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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE OLGA J. NOWAK IRREVOCABLE TRUST, Appellant, Plaintiff-Below, v. VOYA FINANCIAL, INC. AND SECURITY LIFE OF DENVER INSURANCE COMPANY, Appellees, Defendants-Below.	No. 254, 2022 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2021-0830-FW

CORRECTED APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

PAGE:

TABLE OF CITATIONS

CASE: **PAGE:**

STATUTES:

OTHER AUTHORITIES:

* * * *

NATURE OF PROCEEDINGS

This appeal involves claims for contract reformation, and equitable and constructive fraud arising out of an agreement for $4,000,000 of life insurance ("Insurance"), insuring the life of Olga Nowak ("Insured"), and years of disclosures ("Illustrations") which touted benefits of that Insurance, which the Policy, when issued, did not actually provide. The Policy was issued retroactively as of[1] February 21, 1999 by and serviced by Defendants Below-Appellees Security Life of Denver Life Insurance Company ("SLD"), and Voya Financial Inc. ("Voya"), SLD's parent, through various predecessors and subsidiaries (collectively "Defendants").[2] The Illustrations were issued from February 21, 1999 (dated retroactively) through July 14, 2015. The Policy owner/beneficiary was Plaintiff Below-Appellant, The Olga J. Nowak Irrevocable Trust ("Trust" or "Plaintiff"). The Plaintiff maintained the Policy in force until the Insured's death on June 29, 2016, making premium payments for almost 17 years totaling over $3,200,000.

The action was originally filed on May 18, 2017 in The Superior Court of the State of Delaware as C.A. No. N17C-05-254 (the "Superior Court Proceeding") and was assigned to the Honorable Ferris Wharton. On November 30, 2020, the Superior

[1] SLD required that the Policy be "issued" retroactively nine months to provide it an additional $187,500 in premiums, risk free. (A-201- A-234).

[2] This corporate structure and evolution are not pertinent to this appeal. Thus, all related entities collectively are referred to as "Defendants."

Court granted summary judgment to the Defendants on the Plaintiff's claims for Breach of Contract, under the Delaware Consumer Fraud Act, for Unconscionability of Contract Terms, and for Unjust Enrichment. The Superior Court held it lack jurisdiction over claims it found were equitable, the Contract Reformation claims. *Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc*, 2020 WL 7181368 (Del. Super.) ("*Nowak I*"). On July 7, 2021, this Court issued a summary affirmance of that decision. *Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc.*, 256 A.3d 207 (Table) (Del. 2021) ("*Nowak II*").

On August 20, 2021, the Superior Court entered an order transferring the action to the Court of Chancery for disposition of the equitable claims, based upon Plaintiff's Notice of Election to Transfer, pursuant to 10 *Del.C.* §1902. (Superior Court Proceeding D.I. 215, 208,[3] A-007). Thereafter, Plaintiff filed the complaint now before this Court seeking equitable relief in the Court of Chancery (the "Chancery Complaint" or "Comp."), specifically: Reformation Based Upon Mutual Mistake (Count I); Reformation Based Upon Mistake Coupled With Inequitable Conduct (Count II); Equitable and Constructive Fraud (Count III); Aiding and Abetting Equitable and Constructive Fraud (Count IV); and Breach of Reformed

[3] D.I. citations to the Superior Court Proceeding docket shall be specifically identified as such. D.I. citations to the Chancery Court Proceeding shall be identified only as "D.I."

Contract (Count V). Counts I, II, and V are referred to herein as the "Reformation Counts" and Counts III and IV are referred to herein as the "Equitable Fraud Counts." The proceeding was designated Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc., C.A. 2021-0830-JRS (the "Chancery Court Proceeding") (D.I. 1, A-001). By order of November 2, 2021, this Court designated the Honorable Ferris Wharton to sit as a Vice Chancellor in the Chancery Court Proceeding. (D.I. 8, A-002).

Defendants moved to dismiss all counts under Chancery Rule 12(b)(6). By Memorandum Opinion dated June 30, 2022, the Chancery Court granted that motion and dismissed the Chancery Complaint (D.I. 23, A-006) (the "Judgment"), holding that all claims were barred by laches.[4] *Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc*, 2022 WL 2359628 at *1 (Del.Ch.) ("*Nowak III*"). On July 25, 2022, Plaintiff filed this appeal from *Nowak III*. Plaintiff seeks reversal of the Judgment and a remand for further proceedings on Plaintiff's claims.

This is Plaintiff's Opening Brief in support of its appeal.

[4] The Court noted that even if it agreed with Defendants as to any of the other claimed deficiencies, "it would likely allow leave to amend." *Nowak III* at *1.

SUMMARY OF ARGUMENT

1. The Contract Reformation Counts Are Not Barred By Laches.

The standard of review and for a motion to dismiss. The decision below dismissed the action under Chancery Rule 12(b)(6) on the ground of laches. This Court reviews *de novo* a decision to grant a motion to dismiss. Dismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven, the plaintiff would not be entitled to relief. In reviewing the grant of a motion to dismiss, the complaint is viewed in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations. *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009) ("*Gantler*").

Laches is an affirmative defense as to which the Defendants bear the burden of proof. *Hadak v. Procek*, 806 A.2d 140, 153 (Del. 2002) ("*Hadak*"). Laches is a fact intensive doctrine rendering consideration of it inappropriate on a motion to dismiss "unless 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 …". *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) ("*Spazio*"). *Accord*, *Wal-Mart, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320-21 (Del. 2004) ("*Wal-Mart*"); *Kim v. Coupang, LLC*, 2021 WL 3671136 at *2 (Del.Ch.) ("*Kim*").

Actual prejudice is required for laches to bar a contract reformation claim, but none was established. Counts I, II and V of the Chancery Complaint allege claims for reformation of an insurance contract. The Policy was issued unilaterally by Defendants only after an agreement had been reached between Plaintiff's Trustee and Defendants' agent and after the first premium of $247,740.00, which included $186,500.00 in "retroactive" risk-free premium, had been paid and accepted by Defendants. That agreement was for $4,000,000 in life insurance to be paid at the Insured's death (whenever that occurred) to the beneficiary, Plaintiff, an irrevocable life insurance trust, as part of the Insured's estate planning. In *Nowak I*, the Superior Court held that the "four corners" of the language of the Policy document, which was not made available to Plaintiff before entering the contract, was in fact a term policy which terminated the insurance when the insured turned 100 years old. *Nowak I*, *supra*. The reformation claims assert that the parties' mutual agreement *ab initio* was that the death benefit of $4,000,000 would be paid upon the insured's death regardless of age or that, alternatively, even if Defendants never believed the Insurance was to pay if the Insured lived past 100 years old, Defendants knew Plaintiff so believed and acted inequitably, by, among other things, collecting $3,200,000 in premium based upon illustrations which stated the Insurance would be paid after age 100. The Complaint requests that the contract be reformed accordingly.

Laches requires: (1) knowledge of the claim by the plaintiff, (2) an unreasonable delay in bringing the claim, and (3) resulting prejudice to the defendant. *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009). For laches to bar a claim seeking reformation of a contract, it must be shown that the defendant suffered a detrimental change of position. *Nationwide Mutual Insurance Company v. Starr*, 575 A.2d 1083, 1089 (Del. 1990) ("*Starr*") (emphasis added) held that "[t]he right to reform a contract is subject to a defense of laches, *but the action will not be barred in the absence of some showing* ***that the delay caused*** *the defendant to suffer* ***a detrimental change in position***." *Starr* rejected the argument that an analogous statute of limitations should apply. *Id.* at 1088. *Collins v. Burke*, 418 A.2d 999, 1003 (Del. 1980) ("*Collins*") also rejected application of an analogous statute of limitations to a contract reformation claim and required a "showing that [defendant] suffered a detrimental change of position as a result of the delay." No prejudicial change of position by Defendants appears in the record.

While "*in certain contexts*" a rebuttable presumption of laches is applied to claims in equity brought outside an analogous statute of limitations, *Kraft v. WisdomTree Investment, Inc.*, 145 A.3d 969, 974 (Del.Ch. 2016) (emphasis added) ("*WisdomTree*"), such presumptions do not apply to claims for reformation of contracts. *Starr, Collins*. The Trial Court applied an analogous statute of limitations

to presume prejudice when none exists. The Trial Court committed reversable error in disregarding precedent.

The Trial Court's further erred by misapplying an "analogous" statute of limitations. Not only did the Trial Court fail to apply an actual prejudice standard, it misapplied the "analogous" statute of limitations. The Trial Court held the analogous statute of limitation was that for breach of contract. *Nowak III* at *6. 10 Del.C. §8106. The time to commence an action for breach of contract starts when the contract is broken. *E.g.*, *Lehman Brothers Holding, Inc. v. Kee*, 268 A.3d 178, 186 (Del. 2021). *Central Mort. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 2012 WL 3201139 at *21 (Del.Ch.) (emphasis added) ("[C]lear Delaware law [holds] … an action for breach of contract has a three-year limitations period and begins to run when the contract is breached, *regardless of when the plaintiff discovers its injury*."). A contract requiring payment upon death is breached when payment is not made upon the death of the promisor. *Adams v. Jankouskas*, 452 A.2d 148, 157-58 (Del. 1982) ("*Adams*"); *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del. 1982) ("*Spinelli*") (insurance contract breached when payment is due and notice of denial is provided). Therefore, even if an "analogous" statute of limitations is applied to the reformation claims, that period commenced when Defendants did not pay the $4,000,000 upon the Insured's death, and this action, brought less than a year later, is timely.

The Trial Court erroneously held the reformation claims accrued 12 years after the contract was formed when Defendants, in a chart in an illustration, provided the first suggestion that they might not pay the death benefit if the insured died after age 100. *Nowak III* at *9. In addition to applying the wrong laches standard, this was error because, among other factors: (1) anticipatory repudiation of contracts does not commence the running of a statute of limitations *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 78 (Del.Ch. 2013); and (2), as discussed herein, the change in the chart did not constitute notice of an intent to breach because of contrary language in the illustrations, assurances provided by Defendant's agent in response to inquiries by Plaintiff, and Defendants' failure to inform Plaintiff of the purported error in prior illustrations.

In applying laches, "a plaintiff is chargeable with such knowledge of a claim as he or she *might have obtained upon inquiry*, provided the facts already known to that plaintiff were such as to put the duty of inquiry …". *Fike v. Ruger*, 752 A.2d 112, 114 (Del. 2000) (emphasis added). The Court failed to apply the facts and to draw inferences favorably to Plaintiff, the non-moving party, *Gantler*, *supra*. by disregarding that: (a) the very same illustrations which *the changed charts* also stated in clear language the death benefit would be paid after age 100; (b) similar language stating the $4,000,000 would be paid at death regardless of age *appears in every illustration before and after the chart change*, (c) upon inquiry by the

Plaintiff's Trustee, the Defendants' agent expressly stated the chart was wrong and $4,000,000 would be paid even if death occurred after age 100, and (d) despite their knowledge of all the facts, including their prior (and subsequent) confirmations that the Insurance lasted past age 100, Defendants never once told Plaintiff these contrary statements were in error. *Wal-Mart* at 319-321 (discussing the error in resolving conflicting inferences of facts relating to tolling of a statute of limitations in a motion to dismiss).

The Trial Court does not explain its ruling commencing the accrual upon an anticipatory breach nor why the time to file accrued despite Plaintiff having been given erroneous information upon inquiry of the Defendants; assurances the chart was wrong and $4,000,000 would be paid at death regardless of age. Application of laches requires consideration of what someone on inquiry notice would have (or in this case did) discover, particularly from a fiduciary. *Kahn v. Seaboard Corp.,* 625 A.2d 269, 276 (Del.Ch. 1993); *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc*., 677 A.2d 497, 504 (Del. 1996). *Nowak III* does not address *the clear text in every illustration* telling Plaintiff the death benefit would be paid after age 100; why Defendants never informed Plaintiff of the supposed multiple errors which stating the insurance lasted past age 100; or why the Defendants' agent's affirmative statements that the changed chart was in error and the Insurance would be payable after age 100 are of no consequence. *Winner Acceptance Corp. v. Return on Cap.*

Corp., 2008 WL 5352063, at *15 (Del. Ch.), (laches is tolled by misrepresentations which "put a plaintiff off the trail of inquiry" or reliance on fiduciaries).

2. The Equitable Fraud Counts Are Not Barred By Laches.

The standards of review and for a motion to dismiss. The decision below dismissed the action under Chancery Rule 12(b)(6) on the ground of laches. This Court reviews de novo a decision to grant a motion to dismiss. Dismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven, the plaintiff would not be entitled to relief. In reviewing the grant of a motion to dismiss, the complaint is viewed in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations. *Gantler, supra*.

Laches was tolled for the Equitable Fraud Counts until the Insured's death. The Trial Court's exclusive focus on ***a chart*** suggesting Defendants would not pay $4,000,000 after age 100 to the exclusion of all other facts showing multiple contrary statements before and after and disregarding the misrepresentations made in response to Plaintiff's inquiries also resulted in it erroneously determining to commence laches as to the Equitable Fraud Counts in 2011. Both the standard for deciding motions to dismiss, reading facts an inferences in Plaintiff's favor, and the substantive rules for application of laches, barring application where the plaintiff is provided inaccurate information, show the decision below was in error.

The Trial Court was required to accept as true the facts pled and draw inferences most favorably to Plaintiff. *Gantler*, *supra*. However *Nowak III*, *supra*. drew no favorable inferences from the facts that: (1) the very same illustration in 2011 (as did every illustration) *had explicit language stating the death benefit would be paid after age 100*; (2) all illustration both before and after stated in their texts that $4,000,000 would be paid after age 100; (3) despite inquiries from Plaintiff, Defendants never once informed Plaintiff that the charts in illustrations prior to 2011 were in error or that the texts in every illustration were in error; (4) Defendants confirmed in 2004 that the charts showing the death benefit after age 100 were accurate; (5) when Plaintiff's Trustee asked Defendant's agent about this revised chart not showing a $4,000,000 after age 100 and certain Policy language, *he was told the chart was wrong and the Insurance provided that $4,000,000 would be paid if death occurred after age 100*; and (6) despite the fact that Defendants knew of all these facts and the representations to Plaintiff and purported believed them to be in error at least as of 2010, they never told Plaintiff these statements were in error and they continued to make additional misrepresentations until the Insured passed age 100. Taken as true, these facts establish laches is inapplicable. Ignoring these facts, the Court held Plaintiff was required to file litigation in 2011.

The Trial Court held paragraphs 21-33 state Plaintiff knew of the error. They do not. They state: all the illustrations stated in plain language the death benefit

would be paid regardless of age at death, *only the charts in the illustrations but not the textual language* changed beginning in 2010 and again in 2011; Defendants' own agent stated the charts were in error and the insurance would be paid after age 100; and, despite knowing of their "mistake," Defendants never informed Plaintiff there was any mistake or error in the language of the illustrations or in the prior charts showing death benefits beyond age 100. The Trial Court erred in failing to draw all inferences in favor of Plaintiff.

STATEMENT OF FACTS

1. An Agreement Is Reached Between Defendants' Agents and Plaintiff To Provide Insurance Paying $4,000,000 Upon the Death of The Insured Regardless of Her Age At Death.

The Chancery Complaint seeks reformation of contract between the Parties for $4,000,000 in life insurance to conform it to the agreement made, and, in the alternative, for equitable and constructive fraud in connection with the sale thereof and the solicitation and collection of additional premiums thereon. Comp.¶1. Plaintiff purchased the Insurance 1999 from Defendants.[5] Comp.¶2.

The Insurance was purchased by Plaintiff for purposes of the Insured's estate which required that the $4 million death benefit would continue until the Insured's death, While premiums would be payable only until the earlier of her death or age 100. Comp.¶3. Both before the Policy was issued and in the course of soliciting additional premiums from Plaintiff, Defendants confirmed this understanding by provided Plaintiff documents stating Plaintiff would receive the $4,000,000 death benefit well past the insured reaching the age of 100[6] and regularly showed the operation of the Insurance Policy through Mrs. Nowak reaching the age of 110. *Id.*

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[5] As note above as the evolution of Defendants' corporate structure and names are not pertinent to this appeal, Plaintiff shall use "Defendants" throughout this brief.

[6] The Policy uses a defined term Attained Age," defined as the next policy issue date after the insured's 100th birthday. This distinction is not pertinent to the claims herein.

The illustrations were important because while the Defendants were obliged to continue coverage as long as the contract was in force, Plaintiff was not obliged to make any additional premium payments and, without breaching the contract, could have stopped payments and let the Insurance lapse. A-201 – A-233. The illustrations provided by Defendants reflected the agreement that the $4,000,000 benefit would continue notwithstanding that the premiums stopped at age 100. Comp.¶3. Prior to the issuance of the Policy document, no document provided by Defendants showed any cutoff, conversion, alternate calculation or decline in the death benefit upon the Insured reaching any age. *Id*. Defendants confirmed this understanding in conversations prior to the purchase, at the time the Policy was delivered, and subsequently through numerous written and oral communications between Plaintiff's Trustee and Mark Wilcock ("Wilcock"), Defendant's agent, who facilitated the issuance of the Insurance and recommended it to Plaintiff as suitable for its needs. *Id*. Wilcock was an agent for and was compensated by Defendants for his services on its behalf. *Id.* Wetherell, who acted to deliver the Policy in Wilcock's absence after a contract was formed and the first premium paid, was also an agent of Defendants and confirmed these understandings at that time. *Id*.

These events began around early 1999 when Plaintiff's Trustee began looking for financial advice for himself, individually. Comp.¶13. Through a mutual acquaintance, he was introduced to Wilcock. *Id*. Initially, the Trustee was not

looking for life insurance for himself or anyone else, had never purchased any life insurance, and had no knowledge of the various types of life insurance or how they functioned. *Id*. The Trustee consulted with Wilcock and Wetherell understanding they were acting as fiduciaries and would provide advice in the best interests of the Trustee and his family. *Id*.

In discussions with Defendants' agents, Plaintiff's Trustee shared that his mother, who had worked her entire life as a secretary, had made one fortuitous investment. Comp.¶16. At that point, Defendants' agents began exploring estate planning strategies for his mother, who was then 83 years old. Comp.¶17. On the advice of Defendants' agent Wilcock, Plaintiff commissioned a report by Legacy Analytics dated August 3, 1999, which was addressed to the Defendants and delivered to its agent Wilcock ("Legacy Report"). *Id*. A-612 – A-613. Wilcock, as Defendants' agent, understood irrevocable life insurance trusts and knew that Legacy Analytics was in the business of recommending how much insurance such trusts should purchase. *Id.* The Legacy Report recommended that life insurance owned by a trust, with a benefit of "$3M to $5M" be purchased on the life of the Insured, the Trustee's mother. *Id.* The report was addressed specifically to one of Defendants' predecessors, an insurance company the Trustee had never heard of. *Id.* It was not addressed to the Plaintiff, the Trustee or his mother. *Id.* Thus, it is clear, even before the Legacy Report was issued, Wilcock had determined to sell the Trust

a product from Defendants, for whom he acted as an agent and under which he would receive a sizable commission and the Defendants would receive sizable premiums. *Id*.

Defendants were aware that Wilcock and Wetherell held themselves out as financial consultants and were in a position to direct their clients into Defendants' products. *Id.* Neither Defendants nor their agents advised Plaintiff that some insurance policies ended the stated death benefit at age 100, despite their knowledge of the such and extent of this risk. *Id.* Neither did Defendants identify any alternative to the agreed Insurance, such as purchasing an insurance policy that had the risk of terminating at age 100, as is reflected in the Policy language. *Id*. They never identified any such risk and never quantified any different costs of these alternatives. *Id*.

The use of a life insurance trust is a well-recognized and accepted approach wherein a trust is established to own a life insurance contract and the heirs receive the proceeds when the insured passes. Comp.¶18. This only works if the death benefit is paid on death, regardless of age. *Id.* Defendants were the addressees of the Legacy Report and were aware of Plaintiff's needs. *Id*. Plaintiff relied upon Defendants to provide an insurance produce fulfilling those needs. *Id*. Accordingly, as Defendants knew when they sold the Insurance that Plaintiff believed it purchased

a life insurance policy that would pay a death benefit at the Insured's death, regardless of when such event should occur. *Id.*

The Trustee was never presented any insurance for consideration other than the one that he purchased and, before the Trust made the initial payment of about $250,000 he was never shown any illustrations for any other policy, other than the one's he signed for. Comp.¶19. Those illustrations state the $4 million death benefit would be paid at death. *Id*. The Trustee was specifically and repeatedly told by Defendants' agents that the premiums would end at age 100, but the $4 million would be paid at death. *Id*. As agents of Defendants, Wilcock and Wetherell were obliged to present the Policy using the materials prepared by Defendants. *Id*. They did so and those materials never state the $4 million death benefit terminates at age 100. *Id.*

From before the Trustee purchased the Insurance and until 2010, when an advisor told him some insurance policies could end at age 100, the Trustee was not aware of and had never heard of any such possibility. *Id.* Although Defendants acknowledge they were aware of the risks to Plaintiff of purchasing a policy with a death benefit that ended at age 100, there is no written communication from Defendants or their agents ever informing Plaintiff of those risks, or ever advising that the Policy Defendants issued to Plaintiff had exposed Plaintiff to those risks. *Id*. Defendants' agent acknowledged he never provided anything in writing to the

Plaintiff's Trustee before the Insurance was purchased from which the Plaintiff could have known the Policy form they issued ended Insurance at age 100. Comp.¶3.

In selling the Insurance to Plaintiff, Defendants represented that even though no premiums for the Insurance needed to be paid after Ms. Nowak reached 100 years old, the $4 million death benefit would continue to be payable whenever Ms. Nowak passed away. Comp.¶20. Those communications resulted in a meeting of the minds that the death benefit would continue until death, regardless of the attained age of the insured at the time of her death. Id.

2. Plaintiff Purchases the Insurance And Makes About $3,000,000 In Premium Payments Before A Chart In An Illustration Suggests there Is An Issue With the Date of Death.

In reliance on these representations made by Defendants regarding how the death benefit worked, Plaintiff purchased the Insurance and over the course of years made substantial premium payments on it, which payments it was not contractually obligated to make. Comp.¶4. The parties' understanding of the death benefit being paid upon death at any age is reflected, among other places, in an August 9, 1999 presentation with included narrative descriptions (referred to as a policy "illustration") provided to Plaintiff as part of the sales presentation of Defendants' agent Wilcock and a Statement of Policy Cost and Benefit Information dated

February 21, 1999. *Id.* Defendants were obligated to provide illustrations as to how the Policy operated. *Id.*

Over the next decade, Defendants prepared numerous illustrations showing the continuation of the $4,000,000 death benefit past age 100, indeed throughout this period, including illustration that benefit up to the age of 110, which documents never indicated any decline or age limitation on that benefit. Comp.¶5. In reliance on the above representations and illustrations, the Nowak Trust paid substantial annual premiums (about $250,000 per year, totaling over $3 million) to ensure that the Insurance remained in place. Comp.¶5.

Approximately 12 years after the Insurance Policy was entered into, Defendants sent an illustration with a chart that changed their presentation of the Insurance. Comp. ¶6. ***The descriptive textual language of the illustration did not change the description that the $4 million death benefit would continue until death regardless of age.*** *Id* (emphasis added).

As is shown in the Illustrations and in a chart, whose accuracy Defendants have never contested, ***every single illustration from the formation of the contract until the Insured's death had textual language stating that $4,000,000 would be paid regardless of the Insured's age at death and specifically stating the $4,000,000 death benefit would apply after age 100***. A-375-392 (quoting language

from all 31 illustrations covering a period of 16 years (the actual illustrations appear at A-393 – A-610) (emphasis added)).

Defendants never communicated to Plaintiff that there was any error in any illustration, despite their knowledge that they changed the chart, but not the text of illustrations beginning in 2011. Comp.¶26. Indeed, Wilcock testified that he checked and was specifically told that the charts showing the death benefit was $4,000,000 after age 100 were correct. Comp.¶22. Plaintiff, and its Trustee (and Defendants own agent according to his sworn testimony) were deceived by Defendants' conduct, representations and deceptive draftsmanship (including the multiple illustrations). Comp.¶34.

3. Defendants Breach the Parties' Agreement By Failing to Pay $4,000,000 On the Insured's Death and Litigation Is Brought.

Under the Insurance, the Insured turned age 100 on February 21, 2016. Comp.¶11. She died on June 29, 2016, 130 days past the age of 100. *Id*. Defendants refused to honor the $4,000,000 death benefit, despite Plaintiff having paid over $3,200,000 in premiums, based upon the parties' agreement and Defendants repeated representations. *Id.* This action was commenced less that a year later, on May 18, 2017. Superior Court Docket D.I.1, A-77.

4. Defendants Suffered No Detrimental Change of Position After 2014.

Nowak III at *9 (emphasis added) concluded that prejudice to the Defendants occurred because an action was not filed by 2014, three years after 2011. It stated:

> Here, significant, material elements of the reformation claims involve oral communications occurring as far back as 1999 and no more recently than 2011. It is unfair to any party to litigate the accuracy of such long ago conversations. Further, while the actuarial risks *are a matter of debate, it is certainly arguable* that the Defendants were prejudiced by collecting premiums for a Policy paying a Death Benefit of $4 million until age 100 if that Death Benefit actually extended indefinitely beyond 100.

There is nothing in the Complaint or record to support these conclusions. These documents and conversations regarding the contract formation are clearly identified. Further, as is reflected in the record in the Superior Court Proceedings, the documents reflecting Plaintiff's claims were available and the witnesses involved in making the agreement with Plaintiff were able to testify to the events in question. *Nowak I*, *supra*.; Superior Court Docket D.I. 128, 105. A-33, A-39. Not only does no prejudice exists from the face of the Complaint, it otherwise has not been shown. Specifically, as to prejudice arising from a "failure" to file this action in 2014 instead of 2017, there is nothing to even suggest any evidence was lost in that period.

As to the premiums, they were self-selected by Defendants *ab initio*. Comp.¶20. Not only was there no change in Defendants' position, from 2014 to 2017, there is nothing in the complaint, or for that matter in the Superior Court Record from which it could conclude that the over $3,200,000 in premiums Plaintiff paid were in any manner detrimental to Defendants or less than otherwise would have been paid. The allegations in the Complaint are that Defendants never provided any such information. Comp.¶17. Indeed, as Defendants never produced this evidence in the Superior Court Proceeding, *Nowak I*, *supra*., there is no reason to conclude that the premiums paid were anything other than those appropriate for insurance paying the death benefit regardless of the age of death.

5. Until the Insured's Death, In Illustrations, And Otherwise, The Defendants Repeatedly Reassured Plaintiff That The Defendants Would Pay $4,000,000 Regardless of When Death Occurred.

At no time in the 12 years after the Insurance was purchased, and Defendants' solicitation and receipt of over $3 million in premiums, did Defendants ever communicate any belief or understanding contrary to that reached upon formation of the contract. Comp.¶20.

By early 2010 the Trustee and Wilcock both had seen and understood the policy illustrations showed the policy in force and paying a $4,000,000 death benefit until Mrs. Nowak reached the age of 110, with no premium due after age 100.

Comp.¶22. In 2004, Wilcock had confirmed within Defendants that the charts in the illustration depicting a $4 million death benefit at age 110 were accurate. *Id*. His communications with Mr. Nowak reflected that confirmation. *Id*.

When the illustration for 2010 arrived, Wilcock forwarded it to the Trustee, and wrote that "it looks good … as the numbers are very similar to last year." Comp. ¶24 The 2010 illustration, however, ended at an "end of year age" of 100. Wilcock noted that and indicated that he had asked for an illustration through age 110 as in past years, but "obviously, I must not have been clear …". He did not indicate this illustration in any manner conflicted with the parties understanding of $4 million at death regardless of age. *Id*.

When the Plaintiff's Trustee began exploring methods to reduce the premiums paid, earlier in 2010, the latest illustrations clearly showed at net death benefit of $4,000,000 through the entire illustration which illustrated until Mrs. Nowak reached an "end of year age" of 110. *Id*. Comp.¶24. While consulting advisors about methods of reducing premiums while keeping the Insurance in force, an advisor informed the Trustee that there were certain trusts and policies that terminated at age 100 and that the Trustee should recheck everything. *Id*. The Trustee searched for clauses referring to a possible termination at age 100 and for the first time learned of a clause buried in the fine print of the Insurance Policy, as

written by Defendants, which might be contrary to the understanding of the Nowak Trust, and Defendants (and their agent Wilcock)[7] *Id.*.

The Trustee discovered language buried on page 16, not in the section on death benefit definition, which he interpreted, ***as possibly meaning the death benefit ended at age 100***, something completely contrary to his prior understanding. Comp.¶25 (emphasis added). After making inquiries of Wilcock and his financial advisor as to whether this interpretation was correct, *Wilcock assured him that he was misreading the policy and that "the death benefit is the surrender value thus 4M is the surrender value.*" *Id.* (emphasis added). Based on these assurances, the Trustee understood he was overreacting and that the Insurance Policy in fact operated as he had always understood. *Id.*

In particular, in 2010, when the Trustee inquired, Defendants never advised the Trustee that Defendants believed or held the view that a death benefit of $4,000,000 was unavailable after age 100. *Id.* Instead, Defendants stated that their system "now cannot illustrate past age 100." *Id*. Wilcock informed the Trustee that cutting off the illustration at age 100 was "totally contrary to the way [it] has been presented" in the past and that he would work on clarification. *Id.* Wilcock obviously shared Plaintiff's understanding of the Insurance and the prior illustrations, raised

[7] In *Nowak I,* Defendants prevailed in obtaining a decision that the Insurance Policy language did terminate the $4 Million benefit before the Insured's death and that Plaintiff could not recover for a breach of the contract as written. *Id*.

no alarm or question regarding a potential termination of the $4,000,000 death benefit. *Id.* Based on these illustrations and the parties' understanding of the Insurance, the Nowak Trust continued to pay hundreds of thousands of dollars in premiums every year, totaling in excess of $3 million over the life of the policy. Comp.¶20

In 2011, Defendants provided an new illustration, this time with a chart past age 100. Comp.¶11. For the first time, that chart indicated, contrary to the agreement of the parties, and the verbal and written representations of Defendants, including the illustrations prepared and provided by Defendants for years, that Defendants *might not* pay $4,000,000 after age 100. *Id*. Critically, this illustration only changed a chart and did not change the textual language in the illustration which stated the death benefit would continue past age 100. A-377 – A-610. ***The text of that illustration, indeed, the text of every illustration stated $4,000,000 would be the death benefit after age 100.*** *Id*.; Comp.¶21 (emphasis added).

In various phone calls, emails and meetings, Wilcock confirmed that the chart in the 2011 illustration was a mistake and was contrary to what had been represented by Defendants for years, and that it was his understanding that full death benefit of the policy would continue until Ms. Nowak's death. Comp.¶9.

The charts in 2011 showed the post-age 100 death benefit was the same as the "surrender value." This surprised both Wilcock and Mr. Nowak. Comp.¶27. Indeed,

Wilcock expressed his surprise to Defendants in a phone call to their representatives. *Id.* Notwithstanding this change in the chart, the textual material in the illustrations have consistently stated throughout that the $4 million death benefit was available regardless of age. Comp ¶32. In fact, the chart was changed by a contract computer programmer who acted without any authorization. Comp.¶28. Defendants never told Plaintiff there was any error in any illustration. Comp.¶26. Plaintiff, and its Trustee (and Defendants own agent according to his sworn testimony) were deceived by Defendants' conduct, representations and deceptive draftsmanship (including the multiple illustrations). Comp.¶34.

The complaint, on page 16 has a heading that the Trial Court misread. Specifically, the Trial Court did not note the distinction made between the chart in the 2010 and 2011 illustrations and the textual language in those very same illustrations. This distinction, missed by the Trial Court, is highlighted in red below.

IN 2010, VOYA ALTERS ITS ILLUSTRATIONS, FIRST TERMINATING A CHART IN THE ILLUSTRATIONS AT AGE 100 AND THEN, IN 2011, INCLUDING A CHART ILLUSTRATING THAT, CONTRARY TO DEFENDANT'S REPRESENTATIONS OF THE PREVIOUS 10 YEARS, AND THE TEXTUAL LANGUAGE OF THE ILLUSTRATIONS, THE $4 MILLION DEATH BENEFIT TERMINATED AT AGE 100.

Nowak III, *supra*. acknowledges assurances from Defendants, finds Plaintiff's reliance on them justifiable, but gives them no weight. The Complaint alleges numerous examples. *E.g.*, Comp. ¶21 (the 2011 chart conflicted with "*the text of*

every illustration [which] stated $4 million would be the available death benefit after age 100" (emphasis in original)).

The Trial Court misread the sequence of events and assumes ending Insurance at age 100 was in fact the parties' agreement. when it concluded "despite the *intervening* ***incorrect*** *illustrations* and Wilcock's assurances, *after "rereading"* the Policy and *receiving other* ***corrected*** *illustrations*, it was apparent to the Trustee that the "Defendants intended to interpret and rely upon certain language in the Insurance Policy, which contradicted the parties' understanding" *Nowak III* at * 7 (emphasis added). Nowak III cites to but ignores the rest of paragraph 7 of the Complaint which identifies the substantial contrary information that was provided, *including the text of the 2011 illustration itself*. the Court never explained the basis for concluding the 2011 chart was "correct" and the text (in 2011 and throughout) was "incorrect." The Court also ignored that the sentence refers to the 2011 chart only and that two paragraphs later the Complaint relates how the Trustee was assured by Defendants' agent that "the 2011 illustration w[as] contrary to what had been represented by Defendants for years, and that it was his understanding that full death benefit of the policy would continue until Ms. Nowak's death." Comp.¶9.

The Complaint alleges the sequence as: the Trustee found the buried language and then contacted Defendants and received assurances, Plaintiff then received the intervening illustrations and then received additional assurances from Defendants'

agent. “Upon checking with Defendants’ agent Plaintiff was assured that this clause would not operate …” to terminate the insurance. Comp ¶6. “In various phone calls, emails and meetings, Wilcock confirmed that the text of the Insurance Policy was a mistake, that it and the 2011 illustration were contrary to what had been represented by Defendants for years, and that it was his understanding that full death benefit of the policy would continue until Ms. Nowak’s death.” Comp.¶9.

Nowhere does the Complaint allege that the Trustee knew and believed the Defendants would not pay the Insurance if the Insured died after age 100. Indeed, if this “fact” was so clearly understood by all, why is it that the Defendant never informed the Plaintiff that all of the innumerable representations that the death benefit would be paid after age 100 were in error? Why did Defendants continue to put, *in every illustration*, statements that the $4,000,000 in Insurance would be paid at death even after age 100? The Court Below incongruously concluded that the Plaintiff knew something as a fact when Defendants’ own documents show that either Defendants themselves did not believe it to be true or they deliberately misrepresented this fact.

ARGUMENT

I. The Contract Reformation Counts Are Not Barred By Laches.

(1) Questions Presented.

Whether the Contract Reformation Counts (Counts I, II, and V) should be dismissed on the grounds of laches? (D.I. 12, A-003, A-296, A-346-A-355).

(2) Scope of Review.

The standard of review is *de novo*. The decision below dismissed the action under Chancery Rule 12(b)(6) on the ground of laches. This Court reviews *de novo* a decision to grant a motion to dismiss. *Gantler* at 703; *Brinckerhoff v. Enbridge Energy Co., Inc*., 159 A.3d 242, 252 (Del. 2017) ("*Brinkerhoff*").

(3) Merits of Argument

A. As To Claims For Contract Reformation Laches Requires that Defendants Detrimentally Changed of Their Position As a Result Of An Unreasonable Delay.

(i) The Legal Standards.

On a motion to dismiss under Court of Chancery Rule 12(b)(6), dismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven, the plaintiff would not be entitled to relief. In reviewing the grant of a motion to dismiss, the complaint is viewed in the light most favorable to

the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations. *Gantler* at 703.

Laches is an affirmative defense which requires that the Defendants show: (1) knowledge of the claim by the plaintiff, (2) an unreasonable delay in bringing the claim, and (3) resulting prejudice to the defendant. *Spazio* at 182. For claims for reformation of contracts, it must be shown that the defendant suffered a detrimental change of position as a result of the delay. *Starr*, *supra*., *Collins, supra*. Laches is a fact intensive doctrine rendering consideration of it inappropriate on a motion to dismiss "unless 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." *Spazio,* at 183. Accord, *Wal-Mart, Inc.* at 320-21; *Kim* at *2.

In *Starr* at 1089 (emphasis added), this Court held that "[t]he right to reform a contract is subject to a defense of laches, but the action will not be barred in the absence of some showing that *the delay caused the defendant to suffer a detrimental change* in position." In *Starr*, the insured obtained the judgement as to which it sought reformation of the applicable coverage over five (5) years before suit was filed and relied on a statute which was effective more than three (3) years before their suit was filed. *Starr* at 1088-89. *Starr* rejected the argument that an analogous statute of limitations should apply. *Id*. at 1088.

In *Collins,* the plaintiff "knew of the mistake" four (4) years before filing the action. *Id.* at 1003. This Court rejected application of an analogous three-year statute of limitations to a contract reformation claim and required a "showing that [defendant] suffered a detrimental change of position as a result of the delay." *Id*.

(ii) No Prejudice To Defendants Has Been Shown.

No detrimental change of position appears in the record before the Court, and none is even claimed by Defendant to have occurred in the year after the contract is alleged to have been breached. See argument B below. Laches is an affirmative defense as to which the Defendants bear the burden of proof. *Hadak* at 153. Instead, the Trial Court presumed prejudice in resolving a motion to dismiss.

This action was filed within a year of the alleged breach of contract, therefore any prejudice as to the Contract Reformation Counts needed to occur within that period and the be weighed against the period of the "delay". If the breach of contract limitations rules were inapplicable, "[w]here no analogous limitations period exists, "the legal statute of limitations cannot apply by analogy, and instead the Court relies entirely on the traditional principles of laches." *Kraft v. WisdomTree Invs., Inc*., 145 A.3d 969, 979 (Del. Ch. 2016). The analysis is whether "the plaintiff has unreasonably delayed in bringing his cause of action, and that delay has disadvantaged the defendant to the extent that it would be inequitable to allow suit

to go forward." *Kirby v. Kirby*, 1989 WL 111213 at *4 (Del.Ch.). Here the delay was not unreasonable and there is no prejudice.

(iii) There Is No Prejudice In the Year After The Cause of Action Accrued.

Prejudice is does not appear from either the Complaint or, even if considered, the record of the Superior Court Proceedings. Defendants had already determined what premiums to charge long before and there were no additional premiums due. There was no change in position. Nor, even if one assumes there was a need to file this action earlier, is there anything in the record to show that Defendants would have charged a different premium from the outset, or that Plaintiff would have agreed to pay it.

The finding of a purported unfairness of litigating "the accuracy of such long ago conversations," *Nowak III* at *9, also is flawed. There is no showing that any witness has become unavailable or forgot these events or that critical documents have been lost, since 2016 or otherwise. Indeed, the record before the Superior Court demonstrates this did not happen regardless of when one assumes an action should have been filed. *Nowak I*, *supra*.: Superior Court Docket D.I. 128, 105. A-33, A-39. (indicating all records still existed and all pertinent witnesses were deposed). Assuming such as "fact" without any proof from Defendants is inappropriate.

Hadek. Critically under Rule 12(b)(6), the complaint does not show any witness or materials were lost.

B. Even Were The Analogous Statute Of Limitation To Apply, This Action was Commenced Within One Year Of Accrual.

Even if the "analogous" statute of limitations is considered, the Trial Court's misapplied it. The Trial Court held the analogous statute of limitation to be that for breach of contract. *Nowak III* at *6. 10 *Del.C.* §8106. The time to commence an action for breach of contract starts when the contract is breached regardless of when injury occurs. *E.g.*, *Lehman Brothers Holding, Inc. v. Kee*, 268 A.3d 178, 186 (Del. 2021). *Central Mort. Co. v. Morgan Stanley Mortg. Capital Holdings*, LLC, 2012 WL 3201139 at *21 (Del.Ch.) (emphasis added) ("[C]lear Delaware law [holds] … an action for breach of contract has a three-year limitations period and begins to run when the contract is breached, *regardless of when the plaintiff discovers its injury*."). Anticipatory repudiation of a contract does not commence the running of a statute of limitations. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 78 (Del.Ch. 2013).

An insurance contract requiring payment is breached when payment is not made. "Established contract case law thus recognizes that until a breach occurs, there is no justiciable controversy under the contract (here a policy) upon which a party may sue. So long as the parties to a contract perform in accordance with the

bargained-for obligations, no party has cause to complain. It is only when one party contends the other party has ceased to perform in violation of the contract that a justiciable controversy exists. Here, we conclude that a justiciable controversy did not arise until Allstate denied Spinelli's claim for coverage benefits and so informed [the insured]." *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del. 1982) ("*Spinelli*"). A contract requiring payment upon death is breached when payment is not made upon the death of the promisor. *Adams v. Jankouskas*, 452 A.2d 148, 157-58 (Del. 1982) ("*Adams*"); *Spinelli*, at 1292 (after payment denied and notice of denial is provided).

At the argument on the motion to dismiss, the Defendants conceded that before the Insured died, the only form of action which could have been brought would have been a declaratory judgment action. Transcript 53:2-10. A-712. This concedes a claim had not accrued. "[T]he basic purpose of the Declaratory Judgment Act is to enable the courts to adjudicate a controversy prior to the time when a remedy is traditionally available and, thus, to advance the stage at which a matter is traditionally justiciable." *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973). For this reason, the Trial Court's statement, *Nowak III* at *9, made without any citation to authority, that Plaintiff's reformation claims accrued when the Trustee had "sufficient facts to bring a claim" is in error.

Even if the contracts statute of limitations is considered for the Contract Reformations Claims, this action is timely.

II. The Equitable Fraud Claims Are Not Barred By Laches.

(1) Questions Presented

Whether the Equitable Fraud Counts (Counts III and IV) should be dismissed on the grounds of laches? (D.I. 12, A-003, A-296, A-346-A-355).

(2) Scope of Review

The standard of review is *de novo*. The decision below dismissed the action under Chancery Rule 12(b)(6) on the ground of laches. This Court reviews de novo a decision to grant a motion to dismiss. *Gantler* at 703; *Brinckerhoff* at 252.

(3) Merits of Argument

A. The Claims for Equitable Fraud Are Subject to Tolling.

(i) The Legal Standards.

As to the standards for determination of a motion to dismiss and the standard for applying laches in a motion to dismiss, the law is the same for the Equitable Fraud Claims as for the Contract Reformation Claims.

As to the Equitable Fraud Counts, this Court will refer to the analogous statute of three-year limitations in 10 *Del.C.* §8106. *WisdomTree* at 978. The application of that is subject to equitable tolling based on facts showing an inherently unknowable injury, actions by defendants concealing the injury, or a misleading response to an investigation by plaintiff which allays suspicion. *WisdomTree*; *Spazio*; *Whittington v. Dragon Group, LLC,* 991 A.2d 1, 7-9 (Del. 2009). *Wal-Mart*

at 321 (finding that relying on defendant's advice made an injury inherently unknowable until a court ruled otherwise). The equitable tolling doctrines have been summarized as follows:

> Under the … "discovery rule," … the statute will begin to run only upon the discovery of 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 such facts*. The statute of limitations then begins to run upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person on inquiry notice of such facts.
>
> The statute of limitations will also be tolled if a defendant engaged in fraudulent concealment of the facts necessary to put a plaintiff on notice of the truth. Fraudulent concealment requires an affirmative act of concealment or some misrepresentation by a defendant that prevents a plaintiff from gaining knowledge of the facts. … Where there has been fraudulent concealment from a plaintiff, the statute of limitations is suspended until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence.
>
> Under the theory of equitable tolling, the statute of limitations is tolled … even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary. Underlying this doctrine is the idea that even an attentive and diligent [plaintiff] may rely, in complete propriety, upon the good faith

> of fiduciaries. … This doctrine tolls the limitations period until an [plaintiff] knew or had reason to know of the facts constituting the wrong." *Albert v. Alex. Brown Mgmt. Servs., Inc.,* 2005 WL 1594085, at *19 (Del. Ch.).

"In addition, "[i]f there is a continuing wrong, the cause of action is timely so long as the last act evidencing the continuing wrong falls within the limitations period. To plead a continuing wrong, the plaintiff must allege that the various acts are so inexorably intertwined that there is but one continuing wrong. *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2022 WL 3010640, at *12 (Del. Ch.). "If there is a continuing wrong, the cause of action is timely so long as the last act evidencing the continuing wrong falls within the limitation period. *Kerns v. Dukes*, 2004 WL 766529, at *4 (Del. Ch. Apr. 2, 2004)." *Frederick Hsu Living Tr. v. ODN Holding Corp.,* 2017 WL 1437308, at *43 (Del. Ch. Apr. 14, 2017), as corrected (Apr. 24, 2017).

(ii) The Fraud Claims Accrued At The Time of The Wrongful Acts.

Equitable or constructive "fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud." *In re Wayport, Inc. Litig.,* 76 A.3d 296, 327 (Del. Ch. 2013).

"The elements of equitable fraud are similar to those for common law fraud, except that the claimant need not show that the respondent acted knowingly or recklessly - innocent or negligent misrepresentations or omissions suffice. Indeed, the concept of equitable fraud is more flexible and includes all willful or intentional acts, omissions, and concealments which involve a breach in either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained." *Zebroski v. Progressive Direct Ins. Co*, 2014 WL 2156984, at *7 (Del. Ch.). *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (defendant need not even know his statements were false).

The wrongful acts supporting the Equitable Fraud Counts were the representations that the $4,000,000 would be paid at death even if the Insured died after age 100. *E.g*. *Kim* at *6. As a result, in this case there are multiple wrongful acts alleged, including thirty one (31) acts in the illustrations alone. These constituted a continuing fraud which occurred throughout the period from 1999 until July 14, 2015. Comp.¶¶3, 32, 33; A-375-A-392. Even if each misrepresentation is considered separately, laches was tolled and the action was timely.

(iii) The Analogous Statute of Limitations Was Tolled Until 2016 As To All Acts of Equitable Fraud.

The Trial Court erroneously held the Equitable Fraud Claims accrued in 2011, 12 years after the contract was formed when Defendants, when a chart in an illustration, provided the first suggestion that Defendants might not pay the death benefit if the insured died after age 100. *Nowak III* at 7. Based on the analogous statute of limitation in tort, the Trial Court held the Equitable Fraud Counts needed to be filed by 2014. *Id.* at *7, *9.

As with its misapplication of an analogous statute of limitations to the Reformation Claims, the Court failed to view the facts and inferences favorably to Plaintiff, the non-moving party, *Gantler*, *supra*. and disregarded contrary facts and the misrepresentations Plaintiff was told when Plaintiff's Trustee made inquiries. Even if one ignores the continuing fraud and treats each misrepresentation as a separate fraud, those facts as of 2011 include: (a) the very same illustrations which the changed charts also stated in clear language the death benefit would be paid after age 100; (b) all illustration before stated in their texts that $4,000,000 would be paid after age 100; (c) despite inquiries from Plaintiff, Defendants never once informed Plaintiff that the charts in illustrations prior to 2011 were in error or that the texts in every illustration were in error; (d) Defendants confirmed in 2004 that the charts showing the death benefit after age 100 were accurate; (e) when Plaintiff's Trustee

asked Defendant's agent about the revised chart not showing a $4,000,000 after age 100 and about the Policy language, he was told the chart was wrong and the Insurance provided that $4,000,000 would be paid after age 100; (f) despite the fact that Defendants knew of all these representations to Plaintiff and purported believed them to be in error at least after 2010, they never once told Plaintiff these statements were in error; and (f) Defendants *continued to make additional misrepresentations after 2011 until the Insured passed age 100*.

The Trial Court does not explain its decision to commencing the accrual of the statute of limitations with the first contrary chart, does not address the clear text in every illustration telling Plaintiff the death benefit would be paid after age 100, and does not address what the Trustee was told when he made inquiries after receiving the 2011 chart. Instead, *Nowak III*, *supra*. while acknowledging that Plaintiff's reliance on the Defendants' agent's statements was reasonable, simply dismisses that reliance without discussion. *Nowak III* at *6 ("In various communications with Wilcock, the Trustee was assured that the 2011 illustration was a mistake, and that it was Wilcock's understanding that the full Death Benefit would continue until Mrs. Nowak's death."). Dismissing these facts as inconsequential was error. E.g., *Wal-Mart* at 319-321 (in reversing a decision applying laches, this Court held that erroneous advice from a broker tolled laches until a court decision established the advice was in error).

Nowak III, *supra*. also relies on "facts" that simply are not in the record. *Nowak III* at *9 states the Complaint acknowledges that "the Trust knew as early as 2010, and certainly no later than 2011, that the Defendants would not pay …" and cites the Complaint at ¶¶24-34. However, the Complaint has no allegations admitting such knowledge, alleges only that doubt was raised, that Plaintiff acted prudently when doubt was raised, and was assured by Defendants' agent that the $4,000,000 would be paid on death regardless of age.

Nowak III at *3 contains another "factual" statement without any record reference. "Mr. Nowak contacted Wilcock and eventually SLD for clarification. Although Wilcock thought differently, SLD confirmed Mr. Nowak's understanding that the Trust would receive a Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if she died at attained age 100 or thereafter." *Id.* This nowhere appears in the Complaint or the Record before the Court. The complaint never states the Trustee had any such understanding or that it was confirmed by anyone at Defendant, Security Life.

As these "facts" do not appear in the record or are contrary to it, the Trial Court erred in relying on them. *Gantler*, *supra*.

CONCLUSION

For the foregoing reasons the Trial Court's dismissal of the complaint on laches grounds should be reversed and the matter remanded for further proceedings.

COOCH AND TAYLOR, P.A.

/s/ R. Bruce McNew

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