



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLENE E. STEVANOV, )  
 )  
 Plaintiff/Counterclaim Defendant, )  
 )  
 v. ) Civil Action No. 3820-VCP  
 )  
 DAVID A. O'CONNOR, )  
 )  
 Defendant/Counterclaim Plaintiff, )

**MEMORANDUM OPINION**

Submitted: December 4, 2008  
Decided: April 21, 2009

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**PARSONS, Vice Chancellor.**

This action arises out of the failed marriage of life and business partners. In 1992, a husband and wife started a family business. The family business operated on a large plot of land owned personally by the husband and wife. Not surprisingly, the business paid rent to the family for the use of the land. The husband and wife then got a divorce. Two years later, the Family Court of the State of Delaware awarded the wife 55% of the marital property, which included the family business. Although the family business may have been capable of generating revenue, it was in shaky financial straits in January 2005 and now appears to be irreversibly insolvent due to a large judgment against it and other substantial debts. As recourse loans, some of the latter obligations were backed by the husband's and wife's (or at this point ex-husband's and ex-wife's) own assets, including the large commercial lot and the family home.

Here, things get fuzzy. The husband arranged for a contract with the family business's major customer to be granted to a new business run by the husband, but owned by his son from a different marriage. In January 2005, the Family Court approved the husband's action in this regard based on the apparent insolvency of the original family business. Since then, the husband allegedly has caused the new business to achieve some success by continuing other aspects of the original company's business, using the land, the equipment and other assets, and the employees of the original company. In the first half of 2008, the husband purchased 100% of the new company from his son for all of \$10. In the meantime, the family business essentially has been dormant and, according to the ex-wife, never received fair compensation for the new business's use of its assets.

On June 11, 2008, the ex-wife filed the complaint in this action. She seeks equitable and compensatory relief from her ex-husband based on claims for breach of fiduciary duty, conversion, unjust enrichment, and fraud. The ex-husband answered and asserted a counterclaim against the ex-wife. Shortly thereafter, the ex-husband moved to dismiss or for summary judgment on the ex-wife's claims based on a myriad of grounds. For the reasons stated in this opinion, that motion is granted in part and denied in part.

## **I. BACKGROUND**

### **A. Facts**

Plaintiff, Charlene Stevanov, and Defendant, David O'Connor, were married in 1990, but divorced in 2003. In 1992, Stevanov and O'Connor formed a company called Advanced Environmental Systems, Inc. ("AES"), which held itself out as a Delaware corporation. AES is not a party to this action.

Stevanov and O'Connor formed AES to fabricate and manufacture air pollution equipment. At formation, O'Connor owned 80% of the equity in AES and acted as the CEO or President. Stevanov owned the remaining 20% of AES and acted as Vice President. For a number of years, Stevanov worked at AES.

On September 21, 1995, O'Connor and Stevanov purchased in their personal capacities, presumably as tenants by the entirety, a 140-acre tract of land located on Oldfield Point Road in Elkton, Maryland (the "Oldfield Property"), which housed a 39,000 square foot office and manufacturing facility that AES later used as its headquarters. At some point, O'Connor and Stevanov entered into a lease agreement

between themselves as lessors and AES as lessee, whereby AES agreed to pay \$17,500.00 a month to use the Oldfield Property for an unspecified term.

In 2002, loans made for the purpose of financing AES became due. As a condition for continuing the loan, the lender, County Bank and Trust Company (“County Bank”), required guarantees and mortgages from both Stevanov and O’Connor. Stevanov signed a guarantee and mortgages on two properties she jointly owned with O’Connor, the Oldfield Property and the couple’s residence.

On December 11, 2003, Stevanov and O’Connor divorced.

In January 2005, Broin, Inc. sued AES in federal court in South Dakota for defective fabrication work performed by AES for Broin. AES allegedly did not contest the claim, and in February 2007 the court entered a default judgment for \$4,699,248.00 against AES (the “Broin Judgment”).<sup>1</sup>

On January 21, 2005, the Family Court of the State of Delaware entered an Order (the “Family Court Order”) awarding Stevanov 55% of the marital assets.<sup>2</sup> According to the Family Court, both the Oldfield Property and the family residence were subject to the mortgages in favor of County Bank. The Family Court wrote: “There is no question that both of these parcels of real estate must be sold and the proceeds applied toward reducing or eliminating all of the secured indebtedness encumbering the properties.”<sup>3</sup> The Family

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<sup>1</sup> See Aff. of Charlene Stevanov Sept. 5, 2008 (“Stevanov Aff.”), ¶ 12.

<sup>2</sup> *O’Connor v. Stevanov*, No. CN03-08783, Order at 3 (Del. Fam. Jan. 21, 2005) (civil disposition summarizing rulings made in court and explained on the record).

<sup>3</sup> *Id.* at 4.

Court further found that AES had “many other unsecured debts, for which [Stevanov and O’Connor] are also personally liable,”<sup>4</sup> and that any excess proceeds from the sale of the two properties over and above the amount paid out to the secured creditors “must be applied to remaining unsecured marital debts.”<sup>5</sup>

As noted in the January 2005 Family Court Order, the court also found that O’Connor acted properly in arranging for a contract that AES had with 3M to be transferred to a new company, Air Clear, LLC (“Air Clear”), to keep that work. There is no dispute that O’Connor acted as Air Clear’s CEO at all relevant times. Initially, however, O’Connor’s son, David Anthony O’Connor (“David”), was the sole member of Air Clear.<sup>6</sup> In the first half of 2008, O’Connor allegedly purchased David’s membership interest in Air Clear for \$10.<sup>7</sup> Air Clear is not a party to this action.

In its Order, the Family Court also made a series of factual findings and legal determinations regarding O’Connor’s actions with respect to Air Clear and AES:

Husband did not dissipate any of the value of AES by failing to reduce its debt load as a result of transferring a purchase order from an RTO to control emissions from a manufacturing plant in Iowa owned by 3M Company to Air-Clear, LCC [sic]. The original contract between 3M Company and AES contained a provision due to the shaky financial straits of AES, that prior to January 1, 2005, when

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> Stevanov Aff. ¶¶ 21-22. Stevanov only made this averment on information and belief, but O’Connor did not dispute it.

<sup>7</sup> *Id.*

production of the RTO was to start, that AES's financial situation would have to be stabilized or production transferred to another corporation. Basically, 3M Company wanted to guarantee that AES would be able to finish the product with good quality workmanship. AES was unable to provide such a guarantee or show improved stability and Husband devised a plan to transfer the responsibility for their contract to Air-Clear, LLC. It is undisputed that Air-Clear, LLC utilized AES employees and materials to work on the 3M and other projects. However, Air-Clear, LLC reimbursed AES for all materials purchased by them, for all labor performed by AES employees, plus a 20% profit on the labor. Husband did not breach any fiduciary duty as an officer to AES. He placed AES in a no-lose situation where they could not lose money should any of the projects turn out to be unprofitable and AES made the profit on the labor utilized by Air-Clear, LLC. Without the transfer, there would be no possibility of any profit for either corporation. Thus, if there is a profit in the future, Air-Clear, LLC is entitled to retain same. The Court finds Husband to have exercised acceptable business practice and sound business judgment. It was beneficial and not detrimental to AES. The Court cannot find any dissipation of the net value of AES by husband.<sup>8</sup>

In a letter dated March 1, 2005, O'Connor terminated the lease agreement between AES, as lessee, and Stevanov and O'Connor, as lessors, of the Oldfield Property. The letter was addressed to O'Connor and Stevanov and was signed by O'Connor for AES. Although Air Clear and another company, Sayers & Shipman, LLC ("S&S"),<sup>9</sup> still occupy the property, the Complaint alleges that neither Air Clear nor S&S has paid any rent for their use of the Oldfield Property. O'Connor disputes that allegation, and avers

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<sup>8</sup> Fam. Ct. Order at 5-6.

<sup>9</sup> S&S allegedly is a company owned by O'Connor's current spouse that "engaged in transactions deflected from AES/Air Clear . . . in which she earned profit from the acquisition of equipment 'fixed' by AES/Air Clear." Stevanov Aff. ¶ 27.

that Air Clear has paid the mortgage payments and other obligations of AES and Stevanov in amounts that exceed any reasonable rental value.

On April 22, 2005, O'Connor informed Stevanov that AES could no longer afford to pay her salary, and terminated her employment with AES. O'Connor also allegedly ceased paying the debts of AES for which he and Stevanov were guarantors and allowed AES's charter to become void by failing to pay its franchise taxes after the year 2005.<sup>10</sup> The Complaint further avers that O'Connor "repeatedly told Stevanov that AES was unable to pay her salary at times when he was inflating his own income from Air Clear."<sup>11</sup> In addition, without specifying when statements were made, the Complaint also alleges that O'Connor "continually assured Stevanov that the operations of AES were successful and would provide amply for [her] retirement."<sup>12</sup> The only reasonable inference from the facts alleged is that the latter statements were made before April 2005, when O'Connor terminated Stevanov's employment.

## **B. Procedural History**

Stevanov filed her Complaint on June 11, 2008. On July 15, 2008, O'Connor answered and counterclaimed.<sup>13</sup> On August 15, 2008, O'Connor filed a Motion to

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<sup>10</sup> Compl. ¶ 3.

<sup>11</sup> *Id.* ¶ 31.

<sup>12</sup> *Id.*

<sup>13</sup> The counterclaim contains four counts: subrogation, indemnification, unjust enrichment, and defamation. Def.'s Answer and Countercl. ¶¶ 34-88. The first three counts relate to Air Clear's assumption of the mortgage and payments of

Dismiss Verified Complaint or for Summary Judgment (the “Motion for Summary Judgment”). Stevanov then sought to stay consideration of the Motion for Summary Judgment pending discovery. After briefing and argument on the request for a stay, I entered an order authorizing the parties to conduct discovery, but limited to the issues raised in the Motion for Summary Judgment. The parties since have completed the briefing and presented oral argument on the Motion for Summary Judgment, although Stevanov argues pursuant to Court of Chancery Rule 56(f) that she is entitled to additional discovery before the motion is decided.

### **C. Parties’ Contentions**

Stevanov’s Complaint contains five counts. Count I alleges breach of fiduciary duty against O’Connor. Count II alleges conversion of jointly owned assets. Count III alleges unjust enrichment. Count IV accuses O’Connor of fraud based on certain statements he made concerning AES and its profitability. Count V seeks an accounting for all tangible and intangible assets allegedly taken by O’Connor. In terms of relief, Stevanov seeks damages, an accounting for lost income and property, a determination that O’Connor’s conduct has been in breach of his fiduciary duties, imposition of an equitable lien upon all interests in Air Clear or S&S owned by him or any of his nominees, as well as a constructive trust upon all assets improperly removed from AES by O’Connor and all financial accounts into which monies improperly removed from AES have been deposited.

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taxes, insurance, and expenses on the Oldfield Property. The counterclaim is not subject to the motion for summary judgment.

Through his Motion for Summary Judgment, O'Connor seeks dismissal of the Complaint or, in the alternative, summary judgment in his favor on all counts. O'Connor maintains that the breach of fiduciary duty count fails to state a claim, fails to comply with the requirements for filing a derivative suit, and is barred by laches, issue preclusion, claim preclusion, and law of the case. As to Count II for conversion, O'Connor argues that it must be dismissed because there is no evidence that he and Stevanov owned any assets used by O'Connor besides the Oldfield Property, and that a claim for converting real property is not recognized at law or in equity. O'Connor similarly contends the fraud count does not meet the particularity requirements of Rule 9(b) and otherwise fails to state a claim. O'Connor requests the entry of judgment in his favor on the unjust enrichment count because, among other things, Stevanov has not demonstrated she suffered any detriment. Lastly, on the claim for an accounting, O'Connor seeks summary judgment because Stevanov failed to show the absence of an adequate remedy at law and, in any event, her claims are barred by laches and unclean hands.

O'Connor's Motion for Summary Judgment addresses each of the counts of the Complaint seriatim. At the risk of some repetition as to common defenses, I take up the issues raised by O'Connor's Motion on a similar claim-by-claim basis in roughly the same order.

## II. ANALYSIS

### A. Standard

“Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>14</sup> When considering a motion for summary judgment, the court must view the evidence and the inferences drawn from the evidence in the light most favorable to the nonmoving party. The nonmoving party “may not rest upon mere allegations or denials of the adverse party’s pleading,” but rather, “must set forth specific facts showing that there is a genuine issue for trial.”<sup>15</sup> Under Rule 56(f), the court may deny summary judgment or order a continuance, if the nonmoving party is unable for legitimate reasons to present by affidavit facts essential to justify its opposition.<sup>16</sup> Likewise, summary judgment will be denied when the legal question presented needs to be assessed in the “more highly textured factual setting of a trial.”<sup>17</sup> The Court “maintains the discretion to

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<sup>14</sup> *Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at \*8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

<sup>15</sup> Ct. Ch. R. 56(e).

<sup>16</sup> Ct. Ch. R. 56(f); *Kier Const., Ltd. v. Raytheon Co.*, 2002 WL 31583266, at \*1 (Del. Ch. Nov. 4, 2002).

<sup>17</sup> *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.”<sup>18</sup>

## **B. Breach of Fiduciary Duty**

O’Connor argues that the breach of fiduciary duty claim against him should be dismissed for four reasons. He contends: (1) that Stevanov has not stated a claim upon which relief can be granted, because she has failed to identify what duty is alleged to have been breached and what specific conduct constituted the breach; (2) Stevanov has failed to meet the pleadings requirements for a derivative claim under Rule 23.1 related to making a demand and to averring she has continuously held stock in AES from the time of the breach to the present; (3) laches bars the claims against O’Connor based on the analogous statute of limitations; and (4) issue or claim preclusion, as well as the law of the case, bars prosecution of the breach of fiduciary duty claim. I turn next to those arguments.

### **1. What is the nature of O’Connor’s duty?**

O’Connor is an officer of AES and allegedly controls the company. The facts adduced are sufficient to support both of those allegations, so in that sense O’Connor owes a fiduciary duty of care and loyalty to AES and to Stevanov, the only other AES stockholder.<sup>19</sup> Although there is some confusion in the briefing regarding whether this case involves other potential sources of a fiduciary duty, such as under a *de facto*

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<sup>18</sup> *Tunnell v. Stokley*, 2006 WL 452780, at \*2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at \*11 (Del. Ch. May 24, 2000)).

<sup>19</sup> *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

partnership theory, Stevanov denied relying on any such theory at argument with respect to her interest in AES. Thus, with respect to Stevanov’s interest in AES, the only source of a fiduciary duty she has asserted as to O’Connor stems from his capacity as an officer and controlling person of AES.

## **2. What is the nature of the claimed breach of duty?**

The Complaint does not purport to assert a derivative claim on behalf of AES, and at argument Stevanov’s counsel expressly denied making any such claim. Consequently, the focus of Stevanov’s Complaint is on breaches of duties owed to her personally, either in her capacity as a stockholder of AES or as a co-owner of the Oldfield Property. O’Connor argues that Stevanov’s breach of fiduciary duty claims are entirely derivative rather than direct, and that Stevanov, therefore, cannot bring them on her own behalf instead of AES’s. Thus, as a threshold matter, I must determine whether the alleged breaches of fiduciary duty by O’Connor can support a direct claim.

The Delaware Supreme Court has held that the test for determining whether a claim is derivative or direct is: “Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?”<sup>20</sup> Here, the alleged misconduct includes “a series of self-dealing acts in which he [O’Connor] appropriated the clients and business of AES.”<sup>21</sup> The primary allegation is that O’Connor, who was an officer and controlling person at AES and a

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<sup>20</sup> *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).

<sup>21</sup> Compl. ¶ 23.

principal of Air Clear, allowed or caused Air Clear to use assets of AES for his personal benefit, either directly or through Air Clear. The assets alleged to have been appropriated include (i) the right to use the Oldfield Property,<sup>22</sup> (ii) the equipment owned, leased, or otherwise used by AES, and (iii) intangible assets, such as AES's assembled workforce, customer lists, and proprietary or confidential technologies and information. In addition, Stevanov appears to claim that O'Connor breached his duties by allowing a default judgment to be entered against AES in the *Broin* litigation.

O'Connor argues that these claims are exclusively derivative in nature and, thus, should have been asserted on behalf of AES. Moreover, O'Connor maintains that Stevanov has not met her pleading burden for a derivative claim in that she failed to (i) make a demand on the board or show that demand was futile, or (ii) aver that she

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<sup>22</sup> In the breach of fiduciary duty count, Stevanov asserts that O'Connor "appropriated the Oldfield Point Road property as well as equipment therein jointly owned by Plaintiff and himself." Compl. ¶ 23. It is not clear, however, whether Stevanov means that these assets were held by AES, in which both she and O'Connor had an interest, or that she and O'Connor jointly owned them. The accompanying text addresses the situation in which AES owned or had rights in the equipment and, at certain times, had a possessory interest under a lease in the Oldfield Property. If Stevanov intends, instead, to press a breach of fiduciary duty claim unrelated to her interest in AES, but rather based on her alleged joint ownership with O'Connor, in their individual capacities, of the real estate or equipment, the nature of that claim is less clear, and technically may involve legal duties of joint owners, as opposed to fiduciary duties. Drawing all inferences in Stevanov's favor, however, O'Connor may have occupied a position of trust or superior knowledge vis-à-vis Stevanov as a result of his role as an officer of both AES and Air Clear during the relevant time period. Similarly, because this action concerns commercial property, O'Connor and Stevanov might be viewed as co-venturers with the duties such a relationship entails. For purposes of the pending Motion for Summary Judgment and in light of the relatively early stage of this litigation, I need not resolve those details of Stevanov's claims and simply conclude that she might be able to prove the existence of a fiduciary duty.

contemporaneously and continuously held stock in AES.<sup>23</sup> Because Stevanov, through her counsel, explicitly disclaimed any intent to assert a derivative claim in this litigation, O'Connor's challenge to the adequacy of her pleading under Rule 23.1 is inapposite. Instead, the primary question before me is whether Stevanov has stated a direct claim against O'Connor for breach of his fiduciary duties as an officer and controller of AES.

Neither Stevanov nor O'Connor helpfully addressed this issue by way of citing relevant case law or otherwise. Part of the problem may stem from Stevanov's apparent reliance on a "*de facto* partnership" argument, which her counsel later stated at oral argument was not the basis of her fiduciary duty claim. By then, however, O'Connor had devoted a considerable portion of his reply papers to disproving the existence of a "*de facto* partnership." Based on the representation of Stevanov's counsel, I understand that she is not pursuing a breach of fiduciary duty claim on a *de facto* partnership theory as to any assets of AES. Still, O'Connor's Motion for Summary Judgment offered only a single sentence, without citing any case law, as to why Stevanov's breach of fiduciary duty count must be viewed as involving a derivative, and not a direct, claim.

Regardless, it is conceivable on the facts of this case that imposing derivative requirements would be, as then-Vice Chancellor and now Chief Justice Steele wrote in

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<sup>23</sup> See Def.'s Mot. for Summ. J. ¶ 9; 8 *Del. C.* § 327; Del. Ct. Ch. R. 23.1. By denominating their relatively lengthy submissions as a Motion (19 pages), a Response (31 pages), and a Reply (33 pages), the parties managed to have them accepted for filing, despite the absence of tables of contents and authorities and other indicia of briefs. Nevertheless, the documents clearly are briefs and violate the spirit, if not the letter, as well, of Rule 171. The informality of these submissions has disserved the Court and will not be tolerated in the future.

the limited partnership context in *In re Cencom Income Partners*, “a legal artifice that has no justification and, therefore, put plainly, makes no sense.”<sup>24</sup> In *Cencom*, former Vice Chancellor Steele allowed limited partner plaintiffs to proceed directly where “(1) a business association consists of only two parties in interest . . . ; and, (2) the business association is effectively ended, but for the winding up of its affairs; and (3) the two sides oppose each other in the final dispute over the liquidation of that association.”<sup>25</sup> Although the issue is not free from doubt, the facts in this case and the reasonable inferences from them are sufficient to support an argument that Stevanov has stated a direct claim analogous to that recognized in *Cencom*.

I am mindful, however, of the analysis in *Agostino v. Hicks*, wherein Chancellor Chandler expressed reluctance to “expand *Cencom* into the corporate context because once such a step is made, any attempt by later courts to limit [this exception] would only add to the confusing ambiguities surrounding the direct/derivative distinction.”<sup>26</sup> In *Tooley*, the Supreme Court accepted the analysis and reasoning in *Agostino* as it related to formulating a consistent test for derivative claims, but it made no mention of *Cencom*.<sup>27</sup> Nevertheless, following *Tooley*, the Supreme Court confirmed that certain

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<sup>24</sup> 2000 WL 130629, at \*4 (Del. Ch. Jan 27, 2000).

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> 845 A.2d 1110, 1125 (Del. Ch. Mar. 22, 2004).

<sup>27</sup> *Tooley*, 845 A.2d at 1039. *Tooley* specifically rejected the “special injury test” for determining whether a claim was direct or derivative. *Id.* at 1038-39. Prior to *Tooley*, however, this court had applied the “special injury test” in the corporate context to achieve results analogous to *Cencom*. See *Boyer v. Wilm. Materials*,

claims can proceed both as derivative and direct claims in *Gentile v. Rossette*.<sup>28</sup> There, the ability to pursue the claim directly was key, because even though under *Tooley* the claim could be brought derivatively or directly, as a practical matter, the only claim available was a direct action by the plaintiffs, because the company no longer existed.<sup>29</sup>

In this case, Stevanov may have a cognizable claim for breach of fiduciary duty regarding the use of the Oldfield Property for the reasons previously discussed. Drawing all inferences in Stevanov's favor, I also conclude that Plaintiff may be able to show she has a right, consistent with *Tooley* and its progeny, to pursue directly a claim against O'Connor for misuse of the assets of AES. Although this action is before me on a motion for summary judgment and the question of whether a claim is direct or derivative presents a question of law, the record has not been developed sufficiently to permit a summary resolution of that issue. O'Connor made a blunderbuss motion for summary judgment at the outset of the litigation before general discovery had been taken. While some discovery has occurred, it has not been commensurate with the breadth of the issues O'Connor's motion raised. Stevanov has responded, in part, with a request for additional

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*Inc.*, 754 A.2d 881, 902-03 (Del. Ch. 1999) (treating claims as direct when stockholder of closely held corporation sued directors for breach of fiduciary duty); *Fischer v. Fischer*, 1999 WL 1032768, at \*3-4 (Del. Ch. Nov. 4, 1999) (holding that stockholder asserted direct claims based on fact that if money were returned to corporation defendants would be unjustly enriched). Nevertheless, there are circumstances in which this court has held that cases applying the special injury test have "continuing relevance." *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1176-77 (Del. Ch. 2006).

<sup>28</sup> 906 A.2d 91, 103 (Del. 2006).

<sup>29</sup> *Id.*

discovery and a continuance of the summary judgment motion under Rule 56(f). Furthermore, there are numerous questions of fact related to the degree of control O'Connor exercised during the relevant time period and how much control he now exercises over AES. There also is a question about whether AES still exists, and if not, when it was dissolved, by whom, and under what authority. Indeed, while O'Connor claims that AES no longer exists, he apparently took tax deductions for it as late as 2007.<sup>30</sup> Based on these circumstances and the lack of useful briefing on the availability to Stevanov of a direct claim regarding the alleged misappropriation of AES's assets, I decline to grant summary judgment on that claim based on its exclusively derivative nature, because "a more thorough development of the record would clarify the law or its application."<sup>31</sup>

### **3. Is the breach of fiduciary duty claim barred by laches?**

O'Connor also seeks dismissal of Stevanov's breach of fiduciary duty claim as time-barred by Delaware's three-year statute of limitations.<sup>32</sup> Preliminarily, I note that in a court of equity, the applicable defense for untimely commencement of an action for an equitable claim is laches, rather than the statute of limitations.<sup>33</sup> When exercising

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<sup>30</sup> Stevanov Aff. ¶ 25.

<sup>31</sup> *Tunnell v. Stokley*, 2006 WL 452780, at \*2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at \*11 (Del. Ch. May 24, 2000)).

<sup>32</sup> *See* 10 Del. C. § 8106.

<sup>33</sup> *See Reid v. Spazio*, 2009 WL 962683, at \*3-4 (Del. 2009) (citations omitted); *see also Whittington v. Dragon Group LLC*, 2008 WL 4419075, at \*3 (Del. Ch. June 6, 2008) ("Laches operates to prevent the enforcement of a claim in equity if

ancillary jurisdiction over legal claims, however, this Court will apply the applicable statute of limitations found at law.<sup>34</sup> In addition, because equity follows the law, this Court looks to analogous statutes of limitations and gives those statutes appropriate weight when evaluating causes of action that invoke the Court's concurrent jurisdiction or involve an equitable claim bearing a close resemblance to a legal claim.<sup>35</sup> Thus, this Court has held that a three year statute of limitations applies either directly or analogously to a breach of fiduciary duty claim.<sup>36</sup> Section 8106 specifies a three-year limitations period for actions analogous to those for breach of fiduciary duty, and a cause of action of that type accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.<sup>37</sup>

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the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment. This doctrine is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights.”) (internal quotations omitted).

<sup>34</sup> See *Halpern v. Barran*, 313 A.2d 139, 141 (Del. Ch. 1973) (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970)).

<sup>35</sup> See *U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996). For example, a fraud claim can be both equitable and legal in nature and presumably would be subject to an analogous three-year statute of limitations. See *supra* note 63; Wolfe & Pittenger, § 2.03[b][1][ii], at 2-30.

<sup>36</sup> See *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at \*12 (Del. Ch. June 29, 2005) (evaluating statute of limitations directly or by analogy).

<sup>37</sup> 10 *Del. C.* § 8106; see *Alex. Brown*, 2005 WL 1594085, at \*13.

As the Delaware Supreme Court recently stated in *Reid v. Spazio*:<sup>38</sup>

Although there is no hard and fast rule as to what constitutes laches, it is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant. Therefore, “laches generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim, and third, resulting prejudice to the defendant.”<sup>39</sup>

Because a “court of equity moves upon considerations of conscience, good faith, and reasonable diligence,” the Supreme Court further noted that, unlike a statute of limitations defense, which focuses solely on the passage of time between the challenged conduct and the filing of suit, “the laches inquiry is principally whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties.”<sup>40</sup> Thus, under ordinary circumstances, a suit in equity will be barred by laches if it is filed after the expiration of the analogous statute of limitations; but, “if unusual conditions or extraordinary circumstances make it inequitable . . . to forbid [a suit’s] maintenance after a longer period than fixed by the statute, the [court] will not be bound by the statute, but

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<sup>38</sup> 2009 WL 962683 (Del. 2009).

<sup>39</sup> *Id.* at \*3 (quoting *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005)) (internal citations omitted).

<sup>40</sup> *Reid*, 2009 WL 962683, at \*4 (citations omitted).

will determine the extraordinary case in accordance with the equities which condition it.”<sup>41</sup>

The statute of limitations and laches are affirmative defenses normally raised in an answer.<sup>42</sup> In this case, O’Connor contends the analogous limitations period has lapsed and Stevanov’s claim is time-barred. Because laches is an affirmative defense and he seeks summary judgment, O’Connor bears the burden of proof on that initial inquiry and must prove the absence of any genuine issue of material fact as to, for example, the time of accrual of the cause of action. To survive a motion for summary judgment as to a cause of action that accrued outside the statute of limitations, Stevanov then would have the burden of showing a reasonable inference that one of the tolling doctrines recognized in Delaware applies or that some other extraordinary circumstance exists to make laches inappropriate.<sup>43</sup>

Stevanov filed her Complaint on June 11, 2008. Thus, any cause of action that accrued before June 11, 2005 will be barred unless a tolling exception applies or some other unusual condition counsels against the application of laches. The parameters of Stevanov’s breach of fiduciary duty claims are far from precisely drawn. Stevanov appears to complain primarily that O’Connor used assets of AES for his personal benefit or for the benefit of Air Clear in which he was a principal, initially as the CEO and later

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<sup>41</sup> *Id.* (internal quotations and citations omitted).

<sup>42</sup> *See id.* at \*4 (citations omitted); *Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at \*3 (Del. Super. Oct. 1, 2008) (citations omitted).

<sup>43</sup> *Reid*, 2009 WL 962683, at \*4 (citations omitted).

as the owner, as well. The alleged misappropriation of assets includes: (1) allowing Air Clear to use the Oldfield Property, which Stevanov and O'Connor jointly owned as tenants in common during the relevant time period; (2) allowing Air Clear to use AES equipment; and (3) allowing Air Clear to use other assets of AES, such as its customer list, assembled work force or employees, and confidential information. The net result of this misconduct, according to Stevanov, was that Air Clear effectively took over the assets with which AES had operated as a going concern and used them for the benefit of O'Connor, Air Clear, and another entity with which he was affiliated, S&S, without paying fair value for them.

Stevanov also vaguely suggests that O'Connor's decision to allow entry of a default judgment against AES in the *Broin* case may have constituted a breach of his duties to her. As to that aspect of Count I, O'Connor has failed to demonstrate that the claim is barred by laches. Although Stevanov avers the *Broin* action was brought in January 2005, the default judgment was not entered until 2007. Nothing in the record that would indicate that O'Connor's actions or inaction before the critical date, June 11, 2005, in connection with the *Broin* lawsuit caused the entry of that judgment. Nor has O'Connor shown the existence of any extraordinary circumstance warranting the use of a shorter laches period to preclude such a claim.

Turning to the alleged misappropriation of both tangible and intangible assets of AES, it is not entirely clear when those actions occurred. The Family Court Order establishes that Air Clear's use of AES assets for work on the 3M contract probably began before June 11, 2005, and, perhaps, as early as January 2005, and that this use was

known to all involved at that time and was authorized by the Family Court. The plain language of the Family Court Order indicates that at least some work related to the 3M contract would continue after January 2005. Whether it also would have continued beyond June 11, 2005 is less clear. That issue is immaterial, however, because, as explained *infra* in Part II.B.4, any claims by Stevanov for breach of fiduciary duty based on the use of AES assets or the Oldfield Property in connection with the 3M contract are barred under the doctrines of claim or issue preclusion. Consequently, I will focus on uses of AES's assets and the Oldfield Property for purposes unrelated to the 3M contract.

The record on the pending motion for summary judgment does support a reasonable inference that O'Connor allowed Air Clear to use at least some AES assets and the Oldfield Property after January 2005 for purposes unrelated to the 3M contract. One also could reasonably infer that much of that activity occurred after the critical date of June 11, 2005. Moreover, to the extent any non-3M-related activity occurred between January 2005 and June 11, 2005, O'Connor has not shown that a claim based on such activity should be barred by laches. The existence of the 3M contract probably would have masked any misappropriation, and rendered excusable any delay by Stevanov during that relatively short period in discovering the misconduct and acting to rectify it.

As to Defendant's argument that this is not a situation involving a continuing wrong, I do not find that persuasive at the summary judgment stage. There is no clear line of demarcation between what O'Connor and Air Clear were doing on the 3M job and the other work that Air Clear did. The record contains no details in that regard. Hence, O'Connor has not met his burden of showing summary judgment is appropriate as to

actions relating to the misappropriation of AES assets or the Oldfield Property after January 2005, when the Family Court Order issued, except to the extent they relate to the 3M contract.

To the extent Stevanov asserts a claim based on O'Connor's direct or indirect misappropriation of AES property or the Oldfield Property before January 2005, laches would bar such a claim. Such activity presumptively would give rise to laches because it occurred more than three years before Stevanov filed her Complaint. Thus, to avoid laches, Stevanov must show the existence of sufficient facts to support a reasonable inference that one of the tolling doctrines applies or that some other extraordinary circumstance makes it inequitable to preclude the claim based on laches. The Delaware courts recognize three doctrines for tolling the statute of limitations: (1) inherently unknowable injuries, (2) fraudulent concealment, and (3) equitable tolling.

Under the doctrine of inherently unknowable injury, the statute of limitations will be tolled until the point when an injury becomes empirically discoverable. At that time, the plaintiff would be on inquiry notice of a claim and the statute would begin to run.<sup>44</sup> There is no indication Stevanov relies upon this tolling theory. Under the doctrine of fraudulent concealment, the statute of limitations will be tolled if there was an affirmative act of concealment or some misrepresentation that was intended to "put a plaintiff off the trail of inquiry" until such time as the plaintiff is put on inquiry notice.<sup>45</sup> The third tolling

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<sup>44</sup> *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at \*5 (Del. Ch. July 17, 1998) (citation omitted).

<sup>45</sup> *Id.*

doctrine, equitable tolling, applies when a plaintiff “reasonably relies on the competence and good faith of a fiduciary.”<sup>46</sup>

Stevanov contends that the doctrines of fraudulent concealment and equitable tolling apply in these circumstances. She claims she did not know O’Connor owned Air Clear until his deposition in May 2008. She further contends that O’Connor fraudulently concealed his interest in Air Clear before he became the legal owner by having the shares of Air Clear placed in his son’s name. The record, however, does not support tolling the statute of limitations based on fraudulent concealment as to the ownership of Air Clear. In the January 2005 Family Court Order, the court stated that O’Connor was “the CEO, although not stockholder, of a new limited liability corporation known as [Air Clear].” The Family Court decision also found that O’Connor had devised a plan to transfer AES’s responsibility for the contract with 3M to Air Clear and that Air Clear utilized AES employees and materials to work on that contract. Based on these facts, Stevanov was at least on inquiry notice that O’Connor might have some interest in Air Clear. In addition, she was engaged in litigation then with O’Connor on similar issues and had reason to inquire into that subject. Although she has had the benefit of discovery, Stevanov has not adduced any specific evidence to support tolling the limitations period for fraudulent concealment.<sup>47</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> Stevanov asserted on information and belief that O’Connor purchased his son’s interest in Air Clear for \$10 in early 2008. Stevanov Aff. ¶ 21. Assuming that is true, it would support an inference that O’Connor had some form of beneficial interest in Air Clear before 2008 and, perhaps, as early as January 2005. Yet,

For similar reasons, I find that while Stevanov may have relied on the good faith of O'Connor as a fiduciary in some respects after January 2005, she could not reasonably have done so before then based on the adversarial nature of her relationship with O'Connor on matters related to the Family Court proceeding. Stevanov, therefore, cannot invoke the doctrine of equitable tolling for that period. Thus, any claims based on actions that occurred before January 2005 are barred by laches.

#### 4. Preclusion

O'Connor also argues that the breach of fiduciary duty claim should be dismissed based on the law of the case, issue preclusion, and claim preclusion. First, as for law of the case, the only precedent cited by either party states: “The ‘law of the case’ is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the *subsequent course of the same litigation*.”<sup>48</sup> Because the issues as to which O'Connor claims the law of the case doctrine applies did not arise in “the same litigation,” but rather in the previous Family Court litigation, those issues are not governed by the law of the case.

Second, issue preclusion, or collateral estoppel, provides that “where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a

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Stevanov inexplicably failed to develop the record any further in terms of attempting to show an affirmative act of concealment by O'Connor intended to put her off the trail of inquiry.

<sup>48</sup> *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) (emphasis added).

different cause of action.”<sup>49</sup> To prevent a party from re-litigating an issue, a litigant must show that: “(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) the issue [was] actually litigated; (3) [the issue was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.”<sup>50</sup>

Although the Restatement (Second) of Judgments identifies a few exceptions to the doctrine of issue preclusion,<sup>51</sup> Stevanov has not invoked any of those exceptions and

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<sup>49</sup> *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991).

<sup>50</sup> *Acierno v. New Castle County*, 679 A.2d 455, 459 (Del. 1996).

<sup>51</sup> The recognized exceptions to the doctrine of issue preclusion are:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action,

nothing in the record on summary judgment indicates one or more of them would make the doctrine inapplicable in this case. The question here, therefore, is whether O'Connor has shown the elements of issue preclusion exist and preclude Stevanov from pursuing any of the matters she has asserted in this case.

The doctrine of res judicata or claim preclusion stands for the proposition that “a final judgment on the merits rendered by a court of competent jurisdiction may, in the absence of fraud or collusion, be raised as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, or his privies.”<sup>52</sup> In *Maldonado v. Flynn*, the court adopted the modern, “transactional view” of res judicata, which serves to bar not only the claims asserted in an initial action but also any claims arising out of the same transaction that might have been asserted in the first action.<sup>53</sup>

O'Connor's defenses of issue preclusion and claim preclusion rely solely on the Family Court Order. There is no dispute that the January 2005 Order constitutes a final

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(b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28 (1982). The Delaware courts regularly cite the Restatement (Second) of Judgments with approval. *See, e.g., Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at \*7 (Del. Ch. Aug. 10, 2006); *Orloff v. Shulman*, 2005 WL 3272355, at \*7 (Del. Ch. Nov. 23, 2005).

<sup>52</sup> *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

<sup>53</sup> *Id.*

and valid judgment on the merits of the issues before the Family Court. Nor has Stevanov presented sufficient evidence to demonstrate the presence of any fraud or collusion in connection with that judgment.

In terms of res judicata or claim preclusion, therefore, the question is whether any of the claims asserted in this action were asserted in the Family Court litigation or arise out of the same transaction and might have been asserted in that litigation. To the extent any of Stevanov's claims are based on allegations that O'Connor breached his fiduciary duties to Stevanov or AES by transferring the 3M contract or any other contract work known to Stevanov as of January 2005 to Air Clear or allowing Air Clear to use the Oldfield Property or other assets of AES to perform work on the 3M or such other contract, those claims are barred by claim preclusion. Such claims either were asserted or could have been asserted in the Family Court litigation. For claims based on AES projects that O'Connor did not transfer to Air Clear until sometime after January 2005, however, he has failed to show an entitlement to summary judgment on grounds of claim preclusion. I consider claims of that nature outside the scope of what was raised or could have been raised in the Family Court litigation. Similarly, Stevanov's claims based on the unauthorized use of the Oldfield Property after January 2005 for purposes unrelated to the 3M contract would not be precluded by res judicata. If there are any claims of unauthorized use of the Property for the 3M contract, and it does not appear there are, those claims would be governed by the Family Court Order and that court's

understanding that Air Clear would “reimburse AES for all materials purchased by them, for all labor performed by AES employees, plus a 20% profit on the labor.”<sup>54</sup>

Turning to issue preclusion or collateral estoppel, the elements in dispute appear to be whether: (1) any issue sought to be precluded is the same as that involved in the Family Court litigation; (2) the issue was actually litigated; and (3) the determination of the issue was essential to the prior judgment. One issue present in this action that was involved and litigated in the Family Court action is that, as of January 2005, AES “had no marketability and many debts. It [was] in the process of being phased out and [would] close its doors sometime [in the] spring or summer [of 2005].”<sup>55</sup> The court also concluded that liquidation of AES probably was imminent and that besides Stevanov and O’Connor’s mortgage on the Oldfield Property, AES had “many unsecured debts, for which the parties also [were] personally liable.”<sup>56</sup> Further, the Family Court found that, as of the beginning of January 2005, AES occupied “shaky financial straits” and was unable to provide a guarantee to 3M that it would be able to finish the product it had contracted to supply with good quality workmanship or to “show improved stability.”<sup>57</sup>

The Family Court’s determination of all of these issues was essential to its related rulings that: “[O’Connor] did not dissipate any of the value of AES by failing to reduce

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<sup>54</sup> Fam. Ct. Order at 5.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 5.

its debt load as a result of transferring” the 3M contract to Air Clear and “exercised acceptable business practice and sound business judgment” in that regard.<sup>58</sup> Accordingly, Stevanov is precluded under collateral estoppel or issue preclusion from relitigating in this proceeding any of those facts as to any of her purported causes of action.

### C. Fraud

Stevanov also alleges that O’Connor engaged in fraud. To state a claim for fraud, a plaintiff must allege:

1) a false representation, usually one of fact . . . ; 2) the defendant’s knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff’s action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.<sup>59</sup>

Fraud need not take the form of an overt misrepresentation;<sup>60</sup> it also may occur through concealment of material facts, or by silence when there is a duty to speak.<sup>61</sup>

Additionally, per Court of Chancery Rule 9(b), “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” That is, “[t]o satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the

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<sup>58</sup> *Id.* at 5, 6.

<sup>59</sup> *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

<sup>60</sup> *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>61</sup> *Id.* (“Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading.”).

representation; and (3) what the person intended to gain by making the representations.”<sup>62</sup> Because those requirements apply at the pleading stage, it necessarily follows that a plaintiff claiming fraud must provide at least the same level of specificity to survive a motion for summary judgment.

Stevanov identifies only a couple of allegedly false statements. First, she alleges O’Connor falsely claimed AES was successful and would provide for her retirement. Second, Stevanov avers that O’Connor falsely claimed AES could not afford to pay her salary, when in reality he was inflating his own salary at Air Clear. Initially, I note that both these allegations are so generic and amorphous that they arguably fail to satisfy the particularity requirements of Rule 9(b) and are barred by laches. Further, as discussed *supra* Part II.B.4, Stevanov is collaterally estopped by the Family Court Order from denying that, as of January 2005, “AES ha[d] no marketability and many debts” and it appeared to be “in the process of being phased out and [about to] close its doors sometime in the spring or summer.” Thus, Stevanov could not have justifiably relied on any statement made after the Family Court Order issued that AES was “successful” or that AES would provide anything in the future. Further, any claim for fraud based on statements made before the Family Court Order in January 2005 would be barred by laches in that they would have occurred more than three years before the filing of this

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<sup>62</sup> *Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

litigation in June 2008, and Stevanov has not shown any basis for tolling the limitations period or otherwise avoiding laches in the present circumstances.<sup>63</sup>

Additionally, the statement that AES would provide for her retirement relates to an unknown and uncertain future. To support a claim for fraud, the putative misrepresentation must concern either a past or contemporaneous fact or a future event that falsely implies an existing fact.<sup>64</sup> An unfulfilled promise of future performance will not convert a potential contract claim into a claim sounding in fraud, unless at the time the promise was made the speaker had no intention of performing.<sup>65</sup> Conversely, if a speaker intended when she made a promise to perform it, but sometime later reneges, no

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<sup>63</sup> The analogous statute of limitations for fraud is three years. *See* 10 *Del. C.* § 8106; *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at \*12 (Del. Ch. June 29, 2005).

In the fraud count of her Complaint, Stevanov also alleges that O'Connor told her that AES could no longer afford to pay her salary. This allegation fails to support a claim for fraud for a number of reasons. For example, Stevanov has not presented evidence that this statement was false at the time it was made. Indeed, O'Connor's alleged statement is consistent with the Family Court Order's description of AES. Likewise, the allegation fails the particularity requirements of Rule 9(b). Moreover, even giving Stevanov the benefit of the doubt, this statement presumably was made in or before April 2005, when Stevanov's employment was terminated. Because that is more than three years before Stevanov filed her Complaint and she has not shown any basis for tolling the limitations period or other extraordinary circumstance, this aspect of her fraud claim also would be barred by laches.

<sup>64</sup> *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at \*8 (Del. Ch. Dec. 15, 1997) (applying Florida law but noting that Delaware law is the same).

<sup>65</sup> *See id.* (holding that "a party's failure to keep a promise does not prove the promise was false when made" and that the plaintiff did not adduce evidence showing that the defendant intended to renege at the time it made the promise) (citations omitted).

action for fraud arises.<sup>66</sup> Thus, even if the statements related to the current and future success of AES were not mere puffery<sup>67</sup> and Stevanov somehow could overcome O'Connor's laches defense, Stevanov has failed to state a claim for fraud because she has not met the requirements for such a claim.

#### **D. Conversion**

Conversion is defined as the “act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it.”<sup>68</sup> Stevanov ultimately must prove: that she had a property interest in equipment or other property; that she had a right to possession of the property; and that the property was converted.<sup>69</sup>

Drawing all inferences in Stevanov's favor, as the Court must on a motion for summary judgment, the evidence adduced by Plaintiff conceivably could support a claim

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<sup>66</sup> See *Consol. Fisheries Co. v. Consol. Solubles Co.*, 112 A.2d 30, 37 (Del. 1955) (“It is the general rule that mere expressions of opinion as to probable future events, when clearly made as such, cannot be deemed fraud . . . .”); *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 206 (Pa. 1976) (“Statements of intention, however, which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent. . . . This knowing misrepresentation of one's intention or state of mind is a misrepresentation of an existing fact.”), cited with approval in *Berdel*, 1997 WL 793088, at \*8.

<sup>67</sup> See *Solow v. Aspect Res., LLC*, 2004 WL 2694916, at \*3 (Del. Ch. Oct. 19, 2004) (“[S]tatements such as, ‘Aspect has the skills, experience, and resources to successfully and quickly capitalize on the 3D opportunity’ are mere puffery and cannot form the basis for a fraud claim.”).

<sup>68</sup> *McGowan v. Ferro*, 2004 WL 2423570, at \*19 (Del. Ch. Oct. 8, 2004) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996)).

<sup>69</sup> *Facciolo Constr. Co. v. Bank of Del.*, 514 A.2d 413, 1986 WL 17356, at \*2 (Del. Aug. 12, 1986) (TABLE).

for conversion of the disputed assets, with the exception of the Oldfield Property. There is a factual dispute about whether the parties jointly owned any assets other than the Oldfield Property. It is also reasonable to infer from the evidence that O'Connor both used and benefited at least indirectly from the challenged use of personal property he, himself, and Stevanov jointly owned either in their individual capacities or through their ownership interests in AES. Moreover, even if, as O'Connor alleges, Stevanov benefited from his use of equipment or other personal property that she or AES owned, this point goes to the degree of damage. There is insufficient evidence at this stage to prove conclusively that Stevanov received a net benefit from O'Connor's use of the assets commensurate with the fair value of such use. Thus, I deny summary judgment as to this aspect of Stevanov's conversion claim.

As to the Oldfield Property, a case O'Connor cites in his opening brief provides persuasive authority that "the tort of conversion cannot apply to the use of real property."<sup>70</sup> Because Stevanov did not respond to this argument, she has waived any objection to it.<sup>71</sup> Accordingly, the claim for conversion as to the Oldfield Property is dismissed.<sup>72</sup>

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<sup>70</sup> See *Williams v. City of Dallas*, 53 S.W.3d 780, 787 (Tex. App. 2001).

<sup>71</sup> See *Emerald Partners v. Berlin*, 2003 WL 21003437, at \*43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003).

<sup>72</sup> This conclusion does not impact the sufficiency of Stevanov's claims for breach of fiduciary duty and unjust enrichment based on the allegedly improper, unauthorized use of the Oldfield Property.

## E. Unjust Enrichment

In Count III of the Complaint, Stevanov seeks to recover on an unjust enrichment theory. The elements of unjust enrichment are: “the unjust retention of a benefit to the loss of another, or the retention of money or property against the fundamental principles of justice or equity and good conscience.”<sup>73</sup> In other words, courts look for: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.<sup>74</sup> Stevanov alleges three forms of conduct by which she claims O’Connor “and his proxies” have been unjustly enriched: (1) by creating Air Clear and permitting it to occupy and use the Oldfield Property without compensation to Stevanov; (2) by diverting income to S&S and permitting it to occupy and use the Oldfield Property without compensation to Stevanov; and (3) by converting AES assets in which Stevanov had a shared interest with O’Connor to the use of Air Clear and the exclusion of Stevanov.

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<sup>73</sup> *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

<sup>74</sup> *Oliver v. Boston Univ.*, 2000 WL 1091480, at \*9 (Del. Ch. July 18, 2000) (citations omitted). In the circumstances of this case, where subject matter jurisdiction exists over the unjust enrichment claim under at least the clean-up doctrine, the existence or absence of the fifth element, an adequate remedy at law, is immaterial. Depending on the circumstances, unjust enrichment can be thought of as either a legal or an equitable claim. In *Crosse v. BCBSD, Inc.*, the Delaware Supreme Court held that the Superior Court could award relief for an unjust enrichment claim, when unjust enrichment served as an alternate theory of recovery for a contract claim. 836 A.2d 492, 496-97 (Del. 2003); *see also Testa v. Nixon Uniform Serv., Inc.*, 2008 WL 4958861, at \*3 n.23 (Del. Ch. Nov. 21, 2008) (embracing the proposition that a claim for unjust enrichment by itself does not invoke this court’s subject matter jurisdiction).

O'Connor seeks summary judgment in his favor on Stevanov's unjust enrichment claim on several different grounds. First, O'Connor contends he is entitled to occupy the Oldfield Property as a cotenant absent a contractual bar or an ouster. In the same vein, he claims Air Clear's use of the Property was justified in that he authorized it as a cotenant. Second, Defendant alleges that Air Clear has paid more in mortgage payments and other expenses and taxes than the amount of any benefit it has received from the use of the Oldfield Property or any assets of AES. Indeed, O'Connor argues that both he and Stevanov have benefited from Air Clear's payments toward the mortgage in that without those payments the value of the Oldfield Property would have been eroded or extinguished. Third, O'Connor asserts that Stevanov erroneously equates him with Air Clear and S&S. He avers that he only owns interests in two entities, AES and Air Clear, and that there is no basis for any veil piercing here.<sup>75</sup> Fourth, Defendant contends Stevanov has not shown any impoverishment in that she did not try to use the Oldfield Property, and she has not shown any relationship between Air Clear's use of that property and Stevanov's alleged impoverishment. Lastly, according to O'Connor, Stevanov's unjust enrichment claim, like certain of her other claims, should be dismissed based on the existence of an adequate remedy at law, laches, and unclean hands.

O'Connor maintains that "at common law, in the absence of an agreement to pay rent or an ouster, a cotenant in possession is not liable to his cotenants for the value of his

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<sup>75</sup> O'Connor denies that he ever had any control over, or interest in, S&S.

use and occupation of the property.”<sup>76</sup> In support, he serves up one and only one case—a 1954 Alabama court decision.<sup>77</sup> Without citing to any other case or authority, Stevanov volleys back by vigorously distinguishing that case, but then argues that the principles on which the case was decided actually support her position, and not O’Connor’s. The Court’s own legal research uncovered a Delaware statute and a case decided by a Delaware court on this very topic.<sup>78</sup> In *Carradin v. Carradin*, the court held:

At common law a co-tenant who occupies a co-tenancy without a legal ouster of his co-tenant is not required to account to the co-tenant for his use of the premises . . . . Delaware, however, has corrected the unfairness of the common law by the enactment of 25 *Del. C.* § 702 which grants a co-tenant not in possession a right of action against the co-tenant in possession for the rental value of the premises. *In Re Estate of Moses Journey*, Del. Ch., 44 A. 795 (1892). A co-tenant out of possession, however, has a duty to contribute to the co-tenant in possession as to any payments on a mortgage or for taxes.<sup>79</sup>

Accordingly, O’Connor has not demonstrated as a matter of law that he is not required to account to Stevanov for the rental value of his, or Air Clear’s, use of the Oldfield Property, even absent an ouster. Additionally, there are disputed issues of fact about whether an ouster occurred, as well as what the rental value of the property is.

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<sup>76</sup> Def.’s Mot. for Summ. J. at 9.

<sup>77</sup> *Fundaburk v. Cody*, 72 So. 2d 710 (Ala. 1954).

<sup>78</sup> *See Carradin v. Carradin*, 1980 WL 268076 (Del. Ch. Sept. 22, 1980); 25 *Del. C.* § 702. Because neither side presented any argument even hinting at a choice-of-law issue, I assume Delaware law applies for purposes of this motion.

<sup>79</sup> 1980 WL 268076, at \*2.

O'Connor's second argument relies upon Air Clear having paid the mortgage and taxes on the Oldfield Property. Here, there are similar issues of fact concerning whether he or Air Clear has paid fair market rental value for the use of the property. In particular, as discussed *supra* Part II.B.2, Stevanov and O'Connor jointly own the Oldfield Property. As a cotenant, Stevanov may have rights to compensation from O'Connor for his conduct in arranging for Air Clear or S&S to use the property for his own personal benefit. The record shows Air Clear did make payments on certain mortgages and, perhaps, other obligations of Stevanov and AES during the relevant time period. The parties dispute, however, whether those payments constitute fair compensation. I find there are genuine issues of material fact in that regard.

The remaining grounds advanced for summary judgment on the unjust enrichment claim similarly lack merit. O'Connor's third argument fails because there are issues of material fact about the benefit O'Connor received from his or Air Clear's use of the property, especially given, among other things, the alleged transfer of ownership in Air Clear for \$10 from O'Connor's son to O'Connor and his current spouse's alleged ownership interest in S&S, and concerning whether Air Clear's business entity veil may be pierced on these facts. O'Connor's fourth argument involves the same issues as his first and second arguments, so summary judgment is denied here for those reasons, as well. Finally, I reject his catch-all fifth argument for reasons stated in several other sections of this opinion. Thus, O'Connor has not shown he is entitled to summary judgment on Stevanov's claim based on Air Clear and O'Connor's use of the Oldfield Property without her authorization.

## F. Accounting

Count V of Stevanov's Complaint seeks an accounting. O'Connor urges the Court to deny this relief because none of the wrongdoing alleged in the Complaint has been proven, so there is no need for an accounting. Further, Defendant argues that Stevanov has a key to the AES property and has had access to its books and records, but has not inspected them. Finally, he contends that Count V, like the other counts of the Complaint, is barred by laches and the applicable statute of limitations.

A claim for an accounting in the Court of Chancery generally reflects a request for a particular type of remedy, rather than an equitable claim in and of itself.<sup>80</sup> That appears to be the case here. Having already reviewed the substantive claims in the Complaint in some depth and concluded that many of them are not susceptible to disposition on summary judgment at this time, I also find that O'Connor has not shown a basis for obtaining summary judgment on Stevanov's request for an accounting.

## III. CONCLUSION

For the reasons stated in this opinion, I grant in part and deny in part O'Connor's Motion for Summary Judgment. Specifically, I grant summary judgment in O'Connor's favor on those portions of Count I for breach of fiduciary duty based on actions that occurred before January 2005 or that occurred before June 11, 2005 and relate to the contract Air Clear had with 3M referenced in the Family Court Order, on those portions of Count II for conversion predicated on the use of the Oldfield Property, and on Count

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<sup>80</sup> See, e.g., *Addy v. Piedmonte*, 2009 WL 707641, at \*23 (Del. Ch. Mar. 18, 2009) (citations omitted).

IV for fraud in its entirety. In accordance with Court of Chancery Rule 56(d), the facts found by the Family Court and referred to in Part II.B.4, *infra*, shall be deemed established for purposes of the trial of this action. In all other respects, O'Connor's motion is denied.

**IT IS SO ORDERED.**