No. _____

In The Supreme Court of the United States

BRENT ANDREW BRACKETT ARBOGAST,

Petitioner,

v.

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

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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

TO THE HONORABLE KETANJI BROWN JACKSON, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioner respectfully requests a 60-day extension of time, up to and including Monday, March 3, 2025 to file a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. Petitioner seeks a review of that court's ruling in *Brent Andrew Brackett Arbogast v. Pfizer, Inc., as successor to Wyeth Pharmaceuticals; Sheehan, Phinney, Bass & Green, P.A.; John Brack; Kerri Lewandowski; Leigh Cowdrick; Michael J. Lambert; Thomas M. Closson*, No. 23-1481 (1st Cir. Jun. 20, 2024) (attached as Exhibit A, Electronic Case File (ECF) No. 6650132). The First Circuit issued its order on June 20, 2024, and denied rehearing en banc on October 4, 2024 (attached as Exhibit B, ECF No. 6672565). Absent an extension of time, the petition would be due on January 2, 2025. The jurisdiction of this court is based on 28 U.S.C. § 1254(1). This application is timely because it is filed more than 10 days prior to the date when the time to file a petition expires.

1. Although not considered directly related under Supreme Court Rule 14(1)(b)(iii), this case is connected to the original case, *Arbogast v. Wyeth*, No. 06-cv-10333-PBS (D. Mass. June 28, 2022) (hereinafter "Original Action"). The Original Action was filed on Petitioner's behalf without his knowledge or consent. This filing, apparently collusive, helped the employer, Wyeth, avoid compliance with a U.S. Department of Labor order requiring the reclassification of 156 employees and the

payment of back wages for their misclassification as exempt under the overtime provisions of the Fair Labor Standards Act (FLSA). The present case seeks to address and remedy the resulting issues from the Original Action.

2. The Petitioner seeks this Court's help in resolving a circuit split on whether claims brought pursuant to the FLSA can be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(1). Currently, several circuits require judicial approval of FLSA claims meaning they are not eligible for dismissal under Rule 41(a)(1). (See e.g., *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 11th Cir. 1982; *Samake v. Thunder Lube, Inc.*, 24 F.4th 804 (2d Cir. 2022); *Taylor v. Progress Energy*, 493 F.3d 454, 460 (4th Cir. 2007); *McConnell v. Applied Performance Techs., Inc.*, 98 *F. App'x* 397, 398 (6th Cir. 2004); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); *Seminiano v. Xyris Enter., Inc.*, No. 13-56133, 3-4 (9th Cir. May. 12, 2015); *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009)). In this case, the court recognized as valid a stipulation of dismissal filed by an employer defending an FLSA claim, despite the fact that the plaintiff neither authorized nor signed it (See Exhibit A at 2, 3; Order affirming judgment, which states that the Original Action concluded in 2007 when the stipulation was filed.) Because Rule 41(a)(1) explicitly states that only a plaintiff may dismiss a case by filing a stipulation of dismissal, this Court may also clarify whether the Rule permits such action by defendants.

3. The requirement that an individual must have an opportunity to be heard in a meaningful manner is well established. *Goldberg v. Kelly*, 397 U.S. 254

(1970). However, there is no uniform standard to distinguish between an opportunity that is truly meaningful and one that is not.

In this case, the First Circuit did not address a single argument that the Petitioner raised on appeal. These arguments included:

> i. **Res Judicata**: The doctrine of res judicata did not apply to the Petitioner's claims because no valid judgment exists from the original proceedings. (*See* Appellant's Brief, ECF No. 6596686, at 48-51).
>
> ii. **Fraudulent Concealment**: The statutes of limitation for the Petitioner's claims were tolled under Massachusetts' fraudulent concealment doctrine, codified at M.G.L. c. 260, § 12. (*Id.*, at 67-69).
>
> iii. **Conversion of Motion**: The motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should have been converted into a motion for summary judgment pursuant to Fed. R. Civ. P. 56. (*Id.*, at 72-73).
>
> iv. **Extension of Time**: The district court violated the Petitioner's due process rights by depriving him of the benefits of an extension of time to file an amended complaint, failing to notify him that the extension had been granted for good cause. (*Id.*, at 73-74).
>
> v. **Motion to Amend**: The district court abused its discretion by denying the Petitioner's single motion to amend his complaint. (*Id.*, at 76-77).
>
> vi. **Equitable Estoppel**: The defendants should have been equitably estopped from asserting the statute of limitations as a defense. (*See* Appellant's Reply, ECF No. 6608417, at 3, 11).

Instead of addressing the arguments raised by Petitioner on appeal, the First Circuit attributed to him a losing argument he did not make and ruled against him based on that misattribution. Currently, it would challenge principles of fairness to suggest that the Constitution permits an appellate court to disregard a party's legal arguments, mischaracterize the arguments made by Petitioner to them, and then rule against them on that basis not argued by Petitioner. Unless this Court

intervenes, the perception may arise that such practices are an acceptable standard of judicial procedure.

CONCLUSION

A complex fact pattern should not deter this Court from addressing important issues of federal law. However, as the Petitioner is representing himself and lacks the resources and expertise typically available to attorneys, additional time is necessary to prepare a filing that presents the issues with the clarity expected by this Court. Accordingly, Petitioner respectfully requests that the time to file a petition for a writ of certiorari be extended by 60 days, up to and including March 3, 2025.

Certification of Word Count

Pursuant to Supreme Court Rule 33.1(h), I certify that this document complies with the word limits set forth in the Rules of the Supreme Court. According to the word count feature of the software used to prepare this document, the total word count is 1,034 words, excluding the parts of the document exempted by Rule 33.1(d).

Certificate of Service

I, Brent Arbogast, certify that on December 10, 2024, I served a copy of the foregoing **Application for Extension of Time to File a Petition for a Writ of Certiorari** on the following parties by U.S. Mail, first-class, postage prepaid:

Benjamin R. Davis and Stephen T. Paterniti
JACKSON LEWIS P.C.

75 Park Plaza, 4th Floor
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Tel.: 617.367.0025

Attorneys for Pfizer, Inc., John Brack, Kerri Lewandowski, and Leigh Cowdrick

I, Brent Arbogast, certify that on December 10, 2024, I served a copy of the foregoing **Application for Extension of Time to File a Petition for a Writ of Certiorari** on the following parties by electronic mail:

Edwin F. Landers, Jr. and Linda M. Smith
Morrison Mahoney LLP
250 Summer Street
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Tel.: 617-439-7583
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Attorneys for Sheehan, Phinney, Bass & Green, P.A., Michael J. Lambert, and Thomas M. Closson.

Dated: December 10, 2024

Respectfully submitted,

/s/ Brent Arbogast

Brent Arbogast

Pro Se Petitioner

X Brent Arbogast

Brent Arbogast

Exhibit A

United States Court of Appeals
For the First Circuit

Nos. 23-1481
23-1591

BRENT ANDREW BRACKETT ARBOGAST,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

Before

Kayatta, Howard and Rikelman,
Circuit Judges.

JUDGMENT

Entered: June 20, 2024

These appeals, now consolidated, follow dismissal of a complaint, filed in the United States District Court for the District of Massachusetts, as time-barred and otherwise insufficient. Appeal 23-1481 concerns the district court's dismissal of the underlying action and the rulings leading thereto, and Appeal 23-1591 concerns the district court's disposal of post-judgment motions.

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

Plaintiff-appellant Brent Arbogast worked at a drug company (a predecessor to defendant-appellee Pfizer, Inc.) for approximately fourteen weeks in 2004. The company categorized him as

a salaried employee exempt from statutory overtime-pay requirements. Arbogast disputed this categorization and, after the company terminated his employment, he consulted with defendant-appellee Thomas Closson, a New Hampshire lawyer. Closson ultimately agreed to represent Arbogast and enlisted as local counsel defendant-appellee Michael Lambert, another New Hampshire attorney who had been admitted to the Massachusetts Bar.

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

In December 2018, Arbogast returned to Closson's office to review the materials in the litigation file. Arbogast's review led him to conclude that his lawyers had deliberately colluded with his former employer to sabotage his case and avoid any larger initiative against the former employer's illegal pay practices. In early December 2022, Arbogast returned to federal court pro se, seeking in the Original Action relief from the December 2007 judgment of dismissal. Shortly thereafter, he initiated a new action, filing a complaint to allege, inter alia, civil RICO violations by his lawyers and former employer (hereinafter, "the 2022 Action"). In the Original Action, Arbogast was denied relief from judgment. No appeal followed that denial. In the 2022 Action, the complaint, as amended, was dismissed as time barred under the applicable statutes of limitations, as to the attorney defendants, and was dismissed as barred by res judicata, as to the employer defendants. (The district court also held, in the alternative, that, with his complaint, despite all attempts at curative amendment, Arbogast failed to state claims against the attorney defendants on which relief could be granted.) Appeal 23-1481 followed.

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

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

A federal civil RICO claim generally accrues, triggering the start of the limitations clock, when the plaintiff knows or should know of his injuries. See Lares Grp., II v. Tobin, 221 F.3d 41, 44-45 (1st Cir. 2000).

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

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

Turning to Appeal 23-1591, following dismissal, Arbogast filed a series of post-judgment motions, seeking, among other things, relief from judgment and recusal of the presiding judge. We review the denial of these motions for abuse of discretion, which includes de novo review of embedded questions of law. See Groden v. N&D Transportation Co., Inc., 866 F.3d 22, 26 (1st Cir. 2017). We conclude that Arbogast's post-judgment motions were not meritorious, and the district court did not abuse its discretion when denying them. Cf. Panzardi-Alvares v. United States, 879 F.2d 975, 984 (1st Cir. 1989)("Prior adverse rulings alone cannot, of course, be the basis for a motion to recuse.").

In accordance with the foregoing, the rulings of the district court are **AFFIRMED**.

By the Court:

Maria R. Hamilton, Clerk

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

Exhibit B

United States Court of Appeals
For the First Circuit

Nos. 23-1481
23-1591

BRENT ANDREW BRACKETT ARBOGAST,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

Before

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

ORDER OF COURT

Entered: October 4, 2024

Following entry of judgment in this matter on June 20, 2024, Appellant Brent Arbogast has filed a "Motion for Reconsideration and Correction of the Record," an "Emergency Motion to Correct the Record," and a "Petition for Rehearing En Banc."

The motion to reconsider and correct is **DENIED.**

The "emergency" motion is **DENIED.**

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

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and

a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be **DENIED**.

By the Court:

Anastasia Dubrovsky, Clerk

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