

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Rochester Bituminous Products, Inc.,
Michael P. Todesca, Albert M. Todesca, and
Thomas N. Russo,**
Petitioners,

Docket No.: LB-22-0005

v.

**Office of the Attorney General, Fair Labor
Division,**
Respondent.

**MEMORANDUM AND ORDER ON STATUTE OF
LIMITATIONS DEFENSE**

I. Introduction

This is an appeal from twenty-five citations issued to the petitioners by respondent the Office of the Attorney General, Fair Labor Division (division). The citations allege violations of the prevailing wage law, including its record-keeping provisions, plus violations of the statutory obligation to produce records to the division upon request. *See* G.L. c. 149, §§ 27, 27B; G.L. c. 151, §§ 15, 19(3).

Among other defenses, the petitioners maintain that four citations are wholly or partly time barred. The parties jointly proposed to litigate that defense at a preliminary evidentiary hearing.

Adopting that proposal, I held the preliminary hearing on September 25, 2025. The division's witnesses were Division Chief Lauren Moran, Assistant Attorney General Amy Goyer, and senior investigator Greg Reutlinger. The petitioners called Attorney Scott Semple and

Attorney Marshall Newman. Before and at the hearing, I admitted into evidence stipulations marked 1-69 and exhibits marked 1-19. I now admit additional exhibits marked 20-22.¹

For the reasons that follow, the petitioners' statute of limitations defense is meritorious. The practical consequences of that determination are prescribed in part IV *infra*.

II. Background

A. The Investigation

Petitioner Rochester Bituminous Products, Inc. (Rochester) is a construction and paving company. The individual petitioners hold or have held positions at that company. Rochester's business includes public works projects governed by the prevailing wage law, G.L. c. 149, §§ 26-27C. Roughly speaking, that law requires employees on public projects to be paid wages prescribed by published schedules.

In early 2019, the division commenced an investigation into potential violations of the prevailing wage law by Rochester. The investigation was assigned to AAG Goyer and Investigator Reutlinger. Rochester was represented for purposes of the investigation by Attorney Richard Wayne of Prince Lobel Tye.

The division served Rochester with demands for documents. After several extensions of its deadline, Rochester remained less than fully compliant. The division became frustrated,

¹ Exhibits 1-17 were proposed and listed by the parties; exhibit 18 is a November 2021 email from AAG Goyer to Attorney Semple; exhibit 19 is a compilation of electronic notes by Investigator Reutlinger; exhibit 20 is the petitioners' October 2022 motion for summary decision (with its affidavits and exhibits); exhibit 21 is the division's October 2022 brief in opposition (with Investigator Reutlinger's affidavit but no other accompanying documents); exhibit 22 is the division's June 2025 responses to the petitioners' interrogatories (with its exhibits).

feeling that Rochester's foot-dragging was impeding the division's ability to seek restitution for underpaid employees.

By January 2020, the division was conscious that some of the conduct it was investigating might run up against a statute of limitations. The division hoped to alleviate the time pressure posed by this concern through a tolling agreement.

On January 27, 2020, AAG Goyer emailed a draft tolling agreement to Attorney Wayne. The date of the email was also the effective date appearing in AAG Goyer's draft agreement. The agreement would have paused the limitation period indefinitely, subject to termination by either party with sixty days' notice. The parties named in the draft were the division, Rochester, and petitioner Thomas Russo.

On several subsequent occasions, AAG Goyer resent the same draft agreement to Attorney Wayne. Each time, she received no response.

B. The Debarment

In late 2020, the division issued two civil citations to Rochester for failure to comply with demands for documents. Rochester did not timely pay the citations. As a result, Rochester became subject to statutory debarment from participating in public works projects. On February 12, 2021, the division issued a notice announcing the debarment.

Rochester learned about the debarment a few days later. Because Rochester's business focuses entirely on public projects, the debarment posed an urgent threat to the company's viability. Seeking help, Rochester contacted Attorney Newman, a longtime attorney for the company on other matters.

Attorney Newman was unable to track down Attorney Wayne. Approximately on February 16, 2021, he spoke by telephone to AAG Goyer and Investigator Reutlinger. Attorney Newman described the urgency of Rochester's problem. He explained that Rochester had overlooked its citations because key employees had contracted COVID-19. In subsequent conversations, the parties learned that serious health issues had impeded Attorney Wayne's ability to act promptly on Rochester's behalf.

C. The Four-Way Discussion

Over the course of one or two telephone calls during the ensuing days, still in mid-February 2021, a four-way discussion took place among AAG Goyer, Investigator Reutlinger, Attorney Wayne, and Attorney Newman. Two distinct impressions of the discussion were presented at the hearing.

According to the division, Attorney Newman, speaking for Rochester, agreed that the company would produce the documents demanded of it and pay the citations issued to it; he also accepted, wholesale, the terms of the tolling agreement stated in AAG Goyer's draft. The division's version of events is supported both by AAG Goyer's testimony and by Investigator Reutlinger's electronic notes, which say: "Attorney Newman noted that Rochester . . . will sign *the proposed agreement*" (emphasis added).²

² AAG Goyer's testimony included the following statements: "Marshall Newman told me that they agreed to the terms of the tolling agreement that I had sent him. . . . He said he agreed to the terms that I had sent over, which included the effective date." When asked to confirm that the parties had reached no final agreement on an effective date, AAG Goyer said: "Not true. Marshall Newman . . . agreed to the terms of the tolling agreement that we had sent, and that was very specific."

Attorney Newman's recollection shared many particulars but differed dramatically in tenor and outcome. On his telling, he proposed an exchange: Rochester would produce documents, pay its citations, and enter into a tolling agreement (details to be determined); in return, the division would lift the debarment. According to Attorney Newman, AAG Goyer responded by endorsing Rochester's proposed obligations but declining to lift the debarment. Attorney Newman rejected this counter, ended the call, deduced that the debarment would need to be challenged in the Superior Court, and instructed a coworker to draw up a complaint.³

A preponderance of the evidence supports Attorney Newman's account. Both he and AAG Goyer testified believably, without hesitation or equivocation. But the petitioners' version of events is more readily consistent with the actions and statements that ensued, as discussed in the following sections.

D. Subsequent Negotiations

After the four-way discussion, the debarment remained in place. Rochester involved a third lawyer: Attorney Wayne's partner, Richard Prince.

AAG Goyer invited Attorney Prince to present Rochester's position to the division in writing. He did so in a letter dated March 11, 2021, specifying the illnesses and other

³ Attorney Newman's testimony included the following: "I said Rochester would be willing to sign a tolling agreement, and would be willing to pay the \$30,000, and would produce whatever documents you need produced, provided that you revoke the order of debarment. And Amy Goyer said, 'Okay, this is what we'll do: you pay the \$30,000 fine, you sign a tolling agreement, you produce the documents, but I'm not going to revoke the debarment.' I said, 'What kind of deal is that! There's nothing else to discuss.' And I hung up the phone. . . . We had no deal."

circumstances that had contributed to Rochester's non-responsiveness. The letter added that Rochester was willing to pay its fines, was already producing the documents requested by the division, and: "is . . . prepared to enter a tolling agreement."

AAG Goyer spoke to her supervisors. On a phone call on March 15, 2021, she told Attorney Prince that the division would lift the debarment by vacating the unpaid citations. The division kept that promise during the ensuing week.

Attorney Prince was not comfortable signing a tolling agreement himself. He identified Attorney Newman to AAG Goyer as "the person [she] should be dealing with." AAG Goyer wrote to Attorney Newman:

Please find attached a copy of the draft tolling agreement I have left the date on the agreement the same as it was when first proposed and hope we can utilize that date for a final agreement.

On the following day, AAG Goyer wrote: "Please let me know about the tolling agreement at your earliest possible convenience." Attorney Newman reviewed AAG Goyer's draft and made redlines, including a new proposed effective date in February 2021.⁴ He did not end up sending his redlines to anyone.

On March 30, 2021, Attorney Semple took over the case for Rochester. AAG Goyer promptly wrote to him: "I still do not have a signed tolling agreement in place." They spoke by telephone on the next day about the history and status of the investigation.

⁴ The logic of the February 2021 proposal is not obvious on any party's account, since Attorney Newman believed no agreement was reached in February, whereas AAG Goyer thought the parties agreed at that time on a January 2020 effective date.

Two weeks later, AAG Goyer followed up to “check[] in on the status of the tolling agreement” The following exchange ensued:

ATTORNEY SEMPLE (April 13): “Yes, Rochester will enter a tolling agreement. Can you forward me the form you would like to use?”

AAG GOYER (April 14): “I have attached the template tolling agreement that I previously sent to prior counsel.”

ATTORNEY SEMPLE (April 16): “I am fine with this except that it is dated in January 2020. Rochester will sign a tolling agreement but will not backdate it to that extent. Can we agree on March 1, 2021?”

AAG GOYER (April 20): “I would like to go back at least as far as when we stopped getting communication from prior counsel. Would your client be amenable to September 1, 2020?”

ATTORNEY SEMPLE (April 23): “I really can’t justify September to the client. I can do the February date when [Attorney] Newman committed by phone to have a tolling agreement signed.”^[5]

AAG GOYER (April 26): “This is very disappointing. . . . All I am requesting is that we are put in the same place we would have been had counsel, and your client, been responsive.”

The negotiation ended there; no written agreement was signed. In September 2021, rejecting a request by Rochester for additional time to produce certain documents, AAG Goyer pointed to “statute of limitations issues,” noting: “I never received a final answer on the tolling agreement” In November 2021, inviting Attorney Semple to engage in expedited settlement discussions, AAG Goyer wrote: “As you know, there is no tolling agreement in this matter”

⁵ Attorney Semple did not specify in his emails or at the hearing whether his information about the February 2021 discussion came from AAG Goyer or from Attorney Newman’s firm.

E. Positions on Appeal

On January 13, 2022, the division issued its twenty-five citations, each one directed to all four petitioners. The statutes alleged to have been violated are G.L. c. 149, §§ 27 and 27B, plus G.L. c. 151, §§ 15 and 19(3). The petitioners timely appealed.

Two of the twenty-five citations, nos. 15 and 27, arise from alleged conduct in January through September of 2018, i.e., more than three years before the citations were issued. Two other citations, nos. 16 and 26, arise from alleged conduct in October 2018 through December 2019, i.e., partly more and partly less than three years before the citations were issued.

The petitioners first challenged the timeliness of the citations through a motion for summary decision. The division's response combined contractual and equitable concepts, stating that "equitable tolling" was warranted by Rochester's "very specific agreement to toll the statute of limitations . . . coupled with [its] further efforts to delay the investigation." A supporting affidavit from Investigator Reutlinger referenced commitments to toll the statute of limitations from both Attorney Prince and Attorney Newman. The motion for summary decision was denied.

More recently, the parties exchanged interrogatories and responses to interrogatories. The division's responses, dated in June 2025, were prepared by AAG Goyer and sworn by Investigator Reutlinger. When asked to support its claim that the parties had entered into a tolling agreement, the division wrote:

The Attorney General entered into an enforceable tolling agreement with Rochester Bituminous when, in reliance on Rochester Bituminous' assertions that it was willing to toll the statute of limitations, the Attorney General withdrew a debarment [of Rochester] [T]he date

of the tolling agreement is March 17, 2021, when the Attorney General withdrew the debarment Therefore, all time after March 18, 2018 is within the statute of limitations

Similarly, when asked to explain why the statute of limitations should be tolled, AAG Goyer and Investigator Reutlinger wrote that “an enforceable tolling agreement was entered into between the parties on March 17, 2021.”

F. The Four-Way Discussion Revisited

At the hearing, the division presented a single theory: that a tolling agreement bearing a January 2020 effective date was accepted by Attorney Newman during the four-way discussion of February 2021. The following paragraphs draw together points of fact that tend to undermine the division’s theory and to support Attorney Newman’s contrary recollection, i.e., that no agreement was reached during the four-way discussion.

In March 2021, when Attorney Prince became involved, he wrote in his letter to the division that Rochester “is . . . prepared to enter a tolling agreement.” AAG Goyer did not correct the tacit premise that no agreement had already been made. She similarly left uncorrected Attorney Semple’s statement one month later that Rochester “will enter a tolling agreement.” And when Attorney Semple asked to see the form agreement that AAG Goyer “would like to use,” she did not respond that Rochester had already accepted her terms without amendment.

In her emails to Attorney Semple during April 2021, AAG Goyer referred to the January 2020 agreement as a “template.” She described her “hope” that the parties could retain the draft’s original date. She said that she “would like” to see the agreement bear an effective date in September 2020 (or earlier). She “request[ed]” terms that would remedy the

petitioners' initial non-responsiveness. Each of these choices of wording reads most naturally as part of a negotiation over a not-yet-binding agreement.

Sharper language from AAG Goyer appeared in remarks to Attorney Semple during September and November 2021. On one occasion, she wrote that she “never received a final answer on the tolling agreement.” On another, she added: “[T]here is no tolling agreement in this matter.” These were not offhand utterances: an experienced litigator put them in writing to a potential adversary. Especially in that light, AAG Goyer’s language reads most naturally as meaning what it said, i.e., that no tolling agreement ever took effect.

The division drew no distinctions among the four petitioners in its citations and summary decision papers; but the tolling agreement as written in January 2020 would have covered only the company and Mr. Russo. Later, in its interrogatory responses, the division repeatedly wrote that a tolling agreement became effective on “March 17, 2021, when the Attorney General withdrew the debarment,” rather than in February 2021, when Attorney Newman accepted the division’s terms. Otherwise put, even while the case was being litigated, the division’s papers and actions did not match the view of the facts presented by AAG Goyer in her hearing testimony.⁶

⁶ An important purpose of prehearing interrogatories is to stake out the claims that the parties may expect to see litigated. That purpose was subverted when the division presented one theory in its responses to the petitioners’ interrogatories and another theory at the hearing. See *Palmier v. Ahearn*, 91 Mass. App. Ct. 1116 (2017) (unpublished memorandum opinion); *Laurenza v. deSilver*, 1 Mass. L. Rptr. 608 (Mass. Super. 1994); *Licciardi v. TIG Ins. Grp.*, 140 F.3d 357, 363-64 (1st Cir. 1998). The problem was compounded by the division’s failure to produce a key piece of evidence, namely Investigator Reutlinger’s electronic notes, until immediately before the hearing. On that score, the division contravened not only a hearing-preparation deadline but also, for nearly three years, an order compelling discovery. See 801

III. Analysis

A. The Limitation Period

The division is authorized to punish various violations of the labor laws through civil citations. See G.L. c. 149, § 27C(b). On appeal from such citations, the petitioner bears the burden of “demonstrat[ing] by a preponderance of evidence that [the citations were] erroneously issued.” *Id.* § 27C(b)(4).

A statute about the consequences of specified labor law provisions says: “An employee claiming to be aggrieved . . . may . . . within 3 years after the violation, institute . . . a civil action.” G.L. c. 149, § 150. On its terms, the statute discusses civil suits by individual employees, not enforcement actions by the division. See *Shephard v. Attorney Gen.*, No. LB-13-479, at *9 n.1 (Div. Admin. Law App. May 15, 2014). Also, §§ 27 and 27B are not among the provisions listed in the statute.

The parties nevertheless agree that the division’s citations are subject to a three-year limitation period. That agreement is sound. The Supreme Judicial Court has held that, with respect to any cause of action, the courts “will be most hesitant to conclude that the Legislature intended no statute of limitations to apply, absent express guidance to that effect.” *Suburban Home Health Care, Inc. v. Executive Off. of Health & Hum. Servs.*, 488 Mass. 347, 355 (2021).

C.M.R. § 1.01(8)(i). It is not necessary to consider any separate remedial measures given that the petitioners prevail by a preponderance of the evidence as presented.

By way of a postscript, one month after the hearing, the division served and filed an amendment to its answers to the petitioners’ interrogatories. The amendment asserts that the parties are bound by a tolling agreement effective as of January 2020; it continues to state that the agreement “was entered into [on] March 17, 2021, when . . . the Attorney General withdrew the debarment.” This recent development does not change the outcome or essential analysis of this memorandum and order.

Sections 27 and 27B say nothing “express” to suggest that they grant the division “an unlimited period of time to collect.” *Id.* at 356. It is more likely that these provisions incorporate the usual three-year timeframe.

It is common ground that citations nos. 15, 16, 26, and 27 were issued more than three years after some or all of the pertinent conduct. The question presented is whether the limitation period is extended on any basis.

B. Tolling by Agreement

A statute of limitation offers an optional defense that actual or potential defendants may relinquish in whole or in part. *See Coastal Oil New England, Inc. v. Citizens Fuels Corp.*, 38 Mass. App. Ct. 26, 29 n.3 (1995); *Alpert v. Radner*, 293 Mass. 109, 111-12 (1936); *McLearn v. Hill*, 276 Mass. 519, 525 (1931). A tolling agreement extends the limitation period by pausing the accumulation of countable time. The formation of a tolling agreement is controlled by standard principles of contract law. *See Department of Revenue v. Estate of Shea*, 71 Mass. App. Ct. 696, 702 (2008); *Forrest v. The Paul Revere Life Ins. Co.*, 662 F. Supp. 2d 183, 193 (D. Mass. 2009); *In re AMC Invs., LLC*, 656 B.R. 95, 108-10 (D. Del. 2024).

“[T]o create an enforceable contract, there must be an agreement between the parties on the material terms . . . and the parties must have a present intention to be bound.” *McCarthy v. Young*, 105 Mass. App. Ct. 203, 207 (2025). This formula relaxes the traditional adage that “[a]n agreement to reach an agreement . . . imposes no obligations on the parties.” *Id.* at 210. Under today’s jurisprudence, binding obligations may arise as soon as the parties have agreed on the “material” terms, even if “subsidiary” details are left to be settled later. *See id.*; *Rosenfield v. U.S. Tr. Co.*, 290 Mass. 210, 217 (1935); *Duff v. McKay*, 89 Mass. App. Ct. 538,

543-44 (2016); *Community Builders, Inc. v. Indian Motorcycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 556 (1998); *Goren v. Royal Invs. Inc.*, 25 Mass. App. Ct. 137, 140-41 (1987); *Quint v. A.E. Staley Mfg. Co.*, 246 F.3d 11, 15 (1st Cir. 2001).

The presence or absence of an intention to be bound is assessed based on the parties' objective actions. *See Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878-79 (2000); *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 596 n.35 (2007). The division's theory at the hearing was that in February 2021, Attorney Newman expressed an intention to be bound by the terms of AAG Goyer's January 2020 draft, including its effective date. For the reasons described earlier, that theory is not supported by a preponderance of the evidence.

In its post-hearing brief, the division offers an alternative theory: that a binding tolling agreement was formed after Attorney Prince joined the discussions, during the March 15, 2021 telephone call on which the division agreed to lift the debarment.

A preponderance of the evidence supports the conclusion that Attorney Prince expressed some intention to be bound on the March 15 call. He agreed on Rochester's behalf that the company would "enter into a tolling agreement" (the words of his letter, emphasis added). He made that particular commitment forcefully enough to persuade the division that it could safely lift the petitioners' debarment. Contrast *Dabish v. McMahon*, 818 F. App'x 423, 427-28 (6th Cir. 2020).

The problem for the division is that the discussions with Attorney Prince did not touch on the effective date of the anticipated tolling agreement. AAG Goyer herself said that only Attorney Newman, not Attorney Prince, agreed to her proposed "terms." And the history of

the parties' actions and statements as recited and analyzed earlier is instructive here too: after the March 15 telephone call, AAG Goyer sent Attorney Newman a "draft," which he redlined, believing that the details remained up for discussion; the April 2021 exchange of proposed effective dates between AAG Goyer and Attorney Semple reads as a negotiation over a not-yet-settled term; AAG Goyer's subsequent emails indicate that the negotiation fell through; so do the division's citations and responses to interrogatories.

The resulting key question is whether the effective date was a "material" term of the tolling agreement. *See McCarthy*, 105 Mass. App. Ct. at 207. The case law does not define materiality comprehensively in this context. Massachusetts courts have said that contract terms are "subsidiary" if they can be supplied by the factual context or by industry norms. *See Malouf*, 430 Mass. at 879; *Duff*, 89 Mass. App. Ct. at 544; *Goren*, 25 Mass. App. Ct. at 141. *See also Nickel v. Zeitz*, 258 Mass. 282, 286 (1927). And federal courts analyzing materiality under Massachusetts law have asked whether "the transaction [could] . . . be consummated solely on the basis of the [agreed terms]." *Video Cent., Inc. v. Data Translation, Inc.*, 925 F. Supp. 867, 870 (D. Mass. 1996). *See Rand-Whitney Packaging Corp. v. Robertson Grp., Inc.*, 651 F. Supp. 520, 535 (D. Mass. 1986).

In the case of many types of agreements, the purpose of the effective date is to trigger more substantive obligations. An effective date of that variety may be a subsidiary detail that does not impede an agreement's entry into force. But in the case of a tolling agreement, the entire point of the transaction is to extend the statute of limitations by some period of time. That period is staked out by the agreement's effective start and end dates. Those two terms define the essential upshot of the agreement.

The petitioners and the division understood that any acceleration of the tolling agreement's effective date would expose additional conduct to enforcement action. It was no accident that AAG Goyer pressed for an effective date in early 2020, and that the petitioners favored a date thirteen months later. The effective date was a central aspect of the deal from the start. Contrast *Duff*, 89 Mass. App. Ct. at 544. In the absence of an agreement on that term, the agreement remained unenforceable. Contrast *United States v. Uvari*, No. 23-910, 2024 WL 4589083, at *1-2 (9th Cir. Oct. 28, 2024) (unpublished memorandum opinion).

AAG Goyer and Attorney Semple also did not land on a binding effective date through their subsequent correspondence. The pertinent rule is that when one party responds to another party's offer by proposing a "substantial variation in contract terms," that response "is not a binding acceptance but a counter offer." *Massachusetts Hous. Fin. Agency v. Whitney House Assocs.*, 37 Mass. App. Ct. 238, 241 (1994). See *Sea Breeze Ests., LLC v. Jarema*, 94 Mass. App. Ct. 210, 216 (2018); *Tull v. Mister Donut Dev. Corp.*, 7 Mass. App. Ct. 626, 631 (1979). Cf. *Tripmasters, Inc. v. Hyatt Int'l Corp.*, No. 82-cv-6792, 1988 WL 117422, at *5-7 (S.D.N.Y. Oct. 25, 1988). Each of the emails between AAG Goyer and Attorney Semple substantially varied the terms of the anticipated contract. Each time one of the attorneys proposed an effective date, the other countered with a proposal at least six months earlier or later. Neither attorney suggested a willingness to live with the other's position. See *Costello v. Pet Inc.*, 17 Mass. App. Ct. 382, 387 (1984). The correspondence reflected only a series of unaccepted counter offers. Because a material term of the tolling agreement was never agreed upon, the agreement never became enforceable.

C. Reliance on a Promise

The division's responses to the petitioners' interrogatories maintained that a tolling agreement became binding two days *after* the division's telephone call with Attorney Prince, through the division's act of lifting Rochester's debarment. At the hearing, AAG Goyer characterized the responses to interrogatories as "misstatements"; but the division's post-hearing brief revives the same theory as an alternative position.

The pertinent underlying doctrine is known as promissory estoppel, or "reliance on a promise." *Loranger Const. Corp. v. E. F. Hauserman Co.*, 376 Mass. 757, 761 (1978).⁷ The essence of the doctrine is that a party may accept a contractual offer through the act of reasonably relying on it. *See id.*; *Tull*, 7 Mass. App. Ct. at 631; *Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 28 n.9 (2006). *See also Nahant Pres. Tr., Inc. v. Northeastern Univ.*, 104 Mass. App. Ct. 698, 714 (2024). The division theorizes in substance that it accepted the petitioners' offer to enter into a tolling agreement by relying on that offer to lift the petitioners' debarment.

The theory is unsuccessful. The decisive problem is that on the weight of authority, the types of offers that can be accepted through reliance are the same types of offers that can be accepted through ordinary, verbal acceptances. As a result, such offers need to cover the material terms of the agreement. *See Rhode Island Hosp. Trust Nat'l Bank v. Varadian*, 419 Mass. 841, 849-50 (1995); *Pappas Indus. Parks, Inc. v. Psarros*, 24 Mass. App. Ct. 596, 599

⁷ *Loranger* describes "reliance on a promise" as a "traditional contract theory." 376 Mass. at 761. Perhaps for that reason, the Appeals Court has viewed the doctrine as invokable in administrative tribunals. *See Findlay's Case*, 77 Mass. App. Ct. 108, 115-16 (2010); *Donovan's Case*, 58 Mass. App. Ct. 566, 568-69 (2003). *See also infra* note 9.

(1987); *Hall v. Horizon House Microwave, Inc.*, 24 Mass. App. Ct. 84, 94 (1987); *Moore v. La-Z-Boy, Inc.*, 639 F. Supp. 2d 136, 142 (D. Mass. 2009). Cf. *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 340-41 (D. Mass. 2011). For the reasons described earlier, the petitioners' offer to enter into a tolling agreement was missing a material term, namely the agreement's effective date. The division's reliance on that offer therefore could not generate an enforceable agreement.

The division's subsequent actions and communications also may cast doubt on whether the division truly "relied" on the petitioners' promise. The issue in this regard is that after the division lifted the debarment, it continued to negotiate with the petitioners about the terms of the brewing agreement. That course of conduct tended to imply an intention by the division to rely on the petitioners' anticipated future consent rather than on their original promise. In an instructive case, a contractor received a price quote from a supplier, used the quote to bid for a project, won the project, and then attempted to hold the supplier to its quote. The Appeals Court concluded that the requisite reliance was absent, reasoning in part: "[T]he trial judge found that [the contractor] expressly reserved the right to shop among suppliers after the [contract] was awarded, and . . . [the contractor] admitted that it was actively seeking a better price." *I & R Mech., Inc. v. Hazelton Mfg. Co.*, 62 Mass. App. Ct. 452, 459 (2004). AAG Goyer likewise persisted in her efforts to secure a better, earlier effective date for weeks or months after the division's supposed reliance on the petitioners' promise. See also *C.G. Schmidt, Inc. v. Permasteelisa N. Am.*, 825 F.3d 801, 808-09 (7th Cir. 2016); *APAC-Se., Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373, 1379 (N.D. Ga. 2007); *C.H. Leavell & Co. v. Grafe & Assocs., Inc.*,

414 P.2d 873, 878-79 (Idaho 1966); *R.J. Daum Const. Co. v. Child*, 247 P.2d 817, 823-24 (Utah 1952); *LAHR Const. Corp. v. J. Kozel & Son, Inc.*, 168 Misc. 2d 759, 765-66 (N.Y. Sup. Ct. 1996).^{8,9}

IV. Order

In view of the foregoing, it is hereby ORDERED as follows:

1. Because all of the conduct underlying citations nos. 15 and 27 occurred more than three years before the citations were issued, those citations are VACATED.
2. Because part of the conduct underlying citations nos. 16 and 26 occurred more than three years before the citations were issued, those citations are MODIFIED accordingly.
3. In their upcoming memoranda in advance of the main evidentiary hearing, the parties shall state and support their positions on the updated restitution and penalty amounts

⁸ The case law adds that relied-upon promises are enforceable only “to the extent necessary to avoid injustice.” *Varadian*, 419 Mass. at 849. See *Loranger*, 376 Mass. at 760-61; *I & R Mech.*, 62 Mass. App. Ct. at 458; *Johnny’s Oil Co. v. Eldayha*, 82 Mass. App. Ct. 705, 714-15 (2012). In terms of injustice avoidance, the enforcement of a tolling agreement here would offer mixed benefits. Until litigation was underway, the division’s statements indicated that no tolling agreement had taken effect. The petitioners therefore had no reason to invoke their right under the proposed agreement to terminate it at any time, effective sixty days later. A determination at this late date that the agreement has been in effect all along would leave the petitioners no opportunity to exercise that right. Such a determination would subject the petitioners to a much more onerous agreement than the parties ever contemplated.

⁹ The division appears to have abandoned the theory that the statute of limitations may be tolled “equitably” on the basis of factors other than an agreement between the parties. That theory suffered from insurmountable weaknesses. To start with, it is unsettled whether equitable tolling is ever invokable in administrative tribunals. Compare *Genetics & IVF Inst. v. Kappos*, 801 F. Supp. 2d 497, 509 (E.D. Va. 2011), and *Amado v. Attorney Gen.*, No. LB-22-592, 2023 WL 395874, at *1 (Div. Admin. Law App. Jan. 13, 2023), with *Boechler, P.C. v. Commissioner of Internal Revenue*, 596 U.S. 199, 209 n.1 (2022). Plus, even where the doctrine applies, it is “generally limited to specified exceptions,” *Shafnacker v. Raymond James & Associates, Inc.*, 425 Mass. 724, 728 (1997), none of which are present here. See also *Halstrom v. Dube*, 481 Mass. 480, 485 (2019); *Campanella & Cardi Constr. Co. v. Commonwealth*, 351 Mass. 184, 187 n.4 (1966); *Andrews v. Arkwright Mut. Ins. Co.*, 423 Mass. 1021, 1021 (1996); *Adamczyk v. Augat, Inc.*, 52 Mass. App. Ct. 717, 724 (2001).

that citations nos. 16 and 26 may now properly assess against the petitioners (without prejudice to any additional defenses that the petitioners may assert).

4. Paragraphs 1-2 will govern the remaining proceedings in this appeal. Those paragraphs will become enforceable elsewhere and appealable on the date of the final disposition of this matter.

Dated: October 28, 2025

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate
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