EFiled: Oct 10 2022 04:58PM EDT
Filing ID 68232122
Case Number 254,2022

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

APPELLANT'S REPLY BRIEF

R. Bruce McNew (No. 967)
COOCH AND TAYLOR, P.A.
The Nemours Building
1007 North Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
(302) 984-3810

Attorney for Appellant/ Plaintiff Below

October 10, 2022

TABLE OF CONTENTS

PAGE:

TABLE OF CITATIONS

CASE: **PAGE:**

STATUTES:

OTHER AUTHORITIES:

ARGUMENT

I. DEFENDANTS' ARGUMENTS IGNORE THE PROPER STANDARD OF REVIEW.

A. As Did The Trial Court, Defendants Fail To Accept The Complaint's Allegations and All Inferences Favorable to the Plaintiff.

Defendants' Answering Brief ("AB") pays lip service to the applicable standard for granting a motion to dismiss, reciting it only once, not in the standard of review section for either of its arguments. AB 10. After reciting that standard: well-pleaded factual allegations are accepted as true and reasonable inferences are drawn in the non-moving party's favor … [and] [d]ismissal is warranted if the plaintiff is not entitled to recover under any reasonably conceivable set of circumstances susceptible of proof" (*Id*.) Defendants then ignore it and rely on "facts" that are either outright inaccurate or are conclusory inferences drawn favorably to Defendants. Other than citations noting the counts in and document references in the complaint, the Policy issue date and the date the insured died, Defendants cite only six times to the Complaint, *in every instance misstating the allegations made*. Before accepting any "fact" from the Defendants' Answering Brief, respectfully, the first question should be: where is that in the complaint?

Under the proper standard, a motion to dismiss on the ground of laches is appropriate only if it appears from the face on the complaint that, accepting all facts

pled and favorable inferences, the factually intensive affirmative defense of laches would apply under any reasonably conceivable set of circumstances susceptible of proof at trial. *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009) ("*Gantler*"). Further, as an affirmative defense as to which Defendants bear the burden of proof, the factually intensive affirmative defense of laches is ill suited for disposition on a motion to dismiss. *Reid v. Spago*, 970 A.2d 176 (Del. 2009) ("*Spago*").

As to facts central to the error below: Defendants simply ignore them and Plaintiff's arguments based upon them, and as did the Court below, fail to explain how dismissal is appropriate under those allegations. Defendants never discuss that for 16 years *every single illustration* of the Policy (using slight only variations in language) stated the Policy had "Death Benefit Option A", under which the "Death Benefit is equal to the stated death benefit" (here $4,000,000), and "is available after age 100." A-375-392. These illustrations without exception reflect precisely the term that Plaintiff alleges was agreed between the parties. *These statements were made 31 times*. *Id.* Defendants never told Plaintiff any of these was in error or a mistake. A96-101. Indeed, Defendants Answering Brief admits that the illustrations before 2004 were accurate. AB 6. These confirmed the agreement was for "Death Benefit Option A" A-399-403, A-408-409 (on every page). Option A is consistently described as the form of death benefit "available after age 100." A-376-392.

Defendants also never discuss that while eleven years into the Policy, after approximately $3,000,000 in premiums were paid, an unauthorized change by a computer programmer to one chart in the illustrations, *but not in the text of the illustrations*, raised some questions, *the Plaintiff pursued those questions and was assured by the Defendants' own agent*, consistent with the agreement that had been reached at the outset and consistent with the text of the illustrations, that the insurance would pay $4,000,000 even if the insured died after age 100. A-095-097. There is no allegation, nothing in the record, and not even anything in the Decision Below to support Defendants assertion that this change in the chart was a "correction" of any error. *See*, AB 6. Defendants never discuss these allegations, because they demonstrate the error in the Decision Below.

In fact, favorably read towards Plaintiff, complaint alleges an unauthorized change in the one chart of the illustrations during years 11 through 16, which conflicted with the text of those very same illustrations, created some doubt, which Plaintiff's Trustee ran to ground by contacting Defendants' agent who informed him that the benefit would be paid after age 100. Even if the conflicting chart was inquiry notice; ***inquiry*** notice is just that, sufficient notice to undertake an inquiry. The complaint alleges that this inquiry resulted in Plaintiff being informed there was no issue with payment after age 100. A-095-097, Comp. ¶¶24-26.

The five times Defendants cite the complaint for pertinent substantive facts are wrong in every instance. Contrary to Defendants claims: (1) at AB 5, the Trust was not shown illustrations of policies from different insurers. (A-090 "The Trustee was never presented any insurance policy for consideration other than the one he purchased …".); (2) at AB 6 fn 17, the complaint does not allege that the illustrations from 2004 to 2009 were in any manner "erroneous[]." (A-093 "This understanding of the mechanics of the Insurance Policy was repeatedly confirmed … by illustrations in those years.); (3) at AB 7 fn 18 there is no allegation that the illustrations before 2011 were *in error* or were *corrected* thereafter. (E.g., A-094 "Even after that, the text of every illustration stated $4 million would be available as the death benefit after age 100."); (4) at AB 7 fn 19 the complaint does not allege illustrations after 2010 "clarified that only surrender value was available after age 100." (A-094 "Even after that, the text of every illustration stated $4 million would be the available death benefit after age 100." "the illustrations have consistently stated throughout that the $4 million death benefit was available regardless of age."); (5) at AB 7 fn 21 the Trustee did not understand the language as stating the death benefit ended at age 100. (The complaint at A-96 states "[b]ased on the assurance [the Trustee] understood … the Insurance Policy in fact operated as he always understood [paying $4,000,000 regardless of the age at death.); (6) at AB 7 fn 23 the complaint does not admit the Trust understood the unauthorized change in the chart

in 2005 was correct. (A-99 “Defendants never explained why any of the changes were made …”. A-94 after 2011 “the text of every illustration stated $4 million would be the death benefit after age 100. Based on these illustrations and the parties understanding” premiums continued to be paid. (emphasis in original)).

As required by Supreme Court Rule 14(c)(1) Plaintiff relies upon and does not repeat here material in its Opening Brief.

II. THE COURT BELOW FAILED TO APPLY THIS COURT'S PRECEDENT.

A. Defendants Fail To Address The Proper Standard Of Review.

Apparently recognizing that the Decision Below does not adhere to precedent, Defendants seek to justify the granting of the motion to dismiss by asking this Court to weigh the allegations to see if they would prevail under the clear and convincing standard required at trial.[1] AB 33. This confuses the standard of proof at trial with the standard of review of the grant of a motion to dismiss on the grounds of laches. The standard of proof at trial "does not impact [this Court's] standard of review. *Clark v. Clark*, 994 A.2d 744 at *3 (Del. 2010) (Table). The proper standard of review in this appeal is a *de novo* review assessing whether, accepting all factual allegations as true and drawing all reasonable inferences from them in Plaintiffs favor, it appears to a reasonable certainty under any set of facts that could be proven, Plaintiff's claims would be barred. *Gantler* at 703. As Defendants never address the facts alleged in the complaint or reasonable inferences favorable to Plaintiff from them, Defendants never analyze the error below presented in Plaintiff's Opening Brief ("POB").

[1] Defendants even seem to suggest that Judge Wharton dismissed the equitable allegations simply because he previously had dismissed the legal claims. "Following the Superior Court's lead, the Court of Chancery dismissed those claims." AB 1 (failing to note that Judge Wharton decided both matters).

Defendants compound this omission by claiming that the scope and effect of the Law of the Case Doctrine is that every word in the Superior Court summary judgment opinion by Judge Wharton in *Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc.,*2020 WL 7181368 (Del. Super.) ("*Nowak I*"), aff'd *Olga J. Nowak Irrevocable Trust v. Voya Financial, Inc*., 256 A.3d 207 (Table) (Del. 2021) ("*Nowak II*") is conclusive and binding as to these separate equitable claims. Defendants made this argument to Judge Wharton who sat on the Superior Court proceedings and on the Chancery proceedings, sitting by designation as a Vice Chancellor. He rejected the argument, stating: as to "the scope of the record and the law of the case. In that regard. The Court has relied only on the Complaint and *the Superior Court's determination, as affirmed by the Delaware Supreme Court, that the Defendants did not breach the written Policy in reaching its decision*." *Olga J. Nowak Irrevocable Tr. v. Voya Fin., Inc.,* 2022 WL 2359628, at *5 (Del. Ch.) ("Nowak III", the decision from which this appeal is taken) (emphasis added). Defendants did not appeal that ruling. Probably because, as the Trial Court recognized, and as Defendants Answering Brief admits: "The core of the [*Nowak I*, Superior Court] dispute was pure policy interpretation …". AB 1 The core facts on which the Chancery Complaint premises its claims for recovery are not within the Policy language.

In any event, because the determination that there was no breach of contract was based upon the four corners of the Policy language, the Defendants reliance on dicta or extraneous and, at times inaccurate, language in Nowak I, never affirmed by this Court, is wrong. *Cede & Co. v Technicolor, Inc.*, 884 A.2d 26 (Del. 2005) ("*Cede*") notes the law of the case doctrine is narrow, applies to appellate court decisions, not trial court decisions, and has exceptions. Nowak II summarily affirmed the dismissal of the legal claims, and the lack of jurisdiction over the equitable claims. "[T]he trial court on remand is not constrained … as to issues not addressed on appeal …". *Cede* at 38. The doctrine is limited to "issues expressly or implicitly disposed of in [the appellate court] decision." *Id*. Defendants identify no fact in the Complaint which is contrary to any issue expressly or implicitly disposed of in affirming the dismissal of the legal claims. As a result, reliance on matters outside the complaint or documents incorporated therein by reference is improper.

B. Establishing Laches In Bringing a Claim for Reformation of An Insurance Contract Requires Actual Prejudice and None Exists From the Face of the Complaint.

1. Actual Prejudice Is Required.

Defendants misconstrue *Nationwide Mut. Ins. Co. v. Starr,* 575 A.2d 1083 (Del. 1990) ("*Starr*") and urge that this Court adopt a new rule that reformation

claims accrue upon delivery of a nonconforming writing, even in the absence of a contract breach or any injury.

The full quote from *Starr* at 1089 is: "The 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." Rather than discuss this language, Defendants argue Starr's result is consistent with an application of the accrual rule they urge this Court to adopt, and assert this Court found the cause of action in Starr accrued when this Court issued a decision interpreting an applicable insurance code section and that the action was thereafter filed within the analogous statute of limitations. AB 15. This attempt fails. *Starr* applied no analogous statute of limitations. Instead, it applied the traditional "unreasonable delay resulting in prejudice" analysis and found that filing within two years of a final decision of this Court establishing finally the rights at issue was not an unreasonable delay and further found the insurer had suffered no prejudice. *Starr* at 1089. Defendants cite no language in *Starr* which can be interpreted as they assert; that this "Court *agreed* that an analogous statute of limitations applies to reformation." AB 15 (emphasis in original). It does not exist.

Even if *Starr* could be interpreted as an accrual of an analogous statute of limitations decision, according to Defendants, the accrual in *Starr* was this Court's final disposition of a case relating to the Plaintiff's rights. Applying that rule to this

case, the accrual of the equitable claims commenced upon this Court's affirmance of the summary judgment interpreting the Policy in a manner inconsistent with the parties' prior agreement. That occurred in 2021. *Nowak II*.

Defendants superficially dismiss the precedent in *Collins v. Burke*, 418 A.2d 999 (Del 1980), cited in *Starr* at 1089. Collins required actual prejudice before laches can apply to a claim for reformation, and held "in the absence of any showing that appellants suffered a detrimental change of position as a result of the delay, the action will not be barred by laches." *Id*. at 1003. Defendants dismiss this by stating; an analogous statute of limitations "never came up" in *Collins*. AB 14. True, because that is not the appropriate analysis. In fact, had an analogous statute of limitations based upon inquiry notice been applied, the case would have been untimely as the error occurred in 1967, the plaintiff purchased the lot in May 1970, the error was found plaintiff's surveyor 8 months later (January 1971), and the plaintiff was further made of it in the spring or 1972. Yet litigation was not filed until the plaintiff tried to sell the lot in 1976. *Collins* at 1003.

2. Defendants Experienced No Prejudicial Change Of Position And, Even If The Two Items Identified Could Constitute Prejudice, They Do Not Appear In The Record.

The Court below noted two types of purported actual prejudice that Defendants assert are "beyond presumed prejudice." AB 21. The first is the

difficulty of litigating "claims arising from events in 1999." *Id.* No actual difficulties, no lost evidence, and no lost witnesses have been shown, and none appears in the Complaint. In fact, the allegations of the Complaint establish the documents and witnesses are available. A-078-107 As a result, in reality, this argument is that there is an irrebuttable presumed prejudice due to the passage of time, *despite allegations to the contrary.* That is application of an analogous statute of limitations, albeit without any proper analysis of the applicability of the doctrine. Actual prejudice is required. *Starr* at 1089 ("some showing that the delay caused the defendants to suffer a detrimental change in position.") Any other rule would result in an irrebuttable presumption of a detrimental change of position due to the passage of time alone.

The second purported prejudice was that Defendants continued to provide insurance coverage. AB 21. This not a change in position as Defendants could not have cancelled the insurance as long as the premiums were paid. Nor is there anything to show it was detrimental in any way. Defendants collected over $3,200,000 in premiums over 16 years. Further, as the Defendants selected the premium, and Plaintiff paid it, before any written Policy was issued, the stated premium was part of the bargain and not a change in position.

As to any claim that the premiums would have been different if Defendants had believed coverage would extend past age 100, there is nothing in the complaint,

indeed nothing in the record of the proceedings on the legal claims, which establishes that any different premium would have been charged. Finally, the premise, a conclusion that Defendants never believed coverage would extend past age 100, is impermissibly drawing an inference favorable to Defendants on a motion to dismiss.[2] Indeed, even if the entire factual record before the superior Court were to be considered, which respectfully it should not, there is nothing to suggest that the Plaintiff did not in fact pay the premium that was appropriate for insurance as was agreed between the parties.

[2] If it is seen as a conclusion that the claims will fail on the evidence, it would be a prejudgment of claims as to which there is contested evidence before trial.

III. EVEN IF THE ANALOGOUS LIMITATIONS PERIOD FOR BREACH OF CONTRACT IS APPLIED, THE DISMISSAL WAS IN ERROR.

Although, Plaintiff disputes that application of an analogous statute of limitations applies to the Reformation claim. Even if it were applied, Plaintiff's reformation claims were timely.

A. Under Contract Law, The Breach Occurred When the Death Benefit Was Not Paid On The Insured's Death.

Defendants do not contest that an insurance contract is breached when payment is not made as set out in Plaintiff's Opening Brief. OB 33-36. Nor do they contest that, if the agreement was to pay on death even if that occurred after age 100, that event occurred less than three years before this action was commenced. *Id.*

The cases cited by Defendants, support the timeliness of the claims here, even under an analogous statute of limitations standard. *Lehman Bros Holdings, Inc. v. Kee,* 268 A.3d 178 (Del. 2021) ("*Kee*") involved a claim that a seller had transferred a worthless deed. This Court held that the claims accrued when the deed was transferred. This was a straightforward application of the rule that a claim accrues when a party breaches a contractual duty. The seller's duty was to tender a valuable deed at closing. It was alleged the seller did not and the claim accrued then. Seller had no duties thereafter. The document as to which reformation was sought was the erroneous deed, not the purchase contract. The language Defendants cite, "those

claims accrue when the elements of those claims have been met" is followed by a description of the conduct breaching the agreement: delivery of "a purportedly worthless deed." Id. at 190-91. Here Defendants contracted to pay $4,000,000 at death of the insured. They did not and the claim accrued then. Defendants' claim that either *Kee* or *Cerberus Intern., Ltd v. Apollo Management, L.P.*, 794 A.2d 1141, 1151-2 (Del 2002) hold that a party must (or even may) file suit to reform a contract prior to a breach is simply wrong.

Similarly, *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845 (Del.Ch.) ("*Sunrise*") followed precedent. There the claim was for equitable fraud[3] and equitable rescission. Id. at *1, 7. The Court held that the alleged fraud was executing the agreement to convey property. *Id*. at * 6. The Court held the purchaser "was clearly put on inquiry notice … [of the problems supporting the claim] *even before the 2004 Agreement was executed* and, therefore, *the statute of limitations was not tolled*." Id. at *7 (emphasis added). Still, claim accrued when the fraud occurred at the signing of the agreement, not upon inquiry notice. *Id*. *Sunrise* is of no applicability to the contract reformation claims and, as discussed below, supports reversal of the dismissal of the equitable fraud claims.

[3] Application of laches to the equitable fraud counts is discussed in Argument IV.

B. Under An Accrual On Breach Standard This Action Is Timely.

Even were actual prejudice not required under *Starr*, supra, the Decision Below was in error. Defendants acknowledge that the law of Delaware is that an action for breach of contract accrues upon a breach. AB at 19. Defendants do not and could not challenge that: (1) a breach of an insurance contract by an insurer occurs when the payment is not made; (2) accepting the factual allegations as true, the breach occurred when payment was not made upon the insured's death: and (3) this action was commenced within three years of that breach. POB at 33-36.

Defendants attempt to escape this clear application of Delaware law proves too much. They concede Plaintiff's analysis "may be true" and then state "but this is not a breach of contract case." AB at 19. If it is not a breach of contract case, how can the analogous statute of limitations be that for breach of contract?

What Defendants argument reveals is that the Court Below adopted a new rule, contrary to precedent, that regardless of the nature of the contract and the duties specified thereunder, there is a duty implied in every contract that a party deliver a written document conforming with the pre-existing agreement, and that a breach of this implied duty is itself an actionable breach of the pre-existing agreement, regardless of any breach of the actual terms of the agreement. Defendants cite no case in Delaware or any other jurisdiction that has adopted such a rule. Indeed, as this Court has held that a total failure to read the written rendition of a pre-existing

agreement is not preclusive of a claim for reformation, it has impliedly declined to adopt such a rule. *Parke Bancorp, Inc. v. 659 Chestnut LLC,* 217 A.3d 701, 711 (Del. 2019). Adopting such a rule would have the negative consequence of encouraging, even requiring, litigation when there was no live substantive dispute between the parties.

IV. THE EQUITABLE FRAUD CLAIMS WERE TIMELY

The equitable fraud claims arise from the misrepresentations that were made for 16 years, not just for a five-year period as Defendants claim. E.g., A-094, A-375-610. Defendants Answering brief does not discuss the discovery rule, what Plaintiff in fact discovered when it made inquiry in 2010 and thereafter, nor the doctrines of continuing wrong. Plaintiff shall not repeat here is material from its Opening Brief, but notes that Defendants silence is a de facto concession that the decision below cannot be sustained in the face of these doctrines and the facts alleged in the complaint.

The one argument Defendants do make conflates the reformation claims with the equitable fraud claims. The equitable fraud is for providing 16 years of indisputably inaccurate statement as to whether the $4,000,000 would be payable after age 100. This is separate from the reformation claims. As a result, Defendants' argument that the illustrations "were post Policy issuance" arguments are *non sequitur*. AB 23.

Defendants' reliance in *Sunrise*, also is unavailing. In *Sunrise* at *1, 6-7, the Court found the Plaintiff was on inquiry notice before the wrongful act *and that had it pursued an inquiry, it would have learned the truth*. Here, Defendants fail to discuss that Plaintiff did pursue an inquiry and was told that the insurance would pay $4,000,000 after age 100. A-093-097. These statements were reinforced by

language in the illustrations. A-094. Defendants, despite claiming that they knew these were a "mistake," never once told plaintiff that anything in any of the illustrations was a "mistake." A-092-101. Dismissal based upon inquiry notice must consider what a plaintiff would have learned when making an inquiry. *Fike v. Ruger*, 752 A.2d 112,114 (Del. 2000).

V. THIS COURT SHOULD NOT AFFIRM ON ALTERNATE GROUNDS.

A. Introduction

Defendants ask the Court to affirm on alternative grounds. The Court should decline Defendants' request, as it did in *Appel v. Berkman,* 180 A.3d 1055 (Del. 2018). There the Court noted that "the sole basis for the Court of Chancery's dismissal was without merit." Id. at 1064-5. The Court thus declined "defendants' invitation … to find another ground for affirmance… which was not addressed by the Court of Chancery." *Id.* Defendants are wrong in asserting that whether alternate grounds could have supported a dismissal is reviewed *de novo*. AB 29. Declining Defendants invitation is particularly appropriate in this case as: (1) the Trial Court stated that even if it had considered Defendants' other arguments, and had found any as having any merit, it would have allowed Plaintiff leave to amend. Nowak III at *1; and (2) the issues relate to the factually intensive affirmative defense of laches, the disposition of which usually is not suited for a motion to dismiss. *Spago*, *supra*.

In any event these arguments are without merit.

B. The Equitable Fraud Claims Relate Back to the Original Superior Court Filing.

Defendants repeat a claim they presented unsuccessfully below: that the time for determining the filing of the equitable fraud claims is the filing of the complaint in the Court of Chancery after this action was transferred. *Nowak III* at *6. They

claim, without any authority, that the chancery action is a separate lawsuit and as a result there can be no relation back. Defendants fail to discuss the language of the transfer statute, 10 Del.C. §1902.

Section 1902 provides "no civil action … shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter …". Instead, [s]uch proceeding may be transferred … [along with] all or part of the papers filed … in the court where the proceed was originally instituted …". The statute clearly considers that there is only one proceeding which is transferred.

In any event, whether or not the transferred proceeding is a new proceeding, §1902 is explicit as to how the defense of laches is to apply. "For the purpose of laches …, the time of bringing the proceeding shall be deemed to be the time when it was brought in the first court." 10 Del.C. § 1902. Defendants did not appeal from the Trial Court's rejection of this argument and, even now, fail to explain any error in the Trial Court's determination that the time of filing was determined from the filing of the Superior Court action. Nowak III at *6. Defendants' argument is meritless.

C. An Agreement Is Alleged To Have Been Reached Before The Policy Was Issued.

Defendants assert "the Trust never alleged it had an agreement with Defendants before the Policy." AB 33-4. This is false. The complaint identifies the

conversations which occurred prior to the Policy document being issued. E.g. A-081-82. It specifically alleges "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 death." A-092-093.

Further Defendants have conceded an agreement existed before Plaintiff was ever shown the Policy. A-138-139. The Policy was given to the Plaintiff *after its application was accepted and after it had paid the $247,500 first premium*. A-201.

Defendants' claim that reformation of insurance contracts cannot be permitted as a matter of Delaware public policy runs counter to this Court's decisions reforming such contracts. E.g., *Starr*, *supra*. The claim that only policy forms approved by the Insurance Commissioner are permitted is misdirection. Plaintiff is not asserting any agreement to insurance terms that Defendants have shown to be prohibited under Delaware insurance regulations and Defendants make no claim that they would be.

D. A Special Relationship Supporting The Claims For Equitable Fraud Is Alleged.

Defendants concede that insurance advisors can be fiduciaries satisfying that requirement for equitable fraud. AB 30. They assert the complaint fails against Defendants because such claims had to be asserted only against Defendants' agents and not the Defendants themselves. They cite neither any authority nor any logic

for this position. Acts of Defendants' agents within their authority are imputed to and bind the principal, particularly where it is a corporation. E.g., *In re Dole Food Co., Inc. Stockholder Litigation*, 110 A.3d 1257, 1261 (Del.Ch. 2015). The complaint alleges the direct involvement of the Defendants in the matters giving rise to the fiduciary relationship. E.g., A-089-090; A-104-105. Further the Complaint alleges Defendants, to the extent they are not found to be in a special relationship with Plaintiff, aided and abetted the breach of their agents' fiduciary relationships. A-109-112. E.g., *In re Rural Metro Corp*., 88 A.3d 54 (Del.Ch. 2014). These claims are particularly unsuited for disposition by this Court as a matter of law on the present record.

E. There Is Proper Equitable Jurisdiction.

In a stretch of a single Chancery Court decision, *Zebrowski v. Progressive Direct Ins. Co.,* 2014 WL 2156984 (Del. Ch.) Defendants assert that anytime a party has a legal claim against a defendant it cannot also have an equitable claim. This represents a fundamental misreading of Delaware law. The misreading was recently explained by the Court of Chancery in *Garfield v. Allen,* 277 A.3d 296, 306, 346-347 (Del.Ch. 2022) noting that the "adequate remedy at law" requirement is only that there be a basis for equitable jurisdiction. In this case, the Superior Court, as affirmed by this Court, already determined that the reformation claims properly were equitable. Nowak II, *supra*.

Further, that a given set of facts gives rise to legal claims, even a claim for breach of contract, does not establish that equitable claims do not also exist. *Park Oil, Inc. v. Getty Refining and Marketing Co.,* 407 A.2d 533 (Del. 1979). Were that true, there would be no 10 Del.C. §1902 nor would there be the equitable clean up doctrine. E.g., *FirstString Research, Inc. v. JSS Medical Research Inc.,* 2021 WL 2182829 (Del.Ch.). Reformation of contract is an equitable remedy available in this Court. E.g., *Cerberus* at 1151. It is distinct from seeking to recover on the contract as written as it is seeking to reform the contract. *Id*.

CONCLUSION

For the foregoing reasons the Decision Below should be reversed and remanded.

COOCH AND TAYLOR, P.A.

/s/ R. Bruce McNew

_____

R. Bruce McNew (No. 967)
The Nemours Building
1007 North Orange Street, Suite 1120
P.O. Box 1680
Wilmington, DE 19899-1680
bmcnew@coochtaylor.com
(302) 984-3810

Attorneys for Appellant / Plaintiff-Below

October 10, 2022