

EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

John CD Doe, a single man,

Plaintiff,

vs.

Big Brothers Big Sisters of America, a
District of Columbia, non-profit
corporation; Big Brothers Big Sisters of
Central Arizona, an Arizona corporation;
John Doe 1-100; Jane Doe 1-100; and Black
& White Corporations 1-100,

Defendants.

Case No. CV2020-014920

**REPLY IN SUPPORT OF MOTION TO
DISMISS**

(Oral Argument Requested)

(Assigned to the Hon. M. Scott McCoy)

Defendant Big Brothers Big Sisters of America (“BBBSA”), through undersigned
counsel, files its Reply in support of its Motion to Dismiss.

**I. PLAINTIFF HAS FAILED TO SHOW THAT HIS CLAIMS ARE NOT
BARRED BY THE STATUTE OF LIMITATIONS.**

The statute of limitations applicable to Plaintiff’s claims is A.R.S. § 12-514. That
statute permits civil claims for sexual abuse to be filed twelve years after the plaintiff reaches
the age of 18—or by the age of 30. In his Response, Plaintiff does not address and, and
therefore concedes, the fact that he was either 46 or 47 at the time he filed his Complaint.

1 The only argument Plaintiff makes is that his Amended Complaint sufficiently alleges
2 that BBBSA knew or had actual notice of Arbulu's misconduct such that his claim is allowed
3 under the applicability provision of A.R.S. § 12-514. Plaintiff is incorrect. As set forth
4 below, his Amended Complaint fails to allege sufficient facts demonstrating that BBBSA
5 knew or had actual notice of any misconduct by Arbulu prior to Arbulu allegedly committing
6 any acts of sexual abuse against Plaintiff.

7 Because Plaintiff was over 30 years of age when he filed this lawsuit and because he
8 does not allege sufficient facts of knowledge or actual notice of any misconduct that creates
9 an unreasonable risk of sexual conduct or sexual contact with a minor, Plaintiff's claims are
10 barred by the statute of limitations.

11 **II. PLAINTIFF'S AMENDED COMPLAINT STILL FAILS TO STATE A CLAIM**
12 **UPON WHICH RELIEF CAN BE GRANTED.**

13 Plaintiff filed an Amended Complaint concurrently with his Response to BBBSA's
14 Motion to Dismiss. The only allegations he added are as follows:

15 Defendants knew or otherwise had actual notice of misconduct by its agents,
16 volunteers, representatives, mentors, and or Bigs, including knowledge or
17 actual notice that because Defendants "deal with boys and girls who may have
18 no adequate role model or parent figure in their lives, it is very characteristic to
19 shower the child with new found approval, affection and attention with the new
20 friendship . . . all [of which] could be ways to pressure the child into approval
21 for otherwise reluctant behavior. Clearly, [Defendants knew or had actual
22 notice] that [Defendants'] clients are high risk for the potential abuser. The
23 pedophilic applicant will generally try to encourage overnight visits, weekend
24 stays at his home or trips which involve travel."

25 Defendants knew, had constructive knowledge or otherwise had actual notice
26 of misconduct by its agent, volunteer, representative, mentor, and or Big, Italo
27 Arbulu and other agents, volunteers and Bigs, including Arbulu that:

- 28 a. Showered Littles, including Plaintiff, with affection, praise attention, gifts,
experiences, travel, and or overnight stays among other grooming behavior.
- b. Pressured, manipulated, coerced, threatened [sic], and or intimidated Littles
including but no limited to Plaintiff, into reluctant behavior including sexual
acts;

1 c. Touched the genitals and or body parts of Littles and or engage in other
2 physical and psychological boundary violations of Littles, including
3 Plaintiff.

4 (Amended Complaint, ¶¶ 43-44, 57-58). Plaintiff added these allegations to Counts I and II
5 of his Amended Complaint. He also added the following to Count VI, “Defendants’ acts and
6 or omissions were done with reckless disregard for the near certainty that Plaintiff would
7 suffer extreme emotional distress.” (Amended Complaint, ¶ 90). However, none of these
8 additions are factual allegations that demonstrate actual knowledge on the part of BBBSA of
9 misconduct by Arbulu. Instead, they are simply additional legal conclusions. Further, having
10 actual knowledge that boys and girls are at “high risk” for being abused is not an allegation
11 that BBBSA knew or had actual knowledge of any misconduct by Arbulu. While Plaintiff
12 alleges that Arbulu engaged in sexual misconduct with minors, he still fails to allege any facts
13 to demonstrate that anyone who was an agent of BBBSA—other than Arbulu—knew about
14 Arbulu’s alleged misconduct at the time Arbulu allegedly sexually abused Plaintiff. These
15 additional facts do not save Plaintiff’s claims—they are still insufficient to state a claim
16 against BBBSA.

17 Plaintiff claims that his allegation in paragraph 35 of his Amended Complaint that at
18 some unspecified time he “told an agent, employee, representative of [BBBSA] or Big
19 Brothers Big Sisters of Central Arizona that . . . Arbulu had touched Plaintiff’s penis”
20 sufficiently shows actual knowledge by BBBSA. Further, he doesn’t specifically allege that
21 it was BBBSA’s agent he told—it could have been Big Brother Big Sisters of Central
22 Arizona’s agent. Regardless, this allegation also does not state that BBBSA or any of its
23 agents knew or had actual notice of misconduct by Arbulu that created an unreasonable risk
24 of sexual conduct or sexual contact with a minor by Arbulu before Arbulu allegedly sexually
25 abused Plaintiff, including touching Plaintiff’s penis. For example, Plaintiff does not allege
26 that after he told an agent of BBBSA or Big Brothers Big Sisters of Central Arizona, Arbulu
27 committed any further act of sexual abuse against him. Plaintiff has now filed two different
28 complaints and still fails to allege facts such as these to demonstrate knowledge or actual
notice by BBBSA that Arbulu had sexually abused anyone.

1 A. **Plaintiff's Allegation that Arbulu was BBBSA's Agent Is Insufficient to**
2 **State a Claim Against BBBSA Under the Theory of *Respondeat Superior*.**

3 Plaintiff's argument that Arbulu was BBBSA's agent, and therefore all knowledge of
4 the alleged acts by Arbulu can be imputed to BBBSA, making BBBSA liable to him under
5 the doctrine of *respondeat superior*, is unsupported by case law. Applicable principles of
6 Arizona agency law demonstrate the absurdity of that argument.

7 First, in Manley v. Ticor Title Ins. Co., 168 Ariz. 568, 572–73, 816 P.2d 225, 229–30
8 (1991), the Arizona Supreme Court held that the rule of imputed notice does not apply when
9 the agent is serving his own purposes and acting adversely to the principal:

10 The rule that notice to the agent is notice to the principal is premised on the
11 presumption that the agent will perform his obligation to give his principal
12 knowledge relevant to the principal's protection and interest.... However, the
13 presumption ... 'will not prevail where it is certainly to be expected that the
14 agent will not perform his duty, as where the agent ... is in reality acting in his
 own or another's interest and adversely to that of his principal.' In such cases
 the presumption is that the agent will conceal any facts which might be
 detrimental to his own interests, rather than that he will disclose it.

15 Id. at 572, 816 P.2d at 229 (internal citations omitted). Likewise, In S Development Co. v.
16 Pima Capital Management Co., 201 Ariz. 10, 20, ¶ 24, 31 P.3d 123, 133 (App. 2001), which
17 is cited by Plaintiff in his Response, the Arizona Court of Appeals specifically held that the
18 principles of imputed knowledge do not apply when actual knowledge on the part of the entity
19 is required, as is the case here. See also Arizona Title Ins. & Tr. Co. v. Smith, 21 Ariz. App.
20 371, 376, 519 P.2d 860, 865 (1974) ("the knowledge imputed by law from an agent to his
21 principal is irrelevant in situations where actual knowledge is required"). Moreover, the
22 knowledge acquired by the agent must have been **in the course of employment** in order for
23 it to be imputed to the principle. S Development Co., 201 Ariz. at 20, ¶ 25, 31 P.3d at 133.
24 In this case, Arbulu's alleged actions in sexually abusing Plaintiff were clearly not within the
25 course and scope of his role as a volunteer with BBBSA, were for his own purposes, and were
26 completely adverse to the interests of BBBSA. Indeed, courts that have considered the
27 allegations of sexual harassment and sexual abuse in other contexts have held that these acts
28 are not within the scope of employment and knowledge of them by the perpetrator cannot be

1 imputed to the employer. See, e.g., Smith v. Am. Exp. Travel Related Services Co., Inc., 179
2 Ariz. 131, 136, 876 P.2d 1166, 1171 (App. 1994) (“Most courts that have considered the
3 question have held that, as a matter of law, an employee's sexual harassment of another
4 employee is not within the scope of employment.”). Additionally, in Gebser v. Lago Vista
5 Independent School District, the Supreme Court of the United States held, “[w]here [an
6 entity’s] liability rests on actual notice principles, however, the knowledge of the wrongdoer
7 himself is not pertinent to the analysis.” 524 U.S. 274, 291 (1998).

8 Plaintiff’s citation to In re Milliman’s Estate, 101 Ariz. 54, 65, 415 P.2d 877, 888
9 (1966), for his argument that Arbulo’s knowledge of his alleged acts can be imputed to
10 BBBSA is inapposite. The issue in In re Milliman was whether the knowledge of an
11 insurance agent, who was acting within the course and scope of his employment with an
12 insurer and neglected to inform the attorneys of the insurer who were preparing the papers
13 for a wrongful death settlement about an additional heir of the decedent, could be imputed to
14 the insurer. Id. The court held that it could. Id. Those facts are easily distinguishable from
15 this case because here, Arbulo was not acting within scope of his volunteer position with
16 BBBSA. Instead, he was acting in his own interest and contrary to the interest of BBBSA.
17 Further, because actual knowledge of BBBSA is required for a claim to be maintained against
18 BBBSA, the principles of imputed knowledge are inapplicable. Therefore, Plaintiff’s
19 allegation that Arbulo was BBBSA’s agent is not sufficient to state a claim that BBBSA is
20 liable for Arbulo’s alleged sexual abuse of Plaintiff under the doctrine of *respondeat superior*.

21 Additionally, in his Response, Plaintiff has failed to demonstrate that any of the nine
22 counts asserted in his Amended Complaint,¹ or his claim for punitive damages, state a claim
23 upon which relief can be granted as to BBBSA as addressed below.

24
25 ¹Plaintiff states in footnote 1 of his Response that he has “resolved” all of BBBSA’s
26 “technical objections” about his Complaint by filing an Amended Complaint. However,
27 throughout his Response, he refers to the paragraphs of his original Complaint to support his
28 arguments that he has sufficiently stated causes of action against BBBSA. Not only is this
confusing, the Complaint to which Plaintiff refers is not the operative complaint in this case.
See Collins v. Streitz, 47 Ariz. 146, 153, 54 P.2d 264, 267 (1936) (“original complaint

1 **B. Count 1 – Sexual Assault/Sexual Abuse/Sexual Conduct**

2 Plaintiff argues that the allegations he added to Count 1 are sufficient to state a claim
3 under the applicability section of A.R.S. § 12-514 and/or A.R.S. § 13-3623. However, his
4 legal conclusions that BBBSA “knew or had actual notice” that its “littles” were at high risk
5 and that at some unspecified point in time Arbulu committed acts of sexual abuse, are still
6 insufficient to state a claim. These allegations do not demonstrate that BBBSA had actual
7 knowledge of any misconduct that created an unreasonable risk of sexual conduct or sexual
8 contact with a minor by Arbulu **before** Arbulu allegedly sexually abused Plaintiff. Therefore,
9 Count 1 fails to state a claim upon which relief can be granted against BBBSA and should be
10 dismissed.

11 **C. Count 2 – Negligence**

12 Without citing any authority in support, Plaintiff argues that Count 2 of Plaintiff’s
13 Amended Complaint adequately asserts a claim for negligence against BBBSA simply
14 because it alleges that BBBSA had a “special, fiduciary, *in loco parentis* relationship” with
15 Plaintiff. Plaintiff’s allegation in paragraph 35 of his Amended Complaint that at some
16 unspecified time he “told an agent, employee, representative of [BBBSA] **or** Big Brothers
17 Big Sisters of Central Arizona that . . . Arbulu had touched Plaintiff’s penis” is insufficient
18 to show knowledge or actual notice by BBBSA. This allegation also does not demonstrate
19 that BBBSA or any of its agents knew or had actual knowledge of misconduct by Arbulu that
20 created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu
21 **before** Arbulu allegedly sexually abused Plaintiff, including touching Plaintiff’s penis.
22 Again, the legal conclusions that Plaintiff alleges in his Amended Complaint do not show
23 that BBBSA had actual knowledge of any misconduct of Arbulu that created an unreasonable
24 risk of sexual conduct or sexual contact with a minor by Arbulu **before** Arbulu allegedly
25 sexually abused Plaintiff, which is required to state a claim under the applicability section of

26 _____
27 performs no further function as a pleading when an amended complaint is filed”). Therefore,
28 all citations to the original Complaint should be disregarded by the Court and not considered
in its ruling on BBBSA’s Motion.

1 A.R.S. § 12-514. Therefore, Count 2 of the Amended Complaint fails to state a claim upon
2 which relief can be granted against BBBSA and should be dismissed.

3 **D. Counts 3 and 4 – Negligent Supervision/Training/Retention**

4 Plaintiff argues that his conclusory allegations that BBBSA had a duty to train its
5 agents and employees, that it breached that duty, and the breach was the proximate cause of
6 an injury to him, is sufficient to state a claim for negligent training. He cites Inmon v. Crane
7 Rental Servs., Inc., 205 Ariz. 130, 137, ¶ 28, 67 P.3d 726, 733 (App. 2003), claiming this is
8 all he need allege. However, in Inmon, the court stated that there must be “facts specifying
9 in what way [the employee’s] training or lack thereof was negligent.” Id. Plaintiff fails to
10 point to any allegations in his Amended Complaint setting forth what training should have
11 been provided.

12 Plaintiff also argues that his conclusory allegations that BBBSA negligently failed to
13 supervise Arbulu are sufficient to state a claim for negligent supervision. However, in order
14 to state a claim for negligent supervision, a plaintiff must allege facts showing “that the
15 defendant employer had a reason and opportunity to act,” meaning that it had knowledge or
16 reason to know that the employee might commit misconduct. Petty v. Arizona, 2016 WL
17 4095835, at *1 (D. Ariz. Aug. 2, 2016). Plaintiff points to no such factual allegations in his
18 Amended Complaint—because there are none.

19 Finally, Plaintiff agrees that to state a claim for negligent retention he must allege that
20 the employer retained the employee even though it “knew or should have known of the
21 employee’s dangerous propensities.” Again, Plaintiff fails to point to any allegations in his
22 Amended Complaint that BBBSA knew of any propensity by Arbulu to commit sexual abuse
23 **before** Arbulu allegedly sexually abused Plaintiff. Therefore, Counts 3 and 4 both fail to
24 state a claim upon which relief can be granted against BBBSA and should be dismissed.

25 **E. Count 5 – Breach of Fiduciary Duty**

26 Plaintiff argues that the conclusory allegations in his Amended Complaint that
27 BBBSA had a special relationship with him are sufficient to state a claim. However, Plaintiff
28 fails to point to any factual allegations in his Amended Complaint that demonstrate any

1 alleged breach of a duty by BBBSA was the cause of Arbulu's alleged sexual abuse of
2 Plaintiff. Plaintiff also fails to allege facts demonstrating any knowledge or actual notice on
3 the part of BBBSA of misconduct by Arbulu that created an unreasonable risk of sexual
4 conduct or sexual contact with a minor by Arbulu **before** Arbulu allegedly sexually abused
5 Plaintiff. Therefore, Count 5 fails to state a claim upon which relief can be granted against
6 BBBSA and should be dismissed.

7 **F. Count 6 – Intentional Infliction of Emotional Distress**

8 Plaintiff argues that he sufficiently alleges a claim for intentional infliction of
9 emotional distress against BBBSA because he alleges that BBBSA engaged in a conspiracy
10 to conceal, failed to report, and acquiesced, affirmed, and ratified Arbulu's sexual abuse.
11 (Response, p. 8). However, Plaintiff's Amended Complaint does not allege any specific
12 actions by BBBSA demonstrating that it knew or had actual notice of Arbulu's misconduct
13 **before** he allegedly sexually abused Plaintiff such that it engaged in this alleged "extreme
14 and outrageous" conduct. Further, Plaintiff's addition of the allegation that "Defendants' acts
15 and or omissions were done with reckless disregard for the near certainty that Plaintiff would
16 suffer extreme emotional distress" in ¶ 92 of the Amended Complaint is simply a legal
17 conclusion that does not demonstrate knowledge or actual notice by BBBSA of misconduct
18 by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor
19 by Arbulu. Therefore, Count 6 fails to state a claim upon which relief can be granted against
20 BBBSA and should be dismissed.

21 **G. Count 7 – Endangerment**

22 In his Response, Plaintiff argues that this claim is a "common law" claim based on the
23 elements set forth in the criminal endangerment statute, A.R.S. § 13-1201. However, again,
24 he fails to point to any allegations in his Amended Complaint that BBBSA had knowledge or
25 actual notice of misconduct by Arbulu that created an unreasonable risk of sexual conduct or
26 sexual contact with a minor **before** Arbulu allegedly sexually abused Plaintiff. Plaintiff cites
27 Wertheim v. Pima Cty., 211 Ariz. 422, 425, ¶ 11, 122 P.3d 1, 4 (App. 2005), for the
28 proposition that a defendant owes a duty to control the conduct of a third party (an employee

or agent) when there is a special relationship between the employer and the plaintiff. Plaintiff then claims that he has sufficiently alleged such a duty on the part of BBBSA. However, in Wertheim, the court held that the defendant employer did **not** have a duty to control its employee when the employee was acting outside the scope of his employment—regardless of the relationship between the employer and the plaintiff. Id. at 425, ¶¶ 12-14, 122 P.3d at 4. As set forth above, Arbulu was acting outside of the scope of his volunteer position with BBBSA when he allegedly sexually abused Plaintiff, and thus under Wertheim, BBBSA cannot be liable for this conduct. Therefore, for all of the foregoing reasons, Count 7 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

H. Count 8 – Child Abuse

First, Plaintiff has failed to demonstrate that this Count states a cognizable civil cause of action. There is not any Arizona authority stating that a civil claim can be brought against an entity for child abuse. Additionally, in support of Count 8, Plaintiff argues that his Amended Complaint alleges actual notice. However, for the same reasons set forth above in Sections (II)(A) and (B), the conclusory allegations in Plaintiff’s Amended Complaint fail to allege facts demonstrating BBBSA had knowledge or actual notice of misconduct by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu **before** Arbulu allegedly sexually abused Plaintiff. Therefore, Count 8 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

I. Count 9 – Assault

Plaintiff argues that because he has alleged Arbulu was BBBSA’s agent, he has sufficiently stated a claim for assault. For the reasons set forth above in Section (II)(A), Arbulu was not acting as BBBSA’s agent at the time he allegedly sexually abused Plaintiff because he was acting outside the course and scope of his volunteer position. Therefore, Count 9 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

...

...

1 **J. Plaintiff's Claim for Punitive Damages**

2 The applicability section of A.R.S. § 12-514 expressly bars a plaintiff from seeking
3 punitive damages against an entity that was not the perpetrator of the alleged sexual abuse.
4 In his Response, Plaintiff simply argues that dismissal of the claim would be premature and
5 that a jury should decide the issue of punitive damages. However, the only case cited by
6 Plaintiff in support of this argument does not support his argument for several reasons. In
7 Farr v. Transamerica Occidental Life Ins. Co. of California, 145 Ariz. 1, 8, 699 P.2d 376, 383
8 (App. 1984), there was not a statute applicable to the bad faith claim being asserted by the
9 plaintiffs against their health insurer that specifically prohibited a claim for punitive damages.
10 Here, there is. Further, in Farr, even though punitive damages were available in a bad faith
11 case, the Arizona Court of Appeals set aside the jury's award of punitive damages, holding
12 that there was insufficient evidence of "deliberate" "oppressive conduct," "aggravation,
13 insult, cruelty, vindictiveness, or malice" for the jury to even consider the issue of punitive
14 damages. Id. at 8-9, 699 P.2d at 383. In this case, as set forth above, Plaintiff has failed to
15 allege any facts that BBBSA knew or had actual notice of any wrongdoing by Arbulu **before**
16 he allegedly sexually abused Plaintiff or engaged in any other conduct justifying an award of
17 punitive damages. Under Farr, even if punitive damages were allowed by the applicability
18 provision, there are not sufficient allegations of wrongful conduct by BBBSA to support an
19 award of punitive damages. Therefore, Plaintiff's claim for punitive damages must be
20 dismissed.

21 **III. THE APPLICABILITY PROVISION OF A.R.S. § 12-514 THAT PURPORTS**
22 **TO "REVIVE" PLAINTIFF'S CLAIMS AGAINST BBBSA VIOLATES THE**
23 **ARIZONA AND UNITED STATES CONSTITUTIONS.**

24 **A. The Ex Post Facto Clause Applies to Statutes Affecting Civil Lawsuits in**
25 **Arizona.**

26 Plaintiff argues in his Response that the prohibition against ex post facto laws applies
27 only to criminal cases and penalties and, thus, cannot apply to any aspect of a civil case.
28 Although generally the prohibition against ex post facto laws applies to criminal statutes, it
can apply to civil statutes when the statute is "so punitive either in purpose or effect as to

1 negate [the State’s] intention’ to deem it civil.” Smith v. Doe, 538 U.S. 84, 92 (2003) (internal
2 citations omitted); see also Does v. Wasden, 982 F.3d 784, 791 (9th Cir. 2020) (“When a
3 statute is expressly civil in intent, the Supreme Court has stated that only the clearest proof is
4 sufficient to override the legislature’s intent and render the putatively civil regulation a
5 criminal penalty.”). Here, the statute at issue is based upon criminal conduct and, in fact,
6 cites the criminal code in describing the acts that would bring a person or entity under a claim
7 utilizing the Applicability Section. Moreover, this statute is punitive as it opens BBBSA up
8 to liability for alleged actions that it did not commit, well beyond the statute of limitations,
9 and makes it nearly impossible for BBBSA to defend itself from the alleged actions of a
10 volunteer that occurred more than thirty years ago, well past any record retention policy, and
11 in violation of ex post facto principles.

12 While the Arizona Supreme Court did not use the phrase “ex post facto” in its decision
13 in San Carlos Apache Tribe v. Superior Court ex rel. Cty. of Maricopa, 193 Ariz. 195, 205 ¶
14 15, 972 P.2d 179, 189 (1999), it specifically held that a statute may not “attach new legal
15 consequences to events completed before its enactment.” Even if the legislature intended to
16 “revive” causes of action, the statute is still unconstitutional—“legislation may not disturb
17 vested substantive rights by retroactively changing the law that applies to completed events.
18 . . . A vested right ‘is actually assertable as a legal cause of action or defense or is so
19 substantially relied upon that retroactive divestiture would be manifestly unjust.” Id. In his
20 Response, Plaintiff does not address these legal principles set forth by the Arizona Supreme
21 Court or cite any contrary authority.

22 Plaintiff also dismisses the cases from other states cited on this point by BBBSA in its
23 Motion as inapplicable, then cites only a non-controlling law review article (not attached for
24 the Court or opposing counsel to review) claiming that Arizona follows the “federal
25 approach” of allowing retroactive extensions of statutes of limitations. In fact, federal courts,
26 including the Ninth Circuit Court of Appeals, have held that the ex post facto clause of the
27 United States Constitution prohibits previously time-barred civil claims from being revived
28 by legislation. See, e.g. Chenault v. U.S. Postal Service, 37 F.3d 535, 539 (9th Cir. 1994) (“a

1 newly enacted statute that lengthens the applicable statute of limitations may not be applied
2 retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory
3 scheme because to do so would 'alter the substantive rights' of a party and increase a party's
4 liability"). Therefore, Plaintiff has failed to overcome BBBSA's argument that the
5 applicability provision of A.R.S. § 12-514 violates the ex post facto clause of the Arizona
6 and United States Constitutions.

7 **B. The Applicability Provision Violates the Due Process Clause of the Arizona**
8 **Constitution.**

9 Plaintiff argues that in Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 641
10 P.2d 1275 (1982), the Arizona Supreme Court interpreted the due process clause of the
11 Arizona Constitution much more broadly than the due process clauses of neighboring states
12 have been interpreted, such that under the Arizona Constitution, barred claims can be revived.
13 Plaintiff completely misinterprets the holding of Chevron Chemical. BBBSA actually cited
14 that case in its Motion to demonstrate an instance other than reviving barred claims that the
15 Arizona legislature was permitted under the due process clause of the Arizona constitution to
16 change the procedure needed to bring a cause of action. In Chevron Chemical, the issue was
17 whether it was unconstitutional for the Arizona Legislature to amend the worker's
18 compensation statute to allow a worker's compensation claim against the negligent third party
19 to be reassigned to the employee from the employer or the employer's insurance carrier and
20 allow the employee to still bring the claim against the negligent third party within the two-
21 year personal injury statute of limitations (instead of the former requirement that the claim
22 be brought within a year). Id. at 437-438, 641 P.2d at 1281-1282. In so ruling, the Arizona
23 Supreme Court held that "[w]e find no federal constitutional prohibition in allowing H.B.
24 2176, s 2, to relate back to those cases which have been barred by the one year statute for
25 workmen's compensation claimants, but which have not been barred by the two year statute
26 of limitations for personal injury." Id. at 440, 641 P.2d at 1284. In Chevron Chemical, the
27 tortfeasor was always liable for damages within the two-year statute of limitations period—
28 the only legislative change was to how much time an injured employee had to bring a claim

1 directly against the tortfeasor under the worker's compensation statute, which always fell
2 within the two-year statute of limitations. Here, in contrast, BBBSA has never been liable
3 for the damages alleged by Plaintiff outside of the two-year statute of limitations, and the
4 revival of these claims creates new liability, resulting in a taking of property without due
5 process of law. The new statute enacted as A.R.S. §12-514, along with its Applicability
6 Section, creates liability for past actions which must be proved by clear and convincing
7 evidence. It also limits the measure of a plaintiff's damages, therefore it is a substantive law,
8 and substantive laws cannot be applied retroactively. See Allen v. Fisher, 118 Ariz. 95, 96,
9 574 P.2d 1314, 1315 (App. 1977) ("it is generally agreed that a substantive law creates,
10 defines and regulates rights while a procedural one prescribes the method of enforcing such
11 rights or obtaining redress. . . A rule affecting the measure of damages is a substantive right").
12 The statute of limitations was not merely altered by the enactment of A.R.S. § 12-514 and
13 the applicability provision, rather, an entirely new cause of action is created and previously
14 extinguished liability is expanded. That violates the due process clause of the Arizona
15 Constitution.

16 Plaintiff argues in his Response that the United States Supreme Court's holding in
17 Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945), is relevant and
18 controlling. However, the facts of that case are easily distinguishable. In Chase Securities,
19 the Minnesota legislature amended the statute of limitations applicable to securities fraud
20 while the plaintiff's action was pending and had not been finally adjudicated. Id. at 306-307.
21 The statute of limitations for securities fraud was amended to provide that the six-year
22 limitations period began to run from the date the securities were issued instead of from the
23 time the fraud was discovered, but also gave a grace period that allowed parties who had
24 received delivery of the securities more than five years prior to the enactment of the statute,
25 one year to bring their claims. Id. at 307. Therefore, at issue was the date upon which the
26 statute of limitations began to run, and the statute did not extend the statute of limitations to
27 include claims that had been foreclosed for over thirty years that the defendants could not
28 foresee. In its ruling the Court stated, "Some rules of law . . . could not be changed

1 retroactively without hardship and oppression . . . [T]he appellant has not pointed out special
2 hardships or oppressive effects which result from lifting the bar in this class of cases with
3 retrospective force. This is not a case where appellant's conduct would have been different
4 if the present rule had been known and the change foreseen." Id. at 315-16. The ruling was
5 based on the fact that a defendant who had allegedly committed securities fraud would know
6 at the time he was supposed to have registered the securities pursuant to a statute, that he did
7 not do it. Here, unlike in Chase Securities, the time period for the statute of limitations was
8 expanded without limit and without consideration for the special hardship that would result
9 to BBBSA and entities like it from this retroactive expansion. If the Applicability Section of
10 A.R.S. § 12-514 is allowed to stand, BBBSA will be forced to defend against actions
11 stemming from the alleged acts of one of its volunteers fifty years ago. Memories have faded,
12 witnesses have disappeared or died, and there are no records to review to determine the facts.
13 Organizations such as BBBSA generally retain records corresponding with their potential
14 liability, and BBBSA could not foresee that it would need to retain records dating back to its
15 inception to defend itself. However, if BBBSA had known that such a change in its exposure
16 was going to occur, it certainly would have retained its records. The potential revival of these
17 claims leaves BBBSA without a fair ability to participate in its defense and although revival
18 of the statute of limitations is not automatically a per se violation of due process rights as set
19 forth in Chase Securities, the Applicability Section as applied to the facts of this case, violates
20 due process principles as it amounts to a taking of property without due process of law.

21 Plaintiff also cites to Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local
22 790 v. Robbins & Myers, Inc. 429 U.S. 229, 243-44 (1976), for the proposition that a
23 legislative body has the constitutional power to revive actions that are already barred by the
24 statute of limitations. Plaintiff misstates the holding of the case. In Int'l Union, the issue was
25 whether an amendment to the Equal Employment Opportunity Act that extended from 90
26 days to 180 days the time period within which a plaintiff had to file a charge with the EEOC
27 before bringing a lawsuit, should be applied to allow the claim of an employee who filed her
28 charge with the EEOC 108 days after she was fired. Id. at 231-233. In other words, the

1 employee's charge was untimely when she filed it because it had been more than 90 days
2 since she filed it, but the court was considering whether the amendment of the statute made
3 the charge timely because she had filed it within 180 days. The amendment to the statute was
4 effective before the employee's 180 days to file her charge had run, and specifically stated
5 that it applied to pending charges filed with the EEOC. Id. at 233, 241. In holding that the
6 new time period to file the charge applied to allow the employee's claim (and only to her
7 claim and claims of those who were similarly situated), the court stated, "The Fourteenth
8 Amendment does not make an act of state legislation void merely because it has some
9 retrospective operation. What it does forbid is taking of life, liberty or property without due
10 process of law." Id. at 243. It then held that allowing the statute to include retroactively the
11 small set of individuals whose charges were made timely if the charges had been pending at
12 the time the amendment was made did not violate due process. Id. at 244. In this case, the
13 facts are vastly different. The Arizona Legislature revived claims that had been barred for
14 decades and allowed them to be filed. This is markedly different from allowing a 90-day
15 grace period for EEOC charges pending at the time the amendment to the statute was made.

16 The case of Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 119
17 A.3d 462 (2015), cited by Plaintiff, can also be distinguished from this case because the
18 statute at issue was different from the statute at issue in this case. In Hartford Roman, the
19 legislature simply amended the Connecticut statute to alter a preexisting statute of limitations.
20 Id. It did not for the first time create, define, and regulate civil statutory claims arising from
21 sexual conduct against a minor. Id. When the Arizona legislature enacted the applicability
22 provision of A.R.S. § 12-514, it did not simply alter a statute of limitations, but it created an
23 entirely new statute with expanded liability and defined damages. Therefore, the holding of
24 Hartford Roman does not apply here.

25 **C. Unconstitutional Statutes Should Not Be Broadly Construed.**

26 Finally, in support of his argument that "remedial statutes should be construed
27 broadly," Plaintiff cites In re Est. of Wyatt, 235 Ariz. 138, 329 P.3d 1040 (2014). However,
28 in that case, the Arizona Supreme Court was not addressing the revival of a statute of

1 limitations. Instead, it was considering whether hospitals were exempted from the statute
2 that allows a cause of action for vulnerable adult abuse against persons or enterprises who
3 are employed to provide care to vulnerable adults. Id. at 140, 329 P.2d at 1042. The Arizona
4 Supreme Court concluded that because the Arizona legislature had specifically exempted
5 other providers (physicians, podiatrists, nurse practitioners, and physician’s assistants) from
6 the statute, but did not exempt hospitals, the statute could be construed to include hospitals
7 before they are “employed to provide care” to vulnerable adults. Id. Therefore, the holding
8 in Wyatt is not applicable here to allow the applicability provision of A.R.S. § 12-514 to be
9 construed broadly to revive previously barred claims.

10 Plaintiff has failed to demonstrate that the applicability provision of A.R.S. § 12-514
11 passes constitutional scrutiny under the Arizona and United States Constitutions. Therefore,
12 this Court should rule that it is unconstitutional.

13 **VI. THE DOCUMENTS ATTACHED TO PLAINTIFF’S RESPONSE ARE**
14 **IRRELEVANT AND IMPROPER AND SHOULD NOT BE CONSIDERED BY**
15 **THE COURT.**

16 As Appendix C to his Response, Plaintiff attaches 19 articles (comprising 249 pages)
17 regarding child sexual abuse and problems with adult memory of the abuse. Pursuant to Ariz.
18 R. Civ. P. 12(d), this Court cannot consider any of these articles in ruling on BBBSA’s Motion
19 because they are matters outside the pleadings. Therefore, the Court should disregard these
20 documents.

21 **V. CONCLUSION.**

22 For the reasons set forth in BBBSA’s Motion to Dismiss and above, all of Plaintiff’s
23 claims against BBBSA in his Amended Complaint should be dismissed with prejudice and
24 Judgment entered in favor of BBBSA.

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27 ...

28 ...

1 DATED this 6th day of August, 2021.

2 BERKE LAW FIRM, PLLC

3
4 By /s/ Jody C. Corbett

5 Lori V. Berke

6 Jody C. Corbett

7 Attorneys for Defendant Big Brothers Big
8 Sisters of America

9 The foregoing document was e-filed
10 with the Clerk of Court this 6th day
11 of August, 2021, and a copy e-served via
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