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Case Number 438,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANKLIN BROWN	)	
	)	
Plaintiff-Below, Appellant,	)	No. 438, 2016
	)	
v.	)	
	)	On Appeal From Court of Chancery of
	)	the State of Delaware
RITE AID CORPORATION, a Delaware corporation,	)	C.A. No. 11596-VCL
	)	
	)	
Defendant-Below, Appellee.	)	

ANSWERING BRIEF OF APPELLEE, RITE AID CORPORATION

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Dated: November 9, 2016

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NATURE OF PROCEEDINGS

On October 17, 2003, a federal jury convicted former Rite Aid Corporation ("Rite Aid") officer and director Franklin Brown of numerous crimes arising out of his role in conspiracies to misappropriate and to conceal the misappropriation of millions of dollars from Rite Aid, a publicly-traded Delaware corporation, and to obstruct investigations into the conspirators' misconduct. Although Brown was not convicted of all of the predicate crimes underlying the conspiracies, those of which he was found guilty included submitting false documents to Rite Aid's Board to justify the conspirators' defalcations, destroying evidence and witness tampering.

The Third Circuit affirmed, and on January 10, 2011 the U.S. Supreme Court denied certiorari review of Brown's prosecution, at which time his conviction became final as a matter of law. Subsequent collateral attacks on Brown's conviction concluded unsuccessfully in November 2014.

To date, Brown has asserted claims in four actions against Rite Aid in three different courts demanding that the corporation he looted pay his criminal defense costs. The first three pleaded an entitlement to advancement in excess of the $1.1 million Rite Aid paid before Brown's conviction. The fourth, this action, was brought in the Chancery Court on October 8, 2015 – almost five years after Brown's conviction became final – and seeks mandatory indemnification pursuant

to 8 *DEL.C.* § 145(c) and Rite Aid's Restated Certificate of Incorporation and bylaws.

Rite Aid moved to dismiss Brown's complaint as time-barred and, in the alternative, to dismiss or stay the Chancery Court proceeding in favor of a prior-filed advancement action pending in a Pennsylvania state court. A394-A420. Brown moved for partial summary judgment, seeking a declaration he was entitled to indemnification in an amount to be determined. A440-A485.

On August 22, 2016, after full briefing and argument, the Chancery Court dismissed this action as time-barred. Opening Appellant Brief ("Appellant Brief"), Ex. A. The Chancery Court did not reach Rite Aid's alternative grounds for dismissal or stay, or Brown's request for partial summary judgment. Final Judgment was entered on August 24, 2016. *Id.*, Ex. B.

Brown appeals that Judgment. As shown below, Brown's key arguments on appeal were never raised below. Indeed, one is premised on a complete reversal of the position Brown took before the Chancery Court. The Chancery Court's decision was correct and should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Brown's indemnity claim accrued no later than January 10, 2011, when the U.S. Supreme Court denied certiorari review of the affirmance of his direct appeal. The three-year statute of limitations thus passed long before Brown commenced this action in October 2015. Brown's contention that his claim did not accrue until November 10, 2014, when the collateral attacks on his conviction concluded, is incorrect as a matter of law. An indemnity claim accrues when the claimant "can 'be confident any claim against him ... has been resolved with certainty.'" *Scharf v. Edgcomb Corp*., 864 A.2d 909, 916 (Del. 2004). Such certainty exists at "the 'final, non-appealable conclusion of a proceeding.'" *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 383 (Del. Ch. 2008); *Scharf*, 864 A.2d at 920 ("Until the final judgment of the trial court withstands appellate review, the outcome of the underlying matter is not certain."). Collateral attacks do not affect the finality of a conviction or the accrual of the defendant's indemnity claim because they are not appeals. *Sun-Times*, 954 A.3d at 396 n. 62 (collateral attack through *habeas corpus* accrues only after final judgment); *see Clay v. U.S.*, 537 U.S. 522, 525 (2003) (criminal proceeding final when direct appeal resolved). Brown's argument that his collateral attack on his conviction should be considered a part of the original criminal proceeding because it was docketed under the same caption was not properly raised below and is incorrect. The practice of filing

collateral challenges under the same caption as the defendant's original conviction does not alter the finality of the original conviction or change the collateral nature of the proceedings. *Wall v. Kholi*, 562 U.S. 545, 560 (2011).

2. Denied. Brown's indemnification claim is subject to a three-year statute of limitations. 10 *DEL. C.* § 8106(a). His claim that Rite Aid's Restated Certificate of Incorporation (the "Certificate") extended the deadline indefinitely relies on a provision permitting an advancement or indemnity lawsuit to be filed "at any time after" thirty days following the claimant's tender of a demand. The argument mischaracterizes the Certificate provision and misperceives the statute authorizing such an extension. The Certificate provision precludes a claimant from filing a lawsuit before the corporation has the opportunity to evaluate a demand. It does not extend the statute of limitations. Brown's reading of the Certificate would violate 10 *DEL. C.* § 8106(c), requiring that any contractual statute limitations modification specify the time bar as modified, which the Certificate provision on which Brown relies does not do.

3. Denied. Because Brown brought this action long after the applicable statute of limitations expired, the Chancery Court correctly held it was barred by laches. Brown argues that a prior pending proceeding in Cumberland County, Pennsylvania (the "Cumberland Action"), in which Brown sought advancement from Rite Aid, put his indemnification claim at issue, thereby tolling the deadline

for asserting an indemnification claim here. But, advancement and indemnification are "discrete and independent rights." *Kaung v. Cole Nat'l Corp.,* 884 A.2d 500, 510 (Del. 2005). Moreover, Brown consistently took the position before the Chancery Court below and before the court in Pennsylvania that indemnification was never at issue in the Cumberland Action. *See* Brown's arguments at A478, A581, A584, A586, A622, A636; Trial Court at A644. Brown cannot legitimately argue he relied on the Cumberland Action to protect his indemnification rights when he never thought his indemnification claims were at issue there. Further, tolling as an independent basis for excusing laches is premised on Delaware's Saving Statue, 10 *Del. C.* § 8118(a), which does not apply. *Levey v. Brownstone Asset Mgmt., L.P.*, 76 A.3d 764, 772 (Del. 2013) (Savings Statue tolled statute of limitations "for pendency of the prior action in which plaintiff raised the identical claim").

4. Denied. The Chancery Court received evidence and argument on the factors to be considered in determining whether "unusual conditions or extraordinary circumstances" justify a deviation from the analogous statute of limitations. *See IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011). The Chancery Court carefully considered the factors, applied an appropriate weighting, and correctly held that Brown did not demonstrate "unusual conditions or extraordinary circumstances" excusing his late filing. Whether viewed on its

own or in the context of the *IAC* test, the pendency of the Cumberland Action does not warrant tolling of the time for Brown to assert his indemnification claim.

STATEMENT OF FACTS

A Delaware corporation, Rite Aid is one of the nation's largest drug store operators. A310. Brown was a Rite Aid officer from 1969, serving in positions including Executive Vice President and Chief Legal Counsel. He retired in 1996, remaining on the Board of Directors until July 2000. From July 1997 until he stepped down in 2000, Brown was Vice Chairman of Rite Aid's Board. A303.

A. Brown's Misconduct and Conviction

On October 11, 1999, Rite Aid announced unexpected losses for the second quarter of fiscal 2000 and that it would be restating its financial statements for fiscal 1999. Ultimately, the restatement reduced Rite Aid's reported income by $1.6 billion after taxes, making it the largest accounting restatement in U.S. corporate history to that time. A085-86. The announcement triggered an internal Rite Aid inquiry and investigations by the Securities and Exchange Commission and the Department of Justice. A314-15.

On June 21, 2002, Rite Aid entered into a consent order resolving the SEC investigation. On the same day, a federal grand jury sitting in the Middle District of Pennsylvania returned a 36-Count Indictment against Brown and several co-conspirators, including former Rite Aid Chief Executive Officer Martin Grass. Brown was a defendant in all but one of the Counts. A060-160.

1. The Indictment

The Indictment alleged a broad scheme to divert tens of millions of dollars from Rite Aid's coffers to several senior executives, including Brown and Gras. Specifically, the Indictment charged two broad criminal conspiracies: one to defraud the Government, Rite Aid, its Board of Directors, shareholders and vendors; and another to obstruct investigations into the fraud. A087-126; A140-52. Acts in furtherance of the fraud conspiracy included: causing the Company to distribute millions of dollars in compensation, loan guarantees and other benefits to themselves and other senior executives without authority or Board of Directors approval; generating fraudulent, back-dated documents to fabricate authority for the self-dealing transactions; falsely inflating the Company's stated income to justify unearned profitability bonuses; and disseminating false and misleading financials through public disclosures and SEC filings. A102-126. The conspirators were also charged with concealing their misconduct by falsifying published financial statements, destroying evidence, and attempting to corrupt potential witnesses and attempting to suborn perjury. A140-51.

Rite Aid advanced Brown and his co-conspirators millions of dollars in defense costs. Brown alone received $1.1 million.

In June 2003, Brown's co-defendants pleaded guilty to certain of the charges, and each was incarcerated. Brown also pled guilty, but subsequently withdrew that plea and demanded a trial. A324-25.

2. Brown's Conviction, Appeal and Collateral Attacks

On the eve of trial, the Government announced it would proceed on the two conspiracy counts and on ten of the 24 counts predicated on acts in furtherance of the conspiracies. Following a three week trial, on October 17, 2003, a jury convicted Brown on ten counts, including both conspiracy charges. A325-26.

In his Appellant Brief, Brown contends he "faithfully represented Rite Aid for decades, from the inception of Rite Aid's business in 1962 until his retirement in 2000 …." Appellant Brief 7. He also asserts he "cooperated with the government's investigations ... [and with] Rite Aid's own internal investigation" of the accounting irregularities. The jury concluded otherwise and unanimously found, among other things, that Brown:

- Forged and delivered to the Rite Aid Board false, unauthorized, back-dated letters purporting to enhance compensation for himself and his co-conspirators (Jury Fraud Conspiracy Findings A104, ¶ 44; A124-25, ¶¶ 131-34);
- Executed and delivered to the Board a false Proxy Statement questionnaire response (*id.*A115, ¶ 88);
- Instructed an employee to delete the forged documents from Rite Aid's computers (Jury Obstruction Conspiracy Findings A143, ¶ 9);
- Misled Rite Aid's internal investigators (*id.* A143,¶ 10); and

- Offered to buy a car for a Rite Aid employee likely to be a Government witness (*id.* A143 ¶ 11).

On October 14, 2004, District Court Judge Sylvia Rambo sentenced Brown to ten years in prison, a sentence later reduced in light of an intervening U.S. Supreme Court case invalidating mandatory federal sentencing guidelines. In her sentencing ruling, the Judge Rambo found Brown was a leader and organizer of the fraud conspiracy, obstructed Grand Jury and SEC investigations, and abused his position of trust as a Rite Aid officer and director. *See U.S. v. Brown*, No. 1:02-CR-00146-2, slip op. at 1, 10-13 (M.D. Pa. Aug. 17, 2004).

Brown subsequently sought a new trial under Rule 33 of the Federal Rules of Criminal Procedure. That motion was denied. *See United States v. Brown*, 2008 WL 510126, *25 (M.D. Pa. Feb. 22, 2008); A364. He then proceeded with his direct appeal to the Third Circuit, which affirmed his conviction in all respects. A365; *U.S. v. Brown*, 595 F.3d 498 (3d Cir. Feb. 23, 2010). Brown's petition to the United States Supreme Court for certiorari review was denied on January 10, 2011. A366; *Brown v. U.S.*, 131 S.Ct. 903 (2011) (mem.).

After the conclusion of his direct appeals, Brown challenged his conviction collaterally by filing a petition under 28 U.S.C. § 2255 in the District Court. The District Court denied the petition, and the denial was affirmed by the Third Circuit. *United States v. Brown*, No. 1:02-CR-146, 2013 WL 6182032, at *15 (M.D. Pa. Nov. 25, 2013) (denying motion to vacate, set aside or correct convictions and

sentence pursuant to 28 U.S.C. § 2255); *United States v. Brown*, No. 1:02-CR-146 (M.D. Pa. Jan. 7, 2014 Order) (denying application for certificate of appealability), *aff'd*, No. 13-4786 (3d Cir. May 22, 2014 Order); *United States v. Brown*, No. 13-4786 (3d Cir. Jul. 1, 2014 Order) (denying petition for rehearing *en banc*). Brown's petition for certiorari to the U.S. Supreme Court, was denied on November 10, 2014. *Brown v. U.S.*, 135 S. Ct. 489 (2014) (mem.).

B. Litigation Against Rite Aid

Brown argues that, as a result of Rite Aid's cessation of advancement, he was unable to mount a competent criminal defense or to bring a timely indemnification claim. *E.g.* Appellant Brief 10, 41-42. That assertion ignores the rejection of his collateral attack based on an alleged ineffective assistance of counsel. *See id.* 13. It is also belied by the numerous lawsuits Brown prosecuted against Rite Aid and others,[1] in addition to his many reconsideration motions,

[1] In addition to suing Rite Aid multiple times, Brown sued co-conspirator and former Rite Aid CEO Martin Grass; Grass's attorney, Isaac Neuberger; Neuberger's law firm, Neuberger Quinn Gielen Rubin & Gibber, P.A.; the law firm with which Brown's current attorney was formerly associated, Duane Morris LLP; and Duane Morris client, PNC Bank. *Franklin C. Brown, et ux. v. Isaac Neuberger, PNC Financial Services Group, Inc., PNC Bank National Association, et al.*, Case No. 24-C-14-001757-OT (Cir. Ct. Baltimore City); affirmed, No. 01063 (Md. Ct. Special Appeals)(dismissed for failure to state claim; B92-93, B97-126); *Franklin Brown & Karen Brown v. PNC Bank, N.A.*, Case No. 2013-CV-001573 (Ct. Comm. Pleas, Phila. Co., PA)(voluntarily dismissed, B88-91); *Franklin Brown and Karen Brown v. Duane Morris LLP; Neuberger, Quinn ,etc.; and Isaac Neuberger,* No.: 2011-CV-000283, 2013 WL 10721801 (Ct. Comm.

appeals and collateral attacks in his criminal case. Among these are pleadings in four separate lawsuits (brought in three different courts) in which Brown put at issue his asserted right to the advancement of defense costs. Only one of his actions – the one at issue on this appeal – raises Brown's supposed entitlement to indemnification.

1. The Cumberland Action

On October 9, 2002, shortly after Brown and his co-conspirators were indicted, Rite Aid commenced the Cumberland Action by summons. A full complaint was filed on December 23, 2003, and an amended complaint on July 7, 2004. The bulk of the eight Counts in the amended complaint sought damages for the breaches of duty resulting from the conduct charged in the Indictment. Two Counts related to Brown's legal fee claims: Count VII, seeking recoupment of Rite Aid's previous advances, and Count VIII, seeking a declaration that Rite Aid was not liable to Brown for any payments allegedly due under his employment agreements, for advancement or "for any other reason whatsoever." A228-37. On March 5, 2008, Brown counterclaimed, seeking a declaration he was entitled to

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Pleas, Phila. Co., PA), (dismissed for failure to prosecute, motion to reopen denied, reversed on appeal, B86-B87); *Brown v. Neuberger, Quinn, etc*., 731 F. Supp. 2d 443 (D. Md. 2010), *aff'd*, 495 Fed. Appx. 350 (4th Cir. 2012)(affirming dismissal of claims as time-barred and not entitled to tolling). In each case, Brown proclaims his innocence and seeks to foist responsibility for his conviction on others. These are matters of public record of which the Court may take judicial notice. Delaware Rule of Evidence 201(b).

advancement of past and future litigation expenses, notwithstanding his conviction. A238-43.

On June 27, 2008, Brown moved for partial summary judgment on his Counterclaim, which was denied on November 21, 2008. B1.[2] On October 16, 2008, Rite Aid moved for partial summary judgment as to liability on its affirmative damage claims on the ground that Brown's conviction conclusively established his duty breaches. Rite Aid's Motion was granted on March 16, 2010. B2-B19.

On December 16, 2015, Rite Aid moved for summary judgment on the remaining Cumberland Action issues. Shortly before the hearing on the motion, Brown filed a motion in the United States District Court for the Eastern District of Pennsylvania asserting, for the first time, that Rite Aid's damages claims were barred by a 2001 settlement of a securities class action brought in that forum (the "Federal Action"). A545. On June 7, 2016, the Federal Action judge enjoined Rite Aid from proceeding with its affirmative claims, later clarifying that Rite Aid was free to pursue its Count VIII claim for a declaration that it owed Brown no obligations. A558-72; A572.1.

[2] Citations to Rite Aid's Appendix, filed contemporaneously herewith, are identified by numbers with the prefix "B."

On July 21, 2016, Brown moved to dismiss or stay the Cumberland Action in favor of the present Delaware action. A579-90. On August 11, 2016, Brown voluntarily dismissed his advancement Counterclaim in the Cumberland Action. Brown's motion to dismiss was denied on September 29, 2016, at which time the Court stayed further proceedings pending the resolution of this appeal. B156.

2. The First Delaware Action

On December 3, 2003, after the jury returned a guilty verdict in the criminal trial, Brown filed a complaint in the Delaware Chancery Court seeking advancement of his defense and appeal costs. A219-A227. On July 12, 2004, the Chancellor granted Rite Aid's motion to stay in favor of the prior-filed Cumberland Action. *Brown v. Rite Aid Corporation*, C. A. No. 094-N (Del. Ch. Jul. 12, 2004); A259-A260. The Chancery Court dismissed the First Delaware Action on April 25, 2008 for failure to prosecute. *Brown v. Rite Aid Corporation*, Del. Ch., C.A. No. 094-N. (Apr. 25, 2008) (Order).

Brown contends that once the First Delaware Action was stayed, Rite Aid "allowed … [the Cumberland Action] to languish for more than thirteen years without resolution." Appellant Brief 15. Brown does not discuss what ***he*** did to press his advancement claim. It was not until March 2008 that he brought his advancement counterclaim – almost four years after the Chancery Court stayed the First Delaware Action. Brown neither sought discovery nor a trial date in the

Cumberland Action, and did not file this second Chancery Court action until more than five years after the termination of his direct appeals from his criminal conviction (a year after termination of his collateral attacks).

3. The Dauphin Action

On February 25, 2010, weeks before Rite Aid's first partial summary judgment motion was granted in the Cumberland Action, Brown commenced a fresh lawsuit by summons in the Court of Common Pleas for Dauphin County, Pennsylvania (the "Dauphin Action"). Brown allowed the Dauphin Action to sit for almost three years, filing a complaint on February 1, 2013 only after being directed by the Court to do so. B20-85. Brown's complaint alleged, among other things, that Rite Aid unlawfully conspired with the U.S. Government to undermine his defense by violating his asserted entitlement to advancement.

During an October 6, 2015 argument on Rite Aid's preliminary objections to Brown's complaint, the Dauphin Action Court observed that the action should be transferred to Cumberland County for coordination with the Cumberland Action, and entered an order to that effect on October 21, 2015. B94-95. On November 6, 2015, Rite Aid moved for coordination. B96. That motion, and Rite Aid's preliminary objections, remain pending.

4. The Second Delaware Action

On October 8, 2015, two days after it became apparent that the fragmented Pennsylvania actions would be consolidated in a single court, Brown filed this action (the "Second Delaware Action") seeking indemnification under Section 145(c) of the Delaware General Corporation Law ("DGCL") and Rite Aid's charter and bylaws. A300-90.

Rite Aid moved to dismiss the complaint and Brown cross-moved for partial summary judgment. Rite Aid argued Brown's indemnity claim was time-barred because it was filed more than three years after the direct appeals of his conviction were terminated by the Supreme Court's denial of Brown's certiorari petition. In the alternative, Right Aid sought to dismiss or stay the Second Delaware Action in favor of the prior-pending Cumberland Action. A394-A420.

On August 22, 2016, the Court of Chancery ruled from the bench after oral argument, dismissing Brown's Complaint as time-barred. The Chancery Court found: (a) Brown's claim accrued on January 11, 2011, when the U.S. Supreme Court denied review of the Third Circuit's affirmance of his conviction; (b) the three-year statute of limitations, which governs Brown's indemnification claim, expired before Brown filed suit; and (c) circumstances did not warrant an excuse from laches. A660-64. The Chancery Court did not rule on Rite Aid's alternative grounds for dismissal or stay or on Brown's partial summary judgment motion.

On August 24, 2016, the Chancery Court entered the Order and Final Judgment. Appellant Brief, Ex. B.

C. Brown's Reversal of Position on Appeal

In his Brief to this Court, Brown argues the statute of limitations on his indemnity claim was tolled by the pendency of the Cumberland Action because his "entitlement to indemnification has been the subject of Count VII of the Cumberland Action since 2003." Appellant Brief 36. Count VII of Rite Aid's complaint in the Cumberland Action sought a determination that Brown was not entitled to any further advancement and was obligated to repay amounts previously advanced on the allegation that Brown's conviction constituted a "determin[ation] that Brown is not entitled to indemnification." A236-37.

Brown took the opposite position in the Chancery Court. In resisting Rite Aid's request to dismiss or stay the Second Delaware Action in favor of the prior-filed Cumberland Action, Brown repeatedly declared that indemnification was not, and could not possibly be, at issue in the Cumberland Action. According to Brown:

> The currently-operative complaint in the Cumberland Action was filed a decade before Brown's indemnification claim accrued. Completely absent from the Cumberland Action is any claim with respect to Brown's right to mandatory indemnification pursuant to 8 *Del. C.* § 145(c). Indeed, the complaint in the Cumberland Action makes no reference to indemnification and instead relates to advancement and other payments under Brown's employment and severance agreements.

A478; *also e.g.*, A451, ("indemnification claim was not presented to the Pennsylvania court"); A581 (indemnification "cannot possibly be before" Cumberland Action c]Court). Similarly, during oral argument on Rite Aid's Motion to Dismiss, Brown's counsel told the Chancery Court: "The issue of indemnification is not before the Cumberland County Court" and "[t]here never was a claim for indemnification in Cumberland County." A622, A636. Brown also characterized the Cumberland Action advancement claim as "separate and distinct" from and "independent" of the indemnity claim before the Chancery Court. A477-78.

Brown consistently made the same argument before the Cumberland Action Court. *E.g.* A582-87 (indemnification not within scope of Cumberland Action); A581 (indemnification claim "did not accrue until more than a decade after this case was wrongfully initiated, and cannot possibly be before this Court"). During argument on Brown's Motion to Dismiss or stay the Cumberland Action complaint in September 2016 – more than a month after the Chancery Court dismissed this action – Brown continued hammering away at the same point. (B134, at 8:24-25) (indemnification "is not encompassed within Count 8. It could not have been.")

Although the Chancery Court did not rule on Rite Aid's alternative request for a stay or dismissal in favor of the Cumberland Action, it accepted Brown's position on the scope of the Cumberland Action, finding that litigation seems "to

be focused, at least in the first instance, on advancement and other things, but I don't think it was sufficient for tolling." A662.

ARGUMENT

I. THE CHANCERY COURT CORRECTLY HELD THAT BROWN'S INDEMNITY CLAIM ACCRUED ON JANUARY 10, 2011, WHEN HIS DIRECT APPEAL TERMINATED

A. Question Presented

Whether Brown's indemnity claim accrued on January 10, 2011, when the U.S. Supreme Court denied certiorari on the direct appeal of his conviction, despite Brown's subsequent collateral attacks on the final judgment.

B. Scope of Review

A trial court's "[f]indings of historical fact … are subject to the deferential 'clearly erroneous' standard of appellate review;" a standard that "applies not only to historical facts that are based upon credibility determinations, but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Scharf*, 864 A.2d at 916. The determination of when, based on those facts, the statute of limitations began to run is reviewed *de novo*. *Id.*

C. Merits of Argument

In dismissing Brown's Complaint for mandatory indemnification, the Chancery Court found that: (a) Brown's cause of action accrued on January 11, 2011, when the U.S. Supreme Court denied certiorari review of the Third Circuit's affirmance of his conviction; (b) Brown did not bring his indemnification claim until years after the applicable statute of limitations expired; and (c) the

circumstances did not warrant an excuse from laches. A660-A664. The Chancery Court noted this Court has not yet spoken explicitly on whether an indemnification claim arising from a criminal prosecution accrues when the claimant's direct appeal of the conviction is terminated, or only when subsequent collateral attacks on the conviction are exhausted. A661-A662.

Brown argues his indemnity claim accrued in November 2014 when his unsuccessful collateral attacks concluded. Appellant Brief 18-27. The issue has implications beyond Brown's claim. Because a criminal conviction is always subject to collateral attack (*e.g.,* upon the discovery of new evidence), a holding that a defendant's indemnification claim does not accrue until collateral challenges to the defendant's conviction are resolved would effectively negate any time limitation. Further, the accrual of an indemnification claim coincides with the conclusion of any advancement right. *See Sun-Times,* 954 A.2d at 397 (termination of advancement "temporally connected to the 'ultimate determination'" of entitlement to indemnification). Thus, if indemnification did not accrue until collateral attacks are concluded, indemnitors such as Rite Aid may be liable to advance fees through a collateral attack or even multiple collateral attacks – even though the claimant's guilt has been adjudicated and upheld through a full appeal. Similarly, adjudication of the indemnitor's right to recover advances to which the indemnitee was not entitled (*e.g.*, because his conduct was not

indemnifiable) would be delayed until the conclusion of the indemnitee's collateral challenges, and perhaps indefinitely.[3]

The finality of a conviction is not subject to deferral for the consideration of collateral challenges. As the U.S. Supreme Court taught in *U.S. v. Frady*, 456 U.S. 152, 164-65 (1982):

> Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.

Under federal law under which Brown was tried, a conviction is "final" when the direct appeals are concluded, regardless of the pendency of collateral attacks. *E.g.*, *Clay*, 537 U.S. at 525 ("conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the

[3] The issue is not limited to criminal matters. Civil judgments, too, can be attacked collaterally. For example, losing arbitration parties may argue the claim was not arbitrable, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (challenge to arbitrability on motion to vacate award "subject to independent review by the courts"), and a defendant facing an action in a new forum to collect a judgment may argue the lack of a fair hearing in the original case, *Smith & Loveless, Inc. v. JJID, Inc.*, 2016 WL 3929867, at *7 (Del. Super. Ct. July 15, 2016)(grounds for reopening or vacating foreign judgment are "'lack of personal or subject matter jurisdiction of the rendering court, fraud in procurement (extrinsic), satisfaction, lack of due process, or other grounds that make a judgment invalid or unenforceable'").

conviction"); *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *Frady*, 456 U.S. at 164-65 (quoted above).

Consistent with federal law, this Court has also tied "finality" to the conclusion of any direct appeal. In *Scharf*, 864 A.2d at 919, this Court enunciated the general standard for when an indemnification claim accrues: "when the officer or director entitled to indemnification can 'be confident any claim against him ... has been resolved with certainty.'" *Scharf* arose in the context of a Securities and Exchange Commission investigation that never ripened into litigation. *Id.* at 911-14. Nevertheless, the Court gave guidance for resolving the issue in a litigation context:

> Generally, the matter on which the claim for indemnification is premised may be said to have been resolved with certainly only when the underlying investigation or litigation is definitively resolved. … A successful result on a claim for indemnification does not cause the statute of limitations to begin running if an appeal is taken. ***Until the final judgment of the trial court withstands appellate review,*** the outcome of the underlying matter is not certain.

Id. at 919-20 (emphasis added). Although the Court used the phrase "resolved with certainty," certainty need not be absolute. The triggering moment in *Scharf* was the SEC's settlement of a related action against an affiliated party. *Id.* at 918-19. Nothing precluded the SEC from proceeding against the *Scharf* indemnitee

after the settlement and the Court did not require that *Scharf*'s repose be absolute. The question was whether the indemnitee "***could be confident*** that the SEC's potential claims against him had been resolved with certainty …." *Id.* at 919 (emphasis added).

Brown reads "confidence" out of the Court's holding in favor of absolute "certainty." Since a collateral attack might result in a reversal or modification of the conviction, Brown reasons, the conviction is uncertain as long as a collateral attack persists or, for that matter, is possible. Appellant Brief 24-27. By Brown's logic, indemnification never accrues as long as the convicted defendant is alive, because there is always a chance of a subsequent reversal. *See, e.g.*, *Morris v. Beard*, 2007 WL 1795689, at *1 (E.D. Pa. June 20, 2007), *aff'd,* 633 F.3d 185 (3d Cir. 2011) (after 18 years of appeals and post-conviction petitions, court vacated death sentence and awarded an evidentiary hearing to determine right to new trial based on newly discovered evidence and trial counsel's conflict of interest).

Brown also ignores the fact that a collateral attack is not an appeal. Rather, a collateral attack is a "judicial review of a judgment ***in a proceeding that is not part of direct review***." *Wall*, 562 U.S. at 547 (emphasis added); *see also id.* at 560; *Frady*, 456 U.S. at 165 ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal."). In *Frady*, the U.S. Supreme Court overturned the reversal of a collateral attack on a criminal conviction where the

trial court applied the "plain error" standard applicable to a direct appeal. 456 U.S. at 165. Having noted that "a final judgment commands respect," *id.*, the Court "reaffirm[ed] the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. The collateral attack in *Frady* was asserted pursuant to the same statute utilized by Brown in his collateral attack – 28 U.S. §2255.

The Chancery Court's holding that Brown's indemnification claim accrued at the completion of his direct appeal in January 2011 is fully consistent with the Chancery Court's application of *Scharf* in *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380 (Del. Ch. 2008). There, the Chancery Court ordered a corporation to continue advancing fees to a former officer who was pursuing an appeal from his conviction arising from acts his corporate capacity. The Court found that certificate and by-law provisions requiring advancement through the "final disposition" of a covered action, were "most plausibly read as meaning the 'final, non-appealable conclusion of a proceeding.'" *Id.* at 383.

Consistent with *Scharf*, *Sun-Times* makes it clear that a "final disposition" occurs at the end of the direct appeals, regardless of the pendency of collateral attacks. *See Huff v. Longview Energy Co.*, 2013 WL 4084077, at *2 (Del. Ch. Aug. 12, 2013) (quoting *Hampshire Grp., Ltd. v. Kuttner*, 2010 WL 2739995, at *53 (Del. Ch. July 12, 2010)) ("Under settled principles of Delaware law,

'indemnification claims do not typically ripen until after the merits of an action have been decided, and all appeals have been resolved.'"). The *Sun-Times* Court repeatedly defined a "final disposition" as "the final, non-appealable conclusion of a proceeding." *E.g. Sun-Times*, 954 A. 2d. at 397, 400, 404.

The *Sun-Times* Court further explained that finality occurs when "the outcome is no longer subject to any further review as of right, finding:

> Such a reading would also be consonant with other uses of the word final in contexts when it is important and efficient that final be truly final.

Id. at 396. As an example of a context "when it is important and efficient that final be truly final," the Court cited *habeas* petitions, which "shall not be granted … unless the applicant has exhausted the remedies available in the courts of the State'." *Id.* at n.62. In other words, a collateral attack through a *habeas* petition did not alter the final nature of the termination of the direct appeal.

Once more seizing on a phrase taken out of context, Brown argues his post-appeal collateral attacks should be treated differently from *habeas* petitions because they were brought as a post-judgment motion under 28 U.S.C. § 2255, filed under the same caption as the criminal prosecution. Appellant Brief 20-22. Quoting Advisory Committee's notes to Rule I of the Rules Governing Section 2255 Proceedings ("Advisory Notes") describing a § 2255 motion as "a further

step in the criminal case" (*id.* 21), Brown asserts it is part of the same "proceeding" for purposes of assessing the finality of Brown's conviction.

Although both parties relied heavily on *Sun-Times* in submissions to the Chancery Court, Brown never made that argument in his Chancery Court briefs. It surfaced for the first time in oral argument on Rite Aid's Motion to Dismiss, drawing an objection from Rite Aid's counsel. A628-A629; A646-A647. Having failed to raise the argument properly in the Chancery Court, Brown cannot raise it on appeal. Sup. Ct. R. 8; *see also Riedel v. ICI Americas Inc.*, 968 A.2d 17, 25 (Del. 2009) (because plaintiff "did not fairly present her current theory of misfeasance to the trial judge, Supreme Court Rule 8 precludes her from arguing to us that the trial judge erred" on that basis); *Peterson v. Hall*, 421 A.2d 1350, 1354 (Del. 1980) (refusing to consider argument "not properly raised and fairly presented to the Trial Court or fully briefed below").

Even if this Court were to consider Brown's new argument, it fails. Regardless of the caption under which it brought, a § 2255 claim is a collateral attack that does not affect the finality of a defendant's conviction. In *Wall*, the U.S. Supreme Court "reject[ed] the argument that the meaning of the phrase 'collateral review' should turn on whether the motion or application . . . is captioned as part of the criminal case or as a separate proceeding." 562 U.S. at 559. The Court noted that, even though a § 2255 challenge "is entered on the

docket of the original criminal case and is typically referred to the judge who originally presided over the challenged proceedings, . . . there is no dispute that § 2255 proceedings are 'collateral'." *Id.* at 560; *see Frady*, 456 U.S. at 165 (§ 2255 "simplified the procedure for making a collateral attack on a final judgment entered in a federal case, but [Congress] did not purport to modify the basic distinction between direct review and collateral review") (quoting *United States v. Addonizio*, 442 U.S. 178, 184 (1979)).

Brown's attempt to elevate the significance of the word "proceeding" as used in *Sun-Times* also ignores the fact that challenges under § 2255 are consistently referred to as proceedings distinct from the underlying proceeding. For example, the title of the Advisory Note on which Brown relies characterizes the collateral attack as a "§ 2255 ***Proceeding***." (emphasis added). *See U.S. v. Fiorelli*, 337 F.3d 282, 285 (3d Cir. 2003) ("Section 2255 permits federal prisoners to challenge their sentence ***in a proceeding*** before the sentencing court rather than district court in the jurisdiction where the prisoner is confined" (emphasis added)). The requirement that a § 2255 challenge be filed under the same docket as the conviction was driven by a need to relieve the burdens and inefficiencies created by the concentration of *habeas* petitions in those districts which happen to host prisons. *See U.S. v. Thomas*, 713 F.3d 165, 170 (3rd Cir. 2013) (§ 2255 motion "was viewed as a continuation of the criminal case in the

sentencing court in order to alleviate practical difficulties associated with fragmentation, and to more evenly distribute caseloads amongst districts.")

Brown's argument presupposes that the conclusion of a direct appeal is a final determination if the defendant collaterally attacks it through a *habeas* petition, but not if the collateral attack occurs through a § 2255 motion. The distinction makes no sense given that § 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by *habeas corpus*. . . ." *Fiorelli*, 337 F.3d at 285; *U.S. v. Cook*, 997 F.2d 1313, 1317 (10th Cir. 1993) (cited in Appellant Brief 23) ("court's review should parallel the review afforded to state prisoners in habeas proceedings"); *U.S. v. Asakevich*, 810 F.3d 418, 422 (6th Cir. 2016) (cited in Appellant Brief 23) ("Congress did not somehow turn § 2225 into ongoing proceedings while leaving [*habeas*] as freestanding cases.")). Brown has not identified any authority suggesting such an anomalous result.

The Chancery Court correctly held that Brown's indemnification claim accrued on January 10, 2011. The three year statute of limitations lapsed on January 10, 2013. Because Brown's indemnification claim was not filed until October 2015, it is time-barred and dismissal was appropriate.

II. THE CHANCERY COURT CORRECTLY HELD THAT BROWN'S INDEMNITY CLAIM IS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS

A. Question Presented

Whether Rite Aid's Restated Certificate of Incorporation extended the statute of limitations for officer and director indemnity claims indefinitely, resulting in a twenty year time bar pursuant to 10 *DEL. C.* § 8106.

B. Scope of Review

Interpretation of an unambiguous contract provision is a question of law subject to *de novo* review. *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

C. Merits of Argument

The statute of limitations for director and officer indemnification claims is three years. 10 *DEL. C.* § 8106(a); *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del.2002). Brown argues the statute of limitations was contractually extended indefinitely in Rite Aid's Restated Certificate of Incorporation, effectively allowing Rite Aid officers and directors twenty years to assert an indemnity claim. Appellant Brief 28-31.

Brown misinterprets the Certificate provision at issue. Under the heading "Right of the Claimant to Bring Suit," Rite Aid's Certificate states, in relevant part:

> If a claim [for indemnification] is not paid in full by the corporation within the thirty days after a written claim has been received by the

> corporation, the claimant may at any time thereafter bring suit against the corporation to recover the unpaid amount of the claim ….

Certificate, Art. X (B)(2). A011. Nothing in the provision states or hints that the measure is intended to alter the time-bar applicable to an indemnification claim. The provision neither specifies when a claim accrues nor when it expires. It simply establishes the earliest date on which a lawsuit may be filed. Such provisions are common, allowing a corporation time to consider an advancement or indemnification request before the claimant can sue. They do not and are not intended to extend the statute of limitations indefinitely, as Brown now claims. As the Chancery Court correctly found, the passage is "a rather standard provision that is supposed to say that there is an initial 30 day period where people are going to try to work things out, and after that somebody can file suit." A659.

"Corporate charters and by-laws are contracts among the shareholders of a corporation." *Centaur Partners, IV v. Nat'l Intergroup, Inc.,* 582 A.2d 923, 928 (Del.1990). They are subject to "the rules that govern the interpretation of statutes, contracts, and other written instruments." *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008). When a Court engages in contract interpretation its ultimate goal is to determine the parties' shared intent. *Id.* The Court reviewing the contract language "ascribes to the words their 'common or ordinary meaning,' and interprets them as would an 'objectively reasonable third-party observer.'" *Id.* (collecting cases).

Brown's interpretation of the Certificate is manifestly unreasonable. He argues Rite Aid extended the right to bring a claim into eternity, but did so implicitly. Brown's interpretation begs questions about the operation of the Certificate provision that cannot be answered from the text of the document. Does the statute of limitations begin to run when the indemnification right first ripens, when the claimant makes a demand or thirty days after the demand? If the claimant fails to make a demand, is her claim time-barred after three years? After twenty years? Never?

Taken in full context, the phrase "at any time" defines the first date on which litigation can be commenced, not the last date. *See GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("… Court will give priority to the parties' intentions as reflected in the four corners of the agreement."); *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("court must construe the agreement as a whole, giving effect to all provisions therein"). Brown's construction is the kind of twisted, tortured reading disfavored by the canons of contract construction. *See Kronenberg v. Katz*, 2004 WL 5366649, at *18 (Del. Ch. May 19, 2004) (rejecting as "strained" defendants' interpretation that standard integration clause completely barred fraud claims).

Brown's contention that a twenty-year bar applies because no lapse date is stated in the Certificate also clashes with Section 8106(c), which requires that any contractually varied time period must be "specified in such written contract . . ." The synopsis of the bill that became § 8106(c) cited by Brown makes clear that any modified time period – even an indefinite period – must be specified:

> Examples of a 'period' ***that may be specified*** in a written contract, agreement or undertaking would include, without limitation, (i) a specific period of time, (ii) a period of time defined by reference to the occurrence of some other event or action, another document or agreement or another statutory period and (iii) an indefinite period of time.

Quoted in Appellant Brief at 29 (emphasis added); *see Bear Stearns v. EMC Mortgage LLC*, 2015 WL 139731, at *12 (Del. Ch. Jan. 12, 2015) ("If the contract ***specified*** an indefinite period, then the action nonetheless must be brought prior to the expiration of 20 years from the accruing of the cause of such action;" emphasis added).

Brown's argument that Rite Aid's Certificate implicitly extended the time for asserting indemnity claims indefinitely is meritless. As the Chancery Court correctly ruled, the statute of limitations for Brown's indemnification claim is three years.

III. THE CHANCERY COURT CORRECTLY FOUND NO CIRCUMSTANCES WARRANTING A LACHES EXCEPTION

A. Question Presented

Whether unusual conditions or extraordinary circumstances excused Brown's failure to bring his indemnification claim before the statute of limitations ran.

B. Scope of Review

A trial court's "[f]indings of historical fact … are subject to the deferential 'clearly erroneous' standard of appellate review;" a standard that "applies not only to historical facts that are based upon credibility determinations, but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *Scharf*, 864 A.2d at 916. The review "of the interpretation and application of legal precepts, such as the statute of limitations and the doctrine of laches [is] *de novo*." *Levey*, 76 A. 3d at 768.

C. Merits of Argument

The laches defense reflects the longstanding maxim that "equity aids the vigilant, not those who slumber on their rights." *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009). An equitable claim will be dismissed if there was "an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Id.* When applying laches, the Court looks to the analogous statute of limitations.

IAC/InterActiveCorp v. O'Brien, 26 A.3d 174, 177 (Del. 2011). While prejudice is an element of laches ***before*** the statute of limitations expires, the passage of the statute of limitations is typically conclusive evidence of laches. *Kraft v. WisdomTree Investments, Inc.*, 145 A.3d 969, 979 (Del. Ch. 2016) ("The Court also may presume prejudice if the claim is brought after the analogous limitations period has expired.")

Brown argues that even if the statute of limitations expired on his claim before he filed suit – as it did – laches does not apply. *First*, Brown argues laches cannot be resolved on a motion to dismiss. Appellant Brief 39-40. *Second*, Brown asserts that "unusual conditions or extraordinary circumstances" warrant an exception to laches. *Id.* at 41-45. *Third*, Brown contends the statute of limitations was tolled by the pendency of the Cumberland Action because his indemnification claim was (and is) at issue there. *Id.* at 32-37.

None of Brown's arguments has any merit.

1. Laches is Appropriate for Determination on a Motion to Dismiss

It is, of course, settled law that the well-pleaded allegations of a complaint are taken as true for purposes of a motion to dismiss. *See Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010). Nevertheless, where a party "includes in its pleadings facts that incontrovertibly constitute an affirmative defense to a claim,"

dismissal is appropriate. *Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at *9 (Del. Ch. Jan. 21, 1999).

That principle applies to laches. Indeed, Delaware courts routinely address and decide laches in the context of motions to dismiss, where the facts establishing the defense are apparent from the face of the complaint or on other judicially recognizable evidence. *E.g. In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370, at *7 (Del. Ch. Oct. 17, 2007) (dismissing complaint where allegations show plaintiffs "either were or should have been aware of these claims for far more than three years before filing this action"); *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013) (dismissing complaint, reasoning filings "beyond the statutory limitations period are presumptively barred"); *Jepsco, Ltd. v. B.F. Rich Co.*, 2013 WL 593664, at *8 (Del. Ch. Feb. 14, 2013) (dismissing for laches); *Carbaugh v. Woods on Herring Creek Homeowners Ass'n*, 2014 WL 1689970, at *2 (Del. Ch. Apr. 29, 2014) *aff'd sub nom*. *Carbaugh v. Woods on Herring Creek Homeowners Ass'n*, 108 A.3d 1224 (Del. 2015); *Khanna v. McMinn*, 2006 WL 1388744, at *31 (Del. Ch. May 9, 2006); *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005); *Flerlage v. KDI Corp.*, 1986 WL 523, at *1 (Del. Ch. Dec. 17, 1986).

Here, Brown's complaint establishes laches by alleging that his "petition for a writ of certiorari pertaining to the Third Circuit's affirmation of his convictions

was denied by the United States Supreme Court on January 10, 2011." (Compl.¶ 160; A366). The Chancery Court properly found laches and dismissed the Complaint.

2. Brown Cannot Demonstrate an Exception to Laches

This Court taught in *IAC*, 26 A.3d at 177, that "[u]nder ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law." *Id.* The presumptive period defined by the applicable statute of limitations may be varied "if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute …." *Id.* at 177-78 (citing *Wright v. Scotton*, 121 A. 69, 73 (Del.1923)).

The *IAC* Court identified "several factors that could bear on the analysis" of whether "unusual conditions or extraordinary circumstances" exist:

> 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.

Id. at 178. No one factor is dispositive; the Chancery Court "must exercise its discretion, after considering all relevant facts." *Id.*; *Levey*, 76 A.3d at 770 (Chancery Court properly considered all *IAC* factors, "none of which, viewed alone, was dispositive.").

Brown argues *IAC* factors 1 and 4 ("pursuit of his claim" and participation by Rite Aid in "prior proceedings") favor excusing laches, disingenuously claiming he was pursuing indemnification in the Cumberland Action before bringing this action. Advancement and indemnification are "discrete and independent rights." *Kaung*, 884 A.2d at 510. Thus, Brown's assertion of an advancement claim in the Cumberland Action is not the pursuit of his indemnification claim. *See* 54 C.J.S. Limitations of Actions § 176 ("[F]or the filing of one action to toll the statute of limitations for later filed claims, the causes of action in the original complaint ordinarily must be identical to the later asserted claims.").[4]

Brown cannot credibly claim he pursued indemnification in the Cumberland Action. As discussed above, he consistently argued to the Chancery Court in this action and to the Cumberland Action Court that indemnification was never part of

[4] The cases cited by Brown on this point – *IAC* and *Levey* – are inapposite. In each, the prior proceeding involved the identical claim asserted in the subsequent proceeding. *IAC*, 26 A.3d at175; *Levey*, 76 A.3d at 772.

the Cumberland Action. Moreover, in the thirteen years the Cumberland Action has been pending, Brown never took any action, filed any pleading, asserted any claim or made any argument to "pursue the claim" for indemnification he belatedly seeks to prosecute here.

Nor does *IAC* Factor 2 - the presence of a "material and unforeseeable change" in the parties' circumstances - warrant a laches exception. Brown contends his delay was justified because he was forced to "marshal his limited financial resources to finance his criminal defense." Appellant Brief 41-42. Brown's argument that he could not afford to sue Rite Aid for indemnification is not supported by any record evidence and is belied by the fact he filed and prosecuted numerous actions against Rite Aid and others at the same time he claims he was without resources to bring this action. Nor does Brown explain why he could not proceed on a contingency-fee basis. *See Levey*, 76. A.3d at 770 (rejecting tolling argument where plaintiff "offered no evidence that he was ignorant of his claim …."); *Stifel Fin. Corp*, 809 A.2d at 561 (fees on fees authorized by law); Certificate Art. X(B)(2) (providing for fees on fees).

In any event, the Chancery Court correctly found Brown's argument on his financial limitations insufficient, reasoning that a plaintiff's alleged financial constraints do not excuse failure to file a claim before the statute of limitations expired. A662-63. The Chancery Court's holding is consistent with Delaware

authority holding that "the expense of litigation … cannot justify [plaintiff's] decision to forego filing an action for purposes of this laches analysis." *Houseman v. Sagerman*, 2015 WL 7307323, at *9 (Del. Ch. Nov. 19, 2015).

The circumstances here are very different from those that led the *IAC* Court to find that a change in circumstances excused laches. There, a former corporate officer pursued a timely indemnification claim against his former employer, but was eventually stymied when the company declared bankruptcy, resulting in a stay. With the principal obligor rendered judgment proof, the former officer promptly initiated a claim against a third-party guarantor of the corporation's indemnity obligation. *IAC*, 26 A.3d at 178-79.

IAC Factor 3 – whether the delay was "attributable to a legal determination in another jurisdiction" - similarly fails to justify a laches exception. Neither of the two legal determinations Brown cites remotely prevented him from filing this action in a timely fashion. Brown argues Chancellor Chandler's stay of the First Delaware Action, in which Brown sought advancement and not indemnification, "effectively prevented [Brown] from reasserting his claims against Rite Aid for payment of his legal expenses while the [Cumberland Action] remained pending." Appellant Brief 42. It is not apparent why that was the case, particularly given that Brown filed this action while the Cumberland Action remained pending. Of course, he also could have pursued indemnity within the Cumberland Action.

Brown also asserts he was unable to bring an indemnification claim until the final resolution of his post-appeal collateral attacks on his conviction. Appellant Brief 42. That argument is circular. If Brown's indemnification claim accrued only on the final disposition of his collateral attacks, he would not need an exception to laches.

Finally, although there was and is certainly a bona fide dispute as to Brown's right to indemnification (*IAC* Factor 5), that dispute does not by itself justify an exception to laches.

3. The Trial Court Correctly Held That The Statute of Limitations Was Not Tolled.

Separate from *IAC*'s "unusual conditions or extraordinary circumstances" test, Brown argues his late filing is excused because the statute of limitations was tolled by the pendency of the Cumberland Action. Appellant Brief 32-37. The argument fails as a matter of law. *See In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370, at *6 (where complaint "on its face [is] barred by the statute of limitations, plaintiffs bear the burden of pleading specific facts demonstrating that the statute was tolled.").

Whether a prior-filed action tolls the statute of limitations depends on the applicability of Delaware's Savings Statute, 10 *DEL. C.* §8118(a). *See Reid*, 970 A.2d at 180-81 (Savings Statute "provides exceptions to the applicable statute of limitations in certain instances") (cited Appellant Brief 33,37); *Levey*, 76 A.3d at

772 (Savings Statue tolled statute of limitations for pendency of the prior action in which plaintiff raised the identical claim) (cited Appellant Brief 32-34). The authorities cited by Brown give equitable effect to the Savings Statute in determining when the statute of limitations expired, the threshold question in a laches analysis. *Reid*, 76 A.2d at 182 (considering laches after holding "Reid's action was timely under the analogous statute of limitations by virtue of the Delaware Savings Statute").[5]

The Savings Statute extends the statute of limitations for one year "in certain instances where the plaintiff filed a timely lawsuit, but is procedurally barred from obtaining a resolution on the merits." *Reid*, 970 A.2d at 180 (timely federal claim, dismissed for lack of personal jurisdiction, tolled time to file same claim in Delaware; cited Appellant's Brief 37). The prior action must raise "the identical claim." *Levey*, 76 A.3d at 772 (cited in Appellant's Brief 34). The Savings Statute

[5] The Savings Statute provides that:

> If any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by an unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a write of error; a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

typically applies where the claim was dismissed due to "matters of form," such as lack of jurisdiction, improper venue and improper service of process. *See, e.g.*, *Hartsel v. Vanguard Grp. Inc*., 2015 WL 331434, at *4 (D. Del. Jan. 26, 2015).

Brown makes no explicit mention of the Savings Statute, tacitly admitting it does not apply here. To the extent Brown seeks to rely on the Cumberland Action to toll the statute of limitations, he does not and cannot contend that Action was dismissed for one of the reasons identified in the Savings Statute (or for any other reason) within a year before Brown commenced this action. The purpose of the Savings Statute is to "provide[] exceptions to the applicable statute of limitations in certain instances where the plaintiff has filed a timely lawsuit, but is procedurally barred from obtaining a resolution on the merits." *Envo, Inc. v. Walters*, 2012 WL 2926522, at *10 (Del. Ch. July 18, 2012), *aff'd*, 2013 WL 1283533 (Del. Mar. 28, 2013) (citing *Reid*, 970 A.2d at 180). Brown was not procedurally barred from obtaining a resolution on the merits in Cumberland County – he simply chose not to do so.

Nor can Brown dispute that his Cumberland Action counterclaim – the operative pleading for a Savings Statute analysis – asserted a claim for advancement, not indemnification. While advancement and indemnification actions have some common elements, they are "discrete and independent rights." *See Kaung*, 884 A.2d at 510. Indeed, in his Chancery Court submissions, Brown

acknowledged his "indemnification claim . . . is 'legally quite distinct'" from his advancement claim. A472*; see also*, A451 (same); A583 ("[u]nder Delaware law, indemnification and advancement rights are 'separate and distinct.'"). Even if the Savings Statute permitted Brown to rely on another party's pleading, which it does not, Brown's argument fails. As shown above, he repeatedly argued to the Chancery Court and the Cumberland Action Court that indemnification was not, and could not have been, an issue in the Cumberland Action. The Chancery Court agreed with Brown's prior position. A644. Brown cannot assert a new, inconsistent argument on appeal. Sup. Ct. R. 8; *Riedel,* 968 A.2d at 25 (plaintiff who "did not fairly present her current theory … to the trial judge" was precluded "from arguing to us that the trial judge erred" by failing to rule on that basis); *Peterson*, 421 A.2d at 1354 (declining to consider argument that "was not properly raised and fairly presented to the Trial Court or fully briefed below.")

In short, the allegations in the Complaint establish laches. Brown has not demonstrated circumstances sufficient to overcome the presumption that his claim was time-barred. Dismissal was accordingly appropriate.

CONCLUSION

For the forgoing reasons, the Chancery Court's dismissal of the Complaint in this action as time-barred should be affirmed.

Dated: November 9, 2016

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