IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JAMES FORSYTHE and ALAN TESCHE, Individually and derivatively on behalf of CIBC EMPLOYEE PRIVATE EQUITY FUND (U.S.) I, L.P.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1091-VCL
ESC FUND MANAGEMENT CO. (U.S.), INC., PETER H. SORENSEN, DEAN A. CHRISTIANSEN, VERNON L. OUTLAW, ORLANDO FIGUEROA, ALBERT FIORAVANTI, CIBC ESC ADVISORS, LLC, CIBC ESC SLP, LLC; and CANADIAN IMPERIAL BANK OF COMMERCE,	)	
Defendants,	)	
and	)	
CIBC EMPLOYEE PRIVATE EQUITY FUND (U.S.) I, L.P.,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION AND ORDER

Submitted: October 26, 2007
Decided: October 31, 2007

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LAMB, Vice Chancellor.

I.

The defendants have moved pursuant to Court of Chancery Rule 59(f) for reargument of a portion of this court's October 9, 2007 Memorandum Opinion granting in part and denying in part the defendants' motion to dismiss.[1] The relevant portion of the opinion is the court's conclusion that the complaint adequately alleges facts to support a finding of equitable tolling as applied to the plaintiffs' claims, so that the plaintiffs timely filed their complaint. The defendants do not challenge the court's holding that the concept of equitable tolling applies in this action.[2] Rather, the defendants argue that the court misunderstood a material fact in determining when the plaintiffs were on inquiry notice of their claims.[3] For the reasons stated below, the court denies the defendants' motion.

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[1] *Forsythe v. ESC Fund Mgt. Co. (U.S.), Inc.*, No. 1091, 2007 WL 2982247 (Del. Ch. Oct. 9, 2007).

[2] "[T]he statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." *In re Dean Witter P'ship Litig.*, No. 14816, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998). "Underlying this doctrine is the idea that 'even an attentive and diligent [investor] relying, in complete propriety, upon the good faith of [fiduciaries] may be completely ignorant of transactions that . . . constitute self-interested acts injurious to the [Partnership].'" *Smith v. McGee*, No. 2101, 2006 WL 3000363, at *3 (Del. Ch. Oct. 16, 2006) (quoting *Dean Witter*, 1998 WL 442456, at *6)).

Here, the complaint alleges that the plaintiffs were ignorant of transactions that constituted self-interested acts injurious to the Fund, namely, off-loading underperforming CIBC investments into the Fund for the benefit of CIBC and to the detriment of the Fund. The complaint also alleges that the plaintiffs relied on their fiduciaries for information related to valuation of the Fund's investments. Therefore, the court found that equitable tolling could apply.

[3] "[T]he statute is only tolled until the investor 'knew or had reason to know of the facts constituting the wrong.'" *In re Tyson Foods, Inc. Consl. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007) (citing *Dean Witter*, 1998 WL 442456, at *6)).

II.

The standard applicable to a motion for reargument is well settled. To obtain reargument, "'the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law.'"[4] The misunderstanding or misapplication must be such that "'the outcome of the decision would be affected.'"[5] In addition, a court considering a motion for reargument under Court of Chancery Rule 59(f) may re-examine only the existing record.[6] New evidence generally will not be considered on a Rule 59(f) motion.[7]

The defendants argue that the court erred when it stated in the opinion that:

> The plaintiffs have alleged facts supporting the conclusion that it was not until April 2002, when they received the first annual report indicating the Fund had taken substantial write-offs of the investments (meaning the investments had been sold at a loss, thereby revealing the true value of those investments), that they had facts sufficient to put them on notice of wrongdoing with regard to management of the Fund.

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[4] *Deloitte & Touche U.S.A., LLP v. Lamela*, No. 1542, 2006 WL 345007, at *2 (Del. Ch. Feb. 7, 2006) (quoting *Goldman v. Pogo.com, Inc.*, No. 18532, 2002 WL 1824910, at *1 (Del. Ch. July 16, 2002)); *see also Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995).
[5] *Lamela*, 2006 WL 345007, at *2 (citing *Stein v. Orloff*, No. 7276, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985)).
[6] *See Lamela*, 2006 WL 345007, at *2 (citing *Miles*, 677 A.2d at 506).
[7] *Id.*; *see also Miles*, 677 A.2d at 506; *Maldonado v. Flynn*, No. 4800, 1980 WL 272822, at *3 (Del. Ch. July 7, 1980).

The defendants discern two errors in this statement. First, they argue that, contrary to the plaintiffs' representation to the court, the annual report says nothing about write-offs. Therefore, that report could not have put the plaintiffs on inquiry notice of their injury.[8] Second, the defendants argue that the annual report and a letter to investors dated December 12, 2001 "are identical in terms of the information provided about the value of the Fund's assets and the losses incurred." The defendants argue that if the annual report was sufficient to put the plaintiffs on notice of their injury, then the December 12 letter was equally sufficient to put them on notice months before April 2002.

The defendants are correct that the court misunderstood a fact. The court incorrectly concluded that the plaintiffs first learned of write-offs when they received the annual report in April 2002. The complaint alleges that the Fund took its first significant write-offs in April 2002. However, the complaint never identifies the document in which this information is found, or links this information to the annual report.[9] It is unsurprising, then, that, as the defendants point out, the annual report does not seem to mention write-offs. The opinion

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[8] The annual report was not an exhibit in the record at the motion to dismiss stage. Rather, the defendants introduce this report as an exhibit to their motion for reargument. As noted, the court cannot rely on this new evidence when deciding the motion for reargument.

[9] The complaint does refer to annual reports, but not with relation to write-offs taken in April 2002. Rather, it refers to reports the plaintiffs received from March to May 2003 that take, for the first time, significant write-offs of specific investments in the Merchant Banking Fund and the Trimaran Fund. *See* Compl. ¶¶ 111, 112, 126.

should have omitted any reference to the plaintiffs' receiving a "first annual report" in April 2002. Still, this motion for reargument will be denied because the error was immaterial to the outcome of the decision.

"A plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception."[10] Even with the court's error, the plaintiffs met this burden. The plaintiffs alleged that disclosures they received prior to April 2002 were inadequate to put them on inquiry notice, and the court rejected the defendants' arguments to the contrary.[11]

The plaintiffs then alleged they were on inquiry notice, at the earliest, when the Fund took significant write-offs in April 2002. Absent further argument by the

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[10] *Brady v. Pettinaro Enter.*, 870 A.2d 513, 525 (Del. Ch. 2005) (citing *In re Dean Witter*, 1998 WL 442456 at *6).

[11] First, as the court held in the opinion, the disclosures only show that the Fund estimated that some of its investments had lost value, not that the investments were, as the plaintiffs allege, completely worthless at the time they were transferred to the Fund. As the court also previously held, the fact that these disclosures comported with the Partnership Agreement's mandates had no impact on deciding whether the plaintiffs were on inquiry notice. The complaint alleges self-interested acts, and therefore the plaintiffs did not need to allege active concealment in this case.

Second, as the court held in the opinion, an investor looking solely at the losses disclosed in these reports could have reasonably concluded that they were due to market conditions existing at the end of 2001 (and as described in the December 12, 2001 letter) rather than mismanagement of the Fund. *See also Pomeranz v. Museum Partners, LP*, No. 20211, 2005 WL 217039, at *13 (Del. Ch. Jan. 24, 2005) (holding that the plaintiff was on inquiry notice where it was aware that a major investor had withdrawn from the partnership, and partnership's value subsequently plummeted); *In re Dean Witter*, 1998 WL 442456 at *9 (finding that plaintiffs were on inquiry notice where partnerships had suffered steady losses from the outset *and* the partnerships' public filings contained information suggesting potential problems); *Oliver v. Boston Univ.*, No. 16570, 2006 WL 1064169, at * 21 (Del. Ch. Apr. 14, 2006) (holding that defendant directors were on inquiry notice of derivative claims because they were aware of the self-interested nature of several of the transactions, and shareholders had expressed concerns about transactions).

defendants, the court ruled that, for purposes of the motion to dismiss, the plaintiffs were not on inquiry notice until April 2002. This conclusion was not predicated on the existence of the annual report, but rather on the plaintiffs' allegations that nothing prior to April 2002 put them on inquiry notice. Therefore, the court's reference to the annual report in its opinion was not a material error, and the motion for reargument will be denied on this point.

The defendants' second alleged error, that the court incorrectly assumed the December 12 letter and the annual report provided different disclosures, must fail as well. The court has clarified that its decision was not predicated on the allegation that the annual report put the plaintiffs on inquiry notice of their injury. It was premised on the allegation that the disclosures prior to April 2002 did not put the plaintiffs on inquiry notice. Therefore, the motion for reargument will be denied as to the second alleged error.

III.

Although the court misunderstood a fact in determining, for purposes of the motion to dismiss, that the plaintiffs were not on inquiry notice until April 2002, the misunderstanding involved an immaterial fact. The plaintiffs' allegation that they were not on inquiry notice until the Fund took significant write-offs in April 2002 was sufficient to establish, for the purposes of the motion to dismiss, that the complaint was timely filed. The defendants remain free to present evidence on

summary judgment or at trial that the plaintiffs were, in fact, on inquiry notice prior to April 2002. The motion for reargument is DENIED. IT IS SO ORDERED.