IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WESLEY T. O'BRIEN, Plaintiff, v. IAC/INTERACTIVE CORP. f/k/a USA NETWORKS, INC., Defendant.	)	Civil Action No. 3892-VCP

MEMORANDUM OPINION

Submitted: April 30, 2009
Decided: August 14, 2009

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PARSONS, Vice Chancellor.

In this action for indemnification and advancement, the plaintiff, a former COO and CEO, seeks his attorneys' fees and expenses originating from an arbitration completed over three years ago. In that proceeding, the plaintiff's former employer dragged him into a dispute with a third party and refused to reimburse his expenses. The plaintiff succeeded in that he was found not liable for the claims against him, but the arbitration award provided that each party was responsible for its own costs. Subsequently, a trial court in Florida accepted the former employer's position and ruled that the plaintiff could not recover his fees and expenses on an indemnification theory. The plaintiff appealed, but for fourteen months, the law of the case remained that he was not entitled to indemnification. Then, a Florida appeals court vacated the trial court's decision and remanded the case for a determination of the fees and expenses to which the plaintiff was entitled. The plaintiff's litigation costs continued to increase. Unfortunately, his difficulties in enforcing his indemnification rights also continued in that the former employer filed for reorganization under Chapter 11 of the United States Bankruptcy Code, and the plaintiff became an unsecured creditor entitled to only pennies on the dollar in the best of circumstances. Stymied in his efforts to recover from his former employer, the plaintiff filed a claim for indemnification in this Court in July 2008 against the company's former parent, which had assumed the former employer's indemnification obligations in a merger agreement years earlier. The matter is now before me on cross motions for summary judgment, with the defendant asserting that the action should be barred as untimely.

For the reasons stated in this memorandum opinion, I hold the plaintiff's claims against the former employer's former parent are not time-barred under the controlling doctrine of laches. Accordingly, I deny the defendant's motion for summary judgment and grant the plaintiff's motion for partial summary judgment confirming the plaintiff's right to advancement of the reasonable attorneys' fees and expenses associated with this litigation now and in the future.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Wesley T. O'Brien, was chief operating officer and chief executive officer of Precision Response Corporation ("PRC") from October 20, 1998 to November 20, 2003.

Defendant, IAC/InterActiveCorp ("IAC"), is a Delaware corporation with its principal place of business in New York, New York. In 2000, IAC acquired PRC. As a result of that acquisition, PRC became a wholly-owned subsidiary of IAC, and IAC assumed certain obligations to indemnify O'Brien.

PRC merged into PRC, LLC, on August 5, 2005, but remained a subsidiary of IAC. In late 2006, PRC was acquired by Avaltus, Inc. ("Avaltus"), an entity unrelated to IAC.

B. The Background

In his role as chief operating officer and chief executive officer, O'Brien entered into an Indemnification Agreement with PRC on October 20, 1998.[1] Under the Indemnification Agreement, PRC agreed to indemnify O'Brien "to the fullest extent permitted by law."[2] The Indemnification Agreement purports to be governed by Florida law.

In 2000, IAC acquired PRC pursuant to a Merger Agreement under which IAC agreed to assume the obligations under O'Brien's Indemnification Agreement with PRC. The Merger Agreement provides in section 5.8(a):

> Buyer [IAC], Newco and the Company [PRC] agree that all rights to indemnification . . . as provided in the Company's Amended and Restated Articles of Incorporation, the Company By-laws or an agreement between an Indemnitee and the Company or a Subsidiary of the Company as in effect as of the date hereof and listed in Schedule 5.8 to the Company Disclosure Schedule shall survive the Merger and continue in full force and effect.[3]

"Indemnitee" is defined in the Merger Agreement as "individuals who on or prior to the Effective Time were officers . . . of the Company [PRC]."[4] Additionally, section 5.8(c) provides that IAC shall "expressly assume and honor in accordance with their terms all indemnity agreements listed in Schedule 5.8 of PRC's Disclosure Schedule." O'Brien's

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1 Compl. Ex. B, Indemnification Agreement.

2 *Id.* § 2(a).

3 Compl. Ex. A, Merger Agreement, § 5.8(a).

4 *Id.* § 5.8(b).

Indemnification Agreement is listed on Schedule 5.8.[5] Further, section 5.8(f) of the Merger Agreement provides that IAC "shall, and shall cause the Surviving Corporation to, advance all Costs to any Indemnitee incurred by enforcing the indemnity or other obligations provided for in this Section 5.8 . . . ." The Merger Agreement states that it is governed by Delaware law and contains a Delaware forum selection clause.[6]

In August 2001, PRC acquired Avaltus pursuant to an Acquisition and Merger Agreement (the "Avaltus Agreement"). The Avaltus Agreement contained a dispute resolution clause, which mandated arbitration under the auspices and rules of the American Arbitration Association.[7] The provision states: "The decision of the arbitrator or arbitration panel will not be subject to appeal, review or re-examination, except for fraud, perjury, manifest clerical error, or evident partiality or misconduct by an arbitrator that prejudices the rights of any party to the arbitration."[8]

In October 2002, the principal shareholder of Avaltus, New River Holding Limited Partnership, and various other affiliated entities (collectively, "New River") commenced arbitration against PRC, attempting to recover certain funds placed in escrow in connection with PRC's acquisition of Avaltus. On November 20, 2002, PRC terminated O'Brien for cause. PRC then asserted counterclaims against New River and

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5 Compl. Ex. I.

6 Merger Agreement § 8.7.

7 Enerio Aff. Ex. 1, Avaltus Agreement, § 8.11.

8 *Id.*

two former PRC executives, one of which was O'Brien. PRC alleged that O'Brien had breached his fiduciary duty to PRC and fraudulently induced PRC to acquire Avaltus, which failed soon after the acquisition.[9] O'Brien denied PRC's allegations, however, and, through arbitration, sought a declaratory judgment that he had committed no wrongdoing.

On January 9, 2003, before the arbitration hearing, O'Brien formally requested advancement of his attorneys' fees and expenses incurred in connection with the PRC arbitration claims.[10] Nevertheless, PRC refused to advance O'Brien's fees and expenses during the arbitration proceedings.[11]

After a hearing, a panel of three arbitrators issued an award on January 19, 2005 (the "Arbitration Award").[12] The arbitrators found, in relevant part, that: PRC was not entitled to recovery on its claims against O'Brien; O'Brien was not entitled to the declaratory relief he sought against PRC; and there was no prevailing party in the arbitration, so each party was "responsible for its own attorneys' fees, costs and expenses."[13]

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9 *See* Compl. Ex. E, Post-Arbitration Indemnification Request, at 1.

10 *See* Compl. Ex. C.

11 Compl. ¶ 14.

12 The Arbitration Award was disclosed to the parties on January 7, 2005, but was not signed by all three arbitrators until January 19, 2005.

13 Compl. Ex. D, Arbitration Award.

By letter dated February 23, 2005, O'Brien again requested that PRC indemnify him for his attorneys' fees and expenses, as he successfully had defended himself against all PRC's arbitration claims.[14] Still, PRC refused to indemnify O'Brien. O'Brien then commenced suit against PRC in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Florida Trial Court") to enforce his indemnification rights. On March 31, 2005, O'Brien moved for summary judgment on his claim for indemnification. PRC cross moved for summary judgment on all O'Brien's claims, arguing in part that his indemnification claim was barred by the doctrine of res judicata. In an order dated October 6, 2005, the Florida Trial Court denied O'Brien's motion and granted PRC's motion for summary judgment. The Court based the portion of its ruling pertaining to the indemnification claim on alternative theories of waiver, inadequate support, and res judicata.

O'Brien appealed the Florida Trial Court's ruling to the Fourth District Court of Appeal of Florida (the "Florida Appeals Court"). On December 6, 2006, the Florida Appeals Court vacated the decision of the Trial Court and remanded the case for a determination of the amount of attorneys' fees and expenses due O'Brien. The Florida Trial Court entered an order on May 29, 2007 finding O'Brien was entitled to indemnification, and directing the parties to engage in further proceedings in that court to

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[14] Post-Arbitration Indemnification Request at 1-2.

determine the specific amount due for indemnification.[15] Those proceedings, however, never occurred.

On January 23, 2008, PRC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States District Court for the Southern District of New York.[16] As a result, the Florida proceedings were stayed automatically, and no further proceedings have occurred in Florida to determine the indemnification amount.[17]

On June 20, 2008, the bankruptcy court approved PRC's Joint Plan of Reorganization under Chapter 11. Consequently, O'Brien is permanently enjoined from proceeding against PRC in Florida, and his recovery against it will be limited to pennies on the dollar. On July 15, 2008, O'Brien filed a claim in this Court against IAC (the "Delaware Action") for indemnification and advancement for his attorneys' fees and expenses in the arbitration and in pursuing those fees in Florida and now Delaware.

C. Procedural History

O'Brien's Verified Complaint (the "Complaint") alleges two breaches of contract by IAC, one for indemnification and one for advancement. On September 3, 2008, IAC moved to stay the proceedings in this Court pending the resolution of an evidentiary hearing in the Florida Trial Court to determine the amount of indemnification to which

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15 *See* Compl. Ex. H.

16 Compl. ¶ 21.

17 *Id.*

O'Brien is entitled. On November 24, 2008, O'Brien moved for partial summary judgment on Count II of the Complaint, which seeks advancement of his attorneys' fees and expenses in the Delaware Action. On December 19, IAC responded with its own motion for summary judgment on O'Brien's claims and withdrew its motion for a stay. Since then, the parties briefed and presented oral argument on those motions.

D. Parties' Contentions

The Complaint sets forth two counts. In Count I, O'Brien seeks indemnification of his attorneys' fees and expenses from the arbitration, the Florida litigation, and the bankruptcy proceedings. In Count II, O'Brien asserts a claim for advancement of his attorneys' fees and expenses in this action to enforce his rights to indemnification for his fees and expenses in the other proceedings. For purposes of its motion for summary judgment, IAC admits that it undertook to indemnify him and to cause PRC to indemnify O'Brien for those expenses, and that O'Brien's claim is viable.[18] Nevertheless, IAC seeks summary judgment in its favor because the three-year statute of limitations applicable to indemnification, advancement, and other contract actions bars O'Brien's claims. IAC further contends that because O'Brien's claim for indemnification against IAC is stale, his request for advancement also must be denied.

In opposition to IAC's motion for summary judgment, O'Brien advances several arguments in defense of the timeliness of his claim. First, O'Brien argues that his claim for indemnification is subject to Florida's five-year statute of limitations for actions upon

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[18] Def.'s Answering Br. at 10 n.8.

a contract, rather than Delaware's three-year statute, because the original Indemnification Agreement, which IAC assumed under the Merger Agreement, is governed by Florida law. Second, O'Brien asserts that, even if Delaware's three-year statute applies, his claim against IAC for indemnification is still timely. In support of this argument, O'Brien posits that his claim did not accrue until PRC filed its bankruptcy petition, because only then did IAC's breach of its obligation to cause PRC to indemnify O'Brien become apparent. Finally, O'Brien contends the doctrine of laches governs in a court of equity, and Delaware's equity jurisprudence militates against rigid application of the statute of limitations in the circumstances of this case.

II. ANALYSIS

A. Standard for Summary Judgment

Summary judgment may be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[19] The burden is on the moving party to show the absence of any genuine issue of material fact.[20] The Court views the facts in the light most favorable to the nonmoving party.[21] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[22] Moreover, "[w]hen

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19 Ct. Ch. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

20 *Quereguan v. New Castle County*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).

21 *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

22 *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous."[23] On a motion for summary judgment in a contract dispute, therefore, courts often must focus at the threshold on whether the contract contains an ambiguity.[24] "A contract provision is ambiguous only when it is fairly susceptible to two or more reasonable interpretations."[25]

Because the parties have submitted cross motions for summary judgment on Count II's claim for advancement, that claim is subject to this Court's Rule 56(h). Under Rule 56(h), where, as here, the parties have cross moved for summary judgment and have not presented argument that there is an issue of fact material to the disposition of either motion, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motion."[26]

B. Count I – Indemnification of Attorneys' Fees and Expenses for Arbitration, Florida Litigation, and Bankruptcy Proceedings

O'Brien requests indemnification of all attorneys' fees and expenses stemming from the 2005 arbitration, the Florida litigation seeking the fees and expenses of the arbitration, and his participation in the PRC bankruptcy proceedings in an effort to recover the expenses of the previous actions. IAC asserts that O'Brien's claim for

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23 *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

24 *See id.*

25 *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008) (citing *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008)).

26 Ct. Ch. R. 56(h).

indemnification is barred by Delaware's three-year statute of limitations. O'Brien counters that the doctrine of laches applies and does not bar O'Brien's claim as untimely even if it was filed outside the statutory period, due to the unusual conditions and extraordinary circumstances of this case. O'Brien further argues that, even if the three-year limitations period applies, by analogy or directly, the cause of action against IAC accrued less than three years before July 25, 2008, when he filed his claim in the Delaware Action.[27]

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[27] O'Brien also contends the Florida five-year statute of limitations for contract actions applies to his indemnification claim against IAC because the original Indemnification Agreement between PRC and O'Brien is governed by Florida law. According to O'Brien, because his rights to indemnification and advancement issue from the Indemnification Agreement, Florida's statute of limitations should apply to the adjudication of those rights. IAC counters that Delaware's three-year statute of limitations applies to O'Brien's claim because the Merger Agreement, under which it assumed the obligation to indemnify and advance O'Brien's attorneys' fees and expenses, is governed by Delaware law. IAC further asserts that O'Brien's argument ignores the operation of Delaware's borrowing statute, 10 *Del. C.* § 8121. Section 8121 provides in relevant part:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.

Construed literally, the borrowing statute mandates application of Delaware's three-year statute of limitations, which is shorter than the limitations period in Florida. O'Brien responded that the borrowing statute does not apply where, as here, there is no danger of forum shopping for a longer limitations period in that O'Brien sued in Delaware, which has the shorter statute. *See* Oral Arg. Tr., dated Apr. 30, 2009 ("Arg. Tr."), at 27-29. Regardless, I need not determine the effect, if any, of the Delaware borrowing statute on this controversy, because I find O'Brien's claim is timely under the controlling doctrine of laches.

Because IAC's motion assumes the viability of O'Brien's indemnification claims, I need not consider the merits of those claims. I must determine, however, whether the statute of limitations and the doctrine of laches preclude O'Brien's claim for indemnification against IAC after drawing all reasonable inferences in O'Brien's favor, or whether any of the later accrual dates proffered by O'Brien have merit.

Laches "operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment."[28] The doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[29] In the absence of unusual or extraordinary circumstances, the analogous statute of limitations creates a presumptive time period during which the claim must be filed or else be barred as stale or untimely.[30]

1. The analogous statute of limitations

Because it is in the nature of a contract claim, the analogous statute of limitations for an indemnification action in Delaware is three years.[31] A cause of action for indemnification accrues when a director or officer entitled to indemnification can be

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28 *Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992) (citing *Robert O. v. Ecmel A.*, 460 A.2d 1321, 1325 (Del. 1983); *Shanik v. White Sewing Mach. Corp.*, 19 A.2d 831, 837 (Del. 1941)).

29 *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

30 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009).

31 *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del. 2002). *See also* 10 *Del. C.* § 8106; *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000).

confident any claim against him has been resolved with certainty.[32] The Supreme Court of Delaware explained when an indemnification plaintiff can be free of doubt that a claim has been resolved with certainty in *Scharf v. Edgcomb Corp.*:

> Generally, the matter on which the claim for indemnification is premised may be said to have been resolved with certainty only when the underlying investigation or litigation is definitely resolved. The implicit rationale for this conclusion is that the person seeking indemnity should not have to rush in at the first possible moment but rather should be able to wait until the outcome of the underlying matter is certain. A successful result on a claim for indemnification in the trial court, for example, 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.[33]

Furthermore, Delaware courts apply an objective, reasonable person standard in deciding whether a claim has been definitely resolved in the context of indemnification actions.[34]

O'Brien filed his claim against IAC on July 25, 2008. Therefore, his claim must have accrued after July 25, 2005 to be timely in a legal sense, absent a basis for tolling the statute of limitations. That is to say, the underlying investigation or litigation for which O'Brien seeks indemnification must have been resolved definitely by then. IAC claims this occurred upon the expiration of the period for appealing the Arbitration Award. That would be on April 19, 2005, or ninety days after the entrance of the Award

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32 *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 919 (Del. 2004).

33 *Id.* at 919-20 (internal quotation marks and citations omitted).

34 *Id.* at 919.

on January 19, 2005.[35] O'Brien, on the other hand, contends the accrual date is much later than April 19, 2005. According to O'Brien, because the Arbitration Award specified that neither party had prevailed and each party had to bear its own costs, the statute of limitations did not begin to run from a date based on the entry of that Award.

Ordinarily, the existence of a nonappealable decision determining the parties' dispute would trigger the limitations period. Indeed, it is plausible that the statute of limitations here began to run on April 19, 2005. The circumstances of this case, however, differ from the typical situation in that the apparent resolution of the underlying controversy was arguably ambiguous in terms of its effect on O'Brien's claim for indemnification. Specifically, O'Brien reasonably could have concluded that he prevailed on the merits of the claims underlying his request for indemnification and, therefore, sought to enforce that claim as of April 19, 2005. Indeed, IAC asserts his claim for indemnification accrued at that time for purposes of the applicable statute of limitations. Yet, at precisely the same time, IAC caused PRC to argue to the Florida Trial Court that the doctrine of res judicata barred O'Brien's request for indemnification because the arbitration panel already had denied that request by determining that O'Brien was responsible for his own costs stemming from the arbitration. In June 2005, O'Brien and PRC filed cross motions for summary judgment on that and other issues in the Florida Trial Court. On October 6, 2005, the Florida Trial Court granted PRC's motion

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[35] *See* Fla. Stat. Ann. § 682.13(2) (West 2008).

and denied O'Brien's motion, holding that principles of res judicata, among other things, did bar his claim for indemnification.[36]

At this point, O'Brien's claim for indemnification seems to have been swept into a procedural purgatory because it arguably was both too early and too late. Any claim against IAC at that time would have been unavailing in light of the Florida Trial Court's decision. Based on the law of the case, an indemnification claim against IAC likely would have been hamstrung by principles of collateral estoppel or issue preclusion, just as the claim against PRC was barred by res judicata. Thus, after the Florida Trial Court's ruling in PRC's favor on October 6, 2005, any claim against IAC reasonably could be considered unnecessary or even futile.

On December 6, 2006, the Florida Appeals Court vacated the October 6, 2005 ruling and remanded the matter to the Florida Trial Court to determine the amount of attorneys' fees and expenses due O'Brien. In the fourteen-month interim between the decisions of the Trial Court and Appeals Court, O'Brien did not have an independently viable claim for his attorneys' fees and expenses against IAC.

In addition, the Merger Agreement provides that IAC shall indemnify or cause PRC to indemnify O'Brien for attorneys' fees and expenses.[37] O'Brien plausibly argues

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[36] Heyman Aff. Ex. 5, Trial Ct. Order, dated Oct. 6, 2005, at 6-9.

[37] Section 5.8(b) of the Merger Agreement provides in relevant part:

> Buyer [IAC] shall and *shall cause the Surviving Corporation* to, to the fullest extent permitted by law, (i) indemnify and hold harmless the individuals who on or prior to the Effective

that IAC's obligation to cause PRC to indemnify him is a separate contractual obligation from IAC's own obligation to indemnify O'Brien, and that his claim for breach of the former obligation may not have accrued until PRC finally and definitely refused or failed to indemnify O'Brien. Although the merits of this argument may be debatable, O'Brien has raised genuine issues of material fact regarding IAC's compliance with its obligation to cause PRC to indemnify O'Brien. Under O'Brien's theory, because IAC controlled PRC during the Florida litigation, IAC may not have breached that provision until it became certain that PRC would not indemnify him, *i.e.*, when PRC filed for bankruptcy protection in January 2008. In light of this timeline of events and drawing all inferences in O'Brien's favor, it may be that the three-year statute of limitations does not preclude O'Brien's claim against IAC for breach of its indemnification-related obligations under the Merger Agreement, which was filed July 25, 2008. It is not necessary for me to determine that issue, however, because I find that the doctrine of laches applies to this controversy and that based on the unusual conditions and exceptional circumstances of this case, it would be inequitable for this action to be time-barred.

> Time were officers . . . of the Company . . . against all losses, expenses (including without limitation, attorneys' fees and the cost of any investigation or preparation incurred in connection thereof), claims, damages, liabilities, judgments, or amounts paid in settlement (collectively, "Costs") . . . .

(Emphasis added).

2. The applicability of laches in this case

IAC asserts that the statute of limitations must be applied inflexibly in an action for indemnification because the action is "a contract claim in an indemnification context."[38] I disagree.[39] "A statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches."[40] IAC relies heavily on *Scharf v. Edgcomb Corp.*,[41] in which the Supreme Court applied a three-year statute of limitations to bar an indemnification

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38 *See* Arg. Tr. at 10.

39 IAC seems to argue that O'Brien's indemnification claim involves a legal right and a legal remedy, *i.e.*, it is a contract claim appropriate for monetary damages. Regardless of whether an indemnification claim is properly classified as either equitable or legal, the Court of Chancery has exclusive jurisdiction over indemnification actions brought by officers, directors, agents, and employees of a corporation pursuant to 8 *Del. C.* § 145(k), which provides:

> The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

Section 145(k) embodies legislative intent that corporate indemnification actions are actions to be heard in this court of equity, rather than actions at law ordinarily subject to rigid application of a statute of limitations. Accordingly, an indemnification claim brought by an officer such as O'Brien is more appropriately examined under the doctrine of laches, which guides this Court's determinations of timeliness and serves the independent purposes of equity.

40 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005).

41 864 A.2d 909 (Del. 2004).

action. In a subsequent decision,[42] however, the Supreme Court examined both the analogous three-year statute of limitations, as well as the doctrine of laches, in determining the timeliness of an indemnification claim. Furthermore, recent Supreme Court precedent confirms that laches guides considerations of timeliness in a court of equity, especially where there are unusual or mitigating circumstances, as here. Therefore, I must examine the timeliness of O'Brien's claims against IAC under the doctrine of laches.

Laches, like a statute of limitations, functions as a time bar to lawsuits. Unlike a statute of limitations, the equitable doctrine of laches does not prescribe a specific time period as "unreasonable."[43] Rather, laches is an unreasonable delay by a party, without any specific reference to duration, in the enforcement of a right.[44] An unreasonable delay can range from as long as several years[45] to as little as one month.[46] The temporal aspect

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42 *Homestore, Inc. v. Tafeen*, 888 A.2d 204 (Del. 2005).

43 *Steele v. Ratledge*, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002).

44 *Id.*

45 *See Cooch v. Grier*, 59 A.2d 282, 287-88 (Del. Ch. 1948) (granting motion to dismiss for laches based on plaintiff's fifteen-year failure to act).

46 *See Stengel v. Rotman*, 2001 WL 221512, at *7 (Del. Ch. Feb. 26, 2001) (holding, in the alternative, that when a removed officer waited one month after an election of directors to contest its validity for an alleged breach of the corporation's bylaws, that former officer was barred from asserting his claims by laches).

of the delay is less critical than the reasons for it, because in some circumstances even a long delay might be excused.[47]

Although statutes of limitations that are exceeded always operate to bar actions at law absent applicability of a tolling doctrine, they are not controlling in equity.[48] As noted earlier, while an analogous statute of limitations period at law may create a presumption that a longer delay is unreasonable and would bar a claim for laches, unusual or mitigating circumstances may rebut the presumption that the claim is stale.[49] As the Supreme Court recently held in *Reid v. Spazio*:

> A court of equity moves upon considerations of conscience, good faith, and reasonable diligence. Thus, although a statute of limitations defense is premised solely on the passage of time, the lapse of time between the challenged conduct and the filing of a suit to prevent or correct the wrong is not, in itself, determinative of laches. Instead, the laches inquiry is principally whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties. Under 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; but, 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, the court will not

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47 *Cooch*, 59 A.2d at 286-87.

48 *Reid v. Spazio*, 2009 WL 962683, at *4 (Del. Apr. 9, 2009) (citations omitted).

49 *See Reid*, 2009 WL 962683, at *4; *United States Cellular Inv. Co. v. Bell Atl. Mobile Sys.*, 677 A.2d 497, 502 (Del. 1996); *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989).

> be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.[50]

Thus, laches may not bar an action that would be untimely in terms of the analogous statute of limitations if, in terms of equity, the plaintiff's delay has caused no prejudice to the defendant and is not unreasonable based on the unusual conditions of the action.[51]

In an action at law, the analogous three-year statute of limitations arguably might bar O'Brien's claim. As this Court is guided by considerations of good conscience and equity, however, the doctrine of laches governs whether O'Brien's claim is untimely. In addition, I find that unusual and mitigating circumstances exist here that rebut the presumption that the three-year limitations period should be controlling. The sequence of events in the arbitration and later Florida litigation placed O'Brien in an unusual predicament. The arbitration panel's ruling that neither party had prevailed and each was responsible for its own costs created a cloud over O'Brien's claim for indemnification. O'Brien promptly sought indemnification against PRC in the Florida Trial Court, and lost. Although his position ultimately was vindicated by the Florida Appeals Court, O'Brien effectively was precluded in the interim from receiving indemnification from PRC or IAC under the doctrines of res judicata and collateral estoppel, respectively. For fourteen months, *i.e.*, the period between the decisions of the Florida Trial Court and the

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50 2009 WL 962683, at *4 (citations and internal punctuation omitted).

51 *See Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("The essential elements of laches are: (i) plaintiff must have knowledge of the claim and (ii) there must be prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim.").

Florida Appeals Court, O'Brien remained in a veritable holding pattern. In these circumstances, I cannot fault O'Brien for not pressing his claim against IAC during that period. Nor is there any reason to believe O'Brien could have improved his chances of obtaining relief from the Florida Trial Court's decision by asserting a similar claim against IAC in Florida or some other jurisdiction.

Moreover, IAC, as the parent of PRC, admittedly controlled PRC's litigation strategy at all relevant times during the Florida litigation.[52] Put simply, IAC made the decision to defend against O'Brien's indemnification claims, and orchestrated the way that was done, and likely did so with an eye to preserving IAC's own financial well-being. Thus, it is reasonable to infer, as O'Brien alleges, that IAC knew about PRC's impending inability to meet its financial obligations, which resulted in PRC filing for reorganization in January 2008. The exceptional circumstances of IAC's control of PRC and the Florida litigation also eviscerates any claim of prejudice it might make. IAC knew about the claim against PRC and guided PRC in its vigorous struggle to avoid liability for indemnification. In this sense, IAC and PRC had a common interest and the same motivation to preserve, for example, relevant documentary and testamentary evidence. Thus, IAC has not and cannot credibly claim any prejudice to its ability to

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[52] In its now-withdrawn motion to stay, IAC stated "[w]hile PRC is no longer affiliated with IAC, IAC has been controlling the defense of the Florida Action pursuant to the 2000 merger agreement." Def.'s Opening Br. in Supp. of its Mot. to Stay at 7. IAC has not retreated from this statement. In addition, viewing the facts in the light most favorable to O'Brien, it is reasonable to infer from IAC's statement that IAC also controlled or influenced PRC's decision to file for protection under Chapter 11.

present its case caused by O'Brien's delay in asserting his claim, because IAC knew about it and actually participated in defending against essentially the same claim against PRC from the get-go. Accordingly, based on the unusual conditions and extraordinary circumstances of this case and the lack of prejudice to IAC, I hold that the doctrine of laches does not create a time-bar to O'Brien's claim for indemnification.

C. Count II – Advancement of Attorneys' Fees and Expenses for the Delaware Action

O'Brien and IAC cross moved for partial summary judgment on Count II of the Complaint, which seeks advancement of attorneys' fees and expenses for this action. Because this count is before me on a cross motion and neither party contends there is any disputed issue of material fact, Court of Chancery Rule 56(h) controls. "Thus, the usual standard of drawing inferences in favor of the nonmoving party does not apply," and the Court will treat the issues as to Count II as ripe "for decision on the merits based on the record submitted with the motions."[53]

Delaware follows the "American rule" under which each party is responsible for its own attorneys' fees, but there are limited exceptions to that rule. Under Section 145(e) of the Delaware General Corporation Law ("DGCL"), a corporation may grant its officers expenses, such as attorneys' fees, and advancement of those fees "upon such

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[53] Ct. Ch. R. 56(h); *see Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008).

terms and conditions, if any, as the corporation deems appropriate."[54] Advancement disputes are particularly appropriate for decision on summary judgment, as in most cases "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[55] As this Court has noted, resort to parol evidence in cases like this one is rarely appropriate, or even helpful, as corporate instruments addressing advancement rights are frequently crafted without the involvement of the parties who later seek advancement and often with little negotiation among any of the contending parties at all.[56] Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contract text as the overridingly important guide to contractual interpretation.[57] Thus, if the contractual instrument unambiguously grants advancement, summary judgment is appropriate.[58]

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54 8 *Del. C.* § 145(e). Pursuant to Section 145(k) of the DGCL, the Court of Chancery may determine summarily a corporation's obligation to advance expenses.

55 *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *3 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 371 (Del. 2003).

56 *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *20-21 (Del. Ch. Jan. 23, 2006) ("Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party . . . trigger a right to advancement under the terms of the corporate instrument . . . .").

57 *Id.*

58 *See Lillis v. AT&T Corp.*, 904 A.2d 325, 333 (Del. Ch. 2006).

The Merger Agreement between PRC and IAC provides:

> [IAC] shall, and shall cause [PRC] to, advance all Costs[59] to any Indemnitee incurred by enforcing the indemnity or other obligations provided for in this Section 5.8; provided that [IAC] may require any such advance to be subject to the receipt of an undertaking from such Indemnitee to repay such costs plus interest on such amount at the United States Rate to the extent that a court determines that such Indemnitee is entitled to such indemnification.[60]

According to the express terms of the Merger Agreement, therefore, IAC must advance the Costs of this litigation because through it O'Brien seeks to enforce the indemnification provisions of that agreement.

IAC's defense to O'Brien's argument rests solely upon the success of its motion for summary judgment that his indemnification is untimely and barred by the relevant statute of limitations. For the reasons discussed *supra* Part II.B, however, I find that O'Brien's indemnification request is not barred as untimely under the doctrine of laches or any analogous statute of limitations. Thus, I reject the argument that O'Brien seeks advancement on a stale claim and grant the relief requested in Count II.[61] Further, because O'Brien's right to indemnification of his expenses is subject to a final determination on the merits by this Court, he may be required to provide a full accounting

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[59] The Merger Agreement defines "Costs" as "all losses, expenses (including without limitation, attorneys' fees and the cost of any investigation or preparation incurred in connection thereof), claims, damages, liabilities, judgments, or amounts paid in settlement." Merger Agreement § 5.8(b).

[60] Merger Agreement § 5.8(f).

[61] To the extent IAC may require an undertaking, I note that O'Brien represented on the record that he is willing to provide one.

of his expenses to IAC and repay any funds to which he ultimately is found not to be entitled under the terms of the Indemnification and Merger Agreements.

Therefore, I grant O'Brien's motion and deny IAC's cross motion for summary judgment on Count II, and order IAC to pay O'Brien all reasonable attorneys' fees and expenses he has incurred in this action to date, with prejudgment interest at the legal rate.[62] This would include any "fees on fees."[63] In addition, IAC shall pay O'Brien for any future legal fees and expenses as they are incurred, consistent with the Merger Agreement.

III. CONCLUSION

For the reasons stated in this opinion, I deny IAC's motion for summary judgment on O'Brien's request for indemnification (Count I). I also deny IAC's motion and grant O'Brien's motion for summary judgment on his claim for advancement of his attorneys' fees and expenses in these proceedings (Count II).

IT IS SO ORDERED.

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62 *See Homestore, Inc. v. Tafeen*, 888 A.2d 204, 218 (Del. 2005) ("[A]ll contracts providing for the advancement of expenses are implicitly limited to those that are reasonably incurred."). *See also Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (holding "prejudgment interest is awarded as a matter of right" in advancement cases).

63 *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) ("[W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete."). *See also DeLucca*, 2006 WL 224058, at *15; *Brady v. i2 Techs., Inc.*, 2005 WL 3691286, at *4 (Del. Ch. Dec. 14, 2005).