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: March 31, 2008
Decided: June 6, 2008
Revised: September 30, 2008

Richard H. Cross, Jr., Esquire, Amy E. Evans, Esquire, CROSS & SIMON, LLC, Wilmington, Delaware; *Attorneys for Plaintiff*

John G. Harris, Esquire, RILEY RIPER HOLLIN & COLAGRECO, Wilmington, Delaware; Richard I. G. Jones, Jr., Esquire, Andrew D. Cordo, Esquire, ASHBY & GEDDES, Wilmington, Delaware; *Attorneys for Defendants*

PARSONS, Vice Chancellor.

In this long-running intra-family dispute, Plaintiff, Frank C. Whittington, II ("Frank"),[1] seeks relief relating to his purported interest in a family owned limited liability company, Dragon Group L.L.C., of which his siblings, defendants Thomas D. Whittington, Jr. ("Thomas"), Richard Whittington ("Richard"), L. Faith Whittington ("Faith"), and Dorothy W. Minotti (the "Sibling Defendants"), are members.

This action is presently before me on Defendants' motion for summary judgment. Based on the evidence, briefing, and argument presented, I find there are genuinely disputed issues of material fact on at least the following matters: (1) the date when the cause of action for violation of the Agreement in Principle (the "AIP") among Frank and the Sibling Defendants arose such as to trigger the commencement of the limitations period under 8 *Del. C.* § 8106; (2) whether there are mitigating circumstances that would warrant effectively tolling the statute of limitations, and the length of time, if any, for which the statute should be tolled here; (3) whether in view of Frank's claims for injunctive relief and specific performance of the AIP, his delay in filing this action was unreasonable; and (4) whether Defendants suffered material prejudice due to Frank's failure to file this action until July 2006. I therefore deny Defendants' motion for summary judgment based on laches.

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[1] Because so many of the parties share the surname Whittington, I refer to Frank C. Whittington, II as "Frank," and his siblings by their first names, as well. No disrespect is intended.

I. BACKGROUND

A. The Parties

Frank and the Sibling Defendants are children of Dorothy B. Whittington, who is deceased. The Sibling Defendants are members of Dragon Group, L.L.C., a Delaware limited liability company. Thomas and Richard are managers of Dragon Group.[2] Some members of the next generation of Whittington family members, all members of Dragon Group, also have been added as defendants: Marna C. Whittington, Marna A. McDermott, Sarah I. Whittington, Ruth A. Whittington, Matthew D. Minotti and Dorothy A. Minotti (collectively, the "Next Generation Defendants").[3]

B. History

This case involves a long-running and multi-faceted familial dispute. On June 14, 2001, after three days of trial before Vice Chancellor Lamb, Frank and the Sibling Defendants reached a global settlement and executed the AIP.[4] That agreement consists of eleven numbered paragraphs and expressly contemplated the dismissal of all claims with prejudice. Each of the parties to the litigation before the Vice Chancellor, and their attorneys, signed the AIP. In this litigation, the parties dispute the meaning of language in the AIP concerning Dragon Group and their respective membership rights in Dragon Group.

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2 *See* Am. Compl. (hereinafter "Compl.") ¶ 13.

3 Frank later dismissed Marna C. Whittington from this action under Rule 41(a)(1)(i). *See* Notice of Dismissal of Marna C. Whittington (Sept. 21, 2007).

4 *See* Compl. Ex. A.

After Frank refused to perform under the AIP, his siblings filed a motion with this court to enforce the AIP.[5] Chancellor Chandler heard that motion on October 21, 2001, and ruled the AIP should be enforced as a contract. Among other things, the Chancellor expressly ruled 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 it unenforceable.[6]

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[5] *See Whittington v. The Farm Corp.* (*Whittington II*), C.A. No. 17380, at 2 (Del. Ch. Mar. 4, 2003).

[6] *See Whittington v. The Farm Corp.* (*Whittington I*), C.A. No. 17380, at 11-12 (Del. Ch. Oct. 11, 2001) (TRANSCRIPT). In particular, the Chancellor noted:

> If none of these documents get executed, I'm not sure that would be significant to the court, because I think the agreement can stand on its own, that it can go forward with these recommendations and these terms and payments and notes being canceled and redrafted and percentages all being laid out, all of that can be enforced exactly as it stands. And if the documents that were contemplated for some reason cannot be negotiated and created in a fashion that's acceptable to all, that doesn't rob the rest of the agreement of its enforceability, because I don't think that's a material term of this agreement. I think that was simply the contemplation of the parties at the time that they would in good faith, and reasonably, attempt to negotiate these other documents.
>
> But to the extent many of these paragraphs, or all of them in my view, except for paragraph 11, can take place without additional documents, then that term is . . . in a sense, gratuitous and unnecessary. They could simply have said "This is the agreement."

Id.

Following the Chancellor's ruling, there was a delay of nearly one year in performing the matters identified in the AIP. During that time, Frank retained new counsel and, it appears, continued a pattern of delay and obstruction. Finally, on October 15, 2002, the settlement was concluded by the payment of monies and the exchange of certain documents, such as stock certificates. Since the parties were not working together cooperatively, certain of the secondary documentation referred to by the Chancellor in his ruling was never completed.[7] Vice Chancellor Lamb later found "that those aspects of the Agreement in Principle that required affirmative acts were satisfied."[8]

The parties disagreed, however, as to the form of the ancillary documentation discussed by the Chancellor in his ruling. In particular, Frank was unwilling to accept a form of operating agreement for Dragon Group prepared by the Sibling Defendants to reflect his membership in that entity.[9] By letter dated November 1, 2002, Thomas, Dragon's sole managing member at the time, informed Frank's counsel that Frank's

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7 *Whittington II*, at 3-4. Paragraph 11 of the AIP refers to the operating agreement of Dragon Group, and paragraph 4 refers to a note held by Frank. *See* AIP ¶¶ 4, 11.

8 *Whittington II*, at 3-4.

9 *Id.* at 4. The operating agreement proposed by certain Defendants listed Frank's share at 17.77%. Frank declined to sign the proposed operating agreement at that level of interest, and instead listed his ownership at 24% when he returned his signed copy to the other members of Dragon Group. *See* Harris Aff. Ex. E at P0182.

altered version of the operating agreement constituted a counteroffer that had been rejected.[10]

On December 9, 2002, Frank filed a motion, acting pro se, styled as 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 relating to Dragon Group, and to relitigate certain issues resolved by the AIP.

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 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."[11] Since the court's March 4, 2003

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[10] *See* Harris Aff. Ex. L at D1788-89.

[11] *Whittington II*, at 4-5. In that section of his letter opinion, Vice Chancellor Lamb mistakenly used the name of another Whittington-related entity, "Frog Hollow LLC," instead of Dragon Group. Defendants contend the Vice Chancellor's use of "Frog Hollow" was not a mistake because Dragon Group had no operating agreement at its inception. *See* Tr. at 48. Citations in this form ("Tr.") are to the transcript of argument held on March 31, 2008. Defendants' argument lacks merit, however, because nothing in the underlying motion would support a reference to Frog Hollow LLC in that context. Moreover, the absence of a *written* agreement does not mean there was no agreement; the agreement could have been an oral one subject to the default provisions under Delaware law.

Defendants admit they were confused by the court's opinion. *See* Tr. at 27. To the extent there was any confusion regarding Vice Chancellor Lamb's use of "Frog Hollow LLC" instead of "Dragon Group LLC," the parties could have sought clarification from the court. Defendants apparently made a tactical

letter opinion, Defendants have not amended Dragon Group's operating agreement or taken any other action that would include Frank as a member of the LLC at his desired level of membership. Frank filed his verified complaint for accounting, declaratory, and injunctive relief in this action on July 20, 2006.

C. Parties' Contentions

Frank asserts three separate counts seeking different types of relief. Under Count I, Frank seeks declaratory relief that he is a member of Dragon Group with a 23.65% membership interest.[12] Count II requests a permanent injunction requiring: (1) Defendants to recognize Frank as a member of Dragon Group; (2) an accounting; (3) books and record production; and (4) production of meeting minutes and written consents for actions taken without a meeting.[13] Finally Count III seeks an accounting of Dragon Group.[14] A four day trial on these issues is scheduled to begin on June 10, 2008.

On February 19, 2008, Defendants moved for summary judgment that Frank's claim is barred by the equitable doctrine of laches. This is my ruling on that motion.

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decision not to seek clarification of the *Whittington II* decision because they thought they had won. In any event, Defendants have failed to provide any convincing evidence or argument in support of their contention the reference to Frog Hollow LLC was intentional.

12 *See* Compl. ¶¶ 24-26.

13 *Id.* ¶ 30.

14 *Id.* ¶ 33.

II. ANALYSIS

A. Summary Judgment Standard

The standard for reviewing a motion for summary judgment under Court of Chancery Rule 56 is well settled. To prevail on summary judgment, the moving party must "demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[15] "In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[16] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial.[17] "[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems

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15 *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007) (citing Ct. Ch. R. 56(c); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)).

16 *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co.*, 853 A.2d 124, 126 (Del. Ch. 2004) (citing *Tanzer v. Int'l Gen. Inds., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979); *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

17 *See Levy*, 924 A.2d at 219 (citing Rule 56(e)). Thus, where an action is "not filed until after the limitations period expired, [p]laintiffs bear the burden of presenting factual evidence demonstrating that, when the facts are viewed most favorably to them, their claims are not barred by the statute of limitations or laches." *Kerns v. Dukes*, 2004 WL 766529, at *3 (Del. Ch. Apr. 2, 2004).

desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[18]

B. Is Frank's Claim Barred by Laches?

1. Standard for laches

Laches "operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."[19] This doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[20] As explained by the court in *Federal United Corp. v. Havender*:

> A court of equity moves upon considerations of conscience, good faith and reasonable diligence. Knowledge and unreasonable delay are essential elements of the defense of laches. The precise time that may elapse between the act complained of as wrongful and the bringing of suit to prevent or correct the wrong does not, in itself, determine the question of laches. What constitutes unreasonable delay is a question of fact dependent largely upon the particular circumstances.[21]

"Although there is no bright-line rule as to what constitutes laches, there are three generally accepted elements to this equitable defense: (1) plaintiff's knowledge that she

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18 *Pathmark Stores v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

19 *Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992) (citing *Robert O. v. Ecmel A.*, 460 A.2d 1321, 1325 (Del. 1983); *Shanik v. White Sewing Mach. Corp.*, 19 A.2d 831, 837 (Del. 1941)).

20 *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

21 11 A.2d 331, 343 (Del. Ch. 1940).

has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3) identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[22]

"A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches."[23] Where the plaintiff seeks legal relief or this court has concurrent jurisdiction, however, the court applies the statute of limitations by analogy.[24] Absent a tolling of the limitations period, a party's failure to file within an analogous statute of limitations, if any, is typically conclusive evidence of laches.[25] "[W]here the equitable action has no

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22 *Tafeen v. Homestore, Inc.*, 2004 Del. Ch. LEXIS 38, at *30 (Mar. 22, 2004) (citing *Porach v. City of Newark*, 1999 Del. Ch. LEXIS 143, at *10 (June 25, 1999)); *see also* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11-5[a], at 11-55 (2007); *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("The essential elements of laches are: (i) plaintiff must have knowledge of the claim and (ii) there must be prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim.") (citing *Fed. United Corp.*, 11 A.2d 331 at 343).

23 *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 100, at *37 (June 29, 2005); *see also Jankouskas*, 452 A.2d at 157.

24 *See Weiss v. Swanson*, 2008 Del. Ch. LEXIS 32, at *41 (Mar. 7, 2008).

25 *See Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007) (citing *Alex. Brown*, 2005 Del. Ch. LEXIS 100, at *37); *see also Acierno v. Goldstein*, 2005 Del. Ch. LEXIS 176, at *25 (Nov. 16, 2005) ("Delay beyond the period fixed by the statute is presumptively unreasonable and the equitable doctrine of laches may bar the claim.").

legal analogue, the legal statute of limitations cannot apply by analogy."[26] In that circumstance, I would apply the traditional equity analysis to Defendants' laches defense.

2. Is there an analogous statute of limitations?

The parties dispute which statute of limitations period applies to Frank's claim. Defendants contend the analogous statute of limitations is the three year provision for contract claims under 10 *Del. C.* § 8106.[27] Frank argues there is no analogous limitations period because there is no analogous claim in law to his claim for declaratory and injunctive relief making him a member of Dragon Group.

"The general rule for determining whether the statute of limitations should apply to a suit in equity is that 'the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law.'"[28] Delaware courts use the following test for determining whether a legal claim is analogous to the equitable claim at issue:

> [W]here the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claim so far correspond, that the only difference is, that the one

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26 *Kirby v. Kirby*, 1989 Del. Ch. LEXIS 133, at *16 (Sept. 26, 1989).

27 Section 8106 states in pertinent part, "no action based on a promise … shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ." 10 *Del. C.* § 8106.

28 *Ohrstrom v. Harris Trust Co.*, 1998 Del. Ch. LEXIS 11, at *7 (Jan. 28, 1998) (quoting *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. Ch. 1971)).

> remedy may be enforced in a court of law, and the other in a court of equity.[29]

Here, I find that Frank's claims ultimately are predicated upon the AIP and that this action is "based upon a promise" within the meaning of Section 8106. Frank's claims unquestionably relate to the same subject matter as would a legal claim for damages based on an alleged breach of the AIP.[30] As a practical matter, there is not likely to be much difference between the prosecution of Frank's claim here for an accounting and a claim for damages in a court of law. Thus, Frank's claims for declaratory relief and an accounting are analogous to a legal claim for the same relief. In the case of his request for injunctive relief, it is simply a remedy that may be enforced in a court of equity, as opposed to a claim for damages, which may be pursued at law. Thus, I conclude 10 *Del. C.* § 8106 is an analogous statute of limitations for purposes of a laches analysis.

a. Is the AIP a contract under seal?

One exception to the three year statute of limitations for contract actions specified in 10 *Del. C.* § 8106 is for contracts under seal, for which the common law twenty year period applies.[31] Frank contends the AIP is a contract under seal, while the Sibling

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29 *Artesian Water*, 283 A.2d at 692 (quoting *Perkins v. Cartmell's Adm'r*, 4 Del. 270, 274 (4 Harr.) (Del. 1845)) (punctuation omitted).

30 In addition, Delaware allows claims for declaratory relief to be brought both in equity and at law. *See* 10 *Del. C.* § 6501.

31 *See State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991) (citing *Leiter v. Carpenter*, 22 A.2d 393 (Del. Ch. 1941); *Garber v. Whittaker*, 2 A.2d 85

Defendants assert it is not. As Frank notes, the word "seal" appears in typed letters beside the signature line for each signatory to the AIP.

While "documents of debt, such as mortgages or promissory notes, escape the three year limitation if they contain the most minimal reference to a seal," "actions arising from other types of contracts must show a clearer intent to enter into a contract under seal."[32] In *American Telephone & Telegraph Co. v. Harris Corp.*,[33] then-Vice Chancellor Jacobs, sitting by designation in the Delaware Superior Court, held that:

> In Delaware, for an instrument other than a mortgage to be under seal . . . it must contain language in the body of the contract, a recital affixing the seal, and extrinsic evidence showing the parties' intent to conclude a sealed contract. The mere existence of the corporate seal and the use of the word "seal" in a contract do not make the document a specialty . . . .[34]

Because the AIP is neither a mortgage nor a promissory note, a number of the cases Frank relies upon are inapposite.[35]

(Del. Ch. 1938)); *Ryland Group v. Santos Carpentry Co.*, 2004 Del. Super. LEXIS 87, at *6 (Mar. 26, 2004).

32 *Ryland Group*, 2004 Del. Super. LEXIS 87, at *6-7.

33 1993 WL 401864 (Del. Super. Sept. 9, 1993).

34 *Id.* at *7 (quoting *Aronow Roofing Co. v. Gilbane Bldg. Co.*, 902 F.2d 1127 (3d Cir. 1990)).

35 *See* PAB at 12 (citing *Milford Fertilizer Co. v. Hopkins*, 807 A.2d 580, 582 (Del. Super. 2002) (involving promissory note)). Frank also cites *Peninsula Methodist Homes & Hosps. v. Architect's Studio, Inc.*, 1985 WL 634831, at *1 (Del. Super. 1985), which involved a construction contract rather than a mortgage or promissory note. The contract at issue in *Peninsula Methodist* is distinguishable from the AIP, however, because there the contract contained an additional recital

Here, the AIP contains no reference to a "seal" other than the pre-printed word "seal" next to each signature. That evidence is insufficient to demonstrate an intent of the parties to enter into a sealed contract.[36] Thus, the three year statute of limitation for contracts applies by analogy in this case.

C. Statute of Limitations Analysis

Frank filed this action on July 20, 2006 and claims not to have known about his exclusion until sometime after July 20, 2003. Because Defendants have asserted laches as an affirmative defense and this is their motion for summary judgment, they have the burden to prove the absence of any genuine issue of material fact and the existence of laches. The issue is whether Defendants have shown there was a putative breach of the AIP before July 20, 2003, and the absence of any basis for tolling the applicable three year statute of limitation until sometime after July 20, 2003.

Delaware courts conduct a three part analysis before deciding that a claim is time-barred. The court must determine: (1) the date of accrual of the cause of action, (2) if the

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reflective of an intent by the parties to create a contract under seal. *See id.* at *2 (the relevant clause was, "In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written.").

[36] I make this finding under Court of Chancery Rule 56(d). Thus, for purposes of the trial of this action, it shall be deemed established that the AIP does not qualify as a document under seal or a specialty.

statute of limitations has been tolled, and (3) assuming a tolling exception applies, when the plaintiff received inquiry notice of that claim.[37]

1. When was there a breach?

"The general law in Delaware is that the statute of limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action."[38] "The 'wrongful act' is a general concept that varies depending on the nature of the claim at issue. For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach."[39]

Defendants contend the alleged breach here occurred when they rejected Frank's counteroffer seeking a 24% stake in Dragon Group.[40] Defendants' contention ignores, however, Vice Chancellor Lamb's subsequent finding in *Whittington II* that 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."[41] As of

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37 *See CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6-7 (Del. Ch. Jan. 24, 2005) (citing *Wal-Mart Stores Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004)).

38 *In re Dean Witter P'ship Litig.*, 1998 Del. Ch. LEXIS 133, at *15 (July 17, 1998) (citing *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1117 (D. Del. 1994); *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 132 (Del. 1974)).

39 *CertainTeed Corp.*, 2005 WL 217032, at *7 (citing *Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *14 n.4 (Del. Ch. Feb. 7, 2001)).

40 Opening Br. in Supp. of Defs.' Joint Mot. for Summ. J. ("DOB") at 9. Frank's answering brief and Defendants' reply brief are labeled "PAB" and "DRB," respectively.

41 *Whittington II*, C.A. No. 17380, at 4-5 (Del. Ch. Mar. 4, 2003).

March 4, 2003, Frank reasonably could have anticipated Defendants would abide by the ruling and include him as a member of Dragon Group.[42]

Alternatively, Defendants conclusorily assert that a breach of the AIP occurred, at the latest, by March 4, 2003, the date of Vice Chancellor Lamb's ruling on Frank's Motion for Order Compelling Defendants' Compliance with Court Order and Directing Performance by Substitute.[43] Frank disputes that contention. Drawing all reasonable inferences in Frank's favor, it is possible that, after receiving the court's ruling, he expected Defendants to abide by the ruling and include him as a member of Dragon Group.

Defendants have made no showing of when, after *Whittington II*, a breach of contract occurred. Frank contends an amended Dragon Group LLC agreement executed sometime after January 6, 2005, which excluded him completely from Dragon Group, would qualify as the earliest breach.[44] While Defendants may be able to prove their earlier alleged diminution of Frank's interest in Dragon Group would constitute a breach of the AIP, on the present record it is not clear when such a breach took place. Thus, I

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[42] *Cf. McCoy v. Sussex County*, 1998 Del. Ch. LEXIS 171, at *16-17 (Aug. 27, 1998).

To the extent there was confusion as to Vice Chancellor Lamb's use of "Frog Hollow" instead of "Dragon Group," Defendants shared the burden with Frank to bring that apparently mistaken reference to the court's attention.

[43] *See* DRB at 12.

[44] *See* PAB at 8 (citing PAB App. Ex. 15).

find that there is a genuine issue of material fact as to when Defendants breached the AIP by not giving Frank his due share of the Dragon Group ownership interest.

Moreover, even if March 4, 2003 was the appropriate day to recognize a breach for purposes of this statute of limitations analysis, there is still a genuine issue of material fact as to whether the statute effectively should be tolled.

2. Tolling of the statute

"Even after a cause of action accrues, the running of the limitations period can be tolled in certain limited circumstances."[45] When such a tolling exception applies, the statute of limitations will not run until the plaintiff is on inquiry notice of her claims. It is Frank's burden, however, to "demonstrate that the statute of limitations was, in fact, tolled."[46] Two circumstances that may give rise to tolling in this action are the doctrine of unknowable injuries, and the doctrine of fraudulent concealment.

Under the doctrine of inherently unknowable injuries, the statute is tolled if it would have been a practical impossibility to discover the existence of a cause of action.[47] "Plaintiffs must show that they were blamelessly ignorant of the act or omission and the

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45 *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 100, at *61 (June 29, 2005) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)).

46 *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *23 (citing *United States Cellular Inv. Co. v. Bell Atl. Mobile Sys.*, Inc., 677 A.2d 497, 504 (Del. 1996); *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 Del. Ch. LEXIS 140, at *46 (Nov. 21, 1995)).

47 *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *19 (citing *Ruger v. Funk*, 1996 Del. Super. LEXIS 34, at *7 (Jan. 22, 1996)).

injury."[48] "The statute of limitations then begins to run upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person on inquiry notice of such facts."[49] From March 4, 2003, when the letter opinion in *Whittington II* issued, until sometime thereafter, there is a colorable argument Defendants' breach was inherently unknowable. Whether that period is a matter of weeks or months or even longer depends on the facts. On the present record, however, it is not clear whether Frank was blamelessly ignorant, and, if so, for how long, in not knowing Defendants would continue to exclude him from Dragon Group at an appropriate level of interest.

The statute of limitations also will be tolled if a defendant fraudulently concealed facts necessary to put a plaintiff on notice of the truth. "Fraudulent concealment requires an affirmative act of concealment or some misrepresentation by a defendant that prevents a plaintiff from gaining knowledge of the facts."[50] On the summary judgment record

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48 *See id.* at *19-20. Plaintiffs may establish "blameless ignorance" by showing, for example, justifiable reliance on a professional or expert whom they have no ostensible reason to suspect of deception. *Id.* at *20 (citing *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 133-34 (Del. 1974)).

49 *Albert*, 2005 Del. Ch. LEXIS 100, at *61.

50 *Albert*, 2005 Del. Ch. LEXIS 100, at *62-63 (citing *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *21). "[T]he statute is suspended until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence." *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *21 (citing *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973)). "Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute [of limitations]." *Id.*

before me the facts as to what occurred in the weeks and months following March 4, 2003, are not well developed. In these circumstances, I consider it desirable to inquire more thoroughly into the facts to clarify whether tolling applies here and, if so, for how long. Thus, I conclude the tolling issue is not ripe for summary judgment.

3. Was Frank on inquiry notice of defendants' breach?

The statute of limitations "is tolled *only until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury."[51] Inquiry notice is sufficient to prove that the statute of limitations was not tolled for purposes of summary judgment, or that the doctrine of laches is applicable.[52] Inquiry notice exists when the plaintiff is "objectively aware of the facts giving rise to the wrong," and in the context of inherently unknowable injuries, when "persons of ordinary intelligence and prudence would have facts sufficient to place them on inquiry notice of an injury."[53]

Defendants contend Frank should have known of his exclusion when "he didn't receive any notice of any meetings in 2003, when he didn't receive a K-1, when he wasn't asked, like others, to loan capital to the entity, [and] when he wasn't asked to

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51 *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *23 (citing *In re ML-Lee Acq. Fund II, L.P. Litig.*, 848 F. Supp. 527, 554 (D. Del. 1994)).

52 *Kerns v. Dukes*, 2004 WL 766529, at *4 n.31 (Del. Ch. Apr. 2, 2004) (citing *In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *2 (Del. Ch. Dec. 20, 1999)).

53 *Dean Witter*, 1998 Del. Ch. LEXIS 133, at *23 & n.43 (citing *Seidel v. Lee*, 954 F. Supp. 810, 816 (D. Del. 1996) (applying Delaware law)).

participate in connection with the mortgage . . . ."[54] Defendants further contend Frank would have been aware of these events as a Whittington LTD shareholder.[55] Defendants failed to present significant evidence in support of their motion for summary judgment to enable this Court to determine what Frank objectively would have been aware of as to the events mentioned and, more importantly, exactly when he would or should have known it.

Therefore, drawing all inferences in favor of Frank, I find there are genuine issues of material fact as to whether Frank brought this action in such a dilatory manner he would be barred under the analogous statute of limitations.

D. Application of a Period Shorter than the Analogous Statute of Limitations

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."[56] As the court 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

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54 Tr. at 54-55.

55 *Id.* at 55.

56 *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)).

> a plaintiff who sits on its hands until near the end of the analogous limitations period.[57]

Here, Defendants contend Frank's request for a mandatory injunction is barred by laches, even if he delayed filing his Complaint for less than the analogous three year period of limitation.

The application of laches in the case of delay shorter than the applicable statute of limitations requires a finding of prejudice.[58] 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 because of intervening disappearance, illness, or death.[59] Prejudice can also be substantive, such as where a party suffers a financial detriment by relying on the plaintiffs' failure to seek relief in a timely manner.[60]

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[57] 870 A.2d 513, 527 (Del. Ch. 2005) (citing *CertainTeed*, 2005 WL 217032, at *6; *Carey v. Landy*, 1989 WL 44051, at *3 (Del. Ch. Apr. 27, 1989); *Wright v. Scotton*, 121 A. 69, 72 (Del. 1923)).

[58] *See Territory of U.S. V.I.*, 937 A.2d at 808 (citing *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000)).

[59] *See Steele v. Ratledge*, 2002 Del. Ch. LEXIS 118, at *10 (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); *Cooch v. Grier*, 59 A.2d 282, 287 (Del. Ch. 1948).

[60] *See Ratledge*, 2002 Del. Ch. LEXIS 118, at *10, 14 (defendants were substantively prejudiced by the cost of installing a fence and defending a lawsuit after they built a fence with plaintiff's knowledge, but without the plaintiff's timely objection); *McAllister v. Kallop*, 1995 Del. Ch. LEXIS 99, at *56 (Del. Ch. July 28, 1995) ("A party asserting laches must demonstrate a detrimental change

Defendants contend they have suffered both procedural and substantive prejudice as a result of Frank's delay. The procedural prejudice includes the current inability of Frank and other witnesses to remember pertinent facts. Defendants also argue they were substantively prejudiced by Frank's delay in bringing this action in that they assumed a substantial amount of risk relating to the money and time they invested in Dragon Group's real estate investments.[61] Frank disputes the nature and materiality of the alleged prejudice.

I find there is a genuine issue of material fact as to whether Defendants have been prejudiced. As a threshold matter, Frank is not the only one at fault for the delay in prosecuting this action; Defendants arguably also proceeded in a dilatory fashion after the court's *Whittington II* decision. As to Defendants' claim of procedural prejudice, they have not, for example, sufficiently demonstrated that material facts at issue in this litigation are now unavailable as a result of Frank's alleged delay.[62] Moreover, although Defendants' claim of substantive prejudice is colorable,[63] it, too, raises disputed issues of

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of position"); *Fike*, 752 A.2d at 114 (defendants could have avoided significant personal losses by ceasing to lend money to a joint venture).

61 *See* DOB at 12-13; Tr. at 13-14.

62 This Court can address Defendants' concerns that Frank may benefit in this action from his own memory lapses, when it evaluates how much weight to attach to his testimony.

63 *See Quill v. Malizia*, 2005 WL 578975, at *14 (Del. Ch. Mar. 4, 2005) (the court found "cognizable prejudice as a result of the delay of the resolution of [that] suit. [Plaintiff] used time as an option . . . leaving [defendant and his wife] with

material fact. Even assuming Defendants have expended significant capital and shouldered substantial risk to their detriment, disputed issues of fact remain as to whether they afforded Frank an adequate opportunity to participate in Dragon Group with an interest commensurate with that outlined in *Whittington I* and in *Whittington II*.

I therefore find there are genuine issues of material fact as to whether the Defendants have been procedurally or substantively prejudiced to a degree sufficient for a finding of laches in their favor.

III. CONCLUSION

For the reasons stated in this opinion, Defendants motion for summary judgment is denied.

IT IS SO ORDERED.

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downside risk and reserving to himself the right to leisurely present a claim of ownership . . . .").