IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELUV HOLDINGS (BVI) LTD, ESTHER LUZZATTO and KFIR LUZZATTO,	)	
Plaintiffs,	)	
	)	C.A. No. 6894-VCP
v.	)	
DOTOMI, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: January 3, 2013
Decided: March 26, 2013

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Richard L. Renck, Esq., F. Troupe Mickler IV, Esq., ASHBY & GEDDES, P.A., Wilmington, Delaware; *Attorneys for Defendant.*

PARSONS, Vice Chancellor.

This is a dispute over the plaintiffs' right to shares in a Delaware corporation pursuant to an option agreement. The plaintiffs received an option to purchase the defendant's stock as compensation for services performed between 2000 and 2003. The plaintiffs purport to have exercised the option in 2004, something the defendant vigorously denies. After learning that the defendant was about to engage in a merger in 2011, the plaintiffs inquired as to compensation they would receive for the shares they believed they owned. The defendant denied that the plaintiffs had exercised the option, which had since expired under the terms of the option agreement, and it declined to compensate the plaintiffs for the shares. The plaintiffs sued for a declaration that they validly exercised the option in 2004 and were entitled to compensation for their shares. Both parties moved for summary judgment—the plaintiffs on their declaratory judgment claims and the defendant on the ground of laches. After careful consideration of the parties' briefing and argument, I conclude that the plaintiffs' claims are barred by laches. Accordingly, I grant the defendant's motion for summary judgment.

I. BACKGROUND

A. The Parties

Plaintiff Eluv Holdings (BVI) Ltd. ("Eluv") is an entity organized under the laws of the Territory of the British Virgin Islands ("BVI").[1] Esther and Kfir Luzzatto (the "Luzzattos," and collectively with Eluv, "Plaintiffs") are spouses and are patent attorneys

[1] Pls.' Am. Verified Compl. ("Compl.") ¶ 3.

who reside in Israel.[2] On December 31, 2000, Eluv entered an option agreement with Consumer Media Company, Inc. ("CMC") (the "Option Agreement" or "Agreement"). Eluv is also the trustee of a trust created under an agreement with the Luzzattos (the "Trust Agreement") whereby the Luzzattos are beneficiaries of the grant of an option to purchase common stock under the Option Agreement.[3]

Defendant, Dotomi, LLC ("Dotomi"), is a Delaware limited liability company. Dotomi came into existence when, on August 31, 2011, Delaware corporation Dotomi, Inc., previously named CMC, merged with a wholly owned subsidiary of ValueClick, Inc.[4] Dotomi was the surviving entity in this merger; it remains a wholly owned subsidiary of ValueClick.[5]

B. Facts

The Luzzattos began performing patent related services for Dotomi in 2000.[6] As compensation for those services, Dotomi and the Luzzattos (through Eluv) entered in the Option Agreement. The Agreement provides that Dotomi "hereby grants the Optionee [*i.e.*, Eluv] an option to *purchase* 76,915 shares of Common Stock of the Company" (the

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2 *Id.* ¶ 4.

3 *Id.*

4 Mickler Aff. Ex. 17, Dotomi, LLC's Second Am. Answers to Pls.' First Set of Interrogs., No. 22. CMC changed its name to Dotomi, Inc. on June 29, 2004. *Id.* In this Memorandum Opinion, I refer to CMC, Dotomi, Inc., and Dotomi, LLC collectively as "Dotomi."

5 *Id.*

6 Compl. ¶ 7.

"Option").[7] Under the terms of the Agreement, the Option would vest over thirty months.[8] The Agreement contemplated two scenarios under which Eluv would be entitled to the Option. First, "[i]n the event the Agreement is terminated by the Optionee before the end of the term [(thirty months from June 1, 2000)]," Eluv would be entitled to purchase any shares already vested at the time of termination "by sending the Escrow Agent a written notice to that effect and *against payment of the par value* of the shares of Common Stock."[9] Second, "[i]n any other event," Eluv could exercise the Option within eight years from the date of the grant, *i.e.*, before December 31, 2008.[10]

In 2002, the Luzzattos were advised by their attorney that a recent change in Israeli tax law rendered Eluv, a BVI company, ineffectual for tax relief purposes.[11] Based on this advice, the Luzzattos stopped paying the registration fees associated with Eluv in 2002.[12] As a result, Eluv was "struck off" the BVI Register[13] on May 1, 2003.[14]

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7 *Id.* Ex. 1, Option Agreement, at 1 (emphasis added).

8 *Id.*

9 *Id.* at 2 (emphasis added). Although the Option Agreement provided that an escrow agent would be appointed and would hold the Option shares until either (1) the exercise of the Option or (2) the termination of the Option, no escrow agent was ever appointed. It also appears that no one ever carried out the function of the escrow agent. Luzzatto Dep. 26–27, 38–39.

10 Option Agreement 2.

11 Mickler Aff. Ex. 20, Pls.' Answer to Def.'s Second Set of Interrogs., No. 4.

12 *Id.*

13 The BVI Register is responsible for the registration of all companies formed in the BVI. British Virgin Islands Financial Services Commission, http://www.bvifsc.vg/. The Register is a division of the BVI Financial Services

Eluv was not restored to the BVI Register until October 17, 2012, over one year after this litigation was initiated on its behalf.[15]

In June 2004, after the Option had vested fully, Dotomi's co-founder Eyal Schiff, urged the Luzzattos on several occasions to exercise the Option.[16] Before any attempted exercise of the Option, Schiff delivered a capitalization table to Kfir Luzzatto ("Luzzatto") showing Eluv as a shareholder of Dotomi stock.[17] Schiff asked Luzzatto to "exercise the option so that [Schiff's] cap table . . . would be correct."[18] In response, Luzzatto alleges that he advised Schiff orally that he was exercising the Option. According to Luzzatto, Schiff acknowledged the exercise but advised him to contact Brian Goldstein, Dotomi's counsel, to "confirm the exercise" in writing.[19] After this

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Commission, the agency responsible for authorizing and licensing companies or persons to conduct business and for safeguarding the public against the possibility of an illegal or unauthorized business operating in or from the BVI. *Id.*

14 Mickler Aff. Ex. 16. A company that is "struck off" the BVI Register cannot (1) commence legal proceedings, (2) carry on business or deal with its assets, or (3) defend any legal proceedings. *See infra* Part II.B.2.c.iv.

15 Mickler Aff. Ex. 21 ("[U]nder BVI law, the restoration has retroactive effect such that striking from the registry has no effect.").

16 Luzzatto Aff. ¶ 3.

17 Luzzatto Dep. 43–44.

18 *Id.* at 43.

19 Luzzatto Aff. ¶ 3.

communication with Schiff, and after Luzzatto contacted Goldstein, Schiff's repeated requests for Luzzatto to exercise the Option ceased.[20]

On July 11, 2004, Leeat Peleg of the Ehud Porat Law Offices, Plaintiffs' counsel at the time, sent Goldstein an email stating that "ELUV is entitled, for some time, to receive the Vested Option Shares."[21] Peleg further explained that a Trust Agreement was in place between Eluv and the Luzzattos, according to which "ELUV has engaged in the agreement with [Dotomi] on behalf of Mr. and Mrs. Luzzatto, and has held the option in trust for them."[22] Based on this, Peleg requested that the Option "be issued and allotted, as soon as possible, directly to Esther and Kfir Luzzatto, in equal parts."[23] After receiving a copy of the Trust Agreement, Goldstein advised Peleg by email that there were some inconsistencies between the Option Agreement and the Trust Agreement and suggested that Peleg and Goldstein speak over the phone.[24] Over the next few weeks, the parties attempted to coordinate a phone call, but the phone conversation never happened and communications between the parties ceased in August 2004.

Around the same time in July 2004, Goldstein acknowledged in emails with Schiff and others at Dotomi that it appeared Eluv was entitled to the shares at a total exercise

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20 *Id.* ¶¶ 3–4; Luzzatto Dep. 46–47.

21 Mickler Aff. Ex. 4 at 9.

22 *Id.*

23 *Id.*

24 *Id.* at 8.

price less than $100.[25] According to John Giuliani, ValueClick's Chief Operating Officer and Dotomi's President as of 2011, the par value of the shares was $0.001 per share.[26] Giuliani acknowledged, however, that he had "never seen any document telling plaintiffs that they had to pay $76.92 to exercise their options."[27]

On January 6, 2005, Golan Shlomi, another attorney at Ehud Porat, contacted Goldstein to follow up on the emails sent by Peleg. Shlomi asked Goldstein several questions, including what percentage Eluv held in the company. Shlomi closed his email by inquiring "if there is any prevention to issue our clients the option shares that they are entitled to."[28] Goldstein responded that the "shares Eluv Holdings can obtain currently represents approximately 0.5%."[29] In an apparent attempt to answer Shlomi's question regarding any impediments to issuing the option shares, Goldstein said that he had been trying to locate various agreements and had some questions he needed answered "before completing the option exercise and transfer documents."[30] Shlomi responded to Goldstein that he "was very disappointed to see that [Goldstein] once again, ha[d] not

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25 Pls.' Opp'n to Mot. for Summ. J. ("Pls.' Opp'n Br.") Ex. J; *see also* Giuliani Dep. 94–95.

26 Giuliani Dep. 96–97.

27 *Id.*

28 Mickler Aff. Ex. 7.

29 *Id.*

30 *Id.*

answered all of [his] questions,"[31] to which Goldstein replied: "I have asked multiple times for answers to questions, and still have not received any answers from your office."[32] Goldstein also stated "Do you have a copy of the option agreement? If so, please follow all of the instructions in that agreement and provide me with what you believe is necessary."[33] There is no evidence of any further email or written communications among the parties for approximately six months.

On June 22, 2005, another Ehud Porat attorney, identified simply as Shay, emailed Goldstein and asked whether CMC's stock was transferred to Dotomi.[34] In his response, Goldstein explained that no transfer was made or required because Dotomi was merely the new name of CMC. He also stated that "I believe you may be the beneficial owner of an option, but when I attempted to communicate with your counsel in the past, I was unable to get copies of the relevant documents—the complete option agreement and all documents referenced in the option agreement. Do you have those documents?"[35] Shay responded that he did have the documents and asked Goldstein if there was any way the

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31 *Id.*

32 *Id.* Ex. 6.

33 *Id.*

34 *Id.* Ex. 8. Plaintiffs dispute whether Shay was authorized to act on their behalf. Luzzatto Dep. 68. Plaintiffs' counsel, however, relied on Shay's email to advance the merits of their argument that there was no question about the issuance of shares to Eluv, and that only the issuance of the shares directly to the Luzzattos was in dispute. Cross Mot. for Summ. J. Oral Arg. Tr. ("Tr.") 74. Thus, I consider this email chain to be admissible evidence.

35 Mickler Aff. Ex. 8.

shares could be transferred from CMC to the Luzzattos. This reply from Shay was the last written communication between the parties regarding the exercise of the Option until 2011. Notably, Plaintiffs never attempted to make any payment of the par value of the shares as consideration for the exercise of the Option.[36] Plaintiffs continued to work for Dotomi through 2011. Beginning in 2004, however, they billed Dotomi for their services.[37]

Between 2005 and 2011, after Schiff left Dotomi, Luzzatto's sole point of contact became Yair Goldfinger.[38] Goldfinger was Dotomi's chief technology officer and a director on Dotomi's board of directors.[39] Luzzatto alleges that Goldfinger treated him as a shareholder during this time noting that: they spoke about the performance and future of Dotomi; when they had such conversations, Goldfinger would use pronouns such as "we" or "us"; Goldfinger shared information regarding Dotomi that Luzzatto characterized as "consistent with what would be provided to stockholders"; and, on one occasion, Goldfinger invited Luzzatto to Dotomi's offices in Israel.[40] According to Luzzatto, Goldfinger also called Luzzatto in 2009 and asked him if he wanted to sell his shares,

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36 Luzzatto Dep. 29 ("There wasn't anything else that I had to do. I didn't have to, you know, jump through any hoops. Everything was done. The options were paid for by my work, so all I had to do was to notify the company, okay, now I'm exercising the options.").

37 *Id.* at 15–16.

38 Luzzatto Aff. ¶¶ 5–6.

39 Goldstein Dep. 14–15.

40 Luzzatto Aff. ¶ 6.

which Goldfinger estimated were worth about $40,000.[41] On Goldfinger's advice, Luzzatto decided not to sell.

In 2011, Dotomi and ValueClick engaged in conversations regarding a merger (the "Merger"). On August 9, 2011, Plaintiffs' counsel contacted Goldstein and asked for confirmation that Eluv's shares were taken into consideration in the Merger.[42] Goldstein responded that Eluv had failed to exercise its Option and that the Option had expired in 2008.[43] Although Plaintiffs asked Dotomi to escrow funds from the Merger to cover the value of the Option, Goldstein declined.[44] The Merger closed August 31, 2011.[45] It is undisputed that, at that time, the fair value of 76,915 shares in Dotomi was approximately $644,302.69.[46]

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41 Luzzatto Dep. 72–73. Luzzatto testified that this phone call took place "around 2008." *Id.* at 73. He also states that the exact dates can be found in the Complaint because he confirmed the dates at the time of the Complaint but does not remember them all by heart. *Id.* Paragraph 20 of the Complaint states that it was in June and September 2009 that Goldfinger inquired as to whether Plaintiffs were willing to sell their shares. To support this assertion, Plaintiffs attach "call logs" showing phone calls between Luzzatto and Goldfinger between August 2008 and January 2011. Compl. Exs. 5–6.

42 Mickler Aff. Ex. 9.

43 *Id.* Ex. 11.

44 *Id.* Exs. 10–11.

45 Giuliani Dep. 20.

46 Dotomi, LLC's Second Am. Answers to Pls.' First Set of Interrogs. No. 20.

C. Procedural History

Plaintiffs filed their complaint in this action on September 27, 2011 (the "Complaint"). On November 1, 2012, both sides moved for summary judgment. After full briefing, I heard argument on both motions on January 3, 2013. At that time, I denied Plaintiffs' motion for judgment as a matter of law (1) that Plaintiffs properly had exercised the Option and (2) that Dotomi's failure to compensate Plaintiffs in 2011 entitled them to $644,302.69 plus interest. In each case, I found that there were genuine issues of material fact regarding whether Plaintiffs, in fact, had exercised the Option, and that those issues precluded summary judgment in Plaintiffs' favor. I took Defendant's summary judgment motion under advisement for the purpose of determining whether Plaintiffs' claims were barred by laches, as Defendant contends. Trial is scheduled to begin on April 2, 2013. For the reasons stated in this Memorandum Opinion, I grant Defendant's motion for summary judgment and dismiss Plaintiffs' claims.

D. Parties' Contentions

Defendant argues that Plaintiffs' claims are barred by the equitable doctrine of laches. It contends that Plaintiffs' claims are analogous to claims for breach of contract, and, thus, that the three-year statute of limitations for breach of contract actions applies here by analogy. Defendant further contends that Plaintiffs' claims accrued, at the latest, in 2005, and that the analogous statute of limitations was not tolled. According to Dotomi, Plaintiffs' claims, therefore, expired no later than 2008, three years before Plaintiffs filed their Complaint.

Plaintiffs counter, first, that there is no legal analogue to their equitable claims. According to Plaintiffs, the timeliness of their claims therefore must be evaluated by a traditional laches analysis, which they argue Defendant cannot satisfy. Plaintiffs further assert that, even if the analogous statute of limitations is three years, their claims were tolled until 2011 under each of three recognized tolling theories. Finally, Plaintiffs argue that Defendant is equitably estopped from asserting a defense of laches.

II. ANALYSIS

A. Summary Judgment Standard

The standard for reviewing a motion for summary judgment under Court of Chancery Rule 56 is well-settled. Under Rule 56, "[s]ummary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[47] "In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[48] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue

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47 *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

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

for trial.[49] "[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[50]

B. Are Plaintiffs' Claims Barred by Laches?

Laches "operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."[51] This doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[52] "Although there is no bright-line rule as to what constitutes laches, there are three generally accepted elements to this equitable defense: (1) plaintiff's knowledge that she has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3) identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[53]

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49 *See Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (citing Rule 56(e)). Thus, where an action is "not filed until after the limitations period expired, [p]laintiffs bear the burden of presenting factual evidence demonstrating that, when the facts are viewed most favorably to them, their claims are not barred by the statute of limitations or laches." *Kerns v. Dukes*, 2004 WL 766529, at *3 (Del. Ch. Apr. 2, 2004).

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

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

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

53 *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 16, 2004) (citing *Porach v. City of Newark*, 1999 WL 458624, at *3 (Del. Ch. June 25, 1999)).

"A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches."[54] "Where the plaintiff seeks equitable relief, however, the Court of Chancery generally applies the statute of limitations by analogy."[55] Absent a tolling of the limitations period, a party's failure to file within an analogous statute of limitations, if any, is typically presumptive evidence of laches.[56] "[W]here the equitable action has no legal analogue, the legal statute of limitations cannot apply by analogy."[57] In that circumstance, the traditional laches analysis applies, which requires that the plaintiff had knowledge of his claim and unreasonably delayed in bringing it, and that the delay caused the defendant prejudice.

1. Analogous statute of limitations

"The general rule for determining whether the statute of limitations should apply to a suit in equity is that 'the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with

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54 *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 9 (Del. 2009); *see also Jankouskas*, 452 A.2d at 157.

55 *See Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

56 *See Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007) (citing *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005)); *see also Acierno v. Goldstein*, 2005 WL 3111993, at *5 (Del. Ch. Nov. 16, 2005) ("Delay beyond the period fixed by the statute is presumptively unreasonable and the equitable doctrine of laches may bar the claim.").

57 *Kirby v. Kirby*, 1989 WL 111213, at *5 (Del. Ch. Sept. 26, 1989).

analogous suits at law.'"[58] Delaware courts use the following test for determining whether a legal claim is analogous to the equitable claim at issue: "[W]here the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity."[59]

The parties dispute whether there is an analogous statute of limitations for Plaintiffs' equitable claims. Plaintiffs characterize the gravamen of their claims as seeking a declaration that Eluv or the Luzzattos did exercise the Option and become Dotomi shareholders, and not as seeking a declaration that Dotomi improperly failed to recognize them as shareholders under the Option Agreement. At argument, I accepted Plaintiffs' position that, notwithstanding the Complaint's count for breach of contract, they are not proceeding on a breach of contract theory. Even adopting Plaintiffs' framing, however, there is little, if any, difference between a declaration that Plaintiffs exercised the Option properly and that Dotomi did not fulfill its obligations under the Option Agreement to recognize and effectuate Plaintiffs' exercise of the Option.

Under 10 *Del. C.* § 8106, an "action based on a promise" is subject to a three-year limitations period. Plaintiffs' claims are "based on a promise." In the Agreement, Plaintiffs undertook to perform certain patent-related work, and Defendant promised in return to grant Eluv the option to purchase shares of Dotomi stock. Plaintiffs now seek a

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58 *Ohrstrom v. Harris Trust Co.*, 1998 WL 44983, at *2 (Del. Ch. Jan. 28, 1998) (quoting *Artesian Water Co. v. Lynch*, 283 A.2d 690, 692 (Del. Ch. 1971)).

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

declaration that they properly exercised the Option and, therefore, owned shares in Dotomi at the time of the Merger. Thus, this action is "based on a promise," namely, the promises in the Agreement. Furthermore, "the legal and equitable claim so far correspond, that the only difference is, that the one remedy [(damages for breach of contract)] may be enforced in a court of law, and the other [(a declaratory judgment that Eluv is the holder of 76,915 shares of Dotomi stock)] in a court of equity."[60] This conclusion regarding the nature of Plaintiffs' claims is buttressed by Plaintiffs' own pleadings and Luzzatto's deposition.[61] I therefore find that Plaintiffs' claims are analogous to breach of contract claims, and that the analogous statute of limitations is three years under 10 *Del. C.* § 8106.

2. Statute of limitations analysis

Determining whether a claim is time-barred by a statute of limitations requires determining three things: (1) the date the cause of action accrued, (2) whether the cause of action has been tolled, and (3) if the cause of action has been tolled, whether and when Plaintiffs were placed on inquiry notice of their claims.[62]

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60 *Id.*

61 *See* Compl. (including a count for breach of contract and seeking damages); Luzzatto Dep. 87–88 (discussing the ways in which Luzzatto believed Dotomi had breached the Option Agreement).

62 *See CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6–7 (Del. Ch. Jan. 25, 2005) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004)).

a. When did Plaintiffs' cause of action accrue?

"The general law in Delaware is that the statute of limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action."[63] "The 'wrongful act' is a general concept that varies depending on the nature of the claim at issue. For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach."[64]

The parties contest when Plaintiffs' cause of action accrued. Defendant asserts that the cause of action accrued no later than June 2005. According to Defendant, it was around June 2005 that Plaintiffs' attempt to exercise the Option culminated and they then abandoned their efforts and ceased communications with Dotomi for approximately six years. Plaintiffs allege that they exercised the Option in July 2004 and that Eluv became a shareholder in Dotomi at that time. They argue that it was not until August 2011 that they learned that Defendant wrongfully would refuse to recognize Eluv as a shareholder. Thus, according to Plaintiffs, their claim did not accrue until August 2011 and clearly is timely.

For Plaintiffs to prevail on their argument, then, the evidence of record must demonstrate that Eluv reasonably believed that Dotomi recognized Eluv as a shareholder from July 2004 to August 2011. Because this is Defendant's motion for summary

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63 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) (citing *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1117 (D. Del. 1994) and *Isaacson, Stolper & Co. v. Artisan's Sav. Bank*, 330 A.2d 130, 132 (Del. 1974)).

64 *Whittington v. Dragon Gp. L.L.C.*, 2008 WL 4419075, at *5 (Del. Ch. Sept. 30, 2008) (citing *CertainTeed Corp.*, 2005 WL 217032, at *7).

judgment, I draw all reasonable inferences from the facts in the light most favorable to Plaintiffs.

Delaware law allows corporations to rely almost exclusively on the stock ledger to determine who the shareholders of the corporation are.[65] Where the company's ledgers show record ownership, no other evidence of shareholder status is necessary.[66] Where a stock ledger does not reflect record ownership and the plaintiff possesses no certificate, however, the burden is on the plaintiff to prove its shareholder status.[67] Courts then can look to outside evidence to determine whether the plaintiff is recognized as a shareholder.[68]

It is undisputed that Plaintiffs never received certificates for the shares they claim to own. Additionally, Dotomi's capitalization tables from 2005 through 2011 reflect that Eluv owned common stock warrants.[69] Dotomi claims that it only has shareholder ledgers for the years 2006, 2007, and 2010 and notes that none of those ledgers list Eluv as a shareholder.[70] Thus, the relevant internal capitalization records at Dotomi show that

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65 *Rainbow Nav., Inc. v. Pan Ocean Nav., Inc.*, 535 A.2d 1357, 1359 (Del. 1987).

66 *Testa v. Jarvis*, 1994 WL 30517, at *6 (Del. Ch. Jan. 12, 1994).

67 *Id.*

68 *Id.*

69 Pls.' Opp'n Br. Ex. R.

70 Defendant asserts that it produced the stock ledgers that it had and its counsel presented the 2006, 2007, and 2010 ledgers to the Court during oral argument. Tr. 22–23. Dotomi stated that it does not possess shareholder ledgers for 2004, 2005, 2008, or 2009. *Id.* at 20, 23. Plaintiffs ask this Court to draw an adverse inference as to the contents of the ledgers for these years. Defendant counters that because

Eluv was recognized as an option holder, not a shareholder. The facts that Plaintiffs do not possess share certificates and that the relevant ledgers list Eluv as an option holder (not a shareholder) support Defendant's position that Eluv was not recognized as a shareholder from 2004 to 2011.

To rebut this allegation, Plaintiffs rely in part on a Dotomi capitalization table from 2004 that shows Eluv as a shareholder.[71] They argue that Schiff's delivery of this capitalization table of the company to Luzzatto effected a delivery of the disputed shares to Plaintiffs.[72] Schiff delivered this table to Luzzatto, however, on June 16, 2004, almost

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as many as eight years have passed and Dotomi has undergone several significant corporate changes, it is unsurprising that Dotomi shareholder ledgers are not available for every year from 2004 through 2011. Answering Br. in Opp'n to Pls.' Mot. for Summ. J. 18 n.8. In this case, I do not consider an adverse inference to be warranted. There is no credible evidence that, in the years leading up to 2011, Dotomi knew Plaintiffs eventually would bring claims against it. *See Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. 2009) ("An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item." (quoting *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006))).

71 Pls.' Opp'n Br. Ex. F.

72 Plaintiffs base this argument on 6 *Del. C.* § 8-301(b). Section 8-301(b) provides that "Delivery of an uncertificated security to a purchaser occurs when: (1) the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer . . . ." Plaintiffs have not presented the Court with any authority to support applying Section 8-301(b) in the circumstances of this case, namely, where a party received a capitalization table that reflected what the ownership of the company would be if certain action was taken by that party. Furthermore, Defendants have presented some evidence that Dotomi shares are actually certificated. *See* Giuliani Dep. 56, 185–86. In addition, Defendant argues that the pleadings gave it no notice of Plaintiffs' position that Dotomi's shares were uncertificated and that the emailed capitalization table effected a delivery of

a month before Eluv first attempted to exercise the Option.[73] According to Luzzatto, Schiff provided Luzzatto the capitalization table on the following basis:

> [Schiff] [c]alled me and said, look, we are going to have investment, I'm sending you the cap table that shows you are a shareholder, and we need this to be correct, so I need you to tell the company lawyer that you exercise the option so that my cap table won't be – would be correct.[74]

Even construing the delivery of the 2004 capitalization table in the light most favorable to Plaintiffs, therefore, I am not persuaded that this document demonstrates that Eluv was a shareholder of Dotomi in 2004. This table reflected what Dotomi's capitalization *would be* if Eluv exercised its Option. Luzzatto understood that he was required to take action for this table to be accurate. Indeed, Plaintiffs' subsequent attempts to exercise the Option confirm that Plaintiffs realized that Eluv still held only an option to purchase Dotomi shares as of July 11, 2004.[75]

Plaintiffs also rely on email communications between Plaintiffs' attorneys and Dotomi representatives between July 11, 2004 and June 2005 to demonstrate that they properly had exercised the Option.[76] Even construing these emails in the light most favorable to Plaintiffs, however, the emails demonstrate only that Plaintiffs attempted to

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those allegedly uncertificated shares. For all of these reasons, I find Plaintiffs' argument on this point unpersuasive.

73 Luzzatto Dep. 42–45.

74 *Id.* at 42–43.

75 *See* Pls.' Opp'n Br. Ex. H.

76 *See* Mickler Aff. Exs. 4–6.

exercise the Option. As discussed in detail *infra*, the emails are devoid of indication that Dotomi believed that Eluv became, or had become, a shareholder in Dotomi rather than being an option holder seeking to exercise its option.[77] Plaintiffs' attempted exercise of the Option does not support a conclusion that Eluv reasonably believed that Dotomi recognized Eluv as a Dotomi shareholder at that time.

For these reasons, I conclude that Plaintiffs attempted to exercise the Option between July 2004 and June 2005 but that Dotomi never recognized Eluv as a shareholder and that Eluv was on notice that Dotomi did not believe Eluv effectively had exercised the Option. Plaintiffs' cause of action based on Dotomi's failure to recognize Eluv as a shareholder, therefore, began to accrue at the latest in June 2005. Thus, absent tolling, Plaintiffs' claims are presumptively barred by laches because the analogous three-year statute of limitations expired in June 2008.

b. Was the statute of limitations tolled?

"Even after a cause of action accrues, the running of the limitations period can be tolled in certain limited circumstances."[78] Plaintiffs allege that tolling applies under each of the three recognized tolling doctrines: (1) fraudulent concealment, (2) inherently unknowable injury, and (3) equitable tolling.[79] Even if a plaintiff successfully invoked

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77 *See infra* Part II.B.2.c.i.

78 *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)).

79 Plaintiffs suggest that to assess the doctrine of equitable tolling in this case, the Court would be required to decide the merits of Plaintiffs' declaratory judgment

any of the three tolling doctrines, however, the limitations period is tolled only until the plaintiff discovers, or by exercising reasonable diligence should have discovered, its injury.[80] That is, the limitations period begins to run when the plaintiff is objectively aware of facts giving rise to the wrong, *i.e.*, is on inquiry notice. "Inquiry notice is sufficient to prove that the statute of limitations was not tolled for purposes of summary judgment, or that the doctrine of laches is applicable."[81] Inquiry notice exists when

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claim. According to Plaintiffs, this is because whether or not Defendant owed Plaintiffs fiduciary duties may depend on whether they successfully exercised the Option and became Dotomi shareholders. In the alternative, they argue that Defendant owed them fiduciary duties from the time they *attempted* to exercise the Option, regardless of whether the attempt was successful. It is not necessary, however, to reach this issue. Even if the doctrine of equitable tolling was available to Plaintiffs, the limitations period is tolled only "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." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998). No evidence of actual concealment is necessary. *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007). This doctrine is supported by the idea that even a diligent and attentive investor, in reliance on the good faith of a fiduciary, may be ignorant of the fiduciary's self-interested acts that are injurious to the company. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (citing *Kahn v. Seaboard Corp.*, 625 A.2d 269, 275–76 (Del. 1993)). In this case, rather than concealing the alleged injury, Goldstein affirmatively informed Plaintiffs that they owned an option, not Dotomi shares, and that further action was required to exercise the Option. Furthermore, for the reasons I find that Plaintiffs were on inquiry notice of their claim, a diligent investor would have known of the alleged injury.

80 *Albert*, 2005 WL 1594085, at *19.

81 *Whittington v. Dragon Gp., L.L.C.*, 2008 WL 4419075, at *7 (Del. Ch. Sept. 30, 2008) (citing *Kerns v. Dukes*, 2004 WL 766529, at *4 n.31 (Del. Ch. Apr. 2, 2004)).

"person[s] of ordinary intelligence and prudence [have facts sufficient to place them] on inquiry which, *if pursued*, would lead to the discovery" of the injury.[82]

c. When were Plaintiffs on inquiry notice?

A close look at each of the three tolling doctrines that Plaintiffs invoke is not necessary. The evidence overwhelmingly demonstrates that a reasonable person would have been on notice in 2005 that, at least from Dotomi's perspective, more was required to exercise the Option. Plaintiffs' main counterargument is that the parties' email communications demonstrate that the dispute was not over whether the Option had been exercised, but over whether the shares could be issued directly to the Luzzattos, rather than to Eluv as an entity. The emails, however, cannot reasonably be read in this way. As the following review of the parties' communications reveals, Plaintiffs, and their counsel at the time, could not reasonably have thought that Dotomi believed the Option had been exercised. Thus, Plaintiffs were on inquiry notice of their claims for declaratory judgment that they properly had exercised the Option in June 2005, at the latest.

i. The email communications between the parties

On July 11, 2004, Plaintiffs sent their first request by email "that the Option shares that ELUV is entitled to receive, shall be issued and allotted, as soon as possible, directly to Esther and Kfir Luzzatto, in equal parts."[83] Goldstein responded not by confirming the exercise, but by requesting a copy of the Trust Agreement between Eluv and the

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82 *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004) (emphasis added) (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7).

83 Mickler Aff. Ex. 4.

Luzzattos and stating that he would "be able to confirm for [Plaintiffs] what must be done to properly exercise any rights under the option agreement."[84] After receiving the Trust Agreement, Goldstein informed Plaintiffs that there were several inconsistencies between the Option Agreement and the Trust Agreement and that the parties should confer by phone to resolve them. No such conversation occurred, and discussions between the parties ceased until January 2005.

In January 2005, Plaintiffs' attorney Shlomi initiated another chain of emails with Goldstein. Shlomi asked Goldstein several questions about Dotomi's value and Eluv's percentage in the company. As noted *supra*, Shlomi closed his email by inquiring "if there is any prevention to issue our clients the option shares that they are entitled to."[85] Goldstein responded by asking questions regarding the Trust Agreement, and asking whether an escrow agent had been appointed as required by the terms of the Option Agreement.[86] Goldstein stated that these were "some of the questions I was trying to get answers to *before completing the option exercise* and transfer documents."[87] In response to Shlomi's question about Eluv's current ownership percentage in Dotomi, Goldstein responded that the "76,915 shares that Eluv Holdings *can obtain* currently represents approximately 0.5% on a fully diluted basis."[88] Shlomi was not happy with Goldstein's

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84 *Id.*

85 Pls.' Opp'n Br. Ex. O.

86 Mickler Aff. Ex. 6.

87 *Id.* (emphasis added).

88 *Id.* (emphasis added).

response. He replied that he was "very disappointed to see that you once again, have not answered all of my questions."[89] Without addressing the questions Goldstein asked about the Trust Agreement and escrow agent, Shlomi closed by stating: "Once again (For the 3rd time), I would like to ask if there is any prevention to issue our clients the options shares they are entitled to."[90] In addition to Shlomi's obvious frustration with Goldstein, Luzzatto expressed the view that "Mr. Goldstein was, to put it mildly, obstructive,"[91] that he was "uncooperative,"[92] and that he was "being unresponsive."[93] Nevertheless, Plaintiffs now assert that they relied on these interactions with Goldstein as supporting the reasonableness of their belief that Eluv properly had exercised the Option.

The email from Plaintiffs' counsel Shay in June 2005 initiated the last email exchange between the parties. In this exchange, Goldstein alerted Shay that Eluv "may be the *beneficial owner of an option*."[94] Shay responded by asking "if there is any way to transfer the shares *from cmc* [*i.e.*, Dotomi] to luzzatto?"[95] This was the last email

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89 *Id.*

90 *Id.*

91 Luzzatto Dep. 53.

92 Luzzatto Aff. ¶ 3.

93 Luzzatto Dep. 57.

94 Mickler Aff. Ex. 8 (emphasis added).

95 *Id.* (emphasis added).

between the parties until Plaintiffs' August 2011 request for "confirmation that the shares owned by ELUV in DOTOMI are taken in consideration" in the anticipated Merger.[96]

Plaintiffs allege that, after these conversations, they believed that Eluv had exercised its Option, and that these email discussions related only to Plaintiffs' request to have the shares issued directly to the Luzzattos. At no point in any of these email exchanges, however, did Dotomi indicate that Eluv successfully had exercised its Option. Rather, Goldstein continually requested more information from Plaintiffs, suggested that the parties' representatives speak over the phone, and, at one point, explicitly told Plaintiffs that they were considered the beneficial owners of an option. Moreover, even Plaintiffs' initial email requesting that the Option be exercised indicated that Plaintiffs understood that further action would be necessary. In the sentence following the attempted exercise, Plaintiffs' attorney wrote: "Please inform me what needs to be done, in order to fulfill the above request."[97] Furthermore, Shay's last email on behalf of Plaintiffs recognized that CMC, *i.e.*, Dotomi, not Eluv, was the holder of the shares. This perception of the existing state of affairs was confirmed repeatedly by Goldstein's replies.

The communications that Luzzatto allegedly had with Goldfinger after 2005 do not change this result. As an initial matter, some of the information regarding these communications appeared in the record for the first time through Luzzatto's affidavit.

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96 *Id.* Ex. 9.

97 *Id.* Ex. 4 at 9.

This affidavit was filed as an exhibit to Plaintiff's answering brief in opposition to Defendants' motion for summary judgment and is dated the same day as that brief, December 3, 2012. Defendants complain that some matters addressed in Luzzatto's affidavit were not disclosed during fact discovery, which ended on August 20, 2012, despite being directly responsive to certain discovery requests.[98] Even considering this belated affidavit, and giving Plaintiffs the benefit of all reasonable inferences that could be drawn from the averments made therein, however, a reasonable investor could not have relied on these communications to conclude that the Option had been exercised properly.

This is mainly because Goldstein, not Goldfinger, was by all appearances the Dotomi representative who could confirm or deny whether an effective exercise of the Option had occurred. Luzzatto's subsequent communications with Goldfinger do not change the fact that Goldstein previously had communicated a rather clear message that Plaintiffs had not exercised the Option yet. In addition, Goldfinger's actions that Plaintiffs allege were confirmatory of their status as Dotomi shareholders, can be harmonized with Plaintiffs' status as Dotomi's patent attorneys. It is not unusual, for

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[98] Defendant also argues that Luzzatto's affidavit contradicts his deposition testimony and includes conclusory statements and patent hearsay. Giving Plaintiffs the benefit of all reasonable inferences, the affidavit and deposition can be read as noncontradictory. I have not considered, however, the statements in Luzzatto's affidavit that are simply conclusory or constitute hearsay. *See* Luzzatto Aff. ¶ 4 ("[F]rom that point forward, I was acknowledged and treated by Mr. Schiff as a stockholder of Dotomi."); *id.* ¶ 8 ("I understand from [a mutual friend] that, on numerous occasions, Mr. Goldfinger acknowledged our status as stockholders in Dotomi.").

example, that Dotomi's chief technology officer would use the pronouns "us" and "we" in conversations with the company's patent attorney nor that he would invite Luzzatto to Dotomi's offices. Moreover, at the time of Goldfinger's 2009 phone call regarding Luzzatto selling his shares, Plaintiffs' cause of action for declaratory judgment in this case already would have been barred as untimely. Four years had elapsed since Dotomi, through Goldstein, had indicated that it did not recognize Plaintiffs as Dotomi shareholders. Thus, these alleged interactions with Goldfinger occurred outside of the critical time period and do not provide evidence that a reasonable investor would not have been on at least inquiry notice of his claims in June 2005.

Thus, I conclude that the email exchanges with Goldstein and communications with Goldfinger compel the conclusion that Plaintiffs knew in 2004 and 2005, or, at least, were on inquiry notice, that Dotomi believed that they had not completed the exercise of the Option and did not recognize Eluv as a shareholder. The email communications alone are sufficient to have placed Plaintiffs on inquiry notice of facts that, if pursued, would have led them to discover that Dotomi did not consider the Option to have been exercised. There is additional evidence, however, that, even when viewed in the light most favorable to Plaintiffs, buttresses this conclusion.

ii. Plaintiffs never received stock certificates or other shareholder information

It is undisputed that Plaintiffs never received stock certificates.[99] In the six years following Eluv's attempted exercise of the Option, Plaintiffs did not receive any written

[99] Tr. 20.

material regarding Eluv's status as a shareholder.[100] Plaintiffs received no shareholder reports, financial statements, or notices regarding shareholder meetings. Eluv never was asked to vote on any matters regarding Defendant's affairs and Plaintiffs never attended a stockholder's meeting after Eluv's purported exercise. Not receiving documents of this sort should have alerted a reasonable investor to the fact that Dotomi did not consider Eluv a shareholder.

iii. Plaintiffs did not pay the par value price to exercise the Option

It also is undisputed that Plaintiffs did not pay an exercise price or "strike price" for Dotomi's stock. Plaintiffs contend that the Option Agreement unambiguously does not require a cash payment to exercise the Option.[101] For example, the Agreement does not explicitly state a dollar amount to be paid to exercise the Option. That does not

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[100] For example, at Luzzatto's deposition, Dotomi's counsel, referring to paragraph 13 of the Complaint, asked "What things did the company do, in your view that recognized the plaintiffs as de facto stockholders of the company?" Luzzatto replied:

> Again, I think you shouldn't think that Dotomi at the time was IBM. It was a small startup company. So conversation flowed very openly and freely between various people. And there were other shareholders that were invited to meet or had phone conversations and spoke about Dotomi's affairs, where is Dotomi going, what should be done. And I was consulted in the period freely and I gave my advice freely as much as I could on various things. And again, I was invited – I only found one email that invites me, but I was invited to attend other meetings back in 2002, 2003. And I did. I attended them.

Luzzatto Dep. 77–78.

[101] *Id.* at 30 ("[I]t's absolutely clear that there was no additional price to pay. And also from the agreement it's clear.").

mean, however, that no payment at all was required to exercise the Option here. The Agreement sets out two circumstances under which Eluv is entitled to the Option under a section entitled "Mechanism of the Option." This section expressly contemplates the "purchase" of shares through payment of par value if the Agreement is terminated before the Option fully has vested and specifies the procedure to be used to determine the exact extent to which the Option will be treated as vested at the time the Agreement was terminated. The next sentence of the Agreement states "[i]n any other event [*i.e.*, if the Agreement is not terminated before the Option is fully vested,] the Option may be exercised by the Optionee at any time within 8 (eight) years from the date of the grant."[102]

Plaintiffs contend that in the latter circumstance, the Agreement does not require the Option to be "purchased" for par value. In this respect, Plaintiffs appear to argue that the Dotomi shares have been "purchased" through Plaintiffs' performance of the patent services contemplated by the Agreement. This conflates the vesting of the Option, however, with the actual exercise of the Option to obtain the underlying shares. That is, by performing patent services, Plaintiffs perfected their right to an option (or had it vest) to purchase a specified number of Dotomi shares for their relatively nominal par value. Furthermore, Defendant counters that the statement "the Option may be exercised" is merely a reference to the manner in which the Agreement provided for the Option to be exercised, *i.e.*, against payment of the par value of the shares. Indeed, the Option

[102] Option Agreement 2.

Agreement grants to Eluv "an option *to purchase* 76,915 shares."[103] To the extent Plaintiffs contend that the absence of a repeat reference to the "purchase" of Option shares means no payment is required if the Option is exercised after the Option is fully vested, I conclude that interpretation is unreasonable and does not reflect the objective intent of the parties.

Additionally, 8 *Del. C.* § 157(d) states, in relevant part, "In case the shares of stock of the corporation to be issued upon the exercise of such rights or options shall be shares having a par value, the consideration so to be received therefor shall have a value not less than the par value thereof." In other words, Delaware law requires the payment of at least par value "upon the exercise . . . of options." Finally, the Delaware Supreme Court defines an option as "a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time."[104] In the face of this authority and the language of the Agreement, a reasonable investor would expect to pay a strike price to exercise the Option. The fact that they never had made such a payment put Plaintiffs, who were represented by

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103 *Id.* at 1 (emphasis added); *see also* Mickler Aff. Ex. 1, Trust Agreement, § 1.4.2 ("The Trustee [(Eluv)] will notify the Beneficiaries [(the Luzzattos)] regarding the payment due to the Optioner [(CMC)] for the executed Option Shares, and the Beneficiaries will be responsible for making the payment to the Optioner or the Escrow Agent.").

104 *Gibbs v. Piper*, 153 A. 674, 676–77 (Del. 1930); *see also AT&T Corp. v. Lillis*, 953 A.2d 241, 243 n.1 (Del. 2008) ("An option is a right to purchase a stock at a given price.").

counsel, on inquiry notice that Eluv had not become a shareholder in the Delaware corporation Dotomi.

iv. Eluv is struck from the BVI Register

The record further shows that as of July 11, 2004, the date Plaintiffs claim that Eluv exercised the Option, Eluv already had been struck from the BVI Register. Under British Virgin Islands' law, a company that has been struck from the BVI Register cannot (1) commence legal proceedings, (2) carry on business or deal with its assets, or (3) defend any legal proceedings.[105] Notably, a "company that has been struck off cannot deal with its property" and its "directors and members may not act in any way with respect to the affairs of the company."[106] "If a company that has been struck off has assets, it will be necessary to have the company restored to have access to them."[107] Thus, when Plaintiffs attempted to exercise the Option on behalf of Eluv, the company did not have the legal authority to assert its rights under the Agreement. In addition, Dotomi arguably could not have issued shares to Eluv, which was a legally defunct company.

Plaintiffs reinstated Eluv to the Register on October 17, 2012, over one year after purporting to bring this action on behalf of Eluv, and almost four years after the Option

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105 BVI Financial Services Commission, Registry of Corporate Affairs, User Guides on the BVI Business Companies Act, Striking off and Liquidation of Companies Under the BVI Business Companies Act (2007).

106 *Id.*

107 *Id.*

expired.[108] Even assuming that Eluv's reinstatement retroactively gave Eluv the legal authority to exercise the Option on July 11, 2004,[109] Plaintiffs' actions would have placed Defendant in an awkward position. Defendant legally could not have recognized the attempted exercise by Eluv in 2004 because Eluv had been struck from the BVI Register. Defendant might have had to account, however, for the contingency of Eluv's possible future reinstatement and retroactive legal authority to effectuate the attempted exercise. Under Plaintiffs' theory, then, Defendant would have been forced to hold the Option, theoretically in perpetuity, until Eluv was either reinstated or dissolved. Thus, Plaintiffs' contentions that they exercised the Option and that Eluv became a valid shareholder of Dotomi in July 2004, is undermined by the facts that Eluv had been struck off the Register at that time and that Plaintiffs did not reinstate Eluv's legal status until years after the Option expired in December 2008.

I also note the relative ease with which Plaintiffs could have discovered their injury. A one sentence email insisting that Dotomi confirm that Eluv validly had exercised the Option and was considered a shareholder likely would have been effectual, especially coupled with a reasonable degree of follow up. Yet, instead of pressing the issue, and in the face of several indications that Eluv was not considered a shareholder, Plaintiffs sat idly by until August 2011, when they discovered that, as a result of an

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108 Mickler Aff. Ex. 21.

109 For purposes of this ruling, I need not, and do not, interpret BVI law to determine whether Plaintiffs, in fact, had retroactive legal authority to exercise the Option. Rather, I assume for purposes of Defendant's motion for summary judgment that that is the case.

impending merger, shares of Dotomi stock had become quite valuable. In addition, the record before me indicates that Plaintiffs made a rational decision not to pursue the exercise of the Option to completion because the pursuit was costing Plaintiffs money and the Dotomi shares had no value around 2005.[110]

For all of these reasons, I find that Plaintiffs were on inquiry notice by, at the latest, June 2005 that Eluv was not considered a shareholder of Dotomi. Because Plaintiffs brought their claim in 2011, after the analogous three-year limitations period had expired in June 2008, Plaintiffs' claims presumptively are time-barred by the doctrine of laches. Furthermore, I cannot conclude that there are any "unusual conditions or extraordinary circumstances" that make it inequitable to preclude further pursuit of this action.[111] Plaintiffs delayed over six years in pressing their claim for entitlement to Dotomi stock when it was unreasonable for them to have believed that the Option exercise was a *fait accompli* in 2004. In addition, I find that Defendant would suffer at least some prejudice from Plaintiffs' unreasonable delay because (1) it already has paid the merger consideration to Dotomi shareholders, (2) memories have faded regarding the circumstances surrounding the execution of the Option Agreement and the

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110 *See, e.g.*, Luzzatto Dep. 68 (discussing the Shay email and stating "[b]y that time we already concluded that we didn't want to spend any more money chasing Mr. Goldstein for that particular legal service [*i.e.*, issuing the shares directly to the Luzzattos] that he was reluctant to provide"); Tr. 29 (noting that Dotomi had dim prospects between 2005 and 2008 and making the point that "Eluv as an entity was defunct this entire time, so it would have required the Luzzattos to pay the fees and fines to get it back into good standing"); Giuliani Dep. 61, 74 (noting that Dotomi had no revenue in 2004 and was doing "very poorly" in 2005).

111 *See Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009).

communications regarding its exercise, and (3) Dotomi has gone through several significant corporate changes since it entered the Agreement, including a succession of four different CEOs.[112]

C. Is Defendant Equitably Estopped from Asserting Laches?

In the alternative, Plaintiffs claim that Defendant is equitably estopped from asserting the doctrine of laches. The doctrine of equitable estoppel may be invoked "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change his position to his detriment."[113] "[T]he doctrine is applied cautiously and only to prevent manifest injustice."[114] To prevail on a claim for equitable estoppel, the party claiming estoppel must prove three things: that it "(1) lacked knowledge or means of obtaining knowledge of the truth of the facts in question; (2) relied on the conduct of the party against whom estoppel is claimed; and (3) suffered a

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112 *See* Luzzatto Dep. 35, 37, 46; Giuliani Dep. 31, 32, 164–66. For the same reasons stated in the text, I conclude that Plaintiffs' claims would be barred by laches, even if the Court accepted Plaintiffs' argument that their claims have no analogue at law and, thus, must be analyzed based on the traditional equitable requirements for laches. Defendant has demonstrated that Plaintiffs had knowledge of their claim, unreasonably delayed in bringing that claim, and that the delay caused Defendant prejudice. Plaintiffs' six-year delay in bringing this action is not just outside the three-year limitations period that I find analogous in this case. Rather, they unreasonably delayed twice as long as that analogous limitations period. Defendant also has produced sufficient evidence that they were prejudiced by Plaintiffs' delay. In addition to the points discussed *supra*, it is also notable that two persons with key roles in this dispute, Schiff and Goldfinger, no longer are employed by Dotomi and that neither was deposed.

113 *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1965).

114 *Pilot Point Owners Ass'n v. Bonk*, 2008 WL 401127, at *2 (Del. Ch. Feb. 13, 2008).

prejudicial change of position as a result of his reliance."[115] "Such reliance must be both reasonable and justified under the circumstances."[116]

Plaintiffs have not met the first element. Plaintiffs were in email contact with Defendant from 2004 through 2005, and they performed patent-related services for Defendant through 2011.[117] As stated above, at any point from 2004 until the analogous limitations period expired in 2008, Plaintiffs could have pressed for some form of confirmation that Eluv successfully had exercised its Option.[118] Indeed, in response to an email from Plaintiff's counsel, Goldstein informed Plaintiffs that Eluv was the "beneficial owner of an option," not of shares. While it is true that the "sole means by which the Plaintiffs could have determined they were shareholders was from [Defendant]'s own agents,"[119] Plaintiffs never made a reasonable effort to follow up on their informal request for confirmation of what needed to be done to exercise the Option. Rather, they prematurely abandoned their admittedly unsatisfactory communications with Goldstein. Plaintiffs' failure to use the available means to discover the truth of the facts in question is fatal to their claim that Defendant is equitably estopped from asserting laches.

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115 *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990).

116 *Pilot Point Owners Ass'n*, 2008 WL 401127, at *2.

117 Luzzatto Dep. 15–16.

118 If Plaintiff had inquired and Defendant failed to respond or responded in a way that provided a reasonable justification for Plaintiffs' inaction, Plaintiffs' claim for equitable estoppel would have some force. The evidence in this case, however, is insufficient to support a reasonable inference that Plaintiff lacked knowledge or means of obtaining the facts in question.

119 Pls.' Opp'n Br. 35.

III. CONCLUSION

For the foregoing reasons, I grant Defendant's Motion for Summary Judgment on the basis of laches and dismiss the claims in Plaintiffs' Complaint with prejudice. Each side will bear its own attorneys' fees.

IT IS SO ORDERED.