

894 F.3d 665

United States Court of Appeals, Fifth Circuit.

FIREFIGHTERS' RETIREMENT SYSTEM;  
Municipal Employees' Retirement System of  
Louisiana; New Orleans Firefighters' Pension &  
Relief Fund, Plaintiffs–Appellants Cross-Appellees

v.

GRANT THORNTON, L.L.P.,  
Defendant–Appellee Cross-Appellant.

No. 17-30274

|

FILED July 3, 2018

### Synopsis

**Background:** Public employee pension plans petitioned for damages in state court against independent auditor retained by plans to audit Cayman Islands-based fund that subsequently filed for bankruptcy and against investment advisor after plans lost \$100 million investment in shares issued by fund, asserting claims against auditor for violation of Louisiana Securities Act and Louisiana Unfair Trade Practices Act (LUTPA), detrimental reliance, negligence, negligent misrepresentation, and third-party beneficiary, and asserting claims against for advisor for breach of contract and violation of LUTPA. Auditor and advisor removed action. The United States District Court for the Middle District of Louisiana, Shelly D. Dick, J., dismissed the action after adopting the report and recommendation of Erin Wilder-Doomes, United States Magistrate Judge, 2017 WL 1017749. Pension plans appealed, and auditor cross-appealed.

**Holdings:** The Court of Appeals, Wiener, Circuit Judge, held that:

[1] judicial estoppel did not prevent independent auditor from invoking its right to accountant review panel under Louisiana Accountancy Act;

[2] auditor did not waive its right to accountant review panel under Louisiana Accountancy Act (LAA) by participating in litigation for three years without raising LAA review panel requirement;

[3] judicial economy was best served by resolving peremption question on independent auditor's cross-appeal;

[4] pension plans did not allege plausible claim of fraud against independent auditor, as required for post-malpractice fraudulent concealment to suspend running of preemptive period for accounting malpractice claims; and

[5] pension plan's request for review of accounting malpractice claim by accountant review panel, as required by statute, was untimely and did not prevent peremption of claim.

Affirmed.

West Headnotes (20)

#### [1] Federal Courts

🔑 Pleading

#### Federal Courts

🔑 Dismissal for failure to state a claim

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

170Bk3587 Pleading

170Bk3587(1) In general

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)3 Presumptions

170Bk3664 Pleadings;Dismissal

170Bk3667 Dismissal for failure to state a claim

The Court of Appeals reviews a grant of a motion to dismiss de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

#### [2] Federal Civil Procedure

🔑 Insufficiency in general

**Federal Civil Procedure**

🔑 Matters deemed admitted; acceptance as true of allegations in complaint

- 170A Federal Civil Procedure
  - 170AXI Dismissal
  - 170AXI(B) Involuntary Dismissal
  - 170AXI(B)3 Pleading, Defects In, in General
  - 170Ak1772 Insufficiency in general
  - 170A Federal Civil Procedure
  - 170AXI Dismissal
  - 170AXI(B) Involuntary Dismissal
  - 170AXI(B)5 Proceedings
  - 170Ak1827 Determination
  - 170Ak1835 Matters deemed admitted; acceptance as true of allegations in complaint
- To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

**[3] Federal Civil Procedure**

🔑 Insufficiency in general

- 170A Federal Civil Procedure
  - 170AXI Dismissal
  - 170AXI(B) Involuntary Dismissal
  - 170AXI(B)3 Pleading, Defects In, in General
  - 170Ak1772 Insufficiency in general
- A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged; threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Fed. R. Civ. P. 8, 12(b)(6).

Cases that cite this headnote

**[4] Federal Civil Procedure**

🔑 Claim for relief in general

- 170A Federal Civil Procedure
  - 170AVII Pleadings
  - 170AVII(B) Complaint
  - 170Ak673 Claim for relief in general
- Although a complaint does not need detailed factual allegations, the allegations must be

enough to raise a right to relief above the speculative level. Fed. R. Civ. P. 8, 12(b)(6).

Cases that cite this headnote

**[5] Federal Civil Procedure**

🔑 Insufficiency in general

- 170A Federal Civil Procedure
  - 170AXI Dismissal
  - 170AXI(B) Involuntary Dismissal
  - 170AXI(B)3 Pleading, Defects In, in General
  - 170Ak1772 Insufficiency in general
- Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

**[6] Estoppel**

🔑 Claim inconsistent with previous claim or position in general

- 156 Estoppel
  - 156III Equitable Estoppel
  - 156III(B) Grounds of Estoppel
  - 156k68 Claim or Position in Judicial Proceedings
  - 156k68(2) Claim inconsistent with previous claim or position in general
- Judicial estoppel did not prevent independent auditor from invoking its right to accountant review panel under Louisiana Accountancy Act, in action brought by public employee pension plans alleging violation of Louisiana Securities Act and Louisiana Unfair Trade Practices Act (LUTPA); even if auditor's position was inconsistent with its previous jurisdiction argument, district court did not accept that supposedly inconsistent prior position. La. Rev. Stat. Ann. §§ 37:102(A), 37:105(A).

Cases that cite this headnote

**[7] Estoppel**

🔑 Claim inconsistent with previous claim or position in general

- 156 Estoppel
- 156III Equitable Estoppel

156III(B) Grounds of Estoppel  
 156k68 Claim or Position in Judicial Proceedings  
 156k68(2) Claim inconsistent with previous claim or position in general  
 Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation.

Cases that cite this headnote

**[8] Estoppel**

🔑 Claim inconsistent with previous claim or position in general

156 Estoppel  
 156III Equitable Estoppel  
 156III(B) Grounds of Estoppel  
 156k68 Claim or Position in Judicial Proceedings  
 156k68(2) Claim inconsistent with previous claim or position in general  
 Judicial estoppel requires: (1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.

Cases that cite this headnote

**[9] Federal Courts**

🔑 In general;necessity  
 170B Federal Courts  
 170BXVII Courts of Appeals  
 170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review  
 170BXVII(D)1 In General  
 170Bk3391 In general;necessity  
 An argument not raised before the district court cannot be asserted for the first time on appeal.

Cases that cite this headnote

**[10] Accountants**

🔑 Actions  
 11A Accountants  
 11Ak10 Actions  
 11Ak10.1 In general

Independent auditor did not waive its right to accountant review panel under Louisiana Accountancy Act (LAA) by participating in litigation for three years without raising LAA review panel requirement, since review panel requirement could be waived only by written agreement, auditor's participation was nominal and it did not file answer, and it addressed prematurity issue in motion to dismiss.

Cases that cite this headnote

**[11] Pleading**

🔑 Dilatory exceptions  
 302 Pleading  
 302V Demurrer or Exception  
 302k228.6 Dilatory exceptions  
 Louisiana's dilatory exceptions serve a similar purpose as do motions to dismiss under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12; La. Code Civ. Proc. Ann. arts. 923, 926.

Cases that cite this headnote

**[12] Limitation of Actions**

🔑 Causes of action in general  
 241 Limitation of Actions  
 241II Computation of Period of Limitation  
 241II(A) Accrual of Right of Action or Defense  
 241k43 Causes of action in general  
 Contra non valentum under Louisiana law did not apply to peremption.

Cases that cite this headnote

**[13] Federal Courts**

🔑 Theory and Grounds of Decision of Lower Court  
 170B Federal Courts  
 170BXVII Courts of Appeals  
 170BXVII(K) Scope and Extent of Review  
 170BXVII(K)1 In General  
 170Bk3548 Theory and Grounds of Decision of Lower Court  
 170Bk3549 In general  
 The Court of Appeals may affirm on any basis supported by the record.

Cases that cite this headnote

**[14] Federal Civil Procedure**

🔑 Effect

- 170A Federal Civil Procedure
- 170AXI Dismissal
- 170AXI(B) Involuntary Dismissal
- 170AXI(B)5 Proceedings
- 170Ak1837 Effect
- 170Ak1837.1 In general

A dismissal without prejudice may be converted into a dismissal with prejudice when a defendant files a cross-appeal.

Cases that cite this headnote

**[15] Federal Courts**

🔑 On appeal from final judgment

- 170B Federal Courts
  - 170BXVII Courts of Appeals
  - 170BXVII(K) Scope and Extent of Review
  - 170BXVII(K)1 In General
  - 170Bk3543 Questions Considered
  - 170Bk3546 Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pendent Appellate Jurisdiction
  - 170Bk3546(2) On appeal from final judgment
- Judicial economy was best served by resolving preemption question on independent auditor's cross-appeal while on review of dismissal of pension's plan action alleging violation of Louisiana Securities Act and Louisiana Unfair Trade Practices Act (LUTPA), since both parties had ample opportunities to address issue in district court, as well as in their appellate briefs. La. Rev. Stat. Ann. § 9:5604.

1 Cases that cite this headnote

**[16] Limitation of Actions**

🔑 In general;what constitutes discovery

- 241 Limitation of Actions
- 241II Computation of Period of Limitation
- 241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
- 241k95 Ignorance of Cause of Action

241k95(1) In general;what constitutes discovery

Under Louisiana law, contra non valentum prevents the commencement of the running of prescription when the plaintiff does not know or reasonably should not know of the cause of action.

Cases that cite this headnote

**[17] Limitation of Actions**

🔑 Causes of action in general

- 241 Limitation of Actions
- 241II Computation of Period of Limitation
- 241II(A) Accrual of Right of Action or Defense
- 241k43 Causes of action in general

The equitable doctrine of contra non valentum under Louisiana law demands suspension when the plaintiff is effectively prevented from enforcing his rights for reasons external to his own will.

Cases that cite this headnote

**[18] Limitation of Actions**

🔑 Concealment of Cause of Action

- 241 Limitation of Actions
- 241II Computation of Period of Limitation
- 241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
- 241k104 Concealment of Cause of Action
- 241k104(1) In general

Pension plans did not allege plausible claim of fraud against independent auditor under Louisiana law, as required for post-malpractice fraudulent concealment to suspend running of preemptive period for accounting malpractice claims, where plans did not allege that auditor acted with specific intent to deceive, made deliberate misrepresentations, or concealed alleged misrepresentations. La. Civ. Code Ann. art. 1953.

Cases that cite this headnote

**[19] Fraud**

 Intent

184 Fraud  
 184I Deception Constituting Fraud, and Liability Therefor  
 184k2 Elements of Actual Fraud  
 184k4 Intent  
 Under Louisiana law, fraud cannot be based on mistake or negligence, regardless how great.

1 Cases that cite this headnote

**[20] Limitation of Actions**

 Pendency of Action or Other Proceeding

241 Limitation of Actions  
 241II Computation of Period of Limitation  
 241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War  
 241k105 Pendency of Action or Other Proceeding  
 241k105(1) In general  
 Pension plan's request for review of accounting malpractice claim by accountant review panel, as required by statute, was untimely and did not prevent peremption of claim under Louisiana law, since request for review occurred more than one year after plan discovered alleged acts of negligence by independent auditor. La. Rev. Stat. Ann. §§ 9:5604, 37:105(A).

Cases that cite this headnote

\*667 Appeals from the United States District Court for the Middle District of Louisiana

**Attorneys and Law Firms**

Phillip W. Preis, Esq., Charles Malcolm Gordon, Jr., Esq., Preis Gordon, A.P.L.C., Baton Rouge, LA, for Plaintiffs–Appellants Cross-Appellees.

Joseph R. Palmore, Sophia Madeleine Brill, Morrison & Foerster, L.L.P., Washington, DC, Laura Elizabeth Carlisle, Amelia Williams Koch, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., New Orleans, LA, Grant J. Esposito, Morrison & Foerster, L.L.P., New York, NY, for Defendant–Appellee Cross-Appellant.

Before SMITH, WIENER, and WILLETT, Circuit Judges.

**Opinion**

WIENER, Circuit Judge:

Plaintiffs–Appellants Firefighters' Retirement System, Municipal Employees' Retirement System of Louisiana, and New Orleans Firefighters' Pension & Relief Fund (collectively, "Plaintiffs") filed accounting malpractice claims against Defendant–Appellee Grant Thornton ("GT"). GT filed a motion to dismiss the suit as premature because Plaintiffs failed to bring their claims before an accountant review panel, as required by Louisiana law. The district court agreed with GT and dismissed Plaintiffs' suit without prejudice. Plaintiffs now appeal, contending that GT is either estopped from asserting its right to a review panel or has waived that right. GT cross-appeals, arguing that those claims are extinguished because Plaintiffs failed to request \*668 a review panel within the relevant preemptive period.

**I. FACTS AND PROCEEDINGS**

In 2008, Plaintiffs invested \$100 million in the FIA Leveraged Fund ("Leveraged"). The terms of the Leveraged Offering Memorandum stated that GT was "the Fund's independent auditor" and would provide shareholders with "an annual audited financial report" of the Leveraged Fund.<sup>1</sup> GT prepared and issued the 2007 and 2008 audit reports for Leveraged. In 2011, GT withdrew these audits after an SEC investigation. GT admitted errors in its 2007 and 2008 reports and issued restated audits to correct previously overstated capital and net cash flow.<sup>2</sup> In 2012, Leveraged filed for bankruptcy.

<sup>1</sup> GT alleges that it did not issue the audit opinions at issue in this case. It contends a separate legal entity, Grand Thornton Cayman, did all of the work for the Leveraged audit reports. Plaintiffs claim that GT performed all of the audit services and the two entities have an agency relationship. Regardless, it is not necessary for us to reach this issue in order to resolve the issues presented in this appeal.

<sup>2</sup> Plaintiffs also contend that during the relevant time period, GT served as a personal financial

advisor for Alphonse Fletcher. In the course of this relationship, Leveraged loaned Fletcher \$27 million, allegedly in violation of the terms of the Leveraged Offering. Plaintiffs allege that this transaction demonstrates that GT had a conflict of interest and was therefore unable to perform its role as Leveraged's "independent auditor." This argument, however, is not directly related to the issues in the present appeal.

In January 2014, Plaintiffs filed suit against GT in Louisiana state court alleging various accounting malpractice claims.<sup>3</sup> The suit was removed to the Middle District of Louisiana in February 2014 pursuant to 28 U.S.C. § 1334(b), as a civil case arising from a title 11 bankruptcy. In April 2014, GT filed a motion to dismiss based on (1) lack of personal jurisdiction, (2) improper venue, (3) untimeliness, (4) failure to state a claim, and (5) failure to join an indispensable party. In their opposition to dismissal, Plaintiffs noted that the case had not been reviewed by an accountant review panel, as required by Louisiana law. The magistrate judge then requested supplemental briefing on whether Plaintiffs were required to submit their claims against GT to a public accountant review panel pursuant to Louisiana Revised Statutes §§ 37:102 and 37:105.

<sup>3</sup> Plaintiffs also named Consulting Services Group, LLC ("CSG") as a defendant; however, Plaintiffs had already filed claims against CSG and twenty-two other defendants in state court. The new claims against CSG were consolidated with the previous suit. CSG is no longer a defendant in this case.

In its supplemental brief, GT argued that Plaintiffs' suit was premature because they had not submitted their claims to a review panel before filing suit. GT explained that it did not previously raise this issue "because it did not want to create grounds for Plaintiffs to argue it had compromised its personal jurisdiction defense via reliance on a Louisiana statutory procedure." GT urged that the case should still be dismissed for lack of personal jurisdiction, but in the alternative should be dismissed as premature. Plaintiffs responded that GT had waived the prematurity defense by participating in the litigation for three years without mentioning the review panel.

In February 2017, the magistrate judge issued a report and recommendation on GT's motion to dismiss.<sup>4</sup> The magistrate judge concluded that the district court had personal jurisdiction over GT and that venue was proper

in the Middle District of Louisiana. The magistrate judge also determined \*669 that "because Plaintiffs' claims arise out of Grant Thornton USA's preparation of the Initial and Restated Audits," the claims were within the scope of the Louisiana Accountancy Act and Plaintiffs were required to submit their claims before a review panel prior to filing suit. The magistrate judge recommended dismissing the suit as premature.<sup>5</sup> Both parties objected to the report and recommendation. The district court reviewed the objections, adopted the magistrate judge's report and recommendation, and dismissed Plaintiffs' claims. Plaintiffs timely appealed and GT timely cross-appealed.

<sup>4</sup> The delay between the date of filing and the magistrate judge's opinion is largely explained by an eighteen-month stay during this court's consideration and ruling in the related case of *Firefighters' Ret. Sys., et al. v. Citco Grp. Ltd.*, 796 F.3d 520 (5th Cir. 2015) ("Citco Case").

<sup>5</sup> The court did not address GT's peremption arguments.

## II. ANALYSIS

The appeal and cross-appeal raise two main issues: First, whether Plaintiffs' claims against GT were premature because they were not submitted to an accountant review panel; second, whether the claims are time barred under the applicable preemptive period. The district court determined that the claims were premature but did not address the peremption issue.

A. Plaintiffs' claims against GT are premature because they did not submit them before an accountant review panel prior to filing this lawsuit.

### 1. Standard of Review

[1] [2] [3] [4] [5] We review the grant of a motion to dismiss de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff."<sup>6</sup> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"<sup>7</sup> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>8</sup> “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>9</sup> Although a complaint “does not need detailed factual allegations,” the “allegations must be enough to raise a right to relief above the speculative level....”<sup>10</sup> “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.”<sup>11</sup>

6 *Hines v. Alldredge*, 783 F.3d 197, 200–01 (5th Cir. 2015) (quoting *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009)).

7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

8 *Id.*

9 *Id.*

10 *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

11 *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009) (quoting *Fernandez–Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993)).

## 2. Louisiana Accountancy Act

[6] The parties do not dispute that these claims fall within the Louisiana Accountancy Act. Plaintiffs contend, however, that GT is estopped from asserting its right to a review panel or, in the alternative, that it has waived this requirement.

The LAA states that “[a]ll claims against certified public accountants or firms ... shall be reviewed by a public \*670 accountant review panel.”<sup>12</sup> “[N]o action against a certified public accountant or firm ... may be commenced in any court before the claimant’s request for review has been presented to a public accountant review panel ... and the panel has issued a written opinion.”<sup>13</sup> Compliance with this requirement “is not to be deemed optional.”<sup>14</sup> District courts within the Fifth Circuit have dismissed accounting malpractice claims as premature because plaintiffs did not present the claims to an accountant review panel.<sup>15</sup>

12 La. Stat. Ann. § 37:102(A).

13 *Id.* § 37:105(A).

14 *Id.*

15 See *Bickerstaff v. Bickerstaff*, 226 F.Supp.3d 652, 655–58 (E.D. La. 2016); *Barrack Children’s Irrevocable Tr. v. Paillet*, No. CIV.A. 12-00784, 2012 WL 2513682, at \*1 (E.D. La. June 27, 2012).

It is undisputed that Plaintiffs filed suit before submitting their claims before a review panel. Plaintiffs do not contend they are exempt from this requirement, but argue that GT is estopped from asserting its right to a review panel because it previously asserted that it was not subject to specific personal jurisdiction in Louisiana. Plaintiffs also argue that GT waived its right to a review panel by not raising the issue earlier in the litigation. GT responds that estoppel does not apply because it has not taken inconsistent positions in the litigation. GT also contends that it has not waived its right to a review panel, as such a waiver requires a written agreement by the parties.

### *i. Judicial Estoppel*

[7] [8] [9] “Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation.”<sup>16</sup> Judicial estoppel requires: “(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.”<sup>17</sup> Plaintiffs contend that GT’s contention that it is entitled to a review panel is inconsistent with its previous position that it was not subject to personal jurisdiction in Louisiana. The district court expressly found, however, that it had personal jurisdiction in this case. Even if Plaintiffs are correct that GT’s position is inconsistent with its previous jurisdiction argument, the district court did not accept this supposedly inconsistent prior position. Judicial estoppel, therefore, does not prevent GT from invoking its right to an accountant review panel.<sup>18</sup>

16 *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004).

17 *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011).

18 *See id.* In fact, Plaintiffs might have waived this issue. They did not include this argument in their response to GT's motion to dismiss, in the supplemental briefing requested by the magistrate judge, or in their objections to the report and recommendation. "An argument not raised before the district court cannot be asserted for the first time on appeal." *SmithGroup JJR, P.L.L.C. v. Forrest Gen. Hosp.*, 661 F. App'x 261, 265 (5th Cir. 2016) (quoting *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008)). By failing to raise this issue in the district court, Plaintiffs likely waived it.

*ii. Waiver of Panel Review Requirement*

[10] Plaintiffs also argue that GT has waived its right to an accountant review panel by participating in this litigation for three years without raising the LAA review panel requirement. In support of \*671 their argument, Plaintiffs rely on *Moon Ventures, L.L.C. v. KPMG, L.L.P.*, in which the Louisiana Third Circuit held that an accounting firm had "waived its right to ... a review panel when it filed not only one but two answers in this litigation and participated in discovery" without timely raising the issue of prematurity.<sup>19</sup> In response, GT contends that the review panel requirement is mandatory and can only be waived by "written agreement of both parties."<sup>20</sup>

19 *Moon Ventures, L.L.C. v. KPMG, L.L.P.*, 2006-1520, p. 6 (La. App. 3 Cir. 8/15/07), 964 So.2d 446, 451, writ denied, 2007-1862 (La. 11/21/07), 967 So.2d 1156.

20 *See* La. Stat. Ann. §§ 37:105(A), 37:107.

The LAA states that a public accountant review panel is mandatory but may be waived "[b]y written agreement of both parties."<sup>21</sup> There is no such written agreement in this case. Instead, Plaintiffs contend that GT's participation in the litigation amounts to waiver, in accordance with *Moon Ventures*.

21 La. Stat. Ann. § 37:107.

[11] In that case, the defendant failed to file a dilatory exception of prematurity<sup>22</sup> despite filing two answers and participating in discovery during six years of litigation.<sup>23</sup> Under Louisiana procedure, "the dilatory exception shall

be pleaded prior to or in the answer."<sup>24</sup> As noted, the defendant in *Moon Ventures*, filed two answers before filing a dilatory exception, in clear violation of the state procedural requirements.<sup>25</sup> The court in *Moon Ventures* thus reached its decision—which is arguably in conflict with the plain language of the statute<sup>26</sup>—based on Louisiana rules of procedure, which are not applicable in this case.<sup>27</sup>

22 Louisiana's dilatory exceptions serve a similar purpose as do motions to dismiss under the Federal Rules of Civil Procedure. *See* La. Code Civ. Proc. arts. 923, 926; *see also* N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1266 (1994) ("A dilatory exception retards the progress of a lawsuit, but does not tend to defeat the action. Examples include prematurity, vagueness of the petition, and nonjoinder of a necessary party.").

23 *Moon Ventures, L.L.C.*, 964 So.2d at 448, 450. The court relied on *Solow v. Heard, McElroy & Vestal, L.L.P.*, which held that parties may waive panel review "by failing to assert a dilatory exception of prematurity timely as required by La. C.C. P. art. 926(B), which states '[a]ll objections which may be raised through the dilatory exception are waived unless pleaded therein.'" *Solow v. Heard, McElroy & Vestal, L.L.P.*, 2005-1028 (La. App. 4 Cir. 4/12/06), 937 So.2d 875, 878, on reh'g (May 31, 2006), writ denied, 2006-1680 (La. 10/6/06), 938 So.2d 80.

24 La. Code Civ. Proc. art. 928.

25 *Moon Ventures, L.L.C.*, 964 So.2d at 451.

26 The dissent in *Moon Ventures* explained that while a party may waive the dilatory exception, it cannot waive the right to a review panel. *See id.* at 451–53.

27 *See id.* at 451.

Unlike the accountants in *Moon Ventures*, GT has not filed an answer in this case and addressed the prematurity issue in a motion to dismiss. Even if *Moon Ventures* applied to this case, GT has not waived its right to a review panel by its nominal participation in this litigation. Furthermore, unlike *Moon Ventures*, this litigation has not advanced as far as the suit in that case. It has been pending for three years but was stayed for 18 months pending the resolution of a related case. In any event, three years of litigation is still substantially different from the six-year litigation in *Moon Ventures*.<sup>28</sup> Plaintiffs' \*672

argument would be more persuasive if GT had filed an answer; however, the plain language of the statute is clear that parties may only waive their right to panel review by a written agreement.<sup>29</sup> Because GT is not estopped from asserting its right to panel review and has not waived this right, Plaintiffs' lawsuit was premature. We therefore affirm the district court's decision to dismiss Plaintiffs' lawsuit.

28 *See also Bernard, Cassisa, Elliott & Davis v. Estate of Laporte*, 12-758 (La. App. 5 Cir. 3/27/13), 113 So.3d 397, 401, writ denied, 2013-0899 (La. 5/31/13), 118 So.3d 398 (“[C]onducting of discovery and the use of the district court to aid in discovery are parts of the review panel process and do not constitute a waiver of the review panel.”).

29 La. Stat. Ann. §§ 37:105(A), 107.

B. Plaintiffs' claims against GT are time-barred under the relevant peremptive period.<sup>30</sup>

30 For a brief discussion of the civil law doctrine of preemption, *see* Jeffrey J. Gelpi, Comment, *Has Prescription Preempted Preemption?: A Plea to Bury the Ghosts of Survival Actions*, 89 TUL. L. REV. 253, 259 (2014) (“Peremption is ‘a period of time fixed by law for the existence of a right.’ Unlike prescription, which simply bars the remedy, preemption destroys the right itself.... A peremptive period defines the period of time for the right subject to preemption to exist and extinguishes the right upon the expiration of the period. Once the peremptive period has expired, no cause of action or substantive right exists to be enforced.” (quoting La. Civ. Code art. 3458) ).

[12] GT cross-appeals and argues that Plaintiffs' claims are time-barred because they did not present their claims before a review panel within the applicable peremptive period. GT raised this issue in district court, but the magistrate judge declined to address it and instead recommended dismissing the case on prematurity grounds. Plaintiffs counter that (1) this issue is not ripe for review because it was not addressed in the district court; (2) it is not appropriate for a motion to dismiss because it involves disputed fact issues; and (3) their claims are not extinguished because either *contra non valentum* or GT's post-malpractice fraud suspended the peremptive period.

## 1. Standard of Review

[13] [14] This court reviews a Rule 12(b)(6) dismissal *de novo* and “may affirm on any basis supported by the record.”<sup>31</sup> The district court dismissed Plaintiffs' claims without prejudice, but a dismissal without prejudice may be converted into a dismissal with prejudice when a defendant files a cross-appeal, as GT has done here.<sup>32</sup> This court has dismissed a case with prejudice when the district court's dismissal was based on a failure to exhaust and further proceedings would be futile.<sup>33</sup>

31 *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013).

32 *See Arvie v. Broussard*, 42 F.3d 249, 250 (5th Cir. 1994); *see also* 15A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3904 (2d ed. 1992).

33 *See, e.g., Manemann v. Garrett*, 484 F. App'x 857, 859 (5th Cir. 2012) (dismissing case with prejudice where the district court had dismissed claims for failure to exhaust administrative remedies and plaintiff's claims had by then become time-barred, making further proceedings futile).

Plaintiffs urge this court not to resolve the preemption question because the same issue is now pending in district court. Some procedural background may be beneficial here. After the district court dismissed Plaintiffs' claims as premature, they filed a notice with an accountant review panel and initiated a proceeding in district court to obtain discovery related to such a panel. GT objected to the review panel and filed a motion to dismiss the discovery proceeding based on the same preemption argument it raises in this cross-appeal. According to GT, both the district court and the accountant review panel have not yet addressed the preemption issue. GT claims that if we do not address preemption now, a future appeal will present “the very same question.”

\*673 [15] We conclude that judicial economy is best served by resolving the preemption question at this stage in the proceeding. Both parties have had ample opportunities to address the issue in the district court, as well as in their appellate briefs. Plaintiffs argue preemption is not properly before the court because this issue necessarily involves factual inquiries, but they also admit that any ruling on preemption must be based on

allegations in the complaint. We shall therefore address the peremption issue and evaluate the timeliness of Plaintiffs' claims based on the facts they alleged in the initial state court petition.

2. Peremptive period for accounting malpractice claims

GT contends that Plaintiffs' claims are not only untimely but also extinguished under Louisiana law. Section 9:5604 of the Louisiana Revised Statutes establishes the limitations periods for claims of professional accounting liability. It states:

No action for damages against any accountant duly licensed under the laws of this state ... arising out of an engagement to provide professional accounting service shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered.... **in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.**<sup>34</sup>

<sup>34</sup> La. Stat. Ann. § 9:5604(A) (emphasis added).

These one- and three-year limitations periods are peremptive, so they “may not be renounced, interrupted, or suspended.”<sup>35</sup> Neither of these limitations periods “shall [ ] apply in cases of fraud.”<sup>36</sup> Plaintiffs contend that the peremptive periods were suspended by either (1) the equitable doctrine of *contra non valentum* or (2) GT's post-malpractice fraudulent concealment.

<sup>35</sup> La. Civ. Code art. 3461.

<sup>36</sup> La. Stat. Ann. § 9:5604(E).

*i. Contra non Valentum*

[16] [17] Under Louisiana law, *contra non valentum* “prevents the commencement of the running of prescription ‘when the plaintiff does not know nor [sic] reasonably should know of the cause of action.’ ”<sup>37</sup> This equitable doctrine “demand[s] suspension when the plaintiff is effectively prevented [from] enforcing his rights for reasons external to his own will.”<sup>38</sup> The Louisiana Supreme Court “has distinguished prescription from peremption in that **contra non valentum does not apply to peremption.**”<sup>39</sup> *Contra non valentum*, therefore, does not extend the peremptive period in this case.<sup>40</sup>

<sup>37</sup> *Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 320 (5th Cir. 2002) (quoting *Picard v. Vermilion Parish Sch. Bd.*, 2000–1222, 4 (La. App. 3 Cir. 4/4/2001), 783 So.2d 590, 594).

<sup>38</sup> *Terrebonne Par. Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 885 (5th Cir. 2002).

<sup>39</sup> *Reeder v. North*, 97-0239 (La. 10/21/97), 701 So.2d 1291, 1298 (emphasis added).

<sup>40</sup> Plaintiffs claim that *contra non valentum* applies here based on the Louisiana Supreme Court's decision in *Lomont*, in which the court held *contra non valentum* applied when the plaintiff's “delay in bringing [suit] was a direct result of [the defendant's] fraud.” *Lomont v. Bennett*, 2014-2483 (La. 6/30/15), 172 So.3d 620, 637. The claim in *Lomont*, however, was governed by a prescriptive—not peremptive—period. *Id.* Because *contra non valentum* does not apply to peremptive periods, Plaintiffs' argument is unconvincing.

**\*674** *ii. Fraud*

[18] Plaintiffs also insist that the fraud exception suspends the running of the peremptive period in this case. The Louisiana Civil Code defines fraud as “a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.”<sup>41</sup>

<sup>41</sup> La. Civ. Code art. 1953.

Plaintiffs contend that in *Lomont v. Bennett*, the Louisiana Supreme Court also held that “post-malpractice fraudulent concealment can constitute fraud

as contemplated by La. R.S. 9:5605(E),”<sup>42</sup> and that, at the very least, fact questions exist as to whether GT concealed its accounting malpractice. Plaintiffs acknowledge that *Lomont* addressed Louisiana’s legal malpractice statutes, but aver that the accounting malpractice statute “contains identical language and provides for the same exception.” Neither this court nor Louisiana courts have addressed whether the rule in *Lomont* applies to accounting malpractice claims. We assume, without deciding, that if Plaintiffs have sufficiently alleged that GT engaged in post-malpractice fraudulent concealment, the fraud exception to the peremptive period will apply.

42 *Lomont*, 172 So.3d at 629.

In *Lomont*, the Louisiana Supreme Court held that “post-malpractice fraudulent concealment can constitute fraud” but explained that “[s]pecific intent to deceive is a necessary element of fraud, and fraud cannot be based on mistake or negligence, regardless how great.”<sup>43</sup> To determine if a defendant committed fraud, the court should evaluate the defendant’s actions and “consider whether [its] misrepresentations were deliberate and ‘knowing’ and whether evidence of the misrepresentations was concealed.”<sup>44</sup>

43 *Id.* at 627, 634.

44 *Id.* at 634.

In their complaint, Plaintiffs allege that GT “failed to detect and report” the following information in either the initial or restated audits:

- That \$42 million of the proceeds of the initial offering were not invested, but used to pay obligations to Citco;
- The conflict of interest between Citco, Fletcher, and Leveraged investors;
- The reasons GT resigned as an auditor of Leveraged; and
- The accurate value of specific notes within the Leveraged Fund.

[19] Even assuming that these allegations are true, as is required at this stage of the proceedings, Plaintiffs have failed to allege that GT made any of these omissions

with a “[s]pecific intent to deceive.”<sup>45</sup> “[F]raud cannot be based on mistake or negligence, regardless how great.”<sup>46</sup> Plaintiffs have failed to allege that GT acted with specific intent to deceive, made deliberate misrepresentations, or concealed the alleged misrepresentations. Because these are required elements of post-malpractice fraudulent concealment, Plaintiffs have failed to allege a plausible claim of fraud.<sup>47</sup> The fraud exception thus did not suspend the peremptive period.<sup>48</sup>

45 *Lomont*, 172 So.3d at 634.

46 *Id.*

47 *Id.*

48 *See id.*; La. Civ. Code art. 1953.

### iii. Peremptive period

[20] Even though Plaintiffs have failed to allege facts which demonstrate that the \*675 peremptive period was suspended, we must still determine when the peremptive period began to evaluate the timeliness of Plaintiffs’ claims. To be timely, Plaintiffs must have filed their claims

“in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered.... [and] in all events such actions shall be filed ... within three years from the date of the alleged act, omission, or neglect.”<sup>49</sup>

49 La. Stat. Ann. § 9:5604.

The parties disagree regarding when the relevant conduct occurred and when Plaintiffs knew, or should have known, about the alleged misconduct.<sup>50</sup> To evaluate the timeliness of Plaintiffs’ claims we “accept[ ] all well-pleaded facts as true and view[ ] those facts in the light most favorable to the plaintiff.”<sup>51</sup> Plaintiffs claim they did not have knowledge of the alleged misconduct until November 2013 when they received a Trustee Report that revealed additional factual inaccuracies in the 2011 restated audits. They also contend that this misconduct occurred in 2011, less than 3 years before they filed this

lawsuit. For the purposes of this appeal, we will accept these allegations as true.<sup>52</sup>

50 GT contends that Plaintiffs' claims are based on the 2007 and 2008 audit opinions, and therefore their 2014 lawsuit and 2017 review panel request are perempted because both were filed more than three years after the alleged misconduct. GT also argues that Plaintiffs' claims based on the 2011 restatements are perempted because they admitted they knew their investment was not liquid and the accounting statements were inaccurate when they received the promissory notes on June 15, 2011. Plaintiffs contend they were not on notice of the alleged malpractice until November 2013, when they learned of additional factual inaccuracies in the 2011 audit restatements. As discussed above, even accepting Plaintiffs' claims as true, those claims are still barred by the peremptive period in La. Stat. Ann. § 9:5604.

51 *Hines*, 783 F.3d at 201 (quoting *True*, 571 F.3d at 417).

52 The undisputed facts of this case, however, indicate that Plaintiffs likely had notice of the alleged misconduct in 2011. In their initial petition in the *Citco* case, Plaintiffs explained that the date they received the promissory note in 2011 was “the first point in time that [Plaintiffs] had any notice or knowledge that [their] investment in [Leveraged] was not liquid and that the valuations contained in the account statements issued to it were not accurate.” Pl.'s Pet. for Damages ¶ 41, *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, Civil Action No. 3:13-cv-373 (M.D. La. June 11, 2013), filed as Exh. A to Defendants' Notice of Removal, ECF No. 1 (“Plaintiffs' Initial Petition for Damages”). This petition is a matter of public record and subject to judicial notice. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007).

Even if Plaintiffs did not have constructive notice of the alleged misconduct until 2013, their claims are still perempted. After the district court dismissed the case, Plaintiffs filed their first petition before an accountant review panel on March 23, 2017. GT argues that this petition is now perempted because filing in state court does not interrupt the applicable peremptive period, and all of the alleged misconduct occurred more than three years before March 23, 2017.

The Louisiana Fifth Circuit Court of Appeal recently addressed a similar fact pattern.<sup>53</sup> In *Bernard, Cassisa*,

*Elliott & Davis v. Estate of Laporte*, plaintiffs filed an accounting malpractice claim in state court in March 2011.<sup>54</sup> Defendants filed a dilatory exception of prematurity, insisting \*676 that the claim had to be reviewed by an accounting panel.<sup>55</sup> Plaintiffs filed their claim with the review panel on May 31, 2011, and initiated discovery proceedings in state court.<sup>56</sup> In response, defendants filed an exception arguing that the claim was perempted because plaintiffs had knowledge of the alleged malpractice on May 3, 2010, but failed to file a request for an accountant review panel until May 31, 2011—more than one year later.<sup>57</sup> The state trial court dismissed the claim on peremption grounds.<sup>58</sup>

53 *Bernard, Cassisa, Elliott & Davis*, 113 So.3d at 399.

54 *Id.* at 398.

55 *Id.* In July 2011, the parties entered into an agreement that the plaintiffs' claims were premature and the suit was dismissed without prejudice.

56 *Id.*

57 *Id.* at 399.

58 *Id.*

On appeal, the Louisiana Fifth Circuit explained that “[b]ecause the rights to which peremptive periods attach are extinguished after the passage of a specified period of time, nothing may interfere with the running of a peremptive period.”<sup>59</sup> The court specifically found that “the premature filing and subsequent dismissal of the Petition for Damages had no effect on the peremptive period.... Only the timely filing of a written request for review under La. R.S. 37:105 prevents peremption.”<sup>60</sup> The Louisiana Supreme Court denied the writ.<sup>61</sup>

59 *Id.* at 400.

60 *Id.* at 401.

61 *Bernard, Cassisa, Elliott & Davis v. Estate of LaPorte*, 2013-0899 (La. 5/31/13), 118 So.3d 398 (denying writ).

Applying the rule in *Bernard* to this case, Plaintiffs' claims are time-barred. Louisiana law is clear that Plaintiffs cannot bring a malpractice claim against GT before submitting their claim to an accountant review panel.<sup>62</sup> At the absolute latest, Plaintiffs were aware of these

potential claims on January 17, 2014, when they filed this lawsuit in state court. Once they were aware of the claim, they had one year to file a written request for a review panel.<sup>63</sup> Inexplicably, they waited more than three more years before filing their first request for panel review; that was on March 23, 2017. Because filing a lawsuit in state court does not suspend the preemptive period for accounting malpractice claims, Plaintiffs' claims currently before the review panel were filed outside the preemptive period and are therefore extinguished.<sup>64</sup>

<sup>62</sup> La. Stat. Ann. § 37:105(A).

<sup>63</sup> La. Stat. Ann. § 9:5604(A); *see Bernard, Cassisa, Elliott & Davis*, 113 So.3d at 401.

<sup>64</sup> *See id.*; *see also Holloway Drilling Equip. v. Broussard*, 2014-668 (La. App. 3 Cir. 1/14/15), 158 So.3d 164, 171, writ denied, 2015-0312 (La. 5/1/15), 169 So.3d 372 ("The filing of a request for review with the public

accountant review panel within one year of the alleged acts giving rise to the complaint is an 'exercise of [a claimant's] right to seek judicial cognizance of his claim' and is sufficient to avoid preemption. Filing suit in district court prematurely will not be sufficient to avoid the preemptive periods established in La. R.S. 9:5604." (internal citations omitted) ).

### III. CONCLUSION

We AFFIRM the district court's dismissal of Plaintiffs' claims as premature. Additionally, all of Plaintiffs' accounting malpractice claims must be dismissed *with* prejudice because they were filed outside the relevant preemptive period and thus were extinguished.

#### All Citations

894 F.3d 665