STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: APRIL 12, 2012)

RONALD A. KRUPINSKI, Individually and Derivatively on Behalf of SCHARNHORST, INC.	:	
v.	:	**C.A. No. PB 07-3484**
WILLIAM A. DEYESSO, SCHARNHORST, INC., and RICHARD P. MCCABE	:	

DECISION

SILVERSTEIN, J. Before the Court is Defendants William A. Deyesso, Richard P. McCabe, and Scharnhorst, Inc.'s (Scharnhorst) (collectively, Defendants) Motion to Dismiss the Plaintiff Ronald A. Krupinski's Verified Third Amended Complaint and Jury Demand (Third Amended Complaint or Complaint) pursuant to Super. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Defendants argue that Krupinski's Complaint is barred by G.L. 1956 § 7-1.2-1324 and that Scharnhorst is dissolved, precluding Krupinksi from bringing a derivative action. Furthermore, Defendants contend that Krupinksi did not satisfy the requirements for filing a derivative claim, as set forth in § 7-1.2-711(c) and Super. R. Civ. P. 23.1, and that Counts II and IV of the Complaint are barred by the applicable statutes of limitations. Krupinski seeks to reinstate Scharnhorst and to relate back all claims to a time within the applicable statutes of limitations and § 7-1.2-1324.

I

Facts and Travel

Taking the information alleged in the Complaint as true, this case involves a potential shareholder dispute related to the Providence Centerfolds adult entertainment club (hereinafter, as the context may provide, Scharnhorst, the legal entity).[1] The facts as recited herein are gleaned directly from the Complaint.

In 1995, Krupinski sought to open an adult entertainment club at a location owned by his friend, Pasquale Cortellessa, on Eddy Street in Providence. Krupinski met with Frank Viola and Deyesso, and they agreed to open the Providence Centerfolds. Krupinski claims that he was to be a 33% owner in the club in exchange for his "sweat equity," or work building out and opening the club. He further claims that he was to earn $52,000 per year plus bonuses while working as a manager at the club. Viola, Deyesso, and Krupinski discussed purchasing Scharnhorst, which held a liquor license, as the entity to operate the club and to lease the space for the operation.

Viola purchased Scharnhorst. In December 1995, Deyesso and others became officers and shareholders of Scharnhorst though a corporate resolution that did not list Krupinski as a shareholder, director, or officer. Krupinski worked full-time from May 1995 to February 1996 to prepare to open the club, coming up with the Centerfolds name and developing the business plan and protocols. The Providence Centerfolds opened in February 1996, but closed after a day or two because of issues with the adult entertainment permit provided by Cortellessa. Krupinski agreed to reduce his ownership interest to 25% because of the permit issues and delays in opening the club.

[1] Scharnhorst was a Rhode Island corporation which operated an adult entertainment club or venue in Providence under the name Centerfolds. Herein it is sometimes referred to as Scharnhorst and sometimes as Providence Centerfolds.

The club reopened in August 1996 and operated until October 2001. Krupinski acted as manager from the club's opening until July 1997. Scharnhorst's 1996 annual report did not list Krupinski as a director or officer. He did not vote for the directors or officers or participate in any shareholder meetings.

In 1997, Deyesso began looking for other adult entertainment clubs to open as Centerfolds locations. Viola left the business that year, conveying his interest to Deyesso. McCabe then became a shareholder of Scharnhorst. Deyesso found a club in Worcester, Massachusetts known as Pudgy's, which he decided to purchase and convert to a Centerfolds location.

Deyesso terminated Krupinski from his position as manager of the Providence Centerfolds in July 1997 without providing him with any justification. At this time, Deyesso was allegedly finalizing the purchase of Pudgy's. Deyesso assured Krupinski he would find another job for him in the business, but never did. Deyesso and McCabe gave Krupinski's job at the Providence Centerfolds to the owner of Pudgy's.

Pudgy's was purchased the following month in McCabe's name. That same month, Deyesso had Krupinski sign a promissory note, which contained a provision that purported to take away Krupinski's voting rights in Scharnhorst. Deyesso told Krupinski the promissory note would vest Krupinski as a shareholder of Scharnhorst. Krupinski claims the note was executed under duress. At the time, Krupinski had never received any distributions from Scharnhorst, despite the business's profitability in 1997.

In 1997 or 1998, Deyesso and McCabe started 320 Advisors, Inc. (320 Advisors). 320 Advisors performed bookkeeping services for the Providence Centerfolds in exchange for payments of its costs plus seven percent of the Providence Centerfolds' gross monthly revenues.

Krupinski alleges Deyesso and McCabe engaged in self-dealing by paying large amounts from Scharnhorst to their company, 320 Advisors, without seeking competitive pricing. Krupinski also claims the bills submitted by 320 Advisors to the Providence Centerfolds were false and inflated.

In 2001, Deyesso and McCabe transferred money from the Providence Centerfolds to Buyers Choice, Inc., another company they controlled. The money was used to fund purchases of and make improvements to adult entertainment venues in Massachusetts that Deyesso and McCabe converted to Centerfolds. Krupinski complains that the new Centerfolds locations were cross-marketed with the original location, using the good will and name of the Providence Centerfolds. Krupinski claims Deyesso opened additional clubs in Massachusetts without giving Krupinski or Scharnhorst the opportunity to participate in any of the business ventures. These business purchases by Deyesso and McCabe included Oxco, Inc. and Oznemoc, Inc., two adult entertainment club businesses. Pudgy's, Oxco, and Oznemoc were all opened and operated by Deyesso and McCabe under the name Centerfolds.

Krupinski received disbursements (the Court believes disbursements as used in the Complaint means distributions) from Scharnhorst from 1998 to 2004, but did not receive any disbursements in 1996 or 1997 (again, the Court believes disbursements means Krupinski's alloquit share of the profits). He never voted or participated in the decision-making of the corporation, and he was not informed of Deyesso and McCabe's other adult entertainment ventures. He was never provided stock certificates. Further, Krupinski claims he was entitled to be repaid an amount equal to the promissory note he signed in favor of Deyesso.

The building in which the Providence Centerfolds was located was taken by eminent domain in 2001, and Deyesso and McCabe failed to timely find a new location. Krupinski

alleges that Deyesso and McCabe used the money remaining in Scharnhorst for themselves or their other ventures. They also used items, such as coolers, chairs, and signs, from the closed Providence club in the new locations. As set forth in the Complaint, Deyesso and McCabe searched—specifically without Krupinski's knowledge or inclusion in the process—for a new location for the Providence Centerfolds in 2002. Yet, Krupinski claims that as recently as 2005, they represented to him that they were still looking for a new location for Centerfolds in Providence.

Deyesso opened an adult entertainment club in Las Vegas with Nando Sostillio, a named director of Scharnhorst. Krupinski claims Sostillio used funds from the Providence Centerfolds to pay travel and related expenses to explore opening the Las Vegas club. Krupinski alleges that all of the other shareholders of Scharnhorst have participated in or profited from the opening of the additional Centerfolds locations (whether in Massachusetts or other states), while Krupinski was excluded.

Scharnhorst's corporate charter was revoked by the Secretary of State on October 7, 2005. Krupinski alleges that Deyesso and McCabe had failed to follow corporate formalities throughout their period of control of Scharnhorst. There were no elections of officers or directors and no shareholder or board of director meetings after 1996.

Krupinski brings this action both individually and derivatively on behalf of Scharnhorst. In the Third Amended Complaint, he claims breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, breach of partnership duty, negligence, accounting, misrepresentation, and unjust enrichment. Krupinski filed his original complaint on July 10, 2007. It was amended on February 18, 2011 and again on November 16, 2011. On February 3, 2012, the Court granted without prejudice Defendants' 12(b)(6) motion to dismiss all counts of

the Second Amended Complaint except for the breach of contract claim brought individually—that claim remained. The motion to dismiss was based on Krupinski's failure to comply with the requirements to file a derivative action, as provided by § 7-1.2-711 and Super. R. Civ. P. 23.1.

The current Complaint was filed February 8, 2012. It attempts to comply with the requirements of § 7-1.2-711 and Super. R. Civ. P. 23.1 by alleging demand futility. It includes new and additional counts for unjust enrichment (derivatively) and for breach of the duty of good faith and fair dealing and breach of partnership duties (both directly). In response, Defendants filed the instant Motion to Dismiss.

II

Standard of Review

It is well-settled in Rhode Island that the "sole function of a motion to dismiss is to test the sufficiency of the complaint." Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011) (quoting Laurence v. Sollitto, 788 A.2d 455, 456 (R.I. 2002)). The court must "assume the allegations contained in the complaint are true, and examine the facts in the light most favorable to the nonmoving party." A.F. Lusi Constr., Inc. v. R.I. Convention Ctr. Auth., 934 A.2d 791, 795 (R.I. 2007) (citations omitted); McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) ("examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts"). The trial judge "must look no further than the complaint . . . and resolve any doubts in the plaintiff's favor." Pellegrino v. R.I. Ethics Comm'n, 788 A.2d 1119, 1123 (R.I. 2002) (citations omitted); see Narragansett Elec., 21 A.3d at 277 (providing court "confined to the four corners of the complaint" in deciding motion to dismiss). The pleading must give fair and adequate notice of the plaintiff's claim, but need not contain a "high degree of factual specificity." See Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 824

(R.I. 2005); Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000) ("Although a plaintiff is not obligated to set out the precise legal theory upon which his or her claim is based, he or she must provide the opposing party fair and adequate notice of the type of claim being asserted").

A court should grant a 12(b)(6) motion only "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim." Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. R.I. Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)); McKenna, 874 A.2d at 225 ("[i]f it appears beyond a reasonable doubt that plaintiff would not be entitled to relief, under any facts that could be established, the motion to dismiss should be granted"). A 12(b)(6) analysis may include "whether the Court is confronted with a justiciable controversy." McKenna, 874 A.2d at 225.

III

Discussion

In their Motion, Defendants argue primarily that § 7-1.2-1324 bars Krupinski's claims because of his failure to bring them within two years following Scharnhort's dissolution. Defendants also raise other arguments to bar Krupinski's claims, including questions of Krupinski's standing as a shareholder, of sufficient notice to bring a derivative action, and of the statute of limitations on the two, new, direct claims in the Third Amended Complaint. In light of the dispositive finding with regard to § 7-1.2-1324 as hereinafter set forth, this Court need not discuss all of the Defendants' other arguments. However, the Court will briefly address Krupinski's request for reinstatement of Scharnhorst. Further, the Court must address whether the two, new, direct claims are permitted at this time.

A

§ 7-1.2-1324

At common law, dissolved corporations could not sue or be sued, regardless of when a cause of action arose. See Halliwell Assocs., Inc. v. C. E. Maguire Servs., Inc., 586 A.2d 530, 532 (R.I. 1991) ("At common law the legal dissolution of a corporation marked the death of its corporate existence and, in the absence of statutory provisions to the contrary, terminated that existence for *all* purposes whatsoever"); 19 Am. Jur. 2d Corporations § 2489 (2012) ("the general rule is that after the dissolution and termination of the existence of a corporation, no action can be maintained against it"). Thus, "without statutory authority, the life of the corporation would not continue even for the purpose of litigation . . . [and] the right to sue a dissolved corporation is usually limited to the time established by the legislature." 19 Am. Jur. 2d Corporations § 2490 (2012); see In re Citadel Indus., Inc., 423 A.2d 500, 503 (Del. Ch. 1980) ("statutory authority is necessary to prolong the life of a corporation past its date of dissolution"). To provide limited rights to sue a dissolved corporation, various states "have enacted corporate-survival statues that abrogate the harsh effect of the common-law rule by allowing a corporation's existence to continue for some time past the date of dissolution to settle its corporate affairs . . . ." Halliwell, 586 A.2d at 533.

In Rhode Island, the Business Corporations Act (BCA) sets forth the statutory framework with respect to corporate dissolution. See § 7-1.2-1301 et seq. It provides for survival of remedies for a limited period of time after a corporation's dissolution. Section 7-1.2-1324 provides, in pertinent part:

> "The dissolution of a corporation . . . [b]y the issuance of a certificate of dissolution by the secretary of state . . . does not take away or impair any remedy available to or against the corporation, its directors, officers, or shareholders, for any right or claim

> existing, or any liability incurred, prior to the dissolution if action or other proceeding on the right, claim, or liability is commenced within two (2) years after the date of dissolution."

Accordingly, while at common law corporate dissolution terminated any remedy against the corporation, under the BCA, dissolution is followed by an additional two-year period during which claims may be brought. See id.; Theta Props., Inc. v. Ronci Realty Co., 814 A.2d 907, 912 (holding "any claim asserted against a dissolved corporation must be brought within the statutory post-dissolution period for doing so").

A corporation ceases to exist for all purposes after the wind-up periods provided by statute in the BCA. See Theta, 814 A.2d at 913; see also § 7-1.2-1325 (continuing corporate existence for five years after dissolution to settle and close affairs, such as litigation brought within the two-year period). Therefore, "if a party fails to sue within the statutory period for doing so, there is no longer an entity that can sue or be sued, and any right of action against the corporation terminates." Theta, 814 A.2d at 913; see In re Citadel Indus., 423 A.2d at 503 (under Delaware law, explaining analogous statute provides "outside limit" after which corporation can no longer be sued). The two-year period "acts as a condition precedent to maintaining the lawsuit." Theta, 814 A.2d at 913; see Ochoa v. Union Camp Corp., 120 R.I. 898, 905, 391 A.2d 123, 127 (1978) (holding statute creating a liability and remedy unknown at common law not merely a limitation but a condition precedent to obtain the benefit of the liability created); see also 54 C.J.S. Limitations of Actions § 31 (2010) ("When a statute creates a cause of action unknown to the common law, a time limit for bringing suit prescribed by the statute is a condition precedent to maintaining the action").

Section 7-1.2-1324 is not a statute of limitations, but rather, a statute of repose. Theta, 814 A.2d at 916-17 (discussing similar, predecessor statute, § 7-1.1-98). "[A] 'statute of repose'

terminates any right of action after a specific time has elapsed irrespective of whether there has as yet been an injury," whereas "a 'statute of limitations' bars a right of action unless the action is filed within a specified period after an injury occurs." Salazar v. Machine Works, Inc., 665 A.2d 567, 568 (R.I. 1995); see Umsted v. Umsted, 446 F.3d 17, 22 n.4 (1st Cir. 2006); Theta, 814 A.2d at 913. The two-year period of repose bars actions brought after the statutory period and deprives the Superior Court of jurisdiction to entertain the action or enter judgment. See Theta, 814 A.2d at 915; § 7-1.2-1324; see also Ochoa, 120 R.I. at 905, 391 A.2d at 128 (interpreting statute of repose in Workers' Compensation Act as "express condition of the right to compensation . . . intended to bar the claim or right to compensation unless its provisions are complied with"). Any claim must be brought before the two-year period expires. Theta, 814 A.2d at 917. Specifically, "the shareholders of a dissolved corporation may not bring a claim in the name of the corporation unless they assert it before the expiration of the statutory wind-up period." Id. at 912 (citations omitted); Halliwell, 586 A.2d at 535 ("All derivative shareholder claims must be instituted before the expiration of this [two-year] period or are forever barred").

Statutes of repose have significant importance in terms of policy. Generally, a statute of repose "creates a substantive right in those protected to be free from liability after the legislatively-determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." 54 C.J.S. Limitations of Actions § 7 (2010). With regard to the BCA, "the [Rhode Island] Legislature sought to strike a balance between two competing principles; first, the rights of shareholders of a dissolved corporation to succeed to the assets of the corporation upon dissolution and, second, the implementation of an orderly and definite means of winding up the affairs of a dissolved corporation." Theta, 814 A.2d at 917 (quoting Halliwell, 586 A.2d at 535); cf. Qualitex, Inc. v. Coventry Realty Corp., 557 A.2d 850, 852-53

(R.I. 1989) (describing other statutes of repose as intended to provide reasonable limitation on potential liability). Unlike a statute of limitations, "[t]he bar of a statute of repose is absolute." 54 C.J.S. Limitations of Actions § 7 (2010). A statute of repose generally "may not be 'tolled' for any reason as tolling would deprive the defendant of the certainty of the repose deadline and thereby defeat the purpose of a statute of repose." Id. at § 133, 134; see Nett v. Bellucci, 774 N.E.2d 130, 134 (Mass. 2002).

There is no doubt that here, the Third Amended Complaint was filed outside of the two-year period provided by § 7-1.2-1324. Scharnhorst was dissolved by the Secretary of State on October 7, 2005. Krupinski filed the original complaint as a direct action on July 10, 2007, within the two-year statute of repose, but Krupinski did not file the current Complaint raising derivative claims until February 8, 2012, four years and four months after the statutory period lapsed.

Krupinski argues that the derivative claims brought in the current Complaint should relate back to the original filing. There is no indication that the doctrine of relation back should apply to claims barred by a statute of repose, and Krupinski's reliance on a Delaware case is misguided. See Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990). In Harris, the Delaware Chancery Court considered "the proper time to measure so-called demand futility where the original pleading does not purport to be brought derivatively." Id. at 228. The court related back the derivative claims to the time of the original complaint for purposes of determining the existence of demand futility; however, it did not treat the issue as implicating any statutes of repose that could have prevented the new, derivative claims from even being brought. See id. at 228-32 (considering time of determining demand futility where composition of board changed between original filing and amendment). The court determined that, where a statute of repose

issue is not raised, a derivative claim relates back to the date of the original complaint for purposes of determining demand futility. See id. The Delaware case does not expressly support application of relation back to place claims within a statute of repose time frame for the purpose of bringing any claims against a dissolved corporation, as would be necessary here.

While this Court is not aware and has not been made aware of any Rhode Island case law applying relation back to a statute of repose, under Massachusetts statutes of repose, claims do not relate back. See Sisson v. Lhowe, 954 N.E.2d 1115, 1126 (Mass. 2011) ("the principle of 'relation back' does not apply to a statute of repose because it 'would have the effect of reactivating a cause of action that the Legislature obviously intended to eliminate'"); Golden v. Gen. Builders Supply, LLC, 807 N.E.2d 822, 828-29 (Mass. 2004) (holding relation back does not apply where it would compromise an objective of the statutory scheme that creates the statute of repose); James Ferrera & Sons, Inc. v. Samuels, 486 N.E.2d 58, 60-61 (Mass. App. Ct. 1985) (ruling statute of repose "completely eliminates" cause of action and relation back does not apply). But see Fields v. Kent County, No. 1096-K, 2006 WL 345014, at *4-7 (Del. Ch. Feb. 2, 2006) (under Delaware law, relation back may apply to statutes of repose). Our supreme court's holdings in Theta and Ochoa seem to favor adoption of the Massachusetts rule. See Theta, 814 A.2d at 917 (stating "any claim . . . had to have been brought before the two-year post-dissolution period"); Ochoa, 120 R.I. at 905, 391 A.2d at 128 (stating "statute of repose . . . is an express condition of the right to compensation and is intended to bar the claim or right to compensation unless its provisions are complied with"). The policy behind the BCA statute of repose further supports a finding that relation back is inapplicable. See Theta, 814 A.2d at 917 (discussing balance of permitting claims and providing repose after corporation dissolves).

The Court declines to apply relation back principles to the statute of repose here in question and finds that application of that statute precludes this derivative action. Section 7-1.2-1324 does not simply bar the cause of action from being brought, but more specifically, provides that two years following the dissolution is the date of death of any unasserted action, including derivative actions. See Theta, 814 A.2d at 913; Halliwell, 586 A.2d at 535. Because no cause of action existed at common law against a dissolved corporation, § 7-1.2-1324 allows for a cause of action only in the period of time provided by the statute—making compliance with the statute of repose a condition precedent to maintaining the action. See Theta, 814 A.2d at 913; Ochoa, 120 R.I. at 905, 391 A.2d at 127; 54 C.J.S. Limitations of Actions § 31 (2010). Here, that time expired on October 7, 2007, two years following the corporate dissolution.

It is clear on the face of the Complaint that the derivative claims were not brought against Scharnhorst within two years of its date of dissolution. Accordingly, there exists no remedy for those claims, and this Court has no jurisdiction to hear them. See Theta, 814 A.2d at 915 (holding statute of repose to sue dissolved corporation bars lawsuit and deprives the court of jurisdiction to entertain the action). Such claims should be dismissed pursuant to Rule 12(b)(6). See Palazzo, 944 A.2d at 149-50 (permitting motion to dismiss when "clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts"); McKenna, 874 A.2d at 225 (permitting determination of whether justiciable controversy exits on motion to dismiss). Relation back does not apply here to a statute of repose that provides a cause of action otherwise non-existent at common law and that has been interpreted by the Rhode Island Supreme Court as definitively barring any claims arising beyond the two-year period. See generally Theta, 814 A.2d 907. Therefore, the claims brought in the Third Amended Complaint, with the exception of the individual breach of contract claim previously raised, are dismissed.

B

Reinstatement

In light of the finding above, it is unnecessary for this Court to address some of the remaining arguments of the Defendants.[2] However, the Court will briefly discuss reinstatement, because the parties argue it may or may not have some effect on the foregoing decision on the statute of repose.

Krupinski has requested this Court to reinstate Scharnhorst as a corporation pursuant to § 7-1.2-1312. Krupinski argues this would make Scharnhorst's corporate existence retroactive, eliminating the applicability of § 7-1.2-1324 and providing Krupinski with standing as a shareholder both at the time of the events alleged and now. Defendants argue that Scharnhorst should not be reinstated, and that there is no legal basis for Krupinski's claim that reinstatement would allow the derivative claims to proceed.

The Court will not judicially reinstate Scharnhorst, as the Court does not believe it within its power to do so. The statute provides that "[w]ithin ten (10) years after issuing a certificate of revocation . . . the secretary of state may withdraw the certificate of revocation and retroactively reinstate the corporation in good standing as if its articles of incorporation had not been revoked . . . ." Sec. 7-1.2-1312. By the statute's plain language, it is the Secretary of State who has the power to reinstate a dissolved corporation. See id.

[2] Defendants claim that the derivative counts do not comply with the requirements for bringing a derivative action set by § 7-1.2-711 and Super. R. Civ. P. 23.1, and that Krupinski no longer has standing as a shareholder because Scharnhorst has dissolved. Because all of the derivative claims are dismissed as outside the statutory period provided in § 7-1.2-1324, it is not necessary to address these arguments. The Court need not, and will not, at this time make a ruling on whether the derivative claims in the Third Amended Complaint satisfy § 7-1.2-711 and Rule 23.1, or whether Krupinski would have had standing as a shareholder. The Court will discuss infra part III(C) whether Krupinski may proceed with Counts II and IV, the new counts set forth in the Third Amended Complaint.

Here, Scharnhorst has not been reinstated by the Secretary of State.[3] Because Scharnhorst has not been reinstated in accordance with the statute, the Court need not resolve the effect its reinstatement would have. Any related arguments are inapplicable. However, the Court offers the following discussion regarding reinstatement.

In one of the only cases referencing the Rhode Island statute, a Connecticut Superior Court stated that it "provides for . . . retroactive reinstatement of a corporation." Groton Open Space Ass'n, Inc. v. Groton Planning Comm'n, No. 124625, 2004 WL 2222842, at *5 (Conn. Super. Sept. 14, 2004). In that case, however, the corporation "provided evidence that under this statute it has been returned to good standing." Id. Thus, that court was not faced with determining whether the entity was a "de facto corporation" at the relevant time. See id. at *4-5. The Connecticut court only considered the effect of reinstatement once evidence was provided that the corporation had already been reinstated.

Under Delaware law, as a point of comparison, corporations may be reinstated upon filing a certificate meeting certain requirements with the secretary of state. See Del. Code Ann. tit. 8, § 312. Delaware, like Rhode Island, places a limit on the period of time during which claims may be brought against a dissolved corporation and the period of time in which those claims must be settled. Compare Del. Code Ann. tit. 8, § 278, with §§ 7-1.2-1324, 7-1.2-1325. The Delaware code allows, however, for that period to be extended by the Court of Chancery in its discretion. See Del. Code Ann. tit. 8, § 278 (" . . . or for such longer period as the Court of Chancery shall in its discretion direct"). As in Rhode Island, the Delaware statutes do not authorize the courts to fully reinstate a dissolved corporation. Compare § 7-1.2-1312, with Del.

[3] Krupinski indicated in his papers that he is in the process of filing an attempt to reinstate Scharnhorst, but acknowledges it is unlikely he will be successful in the reinstatement. (Pl.'s Post-Hr'g Pithy Mem. in Supp. of His Obj. to Defs.' Mot. to Dismiss the Third Am. Compl. 1, Mar. 22, 2012.)

Code Ann. tit. 8, § 312 (both providing secretary of state with authority to reinstate dissolved corporation). But unlike Rhode Island law, Delaware code permits the chancery court to continue a corporation for winding up purposes and for the settlement of claims. Because in the case at bar reinstating Scharnhorst is intended primarily to permit Krupinski to bring these derivative claims once the statutory period for doing so has passed, this Court finds instructive the analysis of the Delaware Court of Chancery considering continuation of a corporation for very similar purposes.[4]

The Delaware Court of Chancery opinion discussed the prospect of continuing a corporation for the purposes of joining the corporation as a defendant in complex tort litigation after the statutory limit of claims under Delaware law had elapsed. The court likened a continuation in that situation to requesting that the court "call the players back from the dressing room, get them back into uniform, and require them to play a little longer even though the regulation game was over and the crowd had gone home." In re Citadel, 423 A.2d at 506. Regarding the power to continue a corporation to face a claim, the chancery court expounded:

> "Nor do I feel that it would be wise to vest this Court with such power. Once a corporation is dissolved, the following three-year [or two-year] period run, all known debts paid, all remaining assets distributed to shareholders, books and records destroyed, and officers and directors gone on to other endeavors, how can any court be expected to get everyone reconvened and reorganized so as to 'continue' the corporation as an entity for further winding up purposes? No doubt this is one reason for the existence of s 279 [or § 7-1.2-1324] in the first place. And if the corporation is so 'continued' after the passage of a period of years so as to enable others to sue it, what happens if a large money judgment is obtained against it? Who pays? How are former liability insurance contracts affected? How can a vast number of former shareholders be compelled to return any final distribution of assets,

[4] This Court and the courts of this State frequently refer to Delaware law on corporate matters. See Bove v. Community Hotel Corp. of Newport, R.I., 105 R.I. 36, 41-42, 249 A.2d 89, 93 (1969).

> etc.? In each such case these factors, along with a myriad of others, would have to be considered by this Court if it were to properly exercise its discretion to continue the entity. In the case of a large, publicly-held corporation, the task would be enormous and the potential problems and considerations would be boundless." Id.

Even in Delaware, where the statutes permit the chancery court to continue the corporation for litigation, the court expressed this reluctance to do so. See id. at 503-04.

Similarly, this Court is of the opinion that, were it within its powers to do so, a dissolved corporation for which the statutory period to bring claims has elapsed should not be reinstated for the purpose of bringing a new claim against it. Permitting a court to reinstate a dissolved Rhode Island corporation after the statutory period seems contrary to both the legislative intent to provide a limited period of time to bring claims and the public policy to provide repose, allowing a corporation to completely wind up its affairs. By the plain language of the Rhode Island statute, the Court has no authority to reinstate a corporation. Moreover, this Court is skeptical of the use of § 7-1.2-1312 to skirt the BCA statute of repose, which provides the existence of the right to sue a dissolved corporation and limits that right to two years following dissolution.

C

Counts II & IV

Although the two-year statute of repose bars the derivative claims brought against the dissolved corporation, the Court's dismissal on that ground has no effect on Krupinski's breach of good faith and fair dealing (Count II) and breach of partnership duty (Count IV) claims. The two claims, brought directly—as opposed to derivatively—and against only Deyesso, are first raised in the Third Amended Complaint. Deyesso suggests in his brief that Krupinski was not permitted to bring the new claims, and Deyesso contends they are barred by the ten-year statute of limitations. (Defs.' Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pl.'s Verified Third Am.

Compl. and Jury Demand Pursuant to R. 12(b)(6) 1-2, Feb. 20, 2012.) Krupinski argues that there was no restriction on the claims he could bring in a Third Amended Complaint and that the new counts relate back to the original complaint.[5] (Pl.'s Obj. to Defs.' Mot. to Dismiss the Third Am. Compl. 1, Mar. 7, 2012.) This Court need not even reach the applicability of the relation back doctrine because it will not permit these two claims to be added in the Third Amended Complaint.

It is clear that whether to allow an amended pleading is a matter within the sound discretion of the trial justice and will not be disturbed on review, absent abuse of discretion. See Barette v. Yakavonis, 966 A.2d 1231, 1236 (R.I. 2009); Manocchia v. Capital Partners Television Invs., 658 A.2d 907, 909 (R.I. 1995); Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1143 (R.I. 1992); Dionne v. Baute, 589 A.2d 833, 836 (R.I. 1991). While "mere delay" may not be enough for a justice to deny amendment, "undue and excessive delay that causes prejudice to the opposing party is grounds for denial." Connecticut Valley Homes of East Lyme, Inc. v. Bardsley, 867 A.2d 788, 793 (R.I. 2005) (quoting Faerber v. Cavanagh, 568 A.2d 326, 329 (R.I. 1990)); see Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514, 531 (observing that the risk of prejudice increases over time). It has been stated that "the trial justice's discretional authority to deny amendments to pleadings when delay is involved must always be placed within the scope of the spirit of the Superior Court Rules of Civil Procedure: They shall be construed to secure the just, speedy, and inexpensive determination of every action." Id. (internal citations omitted). A trial justice will most often deny an amendment when

[5] When Counts II-VI were dismissed without prejudice, the Court's Order provided that "Plaintiff shall have twenty (20) days . . . to file an Amended Complaint." Order, Feb. 10, 2012. The Order did not restrict the contents of the Amended Complaint, although the Court had intended the Complaint to be amended so that the derivative claims could comport with § 7-1.2-711 and R. 23.1.

"the amendment will result in undue prejudice to the other party, is unduly delayed, is offered in bad faith or for dilatory purpose, or [when] the party has had sufficient opportunity to state a claim and has failed." Faerber, 568 A.2d at 329 (quoting 3 Moore's Federal Practice ¶ 15.08(4) (2d ed. 1988)). Significant passage of time—without good cause—between the original pleading and the proposed amended pleading has provided trial justices with firm grounds to deny an amended claim or defense. See Harodite, 24 A.3d at 532-33 (affirming denial of motion to amend and add new count when plaintiff had ample opportunity to amend for over one year prior); Faerber, 568 A.2d at 330 (finding wait of twelve years to amend counterclaim is "undue and excessive delay"); see also Connecticut Valley Homes, 867 A.2d at 793 (upholding trial justice's finding that amendment would be untimely and prejudicial when brought just before trial).

Here, the facts as recited in Krupinski's Complaint demonstrate that the relevant events forming the basis of his claims occurred in the late 1990s. Krupinski first brought this action in July 2007. He filed his Third Amended Complaint on February 8, 2012, approximately four and a half years later. Krupinski had already been granted leave by the Court to file two prior, amended complaints. Although the Court permitted Krupinski in February 2012 to file another amended complaint following the dismissal without prejudice of the derivative claims, it was intended that the amended complaint would address the issues related to proper filing of those derivative claims. The Order was not to permit Krupinski carte blanche to bring any additional claims he sees fit. Amendment of a pleading at this stage remains at the Court's discretion.[6] See Super. R. Civ. P. 15(a).

[6] Notably, when this Court granted the February 10, 2012 Order permitting Krupinski twenty days to file an amended complaint, the Court had not reviewed a copy of the complaint as it was to be amended. Rule 15(a) provides: ". . . a party may amend the party's pleading only by leave

The Court will not allow Krupinski to bring these additional individual claims at this juncture. Bringing additional claims now, four and a half years after the original pleading and ten to fifteen years after the relevant events occurred, constitutes undue delay. See Harodite, 24 A.3d at 531; Connecticut Valley Homes, 867 A.2d at 793. Krupinski possessed ample knowledge and had sufficient opportunity to bring the breach of the duty of good faith and fair dealing and the breach of partnership duty claims far earlier. See Faerber, 568 A.2d at 329 (presenting that amendment may be denied when unduly delayed or party had sufficient opportunity to state claim and failed). The Court did not authorize him to amend his pleadings to add the new, direct claims in Counts II and IV. Permitting Krupinski to now bring these claims would frustrate a just, speedy, and inexpensive resolution of this matter, to which Defendants are entitled. See Connecticut Valley Homes, 867 A.2d at 793 (relying on spirit of rules of civil procedure in denying motion to amend). Accordingly, the Court dismisses Counts II and IV of the Third Amended Complaint.

IV

Conclusion

After due consideration, the Court grants Defendants' Motion to Dismiss for failure to state a claim upon which relief may be granted. Krupinski's derivative claims were brought well after the expiration of the two-year period provided by statute to bring any and all claims against a dissolved corporation. As such, this Court cannot hear the derivative claims set forth in Counts III and V-VIII. Further, within its discretion to deny amendment of a pleading, the Court

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of the court or by written consent of the adverse party . . . . Amendments shall be embodied in a fair copy of the whole paper as amended, which shall be substituted for the original unless otherwise ordered by the court." At the time of its Order, the Court had not ruled specifically on any copy of an amended complaint.

dismisses Counts II and IV of the Third Amended Complaint. Prevailing counsel shall present an Order consistent herewith which shall be settled after due notice to counsel of record.