COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

December 23, 2010

Chad M. Shandler, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19899-0551

Jason C. Powell, Esquire
Ferry, Joseph & Pearce, P.A.
824 North Market Street, Suite 1000
P.O. Box 1351
Wilmington, DE 19899-1351

David A. Jenkins, Esquire
Smith Katzenstein & Furlow LLP
800 Delaware Avenue
P.O. Box 410
Wilmington, DE 19899-0410

Mark D. Olson, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2305
Wilmington, DE 19801

Grover C. Brown, Esquire
Gordon Fournaris & Mammarella, P.A.
1925 Lovering Avenue
Wilmington, DE 19806

Collins J. Seitz, Jr., Esquire
Connolly Bove Lodge & Hutz, LLP
1007 North Orange Street
P.O. Box 2207
Wilmington, DE 19899-2207

David E. Ross, Esquire
Connolly Bove Lodge & Hutz, LLP
1007 North Orange Street
Wilmington, DE 19801

Michael A. Weidinger, Esquire
Pinckney, Harris & Weidinger, LLC
1220 N. Market Street, Suite 920
Wilmington, DE 19801

Re: In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore dated April 14, 1972
C.A. No. 1165-VCN
Date Submitted: September 20, 2010

Dear Counsel:

Respondent Jan C. Otto ("Jan C.") seeks leave to amend his answer in order to assert claims against his former wife, Petitioner Susan W. Gore ("Susan"), and their three children, Respondents Jan P. Otto, Joel C. Otto, and Nathan C. Otto (the "Otto Grandchildren"). This action arises out of Susan's adoption of Jan C. in an effort to obtain a larger (and, in her view, a more equitable) share of the Pokeberry Trust for their children.[1] With his proposed amendment, Jan C. would invoke the doctrines of specific performance and unjust enrichment in support of his quest to benefit financially because of the assistance he provided his children and his former wife by agreeing to the adoption.

[1] The factual background necessary to an understanding of the present dispute may be found in the Court's memorandum opinion following trial of a distinct component of this litigation. *In the Matter of the Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, dated April 14, 1972*, 2010 WL 3565489 (Del. Ch. Sept. 1, 2010). The motion to amend was filed before that decision but held in abeyance pending the outcome.

* * *

Amendments to pleadings are governed by Court of Chancery Rule 15 which guides the Court's exercise of discretion with the admonition that leave to amend "shall be freely given when justice so requires." Susan and the Otto Grandchildren contend that the proposed amendments would be futile and, thus, the motion to amend should be denied.[2] First, they argue that there is no viable claim to a remedy of specific performance. Second, the Otto Grandchildren assert that the proposed amendment does not allege a cause of action for unjust enrichment. Third, Susan and the Otto Grandchildren contend that the proposed amendment should be barred by the applicable statute of limitations or the doctrine of laches. The Court assesses the futility of Jan C.'s new claims by a review of his proposed pleadings.[3]

---

[2] *See, e.g.*, *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006) ("[L]eave to amend should not be granted where it appears with a reasonable certainty that the plaintiff would not be entitled to the relief sought under any reasonable set of facts properly supported by the complaint, because such amendments would be futile."). In essence, the Court is called upon to perform an analysis comparable to that presented by a motion to dismiss under Court of Chancery Rule 12(b)(6). *See FS Parallel Fund LP v. Ergen*, 2004 WL 3048751, at *2 (Del. Ch. Nov. 3, 2004), *aff'd*, 879 A.2d 602 (Del. 2005).

[3] Susan and the Otto Grandchildren invoke the Court's findings of fact following trial. Although those findings may be read to suggest that Jan C. will encounter serious obstacles in prosecuting these claims, the Court made its findings in a different context. Jan C. had been seeking, prior to the limited trial, a direct interest as a beneficiary of the Pokeberry Trust. Now, his claims relate to his efforts to assist his children. It may be that the Court will eventually conclude that the earlier findings provide a basis for rejecting the claims that Jan C. now sponsors, but that conclusion should not be reached (if it is to be reached at all) in a context equivalent to a motion to dismiss.

* * *

To obtain the remedy of specific performance, a party must show, by clear and convincing evidence, "(1) that a valid and specifically enforceable contract exists between the parties; (2) that the party seeking specific performance was ready, willing, and able to perform under the terms of the contract; and (3) that the balance of the equities favors an order of specific performance."[4] Those elements are alleged in the proposed amendment.[5] Thus, the effort to obtain specific performance is not necessarily futile.

* * *

The Otto Grandchildren contend that Jan C.'s allegations simply do not demonstrate an entitlement to relief under the doctrine of unjust enrichment. A plaintiff pursuing a claim for unjust enrichment must show: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the

[4] *Zambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007).
[5] Based on the evidence at trial, including, for example, Jan C.'s denial that there was a contract relating to his acquiescence in adoption by which he would be entitled to compensation, proof of an enforceable contract may prove a challenge. Similarly, a balancing of the equities ultimately may not favor an award of specific performance in light of the Court's findings with respect to Jan C.'s general entitlement to equitable relief under the clean hands doctrine but a motion to amend does not provide the appropriate platform for making that fact-specific inquiry required to assess competing equitable factors.

absence of justification; and (5) the absence of a remedy provided by law.[6] The question posed by the opposition to the motion to amend is not a question of how much compensation Jan C. might be entitled to, but instead a question of whether he is entitled to any compensation. If one accepts the allegations of the proposed amendment, Jan C. incurred costs that resulted (or may have resulted) in a substantial benefit to the Otto Grandchildren. Thus, the Court may not conclude that there is no set of facts that would support a claim for some recovery under the doctrine of unjust enrichment. Accordingly, the claim for unjust enrichment may not be labeled futile for purposes of the pending motion.[7]

* * *

Susan and the Otto Grandchildren assert that Jan C.'s claims are barred by the statute of limitations and to some extent suggest that they may also be defeated by the time bar conferred through the doctrine of laches.

The applicable statute of limitations would be 10 *Del. C.* § 8106. Equity will borrow this three-year statute of limitations with respect to claims that are

---

[6] *Cantor Fitzgerald, LP v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998).

[7] Whether Jan C. would be entitled to any remuneration beyond that suggested at the conclusion of the Court's post-trial memorandum opinion, 2010 WL 356489 at *5 n.74, is a question that does not require an answer at this point.

comparable to those raised in actions at law. Here, the promise or contract that Jan C. seeks to enforce was formed, if at all, and most of the conduct giving rise to his unjust enrichment claim occurred, in 2003. No effort to enforce whatever rights he may have had under those theories began until early 2010. It may well be that a statute of limitations defense would prevail here, but that cannot be determined in the context of this motion to amend. The benefits of this contract, if there is a contract, would not, because of the circumstances surrounding this trust dispute, have been obtained in a short period of time. Instead, it was understood (or should have been understood) by all that it would take some time to work through this complicated family matter. Thus, that Jan C. did not receive an immediate benefit would not have put him on notice of a need to act in order to protect his interests. There is at least an arguable interpretation of the facts that he was not on notice until the second half of 2007 when Susan and the Otto Grandchildren took the position that he was not entitled to anything by virtue of his adoption by Susan. If so, Jan C.'s motion, filed in March 2010, may have been timely. Accordingly, the Court cannot, at this stage, conclude that the statute of limitations renders his claims futile.

The time bar defense of laches requires that the party asserting that affirmative defense show that the claimant waited an unreasonably long time in bringing his complaint and that the moving party suffered prejudice as a result of the delay.[8] Here, based only on the allegations of the proposed amendment, it cannot be said that Jan C. waited too long. Similarly, there is not a sufficient record to demonstrate that Susan or the Otto Grandchildren were somehow prejudiced by this delay. Accordingly, although laches may subsequently become a formidable defense against Jan C.'s claims, denial of the motion to amend may not now be premised upon that doctrine.[9]

---

[8] *See Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009); *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002).

[9] Susan and the Otto Grandchildren also argue that Jan C.'s proposed amendment comes too late and that they are prejudiced by its timing. They speculate, not without some basis, that introducing these new claims would require additional discovery and delay further resolution of these proceedings. The liberal policy favoring amendments may yield to concerns that allowing an amendment would cause undue prejudice or undue delay. *See, e.g.*, *Tomczak v. Morton Thiokol, Inc.*, 1985 WL 21142, at *1 (Del. Ch. Oct. 5, 1985) (citing *Foman v. Davis*, 371 U.S. 178 (1962). Here, however, much, if not all, of the discovery necessary for the new claims has already been undertaken. Moreover, the claims which Jan C. now seeks to assert are, in many ways, the foreseeable result of the decision by Susan and the Otto Grandchildren not to support his claim to being an heir with an enforceable right as to the Pokeberry Trust. For these reasons and the reasons impeding denial on grounds of laches, the risk of prejudice or delay here does not rise to a level which may sustain denial of the motion. This matter has proceeded in fits and starts, in part, because of efforts to find a way out of the Pokeberry thicket. The Court cannot conclude that Jan C. engaged in undue delay or caused undue prejudice by waiting to see if alternatives could bring this dispute to a conclusion.

* * *

Accordingly, for the foregoing reasons, Jan C. Otto's motion to amend his answer is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K