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The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; Hon. Denise Posse Lindberg, and Richard Jeeop Ream, Thomas Samuel Steed; Don Ronald Fischer, Dean Joseph Barlow, Watler Scott Fischer, Richard Gilbert, and Brent Jeffs : Brief of Defendant-Appellant Thomas C. Horne Arizona Attorney General's Opening Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Plaintiff-Appellee,

v.

THOMAS C. HORNE; BRUCE R. WISAN; MARK SHURTLEFF; HON. DENISE POSSE LINDBERG,

Defendants-Appellants,

and

RICHARD JESSOP REAM, THOMAS SAMUEL STEED, DON RONALD FISCHER, DEAN JOSEPH BARLOW, WALTER SCOTT FISCHER, RICHARD GILBERT, and BRENT JEFFS,

Intervenors-Appellants.

No. 20120158-SC

DEFENDANT-APPELLANT THOMAS C. HORNE ARIZONA ATTORNEY GENERAL'S OPENING BRIEF

Matter on Certified Question

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE QUESTION CERTIFIED

Under Utah preclusion law, is the Utah Supreme Court's discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds a decision "on the merits" when it is accompanied by a written opinion, such that later adjudication of the same claim is barred?

CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah R. Civ. P. 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties

before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of Rule 23.

Utah R. Civ. P. 41(b). Dismissal of actions.

(b) Involuntary dismissal; effect therof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal

otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Utah R. Civ. P. 65B(a). Extraordinary relief.

(a) Availability of Remedy. Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restrain on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority; the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

Utah R. Civ. P. 65B(d). Extraordinary relief.

(d) Wrongful Use of Judicial Authority or Failure to Comply With Duty; Actions by Board of Pardons and Parole.

(d)(1) Who May Petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(d)(2) Grounds for Relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative

agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(d)(3) Proceedings on the Petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d)(4) Scope of Review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

STATEMENT OF CASE

This matter is before the Court upon the Order Certifying State Law Questions by the United States Court of Appeals for the Tenth Circuit, pursuant to Tenth Circuit Rule 27.1, and the subsequent Order of Acceptance by this Court pursuant to Rule 41 of the Utah Rules of Appellate Procedure. The matter before the Tenth Circuit arises out of a challenge to a probate judgment entered by Utah's Third Judicial District Court

(Lindberg, J.) in 2006, which reformed the United Effort Plan Trust ("UEP" or "the Trust").

In 2005, the Third Judicial District Court assumed jurisdiction over the Trust after the trustees had abandoned the Trust rather than defend tort lawsuits filed against it and against Warren Jeffs, the President of the UEP Board of Trustees and the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"). *See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg,* 2010 UT 51, ¶1-24, 238 P.3d 1054.

Approximately two years after the reformation order became final and non-appealable, the Plaintiff-Appellee, an unincorporated association of members of the FLDS Church ("Plaintiff Association"), filed this action in the United States District Court to collaterally attack the reformation of the UEP Trust. Aplt. App. 007.[1] Shortly after the original Complaint was filed, it was superseded by an Amended Complaint. Aplt. App. 469-502. The relief sought by the Plaintiff Association in the federal case would nullify the Utah Third District Court's reformation judgment and enjoin its ongoing supervision of the Trust. Aplt. App. at 500-01.

The Amended Complaint named as Defendants Utah District Court Judge Denise Posse Lindberg, Bruce Wisan, the court-appointed Special Fiduciary of the UEP Trust, the Utah Attorney General, and the Arizona Attorney General. Aplt. App. at 470. The

[1] Appellant Appendix references are to the page numbers from the Joint Appendix filed by the Utah Attorney General's Office on August 3, 2011 in *FLDS v. Wisan, et al.*, 10th Circuit, Case No. 11-4049.

Plaintiff Association also moved for a temporary restraining order and preliminary injunction. Aplt. App. 503-11.

Approximately two months after filing the federal action, the Plaintiff Association filed a stipulated motion to stay the litigation and toll all deadlines, which the district court granted. Aplt. App. 1337-39; 1368-69. The purpose of the stay was to allow the parties to engage in settlement discussions.

In October, 2009, the Plaintiff Association filed a petition for extraordinary writ in the Utah Supreme Court. *Lindberg,* 2010 UT 51, ¶20. The extraordinary writ suit challenged the Third Judicial District Court's judgment reformation of the UEP Trust. *Compare Lindberg, id.* at ¶20, *with* District Court's Memorandum Opinion and Order, Aplt. App. at 34.

The extraordinary writ action in the Utah Supreme Court resulted in a ruling adverse to the Plaintiff Association. *Lindberg, id.* at ¶43. The Utah Supreme Court's judgment was appealable to the United States Supreme Court. 23 U.S.C. §1257. The Plaintiff Association in fact sought and was granted an extension of time to file a petition for writ of certiorari from the United States Supreme Court (Aplt. App. 2955-80), but never filed such a petition.

Thereafter, in October 2010, the Plaintiff Association returned to federal district court by filing a renewed motion for a temporary restraining order and preliminary injunction. Aplt. App. 1382-1429; 2908-36. The Arizona Attorney General filed a memorandum in opposition to the requested injunctive relief, as did the other Defendants. Aplt. App. 2087-2113.

After supplemental briefing on various issues and oral argument, the district court issued a Memorandum Opinion and Order on February 24, 2011, granting the Plaintiff Association's motion for preliminary injunction. Aplt. App. 22-69. The district court's preliminary injunction was effective immediately, on terms identical to a temporary restraining order that the court had previously entered on December 22, 2010. Aplt. App. at 68; 3203-05. The district court noted that a separate order would issue specifying additional terms of the preliminary injunction. Aplt. App. at 68.

On about April 8, 2011, the district court entered a modified preliminary injunction order ("Modified PI Order"). Aplt. App. 70-74. The new order enjoined the state court's ongoing supervision of the UEP Trust, suspended the state court's Special Fiduciary, and ordered the Special Fiduciary to transfer control and administration of the Trust to a non-party entity, the Corporation of the President of the FLDS Church ("COP"). *Id.* The parties, with the exception of the Plaintiff Association, subsequently filed notices of appeal with the district court, appealing the Modified PI Order. Aplt. App. 4786-4797.

On April 13, 2011, Judge Lindberg filed the Emergency Motion to Stay Preliminary Injunction Order ("Emergency Motion") with the United States Court of Appeals for the Tenth Circuit. *See* General Docket, Tenth Circuit Court of Appeals, Appeal No. 11-4049 (Consolidated). The Arizona Attorney General and the Utah Attorney General joined the Emergency Motion. *Id.* On April 15, 2011, the Tenth Circuit ordered the Modified PI Order stayed. *Id.* On April 27, 2011, the Tenth Circuit issued the Order Staying the district court's April 8, 2011 Preliminary Injunction Order

and April 14, 2011 Show Cause Order, thereby, in relevant part, ordering the Modified PI Order stayed until the case is decided. *Id.* The parties subsequently briefed the issues on appeal. *Id.*

The Arizona Attorney General, the Utah Attorney General and Judge Denise Posse Lindberg and Bruce R. Wisan filed motions to certify questions of state law. *Id.* The Tenth Circuit granted those motions and issued an order certifying the question now before this Court. *Id.*

STATEMENT OF FACTS

The Arizona Attorney General adopts and incorporates the relevant facts and historical background detailed in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg,* 2010 UT 51, ¶¶1-23. Further background information relating to the United Effort Plan Trust ("UEP") may be found in *Jeffs v. Stubbs,* 970 P.2d 1234 (Utah 1998).

SUMMARY OF ARGUMENT

The certified question should be answered "yes." The discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds accompanied by a written decision explaining that a claim is barred by laches is a decision "on the merits," such that later adjudication of the same claim is barred.

ARGUMENT

I. The Court Should Answer the Certified Question Affirmatively to Preserve the Purposes of Claim Preclusion – Ensuring Finality, Judicial Economy, and Avoiding Inconsistent Judicial Outcomes.

By filing a petition for extraordinary writ, a petitioner asks the Utah Supreme Court to exercise its discretion. Where the Court exercises its discretion and reviews the petition and explains in a published opinion that the claims suffer from an incurable defect such as laches, it is a decision "on the merits" for claim-preclusion purposes because there is nothing more for the Utah Supreme Court or any other court to consider. The Utah Supreme Court does not render advisory opinions. *See State v. Walker*, 2011 UT 53, ¶21, n. 2, 267 P.3d 210, (aggregating decisions regarding the Court's policy against issuing advisory opinions).

"Claim preclusion is premised on the principle that a controversy should be adjudicated only once." *Mack v. Utah Dep't of Commerce*, 2009 UT 47, ¶ 29, 221 P.3d 194 (internal quotations marks omitted). "[C]laim preclusion advances three important purposes. First, it ensures finality and protects litigants from harassment by vexatious litigation. Second, it promotes judicial economy by preventing litigated claims from being relitigated. Finally, claim preclusion preserves the integrity of the judicial system by preventing inconsistent judicial outcomes." *Allen v. Moyer*, 2011 UT 44, ¶ 7, 259 P.3d 1049 (internal quotation marks and citations omitted). "The principle which underlies both the doctrine of res judicata and its close relative, collateral estoppel, is that when there has been a proper adjudication upon a controversy, and the judgment has become final, that should settle the matter and there should be no further litigation thereon." *Int'l*

Res. v. Dunfield, 599 P.2d 515, 516 (Utah 1979). Answering the certified question in the negative would undercut all of these purposes.

II. A Determination that a Claim is Barred by Laches is a Determination "On the Merits" Precluding Later Adjudication of the Same Claim.

A. Under Rule 41(b) of the Utah Rules of Civil Procedure, a Dismissal on the Basis of Laches Constitutes an "Adjudication Upon the Merits."

In Utah, an involuntary dismissal presumably "operates as an adjudication upon the merits." Utah R. Civ. P. 41(b). "Rule 41(b) of the Utah Rules of Civil Procedure 'comprehensively defines a dismissal on the merits.'" *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 61, 44 P.3d 663 (quoting *Madsen v. Borthick*, 769 P.2d 245, 248 (Utah 1988)). This Court has explained:

> Although the last sentence of rule 41(b) may generally escape notice, in fact it does appear . . . to comprehensively define a dismissal on the merits; not just rule 41(b) dismissals, but all dismissals. It states:
>
> > Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision *and any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, *operates as an adjudication upon the merits*.
>
> Utah. R. Civ. P. 41(b) (emphasis added). . . . Therefore, under rule 41(b), unless it was a dismissal for "lack of jurisdiction or for improper venue or for lack of an indispensable party," it was a dismissal on the merits.

Madsen v. Borthick, 769 P.2d 245, 248 (Utah 1988). An involuntary dismissal of claims for laches is not based upon a lack of jurisdiction, improper venue, or lack of an

indispensable party. Thus, with regard to its preclusive effect, dismissal on the basis of laches "operates as an adjudication upon the merits" unless the Court otherwise specifies.

The approach federal courts have employed with regard to Rule 41(b) is instructive on the certified question before the Court. "Because the Utah Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, where there is little Utah law interpreting a specific rule, [the Court] may look to the Federal Rules of Civil Procedure for guidance." *Bichler v. DEI Sys., Inc.*, 2009 UT 63, ¶ 24 n. 2, 220 P.3d 1203. "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n. 2, 53 P.3d 947. In relevant part, Rule 41(b) of the Utah Rules of Civil Procedure provides:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensible party, operates as an adjudication upon the merits.

In relevant part, Rule 41(b) of the Federal Rules of Civil Procedure provides:

> Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - - except one for lack of jurisdiction, improper venue, or failure to a join a party under Rule 19 - - operates as an adjudication on the merits.

A review of the language shows that Utah Rule 41(b) is based upon Federal Rule 41(b).

Federal courts addressing the question of whether a dismissal for laches is a final decision "on the merits" have generally considered such a dismissal a decision "on the

merits." *See, e.g., Paxton v. Ward*, 199 F.3d 1197, 1207 (10th Cir. 1999) ("We noted that dismissals on the basis of laches are considered decisions on the merits."); *Smith v. Chicago*, 820 F.2d 916, 918-19 (7th Cir. 1987); *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 781 (7th Cir. 1986).

In addition to the proper but mechanical application of Rule 41(b), the determination that a claim is barred by laches also constitutes an adjudication "on the merits" in the more traditional sense of that term. "'On the merits' is a term of art that means that a judgment is rendered only after a court has evaluated the relevant evidence and the parties' substantive arguments." *Miller v. USAA Cas. Inc. Co.*, 2002 UT 6, ¶ 42 n.6, 44 P.3d 663 (citing Black's Law Dictionary 1117 (7th ed. 1999)). "To be on the merits, a judgment does not have to proceed to trial." *Id.*

Laches "has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence." *Lindberg*, 2010 UT 51, ¶27.[2] Deciding whether a sufficient lack of diligence exists requires the court to inquire into "'the circumstances of each case,' because 'the propriety of refusing a claim is equally predicated upon the gravity of the prejudices suffered . . . and the length of [the] delay.'" *Id.* at ¶ 28 (quoting *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1260

[2] Dismissal on the basis of laches is similar to dismissal for the failure to prosecute. The former relates to the delay and prejudice in filing the claims and the latter relates to the delay and prejudice in failing to prosecute the claims once filed. In Utah, a court considers the following factors in determining whether dismissal for failure to prosecute is appropriate: "(1) the conduct of both the parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal." *Country Meadows Convalescent Ctr. v. Utah Dep't of Health*, 851 P.2d 1212, 1214 (Utah App. 1993).

(Utah 1975)); *see also Day v. Wiswall's Estate*, 93 Ariz. 400, 403, 381 P.2d 217, 220 (1963) ("[L]aches is properly applied only after a consideration of the circumstances and merits of a suit.") Before finding that laches bars a suit, a court must "consider the relative harm caused by the petitioner's delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith." *Lindberg* at ¶28. Thus, such a determination necessarily involves an adjudication "on the merits" in the traditional sense of that term.

Under both Rule 41(b) and otherwise, a dismissal on the basis of laches is a determination "on the merits" such that later adjudication of the same claim is barred.

B. To Operate As an Adjudication "on the Merits," a Determination that Claims Are Barred by Laches Need Not Address Whether or Not the Plaintiff Would Have Succeeded on Their Claims in the Absence of the Prejudicial Delay.

A written decision on the basis of laches need not address whether or not the plaintiff would have otherwise succeeded on their claims to constitute a decision "on the merits" for the purposes of preclusion. This is true even where a decision states that the merits of the claims were not addressed. Within the context of laches, such a statement means only that the court made no determination whether or not the party asserting the claim would have prevailed but for their prejudicial delay.

"The term 'on the merits' is an unfortunate phrase, which could easily distract attention from the fundamental characteristics that entitle a judgment to greater or lesser preclusive effects. . . . [I]t is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatever of the substantive rights asserted." 18A

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4435 (2d ed. 2012). In *American National Bank & Trust Co. v. Chicago*, Judge Easterbrook aptly explained:

> A decision may be "on the merits" for purposes of preclusion even though the court did not resolve the merits. A dismissal for want of prosecution has this effect, *as does a dismissal for laches*. The decision is on the merits (and hence not jurisdictional) for purposes of preclusion when the litigant had an opportunity to receive an adjudication from that court. That he bollixed his opportunity by starting the suit too late or failing to prosecute it properly does not justify exposing the defendant to another round.

826 F.2d 1547, 1553 (7th Cir. 1987) (internal citation omitted) (emphasis added). The United States Supreme Court has explained:

> It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the state.

Angel v. Bullington, 330 U.S. 183, 190 (1947). "The 'merits' of a claim are disposed of when they are refused enforcement." *Id.*

In *Curry v. Educoa Preschool, Inc.*, 580 P.2d 222 (Utah 1978), this Court found that the involuntary dismissal of the plaintiffs' claims in federal court under Federal Rule of Civil Procedure 41(b), on the basis of a failure to prosecute, "constitute[d] a final judgment; which is entitled to res judicata effect." *Id.* at 224. As with a dismissal on the basis of laches, a dismissal on the basis of a failure to prosecute does not require

resolution of the underlying substantive claims to constitute a dismissal "on the merits" for the purposes of claim preclusion.

In *Donahue v. Smith*, 2001 UT 46, 27 P.3d 552, the Court affirmed a dismissal with prejudice in favor of a deceased defendant for plaintiff's failure to comply with Rule 25 of the Utah Rules of Civil Procedure, which requires that a motion to substitute be filed within ninety days after a suggestion of death is filed. *Id.* at ¶¶1-4. The plaintiff claimed, in part, that the trial court erred in dismissing the complaint with prejudice. *Id.* at ¶4. In making the determination as to whether or not to dismiss the complaint with prejudice, the trial court analyzed Utah R. Civ. P. 41(b), concluding that the plaintiff's failure to comply with Utah R. Civ. P. 25 was not "a dismissal 'for lack of jurisdiction or for improper venue or for lack of an indispensable party'" under Rule 41(b); instead "the district court concluded that the dismissal should constitute an adjudication upon the merits." *Id.* at ¶6 (quoting Rule 41(b)). In upholding the dismissal, this Court found that the dismissal was properly on the basis of the plaintiff's failure to comply with Utah R. Civ. P. 25, rather than Utah R. Civ. P. 19(b), for lack of an indispensable party. *Id.* at ¶8. The Court further found that "a dismissal with prejudice was presumed, and the district court was not in error to so rule." *Id.* Thus, under Rule 41(b), this Court has held that where a dismissal is premised upon the failure of a plaintiff to take timely action with regard to preserving or pursuing their claims and that dismissal is not "for a lack of jurisdiction or for improper venue or for lack of an indispensable party," such dismissal "should constitute 'an adjudication upon the merits.'" *Id.* at ¶¶6, 8-9. Like a dismissal based on laches, in *Donahue* the dismissal did not involve any determination as to

whether or not the plaintiff would have otherwise prevailed on his claims had he taken action to timely preserve and pursue his claims.

Dismissal on the basis of the statute of limitations provides another illustration that analysis of the substantive merits of a claim is not required to constitute an adjudication "on the merits." "The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute; as a judgment on the merits." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S.Ct. 1447, 1457 (1995).

The treatise *Federal Practice and Procedure* explains that "[s]everal federal decisions follow *the clearly correct rule* that dismissal of a prior action as barred by statute of limitations precludes a second action on the same claim in the same system of courts" and that "*[t]he same rule applies to a dismissal on such analogous theories as laches . . . .*" 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4435 (2d ed. 2012) (emphasis added). With regard to the statute of limitations, most federal courts treat the dismissal on the basis of the applicable statute of limitations as an adjudication "on the merits." *See, e.g., Rose v. Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) ("[W]e conclude that Massachusetts would treat this particular limitations-based dismissal as one with claim-preclusive effect."); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2d Cir. 1983) ("The longstanding rule in this Circuit, however, is that a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits. . . ."); *Knoll v. Springfield Township Sch. Dist.*,

699 F.2d 137, 145 (3d Cir. 1983) ("[A] complainant's failure to file within this period operates to bar relief in federal courts on the merits."), *vacated on other grounds*, 471 U.S. 288 (1985); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989) ("We hold that the federal district court's dismissal of plaintiffs' Pennsylvania action on statute of limitations grounds is a final judgment on the merits."); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 880 F.2d 818, 819-20 (5th Cir. 1989) ("[O]ur holding today merely stands for the proposition that a dismissal on statute of limitations grounds in federal court . . . is a final adjudication on the merits. . . ."); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("A summary judgment on the basis of the defense of the statute of limitations is a judgment on the merits."); *Myers v. Bull*, 599 F.2d 863, 865 (8th Cir. 1979) ("Appellant's attempt to resurrect the two claims previously raised . . . is clearly barred by the res judicata effect of the district court's decision . . . that the claims were brought outside the period of the applicable statute of limitations."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) ("The Supreme Court has unambiguously stated that a dismissal on statute of limitations grounds is a judgment on the merits."); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) ("We therefore agree with the Sixth Circuit and other circuits in holding that a dismissal on limitations grounds is a judgment on the merits."); *Wakefield v. Cordis Corp.*, 304 Fed. Appx. 804, 806, 2008 WL 5381432 (11th Cir. 2008) (unpublished) ("[A] ruling based on statute of limitations is a decision on the merits for *res judicata* purposes."); *Smalls v. United States*, 471 F.3d 186, 191 (Fed. Cir. 2006)

(noting that dismissal on statute-of-limitations grounds is a judgment on the merits for claim-preclusion purposes).

In *Charlie Brown Const. Co. v. Leisure Sports Inc.*, 740 P.2d 1368 (Utah App. 1987), the plaintiffs sought a reversal of a district court order denying a motion by plaintiffs to set aside the dismissal of their complaint. The district court dismissed the case for failure to prosecute and, in relevant part, ruled as follows:

> This matter was called on hearing for a Pre-Trial Conference. No one appeared on behalf of either party. This matter had been set several times for pre-trial and no one had ever appeared. The Court ordered the matter dismissed with prejudice and on the merits. The minute entry will serve as the Order of Dismissal.

Id., 740 P.2d at 1370. On appeal, the plaintiffs argued, in part, that the district court erred by dismissing their action with prejudice and on the merits. The Court of Appeals found no abuse of discretion and affirmed the district court's order. *Id.* at 1371. The Utah Supreme Court denied the plaintiffs' petition for writ of certiorari. *Charlie Brown Const. Co. v. Leisure Sports Inc.*, 765 P.2d 1277 (Table) (Utah 1987). Although the dismissal involved no trial and no analysis of the substance of the plaintiffs' claims, the dismissal nonetheless constituted a decision "on the merits." There is no sound reason that a dismissal on the basis of laches should carry any less weight.

For the reasons explained above, a determination of the underlying substantive claims is not necessary for a dismissal on the basis of laches to constitute a decision "on the merits" for the purposes of claim preclusion.

C. A Written Decision Dismissing a Petition for Extraordinary Writ on the Basis that the Claim Is Barred By Laches Is a Decision "on the Merits" Barring Subsequent Litigation of the Same Claim.

A written decision dismissing a petition for extraordinary writ on the basis that the claim or claims are barred by laches constitutes a decision "on the merits" for preclusion purposes. In *Gates v. Taylor*, 2000 UT 33, ¶1. 997 P.2d 903 (per curiam), this Court found that petitioners were barred by res judicata from seeking the same relief in successive petitions for extraordinary writ where, in denying the first petition, the court of appeals "reviewed the pleadings, heard oral argument, [] denied the petition" and issued a brief written order. There, the Court explained that from the short written order it was "clear that the matter was decided on the merits and not on any procedural ground." *Id.* at ¶1.

A written decision signals whether the Court is telling the petitioner "not today" or "not ever" with regard to the dismissal of their claims. In *American National Bank & Trust Co.*, Judge Easterbrook further explained:

> So if the court says "you have come to the wrong court, try another" or "this suit is premature, wait until the case is ripe" it will use the language of jurisdiction. Such adjudications, not "on the merits," may be followed by litigation in the right court or at the right time. But if the court says "you are too late" or otherwise wraps up the case in a way that indicates that the plaintiff has irrevocably failed, the use of jurisdictional language does not mean that the plaintiff may try again.

826 F.2d at 1553. Where this Court finds that claims are barred by laches, it has refused enforcement of those claims. That the determination is made in a decision dismissing a petition for extraordinary writ is of no consequence. There is nothing more that needs to

be determined by this Court or any other court. The Court has made a determination "on the merits" and is telling the petitioner "not ever." While an unripe claim may later come to life, a claim barred by laches only rots further with the passage of time.

CONCLUSION

For the reasons stated above, the Court should find that under Utah preclusion law, its discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds is a decision "on the merits," such that later adjudication of the same claim is barred.

Respectfully submitted this 19th day of April, 2012.

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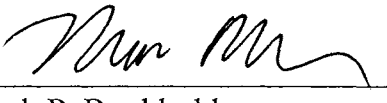

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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 5,575 words, excluding the parts of the brief exempted by Utah R. App. P. 24 (f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13 point font in Times New Roman style.

Dated this 19th day of April, 2012.

Mark P. Bookholder
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CERTIFICATE OF SERVICE

I, Mark P. Bookholder, certify that on April 19, 2012 I served a copy of the attached DEFENDANT-APPELLANT THOMAS C. HORNE ARIZONA ATTORNEY GENERAL'S OPENING BRIEF upon the following parties in this matter, by mailing it via first class mail with sufficient postage prepaid to the following addresses:

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