IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
THE ESTATE OF	)	C. A. No. 7430-MZ
PAULINA du PONT DEAN	)	

MASTER'S REPORT
(Motion to Dismiss)

Date Submitted: November 29, 2016
Draft Report: February 15, 2017
Submitted (Briefing on Exceptions): April 25, 2017
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ZURN, Master

When then-Master LeGrow wrote about this case in 2014, she began: "Two children of an elderly, wealthy woman are engaged in what threatens to be only the opening act in a legal drama that may yet unfold between them."[1] The curtain has risen on the second act, and the first plot twist asks how procedural rules should govern this ancient grudge broken to new mutiny.[2]

The protagonists are two brothers, one of whom holds power of attorney for their incapacitated mother. In the first act, the brothers battled over the extent to which their mother should reimburse her grandchildren's educational expenses, and the attorney-in-fact filed a petition for instructions. His brother counterclaimed, alleging the attorney-in-fact misappropriated their mother's funds and asking for an accounting and repayment. The educational expense issue and the request for an accounting went to trial, and the Court ordered an accounting with the explicit expectation that it would inspire or support further litigation over the attorney-in-fact's actions. And indeed, with the benefit of the accounting, the suspecting brother renewed his misappropriation claims in more detail by filing his own petition in this case in 2016.

The second act opens with the brothers disagreeing as to the nature of that 2016 petition. The attorney-in-fact moved to dismiss, asserting the 2016 petition

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[1] *In re Estate of Paulina duPont Dean*, 2014 WL 3221222, at *1 (Del. Ch. June 30, 2014).
[2] *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET, Prologue.

started a new action and should be dismissed as untimely and violative of the doctrine against claim splitting. The petitioner characterizes the 2016 petition as a second phase of the case that originated in 2012, so the clock did not restart on his claims and they are not split between two actions.

I recommend denying the motion to dismiss. This case has been building to a determination of the attorney-in-fact's liability since 2012. All understood that this case would proceed to that determination upon receipt of the accounting: the Master made that clear in her report recommending the accounting. If this case were to end now, after intermission, the first act will have been a waste of time and resources, without any resolution as to the attorney-in-fact's actions. An accounting that is not followed by an opportunity to remedy alleged bad acts it reflects is useless. While the unusual posture of this case grates against some of this Court's procedural rules, this case's history and this Court's preference for adjudicating cases on the merits lead me to conclude that the motion to dismiss should be denied. This is my final report.

I. **Background**[3]

William Kemble Ketcham ("Kem") and J.S. Dean Ketcham ("Dean") are the sons of Paulina du Pont Dean ("Paulina").[4] Paulina's will names both sons as the beneficiaries of her residuary estate. Paulina named Kem her attorney-in-fact via a durable power of attorney executed October 26, 2004. Paulina resides in Tortola, BVI, where Kem has several business interests. In the late 1990s, Paulina opened two accounts at Banco Popular in Tortola: an account ending in '919 ("the 919 Account") and an account ending in '955 ("the 955 Account"). The 955 Account paid Paulina's expenses, while Kem used the 919 Account as a "holding account" to hold larger balances, pay more significant expenses, and fund investments. Paulina was declared incompetent in 2009. Kem's use of the 919 Account is at the heart of this case.

"In 2008, if not before, Dean began raising questions about his mother's financial affairs."[5] Dean obtained Paulina's written permission to receive information about the 919 Account and one of Kem's Tortola businesses, Tortola Home, LLC ("THL"). Dean learned from that review and from Kem that the 919

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[3] Unless otherwise noted, these facts are drawn from then-Master LeGrow's detailed post-trial final report. *In re Estate of Paulina duPont Dean*, 2014 WL 3221222 (Del. Ch. June 30, 2014). While Kem took exception to her recommendations, the final report's factual background was not disputed or disturbed. *See In re Estate of Paulina duPont Dean*, 2014 WL 4628584 (Del. Ch. Sept. 17, 2014).

[4] I keep the tradition in this case of using the parties' first names in pursuit of clarity. I intend no disrespect.

[5] *Dean*, 2014 WL 3221222 at *2.

Account had been reimbursing Kem's children's educational expenses. Dean's children's educational expenses had been reimbursed until 2001 or 2002, when Dean moved to Maine and began paying his family's expenses himself. In 2010, when Dean learned Kem had continued to receive reimbursement, Dean decided he too should seek reimbursement. Paulina was by then incapacitated, and Kem, as Paulina's attorney-in-fact, refused to reimburse Dean's children's educational expenses. The brothers conferred for several months, but on April 16, 2012, Kem began this civil action by filing a petition for instructions regarding reimbursement of Dean's children's educational expenses ("Kem's 2012 Petition").

Dean filed an answer on May 7, 2012. Dean also counterclaimed ("Dean's 2012 Counterclaim"), alleging that Kem had improperly transferred Paulina's funds for Kem's and Kem's family's benefit and committed other breaches of fiduciary duty.[6] Dean pled that in 2010, he noticed Kem had transferred approximately $500,000 from Paulina to Kem, and that when Dean asked about it, Kem responded that the transfers were for tuition reimbursement.[7] Dean pled, "By making transfers from Mrs. Dean's account(s) to or for his own benefit, upon information and belief, Kem has breached the fiduciary duties he owes to Mrs. Dean and to Dean."[8] Dean pled that Kem improperly kept rental income from a

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[6] *Dean*, 2014 WL 4628584 at *1 (citing Dean's 2012 Countercl. ¶¶ 14-17).
[7] Dean's 2012 Countercl. ¶ 10.
[8] *Id.* ¶ 14.

home Paulina owned through a limited liability company.[9] Dean requested that Kem reimburse "any and all amounts paid to or received by Kem in breach of his statutory, contractual and/or fiduciary obligations."[10] He asked the Court to "compel Kem to account for and repay any amounts he has improperly transferred."[11] Kem replied to Dean's 2012 Counterclaim on May 22, 2012, denying Dean's allegations that Kem had breached his fiduciary duties to Paulina. Kem did not plead any affirmative defenses.

The parties engaged in discovery, including on Kem's use of the 919 Account. Dean requested a forensic reporting on Paulina's THL investment, and on August 10, 2012, Frank D. Morris of Morris Accounting & Consulting LLC issued a report titled "Analysis of Paulina duPont Dean's Investment in Tortola Home Limited" (the "THL Report").[12] Kem answered deposition questions regarding THL, including about the THL Report and loans from Paulina and Kem to THL and another entity called Loblolly.[13] Kem also answered questions about the ownership and distribution of proceeds from the sale of a company called Tortola Concrete Limited.[14]

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[9] *Id.* at ¶¶ 16-17.
[10] *Id.* at ¶ 4.
[11] *Id.* at ¶ 19; *id.*, Wherefore Clause, ¶ 3.
[12] Transmittal Aff. of Courtney Emerson ("Emerson Aff.") Ex. E, THL Report.
[13] Emerson Aff. Ex. G, Deposition of William Kemble Ketcham ("Kem Dep.") 65:15-72:24, 77:3-80:24.
[14] *Id.* at 46:2-48:24.

Then-Master LeGrow held a trial in May 2013. The pretrial stipulation mentioned repayment by Kem but Dean did not present any breach of fiduciary duty claim for the Master's consideration.[15] In post-trial briefing, Dean asserted Kem had breached his fiduciary duties and that Kem should repay Paulina over one million dollars.[16] Kem objected to the timing of Dean's assertions.[17] At post-trial argument, Dean and the Master agreed the Court could not address Kem's alleged breaches of fiduciary duty before an accounting was performed.[18]

In the post-trial final report dated June 30, 2014, then-Master LeGrow noted that "although the post-trial briefing foreshadow[ed] many other disputes that may arise," at that time she needed only to determine "(1) whether Kem is required to account for his transactions on behalf of Paulina and, if so, the appropriate period for such accounting, and (2) the extent to which Dean is entitled to reimbursement from Paulina's estate for Dean's children's educational expenses."[19] As to the former, she concluded Kem should provide a forensic accounting as of the date of the durable power of attorney. She also concluded Dean was entitled to the reimbursement he sought for his children's educational expenses, and that Kem

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[15] Pretrial Stipulation ¶¶ (3)(B)(7),(8); (4)(B)(3).
[16] Emerson Aff. Ex. I, Dean Post Tr. Op. Br. 17-22, 27.
[17] Kem Post Tr. Reply Br. 14.
[18] Emerson Aff. Ex. J, Post Tr. Hr'g Tr. 69:2-71:19.
[19] *Dean*, 2014 WL 3221222 at *4.

was entitled to pay his attorneys' fees from Paulina's estate subject to Dean's right to seek to recoup those funds for the estate in a later proceeding.

Kem took exception to the Master's final report on the grounds that the Master erred in finding the power of attorney (and therefore the duty to account) became effective shortly after it was executed, and in awarding reimbursement of Dean's children's educational expenses.[20] Vice Chancellor Glasscock affirmed the accounting portion of the Master's report.[21] Then-Master LeGrow entered a Judgment Order on June 5, 2015, ordering a forensic accounting of all transactions conducted by Kem on Paulina's behalf as her attorney-in-fact from October 26, 2004, to the present.

The forensic accounting was issued on December 4, 2015. On February 3, 2016, Dean filed a Verified Petition for Breach of Statutory and Fiduciary Duties and to Remove and Replace Attorney-In-Fact ("Dean's 2016 Petition") in this action. Therein, Dean alleges Kem commingled his funds with Paulina's, used her funds for his own expenses and projects, and lent her money to his business entities without appropriate documentation or security. He alleges several specific

[20] *Dean*, 2014 WL 4628584 at *1.
[21] *Id.* at *1-2. Vice Chancellor Glasscock went on to note that Paulina was incapacitated while her sons litigated partially on her behalf, but also in their own interests as they would share equally under her estate plan upon her death. *Id.* at *3. Vice Chancellor Glasscock remanded the matter to the Master to appoint an attorney *ad litem* to investigate and advocate for Paulina regarding the educational expense issue. Vice Chancellor Slights was appointed (while in private practice) and in April 2015 he recommended the Court adopt the Master's final report with respect to the reimbursement issue.

transactions in the forensic accounting are suspect, including funding Loblolly and THL and the distribution from the sale of Tortola Concrete. Dean also alleges Kem transferred ownership and control of the company that owned Paulina's house to himself, kept the rental income, and used Paulina's funds to pay for landscaping not only for the company-owned properties, but also for Kem's personal residence down the street. Dean's Count I claims a breach of fiduciary duty, and Count II claims a breach of the Durable Personal Powers of Attorney Act ("DPPOA"). Dean requests damages, revocation of Kem's status as Paulina's attorney-in-fact and Dean's appointment to that role, and a constructive trust over misappropriated property.

Kem moved to dismiss on March 2, 2016 ("Kem's Motion") on the grounds that Dean's 2016 Petition started a new action and was therefore untimely and violated the rule against claim splitting. Dean responded to Kem's Motion and did not amend Dean's 2016 Petition; Kem replied. In keeping with Vice Chancellor Glasscock's prior directive, I requested the parties select another attorney *ad litem* to represent Paulina (since Vice Chancellor Slights had joined the Court in the meantime). They selected David White, Esquire, who requested time to confer with the parties. I granted his request, and upon receiving Mr. White's supplemental report requesting a hearing on Kem's Motion, held that hearing on November 29, 2016.

I submitted a draft report on February 15, 2017, recommending denial of Kem's Motion. Kem took exception, and the parties briefed Kem's exceptions. This is my final report.

II. Analysis

When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court "should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[22] This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[23] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[24]

A. *Dean's 2016 claims effectively amended his 2012 counterclaims, and Kem may amend his reply to Dean's 2012 counterclaims.*

Kem claims Dean's claims for breach of fiduciary duty and breach of the DPPOA are untimely under a three-year limitations period. Kem dates Dean's

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[22] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).
[23] *Id.* at 537, 537 n.13.
[24] *Id.* at 536.

claims as of February 3, 2016, the date of Dean's 2016 Petition. Kem asserts that because the 919 Account transactions underlying Dean's claims occurred more than three years before February 3, 2016, Dean was required to plead a tolling exception for his claims to survive. Kem contends Dean did not and could not have done so because Dean had inquiry notice of his claims about the 919 Account in the mid-2000s or 2008 at the latest, as evidenced by Dean's 2012 Counterclaim and related discovery.

Dean responds that his claims arose when he received 919 Account documentation in the second half of 2009, so Dean's 2012 Counterclaim brought within three years thereafter is timely. Dean argues he could not have fully litigated his breach of fiduciary claim against Kem before the forensic accounting was ordered and completed, and that then-Master LeGrow ruled as much in her post-trial final report. Dean also contends that because Kem did not plead laches in reply to Dean's 2012 Counterclaim, Kem waived that affirmative defense and cannot assert it against Dean's 2016 Petition.[25] Dean asserts Kem cannot show any prejudice, as Kem alone had access to and information about the accounts, and

[25] In his post-trial brief, Kem asserted Dean's request for an accounting and Dean's post-trial claim that Kem was liable for a THL transaction were untimely. Dean moved to strike this portion of Kem's brief because Kem did not raise laches or the statute of limitations as affirmative defenses to Dean's 2012 Counterclaim. In response to the motion to strike and at argument, Kem's counsel contended the laches argument was limited to Dean's effort to seek monetary damages for Kem's alleged breach of his fiduciary duties as Paulina's agent. Then-Master LeGrow concluded the motion to strike should be denied because Kem withdrew his timeliness defense to the accounting request. *Dean*, 2014 WL 3221222 at *6 n.47.

because Kem's legal expenses have been borne by Paulina. In reply, Kem asserts the timing of Dean's 2016 Petition prejudiced Kem "as a matter of law."[26]

> A court considering timeliness as a basis for a motion to dismiss must draw the same plaintiff-friendly inferences required in a Rule 12(b)(6) analysis. This plaintiff-friendly stance does not govern the assertion of tolling exceptions to the operation of a statute of limitations (or the running of the analogous period for purposes of a laches analysis), however. A plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception.[27]

I find the first step in resolving the issues before me is to properly characterize Dean's 2016 Petition so it may be evaluated under the right standard.[28] Dean pled a breach of fiduciary duty counterclaim in 2012, along with his request for an accounting. Since then, Dean has consistently alleged Kem breached his fiduciary duties and asked this Court to require him to repay misappropriated funds to Paulina. Dean took discovery on some of Kem's transfers that he would later feature in Dean's 2016 Petition, and received a preliminary report on THL's finances.[29]

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[26] *See In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013) ("After the statute of limitations has run, defendants are entitled to repose and are exposed to prejudice as a matter of law by a suit by a late-filing plaintiff who had a fair opportunity to file within the limitations period.").

[27] *State ex rel. Brady v. Pettinaro Enterprises*, 870 A.2d 513, 524-25 (Del. Ch. 2005).

[28] The parties sparred over whether Dean's 2016 Petition should have been filed in a new Civil Action and filed letters, but not motions, debating whether the filing should remain on the docket. I attach no significance to the manner in which Dean's Petition was filed.

[29] *See supra* nn. 12-14.

The Court reviewed this record and concluded the accounting Dean sought was a necessary precursor to determining Kem's potential liability. After trial on the accounting issue, then-Master LeGrow said succinctly that the fiduciary duty issue "will be determined at another time and on a more complete record."[30] She repeatedly found it was premature to assess Dean's breach of fiduciary duty claim without the benefit of the accounting, and that the accounting would set the stage for this second act.[31] She noted the record was incomplete: "Some documents indicate Paulina 'invested' at least $3 million in THL between 2003 and 2008. The nature of those investments is not clear."[32] She also described the discovery and records that Kem provided to Dean, and noted they did not "amount to a proper accounting," did not cover the entire time period, and either did not identify the purpose of transfers out of the accounts or offered inconsistent explanations.[33] In addressing who should bear fees relating to Dean's request for an accounting, she

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[30] *Dean*, 2014 WL 3221222 at *10.

[31] *Id.* at *1 (noting "the specter of looming disputes regarding transactions the attorney-in-fact conducted on his mother's behalf"); *id.* at *4 ("There presently are two primary disputes between the parties, although the post-trial briefing foreshadows many other disputes that may arise, depending in part on how these disputes are resolved."); *id.* at *6 (referring to Dean potentially using one of Kem's submissions "in later proceedings"); *id.* at *7 (referring to "the parties' continued disputes regarding Kem's actions under a Power of Attorney"); *id.* (shifting the accounting's cost to Paulina's estate "without prejudice to a later request to shift the costs in the event Dean successfully challenges Kem's conduct as Paulina's attorney-in-fact"); *id.* at *9 ("If Dean ultimately pursues claims against Kem arising from transactions covered by the accounting, Dean may argue at that time that Kem should reimburse the estate for legal expenses.").

[32] *Id.* at *2.

[33] *Id.* at *6; *see also id.* at *2 (noting Kem's testimony about THL's role in paying Paulina's expenses was inconsistent with his post-trial affidavit).

noted, "At this point, the record is not sufficiently developed for the Court to determine whether Kem should reimburse the estate for his attorneys' fees associated with this portion of the proceeding."[34] The Master went on:

> None of this is intended to conclude that Kem misappropriated or mishandled Paulina's funds. Although Dean's post-trial briefs repeatedly strayed into arguments about whether Kem had acted in accordance with his fiduciary duties as Paulina's agent, at argument counsel conceded that the only thing before the Court at this time is whether Kem is required to account for the transactions he undertook on Paulina's behalf. Although Dean may elect to challenge certain transactions in either a separate action or a later iteration of this case, any such challenge is premature before an accounting is performed.[35]

Neither party took exception to these many conclusions that the state of the record compelled deferring Dean's breach of fiduciary duty claim until after the accounting, essentially bifurcating the case. Even assuming the Master's comments are only factual findings, and not a ruling on bifurcation, the parties are deemed to have consented to them.[36] I, too, am bound by the Master's conclusions.[37]

Dean has persistently alleged Kem breached fiduciary duties and misappropriated Paulina's funds since his 2012 Counterclaim. The Court concluded those allegations would be tested with the benefit of the accounting in a

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[34] *Id.* at *9.
[35] *Id.* at *7.
[36] *See DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).
[37] *See Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sept. 23, 1994) ("Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.").

second stage of the case. Accordingly, Dean clarified and expanded upon his 2012 Counterclaim allegations in his 2016 Petition. Even though Dean filed a new petition instead of requesting leave to amend his 2012 Counterclaim, I will treat Dean's 2016 Petition as an amendment to his 2012 Counterclaim.

Amended pleadings are governed by Court of Chancery Rule 15, which requires leave to amend to be freely given when justice requires. Unless Kem can show (1) undue delay, (2) bad faith or dilatory motive, (3) continued failure to cure deficiencies by prior amendments, (4) undue prejudice, or (5) futility of amendment, Dean's amendment must be permitted in the interest of resolving the case on the merits.[38] Rule 15 allows for liberal amendment in the interest of resolving cases on the merits.[39]

Dean's 2016 Petition gave Kem the benefit of more specific allegations. Indeed, Kem asserts prejudice only "as a matter of law."[40] The accounting was issued on December 4, 2015, and Dean filed his 2016 Petition promptly thereafter on February 3, 2016. I find no bad faith or dilatory motive. If Dean is not permitted to develop his counterclaims (subject to Kem's defenses), then the accounting will have been a wasteful and pointless exercise. Dean will have more

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[38] *Utz v. Utz*, 1998 WL 670920, at *2 (Del. Ch. Aug. 10, 1998) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
[39] *Id.*
[40] Kem's Reply Br. Mot. Dismiss 14-15 (citing *In re Sirius XM S'holder Litig*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013)).

information about Kem's use of Paulina's funds, but no opportunity to recoup them if appropriate. Justice and the interest of resolving Dean's claims on the merits therefore compel permitting Dean's 2016 Petition to effectively amend Dean's 2012 Counterclaim.

Under Court of Chancery Rule 15(c), an amendment of a pleading relates back to the date of the original pleading when the claim asserted arose out of the conduct, transaction or occurrence set forth in the original pleading. Dean's 2016 claims for breach of fiduciary duty and the DPPOA arise out of Kem's management of Paulina's accounts and properties as set forth in Dean's 2012 counterclaim.[41] Therefore, I conclude Dean's 2016 Petition relates back to the date of Dean's 2012 Counterclaim.

I do not agree with Dean that Kem waived his untimeliness defense against Dean's 2016 Petition by not pleading it in reply to Dean's 2012 Counterclaim. A defendant may amend to add affirmative defenses that do not unduly surprise or prejudice the claimant.[42] Kem indicated in his post-trial briefing he believed laches barred Dean's effort to seek monetary damages for Kem's alleged breach of fiduciary duties, and Kem moved to dismiss Dean's 2016 Petition promptly.[43]

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[41] Kem agrees that the claims Dean raised in the 2016 Petition "unequivocally arose from the same transactions that form the basis of" Dean's 2012 Counterclaim). Kem's Opening Br. Mot. Dismiss 37.

[42] Ct. Ch. R. 15(a); *Knutkowski v. Cross*, 2011 WL 6820335, at *1-2 (Del. Ch. Dec. 22, 2011).

[43] *Dean*, 2014 WL 3221222 at *6 n.47.

Appropriately, Dean does not claim any surprise or prejudice.[44] Just as I strained the pleading rules in light of the unique posture of this case to permit adjudication of Dean's claims on the merits, I do the same to reach the merits of Kem's affirmative defense. I conclude Kem may effectively amend his reply to Dean's 2012 Counterclaim and that Kem's affirmative defense of laches is not waived.

B. *Whether Dean's claims are tolled by the fraudulent concealment exception should be evaluated with the benefit of discovery.*

I turn now to the ultimate issue of whether Dean's claims as of 2012 should be dismissed as untimely. In the usual case, in which a pleading initiates the matter in a factual vacuum and the Court is limited to facts appearing on the face of the pleadings, dismissal of a complaint based on an affirmative defense is inappropriate unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it.[45] "Laches can be applied at the pleadings stage only if the complaint itself alleges facts that show that the complaint is filed too late."[46] If a prima facie basis for laches exists from the face of the complaint, the plaintiff bears the burden to plead specific facts to demonstrate that the analogous statute of limitations was tolled.[47] I must draw

[44] *See* Dean's Ans. Br. Mot. Dismiss 11-12.
[45] *Reid v. Spazio*, 970 A.2d 176, 183-84 (Del. 2009).
[46] *Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at * 43 (Del. Ch. Apr. 14, 2017) (internal quotation omitted).
[47] *Bean v. Fursa Capital Partners, LP*, 2013 WL 755792, at *6 (Del. Ch. Feb. 28, 2013).

all reasonable factual inferences in favor of the plaintiff.[48] Even where a complaint is presumptively late, affirmative defenses such as laches are not ordinarily well-suited for treatment on a motion to dismiss, even though the Court may reach a different answer with a more developed factual record.[49]

The case law warning against granting motions to dismiss based on untimeliness is even more cogent in the unique procedural posture of this case. Kem's motion is in the context of not just Dean's pleadings, but also factual findings supporting tolling that cannot be ignored. Dean pleads that from October 26, 2004, through the present, Kem breached his fiduciary duties to Paulina. A prima facie basis for laches exists for these claims: a three-year statute of limitations is applied by analogy, and claims based on transactions from October 26, 2004, through April 16, 2009, were not brought within three years.[50] Dean pleads that Kem did not maintain adequate documentation of his administration of Paulina's funds and commingled his own funds with Paulina's.[51] Dean narrates the

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[48] *Reid*, 970 A.2d at 182.

[49] *de Adler v. Upper New York Investment Co. LLC* 2013 WL 5874645, at *12 (Del. Ch. Oct. 31, 2013); *In re Ebix*, 2014 WL 3696655, at *8 (Del. Ch. July 24, 2014) ("Because of the procedural standard of review on a motion to dismiss—where the Court must accept the well-pled allegations as true and draw all reasonable inferences in the non-moving party's favor—laches is not ordinarily well-suited for treatment on such a motion unless there is no reasonably conceivable set of circumstances susceptible of proof in which laches does not bar the claim.") (internal quotation omitted).

[50] 10 *Del. C.* § 8106(a); *Forsythe v. ESC Fund Mgmt. Co., Inc.*, 2007 WL 2982247, at *14 (Del. Ch. Oct. 9, 2007) ("A three-year statute of limitations applies to breach of fiduciary duty claims.").

[51] Dean's 2016 Pet., Introduction, ¶¶ 7, 17, 24, 47 .

procedural history of this case and pleads that the forensic accounting, issued on December 4, 2015, "outlines numerous interested transactions, a lack of record keeping, transactions purely for the benefit of Kem, and other improper behavior by Kem."[52]

Additionally, the Court has already made factual findings in this case that pertain to the timeliness of Dean's claims. After trial on Dean's 2012 request for an accounting, then-Master LeGrow found:

> In 2008, if not before, Dean began raising questions about his mother's financial affairs. When he was not satisfied with answers he received from Kem, Dean went directly to his mother and obtained her written permission to receive information about both the 919 Account and THL.
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> …
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> When Dean obtained access to Paulina's 919 Account, he noted a number of transfers from the 919 Account to other Banco Popular accounts, including three accounts ending in '928 (the "928 Account"), '937 (the "937 Account") and '946 (the "946 Account"). Dean pressed Kem about those accounts, and understood from Kem's explanation that the accounts belonged to Kem or his wife and were reimbursement for Kem's children's educational expenses.[53]

She also described the discovery and records Kem provided to Dean, noting they did not "amount to a proper accounting," did not cover the entire time period, and either did not identify the purpose of transfers out of the accounts or offered

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[52] *Id.* ¶¶ 8-13, 49-52.
[53] *Dean*, 2014 WL 3221222 at *2-3.

inconsistent explanations.[54] These findings are part of this case and cannot be ignored.[55] They were also incorporated into Dean's 2016 Petition.[56]

Reading Dean's 2016 Petition in the context of the existing record, I concluded in my draft report that it is not clear that an affirmative defense of untimeliness exists and that Dean can prove no set of facts to avoid it, and that the better course is to permit the parties to explore the timeliness of Dean's claims beyond the pleadings.[57] When Dean's claims arose and when the limitations period began may depend on when Dean "began raising questions about his mother's financial affairs"[58] and why, what questions Dean asked Kem and how Kem responded, and what Dean could discern once he had access to the 919 Account.

Kem took exception to this conclusion in the draft report, asserting that regardless of the factual findings this Court has already made, Dean's 2016

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[54] *Id.* at *6.

[55] In my draft report, I analogized my consideration of these findings in this unique procedural posture to consideration of matters outside the pleadings in a Rule 12(b)(6) motion, which converts the motion to one for summary judgment and gives the parties reasonable opportunity to present all material made pertinent to such a motion. Kem took exception to this analogy, asserting his motion had been improperly converted to a summary judgment motion. I did not intend to convert Kem's motion. Further, as Kem pointed out, the analogy is not necessary for me to consider these factual findings, as that final report was included as an exhibit to Dean's 2016 Petition and I may take judicial notice of it in any case. *See* DEL. R. EVID. 202(d)(1)(B). In this final report, I do not rely on any analogy to a summary judgment motion.

[56] Dean's 2016 Pet. ¶ 11, Ex. B.

[57] *See Bean*, 2013 WL 755792 at *6.

[58] *See id.* at *2; *compare* Emerson Aff. Ex. I, Dean Op. Post-Tr. Br. 5 ("In the mid 2000s, Dean became concerned about Kem's handling of Mrs. Dean's affairs.") *with* Dean Ans. Br. Mot. Dismiss 14 (asserting Dean did not learn of his claims "until the latter half of 2009").

Petition failed to plead any tolling doctrines so his facially untimely claims should be dismissed. Kem also asserted that because Dean's response to Kem's motion to dismiss only argued tolling under the "unusual conditions or extraordinary circumstances" doctrine,[59] Dean waived the traditional tolling doctrines of fraudulent concealment and equitable tolling. And finally, Kem argues that if Dean were to benefit from tolling, it should apply only to those transactions Dean "pressed" Kem about when he received the 919 Account records, and not to all the transactions Dean challenges in Dean's 2016 Petition, including the THL transactions.

In response, Dean argues that the draft report found tolling to be "inapplicable" and that this finding was correct. Dean also contends that when considered together with Dean's 2012 Counterclaim, then-Master LeGrow's final report, Vice Chancellor Glasscock's affirming order, and the forensic accounting, Dean's 2016 Petition adequately alleges tolling by fraudulent concealment and equitable tolling. Kem replies that Dean raised these tolling doctrines for the first time on exception so cannot rely upon them even if he had pled them adequately. Kem also contends that because Dean did not address Kem's argument that any tolling would apply only to some of the transactions now at issue, Dean conceded that point.

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[59] *See IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177-78 (Del. 2011).

The issue presented is whether deficiencies in Dean's pleading of tolling trump the substantive standard for a motion to dismiss. Dean's pleadings are by no means a model for pleading tolling. But together, Dean's 2016 Petition and then-Master LeGrow's 2014 final report support a reasonably conceivable basis for tolling under fraudulent concealment.[60] Fraudulent concealment requires an affirmative act of concealment by a defendant that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry.[61] Where there has been fraudulent concealment from a plaintiff, the statute is suspended until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence.[62]

The record and pleadings indicate it is reasonably conceivable that Kem affirmatively obscured his use of Paulina's funds by commingling his funds with hers and through his recordkeeping practices, and that Kem affirmatively misled or stonewalled Dean when Dean asked questions and sought records about Kem's administration of Paulina's funds, necessitating legal action to obtain the forensic accounting. It is reasonably conceivable that Dean did not discover his claims

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[60] *See de Adler*, 2013 WL 5874645 at *14-15 (concluding that allegations that a manager of a family business deliberately neglected to give the plaintiff requisite notices, misrepresented a discrepancy in family assets, and falsely assured the plaintiff that the business was being run properly support a reasonably conceivable basis for tolling under fraudulent concealment).
[61] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998).
[62] *Id.*

until he received the '919 Account information directly from Paulina in late 2009 and the forensic accounting through the first half of this litigation.

Kem argues that Dean's pleadings fail because they fall short of the particularity required by Chancery Court Rule 9(b),[63] and do not allege how Dean discovered any false statements by Kem or how those statements contributed to Dean's delay.[64] Drawing inferences in Dean's favor, Dean alleges Kem concealed his self-dealing by commingling funds, foregoing standard documentation, and refusing to give Dean information about Paulina's accounts. Dean also alleges he discovered Kem's self-dealing and recordkeeping practices after Paulina gave him access to the '919 Account and after the forensic accounting was performed.

While Dean could have pled and argued tolling with more specificity, I do not believe his deficiencies justify dismissing his claims when, in this unique circumstance, the pleadings and record indicates they may be timely. Case law instructs me to view motions to dismiss based on laches with caution, even if the Court may find the claims were untimely with a more developed factual record, and to read the plaintiff's tolling allegations under a "reasonable conceivability" standard and to draw all inferences in favor of the plaintiff.[65] In my view, it would

[63] *See Boeing By Levit v. Schrontz*, 1992 WL 81228, at *3 (Del. Ch. Apr. 20, 1992) ("The allegations of fraudulent concealment necessary to toll the statute of limitations must be set forth with the particularity required by Chancery Court Rule 9(b).").
[64] *See CMS Inv. Holdings, LLC v. Castle*, 2016 WL 4411328, at *4 (Del. Ch. Aug. 19, 2016).
[65] *See, e.g., de Adler*, 2013 WL 5874645 at *12; *Reid*, 970 A.2d at 183.

be improper to grant Kem's motion where then-Master LeGrow's post-trial factual findings, incorporated into and read together with Dean's pleadings, indicate that Dean may prove facts to avoid laches. It is reasonably conceivable that Kem fraudulently concealed the challenged transactions and that Dean's claims were tolled until he obtained inquiry notice via the '919 Account information and the forensic accounting.[66] A reasonably conceivable set of circumstances in which laches does not bar Dean's claims is susceptible of proof.[67] Although the Court may conclude otherwise at a later stage in this proceeding, I conclude Dean's claims are not presently barred by laches.

Kem argues on exception that Dean waived the fraudulent concealment tolling doctrine by not asserting it in response to Kem's motion to dismiss. But Dean asserted that "[w]hen Dean pressed Kem about the nature of those transactions, Kem engaged in a campaign of intentional disinformation with his responses," that "Dean did not become aware of the ['919 Account] transactions until the latter half of 2009" and that Dean was unaware "of the extent of Kem's breaches until after the forensic accounting."[68] Dean has not waived fraudulent concealment.

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[66] *See Technicorp. Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *8 (Del. Ch. May 31, 2000).
[67] *See In re Ebix*, 2014 WL 3696655, at *8.
[68] Dean's Ans. Br. Mot. Dismiss 13-16 (internal quotation omitted) (citing *Orloff v. Shulman*, 2005 WL 3272355, at *10 (Del. Ch. Nov. 23, 2005)).

Kem requests I find that Dean has waived the remaining tolling doctrines. In addition to fraudulent concealment, this Court recognizes the doctrine of inherently unknowable injuries, where it was practically impossible for a plaintiff to discovery the existence of a cause of action, and equitable tolling, which stops the statute of limitations from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary.[69] Given the breadth of the parties' arguments on the timeliness of Dean's claims, I believe all would benefit from narrowing the issues going forward.

Dean has not argued the doctrine of inherently unknowable injuries and has waived that doctrine.[70] Dean has not pled equitable tolling and cannot rely on that doctrine to protect his claims from laches. "Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary."[71] Dean has not pled or argued that he reasonably relied on Kem's competence and good faith, nor has he shown that his claims can benefit from equitable tolling when Kem is in a fiduciary relationship

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[69] *See In re Tyson Foods, Inc.*, 919 A.2d 563, 584-85 (Del. Ch. 2007).
[70] Kem's Op. Br. Exception 13 n.7.
[71] *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 645 (Del. Ch. 2013) (internal quotations and citations omitted).

with Paulina, not Dean.[72] Dean has failed to plead equitable tolling and has waived that tolling doctrine. Finally, Dean's response to Kem's motion to dismiss asserted tolling from 2012 to December 2015 due to "unusual conditions or extraordinary circumstances," under *IAC/Interactive Corp. v. O'Brien*.[73] Dean has not pled or argued that *O'Brien* tolled his claims at any time before Dean's 2012 Counterclaim. I recommend precluding Dean from relying on *O'Brien* to toll his claims before 2012.

Finally, Kem asks that tolling be limited "to those transactions that Dean 'pressed' Kem about upon receiving the '919 Account records" because Dean has not pled any concealing statements by Kem about THL, Tortola Concrete, or Loblolly Limited.[74] I decline at this early stage to parse Dean's two claims into specific transactions by Kem that may or may not be subject to tolling. As explained, Dean pled tolling by fraudulent concealment and that he obtained inquiry notice of some transactions via the '919 Account records, and inquiry notice of other transactions via the forensic accounting. It is impossible to discern at this stage which transactions may be tolled and to what date. Dean's

[72] Dean's 2016 Pet. ¶¶ 55-60 (alleging Kem breached fiduciary duties owed to Paulina). Dean's sole pursuit of equitable tolling is a footnote in his answering brief on exception that "Kem's interested transactions entered into as a fiduciary also support equitable tolling." Dean's Ans. Br. Exception 7 n.2.
[73] Dean's Ans. Br. Mot. Dismiss 17-19.
[74] Kem's Op. Br. Exception 15-16.

overarching claims are tolled for now, and discovery will illuminate whether those claims are supported by wrongful and tolled transactions.

In summary, in view of Kem's exceptions to the draft report, I recommend denying Kem's motion to dismiss Dean's 2016 Petition as untimely, without prejudice to Kem's pursuit of an untimeliness defense. I characterize Dean's 2016 Petition as an amendment to Dean's 2012 Counterclaim that relates back, and reciprocally permit Kem to amend his responsive pleading to add an affirmative defense of untimeliness. I read Dean's 2016 Petition together with the Court's findings in this case to date, and conclude dismissal at this point would be inappropriate because Dean's pleadings and the Court's findings make it reasonably conceivable that Kem fraudulently concealed the challenged transactions and that Dean's claims were tolled until he obtained inquiry notice via the '919 Account information and the forensic accounting. I conclude Dean has failed to plead, or waived, the tolling doctrines of inherently unknowable injury, equitable tolling, and extraordinary circumstances. I therefore recommend denying Kem's motion to dismiss and permitting Dean's 2016 claims, and the issue of whether they were timely in 2012 and tolled by fraudulent concealment, to proceed to discovery.

C. *This single case in two phases does not invoke the rule against claim splitting.*

Kem also moves to dismiss Dean's 2016 Petition on the basis that it violates the prohibition against claim splitting. Kem characterizes this action as two cases: one based on Kem's 2012 Petition and Dean's 2012 Counterclaim, and a second, separate case based on Dean's 2016 Petition. Kem asserts that Dean's 2012 Counterclaim was based on the same transactions at issue in Dean's 2016 Petition, and that because those transactions were known or discoverable during discovery on Dean's 2012 Counterclaim, Dean should have pursued recovery of those transactions without the need for a forensic accounting, and is precluded from pursuing it now. Kem also notes Dean's 2012 Counterclaim alleged Kem improperly pocketed Paulina's real estate rental income, but Dean did not pursue those allegations at trial, instead deferring them until after the accounting which did not inform those allegations. Kem concludes Dean's 2016 redoubled attempt to recover those transfers violates the rule against claim splitting.

Dean responds that the rule against claim splitting does not bar his claims because this is one single case, not two separate actions. He points to then-Master LeGrow's repeated references to a potential later phase of this case due to the incomplete record and the pending forensic accounting. Dean asserts his breach of fiduciary duty and DPPOA claims could not have been litigated without the benefit of the forensic accounting: that is why the forensic accounting was ordered. In

reply, Kem asserts there was neither an agreement among the parties nor a binding Court ruling bifurcating this case, as Kem believes then-Master LeGrow's foreshadowing of the current stage of litigation is dicta.

> The rule against claim splitting is an aspect of the doctrine of res judicata and is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times. Thus, where a plaintiff has had a "full, free and untrammeled opportunity to present his facts," but has neglected to present some of them or has failed to assert claims which should in fairness have been asserted, he will ordinarily be precluded by the doctrine of res judicata from subsequently pressing his omitted claim in a subsequent action. … The question of whether a plaintiff has impermissibly split his claim is therefore dependent on whether he was able to present it, *in its entirety,* in the prior forum; which must be determined from an examination of the jurisdiction of the prior forum.[75]

A bifurcated case in two sequential phases does not implicate this policy concern: no party is exposed to a multiplicity of suits and no party is seeking to take two bites at a proverbial apple.[76]

Kem's reliance on claim splitting fails for two reasons. First, there are not two actions between which to split claims. As explained above, this action began in 2012 with Kem's Petition, followed by Dean's 2012 Counterclaim as amended in Dean's 2016 Petition. This is one action, in one court. Dean has consistently asserted Kem breached his fiduciary duties and requested an accounting to support

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[75] *Maldonado v. Flynn*, 417 A.2d 378, 382-83 (Del. Ch. 1980) (emphasis added).
[76] *Bradfield v. Unemployment Ins. Appeal Bd.*, 2012 WL 3776670, at *2 (Del. Aug. 31, 2012).

those assertions. Dean did not seek or obtain any relief for his breach of fiduciary duty counterclaim in the 2013 trial. Proceeding to that claim now does not present harassment or any risk of double recovery.

And second, this Court has already determined that Dean was not able to present his breach of fiduciary duty claim in the first stage of this action and that he could do so in a second stage upon receipt of the accounting. As explained above, then-Master LeGrow repeatedly made it clear that the accounting would necessarily precede and inform a second stage of this case in which the propriety of Kem's actions would be evaluated. The parties are deemed to have consented to those characterizations.[77] Dean was not able to present his breach claim "in its entirety" at the 2013 trial, and therefore did not impermissibly split that claim.[78]

This is a single case that the Court has already bifurcated. This case does not meet the requirements for claim splitting and does not present its risks. Dean has not yet attempted to prove Kem breached his fiduciary duties or the DPPOA. Dean is not seeking a second bite at the apple for his breach claims: he has not yet had his first bite. The parties and Court agreed that he would have that first bite now, after the accounting was complete. I recommend denying Kem's motion to dismiss.

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[77] *See DiGiacobbe*, 743 A.2d at 184.
[78] *Maldonado*, 417 A.2d at 382-83.

III. Conclusion

For the foregoing reasons, I recommend the Court deny Kem's motion to dismiss. This is a final report and exceptions may be taken in accordance with Court of Chancery Rule 144.

Sincerely,

/s/ Morgan T. Zurn

Master in Chancery