EFiled: Oct 31 2013 03:22PM EDT
Transaction ID 54476599
Case No. 6896-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VIVIAN CZARNINSKI BAIER DE ADLER	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 6896-VCN**
	:	
UPPER NEW YORK INVESTMENT COMPANY LLC, NORTH PARK AVENUE INVESTMENT COMPANY LLC, UPPER HUDSON INVESTMENT COMPANY LLC, VISTAMAR INVESTMENTS LLC, JOHNY JACOBO CZARNINSKI BAIER, DANNY DAVID CZARNINSKI BAIER, and TALY CZARNINSKI SHEFI DE SCHWARTZ,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: July 17, 2013
Date Submitted: October 31, 2013

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Thomas W. Briggs, Jr., Esquire and Matthew R. Clark, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendants Upper New York Investment Company LLC, North Park Avenue Investment Company LLC, Upper Hudson Investment Company LLC, Johny Jacobo Czarninski Baier, and Taly Czarninski Shefi de Schwartz.

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NOBLE, Vice Chancellor

I. INTRODUCTION

This Delaware action is a dispute among family members of Ecuadorian citizenship over their ownership interests in a group of family-owned companies based in Ecuador. That four Delaware limited liability companies hold some of the disputed stock may explain why this lawsuit was filed here.

Vivian Czarninski Baier de Adler ("Vivian") filed this action against two groups of parties: first, the entities Upper New York Investment Company LLC ("Upper New York LLC"), North Park Avenue Investment Company LLC ("North Park Avenue LLC"), Upper Hudson Investment Company LLC ("Upper Hudson LLC"), and Vistamar Investments LLC ("Vistamar LLC," and collectively, the "Delaware LLCs"); and second, the individuals Johny Jacobo Czarninski Baier ("Johny"), Danny David Czarninski Baier ("Danny"), and Taly Czarninski Shefi de Schwartz ("Taly," and collectively, the "Individual Defendants," and together with the Delaware LLCs, the "Defendants").

Vivian contends that the Individual Defendants engaged in a scheme to defraud her of her minority ownership in the Czarninski family empire by, among other actions, consolidating the group of companies into a select few without notice or consent, then unilaterally diluting her ownership interest in the remaining companies, before transferring stock in these companies for inadequate consideration to the Delaware LLCs by way of entities in the British Virgin

Islands.[1] Vivian alleges claims under Ecuadorian law for fraud and abuse and for unjust enrichment.[2]

The Defendants filed three separate motions to dismiss. Upper New York LLC, North Park Avenue LLC, and Upper Hudson LLC moved to dismiss for lack of subject matter jurisdiction, improper venue, and failure to state a claim. Johny and Taly moved to dismiss for lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process.[3] Finally, Vistamar LLC and Danny moved to dismiss upon all six of these grounds. Aside from filing separate motions, the Defendants presented a joint defense.

By an agreement among the parties, the only grounds for dismissal under the Court's consideration at this time are under Court of Chancery Rule 12(b)(1) for subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim upon which relief can be granted for the claims against Danny and the Delaware LLCs (together, the "Moving Defendants").[4]

[1] Plaintiff's Verified Complaint (the "Complaint" or "Compl.") ¶¶ 1, 41, 103. The Complaint is the source of the facts in this memorandum opinion. *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).
[2] Compl. ¶¶ 102-12.
[3] Johny and Taly also purported to preserve the opportunity to move to dismiss for lack of subject matter jurisdiction.
[4] *See* Third Am. Stip. and Briefing Scheduling Order (Oct. 17, 2012).

II. THE PARTIES

Vivian, who resides in Israel, is the sister of Johny and Danny and the aunt of Taly, who is Johny's daughter. Johny, Danny, and Taly all reside in Ecuador.[5]

The Delaware LLCs are Delaware limited liability companies. Johny controls Upper New York LLC, North Park Avenue LLC, and Upper Hudson LLC, all of which were formed on April 2, 2008.[6] Danny controls Vistamar LLC, which was formed on December 29, 2009.[7] The Delaware LLCs have no offices, no employees, and no business, according to Vivian, outside the "sole purpose of storing the assets [held by] Johny, Danny and Taly" at issue here.[8]

III. BACKGROUND

Vivian, Johny, and Danny are the children of Alfredo Czarninski, who founded a group of family-owned companies that came to be known as Grupo Economico El Rosado ("El Rosado Group" or the "Group"), "a real-estate and business empire" in Ecuador that Vivian alleges is currently worth over $1 billion.[9] El Rosado Group is not an entity itself but rather a group of companies with significant cross-ownership.[10] In effect, the Group "owns and operates prominent supermarket chains, shopping centers, hardware stores, toy stores, movie theaters,

[5] *Id.* ¶¶ 2, 7-9.
[6] *Id.* ¶¶ 3-5, 70-72, 75.
[7] *Id.* ¶¶ 6, 73.
[8] *Id.* ¶ 74.
[9] *Id.* ¶¶ 17-19, 27.
[10] *Id.* ¶ 29.

and other businesses."[11] Historically, the main operating company of El Rosado Group was Importadora El Rosado Cia. Ltda. ("El Rosado Ltd."), an Ecuadorian limited liability company that "generated almost all of the Group's revenue, and financed and managed the other companies in the Group."[12]

A. *The Czarninski Family's Ownership of El Rosado Group*

Alfredo Czarninski informed his three children on several occasions that he and his wife each owned 25% of the Group and that the children each owned an equal 16.67%. Not everyone in the family would own his or her designated percentage in every Group company, but rather each allegedly owned that percentage of the Group as a whole.[13] By 2002, Vivian was a stockholder of record for several El Rosado Group companies, and, moreover, her ownership interest reflected her father's general plan. For example, she claims she owned approximately 16.22% of El Rosado Ltd.[14] The purported plan of ownership of the Group by the three siblings after the deaths of their parents was to be an equal 33.33%.[15]

[11] *Id.* ¶ 18.
[12] *Id.* ¶¶ 20, 25.
[13] *Id.* ¶¶ 28-29.
[14] *Id.* ¶ 31.
[15] *Id.* ¶¶ 29-30.

Vivian was less involved than her brothers in the management and operations of the Group. Johny succeeded his father as President of El Rosado Group in 1997, and Danny became Executive Vice President.[16] Living in Israel while the rest of the Czarninski family lived in Ecuador, Vivian was a "passive shareholder of El Rosado Group, who trusted her family members to run the business."[17]

On August 19, 2003, Alfredo Czarninski died intestate.[18] A dispute eventually arose over his estate's assets and plan of distribution, with Vivian claiming ownership of one-third of the estate's stock, if any, in El Rosado Group companies. Since at least their father's death, according to Vivian, "Johny and Danny have exerted complete control over El Rosado Group, ignoring corporate formalities, and acting as if they were the exclusive owners."[19]

B. *The Scheme to Defraud Vivian*

Vivian claims that Johny and Danny deprived her of her stock in El Rosado Group, which she owned as a stockholder of record and by inheritance from their father, with a five-part fraudulent scheme involving:

[16] *Id.* ¶ 35. The Court notes the internal inconsistency of the allegations here that these two individuals became executives of the Group and the prior allegations that the Group was not an actual entity but merely shorthand for the group of family-owned companies.
[17] *Id.* ¶¶ 32-33.
[18] *Id.* ¶ 36.
[19] *Id.* ¶ 37.

> (a) converting El Rosado Ltd. to a corporation; (b) consolidating El Rosado Group through a series of mergers; (c) increasing capital to dilute the other shareholders; (d) transferring a substantial majority of El Rosado corporate shares to shell companies in the British Virgin Islands, for no consideration; and (e) transferring those shares from the BVI companies to the Delaware LLCS, again for no consideration.[20]

This scheme, from Vivian's perspective, demonstrates how Johny and Danny "abused Vivian's trust, violated their fiduciary duties, and conspired to fraudulently manipulate El Rosado Group to transfer wealth from Vivian and their parents to the Delaware companies under their control."[21]

1. The El Rosado Ltd. Conversion and the El Rosado Group Consolidation

The scheme began when Johny, "with the tacit consent of Danny," converted El Rosado Ltd. into Corporacion El Rosado S.A. ("El Rosado Corp."), an Ecuadorian corporation, on March 15, 2005. Although such a conversion under Ecuadorian law purportedly requires the "unanimous written consent of all of [the limited liability company's] members"—which would have included Vivian as a 16.22% member—Johny allegedly did not notify her or obtain her consent.[22]

The next alleged step in the scheme was the consolidation of several companies in El Rosado Group. The restructuring resulted in three "real-estate holding companies worth hundreds of millions of dollars each": El Rosado Corp.,

[20] *Id.* ¶¶ 41, 103.
[21] *Id.* ¶ 40.
[22] *Id.* ¶¶ 42-43.

Inmobiliaria Lavie, S.A. ("Lavie"), and Inmobiliaria Motke, S.A. ("Motke").[23] One other remaining company, Comercial Inmobiliaria S.A. ("CISA"), owned a majority of the stock of El Rosado Corp.[24]

2. The Dilution of Vivian's Minority Stock Ownership

Vivian alleges particular facts about an unlawful dilution of her ownership in one Group company: Lavie. At a general Lavie stockholders meeting on April 19, 2005, Johny unilaterally issued additional stock in Lavie "to companies that he himself wholly owned."[25] Specifically, Vivian alleges that Johny, who "was the only person present" at this meeting, caused Lavie to issue 9,734,582 new shares at a par value of $389,383, "instead of [at] their market value . . . [in the] hundreds of millions of dollars." The newly issued stock purportedly increased Johny's ownership of Lavie from 0.84% to 68.84%.[26] Vivian was not notified of the meeting or in any way offered to subscribe into this new offering of Lavie stock.[27]

3. The Series of Transfers of Group Stock to the Delaware LLCs

The final steps of the scheme, Vivian contends, culminated with the transfer of stock in the remaining El Rosado Group companies to the Delaware LLCs. By March 29, 2007, Johny and Danny had formed four companies in the British

[23] *Id.* ¶ 44.
[24] *Id.* ¶ 45.
[25] *Id.* ¶¶ 46-47.
[26] *Id.* ¶¶ 47-49.
[27] *Id.* ¶ 49.

Virgin Islands (the "BVI Companies").[28] At this point, Vivian's niece, Taly, began to assist Vivian's brothers.[29] The Individual Defendants purportedly transferred two of Lavie's primary assets, its majority controlling interest in CISA "worth hundreds of millions of dollars" and its over 99% interest in Motke similarly "worth hundreds of millions of dollars," to the BVI Companies "for absolutely no consideration."[30] In addition, the Individual Defendants allegedly transferred to the BVI Companies CISA's majority interest in El Rosado Corp., which also "was worth hundreds of millions of dollars[,] . . . again for no consideration."[31] These transfers allegedly occurred throughout 2006 and 2007; the final transaction date

[28] Danny formed one of the BVI Companies, Mazal Worldwide, S.A., in 2006. *Id.* ¶ 51. On March 29, 2007, Johny formed the other three BVI Companies: Upper New York Investment Company Ltd., North Park Avenue Investment Company Ltd., and Upper Hudson Investment Company Ltd. *Id.* ¶ 52.

[29] *Id.* ¶ 50.

[30] *Id.* ¶¶ 54-56.

[31] *Id.* ¶¶ 57-58.

In support of her assertion that these transfers were made for inadequate consideration, Vivian points to Lavie's and CISA's internal accounting records and a report by external auditor PricewaterhouseCoopers ("PwC"). *Id.* ¶ 60. For instance, although Lavie's internal accounting records showed credits of $26,392,555.07 for its CISA shares and $26,659,652.93 for its Motke shares, the corresponding debit entries were "non-deductible expenses," which, Vivian alleges, reflect that Lavie received no consideration for these transfers. Similar accounting entries in CISA's internal records from October 2007 showed credit entries of $44,637,630.75 for its El Rosado Corp. shares; $3,266,573.47 for its Lavie shares; and $14,074.61 for its Motke shares, all with corresponding debit entries for "non-deductible expenses." Vivian complains that these book values undervalued the total market value of the stock transferred by Lavie and CISA. *Id.* ¶¶ 61-62.

Vivian also points to a June 2008 PwC report prepared for CISA that allegedly stated that the transfers "carried out for zero value in favor of related companies domiciled abroad caused the accrual of net losses in the years 2007 and 2006"—losses that purportedly "exceeded the limit permitted by Ecuadorian law"—such that "CISA would have to be dissolved if its shareholders did not 'solve the situation.'" After this report, CISA allegedly merged into Lavie at Johny's direction and with Danny's consent. *Id.* ¶ 63.

referenced is October 2007, based on the dates of the accounting entries for CISA and Lavie.[32]

Ecuadorian law is said to require the seller and the buyer of stock to notify the corporation of the transfer so that the corporation can then register the stock in the buyer's name and notify Ecuador's Superintendent of Companies (the "Superintendent") about the new registration.[33] The Individual Defendants were able to accomplish the stock transfers to the BVI Companies, Vivian contends, through their control of El Rosado Group, by which "they simply sent the notices of transfer to each other, registered themselves in the corporate books, and notified the Superintendent . . . themselves."[34]

Lastly, Vivian alleges that the Individual Defendants completed their scheme by transferring the stock in El Rosado Group companies held by the BVI Companies to the newly formed Delaware LLCs. On April 2, 2008, Johny purportedly domesticated the three BVI Companies he had formed, creating Upper New York LLC, North Park Avenue LLC, and Upper Hudson LLC.[35] Danny

[32] *Id.* ¶¶ 59, 61-62.
[33] *Id.* ¶ 64.
[34] *Id.* ¶ 65. In a telling example, Vivian alleges that Johny signed one notification letter as President of Lavie (the seller) and as attorney in fact for the BVI Companies (the buyers) for the transfer of CISA stock and sent the letter to Taly, CISA's President. Johny, as Manager of CISA, then allegedly registered the BVI Companies as the new owners in CISA's records before signing the notice of transfer and sending it to the Superintendent himself. *Id.* ¶ 66.
[35] *Id.* ¶¶ 70-72.

allegedly then caused the transfer of the Group stock held by his BVI Company to the newly formed Vistamar LLC on December 30, 2009.[36]

The result of the scheme was to put control of approximately 86% of El Rosado Corp., 99% of Lavie, and 100% of Motke in the Delaware LLCs, and thus in the hands of Johny and Danny.[37] By the end of 2010, Vivian claims her direct and indirect stock ownership in these companies had been reduced to almost nothing: from 16% to 5% in El Rosado Corp.; from 14% to 0.02% in Lavie; and from 15% to 0% in Motke.[38]

C. *The Israeli Probate Proceeding for Alfredo Czarninski's Estate*

Vivian initiated an Israeli probate proceeding for Alfredo Czarninski's estate in November 2006. During the proceeding, she, Johny, and Danny agreed that "the three children are the sole heirs of the deceased [Alfredo Czarninski], and should receive equal inheritances of one-third each." The Israeli court purportedly declared that this plan of intestate succession was appropriate under Ecuadorian law.[39] Vivian does not allege that the Israeli court, or any other court, conducted or approved an inventory of the estate.

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[36] *Id.* ¶ 73. Danny's BVI Company, Mazal Worldwide, S.A., allegedly transferred its El Rosado Group holdings to a Panamanian company, Panora Investments S.A., that Danny formed in 2007. *Id.* ¶ 68. Panora Investments S.A. then allegedly transferred its El Rosado Group holdings to Vistamar LLC. *Id.* ¶ 73.
[37] *Id.* ¶ 77.
[38] *Id.* ¶ 79.
[39] *Id.* ¶¶ 82, 84.

D. *Vivian Eventually Learns of the Alleged Scheme*

Throughout this time, Vivian claims to have been "blamelessly ignorant" of what the Individual Defendants were doing with the Group companies "[g]iven her physical distance from Ecuador, her lack of access to El Rosado [Group] information, and her deference to her brothers."[40] In addition, Vivian alleges that the Individual Defendants fraudulently concealed their misconduct by "deliberately neglecting to send her corporate notices, in violation of Ecuadorian law"; by misrepresentations about a discrepancy in family assets during the Israeli probate proceeding; and by a 2007 statement Johny made when the three siblings were in the Netherlands in which he "falsely assured [her] that he and Danny had run El Rosado [Group] by the book, had done nothing wrong, and that [she] would receive everything to which she was entitled."[41] Finally, Vivian asserts that her reliance on these misrepresentations prevented her from uncovering the scheme. [42]

At some point, the dynamic between Vivian and the Individual Defendants seems to have changed. After retaining Ecuadorian counsel in 2009, Vivian alleges she initiated an action, similar to a books and records inspection, for Lavie. Vivian claims she received Lavie documents between May 2010 and January

[40] *Id.* ¶ 88.
[41] *Id.* ¶¶ 90-92.
[42] *Id.* ¶¶ 89, 92.

2011.[43] But it was not until August 2010 that Vivian first became aware of the Defendants' conduct, "[g]iven the complexity of El Rosado Group, the defendants' fraud, and the hundreds of corporate acts involved."[44]

Despite her allegations that the scheme culminated with the transfer of the stock at issue to the Delaware LLCs, Vivian also asserts that the fraud was ongoing. In particular, Johny is alleged to have held a stockholder meeting for El Rosado Corp. on August 16, 2011, to approve a stock increase, purportedly made "to further dilute Vivian's share . . . and fraudulently transfer wealth from Vivian to the defendants." Vivian claims she was not formally notified of the meeting as required under Ecuador law.[45] She claims she only learned of the planned increase on September 5, 2011, at which time her local counsel sent a letter to Johny as Executive President of El Rosado Corp. Vivian alleges that she did not receive a response before she filed the Complaint on September 28, 2011.[46]

IV. CONTENTIONS

Vivian alleges that the Defendants' five-part scheme is fraudulent and abusive conduct committed in the name of companies in violation of Article 17 of the Corporate Act of Ecuador ("Article 17," and the "Article 17 Claim").[47] Vivian

[43] *Id.* ¶ 93.
[44] *Id.* ¶ 94.
[45] *Id.* ¶¶ 96-97.
[46] *Id.* ¶ 98.
[47] *Id.* ¶¶ 102-07.

also alleges that the Defendants' continued, wrongful possession of her El Rosado Group stock constitutes unjust enrichment under Ecuadorian law (the "Unjust Enrichment Claim").[48] Vivian's claims are based on two different theories of stock ownership: first, the stock for which she was a stockholder of record;[49] and second, the stock to which she was entitled upon the intestate death of her father.[50]

A. *Subject Matter Jurisdiction*

Vivian contends that the Court has subject matter jurisdiction over her claims because "the rights [she] invokes are equitable."[51] She frames the Article 17 Claim as a breach of fiduciary duty owed by the Individual Defendants in light of their positions in the Group. Vivian contends that the Unjust Enrichment Claim also asserts equitable rights.[52] Among the remedies sought are an award of damages for the El Rosado Group stock Vivian alleges she owns, or, alternatively, the shares themselves, and a constructive trust on the assets of the Delaware LLCs.

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[48] *Id.* ¶¶ 108-12.
[49] *See, e.g.*, *id.* ¶¶ 31, 33, 39, 89.
[50] *See, e.g.*, *id.* ¶¶ 28-29, 78, 82, 84.
[51] Pl.'s Answering Br. in Opp'n to Points III and V of Defs.' Joint Mot. to Dismiss ("Pl.'s Answering Br.") 11. Vivian also has sought to preserve the right to argue that the Court has equitable jurisdiction on the independent grounds of requesting an equitable remedy where there is no adequate remedy at law, an argument she was not in a position to make before discovery. *Id.* 11 n.29.
[52] *Id.* 11.

In opposition, the Moving Defendants do not challenge that Vivian's claims are premised on fiduciary duties owed to her. Rather, they argue that the Court lacks equitable jurisdiction over the Article 17 Claim because Ecuadorian law would require Vivian first to obtain a criminal judgment for the fraud alleged in the Complaint before pursuing civil remedies—a condition precedent that she has not met.[53] In addition, the Moving Defendants argue that the Court lacks jurisdiction over Vivian's claim under the inheritance theory of ownership because they necessarily involve "unresolved predicate questions" about the assets of Alfredo Czarninski's estate, which the Court also lacks jurisdiction to determine.[54]

B. *Failure to State a Claim*

1. Laches

Vivian concedes that the presumptive limitations period governing her equitable claims is three years.[55] She argues, however, that she has alleged unusual circumstances that warrant application of a limitations period longer than three years.[56] Alternatively, Vivian contends that she has alleged facts that demonstrate

[53] Joint Reply Br. in Supp. of Points III and V of Defs.' Mot. to Dismiss ("Defs.' Reply Br.") 8-9.
[54] Joint Br. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Br.") 22. The Defendants further argued that the intestate inheritance issue was then being litigated not only in Ecuador, but also in Israel. *Id.* 23.
[55] Pl.'s Post-Hearing Opening Br. in Opp'n to Points III and V of Defs.' Joint Mot. to Dismiss ("Pl's Post-Hr'g Br.") 38.
[56] Pl.'s Answering Br. 31.

a reasonably conceivable basis for tolling of the laches period, particularly under the doctrines of fraudulent concealment and equitable tolling.[57]

The Moving Defendants argue that Vivian's claims accrued when the Group stock was transferred to the BVI Companies, which occurred more than four years before the Complaint was filed. This timeline, they assert, means that the claims are presumptively untimely under laches. The Moving Defendants also insist that Vivian was on inquiry notice more than three years before she filed the Complaint, which would make tolling inappropriate, because reasonable diligence would have revealed facts giving rise to her claims.[58]

2. The Article 17 Claim

Vivian contends that the allegations of the five-part scheme involving the Moving Defendants support the Article 17 Claim.[59] She further argues that a criminal judgment is not a required element to sustain that claim for civil remedies.[60] The Moving Defendants take a contrary position, maintaining that a criminal judgment, which Vivian did not obtain, is a necessary element of relief for the Article 17 Claim.[61] In addition to this criminal judgment prerequisite argument, the Moving Defendants argue that Article 17 is a remedial statute and

[57] Pl.'s Post-Hr'g Br. 19-20; Pl.'s Answering Br. 31-34.
[58] Opening Post-Hr'g Br. ("Defs.' Post-Hr'g Br.") 12-14; Defs.' Reply Br. 19-24; Defs.' Br. 37-38.
[59] Pl.'s Answering Br. 22.
[60] Pl.'s Post-Hr'g Br. 2-3.
[61] Defs.' Reply Br. 4-6; Defs.' Answering Post-Hr'g Br. 6.

not a cause of action. They assert, moreover, that Vivian has not alleged that the Individual Defendants acted in the name of companies, making her reliance on Article 17 inappropriate.[62]

3. The Unjust Enrichment Claim

Vivian contends that her allegations support the Unjust Enrichment Claim arising under general principles of Ecuadorian law.[63] The Moving Defendants do not challenge the substance of the allegations, as they instead point to a procedural limitation for this claim. All parties recognize that unjust enrichment is a so-called subsidiary action: it is a claim of last resort available only if Vivian could not have asserted any other cause of action.[64] The Moving Defendants argue that unjust enrichment is unavailable here because Vivian could have sought relief under Article 17 had she first obtained the necessary criminal judgment.[65]

4. *Res Judicata* or Collateral Estoppel

The Moving Defendants contend that Vivian's claims are barred by either *res judicata* or collateral estoppel in light of Vivian's prior petitions for intervention to the Superintendent in Ecuador. Because Vivian's petitions for intervention in El Rosado Group were denied or not appealed, they argue Vivian

[62] Defs.' Post-Hr'g Br. 3; Defs.' Br. 33.
[63] Pl.'s Answering Br. 24-25.
[64] *Compare* Pl.'s Post-Hr'g Br. 13, *with* Defs.' Post-Hr'g Br. 18.
[65] Defs.' Post-Hr'g Answering Br. 6; Defs.' Post-Hr'g Br. 17-18.

cannot relitigate those legal claims or factual issues here.[66] Vivian challenges the Moving Defendants' statement of Ecuadorian law. She argues that neither *res judicata* or collateral estoppel applies here because Ecuador does not apply either doctrine to administrative decisions such as the Superintendent's review of her petitions for invention.[67]

V. ANALYSIS

A. *Subject Matter Jurisdiction*

1. The Standard of Review

If a party moves to dismiss under Court of Chancery Rule 12(b)(1), the non-moving party bears the burden of establishing the Court's jurisdiction.[68] In this analysis, the Court should accept the material factual allegations in the complaint as true,[69] and "all inferences therefrom [should be] construed in [the non-moving

[66] Defs.' Br. 40-41.
[67] Pl.'s Answering Br. 25, 27.
[68] *See, e.g., Gladney v. City of Wilmington*, 2011 WL 6016048, at *2-4 (Del. Ch. Nov. 30, 2011) (finding no equitable jurisdiction for requests of "a declaratory judgment, permanent injunctive relief, and compensatory damages" where, after "[h]aving carefully considered the allegations made and relief requested in the [c]omplaint," the Court determined that the plaintiff "failed to state a colorable claim for equitable relief" and, alternatively, that the "true substance of the relief" sought was available as an adequate remedy at law within the exclusive jurisdiction of a different court); *Shore Invs., Inc. v. BHole, Inc.*, 2009 WL 2217744, at *2 (Del. Ch. July 14, 2009) (considering the plaintiff's arguments from the allegations and relief requested in the complaint and finding that it "failed to meet its burden of establishing the Court's subject matter jurisdiction").
[69] *See Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 588 (Del. 1970).

party's] favor."[70] The Court should determine if equitable jurisdiction is present based not on any "magic words,"[71] but rather upon its review of whether the complaint asserts equitable rights or seeks equitable remedies.[72] Although the Court may look beyond the complaint, the inquiry should be "as of the time of filing"; subsequent events "are generally irrelevant."[73]

Just as the parties can raise subject matter jurisdiction under Rule 12(b)(1), so too can the Court examine this issue on its own under Rule 12(h)(3).[74] The Court's subject matter jurisdiction cannot be determined by contract,[75] by consent

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[70] *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 489 (Del. 1982); s*ee also Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *3 (Del. Ch. May 27, 2005).

[71] *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987); *see also Int'l Bus. Machs. Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) ("[A] judge in equity will take a practical view of the complaint, and will not permit a suit to be brought in Chancery where a complete legal remedy otherwise exists but where the plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery.").

[72] *See Candlewood Timber Gp. LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004); *see also Town Council of Ocean View v. Brown*, 2010 WL 2183924, at *3 (Del. Ch. May 27, 2010) (describing "the prayer for relief in [the plaintiff's] petition" for a mandatory injunction compelling an individual to comply with municipal requirements as "a quintessential equitable remedy for which there is no adequate substitute at law" and therefore within the Court's jurisdiction); *Gelof v. Prickett, Jones & Elliot, P.A.*, 2010 WL 759663, at *3 (Del. Ch. Feb. 19, 2010) (reviewing the allegations of the complaint and finding no jurisdiction for a claim of malpractice against a law firm, despite being couched in terms of a breach of fiduciary duty, where the claim was unsupported by allegations that the attorney-client relationship actually rose to the level of a fiduciary relationship); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *6 (Del. Ch. Dec. 23, 2008) (finding subject matter jurisdiction based on its review of the complaint because the allegations "provide a sufficient basis to support a claim for piercing the corporate veil, which falls within this Court's equitable jurisdiction"); *Prestancia Mgmt. Gp.*, 2005 WL 1364616, at *3 ("In determining whether equitable jurisdiction exists, this Court will look beyond the language of a complaint and examine the substance and nature of the relief being sought.").

[73] *Azurix Corp. v. Synagro Techs., Inc.*, 2000 WL 193117, at *2, (Del. Ch. Feb. 3, 2000).

[74] *See Clark v. Teeven Hldg. Co., Inc.*, 625 A.2d 869, 883 (Del. Ch. 1992).

[75] *See Wife, A.M.M. v. Husband, J.L W.*, 285 A.2d 824, 825 (Del. Ch. 1971).

in the pleadings,[76] or even by procedural waiver.[77] That the Defendants may have conceded that the Court has equitable jurisdiction[78] does not, in Vivian's words, "end the inquiry"[79]—equitable jurisdiction must be found by the Court.[80] For this reason, the Court will consider whether it has equitable jurisdiction over Vivian's claims against all Defendants, even though Johny and Danny did not expressly assert that ground in their motion to dismiss.

2. The Scope of the Court's Equitable Jurisdiction

Three situations fall within the Court's limited jurisdiction: "(1) one or more of the plaintiff's claims for relief is equitable in character, (2) the plaintiff requests relief that is equitable in nature, or (3) subject matter jurisdiction is conferred by statute."[81] The equitable rights asserted or remedies sought need not arise under Delaware law, since this Court is capable of adjudicating such rights and remedies under the laws of foreign jurisdictions.[82] But, as a matter of judicial comity, this Court should not exercise jurisdiction where the claims are within the exclusive

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[76] *See Timmons v. Cropper*, 172 A.2d 757, 760 (Del. Ch. 1961).
[77] *See* Ct. Ch. R. 12(h)(3).
[78] Defs.' Reply Br. 8.
[79] Pl.'s Post-Hr'g Br. 15.
[80] *See generally El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).
[81] *Candlewood Timber*, 859 A.2d at 997; *see also* 10 *Del. C.* § 341 (granting to the Court jurisdiction over "all matters and causes in equity"); 10 *Del. C.* § 342 (removing from the Court's jurisdiction "any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of [Delaware]").
[82] *See generally Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1200 (Del. 1997) ("It is not unusual for courts to wrestle with open questions of the law of sister states or foreign countries."); *see also* Ct. Ch. R. 44.1.

jurisdiction of a foreign tribunal[83]—such as a violation of criminal laws[84] or a proceeding involving a foreign estate with no Delaware assets.[85]

Common equitable rights within the Court's jurisdiction are "fiduciary rights and duties."[86] Equitable remedies are those in which "the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances."[87] Where the claim asserted is equitable, a request for monetary damages does not render this Court unable to hear the equitable claim.[88] In other words, if the right asserted is not equitable, only if the available remedy at law is "sufficient"—meaning "complete, practical and efficient"—would "this Court [be] without jurisdiction."[89]

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[83] *See Candlewood Timber*, 859 A.2d at 1004 ("In limited circumstances[,] . . . Delaware courts will not exercise subject matter jurisdiction over a dispute that is predicated on foreign law where the foreign state has vested jurisdiction exclusively in its own courts.").

[84] *See Wilson v. Girard*, 354 U.S. 524, 529 (1957) (recognizing that, absent consent otherwise, "[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders").

[85] *See Wilkins v. Ellett*, 108 U.S. 256, 258 (1883) (identifying the "proper place[s]" for administration of a decedent's estate as the domicile at the time of death and any jurisdiction "in which he leaves personal property."); *see also Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *10 (Del. Ch. May 7, 1993) ("[U]nder Delaware law, [a non-domiciliary] [e]state's non-Delaware assets are not to be administered in Delaware.").

[86] *Christiana Town Ctr., LLC v. New Castle County*, 2003 WL 21314499, at *9 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307, 307 (Del. 2004).

[87] *Id.*

[88] *See Bird v. Lida, Inc.*, 681 A.2d 399, 402 (Del. Ch. 1996) (noting that the Court is not deprived of jurisdiction over equitable rights even if a monetary recovery "is the only relief sought") (citing *Harman*, 442 A.2d at 496-500).

[89] *Int'l Bus. Machs. Corp.*, 602 A.2d at 78.

Some theories of liability, such as unjust enrichment, resist being defined as either equitable rights or equitable remedies.[90] An unjust enrichment claim typically includes a request for a constructive trust, which is an equitable remedy that generally brings the claim within this Court's jurisdiction.[91] But, this Court has found that a complaint seeking a constructive trust "will only invoke . . . equitable jurisdiction if there is 'either an identifiable fund to which plaintiff claims equitable ownership . . . or the legal remedy will be inadequate for another reason—such as the distinctively equitable nature of the right asserted.'"[92]

Not every claim that a party alleges needs to be equitable. Under the so-called clean-up doctrine, if this Court may hear at least one claim, then it has discretion to resolve the non-equitable, legal claims involving the same controversy.[93] This doctrine is limited to ancillary legal questions—not matters totally outside the Court's jurisdiction, such as punitive damages.[94]

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[90] *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2.03[b] at 2-25 to 2-28 (2013).
[91] *See McKee v. McKee*, 2007 WL 1378349, at *3 (Del. Ch. May 3, 2007).
[92] *Testa v. Nixon Uniform Serv., Inc.*, 2008 WL 4958861, at *3 (Del. Ch. Nov. 21, 2008) (quoting *McMahon*, 532 A.2d at 608).
[93] *See Park Oil, Inc., v. Getty Ref. & Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979); *Medek v. Medek*, 2008 WL 4261017, at *3 (Del. Ch. Sept. 10, 2008) (explaining that clean-up doctrine jurisdiction can be appropriate, among other reasons, "to resolve a factual issue which must be determined in the proceedings; to avoid multiplicity of suits; to promote judicial efficiency; to do full justice; to avoid great expense; to afford complete relief in one action; and to overcome insufficient modes of procedure at law") (quoting *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1978), *aff'd*, 407 A.2d at 533).
[94] *See, e.g.*, *Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. May 10, 1978) (resolving that the Court "should not on its own volition assume new jurisdiction to impose penalties it could not formerly impose").

Vivian alleges the Court has equitable jurisdiction under 10 *Del. C.* § 341,[95] arguing that she has asserted equitable rights.[96] The Court finds it appropriate to analyze Vivian's claims separately by theory of Group stock ownership: first, as a stockholder of record; and second, as a purported heir by intestate succession.

3. Equitable Jurisdiction under the Stockholder of Record Theory

(a) *The Article 17 Claim*

Evaluating the Complaint in its entirety, the Court finds that Vivian has met her burden to establish that the Article 17 Claim is based on a fiduciary duty. Vivian alleges that the Individual Defendants owed fiduciary duties to her as a stockholder of record because of their positions in El Rosado Group and their management and control over her property, namely, her alleged stockholdings.[97] By extension, those fiduciary duties also support the Court's jurisdiction over the Article 17 Claim against the Delaware LLCs, or, at least, clean-up jurisdiction.[98] Vivian's request for monetary relief does not alter the equitable nature of these rights.[99]

[95] Compl. ¶ 10.
[96] Pl.'s Answering Br. 11.
[97] *See, e.g.*, Compl. ¶¶ 39-40, 88-89; *see also Christiana*, 2003 WL 21314499, at *9.
[98] *See Park Oil*, 407 A.2d at 535.
[99] *See Bird*, 681 A.2d at 402.

Notwithstanding this analysis, the Court could still lack jurisdiction if the Article 17 Claim involves Ecuadorian criminal law issues.[100] The Defendants maintain that Vivian cannot assert this claim without a preceding judgment against the Individual Defendants, which would presumably only be available in an Ecuadorian tribunal.[101] The Court held a Rule 44.1 hearing during which the parties presented expert testimony on Article 17, and the experts disagreed over whether a criminal judgment is required for civil liability under that statute.[102] As a result, the Court must interpret Ecuadorian law for jurisdictional purposes.

The relevant statute, Article 17, provides:

> For frauds, misuses, or *de facto* proceedings that are committed in the name of companies and other natural persons or legal entities, they will be personally and jointly liable those:
>
> 1. Who ordered or executed them, without prejudice to the liability that said persons may affect;
>
> 2. Who obtained a profit from it, up to its value; and
>
> 3. Who are the holders of assets for the effecting of restitution.[103]

[100] *See, e.g.*, *Wilson*, 354 U.S. at 529.
[101] Defs.' Answering Post-Hr'g Br. 1-3; Defs.' Post-Hr'g Br. 4-6; Defs.' Reply Br. 4-6; Defs.' Br. 33.
[102] Vivian's expert, Dr. Hernán Pérez Loose ("Pérez"), testified that no preceding criminal judgment is necessary. Hearing Transcript ("Hr'g Tr.") (Pérez) 139-46, 151-57, 163-66. The Defendants' expert, Dr. Ricardo Noboa Bejarano ("Noboa"), testified that the facts alleged in the Complaint would be criminal conduct and that Ecuadorian law requires a criminal judgment before a civil claim seeking indemnity for that criminal conduct. *Id.* (Noboa) 13, 15-16.
[103] Joint Exhibit ("JX") 23.

The Defendants concede that Article 17 provides for civil liability for certain unlawful conduct.[104] But, they assert, where the conduct alleged is criminal, Article 41 of Ecuador's Code of Criminal Procedure ("Article 41") restricts civil liability until after a criminal judgment is obtained.[105] This statutory interpretation puts the Defendants in the awkward position of arguing that the Complaint "alleges conduct that constitutes criminal conduct under Ecuadorean law" [106]—specifically under Article 560 for misappropriation and abuse of trust[107] and Article 563 for deceit[108] of Ecuador's Penal Code. Under this theory, absent a criminal judgment, not only would the Court lack equitable jurisdiction, but also "even a civil court in Ecuador would lack jurisdiction."[109]

[104] Defs.' Post-Hr'g Br. 3-4.
[105] JX 16 ("[N]o suit may be taken for civil indemnification derived from a criminal violation until there is a final criminal verdict that declares a person responsible for the violation.").
[106] Defs.' Post-Hr'g Br. 4.
[107] JX 20 ("One who has fraudulently embezzled or squandered to the detriment of another, commercial paper, money, goods, bills, settlements, documents of any type, which contain obligations or discharges, which were delivered to him under the condition of returning them, or who made a specific use or employment thereof, shall be punished with prison of from one to five years, and a fine of from eight to sixteen United States dollars.").
[108] JX 21 ("A person who, with the intention of appropriating something belonging to another, provides funds, furnishings, liabilities, settlements, receipts, whether using false names or false information, and employing fraudulent dealings to create a belief in the existence of fictitious companies, powers of attorney or imaginary credits, to instill hope or fear of an incident, accident or any other fictitious event, or to otherwise abuse trust or credulity, shall be punished with imprisonment from six months to five years and a fine of fifty thousand sucres.").
[109] Defs.' Reply Br. 8.

In response, Vivian argues that a criminal judgment is not a necessary element of the Article 17 Claim such that the Court has jurisdiction, independent of whether the conduct alleged in the Complaint is criminal.[110] For support, she presented the *Orrantia* litigation in which Ecuador's National Court of Justice[111] allowed a civil claim under Article 17 against an individual for fraud and abuse committed in the name of a company without a preceding criminal judgment against that person.[112] The Defendants argue that *Orrantia* is distinguishable as a case of contractual liability, in contrast to the fiduciary relationship alleged here, [113] but the Court does not find the distinction persuasive.[114] The Defendants do not challenge that, in the *Orrantia* litigation, a civil Ecuadorian court exercised jurisdiction without a criminal judgment.[115] As Vivian's expert conceded, judicial decisions in Ecuador may not be binding, but they are nevertheless "very persuasive."[116] The Court is unwilling to contradict this persuasive example here;

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[110] Pl.'s Surreply Mem. in Opp'n to Points III and V of Defs.' Joint Mot. to Dismiss ("Pl.'s Surreply Mem.") 3-4.
[111] At the time, the court was called the Supreme Court of Justice of Ecuador.
[112] JX 36; Pl.'s Post-Hr'g Br. 4-7, Ex. A.
[113] Defs.' Answering Post-Hr'g Br. 3-6.
[114] Not only was the civil liability upheld before the criminal judgment was obtained, but also the criminal judgment was unavailable because the statute of limitations had already run. Pl.'s Post-Hr'g Br. Ex. A.
[115] In *Orrantia,* the National Court of Justice described the three theories for relief under Article 17 as: (i) fraud, which constitutes "conduct consisting of machination or insidious subterfuge aimed at obtaining an illegal benefit,"; (ii) abuse, which is "excess, misuse, or arbitrary employment of something"; and (iii) manifest disregard of the law, "which is nothing but a path contrary to law, different from that which is set forth in the law." JX 1 ¶ 20 (Noboa Expert Decl.); JX 36.
[116] Hr'g Tr. (Pérez) 122.

rather, through expert reports and testimony, Vivian has met her burden to establish the substance of Ecuadorian law.[117]

The interpretation of Article 41 espoused by the Defendants cannot survive scrutiny under public policy grounds articulated by Vivian. Although civil relief would be independently available for abuse under Article 17, once the conduct alleged involves fraud (and thus becomes criminal), the Defendants' argument goes, civil relief is necessarily dependent on, and available only after, the party asserting the claim obtains a criminal judgment. In other words, the Defendants argue that their alleged conduct was so clearly fraudulent as to be criminal such that Vivian cannot assert a claim now unless and until a judge determines that the Individual Defendants' conduct was criminal,[118] which is not possible unless and until a district attorney finds it appropriate to bring criminal charges.[119] Such a reading, in the Court's opinion, would eviscerate Vivian's equitable rights. On policy grounds, especially in light of *Orrantia*, the Court cannot adopt this reading of Article 41. Instead, the Court finds the more appropriate reading of Article 41 to be that advanced by Vivian's expert: the statute prevents double compensation for an injured party who participated in bringing a criminal action,[120] not *any*

[117] *See Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 46 (Del. Ch. 2012) (quoting *Republic of Panama v. Am. Tobacco Co.*, 2006 WL 1933740, at *4 (Del. Super. June 23, 2006)).
[118] Defs.' Post-Hr'g Br. 4.
[119] Hr'g Tr. (Noboa) 6.
[120] *Id.* (Pérez) 156-59, 248 ("It is my understanding, based on my analysis of article of this text and the case law that we have discussed, that it [the third paragraph of Article 41] prevents a

compensation for that party without a criminal judgment.[121] Thus, the Court has equitable jurisdiction over the Article 17 Claim against the Defendants.

(b) *The Unjust Enrichment Claim*

Vivian has also met her burden to show the Court's equitable jurisdiction over the Unjust Enrichment Claim, which the Defendants largely do not contest.[122] Vivian alleges that the Individual Defendants owed her fiduciary duties and that the Delaware LLCs (and, by extension, the Individual Defendants) unlawfully possess the El Rosado Group stock gained through breaches of fiduciary duty;[123] these allegations satisfy her burden.[124] The requested remedy of "restitution of the fair market value of the [Group] shares of which she has been deprived"[125] does not defeat jurisdiction.[126] By contrast, that Vivian seeks a constructive trust on an identifiable fund—the Delaware LLCs—further supports jurisdiction.[127]

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person who has filed a private accusation in a criminal proceeding along the decision of the [district attorney] to press charges, prevent that person that is filing the private denunciation or private action in order to recover damages later on. That person cannot bring a civil action for the same fact to recover damages too.").

[121] Vivian's expert's acknowledgement that the conduct described in the Complaint "might amount to a crime" does not undermine his presentation of Ecuadorian law. *Id.* (Pérez) 224.

[122] Defs.' Reply Br. 8.

[123] Compl. ¶¶ 39, 74, 77, 88-89, 104.

[124] *See Christiana*, 2003 WL 21314499, at *9.

[125] Compl. ¶ 112.

[126] *See Bird*, 681 A.2d at 402.

[127] *See Testa*, 2008 WL 4958861, at *3.

4. Equitable Jurisdiction under the Stockholder by Inheritance Theory

Vivian contends that the Court has equitable jurisdiction, or at a minimum clean-up doctrine jurisdiction, over the Article 17 Claim and the Unjust Enrichment Claim for the El Rosado Group stock that she is entitled to inherit from her father. Vivian requests that the Court "afford full faith and credit to the decision of the Israeli court," which allegedly found that each of Vivian, Johny, and Danny should receive one-third of Alfredo Czarninski's estate under Ecuador's laws of intestate succession.[128] So armed, Vivian argues that the Court should divide Alfredo Czarninski's estate accordingly and thereby allow her to assert claims as a Group stockholder by inheritance.[129] This request for relief begets an unanswered question: is Group stock among the assets in Alfredo Czarninski's estate?

As a matter of comity, the Court is without jurisdiction to answer that question. None of these assets was alleged to have been in Delaware, let alone owned by the Delaware LLCs, when Alfredo Czarninski died in 2003, as those entities did not even exist until 2008. Vivian has cited one case in which this Court exercised jurisdiction over claims related to a foreign estate—a case in which the plaintiff, a beneficiary, co-executor, and co-trustee of an estate duly probated in Quebec, Canada, filed claims against the co-executors and co-trustees for alleged

[128] Compl. ¶¶ 82, 84-85.
[129] Pl.'s Answering Br. 16-18.

unpaid tax obligations from stock held by the estate in a Delaware corporation.[130] This case does not stand for the proposition that the disposition of entirely non-Delaware assets of a foreign estate may be within this Court's limited jurisdiction; it supports the opposite.[131] That a portion of Alfredo Czarninski's estate's assets may have been subsequently transferred to the Delaware LLCs after his death does not expand the Court's equitable jurisdiction to determine the estate's assets.

For reasons similar to why the Court lacks jurisdiction to award punitive damages,[132] so too does it lack jurisdiction over Vivian's claims here as a beneficiary of her father's estate's stock in El Rosado Group.[133] Not even the

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[130] *See Yancey*, 1993 WL 155492, at *1, *5.

[131] Vivian does not allege that a court with competent jurisdiction had inventoried Alfredo Czarninski's estate before she filed the Complaint. Since the Court's jurisdiction inquiry is focused on the time of the filing, there is no decision for the Court to consider whether it would have equitable jurisdiction to enforce. *See Azurix Corp.*, 2000 WL 193117, at *2.

More than a year after Vivian filed the Complaint, an Ecuadorian court apparently issued a decision that inventoried Alfredo Czarninski's estate at approximately $1 million; this decision was subsequently affirmed in November 2012. Pl.'s Surreply Mem. 4-5. In contrast to asking the Court to afford the Israeli judgment full faith and credit, Vivian here asks that the Court effectively ignore the Ecuadorian decision not only because it is "non-final" in that "if additional assets are discovered . . . they will be added to the inventory," but also because it was allegedly the product of "judicial corruption" such that "the Court cannot grant comity to [it]." Pl.'s Post-Hr'g Br. 15-17. Despite the seriousness of these latter allegations, and irrespective of their potential veracity, it is not the role of the Court to comment on integrity of the judicial system of foreign jurisdictions.

The argument that an estate inventory decision should not be afforded full faith and credit because it may have been the product of a corrupt judicial process does not, on its own, provide equitable jurisdiction to inventory the estate of a non-domiciliary with no Delaware assets where the Court does not already have jurisdiction. In any event, because Vivian expressly argues that the Court should not afford full faith and credit to the Ecuadorian inventory decision, the Court does not consider whether it would have jurisdiction for claims based on any El Rosado Group stock to be distributed to her under that decision.

[132] *See Beals*, 386 A.2d at 1159.

[133] *See Yancey*, 1993 WL 155492, at *1, *5.

clean-up doctrine can overcome the overwhelming concerns of comity; even if it did, the Court would likely be justified in declining to exercise that discretion.[134] In any event, Vivian has not established that Ecuadorian law would allow for administration of Alfredo Czarninski's estate in Delaware, and she thus has not met her burden to show that the Court has jurisdiction over her claims based on this theory of stock ownership.

In sum, the Court has subject matter jurisdiction over Vivian's Article 17 Claim and Unjust Enrichment Claim under the stockholder of record theory. The Court lacks subject matter jurisdiction over Vivian's claims under the stockholder by inheritance theory.

B. *Failure to State a Claim*[135]

1. The Standard of Review

In its review under Court of Chancery Rule 12(b)(6), the Court accepts the well-pleaded allegations of fact in the Complaint as true, including "even vague allegations . . . if they provide the defendant[s] notice of the claim," and it views all reasonable inferences from these allegations in favor of Vivian as the party asserting the claim.[136] But, the Court need not "accept conclusory allegations

[134] *See Park Oil*, 407 A.2d at 535.
[135] Johny and Taly did not move to dismiss under Rule 12(b)(6). The following analysis thus applies to Vivian's claims against the Moving Defendants only.
[136] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

unsupported by specific facts, nor . . . draw unreasonable inferences in [Vivian's] favor."[137] Under this inquiry, the Court should only grant the motion to dismiss if Vivian "could not recover under any reasonably conceivable set of circumstances susceptible of proof."[138]

2. Laches

Because Vivian's claims sound in equity, the limitations doctrine that applies is laches, which focuses on whether an unreasonable delay in asserting the claim has unfairly prejudiced the defendant.[139] This Court frequently uses the analogous statutory limitations period as the presumptive limitations period for laches.[140] Where a party files a claim after the presumptive period, the claim is likely time-barred "except in the 'rare' and 'unusual' circumstance that a recognized tolling doctrine excuses the late filing."[141]

The Court does not need to engage in a traditional laches analysis for a presumptively late complaint.[142] Instead, the Court may look to the complaint to

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[137] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[138] *Cent. Mortg. Co.*, 27 A.3d at 536.
[139] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (defining laches as "an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant").
[140] *See U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996) ("Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period.").
[141] *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013) (citations omitted).
[142] *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005) (citing *U.S. Cellular*, 677 A.2d at 502).

determine if there are sufficient allegations that the period should be tolled.[143] There is no rule barring this doctrine as the basis for dismissal under Rule 12(b)(6) where "it is clear from the face of the complaint that [laches] exists and that the plaintiff can prove no set of facts to avoid it."[144] Indeed, this Court has dismissed claims upon laches grounds at the motion to dismiss stage.[145] But, since the standard of review under Rule 12(b)(6) is only of reasonable conceivability based on the complaint, "affirmative defenses, such as laches, are not ordinarily well-suited for treatment on such a motion," even though the Court may reach a different answer with a more developed factual record.[146]

(a) *What is the Presumptive Limitations Period?*

Under Delaware's borrowing statute,[147] the applicable limitations period for these claims is three years, the shorter of Delaware's analogous statute of

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[143] *See Ryan v. Gifford*, 918 A.2d 341, 359 (Del. Ch. 2007); *see also Smith v. Mattia*, 2010 WL 412030, at *4 (Del. Ch. Feb. 1, 2010) (listing the recognized tolling grounds as an inherently unknowable injury, fraudulent concealment, and equitable tolling).

[144] *Reid*, 970 A.2d at 183; *see also Khanna v. McMinn*, 2006 WL 1388744, at *30 (Del. Ch. May 9, 2006) (examining whether a set of reasonably conceivable facts prevent the application of laches at the pleadings stage); *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005) (determining timeliness based on the facts alleged in, and documents incorporated within, the complaint).

[145] *See, e.g.*, *In re Sirius XM*, 2013 WL 5411268, at *4-7; *In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *6-7 (Del. Ch. Oct. 17, 2007); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 586-87 (Del. Ch. 2007).

[146] *Reid*, 970 A.2d at 183; *see also Pfeiffer v. Toll*, 989 A.2d 683, 690-91 (Del. Ch. 2010) (finding, at the motion to dismiss stage, a sufficient pleading of tolling for claims of breach of fiduciary duty accruing between December 2004 and September 2005 until December 2005 such that a complaint filed in November 2008 was not barred by laches under the presumptive three-year limitations period).

[147] *See* 10 *Del. C.* § 8121.

limitations for fiduciary duty and unjust enrichment[148] and the limitations period under Ecuadorian law.[149] The presumptive three year period began when Vivian's claims accrued, unless it should be tolled.[150]

[148] *See* 10 *Del. C.* § 8106.

[149] This comparison is of the limitations periods and their respective "accoutrements," such as claim accrual and tolling doctrines, and the shorter limitations period is accepted with its accoutrements. *See Frombach v. Gilbert Assocs., Inc.*, 236 A.2d 363, 366 (Del. 1967). A party should not be able to bring a foreign law claim in Delaware if it would be time-barred from bringing that claim in the foreign jurisdiction. *See Calcaño Pallano v. AES Corp.*, 2011 WL 2803365, at *3 (Del. Super. July 15, 2011).

The parties agree that the Ecuadorian limitations period for the Article 17 Claim is longer than three years; they disagree over how much longer. Vivian claims that the period is ten years. Pl.'s Post-Hr'g Br. 18. The Moving Defendants assert not only that the period is four years, but also that they would need to be served with the claim within that time. Defs.' Post-H'rg Br. 15-16. That is, the Moving Defendants argue that Vivian's claims are untimely since they were not served with the claims until October 26, 2011, which is more than four years after they contend Vivian's claims accrued in August 2007. *Id.* 16-17. Since this disputed legal issue could affect the Court's analysis, it again needs to determine Ecuadorian law. But, the Court need not determine whether the Moving Defendants' argument that timeliness is contingent upon service is correct because it concludes that the relevant Ecuadorian limitations period is ten years.

Article 17 does not include an express limitations period. At the Rule 44.1 hearing, Vivian's expert stated that for civil claims like the Article 17 Claim, the period is determined by reference to the default statute, which provides for a ten-year period. Hr'g Tr. (Pérez) 174-76. By contrast, the Moving Defendants' expert argued that since Vivian's expert had analogized Article 17 as an application of liability principles and claim accrual rules from Title XXIII of Ecuador's Civil Code, the Court should adopt Title XXIII's limitations period of four years. *Id.* (Noboa) 35-36; *id.* (Pérez) 234-35. Because, by its very terms, the limitations provision of Article XXIII governs only "[t]he causes of action that this Title grants for damages or fraud," the Court is not persuaded that this statute should be read to apply to the Article 17 Claim. JX 18. The Court instead accepts Vivian's expert's testimony that the limitations period is ten years; thus, the Complaint, regardless of claim accrual or tolling under Ecuadorian or Delaware law, would be timely if it were filed in Ecuador.

[150] *See CertainTeed Corp.*, 2005 WL 217032, at *7; *see also Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *15 (Del. Ch. Dec. 1, 2009) (applying Delaware's law of claim accrual and tolling to claims arising under Italian and Dutch law where the Court applied the borrowing statute and determined that the shorter of the limitations periods was Delaware's).

(b) *When Did Vivian's Claims Accrue?*

Vivian's causes of action accrued when the allegedly harmful conduct took place, "even if [she was then] unaware of the cause of action or the harm."[151] Vivian argues that her claims accrued upon what she considers the last step of the Moving Defendants' fraudulent scheme—when the last Group stock was transferred to the Delaware LLCs in December 2009, which would make the September 28, 2011, Complaint timely.[152] In opposition, the Moving Defendants argue that the claims accrued "at the moment [they] removed their allegedly ill-gotten gains from the El Rosado Group Companies to the BVI Companies," which purportedly occurred in March 2006 and August 2007.[153] The Moving Defendants' argument would render the Complaint presumptively untimely.

The Complaint includes one (repeated) allegation that the transfers of Group stock to the Delaware LLCs were made for no consideration;[154] the Court finds this allegation, without more, insufficient to support Vivian's position on claim accrual. Vivian does not allege to have been a stockholder of either the BVI Companies or the Delaware LLCs; in other words, she does not allege to have been on either side of these transactions. The transfer of El Rosado Group stock from the former to

[151] *In re Tyson Foods*, 919 A.2d at 584 (citing *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974)).
[152] Pl.'s Post-Hr'g Reply Br. in Opp'n to Points III and V of Defs.' Joint Mot. to Dismiss ("Pl.'s Post-Hr'g Answering Br.") 8.
[153] Defs.' Post-Hr'g Br. 11 (citing Compl. ¶¶ 79-81).
[154] Compl. ¶¶ 1, 41, 103.

the latter thus cannot be said to have caused additional damage to Vivian as a purported Group stockholder. It would be unreasonable for the Court to infer from the Complaint that Vivian's claims did not accrue until the transfer to the Delaware LLCs. Viewing the allegations in the Complaint most favorably to Vivian, the Court finds that the alleged fraudulent scheme was complete, and the claims accrued, no later than when the stock in El Rosado Group was transferred to the BVI Companies in 2006 and 2007, with the last transaction in October 2007.

(c) *Should the Limitations Period be Tolled?*

Vivian initially argued that she alleged facts supporting tolling under all three recognized grounds:[155] an inherently unknowable injury, fraudulent concealment, and equitable tolling.[156] In subsequent filings, she did not argue that the alleged injury was inherently unknowable, which would require her to show that "[n]o objective or observable factors . . . exist[ed] that might have put [her] on notice of an injury."[157] Absent a contrary argument, the Court finds Vivian's allegations that she was "blamelessly ignorant" of the alleged scheme and that the injuries were inherently unknowable "[g]iven her physical distance from Ecuador,

[155] Pl.'s Answering Br. 31-34.
[156] *See Smith*, 2010 WL 412030, at *4.
[157] *In re Tyson Foods*, 919 A.2d at 584-85.

her lack of access to El Rosado [Group] information, and her deference to her brothers"[158] to be insufficient to support tolling under this theory.

Tolling under fraudulent concealment requires Vivian to allege an "actual artifice by the [Moving] [D]efendant[s] that either prevented [her] from gaining knowledge of material facts or led [her] away from the truth."[159] Vivian alleged that the Moving Defendants, especially through the actions of Johny and Danny, fraudulently concealed their conduct—namely, by their "deliberately neglecting to send her corporate notices, in violation of Ecuadorian law"; by misrepresentations made by their Israeli counsel; and by Johny's 2007 statement to Vivian.[160]

Aside from the statement in 2007, Vivian does not allege when the fraudulent concealment occurred. But, such an omission at the pleadings stage may be unsurprising where the alleged fraudulent concealment includes the failure to send required notices. This failure, as alleged, would prevent her from gaining knowledge of these material facts. Viewed separately, these allegations may not support a finding of fraudulent concealment. But, considered collectively, the Court finds that these allegations support a reasonably conceivable basis for tolling under fraudulent concealment.

[158] Compl. ¶¶ 87-88.
[159] *In re Tyson Foods*, 919 A.2d at 585 (quotations omitted).
[160] Compl. ¶¶ 90-92.

Finally, under equitable tolling, the Court may find that the limitations period should be delayed during the period where Vivian alleges she "has reasonably relied upon the competence and good faith of a fiduciary."[161] The Moving Defendants do not contest that Vivian's relationship with the Individual Defendants was fiduciary in nature because of their positions in El Rosado Group and their control over her property.[162] Throughout the Complaint, Vivian alleges good faith reliance on the Individual Defendants. Thus, the Court also finds a reasonably conceivable basis for equitable tolling of Vivian's claims against the Moving Defendants.

(d) *Was Vivian on Inquiry Notice?*

Even the most persuasive allegations of tolling can only delay the limitations period until the party asserting the claim was on inquiry notice.[163] That point is when the party discovers facts "constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery" of the claim.[164] Said

[161] *In re Tyson Foods*, 919 A.2d at 563.
[162] Compl. ¶¶ 39-40, 88-89.
[163] *See Albert*, 2005 WL 1594085, at *12.
[164] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (quoting *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)).

differently, Vivian was on inquiry notice if exercising reasonable diligence should have revealed facts giving rise to the harm.[165]

Vivian alleges she first was aware of the Moving Defendants' conduct in August 2010.[166] In turn, the Moving Defendants argue that Vivian was put on inquiry notice when documents evidencing the allegedly wrongful Group consolidations, stock dilutions, and transfers to the BVI Companies were filed with the Superintendent, and thus available to Vivian if she exercised what they consider to be reasonable diligence. It is the Defendants contention that Vivian's failure to discover the alleged fraud for more than five years, where she alleges to be a sizeable minority stockholder in companies purportedly worth hundreds of millions of dollars, is evidence that she was not reasonably diligent.[167]

At the Rule 44.1 hearing, both parties' experts testified that a so-called public deed evidencing the transformation of a limited liability company to a corporation, the merger of two companies, a capital increase, and the transfer of stock must be filed with the Superintendent before the proposed transaction can

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[165] *See, e.g., Weiss v. Swanson*, 948 A.2d 433, 452 (Del. Ch. 2008); *In re Tyson Foods*, 919 A.2d at 591 (explaining Delaware's underlying policy as reflecting that parties "are under an obligation to exercise reasonable diligence in their affairs, and no succor from the statute of limitations should be offered a dilatory plaintiff in the absence of such care").

[166] Compl. ¶¶ 93-94.

[167] Defs.' Joint Br. 37-38. The Moving Defendants also offer extrinsic evidence to show that Vivian was on notice, through a power of attorney they claim she provided to her mother, about the transactions in El Rosado Group. This apparent power of attorney was not referenced in or incorporated into the Complaint, so it is outside of the Court's purview at this stage. *See Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).

occur.[168] But, Vivian's expert contends that it is "[v]ery, very difficult" to find a public deed—in his opinion, a public deed can only be found by someone with some background knowledge of when and where the public deed was filed.[169] The Moving Defendants may not agree with this opinion, but they did not disagree with the opined difficulty in finding a public deed. The Court credits Vivian's expert and thus cannot say now at the motion to dismiss stage that reasonable diligence required Vivian to search for public deeds where she had no information from which to begin a search.[170]

Moreover, the Moving Defendants' argument here centers on what they claim the public deeds would have revealed to Vivian had she found them.[171] Despite how persuasive this evidence might be, the Court's analysis under Rule 12(b)(6), as Vivian correctly notes,[172] is limited to the facts as alleged in the Complaint. The Defendants have not argued that these filings were incorporated or otherwise integral to Vivian's Complaint, so the Court may not consider them now

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[168] *Compare* Hr'g Tr. (Pérez) 239-42, 244, *with id.* (Noboa) 47-50.
[169] *Id.* (Pérez) 181 ("[W]e have been hired sometimes for foreign persons of foreign corporations to find public deeds, and it's not easy unless that person exactly know[s] the date, the notary where the deed was executed.").
[170] *See Weiss*, 948 A.2d at 452 (finding it "beyond 'reasonable' diligence" to require a stockholder to "cull through the company's Form 4s each time they were filed, compare the grant dates of the options with the timing of the quarterly earnings releases, and then conduct a statistical analysis to uncover the alleged malfeasance"); *In re Tyson Foods*, 919 A.2d at 591 (holding that reasonable diligence should not, as a matter of law, "include[] an obligation to sift through a proxy statement, on the one hand, and a year's worth of press clippings and other filings, on the other, in order to establish a pattern concealed by those whose duty is to guard the interests of the investor").
[171] Defs.' Post-Hr'g Br. 12-13.
[172] Pl.'s Post-Hr'g Answering Br. 8.

to determine whether the Complaint states a claim.[173] Consequently, Vivian cannot be said to have been on inquiry notice before August 2010.

Therefore, Vivian's claims cannot be dismissed under laches at this time.

3. The Article 17 Claim

The Moving Defendants assert that Article 17 does not provide relief here because Vivian has not alleged that the fraud and abuse was committed in the name of companies. Their other primary argument is based on the premise that a civil claim alleging fraud under Article 17 requires a preceding criminal judgment, which, as they note, Vivian does not allege that she obtained. For the reasons set forth earlier, based on the persuasive *Orrantia* precedent and legal policy, the Court accepts that the Article 17 Claim can proceed against the Moving Defendants without a criminal judgment against the Individual Defendants.[174]

Vivian alleges that she was not notified about the fraudulent consolidation of entities, the capital increases, or the transfers of El Rosado Group stock. Johny, Danny, and Taly allegedly took these actions, and thereby committed fraud and abuse through their control of El Rosado Group and the BVI Companies—in other words, in the name of companies.[175] The Court need not determine whether the alleged fraud and abuse was committed in the name of El Rosado Group, the BVI

[173] *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).
[174] *See supra* Part V.A.3.a.
[175] *See, e.g.*, Compl. ¶¶ 49, 56, 59, 65-66, 68-73, 75.

Companies and the Delaware LLCs, or all, because Johny, Danny, and Taly acted in the name of companies on both sides of the transactions at issue. These allegations state a reasonably conceivable basis for the Article 17 Claim. Accordingly, the Court may not dismiss this claim for failure to state a claim upon which relief can be granted.[176]

4. The Unjust Enrichment Claim

Vivian's Unjust Enrichment Claim does not arise under any specific provision of Ecuador's Civil Code. Instead, in the words of Vivian's expert, the cause of action reflects a "universal principle of law."[177] The Moving Defendants have, in effect, conceded that this remedy is likely available under Ecuadorian law, noting that "some jurists and the National Court of Justice have suggested that a cause of action akin to unjust enrichment would be recognized in Ecuador."[178]

[176] Assuming *arguendo* that a criminal judgment would be necessary for a claim of fraud, the Moving Defendants have nevertheless not demonstrated that Vivian failed to state a reasonably conceivable basis for a claim of abuse under Article 17. The Court is not persuaded that the predominant use of the word "fraud" in the Complaint and in Vivian's briefs prevents her from asserting a claim for abuse—particularly since Vivian alleges "abuse" throughout the Complaint. *See, e.g.*, *id.* ¶¶ 40, 103-04, 106. It would be unreasonable to allow the Moving Defendants to argue that Vivian has alleged only a claim of fraud where she has expressly alleged both fraud and abuse.

[177] Hr'g Tr. (Pérez) 134 ("Q: Is it possible to bring, in Ecuador, an unjust enrichment claim independent of specific statutory provisions? A. Yes, it's possible. . . . Again, in the case in Article 17 there is an independent cause of action established for unjust enrichment, and the code I cite is also the basis for that to bring an independent action for unjust enrichment. It's a universal principle of law basically.").

[178] Defs.' Reply Br. 6 (citing JX 1 ¶¶ 99-105 (Noboa Expert Decl.); JX 3 ¶¶ 100-103 (Pérez Expert Decl.)).

But, the Moving Defendants insist that the Court can only find that Vivian has alleged a reasonably conceivable basis for the Unjust Enrichment Claim, as a subsidiary action, if Vivian did not have any other cause of action available to her.[179] Vivian, in large part, has agreed with this position,[180] and so too does the Court.

Article 17 would provide relief, in Vivian's own opinion, against a party "who (1) commits fraud or abuse on behalf of companies, (2) takes advantage of corporate fraud or abuse, or (3) is holding property gained through corporate fraud or abuse."[181] This statutory interpretation provides relief against Danny, as an individual who committed fraud and abuse on behalf of El Rosado Group companies, his BVI Company, or Vistamar LLC, and against the Delaware LLCs as entities holding stock in El Rosado Group gained through the Individual Defendants' corporate fraud and abuse. Vivian has not met her burden to show how the Unjust Enrichment Claim would provide for remedies greater than those afforded by the Article 17 Claim.[182] Thus, that the Article 17 Claim is an available cause of action renders the Unjust Enrichment Claim unavailable.

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[179] Defs.' Post-Hr'g Br. 18; Defs.' Reply Br. 6-7.
[180] Pl.'s Post-Hr'g Br. 13.
[181] Pl.'s Answering Br. 22.
[182] By contrast, Vivian's expert testified that Vivian could recover restitution and damages through the Article 17 Claim because that statute "has a component of unjust enrichment." Hr'g Tr. (Pérez) 247; JX 3 ¶¶ 93-96 (Pérez Expert Decl.).

Therefore, the Court must dismiss the Unjust Enrichment Claim against the Moving Defendants for failure to state a claim upon which relief can be granted.

5. *Res Judicata* or Collateral Estoppel

The Moving Defendants argue that Vivian's claims of wrongful conduct by Johny, Danny, Taly, and El Rosado Group are barred by *res judicata* or collateral estoppel based on administrative decisions rendered in Ecuador. Vivian contends that Ecuadorian law does not grant preclusive effect to the Superintendent's decisions. The Court agrees with Vivian's presentation of Ecuadorian law and concludes that neither *res judicata* nor collateral estoppel bars the Article 17 Claim.

Res judicata and collateral estoppel are related doctrines that preclude repetitive litigation. *Res judicata* prevents a party "from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties."[183] Collateral estoppel "prohibits a party from relitigating a factual issue that was adjudicated previously."[184] When a party asks the Court to apply *res judicata* or collateral estoppel to a foreign judgment, "the preclusive effect of a foreign judgment is measured by standards of the rendering

[183] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).
[184] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999).

forum."[185] Accordingly, the Court must determine the preclusive effect under Ecuadorian law of Vivian's petitions for intervention to the Superintendent.

In a petition for intervention, a stockholder requests the Superintendent to review potential wrongful conduct by the corporate entity.[186] Vivian filed petitions for intervention for both El Rosado Corp. and Lavie. The El Rosado Corp. petitions were denied,[187] but the Lavie petition was granted.[188]

At the Rule 44.1 hearing, Vivian's expert explained that the Ecuadorian courts are not bound by the legal or factual decisions of the Superintendent not only because the Superintendent is only an administrative agency, but also because of express language to that effect in the Superintendent's decisions.[189] The Moving Defendants concede that *res judicata* does not apply to administrative decisions,[190] but they maintain, based on their expert's report, that because Vivian failed to challenge the Superintendent's decisions in court, "the effects of the Superintendency's decision[s] become final, and they equate to a kind of *res*

[185] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991); *see also Bata v. Bata*, 163 A.2d 493, 504-11 (Del. 1960) (applying Dutch principles of *res judicata* and collateral estoppel to determine the preclusive effects of a Dutch judgment).
[186] Hr'g Tr. (Pérez) 185 ("The reason why the shareholder requested the intervention was because she alleged that the administrators were doing some wrongdoing in the administration of the company.").
[187] Clark Aff. Ex. C, D.
[188] Castro Decl. Ex. B.
[189] Hr'g Tr. (Pérez) 183-88; JX 3 ¶ 129 (Pérez Expert Decl.).
[190] Defs.' Reply Br. 25.

judicata because they are immutable."[191] In contrast, Vivian's expert testified that the failure to appeal does not have preclusive effects outside of that petition.[192]

The Court is not persuaded by the Moving Defendants' expert and instead accepts Vivian's expert's testimony. Therefore, because the Court has determined that an Ecuadorian court would not find the Superintendent's decisions preclusive for claims or factual questions, Vivian's Article 17 Claim is not barred by either *res judicata* or collateral estoppel.

VI. CONCLUSION

For the preceding reasons, Vivian's claims against the Defendants under the theory of Group stock ownership by inheritance are dismissed under Rule 12(b)(1) for the Moving Defendants and under Rule 12(h)(3) for Johny and Taly. The Moving Defendants' 12(b)(6) motions are granted only as to the Unjust Enrichment Claim. Otherwise, the motions to dismiss are denied.

Counsel are requested to confer and to submit an implementing form of order.

[191] JX 1 ¶ 79.
[192] Hr'g Tr. (Pérez) 187.