IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK C. WHITTINGTON, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2291-VCP
	)	
DRAGON GROUP L.L.C., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: January 30, 2009
Decided: June 11, 2009

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PARSONS, Vice Chancellor.

This case stems from a long-running dispute between a brother and his siblings over ownership of a Delaware business entity. This family has come before the Court of Chancery on multiple occasions seeking resolution of controversies involving the assets held by the siblings and their deceased forebears. The present litigation arises from the parties' divergent readings of a court order entered over five years ago in an attempt to resolve one of the many intra-family squabbles. Specifically, the defendants contend that the plaintiff is not a member of the entity, while the plaintiff seeks a judicial order compelling the defendants to recognize his interest and distribute money and property to him accordingly. Because the parties deeply distrust one another, they have been unable to resolve their disagreements through negotiation. Instead, the matter has been tried and is now before the Court for decision.

Ultimately, the plaintiff may have the more plausible reading of the previous court order. That is largely irrelevant, however, because in the face of overwhelming evidence that the defendants did not recognize his membership interest and related contract rights, the plaintiff unreasonably delayed filing his Complaint for well over two years, and probably over three years, while the entity in question extinguished liabilities and the defendants undertook certain risks not shared by the plaintiff. Consequently, the plaintiff is precluded by laches from obtaining the relief he seeks in this action.

I. FACTUAL BACKGROUND

A. The Parties[1]

Plaintiff, Frank C. Whittington, II ("Frank"), brought this action to enforce his rights as an alleged member of Dragon Group, L.L.C. ("Dragon Group"), a Delaware limited liability company. Defendants include Frank's four siblings, all of whom are members of Dragon Group: Thomas D. Whittington, Jr. ("Tom"), Richard Whittington ("Richard"), L. Faith Whittington, and Dorothy W. Minotti ("Dorothy") (collectively, the "Sibling Defendants").[2] The remaining Defendants are Dragon Group and certain other members of the Whittington family, who are not of the same generation as Frank.[3] Defendants Tom and Richard are also managers of Dragon Group.

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[1] Being from the same family, many of the parties to this action share a common surname, *e.g.*, Whittington or Minotti. Therefore, to make this opinion less cumbersome and more lucid, I generally refer to the parties by their given names. No disrespect is intended.

[2] Frank and the Sibling Defendants are children of Dorothy B. Whittington, who is deceased.

[3] The other individual Defendants are Marna A. McDermott, Sarah I. Whittington, Ruth A. Whittington, Matthew D. Minotti, and Dorothy A. Minotti.

B. The History[4]

This is not the first time the offspring of the late Dorothy B. Whittington have come before the Court of Chancery seeking resolution of their internecine disagreements over the family's many business and real estate holdings. In 2001, Frank and the Sibling Defendants entered into an Agreement in Principle (the "AIP"), which constituted a global settlement of the case styled *Whittington v. The Farm Corp.*, C.A. No. 17380, and various other disputes. In the *Farm Corp.* case, Frank sought recognition of his proportionate ownership interest in various business entities owned and operated by the Sibling Defendants, including Whittington Ltd. ("Ltd."). On June 14, 2001, each of the parties to that litigation signed the AIP following three days of trial before Vice Chancellor Stephen P. Lamb.

The AIP is a single-page document containing eleven numbered paragraphs. It provides in relevant part:

> 3. Frank gets 10 shares of Ltd. Stock upon payment of $10,000 (without interest). Frank's proportionate interest in Ltd. will be carried forward into Dragon Group LLC with same rights as all other members.
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> * * *

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[4] This section includes the findings of this Court following trial in this matter, *Whittington v. Dragon Group, L.L.C.*, C.A. No. 2291. To provide a foundation for the issues before me, I also discuss the facts of a prior case involving Frank and the Sibling Defendants, *Whittington v. The Farm Corp.*, C.A. No. 17380, which integrally relates to this dispute. For a more detailed discussion of that earlier litigation, see *Whittington v. Dragon Group, L.L.C. (Whittington III)*, 2008 WL 4419075 (Del. Ch. Sept. 30, 2008).

5. In full repayment of a $190,000 loan from Dorothy B. Whittington, Frank pays Estate $90,000 and waives his interest in his Generation Skipping Trust in favor of his four siblings; Estate releases to Trust and Trust releases to Frank 55 Ltd. shares upon payment.

* * *

10. Frank, and other members, will receive periodic financial and operating information for Ltd., Frog Hollow and Dragon Group as outlined in items 22 and 23 of the March 21, 2001 letter of Todd C. Schiltz.[5]

11. All payments set forth herein above shall be made by June 30, 2001, and appropriate documentation acceptable to all parties to accomplish same including

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[5] Items 22 and 23 of Schiltz's March 21, 2001 letter provide:

> 22. Dragon Group and the [Sibling] Defendants will agree to give to Frank copies of: (i) any federal, state or local tax returns filed by Dragon Group within five (5) days of such returns being filed with the taxing authorities; (ii) an annual written cash flow statement, balance sheet and income statement for Dragon Group on or before February 28 of each year; and (iii) semi-annual written statements showing any monies paid to any member of Dragon Group (including Tom's law firm) by Dragon Group for any reason (loan repayment, expense reimbursement, fee, distribution, etc.).
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> 23. [Ltd.], Dragon Group and the [Sibling] Defendants will agree to give Frank semi-annual written reports on the status of the sale of the 392 acres from [Ltd.]/Dragon Group to Toll Brothers, Inc. The status reports will specify what stage of development Toll Brothers is in, what actions have taken place since the prior status report, and any formal or informal requests for modifications, if any, to the terms of the Toll Brothers contract by any party and any response thereto.

PX 3, Settlement Term Sheet, at 3.

> without limitation the Certificate of Formation and Operating Agreement for Dragon Group, L.L.C.[6]

Claiming Frank failed to perform under the AIP, the Sibling Defendants filed a motion with this court to enforce that agreement.[7] Chancellor Chandler heard the motion on October 21, 2001, and ruled the AIP should be enforced as a contract. Among other things, the Chancellor expressly held that the parties' inability to agree upon the form of certain documents contemplated in the AIP (*e.g.*, releases, a new note, and new governing documents for certain related entities) did not make the AIP unenforceable.[8]

Despite the Chancellor's ruling, the parties continued their pattern of delay, waiting nearly a year before purporting to comply fully with the express terms of the AIP. Unable to work together cooperatively or effectively, the parties never completed certain of the secondary documentation referred to in the Chancellor's ruling.[9] The parties could not agree, for example, on a proposed form of operating agreement for Dragon Group prepared by the Sibling Defendants to reflect Frank's membership in that entity.[10] On September 23, 2002, Tom distributed that document (the "Offering Memorandum") to all

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6 PX 3, AIP.

7 *See* PX 30, *Whittington v. The Farm Corp. (Whittington II)*, C.A. No. 17380, at 2 (Del. Ch. Mar. 4, 2003).

8 *See* PX 9, *Whittington v. The Farm Corp. (Whittington I)*, C.A. No. 17380, at 11-12 (Del. Ch. Oct. 11, 2001) (TRANSCRIPT).

9 *Whittington II*, at 3-4.

10 *See* AIP ¶ 11. The incomplete documentation also includes the form of a note Frank was to receive in exchange for his $125,000 loan to Frog Hollow, referred to in paragraph 4. *See id.* ¶ 4.

prospective members of Dragon Group. The Offering Memorandum provided that each member must pledge his shares of Ltd. stock as a prerequisite for membership in Dragon Group.[11] The Offering Memorandum also stated that "[a]ny shareholder [of Ltd.] not returning all documents fully executed on or before the close of business on October 15, 2002 will be deemed not to have accepted the offer and thus not be able to participate."[12] Frank submitted an executed copy of the Offering Memorandum by the deadline on October 15; in that copy, however, he changed his Dragon Group ownership interest from 17.77% to 24%. On October 15, 2002 at 4:10 p.m., Frank also paid the aggregate $100,000 referenced in paragraphs 3 and 5 of the AIP and the Sibling Defendants delivered to him the stock certificates for the 65 total shares of Ltd. stock.

By letter dated November 1, 2002, Tom, Dragon's sole managing member at the time, informed Frank's counsel that Frank's altered version of the operating agreement constituted a counteroffer that had been rejected.[13] In response, on December 9, 2002, Frank, acting pro se, filed a Motion for Order Compelling Defendants' Compliance with Court Order and Directing Performance by Substitute (the "2002 Motion"). That motion essentially asked the court to resolve the differences among the parties as to the form of the ancillary documentation for Dragon Group, and to permit relitigation of certain issues resolved by the AIP.

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11 DX 22, Offering Mem., at F453.

12 *Id.* at F454-55.

13 PX 24.

In a letter opinion dated March 4, 2003, Vice Chancellor Lamb denied Frank's 2002 Motion. With respect to Dragon Group's operating agreement, which also is at issue in this action, Vice Chancellor Lamb stated the "terms of the [Dragon Group] LLC operating agreement will be those that were established at its inception, adjusted to reflect Frank Whittington's percentage ownership therein."[14] Seizing upon the fact that the court had denied Frank's 2002 Motion, Defendants apparently claimed victory and proceeded as if nothing had changed. Frank, on the other hand, believed his position had been vindicated and mistakenly assumed he would be included as a member of Dragon Group with a 23.65% ownership stake. In fact, however, Defendants never took any action after the March 4, 2003 letter opinion to include Frank as a member of Dragon Group.

Frank's sister Dorothy testified at trial, but did not reveal during the discovery period, that she spoke to Frank by telephone mere days after the March 4, 2003 ruling.[15] According to Dorothy, she informed Frank that she and the other Sibling Defendants

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[14] *Whittington II*, at 4-5.

[15] Trial Transcript ("T. Tr.") at 636-38. Defendants failed to disclose the fact that this conversation occurred in response to an interrogatory directed at any conversation "from June 14, 2001 to present between [any of Defendants] and [Frank] that reflects, refers to or relates to the [AIP] . . . and . . . [Frank]'s interest (or lack thereof) in Dragon Group, LLC." PX 44 at 8. Dorothy claims that reading *Whittington III*, issued four days before trial commenced on June 6, triggered her memory of the conversation.

believed they had prevailed in the 2002 Motion and, consequently, Frank was not a member of Dragon Group.[16] Frank denies that this conversation occurred.[17]

In April 2003, Frank initiated discussions concerning his rights under the AIP with two attorneys, Professor Jay Katz and Jeffrey Boyer, before engaging them formally as his legal counsel on May 23, 2003.[18] Katz and Boyer had detailed discussions with Frank about the AIP. According to Katz, "[Frank] was adamant that [the Sibling Defendants] were not treating him as a member [of Dragon Group]. He was being excluded. He was not getting information on Dragon Group and he was very upset about that."[19] At the time, the Dragon Group matter was only one of several disputes Frank had with his siblings.

After their engagement, Katz and Boyer sent a global settlement offer on behalf of Frank to Jeffrey Weiner, counsel for the Sibling Defendants. The offer proposed "a buy-out by the [Sibling Defendants] of all of Frank's interests (including notes) in all of the entities for fair market value."[20] The Sibling Defendants rejected Frank's settlement offer on July 7, 2003. About a day or two later, Katz called Weiner to inquire about the

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16 T. Tr. at 637.

17 *Id.* at 774.

18 *Id.* at 679, 689-91 (Katz). The identity of the witness is indicated parenthetically, unless it is clear from the text.

19 *Id.* at 697.

20 PX 58.

rejection and the Sibling Defendants' refusal to negotiate. At trial, Katz described that conversation as follows:

> I pointed out to the fact that Frank had complained that he wasn't getting the Dragon Group financial statements.
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> And [Weiner] said, "Why should he get them? He's not a member."
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> So I asked [Weiner] why [Frank]'s not a member. And isn't that what the [AIP] says. And he gave me his explanation of why he didn't think Frank was a member.
>
> [Weiner] said two different things. One was that in the creation of Dragon Group or at some point all of the Whittington family members who were supposed to be members of Dragon Group were supposed to do something. In that case I think it was, as I remember, to turn over certain certificates. Frank had refused. This was part of the deal. And when Frank . . . had refused, they took that as his saying "Well, I don't want to really be a member." And there might have been some other things he did about marking up some documents. I can't specifically remember what that was, but some back-and-forth which, in his mind, was Frank's rejection of membership in Dragon Group and, therefore, he wasn't entitled to the financial statements.[21]

Shortly after this conversation and before July 20, 2003, Katz informed Frank of the Sibling Defendants' position that he was not a member of Dragon Group, and, therefore, had no right to receive any financial information from that company.[22]

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[21] T. Tr. at 703-04. Generally speaking, Katz's recollection of what Weiner said comports with the major arguments Defendants have made in this litigation in support of their position that Frank is not a member of Dragon Group.

[22] *Id.* at 705 (Katz). Katz testified that Frank visited his office almost every day to discuss the matter during this time and that Frank knew for a fact that the Sibling Defendants did not consider him a member of Dragon Group before July 20, 2003. *Id.* at 705-06.

In August 2003, the entities owned by the Sibling Defendants collectively convened an annual stockholders' meeting.[23] Frank attended with Boyer, but they were excluded from the meeting when the discussion turned to Dragon Group. According to Katz, Boyer "was told that since Frank didn't have an interest in Dragon Group, that he wasn't invited to the meeting or he couldn't stay for the meeting."[24]

The next communication regarding Frank's status vis-à-vis Dragon Group occurred when Tom sent a letter to Frank dated April 14, 2004, stating that Frank had been sent a K-1 for Dragon Group in error. The letter stated:

> The Dragon Group LLC K-1 was sent to you in error . . . . You are not a member of Dragon Group LLC. I looked at your file on this matter and there is correspondence to your attorney regarding the fact that you did not return an appropriately signed Agreement nor did you send Maura your [Ltd.] shares to be used as security for loans that Dragon Group might need.[25]

Frank admits that this letter provided notice of the Sibling Defendants' position that he was not a member of Dragon Group.[26]

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23 Frank and Defendants disagree on the date of the annual meeting. Frank avers it occurred in October 2003, while Defendants maintain it was held in August of that year. Based on my review of the testimony, I find it occurred in August 2003. Notwithstanding this finding, even if the meeting was held in October 2003, it would not affect or modify my analysis of whether Frank is precluded by laches because even a delay from October 2003 to July 2006 would be unreasonable and prejudicial to Defendants in the circumstances of this case.

24 T. Tr. at 708.

25 PX 57 at 2.

26 T. Tr. at 787-88.

In late 2004, Dragon Group called upon its members to make a capital contribution. In connection with that call, Dragon Group received $36,152 on January 12, 2005. The funds contributed by the Sibling Defendants were taken from a dividend approved by the Ltd. board. Dragon Group did not call upon Frank to make a capital contribution, ostensibly because Defendants did not consider him a member of that entity.

In December 2003, Dragon Group entered into a $4 million mortgage with Ltd. for a property in New Castle County, Delaware.[27] Dragon Group made timely payments on the mortgage at a nine percent interest rate from December 2003 until September 2006, when they satisfied it. Frank admits that he generally was aware of the mortgage payments from Dragon Group to Ltd. as a result of the mortgage.[28]

C. Procedural History

Frank commenced this litigation by filing a Verified Complaint for Declaratory and Injunctive Relief (the "Complaint") against Dragon Group, Tom, Richard, Faith, and Dorothy on July 20, 2006. On October 25, 2006, Frank moved for summary judgment. This Court heard argument on that motion and denied it in an oral ruling on May 8, 2007. Frank then filed a Verified Amended Complaint (the "Amended Complaint") on June 22, 2007, which added the other individual Defendants. Later in 2007, Frank dismissed

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[27] DX 34. The note binding Dragon Group to comply with the mortgage agreement is dated December 31, 2003. *Id.* at D2179.

[28] T. Tr. at 899-900.

Defendant Marna C. Whittington without prejudice. On February 19, 2008, the remaining Defendants filed a joint motion for summary judgment on their defense of laches. I issued an opinion denying that motion on June 6, 2008.[29] A four-day trial was held from June 10 to 13, 2008, and the Court heard post-trial argument on January 30, 2009.

D. Parties' Contentions

Frank seeks three different but related types of relief in this litigation. First, he asks the Court to enforce the Dragon Group operating agreement and find that his membership interest under that agreement is 23.65%. Second, commensurate with that membership interest, Frank seeks an order compelling Defendants to turn over his proportionate share of all profits from Dragon Group, including any distributions. Third, Frank requests an accounting of Dragon Group to determine the extent of his share of its profits.

Defendants contend Frank is precluded from obtaining such relief because he failed to bring his claims within the applicable statute of limitations. Defendants also argue that, notwithstanding the statute of limitations, the doctrine of laches bars Frank's claims. In addition, Defendants dispute the merits of Frank's claims. They assert Frank is not a member of Dragon Group because he failed to comply with specific admission requirements. Alternatively, Defendants submit that, even if Frank is a member of

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[29] The memorandum opinion was later revised, but without changes to the disposition. *Whittington v. Dragon Group, L.L.C. (Whittington III)*, 2008 WL 4419075 (Del. Ch. Sept. 30, 2008).

Dragon Group, his membership interest is far less than 23.65%. In reply, Frank asserts that these defenses are barred by the doctrines of res judicata, collateral estoppel, and judicial estoppel based on the outcomes of *Whittington I* and *Whittington II*. Frank also avers that the doctrine of unclean hands prohibits Defendants from raising any defense to his claims.

II. ANALYSIS

Because I have concluded that this action should be dismissed on the grounds of laches, I need not address the merits of Frank's claims. I note, however, that Frank has stated a plausible claim that he was to be a member of Dragon Group under the AIP with an ownership interest possibly as high as 23.65% and that Defendants breached the AIP. For purposes of this opinion, I assume, without deciding, that Frank would prevail on those aspects of his claims, but for the laches defense. Having made that assumption, I also consider it unnecessary to reach Frank's counter-arguments to Defendants' contentions on the merits based on res judicata, collateral estoppel, and judicial estoppel.

A. Standard for Laches

Both the doctrine of laches and statutes of limitations function as time bars to lawsuits. Unlike a statute of limitations, the equitable doctrine of laches does not prescribe a specific time period as "unreasonable."[30] Laches is an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right.[31] An

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30 *Steele v. Ratledge*, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002).

31 *Id.*

unreasonable delay can range from as long as several years[32] to as little as one month.[33] The temporal aspect of the delay is less critical than the reasons for it, because in some circumstances even a long delay might be excused.[34]

Although statutes of limitations always operate as a time-bar to actions at law, they are not controlling in equity.[35] As the Delaware Supreme Court recently held in *Reid v. Spazio*:

> A court of equity moves upon considerations of conscience, good faith, and reasonable diligence. Thus, although a statute of limitations defense is premised solely on the passage of time, the lapse of time between the challenged conduct and the filing of a suit to prevent or correct the wrong is not, in itself, determinative of laches. Instead, the laches inquiry is principally whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties. Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but, if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute, the [court] will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.[36]

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32 *See Cooch v. Grier*, 59 A.2d 282, 287-88 (Del. Ch. 1948).

33 *See Stengel v. Rotman*, 2001 WL 221512, at *7 (Del. Ch. Feb. 26, 2001).

34 *Cooch*, 59 A.2d at 286-87.

35 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009) (citations omitted).

36 2009 WL 962683, at *4 (citations and internal quotation marks omitted).

Thus, the "doctrine of laches also permits this court to hold a plaintiff to a shorter period if, in terms of equity, the plaintiff should have acted with greater alacrity, and when the plaintiff's failure to seek equitable relief with alacrity threatens prejudice to the other party."[37]

B. Are Frank's Claims Barred by Laches Based on the Analogous Statute of Limitations?

The analogous statute of limitations for Frank's claims is three years.[38] The timeline of events involving Frank's claim of ownership in Dragon Group and his allegations of breach of the AIP is relatively clear. Working backwards, Frank filed the Complaint on July 20, 2006. Therefore, if his claims were brought in a court of law, the cause of action must have accrued after July 20, 2003. If it accrued before that date, *i.e.*, if Frank knew that the Sibling Defendants did not consider him a member of Dragon Group and were not complying with their obligations under the AIP before July 20, 2003, then his claims would be barred in an action at law.

According to Frank, he did not know the Sibling Defendants were wrongfully excluding him from membership in Dragon Group until April 14, 2004. This is the date Tom sent the letter to Frank informing him he received Dragon Group's K-1 in error and he was not a member of that entity. Based on the evidence, however, I find that Frank

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[37] *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007) (citing *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005)).

[38] *Whittington III*, 2008 WL 4419075, at *11.

knew he was being excluded from Dragon Group earlier than that. The evidence shows Frank knew about the alleged breach of the AIP as early as July 15, 2003, by which time the Sibling Defendants had rejected his global settlement offer and Katz informed him of the reason. Frank's knowledge of that information was reinforced the next month, when he was excluded from the discussion of Dragon Group at the August 2003 stockholder meeting.

Defendants go further. They contend Frank knew about the Sibling Defendants' refusal to recognize him as a member of Dragon Group days after Vice Chancellor Lamb's March 4, 2003 letter opinion, *i.e.*, *Whittington II*. Frank's sister Dorothy testified that she spoke to Frank on the telephone during the weekend after the opinion issued. According to Dorothy, Frank called her and she told him that in the Sibling Defendants' opinion they "had prevailed, and he was not a member of Dragon Group by virtue of that decision."[39] She testified at trial that, during the call, she unequivocally informed Frank of the Sibling Defendants' position. During discovery, however, Dorothy never revealed this conversation in response to discovery requests from Frank seeking such information. In an attempt to explain away this omission, Dorothy averred:

> I didn't remember [the conversation] until I read Vice Chancellor Parson's opinion [in *Whittington III*], and just the way he phrased things about the fact that Frank could reasonably believe that date after [Vice Chancellor] Lamb's opinion [in *Whittington II*] that he was a member, I'm like, bingo, no, I talked to Frank, we had a conversation, I told him

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[39] T. Tr. at 637.

> we thought we won that and we did not consider him a member.[40]

Although Frank admitted that he spoke to Dorothy via telephone after the issuance of the March 4, 2003 letter opinion, he denies that she explained the Sibling Defendants' position that he was not a member of Dragon Group.

Based on all the circumstances, I am concerned about the reliability of Dorothy's self-serving testimony about her telephone conversation with Frank. The fact that she did not recall the conversation until just before trial began undermines the credibility of her testimony. No other witness or document corroborates the substance of that conversation. Because Frank had no advance notice about Dorothy's belated recollection, he also was denied the opportunity to depose her about it and to propound other discovery targeted at uncovering information that might support his divergent recollection of the conversation. Additionally, more than four years elapsed between the time of the conversation and Dorothy's refreshed memory about it. In sum, although I do not question Dorothy's veracity, I find that her testimony regarding the conversation is fraught with the risk of bias and faulty memory. Therefore, I have not relied on Dorothy's testimony in determining the time at which the statute of limitations would have begun to run.

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[40] T. Tr. at 649. I issued the *Whittington III* decision on June 6, 2008, and the trial began only four days later, on June 10. Dorothy stated that she did not recount the conversation for her attorneys until the pretrial preparation, after she read *Whittington III*.

Defendants have proven, however, that the limitations period for the claims Frank filed on July 20, 2006 commenced shortly before July 20, 2003, and, therefore, presumptively would bar those claims. The global settlement Frank's attorney proposed to the Sibling Defendants' attorney, Jeffrey Weiner, in early July 2003 encompassed the claims Frank asserts in this action. The Sibling Defendants rejected Frank's settlement offer on July 7, 2003. Shortly thereafter, Weiner informed Katz that the rejection stemmed, in part, from the Sibling Defendants' adamant refusal to recognize Frank's alleged membership rights in Dragon Group. Because they did not recognize Frank as a member, the Sibling Defendants refused to provide him with Dragon Group's financial statements. Sometime before July 20, 2003, Katz transmitted this information to Frank during one of their frequent phone calls. Not surprisingly, Frank denies that Katz relayed this information to him. Additionally, Frank objected to this aspect of Katz's testimony and moved to exclude it during trial for unfair surprise.[41]

Beginning with Frank's objection, I find Katz's testimony admissible. Similar to the conversation with Frank that Dorothy testified about, the conversation Katz described

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[41] T. Tr. at 739-40. During the trial, I took Frank's motion under advisement and directed the parties to raise any evidentiary objections in the post-trial briefing. *Id.* at 741. Frank failed, however, to renew his motion to exclude Katz's testimony in his post-trial briefing, and, therefore, has waived it. *See Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (finding that a party waived an argument by not addressing it in its opening post-trial brief). Nevertheless, as explained in the text, even if Frank's motion had been renewed and not waived, I would overrule the objection of unfair surprise and admit Katz's testimony.

was not revealed in discovery or disclosed to Defendants' counsel until the eve of trial. Still, Frank has no basis to complain about unfair surprise. Katz is a third party witness who was deposed by both parties before trial. Yet, the parties evidently failed to ask Katz about the July 2003 conversation he described at trial. The record fails to suggest any reason to fault Defendants or Katz for that oversight, however. The *Whittington III* opinion, which issued only a few days before trial, may have brought the relevance of what occurred during the period from March 4 to July 20, 2003 into sharper focus. Furthermore, Frank has not demonstrated that Defendants knew about Katz's discussion with him and failed to disclose it. Therefore, I find no merit in Frank's objection to his former attorney's testimony.

I also find Katz's testimony credible. Unlike Dorothy, Katz has no interest in the outcome of this litigation. Further, I see no reason to question his testimony on grounds of bias.

Thus, relying on Katz's testimony and documentary evidence, I find that Frank retained Katz and Boyer in May 2003 to, among other things, force the Sibling Defendants to comply with their contractual duties under the AIP by providing him with financial and operating documents. Regardless of whether the information existed at that time, Frank knew that he was not receiving information called for in the AIP and believed the Sibling Defendants were in breach of that agreement. Frank, therefore, knew of his claim for breach of the AIP before July 20, 2003, and delayed filing it for more than three years, *i.e.*, his delay exceeded the analogous statute of limitations. Because Frank has not shown any basis for tolling the statute of limitations or articulated any viable excuse for

waiting more than three years to file his claims, the doctrine of laches applies here to bar those claims.

C. Are Frank's Claims Barred by Laches Even if They Arose After July 20, 2003?

Defendants argue that, even if the analogous three-year statute of limitations does not bar Frank's claims, the doctrine of laches still should preclude this action. Specifically, Defendants contend Frank's claims should be barred by laches because he waited nearly three years to file his Complaint despite knowing the Sibling Defendants denied his status as a member of Dragon Group and believing Defendants were in breach of the AIP. Even assuming Frank's claims arose after July 20, 2003, the Sibling Defendants contend that Frank's dilatory actions and the nature of Dragon Group's investments combine to create sufficiently unusual conditions or extraordinary circumstances as to preclude those claims under the doctrine of laches. Frank argues that laches does not apply here because he did not know about the dispute over his membership status until Tom sent the letter on April 14, 2004, informing him that the Sibling Defendants did not consider him a member of Dragon Group, or about the breach of the AIP until he learned that he was excluded from the distributions made by Dragon Group in November 2005.

Unusual conditions or extraordinary circumstances may make it inequitable to allow a late-filed case to proceed, even if the delay is less than the period specified in the

analogous statute of limitations.[42] As the Court of Chancery stated in *Brady v. Pettinaro Enterprises*:

> [L]aches will typically arise earlier than the end of the limitations period when a plaintiff seeks a judicial order involving compulsions such as an injunction or an order of specific performance. Remedies of this kind will only issue if the plaintiff acts with dispatch, and are normally foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period.[43]

Those principles apply in this case because Frank essentially seeks specific performance of the AIP. Because a "claim for specific performance is a specialized request for a mandatory injunction, requiring a party to perform its contractual duties . . . [it] necessarily invokes a stricter requirement for prompt action by the plaintiff, and a plaintiff may not wait the full period of three years set forth in 10 *Del. C.* § 8106 to seek such relief."[44]

The application of laches in the case of delay shorter than the applicable statute of limitations also requires a finding of prejudice.[45] For purposes of laches, prejudice may occur in different ways. There might be procedural prejudice where, for example, the delay prevents a party from calling crucial witnesses who have become unavailable

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42 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009).

43 870 A.2d 513, 527 (Del. Ch. 2005) (citing *CertainTeed v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005); *Carey v. Landy*, 1989 WL 44051, at *3 (Del. Ch. Apr. 27, 1989); *Wright v. Scotton*, 121 A. 69, 72 (Del. 1923)).

44 *Certainteed Corp.*, 2005 WL 217032, at *6 (citations omitted).

45 *See Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d at 760, 808 (Del. Ch. 2007) (citing *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000)).

because of intervening disappearance, illness, or death.[46] Prejudice also can be substantive, such as where a party suffers a financial detriment by relying on the plaintiff's failure to seek relief in a timely manner.[47]

A relevant factor in analyzing the parties' arguments is when Frank had, at least, inquiry notice of his claims. Inquiry notice does not require actual discovery of the reason for injury.[48] Rather, it exists when the plaintiff becomes aware of "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of injury]."[49] A plaintiff is expected to act with alacrity once he has reason to suspect that his rights have been violated, and the statute of limitations runs

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46 *See Steele v. Ratledge*, 2002 WL 31260990, at *3-4 (Del. Ch. Sept. 20, 2002); *Territory of U.S. V.I.*, 937 A.2d at 809 (the chain of events started approximately thirty years before the court's ruling, and a key witness had passed away); *Fike*, 752 A.2d at 114 (in an action involving an approximately twenty-year-old joint venture, two of defendant's key witnesses, an accountant and a partner, passed away).

47 *See Fike*, 752 A.2d at 114 (defendants could have avoided significant personal losses by ceasing to lend money to a joint venture); *Steele*, 2002 WL 31260990, at *4 (defendants were substantively prejudiced by the cost of installing a fence and defending a lawsuit after they built a fence with the plaintiff's knowledge, but without the plaintiff's timely objection); *McAllister v. Kallop*, 1995 WL 462210, at *20 (Del. Ch. July 28, 1995) ("A party asserting laches must demonstrate a detrimental change of position").

48 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (Del. Ch. July 17, 1998).

49 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

from the point at which the plaintiff, by exercising reasonable diligence, should have discovered his injury.[50]

As discussed in the previous section, Frank knew about the Sibling Defendants' refusal to accord membership status to him at least as early as mid-July 2003. Even if Katz's conversation with Weiner was never relayed to Frank, he knew that his settlement offer was rejected on or about July 7, 2003. As part of that settlement offer, Frank offered to accept a buyout of his interest in all Whittington entities, including Dragon Group. Because he asserts that Katz never notified him of the impetus for the rejection, it would have been reasonable for Frank to inquire into the situation in anticipation of further negotiation or even litigation. The rejection of the settlement should have prompted Frank to determine whether the Sibling Defendants intended to honor their obligations under the AIP as understood by him. If he had pursued that inquiry, Frank would have discovered the basis for his claims. Frank failed, however, to take any steps until July 20, 2006 to enforce his rights as a member of Dragon Group.

Even ignoring the likelihood that Frank was on inquiry notice following the settlement rejection, he indisputably knew about his causes of action when he was excluded from the portion of the 2003 stockholder meeting pertaining to Dragon Group. In this regard, I note that Frank attempts to sidestep the import of the 2003 stockholders meeting and the April 14, 2004 letter from Tom, discussed *infra*, and avoid Defendants'

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[50] *In re Dean Witter*, 1998 WL 442456, at *6; *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 504 n.7 (Del. 1996).

laches argument by invoking the doctrine of anticipatory repudiation.[51] In particular, Frank argues Defendants' statements or actions regarding his exclusion from Dragon Group merely evinced an intent to breach the AIP in the future by refusing to pay distributions to him when they became due, as opposed to an actual breach. According to Frank, the statute of limitations did not begin to run until Dragon Group failed to make a distribution to him and was tolled until he discovered that such a distribution had occurred, *i.e.*, until at least November 8, 2005.

Based on the evidence at trial, I find no merit in Frank's anticipatory repudiation argument. Frank recognized as early as May 2003 that he had potential claims for breach of the AIP based on the Sibling Defendants' failure to provide documents, and he made those very same claims in his Complaint and Amended Complaint.[52] I also find unpersuasive Frank's contention that there could not have been a breach of the obligation to provide documentation because the financial statements were not available until December 2004. Paragraph 10 of the AIP states that members of Dragon Group were to receive financial and operating information for that entity as outlined in items 22 and 23 of Schiltz's March 21, 2001 letter. Specifically, Schiltz's letter provides, among other things, that Dragon Group and the Sibling Defendants must give to Frank "an annual written cash flow statement, balance sheet and income statement . . . on or before February 28 of each year" and "semi-annual written statements showing any monies paid

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51 POB at 15-17; PRB at 9.

52 T. Tr. at 694-95, 697 (Katz).

to any member of Dragon Group . . . for any reason (loan repayment, expense reimbursement, fee, distribution, etc."[53] Thus, information of the kind described in the AIP would have been due contractually in 2003 and early 2004, but was not provided. In these circumstances, Frank would not be able to rely on the doctrine of anticipatory repudiation as of August 2003 or April 2004.[54]

Frank also received unequivocal notice that the Sibling Defendants did not consider him a member of Dragon Group in the form of the April 14, 2004 letter from Tom. That letter pointedly stated, "The Dragon Group LLC K-1 was sent to you in error . . . . You are not a member of Dragon Group, LLC." In the face of that letter and the fact that Dragon Group had not provided him with any information or pertinent

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53 Settlement Term Sheet at 3.

54 Frank also asserts Defendants' defense of laches should be barred under the doctrine of unclean hands. Basically, Frank contends that Defendants acted with unclean hands by ignoring the court's ruling in *Whittington II* and refusing to recognize his claimed 23.65% interest in Dragon Group. I find, however, that Defendants have not acted with unclean hands. "The doctrine of unclean hands provides that a litigant who engages in reprehensible conduct in relation to the matter in controversy forfeits his right to have the court hear his claim, regardless of its merit." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 80-81 (Del. Ch. 2008) (internal quotations, punctuation, and citations omitted). Here, Defendants, on the advice of their counsel, interpreted the Court's ruling differently from Frank and comported themselves accordingly. Although I cannot say that Defendants' construction of the March 4, 2003 letter opinion is the correct one, I do not find it unreasonable or implausible. Thus, Frank has failed to prove Defendants' conduct was reprehensible or egregious or otherwise should preclude them from pursuing their laches defense. *See Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991) (declining to apply unclean hands doctrine to bar plaintiff's claims in part because he proceeded on an "incorrect but reasonable reading" of a contract).

documentation since the March 4, 2003 letter opinion, Frank's claim for breach of the AIP clearly had accrued by that time, at the latest, and Frank knew it.

Assuming for purposes of argument that Frank's claim for breach of the AIP did not arise on or before July 15, 2003, as I found *supra* Part II.B, but rather sometime between August 2003 and April 14, 2004, I turn to the question whether his delay in commencing this action to enforce the AIP until July 20, 2006, renders this action untimely under the doctrine of laches. In other words, as a matter of equity, can this Court allow Frank to wait anywhere from twenty-seven to thirty-five months after his claims had accrued to assert them in view of the nature of the contract at issue, the relief he is seeking, and the alleged changes in the position of the Sibling Defendants in the interim? For the reasons stated below, I conclude that it would be inequitable to permit such a delay, regardless of whether the date the relevant time period began was August 2003 or April 14, 2004.

Frank's delay is problematic for several reasons. First, the primary business of Dragon Group related to the development of particular real estate. Dragon Group continued to operate, taking on and extinguishing risk, for well over two years after Frank knew about his exclusion and the Sibling Defendants' alleged breach of the AIP. During that time, Dragon Group entered into a $4 million mortgage with Ltd., which it paid down at a nine percent interest rate from December 2003 until September 2006. Frank admits that, as a shareholder of Ltd., he generally knew about, and benefited from, the mortgage payments from Dragon Group to Ltd. Nevertheless, Frank did not file his claim until the mortgage was only two months from being fully satisfied. In practical

terms, this meant that the income stream to Ltd., and ultimately to Frank and the other owners of Ltd., from the mortgage was about to stop, and the financial condition of Dragon Group, from which Frank was being excluded, would be stronger than it had been in April 2004, for example.

Second, the record shows that for Frank and his siblings their Ltd. stock constituted an important and valuable asset. As a prerequisite of their membership in Dragon Group, the Sibling Defendants all had to deliver their Ltd. stock to that entity with the understanding that it might be used to secure certain of its liabilities. The evidence also demonstrates that Frank is quite risk averse.[55] Moreover, although Frank did offer to deliver his Ltd. stock to Dragon Group in or around October 2002, the Sibling Defendants rejected that offer because it was tied to changes to the Offering Memorandum that they found unacceptable. In any event, Frank never delivered his Ltd. stock to Dragon Group. Hence, Frank was exposed to less risk than the Sibling Defendants during the period of his delay from late 2003 or early 2004 to July 20, 2006. In that sense, among others, Frank's position roughly approximated an option by which he could defer pursuing his claim to enforce the AIP for a significant period of time and thereby postpone having to subject his Ltd. stock or any other assets to the risks associated with the Dragon Group project until he could be more confident it would succeed. The Sibling Defendants did not enjoy the same luxury.

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[55] *See* T. Tr. at 71 (James S. Green, Sr.); *id.* at 391 (Tom); *id.* at 629 (Dorothy); *id.* at 734-36 (Katz).

Even if I assume Frank had no notice of his claim until Tom's April 14, 2004 letter, Frank failed to provide any valid excuse for his delay. Instead, the evidence suggests Frank may have bided his time until Dragon Group proved successful, or, at least, involved less risk. For laches, the length of a delay may be less important than the reasons for it.[56] Aversion to risk, however, does not excuse the lengthy delay involved in this case. Additionally, the touchstone of the laches inquiry is whether an inexcusable delay leads to an adverse change in the condition or relations of the property or parties.[57] Here, Frank delayed filing this lawsuit until Dragon Group seemed profitable and no longer faced the danger of defaulting on a substantial liability in the form of the mortgage and note to Ltd. The contribution of capital made by the Sibling Defendants also exposed them to greater risk than Frank, who did not make any such contribution. If Frank is granted the relief he seeks, the benefits of Dragon Group ownership to his siblings over the last several years will be reduced in proportion to Frank's alleged stake. For all of these reasons, I find Frank's delay in filing his Complaint was unreasonable even if measured from Tom's April 14, 2004 letter.

The Sibling Defendants also must prove they have been prejudiced by Frank's delay. In situations where less time has passed than the analogous statute of limitations,

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56 *Cooch v. Grier*, 59 A.2d 282, 286-87 (Del. Ch. 1948)

57 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009).

Delaware courts have required a showing of prejudice to the party defending the claims.[58] Defendants assert they have been prejudiced because, unlike Frank, they pledged their Ltd. stock to Dragon Group, made capital contributions, and undertook risks of ownership, such as the mortgage with Ltd., over the past several years.

The Court of Chancery considered a similar situation in *Quill v. Malizia*,[59] where it found in the alternative that a plaintiff's claims were barred by laches because of his unreasonable delay and the prejudice suffered by the defendants, who undertook significant risks in connection with an investment property. The *Quill* plaintiff sought a resulting and constructive trust on the proceeds of sale of a property he averred he jointly owned with defendants. The plaintiff was on notice of his purported causes of action by the spring of 1999, but waited until December 2002 to file his claims. In entering judgment for the defendants, the court held that they had been prejudiced by the plaintiff's delay in bringing the suit. During the delay, the defendants paid all carrying costs on the property and bore the economic risks associated with ownership.[60] Meanwhile, the plaintiff "used time as an option . . . leaving [the defendants] with downside risk and reserving to himself the right to leisurely present a claim of ownership

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58 *See Fike v. Ruger*, 752 A.2d 112, 114 (Del. 2000); *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 809 (Del. Ch. 2007); *Steele v. Ratledge*, 2002 WL 31260990, at *3-4 (Del. Ch. Sept. 20, 2002); *McAllister v. Kallop*, 1995 WL 462210, at *20 (Del. Ch. July 28, 1995).

59 2005 WL 578975 (Del. Ch. Mar. 4, 2005).

60 *Id.* at *14.

that would cloud their title."[61] Under the circumstances, the court looked to the doctrine of laches because to apply strictly the applicable and relatively long statute of limitations "would disserve the independent purposes served by the more flexible equitable bar of laches."[62]

Similar to the situation in *Quill*, because the Sibling Defendants put some of their own capital at risk and satisfied the Dragon Group note, it would be inequitable to allow Frank to claim an interest in Dragon Group now. Frank waited, at a minimum, two years and three months to file his claims. During that period, the Sibling Defendants pledged their Ltd. stock to acquire a membership interest in Dragon Group. If Dragon Group proved unsuccessful, Defendants could have lost their Ltd. stock to creditors, whereas Frank placed none of his interest in Ltd. at risk. The Sibling Defendants also made capital contributions to Dragon Group in early 2005, while Frank was not asked to, and did not, make any such capital contributions.[63] Although Frank may not have been aware of this capital call, the Sibling Defendants made the required contribution. In this way,

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61 *Id.*

62 *Id.* at *15.

63 *See* Post-trial Arg. Tr. at 20. Frank seems to argue that, because the capital contribution for Dragon Group was paid from the Sibling Defendants' dividends on their Ltd. stock, they did not actually risk any money. I find this argument puzzling and unavailing. The source of the funds the Sibling Defendants used to make their capital contributions is irrelevant. What matters here is that the Ltd. dividend was due to the Sibling Defendants and they chose to divert a portion of it to Dragon Group. Frank presumably received his full Ltd. dividend. Furthermore, although $36,152 is a relatively modest figure, it is not a negligible one.

they undertook greater risk by investing their own money in Dragon Group. Meanwhile, Frank effectively sat on his hands, presumably waiting to claim his stake in Dragon Group only if the investment proved successful. Frank's Amended Complaint asks this Court to provide him with all the rewards for the Dragon Group investment despite his unwillingness in the past to accept the attendant risks. For the same reasons the court in *Quill* rejected a similar argument, I consider Frank's position unpersuasive.

The well-known and oft-repeated maxim "equity aids the vigilant, not those who slumber on their rights" is particularly apt in the circumstances of this case.[64] Here, Frank seeks a judicial order compelling Defendants to recognize him as a member of Dragon Group, turn over financial documents and reports, and pay him his share of any profits or distributions. To some degree, at least, he seeks the equivalent of specific performance. The timeliness of such claims are better gauged by the equitable measure of laches than by mechanically affording a dilatory plaintiff the luxury of a full three years to press his claims and enforce his interests.[65] Because injunctions and specific performance constitute uncommon and extraordinary relief, a plaintiff is required to act

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64 *See Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982). Vice Chancellor Strine in *Quill v. Malizia* posited that the maxim is "oft-quoted because it makes good sense." 2005 WL 578975, at *15.

65 *See Quill*, 2005 WL 578975, at *15 (finding laches applicable where relief operated no differently than mandatory injunction).

with more alacrity than he would be were he requesting monetary damages.[66] In this case, it would be inequitable to ignore Frank's sluggishness in bringing his claims and essentially require Defendants to share with him the rewards born from the risks they undertook over the past three years. Frank simply waited too long to pursue his claim that he has an interest in Dragon Group.

III. CONCLUSION

For the reasons stated in this opinion, judgment shall be entered for Defendants and Frank's claims will be dismissed as time-barred under the doctrine of laches. All parties shall bear their own attorneys' fees. The Court is entering a judgment reflecting these rulings concurrently with this opinion.

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66 *See Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005) (citations omitted); *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005) (citations omitted).