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23 **IN THE UNITED STATES DISTRICT COURT**
24 **FOR THE DISTRICT OF ARIZONA**

25 ML SERVICING CO., INC., an Arizona
26 corporation; and ML LIQUIDATING
27 TRUST,

28 Plaintiffs,

vs.

GREENBERG TRAUIG, LLP, *et al*,

Defendants.

Case No. 2:11-cv-00832-DGC

**DEFENDANTS ROBERT S.
KANT AND ELLEN P. KANT'S
MOTION TO DISMISS**

INTRODUCTION

1
2 The case concerns the collapse of Mortgages Ltd., which, prior to its
3 bankruptcy in June 2008, was one of Arizona's oldest real estate lenders. Plaintiffs purport
4 to be successors-in-interest to Mortgages Ltd. for purposes of pursuing claims against
5 Mortgages Ltd.'s former outside professionals. Plaintiffs allege that Greenberg Traurig,
6 LLP ("GT") and one of its shareholders, Bob Kant ("Kant"), as outside securities counsel to
7 Mortgages Ltd., breached their fiduciary duties and committed legal malpractice that
8 prolonged Mortgages Ltd.'s operations, which in turn caused "hundreds of millions of
9 dollars" in damages to Mortgages Ltd.¹ This case is the latest attempt by Mortgages Ltd.'s
10 successors to assign blame to outside professionals for the bankruptcy of Mortgages Ltd.
11 during the collapse of the Arizona real estate market.

12 Plaintiffs' claims against the Kants are time-barred, and should be dismissed
13 with prejudice. The legal malpractice and breach of fiduciary duty claims that Plaintiffs
14 assert each carry a two-year statute of limitations. Although Plaintiffs entered into a tolling
15 agreement with GT, they never did so with the Kants. This Complaint was filed on **March**
16 **25, 2011**, almost three years after Kant engaged in all of the allegedly tortious conduct that
17 the Complaint identifies. Plaintiffs' own Complaint also makes clear that all of Kant's work
18 on Mortgages Ltd.'s securities offerings must have been completed no later than **June 20,**
19 **2008**, when Mortgages Ltd. entered bankruptcy. And, as set forth in greater detail below, by
20 **June 27, 2008**, a group of Mortgages Ltd.'s creditors filed a brief in the Mortgages Ltd.
21 bankruptcy that identified potential claims against GT related to its work on Mortgages
22 Ltd.'s securities offerings. *See* Opp. to Application for an Order Under 11 U.S.C. § 327(a)
23 Authorizing the Employment of Greenberg Traurig, LLP as Counsel to the Debtor, *In re*
24 *Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr. D. Ariz. June 27, 2008), Dkt. No. 60, at 5.

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27 _____
28 ¹ Kant's wife, Ellen Kant, is also named as a defendant, presumably due to Arizona's
community property laws, as there are no substantive allegations as to her.

1 Any claims Mortgages Ltd. had against the Kants thus accrued much more
 2 than two years before it filed suit. For the reasons stated below, Defendants Robert and
 3 Ellen Kant respectfully request that they be dismissed, with prejudice, from this lawsuit on
 4 the basis that all claims against them are barred by the statute of limitations.²

5 **FACTUAL BACKGROUND**³

6 Prior to its collapse, Mortgages Ltd. was one of Arizona's oldest private real
 7 estate lenders. *See* Compl. ¶ 15. During the relevant period, Mortgage Ltd. was run by its
 8 Chief Executive Officer, Scott Coles. *Id.* ¶ 16. Mortgages Ltd., through its registered
 9 broker-dealer Mortgages Ltd. Securities, offered to third-party investors the opportunity to
 10 purchase fractional interests in loans Mortgages Ltd. originated. *Id.* ¶¶ 18–19, 21. Investors
 11 could either purchase interests in particular loans directly or diversify their investments by
 12 purchasing interests in pools that owned shares of multiple loans. *Id.* ¶¶ 21, 22. Mortgages
 13 Ltd. would, in turn, loan those investors' money and its own to borrowers. *Id.* ¶ 19.
 14 Mortgages Ltd. also borrowed money to finance its business. *Id.* ¶¶ 26, 27.

15 In March 2006, Mortgages Ltd. retained GT and Kant to revise its private
 16 offering memoranda ("POMs") and advise it on other securities-related matters. *See* Compl.
 17 ¶¶ 45, 46. Beginning on May 15, 2006, Mortgages Ltd. issued eleven POMs on which Kant
 18 advised. *Id.* ¶¶ 51, 52. The last POM identified by the Complaint was issued by Mortgages
 19 Ltd. Securities in January 2008. *Id.* ¶ 102.⁴

21 ² As set forth in Defendants' Notice of Removal (Dkt. # 1), the Kants' inclusion in this case
 22 has consequences for the existence of diversity jurisdiction as well. Plaintiffs originally
 23 filed this action in state court. On April 25, 2011, GT removed this case to this Court based
 24 on, *inter alia*, federal diversity of citizenship jurisdiction. If the claims against the Kants are
 25 time-barred and subject to dismissal, then under the doctrine of fraudulent joinder, the Kants
 26 should be ignored for purposes of determining complete diversity under 28 U.S.C. § 1332.

27 ³ The facts described are as alleged in the Complaint, taken as true only for purposes of this
 28 motion.

⁴ Although it is not referenced specifically in the Complaint, Kant also advised Mortgages
 Ltd. on a revised Pass-Through POM in February 2008, which was actually the last POM

(Footnote Cont'd on Following Page)

1 In late 2006 or early 2007, Kant attended a meeting with representatives of a
2 company called Radical Bunny, which loaned money to Mortgages Ltd., and Coles. *See*
3 Compl. ¶ 63. The Complaint alleges that at this meeting Kant expressed concern that the
4 manner in which Radical Bunny raised money from its investors violated the securities law,
5 *id.* ¶¶ 72–73, and that Coles might receive negative press attention if Radical Bunny were to
6 be the subject of law enforcement action. *Id.* ¶¶ 74–75. The Complaint alleges that Kant
7 urged Radical Bunny’s representatives to correct their offerings in a manner that would
8 comply with the applicable rules, *id.* ¶ 81, and subsequently referred them to lawyers at
9 Quarles & Brady LLP, whom Radical Bunny later retained. *Id.* ¶¶ 105–106.

10 According to the Complaint, Kant met with Coles and Radical Bunny
11 representatives again in August 2007—this time with Radical Bunny’s attorneys from
12 Quarles & Brady present. *See* Compl. ¶ 113. The Complaint states that at this meeting
13 Kant advised Radical Bunny’s representatives that their operations ran afoul of the securities
14 laws. *Id.* ¶¶ 118–121. The Complaint further states that following this meeting, in late
15 2007, Kant worked on template offering materials that Radical Bunny could use with its
16 counsel, but these materials were never finalized or used. *Id.* ¶¶ 128, 130, 131. The
17 Complaint alleges that Kant failed to advise Mortgages Ltd. to disclose its business dealings
18 and borrowing relationship with Radical Bunny.

19 Separately, the Complaint alleges that in March 2008, Mortgages Ltd.
20 executive Robert Furst began raising “concerns about [Mortgages Ltd.’s] practices with
21 other members of [Mortgages Ltd.’s] senior management.” Compl. ¶ 146. Among the
22 concerns that Furst allegedly raised with other Mortgages Ltd.’s senior management were
23 (1) “the inadequacies in [Mortgages Ltd.’s] disclosures to its investors, including the
24 disclosures that had been prepared by GT and Kant,” and (2) “Mortgages Ltd./Radical
25 Bunny securities issues.” *Id.* ¶¶ 143, 148. On April 8, 2008, Kant and another attorney

26
27 (Footnote Cont’d From Previous Page)

28 issued by Mortgages Ltd. For purposes of this motion, however, it makes no difference
whether the last POM was issued in January or February.

1 from GT allegedly met with Furst and his attorney to discuss the allegations Furst had raised
2 with Mortgages Ltd. management. *Id.* ¶ 149. Furst was terminated from Mortgages Ltd.
3 soon thereafter, and an alleged role by Kant in that termination is the last event involving
4 Kant alleged in the Complaint. *Id.* ¶¶ 149, 150.

5 The Complaint identifies several notable events in June 2008. First, Coles
6 committed suicide on June 2, 2008. *See* Compl. ¶ 42. Second, by June 2, 2008, Mortgages
7 Ltd. had ceased soliciting or accepting new investors, *id.* ¶ 41, which meant that Mortgages
8 Ltd. Securities was no longer distributing any of the POMs on which Kant had advised.
9 Third, Radical Bunny also ceased doing business in June 2008. *Id.* ¶ 107. Fourth, on June
10 20, 2008, a group of Mortgages Ltd.'s borrowers filed a petition to place Mortgages Ltd.
11 into involuntary bankruptcy under Chapter 7 of the Bankruptcy Code. *Id.* ¶¶ 15, 200; *see*
12 *also* Involuntary Petition under Chapter 7, *In re Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr.
13 D. Ariz. June 20, 2008), Dkt. No. 1.⁵ Finally, on June 27, 2008, one of the creditors that
14 originally forced Mortgages Ltd. into involuntary bankruptcy made a filing in the
15 bankruptcy that identified the potential claims Mortgages Ltd. had against GT and Kant
16 based on their work on the POMs. *See* Opposition to Application for an Order Under 11
17 U.S.C. § 327(a) Authorizing the Employment of Greenberg Traurig, LLP as Counsel to the
18 Debtor, *In re Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr. D. Ariz. June 27, 2008), Dkt. No.
19 60, at 5. On April 16, 2010, GT entered into the tolling agreement with Plaintiffs, *see id.* ¶
20 14, followed by an amendment to that agreement effective December 9, 2010. The Kants
21 were not parties to that tolling agreement.

22 ARGUMENT

23 The Complaint alleges that Kant breached his professional duty to Mortgages
24 Ltd. in three primary ways: (1) that the POMs on which Kant advised Mortgages Ltd. from
25 May 2006 through early 2008 were inadequate and misleading; (2) that Kant did not stop his
26

27 ⁵ The Court may look to court filings as a matter of public record on a Rule 12(b)(6) motion.
28 *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) (court may consider matters of
public record).

1 client, Mortgages Ltd., from engaging in illegal conduct, including borrowing money from
2 Radical Bunny, or alternatively, did not withdraw from the representation if he did not
3 succeed; and (3) that Kant provided legal advice to Radical Bunny, whose interests were in
4 conflict with those of Mortgages Ltd.

5 All of the alleged facts underlying these three theories predate the
6 commencement of Mortgages Ltd's involuntary bankruptcy on June 20, 2008. *See* Compl. ¶
7 149 (last factual allegations involving Kant take place in April 2008). Moreover, all of
8 these alleged facts were known to Mortgages Ltd. at the time they occurred, and there is no
9 suggestion that Kant or GT attempted to conceal any of these facts from Mortgages Ltd.
10 The alleged damages arising from the alleged breaches—to the extent there were any—
11 occurred contemporaneously, and certainly no later than the end of June 2008. Indeed,
12 Plaintiffs implicitly acknowledge that Mortgages Ltd. was on notice of its claims as a result
13 of the bankruptcy proceeding initiated in June 2008. *Id.* ¶ 200 (“[Mortgages Ltd.] did not
14 and reasonably could not have discovered the harm it sustained as a result of GT and Kant’s
15 acts and omissions *until after [Mortgages Ltd.] was put into an involuntary bankruptcy*
16 *proceeding.*” (emphasis added)). Consequently, under Arizona law, Mortgages Ltd.’s legal
17 malpractice and breach of fiduciary duty claims against Kant accrued no later than the end
18 of June 2008, and the two-year statute of limitations applicable to these claims thus expired
19 by no later than the end of June 2010—long before the Complaint was filed.

20 **I. The Governing Two-Year Statutes of Limitation for Plaintiffs’ Claims Against**
21 **the Kants Have Expired.**

22 The Complaint alleges two counts as to both GT and the Kants—legal
23 malpractice and breach of fiduciary duty. Compl. ¶¶ 201–236. The statute of limitations in
24 Arizona for both legal malpractice and breach of fiduciary duty claims is two years. *See*
25 *Ariz. Rev. Stat. § 12-542; Keonjian v. Olcott*, 169 P.3d 927, 929 (Ariz. Ct. App. 2007);
26 *Mackenzie v. Leonard, Collins & Gillespie, P.C.*, 2010 WL 46789, at *3 (D. Ariz. Jan. 4,
27 2010). The statute of limitations for a legal malpractice or breach of fiduciary duty claim
28 begins to run when the cause of action accrues. *See Commercial Union Ins. Co. v. Lewis &*

1 *Roca*, 902 P.2d 1354, 1358 (Ariz. Ct. App. 1995) (citing Ariz. Rev. Stat. § 12-542). In
2 Arizona, these claims accrue when (1) “the client knew or should have known of his
3 attorney’s negligence,” and (2) “the plaintiff-client has sustained some injury or damaging
4 effect from the malpractice.” *Ariz. Mgmt. Corp. v. Kallof*, 688 P.2d 710, 712–13 (Ariz. Ct.
5 App. 1984); *see also CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 7 P.3d 979,
6 981–82 (Ariz. Ct. App. 2000) (applying same standard in analyzing accrual of breach of
7 fiduciary duty claim).

8 For a claim to accrue under Arizona law, the plaintiff must know, or
9 reasonably should know, of the facts giving rise to his or her claim. However, a plaintiff
10 “need not know *all* the facts underlying a cause of action to trigger accrual”; *Walk v. Ring*,
11 44 P.3d 990, 996 (Ariz. 2002) (en banc) (quoting *Doe v. Roe*, 955 P.2d 951, 961 (Ariz.
12 1998) (en banc)); rather, the plaintiff need only possess “knowledge that would put a
13 reasonable . . . client on notice to investigate,” *id.* at 998. Nor must the plaintiff appreciate
14 the legal significance of those facts in order for the statute of limitations to commence. *See*
15 *Little v. State*, 240 P.3d 861, 864–65 (Ariz. Ct. App. 2010) (rejecting plaintiff’s claim that
16 her medical malpractice claim did not accrue until she was told by an expert that her injuries
17 were the result of negligence). The relevant inquiry is at what point the plaintiff possesses
18 “a minimum knowledge sufficient to identify that a wrong occurred and caused injury.”
19 *Walk*, 44 P.3d at 996 (emphasis omitted) (quoting *Doe*, 955 P.2d at 961).

20 Where the lapse of the statute of limitations is obvious from the face of the
21 complaint, dismissal of the time-barred claims on a motion to dismiss is appropriate. *See,*
22 *e.g., Jablon v. Dean Witter & Co.*, 614 F. 2d 677, 682 (9th Cir. 1980).

23 **A. Mortgages Ltd. Had Knowledge of the Facts Giving Rise to Its Claims**
24 **Against Kant by the End of June 2008.**

25 Here, it is evident from the face of the Complaint that Mortgages Ltd. had knowledge
26 of its potential claims against Kant no later than the end of June 2008. According to the
27 allegations in the Complaint, by June 20, 2008: (1) Kant had drafted his last Mortgages Ltd.
28 POM, *see* Compl. ¶ 102; (2) Mortgages Ltd. Managing Director Robert Furst had become

1 “very concerned about the inadequacies in [Mortgages Ltd.’s] disclosures to its investors,
2 including the disclosures that had been prepared by GT and Kant,” had “prepared a
3 disclosure document that he proposed to include with all of [Mortgages Ltd.’s future
4 POMs],” and had begun “addressing his serious concerns about [Mortgages Ltd.’s] practices
5 with other members of [Mortgages Ltd.’s] senior management,” *id.* ¶¶ 143, 144, 146; (3)
6 Mortgages Ltd. was insolvent and had stopped making new loans, *id.* ¶¶ 38, 39; (4)
7 Mortgages Ltd. was forced into involuntary bankruptcy by its creditors, *id.* ¶ 161; (5)
8 Mortgages Ltd. was no longer raising money from investors or distributing the POMs
9 drafted by Kant, *id.* ¶ 41; and (6) Mortgages Ltd. was already aware of any role Kant had
10 played in meetings about Radical Bunny, and Mortgages Ltd. had ended its relationship
11 with Radical Bunny, *id.* ¶¶ 107, 193. With all of the alleged events underlying Plaintiffs’
12 claims unfolding on or before June 20, 2008, Mortgages Ltd. would have necessarily been
13 on notice of potential claims against Kant by that date.

14 In addition to knowing the facts underlying its theories against GT and Kant
15 by June 20, 2008—which suffices for its claims to have accrued—Mortgages Ltd. was also
16 directly informed that it might have claims against GT one week later. On June 27, 2008, a
17 group of creditors who forced Mortgages Ltd. into involuntary bankruptcy, filed a brief in
18 the Mortgages Ltd. bankruptcy that stated: “Greenberg also performed opinion work on
19 private offerings made by [Mortgages Ltd.] as recently as January 2008. . . . To the extent
20 any improprieties tainted these private offerings, [Mortgages Ltd.’s] estate may possess
21 claims against Greenberg for its work associated with same.” *See* Opposition to Application
22 for an Order Under 11 U.S.C. § 327(a) Authorizing the Employment of Greenberg Traurig,
23 LLP as Counsel to the Debtor, *In re Mortgages Ltd.*, No. 2:08-bk-07465 (Bankr. D. Ariz.
24 June 27, 2008), Dkt. No. 60, at 5. Thus, there can be no dispute that Mortgages Ltd. was on
25 notice of its claims against Kant by the end of June 2008—well over two years before the
26 filing of the Complaint.

1 **B. Mortgages Ltd.’s Damages, If Any, Were Appreciable by the End of June**
2 **2008.**

3 The second element of accrual of a legal malpractice claim is also present
4 here—namely, that the plaintiff must have sustained “some injury or damaging effect from
5 the malpractice; negligence alone is not actionable.” *Kallof*, 688 P.2d at 713. The plaintiff
6 “need not sustain *all* of its damages for a negligence claim to accrue,” *id.* at 714; rather,
7 “[a]ny appreciable and actual harm flowing from the attorney’s negligent conduct” will
8 suffice. *Id.* (quoting *Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971)) (emphasis added). As a
9 result, “[i]n the majority of malpractice cases, the damage or injury occurs
10 contemporaneously with the malpractice.” *Keonjian*, 169 P.3d at 930 (internal quotations
11 omitted).

12 Arizona courts have held that where, as here, the alleged attorney malpractice
13 took place in a transactional context, the resulting alleged damage is incurred by the plaintiff
14 upon execution of the transaction at issue. *See id.* at 929–30 (holding that any harm arising
15 from the negligent drafting of a deed “occurred at the moment [plaintiff] executed it”);
16 *Kallof*, 688 P.2d at 713–14 (holding that damages arising from attorney’s alleged negligence
17 in a drafting settlement agreement “occurred on the date the settlement agreement was
18 entered into”). Here, the last POM on which Kant advised was issued in February 2008, *see*
19 *supra* at n. 4, funds were allegedly raised using those POMs prior to June 2008, and the
20 Complaint acknowledges that as of Coles’s suicide on June 2, 2008, Mortgages Ltd. ceased
21 raising money from investors using the POMs on which Kant advised, *see* Compl. ¶ 41.
22 Therefore, under Plaintiffs’ theory, Mortgages Ltd. must have suffered damages or injury
23 from alleged deficiencies in the POMs by June 2008.

24 To the extent Plaintiffs are claiming independent injury based on Kant’s
25 interactions with Radical Bunny, the Complaint is clear that both Mortgages Ltd.’s
26 involvement with, and Kant’s advice with respect to, Radical Bunny had ended by June
27 2008, *see* Compl. ¶¶ 107, 131, 193, and any damages allegedly incurred by Mortgages Ltd.
28 as a result of its relationship with Radical Bunny occurred prior to Mortgages Ltd.’s

1 bankruptcy in June 2008, *id.* ¶ 220 (“[I]f GT and Kant had correctly and competently
2 performed all of the duties that they owed to ML, . . . [that] would have prevented ML from
3 substantially deepening its insolvency *between 2006 and 2008.*” (emphasis added)). The
4 Complaint advances no theory under which the fact of damage or injury would have become
5 ascertainable only after June 2008. Instead, Plaintiffs offer only the vague, conclusory
6 assertion that Mortgages Ltd. “did not and reasonably could not have discovered the harm
7 that it sustained as a result of GT and Kant’s acts and omissions until after ML was put into
8 an involuntary bankruptcy proceeding.” *Id.* ¶ 200. Even if conclusory legal assertions such
9 as this carried weight (which they do not, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
10 (2007)), Plaintiffs’ claims would nevertheless be time-barred unless they alleged that
11 Mortgages Ltd. somehow did not know of its alleged damage until some point after March
12 25, 2009—two years before the filing of the Complaint. Given Mortgages Ltd.’s
13 bankruptcy, this is impossible.

14 **C. There Was No Tolling of the Statute of Limitations for the Claims**
15 **Against the Kants.**

16 There is no tolling agreement between Plaintiffs and the Kants. Further, while
17 Arizona recognizes several common law tolling doctrines, none of them applies to these
18 facts. To the extent that Plaintiffs intend to argue that the “continuous representation” rule
19 should toll their claims against Kant based on GT’s representation of Mortgages Ltd. for a
20 time in its bankruptcy proceeding, such an argument runs contrary to established Arizona
21 precedent that the continuous representation rule only applies where the alleged malpractice
22 occurred in a litigation, as opposed to transactional, context. *See Commercial Union Ins.*,
23 902 P.2d at 1360 (“It is only in the context of litigation . . . that accrual of the cause of
24 action is deferred until the litigation in which the malpractice arose is finally resolved.”);
25 *Cannon v. Hirsch Law Office, P.C.*, 213 P.3d 320, 323 (Ariz. Ct. App. 2009) (continuous
26 representation doctrine only applies to claims arising from malpractice “during the course of
27 litigation” (internal quotation marks omitted)); *Kallof*, 688 P.2d at 714. Here, the only
28

1 allegations in the Complaint as to Kant relate to his corporate work on behalf of Mortgages
2 Ltd. Thus, the continuous representation rule has no application here.

3 * * *

4 Because Mortgages Ltd. had knowledge of its claims against Kant by the end
5 of June 2008 (more than two years before the filing of the Complaint), and because,
6 according to Plaintiffs' theory of recovery, harm or injury to Mortgages Ltd. was
7 ascertainable by that point, if not earlier, Plaintiffs' claims against the Kants are barred by
8 the applicable two-year statute of limitations and should be dismissed.

9 **CONCLUSION**

10 For the foregoing reasons, Robert and Ellen Kant respectfully request that the
11 Court dismiss them with prejudice from this action pursuant to Federal Rule of Civil
12 Procedure 12(b)(6) based on Plaintiffs' failure to state a claim against them.

13
14 Respectfully submitted,

15 **GALBUT & GALBUT, P.C.**

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24 *Attorneys for Greenberg Traurig LLP and
25 Robert and Ellen Kant*

26 Dated: May 2, 2011
27
28

NOTICE OF ELECTRONIC FILING

I hereby certify that on May 2, 2011, I electronically filed the foregoing with the Clerk of Court for filing and uploading to the CM/ECF system which will send notification of such filing to all parties of record.

/s/ N. Sunshine Nye