IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JONATHAN BEAN, Plaintiff, v. FURSA CAPITAL PARTNERS, LP, f/k/a MELLON HBV CAPITAL PARTNERS LP, a Delaware limited partnership, and FURSA ADVISORS LLC, a Delaware limited liability company, Defendants.	)	C.A. No. 7566-VCP

MEMORANDUM OPINION

Submitted: November 27, 2012
Decided: February 28, 2013

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PARSONS, Vice Chancellor.

The plaintiff in this case, a limited partner in a Delaware limited partnership, brings suit against the partnership and its general partner. Under the partnership's limited partnership agreement, the general partner is required to provide the partners with audited annual financial statements. The limited partner asserts that he has not received audited financial statements for the years 2008 through 2011. His complaint asserts separate claims for specific performance, breach of contract, and misrepresentation. By way of relief, the limited partner seeks to receive the financial statements and damages.

The defendants moved to dismiss the complaint on the grounds of laches and to dismiss the plaintiff's misrepresentation count for failure to state a claim. In connection with responding to the defendants' motion, the plaintiff also has moved for partial summary judgment on his breach of contract claim.

Having considered the parties' briefs and heard oral argument on the competing motions, I conclude that the plaintiff's claim for the 2008 financial statements, but not for the 2009–2011 financial statements, is barred by laches. I also agree that the complaint fails to state a claim for misrepresentation and, therefore, I grant the defendants' motion to dismiss that claim. In addition, because there are disputed issues of material fact regarding the plaintiff's breach of contract claim, I deny his motion for partial summary judgment on that claim.

I. BACKGROUND

A. The Parties

Plaintiff, Jonathan Bean ("Bean" or "Plaintiff"), is an investor in, and one of the founders of, Defendant Fursa Capital Partners, LP.

Fursa Capital Partners, LP, which was formerly known as Mellon HBV Capital Partners LP, is a Delaware limited partnership (the "Partnership"). The general partner of the Partnership is Defendant Fursa Advisors LLC, a Delaware limited liability company (the "General Partner" and together with the Partnership, "Defendants").

B. Facts[1]

In or about July 2003, a private placement offering memorandum (the "PPM") was circulated to potential investors in the Partnership. The Partnership was created as an investment fund and was marketed to investors as seeking superior long-term capital gains through acquiring influential minority or control positions in middle-market companies. The General Partner raised more than $20 million to establish the Partnership. The Partnership currently is governed by the Amended and Restated Limited Liability Partnership Agreement dated December 2005 (the "LPA"). Both the PPM and the LPA state that the Partnership will send to all partners audited annual financial statements within 120 days of the end of the fiscal year. Under the LPA, the Partnership's fiscal year ends on December 31.

Plaintiff has sought to obtain the Partnership's audited financial statements for 2008 and later for several years. Among his more recent attempts, Bean sent a letter dated November 2, 2011 in which he demanded that the Partnership prepare and deliver

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[1] The following facts pertain to Defendants' motion to dismiss and are drawn from the allegations in Plaintiff's Verified Complaint (the "Complaint"). The parties presented evidence of additional facts with respect to Plaintiff's summary judgment motion. To the extent necessary, those facts are recited in Part II.B, *infra*.

audited financial statements for the years 2008 through 2010. To date, Plaintiff has not received audited financial statements for any of the years 2008 through 2011.

C. Procedural History

On May 24, 2012, Bean filed his Complaint for specific performance, breach of contract, and misrepresentation. Defendants moved to dismiss the Complaint on June 20, 2012. On September 14, Plaintiff filed a competing motion for partial summary judgment on his breach of contract claim. I heard oral argument on both motions on November 27, 2012. At the argument, I directed the parties to file a proposed scheduling order. Under the resulting order, a trial in this action is scheduled to take place on April 16–18, 2013. This Memorandum Opinion constitutes my ruling on Defendants' motion to dismiss and Plaintiff's motion for partial summary judgment.

D. Parties' Contentions

Defendants argue that laches bars Bean's claims. First, they argue that Plaintiff filed his Complaint more than three years after the 2008 financial statements were due and that his claims, therefore, are barred by the analogous three-year statute of limitations. Defendants' second laches argument is that Plaintiff delayed unreasonably in bringing his claim for the extraordinary relief of specific performance and that Defendants would suffer undue prejudice if required to prepare audited annual financial statements now. Defendants also seek dismissal of Count III (misrepresentation) for failure to state a claim because the misrepresentation claim is merely a bootstrap of Plaintiff's breach of contract claim.

Bean opposes Defendants' motion to dismiss on the grounds that laches is not amenable to resolution on a motion to dismiss and that Defendants have failed to prove the elements of a laches defense. Plaintiff also contends that he has pled sufficient facts for the misrepresentation claim to survive a motion to dismiss.

In addition, Bean seeks partial summary judgment on his breach of contract claim.[2] He argues that the LPA is unambiguous, that Defendants have failed to meet their contractual obligations under it, and that this Court should therefore grant his request for specific performance. Defendants counter that summary judgment is not appropriate because a factual dispute exists as to both the existence of a breach and whether Bean is entitled to specific performance. According to Defendants, the General Partner had the authority to, and did, amend the LPA so that the General Partner was no longer required to prepare and send audited annual financial statements.

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[2] It is not clear whether Plaintiff seeks partial summary judgment on Count II for breach of contract, as his motion indicates, or on Count I for specific performance, as his briefing suggests. As I indicated at argument, I consider the motion's focus to be on whether Bean has shown that Defendants breached the LPA and not on the appropriate remedy of specific performance, damages, or both. Oral Arg. Tr. Pl.'s Mot. to Dismiss & Defs.' Mot. for Partial Summ. J. ("Tr.") 34. Therefore, this Memorandum Opinion treats Plaintiff's motion for partial summary judgment as relating solely to whether Plaintiff has shown that Defendants are liable for breach of contract as alleged in Count II.

II. ANALYSIS

A. Defendants' Motion to Dismiss

1. Failure to state a claim under Rule 12(b)(6)

I consider first Defendants' argument under Delaware Court of Chancery Rule 12(b)(6) that the Complaint fails to state a claim for misrepresentation in Count III. When considering a motion to dismiss under Rule 12(b)(6), a court must assume the truthfulness of the well-pled allegations in the complaint and afford the party opposing the motion "the benefit of all reasonable inferences."[3] If the well-pled allegations of the complaint would entitle the plaintiff to relief under any "reasonably conceivable" set of circumstances, the court must deny the motion to dismiss.[4] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[5]

To state a claim for misrepresentation, *i.e.*, fraud, a plaintiff must allege (1) a false representation, (2) defendant's knowledge or reckless indifference that the representation was false, (3) an intent to induce the plaintiff to act or to refrain from acting, (4) plaintiff's action or inaction taken in justifiable reliance on the representation, and (5)

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3 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

4 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

5 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enters. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

damage to the plaintiff as a result of such reliance.[6] "A breach of contract claim cannot be turned into a fraud claim simply by alleging that the other party never intended to perform."[7]

Here, Defendants contend that Bean fails to state a claim for misrepresentation because he fails to allege the misrepresentation of a present fact and fails to allege facts to support the conclusory statement that Defendants misrepresented their intention to comply with their contractual obligations. Defendants assert that Plaintiff's misrepresentation claim is simply "an attempt to recast his breach of contract claim as one for fraud."[8] Plaintiff retorts that his claim is broader than his breach of contract claim because it is based on Defendants' representations at the time the PPM was circulated, which was two years before the LPA was executed and which had a purpose distinct from that of the LPA. Bean argues that he, therefore, can pursue both claims and that he properly has pled the elements of misrepresentation.

Because this is a motion to dismiss, I accept as true the Complaint's well-pled allegations. The Complaint contains a few, very general allegations relating to Defendants' alleged misrepresentation, three of which are particularly relevant here. First, Paragraph 19 states: "Defendants made material representations to investors that

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6 *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. Ch. 1983).

7 *Diamond Elec., Inc. v. Del. Solid Waste Auth.*, 1999 WL 160161, at *7 (Del. Ch. Mar. 15, 1999).

8 Defendants' Opening Br. in Supp. of Mot. to Dismiss the Verified Compl. ("Defs.' Opening Br.") 10.

they would timely deliver audited financial statements for the Fund. Investors reasonably relied upon those representations." Second, Paragraph 21 states: "Defendants determined that they would not deliver audited financial statements to investors notwithstanding the representations they had made to investors." Lastly, Paragraph 22 sets forth the alleged actionable conduct. It states: "Defendants knew or negligently failed to disclose at the time of the PPM that they would not deliver [audited] financial statements when it became inconvenient for them to do so." Similarly, under the count for breach of contract, Bean asserts that "Defendants have breached the LPA by failing to provide audited financial statements for many years."[9]

Paragraph 22 essentially avers that Defendants knew at the time they made the alleged representation in the PPM regarding delivering audited annual financial statements that they did not intend to comply with that representation. The executed LPA contained the same representation as was made in the PPM. In this regard, Plaintiff is alleging that Defendants made a promise that they had no intention of keeping. This amounts to an allegation of promissory fraud. As I discussed in *MicroStrategy, Inc. v. Acacia Research Corp.*,[10] "when a plaintiff pleads a claim of promissory fraud, in that the alleged false representations are promises or predictive statements of future intent rather than past or present facts, the plaintiff . . . 'must plead specific facts that lead to a reasonable inference that the promisor had no intention of performing at the time the

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9 Compl. ¶ 16.

10 2010 WL 5550455, at *15 (Del. Ch. Dec. 30, 2010).

promise was made.'"[11] In this case, Bean has failed to plead specific facts that Defendants had no intention of delivering audited financial statements. Rather, Plaintiff makes a conclusory allegation, unsupported by specific facts, that Defendants knew they would not perform on their promise to deliver audited financial statements "when it became inconvenient for them to do so."[12] Thus, even if I accept Plaintiff's argument that his misrepresentation claim is broader than his breach of contract claim, because it is based on representations on which he relied to make his investment that were made before the parties entered into the LPA, I conclude that he has not pled sufficient facts to support a reasonable inference that Defendants had "no intention of performing at the time the promise was made."[13]

In addition, the allegations in the Complaint contradict Bean's assertion that Defendants had no intention in 2003, when they distributed the PPM, to deliver audited financial statements. The Complaint alleges that Plaintiff demanded audited financial statements only for 2008 and later. These allegations support a reasonable inference that Defendants prepared and delivered the requisite audited financial statements between the December 2005 execution of the LPA (if not earlier) and 2008.[14]

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11 *Id.* (citations omitted) (citing *Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch. Dec. 8, 2009)).

12 Compl. ¶ 22.

13 *MicroStrategy, Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *15.

14 The LPA, which is "Amended and Restated," is dated as of December 2005. Compl. ¶ 6. Presumably, the original limited partnership agreement created an

Furthermore, even reading Paragraphs 19 and 21 broadly to imply that Defendants made the alleged misrepresentations both at the time of the PPM and when the LPA was entered into, the allegations do not survive a motion to dismiss. If the alleged representations were made at the time the LPA was entered into, Count III amounts to impermissible bootstrapping. Under Delaware law, "a plaintiff cannot bootstrap a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations."[15] Thus, to the extent Count III relates to representations made at the time of the LPA, the allegations in the Complaint do not support Plaintiff's argument that his fraud claim is broader than his breach of contract claim. The alleged misrepresentation is that Defendants knew they would not deliver audited annual financial statements. But, the failure to deliver such statements is what forms the basis of Bean's breach of contract claims. Plaintiff's claim based on misrepresentations made at the time the LPA was negotiated, therefore, rests entirely on a representation that Defendants would not perform their contractual obligation.

For these reasons, the Complaint does not contain allegations sufficient to enable Plaintiff's misrepresentation claim to withstand a motion to dismiss. Accordingly, I grant Defendants' motion to dismiss Count III of the Complaint.

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obligation to prepare and deliver audited annual financial statements even before 2005.

[15] *MicroStrategy Inc.*, 2010 WL 5550455, at *17.

2. Laches

Defendants also assert that Plaintiff's claims are barred by laches. Under Delaware law, laches bars a plaintiff from proceeding with a cause of action if he waited an unreasonable length of time before asserting his claim and the delay unfairly prejudiced the defendant. To prevail on a laches defense, a defendant generally must prove that: (1) the plaintiff had knowledge of his claim; (2) the plaintiff delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice.[16] In determining what constitutes an unreasonable delay for purposes of laches, this Court generally looks to the statute of limitations for analogous claims at law. As the Supreme Court stated in *Whittington v. Dragon Group, LLC*, Delaware courts find that a legal claim is analogous to an equitable claim where "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."[17] In general, "statutes of limitations that apply to actions at law are deemed to establish a time period beyond which delay in bringing a claim is presumptively unreasonable for purposes of applying laches."[18] "Consequently,

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

17 *Id.* at 9.

18 *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 526 (Del. Ch. Mar. 22, 2005).

when claims are barred by a controlling statute of limitations, a court of equity need not engage in a traditional laches analysis."[19]

The statute of limitations for Bean's breach of contract claim is three years.[20] When a plaintiff seeks a judicial order involving compulsions, such as an order for specific performance, however, the bar of laches typically will arise earlier than the end of the limitations period.[21]

a. When did Plaintiff's causes of action accrue?

The statute of limitations begins to run, *i.e.*, the cause of action accrues, at the moment of the alleged harmful act.[22] For a breach of contract claim, the wrongful act is the breach and the cause of action accrues at the time of the breach.[23] When a plaintiff challenges a discrete series of individual transactions, "the statute of limitations for each discrete wrongful transaction begins to run upon the occurrence of each transaction."[24] In

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19 *Id.* at 526–27; *see also Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010) ("In the absence of an applicable tolling doctrine, a claim cannot be pressed in the Court of Chancery if the statute of limitations has passed.").

20 10 *Del. C.* § 8106; *Whittington*, 991 A.2d at 9–10. Having concluded that Count III should be dismissed for failure to state a claim, I have limited the laches analysis to Counts I and II.

21 *State ex rel. Brady*, 870 A.2d at 527.

22 *See In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 811–12 (Del. Ch. 2009).

23 *See In re Mobilactive Media, LLC*, 2013 WL 297950, at *10 (Del. Ch. Jan. 25, 2013).

24 *Desimone v. Barrows*, 924 A.2d 908, 924 n.39 (Del. Ch. 2007).

this case, Defendants' repeated failures to prepare and deliver audited annual financial statements for 2008 through 2011 are each separate wrongful transactions.[25] Bean's cause of action for each audited financial statement, therefore, accrued separately, at the time each breach of contract occurred, *i.e.*, when the General Partner was required, but failed, to prepare and mail a given year's audited financial statement.[26]

Under the LPA, the date of accrual for each audited annual financial statement is April 30 of the following year. LPA Section 7.1(b) provides that the General Partner "shall prepare annual financial statements of the Partnership, and shall mail a copy of such statements to each Partner" within 120 days after the end of the fiscal year. The LPA further provides in Section 7.1(c) that these annual financial statements "shall be accompanied by a report of independent accountants" stating that an audit has been made and stating the opinion of the independent accountants in respect of such financial statements.[27] The Partnership's fiscal year ends on December 31. Thus, the financial statements and the accompanying audit report were due to be mailed by April 30 of the year following the year for which the statement was prepared.

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[25] *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) ("Any such wrong occurred at the time that enforceable legal rights . . . were created.").

[26] *Price v. Wilm. Trust Co.*, 1995 WL 317017, at *2–3 (Del. Ch. May 19, 1995) (agreeing that "each incident of overcharging is a completed and independent breach of contract or fiduciary duty and plaintiff had three years in which to institute an action from the completion of each such alleged overcharging or [the plaintiff's] rights arising from such breach would become time barred").

[27] Compl. Ex. B, LPA, § 7.1(c).

Accordingly, Plaintiff's cause of action for the 2008 financial statement accrued on April 30, 2009 and was presumptively time-barred as of April 30, 2012. Because Bean did not file his Complaint until May 24, 2012, his claim for the 2008 statement, but not for the 2009 through 2011 statements, falls outside the statute of limitations period. Based on this dichotomy, I consider Defendants' laches defense in two parts.

b. 2008 audited financial statement

Plaintiff's claim for the 2008 audited financial statements falls outside of the statute of limitations period. Absent tolling, therefore, it is presumptively time-barred.[28] Bean argues that the limitations period was tolled for two reasons: first, because Defendants fraudulently concealed facts necessary to put Bean on notice of his claim and, second, because Bean relied on a fiduciary in delaying the filing of this action.[29] Under the doctrine of fraudulent concealment,

> the statute of limitations may be disregarded when a defendant has fraudulently concealed from a plaintiff the facts necessary to put him on notice of the truth. Under this doctrine, a plaintiff must allege an affirmative act of 'actual artifice' by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth.[30]

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28 *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998).

29 *See In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) (discussing, in applying a statute of limitations by analogy, the three recognized justifications for tolling the limitations period).

30 *Id.*

Under the doctrine of equitable tolling, the statute will not run "while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary."[31] "No evidence of actual concealment is necessary in such a case, but the statute is only tolled until the [plaintiff] 'knew or had reason to know of the facts constituting the wrong.'"[32]

Bean also argues that his claim should, at a minimum, survive Defendants' motion to dismiss because the Delaware Supreme Court has stated that "affirmative defenses, such as laches, are not ordinarily well-suited for treatment on" a motion to dismiss.[33] Indeed, the Supreme Court has cautioned that dismissal of a complaint based on an affirmative defense is inappropriate "[u]nless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it."[34] If a prima facie basis for laches exists from the face of the complaint, the plaintiff bears the burden to plead specific facts to demonstrate that the analogous statute of limitations was tolled.[35]

In this case, I find that it is clear from the face of the Complaint that Plaintiff can prove no set of facts to avoid dismissal of his claim for the 2008 audited financial statements. The Complaint alleges *no* facts to support a reasonable inference that

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31 *Id.*

32 *Id.* (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6).

33 *See Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

34 *Id.*

35 *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6.

Defendants concealed facts from Bean that would toll the statute of limitations or that he could not have discovered his claims because he reasonably relied on the good faith of a fiduciary. In his brief, Bean relies on Paragraphs 18 through 24 of his Complaint to support the assertion that he "expressly claims that Defendants have misrepresented material facts regarding their intent to disclose financial documents to Plaintiff."[36] The Complaint, however, contains no more specific factual allegations of misrepresented facts. The cited Paragraphs 18 through 24, three of which are set forth in full *supra*, relate to Defendants' alleged representations both at the time of the PPM and, broadly construed, at the time of the LPA. The Complaint contains no allegations that Defendants engaged in misrepresentation that would have prevented Bean from discovering the alleged wrong (*i.e.*, that he did not receive the audited financial statements) or that would support a reasonable inference that the statute of limitations would have been tolled under any theory.

In his brief, Bean asserts that it was not until October 25, 2010 that Defendants represented that they would not produce the 2008 and 2009 statements.[37] Plaintiff also argues that he relied on a December 2011 representation by Defendants that an agreement had been reached among the Partnership's partners not to continue producing audited financial statements. According to Plaintiff, he delayed in filing his claims to allow

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[36] Pl.'s Opening Br. in Supp. of His Cross-Mot. for Partial Summ. J. and Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Opening Br.") 14.

[37] *Id.* 16–17.

Defendants to produce proof of this agreement or, in the alternative, to cure their breach.[38] Thus, Bean contends that Defendants' misrepresentations and delays caused him not to be on notice of his claims "until long after the financial statements were first tardy."[39]

As an initial matter, Bean relies on his affidavit that he filed with his motion for partial summary judgment to support these contentions. On Defendants' motion to dismiss, I am constrained to consider only the Complaint. There is no support in the Complaint, however, for Plaintiff's arguments regarding Defendants' representations as to why they did not produce audited financial statements for 2008 and 2009 or Defendants' alleged use of delay tactics. Furthermore, even if I could consider Plaintiff's arguments that go beyond the Complaint, the alleged representations and delays do not support tolling the statute of limitations. Under any tolling theory, the facts constituting the wrong must have been concealed from the plaintiff.[40] The limitations period "is

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38 *Id.* at 17.

39 *Id.*

40 *See, e.g., U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 503 (Del. 1996) (holding that the doctrine of equitable tolling did not apply because the plaintiff had reason to know of the breach of the agreement); *Am. Int'l Gp., Inc. v. Greenberg*, 965 A.2d 763, 812–13 (Del. Ch. 2009) (finding that equitable tolling would not apply if the public filings at issue had given the plaintiffs "good reason to be suspicious about the existence of a claim more than three years before the filing of that claim"); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5–6 (stating that the doctrine of fraudulent concealment suspends the statute of limitations until the plaintiff's rights are discovered and that equitable tolling "tolls the limitations period until an investor knew or had reason to know of the facts constituting the wrong").

tolled *only until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury."[41] The wrong that Bean complains of in this case is Defendants' failure to produce audited financial statements. Under the LPA, Plaintiff should have received the Partnership's 2008 audited financial statements by the end of April 2009. He never received any such statements. Hence, he knew the facts that support his claim for the 2008 audited financial statements more than three years before he filed his Complaint on May 24, 2012. Therefore, Plaintiff's claim for a separate set of audited financial statements for 2008 is time-barred.[42]

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41 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6.

42 In a cursory manner in their brief and only briefly at oral argument, Defendants raised the argument that audited financial statements for 2008–2011 are interrelated and cannot be separated because Defendants would have to obtain audited 2008 financial statements in order to complete later years' statements. Plaintiff responds that this is not necessarily the case. If Defendants are correct, and an auditor would have to produce 2008 audited financial statements to prepare such statements for 2009–2011, Defendants have a plausible argument that Bean's torpor in bringing his claim for the 2008 audited financial statements should bar his claims for all the requested statements on the basis of laches. This argument, however, rests on a factual dispute—*i.e.*, whether an auditor must prepare audited 2008 financial statements—that cannot be resolved on a motion to dismiss. Therefore, this Memorandum Opinion does not preclude Defendants from developing the record on the question of whether the 2009–2011 statements are inextricably related to the 2008 statements and pursuing their defense of laches on that basis. To the extent the Complaint seeks audited annual financial statements for 2008 alone, however, I conclude that claim is barred by laches.

c. 2009 through 2011 audited financial statements

Plaintiff's claims for audited financial statements for years 2009, 2010, and 2011 are not presumptively time-barred by the expiration of the analogous limitations period.[43] Indeed, taking the allegations in the light most favorable to Bean, it is reasonably conceivable that he could prove that he did not delay unreasonably in bringing his claim regarding these statements. The Complaint alleges that Bean attempted to resolve the matter through his demands in, for example, his November 2, 2011 letter. Those efforts proved unsuccessful, and Plaintiff now seeks the aid of the Court.

Defendants argue that Plaintiff's delay is unreasonable because the bar of laches typically will arise earlier than the end of the limitations period for a claim of specific performance. Remedies such as specific performance "are normally foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period."[44] Here, Bean filed the Complaint approximately two years after the limitations period had begun to run on the obligation to provide the 2009 financial statement. Under the analogous statute of limitations, Bean could have waited nearly an additional year to bring his claim. Additionally, Defendants allegedly have known that Plaintiff intended to pursue his rights to audited financial statements "for many years" and since at least

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[43] The 2009 audited financial statements, for example, were due to be mailed April 30, 2010. The statute of limitations on this claim would not expire until April 30, 2013.

[44] *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005).

November 2, 2011.[45] Whether a defendant had notice of the plaintiff's intention to assert his rights is a factor courts will consider when determining whether a delay is unreasonable.[46] As a secondary matter, I also consider relevant the character of Plaintiff's requested compulsory relief, namely, preparation of audited financial statements. Under the circumstances of this case, it is possible that the scope of this requested relief is sufficiently narrow that it would not be so prejudicial to Defendants that this Court should foreclose as untimely a claim for specific performance filed well before the analogous statute of limitations has run.[47] In other words, Bean conceivably could succeed in rebutting Defendants' laches defense.

Therefore, drawing all inferences in Bean's favor, I conclude that he conceivably could prove a set of facts to avoid the defense of laches on his claims for specific performance as to the 2009 through 2011 audited financial statements allegedly due to

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45 *See Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) (considering that the defendant had been on notice for years that the plaintiff "intended to pursue his rights vigorously").

46 *See Whittington v. Dragon Gp. L.L.C.*, 2010 WL 692584, at *6 (Del. Ch. Feb. 15, 2010), *aff'd*, 998 A.2d 852, 2010 WL 2484264 (Del. 2010) (TABLE).

47 *See State ex rel. Brady*, 870 A.2d at 527 & n.28 (noting that requests for judicial orders involving compulsion require prompt action). In *State ex rel. Brady*, the Court denied compulsory relief where it could have involved ordering a party to reacquire a clubhouse it had once owned and maintained for the benefit of condominium owners who alleged that they were promised lifetime access to the clubhouse. *Id.* at 519; *see also Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *1 (Del. Ch. Jan. 24, 2005) (finding that laches barred plaintiff's claim for specific performance of certain environmental remediation and testing work that the defendant was allegedly obligated to perform under an asset purchase agreement).

him under the LPA.[48] Accordingly, I deny Defendants' motion to dismiss the Complaint on the ground of laches regarding these financial statements.

B. Plaintiff's Motion for Summary Judgment

Lastly, I consider Plaintiff's motion for partial summary judgment on his breach of contract claim. "Summary 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."[49] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[50] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[51] The Court also "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[52]

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48 *See Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

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

50 *GMC Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

51 *Schick, Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948)).

52 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

When the issue being presented for summary judgment is one of contractual interpretation, summary judgment may be appropriate in such cases where "the dispute centers on the proper interpretation of an unambiguous contract."[53] "Therefore, the threshold inquiry when presented with a contract dispute on a motion for summary judgment is whether the contract is ambiguous."[54] Ambiguity is said to exist "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[55] Where the moving party can show that its construction of the contract "is the *only* reasonable interpretation," it will be entitled to summary judgment.[56]

1. LPA Sections 7.1(b) and 7.1(c) are not ambiguous

The only reasonable interpretation of LPA Sections 7.1(b) and 7.1(c) is that the General Partner must prepare and mail to each partner financial statements and an accompanying audit report for each fiscal year. This requirement extends to the period

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53 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)).

54 *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. Dec. 21, 2007).

55 *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

56 *Id.*

during which the General Partner is liquidating the Partnership.[57] Indeed, Defendants do not dispute this interpretation of the LPA. Instead, they contend that the General Partner validly amended the LPA so that audited annual financial statements no longer are required.

2. The General Partner's authority to amend the LPA

LPA Section 13.1(a) states in relevant part that "the General Partner may at any time without the consent of the other Partners . . . (i) amend this Agreement . . . in any manner that does not adversely affect the rights of any Partner in any material respect without any such Partner's consent." Section 13.1(i) requires the General Partner to give written notice of any amendment or proposed amendment "other than any amendments of the type contemplated by Section 13.1(a)." Defendants do not allege that they gave Bean notice of the purported amendment. It is possible, however, that the General Partner validly could have amended the LPA without notice to Bean. Under the LPA the General Partner could do so only if the amendment did not adversely affect Bean's rights in any material respect.[58]

Defendants presented evidence to support their argument that such an amendment would not adversely affect the partners' rights in any material respect. Audited annual

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[57] *See* LPA § 10.3(e) ("During the liquidation of the Partnership, the liquidator shall furnish to the Partners the financial statements and other information specified in Article VII hereof.").

[58] *Id.* § 13.1(a)(i).

financial statements were prepared for the fiscal year 2007.[59] As of June 30, 2008, the Partnership expired by the terms of the LPA, and, since then, it has been in the process of winding up.[60] The LPA established a duration for the Partnership of three years with the possibility that the General Partner, at its sole discretion, could extend the term for not more than two one-year periods.[61]

In an October 25, 2010 e-mail, Bean requested audits for 2008 and 2009 from General Partner employee Robert Beers. In response to Bean's request, Beers stated "no, and you [already] know why."[62] Bean claims that this was the first indication he received that Defendants would not deliver audited financial statements.[63] In later correspondence, Defendants indicated that numerous investors had contacted the Partnership and believed that "an audit is an unnecessary waste of funds."[64] Defendants also advised Bean that the Partnership "does not plan any further audits based upon the nearly unanimous desires of the partners."[65] In an April 2, 2012 letter to Bean,

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59 Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Partial Summ. J. ("Defs.' Answering Br.") Ex. A.

60 Singh Aff. ¶¶ 10, 11; Defs.' Answering Br. Ex. A at 18.

61 *See* LPA § 10.1(a), (b).

62 Bean Aff. Ex. C.

63 *Id.* ¶ 7.

64 *Id.* Ex. E.

65 *Id.* Ex. F. Exhibit F to Bean's affidavit includes emails indicating that Benjamin Schliemann, on behalf of Accumulus Fund and Atlantic Security Bank, and James Jenkins of King Street Capital Management, L.P. would like to see audits cease.

Defendants also noted that the Partnership carried only one remaining investment of restricted stock in Fredericks of Hollywood.[66] In addition, the record indicates that the expense of the audits was in the range of $60,000 per year.[67] The partners continued to receive quarterly reports and annual tax return information.[68]

3. There is a genuine issue of material fact regarding the alleged LPA amendment

Defendants have not presented any documentary evidence that the General Partner formally amended the LPA to eliminate the requirement that it provide audited annual financial statements. Defendants have adduced evidence, however, that the former employee who had managed the Partnership often worked from a home computer and that evidence of an amendment may be found there.[69] In addition, Defendants presented evidence that the Partnership was only intended to last for five years, that in 2008—its fifth year—the Partnership shifted its focus from investing to liquidating its assets and winding up its affairs, that preparing the audited annual financial statements Bean seeks would cost approximately $60,000 per year and that the partners would have to bear those expenses, and that several holders of an interest in the Partnership supported

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66 *Id.*; Singh Aff. ¶ 11.

67 Singh Aff. ¶ 6; Bean Aff. Ex. F, email from Limited Partner Schliemann to Beers (Feb. 15, 2011) ("I (speaking for Accumulus Fund and Atlantic Security Bank) would be very happy with waiving any past and future audits and to reverse the $96k accounting fee accrual for the benefit of all limited partners.").

68 Singh Aff. ¶¶ 7, 8; Bean Aff. Ex. F.

69 Singh Aff. ¶¶ 15, 16; Tr. 31, 32. For the reasons discussed *infra*, Defendants' discovery efforts were on-going at the time the Singh Affidavit was filed.

eliminating the requirement for audited financials. Taking these facts in the light most favorable to Defendants as the nonmoving party, it is possible that the General Partner validly amended the LPA under Section 13.1 to dispense with the requirement that audited annual financial statements be sent to Bean and other limited partners. Defendants have raised genuine issues of material fact regarding the argument, including as to whether the alleged amendment would adversely affect Bean's rights in a material respect.

Plaintiff argues that an amendment to the LPA canceling the limited partners' right to receive audited annual financial statements, as a matter of law, adversely would affect the partners' rights under the LPA in a material respect. I decline to make such a ruling at this preliminary stage. Defendants have adduced evidence that raises questions as to whether the need for audited financial statements was as great in the wind-up phase of the Partnership's life as it was when the partners originally invested.[70] In the affidavit of Fursa Alternative Strategies LLC CFO, Lionel Singh, for example, Singh attests that the Partnership has one remaining holding and that the Partnership "has not been liquidated

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[70] Bean counters that the LPA expressly requires the General Partner to furnish the audited annual financial statements to the partners during the liquidation of the Partnership. *See* LPA § 10.3(e). This provision lends strong support to Plaintiff's position that an LPA amendment cancelling this requirement would adversely affect his rights in a material respect. Nevertheless, based on the fact that little discovery has been taken to date and that the LPA provides the General Partner with broad authority to manage the Partnership, including by making relatively unilateral amendments to the LPA, I conclude that the issue of materiality requires a more thorough development of the record.

completely yet due to the sole remaining holding of approximately 35,000 shares of restricted stock in Fredericks of Hollywood."[71]

In addition, Defendants submitted a Rule 56(f) affidavit of David B. Anthony. Under Court of Chancery Rule 56(f), where the party opposing the motion for summary judgment "cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Anthony and Singh attest that potentially relevant documents may be in the custody of former employee Beers, from whom Defendants were in the process of collecting information.[72] Defendants, therefore, asked for more time to complete their discovery before responding to the motion for partial summary judgment or that the motion be denied. Based on the relatively early stage at which Bean moved for partial summary judgment and the factual issues raised by

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71 *See* Singh Aff. ¶ 11.

72 *Id.* ¶¶ 7, 15, 16; Anthony Aff. ¶¶ 4, 5, 9. The affiants assert that Beers has potentially relevant documents on a personal home computer which will lead to admissible evidence that "(i) Mr. Beers advised Plaintiff as early as April 2009 that additional audits would not be forthcoming; and (ii) Mr. Beers explained to Plaintiff, and the other limited partners, that the Fund would not produce audited financial statements for three critical reasons." Anthony Aff. ¶ 11; Singh Aff. ¶ 15; Tr. 31–32.

that motion, including with respect to Defendants' laches defense,[73] I conclude that Rule 56(f) provides an additional basis for denying Plaintiff's motion.

Bean filed his motion for summary judgment before any discovery had been taken and before the briefing on Defendants' motion to dismiss was complete. In these circumstances, it is not surprising that Defendants' Rule 56(f) affidavits were less detailed than the Court generally would expect. Nevertheless, they adequately demonstrate that the record is not sufficiently developed at this stage to enable the Court to consider fully Plaintiff's summary judgment motion.

Therefore, I deny Plaintiff's motion for partial summary judgment on his breach of contract claim because there are genuine issues of disputed material facts that require a more thorough development of the record. These factual issues include, without limitation: whether Defendants attempted to amend the LPA; whether the amendment, if it occurred, adversely affected Bean's or other limited partners' rights in a material respect; whether the General Partner had the authority unilaterally to make the

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[73] Although Defendants did not succeed on their motion to dismiss based on laches with regard to the 2009 through 2011 audited financial statements, Defendants have raised several facts in their defense to Plaintiff's motion for summary judgment that could lead to a finding of laches on Plaintiff's claims to one or all of these statements. For example, Defendants assert that to produce the audited financial statements would cause the Partnership undue prejudice because the audits would be financially burdensome for the Partnership, which has been in the process of winding up since 2008. Singh Aff. ¶¶ 9–11; *see also supra* note 42. They further assert that at least one key employee who may have relevant information is no longer employed by the Partnership and, thus, that they may be unable to secure key evidence to defend against Bean's claims. Singh Aff. ¶ 15; *see also* Tr. 33. Thus, further development of the factual record also is appropriate with regard to Defendants' laches defense.

amendment with no written notice to the limited partners; and whether Bean delayed unreasonably in bringing the Complaint and caused Defendants undue prejudice.[74]

III. CONCLUSION

For the foregoing reasons, I grant Defendants' motion to dismiss as to Count III for misrepresentation and as to Plaintiff's claim for the Partnership's 2008 audited financial statements on a standalone basis.[75] In all other respects, Defendants' motion to dismiss is denied. I also deny Plaintiff's motion for partial summary judgment on his breach of contract claim.

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[74] These factual issues regarding laches closely relate to another issue for trial: the question of whether this Court should award the extraordinary remedy of specific performance. To succeed on a claim for specific performance, Bean must show "(1) that a valid and specifically enforceable contract exists between the parties; (2) that the party seeking specific performance was ready, willing, and able to perform under the terms of the contract; and (3) that the balance of the equities favors an order of specific performance." *Szambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007). The factual issues surrounding whether the LPA amendment at issue adversely affected the partners' rights in a material manner also are likely to be relevant to the determination of whether a balance of the equities supports an order of specific performance.

[75] In accordance with Court of Chancery Rule 15(aaa), the dismissals of these portions of Plaintiff's Complaint are with prejudice. Rule 15(aaa) provides that if a party does not respond to a motion to dismiss by amending its pleadings no later than the time such party's answering brief in response to the motion to dismiss is due to be filed, and if the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6), absent good cause shown, such dismissal shall be with prejudice. Here, Plaintiff responded to Defendants' motion to dismiss and launched his own motion for partial summary judgment, rather than amend his pleadings. Under these circumstances, Plaintiff made a tactical decision to go forward on the allegations in the Complaint and there is no cause to allow him to avoid dismissal with prejudice. *See Peter Schoenfeld Asset Mgmt. LLC v. Shaw*, 2003 WL 21649926, at *3 (Del. Ch. July 10, 2003).

IT IS SO ORDERED.