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.

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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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September 28, 2017

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Re: *Elizabeth Morrison v. Ray Berry, et al.*
Civil Action No. 12808-VCG

Dear Counsel:

The Plaintiff[1] was a stockholder[2] in The Fresh Market (the "Market" or the "Company"), a Delaware corporation owning a grocery store chain.[3] The Market was acquired by an entity controlled by a private equity firm, Apollo Management,

L.P. ("Apollo").[4] The founder of the Market, Ray Berry, rolled his equity ownership in the Market into the acquirer as a part of the deal.[5] At the time of the merger, Ray Berry was a director of the Market.[6] Together with his son,[7] he owned a significant block of Company stock, nearly ten percent of the outstanding common stock.[8] Nearly eighty percent of the outstanding shares tendered into the merger.[9] The Plaintiff alleges a breach of fiduciary duty[10] by the director defendants[11] and that Brett Berry aided and abetted that breach of fiduciary duty.[12]

For reasons explained fully in a number of opinions of this Court and our Supreme Court, this jurisdiction has determined that there is little utility in a judicial review of a corporate merger in which an uncoerced and fully informed vote of the common stockholders has ratified a decision of

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[1] All well-pled facts drawn from Plaintiff's Verified Complaint ("Compl."), together with the reasonable inferences therefrom, are presumed true for purposes of evaluating Defendants' motion to dismiss. *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). However, I am not required to "draw unreasonable inferences in favor of the non-moving party." *Price v. E.I. DuPont de Nemours & Co*., 26 A.3d 162, 166 (Del. 2011). Consideration of certain documents filed with the SEC are also appropriate in this case as they are "both integral to and incorporated into the Plaintiff's complaint." *New Jersey Carpenters Pension Fund v. Infogroup*, Inc., 2011 WL 4825888, at *2 n.1 (Del. Ch. Sept. 30, 2011). I note that the Plaintiff alleges that certain portions of the Schedule 14D-9 are "false and misleading." Compl. ¶ 118.

[2] Aff. & Verification of Elizabeth Morrison Pursuant to Ct. of Ch. R. 23(AA) and 3(AA) ¶ 2.

[3] Compl. ¶ 3.

[4] Compl. ¶ 101; Transmittal Aff. of Christopher P. Quinn Ex. C.

[5] Compl. ¶ 3.

[6] *Id.* ¶ 3.

[7] Defendant Brett Berry is a former CEO and a former Vice Chairman of the Company Board. Compl. ¶¶ 1, 3.

[8] *Id.* ¶¶ 3, 44.

[9] Aff. of Rachel E. Horn in Support of the Dir. Defs.' Mot. to Dismiss ("Horn Aff."), Ex. N ("Horn. Aff. Form 8-K").

[10] Compl. ¶¶ 134–40.

[11] The director defendants include Richard A. Anicetti, Michael D. Casey, Jeffrey Naylor, Richard Noll, Bob Sasser, Robert K. Shearer, Michael Tucci, Steven Tanger, and Jane Thompson. Id. ¶¶ 24–33. Richard A. Anicetti was also the CEO at the relevant time. Compl. ¶ 24.

[12] *Id.* ¶¶ 142–46.

the directors that the merger is in the stockholders' best interest.[13] This matter, to my mind, presents an exemplary case of the utility of that ratification doctrine, as set forth in *Corwin* and *Volcano*. Here there was no coercion applied to the stockholder vote.[14] An insider and board member, Berry,[15] was in favor of a private equity takeover and, without initially informing the other directors, spoke with potential equity investors.[16] He favored Apollo.[17] Apollo, armed with the founder's preliminary agreement to roll over his equity, made an unsolicited offer for the Market.[18] This offer put the Market in play.[19] Berry recused himself from consideration of a potential sale by the Board of Directors,[20] and waived notice of any meetings at which strategic alternatives would be discussed.[21] The remainder of the Board consisted of eight independent directors.[22] These directors created a special committee of three independent directors to consider strategic alternatives;[23] ultimately, the Company engaged in a three-month auction[24] by hiring J.P. Morgan Securities LLC ("J.P. Morgan"),[25] soliciting thirty-two potential bidders,[26] receiving five indications of interest,[27] and evaluating several offers.[28] At the end of this five-month process, Apollo was the successful bidder, and the Board, on recommendation of the special committee, approved the

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[13] See, e.g., *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 306 (Del. 2015) ("For sound policy reasons, Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests."); *In re Volcano Corp. Stockholder Litig*., 143 A.3d 727, 747 (Del. Ch. 2016) ("[A]cceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger . . . has the same cleansing effect under *Corwin* as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority.").

[14] Compl. ¶¶ 10, 122.

[15] Unless otherwise indicated, "Berry" refers to Ray Berry and not his son, Brett Berry.

[16] Compl. ¶¶ 40–41.

[17] *Id.* ¶ 5.

[18] *Id.* ¶ 6.

[19] *Id.* ¶¶ 7, 11.

[20] *Id.* ¶ 79.

[21] Horn Aff. Ex. A at 18–19 ("Horn Aff. Sched. 14D-9.").

[22] Compl. ¶¶ 24–32; Horn. Aff Ex. C at 7.

[23] Compl. ¶ 53; Horn Aff. Sched. 14D-9 at 18.

[24] Compl. ¶¶ 53, 84.

[25] *Id.* ¶ 53.

[26] Horn Aff. Sched. 14D-9 at 22.

[27] *Id.*

[28] See Compl. ¶¶ 84; Horn Aff. Sched. 14D-9 at 23.

tender offer described above.[29] Because the majority of the shares were tendered,[30] (and because there are no allegations of waste) the only remaining question is whether the vote was adequately informed so as to serve as a ratification of the Board's decision. I conclude that it was and that therefore this matter must be dismissed.

The Plaintiff makes two broad arguments that the tender was uninformed. The first, and easiest to deal with, involves the financial disclosures.[31] The Board hired J.P. Morgan to provide a fairness opinion on the Apollo offer.[32] J.P. Morgan used management projections,[33] engaged in a DCF analysis,[34] and determined that the purchase price was within the range of fairness, although marginally so.[35] The Plaintiff's specific complaints of disclosure insufficiency are that the disclosures provided the stockholders with insufficient information about the "conservative" nature of management's November 17, 2015 projections[36] and failed to disclose that sensitivities run on those projections by J.P. Morgan "included upside as well as downside sensitivities."[37] However, nothing indicates that the management projections[38] or J.P. Morgan's analysis[39] are anything other than their best estimates, which were adequately described.[40]

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[29] Compl. ¶ 101; Horn. Aff. Form 8-K; Pl. Elizabeth Morrison's Answering Br. on Cross- Motions for Consolidation & Appointment of Lead Pl. & Lead Counsel Ex. D at 2 ("Pl.'s Ans. Br. Ex. D Sched. 14D-9 Amend. No. 5").

[30] Compl. ¶ 101; Horn. Aff. Form 8-K.

[31] Compl. 126–27.

[32] *Id.* ¶ 53.

[33] *Id.* ¶ 73

[34] *Id.* ¶¶ 73, 97, 99.

[35] *Id.* ¶¶ 20, 73, 107; Horn Aff. Sched. 14D-9 at 43.

[36] Compl. ¶ 63, 126 (alleging that management's "15% overall risk adjustment to the projections. . . reflect[ed] the[ir] incentive[s]" from a "compensation package" rather than "different initiatives receiving different risk weighting based on likelihood of achievability.").

[37] *Id.* ¶ 127 (stating that "revenue growth and EBITDA margin sensitivities reviewed at that [December 1, 2015] Board meeting ranged from -3% to +1%").

[38] Horn Aff. Sched. 14D-9 at 46–48 (including a "summary of the unaudited prospective financial information for the years 2016 through 2025 prepared by TFM's management . . .based on the information available to TFM's management at the time the November 17 Management Case was developed.").

[39] Pl.'s Ans. Br. Ex. D Sched. 14D-9 Amend. No. 5 at 4 (noting that the December 2015 Board meeting discussed the receipt of "certain sensitivity information regarding different assumptions as to revenue and gross margin in the event that TFM was not able to execute on its strategic plan or the timing of certain initiatives contained in the strategic plan was later than anticipated" and included financial projections for three additional scenarios); Horn Aff. Sched. 14D-9 at 46– 48.

[40] Horn Aff. Sched. 14D-9 at 46–48.

The Plaintiff relies more heavily on what she considers to be disclosure violations concerning Berry's role in the process.[41] The disclosures describe the elaborate process through which the Board and its special committee and advisors engaged in a wide-ranging auction process and go-shop period.[42] According to the Plaintiff, however, this very description is misleading because, in her view, the apparent robustness of the auction was a sham.[43] Berry had already made up his mind that he wished Apollo to be the acquirer and only Apollo had a shot at winning the auction.[44] If that allegation were sufficiently supported by the pleadings, surely the disclosures were flawed and inadequate to allow the vote to serve as a ratification of the Defendants' actions.

The problem with the Plaintiff's argument is that the *facts* regarding Berry's involvement with Apollo were disclosed. The conclusion that the Plaintiff reaches— that the auction was a sham—is not supported by the record. The Plaintiff argues that Berry's commitment to Apollo was far stronger than was disclosed to the Board, the participants in the auction, or the stockholders.[45] The firmness of his commitment had a chilling effect on the other participants in the auction, according to the Plaintiffs, and thus the auction was a mere pretense.[46] But this is a non sequitur: If the Board, the participants in the auction, and the stockholders were uninformed of the true commitment between Berry and Apollo, that undisclosed fact cannot have chilled the auction. In fact, a review of the SEC filings indicates that Berry's involvement with Apollo was disclosed to the stockholders.[47] What is not described is the gloss on those facts that the

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[41] *Id.* ¶¶ 119–21, 123–25, 128.

[42] Horn Aff. Sched. 14D-9 at 16–17 (engaging in a strategic review); *Id*. at 17 (retaining counsel and reviewing fiduciary duties); *Id*. at 18 (forming a strategic transaction committee of independent directors); Id. (retaining J.P. Morgan as a financial advisor); *Id*. at 21–22 (soliciting thirty-two parties to submit bids in an auction run by the special committee); *Id*. at 22–23 (receiving and evaluating five indications of interest); Id. at 23–24 (evaluating a proposal for exclusivity by Apollo and granting data room access to several parties); *Id*. at 27 (negotiating a "go-shop" arrangement); *Id*. at 31 (requesting an increase in the offer price from Apollo); *Id*. at 33 (convening the Board, except for Ray Berry, to vote on the strategic committee recommendation).

[43] Compl. ¶ 117.

[44] *Id.* ¶¶ 42, 117.

[45] *Id.* ¶¶ 42, 46–49, 117.

[46] *Id.* at 54, 88, 102, 120.

[47] Horn Aff. Sched. 14D-9 at 16 (recusing Ray Berry from Board meetings and deliberations of the Merger), 17–18 (discussing "three separate conversations" prior to October 2015 between Ray Berry and Apollo and Ray Berry's willingness to "consider an equity rollover" and that "he would only participate in a transaction that was supported by the Board"), 18 (discussing a news article stating that Ray Berry was "exploring a bid to take TFM private"), 20 (reaffirming Apollo's proposal in November

Plaintiff supplies. She complains that the directors did not disclose that they had initially been lied to by Berry about his involvement, a fact that the Plaintiff asserts must have been apparent to the directors under the facts they did disclose.[48] This is a self-defeating argument. To the extent disclosed facts must have demonstrated Berry's mendacity to the directors,[49] it should have been equally clear to the stockholders themselves. More importantly, whether Berry initially was forthcoming about his relationship with Apollo, I find that his position as of the time of the auction process and go-shop—that is, at the time material to stockholders—was adequately disclosed.

The Plaintiff argues that the Schedule 14D-9 "conceals the pressure on the Board from activist stockholders to sell the Company" by failing to specifically mention "a letter from Neuberger Berman, one of the Company's significant stockholders, expressing its view that the Board should consider selling the Company."[50] However, the Board disclosed that the Company "could become the subject of shareholder pressure and communications" if it didn't "enhance efficiency,"[51] and in fact already "initiate[d] a comprehensive strategic review" and "hir[ed] outside financial advisers" as recommended by Neuberger Berman.[52] I find that this disclosure was adequate.

The only factual lacuna in the disclosures that comes close to materiality is that Berry threatened to sell his shares on the market if a

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2015 for an all-cash transaction "together with Ray Berry and Brett Berry" and that Ray Berry and Apollo had "engaged in one conversation" since October 20, 2015), 21 (confirming "that Mr. [Ray] Berry continued to be willing to discuss an equity rollover with any potentially interested party that the Board selected as a winning bidder," and that "Mr. [Ray] Berry would agree to not engage in any discussion regarding an equity rollover with any potentially interested party, including [Apollo], until authorized to do so by the [Company]" and that Ray Berry "was not working exclusively with any one bidder"), 27 (determining that "rollover discussions should be permitted only after final bids had been received" and when allowed by the Board), 30 (considering a request by J.P. Morgan to allow J.P. Morgan to "discuss[] an equity rollover prior to announcement of a transaction"), 31 (reiterating Apollo's "interest in speaking with members of the Berry family regarding a potential equity rollover" and the strategic committee's approval of such discussions if "chaperoned by J.P. Morgan" and if "no specific price details would be shared . . . .").

[48] Compl. ¶ 124.

[49] *Id.* ¶ 124 ("The omission is material not only in substance but also because it shows that Ray Berry was lying to the Board, the Board was on notice that Ray Berry was lying to them and the

[50] *Id.* ¶ 122; Horn. Aff. Ex. Q ("Neuberger Berman October 8, 2015 Letter").

[51] Horn Aff. Sched. 14D-9 at 18.

[52] Neuberger Berman October 8, 2015 Letter at 2; see Compl. ¶¶ 53 (hiring J.P. Morgan), 58 (conducting strategic review).

merger did not close.[53] On reflection, however, it is not clear to me how this would have affected the total mix of information disclosed; certainly, it would not have made investors less likely to tender if they knew that a large blockholder—the founder—was considering a sale if the deal was not consummated. In short, Berry's activities and his connection to Apollo were adequately disclosed to stockholders deciding whether to tender their shares. Unsurprisingly, those stockholders nonetheless accepted the merger by overwhelmingly tendering in favor, given the large premium the merger payment represented over the preannouncement trading price of the Market stock.[54]

Because an uncoerced tender of the majority of shares supported the merger here, the Plaintiff's pleading burden on this motion to dismiss, before I address whether she has otherwise stated a claim, is to plead facts from which it is reasonably conceivable that the potentially ratifying tender was materially uninformed.[55] The Plaintiff pursued documents to bolster her pleading under Section 220, and her position in this case was well briefed and well argued; nonetheless, I find this pleading burden unmet. For that reason, the Defendants' motion to dismiss is granted.

To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

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[53] Compl. ¶ 13.

[54] The Plaintiff makes an argument in briefing that was not advanced at oral argument, that Berry engaged in a long-term scheme in which he: 1) somehow caused the board, with its majority of independent directors, to discharge the CEO, thereby accelerating a long-term decline in the Market's stock price, reducing the value of Berry's block; then 2) several months later approached private equity firms as part of a takeover scheme favorable to him because of the depressed market price; after which he 3) then recused himself and watched the Board engage in a five-month sales process, involving both equity and strategic investors, confident that the acquirer which would further his interests, Apollo, would prevail. If true, Berry is the most ice- cold killer gambler of whom I am aware. Even on a motion to dismiss, however, I am not required to accept such a scenario, which I do not find to be reasonably conceivable. Pl.'s Omnibus Br. in Opposition to Defendants' Motions to Dismiss at 2, 32, 34.

[55] *In re Volcano Corp. Stockholder Litig*., 143 A.3d at 747.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

B.E. CAPITAL MANAGEMENT FUND LP,	)	
Petitioner,	)	
-against –	)	C.A. No. 12843-VCL
FUND.COM INC.,	)	
Respondent.	)	

OPINION

Date Submitted: August 9, 2017
Date Decided: October 4, 2017

Julia B. Klein, KLEIN LLC, Wilmington, Delaware; Jeffrey Chubak, STORCH AMINI PC, New York, New York; Attorneys for Receiver.

Philip Gentile; Claimant Pro Se.

LASTER, V.C.

On October 21, 2016, petitioner B.E. Capital Management Fund LP sought the appointment of a receiver for respondent Fund.com Inc. (the "Company") on the grounds that the Company had abandoned its business. The Company did not respond to the petition. Nor did anyone else. By order dated November 29, 2016, the court entered a default judgment and appointed Thomas Braziel as receiver of the Company (the "Receiver").

The Receiver commenced a process for marshalling the Company's assets, determining its liabilities, and winding up its affairs. The court set a bar date of April 14, 2017, for creditors to file claims. Nonparty Philip Gentile submitted a claim for $497,739. Gentile had served as the Company's CEO from March 1, 2008, until June 18, 2010. He contended that he was entitled to recover the amount sought as a result of various breaches of his employment agreement with the Company (the "Employment Agreement"). Among other breaches, he contended that the Company "stopped making payments in February 2009."[1]

The Receiver rejected Gentile's claim as time-barred. The Receiver reasoned as follows:

> Pursuant to Section 13.1 of the Employment Agreement, the agreement is governed by New York law. The statute of limitations for a breach of contract claim under N.Y. C.P.L.R. § 213 is six years. Mr. Gentile acknowledges in his claim that the Company stopped paying him in February 2009 and did not take legal action against the Company to enforce contractual rights under his Employment Agreement within sex years following accrual of his claim.[2]

Gentile noticed a timely appeal from the Receiver's determination. The Receiver responded by moving to confirm his determination. This decision denies Gentile's appeal and adopts the Receiver's determination as a decision of this court.

Section 296(b) of the Delaware General Corporation Law states:

> Every creditor or claimant who shall have received notice from the receiver or trustee that such creditor's or claimant's claim has been disallowed in whole or in part may appeal to the Court of Chancery within 30 days thereafter. The Court, after hearing, shall determine the rights of the parties.[3]

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[1] Dkt. 31.
[2] Dkt. 41.
[3] 8 *Del. C.* § 296(b).

The Court of Chancery Rules contain a series of provisions that govern receivers. Rule 156 provides that "[e]xceptions to claims shall . . . be heard by the Court upon such notice to the receiver, creditor and exceptant as may be ordered by the Court."[4] Rule 157 states that "[a]t the hearing of exceptions to claims and to accounts, the testimony of witnesses shall be taken in the same manner as is provided for in other causes pending in this Court."[5]

Section 296 "does not purport to establish the standard by which the court shall allow or disallow a particular claim . . . ."[6] The rules do not specify a standard either. Nor is there any authoritative precedent from the Delaware Supreme Court.

While practicing as an attorney before joining the bench, Vice Chancellor and later Justice Jack B. Jacobs authored two articles on Delaware receiverships that remain authoritative.[7] In one, he simply noted that "[a] creditor is given the statutory right of appeal to the court of chancery from any adverse determination by the receiver."[8] In the other, he observed that "[t]he statute and rules do not specify whether an appeal to the court of chancery is *de novo* or on the record."[9] He went on to state:

> In practice most of the hearings on appeal are on the record. However, the reference in section 296 to a "hearing" and the provision in rule 157 that at the hearing of the exceptions to claims "the testimony of witnesses shall be taken in the same manner as is provided for in other causes pending in this Court" suggest that *de novo* hearings are permissible.[10]

Justice Jacobs' articles did not otherwise discuss the standard of review. Moreover, answering the question of whether review is *de novo* or on the record does not fully determine the standard of review. Although

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[4] Ct. Ch. R. 156.

[5] Ct. Ch. R. 157.

[6] 2 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 296.02 (6th ed. 2017).

[7] Jack B. Jacobs, *Delaware Receivers and Trustees: Unsung Ministers of Corporate Last Rites*, 7 Del. J. Corp. L. 251 (1982) [hereinafter Jacobs, *Delaware Receivers*]; Jack B. Jacobs, *Receivership Practice in the Delaware Courts*, 6 Del. J. Corp. L. 487 (1981) [hereinafter Jacobs, *Receivership Practice*].

[8] Jacobs, *Receivership Practice*, at 499.

[9] Jacobs, *Delaware Receivers*, *supra*, at 265.

[10] *Id.*; *see id.* (responding to an argument about potential bias on the part of a receiver by noting that "any risk of bias would be safeguarded against by the appellate remedy (particularly the availability of a *de novo* trial").

"[d]e novo review generally means a new trial or hearing on questions of fact," it is equally possible "to conduct a review *de novo* on the record."[11] This is what the Delaware Supreme Court does when it reviews appeals from decisions that have granted motions for summary judgment or judgment on the pleadings or that dismiss a pleading for failure to state a claim.[12] And to the extent a reviewing court conducts a review "on the record" using a deferential standard, the court may deploy standards involving varying degrees of deference.[13]

The few extant Delaware authorities suggest that the correct standard is *de novo* review with the court having the ability to consider additional evidence. In Lasker v. McDonnell & Co., Inc., then-Chancellor, later-Justice William T. Quillen considered an appeal from a receiver's preliminary determination rejecting a creditor's claim.[14] The parties agreed to forego a further hearing before the receiver, so the court conducted "a judicial hearing . . . as if on appeal from the Receiver's decision."[15] The court reviewed the creditor's arguments, contention by contention, and analyzed the relevant facts and law, effectively conducting *de novo* review.[16] A more oblique authority is Hannigan v. Italo Petroleum Corp. of America.[17] There, after a corporation emerged from receivership,

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[11] *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

[12] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996) ("Our review of the trial court's determinations in [the summary judgment] context is *de novo*, not deferential, both as to facts and the law. On a summary judgment record (which is essentially a paper record not involving credibility assessments), we are free to draw our own inferences in making factual determinations and in evaluating legal significance of the evidence . . . ."); *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131-32 (Del. 2010) ("[T]he grant of a motion for judgment on the pleadings 'presents a question of law, which we review *de novo*,' to determine whether the court committed legal error in formulating or applying legal precepts. . . . On a motion for judgment on the pleadings this Court's review is limited to the contents of the pleadings." (quoting *Desert Equities, Inc v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)); *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001) ("We review *de novo* the dismissal by the Court of Chancery of a complaint under Rule 12(b)(6). The complaint ordinarily defines the universe of facts from which the trial court may draw in ruling on a motion to dismiss." (footnote omitted)).

[13] *See, e.g.*, *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 174 (Del. 2002) ("We cannot conclude on this record that these findings of fact are clearly erroneous."); *Wheatley v. State*, 465 A.2d 1110, 1113 (Del. 1983) ("On the record before us, we find no abuse of discretion in the denial of the motion for mistrial."); *cf. Ivanhoe*.

[14] 1975 WL 1950 (Del. Ch. July 9, 1975).

[15] *Id.* at *1. Under Section 296, the receiver initially makes preliminary rulings on claims based on the claims notices that creditors and claimants submit. A dissatisfied party can seek a further hearing before the receiver and, if it wishes, present evidence. *See* Jacobs, *Delaware Receivers*, at 265 (describing procedure). Once the receiver makes a final ruling, then a dissatisfied party can appeal to the court. *See id.* The parties in *Lasker* skipped the further hearing before the receiver and proceeded directly to the appeal.

[16] 1975 WL 1950, at *1; *see id.* at *9 (noting as to one issue that "[t]he question before the Court is essentially one of fact" and ruling on the issue *de novo*).

[17] 181 A. 660 (Del. Super. 1935).

the assignee of a corporate debt filed suit, even though the receiver for the corporation had disallowed the claim. The question presented was whether the doctrine of res judicata barred the creditor from pursuing its claim after the company emerged from receivership.[18] Consistent with Justice Jacobs' observation that the court reviewing the receiver's determination would have discretion to consider additional evidence, the Delaware Superior Court observed that a claimant in a receivership could seek to present evidence beyond "a mere notice of his claim" and could seek to have "his rights in the fund in controversy adjudicated by bringing the matter directly before the court in some appropriate manner."[19]

These decisions indicate that when a court considers an appeal from a receiver's disallowance of a claim pursuant to Rule 296(b), the standard of review is *de novo*, and the court has discretion as to whether to go beyond the record presented to the receiver by conducting an evidentiary hearing. This interpretation finds support in the common law procedures that predated Section 296. At common law, a creditor who wished to dispute a receiver's determination had to move to intervene in the receivership action.[20] If the court permitted intervention, then the creditor litigated the claim before the court as if it were an ordinary civil proceeding.[21] Effectively, under the common law system, the court conducted a *de novo* review on a potentially different record. Section 296 and the related Court of Chancery Rules streamlined the exceptions process by replacing the formality of intervention with a more

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[18] *Id.* at 661-62, 664.

[19] *Id.* at 664.

[20] *See* 65 Am. Jur. 2d Receivers § 266 ("If the receiver disallows the claim, the creditors' remedy is to intervene in the action and petition the court for an order directing the receiver to allow the claim." (citing *Wood v. Provident Tr. Co. of Philadelphia*, 152 So. 186 (Fla. 1933)); 2 Ralph Ewing Clark, *A Treatise on the law and Practice of Receivers* § 20; *See* 65 Am. Jur. 2d Receivers § 266 ("If the receiver disallows the claim, the creditors' remedy is to intervene in the action and petition the court for an order directing the receiver to allow the claim." (citing *Wood v. Provident Tr. Co. of Philadelphia*, 152 So. 186 (Fla. 1933)); 2 Ralph Ewing Clark, *A Treatise on the law and Practice of Receivers* § 533 (3d ed. 1959) ("One claiming an interest in the property in the hands of the receiver, or claiming any relief in respect to the possession and control of the res may apply to the court appointing the receiver [and] ask to be made a party . . . ."); *accord Hannigan*, 181 A. at 664 ("Under the old Chancery Practice, [taking an exception to a receiver's determination] was usually done by [the creditor] intervening in and making himself a real party to the action in which the receiver was appointed.").

[21] *See, e.g.*, *Nat'l Sur. Corp. v. Sharpe*, 59 S.E.2d 593, 596 (N.C. 1950) ("The general rule as to evidence in civil actions and proceedings apply on the trial of exceptions to reported findings of a receiver in respect to the validity and priority of claims against the estate of an insolvent debtor."); *see also* 65 Am. Jur. 2d Receivers § 274 ("Where a receiver has denied a claim or the circumstances are such that the claim must be determined by the court, the claimant must support his or her claim by evidence, either documentary or oral, or by a stipulation of facts.").

straightforward procedure.[22] There is no indication, however, that the simplified procedure altered the standard of review that prevailed at common law.

Finally, *de novo* review of a receiver's ruling on a claim comports with the standard of review that the Delaware Supreme Court has directed trial courts to use when reviewing a master's report. "The standard of review for a master's findings—both factual and legal—is *de novo*."[23] "When a receiver by order of court hears testimony and proof and rejects or allows a claim his action is closely analogous to that of a master."[24] It follows that the same standard of review would apply when a trial court review the determinations of a receiver.[25]

This decision therefore concludes that a *de novo* standard of review applies when this court considers an appeal from a receiver's determination of a creditor's claim. It bears noting that allowing or disallowing claims is only one of many tasks that a receiver or custodian may perform.[26] This decision has no cause to determine whether the *de novo* standard of review would apply in other contexts. To the contrary, in a situation where a receiver or custodian has exercised judgment regarding the business and affairs of a corporation, such as when selling assets or settling a claim, a more deferential standard of review would seem warranted.[27] Indeed, where the receiver or custodian has exercised the powers that otherwise

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[22] *See* Clark, *supra*, § 657(b) (discussing the modern practice of exception by motion, noting "the court will generally discourage such claims being presented by the method of intervention").

[23] *DiGiacobbe*, 743 A.2d at 184.

[24] Clark, *supra*, § 657; *see also* 16 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 7927 (Perm. Ed., Rev. Vol. 2015) ("In accepting or rejecting the claims of creditors, as well as in filing a report of findings of fact and conclusions of law, a receiver acts like a master, and objections to a receiver's findings of fact and conclusions of law are reviewed de novo by the district court." (citing *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 231-32 (D.R.I. 2006))

[25] *See United States v. ECC P'rs, L.P.*, 820 F. Supp. 2d 654, 659-660 (D. Md. 2011) (reasoning that federal courts would apply the same *de novo* standard of review in an appeal from a federal receiver as to an appeal from a federal masters); *accord Fairway Capital*, 433 F. Supp. 2d at 231-32.

[26] *See* Jacobs, *Receivership Practice*, at 496-99 (describing practical tasks that a receiver must accomplish once appointed).

[27] *See, e.g.*, *In re First Woburn Bancorp., Inc.*, 1999 WL 33318823, at *1 (Del. Ch. Oct. 5, 1999) (holding "the Receiver's decision to seek a closing agreement from the I.R.S., while perhaps debatable, has the *prima facie* protection of the business judgment rule" and emphasizing that "[t]he Receiver's decision is entitled to the protective presumption of the business judgment rule in the absence of any persuasive evidence of bad faith, self-dealing, gross negligence, or any other reason justifying removal of that protection"); *see also Badii* ex rel. *Badii v. Metro. Hospice, Inc.*, 2012 WL 764961, at *11 (Del. Ch. Mar. 12, 2012) ("In performing these tasks, the receiver may exercise independent business judgment to implement, in relation to the IRS offer, or recommend otherwise whatever steps he or she determines, in good faith, will maximize the value of the Company for its various stakeholders under the circumstances.").

would rest with the board of directors, a strong argument could be made that the standard of review should be at least as deferential as the standard that would apply to the board's decision in the same context. To that end, decisions appointing receivers or custodians frequently establish a standard of review that will govern particular types of actions.[28] This decision has not addressed any context other than an appeal from a receiver's decision disallowing a claim. A ruling on the standard of review that would apply in a different context must await a concrete case where that issue is presented.

Having determined that *de novo* review of the Receiver's decision is warranted, the next step is to address the substance of the claim. In my view, the Receiver reached the right conclusion for the wrong reasons.

In rejecting Gentile's claim, the Receiver relied on the statute of limitations for contract claims under New York law. As a court of equity, the Court of Chancery is not bound by statutes of limitation.[29] Instead, it applies the doctrine of laches. That said, "[i]n determining whether an action is barred by laches, the Court of Chancery will normally, but not invariably, apply the period of limitations by analogy as a measure of the period of time in which it is reasonable to file suit."[30] Consequently, "[a] filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches."[31] "[I]f unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute" then the court may "determine the extraordinary case in accordance with the equities which condition it."[32]

To determine the applicable statute of limitations for a breach of contract claim, a Delaware court looks first to the terms of the contract.[33] The Receiver applied New York's statute of limitations because the contract selected New York law. That was logical, but incorrect.

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[28] *See, e.g.*, *Jagodzinski v. Silicon Valley Innovation Co., LLC*, 2012 WL 593605, at *2 (Del. Ch. Feb. 14, 2012) ("With respect to matters in which the interests of all members are implicated, the decisions of the Receiver shall be subject to review and reversal by the Court only on a showing that the Receiver acted in bad faith, in violation of his fiduciary duties, or clearly outside the scope of his authority. The Receiver shall be presumed to have acted in good faith, reasonably, and in compliance with his fiduciary duties.").

[29] *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) ("Although both laches and statutes of limitation operate to time-bar suits, the limitations of actions applicable in a court of law are not controlling in equity.").

[30] *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013).

[31] *Id.*

[32] *Wright v. Scotton*, 121 A. 69, 73 (Del. 1923).

[33] *See Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017).

"[C]hoice-of-law provisions in contracts do not apply to statutes of limitations, unless a provision expressly includes it. If no provision expressly includes it, then the law of the forum applies because the statute of limitations is a procedural matter."[34] The choice- of-law provision in the Employment Agreement states: "This Agreement shall be governed and construed in accordance with the laws of the State of New York, without reference to principles of conflict of laws thereunder."[35] Because it does not expressly apply New York's statute of limitations, the contract provision is not dispositive.

Absent a specific contractual statute of limitations provision, a Delaware court follows a multistep process to identify the applicable statute of limitations. Relevant factors include the nature of the claim and where it arose. The analysis begins with Delaware's Borrowing Statute.[36] In substance, it states that if claim arose in a jurisdiction that has a shorter statute of limitations than Delaware, then the court should use the shorter period. The Borrowing Statute does not apply here, because New York's six-year statute of limitations for breach of contract claims is longer than Delaware's three-year statute.[37]

If the Borrowing Statute does not apply, then a Delaware court follows Delaware's general choice-of-law rules to select the operative statute of limitations.[38] The governing inquiry is "the most significant relationship test set forth in the Restatement (Second) of Conflicts of Laws."[39] This test requires that the court evaluate five fact-intensive factors "in deciding which state has the most significant relationship."[40]

The limited record created before the Receiver does not provide sufficient information to conduct the necessary analysis, although it strongly suggests that New York's statute of limitations would apply. Under the *de novo* standard of review that governs this appeal, the court could conduct further proceedings to determine the operative limitations period. In this case, however, the current uncertainty does not require

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[34] *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *3 (Del. Super. Dec. 29, 2015) (footnote omitted). *See generally* John F. Coyle, *The Cannons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 649 (2017) ("[M]ost U.S. courts have held that statutes of limitations are procedural and hence not covered by a generic choice-of-law clause.").

[35] Mot., Ex. 1 § 13.1.

[36] 10 *Del. C.* § 8121. *See, e.g.*, *Bear Stearns Mortg. Funding Tr. 2006-SLI v. EMC Mortg. LLC*, 2015 WL 139731, at *9 (Del. Ch. Jan. 12, 2015). For insightful commentary on the Borrowing Statute, see Dylan Consla & Brandon Mordue, *Stop Borrowing Trouble: Clarifying The* Saudi Basic *Exception to Delaware's Borrowing Statute*, 41 Del. J. Corp. L. 29 (2016).

[37] *Compare* N.Y. C.P.L.R. 213(2) *with* 10 *Del. C.* § 8016(a).

[38] *Bear Stearns*, 2015 WL 139731, at *9 (internal quotation marks omitted) (quoting *In re Washington Mut., Inc.*, 2010 WL 3238903, at *6 (Bankr. D. Del. Aug. 13, 2010).

[39] *Id.*

[40] *Certain Underwriters*, 160 A.3d at 465.

further proceedings. New York's statute of limitations is the longest period that potentially could apply, and even under that statute of limitations, Gentile's claim remains time-barred.

As noted, New York's statute of limitations for a claim for breach of a written contract is six years.[41] "Generally, any Statute of Limitations begins to run when a cause of action accrues. In New York, a breach of contract cause of action accrues at the time of the breach."[42] Gentile entered into the Employment Agreement on March 4, 2008. He asserts the Company stopped paying him on February 16, 2009. He resigned as CEO on June 18, 2010. On July 2, his attorney sent the Company a letter demanding the same $497,739 that Gentile now seeks in his claim. Given these facts, the latest date on which Gentile's claim could have accrued is June 18, 2010, when he resigned from the Company. Six years from that date is June 18, 2016. Gentile did not submit his claim until more than eight months later, on February 14, 2017. Absent any basis for tolling, Gentile's claim is barred even under New York's generous statute of limitations.

Gentile seeks to invoke several bases for tolling. "Normally, when a foreign jurisdiction's limitations period is found to apply, that jurisdiction's tolling laws will also apply."[43] Gentile argues that under New York law, the limitations period was tolled (i) by his filling of a previous suit, (ii) by the Company's subsequent re-affirmance of the debt, and (iii) as a matter of equity. None of these arguments succeed.

Under New York law, the filing of an action that is later discontinued voluntarily does not toll the limitations period.[44] On November 22, 2010, Gentile filed suit against the Company in the Supreme Court of the State of New York for breach of the Employment Agreement. On August 24, 2011, the parties filed a Stipulation to Arbitrate Dispute and a Stipulation of Discontinuance. Gentile has not produced any evidence that the dispute was arbitrated or resulted in further litigation.[45] Because the New York action was discontinued, it did not toll the statute of limitations.

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[41] N.Y. C.P.L.R. 213(2).

[42] *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 615 N.E.2d 985, 986 (N.Y. 1993).

[43] *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1184 (9th Cir. 2009) (citing Restatement (Second) of Conflict of Laws § 142 cmt. f (1971)).

[44] *See* N.Y. C.P.L.R. 205(a) (stating that actions terminated by voluntary discontinuance are not eligible for tolling); *George v. Mt. Sinai Hosp.*, 390 N.E.2d 1156, 1159-61 (N.Y. 1979) (explaining operation of statute).

[45] Dkt. 60 (containing email from Gentile admitting the evidence of the New York lawsuit is "all that [his attorneys] found").

Under New York law, "[a]n acknowledgement or promise to perform a previously defaulted contract . . . restart[s] the statute of limitations."[46] The Company did not promise to perform. Gentile has pointed to a Form 10-K dated April 23, 2010, in which the Company acknowledged that it "owe[d] Mr. Gentile approximately $200,000 under his employment agreement for 2009."[47] Accepting that this disclosure restarted the statute of limitations on April 23, 2010, it ran six years later, on April 23, 2016. Gentile filed his claim on February 14, 2017.

Finally, equitable tolling does not apply. New York law recognizes only three "well-settled and limited" occasions when the doctrine operates: "(1) the plaintiff timely filed the complaint in the wrong forum, (2) the defendant actively misled the plaintiff, or (3) the plaintiff in some extraordinary way had been prevented from complying with the limitations period."[48] The first indisputably does not apply. The second and third do not apply either. The Company did not do anything to mislead Gentile or to prevent him from prosecuting his claim. He previously sued in New York, but then he chose not to pursue the litigation to its conclusion.

In sum, the Receiver correctly determined that Gentile's claim is barred by the statute of limitations. The Receiver reached this result erroneously by looking to the choice-of-law provision in the Employment Agreement and applying New York's statute of limitations directly. This decision has reached the same result by applying the doctrine of laches, using the statutory limitations period as the presumptive period for the laches analysis, attempting a choice-of-law analysis, assuming that New York's limitations period would apply because it is the most generous to Gentile, and finding that the statutory period ran before Gentile filed his claim. Consequently, after conducting a *de novo* review on the record developed before the Receiver, this court overrules Gentile's exceptions. The Receiver's motion to confirm is granted. This court adopts the Receiver's determination as a decision of this court.

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[46] *Guilbert v. Gardner*, 480 F.3d 140, 149-50 (2d Cir. 2007) (applying New York law); *see also Lew Morris Demolition Co., Inc. v. Bd. of Ed.*, 355 N.E.2d 369, 371 (N.Y. 1976) (noting New York has replaced the common law, now requiring a writing which "recognize[s] an existing debt and . . . contain[s] nothing inconsistent with an intention on the part of the debtor to pay it").

[47] Dkt. 53, Ex. 3.

[48] *O'Hara v. Bayliner*, 679 N.E.2d 1049, 1054 (N.Y. 1997).

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE DOW CHEMICAL COMPANY,	)	
ROHM AND HAAS COMPANY,	)	
ROHM AND HAAS CHEMICAS LLC	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 12090-VCG
	)	
ORGANIK KIMYA HOLDING A.S.,	)	
ORGANIK KIMYA SAN. VE TIC. A.S.,	)	
ORGANIK KIMYA US, INC.,	)	
ORGANIK KIMYA LUXEMBURG	)	
S.A., ORGANIK KIMYA	)	
NETHERLANDS B.V.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: July 21, 2017
Date Decided: October 19, 2017

Rodger D. Smith II and Ryan D. Stottmann, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Charles K. Verhoeven, Raymond N. Nimrod, and James E. Baker, of QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York, *Attorneys for Plaintiffs*.

Kathleen Furey McDonough, John A. Sensing, and Ryan C. Cicoski, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: J. Robert Robertson and Benjamin Holt, of HOGAN LOVELLS US LLP, Washington, DC, *Attorneys for Defendants*.

GLASSCOCK, Vice Chancellor

This action involves allegations by the Plaintiffs, well-known American chemical companies, that the Defendants were involved in a scheme to misappropriate trade secrets and proprietary polymer technology relating to paint pigments. The Complaint alleges that the Defendants used the purloined technology to create products that they sold in the United States. The Plaintiffs seek damages and injunctive relief.

With a single exception, the Defendants are foreign entities with no connection to this forum. The sole exception is a Defendant entity incorporated in Delaware. The other Defendants seek dismissal on the ground that this Court lacks personal jurisdiction over them. The Plaintiffs' contrary theory runs thus: The foreign Defendants caused the Delaware corporation to be chartered in this state as an integral part of their scheme and conspiracy to monetize the theft of the Plaintiffs' technology. Having taken advantage of the laws of this state to charter an entity in material furtherance of their illegal scheme, all Defendants are subject to jurisdiction under Delaware law, consonant with the due process protections of the United States Constitution, according to the Plaintiffs.

I find that the Defendants' Motion to Dismiss must be granted in part and denied in part. My reasoning follows.

I. BACKGROUND

A. *The Parties and Relevant Non-Parties*

Plaintiff the Dow Chemical Company is a Delaware corporation with a principal place of business in Midland, Michigan.[1] Plaintiff Rohm and Haas Company is a Delaware corporation with a principal place of business in Philadelphia, Pennsylvania[2] and Plaintiff Rohm and Haas Chemicals LLC is a Delaware limited liability company whose principal place of business is also Philadelphia, Pennsylvania[3] In April 2009, the Dow Chemical Company acquired Rohm and Haas.[4] For ease of reference, I often call all of these entities "Dow."

Defendant Organik Kimya Holding A.S. is a privately held Turkish chemical company with a principal place of business in Istanbul, Turkey[5] Defendant Organik Kimya San. ve Tic. A.S. ("Organik Kimya Turkey") is a wholly owned subsidiary of Organik Kimya Holding, and its principal

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[1] Compl. ¶ 14.
[2] *Id.* ¶ 15.
[3] *Id.* ¶ 16.
[4] *Id.* ¶ 26.
[5] *Id.* ¶ 17.

place of business is likewise in Istanbul.[6] Defendant Organik Kimya Luxemburg S.A. is a wholly owned subsidiary of Organik Kimya Turkey; its principal place of business is in Luxemburg.[7] Defendant Organik Kimya Netherlands B.V. is a wholly owned subsidiary of Organik Kimya Luxemburg, and it is located in Rotterdam, Netherlands.[8] Defendant Organik Kimya US, Inc. is a Delaware corporation whose principal place of business is in Burlington, Massachusetts; it is a wholly owned subsidiary of Organik Kimya Turkey.[9] I refer to all of the Organik Kimya entities except Organik Kimya US as the "Foreign Defendants," and I often refer to the Organik Kimya entities collectively as "Organik."

Simone Kaslowski is the CEO of Organik Kimya Turkey and Organik Kimya Netherlands; he also serves on the board of Organik Kimya Holding.[10] Stefano Kaslowski, Simone's brother, is the managing director of Organik Kimya Turkey.[11] Like Simone, Stefano serves on Organik Kimya Holding's board.[12] The Kaslowski brothers are the sole officers and directors of Organik Kimya US.[13] Neither is a party to this case.

The Defendants assert, and the Plaintiffs do not dispute, that none of the Organik entities have conducted any business in Delaware, maintained an office in Delaware, had any employees in Delaware, or sold any products in Delaware.[14] As discussed below, the Plaintiffs seek to establish personal jurisdiction over the Foreign Defendants solely on the basis of a single act—the incorporation of Organik Kimya US in Delaware—on the theory that such incorporation was integral to Organik's scheme to misappropriate Dow's trade secrets.[15]

B. *Factual Overview*

This case stems from the Defendants' alleged misappropriation of

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[6] *Id.* ¶ 18.
[7] *Id.* ¶ 19.
[8] *Id.* ¶ 20.
[9] *Id.* ¶ 21.
[10] Stottmann Aff. Ex. 1 at 13:7–25.
[11] Stottmann Aff. Ex. 6 at 11:12–15, 14:23.
[12] *Id.* at 11:5–8.
[13] Stottmann Aff. Ex. 33 at OKDEL00012335–37.
[14] Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 2.
[15] *See* Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 4 ("Under seminal Delaware caselaw, Organik's formation of a Delaware subsidiary as part of its wrongful scheme and conspiracy is sufficient to confer personal jurisdiction over Organik related to Dow's claims arising out of that wrongful scheme.").

the Plaintiffs' trade secrets for manufacturing various polymers useful in the production of paint pigments.[16] According to the Plaintiffs, the Defendants hatched and carried out a scheme in which they hired former Dow employees with knowledge of the relevant technology and used the trade secrets embodied in that technology to manufacture and sell polymers in competition with Dow.[17] I recite only those facts necessary to decide whether this Court has personal jurisdiction over the Foreign Defendants.

1. Organik's Initial Forays into the US Market

Organik Kimya Turkey started selling products in the United States in 1998.[18] At that time, Organik did not have a US subsidiary, and Organik Kimya Turkey sold its products in the US market primarily through third-party distributors.[19] While Organik Kimya Turkey's US sales at this time were not significant, Organik began to consider expanding its United States presence in the mid-2000s.[20] For example, in 2006, Organik Kimya Turkey and Dow considered an arrangement in which Organik Kimya Turkey would toll manufacture[21] Dow's products in Europe and the Middle East and Dow would toll manufacture Organik Kimya Turkey's products in the United States.[22] The deal never came to fruition, however.[23] Also around this time, Organik reached out to Behr,[24] "one of the largest paint manufacturers in the U.S."[25] But, according to the Plaintiffs, Organik was not yet ready to sell to Behr or other major US customers.

The Plaintiffs contend that Organik faced two major hurdles in breaking into the US market. First, Organik's opaque polymers could not meet the standards of major US customers. For example, Behr did not want to buy OPAC 101 or OPAC 103, the opaque polymers Organik was selling in Europe.[26] And Simone Kaslowski, the CEO of Organik Kimya Turkey and Netherlands,[27] said it was his understanding that Organik would not be able to penetrate the US market for opaque polymers until it improved its

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[16] Compl. ¶ 1.
[17] *Id.*
[18] Stottmann Aff. Ex. 10 at OKDEL00025096.
[19] *Id.*
[20] Stottmann Aff. Ex. 1 at 167:18–168:25.
[21] According to the Defendants, "[t]oll manufacturing is contract manufacturing." Defs.' Supplemental Br. in Supp. Of Mot. to Dismiss 6 n.2.
[22] Cicoski Aff. Ex. 3 at 43:18–46:17.
[23] *Id.* at 47:1–11.
[24] Stottmann Aff. Ex. 1 at 167:18–168:25.
[25] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 6.
[26] Stottmann Aff. Ex. 1 at 245:9–14.
[27] *Id.* at 13:7–25

existing line of such products.[28]

The second obstacle to Organik's increasing its United States presence was that it lacked a US subsidiary. To support this assertion, the Plaintiffs point to Simone Kaslowski's testimony that in order to enter the US market in a significant way, it was important for Organik to have a US subsidiary that could understand US customers.[29] Simone further testified that creating a US subsidiary was necessary to do business with "multinationals," because multinationals wanted to buy directly from the producer rather than from a distributor.[30] The Plaintiffs also cite the deposition testimony of Stefano Kaslowski, Organik's managing director, who said that the "primary reason" for forming a US entity was to "allow[] the customers to have as a primary contact another U.S. company that was handling all the supply details, the Customs clearance, everything to do with formalities, . . . [thereby] enhanc[ing] the service level and the satisfaction of our customers."[31]

The Defendants dispute this account of Organik's attempts to expand its United States presence. They argue that the primary obstacle to Organik's penetrating the US market was that large US paint companies would not buy from Organik until it had a manufacturing facility in the country. They point to testimony from Bradley McPhee, an Organik Kimya US sales agent who, during his time at Organik Kimya US, proposed a four-pronged approach to achieving success in the US market: building a manufacturing plant in the United States, avoiding the architectural market, targeting markets in which Dow and BASF, a German chemical company, did not participate, and focusing on innovation.[32] More specifically, McPhee testified that in order "for [US customers] to do business with us, we needed to manufacture here in the US."[33] And according to Naim Benmayor, Organik Kimya US's sales manager, Organik did not need to create a US subsidiary in order to start manufacturing in the United States.[34]

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[28] *Id.* at 213:16–23

[29] *Id.* at 65:13–19.

[30] *Id.* at 177:6–178:8.

[31] Stottmann Aff. Ex. 6 at 84:7–20.

[32] Cicoski Aff. Ex. 2 at 70:12–73:16.

[33] *Id.* at 73:14–16.

[34] Cicoski Aff. Ex. 6 at 141:6–142:5. The Defendants also argue that when Simone Kaslowski referred to "multinationals" during his deposition, he was not talking about Behr. Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 14 n.6.

2. Organik's Alleged Scheme to Misappropriate Dow's Trade Secrets

The Plaintiffs allege that in late 2007, Organik hatched a scheme to steal and use Dow's trade secrets by hiring Dow employees.[35] As part of this scheme, Organik reached out to Dr. Dilip Nene, a Dow employee, about working for Organik as a consultant.[36] During his time at Dow, Dr. Nene had been heavily involved in the production processes for ROPAQUE Ultra, an opaque polymer, and he had access to the recipe for creating the "seed" employed in commercial production of ROPAQUE Ultra.[37] Dr. Nene began working as a consultant for Organik in February 2008.[38] The Plaintiffs allege that over the next four years, Dr. Nene illegally provided Organik with Dow's trade secrets related to the production of certain polymers.[39] Organik also allegedly stole Dow's trade secrets by hiring Leonardo Strozzi, a former Dow employee who had been a manager at Rohm and Haas's emulsion polymer plant in Italy.[40] Organik interviewed Strozzi in December 2007, and according to the Plaintiffs, "[f]orensic inspection of an Organik company issued laptop shows that during the interview, Organik and Mr. Strozzi accessed and reviewed at least 19 Rohm and Haas emulsion polymer recipes that Mr. Strozzi had brought with him on portable storage devices."[41] In September 2008, Strozzi began working for Organik as the plant manager for its Rotterdam plant.[42]

The Plaintiffs focus on two products—ORGAWHITE 2000 and ORGAL P 850 RR ("850 RR")—that allegedly benefited from Dow's trade secrets. As discussed further below, the Plaintiffs allege that Behr's acceptance of these products led Organik to create its Delaware subsidiary in May 2010. As to 850 RR, the Plaintiffs claim that Organik was trying to sell that product to Behr in 2009, but that it did not meet Behr's specifications and so Behr requested that Organik make improvements.[43] Dr. Nene assisted in making these improvements, though he appears to have worked only on "scale-ups,"[44] which Organik argues do notinvolve

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[35] Compl. ¶ 39; Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 10.

[36] Stottmann Aff. Ex. 7 at 99:23–101:13.

[37] *Id.* at 21:9–32:9, 70:14–72:12; Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 10– 11.

[38] Stottmann Aff. Ex. 7 at 158:10–14.

[39] Compl. ¶¶ 3, 72–85.

[40] *Id.* ¶ 41.

[41] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 12 (citing Compl. Ex. B at 44–54).

[42] Compl. ¶ 41.

[43] Stottmann Aff. Ex. 12 at ORG883ITC00112255.

[44] Stottmann Aff. Ex. 13.

substantive changes to the recipe.[45] Nevertheless, the Plaintiffs assert that Dr. Nene used his knowledge of Dow's trade secrets to help improve 850 RR. Notably, by May 2010, Behr had requested shipment from Organik of 850 RR samples from "[a]ctual production."[46]

According to the Plaintiffs, Organik created ORGAWHITE 2000, an opaque polymer, using trade secrets related to ROPAQUE Ultra, a Dow-produced opaque polymer whose performance was unmatched until ORGAWHITE 2000 appeared on the market.[47] As of 2008, "Dow was the exclusive opaque polymer supplier at Behr,"[48] but Behr had been interested in finding a substitute for ROPAQUE Ultra for some time.[49] Starting around 2006, Organik began working with Behr in an attempt to create just such a substitute.[50] But Organik was unable to produce a ROPAQUE Ultra substitute that met Behr's standards.[51] The Plaintiffs allege that Organik achieved something of a breakthrough in this area when, in 2008 and 2009, Dr. Nene incorporated Dow's trade secrets into Organik's recipes for opaque polymers. The Plaintiffs cite an October 2, 2009 version of the ORGAWHITE 2000 recipe, which states that "[t]he whole method [for producing ORGAWHITE 2000] was discussed and revised with Dilip Nene."[52] Later, in February 2010, Behr tested the updated polymer and found that, while significant improvements had been made, the product was not yet up to Behr's standards.[53] The necessary improvements finally came in early 2010, when Dr. Nene allegedly shared more Dow trade secrets with Organik. In a March 17, 2010 email, an Organik scientist sent an email with the subject line "Good news about production of . . . Orgal Opac 204x."[54] The scientist said that "[t]he guy provided free monomer ratios for R&H production runs," as a result of which Organik "will produce [a] better product than [Dow's ROPAQUE] Ultra E."[55] The Plaintiffs argue that "the guy" is "a clear reference to Dr. Nene."[56] Perhaps as a result of these efforts, by May 2010, Behr had

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[45] Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 16 n.7.

[46] Stottmann Aff. Ex. 17 at OKDEL00033735.

[47] Compl. ¶¶ 27–38, 72; Stottmann Aff. Ex. 1 at 105:10–15.

[48] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 17.

[49] Stottmann Aff. Ex. 19 at ORG883ITC00014325.

[50] Stottmann Aff. Ex. 1 at 241:3–17.

[51] Stottmann Aff. Ex. 19 at ORG883ITC00014325.

[52] Stottmann Aff. Ex. 28 at ORG883ITC00016448

[53] Stottmann Aff. Ex. 19 at ORG883ITC00014325–26.

[54] Stottmann Aff. Ex. 21 at ORG883ITC00120481. OPAC 204X was an "[e]arly commercial iteration[] of ORGAWHITE 2000." Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 2 n.2.

[55] Stottmann Aff. Ex. 21 at ORG883ITC00120481.

[56] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 19.

approved ORGAWHITE 2000 as a replacement for Dow's ROPAQUE Ultra.[57]

3. Organik Incorporates a US Subsidiary in Delaware

According to the Plaintiffs, Organik decided to create a US subsidiary in May 2010 because it had recently secured Behr's approval for ORGAWHITE 2000 and Behr had asked for shipment of 850 RR production samples. To repeat, the Plaintiffs allege that these two products benefited from trade secrets Organik stole from Dow. The Plaintiffs here rely heavily on Simone Kaslowski's deposition testimony, in which Simone said that one reason Organik incorporated Organik Kimya US in May 2010 was that Behr had both accepted shipment of 850 RR and approved ORGAWHITE 2000.[58] While Simone suggested that other reasons drove the decision to create the Delaware subsidiary in May 2010, the Plaintiffs argue that he was unable to articulate those other reasons. They point to the following portion of Simone's deposition testimony:

> Q: I said other than the reasons you've given regarding the potential sales to Behr [that is, Behr's approval of ORGAWHITE 2000 and 850 RR], you can't think of any other reasons why you selected May of 2010 to incorporate the Organik US entity, right?
>
> A: Well, there are -- you know, there are many reasons why we -- you know, I explained this morning at length why we wanted to enter the United States, right?
>
> Q: Yes. My question is: Why did you pick May of 2010?
> A: There is no specific reason.
>
> Q: No other reasons?
>
> A: No[59]

The Defendants argue that this testimony is "ambiguous," because it is "far from clear" that Simone "understood that the word 'other' meant 'other than the reasons you've previously given.'"[60]

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[57] Stottmann Aff. Ex. 17 at OKDEL00033736.
[58] Stottmann Aff. Ex. 1 at 149:24–150:10.
[59] *Id.* at 150:19–151:7.
[60] Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 37.

Organik Kimya US was incorporated in May 2010, but Organik had been considering forming a US subsidiary since at least 2007.[61] In 2008 and 2009, as Organik's alleged scheme to misappropriate Dow's trade secrets progressed, Organik received legal advice about where, when, and how Organik Kimya US should be incorporated.[62] Organik continued to receive such advice in early- to mid- 2010; as the Plaintiffs note, "[f]rom January 2010 to May 5, 2010 (the date of incorporation of Organik Kimya U.S.), Organik's privilege log reflects at least 80 entries relating to the formation of Organik Kimya U.S."[63] It appears that Organik chose to incorporate Organik Kimya US in Delaware (as opposed to a different state) for tax reasons and because of the ease of incorporating in Delaware.[64]

Organik Kimya US's sales of emulsion polymers appear to have been driven largely by ORGAWHITE 2000 and 850 RR. For instance, as the Plaintiffs point out, 79% "of the emulsion polymers sold by Organik Kimya US from 2010 through 2014 w[ere] ORGAWHITE 2000."[65] Indeed, Simone Kaslowski testified that ORGAWHITE 2000 was the only product offered by Organik Kimya US that achieved commercially significant sales.[66] The US International TradeCommission ("ITC") later barred Organik from importing opaque polymers such as ORGAWHITE 2000 into the United States for a period of twenty-five years.[67] In any event, Organik's sales in the United States appear to be a small percentage of sales from all Organik entities; the Defendants assert that from 2013 to 2014, "sales in the United States constituted only 3% of Organik's worldwide sales by volume."[68] And Organik Kimya US's sales made up less than 1% of Organik's global sales by volume.[69]

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[61] Stottmann Aff. Ex. 6 at 16:25–18:6, 87:5–19.

[62] Stottmann Aff. Exs. 29–30.

[63] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 25–26 (citing Stottmann Aff. Exs. 29–30).

[64] Stottmann Aff. Ex. 2 at 31:2–32:9; Stottmann Aff. Ex. 3 at 109:15–25.

[65] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 28 (citing Stottmann Aff. Ex. 10).

[66] Stottmann Aff. Ex. 1 at 197:10–13.

[67] Compl. ¶ 9. The ITC entered this injunction after granting default judgment against Organik in a proceeding brought by Dow alleging, among other things, misappropriation of trade secrets related to Dow's opaque polymers. *Id.* ¶¶ 2, 4, 8. The default judgment was granted after the Administrative Law Judge concluded that Organik had "spoliated, or permitted the spoliation, of massive amounts of evidence." *Id.* ¶ 7. This ruling was later affirmed by the United States Court of Appeals for the Federal Circuit. *Organik Kimya, San. ve Tic. A.S. v. Int'l Trade Comm'n*, 848 F.3d 994 (Fed. Cir. 2017).

[68] Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 14 (citing Cicoski Aff. Ex. 22 at OKDEL00002217).

[69] Cicoski Aff. Ex. 1; Cicoski Aff. Ex. 22 at OKDEL00002217.

The Defendants contest the Plaintiffs' description of Organik's motivations for incorporating a Delaware subsidiary in May 2010. The Defendants point out that, because of "significant product testing hurdles,"[70] Behr did not enter a purchase agreement with Organik for ORGAWHITE 2000 until April 2012,[71] and Organik first sold ORGAWHITE 2000 to Behr in November 2012.[72] Moreover, while Behr had requested shipment of production samples of 850 RR by May 2010, raw material shortages prevented Organik Kimya US from selling 850 RR to Behr until 2016.[73] The Defendants also argue that the Plaintiffs have failed to offer any evidence suggesting that Behr itself would not do business with Organik until Organik formed a US subsidiary. And, according to the Defendants, Organik's relationship with Behr was initiated, managed, and facilitated by Brian Turk of Turk International, a California-based distributor.[74] Turk's role in the Behr relationship suggests to the Defendants that incorporation of a Delaware subsidiary was not, in fact, necessary to enable Organik to sell to major US customers.[75]

4. The Various Organik Entities' Roles in the Alleged Scheme

The Plaintiffs assert that each Organik entity played a significant role in the alleged scheme to misappropriate Dow's trade secrets. Moreover, according to the Plaintiffs, "there is no practical distinction between the various Organik corporate entities."[76] This is demonstrated, the Plaintiffs say, by testimony from Organik Kimya US's sales agent to the effect that he did not distinguish between Organik Kimya US and other Organik entities.[77] The Plaintiffs also point out that the Defendants did not make such a distinction in their interrogatory responses.[78]

Turning to the various Organik entities themselves, Organik Kimya Turkey allegedly "hosted Dr. Nene and Strozzi for their interviews in late 2007, and began contacting customers in the United States just a few

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[70] Defs.' Supplemental Br. in Supp. of Mot. to Dismiss 16.

[71] Cicoski Aff. Ex. 29 at 72:17–20; Cicoski Aff. Ex. 30 at ORG883ITC00088776.

[72] Cicoski Aff. Ex. 29 at 82:9–13.

[73] Cicoski Aff. Ex. 1 at OKDEL00025103–04.

[74] Cicoski Aff. Ex. 2 at 60:21–25; Cicoski Aff. Ex. 3 at 170:6–16; Cicoski Aff. Ex. 7 at 92:25–
93:8; Cicoski Aff. Ex. 24 at 59:9–25.

[75] The Plaintiffs emphasize that Simone Kaslowski said he, rather than Brian Turk, initiated the relationship with Behr. Stottmann Aff. Ex. 1 at 167:12–22.

[76] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 29.

[77] Stottmann Aff. Ex. 5 at 208:8–14.

[78] See Stottmann Aff. Ex. 31 at 11 (describing Simone Kaslowski as "a Co-Owner and General Manager of Organik Kimya" and stating that Stefano Kaslowski "is the Managing Director of Organik Kimya" (emphasis added)).

months later."[79] And Organik Kimya Turkey allegedly manufactured products made using Dow's trade secrets and sold them in the United States through Organik Kimya US.[80] Moreover, Organik Kimya Turkey is Organik Kimya US's parent,[81] and Simone and Stefano Kaslowski—Organik Kimya Turkey's CEO and managing director, respectively— are Organik Kimya US's sole officers and directors.[82] Like Organik Kimya Turkey, Organik Kimya Netherlands also manufactured the purportedly unlawful polymers and sold them to the United States.[83] And Organik Kimya Netherlands hired Strozzi, the former Dow employee, to become plant manager for the Rotterdam plant.[84] As for Organik Kimya Luxemburg, that entity is Organik Kimya Netherlands' parent, and Organik Kimya Netherlands performed toll manufacturing for Organik Kimya Luxemburg.[85] Finally, Organik Kimya Holding allegedly "approves all strategic decisions for the Organik entities, as well as all budgets, and has the decision making power for the entire group of Organik entities."[86]

C. *This Litigation*

On March 8, 2016, the Plaintiffs filed their Complaint in this action. The Complaint contains four counts. Count I alleges misappropriation of trade secrets related to Dow's emulsion and opaque polymers.[87] Count II alleges conversion resulting from Organik's theft and use of Dow's trade secrets.[88] Count III alleges unfair competition, Count IV alleges tortious interference with a prospective business opportunity, and Count V alleges tortious interference with contract.[89] Finally, Count VI alleges that the Defendants were unjustly enriched by their misappropriation of Dow's trade secrets.[90]

On April 8, 2016, the Defendants moved to dismiss the Complaint,

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[79] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 30.
[80] *Id.*; Stottmann Aff. Ex. 31 at 12–13.
[81] Stottmann Aff. Ex. 31 at 12.
[82] Stottmann Aff. Ex. 33 at OKDEL00012335–37.
[83] Stottmann Aff. Ex. 10; Stottmann Aff. Ex. 31 at 12.
[84] Compl. ¶ 41.
[85] Stottmann Decl. Ex. 10 at 3.
[86] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 31 (citing Stottmann Aff. Ex. 1 at 30:17–23, 33:9–13; Stottmann Aff. Ex. 2 at 177:14–178:13).
[87] Compl. ¶¶ 88–95.
[88] *Id.* ¶¶ 96–99.
[89] *Id.* ¶¶ 100–14.
[90] *Id.* ¶¶ 115–20.

arguing, among other things, that this Court lacks personal jurisdiction over the Foreign Defendants. The Plaintiffs opposed that motion, and in the alternative sought jurisdictional discovery. I heard oral argument on the Motion to Dismiss on June 7, 2016, at which time I ordered that jurisdictional discovery be conducted.[91] On June 1, 2017, the Plaintiffs filed a supplemental brief responding to the Defendants' jurisdictional arguments, and on June 30, 2017, the Defendants filed their own supplemental brief on the same issue. The parties then submitted further supplemental briefing on the US Supreme Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*.[92] I heard oral argument on these supplemental submissions on July 21, 2017.

II. ANALYSIS

When a defendant moves for dismissal under Court of Chancery Rule 12(b)(2), "the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the defendant."[93] Before any jurisdictional discovery has taken place, the plaintiff "need only make a prima facie showing, in the allegations of the complaint, of personal jurisdiction and the record is construed in the light most favorable to the plaintiff."[94] Where, as here, the parties have conducted jurisdictional discovery but the Court has not held an evidentiary hearing, the plaintiff's burden is heavier: she "must allege specific facts supporting [her] position."[95] Nevertheless, the plaintiff in such a situation still gets the benefit of all reasonable inferences drawn from the record.[96]

This Court engages in a two-step analysis to determine whether it has personal jurisdiction over a nonresident defendant.[97] First, the Court must evaluate "whether 'Delaware statutory law offers a means of exercising

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[91] June 7, 2016 Oral Arg. Tr. 45:7–14.

[92] 137 S. Ct. 1773 (2017).

[93] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

[94] *Spring Nextel Corp. v. iPCS*, Inc., 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008).

[95] *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 (Del. Ch. Mar. 4, 2004) (quoting *Sears, Roebuck & Co. v. Sears plc*, 744 F. Supp. 1297, 1301 (D. Del. 1990)).

[96] See *Reid v. Siniscalchi*, 2014 WL 6589342, at *5, *13 (Del. Ch. Nov. 20, 2014) (noting that jurisdictional discovery had been taken and finding that "[a]t this stage in the proceedings, the Court is required to draw all reasonable inferences in [the plaintiff's] favor, even if other inferences appear more probable"); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *4 (Del. Ch. Dec. 1, 2009) (same).

[97] *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).

personal jurisdiction' over the nonresident defendant."[98] Second, the Court "must determine whether exercising personal jurisdiction over the defendant passes muster under the Due Process Clause of the United States Constitution."[99] The Court's exercise of personal jurisdiction over a nonresident defendant will satisfy due process "so long as there are 'minimum contacts' between the defendant and the forum."[100]

A. *Long-Arm Jurisdiction*

The Plaintiffs argue that this Court has long-arm jurisdiction over the Foreign Defendants under 10 Del. C. § 3104(c)(1), which authorizes personal jurisdiction "over any nonresident . . . who in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State." "Section 3104 is . . . a 'single act' statute that establishes jurisdiction over nonresidents on the basis of a single act or transaction engaged in by the nonresident within the state."[101] Thus, Section 3104(c)(1) "will only support an exercise of personal jurisdiction with respect to those causes of action that have a nexus to the transaction of business that took place in the State."[102]

1. *Papendick* and Its Progeny

The Plaintiffs' theory is that the Defendants, or some of them, caused Organik Kimya US to be chartered in Delaware in material furtherance of their unlawful scheme to monetize their theft of the Plaintiffs' property. This, they assert, allows me to exercise jurisdiction over the Foreign Defendants under Section 3104(c)(1). The Plaintiffs rely heavily on *Papendick v. Bosch*[103] and its progeny in arguing this theory of jurisdiction over the Foreign Defendants. In *Papendick*, the plaintiff and the defendant, a German limited liability company, entered a contract in which the

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[98] *Ruggiero v. FuturaGene, plc*., 948 A.2d 1124, 1132 (Del. Ch. 2008) (quoting *Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc*., 2005 WL 578972, at *3 (Del. Ch. Mar. 3, 2005)).

[99] *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Trust U/A/D/* June 21, 2002, 2017 WL 3575712, at *5 (Del. Ch. Aug. 18, 2017).

[100] *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *3 (Del. Ch. June 29, 2004) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[101] *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc*., 1995 WL 694397, at *10 (Del. Ch. Nov. 21, 1995) (citing *Tabas v. Crosby*, 444 A.2d 250, 254 (Del. 1982); *Eudaily v. Harmon*, 420 A.2d 1175, 1180 (Del. 1980)).

[102] *Chandler v. Ciccoricco*, 2003 WL 21040185, at *11 (Del. Ch. May 5, 2003).

[103] 410 A.2d 148 (Del. 1979).

defendant agreed to pay the plaintiff a finder's fee if the defendant acquired the Borg-Warner corporation.[104] Eight days before the acquisition took place, the defendant had incorporated a Delaware corporation to "serv[e] as a vehicle for the acquisition of the [Borg-Warner] stock . . . involved [in the transaction]."[105] After the acquisition occurred, the defendant refused to pay the plaintiff the agreed-upon finder's fee, and the plaintiff brought suit in Delaware Superior Court.[106] While the Superior Court found that it lacked personal jurisdiction over the nonresident defendant, our Supreme Court disagreed.[107] The Supreme Court stressed that the defendant had formed a Delaware entity "as an integral component of its total transaction . . . to which the plaintiff's instant cause of action relates."[108] Through that formation, the defendant "purposefully availed itself of the benefits and protections of the laws of the State of Delaware for financial gain in activities related to the cause of action," which was enough to "sustain the jurisdiction of Delaware's courts over [the defendant]."[109]

Following *Papendick*, this Court has held that "a single act of incorporation, *if done as part of a wrongful scheme*, will suffice to confer personal jurisdiction under § 3104(c)(1)."[110] But it is not enough to simply "participat[e] in the formation of a Delaware entity."[111] "Instead, the formation must be 'an integral component of the total transaction to which plaintiff[']s cause of action relates.'"[112] Put differently, the formation of a

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[104] *Id.* at 149.

[105] *Id.*

[106] *Id.* at 148–49.

[107] *Id.*

[108] *Id.* at 152.

[109] *Id*. I note that, while "*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 § 3104(c)(1)." *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *6 (Del. Ch. Sept. 2, 2008).

[110] *Conn. General Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011).

[111] *Id.*

[112] *Id*. (quoting *Shamrock Holdings of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006)); see also *Reid*, 2014 WL 6589342, at *10 ("When done as an integral part of a wrongful scheme, the formation of a Delaware entity confers personal jurisdiction under the long-arm statute."); *Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 WL 198721, at *8 n.16 (Del. Ch. May 10, 1994) ("It is well-accepted that the incorporation of a company in Delaware in furtherance of a fraudulent scheme constitutes a contact with this jurisdiction sufficient to satisfy the requirements of the Due Process Clause, particularly where the creation of the corporation is an integral part of the actions giving rise to suit." (emphasis added)); Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 3.04[c][3] (2016) ("[I]n suits in which the incorporation of a Delaware subsidiary is an integral component of the conduct giving rise to the cause of action, the Delaware courts

Delaware entity must be "central to the[plaintiff's] claims of wrongdoing."[113]

The Plaintiffs' theory of personal jurisdiction goes as follows. Organik had been trying to make a splash in the US market for some time. Two obstacles stood in its way, however. First, Organik's polymers could not meet the exacting standards of large US customers such as Behr. Second, Organik lacked a US subsidiary, and without that, large US customers, again including Behr, would not be willing to buy Organik's products. Organik took care of the first problem by misappropriating Dow's trade secrets, which enabled it to manufacture polymers that met Behr's requirements. Organik dealt with the second obstacle by incorporating Organik Kimya US in Delaware. Having surmounted these two obstacles, Organik was able to sell in the US market large quantities of opaque polymers made using Dow's trade secrets. The incorporation of Organik Kimya US in Delaware was therefore an essential component of Organik's scheme to misappropriate Dow's trade secrets. Since that scheme forms the basis of the Plaintiffs' Complaint, the argument goes, this Court may exercise personal jurisdiction over the Foreign Defendants.

Based on the evidence presented and giving the Plaintiffs the benefit of all reasonable inferences, I conclude that personal jurisdiction extends to Organik Kimya Turkey—Organik Kimya US's parent. For the reasons explained below,this Court cannot exercise personal jurisdiction over the other Foreign Defendants. I begin, however, with the evidence that persuades me personal jurisdiction is proper over Organik Kimya Turkey.

First, the Plaintiffs have offered specific evidence supporting their allegation that, starting in late 2007, Organik began to carry out a scheme to misappropriate Dow's trade secrets. Around this time, Organik hired Dr. Nene, a former Dow employee with knowledge of trade secrets related to Dow's opaque polymers.[114] Organik also hired Strozzi, and there is evidence that during his interview with Organik, "Organik and Mr. Strozzi accessed and reviewed at least 19 Rohm and Haas emulsion polymer recipes that Mr. Strozzi had brought with him on portable storage devices."[115] Dr. Nene's role in improving the recipe for 850 RR is murky, but the Plaintiffs have put forth evidence suggesting that Dr. Nene used

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have consistently recognized that a nonresident defendant's incorporation of such subsidiary constitutes constitutionally sufficient 'minimum contacts' with Delaware.").

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

[114] Stottmann Aff. Ex. 7 at 21:9–32:9, 70:14–72:12, 158:10–14; Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 10–11.

[115] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 12 (citing Compl. Ex. B at 44–54).

Dow's trade secrets to modify the recipe for ORGAWHITE 2000 in a way that seemingly satisfied Behr's requirements.[116] The evidence of record implies that Dr. Nene continued his work on ORGAWHITE 2000 until at least March 2010, only a few months before Organik Kimya US was incorporated.[117]

Second, the Plaintiffs have offered evidence suggesting that Organik decided to incorporate a US subsidiary in May 2010 in part because Behr had recently said it would be willing to accept some of Organik's opaque polymers. Organik had been contemplating creating a US subsidiary for several years.[118] While Simone Kaslowski's deposition testimony on this point is far from clear, what is clear is that, according to Simone, one reason Organik Kimya US was formed in May 2010, as opposed to some other time, was that Behr had recently signaled its approval of various opaque polymers produced by Organik.[119] Those polymers included ORGAWHITE 2000, and the Plaintiffs have offered evidence that Behr's approval of that product came only after Dr. Nene had incorporated Dow's trade secrets into its recipe.[120]

The Plaintiffs tie these two strands of evidence together via their allegation that Organik's decision to incorporate a US subsidiary was driven by its belief that such an entity was necessary to sell to large US customers, Behr included. According to the Plaintiffs, that belief proved well founded: After overcoming additional hurdles related to raw material shortages and product testing, Organik Kimya US eventually started selling the allegedly unlawful polymers to Behr.[121] Several pieces of record evidence support this story. First, Simone Kaslowski testified that he thought Organik would not be able to achieve a significant US presence until it formed a US subsidiary that could assist in understanding US customers.[122] He also said that multinationals would not do business with Organik until it formed a US subsidiary.[123] Stefano Kaslowski, for his part, asserted that a US subsidiary would enable "customers to have as a primary contact another US company that was handling all the supply details, the Customs clearance, everything to do with formalities, . . . [thereby] enhanc[ing] the service level and the satisfaction of our

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[116] Stottmann Aff. Ex. 28 at ORG883ITC00016448; Stottmann Aff. Ex. 21 at ORG883ITC00120481.
[117] Stottmann Aff. Ex. 21 at ORG883ITC00120481.
[118] Stottmann Aff. Ex. 6 at 16:25–18:6, 87:5–19.
[119] Stottmann Aff. Ex. 1 at 150:19–151:7.
[120] Stottmann Aff. Ex. 17 at OKDEL00033736.
[121] Cicoski Aff. Ex. 29 at 82:9–13; Cicoski Aff. Ex. 1 at OKDEL00025103–04.
[122] Stottmann Aff. Ex. 1 at 65:13–19.
[123] *Id.* at 177:6–178:8.

customers."[124] I also note that 98% of ORGAWHITE 2000 sales in the United States were placed through Organik Kimya US, the Delaware entity.[125]

Drawing all reasonable inferences in favor of the Plaintiffs, as I must at this stage of the proceedings, I find that these facts plausibly suggest that the formation of Organik Kimya US was a key component of Organik's scheme to misappropriate Dow's trade secrets. True, there are lacunae in this narrative, and Organik points to several pieces of evidence that undercut it. The gap between May 2010, when Organik Kimya US was incorporated, and November 2012, when Organik Kimya US first sold ORGAWHITE 2000 to Behr,[126] weakens the purported causal connection between incorporation and Organik's ability to reach large US customers such as Behr. But it does not eliminate the connection. And, as the Plaintiffs point out, it appears that Behr had at least tentatively approved Organik's opaque polymers around the time of Organik Kimya US's incorporation. That Organik Kimya US later ran into impediments that delayed its sales to Behr does not establish that incorporation of a US subsidiary had no effect on Behr's decision to buy from Organik.

Organik may also be correct that Organik Kimya US's relationship with Behr was largely managed by Brian Turk of Turk International. But the Plaintiffs have presented evidence that, while Turk managed the relationship, it was Simone Kaslowski who initiated contact with Behr.[127] And even if Turk were solely responsible for maintaining Organik Kimya US's relationship with Behr, it does not necessarily follow that the formation of a US subsidiary was not critical to Organik's broader misappropriation scheme. Further, while Organik cites evidence suggesting that a lack of US manufacturing facilities was the real obstacle to Organik's success with large US customers,[128] that evidence runs up against testimony put forward by the Plaintiffs regarding the importance of having a US subsidiary. At this procedural stage, I need not weigh this conflicting evidence or determine whether the Plaintiffs have proven that Organik Kimya US was integral to Organik's misappropriation scheme. Instead, my task is only to decide whether the Plaintiffs have satisfied their burden of "alleg[ing] specific facts supporting [their] position" that this

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[124] Stottmann Aff. Ex. 6 at 84:13–20.
[125] Stottmann Aff. Ex. 10; July 21, 2017 Oral Arg. Tr. 84:18–24.
[126] Cicoski Aff. Ex. 29 at 82:9–13.
[127] Stottmann Aff. Ex. 1 at 167:12–22.
[128] Cicoski Aff. Ex. 2 at 73:14–16.

Court may exercise long-arm jurisdiction over the Foreign Defendants.[129] This they havedone, at least with respect to Organik Kimya Turkey.

As noted above, Organik Kimya Turkey is Organik Kimya US's parent.[130] That, of course, suffices to show that Organik Kimya Turkey "participated in the formation of" Organik Kimya US, a prerequisite for establishing personal jurisdiction over a nonresident defendant under *Papendick* and its progeny.[131] But the Plaintiffs have failed to offer any record evidence suggesting that the other Foreign Defendants played any role whatsoever in the decision to create Organik Kimya US. Organik Kimya Netherlands may have hired Strozzi to run its Rotterdam plant,[132] and it may have manufactured some of the allegedly unlawful polymers that ended up in the United States;[133] but these facts say nothing about whether Organik Kimya Netherlands had anything to do with the formation of Organik Kimya US. Organik Kimya Luxemburg, for its part, performed toll manufacturing for Organik Kimya Netherlands, its subsidiary.[134] But again, that does not suggest that Organik Kimya Luxemburg participated in the incorporation of Organik Kimya US. As for Organik Kimya Holding, the Plaintiffs point out that it "approves all strategic decisions for the Organik entities, as well as all budgets, and has the decision making power for the entire group of Organik entities."[135] Yet the Plaintiffs provide no evidence that Organik Kimya Holding exercised that decision making authority with respect to the creation of Organik Kimya US—the sole Delaware contact alleged in this case. In short, there is simply no evidence that Organik Kimya Netherlands, Organik Kimya Luxemburg, or Organik Kimya Holding "meaningful[ly] participat[ed] in the formation of the Delaware entity."[136]

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[129] Medi-Tec of Egypt Corp, 2004 WL 415251, at *2 (quoting Sears, Roebuck & Co., 744 F. Supp. at 1301).

[130] Stottmann Aff. Ex. 31 at 12.

[131] Vichi, 2009 WL 4345724, at *5.

[132] Compl. ¶ 41.

[133] Stottmann Aff. Ex. 10; Stottmann Aff. Ex. 31 at 12.

[134] Stottmann Decl. Ex. 10 at 3.

[135] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 31 (citing Stottmann Aff. Ex. 1 at 30:17–23, 33:9–13; Stottmann Aff. Ex. 2 at 177:14–178:13).

[136] *Terramar Retail Ctrs., LLC*, 2017 WL 3575712, at *10. I am also not persuaded by Organik's argument that, because there is no "practical distinction" between the various Foreign Defendants, I may simply ignore the separate corporate existence of these entities. Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 29. I am aware of no authority supporting such a position, and the Plaintiffs have not pointed to any. Nor do I believe that personal jurisdiction is proper over Organik Kimya Netherlands, Organik Kimya Luxemburg, or Organik Kimya Holding simply because the Organik entities share common management. Again, without specific evidence tying these nonresident entities to the formation of Organik Kimya US, *Papendick* and its progeny do not permit this Court to exercise long-arm jurisdiction over them.

B. *The Conspiracy Theory of Jurisdiction*

The Plaintiffs do not rely solely on *Papendick* and its progeny, however. They also argue that personal jurisdiction over the Foreign Defendants is proper under the so-called conspiracy theory of jurisdiction. That theory rests "on the legal principle that one conspirator's acts are attributable to the other conspirators."[137] "The 'conspiracy theory' is not an independent jurisdictional basis."[138] Instead, it is "a shorthand reference to an analytical framework where a defendant's conduct that either occurred or had a substantial effect in Delaware is attributed to a defendant who would not otherwise be amenable to jurisdiction in Delaware."[139] Moreover, this Court has repeatedly stated that "the conspiracy theory of jurisdiction is narrowly construed."[140]

Our Supreme Court has established the following test for evaluating jurisdiction premised on a conspiracy theory:

> [A] conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[141]

"Although *Istituto Bancario* literally speaks in terms of a 'conspiracy to defraud,' the principle is not limited to that particular tort."[142] The fourth and fifth elements of the *Istituto Bancario* test "require

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[137] *Matthew v. Fläkt Woods Grp. SA*, 56 A.3d 1023, 1027 (Del. 2012).

[138] *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 976 (Del. Ch. 2000).

[139] *Computer People, Inc. v. Best Int'l Grp., Inc.*, 1999 WL 288119, at *5 (Del. Ch. Apr. 27, 1999).

[140] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *8 (Del. Ch. Feb. 4, 2005); see also *Sustainable Energy Generation Grp., LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at *6 (Del. Ch. May 30, 2014) (noting "this Court's repeated admonitions that the conspiracy theory is a 'strict test that should be construed narrowly'").

[141] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982).

[142] *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 636 (Del. Ch. 2013) (citing *Hamilton P'rs v. Englard*, 11 A.3d 1180, 1197 (Del. Ch. 2010)).

allegations 'from which one can infer that a foreign defendant knew or should have known that the conspiracy would have a Delaware nexus.'"[143] This Court has clarified that "the five elements of the *Istituto Bancario* test functionally encompass both prongs of the jurisdictional test. The first three *Istituto Bancario* elements address the statutory prong of the test. The fourth and fifth *Istituto Bancario* elements address the constitutional prong of the test."[144]

For reasons that should be clear by now, this Court may not exercise personal jurisdiction over Organik Kimya Netherlands, Organik Kimya Luxemburg, or Organik Kimya Holding under the conspiracy theory. Even if I assume that these entities were members of a conspiracy to misappropriate Dow's trade secrets, and that the incorporation of Organik Kimya US in Delaware advanced that conspiracy, there is no record evidence suggesting that these nonresident defendants "knew or should have known" about any Delaware nexus to the scheme.[145] In lieu of offering such evidence, the Plaintiffs simply assert that Simone Kaslowski's "knowledge of the Delaware incorporation is imputed to each of" the Foreign Defendants.[146]Notably, the Plaintiffs cite no authority for this proposition. Absent any indication that these nonresident entities knew or should have known about the Delaware incorporation, the Plaintiffs cannot satisfy the fourth and fifth elements of the *Istituto Bancario* test.

The Plaintiffs' attempt to premise jurisdiction over the Foreign Defendants on a conspiracy theory fails for an additional, independent reason. The Plaintiffs allege a conspiracy among various Organik entities and their wholly owned subsidiaries. But "a corporation generally cannot be deemed to have conspired with its wholly owned subsidiary."[147] There are exceptions to this general principle. For example, the rule may not apply when a parent and its subsidiary do not "share common economic interests."[148] Yet the Plaintiffs have not attempted to show that any such exception applies here, and indeed their jurisdictional argument hinges on the assumption that "the various Organik entities operated as 'one Organik.'"[149] That alone defeats the Plaintiffs' attempt to establish personal jurisdiction over the Foreign Defendants on the basis of a

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[143] *Virtus Capital L.P. v. Eastman Chem. Co.*, 2015 WL 580553, at *15 (Del. Ch. Feb. 11, 2015) (quoting *Matthew*, 56 A.3d at 1024).

[144] *Id.* at *12.

[145] *Matthew*, 56 A.3d at 1024.

[146] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 42.

[147] *In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *6 (Del. Ch. Feb. 28, 2006).

[148] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1042 (Del. Ch. 2006).

[149] Pls.' Supplemental Br. in Opp'n to Defs.' Mot. to Dismiss 30.

conspiracy.[150] Thus, this Court cannot exercise personal jurisdiction over any of the Foreign Defendants except Organik Kimya Turkey.

C. *Due Process*

Because I have held that this Court may exercise personal jurisdiction over Organik Kimya Turkey, I must now determine whether doing so violates due process. "To satisfy due process, the exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice."[151] The question is whether the nonresident defendant "engaged in sufficient 'minimum contacts' with Delaware to require it to defend itself in the courts of this State."[152] "In order to establish jurisdiction over a nonresident defendant, the nonresident defendant's contacts with the forum must rise to such a level that it should 'reasonably anticipate' being required to defend itself in Delaware's courts."[153] I need not dwell on the due process question, however. That is because *Papendick* itself held that the formation of a Delaware subsidiary as an integral component of a transaction from which a plaintiff's claim arises is sufficient to satisfy due process.[154] And this Court has found it unnecessary to engage in a detailed due process analysis when it has found that *Papendick* applies to a nonresident defendant's conduct.[155] Looked at another way, having incorporated a Delaware entity to further its unlawful scheme, a defendant cannot plausibly maintain that an exercise of jurisdiction over it in this forum in regard to that scheme was unforeseeable. Accordingly, because I have already concluded that *Papendick* and its progeny permit personal jurisdiction over Organik Kimya Turkey, I also find that such an exercise of jurisdiction would not

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[150] *See Am. Capital Acquisition Partners, LLC v. LPL Holdings, Inc*., 2014 WL 354496, at *12 (Del. Ch. Feb. 3, 2014) ("While the Plaintiffs aver that '[t]he defendants' injurious actions were performed for reasons outside the normal course of their businesses,' they do not support this general assertion with any particularized allegations; thus, the general rule that a corporation cannot conspire with its wholly-owned subsidiaries and officers must apply." (alteration in original) (footnote omitted)).

[151] *Vichi*, 2009 WL 4345724, at *10.

[152] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 440 (Del. 2005).

[153] *Id*. (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

[154] 410 A.2d at 152.

[155] *See Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155, at *7 n.35 (Del. Ch. Apr. 27, 2012) ("Because the incorporation of a Delaware corporation as an integral component of a total transaction to which a plaintiff's cause of action relates is sufficient to satisfy § 3104 and constitutional due process, I need not discuss separately the second prong of the personal jurisdiction analysis.").

offend due process.[156]

D. *Remaining Issues*

In addition to arguing that this Court lacks personal jurisdiction over the Foreign Defendants, Organik asserts that the Complaint fails to state a claim for relief under Court of Chancery Rule 12(b)(6). Specifically, Organik argues that the Delaware Uniform Trade Secrets Act ("DUTSA") displaces the Plaintiffs' common law claims, and that the DUTSA does not apply extraterritorially. In light of my decision on personal jurisdiction, I find it appropriate to defer ruling on these issues. The parties should confer on how they wish to proceed as to the Defendants' Rule 12(b)(6) arguments in consideration of the holding here.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss for lack of personal jurisdiction is granted in part and denied in part. Consideration of the Defendants' Rule 12(b)(6) arguments for dismissal is deferred. The parties should submit an appropriate form of order.

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[156] The US Supreme Court's recent decision in *Bristol-Myers Squibb Co*. does not affect my analysis here. In that case, the plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb Company ("BMS") in California state court, "asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix." *Bristol-Myers Squibb Co.*,137 S. Ct. at 1777. While BMS sold Plavix in California, it "did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Id*. at 1778. Moreover, "[t]he nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California." *Id*. The Supreme Court understandably held that personal jurisdiction was not proper over these nonresident plaintiffs: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Id*. at 1781. But in the present case, there is a connection between Delaware and the claims alleged in the Complaint: Organik's decision to incorporate a US subsidiary in Delaware, which allegedly was a key component of its misappropriation scheme.

COURT OF CHANCERY OF THE STATE OF DELAWARE

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RE: *R.A. Feuer v. Philippe P. Dauman, et al.*
Civil Action No. 12579-CB

Dear Counsel:

This letter constitutes the Court's decision on defendants' motion to dismiss claims for breach of fiduciary duty, waste, and unjust enrichment. Plaintiff brought these claims derivatively on behalf of Viacom Inc. challenging the company's payment of approximately $13 million of compensation to its founder and then- Chairman Sumner Redstone from July 2014 to May 2016, when Viacom's directors allegedly knew that he was incapacitated and incapable of doing his job. For the reasons explained below, the motion is granted and the complaint will be dismissed with prejudice as to the named plaintiff because the claims asserted in the complaint were released as part of a settlement agreement Viacom entered in August 2016.

I. BACKGROUND

The facts recited below are drawn from the Verified Derivative Complaint filed on July 20, 2016, and certain facts of which I may take judicial notice because they are not subject to reasonable dispute.[1] For the purpose of deciding this motion, I assume the truth of all well-pled facts and draw all reasonable inferences in favor of plaintiff.[2]

A. *The Parties*

Nominal defendant Viacom, Inc. is a Delaware corporation headquartered in New York that owns various global media brands. Plaintiff alleges he has been a stockholder of Viacom at all relevant times.

Defendant Sumner Redstone served as Viacom's Executive Chairman from January 1, 2006 until February 4, 2016, when he became Chairman Emeritus. Sumner founded Viacom and has been its controlling stockholder since 1986. He is the settlor of the Sumner M. Redstone National Amusements Trust, which owns 80% of National Amusements, Inc. ("NAI"), which in turns owns (directly and indirectly through certain subsidiaries) 79.5% of Viacom's Class A voting shares. Defendant Shari Redstone is a Viacom director and Sumner's daughter. She controls the remaining 20% of NAI.[3]

The complaint names as defendants nine other individuals in addition to Sumner and Shari who were members of the Viacom board at the times relevant to the allegations in the complaint: George S. Abrams, Philippe P. Dauman, Thomas E. Dooley, Blythe J. McGarvie, Deborah Norville, Charles E. Phillips, Jr., Frederic V. Salerno, William Schwartz, and Christiana Falcone Sorrell. Dauman had been Viacom's President and Chief Executive Officer since September 2006. He and Abrams also were directors of NAI until May 20, 2016.

B. *Compensation Paid to Sumner from 2014 to 2016*

During the times relevant to this action, Sumner was party to an employment agreement with Viacom dated December 29, 2005, which was amended on September 26, 2006.[4] As amended, the employment

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[1] D.R.E. 201.

[2] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).

[3] This decision refers to Sumner Redstone and Shari Redstone by their first names for clarity. No disrespect is intended.

[4] Cumings Aff. Ex. C: Employment Agreement with Sumner M. Redstone, Dec. 29, 2005, §§ 2(a), (c); Ex. D: Amendment to Employment Agreement with Sumner M. Redstone, Sept. 26, 2006, § 1 (Dkt. 23).

agreement set his base salary at $1 million per year and entitled him to receive bonus compensation. The employment agreement could be terminated at will by either party.[5] Effective January 1, 2014, Sumner's base salary was increased to $2 million.

In May 2014, Sumner turned 91. He was hospitalized several times that year for pneumonia and, according to a lawsuit filed against him by a former caretaker, suffered brain damage that "severely compromised Sumner's ability to swallow and to articulate speech."[6] Beginning in July 2014, Sumner allegedly ceased providing any services of value to Viacom. Sumner was physically absent from a series of board meetings through the summer and fall of 2014, by which point the directors allegedly knew about his incapacitation. Viacom paid Sumner $13.2 million in total compensation for the 2014 fiscal year, which ended on September 30, 2014, including approximately $2 million in salary and a $10 million bonus.[7]

In 2015, Sumner did not participate in any conference calls with analysts and did not physically attend any Viacom board meetings or the annual stockholder meeting. According to sources quoted in a May 31, 2015 *Vanity Fair* article entitled *Who Controls Sumner Redstone*?, "Sumner (a) cannot speak and (b) hasn't had a meal since Labor Day other than tubes."[8] The article quoted an individual who allegedly told one of Sumner's closest friends that Sumner "looks like he's dead," to which the friend replied: "Well, you should see him in person—he looks even worse."[9] Viacom paid Sumner $2 million in salary for the 2015 fiscal year but eliminated his cash bonus.

In February 2016, with rumors circulating regarding his condition, Sumner resigned as Viacom's Chairman and was designated Chairman Emeritus. Nevertheless, on March 14, 2016, Sumner was reelected as a director after the rest of the board recommended his reelection to the stockholders. Sumner continued to receive a salary until May 2016, when payments to him were stopped without public explanation. According to Viacom's public filings, Sumner received $1.3 million in salary during the 2016 fiscal year.[10]

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[5] Cumings Aff. Ex. C: Employment Agreement with Sumner M. Redstone, Dec. 29, 2005, § 9 (Dkt. 23).

[6] Compl. ¶ 28.

[7] The remaining $1.2 million mostly was attributable to a change in the value of Sumner's pension. See Cumings Aff. Ex. E: Viacom Proxy Statement, Jan. 23, 2015, at 39 (Dkt. 23).

[8] Compl. ¶ 47.

[9] Compl. ¶ 48

[10] *See* Cumings Aff. Ex. M: Viacom Proxy Statement, Dec. 16, 2016, at 23 (Dkt. 23).

C. *Turmoil in the Viacom Boardroom Leads to a Settlement*

On May 20, 2016, Dauman and Abrams were notified that Sumner purportedly had removed them as trustees of his trust, as directors of NAI, and as managers of NAI's subsidiaries. These actions prompted Dauman and Abrams to file a lawsuit in Massachusetts seeking to be reinstated to their positions, and prompted Sumner to file a lawsuit in California affirming their removals. In their Massachusetts complaint, Dauman and Abrams alleged that Sumner "suffers from profound physical and mental illness" and that he is afflicted with a "subcortical neurological disorder."[11]

On June 16, 2016, NAI issued a written consent purporting to amend Viacom's by-laws to permit vacancies on its board to be filled by Viacom's stockholders, to remove five of the defendants (Dauman, Abrams, McGarvie, Schwartz, and Salerno) from the Viacom board, and to fill the resulting vacancies with new directors. That same day, two lawsuits were filed in this Court under 8 *Del. C.* § 225 seeking to determine the proper composition of Viacom's board in light of the written consent submitted by NAI. In one action (C.A. No. 12472-CB), NAI sought a declaration that the consent was valid. In the other action (C.A. No. 12473-CB), Salerno accused Shari of exercising undue influence over Sumner and sought to invalidate the consent. On June 24, 2016, these two actions were consolidated (hereafter, the "225 Action").

On August 18, 2016, the 225 Action, the Massachusetts action, and the California action were settled pursuant to a Confidential Settlement and Release Agreement (the "Settlement Agreement") that was signed by each of the individual defendants in this action individually and in their capacity as directors of Viacom.[12] The Settlement Agreement contains a general release of Viacom's claims against its directors (the "Release") up to its Effective Date, which is defined in the agreement's preamble as August 18, 2016:

> Each of **Viacom**, its subsidiaries, affiliates under its control, predecessors, successors and assigns, and the current and former directors, officers, employees, agents, attorneys and representatives of each of them (collectively the "Viacom Parties"), **hereby releases and forever discharges from all liability . . . [Sumner and Sheri Redstone], . . . Dauman, Abrams, Salerno, McGarvie, Schwartz, Phillips, Sorrell, Norville, Dooley**, and the agents, attorneys, representatives, heirs, executors and assigns of each of them . . . **from any**

[11] Compl. ¶ 79.
[12] *See* Cumings Aff. Ex. N: Form 8-K, Aug. 23, 2016, Ex. 10 (Dkt. 23).

> **and all Claims (defined below) which such Viacom Party ever had, now has or hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the Effective Date of this Settlement**, including, but not limited to, any and all Claims arising out of or relating to conduct alleged in, or the claims asserted in or that could have been asserted in, the Massachusetts Action, the California Action, or the Delaware Actions.[13]

II. PROCEDURAL HISTORY AND THE PARTIES' CONTENTIONS

On July 20, 2016, after obtaining documents from Viacom in response to a demand to inspect books and records under 8 *Del. C.* § 220, plaintiff filed this action asserting two claims derivatively on behalf of Viacom. Count I asserts a claim for breach of fiduciary duty and waste of corporate assets against all the individual defendants except Sumner for "approving excessive compensation packages to him in 2014 and 2015, when they knew that he had provided no services of value to the Company after July 2014, at the latest."[14] Count II asserts that Sumner was unjustly enriched by receiving this compensation.

On October 20, 2016, each of the defendants moved to dismiss the complaint under Court of Chancery Rules 12(b)(6) and 23.1 for failure to state a claim for relief and to plead demand futility. Addressing the merits, defendants emphasize that the lion's share of the challenged compensation came in the form of a $10 million bonus that was paid to Sumner for Viacom's 2014 fiscal year, which ended September 30, 2014, and that plaintiff does not allege that Sumner failed to perform services during most of that fiscal year. As to the payments made for fiscal years 2015 and 2016, which totaled approximately $3.3 million, defendants assert that Sumner's "continued retention was deemed appropriate in light of his historical role as Viacom's founder and for his many years of prior service."[15]

On July 18, 2017, after a protracted briefing schedule, a hearing was held on defendants' motion to dismiss. Supplemental submissions were provided thereafter, on July 25 and August 1, 2017.

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[13] *Id.* § 7(a) (emphasis added).
[14] Compl. ¶ 100.
[15] Individual Defs.' Opening Br. 3 (Dkt. 23).

III. ANALYSIS

The standards governing a motion to dismiss for failure to state a claim for relief are well settled:

> all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[16]

Among the arguments defendants have asserted in support of dismissal is that the claims in the complaint, both of which are asserted derivatively on behalf of Viacom, fail to state a claim for relief because Viacom released them in the Settlement Agreement. This argument presents a threshold issue regarding the viability of plaintiff's claims that is dispositive of the present motion.

The plain language of the Release in the Settlement Agreement quoted above unambiguously provides that Viacom released each of the individual defendants "from any and all Claims" it had "by reason of any matter, cause or thing" arising up to the "Effective Date" of the Settlement Agreement, which is defined to be August 18, 2016.[17] The Settlement Agreement defines "Claims" to include "any claim based on . . . breach of fiduciary duty, . . . incapacity, . . . unjust enrichment or other legal duty."[18] Thus, the literal terms of the Release plainly encompass and bar litigation of the fiduciary duty and unjust enrichment claims asserted in the complaint here, since those claims both arise entirely from compensation decisions that directors of Viacom allegedly made before August 18, 2016. Indeed, plaintiff effectively conceded that this expansive language would bar his claims if the Release is valid.[19]

In his brief, plaintiff devoted a single paragraph to address the Release, making two points. First, plaintiff contends that the release is ineffective "because corporate fiduciaries cannot contract away or limit

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[16] *Savor*, 812 A.2d at 896-97.

[17] Cumings Aff. Ex. N: Form 8-K, Aug. 23, 2016, Ex. 10 at 1 (Dkt. 23).

[18] *Id.* § 7(d).

[19] July 18, 2017 Hearing Tr. at 69 (acknowledging that it "looks like" plaintiff's claims would be "released if the release was valid") (Dkt. 48); Pl.'s Aug. 1, 2017 Letter at 1 (conceding that "the release in Section 7(a) of the Agreement is extremely broad and appears nominally to cover a claim of unjust enrichment" against Sumner) (Dkt. 47).

their fiduciary duties."[20] In support of this argument, plaintiff cites *Paramount Communications, Inc. v. QVC Network Inc.*[21] This citation is inapposite. In *QVC*, our Supreme Court found that a no-shop provision in a merger agreement "could not validly define or limit the fiduciary duties" of a target corporation's directors in a sale of control of the corporation, reasoning that "[t]o the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."[22] Here, the Release does not purport to limit prospectively any exercise of fiduciary duty owed by Viacom's directors. Rather, by its terms, the Release extinguishes potential liability arising from prior acts.

Second, plaintiff asserts that the release is "clearly a self-interested transaction."[23] This may well be true, but no claim has been asserted challenging the validity of the Settlement Agreement or the enforceability of the Release.[24] More specifically, when confronted with a defense based on the terms of the Release, plaintiff made no effort to amend his complaint to assert a claim challenging the enforceability of the Release or to allege facts concerning the circumstances under which it was entered so as to provide a record from which the Court could second- guess its enforceability. To the contrary, as plaintiff acknowledged in his brief with admirable candor, "insufficient facts have been put before the Court concerning the circumstances under which [the Release] was negotiated and executed to assess its validity."[25]

"Should a plaintiff become aware that the allegations set forth in his complaint are inadequate to support his claim, he should request leave of the Court to amend his complaint rather than attempt to expand its scope through briefing."[26] Here, defendants raised the Release as a basis for dismissal of plaintiff's claims in their opening brief on May 1, 2017—more than eight months after Viacom publicly disclosed the Settlement Agreement in a Form 8-K.[27] Yet plaintiff elected not to seek leave in

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[20] Pl.'s Answering Br. 34.

[21] 637 A.2d 34 (Del. 1993).

[22] *Id.* at 51.

[23] Pl.'s Answering Br. 34.

[24] *Cf. In re Riverstone Nat'l Inc. Stockholder Litig*., 2016 WL 4045411, at *1 (Del. Ch. July 28, 2016) (holding that entire fairness is the appropriate standard of review for a challenge to a merger where the acquiror waived in the merger agreement the right to pursue a corporate opportunity claim pre-dating the merger against the target board).

[25] Pl.'s Answering Br. 34.

[26] *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002) (citing Court of Chancery Rule 15(aaa)).

[27] Cumings Aff. Ex. N: Form 8-K, Aug. 23, 2016, Ex. 10 (Dkt. 23).

accordance with Court of Chancery Rule 15(aaa) to amend his complaint to address the circumstances surrounding entry of the Release and instead proceeded to file his answering brief based on a stale, incomplete pleading.

Plaintiff's approach here stands in contrast to the approach another Viacom stockholder took in a separate action in this Court (C.A. No. 12545-CB) asserting putative class claims for breach of fiduciary duty against Viacom's directors concerning their response to Sumner's decline in health. In that case, the plaintiffs amended their complaint within two months of the Settlement Agreement, asserting, among other things, that defendants had breached their fiduciary duties by approving the Settlement Agreement.[28]

"Delaware courts recognize the validity of general releases."[29] Given plaintiff's failure to provide a factual basis for the Court to set aside the terms of the Release in the Settlement Agreement, the plain terms of which bar litigation of the derivative claims asserted in this case, the Court has no basis upon which to ignore the terms of a presumptively valid release of claims and thus must dismiss the complaint. This dismissal is with prejudice as to the named plaintiff only. Nothing in this decision, which expresses no opinion on the issue of demand futility or on any matter other than the facial application of the Release to the two claims asserted in the complaint, is intended to have preclusive effect on any other stockholder of Viacom.

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[28] Am. Compl., *In re Viacom Class B S'holder Litig*., No 12545-CB, ¶ 162 (Del. Ch. Nov. 10, 2016) (Dkt. 76). Plaintiffs voluntarily dismissed their claims in this action after oral argument was heard on defendants' motions to dismiss. (Dkt. 121 & 125).

[29] *Deuley v. DynCorp. Int'l, Inc*., 8 A.3d 1156, 1163 (Del. 2010); *see also Chakov v. Outboard Marine Corp*., 429 A.2d 984, 985 (Del. 1981) (same); Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 856 (Del. 1952) (same); *H-M Wexford LLC v. Encorp., Inc*., 832 A.2d 129, 149 (Del. Ch. 2003) ("[I]t is more or less universally the case that when a corporation pays value to settle a claim, it demands and receives releases in favor of its directors, officers and other agents, in order to preclude the possibility of having to defend against any additional claims arising out of the matter at issue in the settlement.").

IV. CONCLUSION

For the reasons explained above, the complaint is dismissed with prejudice as to the named plaintiff only.

IT IS SO ORDERED.

Sincerely,

/s/ Andre G. Bouchard

Chancellor

AGB/gm

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RE: *Dollar Tree, Inc., et al. v. Dollar Express LLC, et al.*
Civil Action No. 2017-0411-AGB

Dear Counsel:

This letter constitutes the Court's decision on a joint motion that defendants and intervenor Duff & Phelps, LLC filed to disqualify Morris, Nichols, Arsht & Tunnell LLP ("MNAT") from representing plaintiffs in this action. For the reasons explained below, the motion to disqualify is denied.

I. BACKGROUND

Sycamore Partners Management, L.P. ("Sycamore") is a private equity firm. At the times relevant to this motion, SP Dollar Holdings, Ltd. ("SP Dollar") was an indirect subsidiary of Sycamore, and Dollar Express LLC ("Dollar Express") was an indirect subsidiary of SP Dollar. In 2015, Dollar Express acquired approximately 330 discount stores from Family Dollar Stores, Inc. ("Family Dollar") when Family Dollar merged with Dollar Tree, Inc. ("Dollar Tree").

Family Dollar, Dollar Tree, and certain of their affiliates are plaintiffs in this action; Sycamore, SP Dollar, Dollar Express, and certain of their affiliates are defendants. Duff & Phelps intervened for the limited purpose of joining defendants in filing the motion to disqualify MNAT from representing plaintiffs in this action.

A. *MNAT Provides Legal Advice in Connection with Dollar Express' Issuance of a Dividend to Sycamore*

In early 2016, as part of a series of transactions, Dollar Express contemplated issuing a dividend of approximately $30 million to Sycamore (the "Dividend"). As reflected in an engagement letter dated April 6, 2016, SP Dollar, on behalf of itself and its subsidiaries, engaged Duff & Phelps to provide a solvency analysis and opinion concerning the Dividend. The engagement letter states that Duff & Phelps would use any "non-public or proprietary information . . . solely in the course of this Engagement and in a manner which Duff & Phelps believes in good faith is consistent with the Company Group's interests or is required by law."[1] It also authorizes Duff & Phelps to retain outside counsel for the engagement and provides that SP Dollar and its subsidiaries would reimburse Duff & Phelps for the reasonable fees and expenses of such counsel.

In April 2016, Duff & Phelps retained MNAT to provide legal advice on the solvency work it performed for SP Dollar (the "Duff & Phelps Matter"). MNAT's engagement letter, which Duff & Phelps signed on April 14, 2016, states that MNAT had been selected as "Delaware counsel to represent Duff & Phelps, LLC in connection with its engagement as independent financial advisor to SP Dollar Holdings Ltd. and certain of its affiliates."[2]

According to a May 3, 2016 invoice MNAT sent to Duff & Phelps,

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[1] Mot. to Disqualify Ex. B at 8. "Company Group" is defined to mean SP Dollar and certain of its subsidiaries. *Id.* at 1.

[2] Transmittal Affidavit of S. Mark Hurd ("Hurd Aff.") Ex. G at 1.

three MNAT attorneys (two partners and one associate) worked on the Duff & Phelps Matter over the course of approximately one week, from April 6, 2016 to April 15, 2016. They billed a total of 12.20 hours of time, with the two partners billing less than four hours each and the associate billing 4.60 hours.[3]

MNAT's invoice reflects that it assisted in revising Duff & Phelps' engagement letter with SP Dollar and in reviewing and advising Duff & Phelps on a board book and a solvency opinion letter.[4] The board book contained, among other things, financial information concerning Dollar Express, an organization chart, a description of the proposed transaction, and various analyses.[5]

On April 19, 2016, Duff & Phelps provided its solvency analysis and opinion to SP Dollar. Duff & Phelps concluded that "[t]he assets of each of the Delaware Entities, at a Fair Valuation, exceed its respective Debts (including Contingent Liabilities)," and that "[e]ach of the Delaware Entities should be able to pay its respective Debts (including Contingent Liabilities) as they become due."[6] The solvency opinion also concluded that "[n]one of the Delaware Entities will have an unreasonably small amount of assets (or capital) for the businesses in which it is engaged or in which management has indicated it intends to engage."[7] Sometime thereafter, the Dividend was issued to Sycamore.

Duff & Phelps paid MNAT for the work it did on the Duff & Phelps Matter.[8] The last time MNAT performed any work for Duff & Phelps on any matter was on August 26, 2016.[9]

B. *MNAT Files the Present Action on Behalf of Plaintiffs*

On June 1, 2017, MNAT filed an eighteen-count Verified Complaint on behalf of plaintiffs in this action alleging that defendants deliberately failed to pay for tens of millions of dollars of goods and services they purchased from plaintiffs in connection with operating the 330 discount

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[3] Mot. to Disqualify Ex. D at SYC0011317.

[4] *Id.* at SYC0011318. According to MNAT, more than half of the time it billed (6.40 hours) involved the engagement letter between Duff & Phelps and SP Dollar. Resp'ts Opp'n Br. at 4.

[5] Mot. to Disqualify Ex. C

[6] Mot. to Disqualify Ex. A at 7. "Delaware Entities" is defined to mean SP Dollar Holdco LLC, SP Dollar Intermediate Holdco LLC, Dollar Express LLC, and Dollar Express Stores LLC. *Id.* at 2. Each of these entities is a subsidiary of SP Dollar.

[7] *Id.* at 7.

[8] Hurd Aff. ¶ 7.

[9] *Id.*

stores that Dollar Express acquired from Family Dollar in 2015. Relevant to this motion, some of the counts allege that the Dividend was a fraudulent transfer and an illegal distribution under 6 *Del. C.* § 18- 607.[10]

On September 6, 2017, counsel for defendants discovered MNAT's May 2016 invoice to Duff & Phelps and thus learned that MNAT had provided legal advice to Duff & Phelps regarding its solvency analysis and opinion for the Dividend.[11] On September 7, 2017, defendants' counsel contacted MNAT and asked it to withdraw from this action.[12] That same day, S. Mark Hurd, MNAT's General Counsel, instructed MNAT personnel to implement an ethical wall between the Duff & Phelps Matter and this action.[13]

Hurd investigated the alleged conflict, personally interviewing the two MNAT partners who worked on the Duff & Phelps Matter.[14] The two confirmed that they have had no involvement in this action and that they have not discussed the substance of their work for the Duff & Phelps Matter with the MNAT attorneys involved in this action.[15] Hurd also confirmed that the MNAT attorneys involved in this action have not discussed any confidential information regarding MNAT's prior work in the Duff & Phelps Matter with the MNAT attorneys who were involved in the Duff & Phelps Matter, nor have they accessed any of the records from the Duff & Phelps Matter.[16]

As part of his investigation, Hurd instructed IT personnel at MNAT to examine the electronic files from the Duff & Phelps Matter. That examination confirmed, consistent with Hurd's interviews, that none of the MNAT attorneys who has appeared in this action ever accessed any confidential information from the records in the Duff & Phelps Matter.[17]

On September 20 and 21, 2017, movants sent letters to MNAT explaining why they believed MNAT was obligated to withdraw from representing plaintiffs in this action.[18] On September 25, 2017, MNAT sent letters to movants' counsel, formally refusing to withdraw.[19] In these letters, MNAT asserted that the Duff & Phelps Matter is not "substantially related" to the matters at issue in this action and explained measures it had implemented to protect Duff & Phelps' confidences:

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[10] Compl. ¶¶ 113-123.

[11] Mot. to Disqualify ¶ 12.

[12] Hurd Aff. ¶ 2

[13] *Id.*

[14] Hurd Aff. ¶ 8. The third MNAT attorney who worked on the Duff & Phelps Matter left the firm before this action was filed.

[15] *Id.*

[16] *Id.*

[17] Hurd Aff. ¶ 9.

[18] Hurd Aff. Exs. A, C, D.

[19] Mot. to Disqualify Ex. F; Hurd Aff. Exs. E, F.

> The Morris Nichols lawyers involved in the Dollar Tree Litigation were not involved in the Duff & Phelps matter, have not accessed the file from the Duff & Phelps matter nor discussed any confidential information from that representation with the attorneys who were involved in it, and have been formally screened from access since early September, when your clients first expressed their views that there was a potential conflict.[20]

MNAT further stated that it had advised Duff & Phelps that it would not examine Duff & Phelps in connection with this litigation, leaving that task to "be conducted exclusively by other counsel," and denied the existence of any implied attorney- client relationship between MNAT and any of the defendants.[21]

On September 29, 2017, the Court granted Duff & Phelps' unopposed motion to intervene in this action. That same day, defendants, joined by Duff & Phelps, moved to disqualify MNAT.

II. ANALYSIS

Rule 1.9(a) of the Delaware Lawyers' Rules of Professional Conduct (the "Rules") provides as follows: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Impermissible conflicts arising under the Rules generally are imputed and apply to a lawyer's entire firm, and not just to a lawyer individually.[22]

A. *Parties' Contentions*

Movants contend that MNAT violated Rule 1.9 in two respects for which it must be disqualified. First, they argue that an *implied* attorney-client relationship was formed between MNAT and defendants because

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[20] Mot. to Disqualify Ex. F at 1-2.

[21] *Id.*

[22] Del. Lawyers' Rules of Prof'l Conduct R. 1.10(a); *Bleacher v. Bose*, 2017 WL 1854794, at *2 (Del. Super. Ct. May 3, 2017).

MNAT received defendants' confidential information in the Duff & Phelps Matter. They contend that it would be improper for MNAT to have *implicitly* advised defendants on the validity of the Dividend in the Duff & Phelps Matter, but now attack the Dividend as impermissible. Second, movants argue that MNAT's participation in this action violates its duty of loyalty owed to Duff & Phelps and merits disqualification because MNAT's representation of plaintiffs in this action would require MNAT to discredit the same work on which it advised Duff & Phelps.

MNAT denies that it had an attorney-client relationship with defendants arising from the Duff & Phelps Matter and contends that its representation of plaintiffs in this action does not violate duties it owes to Duff & Phelps under Rule 1.9. MNAT further contends that, even if its participation in this action were to amount to a technical violation of the Rules, its continued involvement does not undermine the legitimacy of this judicial proceeding such that it should be disqualified from representing the plaintiffs.

I consider the movants' two arguments, in turn, below.

B. *There Was No Implied Attorney-Client Relationship Between MNAT and Defendants*

"In the absence of an express contract or formal retainer agreement, determining the existence of an attorney-client relationship is a fact-intensive inquiry that depends on the circumstances of each case. In determining the existence of an attorney-client relationship, courts look at the contacts between the potential client and its potential lawyers to determine whether it would have been reasonable for the 'client' to believe that the attorney was acting on its behalf as its counsel."[23]

Based on my review of the record, including documents submitted *in camera*, I find it would not have been reasonable for defendants to have believed that MNAT was acting as their counsel in connection with the Duff & Phelps Matter. To start, defendants were represented by separate legal counsel in connection with the Dividend before MNAT became involved. Duff & Phelps thereafter reached out to have MNAT represent it separately.[24] As this Court has recognized on multiple occasions, the prior retention of separate legal counsel is a factor that counts against the

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[23] *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002) (citations omitted).

[24] Transmittal Affidavit of Patricia O. Vella ("Vella Aff.") Ex. 1.

formation of a subsequent implied attorney-client relationship.[25] Additionally, the engagement agreement between Duff & Phelps and SP Dollar was explicit that Duff & Phelps, and not SP Dollar, would engage legal counsel to advise on its solvency analysis and solvency opinion.[26] This Court has viewed the fact that a purported client did not ask a law firm to represent it as a factor counting against the formation of an attorney-client relationship.[27]

Movants invoke *Jack Eckerd Corp. v. Dart Grp. Corp.* for the proposition that "an attorney-client relationship arises whenever a lay party submits confidential information to a lawyer with the reasonable belief that the lawyer is acting as his attorney."[28] This argument fails here on two levels. First, the submission of confidential information to a lawyer does not automatically form an implied attorney-client relationship under Delaware law.[29] Second, and more importantly, it would not have been reasonable in my view for defendants to have believed MNAT was their lawyer for the reasons explained above.

In sum, in my "realistic assessment of all aspects of the relationship,"[30] no implied attorney-client relationship was formed between defendants and MNAT. Thus, the purported relationship between defendants and MNAT does not provide a basis for seeking to disqualify MNAT from representing plaintiffs in this action. I consider next MNAT's relationship with its former client Duff & Phelps.

C. *Movants Have Failed to Establish that MNAT's Representation of Plaintiffs Would Prejudice the Fairness of the Proceedings*

In *In re Appeal of Infotechnology, Inc.*, our Supreme Court made clear that a violation of the Delaware Lawyers' Rules of Professional Conduct is not sufficient by itself to warrant disqualification of counsel from an action, and that disqualification is appropriate *only* if the challenged conduct prejudices the fairness of the proceedings:

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[25] *See, e.g.*, *Benchmark*, 2002 WL 31057462, at *3; *Delaware Trust Co. v. Brady*, 1988 WL 94741, at *3 (Del. Ch. Sept. 14, 1988) (Allen, C.).

[26] Mot. to Disqualify Ex. B at 5 ("[T]he Consolidated Company agrees to promptly reimburse Duff & Phelps . . . for reasonable documented fees and expenses of outside counsel *retained by Duff & Phelps*.") (emphasis added).

[27] *Brady*, 1988 WL 94741, at *3.

[28] 621 F. Supp. 725, 731 (D. Del. 1985).

[29] *See Benchmark*, 2002 WL 31057462, at *3 (citing *Brady*, 1988 WL 94741, at *3) ("While courts have recognized that a client's submission of confidential information to an attorney is an important factor in this inquiry, that factor alone is not controlling.").

[30] *Brady*, 1988 WL 94741, at *3.

> While we recognize and confirm a trial court's power to ensure the orderly and fair administration of justice in matters before it, including the conduct of counsel, the Rules may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs. *Unless the challenged conduct prejudices the fairness of the proceedings*, such that it adversely affects the fair and efficient administration of justice, *only this Court has the power and responsibility to govern the Bar*, and in pursuance of that authority to enforce the Rules for disciplinary purposes.[31]

The Supreme Court reaffirmed this rule more recently, holding that "[a]bsent conduct that prejudicially disrupts the proceeding, trial judges have no independent jurisdiction to enforce the Rules of Professional Conduct."[32]

The rule adopted in *Infotechnology* recognizes that ethical rules "are not to be subverted as procedural weapons."[33] Accordingly, "disqualification of counsel is an extreme remedy that should be employed only when necessary to ensure the fairness of the litigation process."[34]

"As a threshold matter, therefore, the court must consider whether the alleged violation of the Rules is sufficiently serious to prejudice the fairness of the proceeding. If not, then the alleged violation falls within the jurisdiction of the Delaware Office of Disciplinary Conduct, not this court."[35] When making this determination, the Court must weigh "the interests of the former client in protecting confidences revealed during representation with the prejudice that would be suffered by the current client were the attorney or firm be disqualified."[36]

The parties dispute what burden of proof should apply to

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[31] 582 A.2d 215, 216-17 (Del. 1990) (emphasis added).

[32] *Crumplar v. Superior Court ex rel. New Castle Cty.*, 56 A.3d 1000, 1009 (Del. 2012).

[33] *Infotechnology*, 582 A.2d at 220. *See also Rohm & Hass Co. v. Dow Chem. Co.*, 2009 WL 445609, at *2 (Del. Ch. Feb. 12, 2009) (internal quotation omitted) ("Because of the risk that the ethical rules may be invoked by opposing parties as procedural weapons, courts impose a significant burden on the party seeking disqualification."); *Sanchez-Caza v. Estate of Whetsone*, 2004 WL 2087922, at *4 (Del. Super. Ct. Sept. 16, 2004) (citing *Acierno v. Hayward*, 2004 WL 1517134 (Del. Ch. July 1, 2004)) (noting that courts disfavor disqualification motions "because they are often filed for tactical reasons rather than bona fide concerns about client loyalty").

[34] *Fernandez v. St. Francis Hosp., Inc.*, 2009 WL 2393713, at *5 (Del. Super. Ct. Aug. 3, 2009).

[35] *Matter of Rehab. of Indem. Ins. Corp., RRG*, 2014 WL 637872, at *1 (Del. Ch. Feb. 14, 2014) (internal quotation marks and alterations omitted).

[36] *Express Scripts, Inc. v. Crawford*, 2007 WL 417193, at *1 (Del. Ch. Jan. 25, 2007).

establishing prejudice to the fairness of the proceedings. MNAT points to cases holding that the burden is one of clear and convincing evidence.[37] Movants argue that this heightened standard only applies to *non-client* litigants seeking disqualification of opposing counsel,[38] and that courts merely weigh the competing interests of the former and current clients where, as here, a former client moves for disqualification.[39] I need not resolve this issue because, even under the less onerous balance-of-interests test that the movants advocate, I find that the prejudice that would be caused to plaintiffs if MNAT were disqualified outweighs Duff & Phelps' concerns.

Simultaneously with filing this action, plaintiffs filed a motion for expedition and the entry of a status quo order out of concern that defendants were diverting assets improperly to avoid paying a potentially substantial judgment. Shortly thereafter, the parties stipulated to entry of an expedited case schedule, with a five- day trial scheduled to begin in April 2018.[40] Since then, document production has been substantially completed and multiple motions have been fully briefed and presented to the Court. Disqualification of MNAT thus not only would deprive plaintiffs of their chosen counsel, but also undoubtedly would result in significant expense and delay to plaintiffs in a case that has been placed on an expedited track with the consent of all parties.[41]

On the other side of the ledger, MNAT has taken numerous, and in my view, effective, precautions to protect Duff & Phelps' confidences. Although MNAT did not create an ethical screen from the outset of this litigation, it implemented one the same day that it learned of the issue from defendants' counsel.[42] MNAT has represented in an affidavit that no

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[37] *See, e.g.*, *Dunlap v. State Farm Fire & Cas. Co.*, 950 A.2d 658, 658 (Del. 2008) (TABLE); *Matter of Rehab. of Indem. Ins. Corp., RRG*, 2014 WL 637872, at *1; *Postorivo v. AG Paintball Hldgs., Inc*., 2008 WL 3876199, at *14 (Del. Ch. Aug. 20, 2008).

[38] *See Infotechnology*, 582 A.2d at 221 ("[W]e conclude that the burden of proof must be on the non-client litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings.").

[39] *See, e.g.*, *Rohm*, 2009 WL 445609, at *2; *Express Scripts*, 2007 WL 417193, at *1.

[40] Stipulation & Order Governing Case Schedule ¶ 1(v) (Dkt. #41). At a recent hearing, counsel for defendants suggested that the trial date may need to be moved back because of delays in discovery, but that rescheduling has not yet occurred.

[41] *See Postorivo*, 2008 WL 3876199, at *24 (Del. Ch. Aug. 20, 2008) ("[D]epriving Defendants of their chosen counsel, especially in a case like this one with large numbers of documents, extensive electronic discovery, and numerous fact witnesses, would cause substantial prejudice.").

[42] Hurd Aff. ¶ 2. *See also Express Scripts*, 2007 WL 417193, at *2 (denying defendants' motion to disqualify a law firm even though an ethical screen was implemented only after conflict of interest concerns were raised).

attorney who has entered an appearance in this action has ever accessed information from the Duff & Phelps Matter, and the two partners who worked on the Duff & Phelps Matter (for less than eight hours combined) have had no involvement in the present litigation.[43] MNAT also has represented that it will not examine Duff & Phelps in this action.[44] Given these representations, I am comfortable that the fairness of these proceedings has not been prejudiced and that appropriate measures are in place to ensure that they will not be prejudiced in the future.[45]

Based on these findings, there is no need for me to determine whether MNAT has violated Rule 1.9(a), an issue on which MNAT and the movants vigorously disagree, with each of them submitting expert opinions in support of their respective positions on the issue. Indeed, given these findings, it would be inadvisable for the Court to opine on the issue since, under prevailing Supreme Court authority, a trial court does not have the independent authority to enforce disciplinary rules governing attorney conduct when the challenged conduct does not prejudice the fairness of the proceedings.

III. CONCLUSION

For the reasons explained above, the motion to disqualify is denied.

IT IS SO ORDERED.

Sincerely,

/s/ Andre G. Bouchard

Chancellor

AGB/gm

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[43] Hurd Aff. ¶¶ 7-9. As noted above, the associate attorney who worked on the matter was no longer with MNAT when this action was filed.

[44] Hurd Aff. Ex. E.

[45] *See Rohm*, 2009 WL 445609, at *3 ("While [defendant] is correct that the ethical rules impute knowledge of one attorney to other attorneys in the firm, the issue before the Court is not whether there was a violation of the ethical rules. To justify disqualification, the Court must find that allowing the representation to continue would threaten the fair and efficient administration of justice, a threat that is greatly reduced by a credible representation to the Court that the firm will ensure that the attorneys working on this matter do not have access to [defendants'] client confidences.").

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC.,	)	
Plaintiff and Counterclaim Defendant,	)	
v.	)	C.A. No. 12090-VCG
ENERGY TRANSFER EQUITY, L.P. and LE GP, LLC,	)	
Defendants and Counterclaim Plaintiffs.	)	
THE WILLIAMS COMPANIES, INC.,	)	
Plaintiff and Counterclaim Defendant,	)	
v.	)	C.A. No. 12337-VCG
ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC, and ENERGY TRANSFER EQUITY GP, LLC,	)	
Defendants and Counterclaim Plaintiffs.	)	

MEMORANDUM OPINION

Date Submitted: August 29, 2017
Date Decided: December 1, 2017

Kenneth J. Nachbar and Zi-Xiang Shen, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, DE; OF COUNSEL: Sandra C. Goldstein, Antony L. Ryan, and Kevin J. Orsini, of CRAVATH, SWAINE & MOORE LLP, New York, NY, *Attorneys for the Plaintiff and Counterclaim Defendant*.

Rolin P. Bissell, Tammy L. Mercer, and James M. Yoch, Jr., of YOUNG CONAWAY STARGATT & TAYLOR LLP, Wilmington, DE; OF COUNSEL:
Michael C. Holmes, John C. Wander, Michael L. Charlson, and Craig E. Zieminski, of VINSON & ELKINS LLP, Dallas, TX, *Attorneys for the Defendants and Counterclaim Plaintiffs*.

GLASSCOCK, Vice Chancellor

What, Langston Hughes asked, becomes of a dream deferred?[1] When the dream is a multi-billion-dollar merger that changing market conditions no longer favor, it seems, it becomes a carcass that, like those of millions of turkeys featured in the holiday feasts just past, is diligently picked over. The carcass here is the remnant of the dreamed-of merger of The Williams Companies, Inc. ("Williams") and Energy Transfer Equity, L.P. ("ETE" or the "Partnership"). The matter came before me just before its demise, as Williams unsuccessfully fought for injunctive relief to force consummation, a result vigorously opposed by ETE. Thereafter, the parties pursued actions against one another for contractual damages under the merger agreement. Before me now is Williams' Motion to Dismiss ETE's counterclaims. ETE, having successfully resisted Williams' attempt to force consummation of the merger, is in the unlikely position of arguing that it is also entitled to a billion-dollar breakup fee under the merger agreement. ETE, however, was able to walk away from the merger based on the failure of a condition precedent: the inability of its counsel to opine that the merger "should" trigger favorable tax treatment. Since none of the allegations of breach supporting ETE's entitlement to the breakup fee caused, or even relate to, ETE's exercise of its right to avoid the merger, and, fundamentally, because the contract language it relies on is not supportive, I find ETE's counterclaim seeking the breakup fee not viable. My analysis of ETE's remaining counterclaims is mixed. My reasoning follows.

[1] *Harlem*, Langston Hughes, Collected Poems (1994).

I. BACKGROUND

This Memorandum Opinion assumes familiarity with the facts outlined in the previous Opinions of both this Court and the Supreme Court. "The reader is forewarned that this case involves a maze of corporate entities and an alphabet soup of corporate names."[2] This Opinion includes only those facts necessary to my analysis.

A. *The Merger Agreement and Failure of a Condition*

The parties are significant players in the energy pipeline business.[3] Counterclaim Plaintiffs ETE and its affiliate Energy Transfer Corp LP ("ETC") are Delaware limited liability partnerships.[4] Counterclaim Defendant Williams is a Delaware corporation.[5]

Williams and ETE negotiated a merger as set out in an Agreement and Plan of Merger dated September 28, 2015 (the "Merger Agreement" or "Agreement").[6] Under the Merger Agreement, Williams would merge into ETC (the "Merger") in exchange for ETC stock, $6.05 billion in cash, and certain other rights.[7] Post-Merger ownership of ETC would be split, with 19% held by the Partnership and 81% by former Williams stockholders.[8]

After ETE and Williams signed the Merger Agreement, the energy industry—and particularly the outlook for ETE and Williams—declined substantially.[9] In reaction to this decline—although its precise motives are in dispute—ETE issued new units to certain large ETE equity holders after signing the Merger Agreement (the "Special Issuance").[10] Ultimately, ETE's tax counsel, Latham & Watkins LLP ("Latham"), decided that it could not issue a tax-related opinion with the required confidence level to

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[2] *Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *1 (Del. Ch. Oct. 6, 2017) (quoting *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *2 (Del. Ch. Sept. 18, 2014)).

[3] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.* (*Williams' Second Action*), 2016 WL 3576682, at *1 (Del. Ch. June 24, 2016).

[4] In addition, Counterclaim Plaintiffs LE GP, LLC ("LE GP"), ETE Corp GP, LLC ("ETE Corp"), and Energy Transfer Equity GP, LLC ("ETE GP") are Delaware limited liability companies. Defs.' and Countercl. Pls.' Second Am. & Supplemental Affirm. Defenses & Verified Countercl. (the "Countercl." or the "Counterclaim Complaint") ¶¶ 41–45.

[5] *Id.* ¶ 46.

[6] *Id.* ¶ 48 (including a Letter Agreement dated May 24, 2016 and noting that the Merger Agreement was amended on May 1, 2016); *Williams' Second Action*, 2016 WL 3576682 at *1.

[7] Countercl. ¶ 48; *Williams' Second Action*, 2016 WL 3576682 at *3.

[8] *Williams' Second Action*, 2016 WL 3576682 at *3, 6.

[9] Countercl. ¶ 3.

[10] *Id.* ¶¶ 143–46, 149–50, 158–59; *Williams' Second Action*, 2016 WL 3576682 at *4.

satisfy a condition precedent for the Merger to close.[11] Relying on the failure of this condition precedent, ETE exercised its right to terminate the Agreement on June 29, 2016.[12]

B. *Procedural History*

The parties quickly became entangled in litigation. Williams challenged the Special Issuance and filed its first Verified Complaint against the Partnership and LE GP on April 6, 2016 (the "First Action"), arguing that equitable relief was necessary to preserve the Merger Agreement.[13] Williams filed a Verified Amended Complaint on April 19, 2016 (the "Second Action") against the Defendants to specifically enforce the Agreement and compel ETE to comply.[14] I found that ETE was entitled to terminate the Agreement because Latham's inability to issue the tax opinion was a failure of a condition precedent under that Agreement.[15] Williams appealed to the Supreme Court, which affirmed, in pertinent part, the Opinion below.[16] Williams also filed suit against ETE CEO and Chairman Kelcy Warren in Texas state court for tortious interference with contract, but the suit was dismissed as incompatible with the forum selection clause in the Merger Agreement.[17]

Williams seeks contract damages in the current litigation. ETE brought counterclaims and alleges that Williams breached provisions of the Agreement pertaining to (i) the board recommendation requirement, (ii) the forum selection clause, and (iii) the reasonable best efforts, disclosure, and financing cooperation requirements. ETE contends that, as a result of these breaches, Williams owes ETE

$1.48 billion (the "Termination Fee") and other damages.[18] Currently before me is Williams' Motion to Dismiss those counterclaims. Because these alleged breaches largely rely on my interpretation of the

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[11] Countercl. ¶¶ 171–77; Merger Agreement § 6.01(h).

[12] Countercl. ¶ 7; *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 275 (Del. 2017) (denying Williams' request to enjoin ETE from terminating the Merger Agreement).

[13] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, C.A. No. 12168-VCG (Del. Ch. Apr. 6, 2016); a separate challenge to ETE's issuance is also proceeding before me. *In re Energy Transfer Equity L.P. Unitholder Litig.* (*ETE Unitholder Litig.*), 2017 WL 782495, at *1 (Del. Ch. Feb. 28, 2017).

[14] The actions are now combined in the present matter. *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, C.A. No. 12337-VCG (Del. Ch. Nov. 30, 2016).

[15] *Williams' Second Action*, 2016 WL 3576682 at *21.

[16] *Williams Cos.*, 159 A.3d at 275.

[17] Countercl. ¶¶ 72, 168–69.

[18] Countercl. ¶ 8.

Merger Agreement, I include significant portions of that Agreement below.

C. *The Board Recommendation Claim*

ETE alleges that Williams breached the board recommendation and reasonable best efforts provisions of the Agreement by making negative comments about Warren in press releases, public filings, pleadings in a lawsuit against Warren in Texas state court, and by "failing to reconsider the recommendation" of the Merger in light of changes "described in [Williams'] Form S-4" that "gutted the foundations for the original recommendation."[19] The required "Company Board Recommendation" (or the "Recommendation") was defined in Section 3.01(d) of the Merger Agreement:

> The *Board of Directors of the Company duly and validly adopted resolutions* (A) approving and declaring advisable this Agreement, the Merger and the other Transactions, (B) declaring that it is in the *best interests of the stockholders* of the Company that the Company enter into this Agreement and consummate the Merger and the other Transactions on the terms and subject to the conditions set forth herein, (C) directing that the adoption of this Agreement be submitted to a vote at a meeting of the stockholders of the Company and (D) recommending that the stockholders of the Company adopt this Agreement ((A), (B), (C) and (D) being referred to herein as the "Company Board Recommendation"), which resolutions, as of the date of this Agreement, have *not been rescinded, modified or withdrawn in any way*.[20]

ETE's contention relies on interpreting the Agreement to mean that the public statements made by Williams, or Williams' Board of Directors (the "Directors" or the "Board"), constitute a withdrawal of the Company Board Recommendation or designation as a "Company Adverse Recommendation Change" under Section 4.02.[21] Williams argues that a proper construction of Section 4.02 allows for a "Company Adverse Recommendation Change" only in the context of a formal board resolution

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[19] *Id.* ¶ 23.

[20] Merger Agreement § 3.01(d) (emphases added).

[21] For ease of reference, any citation to a "section" refers to a section in the Merger Agreement, unless otherwise noted.

and that no such board resolution was enacted.[22] Section 4.02 reads in relevant part:

> (d) Neither the *Board of Directors of the Company nor any committee thereof* shall (i)(A) *withdraw (or modify or qualify in a manner adverse to [ETE])*, or *publicly propose* to withdraw (or modify or qualify in a manner adverse to [ETE]), the Company Board Recommendation or (B) recommend the approval or adoption of, or approve or adopt, declare advisable or publicly propose to recommend, approve, adopt or declare advisable, any Company Takeover Proposal (any action described in this clause (i) being referred to as a "Company Adverse Recommendation Change") or (ii) approve or recommend, or publicly propose to approve or recommend, or cause or permit the Company or any of its Subsidiaries to execute or enter into any Company Acquisition Agreement.
>
> (f) Nothing contained in this Section 4.02 or elsewhere in this Agreement shall prohibit the Company or any of its Subsidiaries from (i) taking and disclosing to its stockholders a position contemplated by Rule 14d-9, Rule 14e-2(a) or Item 1012(a) of Regulation M-A promulgated under the Exchange Act or (ii) making any *disclosure to its stockholders* if the Board of Directors of the Company or any of its Subsidiaries determines in good faith (after consultation with and receiving advice of its outside legal counsel) that the failure to do so would reasonably be likely to constitute a breach of its fiduciary duties to its stockholders under applicable Law; provided, however, that any such action or statement or disclosure made pursuant to clause (i) or clause (ii) shall be deemed to be a Company Adverse Recommendation Change *unless the Board of Directors of the Company reaffirms its recommendation in favor of the Merger in such statement or disclosure or in connection with such action*.[23]

ETE contends that violations of the Company Adverse Recommendation provision in Section 4.02(d), which fall outside of the safe harbor in

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[22] Pl.'s Br. in Supp. of Its Mot. to Dismiss & to Strike Defs. & Countercl. Pls.' Second Am. & Supplemental Affirmative Defenses & Verified Countercl. ("Pl. Op. Br.") at 23–30; Nov. 30, 2016 Oral Arg. Tr. at 8:14–9:14.

[23] Merger Agreement § 4.02(f) (emphases added).

Section 4.02(f), are necessarily a violation of the reasonable best efforts provision in Section 5.03, and that Williams—by breaching Section 4.02(d)—is also in breach of Section 5.03.[24] ETE also contends that violations of portions of Section 5.03 are "untethered to consummation of the Merger" and that such claims should remain even if the Merger failed.[25] As a result of these and other breaches, ETE seeks unspecified damages.[26]

ETE also argues that Williams' breach of the Company Adverse Recommendation provision in Section 4.02(d) allowed ETE to terminate the Agreement under Section 7.01(e), which permits termination by ETE "in the event that a Company Adverse Recommendation Change shall have occurred."[27] Therefore, Williams became immediately liable for a $1.48 billion fee (the "Company Termination Fee") under Section 5.06(d)(iii).[28] Section 5.06(d)(iii) states that if the "Agreement is terminated by [ETE] pursuant to Section 7.01(e) [a Company Adverse Recommendation change], then . . . [Williams] shall pay [ETE] . . . an aggregate fee equal to $1.48 billion."[29] Thus, according to ETE, Williams' breach of the Company Adverse Recommendation Change provision in Section 4.02(b) allowed ETE to terminate the Agreement under the permissible termination provision in Section 7.01(e), but then required Williams to pay a $1.48 billion Company Termination Fee under Section 5.06(d)(iii).[30]

According to Williams, ETE could receive the $1.48 billion Termination Fee only if ETE "validly terminated the Agreement under Section 7.01(e) because the Williams Board effected a Company Adverse Recommendation Change."[31] Thus, Williams contends, to the extent that ETE maintains that violations of the reasonable best efforts clause in Section 5.01—or any other violations besides those under Section 7.01(e) and Section 5.06(d)(iii)—could lead to Williams paying the Company

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[24] Countercl. ¶¶ 9, 32.

[25] Defs. & Countercl. Pls.' Br. in Opp'n to Pl. and Countercl. Def.'s Mot. to Dismiss & to Strike Defs. and Countercl. Pls.' Second Amended & Supplemental Affirmative Defenses & Verified Countercl. ("Defs. Ans. Br.") 47–48.

[26] The damages sought other than the $1.48 billion Company Termination Fee are left unclear in the Counterclaim Complaint. *See* Countercl. ¶¶ 32 ("By taking these actions, Williams breached Sections 4.01(b), 5.03, and 5.14 of the Merger Agreement, is not entitled to any post-termination relief, and is liable for damages."), 86 ("Williams has, therefore, violated Sections 4.02 and 5.03 of the Merger Agreement, owes ETE $1.48 billion, and is not entitled to any relief.").

[27] Merger Agreement § 7.01(e).

[28] *Id.* § 5.06(d)(iii).

[29] *Id.* § 5.06(d)(iii).

[30] Countercl. ¶ 51.

[31] Pl.'s Reply Br. in Further Supp. of Its Mot. to Dismiss & to Strike Defs. and Countercl. Pls.' Second Am. & Supplemental Affirmative Defenses & Verified Countercl. at 6.

Termination Fee, those contentions are based on an inaccurate reading of the Merger Agreement.[32] Sections 5.06(b) and (c) specify the fees and expenses owed to the parties when the Agreement is terminated under other circumstances.[33] Williams argues that it does not owe ETE the $1.48 billion Termination Fee because it did not effect a Company Adverse Recommendation Change under the Agreement,[34] which is, according to Williams, the *only* way for Williams to owe ETE the $1.48 billion Termination Fee.

D. *The Forum Selection Clause*

ETE alleges that Williams' lawsuit against Warren in Texas for tortious interference with the Agreement (the "Texas Merger Action") violates the forum selection clause in Section 8.10(b) of the Merger Agreement.[35] Section 8.10(b) states that:

> Each of the parties hereto irrevocably submits to the *exclusive jurisdiction of the Court of Chancery of the State of Delaware* for the purposes of any suit, action or other proceeding arising out of or relating to this Agreement and the rights and obligations hereunder or the Transactions or for the recognition and enforcement of any judgment in respect of this Agreement and the rights and obligations arising hereunder or the Transactions.[36]

Williams contends that it did not breach the clause because it sued Warren in his personal capacity and Warren is not a party to the Merger Agreement.[37] Regardless, argues Williams, any such breach was immaterial and therefore not subject to liability because Section 7.02 limits post-termination liability for everything except "*willful* and *material* breach[es] of any of its representations, warranties, covenants or agreements."[38] Even if a breach were material, according to Williams, ETE suffered no cognizable damages.[39] Alternatively, if there were damages, then Williams argues that recovery would be prohibited because Section 5.02(a) of the Agreement states that "all fees and expenses

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[32] Nov. 30, 2016 Oral Arg. 16:22–17:5.
[33] Merger Agreement §§ 5.06(b)–(c).
[34] Nov. 30, 2016 Oral Arg. Tr. 15:9–17:5.
[35] Countercl. ¶ 33.
[36] Merger Agreement § 8.10(b) (emphasis added).
[37] Pl. Op. Br. at 52–53.
[38] Merger Agreement § 7.02 (emphases added).
[39] Pl. Op. Br. at 52.

incurred in connection with this Agreement and the Transactions shall be paid by the party incurring such fees or expenses, whether or not the Transactions are consummated."[40]

E. *The Additional Breach of Contract Claims*

ETE argues that Williams breached Section 5.01 of the Agreement by failing to disclose: (i) information about an internal proxy contest that may have influenced Williams' vote in approving the Agreement and for failing to promptly notify ETE of the same,[41] (ii) "the self-interests of the Williams Board and/or beliefs concerning those self-interests,"[42] and (iii) the "material fact that members of [Williams'] [B]oard considered the possibility of a board-member-led proxy contest when voting in favor of the [Merger]" in the Form S-4.[43] Williams argues that it disclosed the relevant facts and that, in any case, ETE "has pleaded (and can plead) no injury" from any disclosure violations.[44]

Section 5.01 pertains to the preparation of the Form S-4 and the proxy statement and states in pertinent part:

> (a) If at any time prior to receipt of the Company Stockholder Approval any information relating to [ETE] or the Company, or any of their respective Affiliates, directors or officers, should be discovered by [ETE] or the Company which is required to be set forth in an amendment or supplement to either the Form S-4 or the Proxy Statement, so that either such document would *not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they are made, not misleading*, the party that discovers such information shall promptly notify the other parties hereto and an appropriate amendment or supplement describing such information shall be promptly filed with the SEC and, to the extent required by Law, disseminated to the stockholders of the Company.[45]

The success of ETE's allegations rest on whether I find that these omissions are material and, if material, resulted in compensable damages.

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[40] Merger Agreement § 5.06(a).
[41] Countercl. ¶ 29.
[42] *Id.* ¶ 130.
[43] *Id.* ¶ 112.
[44] Pl. Op. Br. at 42–48.
[45] Merger Agreement § 5.01(a) (emphasis added).

ETE further alleges that Williams breached Sections 4.01(b) (carrying on business in the ordinary course), 5.03 (reasonable best efforts), and 5.14 (reasonable cooperation in financing arrangements) of the Agreement by refusing to provide the information required—including certain financial information and a consent from Williams' auditor to include its audit reports related to that financial information—for ETE to file a Form S-3 and complete a public equity offering.[46] ETE's contention is that Williams' obligation to not unreasonably withhold consent for ETE to "carry on its business in the ordinary course" under Section 4.01(b), combined with the Letter Agreement's allowance for "issuances of equity securities with a value of up to $1.0 billion in the aggregate,"[47] should be read together to mean that a proposed issuance, by which ETE intended to finance the Merger in part, was allowable. Williams' consent was improperly withheld, placing Williams in breach of Section 4.01(b).[48] ETE alleges that this violation also breaches the reasonable best efforts provision in Section 5.03 and a provision requiring cooperation in financing arrangements in Section 5.14.[49] Williams argues that Section 5.14 was not triggered because its consent was not *unreasonably* withheld.[50] Section 5.14 states in relevant part:

> Prior to the Effective Time, the Company shall, and shall cause its Subsidiaries and their respective Representatives to, provide cooperation *reasonably requested* by [ETE] that is necessary or *reasonably required* in connection with the Financing or any other financing that may be arranged by [ETE].[51]

The viability of these contentions depends on my finding that Williams' consent was withheld improperly and that any such withholding of consent caused injury to ETE.

In addition, Williams argues that alleged violations of Section 5.01(b)—which pertains to preparing the Form S-4 and the proxy statement—did not result in damages to *ETE*. Section 5.06 states in pertinent part:

> (b) If this Agreement is terminated (i) by either the Company or [ETE] pursuant to Section 7.01(b)(iii) or (ii) by [ETE]

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[46] Countercl. ¶¶ 31–32.
[47] *Id.* ¶ 154.
[48] *Id.* ¶¶ 148–56.
[49] *Id.* ¶¶ 32, 136; Merger Agreement §§ 4.01(b), 5.03, 5.14.
[50] Pl. Op. Br. at 48–52.
[51] Merger Agreement § 5.14 (emphases added).

> pursuant to Section 7.01(c), then in each case of clauses (i) and (ii) the Company shall promptly upon written demand by [ETE] (and in any event no later than two business days after such written demand is delivered to the Company) reimburse [ETE], by wire transfer of same day federal funds to the account specified by [ETE], for *all out-of-pocket fees and expenses incurred or paid by or on behalf of* [ETE] or their respective Subsidiaries and Affiliates in connection with the Merger or related to the preparation, negotiation, execution and performance of this Agreement, the Commitment Letter, the Fee Letter and related transaction documents, including *all fees and expenses of counsel*, financial advisors, accountants, experts and consultants retained by [ETE] or their respective Subsidiaries and Affiliates, such amount *not to exceed $50.0 million* in the case of clause (i) and *$100.0 million* in the case of clause (ii).
>
> (c) If this Agreement is terminated by the Company pursuant to Section 7.01(d), then [ETE] shall promptly upon written demand by the Company (and in any event no later than two business days after such written demand is delivered to [ETE]) *reimburse the Company*, by wire transfer of same day federal funds to the account specified by the Company, for all out-of-pocket fees and expenses incurred or paid by or on behalf of the Company or its Subsidiaries and Affiliates in connection with the Merger or related to the preparation, negotiation, execution and performance of this Agreement and related transaction documents, including *all fees and expenses of counsel*, financial advisors, accountants, experts and consultants retained by the Company or its Subsidiaries and Affiliates, such *amount not to exceed $100.0 million*.[52]

II. ANALYSIS

The Counterclaim Defendants have moved to dismiss the counterclaims under Court of Chancery Rule 12(b)(6). When reviewing such a motion,

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw

[52] Merger Agreement §§ 5.06(b)–(c).

> all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[53]

I need not, however, "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[54] In addition, I refer to certain documents and public filings that are incorporated by reference in the Counterclaim Complaint.[55]

A. *The Board Recommendation Claim*

The most serious contention in the ETE counterclaims—from a damages perspective, at least—is that Williams violated its contractual obligations regarding the Board Recommendation in favor of the Merger, after which ETE terminatedthe Agreement, triggering an obligation on Williams' part to pay ETE a $1.48 billion Termination Fee. ETE seeks specific performance of this provision.

The syllogism under which ETE seeks the Termination Fee is rather complicated. First, ETE points out that under Section 3.01(d)(1), the Williams' Board of Directors is required to cause the Company to adopt resolutions (a) approving the Merger; (b) declaring that the Merger is in the best interest of its stockholders; (c) directing a stockholder vote; and (d) recommending that the stockholders adopt the Merger Agreement in that vote. Resolutions comprising (a), (b), (c) and (d) are defined as the "Company Board Recommendation."[56] All parties agree that the Williams's Board initially complied with the Merger Agreement by making this required Company Board Recommendation. Second, ETE points out that Section 4.02(d)(i)(A) provides that neither Williams' Board, "nor any committee thereof," shall "withdraw (or modify or qualify in a manner adverse to [ETE], or publicly propose to withdraw, or modify or qualify in a manner adverse to [Williams], the Company Board Recommendation."[57] ETE argues that, even though the Williams Directors did not formally withdraw the Company Board Recommendation, the Directors informally decided (in light of ETE's perceived disinclination to merge) that it was more lucrative to Williams to pursue negotiation of a walk-away payment from ETE than to consummate the Merger. Third,

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[53] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (footnotes and internal quotation marks omitted).

[54] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011).

[55] *See Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016).

[56] Merger Agreement § 3.01(d).

[57] *Id.* § 4.02(d)(i)(A).

ETE contends that, in pursuit of the strategy just described, the Company took the following actions during the pendency of the Merger: it (1) issued press releases that signaled Williams' pessimism about the Merger to the market; (2) sued ETE CEO Kelcy Warren in Texas state court and used the pleadings to damage investor confidence in Warren; (3) used the media to portray ETE in a negative light; and (4) released a Form S-4 that undermined the financial projections used to initially recommend the Merger to Williams' stockholders. The actions described above, according to ETE, amount to a *de facto* "withdrawal" of the Company Board Recommendation sufficient to qualify as a breach of Section 4.02(d). Fourth, after that breach, ETE exercised its right to terminate the Merger. Fifth, and finally, under the remedies described in Section 5.06 of the Merger Agreement, termination in this scenario entitles ETE to the Termination Fee.

ETE presses this argument despite the following undisputed facts: 1) Williams sued ETE to specifically enforce consummation of the Merger, which ETE strenuously (and successfully) opposed; 2) notwithstanding the supposed *de facto* withdrawal of the Company Board Recommendation in favor of the Merger, Williams' Directors never acted formally to withdraw the resolutions; 3) the Board affirmed the Company Board Recommendation several times during the pendency of the Merger; 4) an overwhelming majority of Williams' stock was voted in favor of the Merger, after which ETE—not Williams—terminated the Merger *upon failure of a condition precedent.*

Williams notes that ETE did not purport to terminate the Merger based on breach of the Company Board Recommendation provision; instead, it relied on the failure of the tax opinion to avoid the deal. Williams then makes the common-sense observation that it would be passing strange for two parties to a merger agreement to structure the agreement so that a party which desired to exit the agreement could do so, over the other party's objections, and at the same time receive the windfall of a substantial termination fee. ETE does not suggest that it is *not* seeking a windfall in the form of the Termination Fee; it simply notes that Delaware is a contractarian state that leaves parties to the benefits of their bargains, good, bad, and indifferent. ETE argues that Williams breached its duty not to modify the Company Board Recommendation, after which breach ETE terminated the Merger, thereby qualifying for the $1.48 billion Termination Fee. Accordingly, ETE asserts that if it is entitled to the Termination Fee under the negotiated terms of the Agreement, our Courts will enforce the contract, windfall or no. ETE is correct in noting that this

is a contractarian jurisdiction;[58] however, I find the contract language, as written, fatal to ETE's contention here.

That is because the Agreement itself carefully defines the Company Board Recommendation as a series of four recommendations to be made, via board resolution, by the Williams' Directors. It is undisputed that the Williams Board created, via resolutions, a contractually compliant Company Board Recommendation. There are no allegations in the Counterclaim Complaint that the Directors, or any subcommittee thereof, ever formally modified (or expressed the intent to so modify) the Recommendation. In fact, the Recommendation remained in place through the vote on the Merger, which was overwhelmingly approved by Williams' stockholders. ETE, therefore, received what it bargained for. ETE has not alleged facts which make it reasonably conceivable that the Board withdrew the Recommendation.

ETE's argument is really that the Board adopted a strategy under which the Company took a number of actions which ETE deems inimical to consummation of the merger. As will be discussed below, those efforts may be contractually meaningful in terms of the "best efforts" requirement that the Merger Agreement imposed on Williams. However, the Agreement was careful to cabin ETE's entitlement to the Termination Fee to those situations in which Board (or subcommittee) action modified (or proposed to modify) the required Company Board Recommendation, after which ETE terminated the Merger.

Because I find the Merger Agreement sections discussed to be clear on their face, I will not discuss further the parties' various attempts to construe those provisions in light of other provisions in the Agreement. Suffice it to say that ETE's reference to other contract provisions, attempting to demonstrate that the plain reading of the sections I have described above is incompatible with the balance of the Merger Agreement, I find unconvincing.

B. *The Forum Selection Clause*

During the pendency of the Merger, Williams brought an action against Kelcy Warren, ETE's principal, in Texas. The parties dispute the motive behind the litigation, which involved ETE's issuance of equity in ETE to insiders. The purpose for that issuance is itself disputed. Williams characterizes the Texas litigation as in aid of consummation of the Merger; ETE characterizes it as posturing in favor of Williams' negotiating a

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[58] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1075 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012), *as corrected* (July 12, 2012) ("I conclude that . . . consistent with Delaware's pro-contractarian public policy, the parties' agreement . . . should be entitled to specific performance and injunctive relief should be respected.").

payment from ETE in return for Williams' consent to terminate the merger. In any event, ETE argues that the Texas litigation violated Section 8.10(b), which provides that no party shall bring "actions relating to this Agreement or the Transactions in any court other than the [Court of Chancery]" and that each such party "irrevocably submits with regard to any such action or proceeding . . . generally and unconditionally, to the personal jurisdiction of the aforesaid courts."[59] According to ETE, the Texas court dismissed the suit for violating the forum selection clause in Section 8.01(b) of the Merger Agreement.[60] ETE seeks damages here, which it describes as the fees and costs of the Texas action, arising from breach of the forum selection clause.

The parties argue forcefully about whether Warren was a party to the Merger Agreement, and thus whether Section 8.01(b) applied to the Texas action, and whether this Court had jurisdiction over Warren under the terms of the Merger Agreement. Even if I assume that ETE has the best of that argument, and that ETE is the proper party to seek as damages fees and costs incurred in a suit against Warren in his personal capacity, ETE cannot recover those fees and costs here, because Section 5.06(a) of the Agreement is, in that case, dispositive. That Section provides that "all fees and expenses incurred in connection with this Agreement and the Transactions shall be paid by the party incurring such fees or expenses, whether or not the Transactions are consummated."[61] In adopting that language, the parties waived any right to receive fees and expenses for a breach of the Agreement—if a breach it was—of the type ETE describes here.

I note that in addition to fees and costs, ETE argues that it suffered other damages in connection with the representations made by Williams in the Texas litigation, violating Merger Agreement provisions *independent* of the forum selection clause. Those damages claims are incorporated in the discussion below.

C. *The Additional Breach of Contract Claims*

Aside from its arguments concerning the Termination Fee and breach of the forum selection clause, ETE alleges other supposed breaches of the Agreement by Williams.

ETE argues that, as market conditions changed, the Williams' Board failed to obtain an updated fairness opinion from its financial advisors and failed to make disclosures to its stockholders concerning changes in market

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[59] Merger Agreement § 8.10(b).
[60] Defs. Ans. Br. 16.
[61] Merger Agreement § 5.06(a).

conditions. In addition, ETE contends that Williams' disclosures were materially incomplete concerning its reasons for agreeing to the Merger in the first instance. According to ETE, those include the threat of a proxy fight or consent solicitation—which caused some Williams Directors to change their vote to favor the Merger—that was inadequately disclosed. ETE next alleges that Williams failed to disclose various self-interests of Williams' Directors. Also, ETE alleges that Williams failed to update its Form S-4 to reflect that at least one of the potential proxy contests could have been led by at a sitting Williams' Board member, which according to ETE, influenced the other Directors' votes in the Merger. These disclosures, according to ETE, would have been material to stockholders in making an informed vote concerning the Merger. The disclosures—in addition to being required under common law—were required under Section 5.01 of the Agreement.

Whether Williams' Board breached duties to its stockholders either under common law or the Agreement is a question of fact. Here, however, ETE seeks its own damages under the Agreement. While failure of material disclosures may have posed a threat of damages to the combined entity if the Merger had been consummated, the Merger was in fact terminated by ETE. Damages are an element of a breach of contract action.[62] It is simply not reasonably conceivable that any breach of the Williams Directors' responsibility to obtain an updated fairness opinion[63] or make required disclosures to Williams stockholders could lead to damages to ETE, in light of the failure of the Merger. Therefore, the Motion to Dismiss must be granted with respect to this issue.

Next, ETE notes that Williams failed to consent to a nearly $1 billion public offering, by which ETE intended to finance, in part, the Merger. ETE argues that Williams had a responsibility to cooperate with this equity financing, which required Williams to submit certain financial information and a consent from Williams' auditor to include certain audit reports related to that financial information. According to Williams, the public offering was discriminatory to Williams' stockholders, and it had a proper business purpose for withholding its consent. As noted above, I have another action pending[64] concerning this Special Issuance and its effect on other non-participating stockholders. The contractual language regarding Williams' obligation in this situation is not clear to me, and my analysis would benefit from extrinsic evidence regarding that obligation.

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[62] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) ("Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff.").

[63] I make no finding here that Williams was under a common law obligation to obtain an updated fairness opinion, as a duty to its stockholders.

[64] *See ETE Unitholder Litig.*, 2017 WL 782495, at *1.

A more serious question is whether damages can flow from any breach, given that ETE terminated the Agreement for failure of the unrelated condition precedent regarding tax consequences. ETE also argues that Williams failed to use best efforts to consummate the Merger as required by the Merger Agreement. To the extent that ETE can prove such, again, damages are problematic. However, we are at the motion to dismiss phase of this litigation. ETE argues that its willingness to exercise its option to terminate the Merger Agreement, based on the failure of the condition precedent, was informed by the results of Williams' breach of the obligation to approve the equity offering and failure of best efforts. It seeks, at a minimum, to offset Williams' own damages claims accordingly. While I am dubious that ETE will ultimately prevail in demonstrating that Williams breached the Agreement in this regard, and that damages flowed as a result, such an outcome is reasonably conceivable. Therefore, resolution of these issues awaits a developed record and the Motion to Dismiss this claim is denied.

III. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Dismiss the counterclaims is granted in part and denied in part. I note that Williams has a motion outstanding to strike ETE's affirmative defenses, which rest on the same allegations as do the counterclaims. The parties should consult and inform me whether any portion of that Motion to Strike needs further judicial resolution. The parties should also provide a Form of Order consistent with this Memorandum Opinion.