IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JEPSCO, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 7343-VCP
	)	
B.F. RICH CO., INC., a Delaware Corporation, and DAVID SWAYZE, an Individual,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: October 25, 2012
Decided: February 14, 2013

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PARSONS, Vice Chancellor.

A minority shareholder in a privately held Delaware corporation brings breach of fiduciary and statutory duty claims against an individual who served for approximately one year as a court-appointed custodian of the corporation. The shareholder also asserts a claim for aiding and abetting a breach of fiduciary duty against another of the corporation's shareholders. The custodianship culminated in a confidential settlement among parties to a previous litigation. As part of that confidential settlement, the Delaware corporation's sole asset was sold. The minority shareholder complains, among other things, that the custodian should have, but did not, notify it of these events.

The defendants have moved to dismiss the plaintiff's claims on several theories. I grant the motion to dismiss based in part on the custodian's immunity for certain acts he took as an agent of this Court and in part on laches.

I. BACKGROUND

A. The Parties

Plaintiff, Jepsco, Ltd. ("Jepsco"), is a Delaware corporation. Jepsco is a 4% shareholder of Rich Realty, Inc. ("RRI"), which is also a Delaware corporation. RRI owned as its sole asset a parcel of real property and the building located on that property in Newark, Delaware (the "RRI Asset").[1] Jepsco's principal is James Kelly. According to Plaintiff's complaint (the "Complaint"), Kelly is a duly seated director of RRI but was prevented from assuming this position.[2]

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1 Compl. ¶¶ 1, 11.

2 *Id.* ¶ 32.

Defendant B.F. Rich Co., Inc. ("BFR"), a Delaware corporation, is also a shareholder of RRI. BFR is the sole tenant of the building that is part of the RRI Asset.

Defendant David Swayze is a member of the Delaware Bar and a partner at Parkowski Guerke & Swayze, P.A. This Court appointed Swayze as custodian of RRI on October 12, 2007 in a previous action, *B.F. Rich & Co., Inc. v. Gray*, C.A. No. 1896-VCP (the "Underlying Action").[3]

B. Facts the Court May Consider

Preliminarily, I must determine what I may consider on this motion to dismiss. Generally, the complaint "defines the universe of facts that the trial court may consider on a Rule 12(b)(6) motion to dismiss."[4] This general principle also applies when the Court considers the affirmative defense of laches on a motion to dismiss.[5] Documents referred to in a complaint may be considered on a motion to dismiss where, for example, the document is integral to the plaintiff's claim and incorporated in the complaint.[6] In addition, courts also may consider documents outside the pleadings in limited

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3 All docket item numbers ("D.I. No.") cited in this Memorandum Opinion refer to the docket in C.A. No. 1896-VCP.

4 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

5 *Reid v. Spazio*, 970 A.2d 176, 183–84 (Del. 2009) ("Unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate.").

6 *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69–70 (Del. 1995); *see also In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 n.46 (Del. Ch. July 17, 1998).

circumstances.[7] In particular, a Court may take judicial notice of publicly available facts not subject to reasonable dispute.[8]

In this case, in addition to the facts set forth in the Complaint and the documents attached thereto, the parties, especially Defendants, rely on several documents from the docket in the Underlying Action. I take judicial notice of items from that docket pursuant to D.R.E. 201(b)(2).[9] Indeed, the Complaint expressly incorporates five documents from the docket in the Underlying Action. There also is no dispute that Jepsco had access to the publicly available documents from the Underlying Action. Unless otherwise noted, I

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[7] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 170 (courts may consider publicly available facts "not subject to reasonable dispute"); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441, 1999 WL 87385 (Del. 1999) (TABLE) (publicly available documents that form the basis of the plaintiff's complaint); *see also La. Mun. Police Emps.' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *6 (Del. Ch. July 28, 2009) (corporation's certificate of incorporation and public filings with the SEC); *In re Tyson Foods, Inc.*, 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007) (corporation's public filings); *In re ML/EQ Real Estate P'ship Litig.*, 1999 WL 1271885, at *2 (Del. Ch. Dec. 21, 1999) (relying on information plaintiffs indisputably were provided or had available to them).

[8] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 170; *Beiser v. PMC-Sierra, Inc.*, 2009 WL 483321, at *1 (Del. Ch. Feb. 26, 2009) (considering on a motion to dismiss facts drawn from the docket and orders of a related federal case that were publicly available and not subject to reasonable dispute); *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *9 (Del. Ch. Sept. 28, 2007) ("[T]he court also may take judicial notice of publicly filed documents, such as documents publicly filed in litigation pending in other jurisdictions." (citation omitted)).

[9] Rule 201(b)(2) states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

do not rely on those documents for their truth but, rather, for the notice they provided to Plaintiff of their subject matter.[10]

C. Facts[11]

The Underlying Action began in 2006 when BFR brought claims against Richard Gray, Sr. and RRI as a nominal defendant. At that time, RRI had six shareholders.[12] Gray had attempted to elect RRI directors of his choosing by exercising the voting power of his two minor children, who were shareholders of RRI. BFR challenged this effort and sought a declaratory judgment that Gray lacked the authority to vote the shares of his minor children and that the actions he purported to take pursuant to that authority were invalid, thus leaving the previous RRI officers and directors in place.[13] Jepsco was not a party to the Underlying Action, but Kelly was one of the directors that Gray had

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[10] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69–70 (Del. 1995) (finding it appropriate to consider SEC filings to examine what was disclosed with respect to the plaintiff's disclosure violation claims). The Supreme Court in *In re Santa Fe* also stated, with respect to the plaintiff's substantive claims, that "[d]espite the fact that a SEC filing may constitute hearsay with respect to the truth of the matters asserted therein, courts may consult these documents to ascertain facts appropriate for judicial notice under D.R.E. 201." *Id.* at 70 n.9.

[11] Unless otherwise stated, all recited facts are drawn from the Complaint in this action or are otherwise matters of public record.

[12] RRI's six shareholders were Gray's two minor children, Gray's adult child, BFR, Jepsco, and Gray's niece. *B.F. Rich & Co. v. Gray*, 933 A.2d 1231, 1235 (Del. 2007).

[13] For a more detailed recitation of the facts of the Underlying Action, see *B.F. Rich Co. v. Gray*, 2006 WL 3337163 (Del. Ch. Nov. 9, 2006).

purported to remove.[14] This Court and the Delaware Supreme Court issued Opinions in the Underlying Action.[15] The Supreme Court held that Gray could not vote his minor children's shares and that, therefore, the election of directors based on Gray's votes were legally invalid.

Upon remand, on October 12, 2007, this Court granted the stipulated proposed custodian order ("Custodian Order") that the parties had submitted. The Custodian Order appointed Swayze (the "Custodian") as custodian of RRI pursuant to 8 *Del. C.* § 226 (the "Custodianship"). The Custodian Order instructed the Custodian to "deal with the day-to-day operations and other legal and fiduciary responsibilities and obligations of RRI."[16] These responsibilities included fulfilling all duties arising under the Delaware General Corporation Law ("DGCL").[17]

On August 14, 2008, this Court granted another stipulated proposed order regarding the Custodianship (the "August 2008 Order").[18] This Order began by stating

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14 Compl. ¶ 32; *B.F. Rich Co. v. Gray*, 2006 WL 3337163, at *2 (noting that Gray purported to remove Kelly, among others, from the board of directors).

15 *See B.F. Rich & Co.*, 933 A.2d at 1231; *B.F. Rich Co. v. Gray*, 2006 WL 3337163 (Del. Ch. Nov. 9, 2006).

16 Compl. Ex. B, Custodian Order, ¶ 14.

17 8 *Del. C.* §§ 101–619.

18 D.I. No. 194 (Aug. 14, 2008). The Court issued three Orders related to the scope of the Custodianship: the October 12, 2007 Custodian Order; a December 12, 2007 Order confirming the Custodian Order and providing additional details such as who would bear the costs of the Custodianship; and the August 2008 Order. All citations to the docket in the Underlying Action are to documents that are publicly available.

that "the parties to this matter are negotiating earnestly and in good faith to resolve . . . all claims among the parties and their shareholders, officers and directors, as applicable, and to pay all the debts of RRI."[19] It further authorized the Custodian to continue as Custodian until the matter was resolved or until October 31, 2008;

> provided, however, that should the Resolution not have occurred prior to October 31, 2008, but prior to that date, the Custodian shall have initiated efforts to obtain financing to replace financing for RRI which expires on December 15, 2008 in the event that the Resolution does not occur, then this October 31 date shall be extended until December 31, 2008.[20]

The financing for RRI was important because, absent refinancing, RRI's sole asset—the Newark, Delaware property and building—was at risk.[21]

On December 16, 2008, the Custodian notified the Court that a settlement of the Underlying Action had been reached (the "Settlement").[22] Swayze further asked the

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19 *Id.*

20 *Id.* ¶ 3.

21 *See* Mot. to Amend Prior Orders Regarding Custodian and to Impose Additional Sanctions on Richard E. Gray, Sr., D.I. No. 184 Ex. A (June 20, 2008), Letter from Richard E. Gray to Alissa Balotti Anderson, Esq. ("[T]here is no reason whatever that you cannot and should not obtain new financing NOW and reduce monthly cash flow needs . . . . Further, if BFR is going to present obstacles to the refinancing, you had better know NOW while you still have time to obtain any required court approval and other orders—not in December when you do not have the luxury of time on your side.").

22 D.I. No. 195 (Dec. 16, 2008) ("Dec. 16, 2008 Letter"); *see also* Compl. ¶ 29 ("The Custodian, purportedly on behalf of RRI and its shareholders, agreed to the terms of the settlement, as outlined above, which were reduced to a written agreement (the "Settlement Agreement") (Exhibit D hereto), executed on or about December 16, 2008 . . . .").

Court to enter a final order approving the confidential global settlement and settlement stipulation that had "been signed and approved by all parties to the litigation, as well as an absolute majority of the outstanding stockholders of RRI" (the "Settlement Agreement" or "Agreement").[23] The next day, the Court issued a Final Order approving the confidential settlement and stipulation (the "Final Order").[24] The Final Order stated that the Settlement Agreement was "to be kept confidential" and that the parties "believe that it is beneficial to all stockholders of RRI."[25] It further instructed the Custodian to continue his service through the full consummation of the Settlement. On February 4, 2009, the Custodian advised the Court by letter that all outstanding issues between the parties had been resolved and that he had fulfilled his obligations as Custodian. On February 23, 2009, this Court issued an order terminating the Custodianship because "the parties to this matter have resolved all outstanding issues among them" (the "Termination Order").[26] Although the details of the Settlement were under seal, the Court's orders, the Custodian's letters, and numerous other letters, motions, and other filings were matters of public record.

The confidential Settlement provided for, among other things, the sale of the RRI Asset to BFR. This fact was not publicly available. On March 9, 2011, however, Jepsco

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23 Dec. 16, 2008 Letter 1; *see also* Compl. Ex. D, Settlement Agreement (Dec. 16, 2008).

24 Compl. Ex. E, Final Order (Dec. 17, 2008).

25 *Id.* at 1.

26 D.I. No. 198 (Feb. 23, 2009).

requested in the Underlying Action that "all papers filed in the action be opened for review pursuant to Court of Chancery Rule 5(g)(6)."[27] On April 8, 2011, after holding that Jepsco had standing to pursue its request because it met the requirements for intervening under Rules 24(a) and (b), I held that Jepsco was entitled to access certain documents subject only to a clarification of which documents Jepsco was seeking and resolution of any confidentiality issues.[28] The parties ultimately agreed to terms and conditions upon which Jepsco was permitted to have access to certain documents that were then under seal in the Underlying Action.[29]

Several of the claims in the Complaint are based on the terms of the Settlement Agreement. The Complaint alleges that, pursuant to the Settlement Agreement, BFR purchased the RRI Asset and that a substantial portion of the proceeds were transferred to Gray in derogation of the purpose of the Underlying Action.[30] According to Jepsco, the Underlying Action and the Custodian Order were intended to prevent Gray from obtaining the RRI Asset. The Complaint further alleges that the only consideration RRI received in the sale was payment of its mortgage.[31]

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27 Letter from Michael V. Weidinger, Esq., counsel for Jepsco, Ltd. to the Court, D.I. No. 199 (Mar. 9, 2011).

28 D.I. No. 204 (Apr. 8, 2011).

29 D.I. No. 216 (June 9, 2011).

30 Compl. ¶¶ 1, 3, 23.

31 *Id.* ¶ 30.

D. Procedural History of This Action

On March 20, 2012, Jepsco filed its Complaint in this action. To support its claims, Jepsco attached the following documents to the Complaint: (1) the Custodian Order; (2) this Court's December 12, 2007 Order confirming the appointment of Swayze as Custodian; (3) the March 4, 2008 confidentiality agreement between RRI and BFR; (4) the December 16, 2008 Settlement Agreement among RRI, BFR, Gray, and Gray's children; and (5) this Court's December 17, 2008 Final Order. Both Defendants Swayze and BFR moved to dismiss the Complaint. After extensive briefing, I heard oral argument on those motions on October 25, 2012. This Memorandum Opinion constitutes my ruling on these motions.

E. Parties' Contentions

The Complaint asserts claims against Swayze for breach of statutory and fiduciary duties and for an accounting of all information concerning the sale of the RRI Asset and certain tax matters. Jepsco also alleges that BFR aided and abetted the Custodian's breach of fiduciary duty because BFR had knowledge of the breach, was complicit in it, and facilitated the diversion of the consideration received for the sale of the RRI Asset to Gray.

Defendant Swayze moves to dismiss the Complaint on several theories. His main theory is that he is immune from suit as a Custodian of this Court. He also seeks dismissal of the Complaint on grounds of laches, failure to state a claim, release, and failure to join a necessary party, RRI. With regard to his laches defense, Swayze argues that the Complaint alleges facts that show it was filed too late and that Jepsco failed to

plead facts that would support a reasonable inference that the analogous statute of limitations was tolled in any way.

Defendant BFR joins Swayze in arguing that the Complaint is barred by laches. BFR further alleges that the Complaint fails to state a claim against it for aiding and abetting a breach of fiduciary duty because it does not contain factual allegations from which knowing participation in a breach of fiduciary duty reasonably may be inferred.

II. ANALYSIS

The governing pleading standard to survive a motion to dismiss is reasonable "conceivability."[32] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[33]

Thus, if the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[34]

Before I proceed, it will be useful to isolate the distinct wrongs alleged in the Complaint. First, Jepsco alleges that the Custodian breached fiduciary duties when he

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32 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

33 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

34 *Id.* at 536.

did not provide notice to Jepsco of the fact of the Settlement and of its terms.[35] One Settlement Agreement term that Jepsco alleges is unlawful is the purported release on behalf of all RRI shareholders, including Jepsco, of future claims against Gray and BFR with no notice to or approval by Jepsco.[36] In addition, Jepsco alleges that the Custodian breached statutory duties in executing the Settlement Agreement, which involved the sale of substantially all of RRI's assets. Specifically, Jepsco argues that, under the DGCL, it had a right to at least have notice of such a sale. Jepsco contends that, under 8 *Del. C.* § 271, a corporation can sell substantially all of its assets at a board of directors meeting, duly called, only "when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon . . . at a meeting duly called upon at least 20 days' notice."[37] According to Jepsco, no such meeting took place.[38] The sale of substantially all of a corporation's assets also could have been approved by written consents under 8 *Del. C.* § 228. If an action is taken by written consents under this Section, however, "notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be

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35 Compl. ¶¶ 28, 29, 35.

36 *Id.* ¶¶ 26, 27, 46.

37 8 *Del. C.* § 271.

38 Compl. ¶ 32.

given to" non-consenting shareholders.[39] Jepsco neither consented to nor received notice of an action taken by what would have been less than unanimous written consents.[40]

A third alleged wrong is the Custodian's failure to disclose to the Court that no notice of the Settlement or Settlement Agreement had been, or would be, provided to Jepsco, other RRI minority shareholders, or Kelly, as a director.[41] Lastly, the Complaint alleges that, contrary to the express requirement in the Custodian Order, the Custodian failed to provide financial statements to Jepsco, including a full accounting of the sale of the RRI Asset.[42]

The Custodian committed some of these alleged wrongs pursuant to an express order of this Court. For example, in selling the RRI Asset, the Custodian was effectuating the Final Order. The Final Order approves the Settlement Agreement and expands the authority of the Custodian to grant him "the power and authority to carry out the terms of the Settlement as set forth in the [Settlement Agreement]."[43] It further instructs the Custodian to "continue serving as Custodian for RRI through the completion

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39 8 *Del. C.* § 228(e).

40 Compl. ¶¶ 33, 34, 35.

41 *Id.* ¶¶ 46, 47, 50.

42 *Id.* ¶¶ 36, 39. Jepsco concedes that it received some financial information. Paragraph 39 of the Complaint alleges: "[N]either Jepsco nor any shareholder of RRI received . . . an accounting of the disposition of the proceeds of the sale, or any information until after the transaction was concluded, and even then only *ex post facto*, pursuant to Court directive."

43 Final Order ¶ 3.

of the full consummation of the Settlement."[44] Other challenged actions taken by the Custodian, however, were not undertaken pursuant to an express order of the Court. For example, no Court order directed the Custodian *not* to provide notice of the Settlement to Jepsco. With this distinction in mind, I turn to the Custodian's defenses.

A. Judicial Immunity

The Custodian's first argument is that he is immune from suit through this Court's judicial immunity. The doctrine of judicial immunity is "a general principle of the highest importance to the proper administration of justice."[45] This doctrine provides that "a judicial officer, in exercising the authority vested in him, should be free to act upon his own convictions, without apprehension of personal consequences to himself."[46] Delaware Courts have held that the same principle applies to "others who are acting as 'arms of the court.'"[47] "When a court officer is performing a judicial function, or a function 'integral to the judicial process,' he cannot be held personally liable for his actions in a civil proceeding."[48]

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44 *Id.* ¶ 4.

45 *Stump v. Sparkman*, 435 U.S. 349, 355 (1978).

46 *Id.*

47 *Smith v. Del. State Police*, 2012 WL 5355639, at *2 (Del. Super. Oct. 12, 2012) (citing *Buchanan v. Gay*, 491 F.Supp. 2d 483, 494–95 (D. Del. 2007)).

48 *Id.* (citing *Hughes v. Long*, 242 F.3d 121, 126 (3d Cir. 2001) and *Vick v. Haller*, 514 A.2d 782 (Del. 1986) (TABLE)).

Under 8 *Del. C.* § 226, the Court of Chancery may appoint a custodian or, if the corporation is insolvent, a receiver of and for a corporation. Section 226 provides a custodian all authority of a receiver under 8 *Del. C.* § 291, but it clarifies that "the authority of the custodian is to continue the business of the corporation and not to liquidate its affairs and substitute its assets, except when the Court shall otherwise order."[49] The custodian serves as an officer of the Court who appoints him.[50]

Thus, the Custodian, acting as an arm of this Court, is entitled to qualified judicial immunity. The scope of this immunity, however, has not yet been defined in Delaware.[51]

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[49] 8 *Del. C.* § 226(b). Section 291 provides that the Court of Chancery may appoint a receiver

> to take charge of [a corporation's] assets, estate, effects, business and affairs, and to collect the outstanding debts, claims, and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by the corporation and which may be necessary or proper.

[50] *Stockbridge v. Beckwith*, 33 A. 620, 620 (Del. Ch. 1887).

[51] Some other jurisdictions have addressed the issue. For example, one New York court held that "[j]udicial immunity only extends to a receiver who acts in good faith and with appropriate care and prudence." *See In re Liquid. of U.S. Capital Ins. Co.*, 948 N.Y.S.2d 549, 551 (N.Y. Sup. Ct. 2012). The Ninth Circuit, considering an alleged mismanagement of properties by a bankruptcy trustee, held that the trustee was "entitled to derived quasi-judicial immunity for her discretionary acts of hiring and supervising Pro Management." *Bennett v. Williams*, 892 F.2d 822, 825 (9th Cir. 1989). Texas courts follow a "functional approach" and focus on whether the person seeking immunity is "intimately associated with the judicial process and if that person exercises discretionary judgment comparable to that of the judge." *See Alpert v. Gerstner*, 232 S.W.3d

In *Marciano v. Nakash*,[52] then-Vice Chancellor, now Justice Berger distinguished between the immunity a custodian would receive "in the exercise of due care [and] . . . pursuant to an express and explicit order of the court" and "immunity with respect to every business decision [the custodian] will be called upon to make in breaking deadlocks of the board."[53] In *Marciano*, a court-appointed custodian was concerned that he might be drawn into extensive and costly litigation as a result of his appointment. The custodian asked the Court to decide whether the custodian's judicial immunity would extend to the business decisions he would be called upon to make. The Court did not attempt to resolve that issue. Rather, it concluded that it would be "inappropriate to attempt to define the parameters of a custodian's immunity in the abstract."[54] The Court also encouraged the parties to try to agree to contractual protections satisfactory to the proposed custodian which could be embodied in an order. In that regard, the Court noted that the parties appeared to agree that "a court-appointed receiver has immunity as a

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117, 126 (Tex. App. 2006). The Texas Court of Appeals in *Alpert* held that a receiver was entitled to judicial immunity for the acts she undertook pursuant to statutory authority but that she was not entitled "to derived judicial immunity to the extent that she may have breached any fiduciary duties to the beneficiaries in failing to exercise good faith and ordinary care in protecting the stock portfolio assets of the trust." *Id.* at 130–31.

52 1986 WL 4002, at *2 (Del. Ch. Apr. 2, 1986).

53 *Id.*

54 *Id.*

matter of law when, in exercise of due care, he acts pursuant to an express and explicit order of the court."[55]

1. Actions taken pursuant to an express Court order

I consider first the Custodian's actions in implementing the Settlement Agreement, including selling the RRI Asset, pursuant to this Court's Final Order. Jepsco contends that it was entitled to vote on, or at least have notice of the sale of substantially all of RRI's assets under DGCL Sections 271 and 228(e). The Custodian, however, maintains that no such vote or notice was required. First, he emphasizes that his authority arose under DGCL Section 226, not 271 or 228(e). As noted above, Section 226 authorizes all of the control of a corporation to be placed in the hands of the Court through a custodian. Because this Court approved the Settlement proposed by the Custodian and ordered the Custodian to implement the Settlement as reflected in the Settlement Agreement, the Custodian was acting pursuant to this Court's order when he participated in the sale of the RRI Asset.

In addition, there is at least a colorable legal basis for the Custodian's actions in not following the requirements of DGCL Sections 271 and 228(e) when he participated in the negotiations for the Settlement Agreement that led to the sale of the RRI Asset. He took those actions and implemented the Settlement Agreement pursuant to DGCL Section 226. Under the doctrine of independent legal significance, an action taken under

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[55] *Id.* (citing 2 Clark, *Law of Receivers*, § 292(d) and 16 Fletcher Cyc. Corp. § 7864 (Perm. Ed.)).

one section of the DGCL may not be challenged merely because it could have been subject to different requirements if undertaken under another section.[56] According to the Delaware Supreme Court, "the general theory of the Delaware Corporation Law is that action taken under one section of that law is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[57] In a custodianship, this Court and its Custodian "have all the powers" of a receiver,[58] who may "do all other acts which might be done by the corporation and which may be necessary or proper."[59] Here, the Custodian had the authority under Section 226 and the Final Order to sell the RRI Asset. He proposed such a course of action to the Court and this Court approved it. Thus, the Custodian's failure to follow Sections 271 and 228 alone provides no basis for stripping him of judicial immunity.[60]

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56 *See Orzeck v. Englehart*, 195 A.2d 375, 378 (Del. 1963); *see also Rothschild Int'l Corp. v. Liggett Gp. Inc.*, 474 A.2d 133, 136 (Del. 1984) (stating that the doctrine of independent legal significance is a "well-settled principle of Delaware Corporation Law"); *Warner Commc'ns Inc. v. Chris-Craft Indus. Inc.*, 583 A.2d 962, 970 (Del. Ch. 1989) (referring to Delaware's "bedrock doctrine of independent legal significance").

57 *Orzeck*, 195 A.2d at 378.

58 8 *Del. C.* § 226.

59 *Id.* § 291.

60 *See Marciano v. Nakash*, 1986 WL 4002, at *2 (Del. Ch. Apr. 2, 1986); *cf. Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992) (recognizing that a director is "not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication on the matter").

Furthermore, no facts in the Complaint lead to a reasonable inference that the Custodian suffered from a conflict of interest or acted in bad faith when he participated in the negotiations leading to the Settlement Agreement and later implemented the sale of the RRI Asset. The Custodian notified the Court that a *majority* of RRI's shareholders approved the Settlement.[61] This recitation appears in the Settlement Agreement and again in the Final Order, which was proposed by the Custodian and issued by this Court. In addition, the Custodian advised the Court only that three RRI shareholders, Richard E. Gray, Sr., Carson M. Gray, and Adelia H. Gray, had signed the Settlement Agreement.[62] The Custodian did not state that unanimous shareholder consent had been secured or sought. The Custodian did not indicate that a meeting of RRI's directors or shareholders had been held or that he would provide notice of the Settlement to all RRI shareholders. The Custodian, therefore, did not conceal from the Court the facts that led to this alleged wrong, *i.e.*, the sale of substantially all of RRI's assets with no vote by or notice to non-consenting shareholders. Based on the information the Custodian provided, the Court approved the Settlement Agreement in the Final Order. Although Jepsco may disagree with the Court's decision to enter such a Final Order, the Custodian was obligated, as an "arm of the Court," to execute that Order.

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61 Dec. 16, 2008 Letter 2.

62 Settlement Agreement 2. By the time the Settlement Agreement was signed, both Carson and Adelia Gray had reached the age of majority. Custodian's Mot. for Entry of Final Order, D.I. No. 195 ¶ 8 (Dec. 16, 2008), filed under seal.

For all of these reasons, I find that the Custodian is entitled to derived judicial immunity for his action in executing the Final Order, including the act of selling substantially all of RRI's assets, based on the terms set forth in the Final Order and Settlement Agreement. I therefore grant the Custodian's motion to dismiss the Complaint's first claim for breach of statutory duty.

2. Actions not taken pursuant to an express Court order

The other wrongs alleged in the Complaint involve actions by the Custodian that were not taken pursuant to an express order of this Court. For example, the Court did not explicitly order Swayze *not* to disclose the fact of the Settlement to Jepsco.[63] To the contrary, as Jepsco alleges, the issue of notice to minority shareholders was not brought directly to the attention of the Court during the proceedings in the Underlying Action. The Custodian's decision to support the Settlement Agreement as negotiated, and thereby avoid providing notice to Jepsco, was more like a business decision than an act undertaken as an "arm of the Court." Even in that case, however, the Custodian still would have a colorable claim to a qualified judicial immunity for decisions made while

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[63] The Custodian points to the combination of the Settlement Agreement and the Final Order, which required that the Settlement Agreement be filed under seal, as effectively precluding him from disclosing information to Jepsco and other minority shareholders. That may be true, but nothing in the documents submitted to the Court regarding the approval of the Settlement specifically drew the Court's attention to the fact that one effect of the various proposed orders would be to deny notice to certain minority shareholders of RRI.

acting in his court-appointed role.[64] Most likely, the Custodian's qualified immunity would provide protection akin to that of the business judgment rule, provided he acted in good faith and was not subject to a disabling conflict of interest.[65]

For the business decision of the Custodian at issue here, however, there conceivably could be a basis to deny him judicial immunity. For example, taking the facts in the light most favorable to Jepsco, it is possible that Gray and BFR, with the support of the Custodian, engaged in an intentional effort to keep the Settlement and its terms secret from Jepsco because they knew it improperly advantaged Gray, as Jepsco alleges. The facts that caused the Custodian to support this aspect of the Settlement have not yet been discovered fully. In these circumstances, the facts alleged in the Complaint conceivably could form the basis of a claim for which the Custodian would not be immune.

In addition, the Complaint alleges that the Custodian failed to comply with an express Court order. Specifically, the Custodian Order required the Custodian, among other things, to "[h]ave accountants prepare annual financial statements, copies of which

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64 *See Marciano v. Nakash*, 1986 WL 4002, at *2 (Del. Ch. Apr. 2, 1986); *see also supra* note 51.

65 *Cf. Bennett v. Williams*, 892 F.2d 822, 824 (9th Cir. 1989) (stating that the court "consistently held that liability will not be imposed for mistakes in business judgment" and that it is "deferential to the business management decisions of a bankruptcy trustee and [has] held trustees immune from collateral attack for acts of mismanagement when the trustee was acting within the court authorization").

will be distributed to all shareholders."[66] A separate provision in the Custodian Order required the "Custodian to provide a detailed financial report to all shareholders, as reasonably requested."[67] The Complaint contains no allegation that Jepsco requested financial reports from the Custodian while he was serving as Custodian from October 2007 through February 2009.[68] Nevertheless, the Custodian Order required the Custodian to distribute annual financial statements, even absent a shareholder request. The Custodian apparently did not distribute annual financial statements or financial reports to any RRI shareholder during his tenure.[69]

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66 Custodian Order ¶ 9.

67 *Id*. ¶ 19.

68 Jepsco alleges that it requested financial information from BFR and the Custodian, but that did not occur until *after* the Custodianship ended, when Jepsco discovered the sale of the RRI Asset. Compl. ¶ 38. The Complaint further alleges that Jepsco did not know of the sale of the RRI Asset until "many months" after the sale occurred. *Id.* ¶ 52. The sale had occurred before the Custodianship was terminated in February 2009. D.I. No. 198 (Feb. 23, 2009) ("[T]he parties . . . have fulfilled all obligations required by the confidential Settlement Stipulation . . . ."). The allegations in the Complaint, therefore, do not support a reasonable inference that Jepsco requested any financial information while Swayze was acting as Custodian.

69 Compl. ¶ 36. In the Custodian's brief, he offers explanations as to why no annual financial statements were supplied to RRI shareholders. He notes that his custodianship began in late 2007 and that he did not receive RRI's documents in time to distribute financial statements for 2007. The Custodian also avers that the Settlement was reached before the end of 2008 and that the December 2008 Final Order trumped any responsibilities he had under the 2007 Custodian Order to distribute annual financial statements. On Defendants' motions to dismiss, however, the Court may consider only the allegations in the Complaint and the documents of which the Court has taken judicial notice, and it must draw all reasonable inferences in Plaintiff's favor. Therefore, I accept Plaintiff's well-

I conclude, therefore, that Jepsco's well-pleaded allegations potentially could overcome the Custodian's qualified judicial immunity as to (1) his alleged failure to provide notice to Jepsco of the Settlement, (2) his failure to advise this Court that notice would not be provided to all of RRI's minority shareholders, (3) the Settlement's provision of release on behalf of Jepsco and Kelly without providing them notice or obtaining their consent, and (4) his alleged violation of the Custodian Order by not providing annual financial statements to RRI shareholders.

Determining whether any or all of these actions would be subject to a valid defense of judicial immunity when a custodian acts pursuant to the order appointing him but not under an express order of the Court regarding the action in question would necessitate defining much more fully the exact parameters of the immunity defense in this factual context. It is possible that, under these circumstances, a business judgment rule presumption might provide the appropriate degree of immunity. This is especially true in a case such as this one where the facts alleged in the Complaint do not support a reasonable inference that the Custodian suffered from a conflict of interest or failed to act in good faith. For purposes of this case, however, I need not explore this issue further on the preliminary record before me because I find that Defendants are entitled to dismissal of Jepsco's claims on the alternative ground of laches.

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pleaded allegations that the Custodian Order required the Custodian to distribute annual financial statements and that none was ever supplied. *Id.* Furthermore, at this preliminary stage, the Court cannot consider the Custodian's explanations for his actions.

B. Laches

The defense of laches bars an action in equity if the movant waited an unreasonable length of time before asserting its claims and the delay unfairly prejudices the nonmovant.[70] Generally, laches requires proof of three elements: (1) knowledge of a claim by the claimant; (2) unreasonable delay in bringing the claim; and (3) resulting prejudice to the nonmovant.[71] Equity follows the law, however, and this Court will apply a statute of limitations by analogy in appropriate circumstances.[72] Where the legal and equitable claim "so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity," the statute of limitations will bar the equitable remedy absent extraordinary circumstances.[73] The analogous statute of limitations for breach of fiduciary duty claims is three years.[74] This three-year period also applies to claims for breach of a statutory duty.[75] In this case, the Complaint

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70 *See, e.g.*, *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 7–8 (Del. 2009); *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 135 (Del. Ch. 2007) (noting that laches may apply if a claimant has knowledge of its claim and prejudices the opposition by unreasonably delaying in bringing the claim).

71 *Whittington*, 991 A.2d at 8 ("This doctrine 'is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights.'" (quoting *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982))).

72 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998).

73 *Whittington*, 991 A.2d at 9; *see also Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).

74 *See Whittington*, 991 A.2d at 9; *Stevanov v. O'Connor*, 2009 WL 1059640, at *7 (Del. Ch. Apr. 21, 2009); *see also* 10 *Del. C.* § 8106.

75 10 *Del. C.* § 8106.

was filed on March 20, 2012. Thus, Jepsco's claims will be presumptively time-barred if they accrued before March 20, 2009.

A statute of limitations begins to run, *i.e.*, the underlying cause of action accrues, at the moment of the alleged harmful act.[76] The plaintiff's actual awareness of underlying facts giving rise to the cause of action is not required. Instead, "the limitations period begins to run when the plaintiff is *objectively* aware of the facts giving rise to the wrong, *i.e.*, [when the plaintiff is] on inquiry notice."[77] Furthermore, if, as in this case, the complaint "alleges facts that show that the complaint is filed too late, the matter may be raised by a motion to dismiss."[78] To toll the time at which an analogous statute of limitations begins to run, a plaintiff must plead specific facts to demonstrate that the facts underlying his claim were so hidden that a reasonable plaintiff could not have discovered them within the limitations period.[79] In that regard, there are three commonly recognized theories that can support tolling: inherently unknowable injuries, fraudulent concealment, and equitable tolling.[80] But, even if tolling applies, once the

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76 *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 811–12 (Del. Ch. 2009); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7.

77 *In re ML/EQ Estate P'ship Litig.*, 1999 WL 1271885, at *3 (Del. Ch. Dec. 21, 1999).

78 *Id.* at *1 (alterations omitted).

79 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.

80 *Id.*

information underlying the plaintiff's claim is readily available, that plaintiff is on inquiry notice.[81]

1. When did Jepsco's causes of action accrue?

A cause of action for breach of fiduciary or statutory duty accrues at the moment of the alleged wrongful act.[82] The alleged wrongful acts in this case are the sale of the RRI Asset pursuant to the Settlement Agreement, the Custodian's failure to provide notice of this sale and the Settlement to RRI's minority shareholders, and the Custodian's failure to provide annual financial statements to RRI shareholders. The Settlement Agreement was entered on December 16, 2008, and the Custodian filed a letter with the Court that day reporting that a settlement had been reached. According to publicly available documents, the parties fulfilled all obligations required under the Settlement Agreement by February 4, 2009, and this Court terminated the Custodianship on February 23, 2009. Therefore, Jepsco's causes of action regarding the Custodian's alleged failings in relation to the Custodianship accrued, at the latest, on February 23, 2009. Accordingly, it is clear from the Complaint and publicly available information of which this Court can take judicial notice that the Complaint was filed more than three years after the laches period began. Absent tolling, therefore, because Jepsco brought its

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81 *Id.* at *8 (discussing publicly filed corporate documents and stating that "even where defendant is a fiduciary, a plaintiff is on inquiry notice when the information underlying plaintiff's claim is readily available").

82 *See In re Am. Int'l Gp., Inc.*, 965 A.2d at 811–12.

claims outside the analogous statutory limitations period, those claims generally would be time-barred by laches.

2. Was the statute of limitations tolled?

The last issue I must resolve is whether the statute of limitations was tolled. The facts alleged in the Complaint show it was filed too late. The Complaint alleges that the Settlement Agreement was executed on December 16, 2008 and that the RRI Asset was sold pursuant to the Settlement Agreement.[83] Jepsco denies, however, that it was on inquiry notice of these events at that time. According to Jepsco, Defendants actively concealed their wrongdoing from it by entering a confidential Settlement Agreement and by failing to provide Jepsco any information about the Settlement.[84] Therefore, Jepsco contends that the limitations period was tolled until November 2010 when its officer Kelly "first learned generally about the settlement and transaction."[85]

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83 Compl. ¶¶ 29, 30.

84 Opp'n of Jepsco, Ltd. to Defs.' Mot. to Dismiss ("Pl.'s Opp'n Br.") 23–24. In the alternative, Jepsco argues that this action relates back to the request it made in the Underlying Action in March 2011 to have the Settlement Agreement opened for review. *Id.* at 27; Letter from Michael V. Weidinger, Esq., counsel for Jepsco, Ltd. to the Court, D.I. No. 199 (Mar. 9, 2011). Court of Chancery Rule 15 provides that an amendment to a pleading can relate back to the date of the original pleading in certain circumstances. Ct. Ch. R. 15. Here, the Complaint was not an amendment, and the original filing was not a pleading but a letter to the Court. Under these circumstances, the relation back doctrine does not apply. Moreover, because this Court promptly granted Jepsco's request regarding the Settlement Agreement on April 8, 2011, nothing in the proceedings Jepsco initiated in the Underlying Action prevented it from commencing this action before March 20, 2012.

85 Pl.'s Opp'n Br. 24.

In response to Plaintiff's tolling argument, Defendants retort that Jepsco did not carry its burden to plead "specific facts to demonstrate that the statute of limitations was in fact, tolled."[86] The Complaint does not aver that Kelly did not learn of the relevant facts until 2010. Rather, it alleges that, "[e]ven after the sale of the RRI Asset, Jepsco was still not informed of the settlement, the terms of the Settlement Agreement, or the Real Estate Transaction, *until many months later*, when Kelly found out about these events by happenstance."[87] Because the sale of the RRI Asset took place in or before February 2009, I consider it reasonable to construe "many months later" to mean sometime in 2009. Assuming for purposes of argument, however, that such thin pleadings meet Plaintiff's burden, I consider next whether any of Jepsco's tolling arguments have merit.

a. Fraudulent concealment

Jepsco first argues that Defendants fraudulently concealed the facts necessary to put it on notice of its claims. According to Jepsco, Defendants concealed these facts by agreeing to keep the Settlement confidential and through their "silence and stonewalling" when Jepsco eventually did inquire about the terms of the Settlement in 2010 and 2011.[88]

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86 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6.

87 Compl. ¶ 52 (emphasis added).

88 Pl.'s Opp'n Br. 26.

Fraudulent concealment will suspend the statute until the plaintiff's rights could have been discovered in the exercise of reasonable diligence.[89] Under this basis for tolling the relevant limitations period, "a plaintiff must allege an affirmative act of 'actual artifice' by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth."[90]

Here, the Complaint alleges that "had Jepsco been informed of the terms of the proposed settlement prior to its execution, it could have made an appropriate application to the Court to reject the Settlement Agreement as fundamentally unfair."[91] According to Plaintiff, "neither Jepsco nor any shareholder of RRI received any proposals relating to, or drafts of, the Settlement Agreement for review."[92] Assuming these allegations are true, they essentially beg the question. For laches purposes, the question is when Jepsco

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89 *Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966) ("[W]hile the Statute of Limitations may not apply when the acts complained of are fraudulently concealed from the plaintiff, such application is suspended only until his rights are discovered or could have been discovered by the exercise of reasonable diligence."); *In re ML/EQ Estate P'ship Litig.*, 1999 WL 1271885, at *3; *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.

90 *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) (citing *Ewing v. Beck*, 520 A.2d 653, 667 (Del. 1987)); *see also In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 ("[F]raudulent concealment requires an affirmative act of concealment by a defendant—an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry.").

91 Compl. ¶ 44.

92 *Id.* ¶ 39.

was on inquiry notice of his claims. Jepsco had at least constructive notice of the Settlement of the Underlying Action in December 2008.

The Final Order expressly states that the parties to the Underlying Action had "negotiated to resolve all claims among the parties and their *shareholders*, officers, and *directors*."[93] The Order further states that, as part of this negotiated agreement, "the parties to the Stipulation and Settlement have agreed that the Settlement is to be kept confidential."[94] In addition, the Order alerts the public that the Custodian "has considered the merits of the proposed Settlement and the Stipulation and believes them to be fair, reasonable and *in the best interest of RRI and its stockholders*."[95] Thus, by December 2008, Jepsco could have known from publicly available information that Defendants had entered into a Settlement with potentially significant consequences to RRI shareholders, which Defendants represented to be on RRI shareholders' behalf and in their best interest. These available facts, *if pursued*, would have led Jepsco to discovery of its alleged injury.[96]

The confidentiality of the Settlement Agreement's terms did not conceal from Jepsco, fraudulently or otherwise, that a significant agreement had been reached. The details contained within the Settlement Agreement were not essential for Jepsco to realize

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93 Final Order 1 (emphasis added).

94 *Id.* at 1.

95 *Id.* at 2 (emphasis added).

96 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7.

the existence of several of the claims it has asserted in this action. To the contrary, the public filing of a document indicating that a confidential Settlement Agreement had been reached put Plaintiff "in possession of facts sufficient to make him suspicious, or that ought to make him suspicious" of the alleged "general fraudulent scheme."[97]

b. Nature of the Underlying Action

Jepsco's second argument is that the Settlement of the Underlying Action, which involved matters of corporate governance, hardly could have put it on notice of the sale of RRI's main asset to a company affiliated with Gray. This argument is more persuasive, but only as it related to the sale of the RRI Asset. The Underlying Action began as an action under 8 *Del. C.* § 225 relating to corporate governance matters and to who controls RRI.

By September 2007, the Delaware Supreme Court had invalidated Gray's purported election of his slate of directors. Presumably, this information would have been significant to Jepsco's officer Kelly, who was a director of RRI before Gray's illegal action. After the case was remanded to this Court, on October 12, 2007, I entered the Custodian Order which transformed the Underlying Action into a custodianship under 8 *Del. C.* § 226.[98] The Custodian's authority under Section 226 is broad. It even

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97 *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *7 & n.49 (quoting *Harner v. Prudential Secs. Inc.*, 785 F. Supp 626, 633 (E.D. Mich. 1992)).

98 Compl. ¶ 32 (stating that there was "a Court Order in effect holding that Kelly was a duly seated director of RRI" but that he was prevented from assuming that position). Consequently, Kelly and Jepsco were on inquiry notice of the Underlying Action.

includes the power to liquidate a corporation's affairs and distribute its assets upon order of this Court.[99] Jepsco was on notice, therefore, that the Custodian could have liquidated RRI upon Court order. This Court, in fact, issued an order in December 2008 approving the parties' confidential Settlement Agreement.

The public filings between December 2008 and February 2009 provided Jepsco ample notice that the Underlying Action had been resolved in a way that materially could affect its rights as a shareholder of RRI. Jepsco also knew by February 2009 that it had not received notice of any of the terms of the Settlement Agreement. One of those terms purports to give a release on behalf of the minority shareholders of RRI, including Jepsco. Similarly, Jepsco knew by February 2009 that it had not received any of the financial statements referred to in the Custodian Order.

It may be a closer question whether the confidentiality agreement conceivably could be an affirmative act of actual artifice that led Jepsco away from gaining knowledge of the sale of substantially all of RRI's assets. Possibly, this particular fact might not be part of the set of circumstances that Jepsco would have discovered in the exercise of reasonable diligence.[100] I do not believe so, but even if that were true, it only would affect Jepsco's claim for breach of statutory duty. For the reasons discussed in

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99 8 *Del. C.* § 226; *see also supra* note 49.

100 *See Giordano v. Czerwinski*, 216 A.2d 874, 876 (Del. 1966); *In re ML/EQ Estate P'ship Litig.*, 1999 WL 1271885, at *3; *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.

Part II.A.1, *supra*, however, I have held that the Custodian is immune from suit on that claim.

In conclusion, Jepsco was on inquiry notice of his claims no later than February 2009. The fact that a Settlement Agreement had been entered, and that its terms were confidential, were matters of public record. From February 2009, therefore, Jepsco had up to three years to inquire further into the allegedly wrongful acts that formed the basis for his Complaint. Indeed, Plaintiff admits that it had actual knowledge of the Settlement and the sale of the RRI Asset by November 2010 at the latest. Yet, Plaintiff unreasonably allowed the statute of limitations period to lapse in February 2012 before bringing its claim.

Plaintiff's claims for breach of fiduciary and statutory duties, aiding and abetting a breach of fiduciary duty, and for an accounting, therefore, are barred by laches. Based on that conclusion and my ruling on judicial immunity, I find it unnecessary to address Defendants' additional defenses of release, failure to state a claim, and failure to add a necessary party.

III. CONCLUSION

For the foregoing reasons, I grant Defendants' motions to dismiss the Complaint.

IT IS SO ORDERED.