2022 WL 2073534 (Cal.Super.) (Trial Order)
Superior Court of California.
Alameda County

VHS LIQUIDATING TRUST, et al, Plaintiffs/Petitioners,
v.
BLUE CROSS OF CALIFORNIA, et al, Defendants/Respondents.

No. RG21-106600.
June 1, 2022.

***1** Date: 5/25/22
Time: 10:00 a.m.
Dept: 21

Order Granting in Part Motion to Strike Based on Application of Equitable Tolling

Patrick M. Ryan, Marisa C. Livesay, Brittany N. DeJong, and Chad E. DeVeaux, Bartko Zankel Bunzel & Miller, One Embarcadero Center, Suite 800, San Francisco, California 94111, for plaintiffs.

Christopher K. Kelly, Mayer Brown LLP, 3000 El Camino Real, Suite 300, Palo Alto, California 94306, for defendant Blue Cross Blue Shield Association.

Karin A. Demasi, Helam Gebremariam, David A. Markewitz, and Emma K. Kolesar, Cravath, Swaine & Moore, LLP, Worldwide Plaza, 825 Eighth Avenue, New York, New York 10019, for defendant Blue Cross Blue Shield Association.

W. David Maxwell, Hogan Lovells US LLP, Columbia Square, 555 Thirteenth Street, NW Washington, D.C. 20004, for defendant Anthem, Inc. f/k/a Wellpoint, Inc.

Evelio Grillo, Judge.

The Motion of defendants to strike claims that are based on application of equitable tolling was set for hearing on 5/25/22 in Department 21, the Honorable Evelio Grillo presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The Motion of defendants to strike claims that are based on applicability of equitable tolling is GRANTED regarding Rhode Island and DENIED in all other aspects.

BACKGROUND

In 2012, various plaintiffs filed federal cases alleging antitrust claims under the federal Sherman Act. The cases were made part of the federal MDL. The parties in the federal MDL reached an MDL wide class settlement. The federal court preliminarily approved the class settlement and ordered notice to the putative class so that the putative class members could opt out of the class settlement

Plaintiff VHS opted out of federal MDL settlement. On 7/27/21, Plaintiff VHS filed this case in California state court alleging claims under the state Clayton Act.

Plaintiff asserts that equitable tolling applies and that the filing and pendency of the federal case tolled the statute of limitations that would be applied in this case. Defendants argue that the statute of limitations in this case goes back only four years before plaintiff filed this case. (B&P 16750.1, 17208.) More specifically, defendants argue that when a previously filed class action is the basis for equitable tolling under *American Pipe*, then "cross-jurisdictional tolling" prohibits the application of equitable tolling in a state court proceeding unless the previously filed class action was asserting state claims in a state court of the same state.

CHOICE OF LAW

The court will apply California law regarding equitable tolling to the claims under California law. If the laws of other states are different from the law in California, then the court will apply the laws of other states regarding equitable tolling to the claims under the laws of other states.

FEDERAL CASE LAW

The motion concerns the application of the law of California, Alabama, Florida, Indiana, and Rhode Island. The tolling of a statute of limitations on a state law claim is a matter of state law. (*Casey v. Merck & Co., Inc.* (2nd Cir. 2011) 653 F.3d 95, 100.) This court relies on the decisions of state courts interpreting their own state law. (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 910.) In the event of uncertainty or ambiguity, this court must consider the law of the state and predict how the highest court of the forum state would resolve the relevant issue.

The parties rely in substantial part on federal cases that apply substantive state law. (Erie R. Co. v. Tompkins (1938) 304 U.S. 6.) For purposes of Erie, the state's statute of limitation and the state's equitable tolling doctrine are substantive law. "Federal courts must abide by a state's tolling rules, which are integrally related to statutes of limitations." (*Albano v. Shea Homes Ltd. P'ship (9th Cir. 2011)* 634 F.3d 524, 530.) "A federal court sitting in diversity applies the substantive law of the state, including the state's statute of limitations." (*Id.*)

***2** In the absence of clear state law, the job of the federal courts "is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity." (*Ray v. Watnick* (S.D. NY 2016) 182 F.Supp.3d 23, 31.) The court considers the opinions of federal courts interpreting state law for their persuasive value.

CALIFORNIA – ACCRUAL, CONTINUOUS ACCRUAL AND CONTINUING VIOLATION

Claims accrue when the last act necessary to assert the claim occurs. (CCP 312.) A cause of action challenging a discrete wrong accrues when the wrong was committed. A cause of action challenging a recurring wrong may accrue not once but each time a new wrong is committed (continuous accrual). A cause of action challenging an aggregated series of wrongs or injuries can accrue upon commission or sufferance of the last of them (continuing violation). (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1188-1189.)

Defendants presented a last-minute argument that unfolded with the briefing. Defendants argued generally that when there is an ongoing course of conduct then the limitations period begins each time a new wrong is committed, which is known as "continuous accrual." (Opening filed 3/8/22 at 6.) In opposition, plaintiffs argued that the allegedly unlawful actions were "ongoing and continuous" and were a "steady stream of anticompetitive impact and consequences." (4/8/22 Oppo at at p16.) Plaintiffs in a footnote then stated, "Plaintiffs are relying only on the continuing violation theory." (4/8/22 Oppo at p16 fh 5) Defendants in reply then argued that plaintiffs in the FAC had plead continuous accrual (citing to FAC at para 9, 94, 518, 538), had now abandoned continuous accrual, were now limited to continuing violation, and that continuing violation had no merit.

(5/12/22 reply at 6-8.) (*Bartlett v. BP West Coast Products LLC* (S.D. Cal., 2019) 2019 WL 2177655.) At oral argument on 5/24/22, plaintiffs argued that footnote 5 was just a conditional response to an argument.

Procedurally, the court usually does not consider arguments raised in reply. The court will so for this one so that the dispute is resolved and the parties and the court can avoid unnecessary future briefing.

Substantively, the FAC is the operative pleading. The FAC asserts facts that suggest continuous accrual. Defendants in the opening assumed that the continuous accrual applied and in reply identified the paragraphs in the FAC indicating that continuous accrual applied. The court will not deem the complaint amended by a footnote in a brief. Briefs "are not a substitute for an amendment to the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.) Similarly, the court will not find that footnote 5 equitably estops plaintiffs from backing away from their footnote 5 statement that "Plaintiffs are relying only on the continuing violation theory." If defendants relied on footnote 5, they did so for only 6 weeks until plaintiffs argued on 5/24/22 that the footnote does not mean what it says. Defendants have not demonstrated that they relied on footnote 5 to their detriment. Furthermore, the text of footnote 5 is ambiguous when read in context and does not support Defendants' proposed reading.

CALIFORNIA – EQUITABLE TOLLING GENERALLY

***3** California has equitable tolling. "Equitable tolling of a statute of limitations applies when three elements are present: (1) timely notice; (2) lack of prejudice to defendant; and (3) reasonable and good faith conduct on part of plaintiff." (*Saint Francis Memorial Hospital v. State Department of Public Health* (2020) 9 Cal.5th 710, 724.)

California applies equitable tolling if before a plaintiff filed a case the plaintiff gave the defendant timely notice of the claim through a prior civil action, through an administrative proceeding, or through a grievance procedure. (*Addison v. State of California* (1978) 21 Cal.3d 313 [prior civil action]; *Elkins v. Derby* (1974) 12 Cal.3d 410, 414 [prior administrative proceeding]; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 111-112 [prior community college administrative internal grievance procedure].) The doctrine of equitable estoppel is flexible and can toll a statute of limitation against a defendant even if the defendant was not a party to the first proceeding. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 750-751 .)

CALIFORNIA – EQUITABLE TOLLING WHERE FIRST CASE WAS A CLASS ACTION

Equitable tolling where the first case was a class action is still equitable tolling. What is sometimes referred to as "*American Pipe*" tolling is just the application of equitable tolling principles to a situation where the first proceeding was a class action. (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1595-1596; *California Public Employees' Retirement System v. ANZ Securities, Inc.* (2017) 137 S.Ct. 204, 2052.)

Under California law, equitable tolling applies when before a plaintiff filed a case there was a class action regarding the relevant claim that included the plaintiff as a putative class member. *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1595-1596, states "The doctrine of equitable tolling has been applied in the context of class action lawsuits to toll a statute of limitations." *California Restaurant* discussed the relevant United States Supreme Court cases (*American Pipe* and *Crown Cork*) and the California Supreme Court case of *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103.) *Jolly* considered and adopted the *American Pipe* policy considerations—protecting the efficiency and economy of litigation and protecting the defendant from unfair claims. *Jolly* found that equitable tolling was not proper on the facts of that case.

Recent California Court of Appeal decisions have confirmed that equitable tolling applies if before a plaintiff filed a case there was a class action regarding the relevant claim that included the plaintiff as a putative class member. *Fierro v. Landry's Rest. Inc.* (2019) 32 Cal.App.5th 276, 294, states "under California law, the tolling described in *Jolly* (based on *American Pipe* and *Crown, Cork*) applies only to *individual claims*" and did not allow a class action to toll the statute of limitations for a second class action. Similarly, *Montoya v. Ford Motor Co.* (2020) 46 Cal.App.5th 493, 500-503, reaffirmed that a class action will equitably toll the statute of limitations for an individual claim but that equitable tolling does not permit the "stacking" of class actions.

***4** Federal cases applying California law are consistent. *Hatfield v. Halifax PLC* (9th Cir. 2009) 564 F.3d 1177, 1188, also states: "California courts have permitted *individual* plaintiffs to take advantage of the *American Pipe* tolling rule where the prior class action provided the defendant with sufficient notice of the claims made against it."

Other federal cases applying California substantive law under *Erie R. Co. v. Tompkins (1938) 304 U.S. 6*, have suggested that under California law equitable tolling might not apply where the first case was a class action unless the plaintiff in the second filed case can show that she knew of and relied on the existence of the class action in making a decision to not file an individual case. (*Yetter v. Ford Motor Company* (N.D. Cal. 2019) 428 F.Supp.3d 210, 228-229.) That was not an accurate prediction of how this California court will decide the issue.

Under California law, absent class members are treated differently than other litigants. "The structure of the class action does not allow absent class members to become active parties" and "The very purpose of the class action is to "relieve the absent members of the burden of participating in the action." (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430-1431.) If a California court certifies a class, the trial court must define the class let putative class members opt-out, but cannot order a notice that requires class member to opt in. (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1449-1550.) This California law suggests that the responsibility of absent class members to be informed and to take action generally begins when they get the notice of class certification (whether through a motion for class certification or through an agreed class settlement) and ends when they make their decision whether to stay in the class as absent (and passive) class members or whether to opt out and preserve their rights to pursue an individual claim.

Earley and *Hypertouch* suggest that it would inconsistent with the purpose of a class action to condition the application of equitable estoppel on a requirement that absent class members be able to prove that they investigated potential claims, searched court records for pending class actions, evaluated the scope of the class action, considered the quality of class counsel, and then affirmatively decided to not file an individual case in reliance on the effective prosecution of the class action.

The court also has concerns about the effective operation of the notice and opt out procedure that underlies jurisdiction over absent class members in all class actions. *Montoya* highlights that the point of class notice is to permit individual class members to opt out and to pursue as individuals the claims that were pursued on their behalf in the class action. (46 Cal.App.5th at 500 and m 6.) *Montoya* states: "*Crown Cork* pointed to the need for *notice* to class members so they could decide to opt out if they wanted to. The whole point of getting notice the first time was to give class members the right to opt out, and that right to bring an individual claim would be meaningless if the statute of limitations had been allowed to run during the pendency of the class action." (46 Cal.App.5th at 500.) (See also *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812; *Eisen v. Carlisle andJacquelin* (1974) 417 U.S. 156, 176.)

***5** If there were no equitable tolling, then notices of class certification and notices of class action settlements would be inherently coercive because if individuals stayed in the class, then they could have the opportunity to be compensated for their claims in the entire class period but if they opted out to pursue individual claims then they could seek compensation only for claims within the statute of limitations for any newly filed individual claim. Stated otherwise, if there were no equitable tolling, then every court approved class notice that informed class members that they could opt-out and pursue their claims individually would be misleading, if not fraudulent, because a person who opted out could not actually pursue an individual case asserting the

same claims for the same damages. At its most extreme, an absent class member could get a court approved notice that they could opt out, they could opt out and promptly file a case, and then discover that their claim was time barred. That cannot be the law.

CALIFORNIA – EQUITABLE TOLLING WHERE FIRST CASE WAS NOT IN A CALIFORNIA STATE COURT

The court holds as a matter of law that for equitable tolling purposes it is immaterial whether the first individual or class case was filed in federal court and the second case was filed in a California court. The court does not adopt defendant's proposed limitation on "cross-jurisdictional equitable tolling."

Under California law, equitable tolling can apply when the defendant had timely notice of the claim through a prior civil action, through an administrative proceeding, or through a grievance procedure. If equitable estoppel applies in those varied situations, then equitable estoppel could apply if the plaintiff previously filed a case in federal court or in another state court or the plaintiff was previously a putative class member in a case in a federal court or the court of another state.

California case law has applied equitable tolling where the prior case was filed in a federal court. *In* *Addison v. State of California* (1978) 21 Cal.3d 313, the California Supreme Court applied equitable tolling to extend the stature of limitations where the plaintiffs first sought relief in federal court, which dismissed their suit for lack of jurisdiction, before filing their action in state court after the statute of limitations had expired. (*Addison*, 21 Cal.3d at 319.) Although the plaintiffs' first action was futile because of the federal court's lack of jurisdiction, the California Supreme Court reasoned that it "notified [defendants] of the action" and gave them "the opportunity to begin gathering their evidence and preparing their defense." (*Addison*, 21 Cal.3d at 319.) Similarly, in *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1339-1340, the Court of Appeal held that equitable tolling applied when there was a prior class action in a federal court.

Defendants argue that under California law equitable tolling does not apply when the first case was not a California case ("cross-jurisdictional tolling"). Defendants rely on *Clemens v. DaimlerChrysler Corp.* (9th Cir., 2008) 534 F.3d 1017, 1025, and *Hatfield v. Halifax PLC* (9th Cir. 2009) 564 F.3d 1177.

In *Clemens* and *Hatfield* the federal courts were trying to anticipate how a California court would apply California law. (*Erie R. Co. v. Tompkins* (1938) 304 U.S. 6.) As noted above, "A federal court sitting in diversity applies the substantive law of the state, including the state's statute of limitations" and that includes "a state's tolling rules" (*Albano v. Shea Homes Ltd. P'ship (9th Cir. 2011)* 634 F.3d 524, 530.) This court does not need to follow federal cases on matters of California law. Decisions by the lower federal courts "are neither binding nor controlling on matters of state law." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175.) This court is a California court and can apply California law based on California authorities. The court could end the analysis of the federal authorities at this point. In the interest of completeness, the court examines the how the federal authorities anticipated California law.

***6** Considering *Clemens* for its persuasive value, the federal court in *Clemens* relied on case law from other states and on federal cases anticipating the law of other states. The federal court cited to *Maestas v. SofamorDanek Group, Inc.* (Sup Ct. Tenn, 2000) 33 S.W.3d 805, 808-809, and to *Wade v. Danek Medical, Inc.* (4th Cir. 1999) 182 F.3d 281, 286-288. This court considers *Maestas* and *Wade* to be poorly reasoned.

In *Maestas* and *Wade* the courts reasoned that a state has no interest in whether the absence of equitable tolling would require plaintiffs to file protective individual claims in federal court or in the courts of other states and thereby burden the other courts. (33 S.W. at 808; 182 F.3d. at 287.) The comity principle requires that the court consider "considerations of mutual utility

and advantage." (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707.) The California state court system is distinct from federal courts and the courts of other states, but this court will not adopt an approach that is indifferent to, if not dismissive of, the resulting burden on judicial resources generally. The court would hope that "considerations of mutual utility and advantage" would persuade federal courts and the courts of other states would consider the burden on California courts just as this California court considers the burdens on those court systems and on California courts.

Maestas and *Wade* also reasoned that if equitable tolling applied then after a federal or out of state case was concluded then out of state people might forum shop for a longer statute of limitations, file in another state that had equitable tolling, and burden the courts of that state. This analysis seems to conflate issues. If Tennessee or Virginia residents who were putative members in a federal case later filed in Tennessee or Virginia then that is not a new burden on Tennessee or Virginia given that those persons could have earlier filed in Tennessee or Virginia. If out of state residents who were putative members in a federal case later filed in Tennessee or Virginia then that would be a burden on Tennessee or Virginia but the initial issue would be whether the case was properly in Tennessee or Virginia (jurisdiction, forum non conveniens). Assuming that jurisdiction was proper, then the court could turn to whether the claim was barred by the statute of limitation. If the state had a law comparable to California's CCP 361, then the applicable statute of limitations would be that of the plaintiff's state and the plaintiff would get no benefit from their forum shopping. (*State of Ohio ex rel. Squire v. Porter* (1942) 21 Cal.2d 45, 47 ["It is well settled that the statute of limitations of the forum governs the time for the commencement of an action arising in another state"].)

The federal court in *Hatfield* also seemed to conflate issues. *Hatfield* considered substantive California law under *Erie* and decided the case on what it thought would be California law. The *Hatfield* court started with the law that "California's borrowing statute [CCP 361] prevents non-residents from prosecuting an action in a California court where such action would be barred under the statute of limitations of the jurisdiction whose law would otherwise govern." The court then reasoned "If non-residents are denied the opportunity to take advantage where California law provides a longer statute of limitations for its citizens, they certainly should not be permitted to take advantage of the state's tolling doctrine, which lengthens that limitations period. Furthermore, allowing non-resident class members to pursue otherwise expired claims here would place a significant burden on California courts."

***7** *Hatfield's* concern that residents of other states might take advantage of California's law on tolling is reasonable, but stops one step short. If under CCP 361 the statute of limitations law of the other state applies, then that includes both the statute of limitations of the other state and the equitable tolling doctrine of the other state. This California court would not adopt the implication in *Hatfield* that under CCP 361 the court would use the statute of limitations of the other state and then apply California law on equitable tolling instead of applying the equitable tolling doctrines of the other state. To do so would be permit, if not encourage, rank forum shopping.

Hatfield's concern about the burden on California courts is the same as the concern in *Maestas* and *Wade* about the burden on Tennessee and Virginia courts. *Hatfield* held that if California residents who were putative members in the New Jersey case later filed in California then that is not an unreasonable burden on California because "California has a strong interest in providing a remedy for wrongs committed against its citizens." (564 F.3d at 1190.) *Hatfield* then held that California would not permit out of state persons to use California law on equitable tolling because the additional cases would be a burden on California courts. Again, the relevant issue would be whether the case is properly in California, not whether the claim is barred by the statute of limitation.

The court appreciates the concern in *Hatfield* about whether out of state parties could use California equitable tolling to burden California courts. California has tools to ensure that its courts are not burdened by out of state plaintiffs or nationwide cases. In cases by individuals, the court can consider motions to stay under forum non conveniens. (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464 ["The public interest factors include avoidance of overburdening local courts with congested calendars"].) In class actions, the court can consider whether to limit a putative class to California residents. (*Canon U.S.A.,*

Inc. v. Superior Court (1998) 68 Cal.App.4th 1, 7 [California has no "special obligation that would fairly call for this state to assume the burden of adjudicating this nationwide class action."].)

This California court will not consider the burden on the court when evaluating when and whether to apply equitable tolling. The California Supreme Court has been clear that court cannot alter the substantive law to make case or trial management more convenient. (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 34.) The court will not limit the application of equitable tolling as a means to limit the burden on the court.

Defendants also cited to *Patterson v. Novartis Pharmaceuticals Corp.* (2012) 909 F.Supp.2d 116, 121-123, which also discusses issues of cross-jurisdictional tolling, considered state substantive law under *Erie*, and decided that in the absence of state law that it would not presume that Massachusetts would recognize cross-jurisdictional equitable tolling. It raises the same issues as in the other federal cases.

CONCLUSION ON LEGAL ISSUES

The court holds as a matter of California law that equitable tolling can apply when a first individual or class case was filed in federal court and the second case was filed in a California court. This court must follow *Addison v. State of California* (1978) 21 Cal.3d 313, and *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1339-1340.) (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Those cases, however, did not expressly consider the policy implications of cross-jurisdictional tolling that have been explored in subsequent non-binding federal cases. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11.) *Montoya*, 46 Cal.App.5th at 504 fn 9 expressly stated "we do not address the issue of cross-jurisdictional tolling."

***8** Given the absence of clear California appellate authority, the court independently considers defendants' proposed limitation on "cross-jurisdictional equitable tolling." The court finds no basis in California law or equity for that limitation.

What is relevant to the equitable tolling analysis is (1) timely notice to the defendant; (2) lack of prejudice to defendant; and (3) reasonable and good faith conduct on part of plaintiff." (*Saint Francis Memorial Hospital v. State Department of Public Health* (2020) 9 Cal.5th 710, 724.) Under California case law, equitable tolling can apply when the defendant had timely notice of the claim through a prior civil action, through an administrative proceeding, or through a grievance procedure. If equitable estoppel applies in those varied situations, then equitable estoppel should apply if the plaintiff previously filed a case in federal court or in another state court or the plaintiff was previously a putative class member in a case in a federal court or the court of another state.

The considerations of judicial economy and efficiency suggest that the court not limit equitable tolling and thereby encourage absent class members to file unnecessary individual actions just to protect their statutes of limitation. This court tries to discourage unnecessary actions without regard to whether they would be in California courts, the courts of other states, or federal courts. *Addison*, 21 Cal.3d at 319, states, "[W]e discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since "duplicative proceedings are surely inefficient, awkward and laborious."

The effectiveness of the notice and opt out procedure in class actions suggests that the court apply equitable tolling so that when a court ordered notice tells an absent class member that they can opt out and pursue an individual claim that the absent class member can opt out and pursue the same claim with the same statute of limitation as the claim in the class case. This court is not inclined apply the law so that court ordered class notices to absent class members are coercive or misleading.

CALIFORNIA – APPLICATION OF LAW TO FACTS GENERALLY

The court considers the general equitable estoppel factors and the more specific *American Pipe, Crown Cork*, and *Jolly* factors.

Timely notice. For each claim, then court considers when Defendants were on notice of the relevant claim.

Lack of prejudice to defendants. Defendants have defended the claims now asserted in this case in the prior federal MDL proceeding. Following notice of the claims, the Defendants were aware of the claims and presumably have identified the relevant witnesses and maintained the relevant documents. The thorough factual statement in the summary judgment order in the federal MDL suggests that defendants have already collected and preserved much of the evidence that they need in this case. (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Ala., 2018) 308 F.Supp.3d 1241.) The court discusses the specific claims below.

Reasonable and good faith conduct on part of plaintiff. The federal MDL settled on a class basis, the court ordered class notice so that class members could opt out, and VHS opted out to pursue its individual claims. That is the way the system is supposed to work. (*Eisen v. Carlisle andJacquelin* (1974) 417 U.S. 156, 176; *Montoya*, 46 Cal.App.5th at 500.) Plaintiff VHS acted reasonably and in good faith.

***9** Protecting the efficiency and economy of litigation. This is factor in the *American Pipe, Crown Cork*, and *Jolly* analysis that is not a factor in the general equitable tolling analysis. The management of all the antitrust claims against defendants in the federal MDL furthered efficiency and economy. Plaintiffs' decision to rely on the prosecution of their claims by counsel representing the putative class in the federal MDL furthered efficiency and economy. It would have been a poor use of judicial resources to have required plaintiffs to file a redundant case in a California court years ago and to then stay the duplicative case pending the resolution of the MDL just to preserve the statute of limitations.

Protecting the defendant from unfair claims. This is factor in the *American Pipe, Crown Cork*, and *Jolly* analysis. This is the same as the "lack of prejudice to defendants" factor in the general equitable estoppel analysis.

SPECIFIC ORDERS

CALIFORNIA PROVIDER CLAIMS

On 7/24/12, Conway v. Blue Cross and Blue Shield of Alabama et al was filed and alleged subscriber claims. (Pltf RJN Exh 2.) Conway did identify Blue Cross and Blue Shield of California as a defendant. Although the claims were federal antitrust claims, they concerned the same right of action as California state antitrust claims. (*Ford Motor Co. v. Superior Court* (1973) 35 Cal.App.3d 676, 679.) Taking all factual inferences in favor of plaintiff, the court finds that the Blue Cross of California was put on notice of the provider claims as early as 7/24/12.

CALIFORNIA ASO CLAIMS

On 2/7/12, Cerven v. Blue Cross and Blue Shield of North Carolina was filed and alleged subscriber claims. (Def RJN Exh 1; Pltf RJN Exh 1.) This did not put any defendant on notice of Administrative Services Only ("ASO") claims under the California Cartwright Act.

In July 2019, the parties in the federal MDL realized the need for a subclass for ASO plaintiffs. (Pltf RJN 3 at p5.)

In November 2019, the parties in the federal MDL signed a term sheet for an agreement releasing that included the ASO claims. (Pltf RJN 3 at p5.)

On 10/16/20, the parties in the federal MDL signed a settlement agreement releasing that included the ASO claims.

On 11/2/20, the Fourth Amended Subscriber Complaint in the federal MDL was filed and was the first express assertion of the ASO claims in a filing.

On 10/21/21, The federal judge in the MDL stated that he was not aware that ASO claims were part of the case. (Def RJN H at 157:12-17) The federal judge in the final approval hearing on the MDL settlement stated that he was not making a decision on whether the ASO claims related back to filing of an earlier complaint. (Def RJN H at 151:2-6)

Taking all factual inferences in favor of plaintiff, the court finds that the Defendant Blues were put on notice of the ASO claims when the defendants in the federal MDL realized that plaintiffs were asserting claims on behalf of a subclass of ASO plaintiffs, which is July 2019 and for purposes of this order is July 15, 2019.

CALIFORNIA SUBSCRIBER CLAIMS

On 2/7/12, a plaintiff filed Cerven v. Blue Cross and Blue Shield of North Carolina alleging subscriber claims. Cerven did not identify Blue Cross and Blue Shield of California as a defendant. (Def RJN Exh 1; Pltf RJN Exh 1.) This did not put Blue Cross and Blue Shield of California on notice of subscriber claims under the California Cartwright Act.

On 3/29/13, a plaintiff filed Sheridan v. Blue Cross of California alleging subscriber claims. (Def RJN Exh J.) Sheridan did identify Blue Cross and Blue Shield of California as a defendant. This put Blue Cross of California on notice of subscriber claims under the California Cartwright Act. The proposed class in Sheridan was persons who purchased "individual or group full-service commercial health insurance." (Def RJN Exh J [Sheridan Cpt at para 28].)

***10** Taking all factual inferences in favor of plaintiff, the court finds that the Defendant Blues were put on notice of the California subscriber claims as early as when the Sheridan case was filed, which was 3/29/13.

There is a sub-issue of whether plaintiff purchased small group or large group insurance and whether Sheridan gave notice of claims for large group insurance. Plaintiffs do not specify whether they purchased small or large group policies. (Def Moving at 13:26-27) The Sheridan complaint referred repeatedly to "individuals and small groups." (Def RJN Exh J [Sheridan Cpt at para 125, 126, 129, 142, 159.) The parties did not provide the court with a complaint that on a specific date first clearly asserted subscriber claims based on large group insurance. The court does not decide the small or large group issue in this order.

ALABAMA LAW CLAIMS

Weaver v. Firestone (2013) 155 So.3d 952, 957, states, ""[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" as to the filing of his action." *White v. Sims* (Supr Ct. Ala 1985) 470 So.2d 1191, holds that the filing of a class action tolls the statute of limitations on claims by absent class members. *White* states: "We agree with the Supreme Court's analysis in *Crown* … Knowledge and reliance by unnamed class members has never been relevant in determining whether the statute of limitations is tolled during the pendency of a class action."

Alabama has a different standard than California for equitable tolling generally but is consistent with California law on *Applied Pipe* equitable tolling.

FLORIDA LAW CLAIMS

Madison Highlands, LLC v. Florida Housing Finance Corporation (2017) 220 So.3d 467, 472, states that equitable tolling applies "when a party "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum," provided that the opposing party will suffer no prejudice." In *Hromyak v. Tyco Intern. Ltd.* (Dist Ct Fla2006) 942 So.2d 1022, the court applied *American Pipe* and *Crown Cork* as Florida law and affirmed the trial court decision that they did not apply on the facts of that case.

Florida has a substantially similar standard as California for equitable tolling generally and is consistent with California law on *Applied Pipe* equitable tolling.

INDIANA LAW CLAIMS

Torres v. Parkview Foods (Ind Ct App 1984) 468 N.E.2d 580, states, "we hold that when in good faith a plaintiff brings an action in federal court within the statute of limitations, but it fails for lack of diversity jurisdiction, the statute of limitations is tolled with the filing of the suit for purposes of determining whether a subsequent state action involving the same parties and the same claims is brought within the statute of limitations." *Arnold v. Dirrim* (Ct App Ind., 1979) 398 N.E.2d 426, 439-440, adopted the reasoning of *American Pipe*. *Ling v. Webb* (Ct App Ind. 2005) 834 N.E.2d 1137, 1141-1142, refers to the "Class Action Tolling Rule" when referring to *American Pipe* and applies it to the facts of that case.

***11** Indiana has a substantially similar standard as California for equitable tolling generally and is consistent with California law on *Applied Pipe* equitable tolling.

RHODE ISLAND LAW CLAIMS

In *Polanco v. Lombardi* (Sup Ct. R.I. 2020) 231 A.3d 139, 155, the Rhode Island Supreme Court stated that equitable tolling is "is an exception to the general statute of limitations based upon principles of equity and fairness." *Polanco* states, "a prerequisite to this Court's extension of the statute of limitations based on equitable tolling is either a plaintiff who was not able to discover his or her injury despite diligent efforts or extraordinary circumstances that prevented a plaintiff from complying with the deadline despite using reasonable diligence." The parties did not identify, and the court has located, any Rhode Island case law on whether equitable tolling applies when a prior case, administrative proceeding or other proceeding puts a defendant on notice of a claim.

The parties did not identify and the court has located any Rhode Island case law on *American Pipe, Crown Cork*, and whether a class action tolls the statute of limitation for a later filed case.

Rhode Island law is not consistent with California law. In the presence of *Polanco*'s statement of Rhode Island law and in the absence of any Rhode Island case law indicating that equitable estoppel would apply when a prior case, administrative proceeding, or class action puts a defendant on notice of a claim, the court concludes that Rhode Island courts would not interpret equitable tolling to include *American Pipe* tolling.

FURTHER PROCEEDINGS

The court does not order the filing of a Second Amended Complaint at this time. In the interest of efficient case management the court expects to order that after the orders on the motion to strike, the demurrer, and the motions to quash set for 7/26/22 that the court will at that time order plaintiffs to file a Second Amended Complaint against the defendants who are subject to

the court's jurisdiction on the claims where the court has general or specific jurisdiction asserting the claims that survive the motion to strike and demurrer.

The court's order to delay the filing of a Second Amended Complaint in the interest of efficient case management is not an order staying discovery. The parties who have appeared in the case may pursue discovery and must respond to discovery on the claims and defenses in the case. (CCP 2025.210(b); 2030.020(b), 2031.020(b).) "Pleading deficiencies generally do not affect either party's right to conduct discovery [case] and this right (and corresponding obligation to respond) is particularly important to a plaintiff in need of discovery to amend its complaint [case]." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436 fh 3.)

Dated: June 1, 2022

<<signature>>

Evelio Grillo

Judge of the Superior Court

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