SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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December 5, 2013

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RE: *Evan Warren Sokolove v. Roxane Sokolove Marenberg.*
C.A. No. S13C-08-022 RFS
Date Submitted: November 15, 2013

Dear Counsel:

Before the Court is Defendant Roxane Sokolove Marenberg's ("Roxane's") Motion to Dismiss in an action for personal injury filed by her natural son, Evan Warren Sokolove ("Evan"). For the reasons that follow, Roxane's Motion is

DENIED in part, and **GRANTED** in part, with further consideration to be given in this matter after submissions of supplemental memoranda consistent with this opinion.

Facts and Procedural Background

For purposes of ruling upon a Motion to Dismiss, this Court looks to the plaintiff's complaint and accepts all well-pleaded factual allegations as true.[1] The following facts are taken from Evan's Amended Complaint.

Evan was born on September 11, 1992 to Roxane and Robert Sokolove. Evan is currently twenty-one-years old, engaged to be married, and resides in Baltimore, Maryland. Roxane, a former Assistant United States Attorney, also resides in Baltimore, Maryland. She is currently remarried to a man that she met during the events surrounding this case. Robert moved away from the family in 1999 and remarried, but retained a relationship with Evan during the relevant time period.

According to Evan, Roxanne sexually abused him from the ages of six to fourteen. Evan alleged that the first instances occurred when Evan was six years old at the Sokoloves' home in Potomic, Maryland. He claims that during that time, he

[1] *See, e.g.*, *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978) (citation omitted).

and his mother began to spend "special nights" together in bed.[2] Evan alleges that these encounters began with Evan feeling pressure on his genitals during sleep and then escalated to Evan's orally stimulating his mother's breasts at her command. The frequency of these encounters began to escalate as well. Also during this time, Roxane supposedly instructed Evan not to divulge their activities.

In 2000, the two moved to a hotel in Gaithersburg, Maryland,[3] where the nightly visits increased further in frequency and intensity. Evan claims that he began orally touching his mother's genitalia at her bidding, and eventually, his mother performed oral sex on him and "the two engag[ed] in genital-to-genital contact."[4] Roxane also allegedly showed Evan pornographic materials, including a DVD which the two acted out. It was during this time that Roxane met her present husband.

Evan and Roxane then moved to Baltimore, where Evan avers that the encounters continued. He also claims that Roxane continued to instruct him not to divulge their activities, gave him a credit card to confirm his silence, and threatened him that no one would believe him if he told and that therefore, if he did tell, he

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[2] Am. Compl. at 5. Evan states that these encounters began while his father was away from the home on business trips, and believes they began at the time Robert and Roxane's marriage began to deteriorate.

[3] Evan claims that Roxane, in an attempt to villify Robert, blamed Robert for their having to live in a hotel.

[4] Am. Compl. at 6.

would be subject to criminal prosecution, which Evan claims Roxane illustrated on one instance when she allegedly placed[5] him in a holding cell while giving him a tour of an empty courthouse. Also during this time, Evan claims that his mother informed him that when he attended college, the two "would get a room together off of campus and sleep together 'every night.'"[6]

Evan avers that his mother committed similar acts against him while on trips to London, England in 2002 or 2003, Roxane's vacation home in Florida in 2005, Utah in 2005, and New York in 2006. Also in 2005, Roxane took an executive level job in California, where she maintained an apartment. In the summer of 2006, Evan states that he spent time with Roxane there, where he claims that the abuse and threats continued.

In 2005, Evan began to spend time with his father, Robert, at Robert's vacation home in Rehoboth Beach, Delaware. Evan alleges that during these visits, Roxane would reserve a hotel room in Rehoboth, and Evan would, on occasion, spend the evenings with her, where the abuse continued.

In 2007, Evan lived with Robert and his wife in Rehoboth. According to the complaint, during the Fourth of July holiday of that summer, Roxane and her mother

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[5] Evan does not claim that his mother locked the cell door.

[6] *See* Am. Comp. at 7.

traveled to Rehoboth and reserved a hotel room. Evan stayed with them as well. Evan alleges that on more than one occasion during that trip, after Roxane's mother had fallen asleep, Roxane came into Evan's bed and the two engaged in sexual intercourse.

Evan states that he disclosed his mother's abuse to his father on July 16, 2007, and thereafter asked his mother to leave him alone.[7] Subsequently, Roxane allegedly began a series of harassing behavior ranging from incessant phone calls to following Evan and his fiancee on a trip to Mexico. Evan also avers that Roxane began to contact people outside of their circle, such as Evan's future in-laws, to convince them of the falsity of Evan's claims against her and to plea for their help in reuniting her with her son.[8]

Based on Roxane's alleged abuse, Evan avers eight separate counts against his mother: sexual assault and battery of a minor, intentional infliction of emotional harm through sexual abuse of a minor, negligent infliction of emotional harm through sexual abuse of a minor, reckless infliction of emotional harm through sexual abuse

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[7] Am. Compl. at 10. Evan also claims that his father had no knowledge of the abuse prior to this date.

[8] Evan believes that Roxane asked his future in-laws to talk to Evan, telling him that they did not believe Evan's claims and that Evan should invite Roxane to his wedding. Evan also believes that Roxane offered him a large engagement ring to give to his fiancee as an enticement. These two beliefs may be substantiated by an email authored by Evan's future mother-in-law at Ex. C. to Opp'n to Ex Parte Mot to Seal and Entry of Gag Order.

of a minor, false imprisonment for purposes of sexual abuse of a minor, breach of parental/fiduciary duty, action for personal injuries pursuant to 18 U.S.C.§ 2255,[9] and egregious conduct. Evan claims that his mother's alleged abuse has caused him to suffer emotionally, psychologically, and physically, such as instances when, immediately following the abuse, he claims that he engaged in acts of self mutilation. He also claims that his future earning capacity has been hindered. Evan asks for, *inter alia*, compensatory and punitive damages.

Evan initiated this lawsuit on August 20, 2013. He amended his Complaint on September 11, 2013. Roxane filed a Motion to Seal and Entry of Gag Order on August 21, 2013, which this Court granted on August 22, 2013. Roxane then filed the present Motion on September 25, 2013; and the Court heard oral argument on November 15, 2013. Evan filed a Motion to Open Record and Vacate Gag Order on November 6, 2013, for which oral argument will be heard on December 20, 2013.

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[9]

> Any person who, while a minor, was a victim of a violation of [various sections] . . . of this title and who suffers personal injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C.A. § 2255 (2013).

Analysis

Parties arguments

Roxane begins by flatly denying all of Evan's allegations and asserting that Evan's ravings are the product of his "well documented mental illness."[10] Additionally, Roxane notes that Evan has filed criminal charges relating to alleged abuse against her in five separate jurisdictions, each resulting in failure for lack of evidence.

Roxane first argues that all of Evan's counts relating to abuse are time-barred. Evan claims that he suffered abuse in seven separate jurisdictions, excluding Delaware; thus, Roxane points to 10 *Del. C.* § 8121[11] as requiring this Court to apply the shortest statute of limitations possible. Applying the Delaware limitations period, Roxane argues that the normal two-year limitations period in 10 *Del. C.* § 8119 for

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[10] Mot. to Dismiss at 1.

[11]

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

10 *Del. C.* § 8121.

tort actions bars Evan's claim. Moreover, Roxane asserts that Evan is not entitled to the protection against the limitations period provided by the Child Victim's Act ("CVA") as codified in 10 *Del. C.* § 8145[12] because, as she claims, Delaware case law establishes that § 8145 does not apply to cases such as this, where the alleged abuse was not time-barred as of the date of the statute's enactment.[13] Further, she asserts that to read into § 8145 any retroactive effect other than the statute's explicit resurrection of time-barred claims is contrary to Delaware law.[14]

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[12]

> (a) A cause of action based upon the sexual abuse of a minor by an adult may be filed in the Superior Court of this State at any time following the commission of the act or acts that constituted the sexual abuse. A civil cause of action for sexual abuse of a minor shall be based upon sexual acts that would constitute a criminal offense under the Delaware Code.
> (b) For a period of 2 years following July 9, 2007, victims of child sexual abuse that occurred in this State who have been barred from filing suit against their abusers by virtue of the expiration of the former civil statute of limitations, shall be permitted to file those claims in the Superior Court of this State. If the person committing the act of sexual abuse against a minor was employed by an institution, agency, firm, business, corporation, or other public or private legal entity that owned a duty of care to the victim, or the accused and the minor were engaged in some activity over which the legal entity had some degree of responsibility or control, damages against the legal entity shall be awarded under this subsection only if there is a finding of gross negligence on the part of the legal entity.

10 *Del. C.* § 8145.

[13] Mot. to Dismiss at 2 (citing *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1251 (Del. 2011); *John Doe 6 v. Boy Scouts of America*, 2013 WL 1143698, at *5 (Del. Super. Mar. 5, 2013); *Keller v. Maccubbin*, 2012 WL 1980417, at *6–7 (Del. Super. May 16, 2012).

[14] Roxane cites *Chrysler Corp. v. State*, 457 A.2d 345, 350–51 (Del. 1983) for this proposition.

Roxane next contends that Evan's breach of fiduciary duty claim must fail because Delaware law does not recognize a parent's fiduciary duty to a minor child. Alternatively, Roxane claims that even if such a duty exists, a claim based on it should be brought in the Delaware Court of Chancery, rather than this Court. Additionally, Roxane notes that a breach of fiduciary duty claim is subject to a three-year statute of limitations period; and thus Evan is time-barred from presenting this claim.

Roxane lastly asserts that Evan's 18 U.S.C. § 2255 claim must fail because this Court lacks subject matter jurisdiction over the federal claim. Even if the United States Congress did not direct federal courts to hold exclusive jurisdiction over § 2255 claims, as Roxane contends it did, this Court should so limit its jurisdiction because the Delaware Court of Chancery so limited its jurisdiction over the similarly-worded federal RICO statute in *Levinson v. American Accident Reinsurance Group*, and no case law exists in Delaware, or perhaps in any jurisdiction at all, in which a state court has found concurrent jurisdiction over § 2255 claims.[15]

Evan maintains that all of the abuse he allegedly suffered both in and out of Delaware constitutes a continuous course of abuse, none of which is time-barred and

[15] *Levinson v. Am. Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985).

all of which can be litigated in Delaware.[16] Noting this Court's obligation to apply the shortest limitations period available under 10 *Del. C.* § 8121, Evan argues that the Delaware limitations period to be applied is not the two-year period in 10 *Del. C.* § 8119, but rather the infinite period in 10 *Del. C.* § 8145. Evan asserts that, as this Court held in the recent case of *Waterhouse v. Hollingsworth*, § 8145's statutory exemption from the limitations period indeed encompasses claims such as his.[17] Evan argues that § 8145 constitutes a remedial legislative measure that only affects Roxane's procedural, non-substantive rights.[18] Thus, Delaware's limitations period does not bar Evan's claims.

Also, Evan argues that Roxane is estopped from arguing that his claim is time-barred because Roxane entered into a tolling agreement which Evan asserts preserved

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[16] The Court rejects this argument because the Court "considers each instance of sexual abuse to be a separate and distinct claim." *Waterhouse v. Hollingsworth*, 2013 WL 5803136, at *3 n.5 (Del. Super. Oct. 10, 2013) (citing *Whitwell v. Archmere Acad., Inc.*, 2008 WL 1735370 (Del. Super. Apr. 16, 2008); *Eden v. Oblate of St. Francis de Sales*, 2006 WL 3512482 (Del. Super. Dec. 4, 2006);)).

[17] *Id.* at *1–4.

[18] *See* Pl's. Supplemental Letter Mem. at 1–3 (citing, *inter alia*, *Hoennicke v. State*, 13 A.3d 744, 747 (Del. 2010); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993)).

all claims that had not been barred.[19] Also, Roxane's alleged use of threats against Evan if he ever disclosed the abuse should toll the limitations period.[20]

Evan further contends that a parent-child relationship does give rise to a parent's fiduciary duties, and that a parent's sexual abuse of a child constitutes a violation of that duty.[21]

Regarding Roxane's assertion that this Court lacks subject matter jurisdiction over18 U.S.C. § 2255 claims, Evan counters that in *Tafflin v. Levitt*,[22] the U.S. Supreme Court held that the permissive "*may*" in the RICO statute allows state courts to have concurrent jurisdiction over RICO claims; and thus Roxane's reliance on the Delaware Court of Chancery's opinion in *Levinson*, which predated *Tafflin*, is misplaced.

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[19] *See* Ex. 2 to Pl's. Opp'n to Mot. to Dismiss. Thus, the question is whether the claims are barred except for the remedial effect of § 8145.

[20] *See* Pl's. Opp'n to Mot. to Dismiss at 3 (citing, *inter alia*, the California Supreme Court case of *John R. v. Oakland Unified School Dist.*, 48 Cal. 3d 438, 443–47 (Cal. 1989) (holding that threats which prevented the filing of a timely claim would toll the statute of limitations on estoppel grounds).

[21] *See id.* at 4 (citing *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 1613–15 (Cal. Ct. App. 1990)).

[22] *Tafflin v. Levitt*, 493 U.S. 455, 455 (1990) ("[T]here is nothing in RICO's explicit language to suggest that Congress has, by affirmative enactment, divested state courts of civil RICO jurisdiction. To the contrary, § 1964(c)'s grant of federal jurisdiction over civil RICO claims is plainly permissive and thus does not operate to oust state courts from concurrent jurisdiction.").

Discussion

Evan correctly argues that 10 *Del. C.* § 8145's lifting of Delaware's limitations period saves his claims, at least in part. The issue before this Court is § 8145's effect on *unstale* claims (*i.e.*, claims which arose prior to July 9, 2007, but had not yet reached their two-year limitations period as of that date). Recently, this Court held in *Waterhouse v. Hollingsworth* that such claims receive the full protection of § 8145. Analyzing the statute's text, the Court reasoned that § 8145(b), which resurrected previously time-barred claims for a two-year period, applied only to *stale* claims (*i.e.*, claims which arose prior to July 9, 2007, and had reached their two-year limitations period as of that date).[23] The question thus became whether § 8145(a) applied to unstale claims. The Court deduced that it did because, even though the subsection did not expressly mention unstale claims, those claims could not be barred by § 8119 because the claims, being unstale, technically survived § 8119 until *one*

[23] *See Waterhouse v. Hollingsworth*, 2013 WL 5803136, at *1–4 (Del. Super. Oct. 10, 2013) ("It is still necessary to resolve what happens to claims for alleged acts of abuse occurring between July 9, 2005 and July 9, 2007. At the time the statute was enacted those claims were not barred by [§] 8119 because they were not yet more than two years old. Thus for purposes of the resurrection provision of [§ 8145], they could not be claims which [required resurrection].").

day after July 9, 2007.[24] By virtue of that one day, § 8145 triggered and saved the claims forever.[25]

Roxane argues that § 8145(a) has no retroactive affect, as supported by the statute's legislative history. Additionally, she points to *Chrysler Corp. v. State*, in which the Delaware Supreme Court held that a court may "not infer an intention to make an act retrospective, and that to give an act a retrospective operation would be contrary to well settled principles of law applicable to the construction of statutes unless it be plainly and unmistakably so provided by the statute."[26] This point is not persuasive because § 8145 plainly has retroactive effect for stale claims. Moreover, changes to a statute of limitations, such as the CVA in its entirety, are to be considered remedial, may be applied retroactively, and do not destroy fundamental rights.[27] Further, this Court concurs with the *Waterhouse* reasoning that at the time

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[24] *See id.* at 4–5.

[25] *See id.*

[26] *Chrysler Corp. v. State*, 457 A.2d 345, 351 (Del. 1983) (internal quotation marks omitted) (quoting and citing, *inter alia*, *Keller v. Wilson & Co.*, 190 A. 115, 125 (Del. 1936)).

[27] *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1257 (Del. 2011). The *Chrysler* decision involved an assessment similar to a tax on a corporation's capital structure. This was a substantial change, imposing greater liabilities than beforehand, and prospective. On the other hand, remedial changes to statutes of limitations affect procedures and remedies only, and under Delaware law, the CVA can be applied retroactively for stale claims that were filed within the two-year window. *See id.*

of § 8145's enactment, unstale claims technically were not time-barred. Thus, they must have been saved by § 8145(a).

Because § 8145's language is plain and unambiguous, the Court will not undertake a fishing expedition into the statute's legislative history.[28] While this Court's decision in *Keller v. Maccubin*, which predated *Waterhouse*, referenced § 8145,[29] *Keller* involved a twenty-year-old claim of abuse that was not filed within the statute's resurrection period. *Keller* focused on a repressed memory issue and whether the injury was inherently unknowable because of the alleged victim's condition. This Court in *Keller* did not address the questions posed in *Waterhouse*; and thus *Keller* is inapposite to this case.

This does not mean, however, that *all* of Evan's claims survive the Delaware limitations period. As *Waterhouse* also makes clear, when a stale claim is not resurrected by § 8145(b), it is indeed time-barred. It is now 2013; and July 9, 2005 serves as the cut-off date. Thus, Evan's theory of a continuous course of abuse must

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[28] Both the Delaware Supreme Court and this Court have noted the CVA's plain language. *Id.*; *Waterhouse*, 2013 WL 5803136, at *4–7.

[29] *See Keller v. Maccubbin*, 2012 WL 1980417, at *2 (Del. Super. May 16, 2012) ("To place the issues into context, this case falls within the temporarily unique class of cases that do not enjoy reprieve from the statute of limitations under the Child Victim's Act. Here, Plaintiff alleges abuse to have occurred prior to the Act's enactment. He did not file within the two-year window afforded to those victims of child sexual abuse upon whom the statute of limitations window had closed. However, because the alleged abuse did not occur after the Act's enactment, he is not entitled to the Act's elimination of the statute of limitations.").

fail because each alleged instance constitutes a discrete action.[30] He may present claims of abuse arising on or after July 9, 2005, but may not present claims arising before that date.[31]

The parties shall confer and submit memoranda regarding whether Evan's claims arising before July 9, 2005 can be saved via a tolling argument stemming from the duress that Roxane allegedly inflicted on Evan. The memoranda should first address whether the parties agree that as a matter of law, a duress argument can toll the statute of limitations.[32] If the answer is yes, the memoranda should then address whether, as a matter of law, the duress claim would be ineffective. Evan identified July 16, 2007 as the date when he informed his father of the abuse and wanted Roxane out of his life. A disclosure to an interested adult, such as a parent or a teacher, would defeat a time-of-discovery argument on an inherently unknowable injury.[33] The limitations period would run from the time of the disclosure.

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[30] *Waterhouse*, 2013 WL 5803136, at *3 n.5 (citations omitted).

[31] Assumedly, the parties agree that Delaware law will apply to any claim that survives the limitations period, whether arising in Delaware or not. This case does not seem appropriate for a "choice of law analysis." *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Patterson*, 7 A.3d 454, 457–59 (Del. 2010) (determining that Delaware, and not New Jersey law would apply to the tort claim).

[32] *See Mergenthaler v. Asbestos Corp. of Am.*, 500 A.2d 1357 (Del. Super. 1985).

[33] *See, e.g.*, *Garcia v. Nekarda*, 1993 WL 54491, at *1 (Del. Super. Feb. 19, 1993) ("Thus, while plaintiffs did not discover the child's injuries until August of 1991, someone, although an unrelated teacher of the child, knew of the harm. No one filed a claim within the

Evan's claim regarding Roxane's breach of a fiduciary duty must be dismissed entirely. At its core, a fiduciary duty is a creature of equity, and as research has not disclosed a Delaware case that flatly holds that a breach of fiduciary duty claim against a parent lies in a child abuse case, this Court is not prepared to so hold.[34]

Regarding Evan's federal claim stemming from 18 U.S.C. § 2255, further memoranda on this matter is required. There is no case law discussing a state court's jurisdiction over this federal claim. The memoranda should address the pertinent principles regarding this Court's possible jurisdiction, as discussed in *Tafflin*, in which the U.S. Supreme Court explained how a state court's presumed concurrent jurisdiction over a federal claim can be rebutted.[35] Additionally, the parties should

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two[-]year statute of limitations."). *See also*, *Warner v. Univ. of Del.*, 1995 WL 656797, at *3 (Del. Super. Oct. 2, 1995) ("Because plaintiffs did not suffer an inherently unknowable injury, the discovery rule cannot be revoked in the instant case."); Russell G. Donaldson, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of a Child*, 9 A.L.R.5th 321 (1993).

[34] The term "fiduciary duty" can apply to the parent-child relationship, but in wholly different contexts. *See, e.g.*, *Myer v. Dyer*, 643 A.2d 1382, 1389 (Del. Super. 1993) ("Here, a fiduciary duty is statutorily imposed on Jennifer's parents as her guardians. Their status as fiduciaries is reinforced by their appointment as guardians *ad litem*."); *Russum v. Russum*, 2012 Wl 2589960, at *3 (Del. Fam. Ct. June 6, 2012) ("Fiduciary duties also impute to parents who act as custodians on certificates of deposit for their children." (citation omitted)).

[35] *Tafflin v. Levitt*, 493 U.S. 455, 459–60 (1990) ("In considering the proprietary of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." (citation omitted) (quoting another source)). The parties shall not rely upon the Delaware Court

address whether the federal statute of limitations over a § 2255 claim is controlling, and if so whether the limitations period is satisfied, should the Court find that it has jurisdiction.

Based on the above, Roxane's Motion is **DENIED** in part, and **GRANTED** in part, with further consideration to be given to this matter after submissions of supplemental memoranda consistent with this opinion. The parties shall confer and submit appropriate stipulations.

_____IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager

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of Chancery's opinion in *Levinson v. Am. Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985), as that case has been overruled. *See Hem Research, Inc. v. E.I. du Pont de Nemours & Co.*, 1990 WL 7429, at *4 (E.D. Pa. Jan. 30, 1990) ("The *Tafflin* decision, decided by a unanimous Court, now squarely overrules the *Levinson* opinion of the Delaware Chancery Court . . . .").