IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Franklin Balance Sheet Investment Fund and Franklin Microcap Value Fund, Oppenheimer Investment Partnership LP and Oppenheimer Close International Ltd., Wynnefield Partners Smallcap Value LP I, Wynnefield Partners Smallcap Value LP, Wynnefield Smallcap Value Off-Shore Fund LPD and Channell Partnership II, LP, Individually, derivatively and on behalf of a Class of similarly situated stockholders,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 888-N
Thomas G. Crowley, Jr., Molly M. Crowley, Phillip E. Bowles, Gary L. Depolo, Earl T. Kivett, William A. Pennella, Leland S. Prussia, Cameron W. Wolfe, Jr.,	)	
Defendants,	)	
v.	)	
Crowley Maritime Corporation,	)	
Nominal Derivative Defendant.	)	

MEMORANDUM OPINION

Submitted: June 9, 2006
Decided: October 19, 2006

R. Bruce McNew, Esquire, TAYLOR & McNEW, LLP, Wilmington, Delaware, *Attorney for Plaintiff*

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PARSONS, Vice Chancellor.

Pending before the Court is Plaintiffs' motion for leave to amend their complaint and John H. Norberg, Jr.'s ("Norberg") motion to intervene as an additional shareholder plaintiff. The current Plaintiffs are Franklin Balance Sheet Investment Fund and Franklin Microcap Value Fund, P. Oppenheimer Investment Partnership LP and Oppenheimer Close International Ltd., Wynnefield Partners Smallcap Value LP I, Wynnefield Partners Smallcap LP, Wynnefield Smallcap Value Off-Shore Fund Ltd. and Channell Partnership II, LP. For the reasons stated below, Plaintiffs' motion to amend and Norberg's motion to intervene are granted.

I. BACKGROUND

A. Facts

Collectively, Plaintiffs own approximately 30% of the common shares of Crowley Maritime Corporation ("Crowley" or the "Company") not owned by the Crowley family.[1] Norberg beneficially owns nine shares of Crowley and claims to have continuously held those shares since 1991.[2]

Crowley is a Delaware Corporation with its principal executive office in Oakland, California.[3] It provides diversified transportation services in domestic and international markets by means of four operating lines of business: Liner Services, Logistics, Marine Services and Petroleum Services. The company supports its business segments by

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1 Proposed Amended Class Action and Derivative Compl. ("Proposed Compl.") ¶ 8, attached to Plaintiffs' Mot. For Leave to Amend as Ex. A.

2 *Id*. at ¶ 7.

3 *Id*. at ¶ 9.

providing corporate services (such as purchasing, human resources, information technology, public relations and advertising) and by providing vessel construction/architecture technical services, which involve supervising construction of new vessels and maintaining ownership of vessels that are chartered for use in Crowley's operating lines of business.[4] Defendant Thomas B. Crowley, Jr. ("Mr. Crowley") is Chairman, President and Chief Executive Officer of the Company and has been a director since 1994.[5] He beneficially owns or controls approximately 65% of the voting stock of the Company.[6]

Plaintiffs allege that on April 6, 1992, the Company and Mr. Crowley entered into the first of two split-dollar life insurance agreements (the "1992 Agreement").[7] The 1992 Agreement relates to five life insurance policies with a total face amount of $50 million on the life of the survivor of Mr. Crowley's father, Thomas B. Crowley, or his step-mother, Molly Crowley. Under the terms of the 1992 Agreement, Mr. Crowley owned the underlying policies and the Company was obligated to pay the premiums on them.[8]

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4 *Id.* at ¶ 38.

5 *Id*. at ¶ 10.

6 *Id*.

7 Proposed Compl. ¶ 73; *see also* Ex. 10.6 to Crowley's April 1 Form 10-12G, *available at* www.sec.gov/edgar.

8 *Id.*

On July 20, 1998, the Company and Mr. Crowley entered into a second split-dollar life insurance agreement (the "1998 Agreement").[9] The 1998 Agreement relates to six life insurance policies with a total face amount of $50 million on the life of Molly Crowley. Similar to the 1992 Agreement, Mr. Crowley was the sole owner of the policies covered by the 1998 Agreement; the policies were pledged to the Company to secure Mr. Crowley's obligation to repay the Company for the premiums, upon termination of the 1998 Agreement or payment of a death benefit.[10]

The Crowley board claimed to have approved the 1992 Agreement and 1998 Agreement in furtherance of their belief that maintaining the closely held nature of the Company was in the best interests of the Company's stockholders and would maximize long-term stockholder value.[11] The Company disclosed its rationale for entering into the split-dollar insurance agreements in its first public filing with the Securities and Exchange Commission ("SEC") on April 1, 2002.[12]

Following the enactment of the Sarbanes-Oxley Act of 2002,[13] the Company ceased making any further premium payments as required by the 1992 Agreement because the board thought that such payments might violate Section 402 of Sarbanes-

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9 Proposed Compl. ¶¶ 78, 79; *see also* Ex. 10.8 to 4/1/02 SEC filing, *available at* www.sec.gov/edgar.

10 Proposed Compl. ¶¶ 78-79, 83.

11 *Id*. at ¶¶ 64-81.

12 *Id*. at ¶ 64.

13 15 U.S.C. § 7201 (codified as amended in scattered sections of 15, 28 U.S.C.).

Oxley.[14] Accordingly, in its April 19, 2004 proxy statement, the Company stated that Mr. Crowley had been solely responsible for paying the premiums on the insurance provided by the 1992 Agreement since the enactment of Sarbanes-Oxley in July 2002.[15]

On December 23, 2003, the Company and Mr. Crowley entered into an agreement that terminated and settled the parties' obligations under the 1992 Agreement ("Settlement Agreement"). Pursuant to the Settlement Agreement, Mr. Crowley repaid the Company $7.5 million, which represented the total amount of premiums paid by the Company under the 1992 Agreement, and Mr. Crowley relinquished all of his rights under the 1992 Agreement. In return, the Company agreed to pay Mr. Crowley an amount equal to the interest payable by him on the financing he arranged to repay the Company and applicable taxes.[16]

Beginning in July 2002, the Company also suspended premium payments under the 1998 Agreement.[17] The underlying policies of the 1998 Agreement, however, remain pledged as security for repayment of premiums paid through July 2002.[18] No settlement of the 1998 Agreement has been reached.

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14 Proposed Compl. ¶ 87.

15 *Id.*

16 *Id.*

17 *Id.* at ¶ 86.

18 *Id.*

B. Procedural History

Plaintiffs filed this action on November 30, 2004. The complaint asserts derivative and direct claims for, among other things, breach of fiduciary duty, entrenchment, and self-dealing arising out of the 1992 and 1998 Agreements as well as the Settlement Agreement.

On February 25, 2005, Defendants filed a motion to dismiss under Court of Chancery Rule 12(b)(6). On February 28, 2005, Defendants amended their motion to add an additional ground for dismissal under Rule 23.1.

After Plaintiffs filed their answering brief in opposition to the motion to dismiss and Defendants filed their reply brief, the Court heard argument on the motion. During argument, Defendants raised a standing defense and, according to Plaintiffs, a number of other issues not addressed in Defendants' opening brief. Consequently, the Court requested supplemental briefing on at least the standing issue. Defendants filed their supplemental opening brief on October 24, 2005. On December 27, 2005, Plaintiffs moved to amend their complaint in lieu of filing a responsive supplemental brief, and Norberg moved to intervene as an additional shareholder plaintiff. Defendants oppose both motions.

II. ANALYSIS

A. Standards

1. Court of Chancery Rule 15(aaa)

Court of Chancery Rule 15(aaa) provides in pertinent part:

> Notwithstanding subsection (a) of this Rule, a party that wishes to respond to a motion to dismiss under Rules 12(b)(6)

> or 23.1 by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice (and in the case of complaints brought pursuant to Rules 23 or 23.1 with prejudice to the named plaintiffs only) unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.[19]

Chancery Rule 15(a) allows a party to amend it's pleading once as a matter of right at any time before a responsive pleading is served. Thereafter, a party may amend its pleading only with leave of the court. Leave is generally liberally granted unless there is a showing of substantial prejudice or legal insufficiency.[20] Notwithstanding subsection (a), Rule 15(aaa) limits the parties' ability to replead. The purpose of the rule is to minimize situations where this Court must adjudicate multiple motions to dismiss in the same action.[21] When confronted with a motion to dismiss under Rules 12(b)(6) or 23.1, Rule 15(aaa) requires plaintiffs to choose between standing on their complaint and answering the motion or amending (or seeking leave to amend) before the response to the motion is due.[22]

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[19] Rule 15(aaa) was most recently revised on January 4, 2006, effective February 1, 2006.

[20] *Kahn Bros. & Co. v. Fischbach Corp.*, 1989 Del. Ch. LEXIS 109, at *9 (Sept. 19, 1989).

[21] *Stern v. LF Capital Partners, LLC*, 820 A.2d 1143, 1143-44 (Del. Ch. 2003).

[22] *Id.* at 1146.

2. Motion to Intervene

Court of Chancery Rules 24(a) and (b) address intervention of right and permissive intervention. They provide:

> (a) Intervention of right. -- Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive intervention. – Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Although the Delaware courts embrace a liberal policy of allowing intervention, mere incantations of equitable principles will not stave off denial of a motion to intervene if the intervenor lacks standing to bring the claim or otherwise makes a claim that is inherently flawed as a matter of law.[23] A claim is inherently flawed or futile if it would not survive a motion to dismiss under either Court of Chancery Rule 23.1 or Rule 12(b)(6).[24]

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[23] *Flynn v. Bachow*, 1998 WL 671273, at *4 (Del. Ch. Sept. 18, 1998).

[24] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

B. Should Plaintiffs be Granted Leave to Amend Under Rule 15?

Plaintiffs argue that they should be allowed to amend their complaint as of right under Rule 15(aaa) because Defendants raised new arguments in their reply brief, at argument, and in their supplemental briefing. Plaintiffs submit that these material changes in Defendants' argument deprived Plaintiffs of the notice contemplated by Rule 15(aaa). Defendants respond that the language of Rule 15(aaa) requires a party to amend or move to amend no later than the time such party's answering brief in response to a Rule 12(b)(6) or 23.1 motion is due. Because Plaintiffs submitted an answering brief rather than file an amended complaint, Defendants contend that Plaintiffs waived their right to amend their complaint.

In *Stern v. LF Capital Partners, LLC*,[25] the defendants moved to dismiss the plaintiffs' complaint in lieu of filing an answer. The plaintiffs chose to stand on the allegations of their complaint rather than amend the pleading to make more specific allegations, and filed an answering brief. After the defendants filed their reply brief, the Court heard argument on the motion. At argument, Vice Chancellor Lamb asked plaintiffs' counsel whether "there is some reason why, in the interests of justice, I should permit you notwithstanding the fact that you have answered [the motion to dismiss] . . . to amend your complaint," and plaintiffs' counsel responded: "Your Honor, I'm content to rest on the allegations and the inference that Your Honor can draw from it . . . ."[26]

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[25] 820 A.2d 1143 (Del. Ch. 2003).

[26] *Id.* at 1145.

Despite this response, the plaintiffs in *Stern* moved to amend their complaint shortly after the argument on the motion to dismiss.

Although Vice Chancellor Lamb noted that Rule 15(aaa) did not explicitly prescribe a standard for evaluating plaintiffs' untimely motion to amend, he concluded that the plaintiffs' maneuvers contradicted the text and underlying purpose of the rule.[27] In making this determination, the Court observed that Rule 15(aaa) embodies a legislative-type finding that a party-plaintiff has enough information from the motion to dismiss and opening brief to decide whether to replead or stand on the complaint as alleged and respond to the motion.[28] Thus, the Court held that the appropriate procedure was to decide the motion to dismiss first and then, if necessary, consider any motion to amend in light of the good cause requirement of Rule 15(aaa).

The present case involves another procedural guideline, as well. Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion.[29] A movant should not hold matters in reserve for reply briefs. Instead, reply briefs should consist of material necessary to respond to the answering brief.[30]

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27 *Id.*

28 *Id.*

29 *See* Ct. Ch. R. 7(b) & 171.

30 *Carlson v. Hallinan*, 2006 WL 1510759, at *1 (Del. Ch. May 22, 2006) (waiving arguments not raised in opening brief); *U.S. v. Kossak*, 275 F. Supp. 2d 525, 531 (D. Del. 2003) (reserving new legal arguments for a reply brief is improper);

In this case, Defendants filed a motion to dismiss and their opening brief, and Plaintiffs filed an answering brief. Thereafter, despite the briefing rules, Defendants raised new arguments in their reply brief and at argument. For example, Defendants' reply brief raised an entirely new defense, claiming that an exculpatory clause in the Crowley corporate charter bars Plaintiffs' direct claims for monetary damage.[31] Similarly, at argument Defendants made standing arguments not previously raised in their briefs. Because the issue of standing had not been sufficiently briefed, the Court requested supplemental briefs on at least that new argument.

Upon filing their supplemental brief, Defendants again added arguments such as the requirement of continuous ownership of stock from the time of the alleged injury. In addition, during the course of the proceedings Defendants changed significantly the focus of a key argument advanced in their opening brief, switching from a challenge to the two agreements involving the insurance policies to a criticism of the Plaintiffs' failure in the original complaint to challenge specific board actions. Rather than file their own supplemental brief, Plaintiffs responded by filing a motion to amend their complaint and seeking to add a new plaintiff who owned Crowley stock at the requisite times to address the standing issues Defendants raised at argument and in their supplemental brief.

Generally, Plaintiffs would have surrendered the right to amend their complaint when they chose to file an answering brief on the motion to dismiss. By raising a

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Acker v. Burlington N. & Santa Fe R.R. Co., 388 F. Supp. 2d 1299, 1302 n.2 (D. Kan. 2005).

[31] Defs.' Reply Br. in Support of Defs.' Mot. to Dismiss at 19.

completely new issue at argument and in a supplemental brief, however, Defendants effectively expanded their original motion and briefing. Had Defendants presented all of their arguments in the opening brief, Plaintiffs could have considered them in deciding whether to amend their complaint. Instead, Plaintiffs were forced to make a less than fully informed decision when they made the election required by Rule 15(aaa). In contrast to *Stern*, Plaintiffs were not afforded an adequate opportunity to assess the pertinent information before filing their answering brief. In these circumstances, a strict application of Rule 15(aaa) may not be just.

Further, this case is procedurally in its early stages, mitigating any prejudice that might occur if Plaintiffs are granted leave to amend. Since Plaintiffs' filing of the case on November 30, 2004, all of the parties' activities have been directed to Defendants' motion to dismiss and related filings. Moreover, Delaware law has a strong preference for deciding cases on the merits, rather than on procedural grounds.[32]

Plaintiffs contend that, notwithstanding Rule 15(aaa), they are entitled to amend their complaint where, as in this case, the Court permits a party to supplement its briefing in support of a motion to dismiss. I reject a per se exception to that effect as overly broad and inconsistent with the purpose of Rule 15(aaa). If a party's motion to dismiss and opening brief fully and fairly apprised the opposing party of the grounds for that motion, the Court should apply Rule 15(aaa) as written, even if some limited supplemental briefing is permitted. In this case, where Plaintiffs elected to file their brief in opposition

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[32] *One Va. Ave. Condo. Ass'n of Owners v. Reed*, 2005 WL 1924195, at *7 n.35 (Del. Ch. Aug. 8, 2005).

to Defendants' motion to dismiss and to argue that motion before seeking leave to amend, that usually would mean that the Court would decide the motion to dismiss first. Then, if the motion were granted, the Court could entertain Plaintiffs' motion to amend, but only subject to the requirement under Rule 15(aaa) of a showing of good cause that a dismissal with prejudice would not be just under all the circumstances.[33] Defendants urge the Court to follow that procedure here. To avoid the application of Rule 15(aaa), Plaintiffs must show that Defendants failed to apprise them fully and fairly of the grounds for their motion to dismiss.

Based on my review of the record, including the briefing and oral argument on Defendants' motion to dismiss and on Plaintiffs' motion to amend, I find that Plaintiffs did not have sufficient notice of the full scope of Defendants' motion when they filed their answering brief. In particular, Defendants failed to provide adequate notice of their standing argument. Plaintiffs also contend that Defendants raised several other new arguments in their reply brief, at argument and in their supplemental briefing. A careful review of the briefs and arguments confirms that Defendants may have recast some of their arguments during the proceedings on the motion to dismiss, but I find that, apart from the standing issue, Defendants did not materially alter the defenses presented in their motion.

Consequently, I reject the argument that Rule 15(aaa) precludes Plaintiffs from amending their complaint at least with respect to standing. Plaintiffs' proposed

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[33] *See Stern v. LF Capital Partners, LLC*, 820 A.2d at 1146-47.

amendments, however, address more than the standing defense. In that regard, Plaintiffs have violated the spirit, if not the letter, of Rule 15(aaa) because the new allegations contained in their Proposed Complaint go well beyond the facts necessary to address Defendants' standing defense and include several matters germane to issues Defendants did fairly raise in their motion and opening brief. Nevertheless, based on the Court's preference for resolving matters on the merits and the absence of material prejudice to Defendants, I will grant Plaintiffs' motion to amend in its entirety.[34]

I also find, however, that Plaintiffs' actions reflect too glib a rationalization for avoiding the application of Rule 15(aaa) and have resulted in at least some unnecessary briefing and argument by Defendants, to say nothing of the toll on the Court's time and resources. Accordingly, in the exercise of my discretion under Rule 15(aaa) and jurisdiction to enforce this Court's Rules generally, I order Plaintiffs to pay the sum of $10,000 to Defendants to reimburse them for at least a portion of their reasonable attorneys' fees and costs incurred in preparing their reply brief and arguing the motion to dismiss.[35]

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[34] Because the procedural history of this case differs from *Stern*, I find unpersuasive Defendants argument that the Court should adhere strictly to the procedure prescribed in *Stern* and decide the pending motion to dismiss first based solely on the original complaint. One of the benefits Rule 15(aaa) seeks to achieve is to minimize counterproductive and wasteful, multiple motions to dismiss. The problems caused by Defendants' belated addition of the standing issue to its motion to dismiss persuade me that allowing the Proposed Complaint is less likely to cause additional burden, expense and delay than the procedure Defendants urge.

[35] If the parties are unable to agree that the attorneys' fees and expenses incurred by Defendants in connection with their reply brief and the argument on the motion to dismiss amount to at least $10,000, Defendants shall submit appropriate evidence

C. Would an Amendment to Allow the Intervention of Norberg as an Additional Stockholder Plaintiff Be Futile?

Plaintiffs assert that Norberg's ownership of Crowley shares since 1991 provides standing under 8 *Del. C.* § 327[36] to challenge the 1992 Agreement, dated April 6, 1992, and the first of three amendments to that agreement dated May 1, 1995. Defendants contend that allowing Norberg to intervene would be futile because his claims are either time barred or moot. I address the laches and mootness arguments in turn.

1. Laches

In general, as a court of equity, the Court of Chancery does not strictly apply statutes of limitations.[37] Instead the court applies the doctrine of laches and uses analogous statutes of limitations as a presumptive time period for application of laches to bar a claim.[38] The Court also avoids inflexible or arbitrary application of a statute of limitations.[39] Thus, under the doctrine of equitable tolling, the statute does not run

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of the fees and costs they incurred within ten days of the date of this Memorandum Opinion.

[36] 8 *Del. C.* § 327 provides: "In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law."

[37] *U.S. Cellular Inc. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).

[38] *Orloff v. Shulman*, 2005 WL 3272355, at *10 (Del. Ch. Nov. 23, 2005).

[39] *Id.*

against a plaintiff until he or she had reason to know the facts alleged to give rise to the wrong.[40]

A cause of action accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrong.[41] The limitations period will be tolled, however, until such time that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, if pursued, would lead to the discovery of the injury.[42] In situations where the challenged derivative action is a failure to disclose actionable self-dealing, laches does not begin to run until the shareholder knew or should have known of the facts alleging the wrong.[43] Therefore, Plaintiffs and Norberg must point to facts demonstrating that they were not on inquiry notice before November 30, 2001.

Defendants assert that Norberg's claim is barred by laches because the payments under the 1992 Agreement are legal obligations and do not constitute a continuing wrong. Since Plaintiffs' complaint was filed on November 30, 2004, Defendants contend that Norberg's allegations about the 1992 Agreement clearly violate the three year statute of limitations.[44] Plaintiffs characterize the 1992 Agreement and the premium payments the

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40 *Id.*

41 *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. Nov. 19, 1999).

42 *Id.* at 261.

43 *Kahn v. Seaboard Corp.*, 625 A.2d 269, 272-278 (Del. Ch. 1993) (detailing this Court's history on the statute of limitations and laches for claims of self-dealing).

44 The statute of limitations for a breach of fiduciary duty is three years. 10 *Del. C.* § 8106; *Ruggerio v. Estate of Poppiti*, 2005 WL 517967, at *4 (Del. Ch. Feb. 23, 2005).

Corporation made under it as a continuing series of decisions and transactions, the culmination of which were not legally binding obligations. Therefore, because Plaintiffs allege each decision as one that the Company could suspend at any time, the culmination of events is an alleged wrongful act. Plaintiffs also contend that the alleged act, a failure to disclose, is an exception to a time barred claim. Thus, because Plaintiffs assert that Norberg did not discover the wrong until Defendants' disclosure of the 1992 Agreement on April 1, 2002, the complaint was timely commenced and within the statute of limitations and laches period.

The Proposed Amended Complaint avers that Plaintiffs did not discover the 1992 Agreement until April 1, 2002 when Crowley released a 10-K describing the transaction.[45] Defendants' have not pointed to any other document that would have put Plaintiffs on notice of their claim earlier. Thus, Plaintiffs have at least colorably pled that they were not on inquiry notice of this claim for purposes of a motion to dismiss until April 1, 2002, and can argue that the laches period would not begin to run until then. Based on this factor and the arguments of Plaintiffs and Norberg that the 1992 Agreement is a continuing wrong, I find unpersuasive Defendants' argument that Norberg's intervention would be time-barred and therefore futile.

2. Mootness

In addition, Defendants assert that the Settlement Agreement the Company entered into with Mr. Crowley on December 23, 2003 moots Plaintiffs' claims that relate to the

[45] Proposed Amended Compl. ¶¶ 63-64.

1992 Agreement because it allegedly terminated that 1992 Agreement and resulted in Mr. Crowley repaying the Company for its contribution to the policies covered by that Agreement. Plaintiffs contend that the Proposed Complaint is not moot because it challenges both the Settlement Agreement and the 1992 Agreement; further, Plaintiffs challenge the Settlement Agreement as a sham transaction.

The primary function of a court is to adjudicate actual controversies.[46] In the absence of a controversy, a case will be dismissed because a court cannot grant relief in the matter.[47] A matter may become moot if the legal issue in dispute ceases to be amenable to judicial resolution or if a claimant has been divested of standing.[48]

Plaintiffs' claims appear likely to survive a motion to dismiss on mootness grounds. The Proposed Complaint alleges that the Settlement Agreement was unnecessary because the insurance policies covered by the 1992 Agreement were fully paid and there was no need for any further payments by the Company for those policies to continue in full force.[49] The Proposed Complaint also alleges that the purpose of the Settlement Agreement was improperly to remove these insurance agreements from the Company's books and place them entirely in the hands of Mr. Crowley and, at the same

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46 *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997).

47 *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003); *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 582 (Del. 2002).

48 *Id. (citing Gen. Motors Corp.*, 701 A.2d at 821).

49 Proposed Compl. ¶¶ 89-95.

time, provide Mr. Crowley a release for any conduct relating to the 1992 Agreement.[50] Consequently, the Settlement Agreement at least arguably would not moot Plaintiffs' claims. Therefore, I conclude that Norbert's proposed intervention would not be futile and should be granted.

III. CONCLUSION

For the reasons stated, I GRANT Plaintiffs' Motion For Leave to Amend and Norberg's Motion to Intervene, and further order Plaintiffs to pay Defendants the sum of $10,000 to reimburse them, at least in part, for the reasonable attorneys' fees and costs they incurred in connection with their motion to dismiss after the filing of Plaintiffs' answering brief. Plaintiffs and Norberg promptly shall file and serve their respective new pleadings.

IT IS SO ORDERED.

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50 *Id*.