 33; see also 2 CT 259-261.) According to his own operative pleading, he consulted and continually questioned defendants regarding the strategy for proceeding against the MoFo defendants before he hired Kornblum to pursue claims against them. (See 8 CT 1727-1730, ¶¶ 53-63.) And Lockton fails to show that anything hinges on whether the reason for defendants not to represent

him and for him to instead hire other counsel to pursue claims against the MoFo defendants was tactical in nature. For tactical reasons or otherwise, defendants simply did not represent Lockton in his claims against MoFo at any time after his other counsel, Kornblum, filed the state court action in September 2002.

c. Nothing defendants did during the one-year limitations period tolled the statute.

Notwithstanding that only Kornblum pursued the claims against MoFo from September 2002 at the latest, Lockton attempts to demonstrate the "ongoing nature" of his relationship with defendants as somehow tolling the statute. (AOB 28.) He argues that defendants "continued to represent [him], to bill him and to be paid for their ongoing services in Federal court case number 3:99-cv-05462-THE, through a date less than eight months before he [filed] his malpractice claim against [them]." (*Ibid.*)[14] Below, he also relied on the fact that Quinn Emanuel filed a supplemental declaration in connection with a motion for partial summary judgment in the federal action in July 2003, shortly before that action settled. (10 CT 2392, citing 10 CT 2334.) And he cited September 2003 correspondence from O'Rourke to him regarding disbursement of the federal action settlement proceeds. (10 CT 2392, citing 10 CT 2336-2337.)

So what? Not once in six iterations of his complaint has Lockton ever alleged that any of these actions were taken in pursuit of claims *against the MoFo defendants*. Our Supreme Court has made it clear that continuous representation in *other* subject matters does not trump the requirement of the *same specific* subject matter in order for tolling to occur. (*Beal Bank, supra*, 42 Cal.4th at

---

[14] Lockton doesn't cite anything in the record to support this, but the Fifth Amended Complaint alleges that defendants billed him and he paid them "through, at least, August 2003." (8 CT 1731, ¶ 68.)

p. 514, fn. 8.) Lockton's allegations are of actions that defendants continued to take in the federal action—the very lawsuit that their written services agreement contemplated. These actions could not constitute "continuous representation" in claims against the MoFo defendants. As the trial court found with respect to the July 2003 declaration, it "has not been shown to have misled plaintiff concerning the fact that his claims against the Morrison defendants were time barred, or that Quinn had determined that it would reverse its decision to have plaintiff seek other counsel concerning a suit against the Morrison defendants." (11 CT 2471.) The same is true of the alleged continued billing for services in the federal action and the correspondence regarding disbursement of the settlement proceeds from that action.

Lockton also cites a July 2002 letter from O'Rourke to MoFo as evidence that defendants had not unequivocally told him they would *not* sue the MoFo defendants. (AOB 28.)[15] But, as the trial court correctly pointed out, that letter could not have created any significant ambiguity as to the scope of their representation because it preceded Kornblum's filing the state court action against the MoFo defendants in September 2002 and, of course, the state court's ruling striking some of those claims in March 2003. (11 CT 2470.) No matter what the letter in July 2002 said or didn't say, *defendants* did not thereafter proceed to represent Lockton against the MoFo defendants—*Kornblum* did.

[15] Lockton's opening brief erroneously gives "July 25, 2005" as the date of the letter. It was July 25, 2002. (8 CT 1845.)

3. None of Lockton's authorities permits a "continuous representation" finding here.

In his opening brief, Lockton relies principally on *O'Neill, supra*, 19 Cal.App.4th 114, and *Nielsen v. Beck* (2007) 157 Cal.App.4th 1041 (*Nielsen*). (AOB 21, 25-26.) As we demonstrated in section II.B.2.b., *ante*, *O'Neill* does not aid Lockton because, among other things, once Kornblum began pursuing the claims against MoFo, defendants had no continued involvement in them. Additionally, in *O'Neill*, unlike here, the new counsel were retained specifically to investigate malpractice in the very matter in which the client chose to keep utilizing the defendants to perform legal services. (*O'Neill, supra*, 19 Cal.App.4th at p. 119.) Here, Lockton hired Kornblum specifically to pursue the claims against the MoFo defendants.

For similar reasons, *Nielsen* does not help Lockton either. In *Nielsen*, new counsel substituted into a case, the ProLogis matter, in which original counsel, Beck, allegedly committed malpractice. But even after the substitution, the plaintiff, Nielsen, continued to consult Beck about the ProLogis matter and Beck billed Nielsen for those consultations. (*Nielsen, supra*, 157 Cal.App.4th at pp. 1045, 1051.) On those facts, the Court of Appeal determined there were triable fact issues as to whether Beck continued to represent Nielsen in the ProLogis matter up until the date of the last consultation, which was less than a year before Nielsen sued Beck for malpractice. (*Id*. at p. 1051.) Here, Lockton does not allege *any* involvement by defendants in the claims against MoFo in the year before he filed the malpractice claims.[16]

---

[16] *Nielsen* also found triable fact issues as to whether the ProLogis matter and the underlying bankruptcy case in which the ProLogis matter arose constituted the same specific subject matter under section 340.6, subdivision (a)(2). (*Nielsen, supra*, 157 Cal.App.4th at pp. 1052-1053.) Lockton does not rely on this aspect of *Nielsen* (see AOB 25-26), and for good reason. In

Unlike in *O'Neill* and *Nielsen*, Lockton does not allege even an iota of coordination between defendants and Kornblum on the claims against the MoFo defendants. (*O'Neill, supra*, 19 Cal.App.4th at p. 118 ["Respondents were asked to make their files regarding the NLRB action available for review by the new attorney and to provide him office space and 'background' advice on the matter"]; *Nielsen, supra*, 157 Cal.App.4th at p. 1045 ["Beck [the defendant] gave [new] attorney Zack his files and materials relating to the unlawful detainer case"].) Lockton does not allege any interaction between defendants and Kornblum. Kornblum was not an additional lawyer on Lockton's team—there was *no* ensuing teamwork.

Lockton also argues, without explanation, that two cases where appellate courts have found continuous representation tolling—*Gold v. Weissman* (2004) 114 Cal.App.4th 1195 (*Gold*) and *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875 (*Lockley*)—are indistinguishable from this case. (AOB 28.) He is wrong. In those cases, unlike here, the plaintiffs did not employ different counsel to pursue the claims in issue. (See *Gold*, supra, 114 Cal.App.4th at pp. 1197-1198; *Lockley, supra*, 91

Nielsen, the written legal services agreement in the bankruptcy matter had a broad scope defined as "a number of pending legal issues, *including but not limited to* the defense of claims" brought by creditors; the ProLogis matter was filed by a creditor in response to an action that Beck had advised the client to take; and the written legal services agreement for the ProLogis matter in turn reflected that Beck was already representing the plaintiffs in connection with their relationship with the creditor. (*Nielsen, supra*, 157 Cal.App.4th at pp. 1053-1054.) Here, as explained above, the only written legal services agreements expressly did *not* include claims against MoFo and did not "result[] in" those claims (*id.*, at p. 1054)—the MoFo claims already existed and Lockton was aware of them—and Lockton and defendants never entered into any separate legal services agreements as to claims against MoFo.

Cal.App.4th at pp. 879-880.) The same distinction applies to *Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 24-26 (*Gonzalez*). And here, unlike in those cases, defendants told Lockton to get another lawyer to sue the MoFo defendants and, as the trial court correctly pointed out, Lockton was "specifically told by the defendants that they would not bring suit against the [MoFo] defendants." (11 CT 2470.) To contend otherwise, Lockton must again ignore his own allegations that he was told to, and did, hire another lawyer to sue the MoFo defendants.

Nor is this a case in which the client relies on later attempts by a former attorney to "cure" malpractice (*Foxborough*, *supra*, 26 Cal.App.4th at p. 225)—Lockton's complaint does not allege that he accused defendants of any errors before he served the complaint in this action in March 2006.[17] In fact, Lockton does not allege *any* later assistance by defendants with *any* aspect of the claims against MoFo after they were determined adversely to him, unlike what happened in another case he attempts to rely on (AOB 29), *Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 333-334 [after affirmance of dismissal, defendant attorney negotiated a reduction of claimed appellate costs with opposing counsel]. Kornblum, and Kornblum alone, represented Lockton on those claims.

4. The purposes of the "continuous representation" rule do not support tolling here.

---

[17] Even if this were a curing-malpractice case, the possibility that an attorney's subsequent services might cure prior malpractice does not trump the "specific subject matter" requirement. (*Foxborough*, *supra*, 26 Cal.App.4th at pp. 228-229 [no continuous representation even though attorney later worked for client as expert/consultant in lawsuit that might mitigate attorney's malpractice].)

The purposes of the continuous representation rule are to "'avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618, emphasis added.) Lockton contends that the rule's purposes are implicated here because it would have been untenable for him to file a malpractice claim against defendants before the federal action concluded in August 2003. (AOB 24; see also AOB 27.) He argues that suing defendants before then would have placed them "in a position where losing the Motion for Summary Judgment, and thus 'showing' that appellant's underlying case was without merit, would have been to their advantage." (AOB 24; see also AOB 27.)

The motion he describes was, according to his brief, litigated in around August 2003. (AOB 3 [describing activities "[l]ess than Eight [*sic*] months" before this action was filed].)[18] But by that time, according to Lockton's own allegations, defendants had known for at least ten months that they had missed the statute of limitations. (8 CT 1731 ["no later than October 11, 2001 (the first day of Small's deposition), defendants became aware of the fact that they had missed the statute of limitations against the Morrison defendants"].) If the risk of a malpractice action were enough to

---

[18] The record support is indirect at best—a citation to one of the trial court's orders. (11 CT 2655; see 8 CT 1734-1735, ¶ 82, citing 8 CT 1874 [Fifth Amended Complaint cites docket entry in the federal action showing that Quinn Emanuel filed a supplemental declaration on Lockton's behalf in July 2003].) But there is no dispute that Quinn Emanuel represented Lockton *in the federal action* until it concluded.

motivate them to throw the summary judgment motion, they had that motivation regardless of whether Lockton asserted a claim.

In the context of the continuous representation rule, however, our Supreme Court has cautioned against presuming that counsel will violate their fiduciary obligations to their clients. (*Beal Bank, supra*, 42 Cal.4th at p. 514 [noting that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"].) And even in the implausible event that defendants would have behaved as irresponsibly as Lockton suggests, they would have been *less* likely to throw the summary judgment motion after Lockton asserted a claim, because they would have known that their actions would be subject to closer scrutiny.

"Given the conflicting interests at stake, there are no perfect solutions" to avoid "disruption of the client's relationship with its chosen counsel." (*Ibid.*) But it isn't true, as Lockton claims, that clients who discover malpractice before actions have concluded are powerless to protect their interests without disrupting the attorney-client relationship. As the Supreme Court has explained, "disruption may be reduced through voluntary tolling agreements" and "through stays of litigation." (*Beal Bank, supra*, 42 Cal.4th at p. 513; see also *id.*, at pp. 513-514 ["The liberal use of tolling agreements and stays in malpractice cases may reduce the impact on the underlying litigation, ensure that plaintiffs do not have their claims prematurely barred, protect defendants' and defendants' insurers' interests in 'receiving timely notice and

avoiding stale claims' . . . , and allow current counsel, to the extent practicable, to continue to work to ameliorate the consequences of any past mistakes. Current counsel will have considerable incentive to do so, as any mitigation will reduce their own potential future liability," citations omitted].)[19]

In any event, "indirect disruption was not the overriding consideration for the Legislature" in enacting subdivision (a)(2)'s continuous representation provision. (*Beal Bank, supra*, 42 Cal.4th at p. 514, fn. 8.) "Once representation on that matter [i.e., the specific subject matter in which the alleged wrongful act or omission occurred] ends, a client must bring timely suit, notwithstanding that the attorney may continue to represent the client on a range of matters and a direct suit against the attorney may interfere with the attorney-client relationship in all other such matters. Had the Legislature intended preservation of the attorney-client relationship as a dispositive trump card, it would not have so limited the scope of the tolling exception." (*Ibid.*) Here, that means Lockton cannot invoke the continuous representation provision on the ground that suing defendants for their failure to sue the MoFo defendants would have indirectly disrupted his federal action against other defendants.

---

[19] Lockton may respond that, as he stated in his unsworn declaration in support of his deficient motion for reconsideration, he did ask defendants for a tolling agreement and they refused. Even if cognizable, this proves nothing. Lockton's unsworn declaration says this happened in August 2003, after the settlement of the federal action. (11 CT 2515, ¶ 19.) By then, there was no longer any relationship that he needed to be concerned about disrupting. Even so, he waited another eight months to file a malpractice action.

Additionally, to accept Lockton's position would mean that the statute of limitations on malpractice with respect to the claims against the MoFo defendants could never even begin to run until defendants stopped representing him in the federal action. The federal action settled before going to trial, but it very well could have lasted years beyond March 2003, the latest point in time when Lockton discovered the alleged malpractice on the MoFo claims. As "a party to related litigation" and "a prospective malpractice plaintiff," Lockton himself "could influence the course of the collateral suit and the timing of its conclusion." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 755 (*Jordache*).) "This result would undermine the Legislature's purpose in enacting a statute of limitations," which are intended to "to enable defendants to marshal evidence while memories and facts are fresh and to provide defendants with repose for past acts." (*Ibid.*)

Particularly unavailing here is Lockton's attempt to rely on *O'Neill*'s reasoning that tolling serves to "prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." (AOB 21, quoting *O'Neill, supra*, 19 Cal.App.4th at p. 119, emphasis in AOB omitted.) Defendants did the opposite: Instead of trying to "run out the clock" by *continuing* to represent Lockton against the MoFo defendants, they told him to *get other counsel.*

C. Lockton Has Failed To Satisfy His Burden Of Showing That Another Amendment—It Would Be His Sixth— Could Cure The Timeliness Defect.

In the trial court, Lockton did not even bother to argue that he should have been allowed to amend yet again until his deficient motion for reconsideration. (11 CT 2529; see 10 CT 2387-2403; RT 28-32 [no request in opposition to demurrers or oral argument].)

On appeal, Lockton's only attempt to demonstrate that a sixth amendment to his pleading could overcome the limitations bar is his argument that he should have been allowed the opportunity to amend the complaint's allegation regarding O'Rourke's December 2001 advice to hire another attorney to file a state court action against the MoFo defendants. (AOB 21.) Lockton contends he could amend yet again "to explain his objective understanding of the exchange, to wit, that he was receiving tactical advice from his counsel and that, should he decide to reject it, respondents would still represent him in the Federal case, against the Morrison defendants, as they had promised to do from the inception of that case." (*Ibid*.; see also AOB 15 [citing O'Rourke's July 2002 letter to MoFo as "show[ing] that appellant objectively understood that he could always choose to name the Morrison defendants in the then ongoing federal court case and that, if he chose to do so, respondents would represent him because they were his counsel in that case"].)

Lockton is correct that "the statutory language [of section 340.6, subdivision (a)(2)] requires an objective determination of when the representation ended." (*Worthington, supra*, 29 Cal.App.4th at p.1498; see also AOB 24, citing *Worthington*.) But his suggested interpretation is not objective at all. (See *Gonzalez*, 140 Cal.App.4th at p. 31 [tolling lasts only as long as the "client actually and *reasonably* believes that the representation is continuing," emphasis added].) Objectively, Lockton could not reasonably interpret counsel saying "we don't want to [sue the MoFo defendants] now" in the federal action to mean "we *will* sue" and telling him to "get another attorney and sue them in state court" to

mean "you don't need to get another attorney" to file the action. Crediting such an unreasonable, subjective interpretation would give the plaintiff "unilateral control of the statute's commencement," which "can undermine the[] legislative goals" of the statute of limitations. (*Jordache, supra*, 18 Cal.4th at p. 756.)

But even if Lockton actually had this supposedly "objective" understanding as of December 2001, the fact is that he did *not* "decide to reject" O'Rourke's advice. Rather, in July 2002, he hired Kornblum to sue the MoFo defendants in state court, and Kornblum filed the state court action in September 2002. In fact, elsewhere in his operative complaint, Lockton alleges he hired Kornblum "*because* defendant herein, and his lawyer at the time, Michael O'Rourke advised him to do so." (8 CT 1733, ¶ 80, emphasis added.) Lockton's own allegations thus foreclose any contention that defendants thereafter "continued" to represent him *against the MoFo defendants*. Lockton has therefore failed to satisfy his burden of demonstrating a reasonable possibility that the defect in his pleading could be cured by another amendment. (*Blank, supra*, 39 Cal.3d at p. 318.)

CONCLUSION

After six tries and more than three and a half years of pleading, Lockton alleged only time-barred causes of action. Defendants therefore respectfully ask the Court to affirm the judgment.

Dated: April 8, 2009

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Roxanna A. Manuel

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Kent J. Bullard

By: ___________________________________

Kent J. Bullard

Attorneys for Defendants and Respondents
Quinn Emanuel Urquhart Oliver & Hedges, LLP and

Richard A. Schirtzer

CERTIFICATION

Pursuant to California Rule of Court, rule 8.204(c), I certify that this **RESPONDENTS' BRIEF** contains **11,376** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: April 8, 2009

____
Kent J. Bullard