IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUNRISE VENTURES, LLC, DISABATINO VENTURES, LLC, and LAWRENCE J. DISABATINO, individually and as assignee of Wilmington Trust Company	)	
Plaintiffs,	)	
v.	)	C.A. No. 4119-VCS
REHOBOTH CANAL VENTURES, LLC, CANAL VENTURES II, LLC, ROXY'S REAL ESTATE, LLC, JAMES J. KIERNAN, VERONICA T. KIERNAN, RONALD T. MOORE BUSINESS TRUST, 1B VENTURES, LLC, HOUSTON VENTURES, LLC, and RONALD T. MOORE,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: October 28, 2009
Date Decided: January 27, 2010

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STRINE, Vice Chancellor.

I. Introduction

This action centers on a parcel of land in Rehoboth Beach that was the subject of a series of real estate transactions. The parcel (the "Brown Parcel") was initially held by defendants James Kiernan and Ronald Moore through various entities with the purpose of building a condominium complex on the Brown Parcel, called Blue Point Phase Two (the "Blue Point Project"). Plaintiff Lawrence DiSabatino was acting as a contractor for the Blue Point Project when he was approached by Kiernan and Moore, who offered to sell DiSabatino the Brown Parcel plus five adjacent parcels (collectively, the "Blue Point Property") to continue the work that they had started. DiSabatino accepted on the condition that Kiernan remain involved in the Blue Point Project. To that end, DiSabatino — who acted through DiSabatino Ventures, LLC ("DiSabatino Ventures"), an entity he controlled — and Kiernan—who acted through his entity, Roxy's Real Estate LLC ("Roxy's") — created Sunrise Ventures LLC ("Sunrise Ventures") in September 2004 to serve as the owner of the Blue Point Property (the "2004 Agreement").

Not long after, in May 2005, Kiernan proposed to sell his stake in Sunrise Ventures and other properties and ventures to DiSabatino, a proposal which DiSabatino agreed to in June 2006 (the "2006 Agreement"). DiSabatino continued to pursue the Blue Point Project but, in 2006 and early 2007, discovered adverse environmental conditions present on the Brown Parcel. DiSabatino then belatedly asked for an environmental report on the Brown Parcel, the existence of which he

had been informed about in August 2004 but had never bothered to demand. The Phase One environmental study had been completed in 2002 (the "2002 Phase One Study") and pointed out potential environmental problems with the Brown Parcel. Both Kiernan and Moore were allegedly aware of the 2002 Phase One Study when DiSabatino took over the Blue Point Project, but failed to expressly alert DiSabatino to the potential ramifications of its findings, even though the 2004 Agreement explicitly referred to the existence of the Study. A May 2008 assessment of the damage to the Brown Parcel estimates that remediation of the environmental contamination may cost over $5.0 million.

In his First Amended and Supplemental Verified Complaint (the "Complaint"), DiSabatino and the plaintiff entities controlled by him, Sunrise Ventures and DiSabatino Ventures (together, the "Sunrise Ventures Parties"), assert a number of grounds for relief from the alleged misconduct of Kiernan, Moore, and their affiliated entities[1] (together, the "RCV Parties"). The Sunrise Ventures Parties allege that the failure of Kiernan and Moore to disclose the 2002 Phase One Study breached provisions of the 2004 Agreement, was a breach of fiduciary duty, and also constituted mutual mistake and fraud. The Sunrise Ventures Parties also request equitable rescission of the 2004 and 2006 Agreements, and request equitable contribution for the costs DiSabatino and

[1] The defendant entities include: Rehoboth Canal Ventures, LLC ("Rehoboth Canal Ventures"), Canal Ventures II, LLC ("Canal Ventures"), Roxy's, the Ronald T. Moore Business Trust, 1B Ventures, LLC ("1B Ventures"), and Houston Ventures, LLC ("Houston Ventures"). James Kiernan's wife, Veronica Kiernan, is also named as a defendant.

Sunrise Ventures may have to shoulder because of the hazardous waste on the Brown Parcel.

DiSabatino is also asserting claims as the assignee of Wilmington Trust (the "Assignee Claims"). In April 2009, Wilmington Trust granted DiSabatino all of its rights under several loans and mortgages (the "2002, 2003, and 2004 Loans and Mortgages") that had been used to finance the Blue Point Project. As assignee of these Loans and Mortgages, DiSabatino alleges that Kiernan and Moore breached environmental warranties contained in the Loan and Mortgage agreements, and also seeks indemnification from the guarantors of the 2002, 2003, and 2004 Loans.

The RCV Parties move to dismiss the Complaint in its entirety under a variety of theories, including lack of subject matter jurisdiction, failure to state a claim, and laches. Specifically, the RCV Parties have moved to dismiss all claims brought by the Sunrise Ventures Parties, excluding the Assignee Claims, for failure to state a claim, but also because those claims are time-barred. Because I find that the claims brought directly by the Sunrise Ventures Parties, and not by DiSabatino as the assignee of Wilmington Trust, are time-barred, I need not address the merits of those claims.

After dismissing all claims brought by the Sunrise Ventures Parties other than as Wilmington Trust's assignee as time-barred, I am left with the Assignee Claims brought by plaintiff DiSabatino as assignee of Wilmington Trust. None of the Assignee Claims implicate the equitable jurisdiction of this court, and the court

will not exercise clean-up jurisdiction over them because of the lack of a timely equitable claim. But, for the sake of judicial efficiency, I address the pleading-stage merits of the Assignee Claims. After reviewing the merits of the Assignee Claims, I dismiss the Assignee Claims as to the 2002 and 2003 Loans for failure to state a claim. DiSabatino only wields the rights of Wilmington Trust and, because the principal and interest of the 2002 and 2003 Loans was paid off, and because there is no allegation that Wilmington Trust suffered any other harm as a lender for the environmental conditions on the Brown Parcel, DiSabatino has failed to state a claim. I also dismiss the Assignee Claims as to the 2004 Loan for failure to state a claim because DiSabatino has failed to plead that the 2004 Loan is still outstanding, that Sunrise Ventures as borrower of the 20004 Loan is in default, and that DiSabatino may properly request payment from the guarantors of the 2004 Loan. But, because it may be possible that the 2004 Loan remains outstanding, and that facts may be pled to support a viable cause of action on the Loan, I grant the DiSabatino leave to re-plead his Assignee Claims about the 2004 Loan in Superior Court.

II. Factual Background

As required,[2] the recited facts are drawn from the Complaint, and the documents the Complaint incorporates.

[2] *See, e.g.*, *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246973, at *1 n.1 (Del. Ch. July 24, 2009) ("The facts in this opinion, which must be treated as true for the purpose of [a] motion to dismiss, are drawn from the well pleaded allegations of the . . . complaint and the exhibits attached thereto.").

A. The Brown Parcel And The 2002 And 2003 Loans

Defendants Kiernan and Moore, experienced real estate developers and Delaware residents, began to develop property adjacent to the Lewes and Rehoboth Canal into a condominium project called Blue Point Villas in 2001 ("Blue Point Villas"). Kiernan and Moore operated largely through various business entities that they formed and managed, including Rehoboth Canal Ventures, Canal Ventures, Roxy's, 1B Ventures, and Houston Ventures. From 2002 to 2004, Kiernan and Moore, through their affiliated entities, acquired six parcels of property — the Blue Point Property — adjacent to Blue Point Villas for the purpose of beginning another condominium project — the Blue Point Project.

Before Kiernan and Moore's purchase of the Blue Point Property, the City of Rehoboth Beach had attempted to acquire the Brown Parcel from then-owner Lawrence Brown. Rehoboth Beach entered into a contract to purchase the Brown Parcel, and conducted the 2002 Phase One Study. The Study found that solid waste disposal of petroleum-based products may have damaged the land, and that because of the "significant environmental concerns from current and prior uses of the site," a Phase Two study was recommended, particularly if "the intended land use [was] for human dwellings . . . ."[3]

A Phase Two study was not completed before the contract between Brown and Rehoboth Beach expired, and the Brown Parcel was sold to Adam Gelof, who

[3] Compl. Ex. F (Phase One Environmental Study for City of Rehoboth Beach (July 2002)) at 18.

then sold it to Canal Ventures — one of Kiernan and Moore's entities — in December of 2002. Kiernan and Moore were given the 2002 Phase One Study before their purchase.[4]

Canal Ventures' purchase of the land was financed by a loan from Wilmington Trust, and secured by guarantees from Moore, Kiernan, Canal Ventures, and the Moore Business Trust, and by two mortgages on the Brown Parcel (the "2002 Loan" and the "2002 Mortgage"). The 2002 Loan and Mortgage agreements contained language representing that Canal Ventures, as grantor, had no knowledge of any use or disposal of hazardous substances on the property.[5]

In 2003, 1B Ventures — another of Kiernan and Moore's entities — obtained a construction loan from Wilmington Trust (the "2003 Loan").[6] The 2003 Loan was also guaranteed by Moore, Kiernan, and the Moore Business Trust, as well as by Veronica Kiernan, and was secured by a mortgage on the Brown Parcel granted by Rehoboth Canal Ventures (the "2003 Mortgage"). The

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[4] *See* Compl. Ex. H (Letter from Kelly Dunn Gelof, Tunnell & Raysor P.A., to Michael McDermott, Esquire (Feb. 4, 2009)) (explaining that the 2002 Phase One Study was "provided to Mr. Kiernan and Mr. Moore prior to their purchase of the Gelof properties").

[5] *See* Compl. Ex. I (Wilmington Trust Business Loan Agreement (Dec. 19, 2002)) (the "2002 Loan") at 1 ("Borrower has no knowledge of, or reason to believe that there has been . . . any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Collateral by any prior owners of occupants of any of the Collateral . . . ."); Compl. Ex. J (Wilmington Trust Mortgage (Dec. 19, 2002)) (the "2002 Mortgage") at 2 ("Grantor has no knowledge of, or reason to believe that there has been . . . any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property . . . .").

[6] The Sunrise Ventures Parties did not attach the 2003 Loan agreement to their Complaint.

2003 Mortgage documents represented that Rehoboth Canal Ventures had no knowledge of any environmental concerns with the Brown Parcel.[7] The 2002 Phase One Study was not disclosed with either the loan or the mortgage applications.

B. Sunrise Ventures, The 2004 Agreement, And The 2004 Loan

DiSabatino first became involved with Kiernan and Moore in 2001 as a construction manager and contractor for Blue Point Villas. In 2004, DiSabatino was approached by Kiernan and Moore, who offered to sell him the Blue Point Property so that DiSabatino could take over the development of the proposed Blue Point Project. DiSabatino allegedly conditioned his purchase of the land on Kiernan's continued involvement as developer and partner because he felt that Kiernan's familiarity with the project and with residential development in the Rehoboth area would be beneficial to the Project.

Kiernan and DiSabatino decided that the Blue Point Property would be transferred from Rehoboth Canal Ventures and Canal Ventures to a new entity, Sunrise Ventures. Kiernan would hold a 50% interest in Sunrise Ventures through Roxy's, and DiSabatino would hold the other 50% interest through DiSabatino Ventures. In the process of negotiating the 2004 Agreement, Kiernan emailed his attorney, with a copy to Moore and DiSabatino, and proposed the following term: "[Rehoboth Canal Ventures] shall make available all studies on subject parcel

[7] Compl. Ex. K (Wilmington Trust Construction Mortgage, (Dec. 16, 2003)) (the "2003 Mortgage") at 2 (setting forth the same environmental warranty contained in the 2002 Mortgage).

including but not limited to the Phase One conducted on the Rehoboth City Parcel and Brown Parcel."[8] The term was later altered in the final Agreement to state that Canal Ventures would transfer "all studies on the property, including without limitation, Phase One environmental studies" *after* closing.[9] A representation and warranty stating that Canal Ventures, as seller, was not aware of the presence, or former presence, of any hazardous substances on the property, including petroleum based products, was also included as § 11(s) of the Agreement.[10] DiSabatino did not request a copy of the 2002 Phase One Study or ask about its findings, and, although he was given broad contractual rights to do so,[11] he chose

[8] Compl. Ex. M (email from James Kiernan to Steve Ellis, Esquire (Aug. 8, 2004)) (emphasis added).

[9] Compl. Ex. N (Agreement between Canal Ventures, Roxy's, DiSabatino Ventures, and Rehoboth Canal Ventures for the transfer of Sunrise Ventures to Roxy's and DiSabatino Ventures, and the transfer of the Blue Point Property to Sunrise Ventures (Sept. 17, 2004)) (the "2004 Agreement") at 2.

[10] *Id.* at ¶ 11(s)(1). The provision provided that:

> To the best of Seller's knowledge, there has not been manufactured, stored or deposited by Seller, or to the best of Seller's knowledge, by anyone else, on the Property any Hazardous or Toxic Substance (as used herein, "Hazardous or Toxic Substance" means any substance deemed hazardous or toxic, or required to be disclosed, reported, treated, removed, disposed of or cleaned up by any applicable federal, state or local law, ordinance, code or regulation in effect on the date hereof, and includes, without limitation, polychlorinated, biphenyls, *petroleum-based products* and asbestos.) Seller has received no notice of, any proceeding or inquiry by any governmental authority with respect to the possible remediation of any Hazardous or Toxic Substance on the Property.

Id. (emphasis added).

[11] *Id.* at ¶ 9. Specifically, DiSabatino was allowed to:

> [I]nspect the Property and, when appropriate, to perform surveys, dig hole tests, make engineering and environmental studies, conduct well and septic system inspections, termite inspections, radon tests and perform whatever other tests and evaluations [DiSabatino] elect[ed].

Id.

not to inspect the Blue Point Property or conduct any environmental studies of his own.

The transfer of the Blue Point Property to Sunrise Ventures was finalized in September 2004. Canal Ventures formed Sunrise Ventures to acquire and hold the Blue Point Property, and acted as the sole member of Sunrise Ventures. On September 17, 2004, the 2004 Agreement was executed, and Sunrise Ventures acquired the Blue Point Property from Rehoboth Canal Ventures. Also, as part of the Agreement, Canal Ventures transferred its entire interest in Sunrise Ventures, giving DiSabatino Ventures and Roxy's a 50% interest each in exchange for $4.3 million from DiSabatino and Kiernan.[12]

The $4.3 million payment from Kiernan and DiSabatino was financed by a loan and accompanying mortgage from Wilmington Trust (the "2004 Loan"), which was guaranteed by DiSabatino, Kiernan, and Veronica Kiernan and, like the 2002 and 2003 Loans and Mortgages, contained representations from the borrower that there were no environmental concerns with the property.[13] But this time, unlike the 2002 and 2003 Loans and Mortgages, the borrower was Sunrise Ventures, an entity that DiSabatino co-owned and managed with Kiernan. Neither DiSabatino nor Wilmington Trust was given a copy of the 2002 Phase One Study or any information about its findings in connection with the 2004 Loan.

[12] *Id.* at ¶ B(2); Compl. ¶ 83.
[13] Compl. Ex. L (Wilmington Trust Business Loan Agreement (Oct. 17, 2004)) (the "2004 Loan") (setting forth the same environmental warranty contained in the 2002 Loan).

C. The 2006 Agreement And Release

In the spring of 2005, Kiernan expressed his desire to leave the Blue Point Project, citing health problems. Kiernan encouraged DiSabatino to purchase Kiernan's 50% interest in Sunrise Ventures and to release the Kiernans from their obligations under the 2004 Loan. DiSabatino agreed, and DiSabatino Ventures purchased all of Roxy's interest in several companies, including Sunrise Ventures, and took ownership of several parcels of land in exchange for $270,000 (the "2006 Agreement") and a release of the Kiernans from their 2004 Loan obligations (the "2006 Release") (collectively, the "2006 Agreement and Release").[14]

Specifically, under the terms of the 2006 Agreement, DiSabatino was given the other 50% interest in Sunrise Ventures, a 50% interest in two other limited liability companies (New Milton Ventures, LLC and Savannah Ventures, LLC), and a 33% interest in three additional limited liability companies (1630 Ventures, LLC, Milton Village, LLC, and 2026 Venture, LLC).[15] Kiernan also transferred to DiSabatino his co-ownership of "improved real estate in North Carolina."[16]

The 2006 Release was executed among DiSabatino Ventures, DiSabatino, Eastern States Development Company, Inc., and Francis Julian (who were referred

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[14] Compl. Ex. Q (Agreement between Roxy's, DiSabatino Ventures, and Kiernan (July 2006)) (the "2006 Agreement") (transferring Kiernan's 50% interest in Sunrise Ventures, as well as Kiernan's interest in five other limited liability companies, to DiSabatino Ventures); Compl. Ex. R (Release by and between DiSabatino Ventures, Eastern States Development Company, Inc., Lawrence DiSabatino, Francis Julian, Wilmington Trust, Roxy's, James Kiernan, Veronica Kiernan, and Kathlyn Newcomb (July 31, 2006)) (the "2006 Release").

[15] 2006 Agreement at 13.

[16] *Id.* at 1.

to as the "Remaining Obligors"), Wilmington Trust as "Releasor," and Roxy's, Kiernan, Veronica Kiernan, and Kathy Newcomb as "Releasees." Under the terms of the 2006 Release, Wilmington Trust released the Releasees from all of their obligations under any mortgages, bonds, or personal guarantees as to the six limited liability companies that were transferred to DiSabatino in the 2006 Agreement.[17] The Remaining Obligors also agreed that they would "assume the obligations" in the relevant mortgages, bonds and guarantees "without any right of contribution from Releasees with same effect as if the Bond, Mortgage, and Personal Guarantys have been executed by [the Remaining Obligors] alone."[18]

D. DiSabatino's Discovery Of The Environmental Problems

After Kiernan's disassociation from Sunrise Ventures, DiSabatino continued to move forward with the Blue Point Project. The Project appears to have been progressing as planned until DiSabatino conducted a wetlands/storm drainage study on the Blue Point Property in February 2007, which uncovered environmental concerns with the land — especially with the Brown Parcel. DiSabatino contacted Wilmington Trust, Kiernan, and Kiernan's daughter requesting any environmental studies that had been performed on the Blue Point Property. Wilmington Trust gave DiSabatino the report from an environmental study that had been conducted on the earlier Blue Point Villas project, but it did not possess the 2002 Phase One Study. Kiernan's daughter, was, however, in

[17] 2006 Release at ¶ 3.
[18] *Id.* at ¶ 5.

possession of the 2002 Phase One Study, and delivered the original copy of the Study to DiSabatino in February 2007. Although DiSabatino tried to discuss the Study with Kiernan and Moore, Moore was not responsive and Kiernan replied that he had no responsibility to deal with the environmental problems.

DiSabatino's receipt of the 2002 Phase One Study did not exactly spring him into rapid action. Rather, he proceeded at a deliberate pace. DiSabatino commissioned a series of environmental studies on the Blue Point Property, including another Phase One study and a limited Phase Two study, in the summer of 2007, and a summary assessment of the environmental findings to date in May 2008. As a result of the studies' findings, DiSabatino was told that it would cost from $3.1 million to $5.2 million to remedy the environmental problems with the land sufficiently to permit residential development.[19]

E. The Sunrise Ventures Parties Finally Bring Suit Against The RCV Parties

DiSabatino then waited several months before bringing this action in October 2008, with Wilmington Trust named as a nominal party. The RCV Parties moved to dismiss the action in February 2009. On April 9, 2009, the Sunrise Ventures Parties filed the present Complaint, dismissing Wilmington Trust as a party and adding new defendants. Wilmington Trust was dismissed as a party because, in April 2009, DiSabatino purchased all of Wilmington Trust's rights, titles, and interest in the 2002, 2003, and 2004 Loans and Mortgages. Wilmington Trust's assignment of rights to DiSabatino expressly gave DiSabatino the right to

[19] Compl. ¶ 121.

bring claims and defenses related to the Loans and Mortgages in his capacity as assignee of Wilmington Trust.[20]

F. The Claims Asserted In The Complaint

The Complaint brings fourteen counts, asserting a variety of grounds for relief from the RCV Parties' failure to disclose the environmental conditions of the Brown Parcel to either Sunrise Ventures or to Wilmington Trust. For the sake of clarity, I address the claims in two categories — those brought by the Sunrise Ventures Parties in their own capacity, and those brought by DiSabatino as assignee of Wilmington Trust.

In their own capacity, the Sunrise Venture Parties bring a number of claims that all depend on the proposition that Sunrise Ventures was harmed because Kiernan and his affiliates did not disclose the condition of the Brown Parcel.[21]

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[20] *See* Compl. Ex. A (Absolute Assignment and Sale of Mortgage, Note and Other Loan Documents (Apr. 2, 2009)) ("2009 Assignment"). Specifically, the 2009 Assignment transferred to DiSabatino all of Wilmington Trust's "right, title and interest in and to the Original Loan Documents, including but not limited to, [Wilmington Trust's] rights, obligations, claims, causes of actions, defenses, appeal rights, or any other litigation rights arising out of or related to the Original Loan Documents . . . ." *Id*. The "Original Loan Documents" included all documents relating to the 2002 Loan, 2003 Loan, and 2004 Loan. *Id*. Ex. A.

[21] In particular, the Sunrise Venture Parties argue that: Kiernan and Canal Venture's failure to disclose the environmental conditions of the Brown Parcel constituted negligent misrepresentation or equitable fraud (Count I); Kiernan and Canal Ventures breached their fiduciary duties by failing to disclose the conditions of the Brown Parcel before the 2004 Agreement was executed, and to turn over the 2002 Phase One Study after the closing of the 2004 Agreement (Count II), and Moore and Rehoboth Canal Ventures aided and abetted Kiernan and Canal Venture's breaches of fiduciary duty (Count III); Canal Ventures breached the 2004 Agreement by misrepresenting the condition of the Brown Parcel (Count IV); and there was a mutual mistake between DiSabatino Ventures, Roxy's, and Canal Ventures about the condition of the Brown Parcel when the 2004 Agreement was executed (Count XIII).

Because of these alleged misrepresentations and nondisclosures, the Sunrise Ventures Parties seek equitable rescission of the 2004 Agreement and the 2006 Agreement and Release,[22] and equitable contribution.[23]

DiSabatino also brings claims as the assignee of Wilmington Trust. The Assignee Claims allege that the borrowers of the 2002, 2003, and 2004 Loans and Mortgages breached the environmental representations and warranties in the Loan and Mortgage agreements. The Assignee Claims also purport to seek indemnification from the guarantors of those Loans and Mortgages for harm Wilmington Trust has suffered (or will suffer) due to the presence of hazardous waste on the Brown Parcel.[24]

[22] The requests for equitable rescission of the 2004 Agreement is Count VII of the Complaint, and the request for equitable rescission of the 2006 Agreement is Count VIII.

[23] The Sunrise Ventures Parties argue that the guarantors of the 2002 and 2003 Loans must provide DiSabatino and Sunrise Ventures with equitable contribution for harms that they have suffered or will suffer from the breach of the environmental warranties in the 2002, 2003, and 2004 Loans and Mortgages (Count XIV).

[24] Specifically, DiSabatino argues that: Rehoboth Canal Ventures as borrower breached the 2002 Loan and Mortgage (Count IX); Rehoboth Canal Ventures and the guarantors of the 2002 Loan, including Moore, Kiernan, Canal Ventures and the Ronald T. Moore Business Trust, must indemnify DiSabatino (Count X); 1B Ventures as borrower of the 2003 Loan, and Rehoboth Canal Ventures as borrower of the 2003 Mortgage, breached the 2003 Loan and Mortgage agreements (Count XI); 1B Ventures, Rehoboth Canal Ventures and the guarantors of the 2003 Loan, including the Kiernans, Moore, and the Ronald T. Moore Business Trust, must indemnify DiSabatino (Count XII); Sunrise Ventures as borrower breached the 2004 Loan agreement (Count V); and the Kiernans as guarantors of the 2004 Loan must indemnify DiSabatino (Count VI).

III. Legal Analysis

A. The Claims Brought By The Sunrise Ventures Parties In Their Own Capacity Are Time-Barred And Must Be Dismissed On The Ground of Laches

1. The Claims Alleging Fraud And Mistake In Connection With The 2004 Agreement Are Stale

The RCV Parties correctly argue that the claims brought by the Sunrise Ventures Parties in their own instance, and not by DiSabatino as assignee of Wilmington Trust — including the claims for equitable fraud (Count I), breach of fiduciary duty (Counts II and III), breach of the 2004 Agreement (Count IV) and mutual mistake (Count XIII) — are stale and must be dismissed.[25]

The equitable defense of laches is based on the principle that a litigant "may not slumber on his rights to the detriment of another."[26] Although not strictly determinative, legal statutes of limitation serve as a benchmark for this court in applying the doctrine of laches, and create the outermost limit of when a claim may timely proceed.[27] In the absence of an applicable tolling doctrine, a

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[25] The RCV Parties generally aver that the Complaint is barred by a three year statute of limitations. But, as the Sunrise Ventures Parties point out, the counts brought by DiSabatino as assignee of Wilmington Trust for breach of the 2002, 2003, and 2004 Loans and Mortgages fall within the common law twenty year statute of limitations that applies to sealed instruments. *See Whittington v. Dragon Group LLC*, 2009 WL 4894305, at *7 (Del. Dec. 18, 2009) (stating that sealed documents of debt, such as mortgages or deeds, escape the three year statute of limitations and, instead, are governed by a twenty year period). Thus, claims for breach of the 2002, 2003, and 2004 Loan and Mortgage documents — which are sealed instruments — cannot be dismissed for untimeliness. *See* 2002 Loan at 5; 2002 Mortgage at 7; 2003 Mortgage at 7; 2004 Loan at 5.

[26] *Hutchinson v. Fish Eng'g Corp.*, 203 A.2d 53, 63 (Del. Ch. 1964).

[27] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 11.05(c) (2009) (explaining that

claim cannot be pressed in the Court of Chancery if the statute of limitations has passed. Indeed, a plaintiff in the Court of Chancery may be barred by laches before the analogous statute of limitations has run if the plaintiff should have acted with greater alacrity and, by his delay, has inequitably exposed the defendant to possible prejudice.[28]

A three year statute of limitations applies in Delaware to claims "arising from a promise," including claims for breach of fiduciary duty and fraud.[29] The statute of limitations begins to run when a plaintiff's claim accrues, which occurs at the moment of the wrongful act and not when the effects of the act are felt.[30] The Sunrise Ventures' Parties claims for equitable fraud, breach of fiduciary duty, breach of the 2004 Agreement, and mutual mistake are all based in actions taken by Kiernan and, to some extent, Moore in negotiating and executing the 2004

"the time fixed by an analogous statutory provision will be deemed to 'create a presumptive time period for application of laches to bar a claim'") (quoting *U.S. Cellular v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996)); *see also Estate of Osborn ex rel. Osborn v. Kemp*, 2009 WL 2586783, at *11 (Del. Ch. Aug. 20, 2009) ("In the absence of unusual conditions or exceptional circumstances, the analogous statute of limitations creates a presumptively reasonable time period for action, after which a claim likely will be barred as stale or untimely.").

[28] *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007) (citing *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005)) ("[T]he doctrine of laches also permits [the Court of Chancery] to hold a plaintiff to a shorter period if, in terms of equity, the plaintiff should have acted with greater alacrity . . . ."), *aff'd*, 956 A.2d 32 (Del. 2008).

[29] 10 *Del. C.* § 8106(a); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *5 (Del. Ch. Dec. 1, 2009) (explaining that "Delaware law sets a three year statute of limitations for claims for . . . fraud . . . and breach of fiduciary duty").

[30] *See In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *5 (Del. Ch. Oct. 17, 2007) ("Under Delaware law, a plaintiff's cause of action accrues at the moment of the wrongful act — not when the harmful effects of the act are felt — even if plaintiff is unaware of the wrong.").

Agreement.[31] Thus, these claims accrued, at the latest, on September 17, 2004 when the 2004 Agreement was executed. But this action was first filed on October 27, 2008 — more than four years after the claims accrued and more than one year beyond the relevant statute of limitations.

The Sunrise Ventures Parties argue that the actions of Kiernan and Moore prevented DiSabatino from becoming aware of the poor environmental conditions of the Blue Point Property until DiSabatino discovered the Parcel's contamination in February 2007 and, therefore, that the statute of limitations should be tolled under two theories: (1) equitable tolling, and (2) fraudulent concealment. The doctrine of equitable tolling applies when a plaintiff "reasonably relies on the competence and good faith of a fiduciary,"[32] and tolls the relevant statute of limitations until the plaintiff is "objectively aware of the facts giving rise to the wrong, *i.e.*, on inquiry notice."[33] Similarly, the doctrine of fraudulent concealment tolls the statute of limitations until a plaintiff is put on inquiry notice where an

[31] Compl. ¶¶ 127-135 (alleging equitable fraud against Kiernan and Canal Ventures for making misrepresentations and nondisclosures in connection with the 2004 Agreement); 138-145 (claiming that Kiernan and Canal Ventures breached their fiduciary duties to DiSabatino and Sunrise Ventures by making false representations in the 2004 Agreement); 148-155 (arguing that Moore and Rehoboth Canal Ventures aided and abetted breaches of fiduciary duty because of their failure to correct nondisclosures in the 2004 Agreement); 158-160 (claiming that the defendants breached the 2004 Agreement); 215-218 (alleging that DiSabatino Ventures and Roxy's as buyer and Canal Ventures as seller were mutually mistaken as to the Brown Parcel's suitability for residential development in executing the 2004 Agreement).

[32] *Stevanov v. O'Connor*, 2009 WL 1059640, at * 9 (Del. Ch. Apr. 21, 2009) (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998)).

[33] *In re Am. Intern. Group, Inc.*, 965 A.2d 763, 812 (Del. Ch. Feb. 10, 2009) (emphasis omitted).

affirmative act of concealment or a misrepresentation was used to put the plaintiff "off the trail of inquiry."[34]

Even if either or both tolling doctrines were available in this case, DiSabatino was clearly put on inquiry notice of the 2002 Phase One Study and the environmental problems with the Brown Parcel even before the 2004 Agreement was executed and, therefore, the statute of limitations was not tolled. Inquiry notice does not require a plaintiff to have actual knowledge of a wrong, but simply an objective awareness of the facts giving rise to the wrong — that is, a plaintiff is put on inquiry notice when he gains "possession of facts sufficient to make him suspicious, or that ought to make him suspicious."[35]

Here, DiSabatino was given notice of the existence of the 2002 Phase One Study when he received an email from Kiernan in August 2004 with a proposed term for the 2004 Agreement that would have required Rehoboth Canal Ventures to "make available all studies on the subject parcel *including but not limited to the Phase One conducted on the . . . Brown Parcel*."[36] But, despite this revelation, as well as the final language of the 2004 Agreement requiring "[Canal Ventures] to transfer to [DiSabatino Ventures] all studies on the Property, including without limitation, Phase One environmental studies,"[37] DiSabatino failed to request a copy of the study before or after closing, and never complained about its non-

[34] *Krahmer v. Christie's, Inc.*, 911 A.2d 399, 407 (Del. Ch. 2006).
[35] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 n.49 (quoting *Harner v. Prudential Secs. Inc.*, 785 F. Supp. 626, 633 (E.D. Mich. 1992)).
[36] Compl. Ex. M (emphasis added).
[37] 2004 Agreement at ¶ 5(c).

delivery. Nor did DiSabatino avail himself of his rights under the 2004 Agreement to "inspect the Property and . . . to make engineering and environmental studies . . . and perform whatever other tests and evaluations [DiSabatino] elect[ed]."[38] Rather, DiSabatino was content with his ignorance of the 2002 Phase One Study and his decision not to perform a single inspection or study of the Blue Point Property.

Because DiSabatino had notice of the existence of the 2002 Phase One Study, or could have easily discovered the problems it identifies about which he now complains "by the exercise of reasonable diligence" as early as August 2004, he cannot now claim the protection of the tolling doctrines.[39] Therefore, I find that

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[38] *Id.* at ¶ 9.

[39] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5. The doctrine of equitable tolling is also not available because Kiernan was not a fiduciary of DiSabatino until the 2004 Agreement was executed. *See id.* at *5 (stating that equitable tolling is only available if a plaintiff proves reasonable reliance on the "competence and good faith of a fiduciary"). The Complaint alleges that Kiernan's failure to disclose the possible environmental problems with the Brown Parcel in negotiating the 2004 Agreement is actionable. *See, e.g.*, Compl. ¶¶ 129-134 (explaining that Kiernan and Canal Ventures omitted facts about the hazardous waste on the Brown Parcel to induce him to enter into the 2004 Agreement); 138-45 (arguing that Kiernan and Canal Ventures had fiduciary duties to disclose the 2002 Phase I study before entering into the 2004 Agreement). But, at that point, the 2004 Agreement had not been executed, and Kiernan was neither a joint venturer with DiSabatino nor DiSabatino's co-partner in Sunrise Ventures — in other words, no basis for a fiduciary relationship existed. Equitable tolling is, therefore, not available to the Sunrise Ventures Parties on this ground. *See Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *3 n.11 (Del. Ch. Jan. 24, 2005) (finding a request for equitable tolling unpersuasive because the plaintiffs had failed to plead facts supporting an inference that the defendant was a fiduciary).

Likewise, the Sunrise Ventures Parties do not allege an affirmative act of concealment that would allow tolling under the doctrine of fraudulent concealment. *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005) (quoting *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973)) ("[A] claim of fraudulent concealment must be supported by a showing that a defendant knowingly took affirmative steps to prevent a plaintiff from learning facts or otherwise made

Counts I through IV and Count XIII of the Complaint are time-barred, and are dismissed with prejudice.

2. The Sunrise Ventures Parties' Requests For Rescission And For Equitable Contribution Are Untimely

Additionally, the Sunrise Ventures Parties' requests for equitable rescission of the 2004 Agreement (Count VII) and the 2006 Agreement and Release (Count VIII), and for equitable contribution from the borrowers and guarantors of the 2002, 2003, and 2004 Loans (Count XIV), are stale.

Where equitable rescission of multi-faceted real estate transactions is sought, the party seeking rescission must move with alacrity.[40] The request for rescission of the 2004 Agreement was far too slow in coming. As described above, DiSabatino was put on inquiry notice of the problems with the Brown Parcel before the 2004 Agreement was executed, and waited until after the statute of limitations had run before filing this action. Even if DiSabatino had not been

misrepresentations intended to 'put the plaintiff off the trail of inquiry.'"). All the Sunrise Ventures Parties allege is that Kiernan did not turn over the 2002 Phase One Study as required by § 11(s) of the 2004 Agreement, and made a false representation in the representations and warranties of that Agreement. This is the same non-disclosure that supposedly buttresses the breach of contract and fraud claims. The Sunrise Ventures Parties do not allege that Kiernan engaged in any artifice to suggest that the 2002 Phase One Study did not exist, or acted to conceal it. Indeed, DiSabatino received an email identifying the 2002 Phase One Study before entering into the 2004 Agreement.

[40] *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 174 (Del. 2000) (holding that rescission was not available where a plaintiff had "substantially and unjustifiably delayed" in waiting two years before seeking rescission); *Gaffin v. Teledyne, Inc.*, 1990 WL 195914, at *18 (Del. Ch. Dec. 4, 1990) ("It is a well-established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it."); 48 AM. JUR. 3D *Proof of Fact* § 505 (2009) (explaining that a "justification for denying the equitable remedy of rescission is the failure of the rescinding party to timely commence the action for rescission").

on notice of the environmental problems until he commissioned his own Phase One study in February 2007, he waited until October 2008 to bring this case, and did not move to expedite. He cannot now expect that this court will, in 2010, unwind a real estate deal that was made in 2004.

The request for rescission of the 2006 Agreement and Release also fails because it relies entirely on claims of prior fraud in 2004. The Complaint does not claim that any fraud occurred in 2006, or that any misstatement was made by Kiernan that would create a basis for rescission for that agreement. It would be impossible more than four years after the fact for this court fairly and equitably to rescind a complex real estate deal where value has doubtlessly been affected by the intervening events of nearly a half-decade and rapidly churning real estate markets.[41]

Importantly, interests in six limited liability companies, and partial ownership of improved real estate in North Carolina, were transferred in the 2006 Agreement and Release. The Sunrise Ventures Parties' claims only relate to one company, Sunrise Ventures, and only to the Blue Point Property. Rescission of the 2006 Agreement is therefore not appropriate, because it would affect companies and land parcels that have nothing to do with this action.[42]

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[41] *Cf. Stegemeier v. Magness*, 728 A.2d 557, 565 (Del. 1999) (finding that rescission was not an available remedy for a land sale transaction because land had been sold to third-parties, and homes had been built).

[42] *See* 17B C.J.S. *Contracts* § 489 (2009) (noting that where restoration of the status quo is impossible, and especially where the party seeking rescission has obtained a benefit from the contract, rescission is not necessary).

Because the Sunrise Ventures Parties did not move with the alacrity required of a request for the rescission of a multi-faceted transaction involving something as dynamic as real estate, their requests for equitable rescission of the 2004 Agreement and 2006 Agreement and Release must be dismissed for laches.[43]

The Sunrise Ventures Parties' claim for equitable contribution must be rejected for similar reasons. The Sunrise Ventures Parties' claims for equitable contribution from the borrowers and guarantors of the 2002, 2003, and 2004 Loans depend upon the ability of Sunrise Ventures to rescind the 2004 Agreement and the 2006 Agreement and Release. Rescission of these Agreements would restore the borrowers and guarantors of the Loans to their prior obligations under those instruments. Such restoration is necessary because, as part of the 2004 Agreement, Sunrise Ventures agreed to satisfy the 2002 and 2003 Loans without contribution from the borrowers or guarantors of those Loans; and, under the 2006 Agreement and Release, DiSabatino agreed to be responsible for the 2004 Loan, and to release Roxy's and the Kiernans from their obligations under the Loan.

But, as discussed above, the Sunrise Venture Parties' claims for rescission, and the fraud and breach of contract allegations underlying their request for rescission, are time-barred. Absent the restoration of the defendants' status as borrowers and guarantors under the Loans — which depends on the successful

[43] *See Interim Healthcare, Inc. v. Sherion Corp*, 2003 WL 22902879, at *9 (Del. Ch. Nov. 19, 2003) (finding that a claim for rescission was untimely where the plaintiffs sought rescission of a transaction involving the sale of a company which had occurred more than six years earlier).

presentation of the time-barred claims — no joint obligations are owed by the defendants that would allow the Sunrise Parties to bring a claim for equitable contribution.[44] Thus, Counts VII, VIII, and XIV are time-barred, and are dismissed with prejudice.

B. The Assignee Claims Are Dismissed For Lack Of Equitable Jurisdiction And Failure To State A Claim

Perhaps realizing that all of his own claims were stale, DiSabatino sought assignment of Wilmington Trust's rights in connection with the 2002, 2003, and 2004 Loans and Mortgages which are sealed instruments and thus carry with them a twenty year statute of limitations for any claims.[45] DiSabatino, in his capacity as assignee of Wilmington Trust, now brings claims for breach of the environmental warranties contained in the 2002, 2003, and 2004 Loans and Mortgages. The Sunrise Ventures Parties also request indemnification from the borrowers of the 2002 and 2003 Loans and Mortgages, and from the guarantors of the 2002, 2003, and 2004 Loans and Mortgages.

The RCV Parties contend that, even if DiSabatino's claims are viable, none of them states a claim in equity, in the sense of being based on an equitable cause of action or requiring an equitable remedy to make DiSabatino whole.[46] The RCV Parties further argue that even if equitable jurisdiction is present for one or more

[44] *See Valeant Pharm. Intern. v. Jerney*, 2007 WL 2813789, at *18 (Del. Ch. Mar. 1, 2007) (stating the "general principle" that "joint obligations give rise to a right to equitable contribution") (citations omitted).
[45] *Whittington*, 2009 WL 4894305, at *7.
[46] Def's Op. Br. at 13.

of the claims the Sunrise Ventures Parties bring in their own instance, this court should not exercise clean-up jurisdiction at the threshold of litigation when no timely count in the Complaint states a claim in equity.

To analyze this argument, the nature of the claims DiSabatino brings as assignee of Wilmington Trust must be understood. DiSabatino alleges that the borrowers of the 2002, 2003, and 2004 Loans and Mortgages breached an "everlasting" environmental warranty provision in the Loan and Mortgage agreements, which warranted that the borrowers were not aware of any "use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance" on the Brown Parcel.[47] DiSabatino claims that he, as a lender, has suffered damage as a result of the borrowers' breaches of the environmental warranties in the Loan and Mortgage Agreements, and seeks indemnification from the guarantors of the Loans and Mortgages for that alleged damage.

As will be discussed further below, none of the Assignee Claims are based on an equitable cause of action or require an equitable remedy, and, because all of the Sunrise Ventures Parties' direct claims that implicate this court's jurisdiction are time-barred, there is no efficiency or fairness reason for this court to exercise its clean-up jurisdiction to hear DiSabatino's legal claims. Because the Sunrise Ventures Parties' time-barred claims for rescission of the Agreements would state a claim if they were not barred by laches, and because the parties have invested

[47] *See* 2002 Loan at 1; 2002 Mortgage at 2; 2003 Mortgage at 2; 2004 Loan at 1.

scarce resources in briefing the validity of the claims pled by the Sunrise Ventues Parties, I will address the merits of DiSabatino's claims for the sake of the parties, and in the interest of judicial efficiency so that this case is modestly less burdensome to the Superior Court. In addressing the merits of the Assignee Claims, I find that DiSabatino's pleadings are deficient and fail to state a claim as required by Court of Chancery Rule 12(b)(6).

1. Motion To Dismiss Standards

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), this court must consider the nature of the claims brought as well as potential remedies in determining whether a legal, as opposed to an equitable remedy, is both available and adequate.[48] The court has jurisdiction when an equitable right has been invoked, or an equitable remedy has been requested where there is no adequate remedy at law.[49] Also, where equitable claims are present, this court may elect to exercise clean-up jurisdiction over non-equitable claims stemming from the same controversy.[50]

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[48] *See, e.g.*, *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

[49] *Pitts v. City of Wilmington*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009) ("The Court of Chancery can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.").

[50] This well-settled principle is referred to as the "clean-up" doctrine, and provides that "equity, once having obtained jurisdiction, will go on to settle the whole controversy." WOLFE & PITTENGER § 2.04. *See Getty Ref. Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch. 1978) ("[I]f a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to resolve the remaining portions of the controversy as well.").

A court should not grant a motion to dismiss pursuant to Rule 12(b)(6) "unless it can be determined with reasonable certainty that the [non-moving party] could not prevail on any set of facts reasonable inferable" from the pleadings.[51] The truth of all well-pled allegations is assumed, and the non-moving party is given the benefit of all reasonable inferences.[52] But, mere conclusory allegations will not be accepted as true in the absence of specific allegations of supporting fact.[53]

2. The Assignee Claims Are Legal In Nature

DiSabatino has not carried his burden of demonstrating that equitable subject matter exists. The Assignee Claims simply request a declaration that the environmental warranties contained in the 2002, 2003, and 2004 Loan and Mortgage agreements have been breached so that he may seek indemnification for any loss to Wilmington Trust as lender. In other words, DiSabatino is asking this court to determine whether contractual liability exists so that monetary relief may be sought — a legal, not equitable, request for relief.

Importantly, where "a party aggrieved by a claimed breach of contract has an adequate remedy at law in the form of an action for damages, simply alleging that equitable principles are involved and demanding some form of equitable relief

[51] *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc., v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).
[52] *Id.*
[53] *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009).

. . . does not confer subject matter jurisdiction on this Court."[54] An adequate remedy at law is fully available for these claims because the Superior Court can provide a complete and proper remedy in the form of entitlement to indemnification if it finds a breach of contract.[55] Therefore, I decline to exercise this court's clean-up jurisdiction over the Assignee Claims.

3. DiSabatino Cannot State A Claim For Breach Of The 2002 And 2003 Loans

Even if this court were to exercise jurisdiction over the Assignee Claims under the clean-up doctrine — which it will not — DiSabatino's argument that Wilmington Trust's rights under the 2002 and 2003 Loans were not extinguished when those loans were repaid is unconvincing, and fails to state a claim upon which relief can be granted. To state a claim for breach of contract, a plaintiff must show the existence of a contract, a breach of the contractual obligations by the defendant, and resulting damage to the plaintiff. [56]

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[54] *Kerrigan v. Alderman Auto. Svs. Inc.*, 1980 WL 272828, at *2 (Del. Ch. Aug, 18, 1980) (internal citations omitted).

[55] *See, e.g., Delaware Bay Surgical Servs. v. Spellman*, 2009 WL 608547, at *1 (Del. Ch. Feb. 26, 2009) (declining to exercise equitable jurisdiction where a declaratory judgment of liability was requested so that monetary damages could be sought because the Superior Court could provide a complete remedy of law); *Int'l Business Mgmt. Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) (discussing that breach of contract and related causes of action have an adequate remedy at law, and do not provide the Court of Chancery with equitable jurisdiction); s*ee also LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009) ("[T]he term 'indemnity' has a distinct legal meaning that permits the party seeking indemnification to bring a separate cause of action for indemnification after first bringing a successful action for breach of the [underlying] contract."). *Cf. Clark v. Teeven Holding Co., Inc.*, 625 A.2d 869, 878 (Del. Ch. 1992) (declining to exercise equitable jurisdiction over a request for indemnity between joint tort-feasors where the Superior Court could provide a proper remedy).

[56] *See, e.g., H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) (Under Delaware law, the elements of a breach of contract claim are: 1) a contractual

DiSabatino, as assignee of Wilmington Trust, was given Wilmington Trust's "rights, obligations, claims, causes of action, defenses, appeal rights, [and] other litigation rights" arising from the assigned loans and mortgages. In other words, DiSabatino only holds the remedies and liabilities that Wilmington Trust held in the first instance.[57] DiSabatino claims that Wilmington Trust's right to sue for breach of the environmental warranties in the 2002 and 2003 Loans and Mortgages is "evergreen" because, even after the principal and interest on the Loans has been paid, [58] the language of the Loan and Mortgage Agreements provides that the environmental warranties "survive the payment of indebtedness."[59] The most obvious purpose for this provision is that lenders

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obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff); *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *7 (Del. Ch. Nov. 2, 1995) ("To survive a motion to dismiss, a complaint stating a claim for breach of contract must identify a contractual obligation, whether express or implied, a breach of that obligation by the defendant, and resulting damage to the plaintiff.").

[57] 2009 Assignment; s*ee* 59 C.J.S. *Mortgages* § 437 (2009) ("The assignee of a mortgage is entitled to the remedies which are allowed to the mortgagee for the enforcement of the mortgage contract."); 55 AM. JUR. 2D *Mortgages* § 944 (2009) (explaining that an assignee of a mortgage "stands in the shoes of the assignor").

[58] I take judicial notice of the fact that the 2002 and 2003 Loans and Mortgages have been satisfied as of September 29, 2004. Def's Op. Br. Ex. B (Mortgage Satisfaction Piece, Recorder of Deeds of Sussex County, Delaware (Sept. 29, 2004)) (showing satisfaction of the 2002 mortgage); *id.* Ex. C. (Mortgage Satisfaction Piece, Recorder of Deeds of Sussex County, Delaware (Sept. 29, 2004)) (showing satisfaction of the 2003 mortgage). *See Jianniney v. State*, 962 A.2d 229, 232 (Del. 2008) ("A court may take judicial notice of facts that are 'not subject to reasonable dispute [because they are] either (1) generally known . . . or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'") (quoting D.R.E. 201(b)); *see also* Paul J. Kiernan, *Better Living Through Judicial Notice*, A.B.A. LITIGATION, Fall 2009, at 43-44 (quoting FED. R. EVID. 210(b)) ("[A] judicially noticed fact 'must be one that is not subject to reasonable dispute' because it is either well known already or it can be easily looked up.").

[59] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures LLC*, C.A. No. 4119-VCS, at 83-85 (Del. Ch. Oct. 12, 2009) (TRANSCRIPT). *See, e.g.*, 2002 Loan at 1-2; 2003

occasionally take ownership of a borrower's land upon a default and do not wish to be unprotected if they get caught in the cross-fires of later environmental litigation over the land's condition.

But a lender who has been paid both the principal and interest on a loan can no longer sue to recover money from the borrowers and guarantors of the loan, unless the lender has suffered some damage, unrelated to the satisfied principal and interest, as a result of the breach. An example of a possible separate source of damage would be if the lender was dragged into litigation over the condition of the underlying property. Because Wilmington Trust was fully paid on the 2002 and 2003 Loans in September 2004, it lost the ability to bring a claim for the principal and interest of those Loans at that time. As a result, DiSabatino, as assignee of Wilmington Trust, cannot suffer the most obvious injury — a failure to receive repayment of the Loan. The only possible harm that Wilmington Trust — now, DiSabatino — could suffer from the environmental damage to the Brown Parcel is limited to, at most, some form of third party liability if Wilmington Trust was held responsible for environmental conditions on the land because of its prior status as a lender.

Mortgage at 2; 2004 Loan at 1-2. Importantly, the Sunrise Ventures Parties did not attach the 2003 Loan to the Complaint, but simply aver that the warranties contained in the 2003 Loan mirror those contained in the 2002 and 2004 Loans. For the purposes of this motion, I consider this allegation to be true. *See In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc., v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)) (explaining that the truth of well-pled allegations is assumed for purposes of a motion to dismiss).

For example, a lender could fear that it may be accused of being a former "owner" of the land under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), a statute which holds responsible parties liable for the costs associated with environmental cleanup.[60] Lenders have a statutory defense to such claims, because lenders generally fall within the "secured lender exemption" to CERCLA, which provides that a lender is not considered an owner of distressed property unless the lender took an active role in management of the property.[61] Moreover, even if Wilmington Trust was found to be a "former owner" of the property, former owners can only be liable under CERCLA if they owned the property at the time that hazardous substances were disposed of at the site — which Wilmington Trust did not.[62] Nonetheless, the lender could incur indemnifiable expenses in presenting these defenses. The survival clause thus provides a lender with a contractual method of being made whole if the borrower's misrepresentation caused it harm of this type. But DiSabatino has failed to allege that Wilmington Trust has been exposed to any liability or indemnifiable damages for the environmental conditions of the Brown Parcel, or any other harm unrelated to the principal and interest owed on the

[60] 42 U.S.C.A. §§ 9601-9675.
[61] 42 U.S.C.A. § 9601(20)(a); *see* 9 POWELL ON REAL PROPERTY ¶ 660.6[3] (Michael Allan Wolf ed., 2001) (describing the "secured lender" exemption from CERCLA liability, which provides that "one who holds indicia of ownership, such as a deed of trust, primarily as security, is not liable for costs of remediation, provided that such security holder does not participate in the management of the facility").
[62] 42 U.S.C.A. § 9607(a)(2) (extending potential liability to "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of").

Loans, and cannot claim that Wilmington Trust has suffered any harm for principal and interest because Wilmington Trust was fully paid on the principal and interest of the 2002 and 2003 Loans.

Similarly, DiSabatino's request for indemnification from Rehoboth Canal Ventures, 1B Ventures, and Canal Ventures, as the borrowers of the 2002 and 2003 Loans and Mortgages, and from the individual guarantors of the 2002 and 2003 Loans and Mortgages, does not state a claim.[63] DiSabatino argues that Wilmington Trust suffered "losses, liabilities, damages, penalties and expenses" from the hazardous substances present on the Brown Parcel which the borrowers and the guarantors are contractually required to indemnify.[64] But a successful indemnification action requires a predicate showing that the party seeking indemnification has suffered loss or damage through payment of a claim.[65] As discussed above, Wilmington Trust cannot suffer any loss or damage under the 2002 and 2003 Loans because the principal and interest has been fully repaid and, thus, Wilmington Trust has no indemnifiable harm.

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[63] Moreover, DiSabatino has failed to attach the guaranty agreements under the 2002, 2003, and 2004 Loans to the Complaint. Without the guaranty agreements, it cannot be determined whether the guarantys are sealed documents that are entitled to the protection of a twenty year statue of limitations. *See Whittington*, 2009 WL 4894305, at *7 (explaining the twenty year statute of limitations for sealed instruments). Because DiSabatino has not established whether or not the guarantys are under seal, his request for payment from the guarantors may be barred by laches.

[64] *See* Compl. ¶¶ 197-198, 212; *see also* 2002 Loan at 1-2; 2002 Mortgage at 2; 2003 Mortgage at 2.

[65] *See Breakaway Solutions, Inc. v. Morgan Stanley & Co., Inc.*, 2004 WL 1949300, at *15 (Del. Ch. Aug. 27, 2004) ("[I]ndemnification claims do not accrue until the party seeking indemnification has made payment to the injured person.") (citations omitted).

Because the 2002 and 2003 Loans and Mortgages have been fully repaid, DiSabatino cannot establish that Wilmington Trust has suffered damage that would allow him to bring a claim against the borrowers and guarantors of the 2002 and 2003 Loans. His claims for breach of contract and indemnification under the 2002 and 2003 Loans and Mortgages (Counts IX through XII) are thus dismissed with prejudice for failure to state a claim.[66]

4. DiSabatino Has Failed To Plead Facts That Would Entitle Him To Recovery Under The 2004 Loan

Although it is clear that the 2002 and 2003 Loans were paid off and that DiSabatino has no right, as assignee, to bring any claim alleging harm under those Loans, the record is much less clear as to the 2004 Loan. Specifically, it is not clear: (1) whether Sunrise Ventures, the borrower of the 2004 Loan, paid Wilmington Trust the full principal and interest before DiSabatino received assignment of the 2004 Loan or, alternatively, if DiSabatino paid Wilmington Trust a sum of money to be transferred ownership of the 2004 Loan and the right to collect on the remaining principal and interest due; (2) if the 2004 Loan is outstanding, whether Sunrise Ventures is in default; and (3) if Sunrise Ventures has defaulted on the 2004 Loan, whether DiSabatino may seek payment from the guarantors of the 2004 Loan.

[66] Of course, if, at some future date, DiSabatino is subject to lender liability or some other harm as a former lender as assignee of the 2002 and 2003 Loans and Mortgages, he may, upon a proper pleading of later-arising damage, bring suit against the borrowers and guarantors of those Loans and Mortgages.

It seems that Wilmington Trust may have assigned a wide range of rights and liabilities to DiSabatino under the 2004 Loan, but a dearth of facts in the Complaint and the documents it incorporates about the relationship between the 2004 Loan and the 2009 assignment makes it impossible to determine the current status of DiSabatino's rights and whether principal and interest are due under the 2004 Loan. Wilmington Trust assigned the 2004 Loan to DiSabatino in April 2009 — at a time when, unlike the 2002 and 2003 Loans, the 2004 Loan may have been outstanding and Wilmington Trust may have been in possession of its rights to take the full range of contractual rights allowing it to recover the principal and interest due to it under that instrument. Because no facts are pled in the Complaint about the status of the 2004 Loan, I cannot accept as true that, as DiSabatino claimed at oral argument,[67] the 2004 Loan remains outstanding, or if, as the RCV Parties have suggested,[68] it was extinguished just after Wilmington Trust's assignment to DiSabatino in May 2009 when the 2004 Mortgage was satisfied.[69] Because DiSabatino has failed to plead these crucial facts, he has failed to plead

[67] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures LLC*, C.A. No. 4119-VCS, at 73 (Del. Ch. Oct. 12, 2009) (TRANSCRIPT).
[68] *Id.* at 25-26.
[69] I take judicial notice of the fact that the 2004 Mortgage was marked as satisfied on May 13, 2009. Def's Op. Br. Ex A (Mortgage Satisfaction Piece, Recorder of Deeds of Sussex County, Delaware (May 13, 2009)) (showing satisfaction of the 2004 mortgage). I note, however, that the Sunrise Ventures Parties claimed at oral argument that Wilmington Trust recorded the mortgage satisfaction piece in error, because the 2004 Loan had already been assigned to DiSabatino without being paid off. *Sunrise Ventures, LLC v. Rehoboth Canal Ventures LLC*, C.A. No. 4119-VCS, at 73 (Del. Ch. Oct. 12, 2009) (TRANSCRIPT).

that Wilmington Trust has suffered harm that would entitle it to recover under a breach of contract claim.[70]

Additionally, even if the principal and interest remain due on the 2004 Loan, DiSabatino has failed to plead whether Sunrise Ventures as borrower of that Loan is in default and whether, because of a default, DiSabatino may, under the terms of the guarantys, now seek payment from the guarantors of the 2004 Loan, including DiSabatino. The very purpose of a guaranty is to be responsible for payment of the debt of the borrower and, without establishing that Sunrise Ventures' debt under the 2004 Loan is outstanding, and that Sunrise Ventures is in default, payment cannot typically be requested from a guarantor.[71]

To that same point, DiSabatino has failed to attach the guaranty agreements in connection with the 2002, 2003, and 2004 Loans and Mortgages, and thus the obligations of the guarantors are not clear.[72] When seeking payment of a guaranty, a lender must strictly follow the specific provisions of the guaranty agreement on

[70] *See, e.g.*, *H-M Wexford LLC*, 832 A.2d at 140 (Del. Ch. 2003); *Moore Bus. Forms*, 1995 WL 662685, at *7 (discussing the elements for a breach of contract claim, including damages resulting from the alleged breach of contract).

[71] *See In re Explorer Pipeline Co.*, 781 A.2d 705, 716 (Del. Ch. 2001) (stating that to "guarantee" is to "promise to answer for the payment of some debt or the performance of some obligation by another on the default of [a third party] who is liable in the first interest") (citations omitted); POWELL ON REAL PROPERTY ¶ 660.5[5][a] ("A guaranty is the agreement of a person, other than the borrower, to be responsible for payment of all or part of the borrower's debt.").

[72] As discussed earlier, without the guaranty agreements, it cannot be determined whether claims under the guarantys are covered by a three year statute of limitations — which has expired — or by a twenty year statue of limitations. *See supra* note 63. Therefore, DiSabatino's request for payment from the guarantors may be untimely.

how, when, and where to demand payment.[73] DiSabatino has failed to plead what steps must be taken to procure payment of the guarantys, or if any such steps have been taken. Without the guaranty agreements, or any explanation of how demand must be made of the guarantors, I have no way of knowing what steps DiSabatino must follow in requesting payment or if he has taken those steps.

Even if the 2004 Loan is outstanding and Sunrise Ventures is in default, it is not apparent that DiSabatino as assignee of Wilmington Trust has any right to indemnification from the guarantors of the 2004 Loan. In the 2006 Release, Wilmington Trust agreed to release Kiernan, Veronica Kiernan, and Roxy's from their obligations under the 2004 Loan, and expressly agreed that the Remaining Obligors, including DiSabatino, would act as if the "bond, mortgage and personal guarantys" of any parties including Sunrise Ventures "have been executed by [the Remaining Obligors] alone."[74] Because Wilmington Trust chose to release Kiernan and Veronica Kiernan from their obligations under the 2004 Loan, DiSabatino as assignee cannot request payment from them unless the release is invalidated.

Acknowledging that the 2004 Loan may still be outstanding, and that DiSabatino may be entitled to the payment of principal and interest for that Loan, I

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[73] *See* POWELL ON REAL PROPERTY ¶ 660.5[5][a] ("To convert [a] guaranty into payment, the lender must follow the provisions of the guaranty. . . . Such provisions must be strictly followed."). *Cf. Medek v. Medek*, 2009 WL 2005365, at *8 (Del. Ch. July 1, 2009) (applying general principles of contract interpretation in construing obligations under guaranty agreements).

[74] 2006 Release at ¶ 5.

dismiss his claim for breach of contract and indemnification under the 2004 Loan (Counts V and VI) for failure to state a claim without prejudice, subject to DiSabatino's right to transfer the Assignee Claims as to the 2004 Loan to Superior Court.[75]

IV. Conclusion

For the foregoing reasons, Counts I through IV, VII, VIII, XIII, and XIV are dismissed as barred by laches, Counts IX through XII are dismissed for failure to state a claim with prejudice and may not be repled in Superior Court, and Counts V and VI are dismissed for failure to state a claim without prejudice to file an amended complaint in Superior Court after transfer in accordance with 10 *Del. C.* § 1902.[76] IT IS SO ORDERED.

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[75] Under 10 *Del. C.* § 1902, the Assignee Claims as to the 2004 Loan may be transferred to Superior Court "for hearing and determination" if, within 60 days after this order, DiSabatino files in this court a "written election of transfer." *See Clark*, 625 A.2d at 883 (dismissing a case for lack of equitable jurisdiction, "subject to an election of transfer of [the] claims to the Superior Court pursuant to 10 *Del. C.* § 1902").

[76] Additionally, I deny the Sunrise Ventures Parties' belated motion to consolidate. The Sunrise Ventures Parties have moved to consolidate this action with Court of Chancery C.A. No. 5155-VCS, brought by Canal Ventures against Sunrise Ventures, Rehoboth Canal Ventures, and the Blue Point condominium owners. The Sunrise Ventures Parties argue that both actions seek equitable relief involving the 2004 Agreement. Movant's Mot. for Consol. (Jan. 8, 2010) at 3. Court of Chancery Rule 42(a) allows for consolidation "[w]hen actions involving a common question of law or fact are pending before the Court." Ct. Ch. R. 42(a). Further, "[i]n determining whether to consolidate actions the Court must employ its discretion to weigh the possible time and effort that consolidation would bring against any inconvenience, delay, or expense which it could occasion." *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1123 (Del. Ch. 1985). A review of the complaint in C.A. No. 5155-VCS reveals that the issues raised in that action are distinct from the case presently before me. Civil Action No. 5155-VCS seeks equitable relief from a deed that allegedly transferred three parcels of property in error, which is a distinct issue separate from those raised in this action. Because I find that consolidating the two cases would provide no judicial economy and would actually impede the efficient processing of the cases, I deny Sunrise Ventures' motion to consolidate.