IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CÔTE D'AZUR ESTATE CORPORATION	))	C.A. No. 2017-0290-JTL

MEMORANDUM OPINION

Date Submitted: July 13, 2022
Date Decided: September 19, 2022

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Dieter Walter Neupert, *Defendant pro se*.

LASTER, V.C.

Israel Igo Perry died on March 18, 2015. He was survived by his widow, Lilly Lea Perry, and their two daughters, Tamar and Yael Perry.[1] Mr. Perry's last will and testament named Dieter Walter Neupert as the executor of his estate. Neupert is Swiss lawyer who was Mr. Perry's longtime advisor and confidant.[2] Neupert also was the architect of Mr.

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[1] My standard practice is to identify individuals by their last name without honorifics. When individuals share the same last name, my standard practice is to shift to first names. Using Mr. Perry's first name (Israel) can be confusing, because key events took place in the State of Israel. This decision therefore refers to him as "Mr. Perry." The parties sometimes use honorifics for other individuals, and when quoting from their submissions, this decision has not altered their terminology.

Some of the exhibits refer to Mr. Perry as "IIP," "IP," or "Mr. P." and to Lilly as "LLP," "LP," or "Mrs. P." This decision generally does not alter those references. Mr. Perry also used aliases, such as "Ivor Friedman," which appear at times in the exhibits. This decision alters those references to refer to Mr. Perry.

In a number of the exhibits, the authors have dropped the period after "Mr.," "Mrs.," or "Dr.," resulting in "Mr Perry," "Mrs Perry," or "Dr Neupert." Rather than repeatedly modifying the quotations or adding [sic], the decision keeps the original usages. Likely because Neupert and several of the other principal actors speak German, the capitalization in their contemporaneous communications deviates from standard American usage. To maintain the integrity of the quotations, this decision does not modify the odd capitalization, nor does it add [sic].

This decision periodically uses terms such as "the Perry family" or "the members of the Perry family" to refer to Lilly, Tamar, and Yael. By describing the Perry family in this fashion, this decision is not suggesting that other individuals do not qualify as members of the Perry family under a broader definition. For example, Tamar's four children plainly qualify, and Mr. Perry fathered a third daughter through an extra-marital relationship. AC ¶¶ 17, 318; *see* ACX 76. This decision frames the concept of the Perry family more narrowly because it is generally describing actions that were taken or decisions that were made, and Lilly, Tamar, and Yael were the key actors and decisionmakers.

[2] Although Mr. Perry named Neupert to the role of executor in his will, Lilly contested Neupert's ability to serve, and Neupert never secured authority to act as executor.

Perry's estate plan, which involved a complex network of trusts and entities called the "Structure." Louis Oehri & Partner Trust reg. ("LOPAG"), a Liechtenstein commercial trust company, formed and controlled all of the entities in the Structure. Neupert and Louis Oehri co-founded LOPAG in 1989, and they worked hand in hand to create the Structure and advise Mr. Perry.

Neupert and representatives of LOPAG told Lilly that when Mr. Perry died, he was the sole member of Côte d'Azur Estate LLC ("Côte d'Azur" or the "LLC"), a Delaware limited liability company. The LLC owned La Treille, a villa in the south of France (the "Villa"). Neupert and representatives of LOPAG told Lilly that the member interest in the LLC passed to Mr. Perry's estate and that she was the sole heir of the estate.

Lilly, Tamar, and Yael disagreed about the disposition of Mr. Perry's wealth under his will and estate plan. Neupert and LOPAG tried to broker a settlement of those disputes. By June 2016, however, it was clear that the family members would not agree to a settlement. The family divided into two factions, with Lilly and Tamar on one side and Yael on the other.

Neupert and LOPAG sought to force the family members back to the table by pressuring Lilly. To achieve that goal, they reversed their position about the ownership of Côte d'Azur, and they asserted that before his death, Mr. Perry transferred his equity interest in the LLC to the BGO Foundation (the "Foundation"), one of the entities in the

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Instead, Tamar and another individual were appointed as co-executors of Mr. Perry's estate.

Structure. As evidence of the transfer, they relied on a Deed of Assignment dated May 1, 2013. If the Foundation controlled Côte d'Azur, then Neupert and LOPAG could deny Lilly access to the Villa.

In June 2016, in an effort to bolster their new position about the ownership of Côte d'Azur, Neupert and LOPAG engaged in self-help. Neupert caused a Delaware registered agent to file a certificate of conversion with the Delaware Secretary of State that converted Côte d'Azur Estate Corporation ("Côte d'Azur" or the "Corporation").[3] Neupert also caused the registered agent to file a certificate of incorporation that authorized the issuance of 10,000 shares of common stock. Neupert and one of his personal assistants purportedly took action as the board of directors of the Corporation to issue all of its shares of common stock to the Foundation.

In the second half of 2016, litigation broke out in various jurisdictions. In April 2017, Lilly filed this action. She contends that (i) the Deed of Assignment did not effectuate an immediate transfer of the equity in the LLC from Mr. Perry to the Foundation and (ii) Mr. Perry subsequently decided not to carry out the transfer because of adverse tax consequences in France. She maintains that Mr. Perry remained the sole member of the LLC when he died and that Neupert and LOPAG had no authority to convert the LLC into the Corporation or to issue shares of stock to the Foundation.

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[3] Note that the term "Côte d'Azur" may refer to the entity in either its earlier manifestation as the LLC or its current manifestation as the Corporation. Much of the time, the distinction does not matter, and so using "Côte d'Azur" promotes clarity. When the distinction matters, this decision strives to use one of the latter terms

Lilly is pursuing claims for fraud, conversion, and tortious interference with contract against Neupert and the Foundation. She seeks a decree invalidating (i) the issuance of shares to the Foundation and (ii) the conversion of the LLC into the Corporation.

In July 2020, the Foundation filed counterclaims against Lilly and third-party claims against Tamar. For simplicity, this decision refers to both types of claims as counterclaims.

The Foundation alleges that Lilly and Tamar knew about the Deed of Assignment from the start and understood that it transferred Mr. Perry's interest in the LLC to the Foundation. The Foundation alleges that after Mr. Perry's death, Lilly and Tamar allowed the Foundation's representatives and Neupert to believe erroneously that Mr. Perry remained the sole member of the LLC when he died. The Foundation also alleges that Lilly and Tamar engaged in the tort of conversion by taking action on Côte d'Azur's behalf. Based on its contention that Lilly and Tamar have been working together, the Foundation has asserted a claim against them for conspiracy to commit fraud and conversion. The Foundation also seeks a series of declaratory judgments conditioned on the Foundation prevailing in separate litigation pending in Liechtenstein.

Lilly and Tamar have moved to dismiss the counterclaims. They argue that counterclaims are time-barred and that the Foundation's allegations fail to state claims on which relief can be granted. Tamar asserts that she is not subject to personal jurisdiction in this court.

The Foundation's claims are time-barred. The Foundation's claim that the Deed of Assignment immediately transferred Mr. Perry's equity interest in the LLC to the Foundation accrued on May 1, 2013, when the Deed of Assignment was executed. From

that point on, the Foundation knew all of the facts necessary to assert its claim to immediate ownership, and from that point on, it was on inquiry notice regarding the need to challenge any claims of ownership that other parties might make.

The Foundation currently maintains that Lilly and Tamar engaged in fraud by allowing the Foundation to believe that it did not own the equity in the LLC. That theory derives from the Foundation's claim of ownership. The Foundation was on notice of its ability to assert its rights as soon as Lilly and Tamar acted in a manner contrary to the Foundation's claim of ownership. Discussions about who owned the equity in the LLC when Mr. Perry died began immediately after his death on March 18, 2015. The Foundation had all of the facts necessary to assert its rights at that time.

The Foundation's claim for fraud might be timely if Lilly and Tamar had made statements or taken actions more recently that were inconsistent with the positions they took after Mr. Perry's death. The counterclaims do not identify anything which Lilly has said or done that could support such a claim. Within a month after Mr. Perry's death, Neupert and LOPAG had taken the position that Mr. Perry was the sole member of the LLC when he died and that the equity passed to his estate. They told Lilly that. Not surprisingly, Lilly has taken actions and made statements consistent with what Neupert and LOPAG told her. If the Foundation wanted to challenge her position, it should have asserted its rights in a timely fashion after Mr. Perry's death in March 2015. The Foundation could not wait until July 2020 to assert a claim for fraud.

The same is true for the Foundation's fraud claim against Tamar. According to the counterclaims, Tamar took the position beginning in 2015 that Mr. Perry's estate could not

own the equity in the LLC because Mr. Perry had always wanted one of the trusts in the Structure to own Côte d'Azur. Ironically, that is close to what the Foundation currently contends. Regardless, if the Foundation wanted to challenge that position, it needed to do so promptly after March 2015. Asserting the claim in July 2020 is too late.

A similar analysis applies to the Foundation's claim that Lilly and Tamar engaged in the tort of conversion. At its core, that claim derives from the Foundation's current position that it acquired the equity in Côte d'Azur through the Deed of Assignment. The Foundation had all of the facts it needed to assert that claim when the Deed of Assignment was executed in May 2013. The Foundation certainly could have asserted its claim shortly after Mr. Perry's death in March 2015.

As with the Foundation's claim for fraud, the claim for conversion might be timely if Lilly and Tamar had engaged in later acts to seize control of Côte d'Azur, but the counterclaims do not describe any acts that could amount to conversion. The counterclaims allege that Lilly and Tamar have made use of the Villa, but using the Villa that Côte d'Azur owns is different from exercising control over the entity that is Côte d'Azur. Everyone understood and agreed that Mr. Perry wanted his family members to use the Villa.

The counterclaims do not identify any instance since Mr. Perry's death in which Tamar or Lilly asserted ownership over the equity in Côte d'Azur or attempted to exercise control over the entity. Neither Tamar nor Lilly ever engaged in any conduct comparable to Neupert and LOPAG's filing of certificates with the Delaware of Secretary of State and the subsequent purported issuance of shares to the Foundation.

The only acts that the counterclaims point to Lilly and Tamar taking on behalf of

Côte d'Azur involved them approving the filing of tax returns with the French authorities in the years following Mr. Perry's death. Those tax returns identified Lilly as the ultimate beneficial owner of the entity. Through LOPAG, the Foundation's representatives engaged in extensive discussions about the filings in 2015 and 2016. The Foundation was on notice of any dispute regarding control over Côte d'Azur and its tax filings as of that point. Yet again, the Foundation could not wait until June 2020 to assert a conversion claim.

Regardless of whether the Foundation might have sued earlier, the Foundation indisputably was on notice of its claims in June 2016, when Neupert and LOPAG asserted control over the LLC, converted it into the Corporation, then purported to issue all of the Corporation's shares to the Foundation. By seizing the entity, Neupert and LOPAG demonstrated that the Foundation had all of the information necessary to assert its rights. The Foundation simply chose to engage in self-help rather file a lawsuit. The time period in which the Foundation could sue ended not later than three years after that event, in June 2019, over a year before the Foundation asserted its claims.

Because the Foundation's claims for fraud and conversion are time-barred, the claim for conspiracy to commit fraud and conversion is also time-barred.

The timeliness of declaratory judgment claim is more difficult to analyze because it is framed conditionally. The Foundation only seeks declaratory judgments to the extent it prevails in other litigation. Setting aside that issue, the declaratory judgments that the Foundation seeks relate to the ownership of Côte d'Azur, the effects of actions taken after the execution of the Deed of Assignment, and the effects of the filing of the certificate of conversion and certificate of incorporation. The analysis of the timeliness of the declaratory

judgments therefore tracks the analysis of the timeliness of the fraud and conversion claims. The Foundation was on notice of those claims not later than June 2016. The declaratory judgment claims are also untimely.

In addition to being time-barred, the Foundation's claims fail on the merits. The Foundation alleges in its counterclaims that Mr. Perry intended in May 2013 for the Foundation to own the equity in the LLC and that he executed the Deed of Assignment with that goal in mind. The Foundation also alleges that individuals at LOPAG tried to implement the Deed of Assignment by having Mr. Perry execute additional documents. The documents that the Foundation submitted with its counterclaims instead demonstrate that between May 1, 2013, when Mr. Perry executed the Deed of Assignment, and March 18, 2015, when he died, Mr. Perry took inconsistent positions about who owned the member interest in the LLC. In some instances, most notably when making tax filings in France, he acted as if he continued to own the member interest. In other instances, such as when describing his property shortly before his death, he acted as if he previously transferred the member interest to some other entity in the Structure. The Foundation has stipulated that Mr. Perry never executed any additional documents to implement the Deed of Assignment. Dominik Naeff, a principal of both LOPAG and the Foundation, has testified that the Deed of Assignment was never implemented.

The counterclaims make plain that LOPAG was immersed in these issues. Oehri, Naeff, and a third LOPAG representative comprised the Foundation's governing board, making the Foundation and LOPAG one in the same. Neupert also was immersed in these issues, and he worked closely with LOPAG. Not only had Neupert co-founded LOPAG

with Oehri, but until November 2016, he was a partner and minority owner in LOPAG and a member of its governing board. Neupert and LOPAG worked arm in arm create the Structure and advise Mr. Perry. Neupert, Oehri, and Naeff were present when Mr. Perry signed the Deed of Assignment, and Oehri and Naeff countersigned on behalf of the Foundation. After Mr. Perry's death, it was Naeff who told the members of the Perry family and their advisors that the transfer contemplated by the Deed of Assignment was never implemented. Neupert and Naeff subsequently investigated who owned the equity in the LLC, understood the competing arguments, and reached their own conclusions.

Despite the allegations in the counterclaims and the documents in the record, the Foundation grounds its fraud claim on the allegation that it relied to its detriment on actions taken or statements made by Lilly or Tamar. According to the Foundation, it was Lilly and Tamar who made the Foundation believe that Mr. Perry never completed the transfer contemplated by the Deed of Assignment. It is not reasonably conceivable that the Foundation relied on Lilly and Tamar. It is thus not reasonably conceivable that Lilly and Tamar engaged in fraud.

It is also not reasonably conceivable that Lilly or Tamar engaged in the tort of conversion. Neither Lilly nor Tamar never ever asserted control over Côte d'Azur or its equity. Lilly contends in this action that the equity in the LLC passed to Mr. Perry's estate when he died, and she asserts that she is the only heir of the estate and hence has a beneficial interest in the equity of the LLC, but she has never seized control of the entity. She has sought to assert those rights legitimately, through this litigation. Neither Lilly nor Tamar engaged in self-help, as Neupert and LOPAG did.

As noted, the only action that the counterclaims identify which might be consistent with Lilly and Tamar taking action on behalf of Côte d'Azur is the approval of the filing of tax returns in France. The counterclaims show that the returns took the positions that LOPAG and Neupert wanted to take. The Foundation cannot claim that Lilly and Tamar engaged in conversion by doing what the Foundation's own representatives wanted.

The conspiracy claim fails for lack of an underlying wrong. It is reasonably conceivable that Lilly and Tamar began working together in mid-2016. It is not reasonably conceivable that they engaged in a conspiracy to commit fraud or conversion.

The Foundation's claims for declaratory judgments are not ripe, because the Foundation has asserted its claims conditionally. The Foundation only seeks declaratory judgments to the extent it prevails in a second-filed action it is pursuing before a court in Liechtenstein. They are subject to dismissal on that basis.

This decision therefore dismisses the Foundation's claims. They are untimely, and they fail on the merits. That result avoids any need to reach Tamar's jurisdictional arguments.

I. FACTUAL BACKGROUND

The Foundation answered Lilly's complaint and asserted counterclaims.[4] Lilly and

[4] Technically, the Foundation has answered Lilly's amended complaint and has asserted amended counterclaims against Lilly and amended third-party claims against Tamar. For simplicity, this decision generally refers to the operative pleadings as the complaint and the counterclaims. Citations in the form "Ans. ¶ —" refer to the Foundation's answer. Citations in the form "AC ¶ —" refer to allegations in the counterclaims. Citations in the form "ACX __" refer to exhibits to the counterclaims.

Tamar have challenged the sufficiency of the counterclaims as a matter of law. Ordinarily, the court's inquiry on such a motion would be confined to the allegations in the counterclaims and the documents they incorporate by reference, taking into account any admissions in the answer. The court would assume that the well-pled allegations in the counterclaims were true and grant the Foundation the benefit of all reasonable inferences.

This case, however, is already five years old, and the parties have provided the court with a considerable evidentiary record. Lilly originally sued Neupert and the Corporation on April 14, 2017. Dkt. 1. The defendants answered and asserted affirmative defenses, and the Corporation asserted a counterclaim. The latter pleadings maintained that ownership of Côte d'Azur had passed to the Foundation, making the Foundation a necessary party to the lawsuit. The parties briefed whether the Foundation was a necessary party, and in the process submitted twenty-seven documents. *See* Dkt. 24 (six exhibits); Dkt. 33 (nine exhibits); Dkt. 39 (twelve exhibits). Those documents included sworn witness statements that Oehri and Neupert submitted to the Business and Property Courts of England and Wales (the "English Probate Court") in probate proceedings involving Mr. Perry's estate. *See* Dkt. 33 Ex. 2 ("Oehri Aff"); *id.* Ex. 3 ("Neupert Aff."). After considering the submissions and hearing argument, the court held that Lilly could add the Foundation as a defendant, subject to the Foundation's ability to contest whether it was subject to personal jurisdiction in Delaware. *Perry v. Neupert (Necessary Party Decision)*, 2017 WL 6033498 (Del. Ch. Dec. 6, 2017).

After Lilly named the Foundation as a defendant, the Foundation moved to dismiss for lack of personal jurisdiction. Dkt. 48. Lilly argued in response that personal jurisdiction

existed in Delaware because the Foundation had conspired with Neupert to make false corporate filings with the Secretary of State that were designed to bolster the Foundation's claim of ownership. The parties briefed whether the Foundation was a necessary party, and in the process they provided the court with twenty-nine documents. *See* Dkt. 51 (eighteen exhibits); Dkt. 54 (three exhibits); Dkt. 58 (eight exhibits). The exhibits included affidavits that Naeff and Oehri submitted on behalf of the Foundation. *See* Dkt. 53 Exs. A & B. On March 14, 2018, the court ruled that Lilly had established a *prima facie* case for asserting jurisdiction over the Foundation under the conspiracy theory of jurisdiction and authorized jurisdictional discovery. Dkt. 74 at 50, 57–59.

On May 31 and June 1, 2018, the court conducted a two-day evidentiary hearing on the jurisdictional issue. *See* Dkts. 176–77. In connection with that hearing, the Foundation agreed to thirty stipulations of undisputed fact, which remain binding on the Foundation. Lilly and Naeff testified live, with Naeff appearing as a representative of the Foundation. The parties lodged depositions from both witnesses, and they stipulated to the introduction of two affidavits from Oehri, who submitted those affidavits as a representative of the Foundation. During the hearing, the parties introduced a total of 234 exhibits, including emails sent contemporaneously by Naeff and other representatives of the Foundation.[5]

[5] Citations in the form "Stip. ¶ —" refer to stipulated facts. Citations in the form "[Name] Tr." refer to witness testimony from the evidentiary hearing. Citations in the form "[Name] Dep." refer to witness testimony from depositions submitted in connection with the evidentiary hearing. Citations in the form "PX __" and "BX __" refer to exhibits introduced during the evidentiary hearing.

The court issued a ruling in which it made findings of fact based on a preponderance of the evidence and concluded that the Foundation was subject to the court's jurisdiction. *Perry v. Neupert (Personal Jurisdiction Decision)*, 2019 WL 719000 (Del. Ch. Feb. 15, 2019). The case was stayed to accommodate settlement discussions, but those discussions were unsuccessful, and in June 2019, Lilly filed the currently operative complaint. Dkt. 213. It attached twenty-four exhibits.[6]

In July 2019, the Foundation moved to dismiss the complaint on numerous grounds, including (i) lack of subject matter jurisdiction, (ii) lack of standing, (iii) failure to join indispensable parties, (iv) deference to the proceedings in the English Probate Court under *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970), (v) forum non conveniens, and (vi) the failure to state claims on which relief could be granted. Dkt. 221. In support of its motion, the Foundation submitted another eleven exhibits. *See* Dkt. 222 (ten exhibits); Dkt. 236 (one exhibit). Those exhibits include an affidavit that Lilly submitted to the English Probate Court and an affidavit that Tamar submitted in litigation in the Cayman Islands. *See* Dkt. 222 Ex. 6; Dkt. 236 Ex. 1.

The court issued orders denying the motion to dismiss. *See* Dkts. 249–50. In July 2020, the Foundation filed its answer and asserted counterclaims. Dkt. 255. The counterclaims attached and incorporated seventy-one exhibits. *Id.*

Meanwhile, Lilly moved for summary judgment based on the factual findings in the

[6] Citations in the form "CX __" refer to exhibits to the amended complaint.

Personal Jurisdiction Decision. Dkt. 263. In response to that motion, the Foundation submitted another ten exhibits and sought to take Rule 56(f) discovery. Dkts. 265–66. On July 6, 2021, the court denied Lilly's motion for summary judgment, which rendered moot the motion for Rule 56(f) discovery. The court held that the factual findings in the *Personal Jurisdiction Decision* did not constitute binding findings of fact for purposes of subsequent phases of the case.[7]

By the time the court denied Lilly's motion for summary judgment, the Foundation had filed an amended set of counterclaims. Dkts. 278–81. That version of the counterclaims incorporated seventy-six exhibits by reference. Lilly and Tamar moved to dismiss the counterclaims, leading to this decision.

The question is what to do with this voluminous record for purposes of evaluating

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[7] Dkt. 296. The court reached that result because the parties had not stipulated to the binding nature of any evidentiary determinations made during the personal jurisdiction stage, and although the court raised the issue with the parties, both sides hedged. Dkt. 74 at 34–36, 41–42. Neither side gave up its right to continue to litigate following a ruling on personal jurisdiction. *Id.* at 42, 59. It was therefore possible that both sides made decisions about what discovery to conduct and what evidence to present with the expectation that the court's ruling only would address the issue of personal jurisdiction and not be dispositive on the merits. Further complicating matters, Neupert refused to be deposed for purposes of jurisdictional discovery and declined to appear at the evidentiary hearing. As a result, the court drew inferences in Lilly's favor and adverse to the Foundation based on any relevant testimony that Neupert reasonably could have offered. Dkt. 173 at 68–71. The court stated explicitly that it did not necessarily plan to draw the same adverse inference for purposes of the trial on the merits. Dkt. 296 at 18. That ruling meant that the Foundation reasonably could have expected that the court's factual findings might be different at a later stage of the case, making it unfair to hold that the findings were binding for purposes of a motion for summary judgment. *See* Dkt. 296 at 17–18.

the motion to dismiss.[8] A court cannot weigh evidence when deciding a motion under Rule 12(b)(6), but a court can and must assess whether the inferences that the plaintiff seeks to draw are reasonably conceivable.[9] For that latter purpose, the court has considered the record created during the evidentiary hearing and the additional evidence that the parties have submitted during the course of these proceedings. The court has treated the stipulated facts that the Foundation agreed to in connection with the evidentiary hearing as binding on the Foundation. The court also has treated the Foundation's admissions in its answer as binding on the Foundation.[10] Within this framework, the court has treated the allegations in the counterclaims as true and credited the reasonably conceivable inferences that the

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[8] For her part, Lilly continues to rely on the factual findings that the court made in the *Personal Jurisdiction Decision*, but for the reasons stated in its ruling denying Lilly's motion for summary judgment, the court has not treated those factual findings as binding.

[9] *See, e.g.*, *Voigt v. Metcalf*, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020) (explaining extent to which court will "review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks to have drawn is a reasonable one"); *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 658 (Del. Ch. 2013) (evaluating reasonableness of inferences sought in complaint in case where plaintiffs had obtained substantial discovery by pursuing and then abandoning an application for preliminary injunction).

[10] This approach is generally consistent with how the Foundation addressed the record for purposes of its motion to dismiss Lilly's amended complaint. In seeking dismissal, the Foundation drew on the allegations in the amended complaint and the orders, decisions, and opinions filed in related litigations. The Foundation also asked the court to take judicial notice of documents publicly filed in the various litigations. *See* Dkt. 222 at 5 n.4. Everything that the court has considered in evaluating the reasonableness of the inferences that the Foundation seeks is material that the parties have presented to the court in this case, either in docketed filings or in connection with the evidentiary hearing. The court has not considered any material outside of that record.

Foundation seeks.

A. The Structure

Mr. Perry was born in 1942. AC ¶ 16. During his career as an attorney, businessman, entrepreneur, and investor, Mr. Perry amassed substantial wealth. Ans. ¶ 1. His assets included art collections, business holdings, and real estate around the world. AC ¶ 16. He died in on March 18, 2015, after spending several years battling terminal cancer. *Id.*

From 2013 until shortly before his death, Mr. Perry engaged in extensive efforts at estate planning that resulted in him moving much of his wealth into the Structure. *Id.* ¶ 1. The entities in the Structure included eleven Liechtenstein-based trusts (the "Trusts"). Four were general trusts. Each of the other seven was nominally designated for one of the members of Mr. Perry's immediate family: Lilly, Tamar, Yael, and Tamar's four children.[11] In each case, the name of the relevant trust started with the first letter of the name of the pertinent family member. For example, the trust nominally designated for Lilly was the "Liza Trust."

Another entity in the Structure was the Foundation. It is a private Liechtenstein

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[11] *See* ACX 1 ¶¶ 3–4, 65 ¶¶ 14–19, 7 Add. 1; Neupert Aff. ¶ 42. I say "nominally" because it is not clear that any family member has a designated trust for which they are the sole beneficiary. The counterclaims allege that the Trusts have no direct beneficiaries, meaning that no particular individual has any right to benefit from any particular set of Trust assets. AC ¶ 29. Neupert similarly averred in an affidavit that he submitted to the English Probate Court in 2017 that "[t]he class of beneficiaries of all the Trusts … is identical…." Neupert Aff. ¶ 45. But the defendants have not always been clear on this point. In an early filing, the defendants represented that Lilly, Tamar, Yael, and the four grandchildren were the sole beneficiaries of their respective Trusts. Dkt. 33 ¶ 12.

foundation, which is a trust-like vehicle with separate legal existence, roughly analogous to a Delaware statutory trust. AC ¶ 31. The Foundation is governed by a board of trustees (the "Board"). *Id.*

Together, the Trusts and the Foundation held over thirty for-profit businesses and holding companies domiciled in jurisdictions around the world. *Id.* ¶¶ 2, 25. Mr. Perry established the Structure to protect his wealth from creditors, including government creditors seeking to impose and collect taxes. *Id.* ¶ 4. Mr. Perry also established the Structure "to curtail his family's greed for money, power and influence" by removing the bulk of his wealth from their direct control. *Id.*

The trustee of the Trusts and the Board of the Foundation possess expansive discretion about what to do with the assets in the Structure. The Trusts and the Foundation have no direct beneficiaries, meaning that no particular individual has any right to any particular assets or the right to benefit from any particular set of assets. AC ¶ 29. The discretionary beneficiaries are the descendants of Mr. Perry's grandparents, as well as some charitable organizations. The trustee of the Trusts and the Board of the Foundation have broad discretion to determine what action to take to benefit the discretionary beneficiaries.[12]

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[12] In a sworn witness statement submitted to an English court in 2015, Oehri expanded on this point: "As a trustee of discretionary trusts …, I am not required to follow recommendations from Mr Perry or any member of the Perry family for that matter. Indeed, I am not even obliged to consult with them and, with the exception of Mr Perry, I do not believe that LOPAG ever consulted with beneficiaries of the Perry family Trusts we ran

On March 5, 2015, just before his death, Mr. Perry documented his wishes for how the trustees of the Trusts and the Board of the Foundation should manage the Structure by making a video recording that was also transcribed. AC ¶ 20. The written version is known as the "Letter of Wishes." Stip. ¶ 4; *see* PX 19. The trustees of the Trusts and the Board of the Foundation are not legally bound to follow the Letter of Wishes, but as a business matter they will attempt to fulfill their client's requests. *See* Naeff Tr. 64.

In creating the Structure, Mr. Perry regularly sought advice from a worldwide stable of lawyers and advisors. He met regularly with the individuals who managed and supervised the Structure. *See* AC ¶¶ 3, 24.

The entity at the heart of the Structure is LOPAG. As noted, Oehri and Neupert co-founded LOPAG in 1989. Oehri has been a confidant of Mr. Perry's since the early 1980s. *Id.* ¶ 32. Other principles in LOPAG include Naeff, Oehri's son-in-law, and Ann Naeff-Oehri, Oehri's daughter and Naeff's spouse. *Id.* ¶ 33; Ans. ¶ 18.

Since its founding, LOPAG had worked with Mr. Perry. LOPAG formed and managed all of the Liechtenstein-based entities in the Structure. *See* AC ¶ 26; Ans. ¶ 12. At all times relevant to this dispute, LOPAG served as the sole trustee of the Trusts. *See* AC ¶ 28. LOPAG representatives also comprised the members of the Board of the Foundation. *See id.* Oehri served as a member of the Board from 2004 until 2017. *Id.* ¶ 32. Naeff served as a member of the Board from 2011 until his resignation in 2019, after the

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about decisions we took. However, recommendations from Mr Perry have always carried significant weight with me…." Dkt. 349 Ex. B ¶ 12.

evidentiary hearing. *Id.* ¶ 33; *see* Ans. ¶¶ 6, 18. Markus Giger, an accountant and director of LOPAG, served as a member of the Board from 2014 until 2019, after the evidentiary hearing. AC ¶ 34. In November 2016, after the events that are the subject of this litigation, Rupert Neudorfer joined the Board. Neudorfer is a lawyer and partner in a Liechtenstein commercial trust company. In May 2017, Oehri retired, and Stefan Maetzler replaced him on the Board. Maetzler is a lawyer and owner of a Liechtenstein commercial trust company. The counterclaims allege that Neudorfer and Maetzler currently comprise the Board. *Id.* ¶ 35.

The principal architect of the Structure was Neupert, a Swiss attorney and senior partner at Neupert Vuille Partners, a law firm based in Zurich, Switzerland.[13] Neupert was a long-time friend and advisor to Mr. Perry. AC ¶ 27; Ans. ¶ 4. As noted, Neupert co-founded LOPAG with Oehri.[14] Neupert held a minority interest in the firm and served as a

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[13] Stip. ¶ 3. *See* Dkt. 33 ¶ 14 ("In developing his estate plan, [Mr. Perry] enlisted [Neupert]—his decades-long attorney and advisor—to assist. [Mr. Perry's] trust in [Neupert] was well known by [Mr. Perry's] family members and included [Neupert's] being named to administer [Mr. Perry's] UK estate (covering only the disposition of [Mr. Perry's] assets in the UK) and, with his affiliates, being appointed as the protector of the Liechtenstein trusts."); Neupert Aff. ¶ 24 (Neupert averring in an affidavit to the English Probate Court in 2017 that he had "direct personal knowledge of the arrangements made by [Mr. Perry] with regards to the chattels"); *id.* ¶ 99 (Neupert averring that Mr. Perry named him as executor knowing that Neupert had "a detailed understanding of his assets and business dealings worldwide," had "acted as his 'right-hand man' for many years," and was "uniquely placed to administer his affairs after his death").

[14] In a sworn witness statement submitted to an English court in 2015, Oehri stated: "I am the senior director and shareholder in what is now called LOPAG Trust Reg[.] ('LOPAG'). I set up LOPAG together with Dieter Neupert in 1989." Dkt. 349 Ex. B ¶ 1.

member of its governing board until November 18, 2016, when he resigned and sold his interest.[15]

In its capacity as the trustee of each Trust, LOPAG's actions were supervised by a "Trust Protector." AC ¶ 28. The Foundation alleges that the Protector for the Trusts is currently the Swiss Protector Association (the "SPA"). *See id.* Neupert created the SPA during the months leading up to Mr. Perry's death. Neupert Aff. ¶ 44. Its initial directors were Neupert and Neil Duggan, an accountant who audited many of Mr. Perry's companies, both before and after they entered the Structure. Like Neupert, Duggan had served as a longtime advisor to Mr. Perry. *See* AC ¶ 96; ACX 65 ¶ 20. In the Letter of Wishes, Mr. Perry designated Neupert and Duggan as joint Protectors for the Trusts. *See* ACX 1 at 20. It appears that there have been efforts to change the Protectors of certain trusts, as well as litigation over those matters in other jurisdictions. *See* Dkt. 33 Ex. 1 ¶ 10.

Other advisors appear in the saga. Israel Wolnerman, an Israeli attorney, advised Mr. Perry on the creation of the Letter of Wishes and signed the document on Mr. Perry's behalf. *See* AC ¶ 20; ACX 65 ¶¶ 21, 23. Professor Omri Yadlin has been described by Neupert as "a close confidant of Tamar," Neupert Aff. ¶ 77, and Yadlin appears to have been added as a Protector of certain trusts at Tamar's request. *See, e.g.*, ACX 47 at 1, 50 at

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[15] *See* AC ¶ 27; Ans. ¶ 12. In an affidavit submitted to an English court in 2017, Neupert stated: "Lopag is a commercial trust company set up in 1989 and registered on the Liechtenstein commercial register. I was one of the founding members of Lopag and was until 18 November 2016 a member of its Board of Trustees. At one time I also had a small shareholding in the company, but I disposed of that interest at the same time as retiring from the Board, so as to avoid any accusation of impropriety . . . ." Neupert Aff. ¶ 43.

2, 65 ¶ 20. Ze'ev Sharf has acted as Lilly's lawyer. *See* ACX 47 at 1.

B. The Villa And The LLC

Mr. Perry's personal assets included the Villa. AC ¶ 6. Lilly values the property at approximately €25 million. Dkt. 1 ¶ 1.

Mr. Perry caused the LLC to be formed on May 1, 2001, for the purpose of acquiring the Villa and holding title to it.[16] Its limited liability company agreement, also dated May 1, 2001, established a single-member, member-managed governance structure. ACX 2 (the "LLC Agreement").

To provide the funds to acquire the Villa, Mr. Perry caused the LLC to enter into loan agreements with other entities that he controlled, including Britannia Guarantee National Insurance Company ("BGNIC"), a Cayman based insurance company that was part of Mr. Perry's business empire. AC ¶ 37. Pursuant to one such loan agreement, the LLC borrowed $5,333,670 from BGNIC. ACX 4. Later in May 2001, the LLC acquired the Villa. AC ¶ 41.

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[16] The certificate of formation was dated April 17, 2001. ACX 2 at '014. As the court pointed out in the *Necessary Party Decision*, 2017 WL 6033498, at *3 n.12, the certificate of formation reflects that it was filed on May 1, 2001, making that the date of formation for purposes of Delaware law. *See* 6 *Del. C.* § 18-201(b) ("A limited liability company is formed at the time of the filing of the initial certificate of formation in the office of the Secretary of State or at any later date or time specified in the certificate of formation . . . ."). In the counterclaim that Côte d'Azur filed in 2017, Côte d'Azur contended that Mr. Perry formed the LLC on April 17, 2001. Dkt. 12 ¶ 3. Lilly admitted that fact. Dkt. 13 ¶ 3. The parties now agree that the Company was formed on May 1, 2001. *See* Ans. ¶ 21.

C. The Threat Of Civil Forfeiture Proceedings

On October 24, 2007, Mr. Perry was convicted in the District Court of Tel Aviv of theft by an authorized agent. Dkt. 349 Ex. A ¶ 4 (*National Crime Agency and Perry, et al.*, 2014 EWHC 3759 (QB) [hereinafter, *NCA I*]). The conviction related to Mr. Perry's operation of a pension business in Israel. *See* ACX 65 ¶ 13. He was sentenced to twelve years in prison. *NCA I* ¶ 4. On February 5, 2009, the Supreme Court of Israel upheld the convictions, but reduced his sentence to from twelve to ten years. *Id.*

After Mr. Perry's conviction, the English Serious Organized Crime Agency ("SOCA") obtained a disclosure order dated August 8, 2008, which required that Mr. Perry identify his property so that SOCA could investigate whether it was traceable to criminal activity. *See id.* ¶ 7. Any property traceable to criminal activity was potentially subject to forfeiture for the benefit of Mr. Perry's victims. After the affirmance of the conviction, on October 28, 2009, SOCA obtained a worldwide property freezing order against Mr. Perry, the LLC, and two other entities that Mr. Perry controlled—Leadenhall Property Ltd. and Mallet Ford Inc. *Id.*

Mr. Perry, the LLC, and the other defendants challenged the statutory authority of SOCA to pursue assets outside of the United Kington. *See id.* By order dated July 25, 2012, the Supreme Court of the United Kington declared that SOCA only had statutory authority to seek the forfeiture of property within the United Kingdom, and it vacated the worldwide property freezing order to the extent it applied to extraterritorial assets. *See id*.

The decision by the Supreme Court of the United Kingdom did not dissuade the English authorities from continuing to pursue Mr. Perry and his property. In September

2012, the National Crime Agency (the "NCA"), which had succeeded SOCA, commenced a civil forfeiture proceeding against Mr. Perry, the LLC, and the two other entities. *Id.* ¶ 6.

The Foundation alleges that Lilly, Tamar, and Yael were named defendants in the NCA proceedings. The Foundation contends that Mr. Perry retained the Asserson law firm ("Asserson" or the "Asserson Firm") to assist in his defense. *See* AC ¶¶ 69–71; ACX 42.

The Foundation alleges, and the *NCA I* decision indicates, that the assets that the NCA pursued included the equity in the LLC. *See* AC ¶ 78; *NCA I* ¶ 7. In addition, after the Supreme Court of the United Kingdom held that the NCA did not have authority to pursue assets extraterritorially, Parliament responded by amending the statute to permit civil recovery of assets located outside of the United Kingdom under specific circumstances. That law became effective in 2013. *NCA I* ¶ *7*; *see* ACX 18 at 2, 19 at 2. Once that happened, the NCA had statutory authority to pursue the Villa itself.

While these events were unfolding, the Supreme Court of Israel reviewed Mr. Perry's case for a second time. *NCA I* ¶ *5.* In a decision issued on May 23, 2011, the court upheld the convictions, but reduced the amount that Mr. Perry was convicted of stealing from the total of the insurance premiums that the victims paid to the difference between the amount of the premium charged and the cost of similar insurance provided by a legitimate provider. *Id.* In April 2012, Mr. Perry was released to serve the remainder of his sentence under house arrest because of his advanced cancer. AC ¶ 46.

D. The Deed Of Assignment

It is reasonable to infer that Mr. Perry sought to protect the Villa from the civil forfeiture proceedings by moving the LLC into the Structure. *See* ACX 18 at 2, 19 at 2. In

mid-April 2013, Mr. Perry asked Oehri, Naeff, and Neupert to meet in Tel Aviv to address estate-planning issues. Oehri and Naeff attended as representatives of the Foundation and the Trusts. Neupert attended as counsel to Mr. Perry and as a Protector of the Trusts. AC ¶ 45.

The purpose of the meeting was to consider transferring multiple assets into the Structure, one of which was the member interest in the LLC. There was a downside to transferring the member interest to the Foundation, because the transfer would trigger significant tax liabilities for Mr. Perry in France. In preparation for the Tel Aviv meeting, tax counsel warned Neupert and Naeff that if the Foundation became the owner of the member interest in the LLC on or before June 15, 2013, those adverse tax consequences would accrue in the 2013 tax year. *See* BX 5.

Oehri, Naeff, and Neupert flew to Tel Aviv on April 30 and met with Mr. Perry on May 1, 2013. Because Mr. Perry was under house arrest, the meeting took place in his apartment. AC ¶ 46–47.

During the meeting on May 1, 2013 (the "May 1 Meeting"), Mr. Perry signed the Deed of Assignment. In its entirety, it stated:

> The Undersigned, Israel I. Perry, born 23 April 1942, Israeli Passport No. 10922443 herewith assigns the entire share capital of the following companies
>
> 1. Greetnwin.com Inc, Delaware/USA
> 2. Solid Virgin Islands Ltd, BVI
> 3. Cote d'Azur Estate LLC, Delaware/USA
> 4. The Heritage Collection
>
> as well as

all the pieces of art listed in the ARTLID List
(pending approval by SOCA of the
items contained in their Chattel List)

to the **LUDWIG POLZER-HODITZ FOUNDATION, LI-9491 Ruggell**

a Foundation according to Liechtenstein Law

The assignee herewith accepts the aforementioned assignment

Ruggell, 1st May 2013.

ACX 5.[17]

Oehri and Naeff signed for the Foundation. *Id.* After the meeting ended, Naeff took the original back to Liechtenstein and kept it in his office. Naeff Tr. 16.

The Foundation alleges in the counterclaims that the Deed of Assignment was intended to effectuate an immediate transfer of the member interest in the LLC from Mr. Perry to the Foundation. AC ¶¶ 61–62, 124. Earlier in the case, Oehri averred in an affidavit that he and Naeff believed the transfer was effective immediately, and Naeff testified to that effect during the evidentiary hearing. *See* BX 59 ¶ 6; Naeff Tr. 26–29, 37.

In the *Personal Jurisdiction Decision*, the court found that the contemporaneous evidence showed that Mr. Perry, Oehri, Naeff, and Neupert did not intend for the signing of the Deed of Assignment to implement an immediate transfer, because they wanted to avoid any adverse tax consequences for the Foundation during the 2013 tax year. 2019 WL 719000, at *2. They believed that completing the transfer would require additional steps,

[17] When the Deed of Assignment was executed, the name of the Foundation was the Ludwig–Polzer–Hoditz Foundation. It later changed its name to the BGO Foundation. The name change does not matter for purposes of this decision.

and they planned to complete those steps after June 15.

Lilly was present in the apartment on May 1, 2013. The Foundation alleges that she was aware of the purpose and general outcome of the May 1 Meeting, including the intent to transfer the member interest in the LLC to the Foundation.[18]

The Foundation alleges that Tamar was intimately familiar with Mr. Perry's business activities and served as an intermediary between Mr. Perry and LOPAG. The Foundation alleges that Tamar served as the Protector for two Trusts, was represented by many of the same advisors as Mr. Perry, and was frequently included on emails, including in preparation for the May 1 Meeting. *See* AC ¶¶ 51–55. The Foundation contends that as a result, Tamar was familiar with the matters addressed during the May 1 Meeting, including the intent to transfer the member interest in the LLC to the Foundation. *Id.* ¶ 52.

E. The Ordering Of Mr. Perry's Affairs

After the May 1 Meeting, Mr. Perry and his advisors allegedly took a series of actions that reflected an expectation that the transfer of the member interest in the LLC to the Foundation either already was effective or soon would be.

One action that Mr. Perry allegedly took was to inform the lawyers representing him in the NCA proceeding that he no longer personally owned the Villa. Notes of a telephone call on June 30, 2013, between one of Mr. Perry's lawyers from Asserson and his English

[18] *See* AC ¶ 50. Lilly has averred that she "was not involved in Mr. Perry's businesses" nor "in the formation or administration of the trusts and corporate entities that are owned by Mr. Perry's estate." Dkt. 1 ¶ 6.

barrister state, "La Treille owned by Cote d Azur LLC – owned by a trust." AC ¶ 75. By contrast, a set of lawyer notes from Asserson dated April 6, 2009, state: "House - France - Villa La Treille - owned by a Delaware Company (Cote D'Azur Estate LLC) - which is owned by IIP…." *Id.*

Mr. Perry also allegedly sought advice regarding any actions that the NCA might take in France to seize the Villa. Mr. Perry's lawyers at Asserson sent letters to two separate law firms seeking advice on that topic. *See id.* ¶ 77. One letter was dated August 30, 2013, and sent to Bersay Associates. The other was dated September 9, and sent to Olswang France LLP ("Olswang"). *Id.*; *see* ACX 19. Both letters stated: "One of the assets which [the NCA] seeks to confiscate is a luxury property in France which is owned by a Delaware Company. Mr. Perry no longer has any interest in this company, although his family members may." AC ¶ 78.

Audited financial statements for BGNIC also suggest that Mr. Perry transferred the member interest in the LLC to the Foundation. The annual financial statements for BGNIC historically listed the loan to the LLC under the heading, "Related party balances and transactions." *Id.* ¶ 92. The financial statements also identified the beneficial owner of the LLC as "Mr. Perry." ACX 36 at 19. In the audited financial statements for the year ending December 2013, completed on June 11, 2014, the accountants changed the beneficial owners to "members of the Perry family excluding Mr. Perry." ACX 37 at 20. That description is consistent with the Foundation's beneficiaries, suggesting that the accountants understood that the member interest in the LLC had been transferred to the Foundation. AC ¶ 95.

In addition, Naeff prepared various documents reflecting the transfer. For example on May 14, 2013, just after the May 1 Meeting, Naeff sent Mr. Perry an email attaching copies of the documents signed during the meeting plus a chart reflecting which entities in the Structure held various assets. The chart for the Foundation identified the LLC as one of its assets. *Id.* ¶ 82(a); ACX 20. Likewise on November 12, 2013, Naeff sent Mr. Perry an email attaching updated charts reflecting which assets were held by each entity within the Structure as of October 2013. The chart for the Foundation again identified the LLC as one of its assets. AC ¶ 82(d); ACX 23. Similarly on February 13, 2014, Naeff sent Mr. Perry an email titled "Follow-up of the meeting from 09/10.2.2014," which attached a document that "outlines the ACTUAL SITUATION and PLAN" for the Structure. AC ¶ 82(f). The document identified the LLC as owned by the Foundation, although it also noted "proof for shareholding missing." ACX 25.

In January 2015, further meetings occurred in Mr. Perry's apartment in Tel Aviv. Oehri, Naeff, Neupert, and Duggan attended the meetings, and Tamar and Yadlin were present for portions of the meetings. During the meetings, Mr. Perry dictated a list of his assets. Notes from the meeting state: "Villa in France held by Côte d'Azur Real Estate LLC [sic] and ultimately by a trust (JL), estimated market value: USD 20M." The notes were later circulated to Duggan, Neupert, and Mr. Perry. *See* AC ¶ 82(g); ACX 26.

In May 2015, approximately two weeks before his death, Mr. Perry dictated the Letter of Wishes. He stated that that "[t]he houses in London and France and the larger apartment in the [Trump] Tower (at Columbus Circle in New York) shall be granted to the Lilly Trust. To avoid misunderstandings, I am referring to Villa la treille at Villefranche in

France, and the houses at 39-41 South Street in London." ACX 1 ¶ 12(d). The Structure does not contain a "Lilly Trust." It is reasonable to infer that when Mr. Perry mentioned the "Lilly Trust," he was referring to the Liza Trust, which was the Trust in the Structure that was nominally designated for Lilly. *See* AC ¶ 88. Because LOPAG only had authority over assets in the Structure, Mr. Perry's reference to the Villa in the Letter of Wishes suggests that he believed the member interest in the LLC had been transferred into the Structure. *See id.* ¶ 90.

F. Naeff Tries To Effectuate The Transfer.

It is undisputed that after the May 1 Meeting, Naeff sought to implement the transfer of the member interest in the LLC from Mr. Perry to the Foundation. While plainly consistent with an intent to transfer the member interest in the LLC to the Foundation, those efforts are inconsistent with an immediately effective transfer. Naeff and other advisors to Mr. Perry also took steps to implement the other transactions addressed during the May 1 Meeting, which required additional steps to carry out. *See* AC ¶ 66.

The contemporaneous documents show that on June 14, 2013, Naeff emailed Mr. Perry to start the process of formally effectuating the transfers contemplated by the Deed of Assignment. BX 13. He explained that he needed a "direct contact to the local representative (Trust Company or lawyer) that can assist us in doing the necessary [sic]." *Id.* (original in bold and all caps); *see* AC ¶ 84(a); ACX 71.

After not hearing back from Mr. Perry, Naeff sent the same email on June 25, 2013, to Jennifer Risse, Mr. Perry's assistant in the United States. Stip. ¶ 17; *see* AC ¶ 84(b); ACX 21. He followed up on July 1, then again on July 16. BX 14 at '387; *see* AC ¶ 84(c);

ACX 27. On August 8, Naeff asked Risse to have the LLC's registered agent "provide the necessary documents (e.g. share transfer agreement)" to complete the transfer. BX 14 at '387. The Amended Complaint identifies other communications in which Naeff sought to complete the transfer. *See* AC ¶¶ 66, 84; ACX 21–22, 27–30.

In October 2013, Risse put Naeff in touch with Augustin Partners, Mr. Perry's tax counsel in the United States. BX 16; *see* Naeff Tr. 29; AC ¶ 84(g); ACX 30. Naeff asked them for help completing the transfers. *See* BX 16. The firm "resigned shortly thereafter." Naeff Tr. 31.

Later that month, Risse told Naeff that she was "going to need the Trust Documents regarding . . . Cote D'Azur" and the other entities "in order to do the share transfer." BX 17; *see* AC ¶ 84(i); ACX 32. Naeff replied that his assistant would provide the information. BX 18; *see* AC ¶ 84(j); ACX 32. The Amended Counterclaims identify other communications reflecting efforts by Risse and Naeff to effectuate the transfer. *See* AC ¶¶ 84, 97; ACX 33–34, 38–39.

Risse arranged for the law firm of Wiggin and Dana LLP (the "Wiggin Firm") to begin representing Mr. Perry "in connection with the transfer of [his] ownership interests in Cote D'Azur" and the other entities addressed in the Deed of Assignment. PX 5 at '372; *see* Stip. ¶¶ 15, 18; AC ¶ 84(n); ACX 35. The Wiggin Firm eventually prepared a set of draft documents to implement the transfer of the LLC's member interest, consisting of (i) a statement of assignment of Mr. Perry's member interest to the Foundation, (ii) a letter to the LLC from Mr. Perry advising the LLC about the Deed of Assignment and the statement of assignment, and (iii) an amendment to the LLC Agreement to reflect the Foundation as

the LLC's sole member. Stip. ¶ 21; *see* BX 21.

On November 5, 2013, Naeff checked in with Risse about the status of the transfer. BX 20. When Naeff followed up a week later, Risse told him that she was giving the attorneys "all the information" and that "[i]t's going to take some time." *Id.* Throughout November and early December, Naeff continued to follow up with Risse.[19]

Finally, on December 6, 2013, Risse circulated the documents from the Wiggin Firm to both Naeff and Mr. Perry. She asked Mr. Perry to "look them over and let me know if they are good." BX 21.

The Foundation has stipulated that Mr. Perry never executed the documents that the Wiggin Firm prepared to effectuate the transfer. Stip. ¶¶ 20–26; Naeff Tr. 132. Naeff tried to have Mr. Perry execute the documents. He followed up with Risse on December 11, 2013, but Mr. Perry still had not approved them. BX 23. On December 23, Naeff emailed Mr. Perry directly: "Based on the Deed of Assignment, signed on 01 May 2013, both, Greetnwin.com INC and Cote D'Azur Estate should have been transferred to [the Foundation]. Is there any reason from your side not to execute this transactions [sic]?" *Id.* Mr. Perry seemed to approve transferring the member interest in the LLC, responding:

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[19] *See* PX 8 (email dated November 28, 2013, from Naeff to Risse: "Please tell me how far they are. Who are the attorneys in charge and why does it take that long?"); BX 22 (email dated December 6, 2013, from Naeff to Risse: "[W]here are we with the transfer of shares[?]"); *see also* PX 11 (email dated December 10, 2013, from Naeff to Duggan, another of Mr. Perry's advisors, asking for help completing the documents: "[W]e would appreciate if this could be finished after 6 months of continuous efforts. Do you have concrete plans to visit US? Eventually this could help to increase pace.").

"There is no reason why not to transfer the cote d'azure [sic] shares. We are checking now, weather [sic] the transfer of GnW shares would be considered as a tax event in the USA." BX 24.

Subsequent documents strongly indicate that the transfer was never completed. For example, on February 25, 2014, Naeff sent Mr. Perry an email titled "Follow-up of the meeting from 09/10.2.2014." AC ¶ 82. The email lists as a "pending item[]" the "[t]ransfer of Côte D'Azur Estate LLC (US) . . . still not finalized. See assignment agreement, dated 01.05.2013. Still being progressed." ACX 39. In 2015, Oehri provided a witness statement on behalf of LOPAG to an English court in which he averred that when Mr. Perry died, the LLC "was solely owned by Mr. Perry." Dkt. 349 Ex. B ¶ 57.

Documents introduced during the evidentiary hearing indicate that Mr. Perry decided not to complete the transfer to avoid adverse tax consequences in France.[20] The

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[20] *See* BX 26 (email dated March 28, 2015, from Naeff: "This is [sic] assignment is known to us, but it was never executed as far as we are aware. And I'm glad about it with respect to Cote d Azur since reporting obligations in France (relevant due to the Villa in France) became very strict "); ACX 48 at 2 (email dated September 17, 2015, from Risse: "Mr. Perry was the sole member and this was done for tax reasons. . . . Regarding transferring the shares to the Trust. I have attached his draft documents which we never went any further with per IP."); *see also* PX 25 at '058 (email dated August 28, 2015, from Neupert: "According to French law it is absolutely legal for the Delaware company to be [part of the Structure]—IIP simply wanted to save the 3% yearly flat tax and therefore [identified himself as] the ultimate beneficiary"; translated from "Nach französischem Recht ist es absolut legal, wenn die Delaware Gesellschaft in einer Struktur eingebunden ist - IIP wollte einfach die 3% jährliche Flat Tax aparen und hat sich deshalb als Ultimate Beneficiary geoutet"); PX 94 at '554 (email dated July 18, 2016, from Naeff: "Until his death the settlor was the sole shareholder of Côte d'Azur LLC, Delaware, an entity that holds a property in France. At some point the plan was to bring this company into one of the trusts (and the [Letter of Wishes] also provided for that). Since France does its best

LLC never listed the Foundation as its owner on any of its tax filings in France. *See* BX 29, 44; PX 79. The Foundation now asserts that "[t]o the extent Mr. Perry did not execute the documents prepared by [the Wiggin Firm], the Foundation believes Mr. Perry did not do so because he was advised the documents were inoperative, ineffective or otherwise unnecessary as a matter of law." AC ¶ 107.

G. The Understanding Of The Status Of The LLC At Mr. Perry's Death

When Mr. Perry died on March 18, 2015, he was a non-domiciliary resident of the United Kingdom, and his last will and testament was governed by English law. ACX 67 (the "UK Will"). Dated August 29, 2013, the UK Will covered "only [Mr. Perry's] assets in England and Wales[,]" and was "not intended to have any effect in relation to any of [his] assets outside England and Wales." *Id.* at 1. Under English law, however, the UK Will also covered Mr. Perry's personal property, which accordingly passed to his estate (the "UK Estate"). Lilly was Mr. Perry's sole heir under the UK Will. The UK Will named Neupert as the executor of the UK Estate. *See* ACX 65 ¶ 17.

A member interest in a Delaware LLC is personal property. Accordingly, if Mr. Perry remained the sole member of the LLC at the time of his death, then the member interest became the part of the UK Estate.

Approximately one week after Mr. Perry's death, Wolnerman found a copy of the

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(taxes, reporting etc.) to torpedo such structures, this idea was dismissed."); PX 103 at '617 (email dated August 10, 2016, from Naeff: "IIP endowed the Cote d'Azur shares to the Foundation. Initially we had no access and later on we did not implement it due to the consequences in France."); Naeff Tr. 171–72.

Deed of Assignment and asked Naeff about its implications for the ownership of the member interest in the LLC.[21] On March 28, 2015, Naeff responded, copying Neupert:

> This is [sic] assignment is known to us, but it was never executed as far as we are aware. And I'm glad about it with respect to Cote d Azure [sic] since reporting obligations in France (relevant due to the Villa in France) became very strict in the meantime and we have to plan the transfer into THE LIZA TRUST carefully now. Who can inform us about the actual shareholders/directors of Cote d Azure?

PX 21 at '030. At the evidentiary hearing, Naeff testified that by "never executed" he meant "that this transfer has not been completed or finalized." Naeff Tr. 53.

Shortly thereafter, Naeff circulated a chart of the Structure. He did not know where to put the member interest in the LLC, writing "??? TRUST." PX 20 at '151–52. He did not assert that the Foundation was already the sole member of the LLC. In August 2015, Naeff circulated an updated version of the chart. This time he listed the Company as owned by "IIP {personally}." PX 21 at '033; *see* Naeff Tr. 201.

Based on their understanding that the transfer of the member interest in the LLC from Mr. Perry to the Foundation had not been completed, Neupert and the principals of LOPAG concluded that the member interest constituted part of Mr. Perry's personal property at death. It therefore became property of the UK Estate, with Lilly as the sole heir.

After Mr. Perry's death, LOPAG representatives repeatedly told Lilly that the Villa was her responsibility because she was Mr. Perry's sole heir under the UK Will. While

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[21] BX 26 at '870. In an affidavit submitted to the English Probate Court Neupert described Wolnerman as "Tamar's Israeli layer [sic]." Neupert Aff. ¶ 92.

alive, Mr. Perry personally paid for the maintenance expenses of the Villa. Naeff Tr. 68. After his death, Lilly asked LOPAG representatives to have the Foundation cover the maintenance expenses. *See* BX 27 at '441; *see also* PX 96. The LOPAG representatives consistently told her that the Foundation did not own the LLC, could not take any action with respect to the Villa, and would not cover any expenses.[22]

Around the same time, the audited financial statements of BGNIC were issued. In 2014, the financial statements had listed the beneficial owners of the LLC as "members of the Perry family excluding Mr. Perry." AC ¶ 93. In 2015, the financial statements identified the beneficial owner of the LLC as "Lilly Perry, the wife of Mr. Perry." *Id.* ¶ 99. That

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[22] *See* PX 23 (email dated August 17, 2015, from Neupert to property manager, copying Naeff: "[W]e should not forget that formally all agreements concerning the Villa should be concluded by the owner, [i.e] Cote d' Azur Real Estate LLC [sic], Delaware . . . Formally the late Mr. Perry had declared to be the sole sharholder [sic] of the company, so—from a legal point of view—the shares in the Company fall under the UK Probate."); PX 26 (email dated September 17, 2015, from Naeff to Julien Monsenego, a lawyer with Olswang, Neupert, and others: "La Treille belongs to the estate"); PX 36 (email dated November 23, 2015, from Neupert to Tamar, Naeff, and a property manager noting that the Company belongs to the "personal assets of IIP"); PX 37 (email dated November 25, 2015, from Neupert to Tamar, copying Naeff, Yadlin, and Duggan and explaining that "[t]he assets [of Mr. Perry] certainly include the shares in Côte d'Azur Real Estate LL.C. [sic]"); PX 38 (email dated November 25, 2015, from Neupert to Tamar noting that the Company was "held privately by your father"); ACX 49 at '081 (email dated December 15, 2015, from Naeff to Tamar: "La Treille is held by Cote d'Azur Real Estate [sic] and a[s] such part of the estate. We are neither shareholders nor directors, so we can only act based on goodwill of the involved."); PX 99 at '928 (email dated August 1, 2016 from Naeff-Oehri to the property administrator: "Maybe you are not aware that there is still no agreement between the Trusts and Lilly - therefore (and as Lilly has been declared to be the owner of La Treille towards the French Tax Office) would you be so kind to tell her that she is personally responsible for the maintenance costs of the Villa."); *see also* Naeff Tr. 69. At times, LOPAG provided some funds to maintain the Villa from another entity in the Structure. *See* BX 31, 35, 37; PX 39, 44; Naeff Tr. 68–69.

change is consistent with Lilly being the ultimate beneficial owner of the LLC's equity once it passed through the UK Estate.[23]

In its counterclaims, the Foundation acknowledges that at the time of Mr. Perry's death, its representatives believed that the transfer of the member interest in the LLC from Mr. Perry to the Foundation had not been immediately effective and required additional steps to implement. *Id.* ¶ 130. The Foundation claims that it developed this belief after Risse sent her email to Mr. Perry, Naeff, and others on December 6, 2013, which attached documents prepared by the Wiggin Firm that were intended to implement the transfer. *Id.* ¶ 128.

The Foundation alleges that it was "under the wrong impression that, somewhat similar to Liechtenstein, a formal 'registry' was maintained in Delaware, presumably with a government authority, to record the 'owners' of Delaware limited liability companies like Côte d'Azur." *Id.* ¶ 131. The Foundation alleges that it "incorrectly came to believe that it may be necessary to record in the 'registry' the transfer from Mr. Perry to the Foundation before the Foundation could formally declare itself to third parties as the legal owner of Côte d'Azur." *Id.* ¶ 135. The Foundation contends that it "did not appreciate, until it received proper legal advice on this matter, that once Mr. Perry executed the Deed of Assignment, he immediately ceased being the owner of and a member of Côte d'Azur under Delaware law and had no ability to take further actions in connection with Côte

[23] In May 2016, the audited financial statements were revised to omit any reference to the beneficial owner of the Company. AC ¶ 99.

d'Azur." *Id.* ¶ 133. The Foundation alleges that it "did not seek legal advice regarding the ownership of Côte d'Azur until the summer of 2016," at which point the Foundation sought "to ascertain its exact rights with regard to Côte d'Azur." *Id.* ¶ 144.

At least one document attached to the counterclaims calls into question the Foundation's assertion that it believed there was an official share registry. On March 29, 2016, Neupert emailed a lawyer at Olswang, stating:

> You might know that the US has no such thing as a commercial registry – we are trying therefore to get a certificate of Incumbency which would show that I am the legitimate Director of the Company now (as Executor of the Last Will of Mr Perry).

ACX 53. Neupert copied Naeff. *Id.* At least by March 29, 2016, the Foundation was on notice that there was "no such thing as a commercial registry." *Id.* The Foundation also knew that the LLC Agreement itself required the equivalent of a "share registry." The LLC Agreement stated expressly that "[a] written record showing the name, last known address and interest of the Member or members in the Company shall be maintained by the Company at its principal office." ACX 2 ¶ 13.

H. The Concept Of Moving The LLC Into The Structure

After Mr. Perry's death, Lilly raised objections to the Structure and contended that she should receive a greater share of Mr. Perry's wealth. AC ¶ 154. According to the counterclaims, Lilly sought to obtain direct control over the Villa, and she asserted that she was the sole beneficial owner of the Villa because the equity of the LLC would pass to her under the UK Will. As the counterclaims elsewhere recognize, that is what Neupert and LOPAG thought at the time as well. *See id.* ¶¶ 130–43. The contemporaneous documents

show that Neupert and LOPAG representatives, including Naeff, consistently informed Lilly that she was the sole beneficial owner of—and responsible for—the Villa because the equity of the LLC would pass to her under the UK Will.

Neupert and LOPAG representatives made similar statements to Tamar. The counterclaims nevertheless assert that "[t]hrough numerous communications, including e-mail, Tamar steadfastly rejected Lilly's claim to own the Villa and confirmed her understanding that Côte d'Azur had been transferred into the Structure by Mr. Perry." *Id.* ¶ 158; *see* ACX 45, 50 at 2. The counterclaims themselves demonstrate that from a point in time beginning shortly after Mr. Perry's death, there were disputes about the ownership of the LLC's equity.

Neupert was concerned that the probate process in the United Kingdom threatened the family's interest in the Villa. If the LLC's equity was part of the UK Estate, then it was subject to the claims of Mr. Perry's creditors, including a class action in Israel seeking to recover millions on behalf of the pension funds that Mr. Perry had been convicted of defrauding.[24] According to the counterclaims, Neupert and the Perry family sought to minimize that risk by waiting until the class action had settled before submitting Mr. Perry's will to probate and opening the UK Estate. AC ¶ 222. Neupert and the Perry family feared that if the UK Estate was opened before a settlement was reached, then "it would bring to the attention of the class action claimants in Israel information about the family's

[24] *See* PX 92 at '563; Neupert Aff. ¶¶ 27–33.

substantial assets and thus undermine the likelihood of a cheap settlement." *Id.* ¶ 223.

Neupert and LOPAG also wanted to carry out the desires that Mr. Perry expressed in the Letter of Wishes, which had contemplated moving the Villa into the Structure. *See* Naeff Tr. 15. Neupert believed that Mr. Perry would have wanted to preserve the Villa for his family in the most tax-advantageous manner possible, consistent with the extensive tax-avoidance strategies he had deployed during this lifetime.

To achiee these goals, Neupert and LOAPG hoped to broker a global settlement among Lilly, Tamar, and Yael. The counterclaims acknowledge that that parties and their advisors evaluated possible ownership structures for the LLC as part of their settlement talks. The counterclaims also acknowledge that "[e]ach potential settlement structure considered by the Perry family and its advisors carried with it significant adverse tax and other consequences for the Perry family." AC ¶ 198.

> For example, there existed the potential for tax savings if Mr. Perry was deemed the owner of Côte d'Azur until his death and Lilly inherited Côte d'Azur directly from her late husband as a surviving spouse. Such a transfer would avoid the French inheritance tax (potentially up to 60%) and the need to explain to the French authorities past controversial tax filings by the Perry family. This approach, however, would deny Tamar, Yael and the other potential beneficiaries any rights in Côte d'Azur and violate Mr. Perry's express wishes.

Id. ¶ 199. By contrast, if the settlement moved the Villa equity into the Liza Trust as contemplated by the Letter of Wishes, "the interests of Tamar, Yael and other potential beneficiaries would be protected[,]" but that approach "risked incurring substantial tax liabilities." *Id.* ¶ 200.

In August 2015, Neupert asked Naeff if there were documents that would enable

Neupert to "show that [the LLC] was somewhere in the [S]tructure." PX 24 at '643. Later that month, Neupert told Naeff that they needed documentation that would enable them to appoint a new director who could issue equity to show that the LLC was part of the Structure. *See* PX 25 at '060 ("How far have you gotten with the documentation of Côte d'Azur Estates LLC – after all, we need a new director and would possibly have to bring the shares into [the Structure].").

Naeff agreed that they needed someone with authority to act on behalf of the LLC, and he asked whether Neupert could sign the necessary documents as Mr. Perry's executor under the will. *Id.* Naeff also warned that moving the LLC into the Structure would have tax consequences in France. *Id.* Neupert responded that if he signed the necessary documents in his capacity as executor, then they could not avoid having the LLC become part of the UK Estate.[25]

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[25] *See id.* at '059 ("Since it was IIP's idea to [move] the properties into the [S]tructure, we can simply issue new shares to [the Foundation] or one of the trusts (to be signed by the new director); I cannot act in this connection as the executor, because then the shares would become part of the estate and, in accordance with the U.K. last will, would automatically become the property of Lilly. In France we could still declare Lilly as [the ultimate beneficial owner], once the settlement is signed—the date for the meeting between Zeev [sic] Scharf with Lilly's new attorney has just been postponed from August 31 to September 11"; translated from "Nachdem die Idee von IIP ja war, dass die Liegenshaften in die Struktur eingebunden werden sollten, könnten wir einfach neue Shares auf BGO oder einen der Trusts ausstellen (durch den neuen Director zu unterzeichnen), als Testamentsvollstrecker kann ich nicht aktiv werden, da die Aktien sonst Bestandteil des Nachlasses würden und gemäss dem UK Testament automatisch in das Eigentum von Lilly übergehen würden. In Frankreich können wir immer noch Lilly als WB angeben, wenn einmal der Vergleich unterzeichnet ist—das Datum für das Treffen von Zeev Scharf mit dem neuen Anwalt von Lilly bei uns wurde soeben vom 31. August auf den 11. September verschoben.").

At this point, Naeff remembered the Deed of Assignment and suggested that it provided a way to create a document trail that would place the Company within the Structure:

> I see a starting point here. On [May 1, 2013], IIP signed an assignment of Côte d'Azur Estates LLC to the Foundation. Therefore, the Foundation could also appoint a new director. However, I believe that that would have tax consequences in France. It is well known that the rules there are very strict.

PX 25 at '058. Neupert agreed that Mr. Perry had never implemented the transfer because of the tax consequences in France. *See id.* ("According to French law it is absolutely legal for the Delaware company to be [part of the Structure] – IIP simply wanted to save the 3% yearly flat tax and therefore [identified himself as] the ultimate beneficiary."). But he thought using the Deed of Assignment seemed promising and asked for a copy.[26] Naeff sent him a .pdf version.[27]

The counterclaims allege that in September 2015, Naeff contacted Risse to obtain information about the ownership of the Company. *See* AC ¶ 201. Risse provided the documents she had, including the documents that the Wiggin Firm had prepared to effectuate the transfer of the Company's equity. Risse confirmed that the transfer had not been completed:

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[26] *See id*. ("[W]ould you still have a copy of the [Deed of Assignment] for me (I probably prepared it myself at the time in Tel Aviv)?"; translated from "hättest Du mir noch eine Kopie der Widmung vom 01.05.2013 (wahrscheinlich habe ich die damals sogar selber in Tel Aviv aufgesetzt)?").

[27] *See id.* (email from Naeff to Neupert: "You will find the [Deed of Assignment] in the attachment"; translated from "Die Widmung findest du im Anhang.").

> I have attached the documentation that I have passed around for Cote d'Azur. There wasn't a director, Mr. Perry was the sole member and this was done for tax reasons.
>
> If you recall, I had spoken to someone at [the Wiggin Firm], Mark Kaduboski, in December of 2013, regarding transferring the shares to the Trust. I have attached his draft documents which we never went any further with per IP.

ACX 48 at 2.

Naeff interpreted the email as confirmation that "Mr. Perry remained the record owner of Côte d'Azur at the time of his death." AC ¶ 202. After reviewing Risse's email, Naeff wrote to Neupert: "[T]he case is clear. IIP was the sole shareholder. In addition, the company apparently had no director, since the shareholder also exercised the corresponding functions."[28]

Neupert responded: "Thank you. Now this is what we must do." ACX 48 at 1. He then listed four items:

- "Since Coudert Brothers … went bankrupt a few years ago, there probably isn't a registered agent at the moment. So we can ask our correspondent in Delaware, the Company Corporation, to take over."[29]

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[28] Translated from "Der Fall is klar. IIP war Alleinaktionär. Zudem hatte die Gesellschaft offenbar keinen Direktor, da der Aktionär die entsprechenden Funktionen ebenfalls ausgeubt hat." ACX 48 at 1; *see* AC ¶ 203.

[29] Translated from "Da Coudert Brothers, eine ziemlich sportliche Anwaltskanzlei vor ein paar Jahren in Konkurs ging, gibt es wahrscheinlich im Moment keinen Registered Agent—wir könnten unsere Korrespondenten in Delaware, the Company Corporation anfragen, das zu übernehemen."

- "Then I wonder if the annual taxes have been paid -- we're supposed to have a recent Certificate of Good Standing."[30]

- "Then we should elect a new director—preferably someone from LOPAG (since the shares were actually dedicated to the trust), as a shareholder I can (due to my position as Executor) make the appropriate decisions."[31]

- "Finally, the new director can issue one or more share certificates—depending on the decision on the Structure in France—in favor of the Trust or to an SCI [a French real estate company] or directly to Lilly (40%) and to Tami and Yael (30% each)."[32]

Neupert proceeded to do precisely that. He reached out to The Company Corporation to obtain a Certificate of Good Standing for the LLC. *See* PX 29. In doing so, he claimed to be the "executor of the Last Will of Mr Perry." *Id.* at '575. The Foundation's representatives at LOPAG were aware of Neupert's actions. Minutes of a meeting among the LOPAG advisors dated October 19, 2015, state: "Company currently not in good standing. D. Neupert in contact with registered agent in Delaware." PX 30 at '160.

I. The Interactions With The French Lawyers

For help on the tax questions, Naeff and Neupert contacted Olswang, where Monsenego and his colleagues had advised Mr. Perry on tax matters involving the LLC

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[30] Translated from "Dann frage ich mich, ob die jährlichen Steuern bezahlt wurden—wir sollten ja ein aktuelles Certificate of Good Standing haben."

[31] Translated from "Alsdann sollten wir einen neuen Director wählen—am besten wäre jemand von der LOPAG (da die Aktien ja eigentlich dem Trust gewidment wurden), als Aktionär kann ich (qua meines Amtes als Willensvollstrecker) die entsprechenden Beschlüsse fassen."

[32] Translated from "Schliesslich kann der neue Director ein oder mehrere Share Certificates, ausstellen, dass dann—ja nach Entscheidung über die künftige Struktur in Frankreich—an den Trust, eine SCI oder direct an Lilly (40%), Tami und Yael (je 30%) indossiert werden kann."

and the Villa. In an email to Monsenego, Naeff described various ownership allocations that Mr. Perry's surviving family members might agree to and asked about the tax consequences. He wrote:

> With respect to the ownership of the LLC the situation is as follows:
>
> IIP was the sole member of the LLC according to the LLC - documentation available to us. But there is an assignment agreement from 01.05.2013 as well in which IIP assigned his shares in the LLC to a foundation. From my point of view we should focus on the feasible future options now and then decide what needs to be done to document the transfer properly.
>
> **Starting point:** until his demise IIP was reported as the UBO ["Ultimate Beneficial Owner"] of the LLC
>
> What would be the one-off and future (tax-) consequences if the ownership of the LLC would change to:
>
> a) The heirs (e.g. 40% to his wife and 30% / 30% to his both [sic] children)
>
> b) To the foundation or to a Trust (discretionary)
>
> c) To the foundation or to a Trust (with named beneficiaries)
>
> I think these are ultimately the options. Furthermore would there be a benefit to transfer ownership of La Treille from the LLC to a SCI [i.e., a French real estate investment company]? At the end we need a solution that is 100% compliant to the legislation in France.

PX 28 at '672. Naeff copied Neupert on his email.

Monsenego and his colleagues at Olswang believed that any transfer other than an inheritance under the UK Will would have adverse tax consequences in France. Monsenego asked about hiring an international notary to explore the alternatives further. Naeff agreed, but instructed Monsenego not to inform Lilly, Tamar, or Yael:

> Please get the support of an international notary. But I kindly ask you not to involve the heirs at his [sic] stage. We would like to discuss the options first with the Protectors (including Omri [Yadlin]) and then to present the options

> and suggestion to all heirs at the same time. It is a sensitive topic and it would not be received well if one gets the impression that we treat them differently.

Id. at '671. Naeff again copied Neupert on his email.

After receiving Naeff's email, the Olswang lawyers asked for confirmation that the member interest in the LLC had been transferred to and registered with the Foundation. *Id*. at '670. They also wanted to know whether the transfer had been "registered in the shareholders' registry (or other similar document) of the LLC?" *Id.*

Naeff drafted a proposed response, which he sent to Neupert. It stated: "IIP assigned on 01 May 2013 the LLC to the Foundation but the transfer has never been registered in a register of members or similar [sic] according to our knowledge." *Id.* (original text capitalized). Neupert forwarded Naeff's proposal to Wolnerman. After consulting with Neupert, Naeff did not send his response. Instead he told Olswang that he would respond to their questions after consulting with LOPAG's lawyers. BX 33 at '302.

That same day, Neupert independently emailed The Company Corporation:

> As executor of the Last Will of Mr Perry, the former member and director of the above mentioned company, I would like to get a Certificate of Good Standing again.
>
> Would you be prepared to take on the company as new registered agent and could you check whether the company is current with its tax/license obligations? We would then want to nominate a new director.
>
> Unfortunately Coudert Brothers in New York went bankrupt a few years ago which is why we are not able to trace the status of the company.
>
> For that purpose we are including the Certificate of Incorporation, the Certificate of Formation and the Company Agreement to help you with the search.

PX 29. The Certificate of Good Standing was eventually obtained on February 9, 2016. PX 55 at '744.

One month later, on October 20, 2015, Naeff finally responded to Olswang. He abandoned any reliance on the Deed of Assignment, stating flatly: "IIP was the sole shareholder of Cote D'Azur Estates LLC [sic] until his demise in March 2015." BX at '301; *see* PX 30 at '160.

In his email, Naeff asked Olswang to evaluate two specific options for ownership of the LLC:

> - Transfer of all shares in LLC from IIP to his wife (40%), and his two daughters (30% each).
> - Transfer of all shares in LLC from IIP to a SCI [a French real estate company] that is held by his wife (40%), and his two daughters and eventually by his four grandchildren.
>
> The target is to transfer the shares in the LLC to the family or to an entity with the family members as beneficiaries. The solution should be solid and for sure fully compliant with tax regulations in France and abroad.

BX at '301. He copied Neupert.

On October 26, 2015, Neupert followed up with Olswang and confirmed Naeff's representation. He wrote:

> Formally 100% of the shares in the LLC were held by the late Mr Perry (who was disclosed as the ultimate beneficiary to the French Tax Authority). Pending the execution of his Last Will, the shares now belong to the community of heirs (represented by me as the Executor of his Last Will).

PX 32; *accord* PX 46 at '115 (email dated February 29, 2016, from Neupert, copying Naeff: "[I]t was discovered that the widow of Mr Perry [i.e., Lilly] will inherit 100% of the shares of the Company owning La Treille according to Mr Perry's Last Will.").

J. The Amended Counterclaims' Depiction Of The Settlement Discussions

While these events were unfolding, settlement discussions continued among Mr. Perry's heirs and their advisors. *See* AC ¶ 163. The counterclaims assert that Neupert, Naeff, and LOPAG were secondary players in any settlement discussions. According to the counterclaims, "[f]rom the time of Mr. Perry's death in March of 2015 until approximately June of 2016, Lilly and Tamar worked through their respective legal and other advisors to negotiate a mutually acceptable resolution of their disagreements in the hope that if reached, it could be also embraced by Yael and the Trustees." *Id.* ¶ 160.

According to the counterclaims, Neupert became involved in the settlement discussions at the request of Lilly and Tamar "due to his role as a longtime advisor and friend of Mr. Perry, as well as someone who enjoyed the trust of both Lilly and Tamar." *Id.* ¶ 165; *see id.* ¶ 167. According to the counterclaims, "Neupert's primary role during the settlement talks was to serve as an intermediary between Lilly and Tamar through whom settlement demands could be passed along to the other side in a non-threatening manner." *Id.* ¶ 166. The counterclaims allege that Neupert acted "[s]imilar to the role of a court appointed mediator" and that "all of [his] actions in connection with the settlement discussions were fully transparent and known to either Lilly or Tamar, as well as their various advisors." *Id.* ¶ 168–69.

It is not reasonably conceivable, in light of the documentary record, that Neupert played such a limited or even-handed role. It is rather plain that Neupert was one of the principal actors seeking to influence the outcome of the discussions.

The counterclaims allege that in early 2016, the members of the Perry family and

their advisors concluded that their best option was to represent to the French tax authorities that Lilly inherited the membership interest in the LLC as Mr. Perry's sole heir under his will, while at the same time reaching agreement among themselves on a settlement that would move the LLC into the Structure. *See id.* ¶ 204. The counterclaims allege that the Perry family misled Neupert into making the necessary representations to the French tax authorities:

> The Perry family knew that Côte d'Azur did not fall under the U.K. Will or the U.K. Probate Estate. The Perry family also knew that Dr. Neupert, who did not have the benefit of proper legal advice on this issue, was willing to make creative legal arguments if he believed doing so would protect the interests of the family and the memory of his friend, Mr. Perry.

Id. ¶ 205. It is not reasonably conceivable that Neupert was misled about the situation that the Perry family faced. Neupert was immersed in those issues. He and Naeff knew about the ambiguities surrounding the ownership of the LLC and were exploring possible ways to allocate ownership.

K. The March 2016 Inquiries From The French Tax Authorities

It is undisputed that Mr. Perry's tax filings in France had always identified Mr. Perry as the ultimate beneficial owner of the LLC and never reflected a transfer of the member interest to the Foundation. The Foundation alleges that the tax filings also failed to disclose the related-party nature of the loan used to acquire the Villa and significantly underrepresented the value of the Villa. AC ¶ 184.

At this point in the narrative, the counterclaims allege that the settlement talks among the family members "collapsed upon receipt of a French tax audit notice in March 2016 and the need to provide various documents and confirmations to the tax inspector in

order to avoid a full blown investigation or litigation." *Id.* ¶ 186. According to the counterclaims, Lilly and Tamar sought to keep the prospects of settlement alive by "orchestrat[ing] an elaborate charade whereby knowingly inaccurate documents were submitted to French tax officials validating Mr. Perry's prior filings and identifying Lilly as the owner of the LLC by virtue of being the heir under Mr. Perry's U.K. Will." *Id.* ¶ 188. According to the Foundation, Neupert and Naeff were unwitting dupes in this process. The counterclaims allege that

> To perpetrate their deception, Lilly and Tamar exploited the age and loyalty of Dr. Neupert to the Perry family. This resulted in Dr. Neupert, in his capacity as the designated executor of the U.K. Will, drafting and executing documents, at the direct request and knowledge of Lilly, Tamar and their advisors, which were used to obtain extensions from the tax inspector. At the direction of Lilly and Tamar, Dr. Neupert also liaised with the state of Delaware to obtain and file documents that were necessary to address the issue of French taxes.

Id. ¶ 191. According to the Foundation, "in pointing to Lilly as the alleged owner of Côte d'Azur by virtue of the U.K. Will, Dr. Neupert only acted in response to direct requests by Lilly, Tamar and their advisors," and "[h]e acted out of a blind loyalty to the memory of Mr. Perry and the interests of the Perry family, based on a misunderstanding of Delaware (and possibly English and French) law." *Id.* ¶ 194. Even when viewed under a Rule 12(b)(6) standard with all inferences favoring the Foundation, those allegations and the associated inferences are not reasonably conceivable.

In March 2016, a French tax inspector contacted Olswang to obtain documents as part of an audit of the LLC's corporate income taxes for tax years 2013 and 2014. As part of that audit, the tax inspector wanted to know the ultimate beneficial owner of the LLC as

of January 1, 2013, and January 1, 2014. *Id.* ¶ 208.

Neupert engaged with Tamar about the request on March 23, 2016, stating in an email:

> I just heard you had a visit from the French tax inspector – I think we are talking about a new valuation of the property for the French wealth tax? As Director of Cote d'Azur Estate LLC I can deal with that problem and have a specialised [sic] tax advisor at hand who is dealing with all the properties administered by us very successfully. Would you therefore be so kind as to let me have any papers they might have delivered to you?

ACX 52. Neupert was not at that point a "[d]irector" of the LLC.[33]

Tamar responded to Neupert's inquiry about the tax inspection, writing:

> Julien Monsenego [of Olswang] is handling the tax inspection. Perhaps you could assist us with some of the documentation needed for this purpose? Mr. Monsenego would like to show official documents from 2013 and 2014 (the audited year) where my father's ownership is stated. That can be the LLC accounts, my father's tax returns, LLC share ledger or any other US corporate or tax document from these years. If you have any of these, please send them on to me, most preferable [sic] today (as you'll be on Easter holiday this weekend). This would be very helpful.

PX 53.

Neupert did not want to use Olswang. He wanted to use a different law firm:

> With due respect to [Monsenego], I have to admit frankly that I am not happy with his competence.

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[33] The counterclaims allege that the Perry family had previously presented Neupert to third parties as a "Director" of the LLC. AC ¶ 218. As support, the counterclaims cite a settlement agreement with the NCA in November 2015. ACX 51. Lilly and Tamar executed the settlement agreement on the same page that included a space for Neupert to sign on behalf of Côte d'Azur and a space for him to sign as the executor of the UK Estate. *Id.* at 8. There are also signature pages for Naeff to sign on behalf of various entities. *Id.* The signature page does not specifically identify Neupert as a "director" of the LLC, only that he was signing "for and on behalf of Côte d'Azur Estate LLC." *Id.*

> After he told us he is not knowledgeable with regard to French inheritance tax, he convinced us to outsource the La Treille structure to Expert Notaries who came up yesterday with an absolute nonsense memo, assuming that your father was a French national! This nonsense took about 3 months and did cost a lot of money.
>
> You are, of course, aware that the matter is simple and complex at the same time:
>
> Simple, because if your mother gets the shares of Cote d'Azur Estate LLC, she is completely exempt from the French inheritance tax (you and Yael would have to pay at least 40%)
>
> It is complex because – as we are still waiting with the probate procedure in England – I have a problem to legitimate me as Executor of the Last Will in the US. Due to our good connection to a registered agent company in Delaware we should get a Certificate of Incumbency in the next 2-3 weeks, certifying that I can represent the beneficial owner.
>
> We did not bother [Monsenego] with the complex side, but I would really feel much more comfortable with Cofes, a company in Geneva and France who is specialising [sic] in foreigners owning French real estate through structures (we were able for instance to reduce the value basis for the French wealth tax of a sea side villa, previously owned by the Shah of Iran from EUR 250 mio. down to EUR 30 mio.)
>
> Therefore I would like to ask the Protectors to agree on Cofes to handle the tax aspects of La Treille, i.e. the inheritance declaration, the 3% declaration, the company tax for the rental value, and the ISF.
>
> I hope that you share my point of view….

Id. Neupert thus wanted to use a new firm in part because he questioned Monsenego's competence, and in part because he did not want to give Olswang the full story.

> Yadlin, who was copied on the exchange, disagreed:
>
> As far as I understand from my discussion with [Monsenego], the current inspection has nothing to do with the inheritance tax. It is merely about the corporate tax for the years 2013-14.
>
> This issue (of corporate tax) has been litigated in the past (on our part by [Monsenego]) and we won the case.

> Currently, the tax authorities are coming back on the same issue. Their claim is that the court decision was based on the assumption that Mr. P is the sole shareholder, and all they want is to verify that this was the case also in the years 1013-14 [sic]. Since this issue was taken care of by [Monsenego] and was done to our full satisfaction, I think we should not switch horses at this particular point of time.
>
> At this point, all we need is a proof of the fact that IP was the sole owner of the LLC. I would appreciate your assistance on this front—to approach the [lawyers of the LLC] and ask them to send us a certificate showing that Mr. Perry was the sole owner throughout the 2013 and the 2014 years. Once you approach the lawyers, we would like to send the inspector a copy of your letter in order to halt the inspection for [a] few weeks until we get the certificate. Since the French inspector did not raise the issue of inheritance tax, and since we do not want to trigger questions about it, please do not mention the fact that Mr. Perry has passed away…. Just simply ask for the certification that Mr. Perry was the sole owner in 2013-14. It is important to tell the lawyers that this is very urgent!!! [I]s that doable?

Id.

Neupert responded that the situation was "far more difficult than you are assuming." *Id.* He explained:

> The only document proving ownership of IIP we have, is the Incorporation Agreement signed by IIP dated May 1, 2001 which I am enclosing (Annex 2). In order to be able to even talk with the French Tax Office, we need somebody with signature rights for the company—as I do not have the grant of authorisation [sic] from the British Probate Court, the only way around was to convince the new registered agent in Delaware, The Company Corporation, that I am the Executor of the Last Will and therefore the legitimate new Director of Cote d'Azur (fortunately in Delaware they do not know anything about UK probate procedure).

Id. Although Neupert was only telling Tamar and Yadlin about his actions in March 2016, Neupert had started the process in September 2015, when he reached out to The Company Corporation to obtain a Certificate of Good Standing for the LLC. *See* PX 29.

Neupert explained to Tamar and Yadlin that they needed to have the Certificate of

Incumbency, that there were serious implications of not declaring Lilly as the owner of the equity, and that they needed a firm with more expertise than Olswang.

> [W]e have to wait now for the Certificate of Incumbency showing that I am the legal representative of Cote d'Azur, and then we can start giving a power of attorney to the French tax adviser (on what legal basis is [Monsenego] acting at present?).
>
> The company tax in France is a minor side line, the real issue is the valuation of the property for wealth tax purposes (ISF) and an eventual inheritance tax. The fact that IIP signed the 3% declaration (outing himself as the beneficial owner) is, of course, not enough to get off the hook – I would have to confirm as the Executor that Lilly is the only heir of the shares!
>
> As long as we cannot prove that Lilly gets 100% of the shares (unfortunately the Agreement with Lilly is still in the air!), the French Tax Office will subsidiarily apply French inheritance law and will conclude that Lilly gets 50% and Tami/Yael each 25% and we will have in no time to pay an inheritance tax on their hypothetical shares plus penalties for late filings which might result in millions of EUR! Trust me, I have 30 years of experience with French real estate tax.
>
> Since, according to the Letter of Wishes Cote d'Azur should go to the Trust, but we will have to take a decision in May, approving that the shares go to Lilly to avoid huge French taxes – I shall present you some ideas on how we can make sure that the property will stay in the family.
>
> This is why I would strongly recommend [taking] an expert on board, because with the inheritance tax and the ISF we are talking about huge sums of money and from the past performance [Monsenego] is just not qualified.
>
> So maybe you can arrange that I get copies of the newest tax papers to be able to make a brief risk assessment and then we can decide on the French tax advisor. In the meantime we shall try our best to speed up matters in Delaware.

PX 53.

After his exchange with Tamar and Yadlin in March 2016, Neupert again approached The Company Corporation as the "Executor of Mr Perry's Last Will." PX 54 at '298. This time he requested a "Certificates [sic] of Incumbency" that named him as a

director of the company. *Id.*

No agreement was reached on switching to Neupert's preferred law firm, so Neupert contacted Olswang on March 29, 2016:

> … I was informed that you were given notice of an up-coming tax inspection.…
>
> In order to assist you, I can give you the following comments:
>
> - As you now, we only [have] the original mandate to incorporate the company [and] due to the bankruptcy of Coudert, obviously all subsequent files were lost.
> - You might know that the US has no such thing as a commercial registry – we are trying therefore to get a Certificate of Incumbency which would show that I am the legitimate Director of the company now (as Executor of the Last Will of Mr Perry).
> - As this will take another few weeks, at present I could offer you a confirmation letter to the effect, that I, as Executor of the Last Will, can certify that Mr Perry was the owner of Cote d'Azur LLC [sic] from the incorporation until his death.

ACX 53. Neupert copied Naeff, Tamar, Duggan, and Yadlin. *Id.*

Monsenego responded that same day, explaining that a letter from Neupert "would probably cause more questions" from the tax authorities. CX 4 at '989. To avoid those questions, he asked Neupert to provide legal documentation evidencing Mr. Perry's ownership "by the end of the week," because it was "the most urgent item." *Id.* He stressed the need to act "with a lot of caution on this last point, because the previous tax audit turned out to be very painful and time consuming." *Id.* Monsenengo copied Naeff, Tamar, Duggan, and Yadlin. *Id.*

Neupert emailed back on March 30, 2016. He dismissed Monsenego's concerns about the sufficiency of his proposed documentation. *See* CX 4 at '987 ("May I first of all

point out that I have been involved in French/Spanish real estate investments for 40 years, that I have lectured on tax implications of cross border real estate investments and that I have won the first landmark case concerning the 3% flat tax at the Cour de Cassation back in 1983."). He nevertheless changed course and told Monsenego that he could offer "a confirmation of the ownership of Mr. Perry in my capacity as Director of Cote d'Azur Estate LLC." *Id.* Neupert copied Naeff, Tamar, Duggan, and Yadlin. *Id.*

On March 30, 2016, Monsenego responded to Neupert, copying Naeff, Tamar, Duggan, and Yadlin. He reiterated his belief that a confirmation letter from Neupert "will certainly not suffice" and that the tax authorities would want official documentation of Mr. Perry's ownership of the Company's equity at the time of his death. *Id.* Neupert responded by clearly stating what the French authorities should be told about who owned the LLC:

> As I told you that according to the Last Will of Mr Perry, his widow, Mrs Lilly Perry, is the sole heir to the LLC shares, so automatically upon the death she becomes the new owner (without any further legal action). In my opinion it would be a bad idea to say the estate is the owner, because then the tax office will immediately ask who the other family members might be in the hope of getting 40% inheritance tax from the daughters.

Id. at '986. Neupert copied Naeff, Tamar, Duggan, and Yadlin.

After sending his initial email, Neupert wrote separately to Naeff, Tamar, Duggan, and Yadlin:

> Following my mail to [Monsenego], I just received a draft from Delaware for a document showing me as a Director – since we do not have a corporation but an LLC, the document has to be filed by the new owner, i.e. Lilly (if we are using this document for the French Tax Authorities, we have no other choice than to name Lilly – if we just put in the estate of IP, we might face some trouble with the inheritance tax declaration).

> Unfortunately the Agreement with Lilly is still not in the final form, but we have to name her to solve the French tax problem – if we would put in the estate as a new member, we would open a can of worms.

ACX 54. Neupert asked Yadlin for his opinion on what to do. *Id.*

According to the counterclaims, Tamar did not want any declaration regarding Lilly's ownership "outside of the context of a binding settlement agreement." AC ¶ 214. In an email dated March 31, 2016, she objected to the Protectors and demanded that Neupert not represent that Lilly was the beneficial owner of the Company. *Id.* She wrote:

> In the last couple of days Dr Neupert informed our lawyer in France, Mr. Julien Monsenego, that LLP is personally the only owner of the villa in Villefrance sur Mer, in her capacity of [sic] the sole heir of IIP and Cote d'Azur shares. Dr Neupert also informed him that the declarations that my father prepared over the years were not accurate.
>
> I don't think that Dr Neupert had any authority to make such a declaration, which clearly are [sic] in utter contradiction to the contents of the [Letter of Wishes].
>
> … [T]he French authorities were asking questions about the years 2013-2014, and there was no need to rush and give them declarations about the inheritance issues, especially when the agreement is about to be signed in the near future.

ACX 50.

Tamar separately emailed Neupert on the same date, telling him:

> I would like to make it clear that as long as my mother do [sic] not sign the agreement I do not agree that the share [sic] will go to her.
>
> Do you think it is reasonable that before we sign the agreement my mother will get all the shares?
>
> How can you approach my mother and ask her to appoint yourself as director[?] My mother has no authorities [sic] to do it.

AC ¶ 216.

The counterclaims allege that at Neupert, Lilly, Tamar and their advisors "eventually agreed that Dr. Neupert would be presented as the 'director' of Côte d'Azur, principally to deal with the French authorities and [the] state of Delaware." *Id.* ¶ 217. The counterclaims do not allege when that agreement was reached.

Neupert was unable to secure documents from the registered agent in Delaware before the deadline for responding to the tax inspector. The counterclaims allege that Neupert, Lilly, Tamar, and their advisors agreed that Neupert would execute two documents that would be provided to the tax inspector in an effort to secure a further extension. *Id.* ¶ 227.

The first document was a "Mandate" authorizing Olswang to represent the Company before the French tax authorities. Neupert purported to grant that authority "as the legal representative of Côte d'Azur." ACX 55.

The second document was a statement confirming Mr. Perry was the "sole shareholder of the Company during the financial and calendar years 2013/2014." ACX 56. Neupert signed that document "as the legal representative of Côte d'Azur." *Id.*

On March 31, 2016, Olswang provided the two documents to the French tax authorities and asked for an additional extension. The inspector granted an extension until May 1, 2016. AC ¶ 230.

The following week, Monsenego learned more bad news. Neupert advised him that the loans that the Company used to fund the purchase of the Villa were from related parties. *See* ACX 58. Neupert expressed regret that Monsenego had been "obviously left to believe that the loans were at arm's length." *Id.* He reassured Monsenego that

> [w]e shall have [a] Trustee/Protectors Meeting on 2/3 May in Tel Aviv and would like to present the other advisors and the Family a clear picture of the situation, the legal consequences and a proposal to negotiate a way out – may I therefore ask you to keep our exchange of ideas confidential for the time being?

Id.

L. The Failed Settlement

Despite alleging that settlement talks collapsed in March 2016, the counterclaims assert that by April 2016, settlement discussions had advanced to a point where there was a detailed, written agreement. *See* AC ¶ 171; ACX 47. Framed as an agreement between Lilly and the Structure, it contemplated "(i) using assets within the Structure to benefit Lilly; (ii) the Structure agreeing to disclaim ownership over certain assets demanded by Lilly; and (iii) Lilly agreeing not to contest the Structure's ownership over other assets so long as they were available for her primary use." AC ¶ 173. It called for a disposition of the Villa that was generally consistent with the Deed of Assignment and the Letter of Wishes, in that it gave Lilly the primary right to use the Villa during her lifetime, preserved the rights of other beneficiaries to use the Villa, and gave the Protectors the right to move the Villa into the Structure. *Id.* ¶ 175. The operative text stated:

> The rights to the assets mentioned in addendum 3 to this agreement shall be to the control of the Mrs. Perry Trust in order that Mrs. Perry will be able to use and reside in the house in London and the [Villa and a second property] mentioned in addendum 3 to this agreement.
>
> Notwithstanding the said above insofar as the Protectors as to their sole discretion shall wish to transfer the house in France instead to the control of the Mrs. Perry Trust to the ownership of Mrs. Perry, Mrs. Perry shall sign any such document and shall fulfill each demand of the Protectors in such a way that the wishes of the Deceased that after the death of Mrs. Perry the rights to the house in France shall for always remain under the control of the

> trusts. It is hereby declared that such signing shall not change the conditions of use and visitation of the house in France as per this agreement.

ACX 47 § 2.6.

The Foundation alleges that during the settlement discussions, Neupert and Naeff were "working under the false assumption that despite the Deed of Assignment, Mr. Perry remained the owner of [the LLC] at the time of his death." AC ¶¶ 177. The Foundation alleges that during those settlement discussions, Lilly and Tamar and their advisors "knew, on the basis of documents they possessed on and on the basis of legal advice they received," that the Deed of Assignment had effected an immediate transfer of the member interest in the LLC to the Foundation. *Id.* ¶ 179. According to the Foundation, Lilly and Tamar also knew that Neupert and Naeff "were operating under an erroneous understanding of the law when concluding that legal title to the 'shares' of [the LLC] remained the personal property of Mr. Perry at the time of his death and, consequently, could be considered to be part of his estate." *Id.* ¶ 180.

Those allegations and associated inferences are not reasonably conceivable. The counterclaims, the exhibits they attach, and the other evidence in the record shows that everyone knew about the ambiguity regarding the LLC's ownership. Naeff was the lead representative for the Foundation. He was working directly with Neupert. Between them, they knew the most about what was going on.

M. The Events Of May 2016

On May 1, 2016, the extension from the French tax inspector expired. In addition, another tax filing was coming due. Under French tax laws, non-French entities that own

French real estate are subject to an annual tax equal to 3% of market value. The tax does not apply if the entity files a tax return identifying its ultimate beneficial owner, who is then subject to the French wealth tax. AC ¶ 247. The tax filing for 2016 was due on May 15. *See* ACX 60 at '003.

Before his death, Mr. Perry always identified himself as the ultimate beneficial owner of the LLC, thereby avoiding the 3% tax. The counterclaims allege that on May 12, 2015, Lilly and Tamar instructed Olswang to "file the same documents" as in years past, again naming Mr. Perry as the ultimate beneficial owner of the LLC. AC ¶ 251. The Foundation alleges that it was "not consulted prior to the 2015 tax filing." *Id.* ¶ 252. The counterclaims concede that at the time, the Foundation understood that Mr. Perry was the ultimate beneficial owner of the LLC when he died. It is not reasonably conceivable that consulting with the Foundation in May 2015 would have made any difference.

After securing the second extension from the tax inspector, and in anticipation of the due date for the 3% wealth tax filing, the Perry family and their advisors "decided to hold a final settlement meeting in Israel" on May 2, 2016—before the tax filing deadline—when "final issues would be resolved and a definitive settlement agreement executed."[34] The counterclaims allege that the settlement was expected to move the LLC into the Liza Trust, "give Lilly primary if not exclusive access to the Villa during her lifetime," and enable Tamar, Yael, and the other beneficiaries to secure an interest in the Villa through

[34] AC ¶ 255; *see* ACX 60 at '007; Neupert Aff. ¶ 78.

the Structure. AC ¶ 256. The counterclaims allege that once the settlement agreement was executed, Lilly would be identified as the owner of the LLC in her capacity as the sole heir of the UK Estate. *Id.* ¶ 257.

The meeting in Israel did not result in a settlement. The failure to reach an agreement led to a dispute over how to describe the ownership of the Company to the French tax authorities.

Neupert, Lilly, her advisors, and Olswang wanted to identify Lilly as the owner so as to avoid triggering inheritance taxes. *Id.* ¶ 259. On May 4, 2016, Neupert told Monsenego to "declare Lilly Perry as only shareholder of the Cote d'Azur LLC [sic] by inheritance from her late husband Israel Perry according to his Last Will." ACX 60 at '002. He also represented that for the prior tax years, he would send a declaration "signed by me as CEO of the LLC that Israel Perry was indeed the owner of the shares until his Death on 18 March 2015 – you already have my confirmation as Executor of the Last Will." *Id.* When Monsenego asked about the reason for the delay, Neupert told him that "once it was decided that [Lilly] will get the shares, she has to confirm my appointment as Director of the LLC and then I can get a legalized confirmation from Delaware and only then I have the power to issue a Certificate about the previous ownership of the shares by Mr. Perry." *Id.* at '003.

Tamar initially insisted that the tax filings not identify Lilly as the ultimate beneficial owner unless she executed the settlement agreement. AC ¶ 260. On May 4, 2016, she contacted Monsenego and instructed him not to file the 3% tax return reflecting Lilly as the owner of Côte d'Azur absent specific approval from Tamar or her advisors. ACX 60

at ‘002.

On May 6, 2016, Tamar agreed that Lilly could be shown as the owner of the LLC for the 3% tax return. AC ¶ 261. Neupert sent an email to Tamar and the Perry family advisors confirming her agreement and noting that in exchange, Lilly and LOPAG had agreed to add the following section to the settlement agreement: “[At the] death of [Lilly] the Rights to the House in France shall be in accordance with the provisions of the [Letter of Wishes] and the pertinent Trust deed of the Liza Trust.” ACX 61 at ‘911. Neupert believed that with that point resolved, everyone could sign the settlement agreement. AC ¶ 264.

Two days later, on May 8, 2016, Neupert emailed Lilly and Naeff with revised language for the settlement agreement, a copy of the deed for the Liza Trust, and a draft document titled “Written Consent of the Members of Côte d’Azur appointing Dr. Neupert as the Manager” (the “Written Consent”). ACX 62. He described the Written Consent as “[t]he form from Delaware which you should sign in order that I can get the official confirmation for the French Tax Authorities (our French tax advisor is waiting desperately).” *Id.*

That same day, Tamar emailed Monsenego and provided him with a package of documents relating to the LLC, including the loan agreements that funded the purchase of the Villa. *See* ACX 57 at ‘075–76. She advised Monsenego that she expected the settlement agreement to be signed shortly. She also warned Monsenego that “[a]s to Dieter Neupert, he has been acting quite strangely as of late. Some of his actions are in utter contradiction to my father’s wishes and instructions.” *Id.* at ‘075.

Monsenego wrote back and expressed concern about a series of issues. He was worried about the loan that funded the purchase of the Villa, noting that "if there is a direct or indirect relationship between the LLC/IP and the lender," then the loan could not be used to reduce the value of the Villa. *Id.* He also expressed concern about the delays in documenting Mr. Perry's ownership of the LLC:

> I do not understand why [Neupert] delays my information request and why the ownership by your father of the LLC in 2013 and 2014 cannot be obtained. That is objective information that your lawyer or your mother[']s] lawyer should be able to obtain from the US Authorities. And he has delayed by more than a month the gathering of these documents so now this is where he puts you at risk….

Id. He informed Tamar that they were proceeding to file the 3% wealth tax return and that it would list Lilly as the owner. *Id.*

Tamar wrote back on May 10, 2016, and instructed Monsenego to start preparing the documents. She expected the settlement agreement to be signed that afternoon. *Id.* at '074. Later that day, Olswang circulated the 3% tax filing to Neupert, Naeff, Duggan, Yadlin, and other advisors. ACX 60 at '206.

With the settlement in its final stages, Yael began voicing concerns and demanding changes to the documents. The discussions collapsed. AC ¶ 268. The Foundation alleges that "Lilly and Tamar blamed Dr. Neupert for being too attentive to the interests of Yael and for the failure of the settlement discussions." *Id.* ¶ 181.

Monsenego followed up with Tamar on May 12, 2016. He told Tamar that the extension had expired that that he feared that "the inspector will not notify a default of production of documents requiring us to answer formally and start a litigation." ACX 57

at ‘073. Tamar told Monsenego that she hoped to get helpful documents on May 13. *Id.* at ‘073–74. Monsenego followed up on May 18, and Tamar told him that she still had not obtained any documents. *Id.* at ‘072–73.

On May 23, 2016, Monsenego followed up with Tamar again. *Id.* at ‘072. This time, Tamar sent him a certificate from the Delaware Secretary of State that is not in the record, but which seems likely to have been either the original certificate of formation or a certificate of good standing. *Id.* Monsenego noted that the document did not address ownership in 2013 and 2014 and that formal documentation of Mr. Perry’s ownership in those years was still needed. *Id.* at ‘071.

On May 25, 2016, Tamar sent Monsenego a “statement signed by Ms. Jennifer Risse (the authorized person before the State of Delaware) on the ownership of the LLC.” *Id.* Written on LLC letterhead, the letter stated: “I, Jennifer Risse, hereby certify that for the calendar year’s [sic] 2013 and 2014 Mr. Israel I. Perry was the Sole Member/Owner of Côte d’Azur LLC.” AC ¶ 233.

With the settlement talks having collapsed, Tamar did not want her mother declared as the owner of the LLC. She therefore told Monsenego not to disclose the existence of the letter to anyone other than the French tax inspector:

> [Monsenego], may I emphasize once again that the attached document as well as the documents I emailed yesterday are for your eyes only, to be presented to the Tax Inspector. Please do not share/discuss/transfer these documents or their contents to any third parties, not even Dr Neupert. I repeat, these documents and email exchange[s are] privileged and confidential correspondence between you and me, and only the Tax Inspector can see them. I shall see any disclosure or leak of these documents to third parties (Neupert included) other than the tax inspector as a breach of fiduciary duty.

ACX 57 at '071.

It is reasonable to infer that Tamar had decided it was best to have Monsenego tell the French tax authorities that Lilly was the sole heir to minimize potential tax liabilities. Tamar did not want anyone else to know because she did not want that decision to be used against her. Tamar wanted to maintain her ability to argue that Mr. Perry had transferred the Company's equity to the Liza Trust and that Lilly would not inherit it from the UK Estate. Tamar did not want to concede anything until a settlement agreement was signed.

The Foundation alleges that Tamar was not authorized to provide this information to Monsenego and that Risse was not authorized to act on behalf of the Company, use Company letterhead, or make representations to the French tax officials. AC ¶ 235. The Foundation alleges that the statements in Risse's letter were false. *Id.* ¶ 236. The Foundation claims not to know whether or how the French tax audit was resolved or what other documents or statements were provided to the tax inspector. *Id.* ¶ 237.

Although the Foundation now takes umbrage at Tamar's actions, the position Tamar took and the statements that Risse made matched the representations that Neupert had been making to Monsenego with the knowledge and support of Naeff and LOPAG. They also matched the instructions that Neupert gave to Monsenego when he believed that a settlement had been reached. And they matched the instructions that everyone had given Monsenego for purposes of the 3% wealth tax return. Tamar followed the course of action that the Foundation wanted her to take.

On May 26, 2016, Neupert provided Monsenego with an update. Copying Naeff, he reported that neither the settlement agreement nor the Written Consent had been signed.

He expressed reluctance to provide any instructions "until I am formally nominated as Director of Côte d'Azur Estate LLC." *Id.* ¶ 271.

N. The Conversion Of The LLC Into The Corporation

Beginning in late May 2016, the members of the Perry family divided into two camps, with Lilly and Tamar aligned against Yael. AC ¶ 272. The Foundation alleges that "[s]eeking to move the process forward while enabling flexibility in the event the Perry family concluded a settlement, Dr. Neupert converted Côte d'Azur from an LLC to a corporation." *Id.* ¶ 272. According to the Foundation, Neupert pursued this plan because he believed "it would make it easier to divide the ownership and control of Côte d'Azur as discussed with the Perry family and its advisors during the settlement talks." *Id.* ¶ 273.

On June 23, 2016, Neupert emailed the LLC's registered agent, telling them: "We would like to transform the LLC into a corporation, so instead of a member we would have a 100% shareholder. Would you be so kind as to prepare the necessary forms?" PX 85.

On June 30, 2016, Neupert caused a certificate of conversion to be filed with the Delaware Secretary of State that converted the the LLC into the Corporation. Stip. ¶ 28. He also caused a certificate of incorporation to be filed that authorized the Corporation to issue up to 10,000 shares of common stock. *Id*. ¶ 30.[35]

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[35] According to minutes of a board meeting dated July 1, 2016, Neupert and one of his personal assistants acted as the only directors of the Corporation to appoint Neupert as President. Then they issued 10,000 shares of stock to the Foundation. *Id.* Neupert signed a stock certificate in the name of the Foundation. *See* PX 87; *see* BX 46. The court found in the *Personal Jurisdiction Decision* that the board resolution and stock certificate were not

Neupert next informed Olswang that the family members and their advisors "were not yet able to decide whether Lilly Perry should be the Sole shareholder." PX 86 at '620. On July 7, 2016, he sent Olswang "extracts of the Delaware Commercial Registry showing that the LLC has been transformed into a Corporation [sic]." ACX 64. He asserted that "all the shares are held by me as Executor of the Last Will (until the UK probate procedure has come to an end)." *Id.*

Monsenego questioned Neupert's claims:

> You stated that you are starting with the probate procedure now. In other words, you have not currently been confirmed as executor of late Mr Perry. I simply do not have the information that would be required to mention you as the sole shareholder of the LLC. In addition, to mention you personally as shareholder of the LLC would contradict the declaration that Lilly Perry is the sole shareholder of the LLC which we already made to the French tax authorities for the purposes of the 3% tax. Should you insist to be mentioned as sole shareholder I would have to consult with beneficiaries.

PX 91 at '201. Neupert threatened Monsenego that if he filed a tax declaration listing Lilly or Tamar as the owner of the Company, then the filing "will be considered as a criminal act." *Id.* at '200.

O. The Lawsuits Begin.

In July 2016, the two factions and their allies began filing lawsuits. Neupert seems to have filed the first lawsuit when he commenced a proceeding in the Swiss courts challenging what he believed to be an effort by Duggan and Yadlin to take over the SPA,

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prepared until December 2016, at which point they were backdated to July 1, 2016. 2019 WL 719000, at *18.

which was then acting as the Protector for the Trusts. *See* Neupert Aff. ¶ 80. Neupert sought interim relief, which the court denied. *Id.*

Lilly and Tamar responded by filing an *ex parte* application for an injunction against LOPAG in the Princely District Court of Liechtenstein (the "Liechtenstein Court"). *See id.* ¶ 81. The injunction was granted, but set aside on appeal. *Id.* ¶ 82.

As a result of these events, the rift between the two factions deepened. AC ¶ 272. Neupert believed that a settlement was unlikely unless he could put pressure on Lilly. On July 15, 2016, he summarized the plan in an email to Yael, Naeff, and other advisors in their faction: "We have to convince Lilly . . . that If [sic] she does not cooperate she might get the Assets (Bank Accounts in London, La Treille shares) minus Liabilities (NIS 69mio Class Action) but nothing from the [Letter of Wishes]."[36]

P. The Decision To Invoke The Deed Of Assignment

On July 18, 2016, a lawyer representing Lilly and Tamar emailed Naeff, copying Neupert. The lawyer complained about the action Neupert had taken to convert the LLC into the Corporation and questioned his authority.

Naeff forwarded the letter to Hugo Sele, a lawyer who represented various entities

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[36] PX 92 at '564; *see also* PX 93 (email dated July 15, 2016, from Neupert to Giger and Naeff: "As far as you know, are there still other stocks (similar to Côte d'Azur) that IIP personally held and that are therefore [deemed to be] located in London . . . ? They will then of course go to Lilly—after all, she doesn't get anything else!"; translated from "gibt es Deines Wissens noch andere Aktien (ähnlich der Cote d'Azur) die IIP persönlich gehalten hat und die demnach als in London gelegen zu qualifizieren sind . . . ? Die gehen dann natürlich an Lilly - aber sie bekommt ja sonst nichts !").

in the Structure, and explained that Mr. Perry had owned the LLC's member interest when he died:

> Just for the sake of completeness. Until his death the settlor was the sole shareholder of Côte d'Azur LLC [sic], Delaware, an entity that holds a property in France. At some point the plan was to bring this company into one of the trusts (and the [Letter of Wishes] also provided for that). Since France does its best (taxes, reporting etc.) to torpedo such structures, this idea was dismissed. As I see it, Côte d'Azur LLC [sic] is clearly part of the estate and Dr. Neupert, as the executor, surely has the task [of taking] care of it. I don't see any reason for [LOPAG] to respond to [the lawyer's] (threatening) letter.

PX 94 at '554–55. Sele agreed that the member interest in the LLC was part of the UK Estate, making Lilly and Tamar's objections an issue for Neupert rather than for LOPAG and the Foundation. *Id.* at '554 ("Agreed! As [LOPAG] I would not react."); *accord* PX 101 at '494.

On August 5, 2016, Lilly and Tamar's attorney sent another letter to Neupert, threatening to hold him responsible for any damages resulting from "the transformation of the LLC [into] a Corp[.] which you directed and your apprehension of the shares were made without power and without authorization." PX 99 at '928. Neupert asked Naeff and Sele whether he could rely on the Letter of Wishes as a source of authority for his actions, and they agreed that it would not suffice. *See id.* at '926–27.

Seeking a basis for his actions, Neupert sent an email to Naeff on the morning of August 10, 2016, in which he asked about the Deed of Assignment.[37] Naeff reminded

[37] PX 103 at '617 ("Were the Cote d'Azur's [sic] holdings (shares) actually endowed by IIP to the structure [sic] or was that forgotten at the time—after all, we know in the

Neupert that Mr. Perry had signed the Deed of Assignment, but that it had never been implemented because of the "consequences in France."[38] Neupert proposed to invoke it anyway.[39]

Later that afternoon, Neupert emailed Yael and Gal Levita, an attorney for the

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meantime that a request in the [Letter of Wishes] cannot be interpreted as an endowment, with the result that the shares are today part of the official estate.").

[38] Naeff Tr. 171–72; *see* PX 103 at '617 ("IIP endowed the Cote d'Azur shares to the Foundation. Initially we had no access and later on we did not implement it due to the consequences in France.").

[39] *See* PX 98 at '971–72 (email from Neupert to Naeff and Sele: "This is great—I did seem to remember that I myself typed this [Deed of Assignment] in Tel Aviv (IIP's PC always wanted to type from right to left). We can now distinguish two phases: 1. The [Deed of Assignment], i.e. I will issue the shares and deliver them to you (and, based on a power of attorney [signed] by the Foundation, I will be able to act in the future). In France, nothing will change for the moment, since in the 3% declaration IIP [disclosed] himself as [ultimate beneficial owner] and we now provisionally declared Lilly. In the U.K. that means that the shares will definitely not fall under the probate. 2. Then it must only be [examined] whether we (as trustees and protectors) can take the responsibility for transferring the shares to the Liza Trust in accordance with the [Letter of Wishes] or whether they should formally remain with the Foundation because of tax implications. The new situation will surely be a main point in the negotiations with Yossi regarding the settlement!"; translated from "Das ist hervorragend—ich glaubte doch, mich zu erinnern, dass ich diese Widmung in Tel Aviv selber getippt hatte (der PC von IIP wollte doch immer von rechts nach links schreiben)[.] Wir können nun 2 Phasen unterscheiden: 1. Die Widmung von 2013, dh. Ich werde die Aktien ausstellen und Eich einliefern (und in Zukunft Aufgrund einer Vollmacht der Stiftung agieren können)[.] In Frankreich ändert das im Moment nichts, da sich IIP ja in der 3% Erklärung als WB geoutet Hatte und wir nun provisorisch Lilly deklariert haben[.] Im UK heist das, dass die Aktien definitive nicht unter das probate fallen ! 2. Alsdann ist lediglich zu prüfen, ob wir es (als Trustees and Protektoren) verantworten können, die Aktien gemäss dem LoW an den Liza Trust zu übertragen oder ob sie wegen der Steuerkonsequenzen formell bei der Stiftung bleiben sollen[.] Die neue Situation wird sicher in den Verhandlungen mit Yossi betreffend das Settlement Einen Hauptpunkt darstellen !"). Yossi represented Lilly in the negotiations. *See* BX 43 at '974; *see also* PX 92, 98.

Foundation. His email read:

> Surprise - we just found the Original of the Assignment from May 2013 (I remember that I typed it myself, because IPs PC wanted to write from right to left)[.]
>
> So the situation with the Delaware Corp[.] is now clear:
>
> 1. The shares belong to the Foundation and I am acting as CEO (nothing to do with the Executor - Therefore not falling under the UK probate)
>
> 2. As the Foundation has no Protector the Trustee may act as they think fit
>
> 3. Based on the [Letter of Wishes] wie [sic] might offer Lilly some sort of usufruct and continue to pay the Maintenance, If [sic] she fulfills the conditions of the settlement (to be renegotiated) - such a Solution [sic] would also be in line with the French 3% Tax Declaration that Lilly is the Beneficiary
>
> 4. If the shares remain with the Foundation there will be no adverse Tax Consequences in France Until Lilly passes away
>
> The beauty is that Yossi will immediately realize that Lilly may not expect any favours from Tami but only from [Naeff] - which will probably make her shift her loyalty to the Board of the Foundation (The Body that decides when she might use the property).

PX 103.

Neupert copied Naeff. At the evidentiary hearing on jurisdictional issues, Naeff could not explain why Neupert would claim they had just discovered the Deed of Assignment when Naeff had it in his possession since Mr. Perry signed it, and when Neupert and Naeff had discussed it repeatedly during the ensuing years. *See* Naeff Tr. 172–73.

Levita understood Neupert's plan. She wrote back, "Wonderful news. The Deed of Assignment you discovered can indeed serve us well both as leverage over [Lilly] and as a mean [sic] for facilitating the change of directors in Greetnwin.com…." CX 18 at '019.

When Sele saw Neupert's email, he questioned whether the transfer of the member interest in the LLC had ever been completed and whether Neupert could rely on the Deed of Assignment. *See* PX 98 at '970–71. Neupert took a pragmatic view. He did not think Lilly would challenge him, because any litigation would be costly, uncertain, and take years to resolve, and any successful challenge would mean that the equity would end up in the UK Estate.[40] He believed that in the interim, he could put additional on pressure Lilly by denying her access to the Villa and renting it to third parties. *See id.* at '970 ("[D]uring the many years of litigation … the Foundation would rent the villa to third parties!!!").

Q. The Legal Opinion

To bolster their claim that the Deed of Assignment had validly transferred the member interest in the LLC to the Foundation, Neupert and Naeff sought a legal opinion from Zeichner Ellman & Krause LLP ("ZEK"), a New York law firm with an office in Israel. Daniel Rubel, a partner at ZEK, led the team.

Michael Weiser, a LOPAG employee, provided Rubel with a package of documents consisting of the LLC's certificate of formation, the LLC Agreement, the certificate of conversion, the certificate of incorporation, the purchase agreement for the Villa, and a power of attorney executed in connection with the original purchase of the Villa. *See* PX

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[40] *See* PX 98 at '967, '969–70; *see also id.* at '970 ("What would be the result if the family were to prevail? Exactly what Tami wants to avoid, namely that her sister receives at least 25% of the shares as her property—and during the many years of litigation among the claimants (with many legal opinions regarding the law in the U.K., Delaware, Israel and France as well as conflict of law rules) the Foundation would rent the villa to third parties!!!").

110 at ‘679. Weiser told the firm that Risse might possess other documents, but that “it is currently not advisable to contact [her] from a strategic perspective.” PX 107 at ‘715. ZEK never received any of the many documents indicating that the Deed of Assignment was never implemented before Mr. Perry’s death. ZEK also did not receive the French tax filings or the interactions regarding the Villa which evidenced that the Foundation’s representatives at LOPAG did not believe that the Foundation owned the LLC.

Notably, the package did not include minutes of a board meeting which supposedly took place on July 1, 2016, during which Neupert and his secretary purportedly acted as directors to issue shares of stock to the Foundation. It also did not include a stock certificate in the name of the Foundation that purportedly was signed on July 1, 2016. *See* PX 87; BX 46. The court found in the *Personal Jurisdiction Decision* those documents were created in December 2016, then backdated in an effort to create a more persuasive paper trail. 2019 WL 719000, at *18.

Rubel did not believe that the documents Weiser provided were sufficient to enable him to opine that the Deed of Assignment validly transferred the member interest in the LLC to the Foundation. After conferring with Neupert, Weiser told Rubel that there were no additional documents. *See* PX 110 at ‘678, 113 at ‘833.

On August 31, 2016, Rubel asked Weiser a series of critical questions:

> [T]he LLC Agreement states that [Mr. Perry] was the sole shareholder. Can you confirm that he remained the sole shareholder?
>
> A certificate of conversion you provided us lists Dieter Neupert as president. Do you have any documentation regarding his appointment?
>
> When were the assignment of shares registered with the books of the

company?

Was his estate involved at all with the assignment or registration?

PX 113 at '832–33. Weiser responded:

> Yes, Mr. Perry was the sole shareholder and remained the sole shareholder.
>
> To our knowledge, Mr. Neupert is the president of the company, however we do not have any further documents other than [those] already provided to you.
>
> The assignment of shares was never registered in the books of the company, as the administering law firm filed bankruptcy.
>
> Could you please explain your questions regarding the involvement of Mr. Perry's estate in the assignment or registration?
>
> The assignment was signed before the demise of Mr. Perry, thus we can only answer your question after we receive your conclusion whether this assignment was valid or not[.]

Id. at '831–32. Eighteen minutes later, Naeff forwarded the email exchange to Neupert and warned him that the validity of the assignment was "not clear." *Id.* at '831. Neupert responded that he had the power to effectuate the changes as the executor of Mr. Perry's estate (even though he was never appointed to that role). He suggested that "if necessary, we might still have to document" that he acted "on the basis of a power of attorney by the [Foundation]." *Id.* at '830.

On September 2, 2016, after receiving Neupert's response to Naeff, Weiser asked Neupert whether he could represent to ZEK that Neupert had "acted as the executor" when converting the Company into a corporation. *Id.* Neupert agreed: "[Y]es, definitely – you can report this as stated (but keep it away from Tami since it would otherwise be inconsistent with my actions related to the [Deed of Assignment] (but as stated previously,

this could be remedied with a power of attorney))." *Id.*

Weiser did not take up the reference to a power of attorney. Instead, he promptly told Rubel that Neupert claimed authority to effectuate the conversion as the executor of Mr. Perry's estate. PX 114 at '977. In a follow-up email, Weiser told Rubel that Neupert agreed that he had never been appointed as a director or president of the Company and had only acted as executor of Mr. Perry's estate. *Id.* ("Neupert has never been appointed as President/Director of [the Company]. Mr. Neupert did act as executor based on a power of attorney. Thus, the previous information provided to you in this specific regard . . . was not correct.").

On September 9, 2016, Rubel emailed Naeff, copying Weiser and two of Rubel's colleagues. He stated, "As we previously discussed, Dr. Neupert did not have authority to sign the certificate of conversion dated March 2016 converting the LLC to a corporation" and that consequently the filing either needed to be ratified or cancelled. PX 121.

Neupert was furious that ZEK was "questioning his authority." Naeff Tr. 177–78. Neupert told Naeff that the solution was for the Foundation to "approve my actions retroactively." PX 122 ("Since now everything belongs to [the Foundation], [the Foundation] has to approve my actions retroactively, which is no problem at all!").

Frustrated that Rubel was not going along with his plan, Neupert contacted him directly, copying Naeff, Sele, Weiser, and Desiree Oehri:

> Sorry for intervening again but I think we completely lost the track by questioning my Authority [sic]! Again, the facts:
>
> 1. Phase I (before the Original of the Assignment was discovered)

> a) In my capacity as Executor / Trustee of the late [Mr. Perry] all his membership Rights [sic] were automatically vested in me according to § 18-705 of the Delaware LLC Code (Code)
>
> b) as there was already a draft on the table how the shares should be allocated among the heirs (Lilly 40 %, the daughters each 30 %) I had complete authority to convert the LLC into a Corporation and to become its Director
>
> 2. Phase II (After the Original Deed of Assignment was discovered)
>
> a) according § 18-301 and 18-702/4 of the Code [Mr. Perry] lost his membership by assigning his entire interest to BGO Foundation (Ludwig Poltzer at the time) and BGO became the Sole [sic] new Member
>
> b) BGO Foundation has approved my actions by Special Power of Attorney and I recognized as Executor / Trustee of the Last Will that Cote d'Azur [sic] LLC (now Corp[.]) belongs to BGO Foundation (by issuing the entire Share Capital to BGO)
>
> So all you have to do is checking [sic] the quoted provisions in the Code and sign off my opinion - If you are not familiar with the Delaware precedents/ jurisprudence I suggest we ask a Collegue [sic] from Wilmington to give his opinion
>
> The validity of the Assignment has become a rather urgent issue as the French Tax Adviser is not even copying me (as Director) . . . but just acts on the instructions of Tami Perry - I have to replace him as soon as possible!

PX 123. The court found in the *Personal Jurisdiction Decision* that Neupert's description of the discovery of the Deed of Assignment was false. 2019 WL 719000, at *20. He and Naeff had known about it since 2013 and had discussed it in 2014 and 2015. This email marked the first time that anyone suggested to ZEK that the Foundation had authorized Neupert's actions with a power of attorney.

On September 11, 2016, Rubel responded to Neupert, copying Naeff, Sele, Weiser, and two of his colleagues:

> Thank you for the email and additional information. We apologize for any miscommunication and did not intend to question your authority. The certificate of conversion is signed in your name as president and we were advised that you were not a president or director at the time the document was filed so, on that basis, the filing may need to be ratified or amended.
>
> We will review the additional information that you provided. It would probably be best to set up a phone call for tomorrow [to] make sure we are in possession of all the relevant facts, so we can bring this matter to a quick conclusion. I am sure after the call we will all get on the same page and move forward in unison.

CX 21.

On September 12, 2016, Neupert spoke directly with Rubel. Later that day, Rubel emailed Naeff, Weiser, and Neupert about another problem with Neupert's story:

> [I]n Delaware, when a sole shareholder of an LLC assigns all of his shares, then he is no longer a member. However, the assignee cannot become a member of the LLC until his shares are registered, which did not occur here. There is a special analysis that may be applied to this type of situation. However, the analysis is further complicated by the filing of the certificate of conversion, its potential impact and the question of its validity.

PX 126 at '594.

Neupert turned to a power of attorney as the solution: "If you think that there is a missing link in the chain of documents please tell us and we shall let you have . . . a [Power of Attorney] by [the Foundation] in my favour to convert the LLC into a Corp[.], become its Director and to issue a Share Certificate in favour of [the Foundation]." PX 124 at '578. Neupert again did not refer to a specific power of attorney. The court found in the *Personal Jurisdiction Decision* that Neupert contemplated creating a document to fill in "a missing link in the chain." 2019 WL 719000, at *20.

Once again, the LOPAG representatives did not back up Neupert's reference to a

power of attorney. Naeff separately wrote Rubel to confirm that "Neupert is the Executor / Trustee of the late IIP." PX 125 ("I confirm that Dr. Neupert is the Executor / Trustee of the late IIP and IIP was prior to the assignment dd 01.05.2013 the former sole owner of Cote D'Azur Real Estate [sic]. We are looking forward for a conclusive plan to bring all corporate documents in order. This is the basis for all further steps that have to be taken in FR and US."). As the court found in the *Personal Jurisdiction Decision*, Naeff's statement was false in its own right, because Neupert had never secured authority to act as executor of Mr. Perry's estate. 2019 WL 719000, at *26.

On October 31, 2016, Neupert asked Monsenego for the Company's tax-related documents, declaring that he was "chairman of the [Company]" and asserting that his authority was "legitimized" by the Foundation. PX 128 at '389–90. Neupert attached the Deed of Assignment and a new power of attorney granted by the Foundation (the "Foundation Power of Attorney"). The court found in the *Personal Jurisdiction Decision* that Neupert and Naeff created the Foundation Power of Attorney after September 12 and before October 31, then backdated it to February 5, 2016, to make it appear that the Foundation had prospectively authorized the actions Neupert took in June.[41]

On December 5, 2016, one of Neupert's secretaries contacted the Company's

[41] 2019 WL 719000, at *28. The date of the Foundation Power of Attorney is "5/2/2016." In the *Necessary Party Decision*, the court interpreted the power of attorney as bearing a date of May 2, 2016, rather than February 5, 2016. *See* 2017 WL 6033498, at *10. Whether the Foundation Power of Attorney was backdated to May 2 or February 5 does not change the fact that it was backdated.

registered agent to request "a Corporation Kit . . . i.e.[,] a seal of the company, the share certificates and the Minutes Book or whatever." PX 130. By email dated December 28, another one of Neupert's secretaries, Tanja Tandler, sent him the share certificate and a draft set of minutes. PX 131 at '027. Tandler asked whether to sign the documents. Neupert told her to sign, then "affix the seal!" *Id.* at '026

The minutes purported to document a meeting that took place on July 1, 2016, during which Neupert and Tandler acted as the board of directors of the Company, appointed themselves as president and secretary, and issued all of the Company's shares to the Foundation. *See* BX 46. The stock certificate reflected the Foundation's ownership of 10,000 shares of stock. *See* PX 87. In the *Personal Jurisdiction Decision*, the court found that these documents were drafted in December 2016 and backdated to July 1, 2016. 2019 WL 719000, at *18. During the evidentiary hearing, Naeff testified that he did not receive them until December 2016 and agreed it was "certainly odd" that they were dated July 1. Naeff Tr. 196–97.

On February 14, 2017, ZEK finally delivered its legal opinion. In a single, non-reasoned paragraph, it stated:

> COTE D'AZUR ESTATE LLC . . . was converted into the Corporation; BGO Foundation is the owner of all of the authorized and outstanding shares of the Corporation and can thereby exercise control of the Corporation; the duly elected directors of the Corporation are Dr. Dieter Neupert and Ms. Tanja Tandler; and the duly appointed officers of the Corporation are Dr. Neupert, President, [and] Ms. Tandler, Secretary . . . .

PX 150. Rubel did not sign the opinion. Another ZEK partner signed it.

R. More Lawsuits

As 2016 progressed, the members of the Perry family and their advisors filed more lawsuits. *See* AC ¶¶ 8–10; ACX 65 ¶ 8. In September, Tamar initiated two criminal complaints in Switzerland against Neupert personally. Both were dismissed in December. *See* Neupert Aff. ¶ 83. Neupert responded by filing a complaint against the lawyer who filed the criminal complaints. *Id.* ¶ 84.

In November 2016, Lilly applied to the English Probate Court for an order removing Neupert as executor of the UK Estate and appointing herself in Neupert's place. ACX 65 ¶ 2. Her filing described a series of alleged misconduct by Neupert, including the actions he took with respect to the LLC. *See* Dkt. 33 Ex. 1 ¶¶ 34–45.[42]

In early 2017, Tamar intervened in the proceeding before the English Probate Court and sought to be appointed as co-executor, or to have an independent executor appointed. ACX ¶ 3. After initially opposing the applications, Neupert withdrew. The English Probate Court ultimately appointed Tamar and an independent co-executor. *See id.* ¶ 73.

Lilly, Tamar, and Tamar's children (Mr. Perry's grandchildren) also filed an action in the Liechtenstein Court against the Foundation. *See* Dkt. 33 ¶ 23. They accused Neupert of "wrongdoing with respect to the conversion of Côte d'Azur (from an LLC to a

[42] Based on these contentions, the defendants initially argued that the validity of the Deed of Assignment and the effectiveness of the transfer of the member interest in the LLC were before the English court. Dkt. 33 ¶¶ 19–21 (contending that Lilly "squarely put[] the issue of ownership of Côte d'Azur before the UK Court"). The defendants no longer take that position.

corporation) and to the administration of the Foundation and the trusts." *Id.* The defendants moved to dismiss the case for lack of standing, and the Liechtenstein Court agreed. Dkt. 33 Ex 4 at 25. That decision was affirmed on appeal. Dkt. 33 Ex. 5 at 2.

S. Proceedings In Delaware

With the parties launching lawsuits at each other in multiple jurisdictions, Delaware soon emerged as a possible venue. Lilly and Tamar saw Delaware as a promising jurisdiction in which to litigate.

1. The Meetings With The United States Attorney

Tamar attempted to open a Delaware front through meetings in December 2016 between attorneys from the Wiggin Firm and with the United States Attorney for the District of Delaware. *See* AC ¶¶ 9, 321; ACX 70 at 2. A second meeting took place in February 2017. ACX 70 at 1.

During those meetings, the Wiggin Firm presented extensive information about Neupert, described his filings with the Delaware Secretary of State, and contended that they were unauthorized. *See* AC ¶ 322; ACX 70. The Wiggin Firm lawyers hoped that the United States Attorney would bring criminal charges against Neupert. AC ¶¶ 9, 321. The Wiggin Firm lawyers informed the United States Attorney that they were considering bringing a civil action against Neupert in Delaware state court. ACX 70 at 21.

The United States Attorney does not appear to have taken any action against Neupert. The defendants represented in an earlier filing that in September 2017, Neupert's counsel was informed that he was "not the subject of any open federal criminal investigation in Delaware." Dkt. 33 ¶ 27.

2. Lilly Files This Action.

On April 14, 2017, Lilly filed this action against Neupert and the Corporation. Her complaint alleged that Neupert had "concocted a plan to enrich himself by leasing out the French real estate held by Côte d'Azur." Dkt. 1 ¶ 14. The complaint contended that "[t]o bring his scheme to fruition, Neupert sought Lilly's written consent to appoint himself as the manager of Côte d'Azur," but that she refused. *Id.* She alleged that to carry out his scheme, Neupert sought to take control of Côte d'Azur by "secretly convert[ing] Côte d'Azur from a limited liability company to a corporation" and by falsely stating in the certificate that he was "President." *Id.* ¶ 15–16.

Lilly alleged that after taking control of Côte d'Azur, Neupert registered the Corporation as a leasing company in France. *See id.* ¶¶ 14, 22. She contended that she found out about Neupert's actions after her tax lawyers called and asked why the Corporation had been registered, given the tax liabilities that action would trigger. *Id.* ¶ 23.

All of Lilly's substantive causes of action targeted Neupert:

- Count I asserted a claim for fraud against Neupert.
- Count II asserted a claim against Neupert for violations of the Delaware Uniform Deceptive Trade Practices Act.
- Count III asserted a claim against Neupert for tortious interference with Lilly's rights under the Company's operating agreement.
- Count IV asserted a claim against Neupert for conversion.
- Count V asserted a claim against Neupert for unjust enrichment.

Id. ¶¶ 24–46.

As relief, Lilly sought declarations that Neupert acted without authority when filing

the certificate of conversion and certificate of incorporation, an order cancelling both filings, and an award of damages, attorneys' fees, costs, and expenses. *Id.* at 12. She named the Corporation as a defendant so that the court could grant her the relief she sought, including an order invalidating the conversion. The Corporation was thus named in a nominal role.

The Foundation now contends that when Lilly filed this action, she and Tamar and their advisors:

> (i) knew that in May 2013 Côte d'Azur was assigned by Mr. Perry to the Foundation via a valid and effective deed of assignment;
>
> (ii) knew that in the months that followed the assignment, Mr. Perry consistently notified third parties about the assignment of Côte d'Azur;
>
> (iii) [knew that Mr. Perry] died believing that he no longer had any interest in Côte d'Azur;
>
> (iv) knew Côte d'Azur was not covered by Mr. Perry's U.K. Will;
>
> (v) knew Côte d'Azur was not part of the [UK Estate];
>
> (vi) argued in other jurisdictions, when such arguments benefited them, that Côte d'Azur was not part of the U.K. Probate; and
>
> (vii) knew that even if, despite the Deed of Assignment, Côte d'Azur remained the personal property of Mr. Perry at the time of his death, Lilly Perry was not the sole heir to Côte d'Azur.

AC ¶ 10 (formatting added).

3. The Original Answer, Affirmative Defenses, And Counterclaim

Neupert answered the complaint and raised affirmative defenses. Dkt. 12 (the "Orig. Ans."). In his answer, he admitted that he was "a long-time business associate of Mr. Perry" and that he had "extensive knowledge concerning Mr. Perry's assets." Orig. Ans. ¶ 3. In

his only non-conclusory affirmative defense, he asserted that "[t]he Complaint fails, in whole or in part, because Plaintiff was not a member of [the LLC], is not a stockholder of the Corporation, and lacks standing to bring her claims." *Id.* at 17.

The Corporation joined in Neupert's answer and his affirmative defenses. *Id.* at 1. Even though the Corporation only was named for purposes of relief, the Corporation asserted a counterclaim seeking declarations that the challenged transactions were "valid and enforceable," that Lilly was never a member of the LLC, and that she was not a stockholder of the Corporation. Dkt. 12 at 18–19 (the "Original Counterclaim"). The Original Counterclaim relied on the Deed of Assignment and asserted that, by operation of law, the Foundation became a member of the LLC through the Deed of Assignment. *Id.* ¶¶ 4–5. At the time, Neupert was acting as the sole director of the Company. *See* Dkt. 45 at 16–17. He thus controlled the Corporation and caused it to take these positions.

Lilly filed an answer to the counterclaim in which she denied the validity of the Deed of Assignment. Dkt. 13. In addition to other affirmative defenses, she asserted that the counterclaim failed to join the Foundation as a necessary party. *Id.*

On August 31, 2017, Lilly moved pursuant to Rule 19 to join the Foundation as an involuntary counterclaim plaintiff or, in the alternative, to dismiss the Original Counterclaim for failure to join a necessary party. Dkt. 24. The Corporation opposed Lilly's motion. *See* Dkts. 33, 45. The parties briefed the issue, and on December 6, the court issued a decision granting Lilly's motion and joining the Foundation as a relief defendant. *Necessary Party Decision*, 2017 WL 6033498, at *1.

4. The Second-Filed Liechtenstein Action

One month after Lilly moved to join the Foundation as an involuntary counterclaim plaintiff, but before the court could adjudicate the motion, the Foundation commenced a lawsuit of its own in the Liechtenstein Court on September 27, 2017 (the "Liechtenstein Action"). The Foundation's complaint named Lilly, Tamar, and Yael as defendants and sought a declaration that the Foundation became the sole member of the LLC by virtue of the Deed of Assignment. *See* Dkt. 33 Exs. 4–5.

The Foundation's action was a reactive, second-filed action in multiple respects. First, Lilly and Tamar had previously sought to litigate the validity of the Deed of Assignment in the Liechtenstein Court, only to have their claims dismissed for lack of standing. Dkt. 33 ¶¶ 23–24. Second, after Lilly filed this action, both the Corporation (which the Foundation controlled) and Neupert had placed the Deed of Assignment at issue through their answers and affirmative defenses. Third, the Corporation placed the Deed of Assignment at issue through the Original Counterclaim, which it had no obligation to file because it was only present as a defendant for purposes of relief. Fourth, Lilly engaged on those topics by answering the Original Counterclaim and by seeking to join the Foundation as a party in August 2017, one month before the Foundation filed its action in the Liechtenstein Court.

The Foundation has alleged that in May 2020, the Liechtenstein Court issued a decision declaring that the Deed of Assignment was valid. AC ¶¶ 59–60. That decision was reversed on procedural grounds. The Foundation alleges that the Liechtenstein Court continues to have "jurisdiction over the parties and the proceeding in order to determine

whether the Deed of Assignment was fully implemented and the various assets referred to within it, including Côte d'Azur, transferred to the Foundation by Mr. Perry." *Id.* ¶ 60. During the hearing on the motion to dismiss the counterclaims, no one could provide a meaningful update regarding the case. Dkt. 353 at 13–14, 22–23.

5. The Personal Jurisdiction Decision

After the court joined the Foundation as relief defendant, Lilly served the Foundation with process. The Foundation then moved to dismiss Lilly's complaint pursuant to Court of Chancery Rule 12(b)(2), contending that it was not subject to personal jurisdiction in this court. Dkt. 48.

The parties briefed the Rule 12(b)(2) motion, creating an extensive documentary record. *See* Dkts. 51–58. In an oral ruling on March 14, 2018, the court found that Lilly had advanced specific allegations, supported by documentary evidence, sufficient to support a *prima facie* case for jurisdiction based on the Foundation's involvement in a scheme that included acts in the State of Delaware, such as the filing of an unauthorized certificate of conversion and an unauthorized certificate of incorporation. Dkt. 74. The court also noted, however, that the Foundation had presented evidence indicating that the Deed of Assignment was valid and effective such that those actions were authorized and jurisdiction would not exist. The court observed that there was a substantial overlap between the jurisdictional issues and the merits and determined that a ruling on the Rule 12(b)(2) motion should not be issued without an evidentiary hearing. The court instructed the parties to proceed with jurisdictional discovery. After this decision, Neupert's counsel withdrew. Dkt. 75. Since then, he has proceeded *pro se.*

In accordance with the court's ruling, the parties conducted extensive jurisdictional discovery. The Foundation sought third-party discovery from the Wiggin Firm, and the two sides filed seven motions to compel. *See* Dkts. 88, 90–91, 104–06, 113, 122, 135. The Foundation also filed a motion *in limine* and sought an adverse inference based on the failure to produce documents. Dkt. 145.

On May 31 and June 1, 2018, the court held a two-day evidentiary hearing on the issue of personal jurisdiction. On February 15, 2019, the court issued a memorandum opinion in which it concluded that it could exercise personal jurisdiction over the Foundation under the conspiracy theory of jurisdiction. *Personal Jurisdiction Decision*, 2019 WL 719000, at *2–3.

After the issuance of the court's decision, the parties requested a stay of the case to facilitate settlement discussions. The stay expired on June 3, 2019. Dkt. 200.

6. The Amended Complaint And The Motions To Dismiss

On June 24, 2019, Lilly filed the currently operative complaint against Neupert, the Foundation, and the Company. Dkt. 214. She seeks cancellation of the certificate of conversion and certificate of incorporation that were filed with the Secretary of State. *Id.* ¶ 8. She also seeks her attorneys' fees and other damages. *Id.* The complaint asserts in no uncertain terms that "Lilly is the sole heir of [Mr. Perry's UK Estate]. Thus, Lilly is the sole owner of the membership interests in [the LLC]." *Id.* ¶ 31

In response to Lilly's complaint, the Foundation moved to dismiss the amended complaint, thereby taking its third pleading-stage bite at the apple. The Foundation asserted that (i) the court lacked subject matter jurisdiction over the dispute, (ii) Lilly lacked

standing to assert her claims, (iii) the Liza Trust and the executors of the UK Estate were necessary parties who could not be joined, (iv) the court should defer to the proceedings in the UK Estate under *McWane*, and (v) the court should dismiss on grounds of forum non conveniens. *See* Dkt. 222. The Foundation also alleged that Lilly had failed to state any claims on which relief could be granted. Dkt. 221.

In support of its motion to dismiss, the Foundation submitted filings from other litigations between the parties in which Lilly or Tamar had taken positions that appeared inconsistent with the arguments that Lilly had made to this court. The Foundation noted that Lilly was not arguing before the English Probate Court that the equity of Côte d'Azur was part of the UK Estate. *Id.* at 1. Instead, Lilly had submitted an affidavit asserting that the UK Will "only relates to property and assets in the UK." Dkt. 222 Ex. 6 ¶ 9(c).

An obvious problem for the Foundation's jurisdictional and venue-based arguments was that the Corporation had asserted the Original Counterclaim, in which it sought to have this court determine whether Lilly had a beneficial interest in the equity of Côte d'Azur and to decide the validity of the certificate of conversion and the certificate of cancellation. The Corporation sought leave to withdraw its counterclaim. For reasons that remain elusive, Lilly did not oppose that relief. Dkt. 229. The court therefore granted the Corporation's motion, clearing the way for the Foundation to contend that Delaware was an improper forum and that there was no justiciable dispute. But for Lilly's agreement, the court would not have permitted the Corporation to withdraw its counterclaim, and the Foundation would have been forced to seek dismissal while burdened with the inconvenient fact that the Corporation (which it controlled) had asserted a counterclaim

demonstrating that Delaware was an appropriate forum and that a litigable dispute existed. *See* Dkt. 230.

On November 25, 2019, the court held a hearing on the motions to dismiss. Dkt. 240. After the hearing, on December 4, 2019, the court stayed the case to allow the executors of the UK Estate to address whether they wished to intervene in this litigation, whether they wanted to disclaim any interest in the claim, or whether they were content to let Lilly litigate. Dkt. 243. By letter dated January 2, 2020, Tamar and her co-executor informed the court that they were "fully aware of the lawsuit that [Lilly] commenced in Delaware to rescind [Neupert] and the [Foundation's] act of converting [the Company] into a corporation," and that they did not "object to [Lilly's] continued pursuit of her claims against [Neupert] and [the Foundation] in Delaware." Dkt. 246 Ex. A.

On March 27, 2020, the court issued orders denying the Foundation's motions to dismiss. The first order rejected the Foundation's arguments based on standing, failure to join necessary parties, *McWane*, and forum non conveniens. Dkt. 249. The second order rejected the Foundation's arguments that the complaint failed to state claims on which relief can be granted. Dkt. 250.

7. The Answer And Counterclaims

On July 1, 2020, the Foundation answered the amended complaint and asserted counterclaims against Lilly and Tamar. Dkt. 255. The counterclaims contained four counts:

- Count I asserts that Lilly and Tamar engaged in both common law and equitable fraud. *Id.* ¶¶ 340–65.

- Count II asserted that Lilly and Tamar committed conversion because they "misappropriated and converted Côte d'Azur for their own use and profit, at the expense of the Foundation, its rightful owner, and Côte d'Azur." *Id.* ¶ 367.

- Count III asserted that Lilly and Tamar conspired to commit fraud and conversion. *Id.* ¶¶ 372–75.

- Count IV sought declaratory judgments in the event the Foundation prevailed in its action in Liechtenstein. *Id.* ¶ 388.

Lilly and Tamar moved to dismiss the counterclaims. Dkt. 260.

8. The Motion For Partial Summary Judgment

On August 3, 2020, Lilly moved for partial summary judgment. Dkt. 263. In opposing the motion for summary judgment, the Foundation marshalled evidence that went beyond what had been collected during jurisdictional discovery and presented during the jurisdictional hearing, including both the exhibits that the Foundation had attached to its counterclaims and another ten new exhibits. Dkt. 265. The Foundation also sought leave to pursue Rule 56(f) discovery. Dkt. 266.

The Foundation also presented evidence of positions that Lilly and Tamar had taken in other litigation which were inconsistent with positions they had taken here. For example, Yael had filed a proceeding in the Tel Aviv Family Court in Israel in which she sought an inheritance decree under Israeli law. AC ¶ 307. An heir can obtain an inheritance decree pursuant to Israeli law "when the deceased did not leave a valid last will in regard to his estate." *Id.* Tamar argued that Mr. Perry had not left a valid will covering his assets in Israel because the UK Will only addressed his personal property and real property in the United Kingdom. She sought an inheritance decree to cover the assets that were not otherwise in the UK Estate or within the Structure. *Id.* Lilly and Tamar argued in response that the Letter

of Wishes was an "additional will" and submitting an expert report to that effect. *Id.* ¶ 313; ACX 68, 69 at 1–2. If that were true, then Mr. Perry bequeathed the member interest in the LLC to the Liza Trust in the Letter of Wishes. In this court, by contrast, Lilly has contended that the Letter of Wishes was not a will, that it had no effect on the member interest in the LLC, that the member interest became part of the UK Estate, and that as the sole heir of the UK Estate, Lilly has a beneficial interest that gives her standing to sue. *See* Dkt. 287 at 22. Those positions are inconsistent.[43]

The Foundation also described proceedings in the Cayman Islands in which Lilly and Tamar engaged in protracted litigation with Yael, the LOPAG representatives on the Board of the Foundation, and LOPAG in its capacity as trustee of the Trusts. The Foundation represented that in those proceedings, Tamar and Lilly denied that the Company's equity was part of the UK Estate. AC ¶ 305. That position is obviously inconsistent with the relief Lilly seeks in this case.

The Foundation also described findings that the English Probate Court made about

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[43] To similar effect, Lilly and Tamar received an email dated July 14, 2016, from their Swiss legal counsel in which he expressed the opinion that Lilly was "not the sole owner of Côte d'Azure Estate LLC" because Mr. Perry "left all his UK assets to [Lilly] and in the [Letter of Wishes] he stated that La Treille should go to the Trust of [Lilly]." ACX 66 at '253. The lawyer opined that although there were settlement discussions with Lilly which anticipated that the Villa "should not go into the trust, but would go to her personally," those agreements were never signed and therefore, "[i]n theory, there is still an argument that the real estate should go to the trust." *Id.* Under this view of the facts, the Deed of Assignment did not effectuate an immediate transfer, Mr. Perry continued to own all of the equity in the LLC at the time of his death, but then Mr. Perry bequeathed the equity in the LLC to the Liza Trust through the Letter of Wishes.

Tamar and Lilly in a decision in which the English judge ultimately appointed Tamar and an independent party as co-executors. The English judge found that Tamar had engaged in a worldwide effort to attack the Structure and that "her stated aim was to take control of the assets from the Trustees." ACX 65 ¶ 59. The English judge noted that Tamar had been "deliberately selective when she chooses to [utilize] the services of the courts and that she has sought out advisers who are prepared to use aggressive or creative (or 'non-conventional') means to achieve those ends." *Id.* The English judge concluded that Tamar had "formed such a clear view that she and her family have been the victim of what she refers to as a 'fraud scheme,' 'intimidation' and 'embezzlement' and is so firmly secure in her view that it is necessary, in order to fulfill her father's Letter of Wishes, to stand in the way of the Trustees that she has lost a sense of balance as to what has been proved rather than forming the basis only of allegations." *Id.* The English judge found that while Lilly "sought to answer the questions put to her truthfully . . . her recollection of events was often poor, and she accepted that she could not remember everything set out in her witness statements." *Id.* ¶ 60. The English judge found it "plain that [Lilly] defers to [Tamar] on matters concerning [Mr. Perry's] estate and for that reason [the judge was] not satisfied that [Lilly] is willing or able to bring any independence of mind to her proposed role as personal representative." *Id.* While not directly relevant to any issues in this case, those comments have obvious implications for Lilly and Tamar's credibility.

Lilly maintained that all of this material was irrelevant, because this court had made findings of fact based on a preponderance of the evidence. Lilly has argued subsequently that under the *status quo* that exists today, the Foundation claims to own all of the equity

in the Corporation, and hence it is currently true that the equity is not part of the UK Estate. It is only through this litigation, Lilly says, that she can obtain a decree invalidating the issuance of shares, invalidating the conversion, and determining that Mr. Perry owned the member interest in the LLC when he died, such that it became part of the UK Estate.

In an oral ruling on June 22, 2021, the court denied Lilly's motion for summary judgment. Dkt. 294. The court reached this conclusion in part because the court could "envision that there could be additional documents from this late 2013/early 2014 and subsequent time frames which could shed light on whether the deed of assignment was, indeed, carried out. Those documents could corroborate whether it was, in fact, not carried out." Dkt. 296 at 23.

9. The Operative Counterclaims

On December 14, 2020, while Lilly's motion for summary judgment was pending, the Foundation filed amended counterclaims against Lilly and Tamar. Dkt. 278. The counterclaims retained the same basic theories but added additional allegations and supporting exhibits. Briefing and argument were delayed while the parties discussed settlement. The court heard argument on June 16, 2022.

II. THE RULE 12(b)(6) STANDARD

Lilly and Tamar have moved to dismiss the counterclaims under Rule 12(b)(6) for failure to state a claim on which relief can be granted. When considering a motion under Rule 12(b)(6), the court (i) accepts as true all well-pleaded factual allegations in the complaint, (ii) credits vague allegations if they give the opposing party notice of the claim, and (iii) draws all reasonable inferences in favor of the plaintiff. *Cent. Mortg. Co. v.*

Morgan Stanley Mortg. Cap. Hldgs. LLC, 27 A.3d 531, 535 (Del. 2011). The court need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011), *overruled on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1277 (Del. 2018).

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'" *Cent. Mortg.*, 27 A.3d at 537. "Our governing 'conceivability' standard is more akin to 'possibility,' while the federal 'plausibility' standard falls somewhere beyond mere 'possibility' but short of 'probability.'" *Id.* at 537 n.13. Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.* at 535.

III. LEGAL ANALYSIS

Lilly and Tamar contend that the counterclaims fail to state claims on which relief can be granted. They maintain that the counterclaims are untimely and that they fail to plead necessary elements in a manner sufficient to survive a motion to dismiss. The court agrees and dismisses the counterclaims under Rule 12(b)(6).

A. Timeliness

Lilly and Tamar contend that the counterclaims are untimely. In a court of law, timeliness is determined by the statute of limitations. However, "the limitations of actions applicable in a court of law are not controlling in equity." *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) (footnote omitted). "Laches is an affirmative defense that the plaintiff unreasonably delayed in bringing suit after learning of an infringement of his or her rights.

. . . In determining whether an action is barred by laches, the Court of Chancery will normally . . . apply the period of limitations by analogy. . . .” *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013). If the plaintiff asserts its claim after the analogous limitations period has run, the delay is presumptively unreasonable. *Id.*

“[A]ffirmative defenses, such as laches, are not ordinarily well-suited for treatment on [a Rule 12(b)(6) motion to dismiss].” *Reid*, 970 A.2d at 183 (footnote omitted). But laches can be applied at the pleadings stage if “the complaint itself alleges facts that show that the complaint is filed too late . . . .” *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993) (Allen, C.).

The parties agree that the analogous limitations period for the Foundation’s claims is three years. *See* 10 *Del. C.* § 8106. “The general law in [Delaware] is that the statute of limitations . . . begins to run at the time of the wrongful act, and, ignorance of a cause of action, absent concealment or fraud, does not stop it.” *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).

1. The Claim For Conversion

A cause of action for conversion accrues “at the time of the wrongful act,” which is the point at which the defendant wrongfully possesses or disposes of the property that is the subject of the claim. *See Isaacson*, 330 A.2d at 132. This case is about the equity in Côte d’Azur. The claim for conversion therefore arose when Lilly or Tamar wrongfully possessed or disposed of the equity in Côte d’Azur.

The Foundation asserts that “Lilly and Tamar misappropriated and converted Côte d’Azur for their own use and profit, at the expense of the Foundation, its rightful owner,

and Côte d'Azur." AC ¶ 376. According to the Foundation, the improper conversion consisted of Lilly and Tamar "causing the Foundation to erroneously believe it failed to perfect its rights in Côte d'Azur, preserving and encouraging this erroneous belief despite knowing it was based on a mistake of law and missing facts." *Id.* ¶ 377.

As discussed below, that is not conversion. But for purposes of a timeliness analysis, the conversion claim turns on two variables: (i) who rightfully owned and could possess the equity in Côte d'Azur and (ii) who asserted control over the equity in Côte d'Azur. The Foundation contends its principals—Naeff and Oehri—believed that when the Deed of Assignment was executed on May 1, 2013, that it effectuated an immediate transfer of the equity in the LLC to the Foundation. All of the facts necessary to assert the Foundation's rights were known on May 1, 2013, when the Deed of Assignment was executed. To the extent anyone else claimed a right to the equity in the LLC or asserted control over it, the Foundation could assert its claim at any point after May 1, 2013. Absent tolling, the claim became untimely on May 1, 2016.

The Foundation alleges that in December 2013, its representatives came to believe that additional steps were necessary to implement the transfer of the equity to the Foundation, when Risse circulated a package of documents prepared by the Wiggin Firm. Accepting for purposes of the motion to dismiss that Risse's actions constituted a representation that additional steps were necessary to effectuate the transfer, she made that representation on December 6, 2013. The Foundation and its representatives had all of the information necessary to challenge that assertion on that date. Absent tolling, the claim became untimely on December 6, 2016.

Before Mr. Perry's death, the Foundation would have had to assert its rights by suing Mr. Perry. The Foundation never did that. Instead, after Mr. Perry's death, Naeff took the position that the equity in the LLC passed to the UK Estate. Because Lilly was the sole heir of the UK Estate, Naeff viewed Lilly as the ultimate beneficial owner. Now, the Foundation contends that Lilly and Tamar committed the tort of conversion by taking precisely that same position.

The Foundation currently claims that no additional documents were necessary to effectuate the transfer and that the Foundation was the sole member of the LLC when Mr. Perry died. The Foundation had all of the facts necessary to assert that claim on March 18, 2015, after Mr. Perry's death. Absent tolling, the statute of limitations ran on March 18, 2018.

To support its claim for conversion, the Foundation asserts that during the discussions with the French tax authorities that took place starting in March 2016, Lilly and Tamar "began exercising dominion and control over Côte d'Azur for their own benefit." AC ¶ 378. They allegedly "held out Dr. Neupert as having control over Côte d'Azur by virtue of being the 'sole Director' and as the Executor of the U.K. Will." *Id.* According to the counterclaims, "[t]his permitted Lilly and Tamar to dictate what was filed and disclosed to the French tax officials." *Id.* The counterclaims plead that in May 2016, settlement talks among the family members broke down, and Tamar and Lilly disputed Neupert's power to act.

Those allegations do not make out a claim for conversion, because they do not address possession or control of the equity of Côte d'Azur, but setting that problem aside

for later, the Foundation plainly had enough information to assert its rights. The Foundation's own conduct makes that evident, because in June 2016, the Foundation worked with Neupert to assert control over the LLC by filing the certificate of conversion and the certificate of incorporation. The Foundation simply asserted its rights through self-help rather than in court. Assuming for the sake of analysis that the claim accrued at that point, the statute of limitations ran in June 2019.

The Foundation did not assert its claim for conversion until July 2022. Absent tolling, the claim is time-barred.

2. The Claim For Fraud

"[A] claim for common law fraud accrues on the day the misrepresentation is made." *Winklevoss Cap. Fund, LLC v. Shaw*, 2019 WL 994534, at *5 (Del. Ch. Mar. 1, 2019); *accord Lehman Bros. Hldgs., Inc. v. Kee*, 268 A.3d 178, 186 n.57 (Del. 2021). The claim for fraud is difficult to analyze because the nature of the fraud is elusive.

The Foundation asserts that the fraud "evolved over time." AC ¶ 352. According to the Foundation:

> Initially Lilly and Tamar sought to sideline the Foundation to gain free reign to consummate a settlement beneficial to themselves. But as the French tax issue arose, Lilly and Tamar continued to mislead the Foundation so they could control what information was disclosed to French tax officials in order to minimize taxes, avoid penalties, suppress the historically inaccurate tax filings and protect the assets in Mr. Perry's estate from being subject to adverse action by French authorities.

Id.

The Foundation contends that the fraud then evolved into a second phase:

> By the spring of 2016, Lilly and Tamar had agreed on the terms of a settlement that would grant Lilly control over the Villa during her lifetime, keep ownership of the Villa within the Structure, and avoid the troubling French tax issues. This was accomplished by maintaining and fostering the Foundation's misguided belief it did not own Côte d'Azur and advancing the fiction that Côte d'Azur fell under the U.K. Will.

Id. ¶ 353.

The Foundation contends that after May 2016, the fraud entered its third phase:

> When the settlement talks failed, the object of the fraud remained the same: have Lilly declared the owner of Côte d'Azur as the sole heir under the U.K. Will, avoid the French tax issues and secure Côte d'Azur for the sole benefit of Lilly and Tamar. But unable to obtain this result through the U.K. Probate, for the reasons noted above, the focus of the fraudulent scheme turned to Delaware.
>
> Lilly and Tamar first lied to law enforcement officials in Delaware hoping to obtain leverage over the Foundation by securing criminal prosecutions against the Foundation, Dr. Neupert and others. When that failed, they filed a knowingly false complaint in Delaware seeking to have the Court of Chancery issue a ruling that Lilly and Tamar could not even request from the U.K. Probate – that Lilly was the owner of Côte d'Azur as the sole heir under the U.K. Will.

Id. ¶¶ 355–56.

The issue at the heart of the fraud claim is the same issue presented by the conversion claim: who owned the equity of Côte d'Azur after the execution of the Deed of Assignment. The Foundation contends that the Deed of Assignment effectuated an immediate transfer, and all of its claims flow from that premise. As discussed in connection with the conversion claim, all of the facts necessary for the Foundation to pursue that claim were known on May 1, 2013, when the Deed of Assignment was executed. Nothing about that transaction was hidden from the Foundation. Neupert and Oehri signed the Deed of Assignment, and Neupert took the fully executed copy of the Deed of Assignment with

him when he left the May 1 Meeting.

A more generous framing of the issue for purposes of the statute of limitations is who owned the member interest in the LLC after Mr. Perry's death on March 18, 2015. After Mr. Perry's death, the Foundation's representatives believed that the member interest passed to the UK Estate and that Lilly would stand to inherit it as Mr. Perry's sole heir under the UK Will. For the next fifteen months, the issue of ownership of the LLC was front and center for the Foundation's representatives and the other advisors.

Assuming for purposes of analysis that Lilly and Tamar made representations about their ownership by allowing the Foundation to believe that Mr. Perry was the sole member of the LLC when he died, the Foundation had all of the facts necessary to assert its rights. As soon as Mr. Perry died on March 18, 2015, the Foundation could have filed an action seeking to establish its status as the owner of Côte d'Azur. Absent tolling, the statute of limitations ran on March 18, 2018.

Assuming for purposes of analysis that Lilly and Tamar made assertions about who owned the LLC during interactions with the French tax authorities, those assertions were made between March and May 2016. The Foundation could have asserted its rights at any point. The Foundation chose not to file suit because its principals hoped to broker a settlement with the members of the Perry family. Whether that was laudable or foolish is immaterial. Any claim based on assertions that Lilly and Tamar made to the French tax authorities accrued when those statements were made. The claims are now untimely.

By June 2016, the Foundation plainly had enough information to assert its rights. That is when the Foundation and Neupert exercised self-help and took control of the LLC

by making filings with the Delaware Secretary of State. To the extent the Foundation believed it had been defrauded or misled, it had all the facts necessary to sue at that point. Assuming for the sake of analysis that the fraud claim accrued then, the statute of limitations ran in June 2019.

3. The Claim For Conspiracy To Commit Conversion And Fraud

The same analysis that applies to the claims for conversion and fraud governs the claim for conspiracy to commit conversion and fraud. For purposes of this claim, the counterclaims allege only the following: "Lilly and Tamar actively conspired together to defraud the Foundation and Côte d'Azur, and to exercise dominion and control over Côte d'Azur as more fully described herein." *Id.* ¶ 382.

The conspiracy claim depends on the viability of the underlying claims for conversion and fraud. Because those claims are untimely, the conspiracy claim is untimely.

The conspiracy claim is also untimely based on when the conspiracy arose. The counterclaims assert that Lilly and Tamar joined forces in their worldwide attack on the Structure in July 2016. Using that date, the statute of limitations ran in July 2019.

4. The Claim For Declaratory Judgments

The Foundation's final claim seeks a series of declaratory judgments, but the Foundation does not seek any declaratory judgments presently. The Foundation wants the Liechtenstein Court, not this court, to adjudicate "the issue of whether the Deed of Assignment was fully implemented and Mr. Perry's interests in Côte d'Azur transferred to the Foundation." AC ¶ 387. The Foundation therefore only seeks declaratory judgments "[i]n the event the Princely Court of Liechtenstein rules in favor of the Foundation." *Id.* ¶

390. If that occurs, then the Foundation seeks the following three declarations:

- A declaration that upon executing the Deed of Assignment, Mr. Perry "ceased to be a member of or have any interest in, Côte d'Azur." *Id.* ¶ 391.
- A declaration that upon executing the Deed of Assignment, the Foundation as "the assignee, held the entire economic interest in Côte d'Azur, but did not automatically become a member of Côte d'Azur." *Id.* ¶ 392.
- A declaration that by taking various actions, including filing the certificate of conversion and the certificate of incorporation, Neupert and the Foundation revoked any dissolution of Côte d'Azur and installed the Foundation as the sole member of Côte d'Azur. *Id.* ¶ 393.

As framed, these claims are not ripe, because the Foundation has asserted them conditionally and only in the event of a particular outcome in the Liechtenstein litigation. The first two declarations, however, are rulings that the Foundation could have sought at any point after May 1, 2013. The third declaration is one which the Foundation could have sought at any point after June 2016. Those claims are untimely.

B. Tolling Doctrines

In an effort to save its claims, the Foundation relies on tolling doctrines. "[A]fter a cause of action accrues, the 'running' of the limitations period can be 'tolled' in certain limited circumstances." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (footnote omitted). The limitations period is tolled "until the plaintiff is on inquiry notice of their cause of action." *Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at *17 (Del. Ch. Oct. 31, 2013); *accord Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004). "Inquiry notice does not require full knowledge of the material facts . . . ." *Pomeranz v. Museum P'rs, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005). "[R]ather, plaintiffs are on inquiry notice when they have sufficient knowledge to raise

their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued would lead to the discovery of the injury." *Id.* (footnote omitted). The party asserting the claim bears the burden of pleading facts demonstrating that the claimant was not on inquiry notice of the facts underlying the purported claim. *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

1. Equitable Tolling

"Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." *Id.* (footnote omitted). "Equitable tolling usually applies to claims involving self[-]dealing 'where a plaintiff reasonably relies on the competence and good faith of a fiduciary.'" *Pomeranz*, 2005 WL 217039, at *3 n.11 (quoting *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE)); *see also U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 503 (Del. 1996) (discussing equitable tolling). The party relying on tolling bears the burden of showing that the limitations period was tolled. *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007).

"The obvious purpose of the equitable tolling doctrine is to ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing." *In re Am. Int'l Gp., Inc. Consol. Deriv. Litig.*, 965 A.2d 763, 813 (Del. Ch. 2009) (footnote omitted), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011)

(TABLE). "[E]ven an attentive and diligent investor relying, in complete propriety, upon the good faith of fiduciaries may be completely ignorant of transactions that constitute self-interested acts injurious to the [entity]." *Dean Witter*, 1998 WL 442456, at *6 (internal quotation marks and footnote omitted).

The Foundation cannot rely on equitable tolling because Lilly and Tamar were not fiduciaries for the Foundation. They were discretionary beneficiaries of the Foundation and the Trusts that made up the Structure. Although the parties have not briefed this issue, it seems reasonably conceivable that the fiduciary relationship worked in the opposite direction, with LOPAG and its representatives acting as fiduciaries for the beneficiaries of the Structure, which included Lilly and Tamar.

The Foundation argues that Tamar was a fiduciary because she "served as a Protector of some of the trusts within the structure." AC ¶ 369. The Foundation has not alleged when Tamar served as Protector, nor has it identified the Trusts where she served in that role. The Foundation has not addressed whether a Protector under Liechtenstein law owes fiduciary duties. The Foundation has not explained how Tamar acted in a fiduciary capacity in connection with the actions that the Foundation challenges in this lawsuit.

Because the Foundation has not pled adequately that Tamar was a fiduciary, equitable tolling does not apply. In any event, as discussed in the prior section, the Foundation was on inquiry notice about its claims not later than June 2016. Ever since then, the Foundation has asserted ownership and control over the Corporation. The Foundation could have filed an action in June 2016 to establish its rights. The Foundation was on inquiry notice as of that point. Equitable tolling will not save the Foundation from its

decision to wait until July 2020 to assert its claims.

2. Fraudulent Concealment

A statute of limitations may be tolled if a defendant "fraudulently concealed from a plaintiff the facts necessary to put him on notice of the truth." *Tyson Foods*, 919 A.2d at 585. The party invoking this doctrine bears the burden of pleading specific facts to support it. *Eni Hldgs., LLC v. KBR Gp. Hldgs., LLC*, 2013 WL 6186326, at *13 (Del. Ch. Nov. 27, 2013); *see Bean v. Fursa Cap. P'rs, LP*, 2013 WL 755792, at *6 (Del. Ch. Feb. 28, 2013) ("If a prima facie basis for laches exists from the face of the complaint, the plaintiff bears the burden to plead specific facts to demonstrate that the analogous statute of limitations was tolled."). "Claims of fraudulent concealment are subject to a heightened pleading standard and must be 'stated with particularity.'" *In re Est. of Lambeth*, 2018 WL 3239902, at *4 (Del. Ch. July 2, 2018).

The Foundation has not pled any acts of fraud by Lilly or Tamar that concealed the Foundation's ability to assert its claim to own the membership interest in the LLC. At most, the Foundation has alleged that Lilly and Tamar implicitly confirmed the Foundation's understanding that at the time of Mr. Perry's death, the transfer of the member interest from Mr. Perry to the Foundation had never been implemented. That is not an act of fraudulent concealment.

The Foundation maintains that during and immediately after the May 1 Meeting, Naeff and Oehri believed that the Deed of Assignment effectuated a transfer that was immediately effective and did not need any additional steps to implement—notwithstanding the fact that they subsequently took steps to try to implement the transfer.

Accepting that allegation as true, the Foundation had all the information it needed to seek a binding legal determination as to its status as the owner of the LLC's equity. The Foundation acknowledges that it prioritized other issues and chose not to seek legal advice on this subject. That was the Foundation's choice. Nothing was fraudulently concealed.

3. The Discovery Rule

Another tolling doctrine is the discovery rule, which applies "where the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.'" *Wal-Mart Stores, Inc.*, 860 A.2d at 319 (quoting *Coleman*, 854 A.2d at 842). "[T]he statute of limitations begins to run upon the discovery of facts 'constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery' of such facts." *Coleman*, 854 A.2d at 842 (quoting *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982)) ; *see Dean Witter*, 1998 WL 442456, at *7 ("[T]he limitations period is tolled 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." (first emphasis added)); *see also id.* at *7 n.49 ("[O]nce a plaintiff is in possession of facts sufficient to make him suspicious, or that ought to make him suspicious, he is deemed to be on inquiry notice" (quoting *Harner v. Prudential Sec. Inc.*, 785 F. Supp. 626, 633 (E.D. Mich. 1992), *aff'd*, 35 F.3d 565 (6th Cir. 1994)).

The Foundation argues that the discovery rule preserves its fraud claim because the Foundation did not learn the basis for its fraud claim until 2019. The Foundation argues that in 2019, through discovery in litigation in the Cayman Islands, the Foundation obtained

documents which indicated that Lilly and Tamar knew that Mr. Perry was not the sole member of the LLC when he died. Those documents fell into three categories:

- The letters that Asserson sent in August and September 2013 to French lawyers to obtain advice regarding a civil forfeiture action in France, in which Asseron represented that Mr. Perry "no longer has any interest in th[e] [C]ompany." *Id.* ¶¶ 77–79; *see* Dkt. 279 Exs. 18–19.

- The notes of a call from 2013 in which a lawyer from the Asserson Firm appears to tell Mr. Perry's barrister that a trust owned the LLC, rather than Mr. Perry personally. *See* AC ¶¶ 74–76

- The audited financial statements from BGNIC, which suggest that for the year ending December 2013, the equity in the LLC was owned by the Foundation. AC ¶¶ 92–95.

The Foundation alleges that because Lilly and Tamar were parties to the SOCA proceedings and represented by Asserson in those proceedings, they must have known about these documents or similar materials. The Foundation reasons that Lilly and Tamar's subsequent assertions that the equity in the LLC became part of the UK Estate must have been knowingly false.

The issue for purposes of the discovery rule is whether the plaintiff suffered an unknowable injury such that some later event was necessary to put the plaintiff on notice of that injury and give rise to the right to sue. The discovery rule does not fit these facts, because it is not reasonably conceivable that the Foundation was not on inquiry notice about the positions that Mr. Perry and his lawyers were taking in 2013 regarding ownership of the Company's equity.

To advance its claim of undiscoverable injury, the Foundation maintains that it could never have suspected that in response to the NCA's efforts to obtain civil forfeiture

of the Villa, Mr. Perry would have taken the position in 2013 that he no longer owned the Villa because he had transferred it to the Foundation. It is reasonably conceivable that the Foundation did not know about the precise communications evidenced by the documents it obtained in 2019. It is also reasonably conceivable that the Foundation had not focused before 2019 on the audited financial statements for BGNIC. It is *not* reasonably conceivable that the Foundation did not know about the NCA proceeding or the positions that Mr. Perry was taking in 2013 regarding the ownership of the Company's equity.

The NCA proceeding was a major threat to Mr. Perry's wealth. Since the mid-1980s, Mr. Perry had worked with LOPAG and Neupert to protect his wealth and create the Structure. One of the purposes of the Structure was to protect Mr. Perry's wealth from third-party creditors, including government agencies seeking to recover assets on behalf of the victims of Mr. Perry's fraudulent pension scheme. The members of the Board of the Foundation were three representatives of LOPAG: Naeff, Oehri, and Giger. At the time, Neupert was Oehri's partner in LOPAG and a member of its governing board.

It is not reasonably conceivable that LOPAG did not know about the NCA proceeding. It is not reasonably conceivable that LOPAG did not understand that the Deed of Assignment would provide a basis to argue that the member interest in the LLC no longer belonged to Mr. Perry and hence the Villa was not subject to civil forfeiture. It is not reasonably conceivable that LOPAG was not a key player in developing and seeking to implement the plan to transfer Mr. Perry's assets to avoid the threat posed by the NCA.

As discussed in the Factual Background, Mr. Perry pursued litigation challenging the authority of the NCA to pursue assets outside of the United Kingdom, and he prevailed

in a high-profile decision by the Supreme Court of the United Kingdom. After that victory, Parliament amended the law to give SOCA express authority to pursue assets extraterritorially. *See* ACX 18 at 2, 19 at 2. It is not reasonably conceivable that LOPAG and the Foundation did not know about those highly public events.

Any doubt about LOPAG's knowledge is eliminated by the fact that LOPAG joined Mr. Perry, Tamar, Mallet Ford, and two other entities in suing the NCA for $400 million on the theory that Mr. Perry lost a valuable business opportunity as a result of the forfeiture proceedings. *See* AC ¶ 287; Dkt. 349 Ex. B. In 2015, Oehri submitted a witness statement on behalf of LOPAG to an English court in which he explained that he had detailed knowledge of the events related to that proceeding. He averred that he "assisted Mr. Perry to set up the legal and financial structure of the Pension Scheme" that gave rise to Mr. Perry's conviction. Dkt. 340 Ex. B ¶ 8. He explained that he and LOPAG had established Mallet Ford to make an investment that Mr. Perry recommended and that LOPAG controlled 100% of the equity in Mallet Ford, which was owned by one of the Trusts. Dkt. 349 Ex. B ¶¶ 18–24. Oehri was a principal of LOPAG, which controlled the Foundation. Through Oehri, the Foundation knew about these matters.

Neupert contemporaneously submitted a witness declaration to the English court in which he explained that "[f]rom a practical perspective as legal adviser to Mallett Ford Inc. and one of the directors of LOPAG, I am familiar with the details of this case." Dkt. 349 Ex. C ¶ 15(iii). He also averred that he had "worked alongside … Asserson Law Offices … since 2012." *Id.* ¶ 15(iv). In a latter witness statement dated February 23, 2017, that

Neupert submitted to the English court presiding over the UK Estate, he described his involvement in the settlement of proceedings:

> The NCA eventually offered to settle the claim for the sum of £4,824,000. On the instruction of [Mr. Perry's] family (including [Lilly], Tamar and Yael) and their advisors I accepted this offer. The money was due to be paid to me to be held on behalf of the English Estate, but the final instalment [sic] remains held in a solicitors' escrow account.

Dkt. 33 Ex. 3 ¶ 19. Neupert worked hand in glove with LOPAG, which controlled the Foundation. Through Neupert, the Foundation knew about these matters.

It is not reasonably conceivable that any injury from the alleged fraud or conversion was unknown to the Foundation before the production of the Asserson documents in the Cayman Islands Litigation in 2019. Through Oehri and Neupert, LOPAG had sufficient knowledge about the SOCA and NCA proceedings and Mr. Perry's actions in response to them to discover any injury that the Foundation might have suffered. Through LOPAG, the Foundation had that same level of knowledge. The discovery rule does not apply.

4. Extraordinary Facts And Circumstances

In two cases, the Delaware Supreme Court has held that a court could award relief from a statute of limitations based on the extraordinary facts and circumstances in a particular case. *See Levey*, 76 A.3d at 770; *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 178 (Del. 2011). The Delaware Supreme Court has identified the following factors as considerations in determining whether to grant that exceptional relief:

> (1) whether the plaintiff had been pursuing his claim, through litigation or otherwise, before the statute of limitations expired;
>
> (2) whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances;

> (3) whether the delay in filing suit was attributable to a legal determination in another jurisdiction;
>
> (4) the extent to which the defendant was aware of, or participated in, any prior proceedings; and
>
> (5) whether, at the time this litigation was filed, there was a bona fide dispute as to the validity of the claim.

Levey, 76 A.3d at 770 (quoting *O'Brien*, 26 A.3d at 178). "Whether such conditions or circumstances are present cannot be determined by application of a hard and fast rule." *Forman v. CentrifyHealth, Inc.*, 2019 WL 1810947, at *9 (Del. Ch. Apr. 25, 2019). The overarching principle is whether the plaintiff can demonstrate "*either* that he was diligently and productively pursuing his rights before the statute of limitations expired *or* that he was precluded from doing so based on some unusual and unanticipated change in circumstances." *Id.* (emphasis added).

a. Pursuit Of The Claim Before The Limitations Period Expired

The first factor asks whether a party asserted its claim in another "litigation or otherwise before the statute of limitations expired . . . ." *Levey*, 76 A.3d at 770 (internal quotation marks omitted). The Foundation argues that this factor weighs in its favor because it asserted its claim that the Deed of Assignment was valid in Liechtenstein on September 27, 2017. Lilly and Tamar correctly observe that the Liechtenstein Action was a reactive, second-filed action. They also observe that the Foundation initially joined the issue of the validity of the Deed of Assignment in this litigation by using the Corporation as its proxy and causing the Corporation to assert affirmative defenses and file the Original Counterclaim.

The scenarios in *O'Brien* and *Levey* do not resemble what the Foundation has done.

In *O'Brien*, a corporate officer pursued an indemnification action against his former employer, but the employer went bankrupt before action concluded. The officer could have asserted an indemnification claim against his former employer's corporate parent, but did not take the additional step because he was pursuing his former employer. *O'Brien*, 26 A.3d at 176–77. The corporate officer in *O'Brien* thus proceeded diligently but had his claim cut off by a bankruptcy filing.

The *Levey* case also involved a former employee who initially asserted counterclaims against his former employer, in that case after his former employer sued him in federal court. The federal court subsequently held that the claims were subject to mandatory arbitration and closed the case. The arbitrator, however, determined that the employer was not obligated to arbitrate the claim. By the time all of this this had happened, the statute of limitations had run. *Levey*, 76 A.3d at 766–67. The former employee in *Levey* thus proceeded diligently but was whipsawed by the federal court and the arbitrator.

Nothing similar occurred in this case. In both *O'Brien* and *Levey*, the parties started by suing elsewhere, had their actions foreclosed by events outside their control, and then sought to sue in Delaware. That is not what the Foundation did. When Lilly filed this action in Delaware, the Foundation could have intervened to protect its rights. Instead, the Foundation caused the Corporation to assert its claim by proxy through the affirmative defenses and the Original Counterclaim, while arguing that the Foundation could not be joined. The Foundation filed the Liechtenstein Action after losing that argument, then it contested jurisdiction in this proceeding. The Foundation is still pursuing the second-filed Liechtenstein Action, and as shown by the Foundation's requests for declaratory relief, the

Foundation still wants the Liechtenstein Court to decide the principal issue in the case.

This is thus not a case where the Foundation was not able to pursue its claims in Delaware after unexpectedly getting the short end of the stick elsewhere. This is a case where the Foundation has sought to avoid asserting its claims here from the start.

b. Whether The Delay Was Due To Personal Hardship

The second factor asks "whether the delay in filing suit was attributable to a material and unforeseeable change in the parties' personal or financial circumstances . . . ." *Id.* at 770. The Foundation does not assert that this factor applies.

There is good reason why the Foundation did not try to invoke this factor. The Foundation did not delay seeking a determination of its rights because of any hardship. The Foundation did not assert its rights after May 1, 2013, because it thought Mr. Perry would execute the documents necessary to complete the transfer. The Foundation did not assert its rights after Mr. Perry's death because Neupert, LOPAG, and the members of the Perry family were trying to determine the optimal way to document the ownership of the LLC for tax purposes. They were not interested in what had really happened or the actual state of affairs at the time of Mr. Perry's death. They only cared about what would minimize the Perry family's tax bill and yield a settlement among the family members.

When settlement talks broke down in May 2016, the Foundation chose to exercise self-help. Rather than seeking a legal declaration as to its rights, the Foundation and Neupert took control of the LLC by filing the certificate of conversion and certificate of incorporation, then documenting the Foundation's ownership.

As discussed above, when Lilly challenged those acts in April 2017 by filing this

lawsuit, the Foundation caused the Company to use every procedural tool available to drag out this litigation.

- The Company moved to dismiss the case on the grounds that the Foundation was a necessary party.
- After the court denied that motion and joined the Foundation as a defendant, the Foundation contested the exercise of personal jurisdiction.
- While the dispute over personal jurisdiction was pending, the Foundation filed the Liechtenstein Action.
- After the Court held that the Foundation was subject to personal jurisdiction, the Foundation filed an omnibus motion to dismiss that challenged Lilly's claims on the merits and on procedural grounds.

It was only after the court denied the Foundation's motions to dismiss that the Foundation sought to assert its counterclaims.

Personal hardship did not prevent the Foundation from asserting its claims. The Foundation made a series of tactical and strategic decisions *not* to assert them.

c. Whether The Delay Was Due To A Decision Elsewhere

The third factor asks whether the delay "was attributable to a legal determination in another jurisdiction . . . ." *Id.* This factor does not apply. There has not been a decision elsewhere that foreclosed the Foundation from pursuing its claims.

The Foundation suggests this factor weighs in its favor because it "did not become aware of the fraud until it successfully obtained the Asserson files as a result of the Cayman Islands litigation." Opp'n at 29. The production of the Asserson file is not analogous to what happened in *O'Brien* or *Levey*, where the plaintiff suffered *adverse* rulings elsewhere. Moreover, as this decision has found, the Foundation did not need the information from

the Cayman Islands litigation to assert the counterclaims it now seeks to bring. The Foundation was on inquiry notice long ago, and in any event by July 2016.

d. The Involvement Of The Defendants

The fourth factor asks whether the "defendant was aware of, or participated in, any prior proceedings . . . ." *Levey*, 76 A.3d at 770. This factor is designed to determine whether the defendant was aware of the plaintiff's efforts to pursue its claims in another forum such that the plaintiff should not be surprised by the suit.

This factor technically applies, because Lilly and Tamar have known about and participated in the second-filed Liechtenstein Action. Lilly also knew about the Foundation's efforts to have the Corporation litigate the Foundation's claims by proxy in its affirmative defenses to the Original Counterclaim. Lilly and Tamar therefore should not be surprised by the counterclaims, but that does not mean the claims should be allowed to proceed. The facts of this case are so different from *Levey* and *O'Brian* that this factor is insignificant.

e. A Bona Fide Dispute

The fifth factor asks whether there is a "bona fide dispute as to the validity of the claim." *Levey*, 76 A.3d at 770. This factor is plainly met. Both sides agree on that point.

f. The Overall Balancing

The *O'Brien* and *Levey* cases both involved fact-specific rulings by the Delaware Supreme Court with the goal of preventing injustice. In each case, an individual pursued litigation against a former employer that had access to superior resources. In each case, the individual pursued a good faith litigation strategy by filing claims in a logical jurisdiction.

In each case, the individual's ability to recover was foreclosed by unforeseen circumstances. When the individual sought to pursue a remedy in Delaware, the high court did not permit a timeliness doctrine to bar the claim.

This case is nothing like *O'Brien* and *Levey*. The Foundation is a sophisticated party with extensive resources. It could have asserted its theories in July 2016, but instead it chose to use self-help. When Lilly challenged those actions by filing this lawsuit, the Foundation originally envisioned litigating the validity of the Deed of Assignment here, and it caused the Corporation to file the Original Counterclaim so it could do so by proxy. It reversed course only after the court held that the Foundation itself could be joined as a party. At that point, the Foundation sought to avoid this court's jurisdiction and filed a reactive action in Liechtenstein. The Foundation repeatedly moved to dismiss, forcing the plaintiff to survive a pleading-stage gauntlet. Only after three rounds of motions to dismiss did the Foundation finally assert its counterclaims. By then, it was too late.

Both sides in this dispute have used courts and litigation in an effort to gain an advantage. Neither side can legitimately claim an equitable exception.

All of the counterclaims are untimely, and tolling doctrines do not save them. The counterclaims are dismissed on that basis.

C. Other Grounds For Dismissal

Lilly and Tamar have advanced other challenges to the claims on their merits. There are several straightforward grounds for dismissal on the merits, which this decision

addresses. This decision does not reach all of Lilly and Tamar's arguments.

1. Fraud

To state a claim for common law fraud, a party must allege "(1) a false representation, usually one of fact . . . ; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

Under Court of Chancery Rule 9(b), a party must state the "circumstances constituting fraud . . . with particularity." Ct. Ch. R. 9(b). "The relevant circumstances are 'the time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from making the misrepresentation.'" *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 142 (quoting *Trenwick Am. Litig. Tr. v. Ernst & Young LLP*, 906 A.2d 168, 207–08 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007)). "Essentially, the plaintiff is required to allege the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim." *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

The Foundation has not asserted a reasonably conceivable claim of fraud. The counterclaims, the documents that they incorporate by reference, and the other documents in the record show that all of the relevant actors had access to the same basic information

about the ownership of the LLC after Mr. Perry's death. Everyone knew the following core facts:

- Mr. Perry had executed the Deed of Assignment at the May 1 Meeting.
- Mr. Perry had not executed any additional documents to implement the transfer of the LLC's equity contemplated by the Deed of Assignment.
- Mr. Perry had acted at times as if the Deed of Assignment was never implemented and that he remained the owner of the equity at the time his death. Examples include his tax filings in France.
- Mr. Perry had acted at times as if the Deed of Assignment was implemented and that the Foundation was the owner of the equity. One example is his statement in the Letter of Wishes about transferring the equity to the Liza Trust.
- Having Lilly inherit the equity from the UK Estate was most advantageous from a tax perspective and consistent with the tax filings in France.
- Moving the equity into the Structure was consistent with the Letter of Wishes and beneficial for resolving disputes among the members of the Perry family.

It is particularly clear that Naeff, Oehri, and other LOPAG representatives understood these basic facts. As a result of their knowledge, the Foundation understood these facts.

Given this reality, it is not reasonably conceivable that the Foundation relied on any statements by Lilly or Tamar about the ownership of the member interests in the LLC. It is particularly inconceivable that the Foundation relied on any statements by Lilly or Tamar to the effect that the equity was part of the UK Estate and that Lilly would receive it as the only heir under the UK Will. To the contrary, *Naeff was the original source for that belief.* When Wolnerman asked about the Deed of Assignment, Naeff told him that the document was "known" and never "executed." At the evidentiary hearing, Naeff testified that by "never executed" he meant "that this transfer has not been completed or finalized." Naeff

Tr. 53.

The common law fraud claim fails for lack of a conceivable inference of reasonable reliance. In addition to being barred by the statute of limitations, the common law fraud claim is dismissed on the merits.

The equitable fraud claim fails for the additional reason that Lilly and Tamar did not occupy any roles of trust or confidence vis-à-vis the Foundation that would support such a claim. In addition to being barred by the statute of limitations, that equitable claim is dismissed on the merits.

2. Conversion

A plaintiff seeking to plead a claim for conversion must plead that it had a property interest in the property, had a right to possess the property, and that another person took or disposed of the property. *See Gould v. Gould*, 2012 WL 3291850, at *7 (Del. Ch. Aug. 14, 2012); *B.A.S.S. Gp., LLC v. Coastal Supply Co., Inc.*, 2009 WL 1743730, at *8 (Del. Ch. June 19, 2009). Here, the property is the equity in Côte d'Azur.

The claim of conversion fails because Lilly and Tamar have never exercised control over the equity of Côte d'Azur. Only the Foundation has. Since June 2016, the Foundation has maintained that it is the sole owner of all of the Corporation's shares.

Lilly has *asserted* that she has a beneficial ownership interest in the equity of the LLC because (i) the conversion is invalid, (ii) the Deed of Assignment was never implemented, (iii) the equity of the LLC became part of the UK Estate, and (iv) she is the sole heir of the UK Estate. That is the claim that Lilly seeks to prove in this proceeding. Lilly has sought to enforce her rights through litigation. She has not engaged in conversion.

The counterclaims do not allege facts indicating that Lilly or Tamar acted on behalf of Côte d'Azur in a manner that would give rise to a claim for conversion. The Foundation asserts that it has been deprived of control through "the loss of access to the Villa as a result of Lilly and Tamar taking physical possession of the Villa following [Mr. Perry's death.]" Opp'n at 17. The Foundation has not alleged that Lilly and Tamar have used the Villa under a claim of ownership. The Letter of Wishes specified that all of Mr. Perry's heirs could use the Villa. Regardless, using the Villa is different from asserting control over the LLC, converting it into the Corporation, and claiming to own all of the shares.

The Foundation also claims that Lilly and Tamar exercised control over Côte d'Azur by making French tax filings. The Foundation alleges that Lilly and Tamar approved tax filings in May 2015 and in May 2016 that named Lilly as the ultimate beneficial owner of the LLC. The counterclaims and the documents they incorporate demonstrate that everyone viewed that as the correct position to take. In May 2015, that was the position that Naeff and Neupert took. In May 2016, that was the position that everyone agreed to take.

The counterclaims affirmatively plead that Tamar has *not* asserted control over Côte d'Azur. She has maintained that it is part of the Structure and she seems to have contended consistently that it should be owned by the Liza Trust.

It is not reasonably conceivable that the counterclaims' allegations regarding Lilly and Tamar's conduct could support a claim for conversion. In addition to being barred by the statute of limitations, that claim is dismissed on the merits.

3. The Other Claims

For want of an underlying wrong, the conspiracy claim fails. It is reasonably

conceivable that Lilly and Tamar started working together after the settlement talks broke down in May 2015. But because it is not reasonably conceivable that the counterclaims support causes of action for fraud or conversion, they also do not support a claim for conspiracy.

On the merits, the Foundation's declaratory judgment claims could support relief, if the Foundation had not conditioned them on a decision from the Liechtenstein Court. By choosing to frame its claims conditionally, the Foundation failed to assert ripe claims.

IV. CONCLUSION

The Foundation has failed to assert timely counterclaims. The Foundation also has failed to plead necessary elements for its counterclaims. For those reasons, the counterclaims are dismissed. There is no need to reach Tamar's motion to dismiss for lack of jurisdiction.