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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Robert C. Collins, II, Esquire
Schwartz & Schwartz
1140 South State Street
Dover, DE 19901

John M. LaRosa, Esquire
Law Office of John M. LaRosa
Two East 7th Street, Suite 302
Wilmington, DE 19801

Re: *Halpern Medical Services, LLC v. Geary*
C.A. No. 6679-VCN
Date Submitted: January 25, 2012

Dear Counsel:

Defendant Arthur Geary ("Geary") seeks dismissal of Plaintiffs Halpern Medical Services, LLC's ("HMS") and Halpern Eye Associates, P.A.'s ("HEA" and, together with HMS, collectively, the "Plaintiffs") Complaint. HMS seeks damages under the theories of breach of fiduciary duty, breach of contract, and unjust enrichment. HEA seeks damages under the theories of breach of fiduciary duty and unjust enrichment.[1] As additional relief for these claims, the Plaintiffs

[1] It is not easy to determine which claim was brought by which Plaintiff. *See* Mot. to Dismiss Hr'g Tr. (Hr'g Tr.) at 34. When asked at oral argument to resolve this puzzle, the Plaintiffs'

ask that a constructive trust be imposed on any securities in the Plaintiffs that Geary holds and any of the Plaintiffs' funds that Geary is found to have wrongfully taken. Geary argues that dismissal is warranted because: (1) certain acts underlying the Plaintiffs' claims occurred outside of the applicable three-year statute of limitations, which should be applied by analogy; (2) all of the Plaintiffs' claims are barred by the doctrine of laches; and (3) all of HMS's claims are barred by an arbitration clause (the "Arbitration Clause") in Geary's employment agreement with HMS (the "Employment Agreement").[2]

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counsel seemed unsure of which Plaintiff brought each claim. *Id.* at 34-35, 38. This issue is compounded by the failure of the Complaint to identify in what capacity Geary was acting or which Plaintiff was allegedly harmed. Nonetheless, based on paragraphs 66 through 78 of the Complaint, the Court accepts that the Plaintiffs have collectively brought the claims identified above against Geary. In setting forth the breach of fiduciary duty claim, the Plaintiffs repeatedly refer to the "Plaintiffs," "Halpern companies," "Halpern entities," and "Halpern organizations" and state that Geary owed fiduciary duties to both Plaintiffs. Compl. ¶¶ 66-71. This evidences the Plaintiffs' intent to bring this claim on behalf of both HMS and HEA. In setting forth the unjust enrichment claim, the Plaintiffs refer to the "Plaintiffs" multiple times, and state that funds were taken from "Halpern Eye," which is defined as HMS and HEA collectively. Compl. ¶¶ 66-71. Thus, this claim appears to have been brought on behalf of both HMS and HEA. Finally, in setting forth the breach of contract claim, the Plaintiffs state that Geary breached a contractual duty of loyalty owed to HMS and caused damages to HMS, without any mention of damages suffered by HEA. Moreover, the Complaint does not allege that there was a contract between Geary and HEA. Compl. ¶¶ 75-78. Therefore, this claim was seemingly brought on behalf of HMS only.

[2] Geary originally argued that the Arbitration Clause also barred HEA's claims. *See* Def.'s Opening Br. in Supp. of His Mot. to Dismiss 16-18; Def.'s Reply Br. in Supp. of His Mot. to Dismiss 14-16. At oral argument, however, Geary conceded that the Arbitration Clause does not

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The Plaintiffs are two companies majority-owned by Dr. Harold Halpern ("Halpern"). Before hiring Geary, Halpern was deeply involved in their management and operation. Seeking to reduce his involvement in day-to-day operations, to concentrate more on providing patient care, and to grow his business, Halpern hired Geary in April 2002 as HMS's President and Chief Operating Officer.[3] Although the Complaint is not entirely clear on the issue, Geary may also have become Chairman of HMS's board of directors ("Board") at some point.[4]

At the time of Geary's hiring, he entered into the Employment Agreement with HMS; it was later amended in August 2005. Under the amended Employment Agreement, Geary eventually earned a 30% equity interest in HMS and a 9% equity interest in HEA. The Employment Agreement contained two other relevant

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apply to HEA's claims. *See* Hr'g Tr. at 10 (abandoning the position that both HEA and HMS were subject to the Arbitration Clause and asserting that only HMS was subject to it); *id.* at 29 (summarizing Geary's argument and only arguing that HMS is subject to the Arbitration Clause).

[3] Apparently, Geary later became HMS's chief executive officer ("CEO"). Compl. ¶ 68 (stating that Geary was HMS's CEO).

[4] *Compare* Compl. ¶ 7 (stating that Halpern "has served as HMS' [sic] Chairman since its establishment"), *and* Compl. ¶ 68 (alleging that Geary was HMS's Chairman).

provisions. Section 9 established limits on what, if any, work Geary could perform outside of his position with HMS and limited what investments he could make in companies similar to or competing with HMS. Section 14, the Arbitration Clause, provided that, with certain exceptions not implicated in this case, any dispute "arising out of, or relating to, [the Employment Agreement] or the breach thereof . . . shall first be submitted to arbitration in Kent County, Delaware," and that any arbitration award "shall be final and binding, with no right of appeal."

Geary was experienced in the eye care industry and immediately set out to expand HEA's practice. With the benefit of hindsight, it appears that some of his business decisions were ill-fated. These failed initiatives and Geary's partial equity ownership of, and compensated service on the boards of, third-party companies with which Geary and the Plaintiffs became involved form the crux of the Complaint. The Plaintiffs generally criticize Geary's focus on top-line revenue growth, which they claim resulted in a severe cash crunch and layoffs. More specifically, they take issue with several projects involving third-parties, including: (1) the creation of Halco, LLC, which served as the Plaintiffs' laboratory before being sold; (2) the Plaintiffs' investment in and lease of space from Eden Hill

Medical Center ("Eden Hill"); (3) the Plaintiffs' investment in and purchase and implementation of software created by QM Systems, Inc. ("QM Systems"); and (4) Geary's work for others as a consultant while employed by HMS.

Geary received an equity stake in Halco and personally invested in Eden Hill. Furthermore, Geary received equity in both Eden Hill and QM Systems for his service on their respective boards. At QM Systems, Geary was the Chairman. The Plaintiffs allege that this position occupied a significant amount of his time, and that he improperly allowed QM Systems to utilize the Plaintiffs' resources. Perhaps the Plaintiffs' largest gripe relates to Geary's handling of the implementation of QM Systems's Penta computer program at both HEA and HMS. As alleged in the Complaint, the implementation was ill-conceived, rushed, and a complete disaster, resulting in delayed or lost billings, severely decreased productivity, and patient frustration. Before long, the program was replaced. Finally, the Plaintiffs allege that Geary worked as a paid consultant for other companies while employed by HMS, and wrongfully received reimbursement from the Plaintiffs for expenses not tied to his work for them.

* * *

The Court accepts Geary's argument that HMS's breach of fiduciary duty, unjust enrichment, and breach of contract claims are subject to the Arbitration Clause. The process for determining the arbitrability of a claim, as enunciated in *Parfi Holding AB v. Mirror Image Internet, Inc.*,[5] involves two steps.[6] First, the Court must determine whether the Arbitration Clause is broad or narrow in scope.[7] Here, the Arbitration Clause is undoubtedly broad in scope. In fact, its wording is very close to that of the clause at issue in *Parfi*, which was determined to be broad in scope.[8] Next, the Court must apply the scope of the clause to the asserted claim to determine whether the claim falls within the scope.[9] If the Arbitration Clause is broad in scope, the Court must defer to arbitration on any issues that touch on contract rights or contract performance for which arbitration is the agreed-upon mode of dispute resolution.[10] Moreover, the public policy of Delaware supports

[5] 817 A.2d 149 (Del. 2002).
[6] *Id.* at 155.
[7] *Id.*
[8] *See id.*
[9] *Id.*
[10] *Id.*

arbitration, and there is a strong presumption in favor of arbitration.[11] When "interpreting [an] Arbitration Clause, Delaware public policy comes into play and requires that doubts should be resolved in favor of arbitrability when a reasonable interpretation in that direction exists."[12]

HMS's breach of contract claim is based upon alleged breaches of the Employment Agreement, and, as such, falls within the scope of the Arbitration Clause contained in that Agreement.

HMS's other claims are for breach of fiduciary duty and unjust enrichment. Geary argues that these claims are arbitrable, but HMS makes no argument that either the fiduciary duty claim or the unjust enrichment claim, specifically, is not arbitrable.[13] Since one may reasonably interpret the Employment Agreement as granting HMS rights that the fiduciary duty claim touches on, namely the

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[11] *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429-30 (Del. Ch. 2007).
[12] *Ishimaru v. Fung*, 2005 WL 2899680, at *14 (Del. Ch. Oct. 26, 2005) (citing *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del.1998)).
[13] In its brief, HMS recites a correct statement of law to the effect that an arbitration clause has limits, but it never specifically identifies which, if any, of its claims fall outside of the scope of the Arbitration Clause and why. Pls.' Answering Br. to Def.'s Mot. to Dismiss 11.

"contractual duty of loyalty"[14] embodied in Section 9, and this interpretation has not been challenged,[15] the presumption in favor of arbitrability prevails. Similarly, any unjust enrichment claim brought by HMS may be reasonably interpreted as touching on rights granted by, or performance of, the Employment Agreement. The bases for the unjust enrichment claim are that Geary allegedly received outside compensation in violation of Section 9 of the Employment Agreement and was wrongfully reimbursed for non-HMS expenses; HMS's obligation to reimburse Geary's expenses was governed by Section 5 of the Agreement. This interpretation has not been challenged, and, therefore, the presumption in favor of arbitrability prevails.

HMS and Geary each argues that the other has waived the right to invoke the Arbitration Clause, and the Court rejects both arguments. Due to the strong public policy favoring arbitration, "waiver is not to be lightly inferred."[16] Nonetheless, waiver "will be found if the party seeking arbitration has actively participated in a

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[14] Compl. ¶ 77.
[15] Thus, the Court need not determine whether the fiduciary duty claim would be found not subject to arbitration if HMS had taken a contrary position.
[16] *Dorsey v. Nationwide Gen. Ins. Co.*, 1989 WL 102493, at *1 (Del. Ch. Sept. 8, 1989) (quoting *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 668 (Del. Ch. 1980)).

lawsuit or taken other action inconsistent with the right to arbitration."[17] But, "it is not merely the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of the issue of waiver."[18] Normally, waiver is only found when the demand for arbitration or dismissal due to the arbitrability of the claims "came long after the suit commenced and when both parties had engaged in extensive discovery."[19] Indeed, Delaware courts have focused on these two factors when determining that a party has waived its right to arbitrate.[20]

The Court rejects HMS's argument that, by filing a motion to dismiss, Geary has waived his right to invoke the Arbitration Clause. It cites nothing in support of this contention, and, indeed, parties often debate arbitrability in the context of a

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[17] *Id.* (internal quotations and citation omitted).

[18] *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975) (internal quotations and citation omitted), *overruled on other grounds by Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988). Factors relevant to the prejudice inquiry include: (1) the timeliness or lack thereof of a motion to arbitrate or dismiss due to the arbitrability of the claim; (2) the degree to which the party seeking dismissal or to compel arbitration has contested the merits of its opponent's claims; (3) whether that party has informed its adversary of its intent to arbitrate or seek dismissal, even if it has not yet filed a motion to compel arbitration or dismiss; (4) the extent of its non-merits motion practice; (5) its assent to the Court's pretrial orders; and (6) the extent to which both parties have engaged in discovery. *See Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 926-27 (3d Cir. 1992).

[19] *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068-69 (3d Cir. 1995) (internal quotations and citation omitted).

[20] *See, e.g., Dorsey*, 1989 WL 102493, at *2 (denying the defendant's motion for summary judgment and finding that the defendant had waived its right to enforce arbitration because it had allowed litigation to proceed for two years and obtained the benefit of discovery).

motion to dismiss.[21] Geary filed his motion to dismiss less than two months after the Plaintiffs filed the Complaint. In his motion to dismiss, Geary asserted that HMS's claims were time-barred and subject to mandatory arbitration; he did not challenge these claims on their merits. Finally, he has not participated in discovery. These facts do not establish waiver on the part of Geary.[22]

Similarly, the Court rejects Geary's argument, for which he cites no supporting authority, that HMS has waived its right to arbitrate by filing this suit. While it is, apparently, true that HMS has neither served Geary with a Notice of Intent to Arbitrate, nor sought to compel arbitration in this suit, Geary cites nothing in support of his contention that filing this suit, alone, should act as a waiver of HMS's right to arbitrate, nor does he point to any prejudice that he would suffer if HMS later seeks arbitration.

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[21] *See, e.g.*, *NAMA Holdings*, 922 A2d at 417; *cf. SBC Interactive, Inc. v. Corporate Media Partners*, 1997 WL 810008, at *4-5 (Del. Ch. Dec. 29, 1997) (granting the defendants' motion for summary judgment on the basis that the dispute was arbitrable), *aff'd*, 714 A.2d 758 (Del. 1998).

[22] *See Esaka v. Nanticoke Health Servs., Inc.*, 752 F. Supp. 2d 476, 485 (D. Del. 2010) (rejecting the plaintiff's argument that the defendant waived its right to compel arbitration under similar factual circumstances).

The parties do not dispute that HMS's claims are subject to arbitration. The issue has been fairly raised, and the parties should be left to their choice of dispute resolution methodology. Accordingly, HMS's portion of this action shall be stayed, pending arbitration.

* * *

HEA's claims based upon allegations that Geary recklessly pursued growth of top-line revenue or wrongfully entered into the Eden Hill lease are barred by the statute of limitations, which this Court applies by analogy.[23] This argument does not prevail with regard to the allegation that Geary wrongfully accepted compensation for his service on Eden Hill's Board. In the Plaintiffs' Answering Brief and at oral argument, HEA confusingly asserted: (1) that it never intended for these acts to serve as the bases for any claims, and that these allegations were only presented in the Complaint to explain the background leading up to Geary's

[23] As a court of equity, this Court routinely assesses time-bar defenses under the doctrine of laches, not the statute of limitations. However, "[w]here the plaintiff seeks equitable relief . . . the Court of Chancery applies the statute of limitations by analogy [, and] . . . a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches." *Whittington v. Dragon Group LLC*, 991 A.2d 1, 9 (Del. 2009) (citation omitted). "[U]nless there are some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *Puig v. Seminole Night Club, LLC*, 2011 WL 3275948, at *4 (Del. Ch. July 29, 2011).

actionable conduct; (2) but, nevertheless, that this Court should not dismiss any claim based upon these acts.[24] The related claims are brought under either the theory of breach of fiduciary duty or the theory of unjust enrichment.[25] Both of these causes of action are covered by a laches-borrowed three-year statute of limitations[26] that begins to run at the time the alleged wrongful act occurred.[27] The Complaint was filed on July 19, 2011; therefore, any claim of HEA based upon acts that occurred before July 19, 2008, falls outside of the statute of limitations.

According to the Complaint, Geary "immediately began to pursue a strategy of top line growth" (an alleged wrongful act) upon being hired in 2002.[28] Furthermore, at oral argument, HEA conceded that the Eden Hill lease was

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[24] *See* Compl. ¶¶ 5-7; Hr'g Tr. at 30-32.
[25] The allegations that Geary recklessly pursued a plan to grow top-line revenue and entered into an extravagant lease with Eden Hill sound in breach of the fiduciary duty of care, and, in the case of the Eden Hill lease, possibly loyalty. The allegation that Geary wrongfully served on Eden Hill's Board sounds in unjust enrichment, and, perhaps, breach of the fiduciary duty of loyalty.
[26] *Shandler v. DLJ Merchant Banking, Inc.*, 2010 WL 2929654, at *9 n.88 (Del. Ch. July 26, 2010) (citing 10 *Del. C.* § 8106).
[27] *Graulich v. Dell Inc.*, 2011 WL 1843813, at *6 (Del. Ch. May 16, 2011) (fiduciary duties) (internal quotations and citation omitted); *see also In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) (explaining that in Delaware, generally, the statute of limitations begins to run at the time of the alleged wrongful act) (citation omitted).
[28] Compl. ¶ 15; *see also* Hr'g Tr. at 31.

executed in 2006.[29] Although it is alleged, and HEA concedes, that Geary joined the Eden Hill Board in 2006, it is unclear when he received compensation related to this position.[30] Since the alleged wrongful acts associated with the top-line revenue growth and the Eden Hill lease claims were committed outside of the three-year statute of limitations, HEA's claims are dismissed to the extent they are based upon these alleged acts. Because the timing of the alleged wrongful act supporting the Eden Hill Board membership claim is unclear from the Complaint, Geary's motion to dismiss with respect to this claim is denied.

Since Geary conceded at oral argument that the Arbitration Clause does not bind HEA,[31] his only argument supporting dismissal of HEA's remaining claims is that they are barred by the doctrine of laches.[32] "To prevail on a laches defense, a defendant must show that: (1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered

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[29] Hr'g Tr. at 32.
[30] *See id.* at 32.
[31] The Court agrees that the Arbitration Clause does not bind HEA because HEA was not a party to the Employment Agreement, except in its capacity as a guarantor of any severance obligation arising under Section 3(b) of the Agreement, and, as such, cannot be bound by other provisions in the Agreement.
[32] Geary has not invoked in more common fashion Court of Chancery Rule 12(b)(6) to argue that the Plaintiffs have failed to plead the essential elements of a claim.

resulting prejudice."[33] From the face of the Complaint, Geary cannot satisfy the second and third elements. Geary argues that unreasonable delay is supported by his "change of position" from employee to retiree and an "intervention of rights" related to his supposed entitlement to have his HEA and HMS shares purchased at fair value.[34] While Geary's position has changed, he has not shown any resulting prejudice. His argument that, as a retiree, he no longer has access to records of the Plaintiffs needed to defend this suit is wholly unavailing; such information can be obtained through discovery. Also, his argument related to an "intervention of rights" is difficult to follow. Any right that he may have to redeem his HEA and HMS equity at fair value is not implicated in this action.

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For the foregoing reasons, HEA's claims related to the top-line revenue growth and the Eden Hill lease are dismissed with prejudice. HMS's claims are stayed to allow HMS to pursue arbitration. With respect to HEA's remaining

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[33] *Petroplast Petrofisa Plasticos S.A. v. Ameron Intern. Corp.*, 2011 WL 2623991, at *14 (Del. Ch. July 1, 2011) (citation omitted).
[34] *See Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999) ("Change of position on the part of those affected by non-action, and the intervention of rights are factors of supreme importance" when determining whether there has been an unreasonable delay in bringing a suit.).

claims, including those based upon the compensation Geary allegedly received as an Eden Hill Board member, Geary's motion to dismiss is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K