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IN THE SUPREME COURT OF THE STATE OF DELAWARE

COLLEEN MCGUIGAN, Counterclaim- Plaintiff/Appellant, v. THOMAS D. MURRAY and TDM PROPERTY INVESTMENTS LLC Counterclaim- Defendants/Appellees.	)	No. 326, 2023 Court below: Court of Chancery of the State of Delaware, C.A. No. 2018-0819-KSJM

APPELLANT'S OPENING BRIEF

OF COUNSEL:

Robert D. Sweeney
John J. Scharkey
Joanne H. Sweeney
SWEENEY, SCHARKEY & BLANCHARD LLC
230 West Monroe Street
Suite 1500
Chicago, Illinois 60606
(312) 384-0500

Richard P. Rollo (#3994)
Mari Boyle (#6761)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Appellant Colleen McGuigan

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NATURE OF PROCEEDINGS

This is a case where all the parties and the Court of Chancery now acknowledge a critical corporate document was forged. Plaintiff, Thomas Murray ("Thomas"), acquired complete ownership and control over a very successful family business via the forged document (the "1988 Option" or "Option") that transposed the signature block from a legitimate document onto the 1988 Option. The Option granted Thomas the right to buy out his family members' shares in the multi-million dollar business for $250 per shareholder. The forged document was presented to Thomas' sister, Colleen McGuigan (née Murray) ("Colleen") in 2006. For over a decade thereafter, Colleen believed she was no longer a shareholder in the family business. In 2018, Thomas was sued by his brother ("Michael") in the Court of Chancery based on a books and records demand asserting he was still a shareholder. Thomas in a separate suit filed claims for conspiracy, conversion, and aiding and abetting fiduciary breaches, alleging that Michael, Colleen and potentially other family members were attempting to cheat Thomas out of his ownership in the company. Colleen answered the claims by Thomas, never once asserting she was a shareholder, nor that she had an interest in the family business. During Thomas' deposition over a year later, Michael's counsel showed Thomas two documents containing the signatures of seven Murry family members—the Option that Thomas

used to buy out all of his family members for pennies on the dollar and a set of NBC meeting minutes (the "Source Document"). The seven signatures on the Option were identical those on the Source Document, making it clear that a cut-and-paste had occurred. It was only after seeing that and hearing Thomas' explanation (or lack thereof) at his deposition that Colleen realized she had been cheated out of her interest in the business. She subsequently filed counterclaims against Thomas for breach of fiduciary duty, fraud, and unjust enrichment.

Upon motion by Thomas's counsel, the Court of Chancery agreed to hold an evidentiary hearing on Thomas's defense of laches, to determine whether Colleen knew or should have known of the cut and paste forgery and pursued claims earlier. At the hearing, Thomas himself admitted on the stand that he did not know the 1988 Option was fabricated, but also that if he did not know, there was no way for Colleen to know. A233 at 92:10-19. Thomas was the CEO and President of the company where he worked as one of the few employees for nearly three decades. Colleen never worked for the company, and since 2006, believing she was not a shareholder, held no role whatsoever.

Following Thomas' admission on the stand that he did not know of the cut and paste forgery and that Colleen could not have known of it, Thomas took the bewildering position that Colleen must have known or should have known of the

forgery, such that she should have filed claims against Thomas before she did. If this argument seems incongruent, it is—but the Court of Chancery agreed with it.

If, as Thomas testified, there was no way for Colleen to know earlier that the Option was fabricated, then Colleen's counterclaims should have been protected by the discovery rule and allowed to proceed. Conversely, if the forgery was so obvious that Colleen should have discovered it long ago, then Thomas—who is held to a higher standard as the President of the Company and her fiduciary—also should have known of the forgery, and the doctrines of equitable tolling and fraudulent concealment should bar his laches defense.

As it stands, the Court of Chancery has created precedent through this case that a passive corporate shareholder, Colleen, with no involvement in a company's operations, should recognize fraud before the fraud beneficiary, who happens to be the President, CEO and sole director of the company. Not only would such an outcome be profoundly unjust, it would also lead to a perversion of the principles of equity and substantially alter the landscape of inquiry notice jurisprudence in Delaware. Delaware should not encourage stockholders who do not believe they have been defrauded or harmed to file prophylactic litigation based on minor flaws in a document to preserve potential claims of a more substantial and devious nature.

SUMMARY OF ARGUMENT

1. The Court of Chancery of Chancery erred in ruling that Colleen was on inquiry notice that the 1988 Option was forged. Delaware law supports the application of laches only when (1) "red flags" clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire further and (2) the record clearly establishes that a diligent inquiry *would in fact have revealed* the injury. Neither of these elements is present here. There were no unmistakable flags of fraud relating to the 1988 Option. To the extent Colleen had any question about the veracity of her signature on the 1988 Option, her investigation by comparing her signature to that on her old passports—which was reasonable under the circumstances—sufficed to assuage her concern. Indeed, no inquiry short of comparing the 1988 Option to the Source Document could have revealed any nefarious activity—something the Court of Chancery of Chancery itself recognized. Colleen had no access to the Source Document and could not have known or suspected that a document evidencing a forgery even existed until it was produced in this litigation in December 2018. Even then the significance of the Source Document's signature block was unknowable to Colleen until Thomas was questioned about the document at his deposition, which allowed Colleen to link it to a fraud. Because no reasonably diligent inquiry would have revealed the facts

necessary to support Colleen's claims any earlier, laches does not apply, and the Court of Chancery of Chancery's ruling should be reversed. *See* Section I.C, *infra.*

2. The Court of Chancery of Chancery erred in concluding that minor errors on the face of the 1988 Option—primarily an incorrect date—constituted clear and unmistakable "red flags" that served to put Colleen on inquiry notice of fraud. The errors at issue reflect informal recordkeeping that was entirely consistent with the historically informal approach of NBC—a closely held family corporation. These errors were akin to typos—not internal inconsistencies of a magnitude to suggest fraud—and thus, under Delaware law, do not constitute "red flags" that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire further. The Court of Chancery of 's judgment should therefore be reversed. *See* Section II.C, *infra.*

3. The Court of Chancery of Chancery erred in applying laches on the mistaken conclusion that Colleen could have brought her fraud and breach of fiduciary duty claims earlier. Without evidence of the cut-and-paste forgery—which did not become apparent until Thomas was questioned about the identical signature blocks at a deposition in this litigation—Colleen did not have the evidentiary basis to support any colorable fraud or breach of fiduciary duty claims. Both claims have stringent scienter requirements under Delaware law. Had she pursued such claims earlier they would have been dismissed for failure to state a claim before any

discovery could have taken place, and even then she never would have been looking for a cut and paste forgery. The Court of Chancery of Chancery's application of laches where Colleen's claims would have been dismissed for failure to state a claim had she brought them any earlier was error and should be reversed. *See* Section III.C, *infra.*

STATEMENT OF FACTS

A. The Family Business

Norbert Murray ("Norbert") spent much of his adult life in the business of commercial real estate and began forming Murray family-owned entities to manage his business, culminating in the formation of NBC in 1988. NBC had little to no value when it was formed. Its original stockholders were Norbert, Norbert's wife Marjorie, and their five children: Thomas, Shannon (Rolquin), Michael, Kimberly (Meek), and Colleen (McGuigan). Norbert named Thomas, the eldest Murray brother, President of NBC. Thomas managed NBC for over 30 years. Exhibit A, Post-Trial Memorandum Opinion ("Op.") at 2-3.

Thomas contends that NBC should rightfully belong to him because he was the only sibling who worked for NBC long term and because he claimed that he guaranteed some of NBC's loans. A149 at 95:21–96:14. NBC's corporate records contain minutes of a Special Meeting of the Board of Directors of NBC, which reference a February 15, 1988, meeting in Naples, Florida, among the Murray family members. The only matter addressed in the minutes is Thomas's option to purchase the NBC shares held by the other family members for $250. Neither Thomas nor Colleen recall attending the meeting. Op. at 3.

Like many small family businesses, Thomas's focus was on profit, not corporate compliance. He testified he "didn't look at the books and inside the books"

because his "focus was on leasing and management." A224 at 54:5-9. Thomas further stated that in the development business, "people fall on problems because they think about these other things that are important. There is only one thing important, that's a tenant. It's leasing. If I can lease, I can hire people like Kevin Shannon, I can defend myself." *Id.* at 56:8-12. NBC corporate records reflect that shareholder meetings were held at the exact same date and time, and in the same place, as board of directors' meetings from 1997-2016 (A825-64), none of which Thomas recalls (A161 at 142:8-20; A153 at 111:11-18). In a related proceeding, the Court recognized that NBC "did not adhere to corporate formalities," referred to "the company's poor recordkeeping," and noted that "[a]s is typical of many closely held family companies, its recordkeeping was informal and, at times, it resulted in inconsistencies." A74 at 4:16–19; A89 at 19:22–20:6; A91 at 21:16–18. In fact, there was confusion at NBC regarding the number of shares of NBC stock owned by the shareholders due to the existence of two sets of stock certificates. Colleen owned either 12.4% or 12.6% of NBC. Op. at 4 n.24.

B. Colleen's Connection to NBC

Colleen is the youngest member of the Murray Family. Colleen was 19 years old when NBC was incorporated in 1988. A98, ¶ 14; A726. At the time, Colleen was attending college in Indiana and spending school breaks at her family's home in Florida. As an NBC shareholder, Colleen always accommodated her family's

requests to execute corporate documents whether at home or at college. A236 at 101:19–102:6 ("I just know that when I was younger, they would ask for my signature and I would provide it.") After graduating from college in 1990, Colleen moved to Chicago to work for the Federal Government. She was never employed by NBC and never served as an officer or director of the company. A100, ¶ 22; A228 at 72:4–14. Nonetheless, as a shareholder, Colleen continued to accommodate her family's regular requests to execute corporate documents. A426; A236 at 101:19–102:15.

C. Thomas Exercises the Forged 1988 Option in 2006

Thomas had an unfounded belief that he was the sole stockholder in 2006. While the court found that "contemporaneous tax records substantiate that Thomas held that belief" (Op. at 6-7), the court's conclusion is erroneous. Contrary to Thomas's stated belief that he exercised the Option in 1999 and "was sole owner after that," (A153 at 113:25), the Court of Chancery determined this was untrue: "But in fact, at the close of the FDIC litigation in 2000, each member of the Murray family retained their interest in NBC." Op. at 7. The Company tax returns as late as 2006 indicate Thomas only owned 21.3% of NBC, not 100%. A429; A483.

Even though Thomas supposedly believed he was NBC's sole stockholder, his accountants recommended that he exercise the 1988 Option, which would make no sense if Thomas had actually been the sole owner. Thomas retained Florida counsel

("Gunster") to assist with Thomas's exercise of the 1988 Option. Gunster prepared documents for each NBC stockholder to relinquish their shares to Thomas in exchange for $250 (the "2006 Agreement"). The 2006 Agreement stated that Thomas was exercising his rights under the 1988 Option to purchase his family members' interests in NBC. Op. at 8–9. The 2006 Agreement indicated that Thomas was the President of NBC and attached the 1988 Option as an exhibit. A542-49. At no time did Gunster, the Company accountants, nor Thomas point out the "defects" the Court of Chancery claimed Collen should have found obvious, nor opine that they made the Option unenforceable, much less fraudulent. *See* A218 at 30:5–31:9.

Colleen testified that Thomas told her over the phone that she had to sign the 2006 Agreement because she, along with the entire Murray family, had signed the 1988 Option. Op. at 9-10. When Colleen questioned the $250.00 purchase price, Thomas explained that NBC was nearly worthless when the 1988 Option was signed and, therefore, the purchase price was reasonable. A239 at 116:19–117:6.

In 2006, Colleen knew that she had always signed NBC documents when asked previously (A426; A236 at 101:19–102:6), and the signature on the 1988 Option appeared to be hers. A240 at 117:13–21; A240 at 118:22–119:17. Further, Thomas represented to her that "everyone" had signed the 1988 Option. A240 at 117:13–21. Colleen consulted with her husband on the matter, who advised her that if she signed the Option she had no alternative but to execute the 2006 agreements.

A240 at 117:15–19; A275-76 at 260:13–262:21. Based on her review of her signature and Thomas's representations to her, Colleen executed the 2006 Agreements on June 10, 2006, consenting to the transfer of her shares of NBC to Thomas. A240 at 117:20–21; A538-42. Norbert, Marjorie, Shannon, and Kimberly also transferred their shares to Thomas. Op. at 9.

Thomas does not recall signing the Option. A226 at 62:6–7. At trial, Thomas denied creating the Option, but clearly he was its sole beneficiary. A226 at 67:8–68:7.

D. 2017 Revelations of Impropriety at NBC and Colleen's Investigation

During 2017, Thomas retained a new accountant to review NBC's accounting and financial practices. A219 at 35:16–36:3. Around the same time, Colleen learned that Norbert and Thomas had had a falling out. A241 at 122:1–123:10. Thomas reduced his father's annual compensation. A241 at 123:18–24. Norbert was experiencing the degenerative aspects of Parkinson's disease and depended on his NBC income to support himself and his wife. A244 at 134:4–135:7. Thomas also cut off his parents' use of credit cards. *Id.*

Colleen learned from her sister Shannon in 2017 that Thomas was holding himself out as the sole owner of NBC, despite her understanding that Michael was also an NBC shareholder, and that Thomas was making plans to subsume NBC into

a separate, Thomas-owned entity. A241 at 124:2–12. Colleen also learned from Shannon in the fall of 2017 that Thomas was systematically destroying NBC corporate documents. *Id.* Shannon asked Colleen to receive and safeguard copies of certain such documents, fearing that Thomas would destroy them. Colleen agreed. Shannon sent *copies* of some NBC documents to Colleen in late November 2017. A241 at 124:13–125:17. Colleen eventually turned them over to Michael, who she believed was still an NBC shareholder. A242 at 125:19–6; A242 at 127:24–128:15.

On or around December 2017, Colleen learned that Michael believed his signature on the 1988 Option was a forgery of his written signature—in other words, he believed that someone else had signed his name to the Option. A242 at 128:16–129:13. Michael believed that he would not have signed the Option himself. Colleen, on the other hand, believed she would have signed the Option if Norbert and Thomas presented her with it at age 19. A266 at 223:11–17; A269 at 236:19–237:5. Nevertheless, Colleen began investigating whether her signature on the Option could also be a signature forgery. A243 at 130:19–132:18. She had not signed her maiden name since she married twenty-four years before, in 1992. *See* A243 at 130:3-9.

At the time, Colleen's husband Tom McGuigan also noticed other possible problems with the 1988 Option, including that it was dated shortly before NBC's formation, and that Colleen was likely not in Florida on that date. *See* A279 at 275:1–276:3; A282 at 288:10–24. For a time, both Colleen and Tom believed Colleen's

signature was possibly forged and that the other flaws might corroborate evidence of the forgery. A265 at 220:8–14; A278-79 at 272:15–273:13. Colleen has never brought a claim asserting the 1988 Option is void because of the date/location issue which, unlike fraud, did not harm her. They were relevant to her and her husband only to the extent they were potentially supporting evidence that the 1988 Option contained signature forgery. A247 at 145:10–21; A247 at 147:6–21; A257 at 187:14–22.

On or about December 27, 2017, Thomas caused NBC to be merged with and into his own company, TDM (the "Merger"), with TDM as surviving entity. A102 ¶ 33. During this time, Colleen was continuing her investigation into whether her signature on the 1988 Option was genuine. In February and March 2018, she located signature exemplars from the time period of the 1988 Option on canceled passports issued in 1984 and 1992. A246 at 142:14–21; A727–28. She compared the signature exemplars to the signature on the 1988 Option and concluded that her signatures matched. A246 at 143:1–24 ("I thought it was great for my comfort level that I found two documents that surrounded a document, you know. So they were, like, book-ending it. And they were from the same time period. And I was, like, whoa. Those are my L's. Yup. Yup. I signed it.")

Accordingly, regardless of Michael's belief that his signature on the 1988 Option was a forgery, Colleen believed that her own signature was authentic—and in

fact it was—it has just been lifted from a different document she did not possess. A246 at 143:10–16; A266 at 222:4–15. Given the apparent legitimacy of her signature, Colleen did not seek to bring any claims based on the unremarkable date/location issue in the Option. A247 at 145:10–21; A247 at 147:6–21. While sloppiness and poor record-keeping were common at NBC, forging signatures was not. A257 at 187:14–22 ("This is a family business. . . . [N]o one appears to be dotting Is, crossing Ts. Sloppiness is not something that" Colleen would raise in a lawsuit against her own family.)

E. Michael and Thomas Initiate Litigation over TDM

On March 19, 2018, Michael filed an action against Thomas and TDM in Chancery—case number 2018-0193-KSJM (the "Michael Action")—alleging serial self-dealing and manifest breaches of Thomas's fiduciary duties. Op. 18-19; A612.

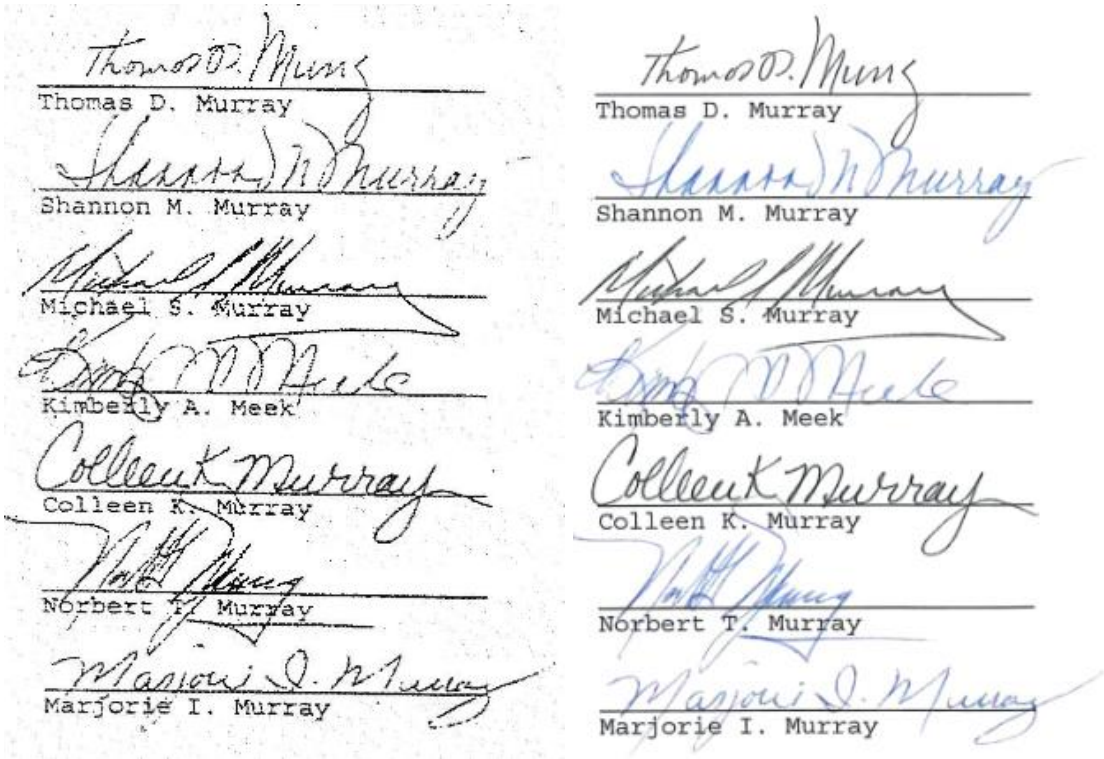
On November 9, 2018, Thomas and TDM then turned around and sued Michael, Shannon and Colleen in the instant action—Court of Chancery case number 2018-0819-KSJM—alleging, in part, a conspiracy against him purportedly perpetrated by his siblings to take NBC from him. *Id.*

On May 30, 2019, the Court of Chancery denied Colleen's motion to dismiss the claims asserted against her in the Thomas Action. A102; A337. Colleen did not file any counterclaims or cross claims against any parties at the time as she did not

believe she had an interest in NBC following her execution of the 2006 Agreement. *See* A247 at 145:22–24.

F. Colleen Discovers the Cut & Paste Forgery on October 1, 2020

Colleen learned that the 1988 Option, the foundation of the 2006 Agreements, was a cut and paste forgery during the deposition of Thomas Murray on October 1, 2020. A247 at 146:5–10. The signature block on the Option is shown on the left (A544), and the signature block on the Source Document for the cut and paste forgery is shown on the right (A380):



Prior to October 1, 2020, Colleen had no reason to suspect that the 1988 Option was a cut and paste forgery. Thomas produced the Source Document in discovery on

November 19, 2018. At the time Colleen did not know it was a "source document" nor that she should be looking for a cut and paste forgery. Prior to its production in this litigation, that document was located only in TDM's confidential files, to which Colleen had no access. *See* A226 at 61:24–62:2; A228 at 72:21–23. At no point did Thomas ever tell Colleen or any other shareholder that there were *any* potential issues (including the purported issues that he now claims are obvious) with the 1988 Option he used to acquire their interests. A280 at 280:6–15.

On September 27, 2021, Colleen filed her Counterclaims alleging Fraud (against Thomas), Equitable Fraud (against Thomas), Breach of Fiduciary Duties (against Thomas), Aiding and Abetting (against TDM), and Unjust Enrichment (against Thomas and TDM) (the "Counterclaims"). A96 ¶ 3.

G. At Trial, Thomas Admits for First Time that 1988 Option is Fraudulent.

At trial, Thomas testified that the first time he heard the 1988 Option was actually a cut-and-paste forgery was during this litigation. A228 at 71:9–72:3. When asked at his deposition whether he believed the 1988 Option was fabricated, Thomas testified that he did not know. A232 at 86:21–87:24. Thomas's testimony changed by the time of trial.

At trial, Thomas was asked to walk through the incontrovertible visual evidence that the 1988 Option's signature block was copied and pasted from a

different document. A230-32 at 77:12–88:24; A544. In contrast to his deposition testimony, Thomas then confirmed that he "think[s] this is the same signature block" and that "it looks like" someone "took a signature block off one document and put it on the other." A231 at 83:5–14. Thomas also testified that "I believe it was a cut and paste." A232 at 88:12–19. He further claimed that he arrived at this conclusion "during this litigation" but could not remember a specific date. A231 at 84:16–20. Despite these admissions, Thomas *refused* to disavow the document, testifying that he was "standing by" the Option. A233 at 90:10–91:8.

When Thomas was asked at trial to confirm that "the entire reason we're here today is because you're suggesting that Colleen should have sued you over that cut-and-paste forgery sooner?" he answered "No." A229 at 74:16–21. In fact, Thomas alleges that Colleen should have been on notice of the 1988 Option's fraudulent nature in 2006 as soon as he presented it to her, despite his testimony that:

- He himself "had no reason to believe that there was a problem" with the 1988 Option. A231 at 84:2–9.
- As the president of NBC for over thirty years he did not know about the cut-and-paste forgery. A233 at 89:5–9.
- He stood to benefit from the 1988 Option's exercise, because he had undertaken "all the risk." A233 at 92:6-9.

- Neither his accountants nor his lawyers at Gunster who recommended and assisted with the 2006 Agreements ever suggested there was a problem with the 1988 Option. *See* A218 at 30:5–31:9.

When asked whether it was his position that "Colleen either knew or should have known that [the 1988 Option] was fabricated," Thomas answered "I didn't know it was fabricated. How would she know?" *See* A233 at 92:10–19.

At an evidentiary hearing to determine whether Colleen knew or should have known of the forgery, Thomas's testimony should have ended the matter. The Court of Chancery nonetheless held that even though Thomas did not know of the forgery, Colleen should have discovered it.

The Court issued its opinion in favor of Thomas on March 9, 2023. Op. at 36. The Court granted partial judgment in favor of Thomas with respect to Colleen's counterclaims on August 11, 2023. Exhibit B, August 11, 2023 Order Granting Defendant Colleen McGuigan's Motion for Entry of Judgment Under Rule 54. Colleen timely filed her notice of appeal on September 8, 2023.

ARGUMENT

The Court of Chancery of Chancery's decision is contrary to established Delaware law, effectively ratifies the use of an undisputed forgery to dupe family members of their shares in the family corporation, and should be reversed. The Court of Chancery of Chancery erroneously concluded that laches barred Colleen's claims against Thomas and TDM. Specifically, it was error to apply laches where (1) the fraud against Colleen was inherently unknowable to her until Thomas produced the Source Document in this litigation so that it could be physically compared to the Option; (2) facial deficiencies on the 1988 Option did not constitute "red flags" of fraud because such deficiencies were consistent with NBC's historically informal recordkeeping; and (3) Colleen could not have maintained fraud and fiduciary breach claims in Delaware courts successfully until she had some evidence of the cut-and-paste forgery.

The Court of Chancery of Chancery incorrectly held that Colleen was on inquiry notice of her claims—fraud, equitable fraud, and breach of fiduciary duty against Thomas; aiding and abetting against TDM; and unjust enrichment against both—prior to the production of the Source Document in this case. The Court of Chancery found that "the relevant question is whether she had inquiry notice before September 27, 2018," three years before Colleen filed her claims. Op. at 31. Conversely, for purposes of this appeal, Colleen need only show that the running of

laches was tolled past September 27, 2018. Colleen argued below, and argues here, that no event prior to December 2018 put her on inquiry notice of her claims, and that the running of laches was tolled until her injury was possible to discover—at the very earliest when Thomas produced the Source Document in December 2018 so that it could be physically compared to the 1988 Option. The Court of Chancery of Chancery found that tolling did not apply, stating that Colleen should have been on notice she was defrauded at some earlier, unspecified point based on a combination of facial inconsistencies in the 1988 Option and generalized suspicions. The Court of Chancery of Chancery never actually identified the date or event when Colleen should have been on notice and was wrong. Judgment in Thomas' favor should be reversed.

I. COLLEEN WAS NOT ON INQUIRY NOTICE UNTIL THE CUT-AND-PASTE FORGERY WAS UNCOVERED BECAUSE IT WAS IMPOSSIBLE TO DISCOVER HER INJURY EARLIER.

A. Question Presented

Whether the trial court erred in concluding that Colleen was on inquiry notice of her claims when it was impossible for her to discover the facts underlying her claims even with a reasonable inquiry. A346-66.

B. Scope of Review

The appellate court reviews the trial judge's findings of fact for clear error. *Scharf v. Edgcomb Corp*., 864 A.2d 909, 916 (Del. 2004). Legal questions and mixed questions of law and fact, as presented here, are reviewed de novo. *Id.* (applying de novo standard in reversing trial court's determination that claim was time barred); *see also Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits of Argument

The Court of Chancery erred in ruling that laches barred Colleen's claims. The Court of Chancery mistakenly relied on Colleen's earlier, general suspicions about Thomas as well as minor facial errors on the 1988 Option to conclude that Collen was "on inquiry notice" of her claims more than three years prior to filing. However, neither general, unrelated suspicions nor minor faults on a document suffice under Delaware law to preclude tolling pursuant to the discovery rule. The discovery rule thus tolled Colleen's claims and her suit against Thomas and TDM was timely.

The doctrine of laches turns on whether the lapse of time has rendered a plaintiff's pursuit of a claim unfair to the defendant. *Kahn v. Seaboard Corp.*, 625 A.2d 269, 272 (Del. Ch. 1993). While courts of equity do not apply statutes of limitation, which are creatures of law, they may, but are not required to, apply an analogous limitations period under a laches analysis.[1] Generally, a limitations period begins to run when the plaintiff is on inquiry notice of her claims: "the statute of limitations beings to run when plaintiffs should have discovered the general fraudulent scheme." Op. at 27 (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (Del. Ch. Jul. 17, 1998)). However, under the "discovery rule," the limitations period is tolled "where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *19 (Del. Ch. June 29, 2005). Pursuant to the discovery rule, the limitations period "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." *Id*.

[1] Under a laches analysis, the analogous limitations period for the relevant claims is three years. 10 *Del. C.* § 8106.

However, two critical preconditions must exist for "inquiry" notice to apply: (1) a "red flag" that "clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire" into the issue (this is further discussed in Section II), and (2) the record must clearly establish that a diligent inquiry *would have revealed* facts sufficient to assert their claim. *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 843 (Del. 2004); *Boerger v. Heiman*, 965 A.2d 671, 675-76 (Del. 2009). It is well established under Delaware law that a plaintiff is not charged with knowledge that a reasonable investigation could not and did not reveal. *See Coleman*, 854 A.2d at 842–43 (holding that inquiry notice only charges a person with knowledge of what a *reasonable* investigation *would have revealed*); *MKE Hldgs. Ltd. v. Schwartz*, 2020 WL 467937, at *12 (Del. Ch. Jan. 29, 2020) (stating that inquiry notice exists where facts put plaintiff "on inquiry which, if pursued, would lead to the discovery of the injury"); *Pomeranz v. Museum P'rs, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005) (holding inquiry notice exists "where persons of ordinary intelligence and prudence would commence an investigation that, if pursued *would lead to the discovery of the injury*" (emphasis added)). As this Court has held, unless it is clear that a reasonable investigation would have led to the injury's discovery, tolling applies. *Coleman*, 854 A.2d at 842–43. The Court of Chancery never identified what Colleen could have done to discover the cut and paste forgery.

Colleen was not under inquiry notice under Delaware law. Colleen was blamelessly ignorant of her claims as they were inherently unknowable until Thomas produced the Source Document that enabled Colleen to compare signatures between the Source Document and the 1988 Option. Contrary to its ultimate ruling, the Court of Chancery itself understood that "[w]ithout seeing the 1988 Option side-by-side with the [Source Document], there was little reason to suspect anything nefarious." Op. at 22. Indeed, when Thomas presented the 1988 Option to Colleen in 2006, it reasonably appeared to be a genuine NBC corporate document: it contained each shareholder's actual signature and the minor errors on its face were not concerning because they were consistent with the company's history of informal recordkeeping. The Court of Chancery itself recognized that "the signatures on the 1988 Option did not appear abnormal because the signatures on the page *were* the signatures of Thomas and his family members." Op. at 22. Under oath at trial, Thomas admitted that Colleen could not have known that the 1988 Option signatures were forged and that the document did not present a reason for suspicion: "I didn't know it was fabricated. How would she know?" A231 at 84:2-9; A218 at 30:5-31:9; A233 at 92:10-19.

Colleen was not on inquiry notice because she performed an investigation that was reasonable under the circumstances and that did not uncover the forgery, nor could have. In late 2017, after learning that Thomas and her father Norbert, the

founder of NBC, had had a falling out and that Thomas was systematically destroying corporate documents, (A241 at 122:1—124:12) Colleen also learned that her brother Michael had begun to suspect that his signature on the Option may have been forged. These factors led Colleen to grow suspicious that her own signature may have been a forgery. A242-43 at 128:16–132:18. Colleen took the only reasonable measures available to her at that time: she located two expired passports that she signed in the same time period as the 1988 Option and compared the signatures. A246 at 142:14–143:24. As the signatures matched, her investigation confirmed in her mind the 1988 Option's validity, and she was able to put her suspicion to rest. Delaware law does not require more. Tellingly, the Court of Chancery did not articulate what more Colleen could have done at that point or how any further investigative steps would—clearly—have revealed the fraud.

In concluding that Colleen should nonetheless have discovered her injury sooner, the Court of Chancery relied on cases where, unlike here, the factual basis of the plaintiff's injury was readily accessible and, if not glaringly obvious, knowable to the plaintiff with reasonable effort. For example, in *In re Dean Witter Partnership Litigation*, 1998 WL 442456 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE) (cited at Op. at 28), the Court of Chancery concluded that laches barred plaintiff shareholders' claims because publicly available reports contained inherently contradictory information about the company's performance—

years of consistent losses contrary to management's rosy projections. *Id.* at *9. Moreover, "it [was] apparent from even the most cursory glance that the amount of the cash distributions for the year 1990 far exceeded the Partnership's net income for the same year." *Id.* at *8. The documents exhibiting the fraud were thus not "hard to understand, nor [were] they buried at the back of a thick report." *Id.* The court concluded that "a plaintiff is on inquiry notice when the information underlying plaintiff's claim is *readily available*." *Id.* (emphasis added). No such readily available information could have alerted Colleen to the fraud here. The facts underlying the fraud were in Thomas's sole possession, and—unlike the Defendants in *Dean Witter* who published such facts in public reports—Thomas took steps to reassure Colleen. When Colleen asked why the Option price was only $250, he told her the price was reasonable at the time the Option was purportedly drafted because NBC was nearly worthless in 1988. A239-40 at 116:19–117:6. The Source Document was buried within NBC's records and became available only when Thomas was compelled to produce it in this litigation. Even then Colleen would never have been looking for the cut and paste forgery. It was pure chance that her brother Michael was involved in the litigation and did not believe he signed the 1988 Option.

Pomeranz v. Museum Partners, L.P., 2005 WL 217039 (Del. Ch. Jan. 24, 2005) (cited at Op. at 29-30), is likewise inapposite. There, the plaintiffs had actual

notice that 60% of the company's capital had disappeared. *Id.* at *10-11. The court concluded that plaintiffs therefore knew enough to investigate and discover their injury, notwithstanding the defendant's continued optimistic projections. *Id.* at *14. No such glaringly apparent fact existed here to alert Colleen that something was amiss, especially after she was able to verify that the signature on the 1988 Option matched her contemporaneous passport signatures.

Colleen's case is more analogous to *Carsanaro v. Bloodhound Technologies, Inc.*, 65 A.3d 618 (Del. Ch. 2013), *abrogated on other grounds by El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1264 (Del. 2016), and *Weiss v. Swanson*, 948 A.2d 433 (Del. Ch. 2008), which support reversal here. In *Carsanaro*, defendants argued that plaintiff investors were on inquiry notice of their fraud claim where the underlying facts could have been discovered by reviewing and comparing several public sources. The Court of Chancery disagreed, finding this would require far too much from a reasonable investor. It ruled that shareholders need not be "preternaturally industrious" and compare details in publicly available documents with an eye to uncovering fraud. 65 A.3d at 646. Here, the Source Document that was necessary to uncover the fraud was not publicly available, but rather kept by Thomas. In keeping with the sound reasoning of *Carsanaro*, Colleen should not be held to the impossibly high standard of having to procure and review a document that Thomas purposefully held but which was the only avenue to uncover the fraud.

Weiss similarly supports reversal. *Weiss* involved defendants who claimed plaintiff was on notice because he could have reviewed a company's public disclosures and noticed a discrepancy indicating that defendant directors had failed to disclose the nature of certain option grants. 948 A.2d at 452. As in *Carsanaro*, the Court of Chancery rejected this defense, holding that "[it] would be inappropriate to infer . . . that Weiss was on inquiry notice of his claims simply because he could have pieced together the alleged practice of timing option grants from publicly available information." *Id.* An investigation that requires review of multiple documents to "piece together" evidence of malfeasance is "beyond 'reasonable' diligence." *Id.* This is especially true where, as here with the 1988 Option and Source Document, "nothing in one document would give [plaintiff] a reason to look at the other." *Id.* at 452 n.85.

If Delaware courts found tolling even when a fraud could have been uncovered by reviewing publicly available information, as in *Carsanaro* and *Weiss*, tolling is even more appropriate where the fraud was only discoverable in confidential documents held solely by the defendant. The Court of Chancery itself recognized that there was no basis from which Colleen could have discovered the facts forming the basis for her claims without examining the Source Document: "[w]ithout seeing the 1988 Option side-by-side with the [Source Document], there was little reason to suspect anything nefarious." Op. at 22. As is amply apparent from

the discussion above, Delaware law requires tolling under such circumstances. This Court should therefore reverse the Court of Chancery's ruling to the contrary.

II. THE POTENTIAL VOIDABILITY OF THE OPTION DID NOT PUT COLLEEN ON INQUIRY NOTICE OF FRAUD.

A. Question Presented

Whether the trial court erred in concluding that minor facial inconsistencies in the corporate document of a closely held family corporation with informal corporate record-keeping put Colleen on inquiry notice of fraud through forgery. A346-66.

B. Scope of Review

The appellate court reviews the trial judge's findings of fact for clear error. *Scharf*, 864 A.2d at 916. Legal questions and mixed questions of law and fact, as presented here, are reviewed de novo. *Id.*

C. Merits of Argument

The Court erred in finding that Colleen was on inquiry notice of fraud based on minor facial inconsistencies in the 1988 Option that were suggestive not of fraud but of NBC's typical informal corporate record-keeping. Inquiry notice is triggered when there is a "'red flag' that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire" into the issue that ultimately formed the basis for their claim. *Coleman*, 854 A.2d at 843; *Boerger*, 965 A.2d at 675-76. A mere reason to "suspect wrongdoing of some kind" does not constitute a red flag and does not trigger inquiry notice. *Technicorp Int'l II v. Johnston*, 2000 WL 713750, at *7 (Del. Ch. May 31, 2000); *Coleman*, 854 A.2d at 843. It is only when the claimant

knows, or reasonably should know, of "the specific facts giving rise to the claims in [the] action" that the claim begins to accrue. *Technicorp*, 2000 WL 713750, at *7 (finding that claim did not accrue until plaintiff wrested control of the company and its books and records, because prior to that he had only suspicions of wrongdoing and "did not know the specific facts giving rise to the claims in this action"). Even once inquiry notice is triggered, if the record does not show that "a diligent inquiry by plaintiffs *would have uncovered* facts sufficient for them to assert" their specific claim, the claim does not accrue. *Coleman*, 854 A.2d at 843 (emphasis added).

The Court of Chancery erred in concluding that minor facial inconsistencies in the 1988 Option, principally incorrect dates, were sufficient to put Colleen on inquiry notice of fraud. The Court of Chancery put significant weight on Colleen's knowledge of two such inconsistencies: (1) the Option was reflected in minutes of a shareholder meeting that shortly predated NBC's certificate of incorporation; and (2) that date was one where Colleen would have been at college in Indiana. Op. at 30. In essence, the date may have been incorrect. This inconsistency does not meet the legal standard for inquiry notice: it is not a red flag that would have unmistakably led a prudent person of ordinary intelligence to inquire into the issue that ultimately formed the basis for their claim—in this case, a cut and paste forgery. *Coleman*, 854 A.2d at 843.

A reasonable shareholder in Colleen's position—as a shareholder in a closely held family business—would have believed, as Colleen did, that glitch with the date was the result of NBC's historically informal approach to record-keeping and corporate formalities rather than indicators of outright fraud. First, in 1988, at the time the Option was purportedly signed, Colleen was young. As indicated, she had always provided her signature on corporate documents for the family business when asked. A240 at 120:7-11. Second, NBC had been formed with a bare bones Certificate of Incorporation on February 29 of that year. A382; A571. Its records did not include the typical initial resolutions electing directors and authorizing the issuance of stock. A385-402; A381. In sum, "[t]his is a family business. . . . no one appears to be dotting Is, crossing Ts." A257 at 187:14-22. "Sloppiness" was not something to pursue a lawsuit over (*see* A257 at 187:14-22); it was not out of character, much less a red flag, based on the company's prior operations.

The corporate record-keeping glitch relied on by the Court of Chancery is insufficient to put a reasonable shareholder on notice that the 1988 Option was fraudulent. This glitch was entirely consistent with NBC's general failure—with which Colleen *was* aware, and the Court of Chancery recognized—to dot Is and cross Ts. It was far more reasonable to assume that Colleen (and other shareholders) had been asked to sign the Option at a different time and/or place than reflected in the minutes, than to assume that the Option was a complete forgery and that someone

had deceptively lifted and pasted the signature block from a different document to dupe six members of a family in favor of a seventh. It was impossible for Colleen to know that.

Dean Witter, cited by the Court of Chancery (Op. at 30), is not to the contrary: it did not find that minor discrepancies in the date of a corporate document should have tipped a shareholder off to fraud. Rather, it found inquiry notice where "it is apparent from even the most cursory glance that the amount of the cash distributions for the year 1990 far exceeded the Partnership's net income for the same year," and any inquiry would have revealed the fraud. *See Dean Witter*, 1998 WL 442456, at *8. Here, a cursory glance at the Option could not reveal that a cut-and-paste forgery had occurred. Indeed, even assuming Thomas was not the forger, Thomas—who was President of NBC for the entirety of its existence—testified that neither he, his accountants, nor his attorneys even *noticed* these facial inconsistencies in the Option, much less did anything to remedy them. *See* A225 at 60:15-62:16. If the President and the company's accountants and attorneys did not consider these purported issues significant, there is no basis to find that Colleen—who is not an accountant or an attorney and had minimal to no involvement in the company—should have considered them red flags of a fraudulent forgery scheme.

It should be noted that the Court of Chancery is mistaken in its belief that Colleen was repeatedly presented an "unknown two-page document" with "blatant

internal consistencies." The Court's Opinion states: "Colleen cannot rely on her blissful ignorance of the family business when repeatedly presented with a two-page document that contained such blatant internal consistencies." (Op. at 30.) There is no evidence in the record to support that Colleen was ever presented *any* document *repeatedly* let alone a two-page document that contained "*blatant internal consistencies*." The record establishes the contrary. A791; A768–69. If the Court of Chancery was referring to the 1988 Option as a "two-page document," then 2006 was the first and only time that Thomas presented the 1988 Option. Thomas has never asserted that he presented the 1988 Option to Colleen before 2006. Given the gravity of the conclusions that the Court of Chancery drew from its clear error, its conclusion falters.

The Court of Chancery set forth a list of additional evidence, discussed below, that it credited as having put Colleen on notice of fraud. That evidence however, points back to the same minor facial inconsistencies that NBC's management and corporate fiduciaries did not consider significant. When, later, concerns were raised about possible signature forgery, Colleen reasonably investigated them—and reasonably concluded, based on the evidence available to her, that there was no evidence of forgery. None of this evidence comprises a red flag that, if investigated, would have put Colleen on notice that she had been defrauded.

1. The 2006 Letter from Michael and Option Agreement Did Not Trigger Inquiry Notice of Forgery.

The Court of Chancery determined that a 2006 letter from Michael to Norbert and Thomas, that Colleen had obtained at some point and produced in discovery, constituted inquiry notice. (Op. at 26 (citing A777-78)). No evidence was introduced as to when Colleen obtained the letter, and Colleen testified that she had never read it. A254 at 176:18-177:17. Even if she had read it, the Court of Chancery provided no explanation as to how the letter put Colleen on notice of fraud/forgery. It did not. The letter is almost entirely devoted to tax obligations and includes nothing that suggests fraud. A777-78. The single line dealing with the Option says, "I do not believe that it is enforceable." A777. But Michael's belief that the Option was not enforceable is not evidence of fraud, to say nothing of a "red flag" of forgery.

The Court of Chancery also found that Colleen's signing of the 2006 Agreement selling her shares to Thomas, when Colleen was first presented with the 1988 Option, put her on notice of fraud. Even if Colleen had been cognizant at that time of the minor inconsistencies in the Option, a reasonable shareholder would not see them as anything more than a minor mistake. Colleen did express initial concern about the $250 price set forth in the Option, but she reasonably investigated this before signing. She asked Thomas specifically why the price was so low, and he responded that in 1988 NBC was not worth much, a contention he continues to

advance here. This was reasonable for Colleen to accept, particularly given that Thomas was NBC's president, her brother and her fiduciary, and the Option had her signature on it. Colleen was not required to do more, and it was wrong to conclude otherwise.

The Court of Chancery also implies that because several years earlier, in 1999, Thomas pressured Colleen to sell her shares to him, she should have been particularly distrustful of his 2006 request to purchase Colleen's shares. But such distrust would at best amount to a generalized suspicion and does not constitute an unmistakable red flag of fraud, and nowhere near forgery.

2. Michael's 2018 Complaint Did Not Trigger Inquiry Notice.

The Court of Chancery further relied on the fact that by June 2018 Colleen had read Michael's 2018 Complaint—consisting of a breach of fiduciary duty and unjust enrichment claim—against Thomas which "alleg[ed] six reasons why the 1988 Option was invalid." Op. at 27. The Court of Chancery provided no analysis of those reasons or how they would have put Colleen on notice that Thomas committed fraud via forgery. They did not, and Colleen testified that they did not. A246-47 at 144:23-147:21. Three of the reasons Michael's Complaint set forth are the same facial recordkeeping issues assessed above surrounding the date. A617 ¶¶ 26-31.

The other three reasons Michael included in his Complaint as rendering the 1988 Option unenforceable also did not put Colleen on inquiry notice. First, Michael's Complaint alleged that the terms of the Option are "vague, ambiguous, and indefinite." Again, here, this may suggest corporate sloppiness and unenforceability due to vague terms, but in the absence of more it did not put Colleen on notice that she had been defrauded via forgery. Second, Michael's Complaint alleged that the $250 option price was too low, a concern Colleen had investigated and Thomas had assuaged in 2006. Third, Michael alleged that his signature was a forgery—that someone else had signed his name—because he believed that he would not have signed the Option himself. *Id.* ¶¶ 29-30. Unlike Michael, Colleen believed she would have signed her name if asked when a mere teenager. Moreover, she reasonably investigated the signature by comparing it to other signatures from the same time period and correctly concluded that it was in fact her signature. Without access to the Source Document there was no way for Colleen to conclude a cut and paste forgery had been committed. When a reasonable investigation cannot uncover a claim, a litigant is not on inquiry notice of that claim. *Coleman*, 854 A.2d at 842–43.

3. 2017 Discussions of "Peculiarities" in the 1988 Option Did Not Trigger Inquiry Notice.

The Court of Chancery cited as further basis for inquiry notice three additional documents in the 2017 timeframe, but ultimately each rehashed the same minor facial glitches in the Option. First, the Court found that Colleen knew of "peculiarities" in the 1988 Option by December 2017. The Court appears[2] to be referring to an interrogatory response in which Colleen stated: "on or around December of 2017, Counterclaim-Plaintiff noticed some peculiarities with respect to the content of the Option. For example, the Option was dated when she was attending college out of state." A708. As discussed above, this does not constitute a red flag of fraud.

Second, the Court of Chancery relied on Colleen's notice of the Implied Partnership Memorandum, a document that Tom and Norbert jointly prepared to help *Norbert* obtain legal advice. Though the Memorandum expresses suspicion of the 1988 Option, that suspicion again rested primarily on record-keeping flaws. A555–56. It noted one additional such flaw, that there was no underlying instrument supporting and documenting the option, but this is again consistent with the informal record-keeping standards (as noted by the Court) at NBC and potential

[2] The Court cited for this statement a letter from Greenberg Traurig confirming a file transfer. Op. at 26, n.161 (citing A705).

unenforceability of the option, not fraud via forgery. A554. The only new fact the Memorandum marshals is that some shareholders did not remember signing the Option. *See id.* That is hardly a red flag given that it was purportedly signed 30 years earlier, when Colleen was a teenager, and subsequent to that Colleen investigated her signature and confirmed it was her actual signature.

Third, the Court relied on a Settlement Term drafted by Tom McGuigan (Colleen's husband) in an effort to resolve Norbert's dispute with Thomas, which had resulted in Thomas cutting off his elderly father's access to his assets. A610-11. The Term Sheet proposed a settlement term that declared the Option "invalid and declared null and void for various reasons." A609. This was a proposed settlement term, not a legal assessment of the Option, however, and rested on the same corporate deficiencies that were insufficient to put Colleen on notice of, or establish, a legally sufficient fraud claim. It neither documented nor provided notice of any new facts that could constitute a red flag of fraud.

4. Tom McGuigan Contacting Prospective Counsel in 2018 Did Not Evidence Inquiry Notice.

The Court of Chancery also found that the decision of Colleen's husband, Tom McGuigan, to contact prospective counsel to evaluate potential claims against Thomas establishes inquiry notice. That Colleen's husband contacted counsel—before Colleen found her passports—is not a red flag of fraud, nor does it support

the conclusion that Colleen knew she had a fraud claim and failed to bring it. Rather, it supports the reasonableness of her investigation into whether she had a claim at that time. Again, the fraud was not discoverable until the cut-and-paste forgery came to light. There is a substantial difference between enforceability of an option agreement and fraud.

5. Colleen's 2018 Re-Circulation of the Partnership Memorandum Did Not Evidence Inquiry Notice.

In 2018, Colleen forwarded the Partnership Memorandum to her sister Kimberly. The Court of Chancery found that Colleen's accompanying email in which she "advis[ed] that Kimberly could contact an attorney but would need to 'edit the memo as you see fit to apply to you, rather than to me, before passing it along to an attorney'" is sufficient to establish inquiry notice. Op. at 30. This finding lacks any support. Neither the Memorandum, which is discussed above, nor the email constitutes a red flag for forgery.

In sum, the Court of Chancery erred in concluding that the evidence it marshaled met the legal standard of "'red flag[s]' that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire" into, much less discover, the fraud perpetrated here.

III. DELAWARE COURTS—CORRECTLY—WOULD HAVE REFUSED TO ENTERTAIN COLLEEN'S CLAIMS WITHOUT EVIDENCE OF THE CUT-AND-PASTE FORGERY.

A. Question Presented

Whether the trial court erred in applying laches when the record is clear that Colleen could not have brought a colorable fraud or breach of fiduciary duty claim prior to revelation of the cut and paste forgery. A375-78.

B. Scope of Review

The appellate court reviews the trial judge's findings of fact for clear error. *Scharf*, 864 A.2d at 916. Legal questions and mixed questions of law and fact, as presented here, are reviewed de novo. *Id.*

C. Merits of Argument

The Court of Chancery's determination that Colleen should have brought her fraud and breach of fiduciary duty claims earlier is flawed. There were no colorable claims available to Colleen prior to her discovery of the cut-and-paste forgery, and had she tried to bring a claim before that discovery, Delaware courts would have dismissed it. Even if Colleen had brought a claim regarding errors or invalidity of the Option, there is no evidence that this would have led to the discovery of a cut-and-paste forgery. In fact, Colleen never would have been looking for a suspected forgery as she had already confirmed that the Option contained her actual signature.

The record below makes clear that Colleen had no basis to plead fraud (which must be pled with particularity) and no basis to plead a breach of fiduciary duty for which the "level of proof is similar to, but even more stringent than, the level of scienter required for common law fraud." *See Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 143–44, 158 (Del. Ch. 2004). It is precisely the willful, fraudulent transposing of a signature block from one document to another—and the employment of a such a forged document to steal shares—that evidences scienter.

The Court of Chancery's suggestion that Colleen should have challenged the enforceability of the 1988 Option prior to ever seeing the Source Document or otherwise having the wherewithal to detect the cut-and-paste forgery is contrary to Delaware law and policy. Demanding shareholders assert their rights each time a mistake appears in a corporate document is exactly the kind of "premature" controversy Delaware courts discourage. Delaware courts "do not issue advisory opinions" on matters that have "yet to become a 'real world' problem." *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1220 (Del. 2014). Moreover, Delaware courts disfavor interfering in unripe corporate disputes "[i]f facts are still unknown or changing . . . for fear it might be offering only advice and a premature binding decision." *See S'holder Rep. Servs. LLC v. DC Cap. P'rs Fund II, L.P.,* 2022 WL 439011, at *7 (Del. Ch. Feb. 14, 2022).

The negative implications of the Court of Chancery's decision to bar Colleen's claims on the basis of laches are significant. Affirming the Court of Chancery's entry of judgment here would not only work an injustice in this case but would undermine Delaware's policies on fiduciaries and their shareholders by effectively ratifying a fiduciary's willful fraud. "Since trust and good faith are the essence of this relationship, it would be corrosive and contradictory for the law to punish reasonable reliance on that good faith by applying the statute of limitations woodenly or automatically to alleged self-interested violations of trust." *Kahn*, 625 A.2d at 275.

Moreover, if this Court were to affirm the decision, it may invite prophylactic shareholder litigation and provide cover for untrustworthy fiduciaries who could claim that a shareholder should have known about their fraud. The Court of Chancery referenced Thomas's fiduciary duties—which, as President of NBC, were undisputed—only twice in its opinion, both times to insist that they were immaterial to Colleen's claims. *See* Op. at 28, 31 ("Colleen also cannot rely on her dependence on Thomas as a fiduciary."). The Court of Chancery's assertion that the 1988 Option's facial inconsistencies translate into an inability of Collen to rely on Thomas's fiduciary obligations (Op. at 31) is sweeping, unsupported by law, and undermines the faith Delaware expects shareholders to place in fiduciaries. If this decision stands, a shareholder who identifies a potentially incorrect date or location of a meeting on a corporate document must now be on guard for fraud as the clock

will have started to bring a claim. This would constitute a significant and negative change in Delaware law.

CONCLUSION

If this Court affirms the Court of Chancery's grant of judgment in Thomas's favor, he will have secured her interest in NBC (as well as those of the other shareholders) using a fraudulent document that worked entirely to his benefit, and then prevented Colleen from obtaining relief by arguing that she should have known of the fraud earlier when he testified before the Court that himself did not know the 1988 Option was fabricated. A233 at 92:10-19. Colleen therefore requests that this Court reverse the judgment of the Court of Chancery, hold that her claims are timely, and allow her claims to proceed to the merits.

/s/ Richard P. Rollo
Richard P. Rollo (#3994)
Mari Boyle (#6761)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Appellant Colleen McGuigan

OF COUNSEL:

Robert D. Sweeney
John J. Scharkey
Joanne H. Sweeney
SWEENEY, SCHARKEY & BLANCHARD LLC
230 West Monroe Street
Suite 1500
Chicago, Illinois 60606
(312) 384-0500

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