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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

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

"This is the tail end of a lengthy and bitter dispute among Norbert Murray's children over ownership of a corporation formed by Norbert, Naples Building Corporation ('NBC' or the 'Company')." Post-Trial Memorandum Opinion ("Op."), at 1.[1] Colleen McGuigan ("Colleen") alleges that her brother, Thomas Murray ("Thomas"), defrauded her by exercising an option (the "1988 Option") to buy her NBC stock in June 2006 -- ***more than 15 years before Colleen asserted her fraud claim.***

Rather than wade through 30 years of family disputes, the trial court bifurcated the case to first consider whether Colleen's Counterclaims were time-barred. After carefully considering the evidence, the trial court correctly determined Colleen was on inquiry notice before September 2018 (*i.e.*, three years before filing her Counterclaims), and therefore, her claims are time-barred. The evidence supporting the trial court's ruling was overwhelming.

For example, Colleen testified she has "always known" she did not attend the February 1988 Special Meeting at which she allegedly approved and signed the 1988 Option. Op._3-4. Thus, from day one, Colleen contends she knew the 1988 Option

[1] Unless otherwise noted, capitalized terms are defined in the Counter-Statement of Facts.

was a fraudulent document, but she did nothing to pursue a claim for more than a decade. Colleen's Opening Brief ("OB") fails to mention this critical evidence.

The evidence also revealed that, no later than December 2017, Colleen became suspicious regarding the 1988 Option and began an investigation, which quickly led to the belief it was a "fraudulent document." Op._15-16. Again, Colleen's Opening Brief fails to mention this testimony. Colleen also fails to reconcile her arguments with the Settlement Term Sheet she drafted in December 2017, which proposed to release "fraud" claims against Thomas in return for consideration worth millions. Op._17. All of this (and much more) occurred more than three years before Colleen filed her Counterclaims -- and demonstrated that Colleen was on inquiry notice.

It is troubling that Colleen accuses the trial court of reversible error, but fails to address much of the evidence it relied upon. Instead, Colleen contends she did not discover one ***additional*** reason to challenge the 1988 Option -- the Cut and Paste -- until October 2020 and asks this Court to fundamentally change Delaware law and hold that the limitations period does not begin to run until a plaintiff knows ***every*** aspect of the wrongdoing and could file a fraud claim. The trial court correctly rejected Colleen's argument. Inquiry notice does not require "full knowledge" of all facts, only that Colleen be on notice of facts sufficient to make her suspect wrongdoing. Here, Colleen admittedly suspected wrongdoing more than three years

prior to filing the Counterclaims, but elected not to pursue claims despite believing the 1988 Option was invalid and void for numerous reasons.

In addition to lacking merit, Colleen's appeal makes no sense because her fraud claim is premised on the contention that, "at the time Thomas exercised the [1988 Option in 2006], he knew [it] bore a cut and paste forgery of Colleen's signature." Op._1. The trial court, however, found that Thomas "credibly testified that he first realized the 1988 Option might contain a cut-and-paste forgery during this litigation." Op._21-22. This factual finding -- which Colleen does not challenge -- is fatal to Colleen's fraud claim even if it had been timely filed. Simply put, if Colleen ever had a fraud claim, it was not against Thomas.

The trial court's determination that Colleen's claims were time-barred was consistent with established Delaware law and supported by a mountain of evidence. The Opinion should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** The trial court correctly determined that Colleen was on inquiry notice of potential wrongdoing before September 27, 2018 (*i.e.*, three years before filing the Counterclaims). Among the red flags, Colleen testified she has "always known" she had not attended the February 1988 Special Meeting at which she allegedly approved and signed the 1988 Option. Op._3-4. Moreover, by December 2017, Colleen admittedly was "suspicious" regarding the validity of the 1988 Option, which led to an investigation resulting in the belief it was a "fraudulent document" that was void for numerous reasons. Op._11-16. Any possible doubt on this issue is eliminated by the fact that, in December 2017, Colleen and her husband drafted the Settlement Term Sheet, which purported to release claims against Thomas for "fraud" in return for consideration worth millions, and stated the 1988 Option and 2006 Agreement "are invalid and declared null and void for various reasons[.]" Op._17. If the facts here are not enough to establish inquiry notice, it is hard to imagine what more would be required.

The trial court also correctly determined that Colleen could not preserve her stale claims by asserting she did not discover one ***additional*** reason to challenge the 1988 Option -- the Cut and Paste -- until October 2020. Inquiry notice does not require full knowledge of all the facts. The numerous reasons to challenge the 1988 Option, including potential fraud, were neither "inherently unknowable" nor

"impossible" to discover prior to Thomas's deposition in October 2020. Nor was Colleen "blamelessly ignorant." Rather than acting with diligence, Colleen testified she did not "care" about the numerous grounds to challenge the 1988 Option of which she was admittedly aware.

2. **Denied**. Colleen's second argument largely repeats assertions in her first argument and fails for the same reasons. Colleen's attempt to characterize the numerous red flags as "minor errors" insufficient to suggest potential fraud (OB, 5) is contradicted by the contemporaneous documents and the sworn testimony of Colleen and her husband.

3. **Denied**. This argument largely repeats assertions in Colleen's first and second arguments and fails for the same reasons. Contrary to Colleen's argument, the trial court correctly held that inquiry notice does not require knowledge of all facts, much less sufficient facts to plead a fraud claim with particularity. In any event, by no later than December 2017, Colleen was aware of numerous reasons to challenge the 1988 Option, including potential fraud, and any reasonable investigation would have led Colleen to discover the Cut and Paste within three years. Colleen cannot blame others for her own failure to act.

COUNTER-STATEMENT OF FACTS

The facts below largely track the trial court's post-trial "factual findings," most of which Colleen ignores in her Opening Brief.[2]

A. The Parties

Thomas is the manager and owner of TDM, which is the successor to NBC. A98. Colleen is Thomas's sister. *Id.* Colleen's husband is Thomas McGuigan. *Id.*

B. Formation Of NBC

Norbert was the patriarch of the Murray family, which includes Marjorie (Norbert's wife), and their children, Thomas, Michael, Kimberly, Shannon, and Colleen. Op._2. Although Norbert had experience and early success in property development, by the late 1980's, Norbert "could foresee the upcoming years as being especially troubling." *Id.* Norbert was subsequently convicted of fraud and filed bankruptcy. Op._2, 5.

In February 1988, Norbert formed NBC "to separate . . . from [his] past troubles." Op._2. The Murray family members were NBC's original stockholders. *Id.* Thomas served as NBC's president. *Id.* Norbert was a "consultant" to NBC. *Id.*

NBC had little to no value when it was formed. Op._3. In 1988, Thomas contributed three strip malls to NBC for nominal consideration (the "NBC Properties"). *Id.* Thomas understood that, in exchange for contributing the NBC

[2] To avoid duplication, some relevant facts are included in the Argument Section.

Properties (and remaining personally liable on associated loans), he obtained an option to acquire the NBC shares held by other family members for $250 each. *Id.* Thomas has managed NBC for over 30 years. *Id.*

NBC's corporate records contain minutes of a Special Meeting of the Board of Directors of NBC, which reference a meeting in Naples, Florida, on February 15, 1988, with all the Murray family members present (the "Special Meeting"). Op._3; A381. The only subject addressed in the minutes is Thomas's option to purchase the NBC shares held by other family members (*i.e.*, the 1988 Option):

> Resolved that Thomas D. Murray has the authority to purchase the shares of Naples Building Corporation Stock that has been issued to the Stockholders of said corporation. The purchase price has been determined to be Two Hundred and Fifty Dollars ($250.00) per Stockholder. ….

Id.

Thomas did not recall attending the Special Meeting, but was aware of the 1988 Option, which was referenced in his financial statements long before this family dispute arose. Op._3-4; B8. Colleen was nineteen and attending college in Indiana on the date of the Special Meeting. Op._4. In both sworn testimony and interrogatory responses, Colleen averred that she has "always known" she "never attended a meeting of NBC directors or stockholders," including the Special Meeting:

Q. If you turn to interrogatory number 20. Do you see where you state that you never attended a meeting of NBC directors or stockholders? Do you see that?
A. Yes.
Q. Did you go back to look for documents to see if you ever attended a meeting?
A. I don't need to. I know I haven't.
Q. Okay.
A. We've just never had one, at least that I've been invited to.
Q. So you've always known that?
A. ***I have always known that.***

A249 (emphasis added); Op._3-4. Colleen stayed in the Midwest after college and described herself as the "the only person" in the family who never worked for the business. Op._4.

C. The FDIC Litigation

Norbert failed to pay the $600,000 fine relating to his fraud conviction. Op._5. As a result, in 1997, the FDIC filed an action against the Murray family members (including Colleen), as well as numerous entities, including NBC. *Id.*[3]

In connection with a potential settlement with the FDIC (which Thomas alone would pay), Norbert twice pressured Colleen to transfer her NBC shares to Thomas. Op._5. In May 1999, Norbert "ambushed" Colleen in the family kitchen, pressuring her to sign a document relinquishing her shares to Thomas. *Id.* Colleen initially

[3] NBC's corporate records, including the 1988 Option, were produced in the FDIC Litigation, and Norbert relied on the 1988 Option to avoid liability in that case. B23-24.

signed the document, but then ripped it up after speaking with her husband. Op._6. In response, Norbert threatened to "destroy" Colleen. A237, A251.

Colleen testified that a month later she was advised she could not participate in the FDIC settlement unless she relinquished her NBC shares to Thomas for $250. Op._6. At that time, Michael advised Colleen that NBC was worth approximately $6 to $7 million, and Colleen should consult with an attorney before relinquishing her shares. *Id.* Colleen sought advice from her attorney and refused to give up her NBC shares. *Id.*

The FDIC agreed to settle for $1.5 million, and the FDIC Litigation was dismissed in 2000. *Id.* Although she was being released, Colleen refused to contribute to the settlement, asserting that "as long as it got paid, [she] didn't care where it came from." *Id.*; A252. Thomas paid the entire amount of the settlement. Op._6; A216-17.

Thomas believed he became NBC's sole stockholder as a result of funding the settlement. Op._6-7. Some of NBC's records, however, continued to suggest that the other Murray family members remained stockholders. Op._7.

D. The 2006 Agreement

In 2006, Thomas's accountants advised him to convert NBC to an S Corporation to minimize his tax liability. *Id.* This conversion made sense under

Thomas's belief he was NBC's sole stockholder, as he could include NBC's income in his personal tax returns. *Id.*

If other Murray family members were still NBC stockholders, however, the conversion to an S Corporation could expose them to tax burdens without distributions to cover the liability. *Id.* Therefore, although Thomas believed he was NBC's sole stockholder, his accountants recommended that he exercise the 1988 Option to eliminate any uncertainty on the issue. Op._7-8.

Thomas retained Florida counsel to assist with NBC's conversion to an S Corporation and Thomas's exercise of the 1988 Option. Op._8. His Florida counsel prepared an agreement (the "2006 Agreement"), which stated, *inter alia*, Thomas was exercising his rights under the 1988 Option. *Id.*; A538-44.

In June 2006, Thomas sent the 2006 Agreement to each family member, accompanied by payment of $250. Op._9. The 1988 Option was attached as Exhibit A to the 2006 Agreement. *Id.* Norbert supported the 2006 Agreement and asked his daughters, including Colleen, to sign it. *Id.* Norbert, Marjorie, Colleen, Shannon, and Kimberly promptly signed the 2006 Agreement. *Id.* Michael initially refused to sign the 2006 Agreement, and instead responded with a letter (copying Colleen) asserting the 1988 Option was not "enforceable." Op._10; A676.[4]

[4] The dispute regarding whether Michael signed the 2006 Agreement was resolved before the July 2022 trial. Op._9 n.51. Colleen contends she does not recall reading Michael's letter, but it was produced from her files. Op._10.

Colleen testified she did not recall ever seeing (much less signing) the 1988 Option before she received the 2006 Agreement. Op._9. Nor did Colleen recall ever granting such an option to Thomas. A250. To the contrary, Colleen testified she had "always known" she had not attended the Special Meeting at which she allegedly approved the 1988 Option. (p. 7-8, *supra*). Despite "knowing" she had not attended the Special Meeting -- and having twice before rejected attempts to acquire her NBC shares for $250 -- Colleen promptly signed the 2006 Agreement (and initialed every page, including the attached 1988 Option). Op._9; A538-44.

E. In 2007, NBC Converts To An S Corporation With Thomas As Its Sole Stockholder

In early 2007, Thomas completed the process for NBC to become an S Corporation. Op._10. For the next decade, Thomas, as NBC's sole stockholder, continued to manage the Company and contributed over $15 million of his own funds to NBC. *Id.* The trial court found "Thomas credibly testified that he would not have contributed his own funds to pay NBC's debts unless he believed that he owned 100% of NBC." *Id.*

F. The Falling Out Between Thomas And Norbert

As a result of his legal and financial troubles, Norbert could not borrow the funds necessary to develop commercial properties. A212. Thomas was the only child to step-up to help his father. For over 30 years, Thomas employed Norbert as a "consultant" to NBC, for which he was "generously compensated." Op._11.

Norbert thus had a strong interest in Thomas continuing to own and successfully operate NBC. Op._3 n.16.

In early 2017, Thomas hired an outside accountant to help with his businesses. Op._11. The accountant questioned the amount of compensation paid to Norbert, who then had a limited role in the business due to his advanced age and health issues. *Id.* To address this issue, Thomas reduced Norbert's compensation to a more "reasonable amount," which "angered Norbert." *Id.* It now appears that other Murray family members saw the friction between Thomas and Norbert as an opportunity to claim part of NBC for themselves.

G. Shannon Secretly Provides NBC Documents To Colleen

In the fall of 2017, Thomas's sister, Shannon (who then worked as an officer and director of NBC), began to secretly copy thousands of pages of documents relating to NBC and Thomas's other business interests. Op._11-12.[5] In November 2017, Shannon sent the documents to Colleen, who provided them to her husband for review. Op._12.

Armed with these documents, Colleen, her husband, and her siblings began investigating potential claims against Thomas. *Id.* The investigation quickly led them to believe that the 1988 Option was a "***fraudulent document***" -- and that both

[5] In her Opening Brief, Colleen falsely asserts that Shannon secretly copied the NBC documents because Thomas was "destroying" documents." OB, 12. The trial court rejected that contention. Op._12 n.79.

the 1988 Option and the 2006 Agreement were invalid and void for "various reasons." Op._12, 16 (emphasis added).

H. Colleen's Husband Prepares The Implied Partnership Memorandum

In December 2017, Colleen's husband (along with Colleen and other family members) made a "concerted effort" to compile claims against Thomas. Op._13. This effort included preparing the "Implied Partnership Memorandum" (the "IPM"), a detailed 12-page, single-spaced document, which they intended to provide to counsel in connection with evaluating claims against Thomas. *Id.*; A568-86. The IPM is drafted from Norbert's perspective, but was written by Colleen's husband. *Id.* Both the 1988 Option and the 2006 Agreement were attached to the IPM. *Id.*

On December 1, 2017, Colleen circulated a draft IPM to Michael and Shannon by email. Op._13; A550-67. The next day, Colleen texted Michael that "Dad and Shannon are in process of adding and reviewing it as well." Op._13; B71. On December 3, 2017, Colleen emailed the final version of the IPM to Shannon with the following cover note: "***fresh start!!***" Op._13 (emphasis added); A568-86.

The IPM contained a separate section relating to the 1988 Option, which states "***[t]here are lots of problems with this option"*** and then lists five of those "problems." Op._14 (emphasis in original). The IPM also states "there is a dispute over the authenticity, validity and enforceability of [the 1988 Option] and [the 2006 Agreement] where [Thomas] claims he had the right and did exercise the right to

purchase all of the NBC shares for $250 per share." *Id.* It further identifies the following settlement goal:

> to restore NBC to its proper legal state ***by voiding or deeming invalid the dubious option agreement(s)-where TDM purportedly purchased other family member's NBC share of stock for $250 per share*** ….

Op._14; A577 (emphasis added). To that end, the IPM states the family members "are considering pursuing legal remedies to invalidate the" 1988 Option. A574.

At trial, Colleen attempted to disavow the IPM by claiming she "never read" it. Op_15. The Court rejected Colleen's testimony as "***not credible***" for numerous reasons, including that Colleen repeatedly emailed the IPM to her siblings with cover notes. *Id.* (emphasis added).

I. Colleen And Her Husband Prepare The Settlement Term Sheet

After identifying potential claims against Thomas in the IPM, and also engaging in discussions with "Colleen's siblings about bringing claims as minority stockholders of NBC[,]" Colleen and her husband prepared a "Settlement Term Sheet" proposing to settle those claims. Op._16-17. On December 16, 2017, Colleen emailed the Settlement Term Sheet to Shannon, Michael, and Kimberly, requesting they "review and add changes or comments as you see fit and pass them back to me." Op._17; A609-11. Two minutes later, Colleen sent a follow-up email saying, "Also you do not need to sign this term sheet. Just want to be in agreement." Op._17; B74.

In the Settlement Term Sheet, Colleen stated that the 1988 Option and 2006 Agreement were "invalid and declared null and void for various reasons" -- and purported to transfer approximately 80% of NBC from Thomas to herself and other family members. Op._17. Based on their review of NBC documents received from Shannon, the siblings contended NBC was potentially worth "at least $50 million." A623. In return for Thomas giving up approximately 80% of a company worth at least $50 million, Paragraph 5 of the Settlement Term Sheet contains a release of claims against Thomas, including a release for "***[a]ny claims of fraud.***" Op._17; A610-11 (emphasis added).

Thus, Colleen was not simply on inquiry notice of a potential fraud claim more than three years prior to filing the Counterclaims, she sought to settle those claims for consideration worth tens of millions. Faced with this evidence, Colleen offered the incredible testimony that she did not "***comprehend***" the Settlement Term Sheet, which she and her husband drafted. A264; B415-16. Worse yet, in her Opening Brief, Colleen falsely suggests the Settlement Term Sheet was drafted only by her husband (not Colleen) to "resolve Norbert's dispute with Thomas[.]" OB, 39. Colleen, however, testified she drafted the Settlement Term Sheet with her husband. A263; B143. And it plainly relates to claims by all family members, including signature lines for all family members. A610-11.

J. Colleen and Her Husband Contact Counsel Regarding Potential Claims Against Thomas

In January 2018, Colleen's husband (with Colleen's consent) contacted counsel "to discuss a possible engagement to evaluate possible claims that [Colleen] may have against [Thomas]." Op._18. That same month, Colleen emailed the IPM to Kimberly, advising Kimberly that it "may be useful to you for any discussions with an attorney." Op._15; B74-152.

In addition to consulting counsel, Colleen did her own "Google lawyering," including researching the rights of minority stockholders. Op._18. On February 2, 2018, Colleen sent an email to Kimberly stating: "Just wanted you to feel comfortable that [M]ike is also a minority shareholder like the rest of us. We are only powerful together. Familiarize yourself with the rights of a minority shareholder if you want to be comfortable with those rights." Op._18; B153.

K. Colleen Reviews Michael's Complaint Against Thomas

On March 19, 2018, Michael publicly filed a complaint asserting claims against Thomas and TDM (as successor to NBC). Op._18; A612-A704. Colleen was aware in March 2018 that Michael filed the complaint, and she reviewed Michael's complaint no later than June 2018. Op._18.

Michael's complaint includes a section titled "***Thomas's Invalid Exercise of an Invalid Option,***" and sets forth six separate reasons why he believed the 1988 Option was invalid. Op._19; A617-18 (emphasis added). Michael further alleged that

"[o]n the date the Invalid Option was purportedly executed, Colleen was attending college in South Bend, Indiana" -- and that Colleen signed the 2006 Agreement "under duress." A618-19. Colleen testified that she was "not surprised" by anything Michael alleged in his complaint. Op._19.

In November 2018, after discovering that Shannon (while serving as an NBC director and officer) had secretly copied thousands of pages of documents from NBC's offices and provided them to Colleen and Michael to use in litigation against Thomas and NBC, Thomas filed a complaint against Michael, Colleen, and Shannon, alleging various claims. *Id.*; B154-78. The Court denied Colleen's Motion to Dismiss, and the two cases were coordinated for discovery and other purposes. B323-35; B336-41. As a party, Colleen had access to all discovery taken in the cases.

L. The "Cut and Paste"

In November 2018, Thomas produced NBC's corporate records, including the 1988 Option and a document, titled "Waiver of Notice of the Special Meeting of Shareholders of Naples Building Corporation held on February 1, 1988 (the "Waiver"). A380; OB, 16; B1-2. Colleen contends it was "obvious" from a review of those documents that the signature block from the Waiver was cut and pasted onto the 1988 Option (the "Cut and Paste"). A266-67

On January 23, 2020, Michael filed a letter with the Court describing the Cut and Paste (and attaching the source documents). Op._19-20; B237-47. Colleen was served with that letter, and her counsel attended the February 25, 2020 hearing at which the Cut and Paste was discussed. *Id.*; B343-66.

Thomas was deposed on October 1 and 2, 2020. Op._20. Colleen and Thomas McGuigan attended portions of the deposition, and Colleen's counsel questioned Thomas. *Id.* During the deposition, Thomas was shown the signature blocks from the 1988 Option and Waiver. *Id.* Thomas testified he was not aware of anyone cutting and pasting the signature blocks; but he acknowledged the documents appeared to be a cut-and-paste forgery. Op._20-21. Contrary to Colleen's assertion, as the trial court found, Thomas's testimony on this point was consistent at both his deposition and trial:

> Thomas testified in his deposition and credibly at trial that he did not cut-and-paste the signature block himself. Thomas also credibly testified that he first realized the 1988 Option might contain a cut-and-paste forgery during this litigation.

Op._21-22.

M. Colleen Files Her Counterclaims

In an effort to end the family dispute, Thomas agreed to a mediation with Michael (the only family member to assert claims against Thomas). Op._22. The night before the mediation, Colleen's counsel emailed Thomas's counsel, stating Colleen was "preparing to file a counterclaim" against Thomas. *Id.*; B248-49. Colleen did not reveal the basis for her counterclaim or explain why she waited to

raise it until more than three years after the litigation had commenced. *Id.* The message, however, was clear -- to resolve the family dispute, Thomas would need to pay-off Colleen even though she had asserted no claims and was a defendant in the case filed by Thomas.

Colleen filed her Amended Answer and Verified Counterclaims on September 27, 2021 (the "Counterclaims"). Op._22; B250-322. Colleen alleged Thomas fraudulently induced her to sign the 2006 Agreement by falsely representing that Colleen (and the "entire Murray family") signed and agreed to the 1988 Option. OB, 10; B295. Specifically, Colleen alleged that, "at the time that Thomas exercised [the 1988 Option in June 2006], he knew that the [O]ption bore a cut-and-paste forgery of Colleen's signature." Op._1. Thus, Colleen contends she remained an NBC stockholder notwithstanding signing the 2006 Agreement. Colleen did not tell her siblings or parents she intended to file the Counterclaims relating to NBC because, in her view, it was "none of their business." A265-66.

Thomas promptly moved to bifurcate to first address whether Colleen's Counterclaims were time-barred. Op._23. Recognizing that bifurcation could promote efficiency, the trial court granted Thomas's motion. *Id.* Therefore, the July 2022 trial was limited to whether Colleen's Counterclaims were time-barred. *Id.*

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT COLLEEN WAS ON INQUIRY NOTICE PRIOR TO SEPTEMBER 2018 AND HER CLAIMS ARE TIME-BARRED

A. QUESTION PRESENTED

Whether the trial court correctly determined that Colleen's Counterclaims are time-barred. Op._24-36.

B. SCOPE OF REVIEW

"A trial court's application of equitable defenses presents a mixed question of law and fact." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043 (Del. 2014). The trial court's "findings of historical fact are subject to the deferential 'clearly erroneous' standard of review." *Poliak v. Keyser*, 65 A.3d 617, 2013 WL 1897638, at *2 (Del. May 6, 2013) (TABLE). "Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated," which is subject to *de novo* review. *Id.* In addition, the trial court's credibility determinations are entitled to "substantial deference." *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. MERITS OF THE ARGUMENT

1. The Trial Court Correctly Determined That Colleen's Counterclaims Are Time-Barred

"[E]quity favors the vigilant, not those who slumber on their rights." *Forman v. CentrifyHealth, Inc.*, 2019 WL 1810947, at *1 (Del. Ch. Apr. 25, 2019) (internal

quotation marks and citations omitted). Accordingly, the "proper focus" of the legal analysis is whether "the claimant [has] exercised 'vigilance' in bringing h[er] claims[.]" *Id.* "[T]he law wisely holds that there shall come a time when even the wrongful possessor shall have peace, and that it is better that ancient wrongs should go unaddressed than that ancient strife should be renewed." *Id.*

a. Colleen's Counterclaims Accrued In June 2006 And The Default Limitations Period Expired In June 2009

The first step in the laches analysis is determining when a claim accrued. Op._24 (citing cases). A claim "accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action." Op._24-25 (citing cases). Colleen's Counterclaims are premised on the assertion that, in June 2006, Thomas fraudulently induced her to sign the 2006 Agreement and give up her NBC shares. Op._25. Thus, Colleen's Counterclaims accrued in June 2006. *Id.*

Although the Court need not address the ***merits*** of Colleen's Counterclaims to affirm the trial court's determination they are time-barred, as explained in Section 1.e below, before filing her Counterclaims, Colleen offered several different stories why she signed the 2006 Agreement, which had nothing to do with the alleged fraudulent representations she now asserts. Colleen's belated fraud claim also is contradicted by the language of the 2006 Agreement, in which Colleen represented she was "not relying on any representations or warranties by Thomas D. Murray

except for those representations specifically set forth in this Agreement[.]" Op._8-9; A539.

In any event, the parties agreed that Colleen's Counterclaims are subject to a three-year statute of limitations. Op._25. Therefore, absent tolling, the "default limitations period expired in June 2009" -- more than ***twelve years*** before Colleen filed the Counterclaims. *Id.*[6]

b. Colleen Was On Inquiry Notice Of Potential Claims More Than Three Years Prior To Filing The Counterclaims

Colleen contends that the limitations period was tolled for various reasons, which Thomas disputes. Importantly, "no theory will toll the statute beyond the point where the plaintiff" was on inquiry notice. *Erisman v. Zaitsev*, 2021 WL 6134034, at *13 (Del. Ch. Dec. 29, 2021). Therefore, regardless of the tolling theory, the critical question is whether Colleen was on inquiry notice more than three years prior to filing her Counterclaims on September 27, 2021. Op._26. Stated another way, "if Colleen had inquiry notice prior to September 27, 2018, then her claims are time-barred." *Id.*

The law in Delaware regarding inquiry notice is well-settled:

> ***Inquiry notice does not require full knowledge of the material facts***; rather, plaintiffs are on inquiry notice when they have sufficient

[6] *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998) ("*[a]bsent tolling* … [plaintiffs'] claims fall outside the statutory period and would be time-barred") (emphasis in original), *aff'd*, 725 A.2d 441 (Del. 1999).

> knowledge to raise their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued, would lead to the discovery of the injury.

Pomeranz v. Museum Partners, L.P., 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005) (emphasis added). "Once a plaintiff is on notice of facts that ought to make [her] suspect wrongdoing, [she] is obliged to diligently investigate and to file within the limitations period as measured from that time." *Id.* at 13. In addition, once on inquiry notice of any alleged wrongdoing, a plaintiff is on "notice of everything to which such inquiry might have led." *Id.* at *14 (citing *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 509 n.7 (Del. 1996)).

Colleen does not dispute this controlling law. OB, 22-23 (citing cases). Colleen also cites the "discovery rule," but as detailed below, the alleged wrongdoing here was far from "inherently unknowable" and Colleen cannot credibly claim to be "blamelessly ignorant." *See In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584-85 (Del. Ch. 2007) (requiring a showing that "it would be practically impossible for a plaintiff to discover the existence of a cause of action").

i. Colleen Had Numerous Reasons To Suspect Wrongdoing When She First Received The 1988 Option In June 2006

When Thomas exercised the 1988 Option in June 2006, Colleen was aware she had rejected two prior attempts in 1999 to acquire these same NBC shares for

the same $250 price. (p.8-9, *supra*). This would have made any reasonable person suspicious -- especially because the 2006 attempt was based on a document (the 1988 Option) that predated the prior 1999 attempts, but was not referenced at that time.

In addition, Colleen testified she had no recollection of signing the 1988 Option or ever agreeing to such an option. A250. And Colleen's suspicions should have been further heightened because she was copied on Michael's June 19, 2006 letter, which asserted that the 1988 Option was not "enforceable." Op._10.

Most importantly, the 1988 Option purports to reflect an action taken at a February 1988 Special Meeting -- and states that Colleen and all family members were "***[p]resent***" at that meeting. A381 (emphasis added). Colleen, however, testified she had "always known" she had not attended that Special Meeting (or any NBC meeting). (*See* p. 7-8, *supra*). Thus, when she received the 1988 Option in June 2006, Colleen not only had reason to suspect wrongdoing -- she ***knew*** the document falsely stated she had attended the Special Meeting and approved the 1988 Option. Because her sworn testimony contradicts her argument that the 1988 Option "reasonably appeared to be a genuine NBC document" (OB, 24), Colleen fails even to mention it in her Opening Brief.

Based on this evidence alone (although much more is detailed below), the trial court could easily conclude that Colleen was on inquiry notice of a potential fraud

with the 1988 Option in June 2006, and the limitations period started to run at that time. Therefore, Colleen was "obliged to diligently investigate and to file within the limitations period as measured from that time." *Pomeranz*, 2005 WL 217039, at *13. Colleen, however, did ***nothing*** to investigate her claims for more than a decade -- while Thomas operated NBC as its sole stockholder and contributed over $15 million to the Company.

ii. Colleen's 2017 Investigation Led Her To Believe The 1988 Option Was A "Fraudulent Document" That Was Void For "Various Reasons"

Even if Colleen could invoke a tolling theory to defer the limitations period from starting to run in 2006, the evidence is overwhelming that, by late 2017, she was on inquiry notice of potential wrongdoing. Op._26-27 (listing evidence). Contrary to Colleen's argument, the evidence cited by the trial court was not simply "minor errors" or "typos" associated with "informal recordkeeping." OB, 5. Colleen was presented with numerous bright red flags that raised far more than "generalized suspicions" -- they quickly led her to believe the 1988 Option was a "fraudulent document" and consult counsel.

To start, in late 2017, Colleen began receiving NBC documents from Shannon and, as Colleen's husband explained, they had "lots of suspicions at that time." Op._11-12; A276. Colleen admittedly noticed "peculiarities" with the 1988 Option, including that she was "attending college out of state" on the date of the Special

Meeting. Op._12-13. In addition, Colleen learned that Michael asserted his signature on the 1988 Option "***was a forgery***." OB, 12 (emphasis added). As a result of their investigation, by December 2017, Colleen and her husband believed the 1988 Option was a fraudulent document:

> [S]o I think we looked at it, the [1988 Option], for the first time in real detail and said: Wait a second. You know, this is a -- this is a ***fraudulent document***. This is ***absolutely ridiculous***. This is dated before the formation of the company. … ***[T]his isn't my wife's signature***. This isn't Michael's signature. You know, ***I can go through all the defects if you'd like***.

Op._16 (emphases added); A262-63. Colleen's husband further elaborated on the numerous reasons to invalidate the 1988 Option:

> ***There was forged signatures on it.*** … ***I don't know if the Delaware courts have ever seen a document like that. It was clearly created after, at some point, fraudulently by someone. And it was the foundation for the 2006 option saying, look, you signed this, but yet it wasn't our signature, it wasn't Michael's signature.*** I don't know if you have the other ones -- or whose signatures they were. ***So I don't believe that it's -- it's a valid document.*** And there's many more, but I didn't know we were here to litigate that matter.

A270 (emphases added). This deposition testimony, which was given more than a year before Colleen contends she discovered the Cut and Paste, directly contradicts her new argument that the 2017 investigation revealed only "minor faults" relating to the 1988 Option that were insufficient to suggest fraud. OB 21, 30. Her husband's sworn testimony (quoted above) alone was sufficient to support the trial court's determination that Colleen was on inquiry notice, but Colleen's Opening Brief ignores it.

The trial court also identified the following additional evidence showing that Colleen was on inquiry notice prior to September 2018:

- In December 2017, Colleen repeatedly circulated the IPM (drafted by her husband), which identified numerous "problems" with the 1988 Option and expressed the intent to assert claims to invalidate it as void. (p. 13-14, *supra*).

Colleen attempts to minimize the problems identified in the IPM, suggesting it raised only generalized suspicions related to "record-keeping flaws." OB, 38. Not true. The numerous problems with the 1988 Option were so significant that the IPM suggested it was "void" and the family members could invalidate it. (p. 13-14, *supra*). Colleen's Opening Brief ignores critical language from the IPM that was quoted by the trial court. Op._14-15.

- In December 2017, Colleen and her husband drafted the Settlement Term Sheet, which proposed to release fraud claims against Thomas and stated the 1988 Option and 2006 Agreements "are invalid and declared null and void for various reasons[.]" (p. 14-15, *supra*).

It is hard to imagine more compelling evidence of inquiry notice than Colleen's drafting of a settlement agreement proposing to settle claims, including for fraud, for consideration worth millions.

- In January 2018, Colleen's husband contacted counsel "to discuss a possible engagement to evaluate possible claims that [Colleen] may have against [Thomas]." Op._26-27.

It defies credulity for Colleen to claim she lacked inquiry notice of potential wrongdoing given that she consulted counsel regarding potential claims against Thomas. Colleen cannot avoid this fact by asserting she believed she signed the 1988 Option and did not

"care[]" about all the other reasons why the 1988 Option may be invalid. (*See,* p. 29-30, *infra*).

- No later than June 2018, Colleen read Michael's complaint, alleging six reasons why the 1988 Option was invalid and unenforceable. Op._27.

Colleen attempts to downplay this fact (OB, 36-37), but Michael's complaint clearly put Colleen on notice of her fraud claim, which is premised on the assertion she "only signed the 2006 [A]greement because of Thomas's alleged statements that [she and all the family members] agreed to and signed the 1988 [O]ption[.]" A271; OB, 10 (asserting "Thomas represented to [Colleen] that 'everyone' had signed the 1988 Option"). In his complaint, however, Michael stated his signature on the 1988 Option was "***forged***" and he never agreed to the 1988 Option. A618 (emphasis added). Therefore, upon reading Michael's complaint, Colleen certainly had reason to suspect that Thomas's alleged representations in June 2006 that "everyone" signed and agreed to the 1988 Option (*i.e.*, the purported representations on which her fraud claim is based) were false. This was not a "record-keeping glitch" -- Michael's sworn statement that his signature on the 1988 Option was forged clearly suggested fraud.

* * *

It is hard to imagine more compelling evidence (much of which Colleen fails to address in her Opening Brief) that Colleen was on inquiry notice of a potential claim relating to the 1988 Option. Colleen's after-the-fact assertion that all the red flags were just "minor errors" not suggestive of fraud (OB, 5, 21, 30) is directly

contradicted by the contemporaneous documents, which reveal that Colleen's investigation quickly led to the belief that the 1988 Option was a "fraudulent document" that was "null and void for various reasons." Contrary to Colleen's argument, the trial court was not required to identify a specific date when Colleen was on inquiry notice. OB, 20. Any one of the foregoing factual findings would be sufficient to conclude that Colleen was on inquiry notice more than three years prior to filing the Counterclaims -- together they make that conclusion inescapable.

c. Colleen Cannot Save Her Stale Claims By Asserting She Did Not Discover The Cut and Paste Until 2020

Colleen contends the limitations period did not begin to run because she conducted a purported investigation in 2017/2018 and concluded she had signed the 1988 Option. OB, 25. Although she believed that the 1988 Option was a fraudulent document that was void for "various reasons," ***Colleen's purported investigation was limited to comparing her signature on the 1988 Option with two other documents.*** *Id.*[7]

That purported investigation was plainly insufficient, including because Colleen focused solely on her signature and intentionally ignored all the other reasons the 1988 Option may be invalid:

[7] Although this Court need not resolve the issue, as explained in the briefing below (B589-93; B638-42), Colleen's story, including the alleged comparison of her signatures on several documents, is contradicted by the record evidence.

> Q. And you contend you did not consider all the other reasons that had been identified as to why the 1988 option was invalid and void because that was not your focus; correct?
> A. Correct.
> Q. And you contend because you allegedly believed you signed the 1988 option, it didn't matter to you that the 1988 option may be invalid for other reasons; correct?
> A. I cared about my signature.

A269; Op._16 n.105. Under Delaware law, "[o]nce a plaintiff's suspicions are triggered, [she] is expected to act with alacrity to explore those suspicions ***as well as other possible instances of non-compliance.***" *GEN-E, LLC v. Lotus Innovations, LLC*, 2022 WL 2063307, at *3-4 (Del. Super. Ct. Apr. 21, 2022) (emphasis added). Colleen, however, ignored potential wrongdoing of which she was admittedly aware. Moreover, contrary to Colleen's argument, after she allegedly compared a few signatures, Colleen's duty to investigate did not end -- especially given that Colleen could seek discovery from Thomas in the litigation and had access to all the documents produced (including NBC's corporate records).

As the trial court correctly held, even if it accepted Colleen's story about her limited investigation, it does "not render Colleen's claim timely." Op._27. As explained in *Pomeranz*:

> The difficulty for [Colleen] is that [her] argument depends on the premise that inquiry notice only exists once [she was] aware of all material facts relevant to their claims. That is not the case. Equitable exceptions to statutes of limitations are narrow and designed to prevent injustice. Once a plaintiff is on notice of facts that ought to make [her] suspect wrongdoing, [she] is obliged to diligently investigate and to file within the limitations period as measured from that time.

2005 WL 217039, at *13 (citations omitted); *Deane v. Maginn*, 2022 WL 624415, at *7 (Del. Ch. Mar. 2, 2022) ("Neither '*actual* discovery of the reason for the injury' nor an 'awareness of all aspects of the alleged wrongful conduct' are necessary for inquiry notice.") (emphasis in original; citation omitted).[8] Once Colleen had a reason to be suspicious regarding the validity of the 1988 Option, "any tolling of [her] claims ceased." *See, e.g.*, *Lehman Bros. Hldgs, Inc. v. Kee*, 268 A.3d 178, 195 (Del. 2021) (although plaintiffs later discovered additional problems, "once the plaintiffs discovered the window leaks, any tolling of their claims ceased").

Applying that well-settled Delaware law, the trial court explained it "has consistently dismissed claims as time-barred where the claimant had sufficient facts to discover wrongdoing, regardless of whether they knew the full extent of the harm." Op._28. The trial court discussed in detail two prior cases, *Dean Witter* and *Pomeranz*, which demonstrated why her alleged lack of actual notice of the Cut and Paste until 2020 would "not save Colleen's claims." Op._28-30. Although Colleen attempts to distinguish those cases (OB, 25-27), the facts here are even more compelling at establishing inquiry notice. "Colleen knew of a laundry list of defects in the 1988 Option before September 2018" and had "always known" she had not attended the Special Meeting at which she allegedly approved the 1988 Option.

[8] *Dean Witter*, 1998 WL 442456, at *7 ("awareness of all of the aspects of the alleged wrongful conduct" is not necessary for inquiry notice).

Op._30. In 2017, Colleen identified "various reasons" why 1988 Option was invalid and void, and proposed to settle fraud claims against Thomas for consideration worth millions. *Id.* Again, it is hard to imagine a more compelling case for the application of laches.

The cases cited by Colleen, which involved motions to dismiss rather than post-trial determinations, are inapposite. OB, 27-28. In *Carsanaro*, the Court determined it was not reasonable for the plaintiffs to discern the purported misconduct by, among other things, constantly monitoring the secretary of state activity for the defendant company and also "figure out the implications of four numbers in 27 pages of dense, single-spaced legal text." *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 646-47 (Del. Ch. 2013). In *Weiss*, the Court did not find inquiry notice because a stockholder would have needed to cull through multiple public filings for information "and then conduct a statistical analysis in order to uncover the alleged malfeasance." *Weiss v. Swanson*, 948 A.2d 433, 452 (Del. Ch. 2008) (but noting the defendants would have an opportunity in later proceedings to show the plaintiff "was, in fact, on inquiry notice").

No "constant monitoring," culling through numerous documents, or "statistical analysis" was required here. Based on a single document (the 1988 Option) in Colleen's possession since at least 2006, Colleen: (1) knew she had never attended the meeting represented in the 1988 Option; and (2) believed upon review

it was a "fraudulent document" and "null and void for various reasons." (*See* p. 7-8, 12-13, 25-26, *supra*). Colleen also was repeatedly presented with documents (*e.g.*, the IPM and Michael's Complaint), which detailed numerous reasons why the 1988 Option was invalid. *Id.* Colleen's contention that she subsequently learned one ***additional*** reason to challenge the 1988 Option (*i.e.*, the Cut and Paste) does not restart the clock. *Deane*, 2022 WL 624415, at *8 ("An argument that events transpired after July 2012 that would have put the plaintiffs on inquiry notice does not mean that earlier events providing for inquiry notice did not occur."). "There is a reason they call it ***inquiry notice*** and not ***everything notice***." Op._28 (emphases added).

d. Colleen Cannot Invoke Tolling By Asserting She Could Not Have Discovered The Wrongful Conduct

Recognizing she had reason to suspect wrongdoing as early as June 2006, Colleen devotes much of her Opening Brief to arguing the limitations period should nonetheless be tolled because it was "impossible" to discover her alleged injury until Thomas's deposition in October 2020. *See*, *e.g.*, OB, 4, 22. Colleen appears to contend that inquiry notice does not begin until the defendant acknowledges that a document may be fraudulent. OB, 2, 4. Again, Colleen's argument fails as a matter of both law and fact.

As explained in Sections C.1.a-b above, Colleen was on inquiry notice once she had reason to suspect wrongdoing, which was long before Thomas's deposition.

Moreover, Colleen's argument is premised on the erroneous contention that she had no basis to pursue a potential claim or suspect she was injured until Thomas was presented with the Cut and Paste at his deposition. But Colleen contends she ***knew*** the 1988 Option was false (*i.e.*, she was not "present" at the Special Meeting) when she first reviewed it in 2006. *See Dean Witter*, 1998 WL 442456, at *8 (a plaintiff "must be *reasonably attentive* to [her] interests" and "*should not put on blinders*") (emphases in original). Thus, in 2006, Colleen already possessed enough information to assert the Option was a fraudulent document -- and therefore numerous statements in the 2006 Agreement were false, including that the 1988 Option was "a legal, valid, enforceable and binding obligation …." and that Colleen "intended to grant, and did in fact grant" Thomas an option to purchase her NBC shares for $250 at the Special Meeting. A538-44.

Unlike in 1988 when Colleen claimed she would sign without review or question anything presented to her, in 2006, Colleen testified that she reviewed (and discussed with her husband) the 2006 Agreement (including the attached 1988 Option) before signing it. A252-53.[9] Colleen admitted that nothing prevented her from having counsel review the 1988 Option before signing the 2006 Agreement -- as she had done in 1999 before refusing a similar demand to transfer her shares to

[9] Colleen asserts that, when younger, she would sign documents if asked by her father. OB, 8-9. But the document Colleen references is a proxy, not a document falsely representing that Colleen was present at a meeting. A426.

Thomas for $250. *Id.* As Colleen's husband conceded, any review of the 1988 Option in "real detail" would have revealed numerous "defects." Op._16.

Given all the red flags waving when Colleen first reviewed the 1988 Option in 2006 (*see*, p. 23-25, *supra*), Colleen's assertion that potential wrongdoing or injury was "inherently unknowable" or "impossible" to discover until October 2020 is nonsense. OB, 23-24. As she had done in 1999, Colleen could have refused to sign the 2006 Agreement and transfer her shares to Thomas. At a minimum, before signing, Colleen could have requested corporate records pursuant to Section 220 to investigate the legitimacy of the 1988 Option -- as Michael had suggested she do when Thomas attempted to acquire her NBC shares in 1999. B69 ("under Delaware Corporation law, you are entitled, pursuant to Sec. 220, to the inspection of corporate books and records)).[10] Having failed even to request the documents, Colleen cannot now claim it was "impossible" to discover the Cut and Paste because NBC's documents were in "Thomas's sole possession." OB, 26-27. This is especially true because Colleen contends the Cut and Paste was "obvious" from a review of those records. A266-67; *Pomeranz*, 2005 WL 217039, at *14 (once on inquiry notice of any alleged

[10] In 2006, when presented with minutes of a purported Special Meeting that she knew to be false (and which contained other alleged flaws), Colleen had a basis to obtain NBC's corporate records. *See e.g., Deephaven Risk Arb. Trading Ltd. v. UnitedGlobalCom, Inc.*, 2005 WL 1713067, at *9-10 (Del. Ch. July 13, 2005).

wrongdoing, Colleen was on "notice of everything to which … inquiry might have led").

Colleen's reliance on *Technicolor International II v. Johnston*, 2000 WL 713750, at *7 (Del. Ch. May 31, 2000) is misplaced for several reasons. In that case, the plaintiff sought books and records pursuant to Section 220 and "diligently and doggedly pursued all of the facts of which he was aware," but was improperly prevented from reviewing the records by defendants' "bad faith conduct." *Id.* Here, Colleen did nothing to investigate her potential claims. Equally meritless is Colleen's reliance on *Coleman v. PricewaterhouseCoopers*, LLC, 854 A.2d 838, 843 (Del. 2004), in which the Court held the limitations issues involved disputed facts such that the trial court erred by deciding them as a "matter of law" on summary judgment. Rather, a resolution of the limitations issues "require[d] a trial" (*id.*) -- which is what the Chancellor ordered in this case and her findings were made after that trial.

Based on the overwhelming evidence presented at trial, Colleen was not "blamelessly ignorant" of the fraud -- when presented with numerous red flags, she stuck her head in the sand and did nothing to investigate. But even if the Court could somehow overlook Colleen's failure to act for more than a decade after being presented in 2006 with a document she "knew" to be false, in late 2017 Colleen and her husband started an investigation that led them to believe the 1988 Option was a

"fraudulent document." (*See*, p. 25-26, *supra*). At that point, there can be no dispute Colleen was on inquiry notice and any tolling ceased. *See Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2020 WL 7028597, at *6 (Del. Super. Ct. Nov. 30, 2020) ("No theory tolls the statute of limitations further once the plaintiff is on inquiry notice."). Importantly, by simply reading the documents produced to her, Colleen could have discovered the Cut and Paste within three years of starting her investigation. *Pomeranz,* 2005 WL 217039, at *13 (a plaintiff is required to "diligently investigate and to file within the limitations period as measured from that time").

First, Colleen concedes that Thomas produced NBC's corporate records in November 2018 -- and the Cut and Paste source documents were at the beginning of that production. OB, 16, 20; p. 17, *supra*. Thus, the source documents were not "buried" or solely in Thomas's possession. OB, 26. Colleen admits it was possible to discover the Cut and Paste from the source documents produced by Thomas in 2018 (OB, 19-20). Unlike Michael, who reviewed the documents produced by Thomas and discovered the Cut-and-Paste, Colleen does not contend she even reviewed the documents available to her.

Second, Colleen did not even need to compare the source documents to discover the Cut and Paste. On January 23, 2020, Michael served Colleen with a letter to the Chancellor detailing the Cut and Paste (and enclosed the two source documents):

> ***Michael will show that the entire signature block of the "option," Ex. A, was cut and pasted from a different NBC document on which Michael's signature was forged. Ex. B.***

B238 (emphasis added)). Colleen's Opening Brief fails even to mention this undisputed fact, which directly contradicts Colleen's argument that she did not discover (and could not have discovered) the Cut and Paste until Thomas's deposition in October 2020. OB, 4-5.

Third, Colleen admittedly was aware of the Cut and Paste no later than Thomas's deposition on October 1, 2020. Again, that is less than three years after Colleen started her investigation.

On this record (which she largely ignores), Colleen cannot credibly claim it was "impossible" to discover the Cut and Paste until Thomas's deposition or that she was "blamelessly ignorant" until that time. Among other things, Colleen received a document detailing the Cut and Paste in January 2020, but waited over a year-and-a-half to file the Counterclaims. ***When asked to explain that delay, Colleen refused to answer and instead invoked attorney-client privilege.*** A247-48. Thus, Colleen apparently made a strategic decision (after consulting counsel) not to pursue claims of which she was undoubtedly aware, and instead waited until the eve of the mediation between Michael and Thomas to first suggest an intent to file Counterclaims. Op._22. Although Colleen might now regret her delay, she has no one to blame but herself.

Finally, Colleen embraces the trial court's finding that Thomas was not aware of the Cut and Paste until this litigation. *See, e.g.*, OB, 17-18. But the issue is when Colleen, not Thomas, was on inquiry notice of potential wrongdoing. Moreover, as Colleen acknowledges, Thomas did not focus "on corporate compliance" or recordkeeping -- he was responsible for managing the Company and leasing its properties. OB, 7-8. Unlike Colleen, Thomas had no reason to challenge the 1988 Option. Thomas always believed he received the option for contributing the NBC Properties and personally guaranteeing millions in debt. Op._3. In contrast, Colleen had no recollection of granting the 1988 Option, and had numerous reasons to be suspicious of its validity. Again, when presented with numerous red flags, Colleen cannot excuse her delay merely by asserting that she (or even Thomas) did not yet know one additional aspect of the fraudulent conduct. (*See* p. 29-33, *supra*).

e. Colleen Cannot Preserve Her Stale Claims By Contending She Lacked Sufficient Information To File A Claim

In her final argument, Colleen asserts she was not on inquiry notice until she learned of the Cut and Paste in October 2020 because she could not have filed a lawsuit that would have survived a motion to dismiss until that time. OB, 41-43. Colleen's argument fails for numerous reasons.

As previously explained, inquiry notice does not require notice of all facts, much less that the plaintiff possess sufficient information to immediately file a claim.

Nor does it require notice of every possible "claim" Colleen could potentially assert. OB, 19. Rather, inquiry notice requires that a plaintiff have "notice of facts that ought to make [her] suspect wrongdoing…." *Pomeranz*, 2005 WL 217039, at *13. At that point, the plaintiff "is obliged to diligently investigate and to file within the limitations period as measured from that time." *Id.* Thus, the very concept of "inquiry notice" contemplates the plaintiff will not initially have all the facts necessary to commence litigation, but must diligently investigate once on notice of potential wrongdoing and file promptly thereafter.

In addition, Colleen's assertion that she did not have any potentially "colorable claims" before Thomas's deposition ignores the evidence. OB, 41. As soon as she received the 1988 Option in June 2006, Colleen contends she knew it was a fraudulent document because she had not attended the Special Meeting at which she allegedly approved the 1988 Option. Again, Colleen's Opening Brief ignores her own sworn testimony, which directly contradicts her argument.

Moreover, Colleen's Counterclaims are premised on the assertion that the 1988 Option and 2006 Agreements were "void," and therefore, Colleen remained an NBC stockholder. As previously explained, the record is crystal clear that, in connection with the 2017 investigation, Colleen drafted, circulated, and/or read numerous documents identifying "***various reasons***" why the 1988 Option and the 2006 Agreements were invalid and void. That Colleen allegedly did not "care[]"

about all the defects of which she was admittedly aware does not mean she could not pursue a claim. Op._16 n.105.

Also, more than three years prior to filing her Counterclaims, Colleen read Michael's complaint asserting that the 1988 Option was invalid for numerous reasons. That document alone, which alleged that Michael's signature on the 1988 Option was forged, was notice of Colleen's fraud claim. (*See* p. 16-17, 28, *supra*). And as Michael explained: "regardless of the signature, the document itself was invalid, so you didn't have to argue the point of the signature." B531. Thomas did not move to dismiss Michael's 2018 challenge to the 1988 Option, and discovery in the litigation (in which Colleen was a party) quickly resulted in the production of the Cut and Paste source documents, which provided an additional basis to challenge the validity of the 1988 Option.

Contrary to Colleen's argument, the trial court's decision does not encourage "premature" litigation. OB, 42-43. Rather, it is entirely consistent with long-standing Delaware precedent requiring a plaintiff to proceed with diligence (including using the tools at hand to seek books and records) once on notice of potential wrongdoing and barring stale claims.

Equally meritless is Colleen's assertion that barring her claim "would ratify[] a fiduciary's willful fraud." OB, 43.[11] To start, Colleen's fraud claim against Thomas necessarily fails given the Court's unchallenged factual findings that Thomas did not create the Cut and Paste and was not aware of it prior to this litigation. (*See* p. 3, 18, *supra*). Moreover, Colleen's fraud claim is a recent fabrication. Years before claiming that Thomas fraudulently induced her to sign the 2006 Agreement, Colleen repeatedly circulated the IPM, which stated that Colleen (and her sisters) signed the 2006 Agreement because Norbert "***personally asked them to accommodate [his] request***." A574 (emphasis added). And in this litigation, Colleen initially submitted sworn statements alleging she signed the 2006 Agreement "***under duress***" and that she "***believed she had no choice but to sign the Agreement because of the prior threats, and her relationship with her father, Norbert would be permanently impaired."*** B231-32 (emphasis added)). Thus, Colleen's current claim that Thomas fraudulently induced her to sign the 2006 Agreement is ***at least*** Colleen's third different and conflicting story on this point.

In any event, it would not be inequitable to bar Colleen's claim based on her delay of over a decade. Thomas contributed the three NBC Properties, personally

[11] Colleen misleadingly asserts that Thomas was the "sole beneficiary" of the 1988 Option. OB, 11. As the trial court recognized, "Norbert also benefited from the 1988 Option. After Norbert's felony conviction and bankruptcy, Norbert's livelihood was tied to the success of NBC and Thomas's willingness to keep Norbert on as a consultant. …." Op._3 n.16 (citations omitted).

guaranteed the millions in associated debt, and devoted thirty years to managing NBC into a successful business. (*See* p. 6-7, *supra*). After Colleen signed the 2006 Agreement, Thomas contributed over $15 million of his own money to NBC believing he was the sole owner while Colleen sat silent for over a decade. *Id.*, at 11. In contrast, Colleen now seeks to claim an interest in NBC more than 15 years after signing the 2006 Agreement -- despite testifying she was the only family member never to have any involvement with the Company (and never having contributed a single cent to NBC). Op._14.

CONCLUSION

The trial court concluded its Opinion by stating that "[t]his lengthy and bitter family lawsuit ends here. Colleen's claims are barred by laches, and judgment is entered in favor of Thomas." Op._36. That ruling was fully supported by the evidence and consistent with well-settled Delaware law. The trial court's decision should be affirmed so this family dispute can finally end.

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