FILED
United States Court of Appeals
Tenth Circuit

July 13, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PATRICK HOGAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PILGRIM'S PRIDE CORPORATION; WILLIAM W. LOVETTE, individually; FABIO SANDRI, individually,

Defendants - Appellees.

GEORGE JAMES FULLER,

Movant - Appellant.

No. 21-1445

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:16-CV-02611-RBJ)

J. Ryan Lopatka (Kim E. Miller with him on the briefs), Kahn Swick & Foti, LLC, New York, New York, for Movant - Appellant.

Caroline Hickey Zalka, Weil, Gotshal & Manges LLP, New York, New York (Seth Goodchild, Weil, Gotshal & Manges LLP, New York, New York; Caitlin McHugh, Lewis Roca Rothgerber Christie LLP, Denver, Colorado; and John A. Fagg, Jr., and Mark A. Nebrig, Moore & Van Allen PLLC, Charlotte, North Carolina, with her on the brief), for Defendants - Appellees.

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

Plaintiff Patrick Hogan[1] brought a putative federal securities-fraud class action in the United States District Court for the District of Colorado against poultry producer Pilgrim's Pride Corp., Pilgrim's former chief executive officer and president William W. Lovette, and Pilgrim's then chief financial officer Fabio Sandri (collectively, Defendants). Plaintiff accuses Defendants of violating § 10(b) of the Securities Exchange Act of 1934 (the 1934 Act or the Act), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b–5, 17 C.F.R. § 240.10b–5. Plaintiff also accuses Mr. Lovette and Mr. Sandri of violating § 20(a) of the Act, 15 U.S.C. § 78t(a).

Plaintiff appeals four decisions by the district court: (1) the grant of Defendants' motion to dismiss the first amended complaint (the FAC) for failure to adequately plead a claim, *see Hogan v. Pilgrim's Pride Corp.*, No. 16–cv–02611–RBJ, 2018 WL 1316979, at *1 (D. Colo. Mar. 14, 2018) (*Hogan I*);[2] (2) the denial of Plaintiff's motion to reconsider *Hogan I* (but granting leave to amend the complaint without setting a deadline), *see Hogan v. Pilgrim's Pride Corp.*, No. 16–cv–02611–RBJ, 2018 WL 5886497, at *1 (D. Colo. Nov. 9, 2018) (*Hogan II*); (3) the grant of Defendants' motion

[1] Mr. Hogan was the sole plaintiff named in the original complaint. George James Fuller was identified as the lead plaintiff in both amended versions of the complaint, but Mr. Hogan remained the only plaintiff named in the case caption. For convenience, we shall refer to a singular "Plaintiff."

[2] In *Hogan I* the district court mistakenly stated several times that it was dismissing Plaintiff's "*second* amended complaint," which was not filed until more than two years later. *See* 2018 WL 1316979, at *1, *9 (emphasis added).

to dismiss the second amended complaint (the SAC) as barred by the applicable statute of repose, 28 U.S.C. § 1658(b)(2), *see Hogan v. Pilgrim's Pride Corp.*, No. 16–cv–02611–RBJ, 2021 WL 1534602, at *1 (D. Colo. Apr. 16, 2021) (*Hogan III*); and (4) the denial of Plaintiff's motion to reconsider *Hogan III*, *see Hogan v. Pilgrim's Pride Corp.*, No. 16–cv–02611–RBJ, 2021 WL 5565805, at *1 (D. Colo. Nov. 29, 2021) (*Hogan IV*).

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's order in *Hogan III*, dismiss as moot Plaintiff's challenges to the orders in *Hogan I*, *Hogan II*, and *Hogan IV*, and remand for further proceedings in district court. Because (1) the SAC did not raise new claims or add any defendants and (2) the district court did not enter a final order after *Hogan I* and *Hogan II* (so Defendants' right to repose had not vested), the SAC was not barred by the statute of repose. Because the SAC superseded the FAC, the sufficiency of the FAC is a moot issue. And because the district court has not addressed the sufficiency of the SAC, we remand for the district court to address this issue in the first instance.

I. BACKGROUND

"The elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b–5 are: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809–10 (2011) (internal quotation marks omitted). "Liability under § 20(a) of the

1934 Securities Exchange Act is derivative of another person's liability under the Act. Section 20(a) provides that a person who controls a party that commits a violation of securities laws may be held jointly and severally liable with the primary violator." *Emps.' Ret. Sys. of R.I. v. Williams Cos., Inc.*, 889 F.3d 1153, 1162 (10th Cir. 2018) (internal quotation marks omitted).

Because we do not decide the pleading sufficiency of the FAC or the SAC on this appeal, a brief summary of the complaints will suffice. Plaintiff alleges that Defendants issued scores of "materially false and misleading statements . . . regarding Pilgrim's financial results, business operations, competition with other poultry producers, and its efforts to transform the Company post-bankruptcy, while concealing a massive collusive effort by Pilgrim and other poultry industry leaders to artificially fix, raise, and maintain high prices on broiler chicken." Joint App., Vol. I at 57 (FAC); *id.*, Vol. VI at 1307 (SAC). This collusion allegedly "allowed Pilgrim to report record earnings and profit margins during the Class Period between February 21, 2014 and November 17, 2016." *Id.*, Vol. I at 57 (FAC); *id.*, Vol. VI at 1307 (SAC). But Pilgrim's investors were ultimately harmed "when the truth was revealed to the market." *Id.*, Vol. I at 58 (FAC); *id.*, Vol. VI at 1307 (SAC).

Plaintiff filed the initial complaint on October 20, 2016. After Plaintiff filed the FAC on May 11, 2017, Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss the FAC for failure to plead sufficient facts to establish the elements of falsity, scienter, and loss causation. Plaintiff filed a response, which contained a footnote at the end

stating: "In the event of dismissal, Plaintiff respectfully requests leave to amend." *Id.*, Vol. III at 770 n.13.

On March 14, 2018, the district court granted Defendants' motion to dismiss. *See Hogan I*, 2018 WL 1316979, at *1. As relevant here, the court held that Plaintiff had failed to plead facts sufficient to establish the existence of an underlying antitrust conspiracy, and—because Plaintiff's securities-fraud claim was predicated on the failure to disclose this conspiracy—the FAC therefore failed to adequately allege that Defendants had made materially false or misleading statements and omissions in violation of § 10(b) and Rule 10b–5. *See id.* at *6–9. Having determined that falsity had not been adequately alleged, the court had no need to reach the parties' arguments about scienter and loss causation. *See id.* at *4. As for Plaintiffs' § 20(a) claims against Mr. Lovette and Mr. Sandri, they "necessarily fail[ed]" because the allegations under § 10(b) and Rule 10b–5 were inadequate. *Id.* at *9.

The district court did not, however, bar Plaintiff from pursuing his claims in the future if he obtained sufficient additional evidence. The order stated:

> As a final note, plaintiff requested leave to amend his complaint in response to defendants' motion to dismiss. A court need not grant leave to amend when a party fails to file a formal motion. I presume that if plaintiffs had additional facts to allege at this time, they would have done so. But I do not mean to foreclose the possibility that plaintiff might obtain facts (through the antitrust [litigation in the Northern District of Illinois involving allegations of anticompetitive conduct by American poultry producers] or otherwise) that would enable him to assert a securities claim that would satisfy the requirements of [the Private Securities Litigation Reform Act of 1995]. His securities case is essentially premature but not necessarily hopeless. Accordingly, I dismiss this case without prejudice.

Id. (original brackets, citations, and internal quotation marks omitted).

On April 11, 2018, Plaintiff filed a timely motion under Fed. R. Civ. P. 59(e) for reconsideration of *Hogan I*. The last two pages of the supporting memorandum of law argued, as an alternative to reconsideration, for leave to amend the complaint. Among the documents attached to the motion was a proposed new version of the complaint.[3] In their opposition to the motion for reconsideration, Defendants stated that they did "not oppose Plaintiff's motion for leave to file a second amended complaint." Joint App., Vol. V at 1285.

On November 9, 2018, the district court denied Plaintiff's motion for reconsideration. *See Hogan II*, 2018 WL 5886497, at *1. But it clarified that Plaintiff could proceed in the future by filing an amended complaint:

> Plaintiff's request for leave to amend is unopposed and is GRANTED. The Court has not reviewed the proposed Second Amended Complaint because it wants to emphasize that the Court does not want to go through the motions process again if there are not genuinely new facts that are materially different tha[n] those that the Court has already found to be insufficient to state a claim. Please review your proposed amended complaint carefully and resubmit it only if it complies.

Id. The district court did not set a deadline for filing an amended complaint. *See id.* Nor did the district court issue any additional orders related to its denial of the motion for reconsideration.

The docket was silent for almost 19 months—until Plaintiff filed the SAC on June 8, 2020. The SAC was filed under the same case number as the preceding versions

[3] This proposed version is distinct from the filed version of the SAC that the district court dismissed in *Hogan III*.

of the complaint. The SAC did not add any new parties or causes of action, nor did it identify any additional statements by Defendants that were allegedly false or misleading. Rather, the SAC added factual allegations to support Plaintiff's existing claims that Pilgrim had participated in a conspiracy, that it had failed to disclose the existence of this conspiracy, and that this failure to disclose constituted securities fraud. The additional allegations involved the use of spot pricing—that is, selling a commodity based on an indexed price at which it can be bought or sold immediately—in broiler markets, concerted manipulation of the Georgia Dock pricing index related to the spot price for broiler chickens, production cuts by Pilgrim and other poultry producers, and allegations in a criminal antitrust indictment recently issued by a federal grand jury in Colorado against four industry executives (two from Pilgrim and two from another company).[4]

On April 16, 2021, the district court granted Defendants' motion to dismiss the SAC. *See Hogan III*, 2021 WL 1534602, at *1. The court did not discuss (let alone decide) whether the SAC sufficed to state a claim. Instead, it ruled that any claims based on misstatements made before June 8, 2015, were barred by the five-year statute

[4] In February 2021 Pilgrim pleaded guilty to an information charging that it "entered into and engaged in a continuing combination and conspiracy to suppress and eliminate competition by rigging bids and fixing prices and other price-related terms for broiler chicken products sold in the United States," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Information at 2, *United States v. Pilgrim's Pride Corp.*, No. 1:20-cr-00330-RM, 2020 WL 7022076 (D. Colo. Oct. 13, 2020), ECF No. 1. But all four executives plus Mr. Lovette (who was named in a superseding indictment) were acquitted in July 2022. Of course, a criminal acquittal "does not foreclose civil litigation, which employs a lower burden of persuasion." *Paper Sys. Inc. v. Nippon Paper Indus. Co.,* 281 F.3d 629, 631 (7th Cir. 2002).

of repose in 28 U.S.C. § 1658(b)(2). *See id.* at *6, *8.[5] The court declined to "excuse [Plaintiff's] nearly two-year delay in refiling this case." *Id.* at *6. It applied the statute of repose as if the SAC were the initial complaint. The court "agree[d] that a dismissal without prejudice is not a final decision for appellate purposes in most circumstances," but it "disagree[d] that [its] decision to dismiss the first amended complaint relate[d] to a subsequent complaint's timeliness," because "a case dismissed without prejudice must be filed within the repose period." *Id.* at *5. It also "decline[d] to adopt" the continuing-fraud exception, *id.* at *7, under which "[D]efendants' misstatements [would be] considered to be part of a single, continuous fraudulent scheme, and the repose period [would] not begin to run until the date of [D]efendants' last act within that scheme," *id.* at *6. And it rejected the argument that the SAC related back under Fed. R. Civ. P. 15(c), which permits certain amendments to a pleading to relate back to the date of the original pleading, because allowing such relation back would violate the mandate of the Rules Enabling Act, 28 U.S.C. § 2072(a)–(b), that the Federal Rules of Civil Procedure not "abridge . . . any substantive right." *See id.* at *8. The court further held that any remaining claims not barred by the statute of repose (because they were based on misrepresentations made less than five years before filing of the SAC in June 2020) were barred by *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,

[5] The district court said that "because the [SAC] was filed on June 8, 2020, all of the alleged misrepresentations on which the claims are based must have occurred after June 8, 2015." *Hogan III*, 2021 WL 1534602, at *6. In light of our disposition of this appeal, we need not opine on when the five-year repose period began because it is undisputed on appeal that the FAC was timely.

730–31 (1975), because Plaintiff had not been a purchaser or seller of securities within that five-year period, *see Hogan III*, 2021 WL 1534602, at *9.[6] The district court ordered the dismissal with prejudice of all claims barred by the statute of repose. *See id.* Judgment was entered on April 19, 2021.

Once again proceeding under Rule 59(e), Plaintiff timely filed a motion for reconsideration of *Hogan III* on May 17, 2021. On November 29, 2021, the district court denied this motion. *See Hogan IV*, 2021 WL 5565805, at *1. On December 28, 2021, Plaintiff filed a notice of appeal from *Hogan I*, *Hogan II*, *Hogan III*, and *Hogan IV*.

II. DISCUSSION

In recent years courts have paid closer attention to the distinction between a statute of limitations and a statute of repose. "Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). "Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 504 (2017) (*CalPERS*) (internal quotation marks omitted). "As a general matter, a statute of limitations begins to run when the cause of action accrues—that is, when

[6] *Blue Chip Stamps* held that only purchasers or sellers of securities have a private right of action under § 10(b) and Rule 10b–5. *See* 421 U.S. at 730–31. We need not address how this doctrine applies here because (1) Defendants have not argued that the *Blue Chip Stamps* rule bars Plaintiff's claims in the FAC and (2) as we shall discuss more fully later, the SAC relates back to the time of filing the FAC. We express no view on whether Defendants are entitled to partial relief under *Blue Chip Stamps*.

the plaintiff can file suit and obtain relief." *CTS*, 573 U.S. at 7–8 (internal quotation marks omitted). And statutes of limitation may be tolled on nonstatutory equitable grounds. *See id.* at 10. "In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants." *CalPERS*, 582 U.S. at 505. A statute of repose "typically bars the right to bring an action after the lapse of a specified period, unrelated to the time when the claim accrued." *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1218 n.2 (10th Cir. 1991). "[T]he injury need not have occurred, much less have been discovered." *CTS*, 573 U.S. at 8 (internal quotation marks omitted). And statutes of repose cannot be tolled absent "a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances." *CalPERS*, 582 U.S. at 507.

The statute at issue here, 28 U.S.C. § 1658(b), which was enacted in 2002 as part of the Sarbanes-Oxley Act, provides:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the [1934 Act] (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

While § 1658(b)(1) is a statute of limitations, § 1658(b)(2) is a statute of repose. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018) (distinguishing between § 1658(b)'s "two-year statute of limitations" and "five-year statute of repose"). The district court ruled that § 1658(b)(2) barred much of the SAC because it was filed more

than five years after many of the fraudulent statements alleged in that pleading. *See Hogan III*, 2021 WL 1534602, at *9.

Because the relevant facts are undisputed for purposes of the motion to dismiss, we review de novo the district court's determination that the 1934 Act's five-year statute of repose bars Plaintiff's SAC. *See Fulghum v. Embarq Corp.*, 785 F.3d 395, 413 (10th Cir. 2015). We interpret statutory language "according to its ordinary, contemporary, common meaning. To discern that ordinary meaning," the words at issue "must be read and interpreted in their context, not in isolation." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (citations and internal quotation marks omitted).

Under § 1658(b)(2), "a private right of action that involves a claim of [certain violations of the securities laws] may be brought not later than . . . 5 years after such violation." The question before us is therefore whether filing the SAC would constitute "bringing" a private right of action. We think not. To reach that conclusion, we rely on the language of the repose statute, the rule of civil procedure governing the relation back of pleadings, and a consideration of the nature of the protection that a repose statute is intended to provide.

To begin with, we think that the natural reading of the language "bring a right of action that involves a claim" is to *initiate* or *commence* a claim. That is the meaning long ascribed to *bring an action*, and "when Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute." *Tafoya v. U.S. DOJ*, 748 F.2d 1389, 1392 (10th Cir. 1984). "To 'bring' an action or suit has a settled customary

meaning at law, and refers to the initiation of legal proceedings in a suit." *Bring suit*, Black's Law Dictionary (5th ed. 1979); *accord Bring an action*, Black's Law Dictionary (11th ed. 2019) ("To sue; institute legal proceedings"); *Hoffman v. Blaski*, 363 U.S. 335, 343–44 (1960) (interpreting statute permitting transfer of civil action to a district "where it might have been brought" to permit transfer only to a district where the suit could have been "commenced"); *Maldonado v. Baker Cnty. Sheriff's Off.*, 23 F.4th 1299, 1304 (11th Cir. 2022) ("To 'bring' an action has long meant to initiate or commence it, not to prosecute or to continue it."). Likewise, we have said that "[i]n general, a statute of repose acts to define temporally the right to *initiate* suit against a defendant after a legislatively determined time period." *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1183 (10th Cir. 2012) (further emphasis and internal quotation marks omitted). It would therefore be a peculiar interpretation of *bring a right of action that involves* a claim to say that it encompasses *continuing to pursue* a claim.

This is not to say, however, that once a complaint is filed within the repose period, § 1658(b)(2) always continues to be satisfied despite later amendments to the complaint. The repose statute is claim specific. It speaks in terms of a cause of action "that involves a claim of fraud." A claim raised for the first time in an amendment to a complaint may well be barred by the statute. But that is not the situation here, where the SAC adds no parties or causes of action; it does not even add additional statements alleged to be fraudulent. We thus see no reason to bar the SAC under the repose statute.

This conclusion finds strong support in Fed. R. Civ. P. 15(c)(1)(B), which states: "An amendment to a pleading relates back to the date of the original pleading when . .

. the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." An amendment to a complaint like the SAC therefore "relates back to the date of the original pleading." *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1497, at 87–89 (3d ed. 2010) ("[A]mendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c)(1)(B) test and will relate back. Thus, amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c)(1)(b)." (footnote omitted)); 3 James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner, *Moore's Federal Practice* § 15.19[2], at 15-106 (3d ed. 2022) ("Amendments that amplify or restate the original pleading or set forth facts with greater specificity should relate back."); *see also Quaak v. Dexia, S.A.*, 445 F. Supp. 2d 130, 137–38 (D. Mass. 2006) (stating that "when the original complaint alleges a wide ranging fraudulent scheme, amended complaints relate back when they assert newly discovered aspects of that scheme," and collecting cases); *Bond Opportunity Fund II, LLC v. Heffernan*, 340 F. Supp. 2d 146, 155 (D.R.I. 2004) (stating that "[i]n securities fraud cases, courts have held that the test [for relation back] is whether the new allegations relate to the same statements and/or documents referenced in the original complaint [as allegedly false or misleading]," and collecting cases). And it is well settled that an amendment that relates back to an earlier timely pleading is not barred by a statute of limitations. *See Krupski v. Costa Crociere*

S. p. A., 560 U.S. 538, 541 (2010); *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 961–62 (10th Cir. 2012); *Hunt v. Broce Constr., Inc.*, 674 F.2d 834, 836–38 (10th Cir. 1982). We can think of no reason why a statute of repose should be treated otherwise. *See Se. Pa. Transp. Auth. v. Orrstown Fin. Servs. Inc.*, 12 F.4th 337, 341, 343 (3d Cir. 2021) (*SEPTA*) (plaintiff's third amended complaint, which reinstituted previously dismissed claims after plaintiff "found further evidence to support them through discovery [on nondismissed claims]," was not barred by statute of repose).[7]

Finally, we fail to see how barring an amended complaint like the SAC would further the limited purposes of a statute of repose. We are aware of no authority suggesting that statutes of repose are intended to protect litigants from evidence uncovered late in the course of litigation. In complicated cases, litigation can take a long time and discovery may not be completed within five years of the alleged misconduct, especially if suit is not brought promptly. As nicely put by the Third Circuit, "[S]tatutes of repose create a deadline for *filing* actions, rather than *resolving* them." *Id.* at 351. Once a defendant's repose has been disturbed by the bringing of a claim, a statute of repose does not protect it from the customary travails of defending the claim. *See Contemp. Mission, Inc. v. N.Y. Times Co.*, 665 F. Supp. 248, 256 (S.D.N.Y. 1987) (allowing relation back and noting that "[w]hen a suit is filed in

[7] We recognize that in *SEPTA* the Third Circuit distinguished *Hogan III* in a parenthetical as a case where "the Court had previously dismissed the timely filed complaint in its entirety." 12 F.4th at 348. But that description of *Hogan III* overlooked that the original dismissal (in view of both *Hogan I* and *Hogan II*) explicitly permitted a future amendment. Following the reasoning in *SEPTA*, we think it requires the same conclusion that we reach.

federal court, the defendant knows that the whole transaction described in it will be fully scrutinized, by amendment if necessary. It knows that discovery will follow, and that leave to amend will be freely granted." (citations omitted)), *aff'd*, 842 F.2d 612 (2d Cir. 1988).

On the other hand, the district court had dismissed the FAC. That might seem to mean that filing the SAC amounted to "bringing" a new action. One could say that proceeding under the SAC would interrupt the repose that Defendants expected and were entitled to after dismissal of the FAC.

That "entitlement" to repose, however, depends on whether the dismissal was a final judgment. An order, even a dismissal, other than a final judgment "does not end the action as to any of the claims or parties and *may be revised at any time* before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b) (emphasis added). Setting aside a dismissal before final judgment is entered is no more the bringing of a new action than resuming play after a timeout is the start of a new football game.

The problem for Defendants here is that *Hogan II*, the operative order controlling the case when the SAC was filed, was not a final judgment.[8] This is not just

[8] It is possible that there was a final judgment for a short period of time after *Hogan I*. Although the district court appeared to leave open the possibility of a future amended complaint in the same case, the clerk entered final judgment on the same day that *Hogan I* was decided. In any event, when Plaintiff filed his Rule 59(e) motion, any finality of *Hogan I* was "suspended" or "eliminated." *See Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 445 (1974) (the "motion for reconsideration . . . suspended the finality of the judgment"); 12 James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, Georgene M. Vairo & Chilton Davis Varner, *Moore's Federal Practice*

because *Hogan II*'s dismissal of the FAC was without prejudice. Sometimes a dismissal without prejudice is a final judgment because no "further proceedings" in the case are anticipated. *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001); *see United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned."); 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.1, at 525–26 (3d ed. 2022) ("[A]n order dismissing the complaint is final if the circumstances indicate that there is nothing the plaintiff can do by way of amendment to preserve the action."). When no further proceedings are anticipated in the case, we say that the district court has dismissed the action, not just the complaint. *See Moya v. Schollenbarger*, 465 F.3d 444, 448–49 (10th Cir. 2006) ("[I]n this circuit, whether an order of dismissal is

---

§ 59.32[1], at 59-128 (3d ed. 2023) ("A timely post-judgment motion eliminates the finality of, and reopens, the earlier judgment."); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2812, at 189 (3d ed. 2012) ("If a motion is made within 28 days under Rule 59, it suspends the finality of the judgment and the court may grant the motion after the 28-day period has expired." (footnote omitted)); Fed. R. Civ. P. 59 advisory committee's note to 1995 amendment (a timely filed postjudgment motion "affect[s] the finality of the judgment"). When the district court granted Plaintiff's request for leave to amend in *Hogan II*, the court "conclusively show[ed] that [it] intended only to dismiss the complaint [rather than the action]; the dismissal [of the FAC in *Hogan I*, adhered to in *Hogan II*, was] thus not a final decision." *Moya v. Schollenbarger*, 465 F.3d 444, 451 (10th Cir. 2006); *accord* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.1, at 519–20 (3d ed. 2022) ("An order that both dismisses and grants leave to amend . . . is not final unless [a] collateral-order theory supports an appeal or until some further event makes it final." (footnotes omitted)).

appealable generally depends on whether the district court dismissed the *complaint* or the *action*. A dismissal of the complaint is ordinarily a non-final, nonappealable order (since amendment would generally be available), while a dismissal of the entire action is ordinarily final." (internal quotation marks omitted)); *see also, e.g.*, *Constien v. United States*, 628 F.3d 1207, 1210 (10th Cir. 2010) ("[D]ismissal without prejudice for failure of service is a dismissal of the action and not just the complaint because no amendment of the complaint could cure the defect."); *Amazon*, 273 F.3d at 1275 ("Here, the district court [dismissed the plaintiff's Lanham Act claim and] declined to exercise supplemental jurisdiction over the state law claims, dismissing the claims without prejudice so that Amazon might re-file them in state court. The district court dismissed the entire action, effectively excluding Amazon's suit from federal court. Therefore, the dismissal, although without prejudice, was final and appealable under controlling precedent."). When the *action* is dismissed without prejudice, the plaintiff is not barred from bringing the claim again, but no further proceedings in that case are anticipated and the claim would have to be pursued by filing a new case.

In this case, however, further proceedings *were* anticipated. The decision in *Hogan II* explicitly authorized Plaintiff to file an amended complaint. *See Jung v. K. & D. Mining Co.*, 356 U.S. 335, 336–37 (1958) (per curiam) (order that grants leave to amend is not a final judgment); *Moya*, 465 F.3d at 451 ("[W]hen the dismissal order expressly *grants* the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint [rather than the action]; the dismissal is

thus not a final decision.").[9] And *Hogan II* set no deadline.[10] So long as the case remained open, Defendants had no vested right to repose.[11] The passages of *CalPERS*

---

[9] In their brief and at oral argument Defendants cite several cases which, they argue, show that "dismissal of [a] suit without prejudice does not authorize [a] later suit brought outside [an] otherwise binding limitation period." Aplees. Br. at 42–43 (internal quotation marks omitted). In each of these cases, however, the dismissal was a final judgment, and the plaintiff later sought to refile its case (not submit an amended complaint in the original case) after the close of the limitations period. *See Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000); *Chico-Velez v. Roche Prods., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998); *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 961 (10th Cir. 1991), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *McIntosh v. Boatman's First Nat'l Bank of Okla.*, 103 F.3d 144 (tbl.), 1996 WL 685655, at *1 (10th Cir. 1996) (unpublished) (plaintiff had unsuccessfully attempted to intervene in earlier case). In this case, however, the dismissal was not a final judgment.

The distinction is nicely illustrated by the proceedings in *Ciralsky v. CIA*, 355 F.3d 661 (D.C. Cir. 2004), another case cited by Defendants. There, the district court dismissed without prejudice "both [the plaintiff's] complaint and his lawsuit against his former employer" on the ground that the complaint was unreasonably long. *Id.* at 664. On appeal the plaintiff challenged those rulings as well as "the district court's denial of his subsequent motions under Rules 59(e) and 15(a) to alter the court's judgment and to amend his complaint." *Id.* Although the circuit court affirmed all the district court's rulings, it was "nonetheless troubled by the fact than an affirmance of its Rule 59(e) disposition would terminate this lawsuit," *id.* at 673–74, because "although the dismissal was without prejudice, the effect was to bar [the plaintiff's] Title VII claims under the statute of limitations," *id.* at 667 n.3. The court therefore remanded the case "to allow [the district court] to decide whether, given the surfacing of the statute of limitations problem, [it] wishe[d] to give plaintiff a further chance by allowing the present action to proceed" under the plaintiff's shorter proposed amended complaint. *Id.* at 674 (original brackets and internal quotation marks omitted). *Ciralsky* thus illustrates the central point missed by Defendants here. If the district court dismissed the complaint without prejudice *and* without leave to amend, any further complaint filed in a new case would be barred by the statute of limitations. But if the district court permitted an amended complaint in the present case, that complaint would not necessarily be barred. The latter alternative is our situation.

[10] Where, unlike in this case, the district court sets a date-certain deadline by which a plaintiff must file an amended complaint, there is a split of authority among the circuits regarding whether the judgment becomes final automatically at the expiration of the allowed time, or, instead, whether some further action must be taken for the judgment to become final. *Compare, e.g.*, *N. Am. Butterfly Ass'n v. Wolf*, 977

and *CTS* quoted by the district court in *Hogan III* (stating the uncontroversial proposition that statutes of repose generally cannot be equitably tolled, *see* 2021 WL 1534602, at *5) do not alter this analysis because tolling pertains to the time within which a plaintiff must first bring a suit or a claim and, as we have explained, filing the SAC did not constitute bringing a claim.

Defendants may feel put upon because of the long delay until their entitlement to repose. But it is not as if they had been without recourse to expedite the matter. For one thing, they could have requested the court to impose a deadline. *See Jung*, 356 U.S.

F.3d 1244, 1256 (D.C. Cir. 2020) ("[T]his appeal, taken after expiration of the minute order's time-limited opportunity to amend, and appealing from the judge's dismissal order and accompanying opinion that unambiguously dismissed the entire 'case' and all 'claims,' addresses a final decision of the district court and therefore falls within our jurisdiction under section 1291—without the need for the plaintiff to request and obtain a further order from the district court."), *with, e.g.*, *Britt v. DeJoy*, 45 F.4th 790, 797 (4th Cir. 2022) (en banc) (stating, in reliance on *Jung*, 356 U.S. at 336–37, "In granting a plaintiff leave to amend her complaint, the district court may have: (1) provided the plaintiff with a specified number of days during which she could seek to amend; or (2) stated that the plaintiff could seek to amend but remained silent as to a deadline by which she was required to do so. A decision granting leave to amend, however, is not final. Therefore, we now clarify that a plaintiff in either instance must obtain an additional, final decision from the district court finalizing its judgment before she may appeal.").

[11] Because Defendants' right to repose never vested, we reject Defendants' argument that allowing Plaintiff to file an amended complaint that relates back to the FAC under Rule 15(e)(1)(B) would violate Defendants' substantive rights, in violation of the Rules Enabling Act. To be sure, "a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Fulghum*, 785 F.3d at 416 (internal quotation marks omitted). But "the expiration of a repose period creates a vested right to be free from liability only as against those plaintiffs who do not have a pending action under the statute at that time." *SEPTA*, 12 F.4th at 351. The repose statute governs only when a claim can be brought, and every claim in the SAC had already been brought in the FAC. Thus, the filing of the SAC would not violate any vested right of Defendants—so there is no Rules Enabling Act problem here.

at 337 (defendants "did not, as they so easily could have done, . . . take any step to put a definitive end to the case"); *Britt v. DeJoy*, 45 F.4th 790, 798 (4th Cir. 2022) (en banc) ("Litigants on either side have the option of filing a motion requesting that the district court provide a specific deadline by which the plaintiff must amend her complaint."). Alternatively, Defendants could have filed a motion under Fed. R. Civ. P. 41(b) seeking dismissal for failure to prosecute. Yet they took no such action.

In sum, we hold that the district court erred in dismissing the SAC on the ground that it was barred by the statute of repose. We therefore reverse *Hogan III*. Because the district court did not review the adequacy of the SAC, we remand for consideration of that issue. *See EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1175 (10th Cir. 2017) ("[T]he better practice on issues raised below but not ruled on by the district court is to leave the matter to the district court in the first instance." (original brackets and internal quotation marks omitted)).

In light of our reversal of the dismissal of the SAC as untimely, that pleading is now the operative complaint, superseding the FAC. *See Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1180–81 (10th Cir. 2015) ("[A]n amended pleading supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified." (internal quotation marks omitted)). The sufficiency of the FAC is therefore irrelevant and nothing would be resolved by our opining on the sufficiency of that pleading by reviewing *Hogan I* or *Hogan II*. We therefore dismiss the appeals of those two orders as moot. *See CollegeAmerica*, 869 F.3d at 1173 ("In assessing mootness, we consider whether a favorable judicial decision would have

some effect in the real world."). Likewise, Plaintiff's challenge to the denial in *Hogan IV* of the motion to reconsider the dismissal of the SAC in *Hogan III* has been mooted by our reversal in the appeal of *Hogan III*. We therefore dismiss that appeal as well. Finally, we leave to the sound discretion of the district court whether to permit a further amendment of Plaintiff's complaint on remand.

III. CONCLUSION

We **REVERSE** the judgment below, **DISMISS** as moot the portion of Plaintiff's appeal challenging *Hogan I*, *Hogan II*, and *Hogan IV*, and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 13, 2023

Mr. Craig John Geraci
Mr. Lewis S. Kahn
Kahn Swick & Foti
1100 Poydras Street, Suite 960
New Orleans, LA 70163

Mr. J. Ryan Lopatka
Ms. Kim E. Miller
Kahn, Swick & Foti
250 Park Avenue, Suite 2040
New York, NY 10177

RE: 21-1445, Hogan, et al v. Pilgrim's Pride Corporation, et al
Dist/Ag docket: 1:16-CV-02611-RBJ

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Aaron J. Curtis
John Anderson Fagg
Seth D. Goodchild
Tania Matsuoka
Caitlin C. McHugh
Mark A. Nebrig
Caroline Zalka

CMW/na