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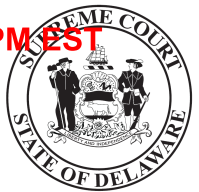

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GORDON LEVEY, Plaintiff below- Appellant, v. BROWNSTONE ASSET MANAGEMENT, LP, BROWNSTONE INVESTMENT PARTNERS, LLC, PINEBANK INVESTMENT PARTNERS, LLC, PINEBANK ASSET MANAGEMENT, LP, DOUGLAS LOWEY, OREN COHEN, and BARRETT NAYLOR, Defendants below- Appellees.	)	FROM AN OPINION OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 5714-VCL No. 551, 2012 **REDACTED PUBLIC VERSION**

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

NATURE OF PROCEEDINGS..1

SUMMARY OF ARGUMENT..2

STATEMENT OF FACTS...5

I. 2004: Formation of BIP and BAM..5

II. 2006: Plaintiff Leaves and Defendants Make Clear That They Believe He Has No Interest in BIP and BAM.............6

III. 2007: Defendants Again Make Clear to Plaintiff That They Believe He Has No Interest in BIP or BAM..............8

IV. 2008: Plaintiff Understood that Defendants Believed He Had No Interest in BIP or BAM...........................8

ARGUMENT..11

I. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH THE BURDEN OF PROOF ON THE MERITS, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT...11

   A. Question Presented...11

   B. Scope of Review..11

   C. Merits of Argument...11

II. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH WHETHER HIS WITHDRAWAL VIOLATED THE DELAWARE LIMITED LIABILITY COMPANY ACT OR THE DELAWARE LIMITED PARTNERSHIP ACT, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT............................12

   A. Question Presented...12

   B. Scope of Review..12

   C. Merits of Argument...12

III. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH THE PURPORTED FACTUAL INCONSISTENCIES, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT....13

A. Question Presented....13

B. Scope of Review....13

C. Merits of Argument....13

IV. PLAINTIFF'S UNTIMELY SUIT IS BARRED BY THE DOCTRINE OF LACHES AND THE STATUTE OF LIMITATIONS....14

A. Question Presented....14

B. Scope of Review....14

C. Merits of Argument....14

1. The Court of Chancery Properly Concluded That Plaintiff's Claim Is Time-Barred....14

2. Plaintiff's Claim Is Barred by the Statute of Limitations....16

a. Plaintiff's Claim Is Subject to the Statute of Limitations....16

b. Plaintiff Filed His Claim After the Statute of Limitations Expired....17

c. Plaintiff's Sole Defense, Equitable Tolling, Does Not Save His Claim....21

i. Plaintiff Waived This Argument....21

ii. Plaintiff Did Not Establish the Required Reasonable Reliance....21

iii. Even If Equitable Tolling Applied, Plaintiff Was Put On Inquiry Notice of His Purported Injury 22

3. Plaintiff's Claim Is Barred By Laches....23

a. The Elements of Laches Are Satisfied.......24

b. Plaintiff's Sole Defense, His Attorney's Purported Error, Does Not Constitute "Unusual Conditions Or Extraordinary Circumstances"..............................26

V. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH WHETHER ANY ORAL AGREEMENT VIOLATED THE STATUTE OF FRAUDS, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT..........................29

A. Question Presented...................................29

B. Scope of Review......................................29

C. Merits of Argument...................................29

CONCLUSION...30

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Adams v. Jankouskas,
452 A.2d 148 (Del. 1982) 24

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999) 13

Fike v. Ruger,
754 A.2d 254 (Del. Ch. 1999), *aff'd*,
752 A.2d 112 (Del. 2000) 3, 16-17, 21, 22, 23

Gamles Corp. v. Gibson,
939 A.2d 1269 (Del. 2007) ....*passim*

Giordano v. Marta,
723 A.2d 833 (Del. 1998) 27

Henglein v. Colt Indus. Operating Corp.,
260 F.3d 201 (3d Cir. 2001) 19

In re Dean Witter P'ship Litig.,
1998 WL 442456 (Del. Ch. July 17, 1998), *aff'd*,
725 A.2d 441 (Del. 1999) 18

Kahn v. Seaboard Corp.,
625 A.2d 269 (Del. Ch. 1993) 4, 20, 23

Kennerly v. State,
580 A.2d 561 (Del. 1990) ....*passim*

Kerns v. Dukes,
2004 WL 766529 (Del. Ch. Apr. 2, 2004) 3, 20, 23, 24

L.R. Oliver & Co. v. B & J Mfg. Co.,
1999 WL 965460 (N.D. Ill. Sept. 30, 1999) 19

Lynch v. City of Rehoboth Beach,
894 A.2d 407 (Del. 2006) 11

Mahan v. Tash,
703 F. Supp. 130 (D.D.C. 1989) 19

Moody v. State,
988 A.2d 451 (Del. 2010) 21

Nat'l Labor Relations Bd. v. Jerry Durham Drywall,
974 F.2d 1000 (8th Cir. 1992) 18

Olson v. Halvorsen,
986 A.2d 1150 (Del. 2009) 29

Quill v. Malizia,
2005 WL 578975 (Del. Ch. Mar. 4, 2005) 26

Quiroga, S.L. v. Fall River Music, Inc.,
1998 WL 851574 (S.D.N.Y. Dec. 7, 1998) 19

Quiroga, S.L. v. Fall River Music, Inc.,
1999 WL 102754 (S.D.N.Y. Feb. 25, 1999) 20

Rapposelli v. State Farm Mut. Auto. Ins. Co.,
988 A.2d 425 (Del. 2010) 29

Reid v. Spazio,
970 A.2d 176 (Del. 2009) 14, 15, 26, 27, 28

SmithKline Beecham Pharm. Co. v. Merck & Co.,
766 A.2d 442 (Del. 2000) 14

Taylor v. Diamond State Port Corp.,
14 A.3d 536 (Del. 2011) 12

U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc., 677 A.2d 497 (Del. 1996) ....*passim*

Vance v. Irwin,
619 A.2d 1163 (Del. 1993) 4, 26-27

Whittington v. Dragon Group, L.L.C.,
991 A.2d 1 (Del. 2009) 17, 24

Worrel v. Farmers Bank of State of Del.,
430 A.2d 469 (Del. 1981) 17-18

Zuill v. Shanahan,
80 F.3d 1366 (9th Cir. 1996) 19, 20

STATUTES

6 *Del. C.* § 18-101..4, 29

6 *Del. C.* § 17-111..17

6 *Del. C.* § 17-101..4, 29

6 *Del. C.* § 18-111..17

NATURE OF PROCEEDINGS

Plaintiff filed this action more than four-and-a-half years after he walked out seeking money earned by Brownstone Investment Partners LLC ("BIP") and Brownstone Asset Management, LP ("BAM") after he left. Plaintiff filed a seven-count complaint on August 12, 2010, and an amended complaint on November 24, 2010. On April 4, 2011, the court dismissed all but one claim for [redacted] of distributions within the three years immediately preceding the filing of the action. Plaintiff filed a second amended complaint on February 27, 2012.

Defendants moved for summary judgment on July 30, 2012, on the grounds that Plaintiff's claim was barred by the statute of limitations and laches. Argument was held September 27, 2012.

Based on undisputed facts, the Court of Chancery found that Plaintiff and his attorney "understood [no later than January 2007] that they had claims . . . and yet for some reason decided not to move forward or failed to move forward at that time." Hr'g Tr. 38.[1] The court granted summary judgment, holding that Plaintiff's claim could not proceed since it was "premised upon the existence of an ownership right that itself was put at issue in January 2007 and then not pursued." *Id.* 39.

[1] The transcript of Oral Argument on Defendants' Motion for Summary Judgment and Rulings of the Court ("Hr'g Tr.") was included as Exhibit A to Appellant's Opening Brief.

SUMMARY OF ARGUMENT

After repeatedly threatening legal action and unsuccessfully filing claims in arbitration, Plaintiff filed this action on August 12, 2010. Plaintiff's claim comes four-and-a-half years after he left BIP and BAM, and long after the expiration of the applicable statute of limitations.

1. Denied. The Court of Chancery did not reach the issue of who bears the burden of proof on the merits. While there is no basis for shifting the burden of proof as Plaintiff suggests, because the Court of Chancery did not resolve that issue, it is not properly before this Court. *See Gamles Corp. v. Gibson*, 939 A.2d 1269, 1275 (Del. 2007); *Kennerly v. State*, 580 A.2d 561, 566 (Del. 1990).

2. Denied. Neither the Delaware Limited Liability Company Act nor the Delaware Limited Partnership Act precluded Plaintiff's withdrawal from BIP and BAM. However, because the Court of Chancery did not resolve this issue, it is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 A.2d at 566.

3. Denied. The purported factual disputes identified by Plaintiff were neither resolved by the Court of Chancery nor formed the basis for the court's decision. As such, those

issues are not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 A.2d at 566.

4. Denied. The Court of Chancery properly held that Plaintiff's claim is time-barred.

The statute of limitations applies by analogy and bars Plaintiff's claim. *See U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000). The undisputed facts show that after Plaintiff left BIP and BAM in January 2006, Defendants did not recognize his claimed ownership interests in those entities. Nevertheless, Plaintiff waited more than four-and-a-half years to file his claim. Equitable tolling, which Plaintiff waived by not raising it below, cannot save Plaintiff's claim in light of the uncontested finding that Plaintiff knew of his claim no later than January 2007 and the absence of evidence that he relied on Defendants' good faith. *Fike*, 754 A.2d at 261.

Plaintiff's claim also is barred by laches, although "[t]he Court need not engage in a laches analysis because Plaintiff['s] claims are barred under the statute of limitations." *Kerns v. Dukes*, 2004 WL 766529, at *6 (Del. Ch. Apr. 2, 2004). "Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous

statutory period." *U.S. Cellular*, 677 A.2d at 502. As a result, "[w]hen the court applies a statute of limitation by analogy . . . it makes no assessment of fairness or prejudice." *Kahn v. Seaboard Corp.*, 625 A.2d 269, 272 (Del. Ch. 1993).

In any event, as discussed above, all three elements of laches are satisfied. First, the Court of Chancery's finding that Plaintiff was aware of his claim by January 2007 is uncontested. Second, Plaintiff's delay beyond the statutory period is unreasonable. The only stated reason for his delay—that his attorney erred—does not save his claim. *See Vance v. Irwin*, 619 A.2d 1163, 1166 (Del. 1993). Lastly, Defendants acted for more than four-and-a-half years under the belief that Plaintiff no longer has an interest in BIP or BAM when, among other things, re-allocating ownership interests, paying substantial distributions, and making tax filings. To allow Plaintiff's claim now would greatly prejudice Defendants.

5. Denied. The statute of frauds does not forbid oral partnership or operating agreements. *See* 6 *Del. C.* § 18-101(7); 6 *Del. C.* § 17-101(12). Nonetheless, the Court of Chancery did not address Plaintiff's statute of frauds argument and, therefore, that issue is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 A.2d at 566.

STATEMENT OF FACTS

The merits of this case involve a dispute over the terms of oral agreements governing a partnership and an LLC, including the withdrawal provisions.

The narrow issue on appeal, however, is whether the Court of Chancery properly found Plaintiff's claim untimely. Accordingly, this Statement of Facts focuses on facts relevant to that inquiry and not the broader merits of the case.[2]

I. 2004: Formation of BIP and BAM

In or about July 2004, Messrs. Lowey and Cohen formed BIP and BAM to manage a hedge fund (the Brownstone Catalyst Fund) focused on corporate credit instruments.[3] B107 at 51:7-52:9.

Messrs. Lowey and Cohen, who owned (directly or indirectly) [REDACTED] of BIP and BAM, invited Messrs. Levey and Naylor (who had previously worked with Mr. Lowey) to become [REDACTED]

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[2] The trial court recognized that it had not "heard the defendants' side of the story yet," Hr'g Tr. 37, and that at this stage of the case it must "giv[e] inferences to the plaintiff as to the merits of his claim," *id.* at 39.

Had the case proceeded to trial, Defendants would have explained that the parties agreed and understood that if one of them left BIP and BAM, he would surrender his ownership interest. That arrangement is not unique. Indeed, it was precisely the arrangement Mr. Cohen made as a non-managing member of the entity he left to join BIP and BAM.

[3] The parties first met in the late 1980s and 1990s through various business connections. *See* B173. Between 1997 and 1998, Messrs. Lowey, Naylor and Levey became affiliated with the newly established Brownstone Investment Group, LLC ("BIG"), an investment firm specializing in high-yield bonds. *Id.*

[redacted] non-managing owners of both entities. B108 at 54:5-55:11. Both accepted. B110 at 64:10-15.

II. 2006: Plaintiff Leaves and Defendants Make Clear That They Believe He Has No Interest in BIP or BAM

On the morning of January 26, 2006, Plaintiff announced that he was leaving, and surrendered his corporate charge card, building identification card and office keys. B128 at 135:4-12; B129 at 138:5-139:6.

Plaintiff knew when he left BIP and BAM of a potential dispute between the parties. Indeed, Plaintiff points out that "[i]n or about February 2006"—almost immediately after he left BIP and BAM—he "retained counsel to represent his interests with regard to the Brownstone entities." Op. Br. 24.

In 2006—following his departure—Plaintiff received a 2005 K-1 for BIP. B1. Unlike the 2004 K-1 for BIP, A41, Plaintiff's 2005 BIP K-1 clearly stated at the top of the first page that it was a "Final K-1" (the "Final BIP K-1"), B1. The Final BIP K-1 also showed that—unlike his prior K-1—Plaintiff ended the year with no capital account:

B1. Plaintiff never received another BIP K-1. B124-25 at 121:25-122:14. He also never received a K-1 for BAM after he left. B125 at 122:15-19, 123:11-21; B152 at 227:9-14. Plaintiff understands that "[p]artners in an entity are supposed to receive a K1," B124 at 119:2-6, as it "exemplifies that this person is a partner in this entity," *id.* at 119:16-120:2.

Plaintiff also never received any distributions after he left, B142 at 185:4-17, even though he believed Defendants were making them annually. B125 at 122:15-19; B138 at 170:24-172:12.

III. 2007: Defendants Again Make Clear to Plaintiff That They Believe He Has No Interest in BIP or BAM

On January 25, 2007—the day before the first anniversary of his departure—Plaintiff purported to "tender . . . demand for payment" for the value of his purported interests in BIP and BAM. A167; A165. In the same communication, Plaintiff's counsel threatened "to pursue the full range of available legal remedies . . . ." A167; A165. On February 15, 2007, BIP and BAM responded, disputing Plaintiff's claimed interests and, among other things, his "basis for believing that he currently holds . . . purported . . . interest[s]" and "is entitled to payment" for those interests. A171; A169. Plaintiff saw these letters in early 2007. B141-42 at 184:13-185:2.

The next day, Plaintiff's attorney responded, calling the February 15 letters "evidence of their bad faith" and "gamesmanship." B7. Plaintiff's attorney stated that absent prompt settlement discussions, he would "deem [the] correspondence as non-responsive and proceed to enforce Mr. Levey's rights through appropriate legal action." *Id.*

IV. 2008: Plaintiff Understood that Defendants Believed He Had No Interest in BIP or BAM

Despite retaining counsel "[i]n or about February 2006," Op. Br. 24, and threatening legal action in January and February 2007, A165; A167; B7, Plaintiff did nothing to enforce his

claimed rights for another year. Then, on February 15, 2008 (more than two years after he left), Plaintiff filed an arbitration demand before FINRA claiming that Defendants wrongfully failed to pay him for his interests in BIP and BAM "*upon his election to withdraw.*" B28 (emphasis added):

FIRST CLAIM
(Breach of Contract)

> Respondents breached their contracts of partnership with Levey by refusing to compensate him for his partnership share in the Brownstone Entities upon his election to withdraw from the partnerships.

Id.[4]

In the demand, Plaintiff claimed he withdrew from BIP and BAM on January 26, 2006, B24—the day he walked out. On that basis, Plaintiff demanded "a cash payment equal to ■ of the value of" BIP and BAM. B29.[5]

On June 24, 2008, the panel advised Plaintiff that neither BIP nor BAM "is . . . compelled by the Rules of FINRA Dispute

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[4] The arbitration demand defines the "Brownstone Entities" as BIG, BIP and BAM. B9.

Plaintiff sought similar relief under claims of promissory estoppel (Second Claim), *see* B29-30, unjust enrichment (Fourth Claim), *see* B31, and conversion (Sixth Claim), *see* B33-34.

[5] As his alternate, and less preferred form of relief, Plaintiff requested that if he could not withdraw, the panel declare his continuing right to receive distributions. B37. Nevertheless, Plaintiff asserted that he had an enforceable right to withdraw and to be paid for his ownership interests.

Resolution to arbitrate disputes with you in this forum." B39; B41. In that same ruling, the panel advised Plaintiff to pursue his claims against those entities "in another forum which does have jurisdiction." B39; B41. Plaintiff understood "that the chair was adamant about the fact that he was not going to in any way force or compel . . . BAM or BIP . . . to participate in the dispute resolution." B143 at 189:20-190:1.

Despite this unambiguous admonition, Plaintiff waited *two more years* to file this action.

Because they understood that Plaintiff no longer held any ownership interests in either entity, Defendants redistributed the interests claimed by Plaintiff, *see* B43; B48, and paid distributions accordingly, *see generally* B53-68. These distributions are reflected in the annual K-1s that they (but not Mr. Levey) received since his departure, which are filed with the IRS.

ARGUMENT

I. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH THE BURDEN OF PROOF ON THE MERITS, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT.

A. Question Presented

Should the Court of Chancery have imposed upon Defendants the burden of disproving Plaintiff's claim? This issue was raised during argument, but was not the basis of the Court of Chancery's decision. Hr'g Tr. 23-24, 36-40.

B. Scope of Review

Had the Court of Chancery reached this question, its allocation of the burden of proof would be reviewed *de novo*. *Lynch v. City of Rehoboth Beach*, 894 A.2d 407 (Del. 2006).

C. Merits of Argument

Plaintiff argues that the Court of Chancery erred by failing to require Defendants to "disprov[e] Levey's legitimate ownership in BAM and BIP." Op. Br. 7. Although the Court of Chancery gave "inferences in favor of the plaintiff as to the merits of his claim," Hr'g Tr. 36-40, because it properly found Plaintiff's claim untimely, it did not resolve this issue.

While there is no basis for shifting the burden as Plaintiff suggests, because the Court of Chancery did not resolve this issue, it is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 A.2d at 566.

II. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH WHETHER HIS WITHDRAWAL VIOLATED THE DELAWARE LIMITED LIABILITY COMPANY ACT OR THE DELAWARE LIMITED PARTNERSHIP ACT, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT.

A. Question Presented

Does the Delaware Limited Liability Company Act or the Delaware Limited Partnership Act preclude Plaintiff's withdrawal from BAM and BIP? This issue was raised in Plaintiff's brief in opposition to the motion for summary judgment, but was not addressed by the Court of Chancery in its decision. Hr'g Tr. 36-40.

B. Scope of Review

Had the Court of Chancery reached this question, its statutory interpretation would be reviewed *de novo*. *Taylor v. Diamond State Port Corp.*, 14 A.3d 536 (Del. 2011).

C. Merits of Argument

Plaintiff argues that because neither BIP nor BAM had an executed written agreement at the time of his departure, the statutory default prevents his withdrawal from those entities. Op. Br. 12-16. Because the Court of Chancery properly found Plaintiff's claim untimely, it did not resolve this issue.

While neither statute precludes Plaintiff's withdrawal, because the Court of Chancery did not resolve this issue, it is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 at 566.

III. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH THE PURPORTED FACTUAL INCONSISTENCIES, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT.

A. Question Presented

Do Plaintiff's various claimed disputes preclude summary judgment? This issue was raised in Plaintiff's brief in opposition to the motion for summary judgment, but was not the basis for the Court of Chancery's decision. Hr'g Tr. 36-40.

B. Scope of Review

Had the Court of Chancery reached this question, this Court would review *de novo* "whether the record shows that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law." *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999) (citation omitted).

C. Merits of Argument

Plaintiff argues that merits-based factual disputes and issues regarding witness credibility preclude entry of summary judgment. Because the Court of Chancery properly found Plaintiff's claim untimely, it did not resolve these factual disputes. While Defendants are confident that they would prevail on the merits following a full trial, because the Court of Chancery did not resolve these factual disputes, this issue is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 at 566.

IV. PLAINTIFF’S UNTIMELY SUIT IS BARRED BY THE DOCTRINE OF LACHES AND THE STATUTE OF LIMITATIONS.

A. Question Presented

Is Plaintiff’s claim barred by laches and/or the statute of limitations? This issue was raised in the parties’ briefs concerning Defendants’ Motion for Summary Judgment, dated July 30, 2012, and at oral argument, and is the basis for the Court of Chancery’s ruling. *See* B179-87; Hr’g Tr. 36-40.

B. Scope of Review

This Court reviews *de novo* the interpretation of the statute of limitations and laches. *Reid v. Spazio*, 970 A.2d 176, 180, 182 (Del. 2009). “Factual findings bearing on” these issues “are reviewed for clear error.” *SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000).

C. Merits of Argument

1. The Court of Chancery Properly Concluded That Plaintiff’s Claim Is Time-Barred

In granting summary judgment, the Court of Chancery found that “Mr. Levey and his attorney at the time were on notice [as of January 2007] of this ownership issue, [and] understood that they had claims . . . and yet for some reason decided not to move forward or failed to move forward at that time.” Hr’g Tr. 38. This was true even though it was “clear that Mr. Levey was, in fact, on notice that he was, in fact being injured.” *Id.* These findings are undisputed.

Because Plaintiff's claim was "premised upon the existence of an ownership right that itself was put at issue in January of 2007 and then not pursued," "the passage of time require[d]" the Court of Chancery to "grant summary judgment." *Id.* at 38-39.

The Court of Chancery was correct. Indeed, Plaintiff does not dispute that he filed his claim after the time set by the analogous statute of limitations. To the contrary, Plaintiff claims his counsel "erred in not pursuing [his] claim in a more timely manner." Op. Br. 29.

Plaintiff concedes that ordinarily "a suit in equity . . . will be stayed after, the time fixed by the analogous statute of limitations at law" unless "unusual conditions or extraordinary circumstances make it inequitable to . . . forbid its maintenance after a longer period than that fixed by the statue." Op. Br. 28 (quoting *Reid*, 970 A.2d at 183). *See also U.S. Cellular*, 677 A.2d at 502 ("Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period."). Plaintiff failed to establish any such circumstances.

Nor can he. As the Court of Chancery found, Defendants repeatedly made clear to Plaintiff that they believed he no longer held interests in BIP or BAM. Hr'g Tr. 38. Among other things:

- In 2006, Plaintiff received the Final BIP K-1 which, unlike his prior K-1, was marked "Final K-1" on the first page and also showed—unlike his prior K-1—no ending capital account balance. *See*, pp. 6-7, *supra*.

- Other than the Final BIP K-1, Plaintiff never received a K-1 for BIP or BAM following his departure. *See*, p. 7, *supra*.

- Plaintiff never received a distribution after he left, although he believed they were being made. *See*, pp. 7-8, *supra*.

- On February 15, 2007, Defendants sent Plaintiff letters disputing his "basis for believing that he currently holds . . . purported . . . interest[s]" and "is entitled to payment" for those interests. *See*, p. 8, *supra*.

Plaintiff understood Defendants' position. Indeed, Plaintiff hired counsel to protect his interests almost immediately after leaving. *See* p. 6, *supra*. In both January and February 2007, Plaintiff threatened to institute legal proceedings. *See*, p. 8, *supra*. And in 2008, Plaintiff filed an arbitration premised upon the theory that he withdrew in January 2006. *See*, p. 9, *supra*.

2. Plaintiff's Claim Is Barred by the Statute of Limitations

a. Plaintiff's Claim Is Subject to the Statute of Limitations

While the Court of Chancery generally is not bound by statutes of limitation, "equity follows the law and, in appropriate circumstances, applies the statute of limitations by analogy, denying relief when claims are brought after the

analogous statutory period." *Fike*, 754 A.2d at 260 (quotation omitted). Thus, "[a]bsent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *U.S. Cellular*, 677 A.2d at 502. This is particularly true where, as here, the claim ultimately is a legal one. *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 9 (Del. 2009) ("[T]he applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law") (quotation omitted).

Plaintiff's claim is one at law for breach of contract.[6] His claim is based upon purported rights under the governing agreements. As the Court of Chancery concluded: "the claim for distributions that remains live in this case is premised upon the existence of an ownership right." Hr'g Tr. 39. As such, the statute of limitations applies to Plaintiff's claim.

b. Plaintiff Filed His Claim After the Statute of Limitations Expired

For a breach of contract claim, "a right of action accrues and the Statute [of Limitations] begins to run at the time the contract is broken, not at the time when the actual damage

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[6] Indeed, but for the Court of Chancery's statutory jurisdiction, *see* 6 *Del. C.* § 17-111, 6 *Del. C.* § 18-111, Plaintiff would have had to bring his claim in a court of law, for it is beyond the Court of Chancery's historical equitable jurisdiction.

results or is ascertained." *Worrel v. Farmers Bank of State of Del.*, 430 A.2d 469, 472-73 (Del. 1981) (quotation omitted). Because Plaintiff filed this action on August 12, 2010, his claim is timely only if the cause of action accrued after August 12, 2007. *See* A232. It did not.

As discussed above, Defendants' words and actions in 2006 and early 2007 made clear that they did not view Plaintiff as maintaining an ownership interest in BIP or BAM. Indeed, those actions reflected a complete disavowal of any continuing ownership interests.[7]

Although not necessary to start the statute of limitations running, Defendants made their position known to Plaintiff on multiple occasions in 2006 and early 2007.[8]

Once Plaintiff received "notice of a clear and unequivocal" rejection of any continuing contractual rights, he was "required to file [his claim] within" the applicable limitations period. *Nat'l Labor Relations Bd. v. Jerry Durham Drywall*, 974 F.2d 1000, 1005 (8th Cir. 1992) (finding claim time-barred); *see also*

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[7] At the very least, these actions were sufficient to prompt a person of "ordinary intelligence and prudence" to question his ownership status, if he in fact believed himself to be an owner. *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999).

[8] Tolling the statute of limitations for the 129 days his arbitration claims were pending, *see* B38 & B39, would not save Plaintiff's claim. Even if the statute is so extended, the claim is untimely.

Henglein v. Colt Indus. Operating Corp., 260 F.3d 201, 213-14 (3d Cir. 2001) (affirming decision finding claim time-barred; "where there was an outright repudiation at the time the employees' services were terminated, it is reasonable to expect that the statute of limitations began to run at that point"). Plaintiff failed to do so.

Zuill v. Shanahan, 80 F.3d 1366 (9th Cir. 1996), involved a dispute concerning a copyright ownership agreement. In that case, "any claims to ownership by [the plaintiffs] were expressly repudiated by [the defendants] in 1987," when they tendered documents "claim[ing] sole ownership." *Id.* at 1368. Plaintiffs brought suit in 1991 seeking "an accounting for their claimed share." *Id.* The district court granted summary judgment for defendants, finding the claims time-barred, and the Court of Appeals affirmed. *Id.*[9]

Plaintiff's stale claim cannot be saved by characterizing each distribution as a new breach. The issue here is not how to calculate distributions or whether Plaintiff was entitled to

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[9] Courts regularly dispose of analogous time-barred claims on summary judgment. *See, e.g., L.R. Oliver & Co. v. B & J Mfg. Co.*, 1999 WL 965460, at **1, 3, 5 (N.D. Ill. Sept. 30, 1999) (granting defendant summary judgment; "when a party to a contract repudiates all obligations and refuses to pay anything . . ., then there is a total breach of the contract and only a single right of actions"); *Quiroga, S.L. v. Fall River Music, Inc.*, 1998 WL 851574, at *33 (S.D.N.Y. Dec. 7, 1998) (same); *Mahan v. Tash*, 703 F. Supp. 130, 132 (D.D.C. 1989) (same).

participate in particular distributions. As the Court of Chancery concluded, the issue is whether Plaintiff retained interests in BIP and BAM. Hr'g Tr. 39. In several analogous cases discussed above, the courts rejected this very argument. *See, e.g.*, *Quiroga, S.L. v. Fall River Music, Inc.*, 1999 WL 102754, at *1 (S.D.N.Y. Feb. 25, 1999) (stating that plaintiff's argument "would lead to a perverse result: the Plaintiffs could conceivably wait 27 years after Defendants' unequivocal repudiation to bring suit and seek to recover damages incurred due to Defendants' biannual breaches in years number 22 to 27 inclusive"); *Zuill*, 80 F.3d at 1369 (rejecting claim that "a new claim arose every time the product was sold, and their 1991 law suit was not barred for sales during the three years" preceding the filing; contract claims "accrue when plain and express repudiation of co-ownership is communicated . . . and are barred three years from the time of repudiation.").

The same rule applies under Delaware law. "[W]here suit can be brought immediately and complete and adequate relief is available, a cause of action cannot be tolled as a continuing violation." *Kerns*, 2004 WL 766529, at *4 (citing *Kahn*, 625 A.2d at 271). That was precisely the case here. As early as 2006, Plaintiff could have brought an action to establish his purported interests in BIP and BAM. He failed to do so.

c. Plaintiff's Sole Defense, Equitable Tolling, Does Not Save His Claim

i. Plaintiff Waived This Argument

Plaintiff argues for the first time on appeal that equitable tolling saves his claim from the statute of limitations. Op. Br. 30. Plaintiff waived that argument by not making it below. *See*, *e.g.*, *Moody v. State*, 988 A.2d 451, 453 (Del. 2010) (stating that argument not presented to trial court was waived).

ii. Plaintiff Did Not Establish The Required Reasonable Reliance

Even if not waived, equitable tolling does not apply. Equitable tolling may apply where a plaintiff is unaware of his claim because he "reasonably relie[d] on the competence and good faith of a fiduciary." *Fike*, 754 A.2d at 261 (quotation omitted). Plaintiff bore the burden of proof on this issue. *U.S. Cellular*, 677 A.2d at 504.

Plaintiff offered no evidence that he was unaware of his claim, that he relied on Defendants' "competence and good faith" as fiduciaries, or that any reliance delayed his filing suit. *Fike*, 754 A.2d at 261. Indeed, Plaintiff does not claim to have relied on Defendants at all. Plaintiff only argues that, as a matter of law, Defendants "had a fiduciary duty to notify Levey of distributions for his interests as provided by statute; they did not." Op. Br. 30. Plaintiff does not claim to have

believed this at the time or acted in reliance upon such a belief. As such, even if that obligation is assumed to have existed for these purposes, without reliance it is not enough.

Nor can Plaintiff establish reasonable reliance. Not only did Defendants repeatedly make their position clear, but Plaintiff repeatedly threatened Defendants with legal action and, in doing so, questioned their good faith. *See*, p. 8, *supra*. Plaintiff's own actions therefore make clear that he was not relying upon Defendants' good faith.

iii. Even If Equitable Tolling Applied, Plaintiff Was Put On Inquiry Notice of His Purported Injury

In any event, equitable tolling only applies "until such time that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, *if pursued,* would lead to the discovery of the injury." *Fike*, 754 A.2d at 261 (quotation omitted); *see also U.S. Cellular*, 677 A.2d at 503 (holding tolling inapplicable because plaintiff "had reason to know of the breach").

The Court of Chancery specifically found it "*clear* that Mr. Levey was, in fact, on notice that he was in fact, being injured." Hr'g Tr. 38 (emphasis added). His ownership interest, and the claim for distributions that flows from it, "was put at issue in January of 2007 and then not pursued," *id.*

at 39. *See Fike*, 754 A.3d at 258-59 (finding that letters from plaintiff's counsel threatening legal action "make clear that she understood the potential dispute and that a claim against her co-venturers was an option."). Plaintiff does not dispute that finding, Op. Br. 27-30, which is well-supported in the record.

Thus even if equitable tolling did apply, by January 2007 (well more than three years before the filing of this action) Plaintiff knew that Defendants did not recognize his claimed interests. That precludes any reliance upon equitable tolling. *See U.S. Cellular*, 677 A.2d at 504 (affirming dismissal of claim where "the undisputed facts . . . indicate that [Plaintiff] was chargeable with notice of the contractual breach").

3. Plaintiff's Claim Is Barred By Laches

As a threshold matter, "[t]he Court need not engage in a laches analysis because Plaintiff['s] claims are barred under the statute of limitations." *Kerns*, 2004 WL 766529, at *6. "Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period." *U.S. Cellular*, 677 A.2d at 502. As a result, "[w]hen the court applies a statute of limitation by analogy . . . it makes no assessment of fairness or prejudice." *Kahn*, 625 A.2d at 272. Nevertheless, as in *Kerns*, laches

"provides an additional justification for granting . . . summary judgment." *Kerns*, 2004 WL 766529, at *6.

a. The Elements of Laches Are Satisfied

"[L]aches generally requires proof of three elements: first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, resulting prejudice to the defendant." *Whittington*, 991 A.2d at 8 (quotations omitted). Each condition is satisfied here.

First, as discussed above, Plaintiff knew in late 2006 (when he received no further K-1 other than the Final BIP K-1, and no distributions), and certainly well before August 2007 (after receiving correspondence questioning his ownership interests), that a dispute existed regarding his claim of ownership of BIP and BAM. *See supra* pp. 7-8. But Plaintiff did not file this action until late 2010.

Second, Plaintiff's delay is unreasonable. "[E]quity aids the vigilant, not those who slumber on their rights." *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982). Plaintiff waited two years to bring *any* claim (albeit on an incompatible theory) and then, after the FINRA arbitration panel directed Plaintiff in June 2008 to bring his claims "in another forum which does have jurisdiction," *see* B39, waited more than *two more years* to file suit.

Third, Defendants would be prejudiced by the untimely assertion of Plaintiff's purported claim of ownership. Before Plaintiff brought this claim, Defendants acted for more than four-and-a-half years under the belief that Plaintiff no longer owned an interest in either BIP or BAM. Indeed, Plaintiff fostered that belief by asserting in arbitration that he had already withdrawn. Defendants redistributed the interests claimed by Plaintiff and paid distributions accordingly. For example, on January 1, 2008, Messrs. Lowey and Cohen awarded Curt Schade B43; B48. They those interests as of January 1, 2009. B43; B48. Defendants have made distributions to Mr. Schade since granting him interests. *See generally* B53-68. The distributions to Mr. Schade and the other owners of BIP and BAM are reflected in the annual K-1s that they (but not Plaintiff) received since Plaintiff's departure, and which are filed with the IRS. If Plaintiff is allowed to pursue his claim, an argument could be made that the filings made based upon those documents are inaccurate.[10]

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[10] Plaintiff claims, without support, that Defendants have been "on notice for years of [his] intent to sue if he was not appropriately compensated." Op. Br. 29. But Plaintiff does not claim to have done anything to provide such notice in the more than two years after his arbitral demand, in which he asserted that he had previously withdrawn, was dismissed.

Defendants would be further prejudiced by permitting Plaintiff to assert a claim for monies distributed years ago when Defendants bore the cost and risk of ownership, while Plaintiff "reserve[ed] to himself the right to leisurely present a claim" once he deemed it to be in his interest. *Quill v. Malizia*, 2005 WL 578975, at *14 (Del. Ch. Mar. 4, 2005) ("Charles and Michelle, who have . . . borne the economic risk associated with ownership, have suffered cognizable prejudice as a result of the delay of the resolution of this suit. Richard used time as an option here, leaving Charles and Michelle with downside risk and reserving to himself the right to leisurely present a claim of ownership that would cloud their title.").

b. Plaintiff's Sole Defense, His Attorney's Purported Error, Does Not Constitute "Unusual Conditions Or Extraordinary Circumstances"

Plaintiff argues that his claim should not be barred because his "former counsel erred in not pursuing [his] claim in a more timely manner." Op. Br. 29. But error by one's lawyer is not an "unusual condition[] or extraordinary circumstance." *Reid*, 970 A.2d at 183. As this Court has held, "our system necessarily imposes upon [parties] the consequences of their chosen attorneys' course of conduct." *Vance*, 619 A.2d at 1166 (affirming dismissal on statute of limitations grounds despite claim of error by attorney) (quotation omitted). Thus, "each

party must be deemed bound by the acts of his lawyer-agent." *Id.* at 1165 (quotation omitted). The same principle "also extends to pre-litigation matters under agency principles." *Id.*

This rule applies even in cases involving only minor delays. In *Giordano v. Marta*, 723 A.2d 833 (Del. 1998), the appellant claimed that the court clerk's failure to mail notice of entry of final judgment excused his untimely appeal, filed one day after the deadline. *Id.* at 834, 836. Rejecting that argument, this Court held that any "unusual circumstances" must "not [be] attributable to the appellant or the appellant's attorney." *Id.* at 837 (quotation omitted). Because the appellant's attorney knew that the final judgment had been submitted to the court, he "had a continuing duty of inquiry to ascertain if the final judgment had been docketed." *Id.* at 837-38. His failure to do so did not excuse the untimely appeal.

Nevertheless, Plaintiff claims that under *Reid*, Defendants must show "extraordinary circumstances that make Levey's claim unreasonably delayed." Op. Br. 29; citing *Reid*, 970 A.2d at 183. That is not correct.

Reid involved a claim that this Court held was timely filed. *Reid*, 970 A.2d at 183. As such, in that case the defendants sought to shorten the limitation period. *Id.* When a defendant seeks to invoke laches to *shorten* the time allowable

under the statute, he bears the burden of establishing such extraordinary circumstances. *Id.* at 183. But when a plaintiff seeks to *extend* the time to bring an otherwise untimely claim, as here, the burden is on him to show extraordinary circumstances to excuse his tardiness. *Id.*

Plaintiff concedes that he seeks to extend the statute of limitations period. As such, under *Reid*, he bears the burden of proof. But as discussed above, Plaintiff cannot prove "extraordinary circumstances" excusing his delay.[11]

[11] Plaintiff also makes the conclusory claim that he "acted in good faith with reasonable diligence" to preserve his claim. Op. Br. 29. The Court of Chancery properly found just the opposite. *See* Hr'g Tr. 38. (finding that after learning of the dispute Plaintiff "for some reason decided not to move forward or failed to move forward at that time.")

V. BECAUSE THE COURT OF CHANCERY PROPERLY FOUND PLAINTIFF'S CLAIM UNTIMELY, IT DID NOT REACH WHETHER ANY ORAL AGREEMENT VIOLATED THE STATUTE OF FRAUDS, AND THIS ISSUE IS NOT PROPERLY BEFORE THIS COURT.

A. Question Presented

Would oral partnership and LLC operating agreements between Defendants and Plaintiff violate the statute of frauds? This issue was raised in Plaintiff's brief in opposition to the motion for summary judgment, *see* B219-24, but was not addressed by the Court of Chancery in its decision, Hr'g Tr. 36-40.

B. Scope of Review

Had the court reached this question, its statutory interpretation would be reviewed *de novo*. *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010).

C. Merits of Argument

Plaintiff argues that the parties' oral agreements concerning the governance of BIP (a Delaware Partnership) and BAM (a Delaware Limited Liability Company), violate the statute of frauds. Op. Br. 31-32 (citing *Olson v. Halvorsen*, 986 A.2d 1150, 1161 (Del. 2009)). Because the Court of Chancery properly found Plaintiff's claim untimely, it did not resolve this issue.

While *Olson* was overruled by statute, *see* 6 *Del. C.* § 18-101(7); 6 *Del. C.* § 17-101(12), because the Court of Chancery did not resolve this issue, it is not properly before this Court. *See Gamles*, 939 A.2d at 1275; *Kennerly*, 580 at 566.

CONCLUSION

For the reasons set forth above, the decision of the Court of Chancery should be affirmed.

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