IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF TRANSAMERICA AIRLINES, INC.	)	
HARRY A. AKANDE, Petitioner/Plaintiff,	)	
v.	)	Civil Action No. 1039-N
TRANSAMERICA AIRLINES, INC., a Delaware corporation, f/k/a, TRANS-INTERNATIONAL AIRLINES, INC., a Delaware corporation, BURTON E. BROOME, SHIRLEY H. BUCCIERI, EDGAR H. GRUBB, and TRANSAMERICA CORPORATION, a Delaware Corporation. Respondents/Defendants.	)	

MEMORANDUM OPINION

Submitted: November 9, 2005
Decided: February 28, 2006

James S. Green, Esquire, George H. Seitz, III, Esquire, Patricia P. McGonigle, Esquire, Kevin A. Guerke, Esquire, SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware, *Attorneys for Petitioner/Plaintiff*

John G. Harris, Esquire, REED SMITH LLP, Wilmington, Delaware, *Attorneys for Defendants*

PARSONS , Vice Chancellor.

Pending before the Court is Plaintiff, Harry Akande's, motion for leave to file his Third Amended Complaint (the "Proposed Complaint"). In the Proposed Complaint, Akande seeks to (i) withdraw his petition for the appointment of a receiver, (ii) add factual allegations to the counts for fraudulent conveyance and conspiracy and for corporate veil piercing to address Defendants' statute of limitations defense, and (iii) add causes of action for breach of fiduciary duties and imposition of a constructive trust. For the reasons stated below, the Court grants Akande's motion in part and denies it in part.

I. BACKGROUND

A. The Nigerian Action

This action seeks to enforce a Nigerian judgment based on a breach of contract dispute. Akande filed the original lawsuit in the High Court of Lagos State in Nigeria on October 13, 1976. On January 19, 1978, that court found in Akande's favor. Then on March 28, 1978, the defendants in the Nigerian action, M.A. Omisade, New African Development Co. Ltd. ("NADCO"), Trans International Airlines, and New African Technical & Electrical Co., Ltd., appealed the decision of the trial court to the Federal Court of Appeal. The Court of Appeal affirmed in part and reversed in part the lower court's decision on May 4, 1983.

On June 3, 1983, Omisade and NADCO appealed that decision to the Supreme Court of Nigeria. The Supreme Court determined that, under Nigerian statutory law, Akande should have brought his action in the Federal High Court instead of the High Court of Lagos State. It therefore reversed the decision of the Federal Court of Appeal and remanded the action for a trial de novo before the Federal High Court.

On remand the case experienced numerous delays between 1988 and 1998, when trial finally commenced. On October 20, 1999, the Federal High Court entered judgment in Akande's favor. Since that time Akande has sought unsuccessfully to enforce the judgment.

B. Procedural History in the Court of Chancery

As part of his enforcement efforts, Akande filed this action on January 21, 2005. His original complaint sought recognition and enforcement of the judgment entered by the Nigerian court against Defendant Transamerica Airlines, Inc. ("TransAir") f/k/a TransInternational Airlines, Inc. ("TIA").[1] By the time Akande commenced this action, the amount of the judgment inclusive of pre- and post-judgment interest exceeded $15 million. To the extent TransAir does not have sufficient assets to satisfy the judgment, the original complaint also sought authorization for Akande to sue its shareholders to collect on it. There is no indication in the record, however, that Akande served TransAir with the original complaint.

On February 17, 2005, before any responsive filings by TransAir, Akande filed an Amended Petition and Complaint. The amended complaint added four more defendants: Burton E. Broome, Shirley H. Buccieri, and Edgar H. Grubb, all of whom are former directors and officers of TransAir, and Transamerica Corporation ("Transamerica") (collectively with TransAir, "Defendants"). Shortly thereafter, Akande's counsel, Blank

[1] The 1999 Nigerian judgment was against TIA. During the pendency of the Nigerian litigation, TIA changed its name to Transamerica Airlines, Inc. or TransAir for short. On December 23, 1998, TransAir filed a Certificate of Dissolution with the Delaware Secretary of State.

Rome LLP, developed a conflict of interest and withdrew. Akande's new counsel, Seitz, Van Ogtrop & Green, PA, entered their appearance on April 13, 2005.

One week later and still before Defendants had filed any response to the amended complaint, Akande filed a second amended complaint, adding claims for fraudulent conveyance and civil conspiracy and seeking to pierce the corporate veil of TransAir to reach its parent, Transamerica.

On June 15, 2005, Defendants moved to dismiss the second amended complaint on the following grounds: (1) Akande failed to obtain leave of Court as required by Rule 15(a) before filing the second amended complaint; (2) 8 *Del. C.* § 279 is inapplicable or Plaintiff has failed to establish "good cause" under section 279 sufficient to warrant either cancellation of the Certificate of Dissolution of TransAir or appointment of a receiver; (3) the Nigerian courts lacked jurisdiction over TIA; (4) both the fraudulent conveyance and civil conspiracy claims are barred by the statute of limitations; (5) Akande has failed to state a claim as to civil conspiracy; and (6) he has failed to plead the fraudulent conveyance and civil conspiracy claims with sufficient specificity to satisfy the requirements of Court of Chancery Rule 9(b).

In response to the motion to dismiss, Akande moved to amend his complaint for a third time on August 15, 2005. According to Akande, the proposed amendments eliminate his petition for appointment of a receiver, assert additional facts in support of the fraud, civil conspiracy and veil piercing claims, and assert claims against the former directors of TransAir for breach of fiduciary duties and imposition of a constructive trust on certain assets transferred to Transamerica.

On November 9, 2005, I heard argument on Plaintiff's motion to amend, Defendants' motion to dismiss, and Plaintiff's motion to exclude certain exhibits or to convert the motion to dismiss into one for summary judgment and permit discovery. At argument, I granted the latter motion and converted the motion to dismiss into a motion for summary judgment and permitted discovery as to the underlying issues. In addition, I took the motion to amend under advisement.

II. STANDARDS

Court of Chancery Rule 15 prescribes the procedures for amending the pleadings.

A. Rule 15(a)

Rule 15(a) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Rule reflects the modern philosophy that cases are to be tried on their merits, not on the pleadings.[2] Rule 15 provides for liberal granting of amendments when justice requires.[3] To defeat a motion to amend, the party opposing the motion must show undue or demonstrable prejudice or bad faith by the moving party.[4] Further, courts generally

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2 *Garrod v. Good*, 203 A.2d 112, 114 (Del. 1964).

3 *Mullen v. Alarm Guard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

4 *Gotham Partners v. Hallwood Realty*, 1999 WL 1022069, at *2 (Del. Ch. Oct. 18, 1999).

will not test the sufficiency of pleadings in ruling on a motion to amend.[5] A motion to amend may be denied, however, if the amendment would be futile in the sense that it would not survive a motion to dismiss under either Court of Chancery Rule 23.1 or 12(b)(6).[6]

B. Rule 15(aaa)

Rule 15(aaa) provides:

> Notwithstanding subsection (a) of this Rule, a party that wishes to respond to a motion to dismiss under Rules 12(b)(6), 12(c) or 23.1 by amending its pleading must file an amended complaint or a motion to amend in conformity with this rule no later than the time such party's answering brief in response to the Rule 12(b), 12(c) or 23.1 motion is due to be filed.

The purpose of Rule 15(aaa) is to "eliminate (or at least sharply curtail) instances in which this court is required to adjudicate multiple motions to dismiss the same action" by requiring plaintiffs, when confronted with a motion to dismiss, to either "stand on the complaint and answer the motion or, instead, to amend or seek leave to amend . . . before the response to the motion is due."[7]

III. ANALYSIS

A. Was the Motion to Amend Improperly Filed?

Defendants contend that Akande's failure to request leave of court to file his second amended complaint, as required by Rule 15(a), bars him from amending his

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5 *Rodriquez v. Palmer*, 2001 WL 1628317, at *3 (Del. Super. Sept. 26, 2001).

6 *Id.*

7 *Stern v. LF Capital Partners, LLC*, 820 A.2d 1143, 1143 (Del. Ch. 2003).

complaint for a third time. Noting that Defendants have not cited any case law for that proposition, Akande argues that Rule 15(a) gives this Court ample authority and discretion to consider the pending motion to amend.

In evaluating the technical sufficiency of Akande's successive efforts to amend his complaint, I note first that he evidently never served his original complaint and did not serve the first amended complaint until February 25, 2005. Akande filed his second amended complaint on April 21, 2005, before Defendants had responded to the amended complaint. On June 15, 2005, Defendants moved to dismiss the second amended complaint, arguing, among other things, that Akande violated Rule 15(a) in not seeking and obtaining court approval before filing that pleading. In that regard, Defendants are correct. By moving to amend in response to the motion to dismiss, however, Akande acted consistently with Rule 15(aaa) and effectively obviated any prejudice to Defendants caused by his mistake.

In the circumstances of this case, I consider it reasonable to treat the motion to amend as referring back to the first amended complaint and incorporating any intervening amendments in the second amended complaint. Based on the extensive briefing and argument on the pending motion, I am convinced that all parties had notice of and understood the claims Akande seeks to pursue in his Proposed Complaint. Furthermore, Defendants have not shown that they have suffered any material prejudice as a result of

the flawed filing of the second amended complaint.[8] I therefore reject that ground for their motion to dismiss.

B. Are the Proposed Amendments to the Fraudulent Conveyance Claim Futile?

According to Defendants, Akande's proposed amendments to Counts IV and V are futile because the statute of limitations bars those claims and the proposed amendments do not cure that defect.[9] Defendants further contend that the Proposed Complaint fails to plead specific and particular facts to justify the application of any tolling doctrine.

At the outset, the Court must synchronize the numbering of the counts to correct the misnumbering in the Proposed Complaint and the confusing numbering used in the briefing. The Proposed Complaint contains six counts: the first three are logically numbered Counts I – III; the remaining three counts are all numbered "Count IV." For purposes of this opinion, I have renumbered the last three counts as follows: Count IV -- Constructive Trust; Count V -- Fraudulent Conveyance and Conspiracy; and Count VI -- Piercing Corporate Veil for Fraud. Thus, the claims Defendants challenge as untimely are actually Counts V and VI. I address Count V for Fraudulent Conveyance first.

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[8] Defendants' hypertechnical argument exalts form over substance. The clumsy handling of Plaintiff's pleadings may be due in part to his need to change counsel at the outset of this action. In any event, the technical deficiencies in Akande's second amended complaint and the disruption caused by his need to seek leave for a further amendment are relatively minor.

[9] Defs.' Combined Rep. Br. in Supp. of their Mot. to Dismiss and in Opp'n to (1) Pl.'s Mot. to Exclude Consideration of Exs. or to Convert Mot. to Dismiss into one for Summ. J. and to Permit Disc.; and (2) Pl.'s Mot. to Amend the Compl. ("DRB") at 28.

An amendment is futile if it would not survive a motion to dismiss under either Court of Chancery Rule 23.1 or 12(b)(6).[10] In determining whether to grant such a motion to dismiss the court accepts as true all the well pleaded facts and takes no evidence with respect to them.[11]

Count V alleges that TransAir fraudulently conveyed substantially all of its assets to its parent, Transamerica, at some point between January 30, 1986 and TransAir's dissolution on or about December 14, 1998,[12] or within the three years following dissolution. The statute of limitations for fraudulent conveyance provides that:

> A cause of action with respect to a fraudulent transfer or obligation under [6 *Del. C.* Ch. 13] is extinguished unless action is brought:
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> (1) Under § 1304(a)(1) of this title, within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;
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> (2) Under § 1304(a)(2) or § 1305(a) of this title, within 4 years after the transfer was made or the obligation was incurred; or
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> (3) Under § 1305(b) of this title, within 1 year after the transfer was made or the obligation was incurred.[13]

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10 *Zimmerman v. Braddock*, 2005 WL 2266566, at *6 (Del. Ch. Sept. 8, 2005).

11 *Certainteed Corp. v. Celotex Corp*., 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).

12 The Proposed Complaint confusingly defines this timeframe as the "Pre-Dissolution Period" (¶ 96), but then seems to refer to the same period as the "Dissolution Period," as well (¶ 116).

13 6 *Del. C.* § 1309. The subsections of sections 1304 and 1305 referred to in section 1309 provide as follows:

Based on the facts alleged, the claimed fraudulent transfer conceivably could fall under any one or more of the subsections of sections 1304 and 1305 referred to in section 1309. Thus, the applicable statute of limitations is either 4 years after the transfer was made or 1 year after the transfer was or could reasonably have been discovered by Akande.

The Proposed Complaint generally avers that "[p]laintiff has yet to discover the times and manner in which the TransAir assets were distributed, but, upon information and belief, such assets were distributed during the Dissolution Period [sic: Pre-Dissolution Period from January 30, 1986 to December 14, 1998] or within the three year

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6 *Del. C.* § 1304(a): "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."

6 *Del. C.* § 1305: (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.

period following dissolution."[14] The Proposed Complaint further alleges that "[a]s of April 15, 1988, TransAir had sold substantially all of its aircraft and related equipment for $86.3 million and ceased its operations."[15] Assuming Akande challenges the bona fides of this transaction, I must evaluate whether his claims based on transactions that occurred on or before April 15, 1988 are time barred.

Because the 1988 transfer took place more than four years before Akande filed his original complaint, these claims can survive the statute of limitations only if the complaint was filed within 1 year after Akande discovered or could reasonably have discovered that transfer. Defendants contend that the facts relating to the alleged fraudulent transfer were disclosed in TransAir's 1987 10K. Plaintiff responds that discovery of those facts would not have led to discovery of the fraud.

Akande admits that he "did not discover any facts relating to the alleged fraudulent transfer until February 2004 upon review of the 1987 10K revealing that TransAir had sold substantially all of its assets."[16] Form 10Ks are publicly available documents. Furthermore, the Proposed Complaint acknowledges that Akande also had

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[14] The dissolution became effective upon the filing of the Certificate of Dissolution on or about December 23, 1998. Compl. ¶ 105; 8 *Del. C.* § 275. Unless otherwise noted, all references to the Proposed Complaint are in the form "Compl. ¶ ____."

[15] Compl. ¶ 102.

[16] Pl.'s Combined Reply Br. in Supp. of (1) Mot. to Am. Compl. and (2) Mot. to Exclude Consideration of Exs. or to Convert Mot. to Dismiss into one for Summ. J. and Permitting Disc. ("PRB") at 3. The Proposed Complaint suggests that the discovery did not occur until "on or about March 1, 2004." *See* Compl. ¶¶ 114, 115.

access to an article dated September 17, 1987 which reported that Transamerica had sold 11 of its aircraft for $86.3 million.[17] Thus, Akande could have reviewed the TransAir 10K in 1987 or at any time from then through 2003 and learned the same information that caused him to file this lawsuit in 2005.

Similarly, TransAir filed a Certificate of Dissolution with the Delaware Secretary of State on December 23, 1998.[18] As with the 10K, the public has access to TransAir's Certificate of Dissolution.

To the extent Akande's claims are subject to the 4 year statute of limitations after the transfer was made or the obligation was incurred, any claims based on transactions or obligations pre-dating January 21, 2001 would be barred unless TransAir made them with "actual intent to hinder, delay or defraud any creditor," including Akande,[19] and the transaction was or could reasonably have been discovered by Akande less than 1year before he commenced this action. I will discuss that exception shortly. For the moment, however, I focus only on the limitations period that runs from the time of the challenged transaction.

The Proposed Complaint potentially encompasses at least some transactions that may not be stale under section 1309. Specifically, the statute does not bar claims for fraudulent conveyances that took place on or after January 21, 2001 – i.e., less than 4

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17 Compl. ¶ 114.

18 Compl. ¶ 81, Ex. A.

19 6 *Del. C.* §§ 1304(a)(1), 1309(1).

years before Akande commenced this action. According to the Proposed Complaint, Defendants made fraudulent transfers within the three year period following dissolution. Measured from the filing date of the Certificate of Dissolution, this three year period would have ended on December 23, 2001. Therefore, the Proposed Complaint would not be futile on limitations grounds to the extent it challenges transfers by TransAir that occurred between January 21, 2001 and December 23, 2001. To that limited extent, therefore, Count V would not be futile.

In addition, Plaintiff could preserve his fraudulent conveyance claims for actions predating January 21, 2004 under the 1 year from actual or constructive discovery exception set forth in 10 *Del. C.* § 1309(1). That is, Akande could avoid dismissal on statute of limitations grounds if he could show that he did not discover and could not reasonably have discovered the questionable transfers until January 21, 2004 or later. The Proposed Complaint alleges that he did not actually discover the relevant public information discussed above until March 1, 2004. Still, the question remains whether Akande reasonably could have discovered that and other pertinent information before January 21, 2004.

In my opinion, Akande reasonably could have discovered the necessary information earlier. The Nigerian judgment he seeks to enforce was entered against TransAir on October 29, 1999. The Court would expect a reasonably prudent person in Akande's shoes to begin investigating their prospects for enforcing such a judgment promptly after receiving it. At a minimum a reasonable inquiry would have included reviewing publicly available financial information relating to TransAir and, perhaps, its

major affiliates, as well. TransAir's 1987 10K, its Certificate of Dissolution and the 1987 article admittedly were publicly available to Akande when he obtained the judgment in October 1999. Had he been reasonably diligent, Akande surely could have discovered that information before January 21, 2004 – more than four years later.

Furthermore, if after obtaining the judgment in 1999 Akande had encountered difficulty finding financial information about TransAir, he could have sued to enforce the judgment and sought ancillary discovery. The Proposed Complaint neither contains any persuasive justification for Akande's failure to act more quickly nor suggests any other grounds for tolling the statute of limitations.[20]

In opposing Akande's motion to amend, Defendants also argue that Count VI, which seeks to pierce the corporate veil based on fraud, likewise should be dismissed as futile on statute of limitations grounds. Count VI rests on more than just Akande's allegations of fraudulent conveyance. It also relies on the alleged breaches of fiduciary duties and relates to a form of relief Akande seeks as to several of his claims. Accordingly, I do not consider Count VI ripe for adjudication in the context of a futility argument in opposition to Plaintiff's motion to amend. I will grant Akande's motion to amend, therefore, as it relates to Count VI. Defendants' limitations argument can be assessed on its motion for summary judgment.

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[20] *See Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993) ("where the complaint itself alleges facts that show that the complaint is filed too late the matter may be raised by defendants' motion to dismiss . . . .").

C. The Conspiracy Claim

In Count V of the Proposed Complaint, Akande avers that "TransAmerica conspired with TransAir in effectuating the fraudulent transfer of substantially all of TransAir's assets to TransAmerica.[21] Defendants contend that allowing Plaintiff to assert such a conspiracy claim would be futile, because Transamerica cannot conspire with its subsidiary TransAir or its officers and agents as a matter of law. In response, Akande urges the Court not to ignore the separate and distinct corporate forms of TransAir and Transamerica.[22] Therefore, they assert that TransAir can conspire with Transamerica.

A civil conspiracy requires a plaintiff to establish that two or more persons combined or agreed with the intent to do an unlawful act or to do an otherwise lawful act by unlawful means.[23] Yet, a corporation generally cannot be deemed to have conspired with its wholly owned subsidiary, or its officers and agents.[24] This general rule does not apply, however, when the officer or agent of the corporation steps out of her corporate role and acts pursuant to personal motives.[25]

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21 Compl. ¶¶ 159-66.

22 In an example of alternative pleading, Akande elsewhere avers that "Transamerica and TransAir did not act with separate corporate identity and are merely the alter ego of each other . . . ." Compl. ¶ 175.

23 *See Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

24 *Amaysing Tech. Corp. v. Cyberair Commc'n, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005).

25 *Id.*

In this case Transamerica is TransAir's sole shareholder. Nothing in the complaint alleges that TransAmerica acted other than in its role as the 100 percent owner of TransAir. In these circumstances, I consider the general principle that a corporate parent and its wholly-owned subsidiary cannot conspire together to be controlling.[26] Consequently, Plaintiff's conspiracy claim is futile because it would fail as a matter of law.

D. Are the Proposed Amendments Relating to the Claim for Breach of Fiduciary Duties Legally Insufficient or Futile?

Defendants assert that the Proposed Complaint offers only conclusory allegations of fiduciary violations and lacks specific and credible facts that support the proposed claim. In particular, Defendants contend that the Proposed Complaint admits the following facts which demonstrate that the proposed fiduciary duty claim is legally insufficient:

> (i) [TransAir] was not aware of and did not participate in the proceedings in Nigeria's Federal Court—the Court that rendered the Judgment, (ii) [TransAir] was dissolved and liquidated prior to the entry of the Judgment, (iii) Plaintiff has never asked for nor reviewed [TransAir's] Plan of Dissolution, and (iv) Defendants were not given notice of the Judgment until many years after [TransAir's] dissolution.[27]

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[26] Akande argues that the caselaw Defendants rely on as precluding conspiracy between a parent corporation and its wholly owned subsidiary is either not controlling in this Court or limited to the Sherman Antitrust Act. PRB at 4-6; Pl.'s Combined Ans. Br. in Opp. to the Mot. to Dismiss and Opening Br. in Supp. of the Mot. to Amend and Mot. to Exclude at 35-37. I have considered Akande's argument but do not find it persuasive.

[27] DRB at 31.

Plaintiff responds that Defendants misstate the Proposed Complaint. Akande further contends that he has sufficiently pled facts to support a breach of fiduciary claim and that Defendants' arguments center on the merits of the claim rather than the legal sufficiency of the pleadings. In analyzing the parties' respective arguments, I also am mindful that Akande purports to state a claim for breach of fiduciary duty for failing to provide for a creditor.

When a company becomes insolvent, its directors owe fiduciary duties to the company's creditors, as well as its stockholders.[28] The important unanswered question is precisely what the contours of those duties are.[29] Delaware case law recognizes, however, that a director breaches her fiduciary duty to creditors if she fails to comply with the dissolution procedures set forth in 8 *Del. C.* §§ 280-282.[30] The purpose of sections 280 to 282 is to provide a judicial mechanism to afford fair treatment to foreseeable future, yet unknown, claimants of a dissolved corporation, while providing corporate directors with a mechanism that will both permit distributions on corporate dissolution and avoid risk that a future corporate claimant will, at a later time, be able to establish that such distribution was in violation of a duty owed to the corporation's creditors on dissolution.[31]

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28 *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d 772, 790-91 (Del. Ch. 2004).

29 *Id.* at 797.

30 *Gans v. MDR Liquidating Corp.*, 1990 WL 2851, at *6-8 (Del. Ch. Jan. 10, 1990).

31 *In re Rego Co.*, 623 A.2d 92, 94 (Del. Ch. 1992).

Sections 280 to 282 of the Delaware General Corporation Law provide two sets of procedures a company can follow upon dissolution. They can follow either the baseline procedure in 8 *Del. C.* § 281(b) or the elective procedures in §§ 280 and 281(a).[32] Because the Proposed Complaint does not indicate which procedure TransAir followed, I will address both.

1. The elective procedures (Sections 280 and 281(a))

The elective procedure of section 280(a)(1) provides that upon dissolution a corporation may give notice of the dissolution, requiring all persons having a claim against the corporation that is not already pending in a proceeding to present it. The statute further provides that "the corporation or successor entity shall mail a copy of such notice by certified or registered mail, return receipt requested, to each known claimant of the corporation including persons with claims asserted against the corporation in a pending action, suit or proceeding to which the corporation is a party."

Thus, to plead a breach of fiduciary duty claim for failure to comply with § 280(a) Akande must present facts from which one could infer that (1) TransAir elected to give notice of its dissolution to its creditors but did not give notice to Akande and (2) that TransAir knew of the pending action in Nigeria. Defendants admit that they did not give Akande notice of the dissolution. Thus, I only address whether Akande pled facts sufficient to support an inference that TransAir knew about the Nigerian action.

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[32] *In re Delta Holdings*, Inc., 2004 WL 1752857, at *6 (Del. Ch. Jul. 26, 2004).

In my opinion, the Proposed Complaint does plead sufficient facts to support an inference that TransAir knew about the Nigerian lawsuit. In particular, the Proposed Complaint alleges that Akande served TIA with a copy of the Nigerian Summons and Amended Claim through E.M.S. Courier Service on October 4, 1990.[33] Further, the Proposed Complaint states that in a hearing before the Federal High Court of Nigeria counsel appeared for TIA[34] and that, on May 27, 1994, counsel for TIA requested that they be stricken as a defendant from the action.[35] Thus, although Defendants deny that they had notice, I conclude based on the allegations in the Proposed Complaint that Akande conceivably could prove that TIA (or TransAir) knew about the Nigerian action.

Defendants further assert that because the Proposed Complaint acknowledges that "TIA was dissolved and liquidated prior to the entry of the Judgment," they did not have to provide for Akande as a potential creditor. Section 280(a)(1), however, explicitly requires a Delaware corporation that decides to provide notice to its creditors to include among those receiving notice "persons with claims asserted against the corporation in a *pending* action, suit or proceeding to which the corporation is a party."[36] Thus, if TransAir did give notice, the statute explicitly requires that it provide such notice of its dissolution to individuals like Akande who have a pending action against it. Consequently, while Akande ultimately may not prevail on these allegations, the

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33 Compl. ¶¶ 59-60.

34 *Id*. ¶¶ 61-62.

35 *Id*. ¶ 71.

36 8 *Del. C.* § 280(a)(1) (emphasis added).

Proposed Complaint alleges sufficient facts to survive a motion to dismiss, if TransAir proceeded under section 280 or 281(a). Thus, amending the fiduciary duty claim would not be futile.

2. The Default Provision (Section 281(b))

Section 281(b) provides:

> A dissolved corporation or successor entity which has not followed the procedures described in § 280 of this title shall, prior to the expiration of the period described in § 278 of this title, adopt a plan of distribution pursuant to which the dissolved corporation or successor entity . . . (ii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party and (iii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation or successor entity within 10 years after the date of dissolution.

As discussed above, the Proposed Complaint supports an inference that Defendants knew of the lawsuit in Nigeria and the resulting judgment. The Proposed Complaint also alleges that TransAir, in connection with its dissolution, did not make a provision that would be reasonably likely to provide compensation for Akande's pending claim.[37] The Proposed Complaint alleges that TransAir and the individual Defendants, who were its directors, distributed TransAir's assets to Transamerica without adequately providing for

[37] Moreover, even if TransAir did provide for Akande's claim, compliance with § 281(b)'s standard, "reasonably likely to be sufficient," is still litigable. *In re Rego Co.*, 623 A.2d at 97.

the claims of TransAir's creditors, including Akande.[38] Consequently, Akande has alleged sufficient facts in support of his claim that Defendants failed to meet the requirements of Section 281(b)(ii) to survive a motion to dismiss. Therefore, the fiduciary duty claim in the Proposed Complaint would not be futile.

E. The Proposed Amendments Relating to the Constructive Trust Claim

Defendants argue that the proposed constructive trust claim attempts to pursue the very relief Akande had sought in his now abandoned petition for the appointment of a receiver and cancellation of TransAir's Certificate of Dissolution. Akande responds that the relief afforded by the appointment of a receiver differs from that of a constructive trust.

A receiver is an agent appointed by the court to take charge of, conserve, and, in most cases, administer the assets of a corporation. A receiver's appointment is for the benefit of all interested parties, including those who may ultimately establish rights in the case.[39] Thus, appointment of a receiver is an intermediate remedy to preserve assets until litigation is resolved.[40] In contrast, "[a] constructive trust is an equitable remedy imposed to compel a person who wrongfully has obtained or asserted title to property, by virtue of fraud . . . to hold such property in trust for the person by whom in equity it should be

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38 Compl. ¶¶ 142, 147.

39 *Hannigan v. Italo Petroleum Corp. of Am.*, 181 A. 4, 5 (Del. Super. 1935).

40 *Beal Bank, SSB v. Lucks*, 1999 WL 413356, at *5 (Del. Ch. June 11, 1999).

owned and enjoyed and convey it to that rightful owner."[41] Thus, imposition of a constructive trust "is really an element of the final relief to which the plaintiff would be entitled only if it proved its case on the merits."[42] A receiver provides relief during litigation whereas a constructive trust provides a form of ultimate relief. Therefore, a constructive trust differs from the relief sought in Akande's abandoned petition for appointment of a receiver.

Additionally, if Akande succeeds in this action, a constructive trust conceivably could constitute an appropriate form of relief. Specifically, on dissolution corporate directors have obligations to creditors and, in appropriate circumstances, "creditors of whom the corporation had reason to know, have an equitable right to follow corporate assets and to impress a constructive trust upon them in the hands of shareholders."[43] Akande's Proposed Complaint alleges that he has an unsatisfied judgment and that Defendant Transamerica, TransAir's sole stockholder, has assets obtained from TransAir from which the judgment can be satisfied. Therefore, for purposes of Akande's motion to amend, I do not consider his proposed claim for a constructive trust to be legally insufficient or futile.

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41 *Prestancia Mgmt. Group, Inc. v. Virginia Heritage Found., II LLC*¸ 2005 WL 1364616, at *6 n.51 (Del. Ch. May 27, 2005) (internal quotations omitted).

42 *Richard Y. Johnson, Inc. v. Just-In Const., Inc.*, 2006 WL 75308, at *2 (Del. Ch. Jan. 6, 2006).

43 *In re Rego Co.*, 623 A.2d at 95.

F. Proposed Withdrawal of Petition for Appointment of a Receiver

Defendants do not oppose the withdrawal of Akande's claim for a receiver. They object, however, to the request in Akande's prayer for relief for the appointment of a receiver as inconsistent with his purported withdrawal of that claim. Since Plaintiff did not respond to this argument, I assume he erred in keeping the request for a receiver in the prayer and order Plaintiff to strike that request from the amended complaint he ultimately files.

IV. CONCLUSION

For the reasons discussed above, I grant Akande's motion to amend in part and deny it in part. Akande shall submit a form of implementing order promptly, on notice to Defendants. The proposed order shall include for filing, upon approval by the Court, a signed version of the Proposed Complaint, as allowed.

IT IS SO ORDERED.