**COURT OF CHANCERY**
**OF THE**
**STATE OF DELAWARE**

**ABIGAIL M. LEGROW**
**MASTER IN CHANCERY**

**NEW CASTLE COUNTY COURTHOUSE**
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Re: *IMO the Restated Revocable Trust of Lawrence F. Conlin, deceased*
C.A. No. 8052-ML

Dear Counsel:

A trust beneficiary, who began receiving monthly statements relating to the trust in January 2008, and who began asking questions and raising concerns in 2007 regarding the assets that comprise the trust, finally filed an action against the trustee in November 2012. The trustee moved for summary judgment on the basis that the beneficiary's claims are untimely. The beneficiary argues that, notwithstanding the monthly statements and her frequent questions regarding the trust, the statute of limitations did not begin to run until February 2012, when a forensic accountant retained by the beneficiary

rendered a report regarding the administration of the trust. For the reasons that follow, I conclude the beneficiary's claims are time-barred, and recommend that the Court enter summary judgment in favor of the trustee on that basis. Because I find the claims are not timely, I do not reach the trustee's alternate argument that he is entitled to summary judgment on the merits of the claims. There are disputed issues of fact regarding the trustee's claim for attorneys' fees under 12 *Del. C.* § 3584, and I therefore recommend that the Court deny the trustee's motion for summary judgment on that issue.

## FACTUAL BACKGROUND[1]

The Revocable Trust of Lawrence F. Conlin was created in 1993 and restated on December 18, 1996 (the "Trust") by Lawrence F. Conlin ("Lawrence"),[2] who was the trustor and the initial trustee of the Trust. In February 2004, Lawrence resigned as trustee and designated his son, Daniel Conlin ("Daniel"), as successor trustee. In April 2005, with Lawrence's physical and mental health declining, Daniel became Lawrence's court-appointed guardian. Lawrence died on August 19, 2007. He was survived by his second wife, Norma Conlin ("Norma"), and his five children.

The terms of the Trust provided that all the net income of the Trust would be paid to Norma for the remainder of her life.[3] The trustee also was permitted to invade the Trust principal if the funds available to Norma were insufficient to provide for her health,

[1] Except as noted, the following facts are not in dispute.
[2] I use certain of the parties' first names for the sake of clarity. No disrespect is intended.
[3] Verified Pet. to Remove Trustee, Compel Accounting, and Order Surcharge Against Trustee (hereinafter "Pet.") Ex. A, Art. VII(A).

education, maintenance, and support.[4] After Norma's death, the remaining principal was to be divided into equal shares for each of Lawrence's children, which each such child serving as trustee of her or her own share of the Trust.[5] The petitioner, Mary P. Judge ("Ms. Judge"), is one of Lawrence's children.

At the time of Lawrence's death, the Trust's assets included the Lawrence F. Conlin Fidelity Revocable Trust Account (the "Fidelity Trust Account"), the Lawrence F. Conlin, Jr. Fidelity Rollover IRA Account (the "Fidelity IRA"), and the Janney Montgomery Scott Lawrence F. Conlin Trust Account (the "Janney Montgomery Account").[6] After Lawrence's death, Daniel, who is the respondent in this action, transferred those accounts to Wells Fargo. The Fidelity IRA was transferred to what the parties call the "Wells Fargo IRA," and the Fidelity Trust Account and the Janney Montgomery Account were consolidated into a trust account the parties call the "Wells Fargo Trust Account."[7]

After Lawrence's death and before the accounts were transferred to Wells Fargo, Daniel provided quarterly reports to the beneficiaries. The Wells Fargo accounts were established by December 2007, and all of the Trust beneficiaries, including Ms. Judge, then began receiving monthly statements relating to the Trust. The monthly statements described the Trust assets and transactions relating to the Trust.[8]

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[4] Pet. Ex. A, Art. VIII.
[5] Pet. ¶ 8; Pet. Ex. A, Art. VII(B)
[6] Aff. of Daniel L. Conlin dated June 26, 2013 (hereinafter, the "Conlin Aff.") ¶ 5.
[7] *Id.* ¶ 8.
[8] *Id.* ¶¶ 9-10.

Notably, in addition to receiving the monthly statements beginning in January 2008, Ms. Judge began raising as early as 2007 questions and concerns about the Trust and assets she believed should be contained in the Trust. In 2007, both Ms. Judge and her attorney contacted Exxon Mobil Corporation ("Exxon") regarding shares of Exxon stock Ms. Judge believed Lawrence owned.[9] During that same period, Ms. Judge also began asking questions regarding Mellon Bank accounts she believed were held by her father or her late mother, Eloise Conlin.[10] Similarly, Ms. Judge received one or more documents from Fidelity in 2007 or 2008 regarding a 529 account that she believes may have been established on behalf of herself or her issue.[11] Although she contends she never received satisfactory responses from Daniel regarding the assets at issue, she did not take any further steps at the time to pursue her concerns.

Norma died on May 29, 2010. In late 2011 or early 2012, Daniel announced that he intended to distribute the corpus of the Trust into five shares for each of Lawrence's children, and sought a waiver from the beneficiaries covering Daniel's administration of the Trust. That waiver request apparently spurred Ms. Judge to retain a forensic accountant to review information regarding the Trust. The accountant, William St. Clair, issued a series of reports that identified several issues regarding Daniel's administration of certain Trust assets. Mr. St. Clair apparently issued three reports, the second of which (the "Second St. Clair Report") was rendered sometime around May 2012. The Second

[9] Dep. of Mary P. Judge dated Mar. 21, 2013 (hereinafter, "Judge dep.") at 17-20; Conlin Aff. Ex. B.
[10] Judge dep. at 21-24.
[11] *Id.* at 29-33.

St. Clair Report formed the basis for correspondence between the parties' counsel and later was used to prepare the petition filed by Ms. Judge in this action.[12] During discovery Ms. Judge revealed that Mr. St. Clair issued a third report (the "Third St. Clair Report") in or around August 2012.[13] Although the Third St. Clair Report was issued well before this action was filed, Ms. Judge apparently did not rely on it when preparing the petition.[14] The parties dispute the significance of the Third St. Clair Report: Daniel contends the report indicates Mr. St. Clair signed off on Daniel's administration of the trust and had no further questions or concerns, but Ms. Judge disagrees, asserting that the Third Report identifies several unresolved issues regarding the Trust.

After exchanging correspondence with Daniel's counsel regarding the Trust, Ms. Judge filed this action on November 21, 2012. The petition alleges Daniel breached his fiduciary duties as trustee and seeks removal of Daniel as trustee, an accounting of Daniel's actions as trustee, and damages for any transaction for which Daniel cannot properly account. According to the petition, Mr. St. Clair "found discrepancies and other issues with the handling and transferring of funds between various financial accounts which left several hundred thousand dollars in assets missing or otherwise unaccounted for from the Trust."[15] In addition, the petition identifies "a significant amount" of Exxon stock, one or more Mellon Bank accounts, and "several" 529 accounts that could not be

[12] Conflin Aff. ¶¶13-17.
[13] *Id.* ¶ 21.
[14] Pet'r's Objections and Resps. To Resp't's First Set of Interrogs. at 1; Judge dep. at 10-11.
[15] Pet. ¶ 12.

traced.[16] The petition criticizes Daniel for failing to provide an accounting and for failing to provide any information regarding the "missing assets," the Mellon Bank accounts, the 529 accounts, or the Exxon stock.[17]

Daniel seeks summary judgment on the basis that Ms. Judge's claims are barred by the applicable statute of limitations. In the alternative, Daniel argues he is entitled to summary judgment on the merits of Ms. Judge's claims. Finally, Daniel asks this Court to order Ms. Judge to pay his attorneys' fees and expenses.

**ANALYSIS**

Summary judgment should be awarded if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[18] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[19] A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists.[20] If the movant makes such a showing, the burden then shifts to the non-moving party to submit sufficient evidence to show that a genuine factual issue, material to the outcome of the case, precludes

[16] *Id*.
[17] *Id*. ¶ 13.
[18] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).
[19] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[20] *Johnson v. Shapiro*, 2002 WL 31438477, at *3 (Del. Ch. Oct. 18, 2002).

judgment before trial.[21] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[22]

Daniel argues that summary judgment is appropriate here because Ms. Judge's claims accrued no later than January 2008, when she began receiving monthly statements relating to the Trust. At that point, Daniel contends, Ms. Judge was aware of the assets that comprised the Trust corpus and could have investigated and raised claims about assets she believed were missing or mishandled. Daniel submitted evidence, through depositions, documents, and his affidavit, showing Ms. Judge's claims relate to alleged wrongdoing that occurred in 2007 or 2008, at the latest, and Ms. Judge received regular information about the Trust beginning January 1, 2008. Ms. Judge argues her claims did not accrue until 2012, when she hired a forensic accountant whose report alerted her that Trust assets may have been mishandled. According to Ms. Judge, this was the first time she "acquired the necessary knowledge with which she could bring a fiduciary duty action," and the statute of limitations did not begin to run until she received "actual knowledge" that there were discrepancies in the funding and administration of the Trust.[23] In the alternative, Ms. Judge contends that the statute of limitations was tolled.

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[21] *Id.*; *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003).
[22] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).
[23] Pet'r's Answering Br. in Opp. of Resp't's Mot. for Summ. J. (hereinafter "Answering Br.") at 15.

**A. Ms. Judge's claims accrued no later than 2008 and are presumptively barred by the three year statute of limitations.**

Because Ms. Judge's claims sound in equity, the statute of limitations does not technically apply. Rather, this Court applies the doctrine of laches to assess the timeliness of claims in equity. That doctrine bars an action when a claimant unreasonably delays in asserting a claim, which delay unfairly prejudices a defendant. This Court, however, frequently uses the analogous statute of limitations as a presumptive limitations period for purposes of laches.[24] When a complaint is filed after the presumptive limitations period, the Court need not engage in a traditional laches analysis, and instead may bar the claim except in "rare" and "unusual" circumstances.[25]

Ms. Judge concedes her claims are subject to a three year statute of limitations under 10 *Del. C.* § 8106.[26] That statute of limitations begins to run at the time of the allegedly wrongful act, even if a party is ignorant of the cause of action or the harm suffered.[27] Although Ms. Judge contends she is unaware when the harmful acts alleged in the complaint actually took place, she has not identified any genuine issue of fact suggesting the acts took place on or after November 21, 2009, which was three years

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[24] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996).
[25] *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. Jun. 29, 2005); *In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013).
[26] Daniel takes the position that Ms. Judge's claims are governed by the two year statute of limitations established by 12 *Del. C.* § 3585, which applies when a trust beneficiary was sent a report adequately disclosing the facts constituting a claim. Because Ms. Judge's claims are barred by 10 *Del. C.* § 8106, I need not reach the question of whether Section 3585 applies in this case.
[27] *de Adler v. Upper New York Inv. Co. LLC*, 2013 WL 5874645, at *14 (Del. Ch. Oct. 31, 2013); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007).

before Ms. Judge filed suit. Ms. Judge also failed to attach an affidavit identifying any additional discovery that is necessary to determine when the alleged wrongdoing occurred.[28] The Second St. Clair Report identifies several questioned transfers and distributions from the Trust, but all such transfers and distributions occurred well before November 21, 2009.[29] Ms. Judge's complaint also raises issues regarding the Exxon stock, the Mellon Bank Account, and one or more 529 accounts, but any alleged wrongdoing associated with those assets also occurred no later than 2007 or 2008.[30] Because there is no genuine issue of fact regarding whether the claims accrued after November 21, 2009, Ms. Judge's petition is stale unless the statute of limitations was tolled.[31]

**B. Ms. Judge has not presented any genuine issue of fact that would support tolling the statute of limitations.**

There are three bases recognized in Delaware for tolling a limitations period: (1) an inherently unknowable injury, (2) fraudulent concealment, and (3) equitable tolling.[32] Ms. Judge asserts any of these three doctrines apply in this case and operate to toll the limitations period until 2012, when Ms. Judge obtained the Second St. Clair Report. As

[28] *See* Ct. Ch. R. 56(f).
[29] Conlin Aff. Exs. D, G.
[30] Judge dep. at 17-24, 29-33.
[31] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998).
[32] Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* (hereinafter "Wolfe & Pittenger"), § 11.06[d].

the party advancing a tolling argument, Ms. Judge bears the burden of establishing sufficient facts to support application of these doctrines.[33]

The first tolling doctrine, which applies to inherently unknowable injuries, rarely, if ever, applies to alleged violations of fiduciary duties.[34] Where, as here, the alleged wrongdoing readily was discoverable from an examination of the books and records of the Trust, I cannot conclude that it was "practically impossible" for Ms. Judge to discover the wrongdoing before 2012.[35] Ms. Judge argues the wrongdoing could not be discovered until she retained a forensic accountant to examine the records provided by Daniel, but she fails to articulate why she was unable to retain a forensic accountant before 2012. Daniel's request that the beneficiaries execute a waiver in connection with the distribution of the Trust corpus was not an event that made the allegedly wrongful acts any more or less discoverable than they were in the years leading up to that request. Although the waiver request may have spurred Ms. Judge to take additional steps to investigate her suspicions, there was nothing that prevented her from making those investigations or discovering any alleged wrongdoing before 2012. She therefore cannot avail herself of the first of the three tolling doctrines.

A statute of limitations also may be tolled if a defendant fraudulently conceals from a plaintiff the facts that would put him on notice of the truth.[36] To establish fraudulent concealment, "a plaintiff must allege an affirmative act of 'actual artifice' by

[33] *In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *2 (Del. Ch. Dec. 21, 1999).
[34] *See Id.* at *2; Wolfe & Pittenger § 11.06[d][1].
[35] *See In re Tyson Foods Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007).
[36] *Id*. at 585.

the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth."[37] The only affirmative act of concealment to which Ms. Judge can point, however, is Daniel's representation in July 2012 that neither Lawrence nor the Trust owned any Exxon stock, a representation that has since been shown to be false. The representation was made well after the statute of limitations expired for claims relating to that stock. Even if this representation could be said to be an affirmative act of concealment, it could not reset a limitations period that already had expired. In addition, Ms. Judge's counsel conceded at argument that Ms. Judge's questions regarding the Exxon stock have since been resolved and she is not pursuing any claims relating to that stock. A misrepresentation relating to Exxon stock could not toll the statute of limitations for the claims Ms. Judge is pursuing. Accordingly, there are no disputed issues of fact that support application of this second tolling doctrine.

Finally, Ms. Judge contends she was entitled to rely on Daniel as a fiduciary, and the statute of limitations should be tolled on that basis. Under the doctrine of equitable tolling, the statute of limitations is tolled when the plaintiff "reasonably relies on the competence and good faith of a fiduciary."[38] In the context of claims against a trustee, the doctrine of equitable tolling is based on the fact that "the trust relationship has utility only if beneficiaries feel at ease confiding in and relying upon a trustee."[39] Given the

[37] *Id*.
[38] *de Adler v. Upper New York Inv. Co. LLC*, 2013 WL 5874645, at *15 (Del. Ch. Oct. 31, 2013).
[39] *Reed v. Delaware Trust Co.*, 1995 WL 317013, at *2 (Del. Ch. May 19, 1995).

fiduciary nature of the relationship, the statute of limitations is tolled until a beneficiary knew, or had reason to know, of the facts supporting the cause of action alleged.[40]

As with all tolling doctrines, however, the limitations period begins to run when a plaintiff is on "inquiry notice" of the facts supporting a claim.[41] Thus, even when a plaintiff is entitled to rely on the good faith of a fiduciary, the statute of limitations only is tolled "until such time that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, *if pursued*, would lead to the discovery of the injury."[42] Contrary to Ms. Judge's arguments, the statute of limitations is not tolled until a plaintiff has actual knowledge of the alleged wrongdoing,[43] but only until the plaintiff should have discovered the purported wrongdoing or harm. After such time, a plaintiff no longer is entitled to rely on the representations of the fiduciary.

The undisputed facts offered by Daniel demonstrate Ms. Judge was on inquiry notice of any alleged wrongdoing no later than January 2008. Ms. Judge began receiving monthly statements for the Trust in January 2008, at which point she was aware of what assets Daniel held the Trust, and she began asking questions about the Trust and the assets that comprised the corpus no later than 2007. Although she retained counsel and requested documents from Daniel during that time period, and apparently believed the

[40] *Id*. at *3.
[41] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998).
[42] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 (emphasis in original).
[43] *See* Answering Br. at 15.

documents he provided did not fully satisfy her requests,[44] she took no further steps to assuage her concerns until 2012, when she finally hired a forensic accountant. Ms. Judge's receipt of the monthly statements and her own conduct in raising questions about assets she believed were missing from the Trust demonstrates she was aware or should have been aware of the conduct she alleges constituted a breach of Daniel's fiduciary duties.[45]

Ms. Judge argues, however, that she did not know or have reason to know of the allegedly wrongful acts until she hired a forensic accountant in 2012. The decision to hire the accountant apparently was triggered by Daniel's request for a waiver relating to his administration of the Trust. As previously discussed, however, nothing precluded Ms. Judge from hiring an accountant sooner, and it is undisputed that her questions regarding the assets that were included in the Trust dated back to 2007. Her failure to investigate sooner her concerns regarding the Trust does not serve as a basis to toll the statute of limitations once she had facts sufficient to put her on inquiry that, had she acted diligently, would have led her to discover the injury.

**C. Attorneys' fees cannot be awarded on the present record.**

Because I conclude Ms. Judge's claims are time-barred, I need not reach Daniel's alternate argument that he is entitled to summary judgment on the merits of Ms. Judge's claims. Daniel also argued that he is entitled to attorneys' fees under 12 *Del. C.* § 3584,

[44] Pet. ¶ 11; Answering Br. at 3.
[45] *Reed v. Delaware Trust Co.*, 1995 WL 317013, at *3 (Del. Ch. May 19, 1995) (statute of limitations began to run once a beneficiary received monthly trust statements and had reason to know of the cash disbursements about which he later filed suit).

which gives this Court discretion to allocate fees incurred in trust litigation to one or more of the parties involved in the proceeding.[46] Section 3584 "supplements" the Court's authority to award fees under the American Rule, and gives the Court "somewhat greater flexibility in exercising its discretion to shift attorneys' fees."[47]

Daniel's claim for attorneys' fees is based primarily on his contention that Ms. Judge filed this action based on the Second St. Clair Report, despite the fact Mr. St. Clair had issued the Third St. Clair Report, in which Daniel contends Mr. St. Clair "signed off on the handling of the various accounts and [indicated he] had no more questions for [Daniel]."[48] Although Ms. Judge's decision to rely on the Second St. Clair Report, and her failure to disclose the Third St. Clair Report until discovery in this action, raises a number of questions and may serve as a basis for awarding fees, there are disputed facts that preclude resolution of that issue on summary judgment. For example, the Third St. Clair Report does not unequivocally indicate on its face that Mr. St. Clair agreed with Daniel's administration of all the Trust assets or that all the requested information was provided. There is no indication that Mr. St. Clair agreed with Daniel's handling of the account identified as item 10 on the report, and it appears Mr. St. Clair had not received one statement for the IRA account listed as item 7 on the report.[49] More significantly,

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[46] *In re Trust for Grandchildren of Gore*, 2013 WL 771900, at *2 (Del. Ch. 2013). This inquiry is separate from the question of whether Daniel, as trustee, is entitled to have his fees paid from the Trust itself. *See* 12 *Del. C.* § 3333; *In re Couch Trust,* 723 A.2d 376, 384-85 (Del. Ch. 1998).
[47] *In re Trust for Grandchildren of Gore*, 2013 WL 771900, at *2.
[48] Resp't's Opening Br. in Support of Mot. for Summ. J. at 21.
[49] *See* MJ0134.

just because Mr. St. Clair may have indicated he agreed with Daniel's administration of certain assets does not lead inexorably to the conclusion that Ms. Judge had no basis for bringing this action. That question requires further exploration through discovery and testimony at trial.

**CONCLUSION**

For the foregoing reasons, I recommend the Court grant the respondent's motion for summary judgment on the basis that the claims asserted in the petition are barred by the statute of limitations. I further recommend the Court deny the respondent's motion for summary judgment on his request for attorneys' fees under 12 *Del. C.* § 3584. This is my final report and exceptions may be taken in accordance with Court of Chancery Rule 144.

Sincerely,

/s/ *Abigail M. LeGrow*

Master in Chancery