18-3278-cv(L)

18-3322-cv(CON), 18-3325-cv(CON), 18-3326-cv(CON), 18-3327-cv(CON), 18-3328-cv(CON), 18-3330-cv (CON)

In the

United States Court of Appeals

For the Second Circuit

WILLIAM ALBERT HAYNES, III, JOSEPH M. LAURINAITIS, AKA Road Warrior Animal, RUSS MCCULLOUGH, individually and on behalf of all others similarly situated, AKA Big Russ McCullough, RYAN SAKODA, individually and on behalf of all others similarly situated, MATTHEW ROBERT WIESE, individually and on behalf of all others similarly situated, AKA Luther Reigns, EVAN SINGLETON, VITO LOGRASSO, CASSANDRA FRAZIER, Individually and as next of kin to her deceased husband, NELSON LEE FRAZIER, JR. a/k/a Mabel a/k/a Viscera a/k/a Big Daddy V a/k/a King Mabel

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court for the District of Connecticut

BRIEF OF DEFENDANTS-APPELLEES WORLD WRESTLING ENTERTAINMENT, INC. AND VINCENT K. MCMAHON

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and as personal representative of The Estate of NELSON LEE FRAZIER, JR., Deceased, SHIRLEY FELLOWS, on behalf of Estate of TIMOTHY ALAN SMITH a/k/a Rex King, PAUL ORNDORFF, AKA Mr. Wonderful, CHRIS PALLIES, AKA King Kong Bundy, ANTHONY NORRIS, AKA Ahmed Johnson, JAMES HARRIS, AKA Kamala, KEN PATERA, BARBARA MARIE LEYDIG, BERNARD KNIGHTON, as Personal Representative of Estate of BRIAN KNIGHTON, a.k.a. Axl Rotten, MARTY JANNETTY, TERRY SZOPINSKI, AKA Warlord, SIONE HAVIA VAILAHI, AKA Barbarian, TERRY BRUNK, AKA Sabu, BARRY DARSOW, AKA Smash, BILL EADIE, AKA Ax, JOHN NORD, JONATHAN HUGGER, AKA Johnny the Bull, JAMES BRUNZELL, SUSAN GREEN, ANGELO MOSCA, AKA King Kong Mosca, JAMES MANLEY, AKA Jim Powers, MICHAEL ENOS, AKA Mike, AKA Blake Beverly, BRUCE REED, AKA Butch, SYLAIN GRENIER, OMAR MIJARES, AKA Omar Atlas, DON LEO HEATON, AKA Don Leo Jonathan, TROY MARTIN, AKA Shane Douglas, MARC COPANI, AKA Muhammad Hassan, MARK CANTERBURY, AKA Henry Godwin, VICTORIA OTIS, AKA Princess Victoria, JUDY HARDEE, JUDY MARTIN, TIMOTHY SMITH, AKA Rex King, TRACY SMOTHERS, AKA Freddie Joe Floyd, MICHAEL R. HALAC, AKA Mantaur, RICK JONES, AKA Black Bart, KEN JOHNSON, AKA Slick, GEORGE GRAY, AKA One Man Gang, FERRIN JESSE BARR, AKA J.J. Funk, ROD PRICE, DONALD DRIGGERS, RODNEY BEGNAUD AKA Rodney Mack, RONALD SCOTT HEARD, on behalf of Estate of RONALD HEARD also known as Outlaw Ron Bass, BORIS ZHUKOV, DAVID SILVA, JOHN JETER, AKA Johnny Jeter, GAYLE SCHECTER, as Personal Representative of Estate JON RECHNER a.k.a. Balls Mahoney, ASHLEY MASSARO, AKA Ashley, CHARLES WICKS, AKA Chad Wicks, PERRY SATULLO, AKA Perry Saturn, CHARLES BERNARD SCAGGS, AKA Flash Funk, CAROLE M. SNUKA, on behalf of Estate of JAMES W. SNUKA,

Consolidated Plaintiffs-Appellants,

KYROS LAW P.C., KONSTANTINE W. KYROS,

Appellants,

JIMMY SNUKA, "Superfly," by and through his guardian, CAROLE SNUKA, SALVADOR GUERRERO, IV, AKA Chavo Guerrero, Jr., CHAVO GUERRERO, SR., AKA Chavo Classic, BRYAN EMMETT CLARK, JR., AKA Adam Bomb, DAVE HEBNER, EARL HEBNER, CARLENE B. MOORE-BEGNAUD, AKA Jazz, MARK JINDRAK, JON HEIDENREICH, LARRY OLIVER, AKA Crippler, BOBBI BILLARD, LOU MARCONI, BERNARD KNIGHTON, KELLI FUJIWARA SLOAN, on behalf of Estate of HARRY MASAYOSHI FUJIWARA,

Consolidated-Plaintiffs,

– v. –

WORLD WRESTLING ENTERTAINMENT, INCORPORATED,

Consolidated Plaintiff-Defendant-Appellee,

VINCENT K. MCMAHON, Individually and as The Trustee of the Vincent K. McMahon Irrevocable Trust U/T/A dtd. June 24, 2004, as the Trustee of the Vincent K. McMahon 2008, and as Special Trustee of the Vincent K. McMahon 2013 Irrev. Trust U/A dtd. December 5, 2013 and as Trust,

Consolidated Defendant-Appellee,

ROBERT WINDHAM, THOMAS BILLINGTON, JAMES WARE, OREAL PERRAS, JOHN DOE'S, VARIOUS,

Consolidated-Defendants.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee World Wrestling Entertainment, Inc. ("WWE") is a publicly traded corporation with no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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COUNTER-STATEMENT OF JURISDICTION

For the reasons stated herein, the District Court lacked subject matter jurisdiction over the wrongful death claims in the *Frazier* and *Laurinaitis* cases and the declaratory judgment, misclassification, and RICO claims in the *Laurinaitis case.* (*See* Argument §§ III.A.2.b; V.B.1-2; V.B.6, *infra*.) For the reasons stated in WWE's pending motions to dismiss, this Court lacks appellate jurisdiction over the appeals in the *Haynes*, *LoGrasso*, *Frazier*, and *McCullough* cases and of the sanctions orders in the *LoGrasso* and *Laurinaitis* cases.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the District Court's judgments should be affirmed as to claims that Appellants have abandoned on appeal.

2. Whether the District Court properly granted summary judgment on the fraud by omission claims in the *LoGrasso* case.

3. Whether the District Court properly dismissed the claims in the *Laurinaitis* case because they are time-barred and Appellants failed to plausibly allege any basis for tolling.

4. Whether the District Court's dismissal of the claims in the *Haynes, McCullough,* and *Frazier* cases can be affirmed on the alternative ground that they are time-barred and Appellants failed to plausibly allege any basis for tolling.

5. Whether the District Court properly dismissed the wrongful death claim in the *Frazier* case.

6. Whether the District Court properly dismissed the fraudulent deceit and negligent misrepresentation claims in the *Haynes* and *McCullough* cases.

7. Whether the District Court properly dismissed the unconscionable contracts claim in the *Laurinaitis* case.

8. Whether the District Court's dismissal of the other claims in the *Laurinaitis* case on limitations grounds can be affirmed on the alternative ground that they fail to state a claim and are substantively deficient.

9. Whether Attorney Kyros demonstrated any abuse of discretion in the sanctions orders against him.

INTRODUCTION

After devising an internet-based scheme to solicit former wrestlers to sue WWE in the hopes of replicating the settlement by the NFL in the class action case against it over chronic traumatic encephalopathy ("CTE"), the lead counsel for Appellants, Konstantine Kyros ("Kyros"), filed three duplicative class action cases and two wrongful death cases against WWE asserting tort claims centered on CTE. He then filed a mass action lawsuit involving 60 different plaintiffs which asserted the same kind of tort claims, and a motley assortment of other stale claims. All the cases were consolidated below.

It is undisputed that Connecticut's limitations statutes govern, including its three-year statute of repose for all tort claims. Of the 67 Appellants, 66 present claims time-barred on the face of the respective complaints, with only Evan Singleton presenting a timely, albeit meritless, fraudulent omission claim. One Appellant ceased performing in the 1970s. Thirteen ceased performing in the 1980s. Nineteen ceased performing in the 1990s. Thirty-three ceased performing between 2000-2010.

None of the Appellants plausibly pled facts satisfying basic requirements of the two tolling doctrines they rely on before this Court, which are fraudulent concealment and continuous course of conduct tolling. Both doctrines require each person seeking tolling to show acts by WWE within the three-year limitations

period for tort claims following their respective departures from WWE, which by definition involved different time periods for each Appellant. Additionally, no Appellant plausibly pled diligence during the time each seeks to have limitations tolled. Indeed, the District Court's final opinion on repose issues specifically found that Kyros lacked a good faith basis to even assert that Appellants could not, in the exercise of diligence, uncover information about CTE or its potential causes in light of widely publicized information in September 2007 regarding the findings of CTE in former wrestler Chris Benoit (the "2007 Benoit CTE Reports"). This Court can also take judicial notice of that widespread, publicly-available information.

Stripped to its essence, Appellants take the position that there is no repose for fraudulent omission claims and, in doing so, ignore a controlling recent decision of the Connecticut Supreme Court and base their argument on prior decisions which were expressly limited to product liability cases in the recent decision they ignore. For these and other reasons set forth herein, all dismissals should be affirmed.

COUNTER-STATEMENT OF THE CASE

I. The Initial Forum Shopping

On October 23, 2014, Kyros filed a class action complaint against WWE in Oregon on behalf of Billy Jack Haynes, who last performed for WWE in 1988 ("*Haynes Action*").

On January 16, 2015, Kyros filed a duplicative class action on behalf of Vito LoGrasso and Evan Singleton in Pennsylvania ("*LoGrasso Action*"). LoGrasso last performed for WWE in 2007, and Singleton on September 27, 2012. Both plaintiffs had contracts containing forum selection clauses requiring the litigation to be in Connecticut. The Pennsylvania court enforced the forum selection clauses and transferred the *LoGrasso Action* to Connecticut.

On February 18, 2015, Kyros filed a wrongful death lawsuit on behalf of the estate of Nelson Frazier in Tennessee ("*Frazier Action*"). Frazier last performed for WWE on March 11, 2008 and also agreed to a Connecticut forum selection clause. Frazier died of a heart attack on February 18, 2014.

On April 9, 2015, Kyros caused to be filed another duplicative class action in California on behalf of Russ McCullough, Ryan Sakoda and Matthew Wiese ("*McCullough Action*"). Those three plaintiffs last performed for WWE in 2001, 2004 and 2005, respectively, and also agreed to a Connecticut forum selection clause.

On June 2, 2015, Kyros mailed letters to WWE threatening litigation on behalf of four different performers. Those performers, and the dates they last performed for WWE were Robert Windham (1987), Thomas Billington (1988), James Ware (1999) and Oreal Perras (decades prior).

II. The Initial Admonitions By The District Court

On June 8, 2015, the District Court held a status conference in the *LoGrasso Action*. During that conference, the Court was advised of the motions to have all the cases transferred to Connecticut and the associated repose issues. The Court was also advised of significant problems with the *LoGrasso* complaint, including an allegation that WWE had caused the death of the plaintiffs, both of whom were alive.

Upon inquiry from the Court, Kyros was not prepared to state why limitations did not apply and did not identify any known tolling doctrine. (A1754-1758.)[1] The Court then instructed Kyros to research and present claims that were not patently time-barred, and to amend the *LoGrasso* complaint to comply with the Court's instructions. (A1768-1773.)

[1] WWE is filing a Supplemental Appendix and Confidential Supplemental Appendix with its Brief. The page numbers for each continue sequentially from the last page of Appellants' Appendix and Confidential Appendix, respectively, and use the same prefixes—"A" for the Supplemental Appendix; "CA" for the Confidential Supplemental Appendix.

III. Additional Forum Shopping And Transfer Orders

On June 25, 2015, the Oregon court found that Kyros had been forum shopping and transferred the *Haynes Action* to Connecticut. The next day, June 26, 2015, Kyros filed another wrongful death case in Texas regarding the death of Matthew Osborne, who died in 2013 of a drug overdose two decades after he last performed for WWE ("*Osborne Action*"). Osborne had also agreed to a Connecticut forum selection clause.

On June 29, 2015, WWE brought an action in the Connecticut federal court against the four performers identified in Kyros' letters of June 2, 2015 seeking a declaration that their claims were time-barred ("*Windham Action*").

All of the lawsuits filed by Kyros were transferred to Connecticut and consolidated.

IV. The Defined Nature Of The Lawsuits

The lawsuits specifically defined the focus of the claims. Concussions were said to produce symptoms that "are often sensory and manifest immediately." (A83 ¶ 34; A129 ¶ 35.) Post-concussion syndrome involved symptoms which may not be noticed for days or months after the injury, or which remain after a concussion "for days, weeks or even months." (A82 ¶ 29; A126 ¶ 29.) CTE was alleged to be a neurodegenerative disease that manifested years later and which could only be diagnosed post-mortem. (A83 ¶ 34; A129 ¶ 35.) The relevant

injuries were specifically alleged to be concussions and CTE. (A81, ¶ 25; A125 ¶ 25; A196 ¶ 26.) The other key allegation in the lawsuits, made after the District Court told Kyros to check his allegations for accuracy, was that "[s]pecifically, WWE was aware in 2005 and beyond that wrestling for the WWE and suffering head trauma would result in long-term injuries." (A134 ¶ 56; A205 ¶ 57.) As support for that allegation, the complaints cited to a February 17, 2005 Mayo Clinic article. (A134 n.20; A205 n.20.)

The District Court defined the scope of discovery based on Appellants' allegations. On January 15, 2016, the District Court entered an order directing the parties to proceed with discovery in the *LoGrasso Action* relevant to (1) whether WWE had or should have had knowledge of and owed a duty to disclose to those plaintiffs the risks of long-term degenerative neurological conditions resulting from concussions or mild traumatic brain injuries to wrestlers who performed for WWE in the year 2005 or later; (2) whether and when WWE may have breached that duty, and (3) whether such a breach, if any, continued after Singleton and LoGrasso ceased performing for WWE. (A1777.)

Still later, when Kyros sought discovery broader than the issues framed by the complaints, the District Court ruled that "[t]his case is not about concussion prevention" and "[d]iscovery of information and production of documents which merely reflect a desire to limit concussions and prevent injury to WWE talent—or

specific incidences of head trauma occurring during WWE activities are not relevant, nor would such discovery be proportional. Rather, the sole remaining claim concerns an allegation of fraudulent non-disclosure of knowledge of a link between wrestling activity and permanent degenerative neurological conditions." (A1780.) As for pre-2005 discovery, the District Court held that "Plaintiffs have not presented any factual predicate whatsoever entitling them to discover documents or information dated prior to the year 2005 and absent such a factual predicate Plaintiffs motion to compel is denied on that issue." (A1781.)

V. The Initial Decision On Dispositive Motions

On March 21, 2016, the Court issued its initial decision on the Motions to Dismiss in the *Haynes*, *LoGrasso,* and *McCullough Actions*. (SPA1-71.) The Court dismissed all claims, including claims sounding in negligence,[2] except for a single fraudulent omission claim of Singleton and LoGrasso. (*Id.*) The Court focused on the allegation that WWE was specifically aware "in 2005 and beyond" that wrestling for WWE and suffering head injuries would result in long-term

[2] The negligence claims were dismissed on the authority of *Jaworski v. Kiernan*, 241 Conn. 399 (1997), holding that participants assume the risks of injuries inherent in the athletic endeavor in question. (SPA47-54.) Appellants have not argued on appeal that it was error to dismiss negligence claims in any of these cases, and no negligence claim was contained in the operative complaint dismissed in the *Laurinaitis Action*. Thus, there is no challenge on this appeal to the dismissal of negligence claims.

injuries. (SPA9, 67-68.) Because Singleton and LoGrasso both wrestled on or after 2005, their claims for fraudulent omission were allowed to proceed. (SPA68.) The same claims by Haynes and the plaintiffs in the *McCullough Action* were dismissed since all had finished performing prior to 2005. (SPA14-16, 68-69.) As to the repose issue, the Court noted the contradiction in the fraud claims because plaintiffs alleged widely publicized information linking concussions to permanent degenerative conditions yet at the same time claimed they had no knowledge of it. (SPA31-32.) Nevertheless, the Court construed the complaint in favor of LoGrasso as plausibly alleging either continuing conduct tolling or fraudulent concealment tolling. (SPA33.)

VI. The Filing Of The Mass Action Complaint

On July 18, 2016, Kyros filed a mass action complaint on behalf of dozens of former WWE performers ("*Laurinaitis Action*"). (No. 3:16-cv-01209, Doc. 1.) None of the plaintiffs had performed for WWE within three years of the time suit was filed. In addition to the stale tort claims, stale claims were asserted for the first time based on alleged misclassification as independent contractors, for 50% of the revenue earned by WWE on its network, and a host of other misjoined claims. (*Id.*) No attempt was made to plead a tolling basis for each plaintiff. Instead, the complaint alleged that WWE was equitably estopped from raising limitations. (*Id.* at ¶¶ 606-56.) Reams of allegations from the complaint against the NFL were

simply plagiarized and attributed to WWE. (A1784-1830.) Words spoken by Roger Goodell to NFL players cited in the NFL complaint were falsely attributed to WWE, followed by false allegations that WWE supposedly made the statement for wrestlers to rely upon. (A1817 ¶ 506.) Studies published by NFL doctors in medical journals downplaying the risks of concussions were alleged to have been published by WWE. (A1816 ¶ 503, A1826 ¶ 548.) At the same time these and other Rule 11 violations were becoming manifest, compulsion orders in the *LoGrasso Action* were being defied by Kyros.

VII. The Sanctions Motion in the *LoGrasso Action*

On August 8, 2016, WWE moved for sanctions under Rule 37 in the *LoGrasso Action* for the willful failure to comply with a compulsion order to respond to interrogatories establishing that key allegations in the *LoGrasso* complaint were fabricated. (No. 3:15-cv-01074, Doc. 198.)

VIII. The Dismissal Of The *Frazier* and *Osborne Actions*

On November 10, 2016, the Court granted WWE's motions to dismiss the *Frazier* and *Osborne Actions*. (A1831-1858.) The Court dismissed the *Osborne Action* because the plaintiff lacked standing.[3] (A1844-1846.) As to the *Frazier Action*, the Court noted that Kyros had consistently alleged that CTE could only be

[3] No appeal has been taken from that decision.

diagnosed by a post-mortem examination of brain tissue and that Frazier had been cremated without such an analysis. (A1847-1848.) The Court reasoned that it was therefore not plausible to allege that he had CTE. (A1848.) The Court further noted there was no allegation that his heart failure could be attributable to a degenerative brain disease. (A1848-1849.) The Court noted Kyros' habit of deceptive pleadings, and cautioned him to adhere to the standard of professional conduct lest he risk future sanctions. (A1853-1858.)

IX. Sanctions Motions In The *Laurinaitis Action*

WWE filed motions to dismiss and for sanctions regarding the complaint in the *Laurinaitis Action*. (No. 3:15-cv-01074, Doc. 228 & 232.) WWE documented the massive plagiarism of the NFL Complaint and numerous other Rule 11 issues. (No. 3:15-cv-01074, Doc. 229.) Kyros then filed an amended complaint which did not cure the Rule 11 issues. (No. 3:15-cv-01074, Doc. 252.) WWE again moved to dismiss and for Rule 11 sanctions on December 23, 2016. (No. 3:15-cv-01074, Doc. 262 & 263.)

By order dated November 4, 2016, the Court referred the Rule 37 sanction motion in *LoGrasso Action* and the original Rule 11 motion in the *Laurinaitis Action* to Magistrate Judge Richardson. (No. 3:15-cv-01074, Doc. 249.)

X. The Court's Interim Order in the *Laurinaitis* and *Windham Actions*

On September 29, 2017, the Court issued an interim order on the pending motions of WWE to dismiss the *Laurinaitis Action*; for judgment on the pleadings in the *Windham Action*; and on the Rule 11 motion in the *Laurinaitis Action* directed at the original complaint. (SPA120-141.) The Court reserved judgment on those motions pending Kyros' compliance with the detailed order issued that day. (SPA121, 139-141.) The Court also reiterated its prior decision establishing that a tolling vehicle would be necessary to defeat repose. (SPA132-138.) The Court emphasized that the case was about whether WWE knew as early as 2005 that research linked repeated brain trauma with permanent degenerative brain disorders. (SPA136-137.) The Court noted that none of the lawsuits plausibly alleged that WWE knew of such a link before 2005 and failed to disclose that knowledge. (SPA135-136.) The Court further noted that, in then pending summary judgment papers in the *LoGrasso Action,* plaintiffs' counsel's submissions were "devoid of any admissible evidence that a particular agent of WWE knew before 2005 that wrestling could cause a long-term degenerative neurological condition." (SPA137.)

As to the *Laurinaitis Action*, the Court noted that Kyros had filed a 335-page complaint with inaccurate, irrelevant or frivolous allegations that failed to specify which claims applied to which plaintiffs or how or why they did apply. (SPA126-

127.) The Court further noted that it had been applying a liberal pleading standard more suited to a *pro se* plaintiff than to a licensed attorney. (SPA138.) Thus, the Court reserved judgment on the motions pending the filing of an amended complaint and the filing of affidavits *in camera* by each plaintiff containing detailed information required by the Court to determine if Rule 11 had been satisfied. (SPA139-141.)

XI. The Sanctions Ruling in the *LoGrasso Action*

On February 22, 2018, Magistrate Richardson ruled on the sanctions motion in the *LoGrasso Action*. (SPA142-159.) The Court noted that the deficient responses went to the heart of plaintiffs' claims in that they sought to establish what information plaintiffs contend was known to WWE and how plaintiffs relied upon such information. (SPA150-155.) Magistrate Richardson recommended that Kyros and his firm pay WWE's legal fees in connection with the motion and warned Kyros that any further dishonesty should lead to dismissal. (SPA158-159.)

On July 22, 2018, Judge Bryant adopted the Recommended Rulings. (SPA181-190.)

XII. Summary Judgment in the *LoGrasso Action*

On March 28, 2018, the Court granted summary judgment to WWE on the sole remaining fraudulent omission claim by the two plaintiffs in the *LoGrasso Action*. (SPA160-180.) The Court ruled that Kyros' Rule 56(a)(2) statement was

rife with mischaracterizations of the evidence. (SPA161.) The Court found there was no evidence that WWE knew of a risk of permanent degenerative conditions prior to September 5, 2007, when the 2007 Benoit CTE Reports were widely revealed in the media. (SPA173.) The Court noted that LoGrasso was aware of the Benoit CTE diagnosis. (SPA169, 173.) Hence, the Court found that no reasonable jury could find that WWE concealed the fact of Benoit's diagnosis from LoGrasso and there was no evidence WWE fraudulently concealed any cause of action from LoGrasso. (SPA174.) The Court held his claim was time-barred and that his fraud claim would not survive anyway because the undisputed evidence established that WWE did not know of any link between concussions and permanent neurological disorders until after LoGrasso stopped wrestling for WWE. (SPA177.)

As to Singleton, the Court noted the educational training WWE gave to its talent after the 2007 Benoit CTE Reports and that Singleton was instructed to attend a presentation prior to his injury, which was a single concussion. (SPA169-170, 178-179.) The Court ruled that holding educational sessions where it is explained that repeated concussions can cause CTE is not consistent with fraudulent intent to withhold such information to induce Singleton to continue wrestling, and dismissed his claim. (SPA179.)

XIII. The Dismissal And Sanctions Order In the *Laurinaitis Action*

On September 17, 2018, the Court issued its final order in the consolidated cases granting judgment on the pleadings in the *Windham Action*; granting the motion to dismiss the *Laurinaitis Action* in its entirety; and granting Rule 11 sanctions against Kyros for all the legal fees incurred by WWE in connection with both Rule 11 motions. (SPA191-230.) The Court found that the affidavits submitted by Kyros had not complied with the September 29, 2017 order. (SPA193.) That ruling is not contested on appeal. The Court extensively reviewed the litigation misconduct of Kyros. (SPA193-199, 201-204, 223-228.) Having done so, the Court turned to the substantive motions.

As to the *Windham Action*, the Court found that the wrestlers had not pled facts that would justify tolling of periods of limitation and repose. (SPA208-209.) No appeal has been taken from that ruling. As to the *Laurinaitis Action*, the Court noted that no plaintiff alleged a head injury while wrestling later than 2011, and that suit was filed on July 18, 2016. (SPA212.) The Court then found that all the tort claims, wrongful death claims, misclassification claims, ERISA claims, RICO claims, FMLA claims, and successor liability claims were time-barred. (SPA212-217.) The Court held that the unconscionability claims were frivolous. (SPA218-219.) The Court found that no tolling exception applied (SPA219-223), and made a key Rule 11 finding that Kyros lacked a good faith basis for asserting that

plaintiffs could not in the exercise of due diligence uncover information after 2007 about CTE or concussion risks. (SPA223.) The Court noted that the 2007 Benoit CTE Reports were widely available in public news sources and that WWE could not have thwarted any attempted investigation. (*Id.*) Based on these and other Rule 11 findings, the Court ordered that Kyros pay all of the legal fees incurred by WWE in connection with both Rule 11 motions in the *Laurinaitis Action*. (SPA228.)

SUMMARY OF ARGUMENT

The District Court's judgments should be affirmed because (i) Appellants have abandoned numerous claims on appeal; (ii) all claims of Appellants except for Singleton are patently time-barred, and there is no basis for tolling; (iii) all claims of Appellants fail to state a claim and are substantively deficient; (iv) summary judgment in the *LoGrasso Action* was proper; and (v) the District Court did not abuse its discretion in sanctioning Kyros.

ARGUMENT

I. Standard of Review

This Court reviews a District Court's ruling on a motion to dismiss *de novo*. *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011). This Court reviews a District Court's summary judgment ruling *de novo*, *Buttry v. Gen. Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995), and its factual findings for clear error, *Bessemer Trust Co., N.A. v. Branin*, 618 F.3d 76, 85 (2d Cir. 2010).

In considering motions to dismiss, the Court is not required to accept as true "legal conclusions or unwarranted deductions of fact drawn by the non-moving party." *Scalisi v. Fund Asset Mgmt., L.P.*, 380 F.3d 133, 137 (2d Cir. 2004). Nor is the Court required to accept as true allegations contradicted "by facts of which we may take judicial notice." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995). The Court may "dismiss a claim as 'factually frivolous' if the sufficiently well-pleaded facts are 'clearly baseless.'" *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011).

This Court "may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the district court." *Lotes Co. Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014).

II. This Court Should Affirm the Judgments on Appellants' Waived and Abandoned Claims

The chart below identifies the claims appealed by Appellants and the claims Appellants have waived or abandoned by their failure to address the District Court's dismissal of them in their Brief:

	Haynes **FAC (A75-A118)**	***LoGrasso*** **SAC (A119-A185)**	***McCullough*** **FAC (A190-A238)**	***Frazier*** **FAC (A239-A350)**	***Laurinaitis*** **SAC (A1410-A1634)**
Appealed Claims	I: Fraudulent Concealment / Failure to Warn II: Negligent Misrepresentation	III-IV: Fraud by Omission	II: Fraud by Omission III: Negligent Misrepresentation IV: Fraudulent Deceit	VII: Wrongful Death	I: Fraudulent Nondisclosure II: DJ / Misclassification III: Unconscionable Contracts IV: FMLA V: ERISA VII: RICO VIII: Fraud IX: Wrongful Death / Survival XIV: DJ / Mandatory Reporting
Waived Claims	III: Declaratory or Injunctive Relief IV: Negligence V: Medical Negligence VI: Medical Monitoring VII: Strict Liability for Abnormally Dangerous	I-II: Fraudulent Concealment V-VI: Negligent Misrepresentation VII-VIII: Fraudulent Deceit IX-X: Negligence XI-XII: Medical Monitoring	I: Fraudulent Concealment V: Negligence VI: Medical Monitoring	I: Negligence II: Negligent Misrepresentation III: Intentional Misrepresentation IV: Fraudulent Concealment V: Fraud by Omission VI: Vicarious Liability VIII: Punitive	VI: Successor Liability X: Fraudulent Concealment XI: Civil Conspiracy XII: Equitable Estoppel XIII: Medical Monitoring XV: Accounting / Disgorgement

	Activities			Damages IX: Loss of Consortium	XVI: Unjust Enrichment

Dismissal of Appellants' waived and abandoned claims should be affirmed. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief"); *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief").

III. This Court Should Affirm the Judgments Because Appellants' Claims Are Time-Barred[4]

The District Court properly dismissed all tort claims of the *Laurinaitis* Appellants because they are "patently time-barred" and held that Kyros lacked a good faith basis for asserting a tolling doctrine in light of the widespread publicity of the Benoit 2007 CTE Reports. (SPA212-223.) The District Court also properly entered summary judgment on LoGrasso's fraudulent omission claim because it is time-barred. (SPA172-174.) The District Court's substantive dismissal of the claims of the *Haynes, McCullough,* and *Frazier* Appellants can be affirmed on the same repose grounds. The District Court's substantive dismissal of the *Laurinaitis*

[4] In Section III of the Argument, the term "Appellants" refers to all Appellants except Singleton, whose claim is timely.

Appellants' "unconscionable contracts" claim also can be affirmed on repose grounds. Because those claims are time-barred on the face of their complaints and Appellants failed to allege any plausible basis for tolling, dismissal of those claims is appropriate under Rule 12(b)(6). *See Weaver v. Boriskin*, 751 F. App'x 96, 98-99 (2d Cir. 2018) (affirming dismissal of claims on alternative grounds because they were barred by the statute of limitations).

A. Appellants' Claims Are Time-Barred

Whether Appellants' claims are time-barred is a question of law, *Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 407–08 (2008), which may be decided on a Rule 12(b)(6) motion to dismiss, *Int'l Strategies Grp., Ltd. v. Ness*, 645 F.3d 178, 182-86 (2d Cir. 2011).

1. Summary of Time-Barred Claims

The chart below reflects the dates when each Appellant alleges to have wrestled for WWE, when the applicable statutes of limitations and repose for each of their claims expired, and when their complaints were filed.

Appellant	Wrestling Dates	Tort Time-barred 3 years from date last wrestled	Wrongful Death Time-barred 5 years from date last wrestled	ERISA or Contract Time-barred 6 years from date of first contract or date services began	RICO Time-barred 4 years from date of first contract or date services began	FMLA Time-barred 2 years from date last wrestled; not enacted until 1993	Action Filed
***Haynes v. WWE,* FAC, A75-118**							
Haynes	1986-1988 (¶ 122)	1991					10/23/14
***Singleton et al. v. WWE*, SAC, A119-185**							
LoGrasso	1991-1998, 2005-2007 (¶ 14)	2010					1/16/15
***McCullough et al. v. WWE*, FAC, A190-238**							
McCullough	1999-2001 (¶ 13)	2004					4/9/15
Sakoda	2003-2004 (¶ 15)	2007					4/9/15
Wiese	2004-2005 (¶ 14)	2008					4/9/15
***Frazier v. WWE*, FAC, A239-350**							
Frazier	1993-2008 (¶¶ 136, 153)	2011	2013				2/18/15
***Laurinaitis v. WWE*, SAC, A1410-1634**							
Barr	1986-1987 (¶ 104)	1990		1992	1990		07/18/16
Begnaud, C.	2001-2004, 2006-2007 (¶ 74)	2010		2007	2005	2009	07/18/16
Begnaud, R.	2002-2004, 2006-2007 (¶ 108)	2010		2008	2006	2009	07/18/16
Billard	2003-2004 (¶ 94)	2007		2009	2007	2006	07/18/16

Brunk	2006-2007 (¶ 63)	2010		2012	2010	2009	07/18/16
Brunzell	1985-1993 (¶ 68)	1996		1991	1989	1995	07/18/16
Canterbury	1994-1999, 2006-2007 (¶ 80)	2010		2000	1998	2009	07/18/16
Clark	1993-1995, 2001 (¶ 56)	2004		1999	1997	2003	07/18/16
Copani	2002-2005 (¶ 79)	2008		2008	2006	2007	07/18/16
Darsow	1987-1993 (¶ 64)	1996		1993	1991	1995	07/18/16
Driggers	1985-1988 (¶ 107)	1991		1991	1989		07/18/16
Eadie	1983-1984, 1986-1990 (¶ 65)	1993		1989	1987		07/18/16
Enos	1991-1993 (¶ 72)	1996		1997	1995	1995	07/18/16
Fellows (Smith)	1993-1995 (¶ 99)	1998	2000	1999	1997	1997	07/18/16
Fujiwara Sloan (Fujiwara)	1972-1974, 1977-1978, 1981-1996 (¶ 55)	1999	2001	1978	1976	1998	11/03/17
Gray	1987-1990, 2001 (¶ 103)	2004		1993	1991	2003	07/18/16
Green	1972-1984 (¶ 69)	1987		1978	1976		07/18/16
Grenier	2003-2007 (¶ 75)	2010		2009	2007	2009	07/18/16
Guerrero IV	2001-2011 (¶ 54)	2014		2007	2005	2013	07/18/16
Halac	1994-1997 (¶ 88)	2000		2000	1998	1999	07/18/16
Hardee	1978-1989 (¶ 82)	1992		1984	1982		07/18/16

Harris	1984, 1986-1987, 1992-1993, 2001-2006 (¶ 58)	2009		1990	1988	2008	07/18/16
Heard	1987-1989 (¶ 109)	1992	1994	1993	1991		07/18/16
Heaton	1970s (¶ 77)	1970s or 1980s		1970s or 1980s	1970s or 1980s		07/18/16
Hebner, D.	Late 1970s or early 1980s-2005 (¶ 59)	2008		1980s	1980s	2007	07/18/16
Hebner, E.	1988-2005 (¶ 60)	2008		1994	1992	2007	07/18/16
Heidenreich	2001-2002, 2003-2006 (¶ 89)	2009		2007	2005	2008	07/18/16
Hugger	2001-2004 (¶ 67)	2007		2007	2005	2006	07/18/16
Jannetty	1988-2009 (¶ 87)	2012		1994	1992	2011	07/18/16
Jeter	2001-2008 (¶ 83)	2011		2007	2005	2010	11/09/16
Jindrak	2001-2005 (¶ 84)	2008		2007	2005	2007	07/18/16
Johnson	1986-1993 (¶ 102)	1996		1992	1990	1995	07/18/16
Jones	1989-1990 (¶ 101)	1993		1995	1993		07/18/16
Knighton/Le-ydig (Knighton)	2005 (¶ 86)	2008	2010	2011	2009	2007	07/18/16
Laurinaitis	1990-1992, 1997-1999, 2003 (¶ 51)	2006		1996	1994	2005	07/18/16
Manley	1984-1994 (¶ 71)	1997		1990	1988	1996	07/18/16

Marconi	1994-2000 (¶ 90)	2003		2000	1998	2002	07/18/16
Martin	1989-2001 (¶ 78)	2004		1995	1993	2003	07/18/16
Massaro	2005-2008 (¶ 95)	2011		2011	2009	2010	11/09/16
Mijares	1984-1993 (¶ 76)	1996		1990	1988	1995	07/18/16
Mosca	1970s, 1981, 1984 (¶ 70)	1987		1976	1974		07/18/16
Nord	1991-1993 (¶ 66)	1996		1997	1995	1995	07/18/16
Norris	1995-1998 (¶ 57)	2001		2001	1999	2000	07/18/16
Oliver	1987-1988 (¶ 93)	1991		1993	1991		07/18/16
Orndorff	1983-1988 (¶ 53)	1991		1989	1987		07/18/16
Otis	1982-1984 (¶ 81)	1987		1988	1986		07/18/16
Pallies	1981, 1985-1988, 1994-1995 (¶ 61)	1998		1987	1985	1997	07/18/16
Patera	1976-1978, 1980, 1984-1988 (¶ 62)	1991		1982	1980		07/18/16
Price	1992, 1994, 1996, 1997 (¶ 105)	2000		1998	1996	1999	07/18/16
Reed	1986-1988 (¶ 73)	1991		1992	1990		07/18/16
Satullo	1992, 2000-2002 (¶ 96)	2005		1998	1996	2004	11/09/16
Scaggs	1996-1999, 2006-2007 (¶ 106)	2010		2002	2000	2009	11/09/16

Schecter (Rechner)	1992-1993, 1995, 2005-2008 (¶ 85)	2011	2013	1998	1996	2010	11/09/16
Silva	1971-1987 (¶ 97)	1990		1977	1975		11/09/16
Smothers	1996, 2000, 2005 (¶ 100)	2008		2002	2000	2007	07/18/16
Snuka (Snuka)	1982-1985, 1989-1993 (¶ 52)	1996	1998	1988	1986	1995	07/18/16
Szopinski	1988-1992 (¶ 91)	1995		1994	1992		07/18/16
Vailahi	1988-1992, 1994-1995 (¶ 92)	1998		1994	1992	1997	07/18/16
Wicks	2004-2006 (¶ 98)	2009		2010	2008	2008	11/09/16
Zhukov	1987-1990 (¶ 110)	1993		1993	1991		7/18/16

2. Appellants' Personal Injury Claims

Appellants concede that their personal injury claims are time-barred under Connecticut's statutes of repose absent tolling. (Appellants' Br. at 13.) These statutes reflect Connecticut's strong public policy in favor of "finality, repose and avoidance of stale claims and stale evidence." *Flannery v. Singer Asset Fin. Co., LLC*, 312 Conn. 286, 322-23 (2014).

a. Fraud and Misrepresentation Claims

Appellants' fraud and misrepresentation claims (*Haynes* FAC Counts I-II; *LoGrasso* SAC Count IV; *McCullough* FAC Counts II-IV; *Laurinaitis* SAC Counts I, VIII) are barred by Connecticut General Statutes § 52-577.

Section 52-577 requires all tort claims to be brought "within three years from the date of the act or omission complained of." Conn. Gen. Stat. § 52-577. The "act or omission complained of" is the date when the "conduct of the defendant occurs"—*not* when the cause of action accrues or the plaintiff discovers the injury. *Essex Ins. Co. v. William Kramer & Assocs., LLC*, 331 Conn. 493, 503 (2019). An action brought more than three years from the conduct of the defendant complained of is time-barred "regardless of whether the plaintiff had not, or in the exercise of [reasonable] care could not reasonably have discovered the nature of the injuries within that time period." *Id.*

As the District Court stated, Appellants' tort claims all "arise out of their allegation that WWE concealed the risk that concussions or subconcussive blows could cause permanent degenerative neurological conditions in order to induce Plaintiffs to continue wrestling. This omission must have occurred at a time when the Plaintiffs were still wrestling and could still suffer head injuries while wrestling." (SPA213.) The District Court correctly held that the latest date on which the alleged omission could have occurred is the last date that Appellants wrestled for WWE. (*Id.*) Because no Appellant wrestled for WWE within three years of their complaints, their tort claims are all time-barred.

b. Wrongful Death and Survival Claims

The wrongful death claims asserted on behalf of Nelson Frazier, James

Snuka, Jonathan Rechner, Brian Knighton, Timothy Smith, Ronald Heard, and Harry Fujiwara (*Frazier* FAC Count VII; *Laurinaitis* SAC Count IX) are time-barred by Connecticut General Statutes § 52-555.

The limitations period of Section 52-555 is a subject matter jurisdictional requirement that must be satisfied to maintain a wrongful death action. *Greco v. United Techs. Corp.*, 277 Conn. 337, 349-50 (2006). Section 52-555 provides that "no such action may be brought more than five years from the date of the act or omission complained of." Conn. Gen. Stat. § 52-555(a). Section 52-555 therefore may "serve as a bar to a wrongful death claim" even if "an injured victim could not have known that he or she had a claim against the alleged tortfeasor until after the limitation period had expired." *Greco*, 277 Conn. at 353.

The District Court correctly held that none of the *Laurinaitis* decedents had wrestled for WWE within five years of filing the *Laurinaitis* complaint and therefore their wrongful death claims are time-barred. (SPA213-214.) This analysis equally applies to Frazier's wrongful death claim. (A297-298 ¶ 153.) Any survival claims are likewise time-barred because they were all time-barred prior to the decedents' deaths. *See* Conn. Gen. Stat. § 52-594; *Girard v. Weiss*, 43 Conn. App. 397, 418 (1996) (survival actions may be instituted within one year from the date of death "if the limit of time to bring the decedent's action has not elapsed at the time of the death").

3. *Laurinaitis* Appellants' Misclassification Claims

a. Declaratory Judgment Claim

Appellants' declaratory judgment claim that they were misclassified as independent contractors (*Laurinaitis* SAC Count II) is time-barred by Connecticut General Statutes § 52-577 or § 52-576.

A declaratory judgment claim "is time-barred if the applicable limitations period has run on a direct claim to obtain such relief." *118 E. 60th Owners, Inc. v. Bonner Props., Inc.*, 677 F.2d 200, 202 (2d Cir. 1982). If viewed as a tort claim, it must be brought "within three years from the date of the act or omission complained of." Conn. Gen. Stat. § 52-577. If viewed as a contract claim, it must be brought "within six years after the right of action accrues." Conn. Gen. Stat. § 52-576. The claim accrues "at the time the breach of contract occurs, that is, when the injury has been inflicted." *Amoco Oil Co. v. Liberty Auto & Elec. Co.*, 262 Conn. 142, 153 (2002).

Appellants' misclassification claims allege that (i) the misclassification occurred "[w]hen the Plaintiffs first began working for WWE, whether with a handshake deal or one of the Booking Contracts" (A1518 ¶ 261, A1571 ¶ 468, A1573 ¶ 473); (ii) misclassification "was generally achieved by the presentation . . . of boilerplate Booking Contracts" (A1530 ¶ 327); (iii) the dates of the misclassification "are approximately the dates on the Booking Contracts" (A1573 ¶

475); (iv) the Booking Contracts "flatly declare[]" that Appellants are independent contractors (A1612 ¶ 614(A)); (v) Appellants did not receive the same benefits as employees (A1531 ¶ 328, A1554 ¶ 417, A1576 ¶¶ 483); and (vi) Appellants received a Form 1099 each year indicating that they were not employees (A1579 ¶ 490, A1586-1587 ¶ 518). Additionally, the Booking Contracts attached to the *Laurinaitis* SAC expressly state that Appellants were responsible for their own benefits. (A2733 §§ 9.11-9.13; A2763-2764 §§ 9.12-9.14; A2789 §§ 9.11-9.12; A2817 §§ 9.11-9.12.)

Based on such allegations, and relying on *Levy v. World Wrestling Entm't, Inc.*, No. 3:08-01289, 2009 WL 455258, at *1 (D. Conn. Feb. 23, 2009), the District Court held that the alleged misclassification occurred when Appellants first executed Booking Contracts or began performing for WWE. (SPA215-216.) This holding is consistent with this Court's recent decision that misclassification claims accrue when plaintiffs are put on notice that they are considered independent contractors—a decision completely ignored by Appellants in their Brief. *Reches v. Morgan Stanley & Co. Inc.*, 687 F. App'x 49, 49-51 (2d Cir. 2017) ("Plaintiff's claims accrued when he learned that he was being classified as a leased employee or independent contractor"). All the *Laurinaitis* Appellants began performing for WWE more than six years before their complaint was filed. (SPA215-216.) Thus, the District Court correctly held that their misclassification

claims are time-barred. (SPA216.)

b. RICO Claim

Appellants' RICO claim (*Laurinaitis* SAC Count VII) is subject to a four-year statute of limitations which "begins to run when the plaintiff discovers or should have discovered the RICO injury." *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). Once there are sufficient "storm warnings" to trigger a "duty to inquire," the claim is time-barred if the plaintiff does not inquire within the limitations period. *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 153 (2d Cir. 2012).

The RICO claim is based on the same allegations as the misclassification claims. (SPA216-217.) Appellants discovered or should have discovered their alleged injury when they began performing for WWE or executed the Booking Contracts classifying them as independent contractors. The Booking Contracts, the Form 1099s each year, and the lack of employee benefits provided Appellants with sufficient "storm warnings." (A2733 §§ 9.11-9.13, A2736 § 13.1; A2763-2764 §§ 9.12-9.14, A2767 § 13.1; A2789 §§ 9.11-9.12, 2793 § 13.1; A2817 §§ 9.11-9.12, A2821 § 13.1; A2830-2843.) Any subsequent communications with Appellants reaffirming their status as independent contractors did not give rise to a separate injury for RICO purposes because they were derivative of the alleged underlying injury. *In re Merrill Lynch*, 154 F.3d at 59-60 (later actions or communications

were part of the same alleged scheme and not independent injuries for RICO purposes). Because all the *Laurinaitis* Appellants began performing for WWE more than four years before the filing of their complaint, the District Court correctly held that their RICO claims are time-barred. (SPA216-217.)

c. ERISA Claim

Appellants' ERISA claim (*Laurinaitis* SAC Count V) is subject to the six-year statute of limitations for contract claims under Section 52-576. *Burke v. Pricewaterhouse Coopers LLP,* 572 F.3d 76, 78 (2d Cir. 2009) (statute of limitations for state law contract claim applies to ERISA claim). Because the ERISA claim is based on the same allegations as the misclassification claims, the District Court correctly held that it is likewise time-barred. (SPA216.)

d. Unconscionability Claim

Appellants' claim seeking a declaratory judgment that their Booking Contracts were unconscionable (*Laurinaitis* SAC Count III) is time-barred because it is based on the same allegations as their the misclassification claim. *Ackoff-Ortega v. Windswept Pac. Entm't Co.*, 120 F. Supp. 2d 273, 284 (S.D.N.Y. 2000) ("unconscionability claim accrues upon execution of the challenged agreement").

e. Mandatory Reporting Claim

The District Court correctly held that Appellants' mandatory reporting claim (*Laurinaitis* SAC Count XIV) is also time-barred because it is premised on the

same allegations as their misclassification claims. (SPA216.)

f. FMLA Claim

Appellants' FMLA claim (*Laurinaitis* SAC Count IV) had to be brought within two years of "the date of the last event constituting the alleged violation" or within three years of a willful violation. 29 U.S.C. § 2617(c). The latest date that an FMLA violation could have occurred was the last day that an Appellant wrestled for WWE. Because none of the Appellants wrestled for WWE within two or three years of their complaint or alleged that they requested or were denied family or medical leave within the limitations period, the District Court correctly held that their FMLA claims were time-barred. (SPA217.)

B. The Statutes of Limitation and Repose Were Not Tolled As To Any Appellant's Claims

1. The Summary Judgment Ruling that LoGrasso's Claim Is Time-Barred Should Be Affirmed

The District Court correctly held that "[b]ecause LoGrasso stopped wrestling in May 2007—and he was therefore last exposed to the risks of neurological damage via repeated head injuries years prior to the expiration of the statute of repose for tort claims—his claim cannot survive unless the statute of repose is tolled." (SPA172.) The undisputed evidence established that Benoit's CTE diagnosis was publicly revealed on September 5, 2007; there was widespread publicity of that diagnosis; and that its reported cause was head trauma sustained

while wrestling. (SPA165-166, 173-174; A1877-1878 ¶¶ 56-59; A1899-1920; A2049-2715.) LoGrasso admitted he learned about Benoit's CTE diagnosis at the same time WWE did, which was when it was publicly reported, and that it was a common topic of conversation between wrestlers. (SPA169, 173-174; A1877 ¶¶ 53-56.) Appellants do not claim any error, let alone clear error, regarding any of these facts.

Based on these undisputed facts, the District Court held that fraudulent concealment tolling could not apply. (SPA173-174.) It also ruled that LoGrasso's claim could not survive even if not time-barred because WWE did not know of a potential link between concussions and permanent degenerative neurological disorders until the 2007 Benoit CTE Reports, which were after LoGrasso stopped wrestling. (SPA177.)

On appeal, LoGrasso presents no argument that his claim was tolled under the continuing course of conduct doctrine and his claim that WWE fraudulently concealed Benoit's CTE diagnosis based on certain public statements made by WWE executives is baseless. Those statements merely expressed the common-sense opinion that Benoit would not have been able to perform the tasks required by his profession if he had the mental capacity of an 85-year old with dementia as had been reported—an opinion that LoGrasso himself *agreed with* in his deposition. (A836; A1879 ¶ 67.) Far from concealing information, WWE actually

requested disclosure of *more* information about Benoit's diagnosis but never received it. (CA899 ¶ 50; A1921-1952.) And as the Court found, "no reasonable jury could find that WWE concealed the fact of Benoit's diagnosis from LoGrasso." (SPA174.)

In their Brief, Appellants make the unfounded claim that "WWE concealed the *cause* of the [Benoit] diagnosis, lulling LoGrasso into false complacency." (Appellants' Br. at 58 (emphasis in original).) The media coverage and publicly available information regarding the 2007 Benoit CTE Reports openly discussed that the reported cause of CTE was head trauma. (A1877-1878 ¶¶ 56-59; A1899-1920; A2049-2715.) Apart from that single sentence, LoGrasso presents no other argument on tolling.

As to the District Court's finding that WWE lacked knowledge of a link between head trauma and permanent neurological injuries until the 2007 Benoit CTE Reports, Appellants' Brief resorts to deception. The Brief cites no evidence of such a reported connection to wrestling prior to the 2007 Benoit CTE Reports. Instead, Appellants argue that WWE's "actual knowledge" consists of the "imputed knowledge" of Drs. Lovell and Maroon and WWE's so-called "football franchise" and boxing endeavors. (Appellants' Br. at 56.) As Kyros knows, Drs. Lovell and Maroon were not retained by WWE until *after* LoGrasso departed. (SPA162; CA906 ¶¶ 90-91.) For that reason, the District Court properly found

their knowledge could not be imputed to WWE until 2008 at the earliest. (SPA162.) Appellants further provided no evidence that WWE running a football league for one year in the distant past or promoting a boxing match provided WWE with actual knowledge of reported long-term risks of permanent neurological diseases *in professional wrestling*.

2. The Statutes of Limitation and Repose Were Not Tolled As To Any Other Appellant

Because their claims are time-barred on the face of their complaints, the remaining Appellants had the burden of pleading facts sufficient to toll statutes of limitation and repose. *Hodges v. Glenholme Sch.*, 713 F. App'x 49, 51 (2d Cir. 2017) (fraudulent concealment tolling); *Ness*, 645 F.3d at 183 (continuing course of conduct tolling); *OBG Technical Servs., Inc. v. Northrop Grumman Space & Mission Sys. Corp.*, 503 F. Supp. 2d 490, 504 (D. Conn. 2007) (both).[5] Appellants were required to make *individualized* allegations of tolling with respect to the claims of *each* plaintiff. *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 232 (S.D.N.Y. 2012). The act(s) on which tolling is predicated must occur within the limitations period applicable to each plaintiff, not after it expired. *Flannery*, 312

[5] Appellants incorrectly claim that they were not required to plead facts to support tolling based on *BPP Illinois, LLC v. Royal Bank of Scotland Grp., PLC*, 603 F. App'x 57 (2d Cir. 2015). *BPP* involved the *Pennsylvania discovery rule* and does not address well-settled Second Circuit law holding that a plaintiff must plead facts to establish tolling where claims are time-barred on the face of the complaint.

Conn. at 309, 315-16 (continuing course of conduct tolling); *Bartone v. Robert L. Day Co.*, 232 Conn. 527, 535 (1995) (fraudulent concealment tolling). No Appellant even attempts to make such an individualized showing to discharge this burden.[6]

a. Tolling Does Not Apply Because Appellants Failed To Exercise Reasonable Diligence

Appellants cannot rely on fraudulent concealment or continuing course of conduct tolling because both doctrines require a showing of reasonable diligence.[7] *See Vill. Mort. Co. v. Veneziano*, 175 Conn. App. 59, 79-80 (2017); *Mountaindale Condo. Ass'n v. Zappone*, 59 Conn. App. 311, 322-24, 331 (2000);[8] *AT Engine*

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[6] The *Laurinaitis* Appellants present no tolling argument for their misclassification claims and therefore waived any such argument. Moreover, tolling is inapplicable where the plaintiff was aware of his classification as an independent contractor and did not diligently pursue his rights within the limitations period. *Reches v. Morgan Stanley & Co.*, No. 16 Civ. 1663, 2016 WL 4530460, at *3-4 (E.D.N.Y. Aug. 26, 2016), *aff'd*, 687 F. App'x 49 (2d Cir. 2017).

[7] Although the words "equitable tolling" appear in Appellants' Brief, no attempt is made to demonstrate that doctrine applies here. In any event, equitable tolling cannot apply to Appellants' claims under Connecticut law; *Saperstein v. Danbury Hosp.*, No. X06CV075007185S, 2010 WL 760402, at *13 (Conn. Super. Ct. Jan. 27, 2010); and Appellants failed to plead that they exercised "reasonable diligence" or that any "extraordinary" circumstances stood in their way of discovering their claims; *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996).

[8] This Court "is bound to apply the law as interpreted by a state's intermediate appellate courts, unless there is persuasive evidence that the state's highest court would reach a different conclusion." *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010).

Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc., No. 3:10-CV-01539, 2014 WL 7270160, at *13-15 (D. Conn. Dec. 18, 2014). Allegations of diligence must be pled with particularity. *OBG*, 503 F. Supp. 2d at 510; *In re Publ'n Paper Antitrust Litig.*, No. 304MD1631, 2005 WL 2175139, at *5 (D. Conn. Sept. 7, 2005).

Appellants do not identify any specific attempt to exercise diligence by any individual Appellant—let alone within the limitations period. Instead, citing *OBG*, Appellants purport to invoke the so-called "self-concealing" fraud concept, which *OBG* itself noted is not even clearly part of Connecticut law, and which has nothing to do with situations like the one presented here where there is widespread publicly-available information upon which diligent persons would act. Appellants attempt to excuse their complete lack of diligence through the canard that "WWE's ongoing concealment prevented any due diligence on their part," and claim that "'(a) the circumstances were such that a reasonable person would not have thought to investigate, [and] (b) the [Wrestlers'] attempted investigation was thwarted.'" (Appellants' Br. at 32.) *OBG*, however, specifically requires plaintiffs to plead facts plausibly demonstrating they exercised diligence. Appellants do not point to any particular allegation of attempted diligence or any pled facts demonstrating that WWE somehow thwarted an attempted investigation. Appellants therefore failed to plead diligence with the requisite particularity. *Rodriguez v. SLM Corp.*,

No. 07cv1866, 2009 WL 598252, at *5 (D. Conn. Mar. 6, 2009) (conclusory allegations that plaintiffs "could not ascertain their cause of action until just prior to filing this action due to [defendant's] concealment" and "their attempts to discover relevant information were blocked due to [defendant's] deceptive tactics" were insufficient to satisfy diligence requirement); *OBG*, 503 F. Supp. 2d at 510 (simply reciting the legal conclusion is not an adequate pleading of diligence); *In re Publ'n Paper*, 2005 WL 2175139, at *6 ("[B]ecause the plaintiffs have not alleged anything regarding inquiries made into the activities alleged in the complaint or why such inquiries were not made, they have not satisfied their burden of pleading reasonable diligence.").

The conspicuous failure to plead specific acts of diligence is unsurprising given the District Court's conclusion in its final decision sanctioning Kyros that "counsel lacks a good faith basis for asserting that Plaintiffs who retired after 2007 could not on their own, in the exercise of due diligence, uncover information timely about CTE or the risks that concussions or subconcussive blows could cause CTE." (SPA223.) The mountain of evidence showing the widespread publicity concerning the 2007 Benoit CTE Reports that the District Court considered in connection with the *LoGrasso* summary judgment motion is subject to judicial notice by this Court. (A1867-1868 ¶ 1, A1877-1878 ¶¶ 56-59; A2049-2715.); *see also 421-A Tenants Assoc., Inc. v. 125 Court St. LLC*, 760 F. App'x 44, 49 n.4 (2d

Cir. 2019) ("it is appropriate to take news articles into account" in granting motion to dismiss time-barred claims); *Rivas v. Fischer*, 780 F.3d 529, 535 n.4 (2d Cir. 2015) (taking judicial notice of "the *fact* that press coverage contained certain information"). The existence of such publicly-available information precludes a showing of reasonable diligence to toll the statute of limitations. *421-A Tenants Assoc.*, 760 F. App'x at 49-50; *Phillips v. Generations Family Health Ctr.*, 657 F. App'x 56, 59 (2d Cir. 2016).

Appellants' failure to identify any acts of diligence by any Appellant or the onset of any Appellant's alleged symptoms is not accidental. When attempting to excuse their lack of diligence, Appellants assert that this case involves "latent degenerative diseases that progress over time." (Appellants' Br. at 32.) Elsewhere in their Brief, however, Appellants describe their claims as involving the patent symptoms of concussions like post-concussion syndrome. (*Id.* at 18-21.) Appellants recognized in their complaints, and discovery in the consolidated action confirmed, that post-concussion syndrome (persistence of patent concussion symptoms for weeks or months) is different from long-term neurodegenerative diseases such as CTE. (A126-128 ¶¶ 29, 33-34; CA913 ¶¶ 121, 123.) To the extent Appellants allege they sustained physical injuries while wrestling for WWE (including concussions and their patent symptoms), they necessarily discovered or reasonably should have discovered the alleged harm at the time the injuries were

sustained—significantly more than three years before their complaints were filed. To the extent Appellants allege they are at an increased risk of developing latent neurodegenerative conditions from head trauma in wrestling, they also should have discovered such risks more than three years before the filing of their complaints based on the widespread publicity concerning the 2007 Benoit CTE Reports. And to the extent that Appellants claim they have sustained such conditions but they did not manifest within the limitations period, their claims are foreclosed under the rule that an action brought more than three years from the conduct of the defendant complained of is time-barred "regardless of whether the plaintiff had not, or in the exercise of [reasonable] care could not reasonably have discovered the nature of the injuries within that time period." *Essex*, 331 Conn. at 503.

b. Other Reasons Fraudulent Concealment Tolling Does Not Apply

To toll the statute of limitations based on fraudulent concealment, a plaintiff must plead and prove that the defendant "(1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiffs' cause of action, (2) intentionally concealed these facts from the plaintiffs, and (3) concealed the facts for the purpose of obtaining delay on the plaintiffs' part in filing a complaint on their cause of action." *Falls Church Grp., Ltd. v. Tyler, Cooper, Alcorn, LLP*, 281 Conn. 84, 105 (2007). Fraudulent concealment must be pled with particularity under Rule 9(b). *Hodges*, 713 F. App'x at 51. Like the District

Court correctly found with respect to LoGrasso, fraudulent concealment tolling cannot salvage any other Appellant's claims.

(i) No Actual Awareness

Appellants failed to plausibly allege that WWE was aware of the facts necessary to support their causes of action. None of the Appellants plausibly alleged that WWE had actual knowledge that they were experiencing any of the symptoms they now allege during the limitations period for their claims. Nor do any of the allegations cited by Appellants in their Brief establish WWE's *actual knowledge* of a link between wrestling and latent degenerative neurological conditions. (Appellants' Br. at 18-20, 30.) Allegations that WWE *should have known* of such a link are insufficient to establish *actual knowledge* for purposes of a fraud claim. *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 628 (2006).

Appellants' reliance on statements from two *fictional storylines* taken completely out of context in an attempt to demonstrate WWE's knowledge of something that was not even discovered until decades later is particularly deceptive. First, Appellants cite an allegation that selectively and misleadingly quotes from a 1981 televised interview in which a former wrestler named Pat Patterson was asked whether wrestlers get "punch drunk." (Appellants' Br. at 19 (quoting A1505 ¶ 203.i).) As the record from the sanctions hearing before Magistrate Judge Richardson makes clear, Patterson was a wrestler with a seventh-

grade education and no formal medical training who was giving a promotional interview to advance a storyline, and his comments had nothing to do with long-term neurodegenerative diseases. (A2964-2969, A3079-3080.) Second, Appellants cite an allegation describing a fictional storyline from a 1995 televised program in which Dr. Jeffrey Unger stated that a wrestler named Shawn Michaels had post-concussion syndrome—an allegation cited by the Court as one of many examples of "inaccurate, irrelevant, or frivolous" allegations made by Kyros. (SPA203.) As noted above, post-concussion syndrome is *not* a latent neurodegenerative disease. (A126-128 ¶¶ 29, 33-34; CA913 ¶¶ 121, 123.) As the District Court correctly found, WWE was not aware of any reported link between permanent neurodegenerative conditions and head trauma in wrestling before the 2007 Benoit CTE Reports—the first ever reported case of a wrestler diagnosed with CTE. (SPA172-173, 222-223; CA897-900 ¶¶ 39-52.) Appellants do not and cannot explain how *televised public statements* made by Patterson and Unger decades earlier could form the basis for a fraudulent concealment claim. Even if they could, no such claim plausibly could be timely after the 2007 Benoit CTE Reports.

(ii) No Intentional Concealment

Appellants failed to plausibly allege with the requisite particularity that WWE fraudulently concealed from them facts necessary to establish a cause of

action. The 2007 Benoit CTE Reports were widely publicized and WWE learned about them at the same time the public and former performers did. (SPA173; SPA222-23; CA899 ¶¶ 48-49); *see also Vill. Mortg.*, 175 Conn. App. at 79–80 (rejecting claim of fraudulent concealment "where the 'intensely public nature of [the] process' precludes an evidentiary finding of an intent to conceal"). Appellants did not plausibly allege how WWE could ever have concealed publicly-available information from all of them or any acts by which WWE did so.

Appellants also failed to plead any *affirmative* act of concealment by WWE—let alone one directed at each Appellant during the three-year period after each ceased performing for WWE *before* the expiration of the limitations period on each of their claims. *See Bartone*, 232 Conn. at 535.[9] Because there was no fiduciary relationship between Appellants and WWE (Argument § III.B.2.c.i, *infra*), mere silence cannot establish fraudulent concealment. *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409, 424 (2d Cir. 1999).

[9] As one example of the patently time-barred and frivolous claims, Appellants allege that Susan Green performed from 1972 to 1984 and was injured in 1978 because she suffered "a diagnosed concussion outside of the arena after slipping on ice" and was told that "she should not wrestle" at that show. (A1450 ¶ 69.) Appellants do not and cannot allege any act of fraudulent concealment by WWE before the limitations period expired that prevented her from discovering the facts necessary to bring her claim.

(iii) No Concealment to Prevent Filing Suit

Each Appellant failed to plausibly allege that WWE concealed any facts *for the purpose* of preventing them from filing suit within the limitations period after they ceased performing. *Connell v. Colwell*, 214 Conn. 242, 251 (1990) (fraudulent concealment must be "directed to the very point of obtaining the delay of which [defendant] afterward seeks to take advantage by pleading the statute"); *World Wrestling Entm't, Inc. v. THQ, Inc.,* No. X05CV065002512S, 2008 WL 4307568, at *11 (Conn. Super. Ct. Aug. 29, 2008) (acts of fraudulent concealment must be independent of the alleged misrepresentation or omission that constitutes the underlying fraud claim).

c. Other Reasons Continuing Course of Conduct Tolling Does Not Apply

Although not pled in any of the complaints the *Laurinaitis* Appellants filed in the District Court, and not argued as to LoGrasso, Appellants asserted in opposition to WWE's motions to dismiss and now on appeal that their claims should be tolled under the continuing course of conduct doctrine. In presenting their argument, Appellants conspicuously ignore the Connecticut Supreme Court's most recent decision on continuing course of conduct tolling in *Essex*.[10]

[10] Appellants also improperly rely on *Angersola v. Radiologic Assocs. of Middletown, P.C.,* 330 Conn. 251 (2018). *Angersola* involved the narrow issue of the timeliness of claims under the repose aspect of Connecticut's wrongful death

"[T]o support a finding of a continuing course of conduct . . . there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong." *Essex*, 331 Conn. at 504. Where the Connecticut Supreme Court has found that "a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." *Id.* Continuing course of conduct tolling is limited to "exceptional circumstances" because "tolling of the statute of limitations may compromise the goals of the statute itself." *Neuhaus v. DeCholnoky*, 280 Conn. 190, 207 (2006).

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statute (§ 52-555)—a prerequisite to the court's jurisdiction. The plaintiffs in *Angersola* requested limited discovery or an evidentiary hearing to resolve disputed facts necessary to establish a basis for tolling and thus subject matter jurisdiction over their claims. *Id.* at 273. *Angersola* does not hold, however, that such discovery is required in all wrongful death cases—much less tort claims that do not implicate subject matter jurisdiction under the wrongful death statute. Moreover, unlike the plaintiffs in *Angersola*, no Appellant requested discovery or a hearing for such purposes in the District Court, despite at least four opportunities to do so. (No. 3:15-cv-01074, Doc. 105, 290, 292, 305.) Nor did any Appellant cite the District Court to *Conboy v. State*, 292 Conn. 642 (2009), the case relied upon by *Angersola* for the proposition that a hearing may be appropriate if the determination of subject matter jurisdiction turns on disputed facts. In contrast to *Angersola*, therefore, that issue has not been preserved for appeal.

Appellants' argument for continuing course of conduct tolling relies upon *Handler v. Remington Arms Co.*, 144 Conn. 316 (1957), for the proposition that WWE had "a continuing duty to warn" Appellants of the risks of head trauma sustained in wrestling matches. However, *Essex* expressly limited *Handler* and its progeny to product liability cases. *Essex*, 331 Conn. at 521-22. In addition to relying on abrogated legal authority, Appellants failed to establish either a continuing special relationship or any initial and subsequent wrongful acts to support the existence of a continuing duty.

(i) No Continuing Duty Based on Special Relationship

Appellants did not plausibly allege a special relationship with WWE. "[A] special relationship is one that is built upon a fiduciary or otherwise confidential foundation." *Essex*, 331 Conn. at 506. Fiduciary duties arise when there is a "risk that the other party could be taken advantage of as a result of one party's access to, or influence regarding, another party's moneys, property, or other valuable resources." *Id.* at 512. The existence of a fiduciary relationship presents a question of law. *Iacurci v. Sax*, 313 Conn. 786, 795 (2014).

Appellants did not plausibly allege a special relationship during the time they performed for WWE, and certainly not after each ended any relationship for the following reasons:

- WWE does not fall within the definition of *per se* fiduciaries recognized by the Connecticut Supreme Court such as "agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians." *Essex*, 331 Conn. at 507.

- "[A] mere contractual relationship does not create a fiduciary or confidential relationship." *Id.* at 508-09.

- A mere employer-employee relationship—much less an independent contractor relationship—is not a fiduciary relationship. *See Pergament v. Green*, 32 Conn. App. 644, 653 (1993); *Bill v. Emhart Corp.*, No. CV940538151, 1996 WL 636451, at *3 (Conn. Super. Ct. Oct. 24, 1996).

- A claim that a party has "superior knowledge, skill and expertise" is not "a plausible allegation of a 'special relationship between the parties' giving rise to a continuing duty." *Ness*, 645 F.3d at 184 (quoting *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 210 (1988)). "Aptitude differential" is insufficient to create such a relationship. *Iacurci*, 313 Conn. at 805.

Appellants also failed to allege any *continuing* relationship that did not terminate prior to the time to bring an action. Appellants ignore *Essex's* instructions that, "there may be a formal or a *de facto* termination of the relationship as it pertains to the matter at issue. A formal termination may arise pursuant to contractual terms or communication to that effect, or may result when the matter for which the defendant was hired comes to a conclusion. A *de facto* termination arises by conduct inconsistent with the special relationship created." *Essex*, 331 Conn. at 507. Here, all Appellants' contractual relationships terminated more than three years before suit was filed.

Essex further instructed that "[i]n addition to the possibility that a special relationship may terminate altogether, the relationship may change from its

original form." *Id.* Aside from episodic contacts alleged with a few of them, Appellants do not plausibly allege that WWE had *any* relationship with them after they ceased performing. *Ness*, 645 F.3d at 184 (stating "a plaintiff's miscellaneous, discontinuous interactions with a defendant over an extended period of time" cannot give rise to a continuing duty).

Appellants do not allege that WWE ever treated or advised them regarding their medical conditions after they ceased performing for WWE; indeed, they complained about the lack of such health insurance. (A1419 ¶ 11; A1519 ¶ 263.)[11] Accordingly, the District Court correctly held that Appellants "have not established that WWE had any continuing duty with respect to their health or employment status after they left WWE." (SPA220-221.)[12]

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[11] Although WWE established a Wellness Program for *current* talent in 2006 that was expanded to include a concussion management program in March 2008 after the 2007 Benoit CTE Reports, the Wellness Program never provided medical care or treatment to *former* talent (SPA166-167; CA892 ¶ 9, CA896 ¶ 35, CA906 ¶ 93.)

[12] Moreover, as explained in Section III.B.2.b.i *supra*, no Appellant notified WWE of the symptoms of which they are now complaining before filing suit and therefore WWE lacked actual knowledge that any individual Appellant was at an increased risk of developing a permanent degenerative neurological condition because of head injuries sustained while wrestling for WWE. *Neuhaus*, 280 Conn. at 211-12 (holding continuing course of conduct doctrine was inapplicable because although doctor "was generally aware that babies with respiratory distress syndrome may be at risk for serious neurological problems, he did not believe, and did not have any actual knowledge that Christopher was at risk for developing such a condition").

(ii) No Continuing Duty Based on Initial and Later Wrongful Conduct

There was no initial wrong because Appellants failed to plausibly allege facts giving rise to a duty to disclose in the first instance. *Saggese v. Beazley Co. Realtors*, 155 Conn. App. 734, 752-54 (2015) (stating fraudulent disclosure claims require "a duty to speak"). A duty to disclose exists only where (i) there is a confidential or fiduciary relationship between the parties, or (ii) a party assumed a duty to speak, in which case the party must "avoid a deliberate nondisclosure." *Franchey v. Hannes,* 152 Conn. 372, 378-79 (1965). Appellants do not argue the latter and failed to plausibly allege the former.

Additionally, Appellants did not plausibly allege any subsequent wrongful act by WWE. Appellants assert that "WWE's continuing failure to inform the Wrestlers of the risks associated with WWE performances . . . is a subsequent wrongful act." (Appellants' Br. at 23.) In substance, the alleged subsequent wrong is the same thing as the alleged initial wrong—WWE did not say anything to any Appellant. Connecticut law is clear, however, that "the continuing course of conduct is not the failure of the alleged tortfeasor to notify the plaintiff of his wrongdoing." *Essex*, 331 Conn. at 514 (quoting *Connell*, 214 Conn. at 255); *see also Flannery*, 312 Conn. at 321 (rejecting defendant's "failure to confess his earlier tortious act" as basis for continuing course of conduct tolling); *Fichera*, 207 Conn. at 210 ("We are aware of no authority holding that the perpetrator of a fraud

. . . has a legal duty to disclose his deceit after its occurrence and the breach of that duty will toll the statute of limitations."). Accepting Appellants' argument would mean that repose could never apply in fraudulent omission cases involving a failure to warn, contrary to Connecticut law. *Flannery*, 312 Conn. at 321-22 ("To accept this argument . . . would render the three year statutes of limitations meaningless."); *Neuhaus*, 280 Conn. at 223-24 (refusing to extend duty to warn for "as long as the damaging consequences from the failure to warn were still ongoing" because it effectively would eliminate the prescribed statute of limitation).

No Appellant has alleged any other subsequent wrongful act which occurred prior to the expiration of the limitations period and which continued until at least three years before the lawsuit commenced. *Flannery*, 312 Conn. at 309, 315-316 ("the subsequent activity triggering tolling itself must occur before the three-year statute of limitations has run, to effectively toll it") (quotations omitted). In the absence of any such allegations pled on an individualized basis by each Appellant (given the disparate dates that each stopped performing for WWE), Appellants cannot establish a continuing duty based on later wrongful conduct.

IV. Summary Judgment On Singleton's Claim Should Be Affirmed

Appellants do not even attempt to demonstrate any clear error in the undisputed facts relied upon by the District Court in granting summary judgment

on Singleton's fraudulent omission claim. The basis for the District Court's ruling was quite simple: Singleton was required to and did attend a meeting discussing the risks of head injury, including CTE, *before* he was injured. (SPA178-179; CA910 ¶¶ 103-105; CA922; CA924; A1961-2044.) Thereafter, he sustained a single concussion because he admittedly performed a move incorrectly and never performed again. (SPA169-170; A1881-1882 ¶¶ 82-87; CA910-914 ¶¶ 106-128.) The District Court properly concluded that this undisputed evidence negated any fraudulent intent to withhold such information from Singleton, a legal conclusion which is not challenged on appeal. (SPA169-170, 177-179.)

V. This Court Should Affirm the Judgments Because Appellants' Claims Are Also Substantively Deficient

Although this Court need not address the merits of claims by Appellants held to be time-barred, the judgments should be affirmed because all claims are also substantively deficient.

A. Appellants' Personal Injury Claims

1. Fraudulent Deceit and Misrepresentation Claims

The District Court correctly dismissed the fraud and negligent misrepresentation claims in the *Haynes*, *McCullough* and *LoGrasso* cases (*Haynes* FAC Count II; *McCullough* FAC Counts III-IV; *LoGrasso* SAC Counts V-VIII) because Appellants "failed to plead specific facts indicating that WWE made any specific statement that it knew or should have known to be false at the time, upon

which plaintiffs reasonably relied." (SPA61, 70.)[13] While the fraud claims in the *Laurinaitis Action* (*Laurinaitis* SAC Count VIII) were dismissed on limitations grounds, those claims are also subject to dismissal for the same reason.

Fraud and misrepresentation claims must be pled with particularity under Rule 9(b), which required each Appellant to "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004) (quotations omitted). None of the complaints filed by Appellants identified (i) a single specific fact known to WWE that was misrepresented to any Appellant; (ii) the speaker of any alleged misrepresentation with knowledge of some material fact that was misrepresented, or (iii) the specific dates, places, or circumstances regarding any alleged misrepresentation to any of Appellants, let alone each of them.

Although Appellants appeal the District Court's holding in the *Haynes* and *McCullough* cases that they failed to plead their fraud and misrepresentation claims with particularity, no *affirmative misrepresentations* are even identified in

[13] The dismissal of the fraudulent deceit and negligent misrepresentation claims in *LoGrasso* is not addressed on appeal and therefore abandoned.

Appellants' Brief. (Appellants' Br. at 61-62.) Rather, Appellants acknowledge that their claims are solely based on alleged omissions (*id.*), thus conceding that the District Court's dismissal of the affirmative fraud and misrepresentation claims for failure to plead with particularity was correct.

2. Fraudulent Omission Claims

The District Court correctly dismissed the fraudulent omission claims of the *Haynes* and *McCullough* Appellants (*Haynes* FAC Count I; *McCullough* FAC Count II) because none performed after 2005—when they alleged that WWE became aware of the link between head trauma in wrestling and long-term neurological conditions. (SPA67-70.)

In addition to affirming the dismissal of the *Laurinaitis* Appellants' fraudulent omission claims (*Laurinaitis* SAC Count I) on limitations grounds, this Court can alternatively affirm the dismissal of fraudulent omission claims of all *Laurinaitis* Appellants who stopped wrestling for WWE before September 2007 because WWE lacked knowledge of an alleged link between wrestling and permanent degenerative neurological conditions before then. None of the record citations in Appellants' Brief support their claim that WWE had actual knowledge of an alleged link between wrestling and permanent degenerative neurological conditions such as CTE before September 2007, and discovery in the *LoGrasso* case indisputably established that WWE did not actually know of any such link

before the 2007 Benoit CTE Reports. (SPA161-166, 173; SPA222-23; CA897-900 ¶¶ 39-52.)

3. The Wrongful Death and Survival Claims

a. *Frazier* Was Properly Dismissed

The District Court properly dismissed Frazier's wrongful death claim (*Frazier* FAC Count VII) for failure to plausibly allege a causal connection between Frazier's death and any conduct by WWE. (A1846-1849.) A wrongful death claim "requires that the party seeking relief allege an underlying theory of legal fault and that such fault is the proximate cause of the injury." *Ward v. Greene*, 267 Conn. 539, 547 (2004). The plaintiff must demonstrate "an unbroken sequence of events that tied [his] injuries to the [defendant's conduct]" and "[t]his causal connection must be *based upon more than conjecture and surmise*." *Alexander v. Town of Vernon*, 101 Conn. App. 477, 485 (2007) (emphasis in original).

The District Court correctly concluded that Frazier has "not pled specific facts tending to show that Frazier's death resulted from specific injuries sustained while wrestling for the WWE much less that his death was the result of fraudulent conduct on the part of WWE but for which Frazier would not have contracted CTE." (A1849.) "By Plaintiffs' own admission, Frazier was a six-foot-nine-inch, nearly 500-pound man who 'suffered from diabetes, an enlarged heart, and obesity'

and suffered a heart attack in the shower." (A1848-1849.) That heart attack was six years after his contract with WWE terminated. (A1835.) The District Court concluded that "[e]ven if the Court assumes for the purposes of this motion that Plaintiffs' unprovable allegation that Frazier 'had CTE' were true, the Amended Complaint does not contain a single allegation that heart failure can be a symptom or consequence attributable to a neurologically degenerative condition like CTE" and that the allegation that "Frazier's 'inability to survive the heart attack' can be 'more likely than not attributed' to his CTE is yet another bald and baseless allegation." (A1849.)

The District Court also properly dismissed Frazier's remaining common law claims because "Connecticut's wrongful death statute provides the exclusive remedy for claims alleging injuries resulting in death" and "[a]lternative causes of action arising from those wrongful acts directly resulting in death are therefore barred"—a holding that Appellants have not challenged on appeal. (A1843-1844); *see also Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 295 (1993).

The *Frazier Action* alternatively could have been dismissed on repose grounds. (Argument § III.A.2.b.)

b. The Wrongful Death Claims in the *Laurinaitis Action* Dismissed on Repose Grounds Also Failed To Plead A Causal Connection

While the wrongful death claims in the *Laurinaitis* case on behalf of Snuka, Rechner, Knighton, Smith, Heard, and Fujiwara (*Laurinaitis* SAC Count IX) were properly dismissed on repose grounds, dismissal is also proper because Appellants failed to plausibly allege proximate causation. The single allegation of causation is that "WWE caused the Plaintiffs to develop the debilitating brain diseases and conditions set forth above, which diseases and conditions caused extreme pain, suffering, and anguish and, ultimately, the deaths of some Plaintiffs" (emphasis added). (A1596-1597 ¶ 555.) In addition to not specifying which Plaintiffs' deaths WWE supposedly caused, that peculiar allegation is contradicted elsewhere, as Knighton is alleged to have died from a drug overdose (A1465 ¶ 86); no cause of death was pled for Rechner, Smith or Fujiwara (A1463 ¶ 85; A1477 ¶ 99; A1435 ¶ 55); and a determination of whether Heard even had CTE is alleged to be pending (A1485 ¶ 109). Rechner, in fact, suffered a "[s]udden death due to hypertensive and atherosclerotic cardiovascular disease" in April 2016, eight years after he last performed for WWE. (A1860.) Accordingly, none of the Appellants plausibly alleges that their decedents' deaths were proximately caused by CTE or by WWE's conduct.

Dismissal of survivor claims should be affirmed for the same reason such claims were dismissed in the *Frazier Action*.

B. *Laurinaitis* Appellants' Misclassification Claims

1. Declaratory Judgment Claims

Dismissal of the Appellants' declaratory claims (*Laurinaitis* SAC Counts II, III, XIV) can be independently affirmed because those claims do not present a justiciable case or controversy. The *Laurinaitis* Appellants lack standing because the declarations they seek can have no effect on existing rights since all ceased performing for WWE many years ago. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011) ("[T]hose plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices"); *Glanville v. Dupar, Inc.*, 727 F. Supp. 2d 596, 602 (S.D. Tex. 2010) (plaintiffs lacked standing to assert misclassification claims because they "no longer have any employment relationship" with defendant).

2. Misclassification and Mandatory Reporting Claims

Dismissal of the Appellants' misclassification claims (*Laurinaitis* SAC Count II) and mandatory reporting claims (Count XIV) are not predicated on a cognizable claim under any federal statute.

First, there is no private right of action under FICA or to enforce alleged violations of the Internal Revenue Code. *U.S. ex. rel. Lissack v. Sakura Global*

Capital Mkts., Inc., 377 F.3d 145, 153 (2d Cir. 2004). Any such claims would be preempted by Section 7422 of the Internal Revenue Code, which requires tax refund claims to be administratively filed with the IRS.[14] *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4-7 (2008); *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 354 (6th Cir. 2015).

Second, there is no private right of action under the NLRA for alleged unfair labor practices. *Containair Sys. Corp. v. NLRB*, 521 F.2d 1166, 1170 (2d Cir. 1975). Any such claims would be preempted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

Third, there is no private right of action under OSHA, which may only be enforced by the Secretary of Labor. *Donovan v. OSHRC*, 713 F.2d 918, 926 (2d Cir. 1983).[15]

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[14] Appellants assert in their brief that WWE violated 26 U.S.C. § 7434(a), which prohibits the willful filing of a fraudulent information return. Yet no claim was pled under this statute. Any such claim would be time-barred (26 U.S.C. 7434(c)) and frivolous because WWE did not willfully file any false information returns—the returns accurately reflected Appellants' classification as independent contractors, and there is no contention that WWE did not accurately report the income paid on 1099s to the IRS.

[15] The misclassification claim also cannot be predicated on any violations of the FMLA for the reasons discussed below in Section V.B.4, *infra*.

3. Unconscionable Contracts Claim

The District Court characterized Appellants' unconscionable contracts claim (*Laurinaitis* SAC Count III) as "frivolous," citing principles of ratification. (SPA218-219.) "Each plaintiff who signed a booking contract with WWE enjoyed the benefits of those contracts without seeking legal intervention for years following the execution of the contracts, and indeed, years following the termination of each Plaintiff's employment with WWE." (*Id.*); *see also Young v. Data Switch Corp.*, 231 Conn. 95, 103 (1994) ("[R]atification results, as a matter of law, 'if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or avoid it.'"); *Spinelli v. Nat'l Football League*, 903 F.3d 185, 208 (2d Cir. 2018) (affirming dismissal of unconscionability claim because plaintiffs ratified the contracts by performing under them and accepting benefits of performance). Notably, Appellants have not challenged this ground for dismissal of the unconscionability claim in their Brief.

In any event, there is no affirmative cause of action for unconscionable contracts under Connecticut law. *Bender v. Bender*, 292 Conn. 696, 732 n.26 (2009) ("unconscionability is itself *a defense* to contract enforcement") (emphasis added); *Okafor v. Yale Univ.*, No. CV980410320, 2004 WL 1615941, at *11

(Conn. Super. Ct. June 25, 2004) (dismissing unconscionability claim because "it does not provide an affirmative basis for relief").

Moreover, Appellants failed to plead facts demonstrating procedural and substantive unconscionability. The generalized allegations that Appellants were presented with "take it or leave it" contracts without their own attorney present or an opportunity for negotiation are insufficient. *D'Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 328 (D. Conn. 2011) (rejecting contention that "'take it or leave it' employment contracts written by relatively sophisticated employers" are procedurally unconscionable).

Appellants also made no individualized allegations of substantive unconscionability. As the District Court stated, Appellants "attach the contracts of only two wrestlers to their complaint, and identify no particular unconscionable terms." (SPA218.)[16]

4. FMLA Claim

Dismissal of the FMLA claim (*Laurinaitis* SAC Count IV) can be affirmed for the following additional reasons.

First, the FMLA did not become effective until 1993—after at least 16 of Appellants ceased performing for WWE. *See* Pub. L. 103-3 (Feb. 5, 1993) § 405.

[16] One of the contracts was that of Frazier, who was not even a plaintiff in the *Laurinaitis Action*. (A2773-2799.)

Second, none of the *Laurinaitis* Appellants set forth the required elements of an FMLA interference claim as to them. *Laurinaitis* SAC Count IV makes a blunderbuss assertion of a FMLA claim on behalf of everyone with no specifics as to anyone. 29 U.S.C § 2611; *Woodford v. Cmty. Action of Greene Cnty., Inc.,* 268 F.3d 51, 54 (2d Cir. 2001) ("In order to be eligible for FMLA benefits, an employee must have been employed for at least twelve months with an employer and have worked at least 1,250 hours in the twelve months preceding the date on which eligibility is determined.").[17]

5. ERISA Claim

Dismissal of Appellants' ERISA claim (*Laurinaitis* SAC Count V) can be independently affirmed for the following additional reasons.

First, Appellants admit they were not participants under any ERISA plan (A1555 ¶¶ 420, 422; A1631, Prayer for Relief C.1), and therefore lack standing to assert an ERISA claim. *See* 29 U.S.C. § 1132(a)(3) (civil action may only be brought "by a participant, beneficiary, or fiduciary"); *Puga v. Williamson-Dickie Mfg. Co.*, No. 4:09-CV-335, 2009 WL 3363823, at *5 (N.D. Tex Oct. 16, 2009)

[17] Appellants rely on *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706 (2d Cir. 2001) to argue that equitable estoppel should toll the statute of limitations on their FMLA claim. *Kosakow* does not hold that the FMLA statute of limitations may be tolled by equitable estoppel because a party classifies a person as an independent contractor and does not post notices required by FMLA. No limitations issue was presented in *Kosakow*.

(plaintiff who alleged misclassification lacked standing to assert ERISA claim because he was not a participant in any ERISA plan).

Second, Appellants fail to plead any violation of the ERISA statute or any ERISA plan. Their only claim is that they were improperly excluded from WWE's benefit plans because they were misclassified as independent contractors. However, there is no requirement under ERISA that WWE include all employees in its plan. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.").

6. RICO Claim

The dismissal of Appellants' RICO claim against McMahon (*Laurinaitis* SAC Count VII) can be affirmed for additional reasons.

First, federal administrative procedures provide the exclusive remedy for challenging Appellants' classification as independent contractors. *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637-38 (2d Cir. 1989) (precluding RICO claim because another federal statute provided exclusive remedy for the claims asserted); *Gifford v. Meda*, No. 09-cv-13486, 2010 WL 1875096, at *10 (E.D. Mich. May 10, 2010) (RICO claim was foreclosed because "the resolution of such employee misclassification claims has been firmly vested in the comprehensive administrative enforcement scheme").

Second, Appellants failed to allege any racketeering activity by McMahon. They do not allege any predicate acts of mail or wire fraud. The Booking Contracts expressly state that Appellants were independent contractors (A1612 ¶ 614.A.; A2736 § 13.1; A2767 § 13.1; A2793 § 13.1; A2821 § 13.1), and Appellants received a Form 1099 each year indicating that they were independent contractors (A1579 ¶ 490, A1586 ¶ 518; A2830-2843). Additionally, Appellants only allege a single act—their classification as independent contractors. The mailing or transmission of the Booking Contracts does not transform the single act of classification into a "pattern" of activity. *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) ("[C]ourts must take care to ensure that the plaintiff is not artificially fragmenting a singular act into multiple acts simply to invoke RICO.").

VI. The District Court Did Not Abuse Its Discretion In Sanctioning Attorney Kyros

Although the District Court issued sanctions orders against Kyros requiring him to pay counsel fees related to sanctions motions, the exact amount of the fees to be paid has not been established. The Court therefore lacks jurisdiction over Kyros' appeals of the sanctions orders for the reasons set forth in WWE's motions to dismiss.

Even if this Court could consider the issue, the District Court's decision to impose sanctions under Rule 11 and Rule 37 is reviewed solely for "abuse of

discretion." *Caisse Nationale de Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994) (Rule 11 sanctions); *S.E.C. v. Razmilovic*, 738 F.3d 14, 25 (2d Cir. 2013) (Rule 37 sanctions). Appellants' Brief fails to demonstrate any such abuse of discretion in the District Court's well-supported findings in connection with its sanctions orders.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,925 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Jeffrey P. Mueller
Jeffrey P. Mueller

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's ECF System.

/s/ Jeffrey P. Mueller
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