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.,	)	Appeal No. 392, 2009
THOMAS D. WHITTINGTON, JR.,	)	
RICHARD WHITTINGTON,	)	
L. FAITH WHITTINGTON,	)	
DOROTHY W. MINOTTI,	)	
MARNA A. McDERMOTT,	)	
SARAH I. WHITTINGTON,	)	
RUTH A. WHITTINGTON,	)	
MATTHEW D. MINOTTI, and	)	
DOROTHY A. MINOTTI,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: December 18, 2009
Decided: February 15, 2010

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PARSONS, Vice Chancellor.

This case is the latest in a long-running dispute between a brother in the Whittington family and his siblings over ownership of a Delaware business. The Whittingtons have come to the Court of Chancery on several occasions asking the Court to resolve disputes between the siblings regarding their assets and those of their deceased ancestors. In the latest iteration of these disputes, I ruled that laches prevented the brother from pursuing his claim to an ownership interest in a business entity owned by his siblings. In holding that laches barred the brother from making his claim, I relied on my earlier decision that a three-year statute of limitations applied by analogy to the brother's claims. The brother appealed, and the Delaware Supreme Court determined that the analogous statute of limitations is twenty years instead of three. The Supreme Court, therefore, remanded the matter to this Court to reconsider its laches holding by applying a twenty-year statute of limitations for purposes of analogy.

After receiving additional briefing and hearing oral argument of the parties on remand, I submit this report to the Supreme Court with my findings of fact and conclusions of law on the laches issue. For the reasons stated in this Memorandum Opinion, I conclude that, when viewed in the context of a twenty-year limitations period, the evidence does not support barring the brother's claims for laches.

I. BACKGROUND

A. The Parties

Plaintiff, Frank C. Whittington, II ("Frank"), brought this action to force his siblings to recognize his alleged membership in Dragon Group, L.L.C. ("Dragon

Group"), a Delaware limited liability company.[1] Defendants include Frank's four siblings, each of whom are members of Dragon Group. These siblings are: Thomas D. Whittington, Jr. ("Tom"), Richard Whittington, L. Faith Whittington, and Dorothy W. Minotti (collectively, the "Sibling Defendants").[2] The remaining Defendants include other members of Dragon Group and other of Frank's relatives.

B. Facts and Procedural History

The factual and procedural history of this case is recited in *Whittington I* and summarized by the Delaware Supreme Court in its decision remanding the question of laches to this Court.[3] Therefore, I highlight only briefly the relevant portions of that history.

1. Facts

On June 14, 2001, Frank and a number of his siblings settled a prior dispute by entering into an Agreement in Principle (the "AIP"). As part of the AIP, Frank's share of stock in Whittington Ltd. ("Ltd."), another family-owned entity, would be carried forward into Dragon Group. Although Dragon Group existed at this point, Frank and his siblings could not agree to the terms of an operating agreement for the company. On September 23, 2002, Tom distributed an Offering Memorandum to all Ltd. members,

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1 *Whittington v. Dragon Gp. L.L.C. (Whittington I)*, 2009 WL 1743640, at *1 (Del. Ch. June 11, 2009), *rev'd*, 2009 WL 4894305 (Del. Dec. 18, 2009).

2 Unless otherwise noted, all background facts recited in this Opinion are drawn from *Whittington I* and are supported by the evidence cited therein.

3 *Whittington v. Dragon Gp. L.L.C. (Whittington Remand)*, 2009 WL 4894305, at *10 (Del. Dec. 18, 2009).

offering them a stake in Dragon Group and proposing terms for the operating agreement. To accept the offer, Ltd. members had to pledge all their Ltd. stock and return to Tom a signed copy of the Offering Memorandum by October 15, 2002. Frank complied with the Offering Memorandum's requirements, except that he increased his percentage share in the operating agreement portion of the Offering Memorandum to reflect the share to which he believed he was entitled.

In November 2002, Tom informed Frank's counsel that Dragon Group deemed Frank's changes to the operating agreement a counteroffer, which it rejected. Frank then filed a Motion for Order Compelling Defendants' Compliance with Court Order and Directing Performance by Substitute (the "2002 Motion"). Vice Chancellor Lamb denied the 2002 Motion in a Letter Opinion dated March 4, 2003 (the "March 2003 Opinion"). There, the Court ruled 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 interest."[4] Frank interpreted the quoted language to mean that he had an interest in Dragon Group and that it was at the increased level he had indicated. Defendants interpreted the Court's denial of the 2002 Motion to mean that they had prevailed and Frank had no interest in Dragon Group. Defendants thereafter refused to recognize Frank as a member of Dragon Group.

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[4] *Whittington v. Farm Corp.*, C.A. No. 17380, slip op. at 4–5 (Del. Ch. Mar. 4, 2003).

In May 2003, Frank became frustrated by Defendants' refusal to provide him with Dragon Group's financial information. Because of this and other disputes over various family-owned entities, Frank proposed that his siblings buy out his interests in all of those entities. The Sibling Defendants rejected Frank's proposed buy-out on July 7, 2003 and told Frank's counsel, Jay Katz, that they did not consider Frank a member of Dragon Group.

In August 2003, the Sibling Defendants held annual shareholders meetings for the various family-owned entities. Although Frank attended meetings for the other entities, his siblings excluded him from Dragon Group's annual meeting on the ground that he had no interest in Dragon Group.

In April 2004, Frank received a K-1 from Dragon Group. But, on April 14, 2004, Tom sent Frank a letter informing him that the K-1 was sent by accident. That letter explicitly stated that Frank was not a member of Dragon Group.

In late 2004, Dragon Group called on its members to make a capital contribution. In response, on January 12, 2005, Dragon Group received $36,152 from its members. Frank did not receive notice of the capital call and did not contribute.

In October 2005, during settlement negotiations between Frank and his siblings, Tom and Frank discussed a buy-out proposal whereby either party could buy out the other. In related correspondence with Frank, Tom acknowledged that Frank still asserted an interest in Dragon Group.

The parties never reached a settlement, and Frank eventually filed this action in the Court of Chancery.

2. Procedural history

Frank filed his Complaint in this action on July 20, 2006 against Dragon Group and the Sibling Defendants. On October 25, 2006, Frank moved for summary judgment, which I denied on May 8, 2007. On June 22, 2007, Frank amended his Complaint to add the remaining Defendants.[5] In February 2008, Defendants moved for summary judgment, which I denied in June 2008. One of the issues raised in the briefing on Defendants' motion for summary judgment was the analogous statute of limitations for purposes of a laches analysis.[6] In ruling on Defendants' motion, I held the analogous statute of limitations was three years, and not twenty years, as Frank had argued.[7] After ruling on that motion, I held a four-day trial from June 10 to 13, 2008 and heard post-trial argument on January 30, 2009.

In this litigation, Frank seeks three types of related relief. He requests that the Court (1) enforce Dragon Group's operating agreement and uphold Frank's 23.65% interest in it, (2) compel Dragon Group to disburse his proportionate share of its profits, and (3) provide an accounting of Dragon Group's profits to determine his share.

Defendants argued that either the statute of limitations or the doctrine of laches barred Frank from bringing his claim. They further contested Frank's claimed interest in

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5 In September 2007, Frank dismissed his claims against Defendant Marna C. Whittington without prejudice.

6 *Whittington v. Dragon Gp. L.L.C.*, C.A. No. 2291, slip op. at 11–13 (Del Ch. June 6, 2008).

7 *Id.* at 13.

Dragon Group and argued that if he had an interest, it was less than the 23.65% he claimed. Frank asserted that the doctrines of res judicata, collateral estoppel, and judicial estoppel barred Defendants' defenses.

I ruled on June 11, 2009 in *Whittington I* that the doctrine of laches barred Frank's claim. In doing so, I relied on my earlier decision that the analogous statute of limitations for his claim was three years. On appeal, Frank argued that his claim was based on a breach of a contract under seal and that the analogous statute of limitations, therefore, should be twenty years and not three. The Supreme Court agreed and remanded to this Court the issue of whether laches still bars Frank's claim in light of its holding that the analogous statute of limitations is twenty years.

C. Parties' Contentions

Frank urges the Court to find that laches does not bar his claim to ownership in Dragon Group. First, he argues that the Court should place great emphasis on the twenty-year statute of limitations and find that laches does not apply because Frank filed his claim with seventeen years to spare. Second, Frank argues that no extraordinary circumstances exist that would make it inequitable for the Court to allow his claim to proceed. Third, Frank dismisses as either self-inflicted or immaterial the prejudice claimed by Defendants. Fourth, he argues that this Court can fashion an equitable remedy that accounts for any failure on his part to share in Dragon Group's investment risks.

Defendants ask the Court to reaffirm its previous laches holding despite the significantly longer analogous statute of limitations because the holding in *Whittington I*

was not dependent on the three-year statute of limitations. Defendants further contend that because Frank's Complaint seeks specific performance, an extraordinary circumstance exists that justifies a finding of laches even though the analogous statute of limitations has not run. Finally, Defendants assert that they suffered prejudice as a result of Frank's delay in that they assumed additional risks while Frank waited to bring this suit.

II. ANALYSIS

A. Scope of Review

On Frank's appeal from *Whittington I*, the Delaware Supreme Court ruled that this Court applied the wrong analogous statute of limitations.[8] It therefore remanded "for reconsideration [the Court of Chancery's] laches holding by applying a twenty-year statue of limitations for purposes of analogy."[9]

Defendants assert that, on remand, this Court's scope of review is limited by the "law of the case" doctrine.[10] In particular, they argue that I cannot reconsider any findings or conclusions regarding my prior laches holding and that I am bound to consider only the change in the applicable statute of limitations. I disagree.

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8 *Whittington Remand*, 2009 WL 4894305, at *10.

9 *Id.*

10 Defs.' Opening Br. ("DOB") 13; Defs.' Reply Br. ("DRB") 3–5. On remand, Plaintiff also filed an opening and reply brief; they will be referred to as "POB" and "PRB," respectively.

The "law of the case" doctrine "is designed to prevent the relitigation of prior determinations and inconsistent judgments."[11] When an appellate court remands a case to the trial court, "the trial court must proceed in accordance with the mandate and the law of the case established on appeal."[12] "The trial court is required to implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces."[13] "While the mandate does not control a trial court as to matters not addressed on appeal, the trial court is bound to strictly comply with the appellate court's determination of any issues expressly or impliedly disposed of in its decision."[14] Generally, the trial court is "free to make any order or direction in further progress of the case" that is not inconsistent with, nor settled by, the appellate court's decision.[15] There are, however, exceptions to this rule. As the Delaware Supreme Court recently explained:

> The law of the case becomes applicable when the Court applies a legal principle to an issue based on facts that have stayed constant over the course of the litigation. Only upon a showing of the existence of newly discovered evidence, a change in the law, or a resulting manifest injustice should the

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11 *Fanean v. Rite Aid Corp. of Del., Inc.*, 2009 WL 4842461, at *3 (Del. Dec. 3, 2009).

12 *Motorola v. Amkor Tech., Inc.*, 958 A.2d 852, 860 (Del. 2008) (quoting *Ins. Corp. of Am. v. Barker*, 628 A.2d 38, 40 (Del. 1993)).

13 *Id.*

14 *Barker*, 628 A.2d at 40.

15 *Motorola*, 958 A.2d at 860 (quoting *Barker*, 628 A.2d at 40).

> Court reopen decisions that it has already adjudicated. Without such a showing, there can be no new consideration.[16]

According to Defendants, because the Supreme Court recited certain of this Court's factual findings in its Opinion, it implicitly disposed of those factual issues.[17] In support of their argument, Defendants cite *Chavin v. PNC Bank, Delaware*, in which this Court opined that it "probably" could not reconsider certain claims that the appellee previously advanced before the Supreme Court and which that court implicitly decided by ruling against the appellee and refusing to hear reargument.[18]

Defendants' reliance on *Chavin* is misplaced. Unlike the situation in *Chavin*, in this case the Supreme Court has not ruled either implicitly or explicitly on facts or conclusions of law regarding the appellant's (Frank's) claims. The Court only determined that the AIP is a contract under seal[19] and that the applicable statute of limitations for legal claims analogous to a claim for specific performance based on an alleged breach of the AIP is twenty years. Because it found the AIP to be a contract under seal, the Supreme Court directed this Court to reconsider its laches holding and report back its findings of fact and conclusions of law.[20] If all the findings of fact and

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16 *Fanean*, 2009 WL 4842461, at *3.

17 DRB 4.

18 830 A.2d 1220, 1221–22 (Del. Ch. 2003).

19 *Whittington Remand*, 2009 WL 4894305, at *10.

20 *Id.*

conclusions of law were unalterable, as Defendants contend, the Supreme Court's mandate to report anew those findings would make little sense.

Notwithstanding the foregoing, I do not accept Frank's invitation to review *de novo* the many factual issues he raised in his briefs on remand. Specifically, I decline to reconsider my previous findings that: Dragon Group's 2003 shareholders meeting took place in August rather than October;[21] Frank knew or should have known about his claim by July 15, 2003; and Katz told Frank in early July 2003 that the Sibling Defendants did not consider Frank a member of Dragon Group. To my mind, the change in the analogous statute of limitations provides no basis for altering any of those findings.

B. Standard for Laches

Laches is an equitable defense based on the maxim that "equity aids the vigilant, not those who slumber on their rights."[22] Although there are no hard and fast rules regarding laches, courts typically find laches in situations where a plaintiff unreasonably delays in bringing a lawsuit after learning that someone has infringed upon his rights,

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[21] I note, however, that whether the 2003 shareholders meeting occurred in October, as opposed to August, is immaterial to the pending question on remand based on the longer analogous statute of limitations and my prior holding that Frank knew or should have known about his claim by July 15, 2003.

[22] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citing 2 POMEROY'S EQUITY JURISPRUDENCE §§ 418, 419 (5th ed. 1941)); *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

thereby prejudicing the defendant.[23] The principal inquiry is whether it would be inequitable to permit the plaintiff's claim to be enforced.[24] Defendants seeking to invoke laches generally must prove that the claimant (1) knew of his claim, (2) unreasonably delayed in bringing his claim, and (3) injured or prejudiced the defendant by his unreasonable delay.[25]

1. Frank's knowledge of his claim

Defendants must show that Frank was on at least inquiry notice of his claim and thereafter unreasonably delayed filing that claim, thereby causing Defendants prejudice.[26] Inquiry notice exists when the plaintiff learns of "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of injury]."[27] Courts expect plaintiffs to act once they reasonably suspect that someone has violated their rights; therefore, the statute of limitations runs from the time a plaintiff should have known of his injury.[28]

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23 *Reid*, 970 A.2d at 182. *See also U.S. Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005).

24 *Reid*, 970 A.2d at 183.

25 *Id.* at 182–83; *Homestore*, 888 A.2d at 210.

26 *Quill v. Malizia*, 2005 WL 578975, at *14 (Del. Ch. Mar. 4, 2005).

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

28 *U.S. Cellular*, 677 A.2d at 504 n.7.

The Supreme Court's decision in the *Whittington Remand* did not disturb my finding in *Whittington I* that Frank knew about the alleged breach of the AIP by July 15, 2003. As I stated in that Opinion, even if Katz failed to advise Frank that Defendants did not consider Frank a member of Dragon Group, as Frank alleges, he reasonably should have inquired about why Defendants rejected the settlement offer Katz made on his behalf on July 7, 2003.[29] Had he made that inquiry, he would have learned Defendants did not consider him a member of Dragon Group. Therefore, Defendants have met their burden on this point.

2. Unreasonable delay

In determining whether a plaintiff unreasonably delayed in bringing his claim, an equity court acts "upon considerations of conscience, good faith, and reasonable diligence."[30] The primary inquiry is whether it would be inequitable to permit a claim because the plaintiff's "inexcusable delay [led] to an adverse change in the condition or relations of the property or the parties."[31] To determine whether delay is inexcusable, the court considers whether the plaintiff exercised "that degree of diligence which the situation . . . in fairness and justice require[s]."[32]

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29 *Whittington I*, 2009 WL 1743640, at *6.

30 *Reid*, 970 A.2d at 183.

31 *Id.* at 183.

32 *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922).

Although courts of equity are not bound by statutes of limitations, they still look to analogous statutes of limitations, if any, as evidence of what constitutes a reasonable delay.[33] In 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."[34] "Absent a tolling of the limitations period, a party's failure to file within the analogous period of limitation will be given *great weight* in deciding whether the claims are barred by laches."[35]

If defendants demonstrate that unusual or extraordinary circumstances exist which make it inequitable to give a plaintiff the full filing time provided in the analogous statute of limitations, an equity court may decide that equity and justice require a plaintiff to file suit more quickly.[36] As this court has stated previously:

> [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.[37]

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33 *Whittington Remand*, 2009 WL 4894305, at * 6.

34 *Reid*, 970 A.2d at 183; *see also O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *5 (Del. Ch. Aug. 14, 2009).

35 *Whittington Remand*, 2009 WL 4894305, at * 6 (emphasis added).

36 *Reid*, 970 A.2d at 183.

37 *Whittington I*, 2009 WL 1743640, at *9 (quoting *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005)).

a. The statute of limitations does impact this case

Defendants argue that the Supreme Court's holding that the analogous statute of limitations is twenty years does not impact any of my previous findings other than those relating to Frank's having filed his Complaint after the analogous statute of limitations had run. According to Defendants, none of my reasoning was tied to the three-year statute of limitations, and, therefore, nothing should change with the application of a twenty-year limitations period.

Contrary to Defendants' argument, this Court must give "great weight" to the fact that Frank filed his Complaint well within the twenty-year analogous statute of limitations.[38] I based my previous ruling, in part, on "the nature of the contract at issue."[39] At that time, I did not consider the contract at issue to be a contract under seal. In reconsidering my laches ruling on remand, I must analyze Frank's conduct in light of his having entered into a contract under seal with a twenty-year statute of limitations.

b. In light of the circumstances, Frank's delay was not unreasonable or inexcusable

When considered in the context of a twenty-year statute of limitations, Frank's delay was not unreasonable or inexcusable. Important factors for determining whether a delay is unreasonable or inexcusable include whether the plaintiff filed within the

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38 *See Whittington Remand*, 2009 WL 4894305, at *6.

39 *Whittington I*, 2009 WL 1743640, at *11.

analogous statute of limitations,[40] whether Defendants had notice of the plaintiff's intention to assert his rights,[41] whether the plaintiff acted reasonably under the circumstances,[42] and whether the delay is attributable solely to the plaintiff's conduct.[43]

Frank filed his claim with nearly seventeen years to spare under the analogous statute of limitations. Though this fact is not dispositive, Frank's relatively prompt filing supports his argument that he acted reasonably after he was put on notice of Defendants' intent to exclude him from Dragon Group.

Perhaps more telling are the actions Frank took during the time between learning of his claim and filing his Complaint. As noted earlier, Frank previously sued Defendants in this Court and received what he thought was a favorable ruling vindicating

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40 *Whittington Remand*, 2009 WL 4894305, at *6; *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

41 *See Reid*, 970 A.2d at 184 (in holding that plaintiff's delay was not unreasonable, the court noted that the defendants were on notice for years that the plaintiff "intended to pursue his rights vigorously"); *Steele v. Ratledge*, 2002 WL 31260990, at * 3 (Del. Ch. Sept. 20, 2002) (in barring plaintiff's claim to tear down a fence on his property, the court noted that the plaintiff failed to object to the defendant's action in building that fence until ten years after its construction); *Garber v. Whittaker*, 2 A.2d 85, 87–88 (Del. Ch. 1938) (in rejecting a laches defense where a plaintiff sued four years after the defendants allegedly breached a contract under seal, the court noted that the plaintiff made "repeated efforts" to settle the claim and that the defendants could not have been "lulled into a belief that the complainant considered the matter between them as closed").

42 *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922).

43 *See Adams v. Jankouskas*, 452 A.2d 148, 157–58 (Del. 1982) (rejecting a laches defense and noting that the defendant's failure to fulfill her statutory duty to put the plaintiff on notice that his rights were being challenged cut against a finding of laches).

his interest in Dragon Group. Though the March 2003 Opinion may have been subject to different interpretations, Frank's interpretation was reasonable. Instead of relying solely on the March 2003 Opinion and doing nothing for three years, however, Frank tried on several occasions thereafter, and even as late as October 2005, to assert his interest in Dragon Group by offering to sell to Defendants his interest in that entity, as well as other entities owned by the Whittington family. In fact, Tom acknowledged that Frank still claimed an interest in Dragon Group on October 17, 2005.[44] Therefore, this is not a case where Defendants had no notice of Plaintiff's claim during the period of delay.

As for whether Frank's conduct was reasonable under the circumstances, I find that it was. The March 2003 Opinion dealt with virtually the same issue that underlies the merits of this dispute. That Opinion arguably recognized the validity of the interest Frank claimed in Dragon Group; at a minimum, the Opinion left a cloud over both Frank's and Defendants' claims to an interest in the company. With twenty years to file under the analogous statute of limitations, Frank had no reason to rush back to court before exhausting the possibility of an out-of-court settlement with his siblings. Rather, he tried on several occasions between mid-2003 and late-2005 to settle the matter with Defendants and filed his claim only after those settlement negotiations failed. Had Frank decided to wait and do nothing for three years, Defendants' argument might be more persuasive, but that is not this case.

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[44] PX 69 at D1656.

Finally, I stand by my prior holding that Frank is solely responsible for his delay.[45] The relevant question, however, is: in light of the surrounding circumstances, including that fact, whether it would be inequitable to permit Frank's claim to be enforced. Given the uncertainties associated with the March 2003 Opinion and Defendants' response to it, the twenty-year statute of limitations, and Frank's attempts during the interim to settle with Defendants, I answer that question in the negative and do not find Frank's delay unreasonable.

c. Unusual or extraordinary circumstances

Defendants further assert that Frank's requested relief creates an unusual or extraordinary circumstance that makes it inequitable for the Court to allow Frank's claim to proceed. Defendants argue that because Frank essentially seeks a mandatory injunction, his petition automatically creates such a circumstance and requires him to act with greater alacrity.

Although "laches will typically arise earlier than the end of the limitations period when a plaintiff seeks . . . specific performance,"[46] that does not mean any particular delay in bringing a claim for specific performance necessarily will cause the claim to be barred by laches. In this case, Frank filed his claim three years and five days after he had notice of that claim. Given the twenty-year statute of limitations period, he did not file

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45 *Whittington I*, 2009 WL 1743640, at *12.

46 *Id.* at *9 (quoting *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005)).

his claim anywhere near the end of the limitations period. Thus, Frank's failure to file his claim sooner did not create an unusual or extraordinary circumstance or otherwise constitute an unreasonable delay.

Additionally, Defendants' own actions undermine their assertion that it would be inequitable to allow Frank's claim to proceed. In the wake of the March 2003 Opinion, Defendants steadfastly asserted that the Opinion meant Frank had no interest in Dragon Group, and they rejected Frank's arguments to the contrary. In my opinion, even if Defendants' position was reasonable, it was far from self-evident and involved some risk. Defendants, like Frank, could have reduced that risk by petitioning the Court for clarification, but they chose not to do so. While Defendants elected to ignore Frank's competing claim, they cannot avoid the risks associated with their choice, especially when Frank had the benefit of an analogous twenty-year statute of limitations.

3. Prejudice

To succeed in asserting a laches defense, Defendants also must prove that the plaintiff's "inexcusable delay [led] to an adverse change in the condition or relations of the property or the parties."[47]

Defendants aver that Frank's delay caused them material prejudice because between July 2003 and July 2006, Defendants undertook investment risks that Frank did not. Specifically, Defendants contend that (1) they exposed themselves to the risk that Dragon Group would fail, (2) Dragon Group took on additional risk when it mortgaged

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[47] *Reid v. Spazio*, 970 A.2d at 183.

its assets, and (3) they contributed money to Dragon Group when Frank did not, increasing their risk exposure if Dragon Group failed.[48] In support of their position, Defendants rely on *Quill v. Malizia*, in which the court found prejudice where the defendants bore the economic risks of real property during the time that the plaintiff waited to assert his claim in that property.[49] The court in *Quill* found that, in addition to creating certain evidentiary difficulties, the plaintiff's delay prejudiced the defendants by clouding the defendants' title to the property in question during the interim, thereby making it difficult for them to dispose of the property.[50]

The alleged prejudice to Defendants here pales in comparison to the prejudice in *Quill*, especially when viewed in the context of a twenty-year statute of limitations. As explained in *Whittington I*, Defendants did suffer some prejudice,[51] but their own conduct contributed to that prejudice. With regard to Defendants' Ltd. stock being at risk in Dragon Group, Frank's Ltd. stock would have been subjected to the same risks had Defendants not rejected his proffered pledge of his stock and continual attempts to participate in Dragon Group.

Defendants arguably experienced some additional prejudice when Dragon Group took a $4 million loan from Ltd. The degree of prejudice must be evaluated, however, in

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48 DOB 17–18.

49 2005 WL 578975, at *14 (Del. Ch. Mar. 4, 2005).

50 *Id.*

51 *Whittington I*, 2009 WL 1743640, at *13.

the circumstances of that transaction. Because the shareholders of Dragon Group and Ltd. were essentially the same,[52] the only risk Defendants incurred was the possibility that they would foreclose on themselves if Dragon Group defaulted on the mortgage. Consequently, I do not assign much weight to this purported prejudice.

Defendants also complain that Frank, unlike Defendants, did not participate in Dragon Group's capital call in early 2005. Yet, Defendants did not inform Frank of this capital call and never invited him to participate in it. Although there is some prejudice to Defendants in that they put more money at risk if Dragon Group failed, they chose to deny Frank's asserted interest and rely, instead, on their own interpretation of the March 2003 Opinion. Moreover, the amount of the capital contribution was fairly marginal in terms of the expected value of the Dragon Group investment. In these circumstances, I conclude Defendants have not shown that the nature and degree of any prejudice they endured as a result of Frank's delay in filing this action was sufficient to render that delay either unreasonable or inexcusable.[53]

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[52] If I exclude Frank, the shareholders in Dragon Group and Ltd. apparently would be identical.

[53] Frank also contends that even if Defendants experienced prejudice, his conduct did not cause that prejudice. POB 18–19. Asserting that the only prejudice I should consider is the prejudice caused by his delay, Frank argues that his failure to put his Ltd. stock at risk did not cause Defendants to put their stock at risk. Likewise, Frank avers that his failure to tender any money during Dragon Group's capital call did not cause Defendants to tender their money. Having determined that Defendants have failed to prove laches for the reasons previously discussed, however, I need not address Frank's causation argument.

In sum, even if Frank's delay did cause Defendants some prejudice, I find that laches does not bar his claim. Considering the totality of the circumstances, and in light of the twenty-year analogous statute of limitations, Frank's delay was not inexcusable. While Frank waited three years to file, he did not mislead Defendants to think he would not assert his rights. Frank repeatedly communicated with Defendants or their representatives, asserting his claim that he was a member of Dragon Group and attempting to settle the matter through negotiation. When these efforts failed, Frank brought suit nearly seventeen years before the analogous limitations period would have expired. Therefore, I hold that the equities favor Frank and laches will not bar him from seeking relief through litigation.

III. CONCLUSION

Consistent with the Supreme Court's remand, I have reconsidered my laches holding in *Whittington I* by applying a twenty-year statute of limitations for purposes of analogy, instead of the three-year analogous limitations period I previously applied. For the reasons stated in this Memorandum Opinion, I find that Defendants have not met their burden of showing that Frank unreasonably delayed in filing his claim for breach of the AIP. Defendants also have not shown extraordinary or unusual circumstances that would make it inequitable for this Court to allow Frank to continue pursuing his interest in Dragon Group. Therefore, I report to the Supreme Court that, after reconsideration on remand, I conclude that Frank's claims are not time-barred under the doctrine of laches.