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Case Number 254,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE OLGA J. NOWAK IRREVOCABLE TRUST,	§	
	§	
Plaintiff Below, *Appellant*,	§	No. 254, 2022
	§	
v.	§	On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2021-0830-FWW
	§	
VOYA FINANCIAL, INC.; SECURITY LIFE OF DENVER INSURANCE COMPANY,	§	
	§	
Defendants Below, *Appellees*.	§	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal is the latest chapter in a case that has already reached this Court once when it affirmed a summary judgment in Appellees' favor in a related Superior Court action.[1] After losing on its legal claims, the Plaintiff Trust pursued claims in the Court of Chancery seeking to have the courts judicially rewrite the life insurance contract at issue. Following the Superior Court's lead, the Court of Chancery dismissed those claims. The Trust now appeals again.

In 2017, the Trust sued Defendants-Appellees Security Life of Denver Insurance Company and Voya Financial, Inc. in Superior Court, claiming they breached a life insurance policy (the "Policy") and misrepresented the Policy's death benefit years after the Policy was sold. The core of that dispute was pure Policy interpretation: The Trust argued that the Policy's $4 million face value was owed regardless of when the insured died. Security Life argued that under the Policy's plain terms, that $4 million was only available until the insured reached age 100—after which, only the Policy's cash surrender value was owed.

Based on these arguments, the Superior Court granted Defendants' motion for summary judgment and this Court affirmed. After that, the Superior Court allowed the Trust to transfer its equitable claims (for reformation of the Policy based on

[1] *See generally* A-166–99 (*Olga J. Nowak Irrevocable Tr. v. Voya Fin., Inc.*, No. CV N17C-05-254 FWW, 2020 WL 7181368 (Del. Super. Ct. Nov. 30, 2020), *aff'd*, 256 A.3d 207 (Del. 2021)).

mistake) to the Court of Chancery because it lacked jurisdiction over them—even though the Trust pursued those claims in the Superior Court for years. In fact, in its summary judgment ruling, the Superior Court stated that the equitable claims lacked merit.

The Trust reasserted its reformation claims in the Court of Chancery and added, for the first time, new claims that Security Life and Voya Financial engaged in and aided and abetted equitable fraud. Appellees moved to dismiss these equitable claims as untimely and lacking merit.

The Court of Chancery agreed, holding that laches applies and dismissed the Trust's equitable claims with prejudice.[2] That dismissal should be affirmed.

[2] *See generally* Appellant's Corrected Brief, at Exhibit A ("Exhibit A") (*Olga J. Nowak Irrevocable Tr. v. Voya Fin., Inc.*, No. CV 2021-0830-FW, 2022 WL 2359628, at *1 (Del. Ch. June 30, 2022)).

SUMMARY OF ARGUMENT

1. Denied. This appeal centers on the dismissal of the Trust's equitable claims on laches grounds. Having lost its legal claims, the Trust now tries to transform its case into an equitable dispute. The Trust claims that the Policy did not reflect its desired coverage and that certain post-sale illustrations misrepresent the coverage the Policy actually provides. This new theory is even further afield than the first.

The Trust's reformation claims were asserted years after the three-year limitations window closed. It had constructive knowledge of the alleged mistake when it received the Policy in 1999—eighteen years before it sued—and it admits that it learned the Policy contained the alleged mistake in 2010, when it finally read the Policy. Yet it waited until 2017 to sue. Only the Trust is to blame for its delay, which prejudiced Defendants as a matter of law. Laches applies.

2. Denied. The new equitable fraud claims are also time-barred. These claims were not transferred from the Superior Court and were first brought in the Court of Chancery in 2021—five years after Ms. Nowak passed (in 2016), eleven years after the Trust read the Policy and discovered the supposed issue (in 2010), seventeen years after the Trust received the first supposedly erroneous illustrations (in 2004), and more than *twenty-one* years after it bought the Policy (in 1999). No

matter which event triggered its claims, they accrued years before it sued. No tolling applies. Laches bars these claims too.

Beyond laches, independent grounds warrant affirming the dismissal of because the Trust cannot establish key elements of its claims.[3] Equitable fraud requires a "special relationship" between the Trust and a Defendant—which does not exist here because insurers do not have "special relationships" with insureds or policyowners. The equitable fraud claims also fail because the Trust had an adequate remedy at law (which it pursued in Superior Court for years). Separately, the reformation claims fail because the Trust does not plead that a prior agreement with Defendants existed that the Policy failed to reflect—the very heart of a reformation.

The Court of Chancery rightly concluded that the Trust's claims are time-barred and dismissed them with prejudice. On this ground and the independent reasons just described, this Court should affirm.

[3] *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015) (this Court "may affirm [a Court of Chancery decision] on the basis of a different rationale than that which was articulated by the trial court" if "the issue was fairly presented to the trial court.").

STATEMENT OF FACTS

1. The Trust purchases the Policy at issue.

In 1999, the Trust sought to purchase life insurance to insure the life of then-83-year-old Olga Nowak.[4] The Trustee (her son) reviewed policy illustrations from several insurers, including Security Life's predecessor, Southland Life.[5] The Trustee ultimately applied for a Southland Life policy with a $4 million face amount.[6] When he did, he signed an illustration showing that, if the necessary premiums were paid, the face amount would be available until Ms. Nowak reached age 100.[7] The Trustee also received a "Statement of Policy Cost and Benefit Information" reflecting that the $4 million was available for seventeen years (Ms. Nowak was 83 then) and that the Policy matured when the insured reached age 100.[8]

Southland issued the Policy in August 1999.[9] The Trustee received the Policy but says he did not fully read it then, even though the Policy's cover page urged him

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[4] A-79, 88; A-170–71, 183.

[5] A-87–89; A-170–71.

[6] A-170–71, 192; A-204; A-231–40.

[7] A-183 ("The illustration the Trustee signed when the Trust applied for the Policy shows the $4 million net Death Benefit only through year 17 of the Policy and to the insured's age 100."); A-231–36.

[8] A-82 (discussing Statement of Policy Cost and Benefit Information); A-183–84 ("Finally, the Statement of Policy Cost and Benefit clearly spells out that the Policy 'Matures at Age 100' and shows the $4 million Death Benefit payable only through age 100."); A-238–40.

[9] A-170–71, 192; A-204; A231–240.

to "Please Read Your Policy Carefully."[10] Had he done so, he would have seen that it provided a 10-day "free look" period during which the Policy could be returned.[11] He would have also seen that the Policy unambiguously provided a $4 million benefit, but only if Ms. Nowak passed before age 100.[12] After 100, the Policy provided only the cash surrender value.[13] As a matter of law, this interpretation of the Policy was affirmed by this Court and is no longer in dispute.[14]

While the Policy was in force, the Trust received periodic illustrations.[15] The initial illustrations showed that the Policy's $4 million face amount was available until age 100, consistent with the Policy language.[16] From 2004 to 2009, however, illustrations erroneously showed the $4 million face amount extending beyond 100.[17] That error was corrected, and from 2010 onward the illustrations against depicted

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[10] A-171 ("Mr. Nowak did not fully read the Policy before signing it."), A-197; A-201.

[11] A-196; A-201.

[12] A-215–16; A-184 ("The contractual obligation is unambiguous. If the insured died before attained age 100, Defendants were obligated to pay a Death Benefit of $4 million to the Trust. However, if the insured died after attained age 100, Defendants were obliged to pay only the Surrender Value to the Trust.").

[13] A-184; A-216.

[14] A-184.

[15] A-171–72.

[16] *Id*.

[17] A-171–72; A-93–94.

the $4 million ending at 100.[18] Illustrations issued after 2010 even clarified that only the surrender value was available after 100.[19] The Policy had been in force for years when the erroneous illustrations were sent, and all illustrations state that they do not modify the Policy.[20]

In 2010—over a decade after the Policy's issuance—the Trustee finally read the Policy and "came to the understanding that the Trust would receive the Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if his mother passed away at attained age 100 or thereafter."[21] The next year, in 2011, Security Life confirmed that the Trust would receive $4 million only if the insured passed before 100 and only the surrender value after.[22]

The Trust admits it knew Defendants' position on the Policy's coverage by 2011.[23]

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[18] A-171–72 ("Later, however, some illustrations provided from 2004 to 2009, reflect a $4 million Death Benefit available until age 110. . . . In the 2010 illustration, SLD corrected this purported error."); A-93–100.

[19] A-171–72; A-99–100.

[20] *See, e.g.*, A-248, 254.

[21] A-172; *see* A-96 (Trustee read the Policy and found language showing $4 million not available after 100 after discussing with advisor).

[22] A-172 ("SLD confirmed Mr. Nowak's understanding that the Trust would receive a Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if she died at attained age 100 or thereafter.").

[23] A-99 ("The 2011 illustrations showed that at the time Defendants revealed their newly formed views").

2. Defendants prevail on the Trust's legal claims.

Ms. Nowak died in 2016, a few months after reaching age 100.[24] Rather than submit an insurance claim, the Trust sued Security Life and its parent company, Voya Financial, Inc., in Superior Court.[25] Based on a now-rejected reading of the Policy, it claimed the Policy provided the $4 million death benefit regardless of the insured's age at death.[26] The Trust further contended that Security Life and Voya Financial defrauded it by issuing the erroneous illustrations from 2004 to 2009.[27]

The Superior Court granted Defendants summary judgment, which this Court affirmed.[28] In doing so, it held that the Policy unambiguously provided the $4 million only until 100 and that Defendants therefore did not breach the Policy by declining to pay that sum.[29] The Superior Court also held that the mistaken illustrations could not create liability since they were issued after the Policy was purchased.[30]

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[24] A-86; A-184 (recognizing insured died after 100).

[25] A-184 (explaining the Trust never claimed Surrender Value).

[26] A-177–78.

[27] *Id*.

[28] A-169–70; *see Olga J. Nowak Irrevocable Tr.*, 256 A.3d at 207.

[29] A-169 ("The Court concludes that a fair reading of the Policy's language makes it clear that the Defendants are correct. Because the insured reached attained age 100, the Death Benefit payable to the Trust is the Surrender Value.").

[30] A-191 ("Those 'misleading' illustrations all occurred after the sale of the Policy and cannot support a claim under the DCFA.").

Following this Court's affirmance of the summary judgment, the Superior Court allowed the Trust to transfer its reformation claims to the Court of Chancery under § 1902, which tolled the reformation claims to their 2017 filing.[31]

3. The Trust then sues in the Court of Chancery.

In September 2021, the Trust filed the complaint in the Court of Chancery.[32] In it, the Trust reasserts the same three reformation claims previously filed: (1) reformation upon mutual mistake; (2) reformation upon unilateral mistake coupled with inequitable conduct; and (3) breach of reformed contract.[33] The Trust also asserts two new claims for equitable fraud and aiding and abetting equitable fraud.[34] These fraud-based claims were never asserted in the Superior Court, so they do not relate back and were not tolled.[35]

Security Life and Voya Financial moved to dismiss. The Court granted their motion on June 30, 2022, dismissing all claims on laches grounds.[36] The Trust noticed this appeal on July 25, 2022.

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[31] *See generally* A-116–25; *see also* 10 *Del. C.* § 1902.

[32] *See, e.g.*, A-78–86, 92–94, 96, 99–100, 105 (Policy references); A-79, 81–84, 93–98, 101–02, 105–06, 107–08, 110 (illustration references); A-84, 100, 103, 107, 111 (Superior Court/summary-judgment references).

[33] A-107–08, 112–13; A-125.

[34] A-109–12.

[35] *Compare* A-109–12 *with* A-125.

[36] *See generally* Exhibit A.

ARGUMENTS

The Court should again affirm the dismissal of the Trust's claims. Appellees moved to dismiss under Court of Chancery Rule 12(b)(6). The rule permits dismissal if the plaintiff fails to state a claim. Under that standard, well-pleaded factual allegations are accepted as true and reasonable inferences are drawn in the non-moving party's favor.[37] The Court may disregard conclusory allegations.[38] Only "reasonable inferences that logically flow from the face of the complaint" are accepted; strained interpretations are not.[39] The Court may also consider records featured in the complaint and the affirmed summary-judgment opinion, which the Court can take judicial notice of and is the law of the case.[40] Dismissal is warranted if the plaintiff is not entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[41]

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[37] *Little River Landing LLC v. Allstate Vehicle & Prop. Ins. Co.*, 2021 WL 3877768, at *2 (Del. Ch. Aug. 31, 2021); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–68 (Del. 2006).

[38] *In re Gen. Motors (Hughes)*, 897 A.2d at 168.

[39] *Id.*

[40] *Id.* at 169–70 (considering records featured in complaint); *Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *4, n.24 (Del. Super. Ct. Sept. 4, 2008) (judicial notice of official court); *Orloff v. Schulman*, 2005 WL 3272355, at *12 (Del. Ch. Nov. 23, 2005) (using contradictory pleadings in companion case); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 38–39 (Del. 2005) (describing law-of-the-case doctrine).

[41] *Little River Landing LLC*, 2021 WL 3877768, at *2; *In re Gen. Motors (Hughes)*, 897 A.2d at 168.

1. THE TRUST'S CLAIMS ARE BARRED BY LACHES.

A. Question Presented

Whether laches bars the Trust's equitable claims.[42]

B. Legal Standard and Scope of Review

This Court reviews *de novo* whether the trial court erred as a matter of law in granting a motion to dismiss.[43]

Laches is an equitable defense "born from the longstanding maxim [that] equity aids the vigilant, not those who slumber on their rights."[44] Laches and limitations bar untimely lawsuits.[45] While limitations set a specific time to file claims, laches inquires whether the plaintiff filed the claim within a reasonable time of its accrual.[46]

In applying laches, the Court considers when the party learned of the claim, whether it pursued the claim without unreasonable delay, and whether any delay prejudiced defendants.[47] Absent tolling, equitable claims are time-barred if the

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[42] Exhibit A at 10–11, 16–32.

[43] *See Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).

[44] *Kim v. Coupang, LLC*, 2021 WL 3671136, at **2–3 (Del. Ch. Aug. 19, 2021) (quotes and cites omitted).

[45] *Id.*

[46] *Id.*

[47] *Id.*

analogous statute of limitations has passed.[48] Thus an analogous statute of limitations defines the outermost limit of when claims may be brought.[49] Filing after the analogous limitations period expires is "presumptively an unreasonable delay for purposes of laches" and so "prejudice to defendants is thus presumed."[50]

If it is "clear from the face of the complaint" that the claims are time-barred, the claims should be adjudicated on a motion to dismiss.[51]

C. Merits of the Argument

The Trust's three reformation claims and two fraud claims were properly dismissed under laches.

(1) The reformation claims are barred by laches.

The Trust seeks to reform the Policy based on a mutual mistake or a unilateral mistake.[52] Reformation fixes a contract erroneously written with a mistake.[53] It

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[48] *Id.*

[49] *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010).

[50] *Kim*, 2021 WL 3671136, at *3.

[51] *See Akrout v. Jarkoy*, 2018 WL 3361401, at *11 (Del. Ch. July 10, 2018) (quoting *Bean v. Fursa Cap. P'rs, LP*, 2013 WL 755792, at *6 (Del. Ch. Feb. 28, 2013); *see also de Adler v. Upper N.Y. Inv. Co. LLC*, 2013 WL 5874645, at *12 n.145 (Del. Ch. Oct. 31, 2013) (collecting cases where claims dismissed based on laches at the motion-to-dismiss stage).

[52] A-107–09.

[53] *In re TIBCO Software Inc. Stockholders Litig.*, 2015 WL 6155894, at **13–14 (Del. Ch. Oct. 20, 2015); *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151–53 (Del. 2002).

changes the written instrument but not the underlying deal: "Reformation is not an equitable license for the Court to write a new contract at the invitation of a party who is unsatisfied with his or her side of the bargain; rather, it permits the Court to reform a written contract that was intended to memorialize, but fails to comport with the parties' prior agreement."[54] To justify reformation, the Trust must show it had a prior deal with Defendants but that the Policy mistakenly does not reflect that deal.[55]

Through that lens, the Trust's reformation claims are time-barred because they were first raised after the analogous three-year statute of limitations period ran. The reformation claims accrued when the Policy was issued in 1999 or, at the latest, by 2011 after the Trust learned the Policy contained the alleged mistake. The Trust waited until 2017 to sue. This was too late.

(a) The analogous statute of limitations is three years.

A claim to reform a mistaken contract is an "action based on a promise" and subject to the analogous three-year limitations period in § 8106.[56] Other courts

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[54] *In re TIBCO Software Inc.*, 2015 WL 6155894, at *13.

[55] *See id.* (mistake requires showing that parties "came to a specific prior understanding that differed materially from the written agreement."); *see also Cerberus Int'l, Ltd.*, 794 A.2d at 1151 (mutual or unilateral mistake is shown when the written agreement differs materially from the parties' prior understanding and both parties were mistaken as to a material portion of the written agreement).

[56] Del. Code Ann. tit. 10, § 8106(a) ("no action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action[.]").

agree—including the court below.[57] This Court recently held in *Lehman Bros.* that a mutual-mistake claim brought at law was subject to § 8106's three-year period.[58] If the limitations period for mistake claims at law is three years under § 8106, then the same period applies in equity.

The Trust ignores these authorities—insisting that no analogous statute of limitations applies, given this Court's opinions in *Collins* and *Starr*.[59] Neither case holds this. *Collins* never analyzed whether an analogous statute of limitations exists for a reformation claim.[60] The issue never came up.[61]

The Trust claims that in *Starr* this Court "rejected the argument that an analogous statute of limitations should apply" to a reformation claim.[62] It did not. There, an insured sought to reform an insurance policy to conform to a new law requiring insurers to expand their coverages.[63] In response, the insurer urged the Court to apply § 8106's three-year limitations as an analogue and that laches applied

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[57] *See e.g., Sunrise Ventures, LLC*, 2010 WL 363845, at **6–7 (applying three-year limitations under § 8106 as the analogous limitations period for a mutual-mistake claim); Opinion at 21 (citing *Sunrise Ventures* for this proposition).

[58] *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 190–91 (Del. 2021).

[59] Brief of Appellant, at 6, 30–31.

[60] *Collins v. Burke*, 418 A.2d 999, 1003–04 (Del. 1980).

[61] *Id.*

[62] Brief of Appellant at 30.

[63] *Nationwide Mut. Ins. Co. v. Starr*, 575 A.2d 1083, 1088 (Del. 1990).

because the accrual event occurred four years before suit when the new law was enacted.[64] This Court held that the claim was timely because it was filed two years after new controlling caselaw, which the Court deemed the true accrual event.[65] In other words, the Court *agreed* that an analogous statute of limitations applies to reformation, but held that the accrual event under those facts was only two years prior—*i.e.* inside the limitations window.

This was no oversight by the Court of Chancery, which cited *Starr* when concluding that a three-year statute of limitations governs the reformation claims.[66]

(b) The Trust claimed reformation based on mistake after the three-year analogous limitations period.

Here, the Trust filed outside the three-year window. The Trust claims the "mistake" in the Policy is the language that the $4 million benefit ends at age 100, not Ms. Nowak's death regardless of age.[67] Even taking that disputed allegation as true, the Policy's "mistaken" language was written in 1999, when the Policy was

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[64] *Id.* ("It asserts that the Court of Chancery should have applied the analogous three year statute of limitations for actions based on a statute, 10 *Del.C.* § 8106, and barred the reformation action.").

[65] *Id.* at 1089.

[66] Exhibit A at 21.

[67] *See* A-107 ("The Superior Court having found that the Insurance Policy provides that the death benefit converts from $4,000,000 to cash surrender value at the attained age of 100, such language is a mutual mistake."); *see also* A-108 (alleging that Defendants knew of mistake in Policy and that Plaintiff understood death benefit paid $4 million at death at any age).

issued.[68] The Trust was on notice of the "error" in the Policy's language when it received the Policy. Any mistake-based claims accrued then.

The Trust nonetheless tries to roll back the odometer, arguing the claims accrued in 2016 when Ms. Nowak passed and the $4 million was not paid.[69] This confuses the triggering event. The clock starts ticking when the wrongful act occurs—*not* when its effects are eventually felt.[70] For contract reformation, the accrual event is when the drafting mistake is made.[71] Focusing on harms that resulted from that alleged error, as the Trust hopes the Court will do, confuses the alleged wrongful act (receiving the Policy with supposedly inaccurate terms) with its effects (nonpayment based on that contract interpretation).[72]

Caselaw confirms this analysis. In *Sunrise Ventures*, for example, a plaintiff claimed mutual mistake based on alleged misrepresentations made in contract negotiations that induced the plaintiff into the contract at issue.[73] The court held that

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[68] A-170–71, 192; A-204, at 4; A-231–40.

[69] A-99, 101–02 (discussing the Trust having no choice but to keep policy in force and to avoid litigating until Defendants refused to pay).

[70] *In re Coca-Cola Enters., Inc.,* 2007 WL 3122370, at *5 (Del. Ch. Oct.17, 2007) (claims accrue "at the moment of the wrongful act-not when the harmful effects of the act are felt-even if plaintiff is unaware of the wrong."); *Sunrise Ventures, LLC*, 2010 WL 363845, at *6 (same).

[71] *See Cerberus Int'l, Ltd.*, 794 A.2d at 1151.

[72] *See In re Coca-Cola Enters., Inc.,* 2007 WL 3122370, at *5; *see also Sunrise Ventures, LLC*, 2010 WL 363845, at *6.

[73] *Id.*

the claims accrued, at the latest, when the contract with the mistake was executed since that was when the wrongful act occurred.[74] Likewise, in *Lehman Bros.*, this Court held that a mutual-mistake claim in a real-estate purchase accrued at closing.[75] The Court explained that claims accrue when their elements are met, which occurred at closing when the "parties finalized the transaction based on a mutual mistake that the Sellers could convey absolute title" when in reality it was "a purportedly worthless deed."[76]

Thus, the Trust's reformation claims accrued when the Policy was issued with a supposed drafting mistake in 1999. The Trust had a duty to read the Policy, is charged with knowledge of its terms, and should have raised the drafting-error issue when it received the Policy.[77] When the Trustee finally took the time to read the Policy in 2010, the alleged mistake was clear to him.[78] Seeking reformation in 2017

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[74] *Sunrise Ventures, LLC*, 2010 WL 363845, at *6–7.

[75] *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 190–91 (Del. 2021)

[76] *Id.* (quotes and cites omitted).

[77] *See Olga J. Nowak Irrevocable Tr.*, 2020 WL 7181368, at *11; *see also Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989); *Price v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 1213292, at *9 (Del. Super. Ct. Mar. 15, 2013).

[78] A-96 (Trustee read the Policy and found language showing $4 million not available after 100 after discussing with advisor); A-172 ("In 2010, Mr. Nowak discussed the Policy with another financial advisor and came to the understanding that the Trust would receive the Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if his mother passed away at attained age 100 or thereafter.").

based on a mistake that occurred in 1999 is textbook unreasonable delay.

Even if the clock did not start in 1999, it started by 2010 or 2011—after the Trust finally read the Policy and confirmed its terms with Security Life. Instead, of raising the issue then, the Trust admits it sat back to see what would happen, forcing Security Life to bear a $4 million risk of coverage in the interim: "Accordingly, the Nowak Trust, as was its right, elected not to pursue costly and burdensome litigation that would be completely unnecessary in the event that either Ms. Nowak (then 94) died in the next six years before February 22, 2016 or Defendants honored the parties' understanding."[79]

In other words, if Ms. Nowak died before 100, the Trust would gladly take the $4 million; if she died after, the Trust would sue for the $4 million anyway. This heads-I-win, tails-you-lose gambit is prejudicial and inequitably confirms the Trust understood the existence of the supposed mistake in 2010.

The Trust also argues that the claims accrued only when the Policy was allegedly *breached* in 2016. For support, it cites breach of contract cases to argue that a breach claim accrues when the contract is breached, not upon an anticipatory

[79] *See* A-102; *see also* A-85 ("Upon learning of this 2011 Illustration, the Trustee made the decision not to drain the remaining assets of the Nowak Trust by filing a premature legal action that might never become necessary.").

repudiation.[80] That may be true, but this is not a breach of contract case. The Trust is mixing up its Superior Court suit with this one. The dispute here is whether the Policy's terms as drafted mistakenly fail to reflect the parties' prior agreement and must be reformed to reflect that prior deal.

Breach is not an element of reformation—indeed, parties can reform contracts that have not yet been breached.[81] Judge Wharton explained this after comparing the elements of a reformation claim with a breach claim:

> Breach of a contract is not an element of a reformation claim. Were it otherwise, no contract could be reformed before it was breached, an obviously inefficient and inequitable result. Accordingly, The Trust's cause of action for reformation accrued no later than 2011 when the Trustee realized that the Defendants would not pay the $4 million Death Benefit if Mrs. Nowak died after attained age 100.[82]

Reformation does not cure a breach of the contract; it fixes a mistake in the contract. Whether the corrected contract is breached is a separate legal issue.

The Trust admits it did not sue earlier because it anticipated its dispute would be moot if Ms. Nowak passed before 100.[83] That the dispute may become moot,

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[80] *See, e.g., Allstate Ins. Co. v. Spinelli,* 443 A.2d 1286, 1191 (Del. 1982); *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 78–79 (Del. Ch. 2013).

[81] *See Cerberus Int'l, Ltd.*, 794 A.2d at 1151 (elements of mutual or unilateral mistake); *Lehman Bros. Holdings, Inc.*, 268 A.3d at 190–91 ("Stated differently, claims accrue when the elements of those claims have been met.").

[82] Exhibit A at 25.

[83] *See e.g.* A-101–02; A-85.

however, does not mean it was never ripe. Whether the claims accrued in 1999 or 2011, the Trust sought reformation long after the three-year analogous limitations period, which is a presumptively unreasonable delay.[84]

(c) The Trust's unreasonable delay prejudiced Defendants.

The Trust's delay is also presumptively prejudicial. The Trust argues that laches cannot apply to its reformation claims because Defendants were not prejudiced. This is wrong. Prejudice is presumed when the claim is filed after the analogous limitations period.[85] This makes sense because, as this Court recognizes, statutes of limitations "are designed to avoid the undue prejudice that could befall defendants, after the passage of an unreasonable amount of time[.]"[86] That Defendants were presumptively prejudiced is also confirmed by this Court's

[84] *Kim*, 2021 WL 3671136, at *3.

[85] *See, e.g., Winklevoss Cap. Fund, LLC v. Shaw*, 2019 WL 994534, at *5 (Del. Ch. Mar. 1, 2019) ("a filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches ... and prejudice to defendants is thus presumed.") (quotes and cites omitted); *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 978–79 (Del. Ch. 2016) ("The Court also may presume prejudice if the claim is brought after the analogous limitations period has expired."); *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013) (stating that filing claim after analogous statute of limitations is prejudicial as a matter of law).

[86] *Chaplake Holdings, Ltd. v. Chrysler Corp.,* 766 A.2d 1, 6 (Del. 2001).

precedent establishing that claims filed after the analogous statute of limitations are presumptively time-barred, absent extraordinary circumstances.[87]

Beyond presumed prejudice, Defendants here were actually prejudiced by having to defend claims arising from events in 1999 for two reasons.[88] First, absent dismissal, the Trust's delay would force Defendants to litigate allegations about oral discussions occurring more than two decades ago. As Judge Wharton found, "It is unfair to any party to litigate the accuracy of such long ago conversations."[89] The Trust's reformation claims should be barred for this reason alone.[90]

Second, Security Life was prejudiced by continuing to assume the risk of coverage during a period the Trust allegedly believed the Policy contained a mistake. As Judge Wharton agreed, "Defendants were prejudiced by collecting premiums for a Policy paying a Death Benefit of $4 million until age 100 if that Death Benefit

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[87] *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009*); Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769–70 (Del. 2013).

[88] *Forman v. CentrifyHealth, Inc.*, 2019 WL 1810947, at *11 (Del. Ch. Apr. 25, 2019) ("Beyond presumed prejudice, Defendants would confront actual prejudice in attempting to defend claims arising from events that date back to 2006.").

[89] Exhibit A, at 29.

[90] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 2012 WL 3201139, at *21 (Del. Ch. Aug. 7, 2012) ("Statutes of limitations are enacted to require plaintiffs to use diligence in bringing suits so that defendants are not prejudiced by undue delay, in recognition of the fact that memories fade and information goes stale. Stale claims pose an obvious threat to doing real justice, as any trial judge knows. It is difficult enough to discern what happened when adverse parties are talking about what happened last year.") (quotes and cites omitted).

actually extended indefinitely beyond 100."[91] In other words, the parties had a written agreement for coverage and the parties operated under that written agreement with expectations about premium payments and risk assumption. The Trust cannot wait twenty years to see what happens and then fashion its arguments for coverage with the benefit of hindsight, all while Security Life provides coverage in good faith based on the written Policy. Judge Wharton expressed the sentiment more colorfully: "The bugle sounding the call to the post sounded in 2011 when the Trustee understood that the Defendants would pay only the Surrender Value if Mrs. Nowak lived beyond attained age 100. Having seen how the race turned out, he is now placing his bet. It is too late." [92]

The Court of Chancery correctly held that Security Life and Voya Financial were prejudiced by the Trust's unreasonable delay in asserting its reformation claims and that those claims are barred by laches. Because the Trust is not entitled to reformation, the court accurately concluded that the Trust's claim for a breach of reformed contract must be dismissed too.[93] This Court should affirm that decision.

[91] Exhibit A, at 29.

[92] Exhibit A, at 28.

[93] *Id.* at 29.

(2) The Trust's fraud claims are barred by laches.

This Court should also affirm the Court of Chancery's holding that the equitable fraud and aiding and abetting equitable fraud claims are barred by laches. The Trust agrees that the laches period for these claims is capped at three years from the wrongful act, but misdefines the wrongful act.[94] Regardless, even under the most generous application of laches, the Trust's claims are time-barred. The biggest difference here is that the fraud claims were not even filed until 2021—four years after the reformation claims were filed in 2017.

(a) The Trust's fraud claims were raised more than three years after they accrued.

The Trust's fraud claims are based on supposed misrepresentations made by insurance brokers when the Trust purchased the Policy in 1999 and supposed misrepresentations by Security Life in policy illustrations issued from 2004 to 2009.[95] The Trust is wrong about any misrepresentations, but even so these claims accrued more than two decades before the Trust actually asserted them.

Any fraud based on alleged misrepresentations that induced the Trust to buy the Policy accrued in 1999 when it was purchased. Just as the Trust should have

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[94] Brief of Appellant, at 36; *See Sunrise Ventures, LLC*, 2010 WL 363845, at *6 (fraud); *see also Winner Acceptance Corp. v. Return on Cap. Corp.*, 2008 WL 5352063, at **13–14 (Del. Ch. Dec. 23, 2008); *Clark v. Davenport*, 2019 WL 3230928, at *16 (Del. Ch. July 18, 2019) (aiding and abetting).

[95] A-109–112.

caught a drafting error that caused the written Policy to mismatch the parties' supposed agreement when it received the Policy in 1999, it also should have identified any terms that differed from what it was supposedly told by a broker then. Had the Trust simply read the Policy in 1999, as it is constructively deemed to have done, it would have realized that it did not receive what it thought it purchased, and thus learned of the (imagined) misrepresentation.

Caselaw confirms this. In *Sunrise Ventures*, the plaintiff also claimed equitable fraud arising from alleged misrepresentations made while negotiating a contract.[96] The Court of Chancery held that the claims accrued, at the latest, when the agreement was executed, as the wrongful act occurred by then (even though its effects were felt later).[97] Because the equitable claims were asserted four years after the agreement was executed, the claims were time-barred.[98]

The Trust also tries to ground fraud based on post-issuance conduct in Security Life sending various illustrations. But these are also time-barred. The last wrongful act—allegedly misrepresenting that the $4 million would be paid after age

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[96] *Id.*

[97] *Sunrise Ventures, LLC*, 2010 WL 363845, at *6 ("The Sunrise Ventures' Parties claims for equitable fraud, breach of fiduciary duty, breach of the 2004 Agreement, and mutual mistake are all based in actions taken by *Kernan* and, to some extent, Moore in negotiating and executing the 2004 Agreement. Thus, these claims accrued, at the latest, on September 17, 2004 when the 2004 Agreement was executed.") (footnotes omitted).

[98] *Id.*

100—occurred in 2009 when the last incorrect illustration was sent.[99] Any possible fraud claim accrued by then. Even the Trust alleges it was injured by these wrongful acts by 2010, when it paid premiums in reliance on the illustrations.[100] The Trust then had three years to claim fraud. Instead, it waited eleven until 2021.

Trying to move the goal posts, the Trust again alleges that Security Life's wrongful act was committed in 2016, when it did not pay $4 million upon Ms. Nowak's passing.[101] But then the Trust oddly back pedals and concedes that its claims accrued when Defendants made the alleged misrepresentations.[102] Regardless, the Trust never alleges that any misrepresentations occurred after 2011—*i.e.* after the Trust finally read the Policy and confirmed its meaning with Security Life. The Trust is correct that a continuing wrong can extend a claim's accrual so long as the last wrongful act falls within the limitations period.[103] But the Trust has not pleaded any wrongful acts after 2011, so this principle is irrelevant.

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[99] A-171–72 ("Later, however, some illustrations provided from 2004 to 2009, reflect a $4 million Death Benefit available until age 110. . . . In the 2010 illustration, SLD corrected this purported error.").

[100] *See, e.g.,* A-79, 83, 87, 101–02, 108–09, 111–12 (discussing premiums paid in reliance on Defendants' misrepresentations).

[101] A-102.

[102] Brief of Appellant, at 39 ("The wrongful acts supporting the Equitable Fraud Counts were the representations that the $4 million would be paid at death even if the Insured died after 100.").

[103] *Id.* at 38 (citing *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, 2022 WL 3010640, at *12 (Del. Ch. July 29, 2022)).

This Court should affirm the trial court's holding that the fraud claims are time-barred because they were filed more than three years after they accrued.

(b) No basis exists to toll the Trust's fraud claims.

No after-the-fact excuse justifies the Trust's delay. The Trust cannot escape this timeline by arguing that Defendants' supposed ongoing misrepresentations toll the accrual date. The Trust admits that Security Life communicated by 2011 that it would not pay the $4 million if Ms. Nowak died after age 100.[104] Even the Superior Court noted that Security Life confirmed this position to the Trust at that time.[105] Thus, the Trust offers no basis for tolling past 2011.

Other courts reach the same conclusion. *Sunrise Ventures* is again instructive. There, the plaintiff also argued that defendants' misrepresentations justified tolling its fraud claims.[106] The court disagreed because the plaintiff was "clearly put on inquiry notice" earlier, regardless of when the plaintiff had actual notice.[107] Instead,

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[104] *See, e.g.,* A-99 ("The 2011 illustrations showed that at the time Defendants revealed their newly formed views").

[105] A-172 ("SLD confirmed Mr. Nowak's understanding that the Trust would receive a Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if she died at attained age 100 or thereafter.").

[106] *Sunrise Ventures, LLC*, 2010 WL 363845, at *6–7.

[107] *Id.*; *see also Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5–6 (Del. Ch. July 17, 1998); *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *9 (Del. Ch. Jan. 24, 2005); *Forman*, 2019 WL 1810947, at *8.

tolling is not permitted when the plaintiff has inquiry notice, meaning an objective awareness of facts giving rise to the wrong.[108]

Here, the Trust concedes it discovered the alleged problem with the Policy language when it finally read the Policy in 2010 and confirmed its meaning in 2011.[109] Thus, the Trust was on also actual notice by then, and any accrued equitable claim cannot be tolled further.

Regardless, no tolling can make equitable fraud claims, first filed in 2021, timely. These claims were not filed in the Superior Court action and are not tolled by the Superior Court's § 1902 transfer.[110] Nor do they relate back, because the relation-back doctrine only applies to claims asserted in *amended* pleadings, not new

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[108] *Sunrise Ventures, LLC*, 2010 WL 363845, at *6–7.

[109] *See, e.g.,* A-96 ("He then discovered language hidden on page 16, not in the section on death benefit definition, which he interpreted, as possibly meaning the death benefit ended at age 100, something completely contrary to his prior understanding."); A-97 ("*For the first time*, however, these [2011] illustrations showed the death benefit after age 100 was not $4,000,000 as all the previous illustrations (which showed a post-age 100 death benefit) had shown. Instead, and again for the first time, these illustrations showed the post-age 100 death benefit was the same as the 'surrender value' and the 'accumulation value"' which varied each year."); A-172 ("In 2010, Mr. Nowak discussed the Policy with another financial advisor and came to the understanding that the Trust would receive the Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if his mother passed away at attained age 100 or thereafter."); A-172 ("SLD confirmed Mr. Nowak's understanding that the Trust would receive a Death Benefit of $4 million if his mother died before attained age 100 and the Surrender Value if she died at attained age 100 or thereafter.").

[110] *See* 10 *Del. C.* § 1902; *see also* A-116–25.

ones filed in new actions.[111] The Trust offers no justification for claiming equitable fraud ten years after discovery—and four years after it filed its case in Superior Court. Because no grounds exist to toll the Trust's claims, its 2021 fraud claims are time-barred on this basis too.[112]

Whether the equitable-fraud claims accrued in 1999 (when the Trust received the Policy) or in 2011 (when the Trustee confirmed its meaning after finally reading it) is an "academic" exercise.[113] Either way, the claims accrued more than three years before the Trust asserted them. No excuse justifies the Trust's delay. Laches is therefore appropriate here because its application "can be determined from the face of the complaint as a matter of law."[114] The fraud-based claims were properly dismissed.

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[111] *See* Del. Ch. Ct. R. 15(c) ("An amendment of a pleading relates back to the date of the original pleading when . . ..").

[112] A-168.

[113] Exhibit A, at 22 (discussing how whether claims accrued in 1999 or 2011 is "academic" since each is before 2016).

[114] *Kim*, 2021 WL 3671136, at *1.

2. THE CLAIMS ALTERNATIVELY FAIL BECAUSE THE TRUST HAS NOT PLEADED SUFFICIENT ELEMENTS OF THE CLAIMS.

A. Question Presented

Whether the Trust has pleaded all the elements of its claims.[115]

B. Legal Standard and Scope of Review

Whether the Trust pleaded all elements of its claims as required in a motion to dismiss is reviewed *de novo.*[116]

C. Merits of the Argument

Beyond laches, the Trust's claims fail for the other reasons argued raised with the Court of Chancery.

(1) The Trust's equitable fraud claims fail as a matter of law.

To establish equitable (or constructive) fraud, the Trust must plead: (1) a special relationship between the parties, such as a fiduciary relationship; or (2) a justification for a remedy that only equity can afford.[117] The Trust can do neither.

(a) No special relationship existed between the parties.

"It is settled law that an insurer does not generally owe a fiduciary duty to its insured because this relationship is usually an arm's-length contractual

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[115] Exhibit A at 4, 10–11.

[116] *In re Gen. Motors (Hughes)*, 897 A.2d at 168–69.

[117] *See Zebroski v. Progressive Direct Ins. Co*., 2014 WL 2156984, at *7 (Del. Ch. Apr. 30, 2014).

relationship."[118] In the trial court, the Trust did not dispute this principle but tried to create an exception for the (non-party) brokers' conduct, claiming they acted as both insurance agents and investment advisors.[119] The Trust, however, sued the insurer—not the brokers. Defendants simply did not owe any heightened duty to the Trust. This accords the Superior Court's prior opinion, in which it labeled these brokers as the *Trust*'s advisors.[120]

While the Trust's authorities in the Court of Chancery variously suggested that financial advisors can sometimes be fiduciaries, in each of those cases the financial advisor was a defendant,[121] and none dealt with insurance policies.[122] They are irrelevant here. Without pleading more, this is no special relationship.

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[118] *Id.*, at *8.

[119] *Id.*

[120] A-196 ("At the time the Trust entered into the Policy, the Trust had *consulted with advisors* [.]"); A-197 ("the Trust was given ample time to read the contract and consult with advisors.").

[121] *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *1 (Del. Ch. Oct. 9, 2007) ("The plaintiffs name as defendant . . . the Fund's investment advisor[.]"); *Bamford v. Penfold, L.P.*, 2020 WL 967942, at *1 (Del. Ch. Feb. 28, 2020) ("For at least a decade, Manheim served as Bamford's trusted financial and business advisor.").

[122] *Forsythe*, 2007 WL 2982247, at *1 (relating to a bank's highly paid employees partnership interests in a fund intended to co-invest with the bank); *Bamford*, 2020 WL 967942, at *1 (dealing with investment of "startup capital" for a new company that "facilitates investments by foreign nationals in infrastructure projects"); *Saxe v. Brady*, 40 Del. Ch. 474, 475 (1962) (relating to an open-end investment company under the provisions of the Investment Company Act of 1940.).

(b) The Trust had other adequate remedies at law.

Next, adequate remedies at law existed, also precluding the equitable claims. The focus here is on the *remedy*, not the cause of action. In *Zebroski*, the court dismissed an equitable fraud claim because the insured could pursue a remedy at law through legal claims.[123] The court determined that the insured's attempt to undo its contract under an equitable fraud theory was a remedy available at law.[124]

Similarly, the Trust here seeks to undo the Policy through equitable fraud.[125] In fact, it *already* sought this remedy in Superior Court through consumer fraud and unjust enrichment claims.[126] The relief of obtaining $4 million under the Policy was also pursued in Superior Court before it was brought in the Court of Chancery.[127] Because all relief the Trust seeks was available (and actually pursued) at law, the Trust may not pursue equitable fraud here now.

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[123] *Zebroski*, 2014 WL 2156984, at *8.

[124] *Id*. ("[H]e has not pled circumstances demonstrating that only equity can afford him an adequate remedy. That is, because in a court of law Zebroski conceivably could pursue his personal injury claims and avoid any defense based on the Release Agreement, he has not demonstrated that only equity can afford him the remedy he seeks.")

[125] A-90–112.

[126] A-286–88, 292–93 (seeking disgorgement of $ 3 million in premiums paid).

[127] A-277–86, 288–93 (seeking payment of $4 million under the Policy).

(2) The reformation claims fail since no prior agreement existed.

Courts of equity have only the limited power to reform a contract to express the parties' "real agreement."[128] To equitably reform the Policy, the Trust had to plead and prove either a mutual mistake or a unilateral mistake.[129] That requires the Trust to show that it and Defendants "came to a specific prior understanding that differed materially from the written agreement."[130] Reformation does not provide a mulligan to a party suffering buyer's remorse.[131]

The seminal Delaware reformation case, *Cerberus International Ltd.*, illustrates how reformation may only cure a contract written differently than the agreement the parties struck. There, a financial sponsor (Apollo) acquired a target company (MTI) under a merger agreement in which MTI stockholders would receive $65 million *less* proceeds from the sale of certain options and warrants.[132] After the transaction closed, plaintiffs sued—alleging the contract contained a drafting error warranting reformation because Apollo and MTI actually had agreed to a different purchase price: $65 million *plus* the proceeds from the sale of the

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[128] *Cerberus Int'l, Ltd.*, 794 A.2d at 1151.

[129] *Id.,* at 1151–52.

[130] *In re TIBCO Software Inc.*, 2015 WL 6155894, at *13.

[131] *Id.* at *13.

[132] *Cerberus Int'l, Ltd.*, 794 A.2d at 1151–53.; *see In re TIBCO Software Inc.*, 2015 WL 6155894, at **13–14.

options and warrants.[133]

This Court defined three elements the plaintiff had to prove to reform the mutual mistake: that "(i) MTI thought that the merger agreement gave MTI's stockholders the proceeds of the options and warrants; (ii) ... Apollo was also similarly mistaken ...; and (iii) that MTI and Apollo had specifically agreed that the proceeds of the options and warrants would go to MTI's stockholders."[134] In other words, the party must show a mistake coupled with a prior agreement.

Yet no prior agreement was pleaded or is present here. Applying *Cerberus*, the Trust must show that: (1) at the time, it thought that Defendants would pay $4 million at Ms. Nowak's death regardless of her age; (2) Defendants also agreed to pay $4 million regardless of her age at death; and (3) the parties reached this agreement before the Policy was issued.[135] The Trust's burden is to allege facts about the circumstances of this prior agreement to make it reasonably conceivable that it could establish each of these elements by clear and convincing evidence.[136]

But the Trust never alleged it had an agreement with Defendants before the

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[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *In re TIBCO Software*, 2015 WL 6155894, at *14 ("plaintiff's burden on this motion [to dismiss] is to allege particularized facts concerning the circumstances of a mutual mistake from which it is reasonably conceivable that plaintiff would be able to establish each of these elements.").

Policy. Instead, the Trust's complaint (1) harps on how it believes the Policy as written should be interpreted, relying exclusively on the Policy's language for support;[137] (2) points to erroneous Policy illustrations sent five to ten years *after* the Policy was issued to argue the Policy language is mistaken;[138] and (3) complains about the Superior Court opinion (affirmed by this Court) which already determined the Policy unambiguously provided $4 million only until Ms. Nowak reached attained age 100.[139] Nothing alleges a deal before Policy issuance that the Policy did not accurately reflect.

The Trust does not allege a prior agreement because it cannot. Indeed, the Superior Court—with the benefit of a full summary-judgment record, including briefing on the Trust's reformation claims—found that no writings before the Policy

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[137] *See, e.g.,* A-105 ("Unless the understanding was always that the $4 million would be available at death or one intended to deceive a purchaser about that availability, it is difficult to explain the Policy language, and Defendants never do. It redefines the 'death benefit' to mean 'cash surrender value,' inconsistent with directly the clear and unambiguous language on the cover page of the Insurance Policy stating that 'Death Benefit Proceeds Payable at Insured's Death' and in the Death Benefit section.").

[138] *See, e.g.,* A-101 ("Defendants refused to honor their promises and agreements as originally understood and set out between the parties, particularly in the pre-2010 illustrations."); A-102 ("Defendants have refused to recognize the parties' original agreement and expectations at the time of the contract, as uniformly reflected on the cover page of the Insurance Policy and the many communications, including in 10 years of illustrations provided by Defendants . . .").

[139] *See, e.g.,* A-100 ("The Trial Court decision focused solely on the clause in question and made no findings as to whether this was consistent with other language in the Policy.").

conflicted with what the Policy said.[140] Rather, it found that the only conflict was with the illustrations issued years after the Policy.[141] In other words, some post-sale illustrations were mistaken—not the Policy.

Allowing reformation here up-ends insurance law. By regulation, insurance policies and their terms must be approved by the insurance commissioner before issuance.[142] The insurance policy here is not one where contract terms were negotiated (or even negotiable). It is unclear how the Policy can be modified to capture some supposed new terms that the Trust's broker articulated but that the insurance commissioner has not blessed. It is not possible to grant reformation without wading into the waters of the executive branch.

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[140] *See, e.g.,* A-183 ("The illustration the Trustee signed when the Trust applied for the Policy shows the $4 million net Death Benefit only through year 17 of the Policy and to the insured's age 100."); A-183–84 ("Finally, the Statement of Policy Cost and Benefit clearly spells out that the Policy 'Matures at Age 100' and shows the $4 million Death Benefit payable only through age 100."); A-191 ("Those 'misleading' illustrations all occurred after the sale of the Policy"); A-191 ("the claim relates to illustrations and communications occurring after the sale of the Policy, and thus, is not actionable").

[141] A-194 n.115; A-191 ("Those 'misleading' illustrations all occurred after the sale of the Policy"); A-193 ("the claim relates to illustrations and communications occurring after the sale of the Policy, and thus, is not actionable").

[142] *See generally* Code Del. Regs. 101-4.0; Code Del. Regs. 1205-4.0.

CONCLUSION

The Court should therefore affirm the Court of Chancery's order of dismissal with prejudice.

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