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# [***Bray v. Bank of Am., N.A.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5S2N-YWH1-F900-G3SB-00000-00&context=)

United States District Court for the Middle District of Florida, Tampa Division

November 21, 2017, Decided; November 21, 2017, Filed

Case No: 8:17-cv-75-T-35AAS

**Reporter**

2017 U.S. Dist. LEXIS 219921 \*; 2017 WL 8772160

PATRICK RYAN BRAY, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.

**Prior History:** [*Bray v. Bank of Am., 2014 U.S. Dist. LEXIS 192507 (M.D. Fla., July 29, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MNC-V361-F04D-1440-00000-00&context=)

**Core Terms**

slander, alleges, statute of limitations, tolling, res judicata, contends, lenders, arbitration, argues, lack of standing, limitations, collateral, merits, motion to dismiss, counterclaims, asserts

**Counsel:** **[\*1]**Patrick Ryan Bray, Plaintiff, Pro se, Bradenton, FL USA.

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**Judges:** MARY S. SCRIVEN, UNITED STATES DISTRICT JUDGE.

**Opinion by:** MARY S. SCRIVEN

**Opinion**

**ORDER**

**THIS CAUSE** comes before the Court on a Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. 33) filed by Defendant, Bank of America, N.A., ("BANA"), and the Response in opposition thereto filed by Plaintiff, Patrick Ryan Bray ("Plaintiff"). (Dkts. 35, 36). Plaintiff asserts two causes of action: (1) a claim brought under the "anti-tying provisions" of the Bank Holding Company Act, [*12 U.S.C. § 1972*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVY1-NRF4-414C-00000-00&context=) ("BHCA"); and (2) a claim for slander brought under Florida state law. (Dkt. 22) For the reasons that are set forth below, both claims fall outside the relevant statutes of limitation, and the slander claim is barred by the doctrine of *res judicata*. Upon consideration of all relevant**[\*2]** filings, case law, and being otherwise fully advised, the Court **GRANTS** Defendant's Motion to Dismiss with prejudice.

**I. FACTUAL BACKGROUND**

On February 15, 2017, Plaintiff filed an Amended Complaint ("Complaint"). The relevant factual allegations are as follows: Plaintiff worked as an independent financial advisor who sold mutual fund products managed by several different third-party mutual fund companies. (Dkt. 22 ¶¶ 18, 28). Starting in 2004, Plaintiff managed a General Public Account ("GPA") for American Express Incentive Solutions ("AEIS"), which later changed its name to InteliSpend Prepaid Solutions ("InteliSpend"). (Id. ¶¶ 16, 18, 28-30, 56)

At least since 2003, BANA was the lead lender for a six-bank syndicated line of credit extended to InteliSpend's parent company, Maritz Holdings, Inc. ("Maritz"). (Id. ¶¶ 23, 25) In June 2009, Maritz defaulted on the syndicated loan. (Dkt. 22-1 at 2) Maritz was granted a waiver, forbearing the lenders from exercising any rights arising from the default, and the parties discussed renewing the syndicated loan. (Dkt. 22 ¶ 27, 35-37) Maritz requested that the lenders permit it to acquire American Express's minority shares of AEIS.[[1]](#footnote-0)1 (Id. ¶ 27) The**[\*3]** lenders required Maritz to provide additional collateral for the purchase of the shares of AEIS. (Id. ¶ 30) As collateral for the renewed loan, Maritz pledged the GPA that "was held for future redemptions of already purchased, but yet to be redeemed, gift card monies held and controlled by InteliSpend." (Id. ¶¶ 17, 30, 33, 36-38, 50) However, the six syndicated lenders required that the additional collateral, the GPA, be held at BANA's affiliate, Merrill Lynch. (Id. ¶¶ 40, 47) On November 13, 2009, Maritz and the lenders finalized the loan and signed a contract.[[2]](#footnote-1)2 (Id. ¶ 47)

In March 2010, Plaintiff was hired by Merrill Lynch. (Id. ¶ 58) Plaintiff contends that he was "forced to join Merrill Lynch" to keep his client. (Id. ¶ 60, 99(A)) Plaintiff alleges that in early October 2011, InteliSpend informed him of its plans to leave Merrill Lynch and retain Plaintiff as the advisor. (Id. ¶ 62) Plaintiff also alleges that his client 2 In 2010, Maritz purchased all of the minority shares in AEIS and changed the name of the company from AEIS to InteliSpend. (Dkt. 22 ¶ 7) would have followed him if he resigned from Merrill Lynch and moved to another broker/dealer. (Id. ¶¶ 63-64; Dkt. 22-3 at 4-6) On October**[\*4]** 28, 2011, Plaintiff resigned from Merrill Lynch. (Id. ¶¶ 64, 99(A)) Plaintiff alleges that BANA threatened to put the loan in default if Maritz moved the account from Merrill Lynch to Plaintiff. (Id. ¶ 64; Dkt. 22-3 at 8-10) There is no allegation in the Complaint that the assets previously serviced by Plaintiff ever moved from Merrill Lynch. Plaintiff also contends that BANA worked "behind the scenes" to prevent him from managing the GPA and its employees made "numerous slanderous remarks about [Plaintiff], which prevented [Plaintiff] from having a relationship with his client again." (Id. ¶ 79) Around March 1, 2012, BANA and the other lenders again amended the credit agreement and released the assets as collateral, and the assets remained at Merrill Lynch. (Dkt. 22 ¶¶ 64, 78, 99(A), 125)

In Count I of the Complaint, Plaintiff alleges that BANA violated the BHCA by requiring that the collateral be moved to Merrill Lynch as a condition of the loan renewal. (Id. ¶¶ 116-120) This requirement, he alleges, imposed a "tying requirement on Maritz" that the lenders began enforcing in March 2010. (Id. ¶¶ 102, 116)

In Count II, Plaintiff alleges that "BANA employee(s) . . . slandered [Plaintiff]**[\*5]** to his [c]lient on or around February of 2012." (Id. at 2) He alleges that, in February 2012, a BANA employee "told the CFO of Maritz, Rick Ramos, that [Plaintiff] threatened his life, and the life of his associate, Kevin Knopf." (Id. ¶ 122)

BANA filed the instant motion, seeking to dismiss both claims with prejudice.

**II. PROCEDURAL BACKGROUND**

This is the fourth legal action based on the operative facts alleged in the Complaint. Two of those lawsuits remain pending in the Middle District of Florida. Below is the procedural background on all four actions.

**A. Bray I**

In October 2011, when Plaintiff voluntarily resigned from Merrill Lynch, he owed Merrill Lynch $335,491.88 on a promissory note that he had executed at the outset of his employment. (Dkt. 33-2 at 2)[[3]](#footnote-2)3 Plaintiff failed to repay the note balance. (Id.) On January 6, 2012, Merrill Lynch initiated a Financial Industry ***Regulatory*** Authority ("FINRA") arbitration action ("Bray I") to collect the outstanding balance. (Dkt. 33-3) BANA was not a party to the arbitration.

On March 7, 2012, Plaintiff asserted various counterclaims against Merrill Lynch and later amended his counterclaims to include a claim for alleged BHCA violations of tying**[\*6]** assets. (Dkt. 33-11 at 3; Dkt. 33-6 at 4; Dkt. 36 at 5) Merrill Lynch moved for a judgment as a matter of law on all claims and counterclaims. (Dkt. 33-11 at 4) The FINRA panel issued a judgment as a matter of law against Plaintiff as to the BHCA counterclaim, denied Plaintiff's remaining counterclaims with prejudice, and awarded Merrill Lynch the full balance of the promissory note, plus interest and attorney's fees. (Dkt. 33-11 at 4; Dkt. 36 at 5) On January 27, 2014, the court confirmed the arbitration award. (Dkt. 33-2)

**B. Bray II**

On February 10, 2014, Plaintiff filed a complaint in the Middle District of Florida against BANA ("Bray II"). See Complaint at 1, Bray v. Bank of Am., N.A., (M.D. Fla. 2014) (No. 8:14-cv-00332-SDM-TBM).[[4]](#footnote-3)4 In addition to alleging slander and BHCA violations, the same claims set forth in the instant action, Plaintiff alleged in Bray II libel and harassment claims. On July 29, 2014, the case was transferred to the Eastern District of Missouri. (Dkt. 33-5)

The Missouri federal court thereafter dismissed Plaintiff's claims with prejudice under [*Federal Rules of Civil Procedure 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) and [*12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), finding that Plaintiff lacked standing to assert the BHCA claim, and that**[\*7]** the slander and libel claims fell outside the applicable statutes of limitations. (Dkt. 33-6) Plaintiff appealed to the Eighth Circuit, which affirmed the dismissal with prejudice. (Dkt. 33-7) However, the Eighth Circuit reversed the dismissal of the BHCA claim, directing the district court to consider the impact of [*Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1391-92, 188 L. Ed. 2d 392 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BTS-W1F1-F04K-F003-00000-00&context=), on the court's standing analysis. (Id.) On remand, the district court found that Plaintiff lacked standing to assert the BHCA claim. (Dkt. 33-8)

Plaintiff again appealed to the Eighth Circuit and, on October 26, 2016, the Eighth Circuit upheld the district court's dismissal of the BHCA claim. (Dkt. 33-9) Plaintiff's petition for rehearing was denied. Bray v. Bank of Am., N.A., No. 16-1523, (8th Cir. Dec. 6, 2016).

**C. Bray III**

On October 27, 2015, Plaintiff chose to file another complaint ("Bray III") against BANA and Bank of America Corp. See Complaint at 1, Bray v. Bank of Am., N.A. (M.D. Fla. Oct. 27, 2015) (No. 8:15-cv-02532-MSS-TBM). Bray III is based on the same underlying operative facts in Bray II and asserts claims involving various purported violations of federal and state ***antitrust*** laws. (Dkt. 33-10) Plaintiff also alleges a violation of the BHCA. Bray III is pending**[\*8]** in this court.

**D. Bray IV**

On December 19, 2016, Plaintiff filed the instant action ("Bray IV") in the Twelfth Judicial Circuit in and for Manatee County, Florida. (Dkt. 2) Bray IV is based on the same operative facts as Bray II and Bray III and asserts the same claims that were rejected in Bray II. The Complaint expressly pleads that this action is a copy of Bray II, stating that "[a]fter failing to have his complaint remanded by the Eighth Circuit Court of Appeals, [Plaintiff] rightfully filed the same allegations in State Court in the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida." (Dkt. 22 at 3) On January 10, 2017, BANA removed the instant action to this Court. (Dkt. 1) On March 17, 2017, BANA filed the instant motion to dismiss the claims with prejudice. (Dkt. 33)

**III. LEGAL STANDARD**

The threshold for surviving a motion to dismiss for failure to state a claim under [*Federal Rule of Civil Procedure 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is a low one. [*Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., et al., 711 F.2d 989, 995 (11th Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YSW0-003B-G11G-00000-00&context=). A plaintiff must plead only enough facts to state a claim to relief that is plausible on its face. [*Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1968-69, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=) (abrogating the "no set of facts" standard for evaluating a motion to dismiss established in [*Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J5D0-003B-S1MW-00000-00&context=). Although a complaint challenged by a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss does not need detailed**[\*9]** factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and "a formulaic recitation of the elements of a cause of action will not do." [*Berry v. Budget Rent A Car Sys., Inc., 497 F. Supp. 2d 1361, 1364 (S.D. Fla. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P71-WXD0-TXFP-K36F-00000-00&context=) (quoting [*Twombly, 127 S. Ct. at 1964-65*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=)). In evaluating the sufficiency of a complaint in light of a motion to dismiss, the well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff. [*Quality Foods, 711 F.2d at 994-95*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YSW0-003B-G11G-00000-00&context=). However, the court should not assume that the plaintiff can prove facts that were not alleged. Id. Thus, dismissal is warranted if, assuming the truth of the factual allegations of the plaintiff's complaint, there is a dispositive legal issue which precludes relief. [*Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BDG0-003B-42B7-00000-00&context=).

**IV. DISCUSSION**

**A. Count I: Plaintiff's BHCA Claim is barred by the statute of limitations**

BANA argues that Plaintiff's BHCA claim should be dismissed because it was filed outside the statute of limitations. Plaintiff argues that the statute of limitations was tolled by the pendency of Bray II. The Court agrees with BANA that the claim is time-barred.

In the Complaint, Plaintiff alleges that BANA violated the BHCA. [*12 U.S.C. §1972-78*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVY1-NRF4-414C-00000-00&context=). The BHCA, in relevant part, prohibits a bank from extending credit or varying the consideration for its extension of credit on**[\*10]** the condition or requirement that a customer "obtain some additional . . . service from a bank holding company of such bank, or from any other subsidiary of such bank holding company." [*12 U.S.C. §1972(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVY1-NRF4-414C-00000-00&context=). A private party can bring suit to recover treble damages for an "anti-tying" violation. [*12 U.S.C. §1975*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GWM1-NRF4-42KY-00000-00&context=). The statute of limitations for Plaintiff's BHCA claim is four years. [*12 U.S.C. § 1977*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPT1-NRF4-41XW-00000-00&context=).

Plaintiff filed this action, Bray IV, on December 19, 2016. (Dkt. 2) To be timely, Plaintiff must allege that the BHCA violation occurred on or after December 19, 2012. Here, Plaintiff alleges that BANA violated the BHCA in March 2010, when BANA and the other lenders enforced the contract requiring the assets be moved to Merrill Lynch. (Dkt. 22 ¶¶ 40-41, 65, 102) Plaintiff contends that BANA violated the BHCA because it tied together (i) its provision of credit to its customer with (ii) the requirement that its customer obtain broker-dealer services from its affiliate, Merrill Lynch. [*12 U.S.C. § 1972*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVY1-NRF4-414C-00000-00&context=). Based on Plaintiff's allegation, a timely claim should have been filed no later than the end of March 2014. Plaintiff concedes that the alleged tie between credit and broker-dealer services ended in March 2012, when BANA and the other lenders removed the alleged**[\*11]** "tying" requirement that Maritz's commercial loan be collateralized with an account at Merrill Lynch. (Id. ¶ 64) Even if Plaintiff used March 2012, which he does not because he claims the date is irrelevant, as the last possible date that the alleged BHCA violation occurred, Plaintiff's claim would still fall outside the four-year statute of limitations. In that event, the claim would have to have been perfected by March 2016, at the latest. Thus, Plaintiff's BHCA claim fails on this basis because Plaintiff filed Bray IV in December 2016, more than four years after the alleged violation occurred in March 2010. The statute bars Plaintiff's claim.

Plaintiff argues that the statute of limitations was tolled while Bray II was pending. To the contrary, BANA contends that there can be no tolling as a matter of law, assuming that Bray II was dismissed without prejudice because Plaintiff lacked standing.

Standing is a jurisdictional issue and "a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under [*Fed. R. Civ. P. 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=)." [*Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1232 (11th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S9R-GBT0-TXFX-G3CY-00000-00&context=) (citation omitted). "A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice."**[\*12]** Id. Further, a dismissal without prejudice does not permit a subsequent complaint to be filed outside the statute of limitations. [*Paylan v. DeVage, 2017 U.S. Dist. LEXIS 105044, 2017 WL 2910995, at \*2 (M.D. Fla. July 7, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NYR-6BP1-F04D-11DJ-00000-00&context=) (citing [*Bost v. Fed. Express Corp., 372 F.3d 1233, 1242 (11th Cir. 2004))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CK2-K0M0-0038-X2B8-00000-00&context=). The statute of limitations is not automatically tolled by the filing of a lawsuit later dismissed without prejudice; rather, a plaintiff must demonstrate must demonstrate that tolling is warranted. [*Justice v. United States, 6 F.3d 1474, 1478-79 (11th Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BFW0-003B-P1CN-00000-00&context=) (citing [*Stein v. Reynolds Securities, Inc., 667 F.2d 33 (1982))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-40M0-003B-G267-00000-00&context=).

Here, Plaintiff's BHCA claim in Bray II was dismissed by the Eastern District Court of Missouri for lack of standing. (Dkt. 33-8 at 11) The court analyzed the defendant's motion to dismiss under [*Fed. R. Civ. P. 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) for lack of subject matter jurisdiction and, consequently, the dismissal was not based on the merits. (Id. at 4) Although the court did not expressly dismiss the claim "without prejudice," the Court is satisfied that the dismissal was without prejudice because it was granted for lack of standing, not on the merits. Therefore, tolling was not automatic.

Plaintiff contends that tolling is warranted in this case for two reasons. First, Plaintiff argues that the federal courts in Missouri took three years to finalize Bray II and that he should not be penalized because of the courts' purported delay. Second, in response to the instant motion, Plaintiff argues that**[\*13]** tolling is warranted because Bray IV relates back to the complaint filed in Bray II and cites, in support of his argument, to [*Homaday v. Smith and Nephew, Inc., 994 F. Supp. 2d 1264, 1265 (M.D. Fla. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BCV-R2P1-F04D-12F0-00000-00&context=). However, Plaintiff's arguments are unavailing to justify equitable tolling.

The purpose of the statute of limitations is to protect defendants from unfair surprise and to discourage stale claims. [*Raymond James Fin. Services, Inc. v. Phillips, 126 So. 3d 186, 192-93 (Fla. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59SC-5HP1-F04F-R284-00000-00&context=). Here, Plaintiff's criticism that the courts had been dilatory in resolving Bray II is insufficient to warrant tolling. Plaintiff was able to fully litigate his claims in Bray II and pursue appropriate appeals. Additionally, Plaintiff's reliance on Homaday is misplaced. Plaintiff is correct that, in Homaday, the court ruled that the plaintiff's wrongful death claims were not barred by the statute of limitations because the third amended complaint related back to the original complaint, which was timely filed. [*994 F. Supp. 2d at 1267*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BCV-R2P1-F04D-12F0-00000-00&context=). However, the court noted the Eleventh Circuit holding that "the relation back doctrine does not apply to the filing of a new complaint when the original action was dismissed." [*Id. at 1266*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BCV-R2P1-F04D-12F0-00000-00&context=) (citing Abram—[*Adams v. Citigroup, Inc., 491 F. App'x 972, 975 (11th Cir. 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56TV-2JF1-F04K-X46H-00000-00&context=). Because Bray II was dismissed, the relation back doctrine does not preserve the untimely filing of Bray IV, the new complaint filed in 2016. Thus, Plaintiff's BHCA claim**[\*14]** falls outside of the statute of limitations, and BANA's motion is due to be granted on this basis.

**B. Count II: Plaintiff's slander claim is barred by *res judicata* and statute of limitations**

**a. *Res judicata***

BANA argues that Plaintiff's slander claim should be dismissed because it is barred by *res judicata*. Specifically, BANA argues that the slander claim in the instant action is barred because the same claim was raised in Bray II and dismissed. In the response, Plaintiff contends that the court in the Eastern District of Missouri lacked authority to rule on the slander claim and, thus, the claim is not barred by *res judicata*. The Court finds Plaintiff's argument to be without merit.

"The doctrine of *res judicata*, or claim preclusion, bars the parties to an action from litigating claims that were or could have been litigated in a prior action between the same parties." *Lobo v. Celebrity Cruises, Inc., 704 F.3d 882, 892 (11th Cir. 2013)*. To invoke *res judicata*, a party must establish that: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the judgment was final and on the merits; (3) both cases involve the same parties or those in privity with them; and (4) 'both cases . . . involve the same causes of action.'" [*Borrero v. United Healthcare of N.Y., Inc., 610 F.3d 1296, 1306 (11th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YW8-B0G1-652R-B000-00000-00&context=) (quoting [*In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42NH-1340-0038-X1GV-00000-00&context=).

The**[\*15]** court in the Eastern District of Missouri, which ruled on Bray II, is a court of competent jurisdiction. The slander claim in Bray II was dismissed because it was barred by the two-year statute of limitations. (Dkt. 33-6 at 17) The Eighth Circuit affirmed. (Dkt. 33-7 at 2) The slander claim that was dismissed in Bray II is identical to the claim in Bray IV; both were filed by Plaintiff against BANA. Plaintiff even concedes that Bray IV is "the sister and/or brother of Bray II." (Dkt. 36 at 10) Both complaints allege the same cause of action-that BANA's employees slandered Plaintiff. (Dkt. 33-10 ¶¶ 72-75; Dkt. 22 ¶¶ 122-25) In Bray II, Plaintiff alleged that the slander occurred after he resigned on October 28, 2011. (Dkt. 33-10 ¶ 73) However, in Bray IV, Plaintiff asserts that the slander specifically occurred in February 2012. BANA contends that the mere inclusion of the month and year in the latter complaint is insufficient to defeat *res judicata. See* [*Echeverria v. Bank of Am., N.A, 2014 U.S. Dist. LEXIS 185863, 2014 WL 11369472, at \*4 (M.D. Fla. Nov. 14, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JWX-6CF1-F04D-11F5-00000-00&context=), *aff'd*, [*632 F. App'x 1006 (11th Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HHK-09D1-F04K-X03J-00000-00&context=) (finding that factual allegations that existed when the initial lawsuit was filed, and discoverable with reasonable diligence, but not previously asserts were insufficient to overcome *res judicata*). Thus, the Court finds that**[\*16]** BANA has established that *res judicata* is applicable.

In the response, Plaintiff argues that *res judicata* is inapplicable to Bray IV because the court in Eastern District of Missouri lacked the authority to rule on the slander claim in Bray II. (Dkt. 36 at 12) Plaintiff contends that the court's dismissal of the BHCA claim revoked the court's ability to exercise supplemental jurisdiction over the state-law slander claim. Plaintiff cites to [*Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2KS0-006F-M01X-00000-00&context=), in support of his argument. In Nowak, the court noted that a dismissal pursuant to [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) of a federal claim, that is to say a dismissal not on the merits, precludes the court from exercising supplemental jurisdiction over related state claims. [*Id. at 1188*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2KS0-006F-M01X-00000-00&context=). However, the Second Circuit found that the district court dismissed the federal claim on the merits and, subsequently, properly exercised its discretion to retain supplemental jurisdiction over the state claims. [*Id. at 1192*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2KS0-006F-M01X-00000-00&context=). Thus, Plaintiff's reliance on Nowak is misplaced. Additionally, in Bray II, the court's ruling on Plaintiff's slander claim was final *prior* to the dismissal of the BHCA claim.

Therefore, the Court finds that *res judicata* precludes re-litigation of Plaintiff's slander claim against BANA.

**b. Statute of [\*17]  limitations**

BANA contends that, even if this Court found that *res judicata* did not bar the slander claim, the claim is barred by the statute of limitations. Plaintiff counters that the allegation was timely raised in the FINRA arbitration proceedings, which also tolled the statute of limitations.

The statue of limitations on a slander claim is two years. [*Fla. Stat. § 95.11(4)(g)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8RBV-HY92-D6RV-H4SS-00000-00&context=). The statute begins to run as soon as the alleged defamatory remarks are first uttered. *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan, 629 So.2d 113, 115 (Fla. 1993)* (citing [*Fla. Stat. § 770.07*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-MT31-6SKW-D0WV-00000-00&context=)).

Here, Plaintiff alleges that one of BANA's employees slandered Plaintiff in February 2012. (Dkt. 22 ¶ 122) A timely claim was due to be filed by February 2014. However, Plaintiff did not file this action until December 19, 2016, almost three years past the applicable limitations period.

Plaintiff also alleges that both Florida law and FINRA rules toll the statute of limitations. (Id. ¶¶ 110-11, 126) Plaintiff cites to [*Florida Statute 95.051(1)(g)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5C24-M621-6SKW-D4NX-00000-00&context=), which states, in pertinent part, that "the running of the time under any statute of limitations . . . is tolled by [t]he pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action." Plaintiff also cites to FINRA Rule 12206(c) and 13206(c), which state that a claim filed in arbitration tolls the statute of limitations**[\*18]** for filing a claim in court so long as FINRA retains jurisdiction of the claim. He contends that he raised his slander claim against BANA in the FINRA arbitration. (Dkt. 22 ¶ 90) However, Plaintiff's allegations are without merit. BANA was not a party to Bray I. (Dkt. 33-2 at 1; Dkt. 33-11 at 4) Bray I involved a dispute between Merrill Lynch and Plaintiff. Additionally, although Plaintiff may have informally raised an allegation of slander, Plaintiff offers no evidence that he timely filed a slander claim against BANA in Bray I. Because BANA was not a party to the proceedings and Plaintiff did not assert a claim for slander against BANA in Bray I, Plaintiff is not entitled to the benefits of tolling. Even assuming, *arguendo*, that the FINRA arbitration proceeding tolled the statue of limitations, the arbitration award was issued on November 21, 2013 and confirmed by the court on January 27, 2014 (Dkt. 33-2; Dkt. 33-11 at 1,3). Thus, this claim—which was brought on December 19, 2016—was not filed within the two years of the termination of that proceeding. As such, the slander claim must be dismissed.

**V. CONCLUSION**

Upon consideration of the foregoing, it is hereby **ORDERED** that Defendant's**[\*19]** Motion to Dismiss with prejudice (Dkt. 33) is **GRANTED**. The case is **DISMISSED WITH PREJUDICE**. The CLERK is directed to TERMINATE all pending motions and CLOSE the case.

**DONE** and **ORDERED** in Tampa, Florida, this 21st day of November, 2017.

/s/ Mary S. Scriven

MARY S. SCRIVEN

UNITED STATES DISTRICT JUDGE

**End of Document**

1. 1Maritz was the majority shareholder in AIEIS, and American Express held a 49 percent share. (Dkt. 22 ¶ 15) [↑](#footnote-ref-0)
2. 2Maritz was the majority shareholder in AIEIS, and American Express held a 49 percent share. (Dkt. 22 ¶ 15) [↑](#footnote-ref-1)
3. 3The Court may take judicial notice of undisputed facts of public record in the context of a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion. See, e.g., [*Kaiser v. Deputy Spine, Inc., 944 F. Supp. 2d 1187, 1192 n.2 (M.D. Fla. May 14, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58F3-H7Y1-F04D-11H3-00000-00&context=) (Scriven, J.). [↑](#footnote-ref-2)
4. 4In Bray II, Plaintiff contends that he tried to resolve the BHCA violation claim in Bray I. Complaint ¶ 85, Bray v. Bank of Am., N.A. (M.D. Fla. 2014) (No. 8:14-cv-00332-SDM-TBM). [↑](#footnote-ref-3)