Unreported Cases

INTRODUCTION

UNREPORTED CASES is a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. Select unreported cases of a corporate nature that have not been published by a reporter system are included. The court's opinions and memorandum opinions are printed in their entirety, exactly as received.

CASE INDEX

This Issue

Page

AMIRSALEH v. BOARD OF TRADE OF THE CITY OF NEW YORK, INC., No. 2822-CC (Del. Ch. Sept. 11, 2008). CHANDLER, *Chancellor* 615
COMET SYSTEMS, INC. SHAREHOLDERS' AGENT v. MIVA, INC., No. 2793-VCL (Del. Ch. Oct. 22, 2008). LAMB, *Vice Chancellor* 630
EBG HOLDINGS LLC v. VREDEZICHT'S GRAVENHAGE 109 B.V., No. 3184-VCP (Del. Ch. Sept. 2, 2008). PARSONS, *Vice Chancellor* 642
IN RE LORAL SPACE & COMMUNICATIONS INC. CONSOLIDATED LITIGATION, No. 2808-VCS (Del. Ch. Sept. 19, 2008). STRINE, *Vice Chancellor* 670
OLSON v. HALVORSEN, No. 1884-VCL (Del. Ch. Oct. 22, 2008). LAMB, *Vice Chancellor* 733
SPRINT NEXTEL CORP. v. iPCS, INC., No. 3746-VCP (Del. Ch. Oct. 8, 2008). PARSONS, *Vice Chancellor* 744

STATUTES CONSTRUED[1]

This Issue

DEL. CODE ANN. tit. 6

§ 18-101(6) 642
§ 18-108 642
§ 18-201(b) 642
§ 18-201(d) 642
§ 18-301(b) 642
§ 18-802 744
§ 18-1101(b) 642

DEL. CODE ANN. tit. 8

§ 102(a)(3) 744
§ 211(c) 744
§ 226(a)(3) 744

DEL. CODE ANN. tit. 10

§ 102(b)(7) 670
§ 3104 642
§ 3104(c) 642
§ 3104(c)(1) 642

RULES OF COURT[1]

This Issue

Del. Court of Chancery Rule 9(b) 630, 642
Del. Court of Chancery Rule 12(b) 630
Del. Court of Chancery Rule 12(b)(2) 642
Del. Court of Chancery Rule 12(c) 615
Del. Court of Chancery Rule 56 . . . . . 615, 630
Del. Court of Chancery Rule 56(c) 630
Del. Court of Chancery Rule 56(h) 630

[1]Page reference is to the first page of the case in which the statute or rule is construed.

AMIRSALEH v. BOARD OF TRADE OF THE CITY OF NEW YORK, INC.

No. 2822-CC

Court of Chancery of the State of Delaware, New Castle

September 11, 2008

Elizabeth M. McGeever, Esquire, of Prickett, Jones & Elliott, P.A., Wilmington, Delaware; and Jonathan S. Shapiro, Esquire, Robert J. Shapiro, Esquire, and Kerry C. Foley, Esquire, of The Shapiro Firm, LLP, New York, NY, of counsel, for plaintiff.

Donald J. Wolfe, Jr., Esquire, Michael A. Pittenger, Esquire, and Berton W. Ashman, Jr., Esquire, of Potter Anderson & Corroon LLP, Wilmington, Delaware, for defendants.

CHANDLER, *Chancellor*

No contract, regardless of how tightly or precisely drafted it may be, can wholly account for every possible contingency. In fact, contracting parties often explicitly defer key decisions when constructing their written agreement, and instead endow one side or the other with the discretion and authority to make those decisions during the course of performance. Such a course of action is undoubtedly a risk-shifting device, but the law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith. Consequently, in every contract there exists an implied covenant of good faith and fair dealing. In this case, which arises from a merger, stockholders had the opportunity to elect the form of their compensation, but the merger agreement gave the company the discretion to set the time by which stockholders must have made their choice. Because it is presently unclear whether the company exercised its discretion in good faith when it accepted all late elections but the plaintiff's, there remains a genuine issue of material fact. For this reason and others explained more fully below, the Court grants in part and denies in part defendants' motion for summary judgment.

I. BACKGROUND

Presently before the Court is the motion for judgment on the pleadings or, in the alternative, summary judgment from defendants Board of Trade of

the City of New York, Inc. ("NYBOT") and IntercontinentalExchange, Inc. ("ICE"). In December 2006, NYBOT's predecessor of the same name entered an Agreement and Plan of Merger (the "Merger Agreement") with ICE and ICE's wholly owned subsidiary, CFC Acquisition Co. Pursuant to the Merger Agreement, NYBOT's predecessor, a not-for-profit New York corporation, was merged with and into CFC. The resulting entity was NYBOT in its current form: a Delaware for-profit corporation that is a wholly owned subsidiary of ICE. This merger was effected on January 12, 2007.

Plaintiff Mahyar Amirsaleh owned two membership interests in NYBOT's predecessor. Each of those interests included a right to trade on the NYBOT exchange, and Amirsaleh leased those rights to third parties. The gist of Amirsaleh's complaint is that he lost his right to trade in the merger because he was cashed out and because he did not have a meaningful opportunity to elect to receive equity in the new entity rather than cash. Specifically, Amirsaleh alleges that the defendants breached the Merger Agreement and its implied covenant of good faith and fair dealing.

The Merger Agreement provided that each NYBOT membership interest would be converted into either 17,025 newly issued shares of ICE common stock or $1,074,719 in cash or some combination of shares and cash. Under section 4.1 of the Merger Agreement, each NYBOT member was permitted to elect the form of consideration he or she would receive in the merger.[1] The agreement further provides, however, that the substance of one's chosen consideration might be affected if one option or the other is oversubscribed or undersubscribed.[2] Specifically, the aggregate amounts of stock and cash that could be issued as merger consideration were fixed: the total amount of cash to be paid by ICE in connection with the merger was approximately $400,000,000. Consequently, to the extent cash consideration was over or undersubscribed, the Merger Agreement provided for pro rata reallocation. Finally, the agreement provided that if a member failed to make an election he or she would receive whatever type of consideration was undersubscribed.

The process by which members made their elections was governed in detail by section 4.3 of the Merger Agreement. That provision explained

---

[1]Merger Agreement § 4.1(a) ("[E]ach Membership Interest issued and outstanding immediately prior to the Effective Time shall automatically be converted into and constitute the right to receive, at the election of the Member that is the holder of such Membership Interest . . . either: 17,025 shares of newly issued, fully paid and nonassessable shares of common stock . . . of ICE . . . or . . . the right to receive an amount of cash equal to $1,074,719").

[2]*See id.* § 4.3(e).

that an Election Form "shall be mailed on the same date as the Proxy Statement/Prospectus is mailed to Members or on such other date as ICE and NYBOT shall mutually agree."[3] Importantly, the Merger Agreement specified that "[a]ny Membership Interest with respect to which the Exchange Agent has not received an effective, properly completed Election Form on or before 5:00 p.m. on the fifth day before the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree) . . . shall also be deemed to be No Election Shares."[4] To retain trading rights in the new NYBOT, members were required to own at least 3,162 shares of ICE common stock after the merger and to pledge those shares in accordance with a NYBOT Membership and Pledge Agreement and Pledge Addendum (the "Pledge Agreement"). In sum, NYBOT members desiring to continue in the new enterprise needed to complete and return both an Election Form and a Pledge Agreement.

On November 20, 2006, NYBOT and ICE publically filed with the SEC and mailed to all NYBOT members the definitive joint Proxy Statement and Prospectus. Amirsaleh received this mailing and returned his proxy vote in favor of the merger. The Election Form was not mailed at the same time; the Proxy Statement/Prospectus advised members that it would follow in a subsequent mailing. Furthermore, the Proxy Statement/ Prospectus explained that the deadline for making an election would be disclosed in the supplemental mailing. On December 11, 2006, NYBOT held a special meeting at which the members approved the proposed merger transaction. Sometime in early to mid December, Amirsaleh's executive assistant, Donna Stavrinou, inquired as to when the Election Forms would be mailed. She was told by Helene Recco, the Director of NYBOT Member Services, that they would be mailed shortly.[5]

On December 19, 2006, the Election Forms and Pledge Agreements were sent by first class mail, postage prepaid, to all NYBOT members using the addresses the NYBOT had on file.[6] To accomplish the printing and distribution of the forms, NYBOT and ICE contracted with a third party, RR Donnelly & Sons Company. NYBOT provided RR Donnelly with its list of members and addresses—a list that included Amirsaleh and his proper mailing address. RR Donnelly contracted with Apple Direct Mail Services,

---

[3]*Id.* § 4.3(a).

[4]*Id.* § 4.3(b).

[5]*See* Donna Stavrinou Aff. ¶ 8, June 5, 2008.

[6]Pursuant to NYBOT membership rules, members had a duty to immediately notify NYBOT of any change in their addresses.

Ltd., and Apple mailed the Election Forms, which specified that the deadline for making an election was January 5, 2007.

Amirsaleh, however, did not receive an Election Form in the mail. Despite having been told sometime in early December that the materials would be mailed shortly, Amirsaleh did not inquire again. Amirsaleh's next contact with NYBOT regarding the election occurred on January 12, 2007, when Linda Chin of NYBOT Member Services reached Amirsaleh's office to alert him that he had not signed and submitted a Pledge Agreement. Chin did not provide and Amirsaleh's assistant, Stavrinou, did not ask for a copy of the Election Form. Stavrinou asked Chin to send the agreement by fax, and Chin did so that day. Amirsaleh, however, who was traveling at the time, did not sign and return the Pledge Agreement until January 18. When transmitting the Pledge Agreement, Stavrinou asked Chin what else needed to be done. In response, Chin asked if Amirsaleh had completed and returned an Election Form. Amirsaleh, of course, had not, and Chin faxed a copy stating that she "could not guarantee that [the] booklet will be accepted."[7] Amirsaleh elected to receive stock in the new entity and returned the completed form the following morning, but NYBOT and ICE did not accept it as a timely election.

Although the official deadline for making an election disclosed on the Election Form was January 5, 2007, defendants accepted the stock elections of twenty-five other NYBOT members who made elections between January 6 and January 18. Defendants argue that "NYBOT and ICE determined on or about January 17, 2007, that, to accommodate members who had submitted Election Forms after January 5, 2007, late forms submitted to that date would be accepted."[8] In support of this argument, defendants submitted an affidavit from Helene Recco, the Managing Director of Member Services. Recco's affidavit states simply that "[a] determination was made" to accept forms submitted up to January 19.[9] Although she attached to her affidavit emails she claims support the statement, the exhibit does not offer any evidence that NYBOT and ICE made a determination as to when they would stop accepting late election forms. At best, the emails show that employees in the Member Services department were attempting to assist NYBOT members and were asking their superiors when the company would stop accepting late forms.[10] There

---

[7]Compl. ¶ 39.

[8]Defs.' Reply Br. 9.

[9]June 30, 2008 Aff. of Helene Recco ¶ 12.

[10]*See, e.g., id.*, Ex. 1, at D000916 (email from Donnie Amado asking Andrew Surdykowski to "please confirm the last election we are accepting is Mr. Davis;" there is no evidence in this record

is no evidence in the record before the Court that NYBOT and ICE affirmatively set a new deadline; there is merely a single email from Andrew Surdykowski, the Vice President and Assistant General Counsel of ICE, instructing a project manager to "accept the late elections that you have accumulated."[11]

Amirsaleh's form, which was received on January 19, 2007, was not accepted as valid. Because stock consideration was oversubscribed (and, therefore, cash consideration was undersubscribed), members who did not make a valid election were automatically cashed out. Defendants have stated that only two other members submitted signed Election Forms after January 18, 2007 and that neither of those was accepted. Those two other members, however, each elected to receive cash consideration and, therefore, received what they wanted anyway. Despite defendants' protestations that ICE and NYBOT set a new deadline of January 18, 2007, plaintiff's check constituting his merger consideration was dated January 12, 2007. The cash consideration amounted to $778,199.20 per membership interest. Members who elected to receive stock were issued 11,067 shares of ICE stock and given a cash payment of $378,208.00 per membership interest. During the election period, the minimum value of those 11,067 shares was $1,153,513.41. In addition to the monetary value discrepancy between the two forms of consideration, those members who received cash consideration faced the loss of their rights to trade on the NYBOT. To continue to have that right going forward, an individual needed to own at least 3,162 shares of publicly held ICE common stock and to pledge those shares in accordance with the Pledge Agreement prior to February 1, 2007.

Amirsaleh filed this suit on March 22, 2007, seeking an order requiring defendants to issue to him "shares of ICE in the same amount, and on the same terms and conditions, as issued to other members of NYBOT who had made an election to receive Stock Consideration" in the merger and to reinstate his two trading memberships.[12] In his complaint, Amirsaleh alleges that the defendants breached their obligations under the Merger

---

that the question was answered). Indeed, the record evidence demonstrates that the internal understanding fluctuated. *Compare id.* at D000227 (email from Andrew Surdykowski stating that "[t]he late items will not be accepted. The deadline remains as publicly disclosed and as originally stated in the Election Forms."), *with id.* at D000994 (email from Donnie Amado stating, "Attached are late items we are going to input," and asking Surdykowski, "When can we cut this off officially?").

[11]June 4, 2008 Aff. of Jonathan S. Shapiro, Ex. W, at D002727 (January 17 email from Andrew Surdykowski to Donnie Amado).

[12]*See* Compl. ¶¶ 1-2.

Agreement and breached the Merger Agreement's implied covenant of good faith and fair dealing. Defendants dispute these claims and argue as a preliminary matter that Amirsaleh lacks the requisite standing to make them. After discussing the standards of review applied to the instant motion, I will address defendants' standing argument first and then each claim made by Amirsaleh.

II. ANALYSIS

On June 29, 2007, defendants filed their opening brief in support of their motion for judgment on the pleadings or, in the alternative, for summary judgment. In the intervening time, plaintiffs conducted discovery and the parties constructed a record of evidence, which they submitted with their briefing. Consequently, the Court will treat this as a motion for summary judgment.[13] This Court will grant a motion for summary judgment only "when a movant can demonstrate that there are no genuine issues of material fact."[14] Moreover, the Court must examine the evidence submitted "in the light most favorable to the non-moving party."[15]

A. Standing

Generally, "only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions."[16] Amirsaleh's claims sound in contract, and, therefore, to have standing he must have been a party to the Merger Agreement or an intended third-party beneficiary. The parties agree that the Merger Agreement is a contract between NYBOT and ICE, so the only question for the Court is whether Amirsaleh, as a member of NYBOT, was an intended third-party beneficiary.

This Court has previously bristled at the notion that a stockholder could have "directly enforceable rights as third-party beneficiaries to corporate contracts."[17] Nevertheless, that recalcitrance had more to do with

---

[13]Ct. Ch. R. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .").

[14]*United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007); *see also* Ct. Ch. R. 56(c).

[15]*Sun-Times Media Group, Inc. v. Black*, --- A.2d ---, C.A. No. 3518-VCS, 2008 WL 3009116, at *6 (Del. Ch. July 30, 2008).

[16]*NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 434 (Del. Ch. 2007).

[17]*Orban v. Field*, C.A. No. 12820, 1993 WL 547187, at *9 (Del. Ch. Dec. 30 1993).

the lack of evidence of the contracting parties' intent to confer a benefit under the contract to the shareholders.[18] Indeed, the key to third-party standing in contract law is the intent to benefit the third party. As then-Vice Chancellor Jacobs originally explained and Vice Chancellor Lamb more recently reiterated, "[t]o qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract."[19]

Here, there is little legitimate question that the members of NYBOT were intended beneficiaries of the Merger Agreement, because the Agreement manifests an unambiguous intent to benefit the NYBOT Members. First, the Merger Agreement provides that "each Membership Interest issued and outstanding immediately prior to the Effective Time shall automatically be converted into and constitute the right to receive" either new ICE shares or cash.[20] The substance of the merger consideration was to be determined "at the election of the Member that is the holder of such Membership Interest."[21] Upon election, shares or a check were issued directly to members, and, "[w]hen a promised performance is rendered directly to the beneficiary, 'it is presumed that the contract was for the beneficiary's benefit.'"[22] Indeed, as the United States District Court for the District of Delaware has ruled, former shareholders of a corporation are intended third party beneficiaries where the merger agreement provided that the shareholder would receive compensation for their shares and the merger required shareholder approval.[23]

---

[18]*See id.* ("The idea of shareholders having directly enforceable rights as third party beneficiaries to corporate contracts is, I think, one that should be resisted. One of the consequences of the limited liability that shareholders enjoy is that the law treats corporations as legal persons not simply agents for shareholders. In any event, even were one inclined to look through corporate contracts and see shareholders as third party beneficiaries, this would not be an appropriate instance to do so since, plainly they were wholly incidentally 'benefited' by the Merger Agreement's supermajority class vote provision, if that provision is deemed a benefit.").

[19]*Madison Realty Partners 7, LLC v. Ag ISA, LLC*, C.A. No. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001), *quoted in Comrie v. Enterasys Networks, Inc.*, C.A. No. 19254, 2004 WL 293337, at *2 (Del. Ch. Feb. 17, 2004).

[20]Merger Agreement § 4.1(a).

[21]*Id.*

[22]*Comrie*, 2004 WL 293337, at *3.

[23]*See Hadley v. Shaffer*, No. 99-144-JJF, 2003 WL 21960406, at *5 (D. Del. Aug. 12, 2003) ("The Court concludes that the Hadleys are intended third-party beneficiaries of the Merger Agreement. As consideration for the sale of shares in Kiamichi, the Merger Agreement provided that the shareholders (including the Hadleys) would receive the payments set forth in paragraph

Defendants' argument to the contrary is unavailing and unsupported, and the authorities on which defendants rely are inapposite. First, although the Merger Agreement contains a general provision disclaiming the existence of any third-party beneficiaries,[24] such disclaimer is belied by the Agreement's specific grant of benefits to NYBOT Members.[25] Second, *Orban v. Field* is off point.[26] In *Orban*, former Chancellor Allen declined to allow shareholders to enforce a provision of a corporate contract that purportedly provided the right to vote as a class because the benefit conferred—if any—was "wholly incidental[]."[27] Third, and similarly, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* does not stand for the proposition that a shareholder lacks third-party standing to enforce the terms of his compensation under a merger agreement.[28] *Tooley* is more about ripeness of a third-party contract claim than it is about the appropriateness of shareholder standing to enforce an intended benefit under a merger agreement.[29] Finally, defendants' reliance on *Benerofe v. Cha*[30] is hardly helpful. *Benerofe* simply provides that "[p]laintiffs' standing as third-party beneficiaries, rather than as parties, to the Agreement limits their rights under the Agreement to those clearly provided by the Agreement."[31] Here, Amirsaleh seeks to enforce his right to elect the form of his consideration

---

2.3(a). Paragraph 8.6 of the Merger Agreement required the approval of the Hadleys and other shareholders before the Merger Agreement became final. The Hadleys also consented to the stock purchase and merger. The Hadleys, as shareholders, were undoubtedly intended to receive a benefit from the sale of their stock through the Merger Agreement." (citations omitted)).

[24] *See* Merger Agreement § 9.8 ("[t]his Agreement is not intended to, and does not, confer upon any Person other than the parties who are signatories hereto any rights or remedies hereunder.").

[25] *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Well-settled rules of contract construction require that a contract be construed as a whole, giving effect to the parties' intentions. Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."); *accord MEA-NEA Local I v. Mount Clemens Cmty. Schools*, No. 248794, 2004 WL 2387650, at *7 (Mich. Ct. App. Oct. 26, 2004) ("Despite the general clause disclaiming any third party beneficiary status, the substantive provisions of the management agreement clearly directly benefit plaintiff by specifically extending bargained-for benefits and other protections to union members assigned to MLK. Plaintiff is an intended third-party beneficiary because the management agreement expressly benefits plaintiff and contains promises on behalf of plaintiff.").

[26] C.A. No. 12820, 1993 WL 547187 (Del. Ch. Dec. 30, 1993).

[27] *Id.* at *9.

[28] 845 A.2d 1031 (Del. 2004).

[29] *Id.* at 1034-35 ("[A]ny contractual shareholder right to payment of the merger consideration did not ripen until the conditions of the agreement were met.").

[30] C.A. No. 14614, 1998 WL 83081 (Del. Ch. Feb. 20, 1998).

[31] *Id.* at *6 n.22.

under the Merger Agreement—a right that is specifically and explicitly granted in the contract. In other words, Amirsaleh has standing under *Benerofe* because he seeks to enforce a right "clearly provided by the Agreement."

B. Breach of the Merger Agreement

Amirsaleh alleges that the defendants breached the Merger Agreement in three ways: (1) failing to deliver the Election Form and Pledge Agreement; (2) failing to follow the proper procedures set forth in the Agreement with respect to the timing and mailing of the Election Books; and (3) failing to accept his forms as timely. Because there is no genuine issue of material fact with respect to any of these three alleged breaches, the Court may grant summary judgment, and for the reasons explained below, the Court grants summary judgment in favor of defendants on the breach of the merger agreement claims.

1. Delivery

Amirsaleh argues that the defendants breached the Merger Agreement because they failed to deliver to him the requisite forms to make his election and pledge his shares going forward. Implicit in this argument is the assumption that the contract granted him guaranteed delivery. The record is clear enough that Amirsaleh did not receive an Election Booklet prior to the January 5, 2007 deadline. This fact alone, however, certainly does not amount to a breach of the contract because the contract does not require delivery of the Election Forms. The terms of the Merger Agreement provide only that the Election Form "shall be mailed" to NYBOT members "on the same date as the Proxy Statement/Prospectus is mailed to the Members or on such other date as ICE and NYBOT shall mutually agree."[32] The evidence in the record supports that such a mailing took place on December 19, 2006. Plaintiff is unable to point to any evidence that shows the existence of a genuine issue of material fact with respect to whether or not the forms were mailed.

Plaintiff cites *Gildor v. Optical Solutions, Inc.*[33] in support of his argument that the defendants were required to ensure his receipt of the Election Forms. In *Gildor*, Vice Chancellor Strine held that a corporation

[32]Merger Agreement § 4.3(a).

[33]C.A. No. 1416-N, 2006 WL 1596678 (Del. Ch. June 5, 2006).

breached its obligations under a stockholder agreement when it failed to provide notice to a preferred stockholder of an opportunity to buy new preferred shares.[34] There, the corporation twice attempted to send notice by FedEx to an address it had for the stockholder. The stockholder agreement's terms, however, provided that a schedule of proper addresses would be attached to the contract, and no such schedule was attached. The corporation instead used one of several addresses it had on file for the preferred shareholder. Vice Chancellor Strine concluded that the corporation breached the stockholder agreement for two related reasons. First, it did not literally comply with its requirement of a schedule of addresses. Second, having failed to create such an authoritative schedule, the corporation used only one of several addresses it had on file for the preferred shareholder.[35] *Gildor*, however, will not help plaintiff here because the record is clear that defendants had only one address for Amirsaleh and it was to that address that they mailed the Election Forms. There is no genuine issue of material fact with respect to the mailing/delivery of the Election Forms because defendants *did* literally comply with the notice provision in the Merger Agreement.[36] Consequently, I grant summary judgment in favor of defendants on this issue.

2. Timing

Amirsaleh's second explanation for why defendants breached the Merger Agreement is difficult to understand. Simply stated, Amirsaleh argues that the defendants breached the Merger Agreement by mailing the Election Forms early. Leaving aside the issue of how exactly such a breach would have harmed Amirsaleh, the Court may quickly dispose of this claim. In making this argument, Amirsaleh is fundamentally misreading the contract. In support of his contention, plaintiff says that the Merger Agreement prohibited defendants from sending the Election Forms until five business days after the "Record Date."[37] This is simply incorrect. Section

---

[34]*Id.* at *1.

[35]*Id.* ("When [the mailing] was returned unclaimed for the second time, Optical Solutions did not undertake any further efforts to find Gildor, although it had in its records an alternate address and other contract information previously provided by Gildor.").

[36]*See id.* at *7 ("If Optical Solutions had complied with the Stockholder Agreement, even if it knew that the notice did not reach Gildor, it would have been under no further obligation to search for him.").

[37]Amirsaleh's Answering Br. at 21 ("The Merger Agreement dictated that once such date [the Record Date] was set by Defendants, the Election forms (a.k.a. "Election Booklets") were not to be mailed until January 8, 2007—five (5) business days after December 29, 2006 (taking into account the January 1, 2007 holiday).").

4.3(a) of the Merger Agreement states that the Election Forms "shall be mailed on the same date as the Proxy Statement/Prospectus is mailed to the Members or on such other date as ICE and NYBOT shall mutually agree (the "Mailing Date") to each Member as of the close of business on the fifth business day prior to the Mailing Date (the "Election Form Record Date")." Thus, it is readily apparent that Amirsaleh's interpretation is flatly wrong for several reasons. First, the contract sets only two alternative times by which the Election forms "shall be mailed": (1) the same date as the Proxy Statement/Prospectus or (2) such other date as NYBOT and ICE agree. Obviously, neither date references some nebulous "record date." Second, the reference to the Election Form Record Date and the five business days later in the sentence grammatically modifies the members who were entitled to receive the mailing; it does not set the time by which the mailing must occur. Third, even if one could somehow read the "five business days" clause as setting a timing requirement for the mailing, the sentence references five business days *prior to*—not after—the record date. Because plaintiff's argument that defendants breached the merger agreement by failing to comply with the timing provision makes no sense and fails in every respect to raise a genuine issue of material fact, I grant summary judgment in favor of defendants on this issue.

3. Acceptance

Finally, Amirsaleh argues that defendants have breached the merger agreement by improperly declaring his election "untimely." As noted above, Amirsaleh did not submit his completed Election Form until January 19, 2008. According to section 4.3(b) of the Merger Agreement, those forms were due "on or before 5:00 p.m. on the fifth day before the NYBOT Members Meeting (or such other time and date as ICE and NYBOT may mutually agree)." According to the Election Form, the deadline was set for January 5, 2007.

That clear pronouncement notwithstanding, the record demonstrates that the defendants accepted the apparently late elections of twenty-five NYBOT members between January 5 and 18. Defendants retort with the argument that they set a second, later deadline of January 18, 2007. Although, as noted above, the evidence in the record is far form clear that NYBOT and ICE affirmatively set January 18, 2007, as the authoritative and final deadline, the evidence is clear that no elections were accepted as timely after that date. Thus, there is no genuine issue of material fact as to whether or not ICE and NYBOT "mutually agree[d]" to stop accepting elections pursuant to section 4.3(b) of the Merger Agreement at some point after January 17 but before Amirsaleh submitted his form on January 19. As a

result, I grant summary judgment in favor of defendants on the issue of the purported literal breach of the contract. However, for reasons explained below, there is a genuine issue of material fact with respect to the issue of how defendants exercised the discretion granted to them by the Merger Agreement in setting the deadline. Consequently, although I conclude the Court must grant summary judgment in favor of defendants on all of plaintiff's claims alleging literal breaches of provisions of the Merger Agreement, plaintiff's claim alleging a breach of the implied covenant of good faith and fair dealing must survive.

C. Breach of the Implied Covenant

The Supreme Court has made it explicitly clear that the implied covenant of good faith and fair dealing is "[r]ecognized in many areas of the law" and, indeed, "attaches to every contract."[38] Moreover, "[t]he implied covenant applies even where the contract allows a party to exercise discretion."[39] While the existence and applicability of the implied covenant are well established, its substance and defining contours remain somewhat imprecise. Indeed, plaintiff and defendants have found markedly different authority to support their respective positions. For example, defendants rely heavily on this Court's articulation of the implied covenant in *Bakerman v. Sidney Frank Importing Co.*[40] There, the Court described the implied covenant as "a 'judicial convention designed to protect the spirit of the agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain.'"[41] Defendants argue that there is no evidence in the record that they engaged in "oppressive or underhanded tactics." Defendants note that they offered plaintiff the opportunity to depose Helene Recco and Linda Chin of NYBOT Member Services to explore the issue of ICE and NYBOT's intent in extending the Election deadline. Plaintiff, however,

---

[38] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005).

[39] *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004); *see also* Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith From (Some) Contracts*, 84 OR.L. REV. 227, 244 (2005) ("A common example of the implied covenant of good faith as a gap-filler or interpretive aid is its use in contracts granting discretion to one party with respect to some aspect of the contract. Such discretion might be given in setting price or date of performance, or in assessing the quality or acceptability of performance under the contract ('satisfaction clauses'). Many courts, even those that are reluctant to recognize implied covenants, have embraced the duty of good faith in this context. This uniform acceptance of the implied covenant of good faith in this context reflects its value.").

[40] C.A. No. 1844-N, 2006 WL 3927242 (Del. Ch. Oct. 16, 2006).

[41] *Id.* at *19 (quoting *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).

declined to take the depositions. Defendants suggest that plaintiff's discrimination claim would be undercut by their testimony and argue that plaintiff should be estopped from making his discrimination argument because he squandered his opportunity to develop the record on this point.[42]

Plaintiff, on the other hand, emphasizes the Supreme Court's language in *Dunlap v. State Farm Fire & Casualty Co.*,[43] where the Court defined the implied covenant as protection against "'arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[44] Plaintiff argues that defendants' secretive and ambiguously reached decision to extend the election deadline to sometime prior to his submission amounts to "arbitrary or unreasonable conduct" that has deprived him of his ability to elect to receive shares rather than cash. Plaintiff argues that there is a genuine issue of material fact in dispute concerning whether the January 18 deadline actually existed or was a post-litigation creation. Plaintiff notes that defendants did not disclose this so-called "extended deadline" prior to the filing of this action, in their Answer to the Complaint, or even in their initial motion. In its earlier decision, this Court explicitly ordered defendants to produce all documents and communications relating to this alleged extended deadline.[45] The record, however, still lacks any evidence that the defendants affirmatively set January 18, 2007, as a second cutoff. In fact, an email from Linda Chin sent on January 18, 2007, compromises defendants argument. In her email to Amirsaleh's assistant, Chin states that she "can not guarantee that his booklet will be accepted."[46] Taking the evidence in the light most favorable to Amirsaleh—as the Court must on this motion—I cannot conclude that the defendants had set January 18, 2007 as an extended deadline when on that very date defendants' representatives were admitting they did not know whether forms were still being accepted.

Each turn of phrase—"oppressive or underhanded tactics" and "arbitrary or unreasonable conduct"—is an attempt to capture what it means to act in contravention of the implied covenant or unfairly and in bad faith. Here there is a genuine question of material fact as to whether ICE and

---

[42]*Cf. Turner v. Bernstein*, 776 A.2d 530, 541 n.17 (Del. Ch. 2000) (granting partial summary judgment in favor of plaintiffs and noting that defendants "forewent the opportunity" to depose a key witness).

[43]878 A.2d 434.

[44]*Id.* at 442 (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

[45]*Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, C.A. No. 2822-CC, 2008 WL 241616, at *2-3 (Del. Ch. Jan. 17, 2008).

[46]June 4, 2008 Aff. of Jonathan S. Shapiro, Ex. I, at D001971 (Jan. 18, 2007 email from Linda Chin to Donna Stavrinou).

NYBOT acted fairly and in good faith when they suddenly stopped accepting late Election Forms. The implied covenant is particularly important in contracts that endow one party with discretion in performance; *i.e.*, in contracts that defer a decision at the time of contracting and empower one party to make that decision later. Simply put, the implied covenant requires that the "discretion-exercising party" make that decision in good faith.[47] Here, section 4.3(b) of the Merger Agreement mandated that Election Forms be submitted by "such . . . time and date as ICE and NYBOT may mutually agree." Thus, by contract, the defendants were the discretion-exercising parties. Moreover, because it is abundantly clear that defendants did accept elections after the originally disclosed deadline of January 5, 2007, defendants must have exercised their discretion in setting a different deadline.

As it currently stands, the record is entirely unclear on precisely how, why, or when the defendants determined to stop accepting late election forms. Although defendants have pointed to specific exhibits in support of their contention that a firm decision was made to extend the deadline to January 18, the proffered exhibits offer no such support. Moreover, although defendants argue that it is unfair to permit plaintiff to contend ICE and NYBOT acted in bad faith when plaintiff failed to take the depositions of NYBOT Member Services employees, those employees did not have any control over defendants' decision to stop accepting late forms. Indeed, the emails between Recco, Chin, Donnie Amado, and Andrew Surdykowski demonstrate that Surdykowski was calling the shots with respect to late Election Forms. Thus, deposing Recco and Chin would not have illuminated defendants' purpose in ceasing to accept late Election Forms, and plaintiff's failure to do so has not artificially manufactured an issue of fact. Because "parties are liable for breaching the covenant when their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms," [48] and because there is a genuine issue of material fact as to whether ICE and NYBOT's clandestine and unexplained decision to stop accepting late forms frustrated the purpose of the Merger Agreement's election provision, I deny

---

[47] *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 380-85 (1980); *see also Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, C.A. No. 15202, 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996) ("From that implied covenant flows the principle of contract construction that 'if one party is given discretion in determining whether [a] condition in fact has occurred[,] that party must use good faith in making that determination.'") (quoting *Gilbert v. El Paso Co.*, 490 A.2d 1051, 1055 (Del. Ch. 1984)).

[48] *Dunlap*, 878 A.2d at 442.

defendant's motion for summary judgment and allow plaintiff's claim for a breach of the implied covenant to go forward.

III. CONCLUSION

Plaintiff—a former member of NYBOT—was not a party to the Merger Agreement, but he nevertheless has standing to bring this action because NYBOT Members were explicitly and intentionally granted meaningful benefits in the contract. Plaintiff's causes of action, however, alleging literal breaches of the Merger Agreement must fail because plaintiff has not demonstrated the existence of any genuine issue of material fact. As a result, the Court grants summary judgment in favor of the defendants on the claims alleged in Count I of the complaint.

Plaintiff has also alleged a breach of the implied covenant of good faith and fair dealing, which protects the "spirit of the agreement" and may, therefore, be offended even when a party has not "violat[ed] an express term of the agreement."[49] Of all the election forms seeking equity compensation submitted after the disclosed deadline, only Amirsaleh's was rejected. Although defendants now claim that a new, second deadline was set and that Amirsaleh's form was rejected because it narrowly missed the deadline, defendants have failed to show uncontroverted evidence that the extended deadline even existed, let alone that it was disclosed. Consequently, there are factual issues of whether the extended deadline was actually set for January 18, 2007 and, if so, whether defendants set this deadline in good faith. Because defendants have failed to meet this burden, their motion for summary judgment on Count II of the complaint is denied.

IT IS SO ORDERED.

---

[49] *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).

COMET SYSTEMS, INC. SHAREHOLDERS' AGENT v. MIVA, INC.

No. 2793-VCL

State of Delaware Court of Chancery, New Castle

October 22, 2008

Kurt M. Heyman, Esquire, and Patricia L. Enerio, Esquire, of Proctor Heyman LLP, Wilmington, Delaware; and Stephen M. Kramarsky, Esquire, of Dewey Pegno & Kramarsky LLP, New York, New York, of counsel, for plaintiffs.

Kevin R. Shannon, Esquire, Michael A. Pittinger, Esquire, and Abigail M. LeGrow, Esquire, of Potter Anderson & Corroon LLP, Wilmington, Delaware, for the defendant.

LAMB, *Vice Chancellor*

This breach of contract case arises out of a dispute between the former stockholders of a software company and a successor entity which purchased that company over the interpretation and performance of the earnout provisions of the merger agreement in which those stockholders were bought-out. The former stockholders have moved for partial summary judgment as to the first count of their verified complaint, and the purchasers have cross-moved for summary judgment on all counts.

The central issue presented by these motions is whether a change-of-control bonus paid to the employees of the target corporation prior to the closing of the merger is a "one-time, non-recurring expense" that should be excluded from the target's costs for the purpose of computing the earnout. If the bonus payment is excluded from the cost calculation, the former stockholders will be entitled to an additional payment of approximately $1.67 million under the earnout. The court finds that this is a pure question of law, on which the former stockholders are entitled to summary judgment. The court also concludes that, as a result of a delay in payment, the former stockholders are entitled to an award of interest on the portion of the earnout they already received, as well as on the portion which the court finds they should have gotten.

I.

A. The Parties

Comet Systems, Inc. was a Delaware corporation prior to its merger into a wholly-owned subsidiary of MIVA, Inc. Comet Systems, Inc. Shareholders' Agent is an unincorporated entity consisting of pre-merger Comet shareholders James Armstrong, James Rosen, Thomas Schmitter, and Douglas Stern, all of whom are named plaintiffs in this case. The Comet Shareholders' Agent was formed by action of the pre-merger Comet shareholders, is empowered by the pre-merger Comet shareholders, and recognized by the merger agreement as the appropriate party to take such actions as are necessary to protect the rights of the pre-merger Comet shareholders under the merger agreement.

Defendant MIVA, Inc. is a Delaware corporation, with its principal executive offices in Fort Myers, Florida. MIVA is the legal successor corporation to FindWhat.com, a party to the merger agreement and the parent entity to the corporation into which Comet was merged.

B. Facts

Comet, a provider of "connected desktop software," was founded in 1997 by, among others, James Rosen and Thomas Schmitter. In June 2003, apparently anticipating a potential merger or sale of the corporation, Comet set up a company-wide bonus plan which would pay out to the employees of Comet solely in the event of an acquisition or similar transaction. This merger bonus plan designated that the bonus compensation would be calculated as a percentage of the merger proceeds, and paid out of such proceeds.[1] Comet was acquired by FindWhat.com on or about March 22, 2004, pursuant to the merger agreement dated February 23, 2004 among FindWhat.com,[2] Haley Acquisition Corp., a wholly owned subsidiary of FindWhat.com, and Comet. As a result of that sale, Comet paid out to its employees, pursuant to the merger bonus plan, a total of approximately $800,000, or 3.45% of the merger proceeds. The deal consideration paid to the Comet shareholders consisted of three parts: an immediate cash component, stock in FindWhat.com (to be paid out only to certain Comet shareholders), and an earnout to be calculated on the basis of Comet's

[1]This plan was later amended in December 2003, and again pursuant to § 5.3(h) of the Merger Agreement, to cap the payout under the plan at $1 million.

[2]Later renamed MIVA, Inc.

performance against several metrics over the years 2004 and 2005. The earnout, as described in Exhibit C to the merger agreement, was to pay out a maximum of $10 million, half of which could be earned for meeting the performance targets specified in each of 2004 and 2005. In each year, the payout was based on Comet's performance relative to three performance goals, with each goal worth one-third of the total possible earnout compensation for that year. Thus each goal was worth a maximum of $1.67 million in each year, and a total of $5 million in earnout compensation was possible in each of 2004 and 2005. Achievement of a portion of a given goal would result in a *pro rata* payout on that goal, down to an absolute cutoff level of 66%, below which no payout would result on that goal.

The performance goals consisted of a User Base Goal, a Revenue Goal, and a Cost Goal.[3] The 2004 User Base Goal was based on achieving a cumulative monthly total number of English language "Genesis" users of 50,350,692 for the year ending December 31, 2004. The 2004 Revenue Goal was based on Comet generating average revenue of $0.363 per English language "Genesis" user for 2004. As a threshold condition to any payout on the Revenue Goal, the 2004 revenue per user had to exceed the 2004 cost per user (defined in the merger agreement as "Operating Costs Excluding Amortization and One-time, Non-recurring Expenses") by at least $0.03 (the difference between the revenue per user and the cost per user defined above constituting the 2004 "profit per user"). The 2004 Cost Goal was based on achieving an average cost per English language "Genesis" user of $0.245 in 2004. As a threshold condition to any payout on the Cost Goal, the 2004 profit per user had to be at least $0.06.

On March 16, 2005, MIVA reported in its annual 10-K filing with the Securities and Exchange Commission ("SEC") that approximately $1.1 million of the $5 million allocated to the 2004 portion of the Comet earnout had in fact been earned by Comet. In early 2006, MIVA delivered to the Comet Shareholders' Agent a one-page spreadsheet entitled "Calculation of MIVA Direct Earnout."[4] According to this spreadsheet, MIVA calculated that $1.67 million of the potential $5 million allocated for 2005 had been earned. The spreadsheet showed that all of the $1.1 million MIVA calculated as owing under the earnout for 2004 resulted from achievement of 67.7% of the 2004 User Base Goal. For the 2004 Revenue Goal, it showed that Comet had achieved 108.8% of its target revenue, but that profit per

[3]There is no dispute between the parties regarding the correct value of the payout of the 2005 performance goals.

[4]The 2005 payout value was also confirmed by MIVA's 10-K filing with the SEC on March 16, 2006.

user was $0.014, resulting in a zero payout on that goal. As for the 2004 Cost Goal, the spreadsheet showed a zero payout both because the profit per user was below the $0.06 required threshold for payout, and because Comet had only reached 64.2% of its target on the goal, and was therefore below the 66% absolute cutoff. In calculating the cost per user that drove the profit per user threshold calculations for both the Revenue and Cost Goals, MIVA included the $800,000 payout to Comet's employees under the merger bonus plan—that is, MIVA treated the merger bonus payment as an operating expense not excluded as "one-time" and "non-recurring." MIVA, in purported satisfaction of its obligations under the earnout, paid approximately $2.7 million to the Comet shareholders in June 2006.

C. Procedural History

The Comet Shareholders' Agent, and its four members in their individual capacities as former Comet shareholders, filed a complaint in this court on March 13, 2007 alleging four counts. In Count I, the plaintiffs allege that MIVA breached the merger agreement by not excluding the merger bonus payment from its calculation of cost per user. This alleged failure to properly account for the merger bonus payment resulted in decreasing the 2004 profit per user below the $0.03 threshold, thereby precluding payout on the 2004 Revenue Goal. Comet alleges it achieved 100% of its 2004 Revenue Goal and is entitled to an additional $1,666,500. Count II alleges that MIVA improperly calculated (in an unspecified manner) the cost per user and profit per user for the 2004 Cost Goal. Comet alleges that proper calculation entitles shareholders to an additional payment in excess of $1.1 million. Count III alleges a breach of contract on the part of MIVA in delaying the issuance of the 2004 and 2005 performance payments until June 2006, and seeks interest for the amounts owed during the alleged delay. Count IV, which the court dismissed at teh July 30, 2008 hearing, pleads in the alternative a claim for unjust enrichment to the extent that the merger agreement is determined to be unenforceable.

MIVA filed its answer on May 7, 2007. Comet filed a motion for partial summary judgment on Count I on December 18, 2007, and MIVA filed its cross-motion for summary judgment as to all counts on April 8, 2008. Notably, no fact discovery took place, nor was any attempted by either party. The court heard oral arguments on the cross-motions for summary judgment on July 31, 2008.

II.

The legal standard for cross-motions for summary judgment is well settled. To prevail, each party must show that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[5] Where the parties have filed cross-motions for summary judgment and neither party has argued that there is an issue of material fact, the cross-motions are deemed to be a stipulation for a decision based on the submitted record.[6] However, even when presented with cross-motions, a court must deny summary judgment if a material factual dispute exists.[7] The court must view the facts in the light most favorable to the nonmoving party.[8] The moving party bears the burden of demonstrating that there is no material question of fact.[9] "A party opposing summary judgment, however, may not merely deny the factual allegations adduced by the movant."[10] "If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight."[11] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or "if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[12]

III.

Comet asserts that the meaning of the merger agreement is clear and unambiguous, and that the merger bonus payment properly should have been excluded from the 2004 cost per user calculation because it was a "one-time, non-recurring expense." MIVA agrees that the merger agreement is unambiguous, but disagrees that the merger bonus payment qualifies as a "one-time, non-recurring expense" and therefore was properly included in the 2004 cost per user calculation. Both parties agree that Count I turns on the court's interpretation of the phrase "one-time, non-recurring expense."

---

[5]Ct. Ch. R. 56(c); *see also Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

[6]Ct. Ch. R. 56(h).

[7]*Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003) (citing *Empire of Am. Relocation Servs., Inc. v. Commercial Credit Co.*, 551 A.2d 433, 435 (Del. 1988)).

[8]*Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

[9]*Id.*

[10]*Tanzer*, 402 A.2d at 385.

[11]*Id.*

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

For the reasons discussed below, the court finds that the merger agreement is, in fact, unambiguous, and MIVA should have excluded the merger bonus payment from its cost per user calculation.

The "determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law." [13] Summary judgment is an appropriate process for the enforcement of unambiguous contracts because there is no material dispute of fact for the court to resolve.[14] Contractual terms are "not rendered ambiguous simply because the parties in litigation differ"[15] concerning their meaning, nor because the parties simply "do not agree upon [their] proper construction."[16] Rather, a contract term is ambiguous "only when the provisions in controversy are reasonable or fairly susceptible of different interpretations or may have two or more different meanings."[17] Therefore, the court's analysis is initially focused "solely on the language of the contract itself. If that language is unambiguous, its plain meaning alone dictates the outcome."[18]

The court's analysis of contractual provisions "is guided by the 'elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract.'"[19] In undertaking this analysis, "Delaware adheres to the 'objective' theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party."[20] Therefore, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[21]

Both parties agree that the term "one-time, non-recurring expenses" is unambiguous. They nevertheless disagree as to what the term means with respect to the merger bonus payment. MIVA argues that "one-time, non-

---

[13] *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch.) (citing *Pellaton v. The Bank of New York*, 592 A.2d 473, 478 (Del. 1991); *Reardon v. Exch. Furniture Store*, 188 A. 704, 707 (Del. 1936)).

[14] *NBC Universal*, 2005 WL 1038997 *5.

[15] *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).

[16] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[17] *Id.*

[18] *Chambers v. Genesee & Wyo. Inc.*, 2005 WL 2000765, at *5 (Del. Ch.) (citing *Pellaton*, 592 A.2d at 478).

[19] *In re IAC/InterActive Corp.*, 948 A.2d 471, 494 (Del. Ch. 2008) (quoting *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992)).

[20] *NBC Universal*, 2005 WL 1038997, at *5 (citing *Cantera v. Marriot Senior Living Serv., Inc.*, 1999 WL 118823, at *4 (Del. Ch.)).

[21] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

recurring expenses" should not be read to encompass the merger bonus payment because of the following "contextual facts": (1) Comet paid out other bonuses in the past; (2) Comet treated prior bonuses as normal operating costs; (3) bonuses are common in the technology industry (to which Comet belongs); (4) the purpose of the bonus plan was to retain and incentivize Comet's employees, which is the common purpose for such bonuses; (5) after the consummation of the merger, the continuing employees of Comet were eligible to and did receive bonuses from the MIVA bonus pool. Ultimately, MIVA's argument is unconvincing.

MIVA's contention essentially amounts to a characterization of the merger bonus payment as an ordinary cost of business, as acquisition bonuses contribute to employee retention during the sale process, and thus to the company's revenue generation. But the fact that an expense qualifies as an ordinary cost of business does not preclude treatment of that expense as one-time and non-recurring. *Black's Law Dictionary* defines a "one-time charge" as "[a]n ordinary cost of business excluded from income calculations."[22] Thus, simply qualifying a cost as ordinary is not sufficient to dispositively determine that the cost is not one-time and non-recurring.

A closer look at the purpose for which the "one-time, non-recurring expense" exclusion is being applied—the calculation of an earnout payment—is instructive. Earnouts are typically used where the buyer and seller cannot agree on a price because the seller is more optimistic about the future prospects of a business than is the buyer.[23] As a result, charges and costs which occur as a result of the merger and are not expected to be representative of future costs in the business are reasonably excluded.[24] The natural reading of "one-time, non-recurring expenses" is to exclude exactly such charges.[25] It may be that Comet paid out bonuses in the past, and that the merger bonus served the same metaphysical purpose—to retain

---

[22]BLACK'S LAW DICTIONARY 284 (8th ed. 2004) (defining "special charge," which BLACK'S treats as synonymous with "one-time charge"); *see* BLACK'S LAW DICTIONARY 1122 (8th ed. 2004).

[23]*Structuring and Negotiating Earn-outs*, 1676 PLI/Corp 909, at *911 (May-June 2008).

[24]*Cf.* Clearwire Corp., Preliminary Proxy Statement (Form PRER14A), at 148-49 (Aug. 22, 2008) (disclosing under the heading "Non-recurring Charges" that as a result of the proposed merger that "accelerated vesting of certain members of management's stock options results in a *one-time charge* of approximately $44.9 million," (emphasis added) but not including that charge in the pro forma financial statements because it is not expected to have "continuing impact on the results of operations").

[25]*Cf. NBC Universal, Inc.*, 2005 WL 1038997, at *9 ("Words in a contract are interpreted using their common and ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise.") (citing *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996); *Neary v. Philadelphia, W. & B.R. Co.*, 9 A. 405, 407 (Del. 1887)).

employees. But, unlike Comet's normal bonuses, the merger bonus was designed for an entirely different reason. It was not to compensate the employees for their revenue generating work, but to compensate them for bearing the risk of job-loss and dislocation that often accompanies a corporate acquisition. This is a risk the employees would not have faced but for the sale process, and no payout to them would have been required under the merger bonus plan if not for the consummation of the merger.[26]

The court is convinced that the merger bonus payment qualified as a "one-time, non-recurring expense" pursuant to the plain, unambiguous meaning of the merger agreement, and therefore should properly have been excluded from the calculation of the 2004 cost per user. When the $800,000 merger bonus payment is subtracted from the 2004 costs, the resulting 2004 profit per user increases from $0.014 to $0.037, which is above the $0.03

---

[26]Although not strictly relevant, since extrinsic evidence is not to be considered when construing an unambiguous contract, the court finds it notable that the merger bonus payment was over four times the magnitude of the aggregate bonuses Comet paid out to its employees over the three years prior to the merger. This supports the conclusion that the merger bonus payment differed from other bonus payments made by Comet not just in degree, but in kind.

The Comet shareholders contend (as does MIVA, and the court agrees) that the contract is unambiguous. Nevertheless, in their opening brief, the plaintiffs point to GAAP accounting principles, stating that the "closest equivalent to 'one-time, non-recurring expenses' . . . within [GAAP] is found in Accounting Principles Board Opinion No. 30 ('APB 30') which provides the criteria for Extraordinary Items . . . ." Pl.'s Opening Br. 11. The plaintiffs further offer an affidavit from expert witness John Barron that the merger bonus payment "represented an extraordinary item *as defined* in APB 30 and should, therefore, be considered a 'one-time, non-recurring expense' . . . ." Barron Aff. ¶ 23 (emphasis added). When deposed by the defendant's counsel, Barron admitted that, although the merger bonus payment would qualify as an extraordinary item under the *definition* contained in APB 30, because the extraordinary item characterization is very narrowly applied in practice under GAAP, the merger bonus payment would be unlikely to qualify as an extraordinary item in practice. Barron also testified that he did not believe the parties "intended 'one-time, non-recurring' be defined or applied in accordance with GAAP," since "[h]ad that been their intent, they would have said so in the agreement." Barron Dep. 136-37, Feb. 27, 2008.

In response, MIVA suggests that, if the court chooses to look at outside accounting standards because the bonus payment would not qualify as an "extraordinary item" under GAAP, it should not be excluded as a "one-time, non-recurring expense."

The court does not apply the GAAP definition contained in APB 30 for two reasons. First, the parties chose to use the phrase "one-time, non-recurring expense" and not "extraordinary item in accordance with GAAP practice." The obvious implication is that the parties chose this alternative phrase precisely because they did *not* mean "extraordinary item in accordance with GAAP practice," particularly in light of the fact that the parties obviously knew how to invoke GAAP standards when they wanted to. *See* Merger Agreement § 2.4(c). Second, the GAAP "extraordinary items" standard, as applied in practice, is so strict that even the charges resulting from the September 11, 2001 terrorist attacks did not qualify. *See* Ten Eyck Aff. ¶¶ 21-22. Thus, it seems unreasonable to the court that the parties intended to apply this ultra-strict standard, and to now do so would require the court to assign a meaning to the agreement clearly different than the "common and ordinary" meaning of the words "one-time, non-recurring expense." *NBC Universal, Inc.*, 2005 WL 1038997, at *9.

profit per user threshold for payout under the 2004 Revenue Goal. The Comet shareholders are therefore entitled to the full payout of $1,666,500 on the 2004 Revenue Goal pursuant to the MIVA Direct Earnout Calculation.

IV.

The Comet shareholders claim in Count II of their complaint that they are entitled to payment on the 2004 Cost Goal due to accounting irregularities. MIVA seeks summary judgment against the Comet shareholders on this claim. The Comet shareholders, who had ample opportunity to initiate fact discovery but failed to do so, have adduced no evidence of any accounting irregularity that could entitle them to any additional payment. Nor does it seem likely that any accounting errors of sufficient magnitude could be found, in the absence of fraud on MIVA's part, a claim which the plaintiffs would have been obliged to plead with particularity.[27] The court therefore agrees with MIVA that it is entitled to summary judgment.

Mere allegations or denials are not sufficient to avoid summary judgment. Rather, Court of Chancery Rule 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

MIVA points out, and the plaintiffs do not deny, that even after excluding the merger bonus payment from the 2004 cost per user, the 2004 profit per user is only $0.037. Both parties further agree that the merger agreement clearly requires the 2004 profit per user to be at least $0.06 in order to trigger any payment to the Comet shareholders under the 2004 Cost Goal. To make up for this $0.023 profit per user shortfall, the Comet shareholders would have to uncover an additional $784,000 (approximately) in what their complaint labels "bad faith accounting manipulations."[28] Yet the Comet

---

[27]Ct. Ch. R. 9(b).

[28]Compl. ¶ 77 at 13.

shareholders have not produced evidence of even a single dollar of other improperly included costs or improperly excluded revenue. Instead, the Comet shareholders now request (for the first time, 19 months after filing their complaint) an opportunity to take discovery on this issue. They are too late. Court of Chancery Rule 56(f) permits (but does not require) the court to deny summary judgment "when it appear[s] from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party's opposition." This court has repeatedly denied requests for discovery made in opposition to a motion for summary judgment in the absence of a Rule 56(f) affidavit, instead ordering summary judgment in such cases.[29] The Comet shareholders have not provided such an affidavit.

The Comet shareholders' counter-arguments are misplaced. The Comet shareholders cite *Mann v. Oppenheimer & Co.* for the proposition that summary judgment should be denied when a party (and particularly the party opposing the motion) has not had a "reasonable opportunity" for discovery.[30] However *Mann* is entirely inapposite to this case. In *Mann*, the defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Court of Chancery Rule 12(b)(6).[31] The defendants relied in their motion on evidence outside the four corners of the plaintiff's complaint, and the court thus properly treated the motion as one for summary judgment, in accordance with Rule 12(b).[32] The court refused the plaintiffs the opportunity to take discovery to respond to the outside evidence presented by the defendants and granted the defendants summary judgment. The Delaware Supreme Court reversed.[33] In contrast, the Comet shareholders have made no effort to take fact discovery, either during the six months between the filing of the answer and the Comet shareholders' own motion for partial summary judgment, or, in fact, at any time since the filing of this case in March 2007. There is, therefore, no question that the Comet shareholders have had a reasonable *opportunity* to take discovery, they simply wasted it. To allow them to now set out on a fishing expedition in

---

[29]*See, e.g., In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1104-05 (Del. Ch. 2003); *Nagy v. Bistricer*, 770 A.2d 43, 60 n.42 (Del. Ch. 2000); *Shenandoah Life Ins. Co. v. Valero Energy Corp.*, 1988 WL 63491, at *1 (Del. Ch.).

[30]Pl.'s Br. in Opp'n 31 (citing 517 A.2d 1056, 1060 (Del. 1986)).

[31]517 A.2d at 1059-60.

[32]*Id.*; *see* Ct. Ch. R. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

[33]*Mann*, 517 A.2d at 1059-60.

reward for their torpor would be both unfair to MIVA and contrary to established law.[34]

V.

The Comet shareholders, in Count III of their complaint, allege that they are owed interest on the earnout payment, which they claim was unnecessarily delayed until June 2006. They assert that because the 2004 component of the payment had been fixed by March 2005, the 15-month delay until June 2006 in paying that portion warrants the payment of interest for the period of the delay. MIVA has moved for summary judgment, arguing that the Comet shareholders have pointed to no provision in the merger agreement that was breached. Because the Comet shareholders are clearly entitled to summary judgment, the court will grant summary judgment on this count *sua sponte* to the plaintiffs, in response to the defendant's motion.

The court has inherent authority to grant summary judgment *sua sponte* against the moving party, but should only do so when the state of the record is such that the non-moving party is clearly entitled to such relief.[35] Despite MIVA's contention that the Comet shareholders cannot maintain an action for breach because they cannot cite a provision of the agreement which is breached by the purported delay in payment or failure to pay interest, "[i]n every contract there is implied a promise or duty to perform with reasonable expediency the thing agreed to be done; a failure to do so is a breach of contract."[36]

---

[34] *Cf. Stinnes Interoil, Inc. v. Petrokey Corp.*, 1983 WL 21114, at *2-3 (Del. Super.) (denying a request for further discovery in resisting a motion for summary judgment based on Rule 56(f) where the non-moving party has not shown that it was prevented in its efforts to take discovery); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980 (Del. Ch. 2000) (quoting *Nebenzahl v. Miller*, 1996 WL 494913, at *3 (Del. Ch.)) ("Conclusory allegations that are pleaded without supporting facts 'cannot be the platform for launching an extensive litigious fishing expedition for facts through discovery in the hopes of finding something to support them.'"). The Comet shareholders' citation to *Moore v. Anesthesia Servs. P.A.*, 2008 WL 484452 (Del. Super.) is equally unavailing. In *Moore*, the plaintiffs' attempts at taking discovery had been resisted by the defendants, and the plaintiffs therefore did not have sufficient opportunity to develop the factual bases for their claim at the time the motion for summary judgment was presented by the defendants. 2008 WL 484452, at *5. As has already been discussed, this is unlike the instant case.

[35] *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992); *see also Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196, 1199 (Del. 1987).

[36] 23 WILLISTON ON CONTRACTS § 63:24 (4th ed.) (quoting *Martin v. Star Publishing Co.*, 126 A.2d 238, 244 (Del. 1956) ("If no time for performance is fixed, the court will imply a reasonable time . . . .")).

The Comet shareholders need not show that the merger agreement contains a provision requiring payment on a specific date and the payment of interest for any delay. Rather, they must simply show that payment was unreasonably withheld after the right to that payment had absolutely vested in the Comet shareholders. MIVA, by its own SEC filings, determined by March 16, 2005 that the Comet shareholders were entitled to the payment of approximately $1.1 million under the earnout as a result of Comet's 2004 performance.[37] Furthermore, as admitted by MIVA's counsel at oral argument, there is no provision in the earnout for clawing back or reducing that amount owed based on later events. Thus, there is no question that, on the record before the court, MIVA knew by March 16, 2005 that the Comet shareholders' right to the payment of $1.1 million under the earnout had absolutely vested. MIVA therefore had a duty to make payment on that obligation within a reasonable time in the absence of a contractual term to the contrary. MIVA's annual report for 2004 indicated that at the end of 2004 it held approximately $29 million in cash and cash equivalents, and had generated $7 million in net cash flow during 2004.[38] It would have been quite reasonable to expect MIVA to make payment of a $1.1 million obligation within 90 days of March 16, 2005.[39]

The Comet shareholders are therefore entitled to damages for MIVA's breach of its implied obligation to make payment in a reasonably timely manner. The appropriate damages for breach of contract by delaying payment is the award of interest for the period of the delay. The Comet shareholders are entitled to one year of statutory interest from June 2005 until June 2006.

VI.

For the reasons stated herein, the plaintiffs' motion for summary judgment on Count I is GRANTED, and the defendant's cross-motion for summary judgment as to Count I is DENIED. The plaintiffs are entitled under Count I to payment of $1,666,500 plus statutory interest from June 2005 to the present time. The defendant's motion for summary judgment as to Count II is GRANTED. The defendant's motion for summary judgment as to Count III is DENIED, and summary judgment in favor of the plaintiffs on Count III is GRANTED. Counsel for the plaintiffs shall submit a

---

[37]FindWhat.com, Inc., Annual Report (Form 10-K), at 42 (March 16, 2005).

[38]FindWhat.com, Inc., Annual Report (Form 10-K), at F-7 (March 16, 2005).

[39]Notably, MIVA did in fact make its earnout payment within 90 days of filing its 2005 10-K on March 16, 2006.

proposed form of implementing order within 10 days, on notice. IT IS SO ORDERED.

EBG HOLDINGS LLC
v. VREDEZICHT'S GRAVENHAGE 109 B.V.

No. 3184-VCP

Court of Chancery of the State of Delaware, New Castle

September 2, 2008

Joanne P. Pinckney, Esquire, of Pinckney Harris & Poppiti, LLC, Wilmington, Delaware;and Allan C. Samuels, Esquire, and Jacqueline C. Gerrald, Esquire, of McLaughlin & Stern, LLP, New York, New York, of counsel, for plaintiff.

Vernon R. Proctor, Esquire, and Jill K. Agro, Esquire, of Proctor Heyman LLP, Wilmington, Delaware, *for defendants.*

PARSONS, *Vice Chancellor*

On August 27, 2007, Plaintiff, EBG Holdings LLC ("EBG"), filed its Verified Complaint (the "Complaint") against Defendants Vredezich's Gravenhage 109 B.V. ("VG 109") and NIBC Bank N.V. ("NIBC"), which is VG 109's parent corporation. In what is essentially a breach of contract action, the Complaint alleges VG 109 has failed to reimburse EBG for approximately $445,000 in payments related to withholding tax that EBG made on VG 109's behalf.

On October 19, 2007, VG 109 filed an answer denying liability and asserting several affirmative defenses, and NIBC moved to dismiss pursuant to Court of Chancery Rules 12(b)(2), (4), and (5) for lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process.

After briefing, this Court heard argument on NIBC's motion on March 19, 2008. At argument, NIBC indicated it was pursuing its motion under only Rule 12(b)(2).[1]

Because I find that EBG has not made a sufficient showing for this Court to exercise personal jurisdiction over NIBC, I grant NIBC's motion to dismiss.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, EBG, is a Delaware limited liability company with its principal place of business in New York. EBG owns and operates eight power generation facilities and sells their energy to the New York and New England deregulated energy markets.[2]

Defendant VG 109 is a Dutch private limited liability company with its principal place of business in The Hague, and is a wholly-owned subsidiary of Defendant NIBC.[3] VG 109 was formed on July 12, 2001, as a special purpose entity. Its sole investments have been interests in six limited liability companies or limited partnerships involved in power plants in the United States. VG 109 has no employees or officers of its own, does not have letterhead or envelopes of its own, and has its documents signed by NIBC employees because NIBC serves as its managing director.[4] VG 109 and NIBC share the same business address.[5] VG 109 has separate capital in the amount of 20,000 euros.[6] Neither NIBC nor VG 109 has any officers,

---

[1]*See* Tr. at 3. Citations in this form ("Tr.") are to the transcript of argument held on March 19, 2008.

In its answering brief, EBG requested that the Court not only deny NIBC's motion, but also decide this action in EBG's favor on summary judgment. Even if EBG's request was procedurally proper, the existence of disputed issues of material fact would preclude such a judgment. *See Whittington v. Dragon Group, L.L.C.*, 2008 WL 2316305, at *3 (Del. Ch. June 6, 2008) (party seeking summary judgment must demonstrate that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law). At this early stage of the litigation, the parties dispute a number of material facts. The disputed facts include, among others, the duration and nature of VG 109's membership in EBG, how much tax VG 109 or its membership interest owed as a result of its membership in EBG, and whether VG 109 failed to pay the United States Internal Revenue Service the amount it owed during the relevant period. I, therefore, deny without prejudice EBG's request to have this matter considered on summary judgment.

[2]Compl. ¶ 10.

[3]*Id.* ¶ 11; Van der Have Aff. ¶ 2. Van der Have is General Counsel of NIBC.

[4]*See* Van der Have Aff. ¶¶ 12-14.

[5]Ans. ¶ 23.

[6]Van der Have Aff. ¶ 16. The minimum capital required under Dutch law is € 18,000. *Id.*

directors, or employees working in Delaware, advertises or solicits business in Delaware, or has any property or business office in Delaware.[7]

B. The Creation of EBG

EBG evolved out of a debt restructuring of the Exelon Corporation and its subsidiaries, Boston Generating, LLC ("Boston Generating") and Exelon New England Holdings, LLC ("Exelon New England) (together, the "Exelon Parties"), which was finalized on October 11, 2005 (the "Restructuring Plan").

Boston Generating owned four energy generating units in the Boston area with a capacity of approximately 3,000 MWs, and was a direct, wholly-owned subsidiary of Exelon New England.[8] NIBC was a Boston Generating debt holder, when Boston Generating defaulted on a $1 billion plus credit agreement.[9] Under the Restructuring Plan, a group of lenders to the Exelon Parties (the "Lender Group"), including NIBC, agreed to swap their debt for equity in Boston Generating.

On February 10, 2004, EBG was formed to manage the Boston Generating facilities.[10] EBG was structured to insulate the lenders from potential regulation as public utilities.[11] On March 19, 2004, Boston Generating, Exelon New England, and EBG jointly applied to the Federal Energy Regulatory Commission ("FERC") for authorization to transfer the generating facilities from Exelon New England to EBG (the "Joint Application").[12] That application mentioned NIBC as one of eighteen lenders who ultimately might take an ownership interest, directly or indirectly, in EBG.[13]

By order dated May 10, 2004, FERC authorized the transfer to EBG.[14] As part of its authorization, however, FERC noted that as long as EBG remains a passive entity "the exact ownership and structure of EBG Holdings is not necessary for [its] prior approval [of the transfer of the power generating assets to EBG]."[15] Although the exact ownership structure of EBG was not material, FERC did order EBG to provide details of its "exact

---

[7] *See id.* ¶¶ 4-7.
[8] Pinckney Aff. Ex. E at 7, 17. Pinckney is Delaware counsel for EBG. *Id.* ¶ 1.
[9] Pinckney Aff. Ex. E at 4.
[10] Compl. ¶ 17.
[11] *See* Pinckney Aff. Ex. E at 10, 12.
[12] *See* Joint Application, *available at* Pinckney Aff. Ex. E.
[13] *See id.* at 2.
[14] *See* FERC Order ¶ 1, *available at* Pinckney Aff. Ex. F.
[15] *Id.* ¶ 19.

ownership structure" promptly after the Exelon Parties transferred their assets to EBG.[16] Neither VG 109 nor NIBC took any direct role in the filing of EBG's certificate of formation in February 2004, or EBG's later submissions to FERC.[17]

On May 24, 2004, Exelon turned over its ownership of Boston Generating to EBG. On that same date, VG 109, together with other Boston Generating lenders or their affiliates, entered into the Limited Liability Company Agreement of EBG (the "Original LLC Agreement").[18] VG 109, but not NIBC, signed the agreement. The signing took place in the Netherlands, and the signature pages were faxed to EBG's United States based counsel.[19] The agreement did list NIBC, however, as a "Designating Lender" affiliated with VG 109.[20] In addition, VG 109 is listed as having approximately a 4.5% interest in EBG.[21] Pursuant to the FERC Order, on June 7, 2004, EBG and certain of the Exelon Parties notified FERC of EBG's exact membership composition; they listed NIBC as a "Designating Lender" and VG 109 as the "Class A Member" affiliated with NIBC.[22]

On October 11, 2005, VG 109 and the other EBG members entered into an amended and restated LLC agreement (the "Amended LLC Agreement").[23] Certain Schedules to the Amended LLC Agreement list VG 109 as a member.[24] From October 11, 2005 to March 30, 2006, VG 109 was the record holder of 163,999 equity units representing approximately 2.5% of EBG's total equity for that period.[25] VG 109 executed the Amended LLC Agreement in the Netherlands, and the signature pages were faxed to EBG's counsel in the United States.[26]

C. VG 109's Alleged Transfer of its Interest in EBG

Defendants deny VG 109 had any "economic membership interests" in EBG as of October 11, 2005, when it executed the Amended LLC

---

[16] *Id.*

[17] *See* Suppl. Van der Have Aff. ¶¶ 4-5.

[18] *See* Compl. ¶¶ 19. *See also* Pinckney Aff. Ex. G (Original LLC Agreement).

[19] *See* Suppl. Van der Have Aff. ¶ 3.

[20] *See* Original LLC Agreement at Schedule I ¶ 12.

[21] *See id.* at Schedule II ¶ 13 (further identifying NIBC as a "Designating Lender").

[22] *See* Letter from Counsel to Certain of the Exelon Parties to FERC, Attach. I at 1 (June 7, 2004), *available at* Pinckney Aff. Ex. C.

[23] *See* Compl. Ex. A (Am. LLC Agreement).

[24] *See* Am. LLC Agreement Schedules A-1 and A-2.

[25] Compl. ¶ 58.

[26] *See* Suppl. Van der Have Aff. ¶ 3.

Agreement.[27] Defendants, however, have not submitted *any* evidence documenting the alleged transfer of VG 109's interest in EBG to a third party.

According to a document submitted by EBG, sometime in March 2006, VG 109 executed an agreement entitled, "Assignment and Assumption" (the "Assignment"), under which it purported to transfer all of its 163,999 units in EBG to an unnamed "New York banking institution organized and existing under the laws of the state of Delaware."[28] While NIBC continues to contend that as of October 11, 2005, it had no economic interest in EBG, its reply brief did not dispute the validity of the Assignment, and it failed to present any evidence that VG 109 transferred its interest in EBG earlier than March 2006. Furthermore, NIBC and VG 109 have admitted that VG 109 executed the Amended LLC Agreement on October 11, 2005. Drawing all inferences in favor of the nonmoving party, EBG, as I must on a Rule 12(b)(2) motion to dismiss, I find for purposes of NIBC's motion that VG 109 was a member of EBG at least as of October 11, 2005.

Under § 4.4 of the Amended LLC Agreement, which was in effect on October 11, 2005, EBG was authorized to treat record holders of EBG membership interests as the owners for all purposes. Section 4.4 states in pertinent part:

> Record Holders Except as may otherwise be required by applicable law, [EBG] shall be entitled to treat the record holder of Units as shown on its books as the owner of such Units for all purposes, including the payment of distributions and the Voting rights . . . regardless of any Transfer of such Units, and shall incur no liability for distributions of cash or other property made in good faith to such record holder until

---

[27] *See* VG 109 Ans. ¶¶ 5, 53. Economic interests in limited liability companies may be owned by persons who are not members. *See* ROBERT K. SYMONDS, JR. & MATTHEW J. O'TOOLE, SYMONDS & O'TOOLE ON DELAWARE LIMITED LIABILITY COMPANIES ("SYMONDS & O'TOOLE") § 1.04[C][2], at 1-20 (2007 ed.) (citing 6 *Del. C.* §§ 18-301(b)(1)-(2), 18-702(b)(1)). Accordingly, the significance of NIBC and VG 109's repeated assertions that one or both of them transferred the "economic interest" in EBG is unclear. Perhaps, they mean that they did not owe any taxes, because the assignment of the economic interest amounted to a delegation of the tax obligation. In any event, the facts related to the alleged transfer of VG 109's interest are in dispute, and NIBC has not shown how its version of the relevant facts supports its position on jurisdiction.

[28] *See* Assignment and Assumption Agreement, *available at* Pinckney Aff. Ex. I; *see also* Compl. ¶¶ 54-57 (alleging VG 109 attempted to transfer its interest in EBG sometime between October 11, 2005 and March 30, 2006, but that the alleged transfer was not properly effected pursuant to the Amended LLC Agreement).

> such Units have been Transferred on the books of [EBG] in accordance with the requirements of and in compliance with Article 12.

Article 12 of the Amended LLC Agreement delineates the process by which EBG members may directly or indirectly transfer their interest to other parties. At this preliminary stage, the record is inconclusive as to whether VG 109 properly transferred its interest in EBG to another party in accordance with the requirements of the Amended LLC Agreement. Thus, drawing all inferences in favor of EBG for purposes of the pending motion, I assume that VG 109 continued to hold a membership interest in EBG until at least March 30, 2006.

D. EBG's Payment of VG 109's Withholding Taxes

The Amended LLC Agreement obliges members to reimburse EBG for any tax advances, together with interest, made on their behalf. The Agreement states in pertinent part:

> Tax Advances. To the extent the Company is required by applicable law to withhold or to make tax payments (including any interest or penalties thereon) on behalf of or with respect to any Member (e.g. backup withholding or withholding with respect to foreign investors) ("Tax Advances"), the Board may withhold such amounts and make such tax payments as so required. All Tax Advances made on behalf of a Member, plus interest . . . shall, at the option of the Board, (i) be promptly paid to the Company by the Member on whose behalf such Tax Advances were made (such payment not to constitute a Capital Contribution of such Member) or (ii) be repaid by reducing the amount of the current or next succeeding distribution or distributions . . . . Each Member hereby agrees to reimburse the Company and the Board for any liability with respect to Tax Advances required on behalf of or with respect to such Member.[29]

The taxable income allocated to VG 109 stemming from its EBG membership for the period October 11, 2005 to March 30, 2006, was

---

[29]Am. LLC Agreement § 11.4.

$1,200,788.[30] The Complaint alleges VG 109 owes EBG a total of $444,611 -- $422,376 for the advancement of federal withholding taxes paid to the IRS on VG 109's behalf, $8,655 as interest on foreign taxes, and $13,580 for tax advice related to those payments.[31]

E. EBG's Asserted Claims

In its Complaint, EBG asserts three separate claims: Count I requests specific performance of the Amended LLC Agreement; Count II requests a declaration that VG 109 was NIBC's alter ego; and Count III requests a declaration that VG 109's transfer of its economic interest in EBG was invalid.[32] In essence, this is a breach of contract action. EBG contends VG 109 and its alter ego NIBC breached the Amended LLC Agreement by (1) not reimbursing EBG for the tax withholding payments made on VG 109's behalf, and (2) improperly, and therefore ineffectively, attempting to transfer VG 109's interest in EBG to a third party.

II. ANALYSIS

EBG contends there are four bases for this Court to obtain personal jurisdiction over NIBC. The first two bases would subject NIBC directly to personal jurisdiction: (i) pursuant to Delaware's long-arm statute;[33] and (ii) under the terms of the LLC Agreement. The third and fourth bases would subject NIBC to personal jurisdiction indirectly through VG 109: (iii) under the alter ego or veil piercing theories of jurisdiction; and (iv) under the agency theory of personal jurisdiction.[34]

A. Rule 12(b)(2) Standard

On a motion to dismiss under Rule 12(b)(2), the plaintiff has the burden to show a basis for the court's jurisdiction over the nonresident

---

[30]Compl. ¶ 31.

[31]*See* Compl. ¶¶ 35, 41, 46. In each instance, EBG claims that NIBC is liable for those sums "as VG 109's alter ego." *Id.* ¶¶ 39, 44, 48. EBG paid the withholding taxes totaling $422,376 in three installments: $185,445 on June 22, 2006; $29,632 on July 17, 2006; and $207,299 on January 16, 2007. *Id.* ¶ 35. The foreign tax interest was paid on January 16, 2007. *Id.* ¶ 41.

[32]*Id.* ¶¶ 61-76.

[33]*See* 10 *Del. C.* § 3104.

[34]*See* PAB at 8. This citation is to Plaintiff EBG's answering brief in opposition to the motion to dismiss. Citations to defendant NIBC's opening and reply briefs are in the form "DOB" and "DRB," respectively, followed by the page reference.

defendant.[35] Delaware courts apply a two-pronged analysis to this issue. "The court must first consider whether Delaware's Long Arm Statute is applicable, and next evaluate whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment . . . ."[36] The court may consider the pleadings, affidavits, and any discovery of record.[37] If, as here, however, no evidentiary hearing has been held and discovery has not been taken, plaintiffs need only make a *prima facie* showing of personal jurisdiction, and the record will be construed in the light most favorable to the plaintiff.[38]

B. May this Court Exercise Personal Jurisdiction over NIBC Directly?

I first address EBG's arguments that NIBC is subject directly to personal jurisdiction: (i) pursuant to Delaware's long-arm statute; and (ii) under the terms of the LLC Agreement.

1. May this Court exercise personal jurisdiction over NIBC pursuant to the long-arm statute?

EBG contends that, under § 3104(c)(1), "NIBC's single act of participating in the formation in Delaware of EBG to manage and hold the

---

[35]*Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *14 (Del. Ch. Aug. 26, 2005); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005); *Hart Holding Co. v Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991).

[36]*AeroGlobal Capital Mgmt.*, 871 A.2d at 438; *see also Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003) (citing *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768-69 (Del. 1986)).

[37]*Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008).

[38]*See Ryan*, 935 A.2d at 265; *Hart Holding*, 593 A.2d at 539 ("If the motion is decided on affidavits, the court should require only that plaintiff make out a prima facie case.") (citations omitted).

NIBC has not argued for a stricter standard of review. *Cf. Sprint Nextel*, 2008 WL 2737409, at *5; *Hart Holding*, 593 A.2d at 539 ("If . . . the motion is decided upon testimony, whether at trial or at a pre-trial evidentiary hearing, plaintiff must establish personal jurisdiction by a preponderance of the evidence."); *Sears, Roebuck & Co. v. Sears plc* (*Sears I*), 744 F. Supp. 1297, 1301 (D. Del. 1990) ("If the jurisdictional issue is raised after discovery, the plaintiff must allege specific facts supporting its position."). In this case, however, the movant, NIBC, presented evidence outside the Complaint in the form of affidavits, and EBG *elected* not to take any discovery. This circumstance, plus the fact that certain of EBG's theories of jurisdiction depend on allegations of fraud or other inequitable conduct, leads me to conclude that EBG must come forward with specific facts to support, at least, its averments of fraud and inequitable conduct in connection with its claims of jurisdiction.

Lender Group interests in Boston Generating is sufficient under the circumstances of this case to confer personal jurisdiction over NIBC."[39]

a. Standard

Delaware courts can exercise jurisdiction over foreign corporations if the plaintiff's cause of action arises from a jurisdictional act enumerated in the Delaware long-arm statute.[40] Delaware courts construe the long-arm statute broadly "to confer jurisdiction to the maximum extent possible under the Due Process Clause."[41] Nevertheless, our courts have been careful not to construe the statute so broadly as to "break[] the necessary connection between statutory words and common usage of the English language."[42]

EBG relies on § 3104(c)(1), which provides:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State . . . .[43]

"Section 3104(c)(1) is a single act provision of the long-arm statute. As such, § 3104(c)(1) supplies a basis for personal jurisdiction 'only with respect to claims that have a nexus to such forum-related conduct.'"[44] Thus,

---

[39]PAB at 11.

[40]*See* 10 *Del. C.* § 3104(c).

[41]*Friedman v. Alcatel Alsthom*, 752 A.2d 544, 549 (Del. Ch. 1999) (quoting *Hercules, Inc. v. Leu Trust & Banking, Bah. Ltd.*, 611 A.2d 476, 480 (Del. 1992)); *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986).

[42]*Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *2 (Del. Ch. July 10, 1991) (citing *Trans-Ams. Airlines, Inc. v. Kenton*, 491 A.2d 1139, 1142-43 (Del. 1985)); *see also Sprint Nextel*, 2008 WL 2737409, at *6; *Ramada Inns, Inc. v. Drinkhall*, 1984 WL 247023, at *2 (Del. Super. May 17, 1984) ("Where qualifying language is used, the Court should not ignore that language out of a desire to afford maximum jurisdictional coverage."); *Joint Stock Soc'y v. Heublein, Inc.*, 936 F. Supp. 177, 194 (D. Del. 1996).

[43]10 *Del. C.* § 3104(c)(1). A finding that there is jurisdiction under any one of the provisions of the statute suffices to establish a statutory basis for personal jurisdiction. *See Colonial Mortgage Servs. Co. v. Aerenson*, 603 F. Supp. 323, 326 (D. Del. 1985).

[44]*Cornerstone Techs. L.L.C. v. Conrad*, 2003 LEXIS 1787959, at *9 (Del. Ch. Mar. 31, 2003) (quoting WOLFE & PITTENGER § 3-5(a)(1)(i)); *see also LaNuova D & B*, 513 A.2d at 768 ("Where personal jurisdiction is asserted on a transactional basis, even a single transaction is sufficient if the claim has its origin in the asserted transaction.").

the question here is whether NIBC transacted any business or performed any character of work or service in Delaware from which EBG's claim has arisen.

EBG alleges NIBC, through its subsidiary VG 109, breached a contract, the Amended LLC Agreement, to which VG 109 was a party. Because VG 109 and NIBC are both Dutch entities with little contact in Delaware, they would only be subject to this Court's specific personal jurisdiction as to claims arising out of business they conducted in Delaware. VG 109's amenability to suit for EBG's claim is not challenged; VG 109 consented to this Court's jurisdiction in the Amended LLC Agreement.[45] For this Court to obtain personal jurisdiction directly over NIBC, however, EBG must sufficiently plead that NIBC itself committed acts in Delaware. EBG claims that NIBC, as a member of the Lender Group, formed EBG or participated in the formation of EBG in Delaware.

"As a general rule, ownership of stock in a Delaware corporation, without more, will not suffice to establish general *in personam* jurisdiction."[46] However, "the ownership of a Delaware subsidiary may constitute the transaction of business . . . where the underlying cause of action arises from the creation and operation of the Delaware subsidiary."[47]

In *Papendick v. Bosch*,[48] a German corporation (Bosch) formed a wholly owned Delaware subsidiary (RBNA) to serve as a vehicle to acquire the stock of another company. The plaintiff filed a breach of contract action in Delaware that arose out of that stock acquisition transaction. Bosch argued that because its sole Delaware contact was its "mere" ownership of RBNA stock, there was no basis for personal jurisdiction. The Supreme Court disagreed and held Delaware courts could exercise jurisdiction over Bosch, because the formation of RBNA was an integral part of the scheme of wrongdoing challenged in the complaint, and because in forming RBNA, Bosch had purposefully utilized the benefits and protections of Delaware law in connection with the challenged stock acquisition transaction.[49]

Although *Papendick* was decided in the context of determining Constitutional due process, Delaware courts have invoked the *Papendick* rationale to hold that the incorporation and operation of a Delaware subsidiary constitutes the transaction of business in Delaware under

---

[45]Am. LLC Agreement § 16.8.

[46]*Gibralt Capital Corp. v. Smith*, 2001 WL 647837, at *5 (Del. Ch. May 8, 2001).

[47]*AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439 (Del. 2005) (citing *Papendick v. Bosch*, 410 A.2d 148 (Del. 1979)); *see also Computer People, Inc. v. Best Int'l Group, Inc.*, 1999 WL 288119, at *8 (Del. Ch. Apr. 27, 1999).

[48]410 A.2d 148 (Del. 1979).

[49]*Id.* at 149-50.

§ 3104(c)(1).[50] In *Cairns v. Gelmon*,[51] for example, this court concluded the incorporation of a subsidiary constituted a single act sufficient to satisfy the requirements of § 3104(c)(1) when that incorporation was central to plaintiffs' claims of wrongdoing.[52] There, the plaintiffs contended the defendants violated two letter agreements that allegedly provided for equal share ownership and board membership in a joint venture. The plaintiffs claimed the defendants' incorporation of a Delaware corporation, secret issuance of that corporation's stock to themselves, and stacking of the board were all part of a fraudulent scheme to cause plaintiffs to lose their right to share in the benefits of the joint venture. The court, citing *Papendick*, stated that "because the incorporation of [the joint venture subsidiary] in Delaware is central to [plaintiffs'] claims of wrongdoing, I conclude that in these specific circumstances that single act suffices to constitute the 'transaction of business' in Delaware under 10 *Del. C.* § 3104(c)(1) and to satisfy the requirements of Due Process."[53]

Thus, under *Papendick* and its progeny, this Court would have jurisdiction over NIBC under § 3104(c)(1) if NIBC's actions in relation to the formation of EBG set "'in motion a series of events which form the basis for the cause of action before the court.'"[54]

b. Analysis

Plaintiff contends NIBC's participation in the formation of EBG is sufficient to confer personal jurisdiction and relies on two cases subsequent to *Papendick*, *Cairns* and *Shamrock Holdings*. In response, NIBC disputes its alleged participation in the formation of EBG, and whether EBG's cause of action arises from its formation.[55]

Plaintiff's argument that NIBC is subject to jurisdiction based on § 3104(c)(1) of Delaware's long-arm statute falls far short. Section 3104(c)(1) provides for jurisdiction based on "transacting business," but the

---

[50] *See* WOLFE & PITTENGER §3.05[c][3], at 3-99; *see also Shamrock Holdings of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006) ("A single act of incorporation in Delaware will suffice to confer personal jurisdiction over a nonresident defendant if such purposeful activity in Delaware is an integral component of the total transaction to which plaintiff's cause of action relates.").

[51] 1998 WL 276226 (Del. Ch. May 21, 1998).

[52] *Id.* at *1-3.

[53] *Id.* at *3.

[54] *Haisfield v. Cruver*, 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994) (quoting *Sears, Roebuck & Co. v. Sears plc (Sears II)*, 752 F. Supp. 1223, 1227 (D. Del. 1990), for its interpretation of the "arising from" language in § 3104(c)).

[55] *See* DRB at 4-5, 8.

only business EBG claims NIBC transacted in Delaware was "participating in the formation in Delaware of EBG."[56] NIBC's participation is simply too attenuated to subject it to personal jurisdiction in Delaware, especially since EBG has failed to demonstrate that EBG was NIBC's or VG 109's subsidiary, as that term is commonly understood, as opposed to a company in which VG 109 held only a minority interest.

EBG's reliance on *Cairns* is misplaced. The *Cairns* court did hold that the single act of forming a Delaware corporation sufficed to satisfy the "transaction of business" in Delaware under 10 *Del. C.* §3104(c)(1). Nevertheless, the court pointedly limited that holding to the "specific circumstances" in that case.[57] The circumstances in *Cairns* are quite different than those here, but EBG glosses over those differences and relies on a portion of the holding.

For example, the party resisting personal jurisdiction in *Cairns* had incorporated a Delaware entity which it then *controlled.* The party contesting jurisdiction had, among other things, altered the fundamental structure of the Delaware entity by nominating "four members of the board," instead of abiding by its prior agreement to nominate only one, and then "amended the certificate of incorporation to increase its authorized common stock."[58] Thus, the actions of the nonresident defendant in *Cairns* resulted in direct and fundamental changes to a Delaware entity.[59]

Here, on the other hand, EBG has not alleged that NIBC, or even VG 109, exercised any control over EBG or that such control gave rise to its claim. Moreover, the alleged failure of a Dutch entity—through its Dutch subsidiary—to reimburse approximately $450,000 to EBG on an alleged obligation that arose more than two years after the signing of the Original LLC Agreement does not even approach effecting a direct and fundamental change to a Delaware entity.

In *Shamrock Holdings*, the defendants participated directly in the formation of two Delaware entities, one for the purpose of starting a home-building business, and the other to "obtain[] debt financing to support and grow [the first entity]'s operations and hold the stock in [the first entity]'s

---

[56]PAB at 11.

[57]*Cairns v. Gelmon*, 1998 WL 276226, at *1-3 (Del. Ch. May 21, 1998).

[58]*Id.*

[59]A similar distinction renders inapposite *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch. 2007), which EBG also cites in support of its position. PAB at 11. In *Sample*, the party resisting jurisdiction was a law firm that had "themselves prepared and sent the Certificate [of Incorporation] Amendment to CSC in Delaware for filing with the Secretary of State." *Sample*, 935 A.2d at 1057. NIBC took no comparable action in this case.

subsidiaries."[60] The plaintiff sought, among other things, a declaratory judgment that it had not breached the operating agreement executed in connection with the formation of the two Delaware entities. The court determined that, because the causes of action related directly to the formation of the Delaware entities, the court could assert jurisdiction over the nonresident defendants.[61]

In contrast, the record here does not show that NIBC formed EBG, or participated in the formation in a meaningful fashion. In fact, nothing in the record suggests that NIBC or VG 109 caused EBG to be formed as a Delaware LLC, as opposed to some other type of entity. The formation of EBG stemmed from the Restructuring Plan that resulted from Boston Generating's financial difficulties. NIBC was one of eighteen lenders that agreed to exchange their debt interests for equity under the Restructuring Plan. The Complaint does not allege NIBC had a dominant or controlling position within the Lender Group. NIBC also is not alleged to have made any filing with the State of Delaware, nor is it alleged to have participated in the filing of the certificate of formation in February 2004.[62] I, therefore,

---

[60] *Shamrock Holdings*, 421 F. Supp. 2d at 804.

[61] *Id.* ("Because the causes of action at issue in the suit arise from, and relate to, the incorporation and formation of [the two Delaware entities], the court agrees that defendants' participation in [their] incorporation . . . is sufficient to confer jurisdiction under § 3104(c)(1).") (citing *Papendick*).

[62] NIBC contends that *Papendick* and its progeny are inapposite, because NIBC did not participate at all in the filing of EBG's certificate of formation in February 2004, and, therefore, cannot be said to have formed EBG. *See* DRB at 4. This contention raises questions about when exactly an LLC comes into existence under Delaware law, who can be said to have participated in the "formation," and the earliest date on which a member can be said to have "participated in the formation"—when the certificate of formation is filed, when the operating agreement comes into existence, or when the first member joins the LLC. Several sections of the Delaware Limited Liability Company Act arguably bear on this issue. *Compare* 6 *Del. C.* § 18-201(b) ("A limited liability company is formed at the time of the filing of the initial certificate of formation in the office of the Secretary of State . . . .") *with* 6 *Del. C.* § 18-101(6) (defining a limited liability company as a "limited liability company formed under the laws of Delaware and *having 1 or more members*") (emphasis added); 6 *Del. C.* § 18-301(b) (noting that a member is admitted after formation according to the operating agreement or the consent of the existing members); 6 *Del. C.* § 18-201(d) ("A limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation and, whether entered into or otherwise existing before, after or at the time of such filing, may be made effective as of the formation of the limited liability company or at such other time or date as provided in or reflected by the limited liability company agreement."). I need not determine exactly when EBG was formed for purposes of deciding the pending motion to dismiss, however. Rather, I assume without deciding, that NIBC's activities were sufficiently contemporaneous with and related to the formation of EBG that they conceivably could be viewed as part of EBG's formation. *Cf. Sternberg v. O'Neil*, 550 A.2d 1105, 1121 (Del. 1998) ("[T]he difference between creating a wholly owned subsidiary in Delaware and purchasing a Delaware subsidiary is a distinction without significance, when the subsidiary is not thereafter reincorporated in another state.").

consider this case distinguishable from *Shamrock*. More specifically, I am not persuaded that a minority member of a limited liability company with as small and indirect an ownership interest as that of NIBC would be subject to personal jurisdiction in Delaware in the absence of any facts suggesting NIBC participated in selecting Delaware as the state of EBG's formation, or otherwise actively participated in its formation, beyond taking an indirect interest in a minority membership.[63]

Moreover, EBG's citations to the FERC regulatory review process, where documents prepared by others listed NIBC as one of eighteen potential members of EBG, are not persuasive.[64] The FERC stated it was unconcerned with the particular ownership structure of EBG, and instead was more concerned that the Lender Group remain passive investors with the actual operations of the power generating assets being conducted by those in the energy industry.[65]

EBG also asks this Court to focus on the "fraudulent structure" of the transaction in both its direct and indirect personal jurisdiction arguments.[66] Yet, EBG's reference to a "fraudulent structure" is too conclusory and bereft of supporting allegations of specific fact to warrant any serious consideration on NIBC's motion to dismiss. Although an act of concealment could amount to fraud, the structure of the transaction here was well known to EBG. Indeed, it can hardly be said that EBG was unaware that a special purpose entity like VG 109, not NIBC, would be the member.[67] Moreover, the Original and Amended LLC Agreements both specifically contemplate the exact situation at issue, *i.e.*, the alleged failure of a member to reimburse

---

[63]Like this case, *Shamrock* did involve defendants who were minority investors in a Delaware entity. To the extent *Shamrock* might be read as inconsistent with the result in this case, I note that I do not view it as inconsistent and that, in any event, it is not binding precedent on this Court. The limited facts recited in the *Shamrock* opinion suggest the nonresident defendants in that case committed acts more important to jurisdiction than NIBC's limited involvement in EBG's formation. EBG did not provide any information as to the factual situation in *Shamrock*, beyond what is described in the opinion. Moreover, the investors in Shamrock over whom the court found it had personal jurisdiction evidently had parent entities that were not named defendants. Therefore, the *Shamrock* court had no reason to address issues of indirect jurisdiction over those parent entities akin to the issues presented here as to NIBC.

[64]PAB at 11; *see also* Pinckney Aff. Ex. E at 8.

[65]The documents related to the FERC review do not indicate NIBC took a meaningful role in the formation of EBG. None of the documents were signed by NIBC, and there are no facts indicating that NIBC or VG 109 took any part in the drafting or delivery of them.

[66]PAB at 12-13.

[67]EBG explicitly admits as much in its FERC Application: "Applicants note that some of the current EBG Class A Members of record of EBG may assign or transfer their membership interests to affiliates or new entities prior to closing . . . ." Pinckney Aff. Ex. H at 12.

EBG for tax withholdings.[68] In this context, where EBG's pleadings and proofs generally fail to mention, much less satisfy, the elements of fraud, I find no basis to convert a claim for breach of a contractual promise into a claim for fraud. This is especially so here, because EBG has not pled specific facts indicating that NIBC or VG 109 had an intent to defraud when they took the actions which EBG contends give rise to personal jurisdiction over them.

The "fraudulent structure" argument is unconvincing for another reason, as well. Without some facts to support drawing a reasonable inference that NIBC purposefully used a "fraudulent structure" when EBG was formed, I cannot assign much significance for jurisdictional purposes to NIBC's use of a structure that involves a garden-variety subsidiary that has owned similar interests in the past, and is not alleged to be unlike those used by others in the Lender Group, to shield itself from recognized risks attendant to public utilities. I further note that EBG failed to allege any facts indicating that, when EBG was formed, NIBC or VG 109 had concerns about future tax liabilities.

For these reasons, I find that EBG has not alleged sufficient facts to support a reasonable inference that NIBC *caused* EBG to be formed in Delaware or otherwise engaged in purposeful activity in Delaware which was an integral component of a transaction to which EBG's cause of action relates. Thus, NIBC's own actions do not provide an adequate basis for subjecting it to personal jurisdiction in Delaware.

2. May this Court exercise personal jurisdiction over NIBC pursuant to the consent provision in the Amended LLC Agreement?

EBG's second argument for exercising personal jurisdiction directly over NIBC is that NIBC effectively consented to personal jurisdiction under the express terms of the Amended LLC Agreement.

a. Standard

"Because the defense of lack of personal jurisdiction is a personal right, 'it may be obviated by consent or otherwise waived.'"[69] "[C]onsent has

---

[68] *See* Am. LLC Agreement § 11.4; Original LLC Agreement § 5.03.

[69] *Foster Wheeler Energy Co. v. Metallgesellschaft AG*, 1993 WL 669447, at *1 (D. Del. Jan. 4, 1993) (quoting *Gen. Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991)); *see also Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 986-87 (Del. 2000).

been recognized as a basis for the exercise of general personal jurisdiction. In fact, a variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the Court."[70] Parties may, for example, "submit to a given court's jurisdiction by contractual consent,"[71] or "stipulate to personal jurisdiction."[72]

b. Analysis

At the outset, I reiterate that this suit concerns the alleged breach of a Delaware limited liability company's operating agreement. The Delaware LLC is a statutory creature, and the explicit policy of the Delaware Limited Liability Company Act is "to give the maximum effect . . . to the enforceability of limited liability company agreements."[73] Delaware courts have long recognized that the "basic approach" to the LLC "is to provide broad discretion in drafting" the agreement, as well as encouraging private ordering and customization.[74]

Here, both the original and the amended EBG operating agreements resulted from negotiations among sophisticated parties. If the parties to the Amended LLC Agreement had wished to subject certain nonsignatories, nonmembers, or nonparties to lawsuits brought by EBG or its members in Delaware courts to enforce the agreement, they easily could have agreed to that. In fact, the Amended LLC Agreement contains a consent provision applicable only to the parties to the Amended LLC Agreement. Section 16.8 states in pertinent part:

> Each party hereto hereby irrevocably consents and agrees, for the benefit of each party, that any legal action, suit or proceeding against it with respect to its obligations . . . arising out of . . . this Agreement . . . may be brought in [a Delaware court] . . . .[75]

The plain meaning of this provision would subject the parties that signed the Amended LLC Agreement to jurisdiction in Delaware. The term "party" is

---

[70] *Sternberg v. O'Neil*, 550 A.2d 1105, 1109 (Del. 1988) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

[71] *Sternberg*, 550 A.2d at 1109 n.4 (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964)).

[72] *Id.* (citing *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495 (1956)).

[73] 6 *Del. C.* § 18-1101(b).

[74] *See Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

[75] Am. LLC Agreement § 16.8.

not defined in the Agreement, but it is reasonable to infer that it includes a "Member" as defined in the Agreement.[76] There is nothing to suggest the term "party" would include pre-EBG stakeholders of the Exelon Parties, such as a member of the Lender Group, like NIBC, which was neither a signatory nor a member as to either the Original or the Amended LLC Agreement.

EBG argues, however, that the consent reflected in Section 16.8 for a party, such as VG 109, should be construed to encompass their affiliates, such as NIBC, as well. To support its contention, EBG relies on another section of the Amended LLC Agreement, namely, the limited liability and indemnification provisions of Article 15. Section 15.1(a) states:

> *No* Member, its *Affiliates* or any of their respective officers, directors, trustees, employees, representatives, attorneys or agents (collectively, "Member Indemnified Parties", and each individually, a "Member Indemnified Party") *shall*, by virtue of such Member's status as a Member, *have any liability to any other Person under* the Certificate of Formation of the Company, *this Agreement* or any applicable law, *except liability to the Company* and the other Members *in respect of obligations expressly arising hereunder or expressly required by applicable law*.[77]

Article 15 goes on to indemnify a "Member Indemnified Party" in certain situations.[78] I read § 15.1(a)-(b) to be part of an indemnification provision under the Delaware Limited Liability Company Act.[79] Nothing in the section suggests it relates to personal jurisdiction.

---

[76]"Member" is defined as "those entities admitted to the Company as Members in accordance with this agreement and listed on Schedule A-1." Am. LLC Agreement § 1.1.

[77]Am. LLC Agreement § 15.1(a) (underlining in original, italics added). "Person" is defined as "natural person, corporation, partnership, limited liability company, firm, association, governmental authority or any other entity whether acting in an individual, fiduciary or other capacity." *Id.* at 12.

[78]*See id.* § 15.1(b).

[79]*See* 6 *Del. C.* § 18-108 ("Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.").

NIBC unquestionably qualifies as an Affiliate under the Amended LLC Agreement.[80] Thus, as a Member Indemnified Party, NIBC could invoke § 15.1 to obtain indemnification from EBG as to a lawsuit, not brought by EBG or a member of EBG, relating to VG 109's status as a member of EBG. EBG has failed to explain, however, how the application of this indemnification provision to NIBC supports its contention that NIBC has consented to submit to jurisdiction in Delaware. Indeed, I find that the parties to the Amended LLC Agreement, by expressly including Affiliates, like NIBC, within the ambit of § 15.1 relating to indemnification while referring only to parties in the jurisdiction provision, manifested an intent *not* to include Affiliates under § 16.8.

If the parties had intended the consent to jurisdiction provision to apply to both parties to the Amended LLC Agreement and their affiliates, they could have said so, just as they did in § 15.1. As the Delaware courts have often noted, "[c]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."[81] Accordingly, I hold that NIBC did not consent, either directly or through VG 109, in the Amended LLC Agreement to the jurisdiction of this Court over it for a claim such as EBG has asserted.

C. May this Court Exercise Personal Jurisdiction over NIBC Indirectly?

Whereas the previous sections addressed grounds for asserting personal jurisdiction over NIBC directly, Delaware law also provides indirect bases under which a parent entity may be subject to jurisdiction through a subsidiary. EBG contends this Court may exercise personal jurisdiction over NIBC through VG 109 under two recognized theories of indirect personal jurisdiction: the agency theory and the alter ego theory.[82]

---

[80]The Agreement defines "Affiliate" as a "Person that directly, or indirectly . . . Controls . . . or who holds . . . twenty percent (20%) or more of the equity interest in the Person specified . . . ." Am. LLC Agreement § 1.1.

[81]*Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *7 n.56 (Del. Ch. Apr. 3, 2008) (quoting *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006)).

[82]*See Sprint Nextel*, 2008 WL 2737409, at *10 (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY ("WOLFE & PITTENGER") § 3.05[c], at 3-87 (2008 ed.)).