IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DENNIS A. REID, Plaintiff, v. VINCENZO DAVIDE SINISCALCHI, GIORGIO CAPRA, ALENIA SPAZIO, ALCATEL ALENIA SPACE ITALIA S.p.A. (f/k/a ALENIA SPAZIO) and FINMECCANICA S.p.A., Defendants, and USRT HOLDINGS, L.L.C. and U.S. RUSSIAN TELECOMMUNICATIONS, L.L.C., Nominal Defendants.	:	**C.A. No. 2874-VCN**

MEMORANDUM OPINION

Date Submitted: October 29, 2007
Final Supplemental Submittal: November 21, 2007
Date Decided: March 27, 2008

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NOBLE, Vice Chancellor

I. INTRODUCTION

Defendants Alenia Spazio ("Alenia"), Alcatel Alenia Space Italia, S.p.A. (formerly Alenia Spazio and also referred to as "Alenia"), and Finmeccanica S.p.A. ("Finmeccanica"), all entities established under the laws of Italy and collectively referred to as the "Entity Defendants," have moved to dismiss the Complaint as barred by laches and the applicable statute of limitations and for this Court's lack of personal jurisdiction. Defendant Vincenzo Davide Siniscalchi ("Siniscalchi"), an Illinois resident, has been dismissed voluntarily. Defendant Giorgio Capra ("Capra"), an Italian resident and citizen, Nominal Defendant USRT Holdings, L.L.C. ("USRT Holdings"), a Delaware limited liability company, and Nominal Defendant U.S. Russian Telecommunications, L.L.C. ("USRT"), also a Delaware limited liability company, have not appeared in this proceeding. Plaintiff Dennis A. Reid ("Reid"), a Canadian citizen allegedly holding a 10% membership interest in USRT Holdings, which wholly owns USRT, opposes the motion. For the reasons that follow, the Court concludes that this action is time-barred.

II. BACKGROUND

A. *Substantive Allegations*[1]

By 1995, several Russian satellites in geosynchronous orbit were becoming obsolete: the satellites lacked the state-of-the-art capabilities necessary to support many commercial applications. If the Russian government failed to replace its aging satellites, it risked losing a number of valuable geosynchronous orbital slots.[2]

Dr. Valery Aksamentov ("Dr. Aksamentov"), a Russian space scientist living and working in the United States, saw a business opportunity in Russia's predicament. He had learned of the situation from Konstantin Aksamentov and another friend who worked for the Russian Satellite Communications Company ("RSCC"). At the time, RSCC was a "semi-private company"[3] responsible for allocating and licensing Russian satellite communications frequencies. In conjunction with others at RSSC, Dr. Aksamentov had worked successfully to obtain legislation that commercialized Russia's satellite slots. He then fomented a plan to launch new, state-of-the-art satellites in those orbital slots. Dr. Aksamentov planned to tap Western investors for financing; secure cutting-edge

[1] Under Court of Chancery Rule 12(b)(6), a court will grant a motion to dismiss only if the plaintiff could not prevail "under any reasonably conceived set of circumstances susceptible of proof." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). Thus, for purposes of the pending motion, the Court draws upon the Complaint's well-pleaded allegations and draws all reasonable inferences in the Plaintiff's favor.

[2] The International Telecommunications Union assigns satellite slots.

[3] Presumably, the Complaint describes RSCC as a "semi-private" company because it was partially owned by the Russian government.

Western satellite technology; allocate a portion of the satellite transponders to the Russian government and reserve the remainder for commercial customers; and share the revenues generated by the operation of the commercial satellites between Russia, the investors, and his group.

Dr. Aksamentov was affiliated with International Space Enterprises, a Houston company he founded with a group of NASA space-industry alumni for the purpose of pursuing international commercial space ventures. Dr. Aksamentov and his colleagues at International Space Enterprises, with the aid of Space Marketing, Inc., began to look for financing for the project. Recognizing that obtaining financing for a venture of such scale would be difficult, the Space Enterprises group solicited help from others in the space industry and formed USRT.

Sometime later, the Italian government expressed interest in the project and appointed Capra as a liaison to facilitate legal and financial arrangements between Italy and USRT. Capra was an Italian naval officer, an Italian Ministry of Defense adviser, and an Italian Space Agency board member. Siniscalchi was to assist Capra in his role as liaison.

In September and October of 1997, USRT representatives and Capra met with the heads of several ministries of the Italian government. On November 26, 1997, Capra submitted an official commitment letter from the Italian government

stating that Italy would finance the project. In late December, Capra arranged for Alenia, a division of the then state-owned Finmeccanica, to commit to obtaining the required financing.[4]

Subsequently, Alenia and Finmeccanica failed to provide USRT with a letter of credit or similar guarantee that was necessary to finalize the transaction.[5] "[T]he Italians" informed USRT that they needed more time for the Italian government to enact legislation releasing the funding.[6] On January 15, 1998, representatives of USRT and Alenia and Finmeccanica met with a senior RSCC official in Moscow, where Alenia and Finmeccanica again committed to obtain full financing. On January 16, 1998, Gennaro Visconti sent a formal letter on behalf of the Italian Ministry of Industry and Commerce stating that Italy was willing to provide sufficient funds to finance the project (up to $1.5 billion).

In the spring of 1998, RSCC transferred control of the satellite slots to Inspace JSC ("Inspace"), a Russian company. After the transfer, USRT, Alenia and Finmeccanica, and Inspace agreed to form a joint venture to utilize and profit from the satellite slots. USRT was to provide commercial, legal, and political

[4] According to the Entity Defendants, at the time of the conduct challenged in the Complaint, a company wholly owned by the Italian Treasury Ministry held a 61% equity interest in Finmeccanica. At present, the Italian government has an approximately 34% interest in Finmeccanica.

[5] The Complaint's averments refer to "Alenia/Finmeccanica," and for that reason, the Court refers to "Alenia and Finmeccanica" throughout.

[6] From the face of the Complaint, it is unclear to whom or what entities "the Italians" refers.

support, as well as to continue to identify appropriate financial and technical partners; in exchange, USRT was to receive 30% of project revenues. Alenia and Finmeccanica were to provide the required funding and were also to receive 30% of revenues. Inspace was responsible for launching and operating the satellites; it was to receive 40% of revenues.

USRT, Alenia and Finmeccanica, and Inspace entered into a nondisclosure agreement around April 6, 1998, which provided for open sharing of proprietary information. Sometime later, Alenia and Finmeccanica submitted a loan advance request to the Italian Ministry of Industry and Commerce, which included a full description of the joint venture. According to a feasibility study commissioned by Alenia and Finmeccanica, project revenues of approximately $5 billion were estimated for the initial phase.

During the summer and fall of 1998, the parties worked to finalize preparations for the project. Alenia and Finmeccanica, however, never delivered the financing.

Around that time, Capra and Siniscalchi told USRT that the Italian government would not approve the deal unless USRT was entirely Italian-owned. In order to facilitate the change in ownership, Capra and Siniscalchi caused USRT Holdings to be formed in Delaware. Capra then induced USRT's members to sell

their interests in USRT to USRT Holdings in exchange for $300 million in revenue participation rights.

After acquiring control of USRT, Capra appointed himself as chief executive officer, John L. Reed ("Reed") as president, Reid as chief financial officer, and Siniscalchi as chief operating officer. In exchange for Reed and Reid's employment, Capra awarded each a 5% membership interest in USRT Holdings.[7] Reed subsequently transferred his interest to Reid, giving Reid a 10% equity stake in the entity.

Once Capra gained control of USRT, Reid avers that Capra, Siniscalchi, and Alenia and Finmeccanica began to implement their plan to divest USRT of the project's proceeds, as well as to misappropriate USRT's assets and usurp its corporate opportunities. Reid maintains that he and Reed were asked to participate in this plan but refused, after which they were quickly terminated.[8] Reid contends that these actions were only possible because of the change of control of USRT that had been effectuated in Delaware through the formation of USRT Holdings in this State.

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[7] The Complaint does not address the apparent inconsistency between the requirement that the venture be owned exclusively by Italian interests and the grant of equity positions to Reed and Reid.

[8] According to Reid, in May of 1999, Siniscalchi extended to Reed and Reid an offer on behalf of Alenia that included a $20-$30 million lump-sum payment, salaries of $200,000 per year, and annual consulting fees of between $1 million and $3 million in exchange for transferring USRT's joint venture rights to Alenia and for "running interference" for Alenia against USRT's former members.

In late 1999, Alenia and Finmeccanica began to implement USRT's business plan, launching the first replacement satellite. According to a press release from December 1999, the Russian company that launched the satellite had obtained financing from Alenia and Finmeccanica. Additional satellites have been or are planned to be launched; others are in the development stage.

Based on these allegations, Reid brings causes of action sounding in breach of contract; breach of fiduciary duty; conversion; civil conspiracy; and tortious interference with business relations. Reid asks for actual, consequential, and exemplary damages. He also seeks an accounting of the profits made by Capra, Siniscalchi, and Alenia and Finmeccanica from the satellite project, as well as attorneys' fees.

B. *Procedural History*

Reid first filed suit against Siniscalchi, Capra, Alenia Spazio, and Finmeccanica in the United States District Court for the Southern District of Texas on May 16, 2001 (the "Federal Action"). That action was dismissed pursuant to the parties' agreement on March 6, 2002, and re-filed in state court in Harris County, Texas, on March 11, 2002 (the "Texas Action"). The defendants in that action, the same as in the Federal Action, filed a motion for special appearance on the ground that the Texas court lacked personal jurisdiction. The Harris County District Court denied the motion. Alenia and Finmeccanica then appealed that

interlocutory decision pursuant to Texas Civil Practice and Remedies Code Section 51.014(a)(7), which provides that a party may appeal to the Texas Court of Appeals from an interlocutory order denying a special appearance. The Texas Court of Appeals reversed the Harris County District Court on December 23, 2003, after conducting an extensive jurisdictional analysis.[9] It remanded with instructions to dismiss the claims against Alenia and Finmeccanica for lack of personal jurisdiction. Reid moved for rehearing *en banc* on February 9, 2004; the Texas Court of Appeals denied that motion on April 8, 2004. Reid then petitioned the Texas Supreme Court for review on July 15, 2004; the Texas Supreme Court denied the petition on August 26, 2005, whereupon Reid moved for rehearing on September 12, 2005. The Texas Supreme Court denied that motion on March 10, 2006. At that juncture, the case was remanded to the Harris County District Court, which dismissed the action in an April 11, 2006, order.[10]

On June 8, 2006, Reid petitioned the United States Supreme Court for writ of certiorari. That application was denied on October 2, 2006.

Reid commenced this action on April 9, 2007. The Complaint pending before this Court is substantially the same as the complaint filed in the Texas Action.

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[9] *See Alenia Spazio, S.p.A. v. Reid*, 130 S.W.3d 201 (Tex. App. 2003).

[10] *See* Pl.'s Answering Br. in Opp'n to Mot. of Defs. Alenia Spazio, Alcatel Alenia Space Italia, S.p.A. and Finmeccanica S.p.A. to Dismiss the Compl., Affidavit of Thomas I. Sheridan, III, Ex. A (the dismissal order in *Reid v. USRT Holdings LLC*, No. 2002-12305 (Tex. D. Ct. Apr. 11, 2006)).

III. CONTENTIONS

In their motion to dismiss, the Entity Defendants argue that Reid's Complaint is time-barred. Although there is no dispute that both the Federal Action and the Texas Action were timely filed, the Entity Defendants posit that since the time the Texas Action was filed, the applicable period of limitation for each of Reid's claims has expired and that his action in Delaware is not saved by Delaware's savings statute (the "Savings Statute").[11]

Additionally, the Entity Defendants argue that the Complaint should be dismissed because the Court lacks personal jurisdiction. They contend that *in personam* jurisdiction cannot properly be exercised in accordance with Delaware's Long-Arm Statute (the "Long-Arm Statute")[12] and the United States Constitution's Due Process Clause.[13] The Entity Defendants also contend that Reid has had sufficient opportunity to take jurisdictional discovery in the Texas Action and the Federal Action.

Reid maintains that his claims are timely brought because they are preserved by the Savings Statute. He also urges that the Court may exercise personal jurisdiction over the Entity Defendants or, alternatively, that it should provide him with an opportunity to take jurisdictional discovery.

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[11] 10 *Del. C.* § 8118. In lower case, "savings statute" is used variously to refer to either earlier versions of Delaware's Savings Statute or other states' savings statutes.
[12] 10 *Del. C.* § 3104.
[13] U.S. Const. amend. XIV, § 1.

IV. ANALYSIS

A. *The Timeliness of Reid's Action Under the Statute of Limitations*

Because the complained of conduct allegedly occurred in 1998 and 1999, and the relevant statutory limitation period in Delaware for Reid's claims has run,[14] his claims will be considered untimely at law unless the Savings Statute applies to save them.

In their briefing, the parties have raised several issues that are either unclear or novel in this jurisdiction. Namely, the parties disagree over whether the Savings Statute applies to original actions commenced outside of Delaware; whether an original action that fails for lack of personal jurisdiction following a substantive jurisdictional inquiry comes within the purview of the Savings Statute; whether the Savings Statute is "tolled" during discretionary appeals; whether the timeliness of Reid's action should be considered under the Savings Statute's fourth or sixth prong; and finally, if it is to be considered under the fourth prong, whether an original action's "abatement or other determination" occurs upon an appellate court's decision or upon the date when a trial court enters an order implementing the appellate court's decision, if required.

[14] Reid does not contend otherwise. The parties have looked to 10 *Del. C.* § 8106, a three-year statute of limitations of general applicability.

Delaware first enacted a savings statute in 1829,[15] and by the time Delaware's laws were codified in the Delaware Code of 1852, the statute had assumed a form substantially similar to the modern statute.[16] Given the Savings Statute's early origin and its relatively constant form, it unsurprisingly employs holdover language making reference to antiquated terms of practice and procedure, a feature that makes its application to modern procedure something of a challenge. Set out in relevant portion, the Savings Statute provides as follows:

> (a) If in any action duly commenced within the time limited therefor in this chapter, [1] the writ fails of a sufficient service or [2] return by any unavoidable accident, or [3] by any default or neglect of the officer to whom it is committed; or [4] if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or [5] if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or [6] if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action,

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[15] *See* 7 Del. Laws 266 (1829). As enacted, the original savings statute provided, in pertinent portion,

> That if in any action, judgment shall be rendered for the plaintiff, and the said judgment be afterward reversed, or verdict be given for the plaintiff, and judgment be arrested, or judgment be given against the plaintiff on a plea in abatement, or the plaintiff or defendant die, after writ sued and before the defendants [sic] appearance, a new action may be brought upon the same cause of action at any time within a year after said reversal, arrest, abatement or death. This proviso however shall not avail, if the first action, at the time of bringing it, were barred by this act . . . .

Id.

[16] *See Del. C. 1852* § 2752. The Codes of 1915 and 1935 contain identical provisions. *See Del. C. 1935* § 5139; *Del. C. 1915* § 4681. By the time Delaware's laws were codified in 1953, the statute was identical to the modern Savings Statute. *Compare* 10 *Del. C.* § 8118(a), *with* 10 *Del. C. 1953* § 8117(a).

> at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[17]

The Savings Statute reflects a preference for deciding cases on their merits.[18] It is remedial in nature and therefore liberally construed.[19] Although a court may not graft additions or limitations onto the Savings Statute "under the guise of construction,"[20] the Delaware Supreme Court has taught that the Savings Statute is to be construed by giving due consideration to notions of equity.[21] A plaintiff whose action comes within the terms of the Savings Statute has an absolute right to bring suit; the court's leave is not required.[22]

1. Preliminary Issues

a. *The Savings Statute's Applicability to Original Actions Commenced Outside of Delaware*

While there is some contention among the parties over whether or not the Savings Statute may preserve actions initially commenced outside of Delaware, the Court is satisfied that the Savings Statute applies with equal force to actions timely filed within this State as well as those timely filed in other fora. In *Cloud* v. *Amquip Corporation*, the United States District Court for the District of Delaware

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[17] 10 *Del. C.* § 8118(a).
[18] *See Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 427 (Del. Super. 1971).
[19] *See, e.g.*, *Gosnell v. Whetsel*, 198 A.2d 924, 927 (Del. 1964) ("Statutes such as 10 Del. C. Sec. 8117(a) have a remedial purpose and should be liberally construed.").
[20] *Vari v. Food Fair Stores, New Castle, Inc.*, 205 A.2d 529, 531 (Del. 1964).
[21] *See Giles v. Rodolico*, 140 A.2d 263, 267 (Del. 1958); *see also Towles v. Mastin*, 2007 WL 3360034, at *2 (Del. Super. Oct. 18, 2007); *infra* Part IV.A.1.b and note 36.
[22] *Giles*, 170 A.2d at 266.

interpreted the Savings Statute to apply to an action initially filed in a foreign court.[23] The *Cloud* Court relied in part upon *Leavy v. Saunders*,[24] in which the Delaware Superior Court held that the Savings Statute applied to an action commenced outside the State. In *Leavy*, the Superior Court applied the Savings Statute to an action originally commenced in Pennsylvania but abandoned there for want of personal jurisdiction.[25] In its *ratio decidendi*, the *Leavy* Court provided three bases for its holding, explaining that the Savings Statute is remedial in nature and should be construed liberally; that the language of the Savings Statute does not place any geographical limitation on the original action's commencement; and that a purpose of statutes of limitation, to protect potential defendants from stagnant claims, is not served by imposing such a restriction.[26] This Court accepts that line of reasoning.[27]

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[23] 2003 WL 21037653 (D. Del. Apr. 28, 2003). *See also Criswell v. McFadden*, 2006 WL 435717, at *1-3 (D. Del. Feb. 23, 2006).
[24] 319 A.2d 44 (Del. Super. 1974).
[25] *Leavy*, 319 A.2d at 46-48. For a more extended discussion of *Leavy*, see *infra* note 45.
[26] *Id.*
[27] *Accord United Phosphorous, Ltd. v. Micro-Flo, LLC*, 797 A.2d 1208, 1215-16 (Del. Super. 2001), *rev'd on other grounds*, 808 A.2d 761 (Del. 2002); *Siemer ex rel. Siemer v. Bahri Aviation Inc.*, 1984 WL 484511, at *3 (Del. Super. Feb. 7, 1984). *See also Frombach v. Gilbert Assocs., Inc.*, 236 A.2d 363, 365 (Del. 1967) (assuming, without deciding, that "commencement of a suit in the Federal District Court for Delaware is equivalent to one brought in our Superior Court, within the meaning of our Savings Statute . . ."); *Howmet Corp.*, 285 A.2d at 425-26 (holding that an original action defeated for lack of subject matter jurisdiction in the United States District Court for the District of Delaware came within the Savings Statute's terms). *Contra Sorensen v. Overland Corp.*, 142 F. Supp. 354, 362-63 (D. Del. 1956) (holding the Savings Statute did not save an action previously filed in a foreign court), *aff'd*, 242 F.2d 70 (3d Cir. 1957); *Salsburg v. Pioneer Gen-E-Motor Corp.*, 1962 WL 69576, at *1-2 (Del. Ch. June 13, 1962) (same).

b. *The Savings Statute's Applicability to Original Actions Failing for Want of Personal Jurisdiction Following a Substantive Jurisdictional Inquiry*

The Entity Defendants question whether an original action's "abatement or other determination" in a defendant's favor for lack of personal jurisdiction following a substantive jurisdictional analysis—*i.e.*, an adjudication of whether a court's exercise of personal jurisdiction would be proper based upon a defendant's contacts with the forum—constitutes defeat for a "matter of form." They argue that the majority of cases in which Delaware courts have applied the Savings Statute following an original action's dismissal for lack of personal jurisdiction appear to have involved procedural defects or mistake of fact instead of a defendant's insufficient connection with the forum. Reid replies that those sorts of errors are not the only types that give rise to a dismissal within the protections of the Savings Statute.

The Savings Statute clearly applies to original actions failing for want of personal jurisdiction due to defects in service of process.[28] In *Giles v. Rodolico*,

[28] *See Purnell v. Dodman*, 311 A.2d 877, 879-80 (Del. Super. 1973) (applying the Savings Statute where the original action failed for want of personal jurisdiction due to a defect in service); *Giles*, 140 A.2d at 267-68 (same). That a defect in service might cause a court to decline to exercise personal jurisdiction over a defendant is unremarkable: it is a fundamental precept that a defendant must either be served with process or voluntarily appear in an action before a court may exercise *in personam* jurisdiction over him. *E.g.*, *Giles*, 140 A.2d at 266 ("[J]ursidiction over persons can be acquired by the courts of this state solely through the service of compulsive process."); *Castelline v. Goldfine Truck Rental Serv.*, 112 A.2d 840, at 842 (Del. 1955) ("We think it a fundamental tenet of the law of Delaware, as it was of the common law,

the Delaware Supreme Court applied the Savings Statute where the original action had failed because a defect in service had precluded the exercise of personal jurisdiction.[29] In reaching its decision, the *Giles* Court emphasized examining the equities present in a given case. The Court began by quoting from *Bishop v. Wild's Administrator*,[30] an 1832 Superior Court case that referred to the English antecedent after which Delaware's 1829 savings statute had been patterned:

> "It may not be amiss to remark, that this section has in England received not a rigid or merely literal construction, but a liberal one; and that cases not within the *words* of the section . . . have by an equitable construction of that section been held within it. The inclination of the courts in England has not been to circumscribe the operation of this section, but rather to enlarge its limits and to embrace within it those cases which *equitably* ought to be covered by it."[31]

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that *in personam* jurisdiction can be acquired by a court solely by the proper service of process. . . .").

The majority of states confronted with the issue have held that their savings statutes operate to save actions dismissed for lack of subject matter jurisdiction and those dismissed for lack of personal jurisdiction. *See generally* C.T. Drechsler, Annotation, *Statute Permitting New Action After Failure of Original Action Commenced Within Period of Limitation, as Applicable in Cases Where Original Action Failed for Lack of Jurisdiction*, 6 A.L.R.3d 1043, § 2, at 1046-47 (1966). A minority of states, however, have declined to hold that original actions failing for want of personal jurisdiction come within their savings statutes, reasoning that an action cannot be said to have been "commenced" before a tribunal without power to adjudicate the matter. *See generally id.* § 4(c), at 1053.

[29] *See Giles*, 140 A.2d at 267. The plaintiff in *Giles* did not timely file a praecipe for the issuance of an alias writ after the original summons was returned by the sheriff *non est inventus*, and through this oversight, his original action failed for lack of personal jurisdiction. *Id.* at 264. Apparently, during the period in which the praecipe should have been filed, the plaintiff's counsel was on his honeymoon; he filed it immediately upon his return. *Id.* at 265.

[30] 1 Del. (1 Harr.) 87, 1832 WL 137 (Del. Super. 1832).

[31] *Giles*, 140 A.2d at 267 (quoting *Bishop*, 1 Del. (1 Harr.) 87, 1832 WL 137, at *7) (omission in original).

The *Giles* Court went on to declare that the quoted language established a policy of construction that applied to Delaware's Savings Statute.[32] The court reasoned that justice was best served by allowing the plaintiff, who by no fault of his own found his action time-barred, to try the action on the merits, emphasizing that the defendant had not been harmed because he had had notice of the prior suit.[33] In the last line of the decision, the court concluded, "[t]he circumstance are such as to make this case 'one which *equitably* ought to be covered' . . . ."[34] The Superior Court has since described that analysis as "the Giles test of prejudice."[35] Although prejudice is not the only consideration entertained by courts interpreting the Savings Statute, it is often an analytical polestar.[36]

Delaware courts considering original actions that failed for lack of subject matter jurisdiction have similarly underscored an equitable construction favoring

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[32] *Giles*, 140 A.2d at 267. "The goal of statutory construction is to determine and give effect to legislative intent." *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999). Typically, there is no need to resort to judicial interpretation where a statute is unambiguous. *See id.* Addressing the Savings Statute, however, courts of this State have repeatedly underscored liberal construction and equitable considerations instead of parsing its text. *See supra* note 21 and accompanying text; *infra* note 36.

[33] *See Giles*, 140 A.2d at 267-68.

[34] *Id.* at 268.

[35] *Purnell*, 311 A.2d at 880.

[36] *See*, *e.g.*, *Gosnell*, 198 A.2d at 927 (discussing a defendant's notice of a prior suit as an equitable consideration militating in favor of allowing the plaintiff to bring a second suit); *Giles*, 140 A.2d at 267-68 (discussing that a defendant suffered no harm where it had notice that the plaintiff intended to bring suit); *Defrancesco v. Estate of Davis*, 2002 WL 88979, at *2 (Del. Super. Jan. 11, 2002) ("Delaware Courts have held that weight should be given in favor of allowing the litigation to continue where the defendant has timely notice of the plaintiff's intent to litigate the matter."); *Empire Fin. Servs., Inc. v. Bank of New York*, 2001 WL 755936, at *1 (Del. Super. Jan. 12, 2001) (discussing same); *Howmet*, 285 A.2d at 426 (same).

decision on the merits, especially where the defendant has not suffered prejudice. In *Frombach v. Gilbert Associates*, the Delaware Supreme Court assumed, without deciding, that a United States District Court's dismissal for lack of subject matter jurisdiction came within the terms of the Savings Statute.[37] The issue was squarely before the Superior Court in *Howmet Corporation v. City of Wilmington*.[38] After discussing the Supreme Court's assumption in *Frombach*, the *Howmet* Court went on to stress the equitable construction typically given savings statutes, quoting a New York opinion written by then-Judge Benjamin Cardozo considering whether an action that failed for lack of subject matter jurisdiction came within New York's savings statute:

> "The [savings] statute is designed to insure to the diligent suitor the right to hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts . . . . A suitor who invokes in good faith the aid of the court of justice, and who initiates a proceeding by the service of process, must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum."[39]

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[37] *Frombach*, 236 A.2d at 365 ("We will assume, without deciding . . . . that the reason for dismissal of the Federal Court action [lack of admiralty jurisdiction] is within the scope of [the Savings Statute] . . . .").

[38] *Howmet*, 285 A.2d 423.

[39] *Id.* at 425-26 (quoting *Gaines v. City of New York*, 109 N.E. 594, 596 (N.Y. 1915)). The Court also quoted *Wilt v. Smack*, 147 F. Supp. 700, 703 (E.D. Pa. 1957), which observed that "grounds for dismissal which do not touch the merits of a controversy are within the spirit, if not the letter" of the Savings Statute. *Id.* at 427.

Adopting the construction advanced by Cardozo and addressing the question of "whether an action dismissed for lack of jurisdiction is 'avoided or defeated . . . for any matter of form[,]'"[40] the Court reasoned that the statute was remedial in purpose and was to be liberally construed to allow cases to be decided on the merits and held that the original action was dismissed for a "matter of form" within the meaning of the Savings Statute.[41] The court observed that jurisdictional issues are commonly complex, sometimes making the decision of where to file an action difficult:

> To determine the jurisdictional question, it is sometimes necessary to attempt suit in the most likely forum. If the court finds that the plaintiff is mistaken, he should not be penalized as to the merits of his cause simply because he sought the aid of the tribunal he considered had the power to afford him justice.[42]

Additionally, the Court noted that the defendant had long known of the original action and that the plaintiff had not intentionally filed suit in an incorrect forum.[43]

The same reasoning applies in this case. Under *Giles*, an original action failing for want of personal jurisdiction due to an imperfection in service comes within the Savings Statute, especially where, as here, the defendants have had notice of the plaintiff's intent to vindicate his rights through litigation. The Entity Defendants have supplied no persuasive reason why that holding should be limited

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[40] *Howmet*, 285 A.2d at 425-26 (first alteration in original).
[41] *Id.* at 427.
[42] *Id.* (quotation omitted).
[43] *Id.* at 426.

to situations in which personal jurisdiction is lacking because of a procedural defect. In *Giles*, the Supreme Court highlighted that the statute was to be liberally construed; that its words were not to be read strictly or narrowly; and that it reached those cases that it "equitably ought" to reach, strongly implying that those cases were ones in which the plaintiff was not at fault and where the defendant had not been prejudiced. These same factors were essentially repeated in *Howmet* in that Court's treatment of subject matter jurisdiction, and they are present here.[44] Conscious of the Savings Statute's liberal and equitable construction in favor of deciding controversies on the merits; recognizing the uncertainty that often attends a plaintiff's prospective jurisdictional assessment and concluding that Reid cannot be faulted for having brought suit in Texas—after all, the Texas courts were divided on the question, with the Harris County District Court initially ruling in his favor as to personal jurisdiction; finding that the Entity Defendants had notice that Reid intended to press his claims; and reluctant to adopt a rule undermining judicial economy by encouraging plaintiffs to file "placeholder" suits, the Court is satisfied that further consideration of the Savings Statute is not precluded simply

[44] If charged with determining whether lack of subject matter jurisdiction constituted defeat "for any manner of form" and writing on a *tabla rasa*, the Court's analysis of that question (and the instant issue) may have differed. Well-worn precedent in this jurisdiction, however, recommends an interpretation of the Savings Statute that is, to a degree, divorced from its language. While "form" may seem to connote a procedural fine point, such as perfect compliance with service requirements, Delaware courts have long held that an action's failure for lack of subject matter jurisdiction constitutes failure for a matter of "form." The Court declines to disturb this precedent and finds the reasoning in those cases salient to the issue at hand.

because the Texas Action was dismissed for lack of personal jurisdiction following a substantive juridictional inquiry.[45]

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[45] *Cf. Leavy*, 319 A.2d at 45. In *Leavy*, the original action had failed for want of personal jurisdiction due to the plaintiff's mistake in filing suit in the wrong forum. *Id.* Apparently, the plaintiff had sued in Pennsylvania, incorrectly believing that the traffic accident that was the subject matter of the suit had occurred in that state. *Id.* The Superior Court did not belabor the question of whether the Savings Statute may apply to save original actions failing for want of personal jurisdiction, *see id.* at 48 ("The Delaware Supreme Court held in [*Giles*], supra, that failure to obtain personal jurisdiction over the defendant may be a proper ground to invoke § 8117 in a proper case. In [*Giles*], the Court looked to see whether harm or prejudice to defendant or his insurance carrier resulted from the consecutive filings."), and applied the Savings Statute, *id.* at 47-48. Although not discussed in *Leavy*, filing suit in the wrong forum based on an erroneous belief that the injury occurred there clearly is an incidence of a failure of personal jurisdiction due to an insufficient nexus with the forum. The United States District Court for the District of Delaware applied the Savings Statute in *Criswell*, 2006 WL 435717, at *1-3, a case with a similar procedural history.

Because the Court declines to analyze the Texas Action under the fourth prong, *see infra* Part IV.A.2, it need not discuss whether an action's failure at the trial court level for lack of personal jurisdiction would constitute "abatement" as opposed to "avoid[ance] or defeat[] . . . for any manner of form," a potentially difficult question. The Delaware Supreme Court has declared that an action's "abatement" is a category distinct from an action's being "otherwise avoided or defeated . . . for any matter of form." *See Gosnell*, 198 A.2d at 246 ("A reading of the statute clearly indicates that abatement, in and of itself, is a separate and distinct ground for invoking the provisions of the statute. The language 'for any matter of form' qualifies the phrase 'or the action otherwise avoided or defeated' and does not qualify or limit the language referring to the abatement of the action."). Typically, Delaware courts have used "abatement" in cases involving insufficiency of process, *see, id.* at 245 ("Under present rules of pleading, however, a defendant, objecting to insufficient service of process, may move to quash the writ or, alternatively, to dismiss the complaint. Such an objection, presented in the form of a motion under Rule 12, is in the nature of a plea of abatement." (citation omitted)); *Kort v. Kosmerl*, 2004 WL 772078, at *2 (Del. Super. Apr. 2, 2004) (discussing failure for insufficient service as constituting "abatement"); *Empire Fin. Servs.*, 2001 WL 755936, at *2 (same), including those cases in which insufficient service leads to a personal jurisdiction challenge, *see Giles*, 140 A.2d at 267 (deeming an action "abated" where there was a failure to obtain jurisdiction due to an imperfection in service); *Purnell*, 311 A.2d at 880 (same), and avoidance or defeat for "any matter of form" in cases involving lack of subject matter jurisdiction, *see United Phosphorus*, 797 A.2d at 1215 (Del. Super. 2001) (discussing that an action dismissed for lack of jurisdiction constitutes defeat for a "matter of form"); *Howmet Corp.*, 285 A.2d 427 (holding that the original action had not abated because it was not "effectively destroyed" due to an imperfection in the writ or a defect in the service or return of process).

Nonetheless, one could assert under common law pleading and procedure, the procedural regime to which the Savings Statute's terms make reference, that "abatement" could occur for both lack of jurisdiction and insufficient process, depending on the form of a defendant's

c. *The Savings Statute's Operation During Discretionary Appeals*

The parties also dispute whether the Savings Statute's operation should be suspended during the pendency of appeals taken by a plaintiff that are dependent upon a higher court's discretion.[46] The Entity Defendants argue that the Delaware legislature could not have intended for plaintiffs to be able to extend unilaterally the period in which an action could be brought by filing discretionary appeals and motions for reconsideration. Reid counters that requiring a plaintiff to file a new

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challenge. A defendant could object to insufficiency of process either by moving the court to quash the writ or by entering a plea in abatement. VICTOR B. WOOLLEY, 1 PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 320, at 226 (Wm. W. Gaunt & Sons photo. reprint 1985) (1906). If the irregularity appeared on the face of the "record," a defendant would properly move to quash the writ; alternatively, if the irregularity did not appear on the face of the record but *dehors* (outside of it), a defendant would properly enter a plea in abatement. *Id.* § 302, at 226. Similarly, a defendant could challenge lack of personal jurisdiction by entering either a "plea to jurisdiction" or a "plea in abatement." *Id.* § 466, at 355-56. If the court's lack of jurisdiction was not apparent "on the face of the plaintiff's declaration," the proper plea was "a plea in abatement, in the form of a plea to the jurisdiction." *Id.* § 466, at 366. Thus, so the argument would go, the savings statute was likely drafted to refer to both an action's "abatement" and an action's being "otherwise avoided or defeated . . . for any matter of form" in order that whether or not a plea or motion was based on the face of the record or based at least in part on facts only ascertainable beyond it, the plea or motion, if otherwise within the Savings Statute, would meet its terms. In other words, the savings statute's drafters may have referred to an action's "abatement" and an action's being "otherwise avoided or defeated . . . for any matter of form" not because "abatement" would refer to what we would now term "dismissal" for one set of grounds while "other determination" would refer to dismissal for all other grounds, but instead to include both motions and pleas made on the face of the record and those relying on facts outside of it.

[46] References to "tolling" or "suspending" the Savings Statute's operation may be somewhat inapt. Instead, the Court is more accurately called upon to decide when, in a jurisdiction providing for discretionary review, the Savings Statute's one-year grace period begins to run. This question is answered by asking when "abatement or other determination" or "reversal" occurs under the statute. For ease of reference and for consistency with the language employed by the parties, however, the terms "toll" and "suspend" are used below.

action in a new forum when the original case has yet to be fully litigated would be wasteful and inefficient, forcing plaintiffs to file protective actions.

Although the Delaware Supreme Court has held that the running of the Savings Statute's one-year grace period is tolled during appeals taken as of right, whether it is tolled during discretionary appeals is a novel question.[47] Because appeals from adverse final determinations in civil actions from the Delaware Court of Chancery and the Delaware Superior Court are generally taken as of right to the Delaware Supreme Court, it is not surprising that this is an issue of first impression in Delaware.[48] In interpreting their own savings statutes, other states are divided on this point.[49]

Delaware's Savings Statute is better construed by suspending the running of the grace period during the pendency of discretionary appeals for a variety of reasons. The Savings Statute has a remedial purpose and is to be liberally construed; allowing a plaintiff to bring her case to resolution in one forum before requiring her to file in another forum will discourage placeholder suits, thereby furthering judicial economy; and in most, if not all cases, a defendant will already

[47] *See, e.g.*, *Gosnell*, 198 A.2d 924 (leaving this question unanswered).
[48] *See* Del. Const. of 1897, art. IV, § 11; 10 *Del. C.* §§ 145, 148; Del. Supr. Ct. R. 6.
[49] *Compare, e.g.*, *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 840 N.E.2d 565 (N.Y. 2005) (holding that New York's savings statute is tolled only during appeals of right), *with, e.g.*, *Lubin v. Crittenden Mem'l Hosp.*, 705 S.W.2d 872 (Ark. 1986) (holding that Arkansas's savings statute is tolled during discretionary appeals taken within the federal system).

be on notice that the plaintiff intends to press her claims. For those reasons, the Court will "toll" the Savings Statute during the pendency of Reid's discretionary appeals taken within the Texas judicial system.[50]

2. The Savings Statute's Prongs

With these preliminary issues decided, the parties next debate the proper prong under which the original action's disposition should be considered. Reid argues that this action is saved by the Savings Statute's fourth prong. The Entity Defendants, in turn, contend that the fourth prong is inapplicable, arguing that it applies only in situations where the plaintiff is unsuccessful at the trial court level and not where a trial court's decision in the plaintiff's favor is reversed on appeal, as here. The Entity Defendants maintain that if any of the Savings Statute's prongs are applicable, only the sixth could be read fairly to apply to the Texas Action. Reid replies that the sixth prong is inapposite because a "judgment" for the Plaintiff was never entered. Although the Court concludes that the disposition of the Texas Action is properly evaluated under the Savings Statute's sixth prong, some elaboration on both prongs is necessary to explain that conclusion. Statutes are to be read as a whole,[51] and, because any interpretation of the sixth prong must

[50] Reid has not sought "tolling" during the pendency of his petition for certiorari to the United States Supreme Court.
[51] *E.g.*, *Williams v. State*, 818 A.2d 906, 912 (Del. 2002).

necessarily be informed by considering any other potentially applicable prong, the Court first turns to the fourth prong.

a. *The Fourth Prong*

Reid's action would have been timely filed on April 9, 2007, only under one scenario: if the one-year savings period were calculated from the date of the Harris County District Court Judge's order dismissing the action on April 11, 2006, over a month after the Texas Supreme Court's final decision in the case. Invoking the fourth prong, Reid argues that his action was still pending in the Harris County District Court until April 11, 2006, and therefore, "abatement or other determination" could not have occurred until that point. The Entity Defendants argue that even if the fourth prong were applicable, Reid's failure in Texas was certain with the Texas Supreme Court's decision denying Reid rehearing on March 10, 2006, which rendered the Texas Court of Appeals' decision reversing the trial court the operative law in the case.

Examination of the fourth prong begins with its text: "if the writ is abated, or the action otherwise avoided or defeated . . . for any manner of form[,] . . . a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action . . . ." Around the time of the Saving Statute's adoption, "abatement" generally meant to

"throw down, to beat down, destroy, quash."[52] More specifically, in pleading at law, abatement meant "[t]he overthrow of an action . . . which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way,"[53] and in chancery practice, the term meant "a suspension of all proceedings in a suit, form the want of proper parties capable of proceeding therein."[54] More recently, the Delaware Supreme Court has stated that to abate means to "effectively destroy[]."[55] The Savings Statute's use of the phrase "abatement or *other* determination" suggests that "abatement" is itself a form of "determination." "Determination," in the nineteenth-century and now, signifies "[t]o come to an end. To bring to an end."[56] Consequently, for purposes of interpreting the Savings Statute, "abatement or other determination" occurs when an action is "ended."

Ascertaining when the Texas Action was "ended" is not free from doubt. On the one hand, Reid had effectively no chance of prevailing in Texas after the Texas Supreme Court's final decision denying rehearing. On the other, his action did remain pending, if only in a technical sense, in the Harris County District Court until its formal dismissal on April 11, 2006. Two separate strands of reasoning

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[52] JOHN BOUVIER, 1 BOUVIER'S LAW DICTIONARY 4 (Francis Rawle ed., Boston Book Company 1897) (1839).
[53] *Id.* at 5.
[54] *Id.* at 4.
[55] *Gosnell*, 198 A.2d at 927.
[56] BOUVIER, *supra* note 52, at 564; *accord* BLACK'S LAW DICTIONARY 450 (6th ed. 1990) ("[A] determination" is "[t]he decision of a court . . . . It implies an ending or finality of a controversy or suit."); WEBSTER'S THIRD INT'L DICTIONARY 616 (3d ed. 1993) (providing similarly).

would commend the latter as the date the Texas Action was "abated or otherwise determined" if the fourth prong were applicable.

First, drawing from the text, only at the point of dismissal is the course of litigation categorically ended in a forum.[57] Even though the dismissal of an action may be a *fait accompli* as a result of an appellate court's decision reversing a trial court, the final judicial act of dismissal still remains.[58]

Second, and more resonantly, as has been oft repeated, the Savings Statute is to be construed liberally with a view towards the equities in a particular case. Given this interpretive gloss, Delaware courts have repeatedly looked to whether or not a defendant had timely notice that the plaintiff intended to press her claim in determining the Saving Statute's applicability.[59] Cognizant of these guideposts and recognizing that the Entity Defendants had notice of the Texas Action and that the Savings Statute would be construed more favorably to the Plaintiff by beginning the savings period on the date of dismissal, the Court would be reluctant

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[57] If a trial court initially dismisses a complaint and the plaintiff appeals unsuccessfully, the action abates on the date of affirmance. *Gosnell*, 198 A.2d at 927 (holding that the one-year savings period began when the Delaware Supreme Court affirmed a decision of the Delaware Superior Court dismissing the plaintiff's action for insufficient service of process as opposed to the date the Superior Court entered the order). For further discussion of the rule announced in *Gosnell*, see *infra* Part IV.A.2.b and note 58. For discussion of the appropriate date of affirmance to be used for decisions from jurisdictions which provide for discretionary appeals from intermediate appellate courts, see *supra* Part IV.A.1.c.

[58] "Judicial" is used to convey that the action of a judge was still required to end the controversy. This is in contrast to the situation in *Gosnell*, where an order of affirmance would require no action on the part of the trial judge. *See supra* note 57 (discussing *Gosnell*); *see also infra* Part IV.A.2.b.

[59] *See, e.g.*, *supra* note 36 and accompanying text.

to hold that the Texas Action abated or was otherwise determined before April 11, 2006, the date the District Court Judge entered the order of dismissal.[60] Mindful of this observation, the Court, for the reasons that follow, declines to apply the fourth prong.

b. *The Sixth Prong*

The sixth prong provides, in relevant part:

> If in any action duly commenced within the time limited therefor in this chapter, . . . if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year . . . after the reversal of the judgment therein.[61]

Deferring for a moment the question of whether there was a "judgment" for Reid in the Harris County District Court, the Court begins by observing that, although interpreting much of the Savings Statute is made difficult because of its language referencing archaic terms of procedure, the language of the sixth prong's

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[60] This approach would also free Delaware judges from becoming students of complicated, technical questions of other jurisdictions' procedure. For example, in this case, the Entity Defendants have argued that under Texas procedure, when a Texas Court of Appeals reverses a trial court and there are no further proceedings for the trial court to conduct, it must render the judgment the trial court should have rendered, and that the date of a judgment's rendition (rather than its entering) is the effective date of determination under Texas law. Such technical procedural analysis would be ill-suited to a statute favoring determination on the merits.

[61] Traditionally, the judgments of inferior law courts were reviewed by superior courts on a "writ of error," while causes in equity, ecclesiastical, and admiralty jurisdiction were reviewed on "appeal." 4 C.J.S. *Appeal and Error* § 8 (1993). In modern practice, review by a higher tribunal is almost wholly governed by statute or rule; some states retain the distinction between appeals and writs of error, while others do not. *Id.* For example, Delaware Supreme Court Rule 42 does not acknowledge the historic distinction and refers to the Supreme Court's jurisdiction to "hear and determine appeals in civil cases," which would include cases from both this Court and the Superior Court. *See* Supr. Ct. R. 42(a).

precondition, that "a judgment for the plaintiff [has been] *reversed*," readily suggests that the sixth prong provides the apposite avenue for analysis where the plaintiff has been successful at the trial court level. No other prong explicitly describes a situation in which a plaintiff's initial success at the trial court level is vitiated by the ruling of a superior court. Thus, the Savings Statute's text supports the existence of a dichotomy between actions where the plaintiff was unsuccessful at the trial court level and actions where the plaintiff prevailed at the trial court level but was ultimately unsuccessful on appeal.

Additionally, considering actions under the fourth prong where the plaintiff was initially successful at the trial court level would approach reading the sixth prong into a functional nullity, a result not favored under Delaware law.[62] As discussed above, there is a strong argument that if the fourth prong were applicable in this context, the "abatement or other determination of the original action" would have occurred when the original action was actually dismissed.[63] Under the sixth prong, the one-year savings period clearly commences from the date of reversal (or from a subsequent affirmance or comparable disposition of that reversal). Therefore, if the first five prongs as well as the sixth were read to encompass cases

[62] *See, e.g.*, *Oceanport Inds., Inc. v. Wilmington Stevedores, Inc.* 636 A.2d 892, 900 (Del. 1994) ("[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible." (internal citations omitted)).
[63] *See supra* Part IV.A.2.a (discussing this issue).

where the plaintiff was originally successful at the trial level but ultimately unsuccessful on appeal, prong six would be rarely (if ever) invoked by a plaintiff because, given that the fourth prong's "abatement or other determination" occurs on the date of actual dismissal and the sixth prong is predicated on the date of reversal, the first five prongs would almost always result in a longer period in which the subsequent action could be brought than would be prescribed by the sixth prong.[64] Similarly, even if the proper date of determination under the fourth prong were the date of the appellate court's decision, the sixth prong would still only dictate a savings period equal to that resulting from application of the fourth prong. Again, the sixth prong would seem to serve no apparent, independent purpose.

Moreover, employing the fourth prong where a plaintiff initially prevailed at the trial court level would also lead to the anomalous situation in which the timing or nature of a defendant's appeal would result in different starting points for measuring the period in which the plaintiff's claim could be timely brought in the next venue. Under such a reading, were a defendant to take a successful interlocutory appeal, the savings period would likely commence under prong four

[64] Situations may exist under this interpretation where the sixth prong alone would be implicated. For example, where an appellate court vacates a trial court's decision and remands for additional jurisdictional factfinding and, instead of engaging in further efforts at the trial court level, the plaintiff chooses to discontinue the litigation in the forum. Such situations, however, are in the Court's view, too rare to have warranted the sixth prong's inclusion in the Savings Statute.

(affording the longer period) when the trial court implemented the appellate court's order to dismiss the case. Were a defendant to challenge successfully the trial court's decision after final judgment instead, the savings period would begin on the date of the appellate court's reversal, not on the date of trial court's implementing order. Interpreting the Savings Statute so that the timing of a defendant's appellate challenge to a plaintiff-favorable ruling determines when the savings period begins makes little sense. The contrary view, and the construction adopted by the Court, that only the sixth prong is applicable because the plaintiff was successful in the trial court, fixes the savings period's commencement in both instances at the date of the appropriate appellate court's decision. This interpretation is harmonious with the Supreme Court's pronouncement in *Gosnell*, which began the savings period on the date of affirmance, the date of the appropriate appellate court's decision.[65]

Having decided that the Texas Action is properly considered under the sixth prong, if at all, the Court turns now to that prong's other precondition: whether there was a "judgment" for Reid in the Texas Action. Again, the Court is tasked with applying a statute written in the language of mid-nineteenth century procedure

[65] The Court rejects the Entity Defendants' argument that because "abatement or other determination" precedes "reversal" in the last sentence of the Savings Statute, "abatement or other determination" must occur chronologically before any "reversal," *i.e.*, any appellate court action. In *Gosnell*, the Supreme Court instructed that "abatement" can occur as a result of appellate court action. *See supra* note 57.

to modern practice. In that period, a "judgment" was defined as "the conclusion of law upon facts found or admitted by the parties, or upon default in the course of the suit."[66] Judgments could be categorized into two primary varieties: interlocutory and final.[67] "Interlocutory judgments" were those given during the progression of a litigation that did not finally resolve the suit,[68] while "final judgments" either determined the parties' rights regarding a particular action (a specific suit filed in a specific forum) or resolved issues of law and fact (determining the parties' rights on the merits).[69]

Delaware's highest court has had the constitutional power to receive interlocutory appeals from the Court of Chancery since 1792.[70] More recently, in 1951, the Delaware Supreme Court held that the denial in Chancery of a motion to dismiss for lack of jurisdiction was an interlocutory decree that, determining a substantial issue and establishing legal rights, could be appealed.[71] Under older rules of practice and procedure in Delaware, however, only final judgments could be appealed in actions at law.[72] But by the middle of the last century, it was clear

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[66] WOOLLEY, *supra* note 45 § 763, at 530. Although writing over 75 years after the 1829 savings statute's adoption, Victor Woolley's *Practice in Civil Actions* provides insight from a closer vantage than today and a perspective from before the advent of modern notice pleading.
[67] *Id.* § 763, at 530.
[68] *Id.* § 764, at 530.
[69] *Id.* § 769, at 536.
[70] *See Elec. Research Prods., Inc. v. Vitaphone Corp.*, 171 A. 738, 745 (Del. 1934) (citing Del. Const. of 1792, art. VII, § 1).
[71] *See Du Pont v. Du Pont*, 82 A.2d 376, 379 (Del. 1951).
[72] *See id;* WOOLLEY, *supra* note 45, § 856, at 601.

that interlocutory orders of Delaware's Superior Court were appealable as well if they determined a substantial legal issue and established a legal right.[73]

Under contemporary court rules, many jurisdictions allow parties to appeal before final judgment. Like many states, Delaware now explicitly provides for interlocutory appeals.[74] And while certainly not dispositive in interpreting a nineteenth-century statute, this Court's Rules now provide that a "'[j]udgment' . . . includes any order from which an appeal lies."[75]

At root, the issue presented is whether the Savings Statute's reference to "judgment" should encompass only final judgments or both interlocutory and final judgments. Because the term "judgment" is sometimes used colloquially to refer

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[73] *See American Ins. Co. v. Synvar Corp.*, 199 A.2d 755, 757 (Del. 1964) ("Admittedly, this is an appeal from an interlocutory order. The rule is well settled with respect to appeals from interlocutory orders in Chancery, and is equally applicable now to such appeals from the Superior Court that such an order is appealable only if it determines a substantial legal issue and establishes rights. However, no appeal from an interlocutory order will lie if such order is discretionary and preliminary, or does nothing more than preserve the status quo or forward the cause procedurally. If such an interlocutory order is not determinative of substantive rights, it is not appealable.").

[74] *See, e.g.*, Del. Supr. Ct. R. 42 (providing that certain interlocutory appeals may be lodged to the Delaware Supreme Court's discretion); *see also* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7) (denial of a special appearance may be appealed without invoking appellate court's discretionary jurisdiction).

[75] Ch. Ct. R. 54(a); *see also* Fed. R. Civ. 54(a). Delaware courts have spoken of appealing interlocutory judgments, *see In re Allen*, 748 A.2d 406, 2000 WL 275634, at *2 (Del. 2000) (TABLE), and have certified for interlocutory appeal denials of motions to dismiss for lack of personal jurisdiction, *see Wright v. Am. Home Prods. Corp.*, 2000 WL 973276 (Del. Super. May 16, 2000) (certifying interlocutory appeal of issues first impression under the Hague Service Convention (a question concerning compliance with technical service requirements) and Delaware's Long-Arm Statute (a question involving the defendants' contacts with the forum)), *appeal refused*, *Les Laboratories Sevier v. Wright*, 755 A.2d 389, 2000 WL 975089 (Del. 2000) (TABLE).

to a final judgment, a tenable assertion can be made that the sixth prong only reaches those cases where a final "judgment for the plaintiff is reversed on appeal or a writ of error . . . ." The Court, however, concludes that the statute is better interpreted by reading "judgment" more broadly.

First, although both interlocutory and final judgments were known in the 1800s, the Savings Statute employs the unqualified term "judgment."[76]

Second, if "judgment" was used as "legislative shorthand" to refer to those decisions of a court that were appealable, Reid's action, which is based in large part on breaches of fiduciary duty, sounds in equity, and appropriate interlocutory rulings by a court of equity have long been amenable to appeal.[77] Even if the

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[76] It would be remiss not to note, however, that "judgment," as used contemporaneously in the Delaware Constitution of 1831, was generally interpreted to mean only final judgments. The Constitution of 1831 provided that Delaware's highest court had jurisdiction to "issue writs of error to the Superior Court, and to receive appeals from the Court of Chancery, and to determine finally all matters in error in the judgments and proceedings of said Superior Court, and all matters of appeal in the interlocutory or final decrees and proceedings in chancery." Del. Const. of 1831, art. VI, § 7. Interpreting the phrase "judgments and proceedings of said Superior Court," Delaware courts uniformly held that it meant "*final* judgments, and proceedings of a *final* character." WOOLLEY, *supra* note 45, § 856, at 601 (citing four Delaware cases). Of course, in regard to suits before the Court of Chancery—suits in equity—the 1831 Constitution makes explicit provision for interlocutory appeals. And Delaware's current constitution, the Constitution of 1897, provides for interlocutory appeals of civil actions before the Superior Court as well. Del. Const. art. IV, § 11 ("To receive appeals from the Superior Court in civil causes and to determine finally all matters of appeal in the interlocutory or final judgments and other proceedings of said Superior Court in civil causes . . . ."). As discussed below, the Savings Statute's meaning should not be frozen to reflect the prevailing modes of practice and procedure in the nineteenth-century. *See infra* text accompanying notes 79-80.

[77] *Du Pont*, 82 A.2d at 377-78 ("[T]he right of appeal from Chancery in Delaware exists in the same manner and to the same extent to which the right of appeal to the House of Lords from the High Court of Chancery existed in Great Britain prior to the separation of the colonies. . . . Chancery appellate practice in Great Britain prior to the separation permitted the taking of appeals from orders or decrees at any intermediate stage of the proceedings."); *Elec. Research*

substance of his action advanced legal claims, Delaware's procedure, as with that of other jurisdictions, now allows interlocutory appeals in actions at law.[78] Given that civil procedure in this State has evolved in recognition of the utility of permitting interlocutory appeals in certain instances, so too should the Savings Statute evolve to encompass them. Confronted with a Texas statute specifically authorizing interlocutory review of a trial court's decision denying a special appearance,[79] this Court declines to hold that the order of the Harris County District Court rejecting the Entity Defendants' effort to prevail on personal jurisdiction grounds was not a "judgment" under the Savings Statute.[80]

Prods., 171 A. at 745 ("[I]n [the English Court of Equity], it is clear that where rights were determined by such decrees, appeals could usually be taken from interlocutory or intermediate decrees, as well as from final decrees.").

[78] This change recognizes that interlocutory appeals can serve the administration of justice by "advancing the termination of litigation and saving time below if a threshold question can be resolved." Del. Supr. Ct. R. 42 cmt.

[79] Namely, Texas Civil Practice and Remedies Code Section 51.014(a)(7).

[80] In this case, a fundamental tension exists between construing the fourth prong in a plaintiff-friendly manner and reading the sixth prong so as to give it independent meaning. In addition, there is an inseparable corollary question: what meaning to ascribe to "judgment"? Considering the liberal construction typically afforded the Savings Statute, a construction that the Savings Statute may, in appropriate cases, embrace all non-merits-based dispositions, *see supra* note 39, the Court is hesitant to hold all successful interlocutory appeals taken by defendants beyond the protective cloak of the Savings Statute. Because of the Court's sentiment that the Savings Statute should be interpreted to include interlocutory appeals, if "judgment" were to be read narrowly in the sixth prong, the fourth prong would necessarily need to be interpreted to accommodate interlocutory appeals from plaintiff-favorable rulings to avoid holding these cases beyond the statute. Doing so, however, would leave the sixth prong with no real purpose. Further, it would cause the Savings Statute to operate differently depending upon whether the appeal was from an interlocutory order or a final judgment, a result without policy justification. Thus, the Court resolves its quandary by recognizing that the sixth prong serves a purpose that is consistent with modern procedure.

Consequently, the disposition of the Texas Action comes within the purview of the sixth prong, which, when tolled for the pendency of discretionary appeals within the Texas judicial system, dictates that reversal occurred on March 10, 2006, more than one year before Reid filed this action on April 9, 2007, and thus, outside of the one-year grace period conferred by the Savings Statute. It follows that Reid's action is untimely when measured by the applicable statute of limitations.

B. *Laches*

A statute of limitations, of course, does not automatically bar a suit in equity: whether or not an equitable suit is time-barred is determined by the doctrine of laches.[81] Nevertheless, "[a]n analogous statute of limitations period applicable at law . . . is to be given great weight in determining whether a suit is to be time-barred in equity by laches and will be applied in the absence of unusual or mitigating circumstances."[82] This Court, in actions seeking money damages as the

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[81] *See, e.g.*, *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989). "Laches, an equitable doctrine, bars a plaintiff from delaying unreasonably in bringing a claim to the detriment of the defendant." *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 22, 2004). A defendant, seeking to invoke laches, must demonstrate (1) that the plaintiff knew of his claim, (2) that he unreasonably delayed in bringing suit upon that claim, and (3) that the delay caused injury or prejudice. *See, e.g.*, *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 3927242, at *20 (Del. Ch. Oct. 10, 2006). Laches is grounded "in the inequity of enforcing a dilatory claim where there has been an intervening change in the circumstances prejudicial to the party raising the defense." *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11-5[b][2], at 11-57 (citing *Skouras v. Admiralty Enter. Inc.*, 386 A.2d 674, 682 (Del. Ch. 1978)).

[82] *Atlantic Plastics Corp.*, 558 A.2d at 1064.

remedy for equitable claims, will typically borrow the statute of limitations.[83] Reid has brought this litigation seeking money damages, and unusual or mitigating circumstances are not present.[84] Accordingly, the Court looks to the applicable statute of limitations, reads it in conjunction with the Savings Statute, and holds that Reid's action is, also, time-barred as a matter of laches.[85]

V. CONCLUSION

For the foregoing reasons, Reid's action is time-barred, and, therefore, the Entity Defendants' motion to dismiss is granted. An implementing order will be entered.

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[83] *Id.*

[84] Reid proffers two mitigating circumstances. First, he argues that it was not clear how the Savings Statute would operate in this case, given the uncertain application of Delaware's Savings Statute to cases in which the plaintiff has sought discretionary review. Because the Court has "tolled" the Savings Statute's operation during discretionary appeals, this argument is of no moment. Second, Reid argues that he was at all times pursing his rights, litigating continuously in Texas. While true, the Court declines to overlook the legislative policies implemented by the appropriate statute of limitations and the Savings Statute. The legislature has provided definitive guidance as to how a court should assess the consequences of delay in filing in this forum after an unsuccessful effort to present the dispute for resolution elsewhere. Even if the Savings Statute were not available and did not inform the Court's decision, the Court, in a straightforward application of the laches doctrine, would likely have dismissed the action because of the lengthy delay between the challenged conduct and the filing of this action and the inevitability of some prejudice to the Entity Defendants' ability to put forward a defense resulting from the passage of time.

[85] Because a court may only look to the factual allegations contained in the complaint (or to the documents duly incorporated or referenced in the Complaint) in deciding a motion to dismiss under Rule 12(b)(6), affirmative defenses, such as the time-bar defenses raised in the Entity Defendants' motion, are not best suited for analysis on a motion to dismiss. *See, e.g., Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001); *Merrill Lynch Trust Co., FSB. v. Campbell*, 2007 WL 2069867, at * 3 (Del. Ch. July 11, 2007). Nonetheless, Reid has not argued that the time-bar defenses in this instance cannot be fairly resolved in this setting.

Because Reid's action is time-barred, the Court need not address whether it may properly exercise personal jurisdiction over the Entity Defendants or whether it should consider the affidavit of Dr. Aksamentov which addresses personal jurisdiction issues and is the object of the Entity Defendants' motion to strike.