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 of Chancery's opinions and memorandum opinions are printed in their entirety, exactly as received.

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WINKLEVOSS CAPITAL FUND, LLC, a Delaware Limited Liability Company, TYLER WINKLEVOSS, and CAMERON WINKLEVOSS,	:	
Plaintiffs,	:	
v.	:	C.A. No. 2018-0398-JRS
STEPHEN SHAW, THE WESTERMAN TRUST U/T/D FEBRUARY 25, 2011, and TREATS!, LLC, a Delaware Limited Liability Company,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: January 14, 2019
Date Decided: March 1, 2019

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SLIGHTS, Vice Chancellor

Plaintiffs, brothers Tyler and Cameron Winklevoss, through Winklevoss Capital Fund, LLC, made a substantial investment in an upstart magazine operated by Defendant, Treats! LLC, and founded by Defendant, Stephen Shaw. Plaintiffs allege they have not achieved the return on investment promised them by Defendants and that Shaw's mismanagement of Treats! is to blame. Defendants deny the allegations of mismanagement and bring counterclaims against the Winklevoss brothers in which they allege the brothers breached commitments to allow Treats! to announce and capitalize on the publicity surrounding the brothers' investment. According to the counterclaims, the brothers made their investment in Treats! soon after the release of the movie *The Social Network* in which their association with the social networking site, Facebook, was depicted. Shaw allegedly accepted the investment, in part, based on the brothers' commitment that Treats! could announce (presumably with some fanfare) that the brothers had selected Treats! as one of the first investments of their newly created firm, Winklevoss Capital Fund, LLC. The counterclaims purport to state claims for fraud, fraudulent inducement, "fraudulent misrepresentation" and promissory estoppel.

Defendants have moved to dismiss the counterclaims on multiple grounds, including that the claims are barred by laches and by a fully integrated contract governing the parties' relationship that makes no mention of the brothers' alleged commitment to promote Treats!. In rare circumstances, the Court may apply laches at the pleadings stage to bar a claim when it is clear on the face of the claim that it is untimely and that equity would not be offended by the claim's dismissal. This is especially so when the claimant brings common law claims and seeks common law remedies after the applicable statute of limitations has expired. That is what Defendants/Counterclaim Plaintiffs have done here. Accordingly, Plaintiffs' Motion to Dismiss Defendants' Counterclaims as time barred must be granted.

I. BACKGROUND

I draw the facts from the allegations in the counterclaims, documents incorporated by reference or integral to that pleading and judicially noticeable facts.[1] As I must, I have accepted as true the

[1] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) (noting that on a motion to dismiss, the Court may consider documents that are "incorporated by reference" or "integral"

counterclaims' well-pled factual allegations and have drawn all reasonable inferences from those allegations in Defendants' favor.[2]

A. The Parties

Plaintiffs and Counterclaim Defendants, Cameron and Tyler Winklevoss ("Cameron" and "Tyler," respectively),[3] are businessmen, investors and entrepreneurs. Plaintiff, Winklevoss Capital Fund, LLC ("WCF"), is their investment firm.[4] WCF is a Delaware limited liability company with its principal place of business in New York.[5]

Defendant and Counterclaim Plaintiff, Stephen Shaw, is a professional photographer and the founder and manager of Defendant and Counterclaim Plaintiff, Treats!, LLC.[6] Treats! is a Delaware limited liability company with its principal place of business in Los Angeles, California.[7] Its members are located in California and New York.[8] Treats!, founded in April 2010, owns and operates Treats! magazine, a print and digital magazine depicting nude and semi-nude photography of models and celebrities.[9]

Shaw is the settlor, trustee and sole beneficiary of Defendant and Counterclaim Plaintiff, The Westerman Trust u/t/d/ February 25, 2011 (the "Trust").[10] In March 2011, Shaw transferred his entire interest in Treats! to the Trust.[11]

B. WCF Invests in Treats!

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to the complaint)); D.R.E. 201–02 (codifying Delaware's judicial notice doctrine); *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 776 (Del. Ch. 2009).

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

[3] Since the brothers share the same last name I refer to them here by first names, intending no disrespect.

[4] Winklevoss Ver. Compl. for Breach of Contract and Fiduciary Duty ("Compl.") ¶¶ 6–7, 18–19.

[5] Compl. ¶ 5.

[6] Compl. ¶¶ 1, 14; Defs.' Answer ("Answer") ¶ 14; Shaw Verified Countercl. for Common Law Fraud, Fraudulent Inducement and Misrepresentation, and Promissory Estoppel ("Countercl.") ¶¶ 2, 10, 12.

[7] Answer ¶ 4.

[8] *Id.*

[9] Compl. ¶¶ 1, 15; Answer ¶¶ 2, 15; Countercl. ¶ 12.

[10] Compl. ¶ 9; Answer ¶ 9; Countercl. ¶ 3.

[11] Compl. ¶ 17; Answer ¶ 17.

In early 2011, a mutual friend introduced Shaw to Cameron and Tyler. When they met Shaw, Cameron and Tyler were seeking to strengthen their Los Angeles network. Shaw, a professional photographer well known to many celebrities, opened the door to his social circle for Cameron and Tyler by introducing them to his friends, inviting them to exclusive dinners and parties and photographing their various girlfriends.[12]

When Cameron and Tyler learned about Treats!, they were intrigued and offered to invest in the company. They emphasized to Shaw the potential significance of the fact that Treats! would be the first investment they made through their newly-formed investment firm, WCF. Shaw believed Treats! would develop into a lifestyle brand and he thought a partnership with WCF would provide the perfect launch pad. The notoriety of the Winklevoss brand following the release of the blockbuster film, *The Social Network*, in which the brothers were depicted, was the main attraction for Shaw as he sought to secure their investment in, and promotion of, Treats!.

By July 2011, Cameron, Tyler and Shaw were deciding how publicly to announce WCF's forthcoming Treats! investment. In late 2011, Tyler wrote Shaw to report that he had "toured treats [sic] with my parents. . . . My parents loved it, they totally got it and were hooked (especially my dad lol). We all concluded that treats [sic] is the worlds [sic] best kept secret . . . its [sic] time for everyone to know about it!"[13] Tyler concluded, "our brand can help in a lot of ways."[14]

On August 15, 2012, WCF invested $1,310,000 in Treats! in exchange for 1,310,000 series A preferred units under a written Purchase Agreement by and between WCF, Treats! and the Trust (the "Purchase Agreement"), to which an Amended LLC Agreement for Treats! (the "Amended LLC Agreement") was appended.[15] Both the Purchase Agreement and Amended LLC Agreement contain integration clauses stating that the contracts contain the entire agreement among the parties and requiring that any additional agreements be set forth in separate writings signed by all parties (Treats!, WCF and the Trust).[16] On October

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[12] Countercl. ¶ 11.

[13] Countercl. ¶ 15.

[14] *Id.*

[15] Compl. ¶ 24; Answer ¶ 24; Countercl. ¶ 16.

[16] Compl. ¶¶ 3, 26–28; Answer ¶¶ 26–28. Specifically, Section 15.06(a) of the Amended LLC Agreement states the Amended LLC Agreement, along with certain other attachments to the Purchase Agreement "constitutes the sole and entire agreement of the parties with respect to

26, 2012, Treats! delivered a written promissory note to WCF reflecting a loan to Treats! in the amount of $20,000 (the "October 2012 Promissory Note").[17]

C. The Parties' Relationship Quickly Unravels

Following WCF's investment, the parties' relationship was marked by a consistent refrain. Shaw pressed the brothers to promote Treats! while the brothers pressed Shaw to enhance their personal and professional profiles. For example, Defendants allege that, on October 4, 2012, Tyler asked Shaw to arrange a "special casting" with multiple women he selected from Facebook and a modeling agency's website.[18] Tyler followed this request on October 17, 2012, with further direction to Shaw: "[d]on't hire any of them . . . get their details and call the hot ones up, invite them, and then I can shag them ;)."[19] Shaw refused.

On June 4, 2012, Cameron wrote to Shaw thanking him for offering to speak to actor Kevin Spacey about doing a voice-over for Zum-Zero, a website the brothers were promoting that they hoped would host the world's largest on-line investor community.[20] On November 13, 2012, Tyler asked Shaw and his team at Treats! to promote Hukkster, another of the brothers' investments. Treats!'s then-Chief Operating Officer, Farley Cahen, responded: "until [Cameron and Tyler] announce publicly that they have invested in . . . Treats!, I think promoting sites like Hukkster or other 'off-brand' sites will fall on deaf ears . . ."[21] Both Cameron and Tyler initially indicated that they agreed with this sequencing, but then pressed Shaw again to promote Huckster without having yet taken any steps to promote Treats!.[22] On November 14, 2012, Tyler asked Shaw to connect

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the subject matter contained herein and therein and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral . . . ." Compl. ¶ 26; Answer ¶ 26. Section 6.1 of the Purchase Agreement (which includes the Amended LLC Agreement) provides, in pertinent part: "This Agreement and the documents referred to herein constitute the entire agreement among the parties and no party shall be liable or bound to any other party in any manner by any warranties, representations or covenants except as specifically set forth herein." Compl. ¶ 27; Answer ¶ 27. Section 15.09 of the Amended LLC Agreement provides, in pertinent part, that the agreement can only be amended or modified by an instrument in writing executed by all parties (Treats!, WCF and the Trust). Compl. ¶ 28; Answer ¶ 28.

[17] Compl. ¶ 25; Answer ¶ 25.

[18] Countercl. ¶ 19.

[19] Countercl. ¶ 20.

[20] Countercl. ¶ 24.

[21] Countercl. ¶ 25.

[22] Countercl. ¶ 29.

him with television and radio personality, Ryan Seacrest, so that Tyler could inquire whether Seacrest might be willing to assist the brothers in promoting the Winklevoss brand.[23]

As the brothers sought Shaw's assistance to promote their own profiles, Shaw continued to solicit the brothers' assistance in promoting Treats!.[24] After failing to make any progress on this front, and then having heard from the brothers that they no longer wished to be a part of Treats!, on December 11, 2012, Shaw emailed Tyler to express his frustration:

> An express condition of the sale to you was that I would be able to announce your investment to the World.
>
> * * *
>
> Now you are telling me [you] not only do not want me to announce, but you wish to sell your shares and any reasonable offer will be entertained.
>
> * * *
>
> If [y]ou are adamant that I do not make such an announcement and that seems to be the case' then kindly, by return, make me a proposal that will involve ultimately, us entering into a confidentiality agreement to protect the secrecy of your investment that seems to suddenly have become a priority to you both.[25]

Shaw's frustration grew in 2013, as the brothers continued in their refusal to promote Treats!. In an email to the brothers dated June 17, 2013, Shaw wrote, "you promised to announce your involvement & strung me along milking it for months until you made it clear that you did not want to tell anyone that you were my partners and my investors." He concluded that email by noting that the brothers' failure to honor their commitment had adversely affected him and Treats!: "Now I'm not the first investment. I'm just some mug who got you into a scene you wanted to be in and have been totally suppressed and financially effected [sic]."[26]

As Shaw was accusing the brothers of failing to honor their promise to promote Treats!, the brothers were accusing Shaw of

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[23] Countercl. ¶ 30.
[24] Countercl. ¶ 32–35.
[25] Countercl. ¶ 36.
[26] Countercl. ¶ 38.

mismanagement and failing to grow Treats! as promised.[27] According to Plaintiffs, while Shaw promised them that Treats! would be published at least quarterly, Shaw only managed to get the magazine published twice per year.[28] And rather than strengthen the online readership and advertising revenue, it is alleged that Defendants spent money on Shaw's personal entertainment, food, travel and gifts.[29]

Plaintiffs first raised their concerns about mismanagement in November 2012. Thereafter, from December 2012 through June 2013, the parties exchanged attacks and ripostes with Plaintiffs alleging mismanagement and Defendants alleging breach of the brothers' promises to promote Treats!.[30] The brothers proposed that Shaw buy them out at a price that would allow them to achieve some positive return on their investment. Shaw rejected that proposal and countered that he would buy-out WCF at a deep discount. That proposal was rejected.[31] The parties then threatened each other with legal action.[32]

While the brothers declined to make any conciliatory overtures toward Shaw at any time from 2013 through 2018, they also did not take steps to break the relationship. For his part, Shaw approached at least two companies to help raise capital in an effort to continue operations and ultimately reorganize the company.[33] He also periodically would inquire whether WCF was willing to redeem its interest in Treats! at a discount, including a rebuffed proposal in 2018.[34]

D. Procedural Posture

Plaintiffs filed their Complaint on June 1, 2018, in which they assert four causes of action: (Count 1) Breach of the Amended LLC Agreement based on Defendants' mismanagement of the assets of Treats!; (Count 2) Breach of the October 2012 Promissory Note based on Treats!'s failure to repay the amount owed to WCF under the Note; (Count 3) Breach of Fiduciary Duty based on Shaw's and the Trust's

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[27] Compl. ¶ 30.
[28] *Id.*
[29] Compl. ¶¶ 1, 30, 31.
[30] Compl. ¶ 32; Countercl., ¶¶ 32, 36, 38.
[31] Compl. ¶¶ 2, 33–35; Answer ¶ 35; Countercl. ¶¶ 36–38, 42.
[32] Compl. ¶ 37.
[33] Countercl. ¶ 40.
[34] Countercl. ¶ 42.

misappropriation of Treats!'s funds and/or assets; and (Count 4) Declaratory Relief for a judicial determination that Plaintiffs have no contractual obligations to Defendants to market or promote Treats!.[35]

On July 11, 2018, Defendants filed an Answer and Counterclaims in which they assert five causes of action against all Plaintiffs: (Count 1) Common Law Fraud; (Count 2) Fraudulent Inducement; (Count 3) Fraudulent Misrepresentation; (Count 4) Common Law Fraud; and (Count 5) Promissory Estoppel. Each of these claims arise out of the brothers' alleged promise at the outset of their association with Treats! that they would "publicly announce their investment in Treats! and use their personal brand to help grow the company" as a means "to induce Mr. Shaw and Treats! to partner with [Plaintiffs] and to perform numerous personal and professional favors for [Plaintiffs]."[36] Plaintiffs moved to dismiss Defendants' counterclaims on July 31, 2018.

II. ANALYSIS

The standards governing a motion to dismiss for failure to state a claim are well-settled. "[D]ismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'"[37] When deciding a motion to dismiss, the Court must read the complaint liberally, accept as true all well-pled allegations and draw all reasonable inferences in favor of the non-moving party.[38] Even still, the trial court is not required blindly to accept as true all conclusory allegations "without specific supporting factual allegations."[39]

A. The Proper Application of Laches to the Counterclaims

Defendants are correct that the laches defense is often fact-intensive and, therefore, not readily susceptible to adjudication at the pleadings stage.[40] But "[t]here is no rule barring [laches] as the basis for

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[35] Compl. ¶¶ 40–61; Countercl. ¶¶ 36–38.

[36] *See* Countercl. ¶¶ 1, 17–18, 36, 38, 45–67.

[37] *Gen. Motors (Hughes)*, 897 A.2d at 168 (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[38] *Gen. Motors (Hughes)*, 897 A.2d at 168.

[39] *Santa Fe Pac. Corp.*, 669 A.2d at 65–66.

[40] *See, e.g., Stewart v. Wilm. Trust SP Servs., Inc.*, 112 A.3d 271, 295 (Del. Ch.), *aff'd*, 126 A.3d 1115 (Del. 2015) (noting that the "defense of laches is not ordinarily well-suited for treatment on a Rule 12(b)(6) motion.") (internal quotation marks omitted); *Reid v. Spazio*, 970

dismissal under Rule 12(b)(6) where 'it is clear from the face of the complaint that [laches] exists and that the plaintiff can prove no set of facts to avoid it.'"[41]

In cases where the asserted claims are common law claims seeking common law remedies, this court has made clear that a "plaintiff 'should not be placed in a potentially better position [having filed in Chancery] to seek to avoid a statute of limitation than if she had filed in a Delaware court of law by invoking the more flexible doctrine of laches.'"[42] Indeed, "a filing after the expiration of the analogous limitations period is presumptively an unreasonable delay for purposes of laches . . . and prejudice to defendants is thus presumed."[43] In such cases, "absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period."[44]

Delaware's statute of limitations for claims sounding in fraud or

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A.2d 175, 183 (Del. 2009) (explaining that in "ruling on a motion under Court of Chancery Rule 12(b)(6), the Court is generally limited to facts appearing on the face of the pleadings. Accordingly, affirmative defenses, such as laches, are not ordinarily well-suited for treatment on such a motion. Unless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it, dismissal of the complaint based upon an affirmative defense is inappropriate.").

[41] *Reid*, 970 A.2d at 183–84.

[42] *BioVeris Corp. v. Meso Scale Diagnostics, LLC*, 2017 WL 5035530, at *5 (Del. Ch. Nov. 2, 2017), *aff'd*, 2019 WL 244619 (Del. Jan. 17, 2019) (TABLE) (quoting *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 976 (Del. Ch. 2016)).

[43] *Baier v. Upper New York Inv. Co. LLC*, 2018 WL 1791996, at *11–12 (Del. Ch. Apr. 16, 2018). *See also CMS Inv. Hldgs., LLC v. Castle*, 2016 WL 4411328, at *2 (Del. Ch. Aug. 19, 2016) ("[T]he Court will bar claims outside the limitations period absent tolling or extraordinary circumstances, even in the absence of demonstrable prejudice.") (internal quotations omitted).

[44] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *see also Daugherty v. Highland Capital Mgmt., L.P.*, 2018 WL 3217738, at *7 (Del. Ch. June 29, 2018) (courts need not engage in traditional laches analysis for a presumptively late complaint, and where "a claim is brought in Chancery that would be barred by a statutory limitation if brought at law, the same claim will be barred here by analogy to the statute, absent 'extraordinary circumstances.'"); *de Adler v. Upper New York Inv. Co. LLC*, 2013 WL 5874645, at *12 (Del. Ch. Oct. 31, 2013) ("Where a party files a claim after the presumptive period, the claim is likely time-barred except in the rare and unusual circumstance that a recognized tolling doctrine excuses the late filing. . . . The Court does not need to engage in a traditional laches analysis for a presumptively late complaint.") (internal quotations omitted); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005) ("[W]here the analogous statute of limitations at law has run, a plaintiff is barred from bringing suit without the necessity of the court engaging in a traditional laches analysis.").

promissory estoppel claims is three years.[45] And "[t]he statute of limitations [in such cases] begins to run when a plaintiff's claim accrues, which occurs at the moment of the wrongful act and not when the effects of the act are felt."[46] Thus, a claim for common law fraud accrues on the day the misrepresentation is made.[47] Similarly, "[a] claim for fraudulent inducement accrues when the fraudulent statements were made, which must be on or before the date when the parties entered into the contract."[48] A claim for promissory estoppel accrues when the alleged promise behind the claim is broken.[49]

When "'a complaint asserts a cause of action that on its face accrued outside the statute of limitations,' the plaintiffs have the burden to plead facts 'leading to a reasonable inference that one of the tolling doctrines adopted by Delaware courts applies.'"[50] The doctrines of fraudulent concealment, inherently unknowable injuries and equitable tolling will toll the applicable limitations period only when "the facts underlying a claim were so hidden that a reasonable plaintiff could not timely discover them."[51] "In order to toll the statute of limitation under the fraudulent concealment exception, [therefore], the plaintiff must allege some affirmative act by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth."[52] Similarly, to invoke the doctrine of inherently unknowable

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[45] 10 *Del. C.* § 8106; *Chrysler Corp., (Del.) v. Chaplake Hldgs., Ltd.*, 822 A.2d 1024, 1035 (Del. 2003); *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 n.50 (Del. Super. Apr. 16, 2014); *Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *3 (Del. Ch. Oct. 19, 2004).

[46] *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *6 (Del. Super. Feb. 15, 2013) (quoting *Airport Bus. Ctr. V LLLP v. Sun Nat'l Bank*, 2012 WL 1413690, at *7 (Del. Super. Mar. 6, 2012)). Accrual starts "even if the plaintiff is ignorant of the cause of action." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

[47] *Van Lake*, 2013 WL 1087583, at *7; *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *14 (Del. Ch. Dec. 23, 2008). I note, contrary to Defendants' argument on pages 23–26 of their Answering Brief, that their fraud and promissory estoppel claims accrued as of the date of fraud, not as of some event during the continuum of performance of the parties' governing contract. Thus, the "continuing contract" accrual analysis is not applicable because the counterclaim does not assert a breach of contract claim. *See Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *4 (Del. Super. Dec. 29, 2015); *Chrysler Corp. (Del.)*, 822 A.2d at 1035–36.

[48] *Pivotal Payments Direct*, 2015 WL 11120934, at *4.

[49] *Chrysler Corp. (Del.)*, 822 A.2d at 1035–36.

[50] *Commonwealth Land Title Ins. Co. v. Funk*, 2014 WL 8623183, at *6 (Del. Super. Dec. 22, 2014) (quoting *Winner Acceptance Corp.*, 2008 WL 5352063, at *14).

[51] *See Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006).

[52] *Jeter v. RevolutionWear, Inc.*, 2016 WL 3947951, at *10 (Del. Ch. July 19, 2016) (quoting *Smith v. Mattia*, 2010 WL 412030, at *5 (Del. Ch. Feb. 1, 2010)) (internal quotations omitted).

injuries, the plaintiff must allege facts that would allow an inference that "it would be practically impossible for [him] to discover the existence of a cause of action. . . . [and] that he was 'blamelessly ignorant' of both the wrongful act and the resulting harm."[53] Equitable tolling, likewise, is not available to a plaintiff after he "knew or had reason to know of the facts constituting the wrong."[54]

B. Laches Bars The Counterclaims

The allegations in the counterclaims reveal that Defendants' claims accrued for statute of limitations (and laches) purposes no later than June 17, 2013.[55] Each of Defendants' four fraud claims arise from the Winklevoss brothers' allegedly false promise to "publicly announce their investment in Treats! and use their personal brand to help grow the company" as a means "to induce Mr. Shaw and Treats! to partner with [Plaintiffs] and to perform numerous personal and professional favors for [Plaintiffs]."[56] According to Defendants, this false representation convinced them to enter into the written Purchase Agreement, including the Amended LLC Agreement, on August 15, 2012, and then to assist the brothers in their desire to gain entrée into Shaw's social circles for their personal and business purposes.[57] Shaw questioned the veracity of the brothers' promise to promote Treats! as early as December 11, 2012, when he emailed Tyler to confirm that the brothers had informed him they would not promote Treats! and to express his frustration with this development.[58] By June 17, 2013, Shaw's frustration had turned to an appreciation that the brothers had "[taken] what [they] wanted" from Shaw but had no intention of honoring their commitment to Treats!.[59]

Defendants argue the statute of limitations should be tolled because "repeated efforts over many years to get the Winklevoss twins to [promote Treats!] were met with excuses, delay, and further promises

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[53] *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 788–89 (Del. Ch. 2014) (quoting *In re Tyson Foods, Inc.*, 919 A.2d 563, 584–85 (Del. Ch. 2007)).

[54] *Seiden v. Kaneko*, 2015 WL 7289338, at *8 (Del. Ch. Nov. 3, 2015) (quoting *Tyson Foods, Inc.*, 919 A.2d at 585).

[55] Countercl., ¶¶ 31–32, 38.

[56] *See* Countercl. ¶¶ 1, 17–18, 45–62.

[57] *See* Countercl. ¶ 45 ("As part of the negotiations, the Winklevoss twins falsely represented to Mr. Shaw that they would use their personal brand to promote Treats! . . . ."); *see also* Countercl. ¶¶ 1, 13, 17, 46, 51, 56, 61.

[58] Countercl. ¶ 36.

[59] Countercl. ¶ 38.

which, ultimately, turned out to be untrue."[60] While the counterclaims do not allege anything about "further promises" by the Winklevoss brothers to promote Treats! beyond their initial commitment at or around the time of their investment, even if there were "further promises," it "became clear" to Defendants at least as early as June 17, 2013, that Plaintiffs had no intention to promote Treats! then or ever.[61] Thus, the fraud and promissory estoppel claims accrued no later than June 17, 2013.[62]

The statute of limitations governing each of the counterclaims expired no later than June 17, 2016.[63] They were filed more than two years later, on July 11, 2018, and are, therefore, time-barred absent tolling.[64]

C. Defendants Have Failed to Demonstrate "Unusual Conditions" or "Extraordinary Circumstances"

In the realm of laches, a late-filed claim may be excused in "rare" instances when the claimant can demonstrate "unusual conditions" or "extraordinary circumstances."[65] While these terms have not been precisely defined,[66] our courts have consistently considered certain factors when determining whether to excuse late-filed claims as a matter of equity,

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[60] Countercl. ¶ 46; *see also* Countercl. ¶¶ 51, 55, 61.

[61] Countercl. ¶ 38 ("you made it clear you wouldn't say anything of your investment in Treats!"). In addition, Defendants' counterclaims also quote a December 11, 2012 email from Shaw to Tyler and Cameron, demonstrating Defendants discovered the falsity of Plaintiffs' alleged representations by that date. Countercl. ¶ 36 ("Now you are telling me not only do you not want me to announce [WCF's investment in Treats!]. . . . If you are that adamant that I do not make such an announcement and 'that seems to be the case' . . . .").

[62] Defendants' Answering Brief reasserts these dates and again concedes that Shaw discovered the alleged facts underlying Defendants' claims no later than June 17, 2013. Defs.' Answering Br. in Opp'n to Pls.' Mot. to Dismiss ("Defs.' Answering Br.") at 1 (Defendants state Shaw wrote to Plaintiffs regarding their alleged refusal to publicly announce their investment in Treats! four months after "going into business" with Plaintiffs in 2012.); Defs.' Answering Br. 7 (Defendants allege, "by June of 2013 . . . Mr. Shaw believed that they were breaching their agreement by failing to personally promote and help grow Treats!.")

[63] *See, e.g., BioVeris Corp. v. Meso Scale Diagnostics, LLC*, 2017 WL 5035530, at *5 (Del. Ch. Nov. 2, 2017).

[64] *See, e.g., Maddox v. Collins*, 2015 WL 5786349, at *1 (Del. Super. Oct. 5, 2015) (granting motion to dismiss and holding "[b]ecause all facts that plaintiff is alleging in this case were known to him more than three years prior to the filing of this action, the statute of limitations period has expired and this action [including the plaintiff's fraud claim] must be dismissed with prejudice."); *Airport Bus. Ctr. V LLLP*, 2012 WL 1413690, at *1 ("[P]laintiffs' claims for fraud, negligent misrepresentation, and breach of lease are barred by the statute of limitations and those claims will therefore be dismissed with prejudice.").

[65] *See Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 772 (Del. 2013); *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 179 (Del. 2011).

[66] *Levey*, 76 A.3d at 770; *Stewart*, 112 A.2d at 293–94, *aff'd*, 126 A.3d 1115 (Del. 2015).

including: (1) whether the plaintiff brought his claim, through litigation or any other means, before the statute of limitations expired; (2) whether the delay in filing suit can be explained by a material and unforeseeable change in the parties' personal or financial circumstances; (3) whether he delay in filing suit can be explained by a legal decision in another jurisdiction; (4) whether the defendant knew of, or participated in, any prior proceedings; and (5) whether, at the time the litigation began, a genuine dispute existed regarding the soundness of the claim.[67]

Defendants maintain that the application of these factors mandate the conclusion that their otherwise time-barred claims should survive dismissal. I disagree. As explained below, there are no "unusual conditions" or "extraordinary circumstances" present here.

1. Defendants Did Not Pursue Their Counterclaims Before the Statute of Limitations Expired

Defendants argue this factor is satisfied because: (a) Shaw "sent numerous communications to [Cameron and Tyler] regarding their fraudulent misrepresentations" and "to notify them of his claims";[68] (b) Shaw's attorney sent a letter on April 24, 2018, in which he advised the Defendants that Plaintiffs were preparing to file suit;[69] and (c) Shaw's attorney sent additional correspondence some time thereafter in which he described the evidence that would support the Defendants' claims.[70] Of these communications, only the June 17, 2013 email was sent before the statute of limitations expired on Defendants' counterclaims. Yet even this communication does not reflect that Defendants had pursued their claims "through litigation or otherwise" as contemplated by *O'Brien*.[71] In *BioVeris Corp.*, the plaintiff argued that it satisfied the first *O'Brien* factor by sending two letters to defendants demanding payment and then initiating negotiations to resolve the plaintiff's claims before expiration of the limitations period.[72] The court rejected the argument and held that sending letters stating legal positions and proposing settlement "was not

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[67] *O'Brien*, 26 A.3d at 178; *Levey*, 76 A.3d at 770.

[68] Defs.' Answering Br. 19; Countercl. ¶ 38. Defendants reference the email Shaw sent to Cameron and Tyler on June 17, 2013, as support for this contention.

[69] Compl. ¶ 37.

[70] Compl. ¶¶ 38, 39. *See* Defs.' Answering Br. 19–20.

[71] *O'Brien*, 26 A.3d at 178.

[72] *BioVeris Corp.*, 2017 WL 5035530, at *11–12.

sufficient pursuit of the claims to qualify under the first" *O'Brien* factor.[73] The court went on to say, "[t]hese two letters do not rise anywhere near the same level of diligence exercised by the plaintiffs in Levey . . . ."[74] *BioVeris* is directly on point. Shaw's expressions of frustration with Defendants in 2012 and 2013 are a far cry from actually pursuing claims against them.

Indeed, in each of the cases cited by Defendants where the courts found "unusual conditions" or "extraordinary circumstances" under the first *O'Brien* factor, the claimant took clear steps to pursue their claims, either by filing a lawsuit in another forum or initiating an arbitration action before the limitations period expired.[75] Defendants had every opportunity to do just that, but they inexplicably chose not to until after Plaintiffs filed this lawsuit well beyond the expiration of the statute of limitations on the counterclaims. They have failed, therefore, to meet the first *O'Brien* factor.

2. No Material and Unforeseeable Change in Defendants' Personal or Financial Circumstances Caused the Delay in Filing Suit

Defendants argue they meet this second *O'Brien* factor because the negotiations relating to Plaintiffs' separation from Treats! broke down after the statute of limitations expired. After it became clear Plaintiffs

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[73] *Id.* at *11–12.

[74] *Id.* at *12.

[75] *Levey*, 76 A.3d. at 766–67, 771 (Plaintiff—Levey—satisfied the first factor before the limitations period expired by: (1) previously asserting the same claim by filing a counterclaim against the defendants in an action brought by the defendants in the Southern District of New York; (2) sending a letter to the defendants one year later requesting payment and warning pursuit of legal remedies; (3) filing a motion to stay the Southern District of New York case and compelling defendants to submit to arbitration; and (4) after the court granted this motion, filing a formal demand for arbitration before the Financial Industry Regulatory Authority); *O'Brien*, 26 A.3d. at 175, 176–77, 178 (Plaintiff O'Brien met the first factor in an action for indemnification against IAC, which was the parent company of PRC, by: (1) seeking identical indemnification from PRC in a prior arbitration matter; (2) filing suit in Florida against PRC for indemnification while the arbitration was still pending; and (3) appealing the ruling on PRC's motion for summary judgment related to the indemnification claim in the Florida case); *Stewart*, 112 A.3d at 293–95 (Plaintiff, a receiver, adequately pursued its breach of contract, breach of fiduciary duty and negligence claims against the defendants before the statute of limitations expired by: (1) serving process on the defendants in a related liquidation action; (2) conducting "extensive litigation activity" in the liquidation action, which was necessary before the receiver could sufficiently plead its claims against defendants in the instant action; and (3) engaging in "an extensive investigation" related to the defendants' conduct, which included obtaining and reviewing documents from some of the defendants.).

would not honor their promise to promote Treats!, Shaw attempted to negotiate a buy-out of Plaintiffs' interests.[76] The brothers never budged from their position that they would not separate from Treats! for any less than their $1.3 million initial investment.[77] Shaw steadfastly refused to pay that much, repeatedly reminding Plaintiffs that he had put his "heart, soul, and every penny" into Treats! and that he had been "totally suppressed and financially effected" by their failure to honor their promise to promote the magazine.[78]

Nothing in this history suggests that Defendants were prevented from asserting their counterclaims by "a material and unforeseeable change in the parties' personal or financial circumstances." The parties' negotiating positions did not waiver before the statute of limitations expired; they did not waiver after. All of Defendants' settlement overtures were "to no avail."[79] There was no "unforeseeable change in the parties' . . . circumstances."[80]

3. No Legal Decision Prevented the Filing of the Counterclaims

Defendants wisely make no argument that "the delay in filing suit can be explained by a legal decision in another jurisdiction."[81] This is the only litigation the parties have pursued against one another and there has been no decision in unrelated litigation in another jurisdiction that would have prevented Defendants from timely pursuing their counterclaims.

4. There Have Been No Prior Proceedings

Defendants maintain this factor justifies their untimely filing because they were aware of, and filed their counterclaims in response to,

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[76] Defs.' Answering Br. 20.

[77] *Id.*; Countercl. ¶ 37.

[78] Defs.' Answering Br. 20–21; Countercl. ¶ 38. *See also* Countercl. ¶¶ 41, 42 (recounting failed attempts to buy-out WCF).

[79] *Id.*

[80] *O'Brien*, 26 A.3d. at 178. In *O'Brien*, the court found material and unforeseeable circumstances supporting O'Brien's delay in filing suit because: (1) O'Brien could not in good faith proceed against IAC when his appeal against IAC's subsidiary, PRC, remained pending for over a year; and (2) PRC unexpectedly declared bankruptcy. *Id.* Nothing like this has been alleged here.

[81] *O'Brien*, 26 A.3d at 178.

a "prior proceeding" as contemplated by the fourth *O'Brien* factor, namely this proceeding as initiated by Plaintiffs on June 1, 2018.[82] Setting aside the fact that the instant proceeding can hardly be characterized as a "prior proceeding" under any reasonable construction of that phrase, to invoke this factor, the untimely claimant must identify prior proceedings that were initiated before the limitations period expired.[83] This action, "prior" or not, was initiated well after the statute of limitations on the counterclaims had run.

5. There Was No Bona Fide Dispute Regarding the "Soundness" of Defendants' Claims at the Time of Filing

Defendants maintain "there is a bona fide dispute as to the validity of Mr. Shaw's claims."[84] Of course, they do not elaborate on this point beyond simply parroting the fifth *O'Brien* factor.

"The Supreme Court interprets a 'bona fide dispute' to mean that the claim would survive a motion to dismiss or, in other words, is not futile."[85] In application, this factor is most commonly fulfilled by a previous affirmative court finding that the untimely claims are valid.[86] No such finding has been made with respect to the counterclaims. Moreover, even if there had been a prior finding that Defendants possessed "sound" counterclaims, this alone would be insufficient to excuse Defendants' failure to file the claims on time.[87]

D. Equitable Tolling Does Not Apply Here

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[82] Defs.' Answering Br. 21–22.

[83] *See Levey*, 76 A.3d at 766–67, 771 (the prior Southern District of New York proceedings and the arbitration proceedings both took place before the limitations period for Levey's claims expired); *O'Brien*, 26 A.3d at 176, 178 (the prior arbitration proceedings, Florida action and the appeal all occurred before O'Brien's claims expired); *Stewart*, 112 A.3d at 294–96 (the related liquidation action and the receiver's extensive investigation both occurred before the expiration of the statute of limitations).

[84] Defs.' Answering Br. 22.

[85] *Daugherty*, 2018 WL 3217738, at *7, citing *Levey*, 76 A.3d at 771–72

[86] *See O'Brien*, 26 A.3d at 179 (finding this factor satisfied because the Florida trial and appellate courts had both previously found O'Brien's indemnification claim to be meritorious); *Levey*, 76 A.3d at 771–72 (holding Levey's indemnification claim, which had been brought earlier in the Southern District of New York and in arbitration, would survive a motion to dismiss).

[87] *See BioVeris Corp.*, 2017 WL 5035530, at *12 ("The mere existence of a bona fide dispute at the time the suit was filed does not justify a finding of extraordinary circumstances when the weight of the other factors cuts against such a finding.").

Defendants maintain that the brothers' "repeated misstatements of fact" triggers equitable tolling.[88] Delaware courts will apply equitable tolling in rare cases "where the facts underlying a claim were so hidden that a reasonable plaintiff could not timely discover them."[89] When the claimant alleges that tolling is justified because defendants' fraud obscured the existence of the claim, the tolling doctrine of fraudulent concealment, not equitable estoppel, provides the proper analytical framework.[90] That doctrine permits tolling only where the plaintiff has pled the conditions comprising the fraudulent concealment, and how such conduct prevented him from discovering his claim, with the same particularity as would be required to plead an affirmative claim of fraud.[91]

Defendants have not carried their burden under any of the tolling theories they have proffered for the simple reason that facts giving rise to their counterclaims were never hidden from them.[92] This is clearly revealed in Shaw's own words in 2013 when he acknowledged that Plaintiffs had "made it clear" they did not intend to promote Treats!.[93] Thereafter, Plaintiffs consistently turned down each of Defendants' offers to buy-out WCF's interest.[94] No facts have been pled in the counterclaims that would allow a reasonable inference that Plaintiffs somehow concealed Defendants' potential fraud and promissory estoppel claims from them.

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[88] Defs.' Answering Br. 27.

[89] *Krahmer v. Christie's Inc.*, 903 A.2d 773,778 (Del. Ch. 2006). I note that equitable tolling typically applies to salvage untimely claims for breach of fiduciary duty. *See Albert*, 2005 WL 1594085, at *19 ("Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary."). No such claim has been alleged in the counterclaims, and for good reason. *See Kuroda v. SPJS Hldgs., L.L.C.*, 2010 WL 925853, at *7 (Del. Ch. Mar. 16, 2010) (dismissing defendant's breach of fiduciary duty counterclaim against plaintiff because "[plaintiff] was neither a manager of [defendant LLC] nor a controlling member, and he thus has no fiduciary duties.").

[90] *Jeter v. RevolutionWear, Inc*., 2016 WL 3947951, at *10 (Del. Ch. July 19, 2016) (quoting *Smith v. Mattia*, 2010 WL 412030, at *5 (Del. Ch. Feb. 1, 2010) (internal quotations omitted) ("In order to toll the statute of limitation under the fraudulent concealment exception, the plaintiff must allege some affirmative act by the defendant that

[91] *See CMS*, 2016 WL 4411328, at *4, citing *Boeing Co. v. Shrontz*, 1992 WL 81228, at *3 (Del. Ch. Apr. 20, 1992) ("The allegations of fraudulent concealment necessary to toll the statute of limitations must be set forth with the particularity required by Chancery Court Rule 9(b).").

[92] *First State Towing, LLC v. Div. of State Police*, 2016 WL 2621137, at *4 (Del. Ch. May 5, 2016) (quoting *Capano v. Capano*, 2014 WL 2964071, at *9 (Del. Ch. June 30, 2014)); *Owens*, 2013 WL 5496821, at *2 (holding that equitable tolling assumes the plaintiff "was prevented in some extraordinary manner from timely asserting his rights").

[93] Countercl. ¶ 38.

[94] Defs.' Answering Br. 29–30; Countercl. ¶ 42.

Defendants were well aware of these potential claims; they simply failed to file them on time.

III. CONCLUSION

For the reasons stated above, I am satisfied Defendants' counterclaims must be dismissed as time-barred because they were filed after the expiration of three-year statute of limitations and no tolling doctrine applies. With that said, Defendants may present evidence of Plaintiffs' alleged fraud and broken promises in order to set off any potential damages arising from the affirmative claims asserted against them.[95] In this regard, I note that Defendants have asserted as affirmative defenses fraud, fraudulent inducement, fraudulent misrepresentation, and unclean hands, among others, based on the same facts alleged in the counterclaims. I can discern no basis to restrict Defendants from presenting evidence of the Defendants' failure to honor agreements to promote Treats! as grounds to defend against Plaintiffs' claim that Defendants have not delivered all that was promised. Counterclaims based on this evidence, however, are time-barred.

For the foregoing reasons, the Motion to Dismiss Defendants' Counterclaims must be **GRANTED**.

IT IS SO ORDERED.

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[95] *King Const., Inc. v. Plaza Four Realty, LLC*, 2012 WL 3518125 at *4 (Del. Super. Aug. 7, 2012) ("Ordinarily a defendant may amend a pleading to assert an affirmative defense even where the statute of limitations or other considerations would bar the assertion of a substantially similar counterclaim."); *PNC Bank, Del. v. Turner*, 659 A.2d 222, 225 (Del. Super. 1995) (permitting an affirmative defense of recoupment where the defendant's proposed counterclaim would have been barred by the statute of limitations, finding "the underlying policy of the statute of limitations is not promoted by suppressing a valid defense arising out of a transaction" and the "purpose of statutes of limitation is to bar actions and not to deny matters of defense. As a general rule, such statutes are not applicable to defenses, but only where affirmative relief is sought. [. . .] It would therefore be appropriate for [defendant] to plead her claims [. . .] defensively whether or not they would be barred if pleaded affirmatively.").

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VINTAGE RODEO PARENT, LLC, a Delaware limited liability company, VINTAGE RODEO ACQUISITION, INC., a Delaware corporation, and VINTAGE CAPITAL MANAGEMENT, LLC, a Delaware limited liability company,	)
Plaintiffs,	)
and	)
B. RILEY FINANCIAL INC., a Delaware corporation,	)
Intervenor-Plaintiff,	)
v.	) C.A. No. 2018-0927-SG
RENT-A-CENTER INC., a Delaware corporation,	)
Defendant.	)
---	)
RENT-A-CENTER INC., a Delaware corporation,	)
Counterclaim-Plaintiff,	)
v.	)
VINTAGE RODEO PARENT, LLC, a Delaware limited liability company,	)
and	)
B. RILEY FINANCIAL INC., a Delaware corporation,	)
Counterclaim-Defendants.	)

MEMORANDUM OPINION

Date Submitted: March 11, 2019
Date Decided: March 14, 2019

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GLASSCOCK, Vice Chancellor

Plaintiff Vintage Capital Management, LLC ("Vintage Capital) indirectly owns stores offering consumer goods to the public under the trade name "Buddy's." Buddy's is a "rent-to-own" retailer. This business model offers consumers an alternative to paying for goods with cash or credit, and taking immediate title. Under the rent-to-own model, as I understand it, the consumer "rents" the item, the seller retains title, the consumer makes payments denominated "rental payments," which contain an amount of principal payment, and if the consumer is able to complete the contractual payments, title is then transferred to the consumer. Vintage Capital, through two affiliates (collectively with Vintage Capital, "Vintage" or the "Vintage Entitities"), entered a merger agreement to acquire Defendant Rent-A-Center, Inc. ("Rent-A-Center"), a bigger player in the rent-to-own market. Because of the overlap of these competing retail operations, the parties knew that Federal Trade Commission ("FTC") permission would be required for the merger, and that the review process could be lengthy. Therefore, in a vigorously negotiated provision, the merger agreement provided an "End Date," six months from signing, after which either party could terminate the merger agreement. If, however, the FTC review process was still ongoing, each party negotiated for itself the unilateral right to extend the End Date for three months (and a second time for an additional three months), by giving the other side notice of the election to extend before the original End Date. By doing so, the extending party was binding both its counterparty and itself to compliance with the merger terms during the extension period. If neither party chose to extend the End Date, the merger was not terminated once that date had passed—both parties were still bound by the merger agreement, but either could terminate at will, simply by giving notice.

Thus, as the End Date approached, each party had a set of decisions to contemplate. It could give notice of election to extend, in which case both it and its counterparty would be bound to use commercially reasonable efforts to close during the extension period before the new End Date. If it chose not to extend, the party would nonetheless continue to be so bound if the counterparty gave notice of election to extend.

If neither party gave the required notice, the parties were free to proceed to closing, but with the knowledge that either party had the right to terminate at will before closing.

These decisions were complicated by another bargained-for set of provisions, involving breakup fees. If Vintage chose not to extend the End

Date, it (and its banker, B. Riley Financial, Inc. ("B. Riley"), an intervenor here) was (at least per Rent-A-Center) liable for a reverse breakup fee if either party terminated thereafter. Adjectives are often misplaced in legal opinions; nonetheless, I am comfortable describing the size of the reverse breakup fee, in light of the entity to be acquired, as enormous.[1]

At a meeting of Rent-A-Center's Board of Directors (the "Board") shortly before the End Date, the Board was given a presentation by corporate counsel. According to counsel, the Board was faced with the decision matrix described above: whether it should unilaterally extend the End Date, and if not—and if Vintage chose not to extend—should it immediately cancel the merger, or proceed towards closing? The Rent-A-Center Board determined that it was, by that point, no longer in the corporate interest to proceed under the terms of the merger agreement. It decided, therefore, not to elect extend the End Date, and, should Vintage not elect to extend, to terminate the merger. The Rent-A-Center Board was told by counsel that it was likely that Vintage would extend, given, I assume, market conditions and the reverse breakup fee. In that case, Rent-A-Center would be bound to continue to use commercially reasonable efforts to obtain FTC approval and consummate the merger. If Vintage made the surprising decision not to give notice of an election to extend, Rent-A-Center was ready to exercise its resulting right to terminate, immediately. As it happened, Vintage failed to give notice of an election to extend, and a few hours later, Rent-A-Center gave the notice required to terminate the merger agreement.

Vintage Capital was blindsided. In this litigation, it seeks relief including a declaration that Rent-A-Center's notice of termination was ineffective, and an order that the parties must proceed to obtain FTC approval and merge. If that is to occur, it is apparent that it must happen quickly; therefore, Vintage pursued this action on an expedited basis. This

[1] The reverse termination fee here is $126.5 million, or 15.75% of the equity value ($803 million) of the prospective transaction. *See* JX 691 (Expert Report of Professor Guhan Subramanian) ¶ 19. According to the report of the Plaintiffs' expert, Professor Subramanian, 15.75% is two to three times higher than average in comparable deals. *See* JX 691 ¶¶ 43–69. By contrast, the Defendant's expert, Professor Rock, notes, among other things, that while the reverse termination fee here is above average, reverse termination fees are necessarily deal-specific and that there are examples of reverse termination fees within the same range as the one at issue here. *See* JX 696 (Expert Report of Edward B. Rock) ¶¶ 80, 81. I note, however, that this Court has generally found termination fees of around 3% to be reasonable, subject to deal-specific factors. *See, e.g.*, *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000); *In re Pennaco Energy, Inc.*, 787 A.2d 691 (Del. Ch. 2001); *In re Toys "R" US, Inc. S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005); *La. Municipal Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010).

matter was tried for two days, post-trial argument followed quickly on March 11, 2019, and this partial (and rough-and-ready) decision is the result.

Vintage Capital makes a number of arguments, but principally two, which I find somewhat in tension. First, Vintage asserts that it and Rent-A-Center took numerous actions during the six months following execution of the merger agreement that were intended to achieve regulatory approval, and that these actions and the accompanying joint documents executed by Rent-A-Center and the Vintage Entities made clear that Rent-A-Center expected the merger to close after the End Date. Therefore, per Plaintiffs, Vintage had (through the joint documents) adequately given notice of its election to extend, or the extension notice provision had lost its relevance (and enforceability) in light of both parties' intent to proceed past the End Date, or Rent-A-Center had, through its actions, waived the notice of election to extend. The problem, in my view, with these assertions, is that the parties' activities are consistent with their obligations to use commercially reasonable efforts to obtain FTC approval and close; the ability of the counterparty to extend the End Date unilaterally meant that the parties were required to plan for such activities beyond the original End Date. Therefore, these documents and actions are not inconsistent with an intention to terminate, if such an opportunity became available. As such, they are insufficient to bind the parties under the theories set out above; they are consistent with the merger agreement, which contemplated, but did not require, extension of the End Date.

The other theory the Plaintiffs advance is that Rent-A-Center's behavior was, in effect, fraudulent. Once the Rent-A-Center Board determined, less than two weeks before the original End Date, that it was in the company's interest not to merge with Vintage, Rent-A-Center concealed its intent by continuing to act as though it were willing to consummate the merger. The Rent-A-Center Board, in this view, was hoping that Vintage would choose not to—or would forget to—give notice of extension. If Rent-A-Center had conveyed its real intent to Vintage, or at least acted like a reluctant merger partner, Vintage would have been more scrupulous in exercising its right to extend, presumably by giving the notice required by the merger agreement. While Vintage couches this as a breach of Rent-A-Center's duty to use commercially reasonable efforts to close, this strikes me as the equivalent of a "duty to warn" Vintage of the approaching End Date, which Vintage itself does not contend exists under law or under the merger agreement. More

fundamentally, Rent-A-Center had no reason to believe that Vintage had forgotten or misunderstood its options under the merger agreement, and it believed that Vintage Capital would extend; therefore, Rent-A-Center would continue to be required to expend commercially reasonable efforts toward closing going forward. I find its behavior to be consistent with that understanding.

It is, I find, telling what the Plaintiffs did not present at trial. The Plaintiffs did not attempt to explain why they did not deliver notice of their election to extend, as called for in the merger agreement. They presented no evidence, for example, indicating that Vintage's principals considered the approaching End Date and the contractual option to elect extension, but concluded it would not be necessary to give written election notice out of the belief that Vintage had already bound Rent-A-Center for an additional three months, or that Rent-A-Center had waived notice of election to extend. To the contrary, Vintage's arguments are after-the-fact rationalizations as to why failure to give written notice of election to extend is excused. I am left to the startling conclusion that, having vigorously negotiated a provision under which Vintage was entitled to extend the End Date simply by sending Rent-A-Center notice of election to do so by a date certain, Vintage and B. Riley personnel, in the context of this $1 billion-plus merger, simply forgot to give such notice. As one B. Riley principal messaged another, immediately upon learning of the failure of notice, "We are [prejudiced in the extreme]."[2] This attempt by the Plaintiffs to demonstrate that Rent-A-Center nonetheless was not free to terminate followed.

At bottom, the Plaintiffs' argument is that they were working in good faith toward a 2019 closing, which was expected to occur only after the first End Date, and that Rent-A-Center made it abundantly clear that it was working toward the same goal. Both parties had committed much time and effort in that regard, as required by the merger agreement. Under these circumstances, per the Plaintiffs, it is unfair to allow Rent-A-Center to exercise the letter of its bargained-for rights and walk away from the contract, because of a mistaken failure by Vintage to exercise a right that Rent-A-Center must have known Vintage wanted to exercise. I find,

[2] JX 39, at 155 (expletives modified in accordance with context). In fact, the message employed an Anglo-Saxon expression that, while generally unfit for publication, when used metaphorically has many meanings. I am convinced from context, however, that the meaning the message attempted to express was "prejudiced in the extreme." I note that Vintage's principal had a different reaction; in a text to his partner, he wrote: "No idea what [Rent-A-Center's] thinking. They know its [sic] extended." JX 870.

however, that the End Date, and the methods to extend it, were matters of importance to the parties, and were heavily negotiated. The parties are bound to their contractual bargain. And a finding that contractually-required expenditures of time and effort made, before the End Date, equated to sufficient notice of election to extend, would fundamentally rewrite the bargain of the parties. I explain my reasoning below.

Also pending before me is B. Riley's argument that the reverse breakup fee is untethered to actual damages, and is, therefore, unenforceable. Because of the need to issue my decision quickly in this expedited matter, I have not resolved that issue here. At the end of this Memorandum Opinion, I lay out the issues regarding the reverse breakup fee, and seek additional briefing on whether the implied covenant of good faith and fair dealing should apply to liability for a reverse break fee in these circumstances, where the buyer remains willing and able to proceed toward closing.

I. BACKGROUND

Trial took place over two days, during which eight witnesses gave live testimony. The parties submitted over seven hundred exhibits and lodged eighteen depositions, as well as competing expert reports. The following facts were stipulated by the parties[3] or proven by a preponderance of the evidence at trial.

A. The Parties

1. The Vintage Entities

Plaintiff Vintage Capital is a Delaware limited liability company with its principal place of business in Orlando, Florida.[4] Vintage Capital's managing partner is Brian Kahn ("Kahn").[5] Vintage Capital is the controlling stockholder of Buddy's Newco, LLC d/b/a Buddy's Home Furnishings ("Buddy's").[6] Buddy's, in turn, is a privately held operator

[3] The parties stipulated certain facts in their Joint Pre-Trial Stipulation and Order ("Pre-Trial Order"). I commend the parties for the excellent craftsmanship at trial and in briefing, made all the more remarkable given these expedited proceedings.

[4] Pre-Trial Order ¶ II.A.1.

[5] Kahn Dep. 13:6–13:8.

[6] Pre-Trial Order ¶ II.A.1.

and franchisor of rent-to-own stores, and has close to three hundred locations across the United States and Guam.[7]

Plaintiff Vintage Rodeo Parent, LLC ("Vintage Parent")[8] is a Delaware limited liability company.[9] Vintage Parent is an affiliate of Vintage Capital.[10] Plaintiff Vintage Rodeo Acquisition, Inc. ("Vintage Merger Sub") is a Delaware corporation, and the wholly-owned subsidiary of Vintage Parent.[11] Vintage Parent and Vintage Merger Sub were formed for the purpose of acquiring Defendant Rent-A-Center through a merger of Vintage Merger Sub and Rent-A-Center (the "Merger").[12] Vintage Capital, Vintage Parent, and Vintage Merger Sub are, again, collectively referred to as "Vintage" or the "Vintage Entities."

2. B. Riley Financial, Inc.

Intervenor-Plaintiff B. Riley Financial, Inc.[13] is a publicly traded Delaware corporation with its principal place of business in Woodland Hills, California.[14] B. Riley's Chairman and CEO is Bryant Riley ("Mr. Riley").[15] B. Riley is a financial services company.[16] B. Riley and Vintage Capital have previously worked together on a number of investments.[17] Here, B. Riley arranged debt and equity financing for the Merger.

3. Rent-A-Center, Inc.

Defendant Rent-A-Center[18] is a publicly traded Delaware corporation with its principal place of business in Plano, Texas.[19] Rent-A-Center operates approximately 2,400 rent-to-own stores in the United States, Mexico, Canada, and Puerto Rico, and is the franchisor of approximately 250 rent-to-own stores.[20] In addition to stores, Rent-A-

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[7] *Id.*
[8] Vintage Parent is also a Counterclaim-Defendant.
[9] Pre-Trial Order ¶ II.A.2.
[10] *Id.*
[11] *Id.* ¶ II.A.3.
[12] *Id.* ¶¶ II.A.2, II.A.3; *see also* JX 272.
[13] B. Riley is also a Counterclaim-Defendant.
[14] Pre-Trial Order ¶ II.A.4.
[15] Trial Tr. 301:20–302:9 (B. R. Riley).
[16] *Id.* at 303:1–304:17 (B. R. Riley).
[17] *Id.* at 27:23–28:7 (Kahn); *id.* at 306:4–307:7 (B. R. Riley).
[18] Rent-A-Center is also a Counterclaim-Plaintiff.
[19] Pre-Trial Order ¶ II.A.5.
[20] *Id.*

Center operates approximately 1,250 kiosks in the stores of third-party retailers, where the third-party retailers' customers can obtain rent-to-own financing through Rent-A-Center's Acceptance Now operating segment ("Acceptance Now").[21]

B. The Rent-A-Center Sales Process and Negotiation of the Merger Agreement with Vintage

1. Rent-A-Center Pursues a Sale

In 2017, a Rent-A-Center stockholder, Engaged Capital, ran a successful proxy contest to elect nominees to Rent-A-Center's Board.[22] Engaged Capital's slate included Mitch Fadel ("Fadel"), a longtime Rent-A-Center employee who had left the company in 2015.[23] As a result, Fadel was elected to Rent-A-Center's Board of Directors in June 2017.[24] Around the same time, Vintage Capital sent Rent-A-Center an unsolicited bid to acquire all of Rent-A-Center's common stock for $15 per share, but Rent-A-Center's Board decided not to pursue the bid.[25]

At the end of October 2017, Rent-A-Center's Board designated certain directors, including Fadel, to serve on a steering committee to advise the Board on strategic alternatives, including the possibility of a sale.[26] The Board hired J.P. Morgan to help with the process.[27] On November 7, 2017, Vintage Capital sent another unsolicited proposal to Rent-A-Center, which was declined, given the early stage of the strategic review process.[28] In December 2017, J.P. Morgan, on behalf of the steering committee, identified and contacted thirty potential acquirors, including Vintage Capital.[29] At the end of 2017, Rent-A-Center's CEO retired, and Fadel became CEO on January 2, 2018.[30]

Of the thirty parties contacted by J.P. Morgan, eleven signed non-

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[21] *Id.*; JX 66, at 53.
[22] JX 316, at 36; Trial Tr. 499:20–500:4 (Fadel).
[23] Trial Tr. 494:9–495:2, 499:20–500:4 (Fadel).
[24] JX 316, at 36; Trial Tr. 499:20–500:16 (Fadel).
[25] Pre-Trial Order ¶ II.A.6.
[26] *Id.* ¶ II.A.7; JX 316, at 37; Trial Tr. 508:1–10 (Fadel).
[27] Pre-Trial Order ¶ II.A.9; JX 316, at 36–39; Trial Tr. 501:8–19 (Fadel).
[28] Pre-Trial Order ¶ II.A.8; JX 316, at 37.
[29] Pre-Trial Order ¶ II.A.9.
[30] JX 316, at 38; Trial Tr. 502:8–17 (Fadel).

disclosure agreements ("NDAs") with Rent-A-Center, including Vintage Capital.[31] Discussions with potential acquirors continued into 2018.[32] Only three potential acquirors were considered serious bidders; by May 2018, two of the serious bidders had effectively dropped out, leaving Vintage Capital as the sole potential acquiror.[33] On June 10, 2018, Rent-A-Center publicly announced it was terminating its strategic review process, and on the same day, Vintage Capital made an acquisition offer of $14 per share.[34] After further discussion, on June 17, 2018, Vintage Capital raised its offer to $15 per share in cash, a forty-seven percent premium over Rent-A-Center's closing price on October 30, 2017.[35] Vintage Capital's offer represented "total consideration of approximately $1.365 billion, including net debt."[36] After receiving J.P. Morgan's opinion, the Rent-A-Center Board voted unanimously to approve the transaction with Vintage Capital, and the parties executed the Agreement and Plan of Merger (the "Merger Agreement")[37] on June 17, 2018.[38] Rent-A-Center and Vintage Capital issued a joint press release the next day announcing the Merger; the press release stated that the Merger was "expected to close by the end of 2018."[39]

2. Vintage Capital Engages B. Riley to Finance the Transaction

On March 24, 2018, J.P. Morgan circulated a proposed merger agreement to the (at that point) three prospective acquirors.[40] During the negotiation period that followed, Vintage Capital engaged B. Riley to arrange "backstop" debt and equity financing for the prospective

[31] Pre-Trial Order ¶ II.A.9.

[32] *Id.* ¶ II.A.10.

[33] *Id.* ¶¶ II.A.9, II.A.10; JX 316, at 38–44.

[34] Pre-Trial Order ¶ II.A.10.

[35] *Id.* October 30, 2017 was the trading day before Rent-A-Center announced it was looking at strategic alternatives. *Id.*

[36] JX 263.

[37] The Plaintiffs cite to JX 272 for the Merger Agreement, and the Defendant cites to JX 227. JX 227 was the executed version on July 17, 2018; the following day, the parties corrected several formatting issues, and the Merger Agreement in JX 272 was the version filed with the SEC. *See* JX 272. The two versions are, in pertinent part, identical. I cite to JX 272 for convenience. I also note that, for purposes of clarity, I cite to the sections of the Merger Agreement rather than page numbers.

[38] Pre-Trial Order ¶ II.A.11; JX 227; JX 238; JX 266; JX 316, at 41, 48.

[39] JX 263.

[40] JX 316, at 40.

transaction.[41] As a result, B. Riley, and its subsidiary Great American Capital Partners, agreed to provide a large portion of the total debt and equity to finance the Merger.[42] Of the debt financing, $275 million was in the form of a "liquidation loan" from Great American Capital Partners, and was secured by Acceptance Now's assets.[43] In addition to providing debt and equity financing, B. Riley agreed to guarantee, among other things, a $126.5 million parent termination fee contained in the Merger Agreement, discussed at length below.[44]

C. The Merger Agreement

Rent-A-Center and Vintage Capital exchanged multiple drafts of the Merger Agreement between March 24, 2018, when Rent-A-Center first circulated a proposed merger agreement, and June 17, 2018, when the parties executed the Merger Agreement.[45] Given that Buddy's was one of Rent-A-Center's largest competitors,[46] the parties expected that the Merger would require antitrust clearance from the FTC; accordingly, the Merger Agreement specifically references the Hart-Scott-Rodino ("HSR") Act and the process of obtaining regulatory approval from the FTC.[47]

1. Commercially Reasonable Efforts

The parties, in various provisions of the Merger Agreement, contracted to use "commercially reasonable efforts" to take certain actions and to achieve certain goals, both general and specific. In Section 6.03, the parties agreed to use commercially reasonable efforts to take all action necessary under the Merger Agreement to "consummate and make effective as promptly as practicable . . . the transactions contemplated by [the Merger Agreement]."[48] In Section 6.11(f), Rent-A-Center agreed to

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[41] *Id.* at 44. Mr. Riley explained at trial that "backstop" in this context meant that "if [B. Riley] could not syndicate [the debt] by the time the transaction closed, [B. Riley] would fund it off of [its] balance sheet." Trial Tr. 308:24–309:4 (B. R. Riley).

[42] JX 233; JX 315, at 65; JX 826, at 1; JX 828, at 1.

[43] Trial Tr. 27:15–22 (Kahn); *see also* JX 233, at 2

[44] Pre-Trial Order ¶ II.A.13; JX 229. B. Riley executed the "Limited Guarantee" concurrent with the execution of the Merger Agreement. Pre-Trial Order ¶ II.A.13.

[45] *See* JX 44; JX 48; JX 59; JX 71; JX 78; JX 81; JX 86; JX 106; JX 110; JX 148; JX 159; JX 167; JX 172; JX 187; JX 199; JX 211; JX 225; JX 244; JX 245; JX 246; JX 250; JX 252; JX 255; JX 271.

[46] Pre-Trial Order ¶ II.A.1.

[47] *See, e.g.*, JX 272 §§ 6.18, 7.01(b).

[48] *Id.* § 6.04.

use commercially reasonable efforts to satisfy the conditions of the financing for the transaction, including specific actions, such as attending certain meetings and providing financial information.[49]

With regard specifically to obtaining antitrust approval for the Merger, in Section 6.18(a) the parties agreed to use commercially reasonable efforts both to make all filings and to take all steps to obtain government approval of the Merger.[50] The Merger Agreement specified certain of the steps, such as making a filing pursuant to the HSR Act within twenty days of the Merger Agreement.[51]

Vintage Parent and Vintage Merger Sub further agreed in Section 6.18(b) to use "commercially reasonably efforts to . . . promptly undertake . . . any and all action necessary or advisable to avoid, prevent, eliminate or remove the actual or threatened commencement of any action by . . . any Government Entity . . . that would . . . prevent the consummation of the Merger or the other transactions contemplated."[52] Section 6.18(b) is referred to as a "hell or high water" provision,[53] and it specifically included the possibility of Vintage Capital's divesture of Buddy's.[54]

2. Closing Date, Effective Time, and End Date

The "Closing Date" of the Merger Agreement is defined as the date on which the "Closing" occurs, and is further defined to occur on a date to be specified by Rent-A-Center and Vintage Parent following the "satisfaction or . . . waiver by the party . . . entitled to the benefits thereof of the conditions set forth in Article VII . . . ."[55] Article VII of the Merger Agreement sets out conditions precedent, such as Rent-A-Center stockholder approval of the Merger,[56] government consent for the

[49] *Id.* § 6.11(f).
[50] *Id.* § 6.18(a).
[51] *Id.*
[52] *Id.* § 6.18(b).
[53] *See* Trial Tr. 132:5–15 (Ferris) (A "hell or high water" provision is "[b]asically that the buyer had to remove every impediment to clearance, and every antitrust impediment to clearance.").
[54] JX 272 § 6.18(b) ("[Vintage Parent] and [Vintage Merger Sub] shall . . . use their respective commercially reasonable efforts . . . including (i) proffering and consenting and/or agreeing to an Order or other agreement providing for the sale . . . of particular assets . . . of Vintage Parent (or any of its Affiliates, including Buddy's Newco, LLC) . . . .").
[55] *Id.* § 1.03. The date specified, however, could be no later than the third business day following the satisfaction or waiver of the conditions in Article VII of the Merger Agreement. *Id.*
[56] *Id.* § 7.01(a).

merger,[57] material performance of the obligations of the parties,[58] and the lack of a Rent-A-Center material adverse effect,[59] among others.

On the Closing Date, the parties to the Merger Agreement are obligated to file a certificate of merger with the Delaware Secretary of State.[60] The Merger becomes effective when the certificate is filed, or at a later time if specified in the certificate.[61] The time the merger becomes effective is defined as the "Effective Time."[62]

The "End Date" of the Merger Agreement is defined as "11:59 p.m., Eastern Time, on December 17, 2018."[63] According to Section 8.01(b)(i) of the Merger Agreement "either [Vintage Parent] or [Rent-A-Center] may elect (by delivering written notice to the other party at or prior to 11:59 p.m., Eastern time, on December 17, 2018) to extend the End Date to March 17, 2019," provided that the Effective Time has not occurred by the End Date and "the conditions set forth in Section 7.01(b) or Section 7.01(c) shall not have been satisfied . . . ."[64] Section 7.01(b) contains the condition that "[a]ny applicable waiting period under the HSR Act shall have expired or been earlier terminated and all other required consents under any Antitrust Laws shall have been obtained."[65] Section 7.01(c) contains the condition that no "Legal Restraint"[66] "is in effect and makes the Merger illegal or otherwise prevents the consummation of the Merger . . . ."[67] The End Date could be extended a further and final time, under the same conditions, at the election of either Vintage Parent or Rent-A-Center, from March 17, 2019 to June 17, 2019.[68]

3. Termination of the Merger Agreement

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[57] *Id.* § 7.01(b).
[58] *Id.* §§ 7.02(b), 7.03(b).
[59] *Id.* § 7.03(c).
[60] *Id.* § 1.02.
[61] *Id.*
[62] *Id.*
[63] *Id.* § 8.01(b)(i).
[64] *Id.*
[65] *Id.* § 7.01(b).
[66] *See id.* § 7.01(c) ("No Government Entity of competent jurisdiction shall have enacted, issued, or promulgated any Law or granted any Order (whether temporary, preliminary or permanent) (collectively, the "Legal Restraints") . . . .").
[67] *Id.*
[68] *Id.* § 8.01(b)(i). The election to extend again had to be by written notice and delivered "to the other party at or prior to 11:59 p.m., Eastern time, on March 17, 2019." *Id.*

The Merger Agreement provides circumstances in Section 8.01 by which the Merger Agreement can be terminated prior to the Effective Time.[69] The circumstances include: by mutual written consent;[70] by Rent-A-Center or Vintage Parent upon written notice that the other party has breached a representation or failed to perform any covenant, such that Rent-A-Center stockholder approval or government consent to the Merger would not be obtained as of the Closing Date;[71] by Rent-A-Center or Vintage Rodeo if a Legal Restraint exists or Rent-A-Center stockholder approval is not obtained;[72] by Rent-A-Center if it receives a Superior Proposal[73] prior to Rent-A-Center stockholder approval;[74] by Vintage Parent upon written notice that Rent-A-Center's Board makes or fails to make certain recommendations;[75] and by Rent-A-Center if the conditions precedent in Article VII are satisfied or waived and Vintage Parent and Vintage Merger Sub fail to consummate the merger.[76]

The remaining circumstance in Section 8.01 under which the Merger Agreement can be terminated—and the primary focus of this action—is Section 8.01(b)(i), which reads:

> Section 8.01 Termination. This Agreement may be terminated prior to the Effective Time by action of [Rent-A-Center] or [Vintage Parent], as the case may be: . . .
> (b) by either [Rent-A-Center] or [Vintage Rodeo]:
> (i) upon written notice to the other party, whether before or after receipt of the Company Stockholder Approval, if the Merger shall not have been consummated by [the End Date] . . . .[77]

The right to terminate the Merger Agreement under Section 8.01(b)(i), however, is not available "to any party whose breach of any provision of [the Merger Agreement] causes the failure of the Closing to be consummated by the End Date."[78]

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[69] *Id.* § 8.01.
[70] *Id.* § 8.01(a)
[71] *Id.* § 8.01(c), (e).
[72] *Id.* § 8.01(b)(ii), (iii).
[73] "Superior Proposal" was a further defined term. *See id.*, at 77.
[74] *Id.* § 8.01(d).
[75] *Id.* § 8.01(f).
[76] *Id.* § 8.01(g).
[77] *Id.* § 8.01(b)(i).
[78] Id.

4. Termination Fees

The Merger Agreement provides for a termination fee under certain circumstances. Rent-A-Center agreed to a pay a termination fee of $25,300,000 to Vintage Parent for certain terminations described in Section 8.01, such as if Rent-A-Center terminated the Merger Agreement to pursue a different proposal, or if Vintage Rodeo terminated the Merger Agreement because Rent-A-Center's Board made or failed to make certain recommendations.[79] Vintage Parent agreed to pay a termination fee of $126,500,000 to Rent-A-Center for certain terminations described in Section 8.01 (the "Parent Termination Fee").[80] Relevant here, Vintage Parent agreed to pay the Parent Termination Fee if "[the Merger Agreement] is terminated pursuant to Section 8.01(b)(i) and the conditions set forth in Section 7.01(b) shall not have been satisfied . . . ."[81] Section 7.01(b), again, is the condition that the HSR Act waiting period has expired (or had been terminated) and all other antitrust approval has been obtained.[82]

5. Notice and Waiver Provisions

The Merger Agreement contained provisions on Waiver and Notice. According to Section 8.05, before the Effective Time, the parties could extend the time of performance of any obligation, waive inaccuracies in representations and warranties, waive compliance with covenants and agreements, and waive the satisfaction of conditions.[83] "Any agreement on the part of a party to any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party."[84]

Section 9.02 of the Merger Agreement provides the method, timing, and required addressees of notices and other communications.[85] According to Section 9.02, notices have to be in writing and are considered "duly given" on "the date of delivery if delivered personally" or on "the date sent if sent by facsimile or electronic mail," among other methods.[86]

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[79] *Id.* § 8.03(b).
[80] *Id.* § 8.03(c).
[81] *Id.* § 8.03(c)(i).
[82] *Id.* § 7.01(b).
[83] *Id.* § 8.05.
[84] *Id.*
[85] *Id.* § 9.02.
[86] *Id.*

Section 9.02 requires that notices be delivered to specified addressees set forth in Section 9.02.[87] If the notice is being sent to Rent-A-Center, the addressees are Rent-A-Center, to the attention of its General Counsel, and separately to certain of its attorneys; if the notice is being sent to Vintage Capital, the addressees are Vintage Capital, to the attention of Kahn, and separately to certain of its attorneys.[88]

D. Post-Signing Antitrust, Financing, and Integration Efforts

The parties signed the Merger Agreement on June 17, 2018. On July 16, 2018, Rent-A-Center filed its Preliminary Proxy Statement with the SEC;[89] on August 15, 2018, Rent-A-Center filed its Definitive Proxy Statement on Schedule 14A regarding the proposed Merger.[90] On September 18, 2018, Rent-A-Center stockholders voted on and approved the Merger.[91] Before and after stockholder approval, Rent-A-Center and Vintage Capital worked together on: obtaining antitrust approval, pre-closing integration efforts and planning, and Vintage Capital's financing for the merger. While the June 18, 2018 press release first announcing the Merger contained an expectation that the Merger would "close by the end of 2018,"[92] subsequent press releases and the parties' work on antitrust approval, integration, and financing all reflected a prospective closing date in 2019.[93]

1. Antitrust Approval Efforts

The Merger Agreement required a filing in accordance with the HSR Act for antitrust approval from the FTC within twenty days of the date of the Merger Agreement.[94] The parties to the FTC filing were Rent-A-Center and Buddy's, as Buddy's was Rent-A-Center's competitor.[95]

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[87] *Id.*

[88] *Id.*

[89] JX 283.

[90] Pre-Trial Order ¶ II.C.17; JX 315.

[91] Pre-Trial Order ¶ II.C.20. Prior to the stockholder vote, Vintage sent Rent-A-Center a notice of breach, in which Vintage claimed that Rent-A-Center breached Section 6.01(d) of the Merger Agreement by not scheduling a stockholder vote "as promptly as practicable after the SEC clears the Proxy Statement." JX 308 (internal quotations omitted); see also JX 272 § 6.01(d). Vintage later withdrew its notice of breach. JX 312. Both the notice of breach and the withdrawal notice complied with Section 9.02 recipient requirements. *See* JX 308; JX 312.

[92] JX 263.

[93] Rent-A-Center's own press releases contained the expectation that closing would occur in 2019. *See, e.g.*, JX 355; JX 477.

[94] JX 272 § 6.18(a).

[95] Trial Tr. 129:5–19, 169:12–20 (Ferris).

Rent-A-Center filed its FTC submission within the twenty days, but Buddy's failed to do so because of an administrative error.[96] Given the missed deadline, Vintage Parent requested a waiver, in compliance with Section 9.02's notice requirements, to which Rent-A-Center agreed.[97] Buddy's and Rent-A-Center then submitted their filing to the FTC.[98]

As described by the Plaintiffs and the Defendant,[99] under the HSR Act, prospective merger partners must submit a filing to the FTC, after which they cannot close their merger until a thirty-day "waiting period" has elapsed (or the FTC earlier terminates the waiting period).[100] In other words, the FTC only has the length of the waiting period to make its decision.[101] Before the end of the waiting period, the FTC may request additional information, known as a "second request."[102] If merging parties receive a second request, they cannot close the merger until thirty days after they have complied with the request (again unless the FTC earlier terminates the waiting period), essentially extending the waiting period.[103]

In August 2018, the FTC signaled to the filing parties that it would issue a second request.[104] Vintage Capital and Rent-A-Center decided to pull their FTC filings and then refile, in an effort to avoid a second request by resetting the thirty-day waiting period, which would give the FTC more time to review their filings.[105] As a result, Buddy's and Rent-A-Center refiled under the HSR Act on August 14, 2018.[106] Nonetheless, on September 13, 2018, in response to their refilings with the FTC, Buddy's and Rent-A-Center received a second request.[107] Rent-A-Center and Vintage Capital issued a joint press release on September 13, 2018, which announced that the FTC had sent them a second request and included the

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[96] *Id.* at 134:6–19 (Ferris).

[97] JX 294; Trial Tr. 296:15–24 (Korst).

[98] JX 295; *see also* Trial Tr. 134:6–135:0 (Ferris).

[99] The Plaintiffs and the Defendant agree on what they believe the HSR Act and the FTC antitrust approval process require. *See, e.g.*, Joint Proposed Finding of Fact of Pls. & Intervenor-Pl.; Def. & Countercl.-Pl.'s Proposed Finding of Fact. I make no independent findings as to the underlying antitrust statutes or government process, and simply rely on the parties' representations.

[100] Trial Tr. 136:13–20 (Ferris).

[101] *Id.* at 136:18–20.

[102] Id. at 136:13–23.

[103] Pre-Trial Order ¶ II.C.18.

[104] JX 323; Trial Tr. 135:15–136:12, 136:24–137:6 (Ferris).

[105] JX 311; JX 312; Trial Tr. 138:20–139:20 (Ferris); Ressler Dep. 103:17–104:6.

[106] JX 312; JX 313.

[107] Pre-Trial Order ¶ II.C.18; *see also* JX 352; JX 358.

expectation that the Merger would "close during the first quarter of 2019."[108]

Buddy's and Rent-A-Center subsequently entered into a joint timing agreement (the "Joint Timing Agreement") with the FTC on October 29, 2018.[109] According to the Joint Timing Agreement, Buddy's and Rent-A-Center agreed not to close the Merger for a forty-five day waiting period, which would, in turn, be triggered by their substantial compliance and certification of compliance with the second request they had received.[110] Buddy's and Rent-A-Center "anticipate[d] substantially complying . . . by November 15," but agreed not to certify their compliance on that date.[111] Certification would trigger deadlines for FTC action, and the parties wanted to avoid rushing the FTC into unfavorable action. Instead, Buddy's and Rent-A-Center agreed to a timing structure that involved the FTC making preliminary findings and engaging in a series of meet-and-confers with Buddy's and Rent-A-Center, prior to certification of compliance; that certification would trigger the agreed-upon waiting period.[112] Rent-A-Center's antitrust counsel noted to Rent-A-Center's Board that certification was expected on December 10, 2018, which would "for all practical purposes" push a conclusion to the antitrust approval process to the "end of January" 2019.[113] The Rent-A-Center Board approved Rent-A-Center entering into the Joint Timing Agreement.[114] On November 5, 2018, Rent-A-Center issued a press release regarding its third quarter 2018 financial results, which contained the same expectation that the Merger would "close during the first quarter of 2019."[115]

On November 29, 2018, counsel for Buddy's and Rent-A-Center participated in a call with the FTC, following which counsel updated their respective clients and began working on a "white paper" to explain why full divesture of Buddy's would not be necessary.[116] Buddy's and Rent-A-Center jointly submitted the white paper to the FTC on December 14, 2018.[117] Counsel for Buddy's and Rent-A-Center had an additional call

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[108] Pre-Trial Order ¶ II.D.19; JX 355, at 3.

[109] Pre-Trial Order ¶ II.D.21.

[110] JX 458, at 3.

[111] *Id.*

[112] *Id.* The forty-five day waiting period to which Buddy's and Rent-A-Center agreed could be cut short if the FTC terminated the waiting period or closed its investigation. *Id.*

[113] JX 433, at 1.

[114] *Id.*; JX 437, at 1; JX 439, at 1; JX 440, at 1; Trial Tr. 251:23–252:5 (Lentell).

[115] Pre-Trial Order ¶ II.D.22; JX 477.

[116] JX 526; JX 532; Trial Tr. 174:8–176:22 (Ferris); Agin Dep. 125:7–18.

[117] JX 600; Trial Tr. 176:23–178:2 (Ferris).

with the FTC on December 17, 2018; based on that call, counsel were hopeful that a full divesture of Buddy's would not be necessary, but understood that the FTC needed additional time to further study the issue. As a result, a planned in-person meeting with the FTC on December 19, 2019 was canceled.[118] At this time, Buddy's and Rent-A-Center still had not certified compliance with the second request.[119]

2. Financing

Vintage Capital and Rent-A-Center worked together to create financial models of the post-closing entity, to be used pre-closing by Vintage Capital and B. Riley when engaging with investors, potential investors, and rating agencies.[120] Rent-A-Center was obligated to provide assistance for the financial modeling under the Merger Agreement.[121] Rent-A-Center's Vice President of Finance, Daniel O'Rourke, was primarily responsible for the modeling and for responding to requests from Vintage Capital.[122] O'Rourke created and updated a financial model for "NEWCO," the post-merger entity, and did so with input and model assumptions from Kahn.[123] O'Rourke's original model included a "transaction close" assumption of September 30, 2018.[124] On September 20, 2018, O'Rourke updated the financial model, changing, among other things, the assumption for "Transaction Close" from September 30, 2018 to January 31, 2019.[125] O'Rourke received approval from both Kahn and Fadel to make this change to the financial model.[126]

On December 7, 2018, Fadel met Mr. Riley at B. Riley's Los Angeles office.[127] Fadel first met with Great American Capital Partners, a subsidiary of B. Riley that was providing, in part, debt financing for the

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[118] JX 601; Trial Tr. 190:22–192:18, 193:1–13 (Ferris).

[119] Trial Tr. 191:20–192:7 (Ferris).

[120] *See, e.g.*, Trial Tr. 33:22–35:7 (Kahn); *id.* at 328:1–14 (B. R. Riley).

[121] *See* JX 272 §§ 6.03, 6.11(f).

[122] Trial Tr. 458:24–460:8 (O'Rourke).

[123] *See, e.g.*, JX 282; Trial Tr. 460:24–462:10 (O'Rourke).

[124] JX 282; JX 369, at 6; JX 371, at 6; Trial Tr. 465:5–14 (O'Rourke).

[125] X 369, at 6; JX 373, at 3. The model contains a typo; "January 31, 2018" is clearly a scrivener's error, which should instead be "January 31, 2019." *See* Trial Tr. 115:17–116:5 (Kahn); O'Rourke Dep. 145:20–146:5.

[126] JX 369; JX 370; JX 371; JX 376, at 1; Trial Tr. 488:6–489:7, 489:20–490:10 (O'Rourke).

[127] Trial Tr. 327:24–329:5, 329:19–24 (B. R. Riley); id. at 527:8–528:1, 595:13–16 (Fadel).

Merger.[128] Fadel then met with Mr. Riley and discussed, among other things, how B. Riley might continue to be involved with the post-merger entity.[129] On December 8, 2018, Fadel e-mailed a Rent-A-Center employee, copying Mr. Riley.[130] Fadel wrote that "B. Riley will be a major partner in our company going forward," and B. Riley should therefore be allowed to compete for a financial services opportunity at Rent-A-Center.[131]

Given other changes in the financial model for "NEWCO," on December 11, 2018, O'Rourke asked Kahn if he should move "close timing back."[132] Kahn gave his approval, and O'Rourke updated the financial model with an assumption that the "Timing" of the Merger was the "End of March 2019."[133] This financial model was sent, after review by Kahn, Fadel, and B. Riley, to investors and a rating agency on December 14, 2018.[134]

3. Integration Planning and Rent-A-Center Operations

Rent-A-Center was also obligated under the Merger Agreement to provide support for Vintage's[135] integration of Rent-A-Center.[136] Fadel, who was expected to become the CEO of the merged entity, was involved in integration planning.[137]

Among other meetings and activities, Fadel attended an integration planning meeting in Orlando, Florida on December 10, 2018.[138] After the integration planning meeting, Fadel met with Kahn and discussed, among other things, Acceptance Now.[139] Kahn planned to find a merger partner to manage the Acceptance Now business; Fadel sought Kahn's approval at the meeting, in light of an expected closing in 2019, for ninety days to implement a change to Acceptance Now, in the hopes of keeping it wholly

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[128] *Id.* at 482:11–20 (O'Rourke); *id.* at 527:8–13 (Fadel).
[129] *Id.* at 330:22–331:16, 334:1–8 (B. R. Riley); *id.* at 575:2–8 (Fadel).
[130] JX 553.
[131] *Id.*
[132] JX 573.
[133] JX 589, at 49; JX 594, at 10; JX 595, at 6.
[134] JX 589, at 1; JX 594, at 5; JX 595, at 1; JX 602; Trial Tr. 488:3–489:7 (O'Rourke).
[135] Vintage in this regard includes Buddy's. *See* Trial Tr. 37:23–38:13 (Kahn); *id.* at 514:11–14 (Fadel).
[136] JX 272 §§ 6.03, 6.11(f).
[137] Trial Tr. 37:23–39:13 (Kahn); *id.* at 514:1–515:5, 539:9–11 (Fadel).
[138] *Id.* at 44:11–17 (Kahn); *id.* at 528:30–529:3 (Fadel).
[139] *Id.* at 45:24–47:23 (Kahn); *id.* at 530:5–18 (Fadel).

owned by Rent-A-Center.[140] Vintage and Rent-A-Center representatives had another integration planning meeting scheduled for December 18, 2018.[141]

Rent-A-Center had agreed in the Merger Agreement to "conduct their . . . business and operations in the ordinary course of business consistent with past practices;" conduct outside the ordinary course could only be taken "with the prior written consent of [Vintage Parent] (including by email) . . . ."[142] Rent-A-Center requested such consent from Kahn on several occasions, and received it.[143] The Rent-A-Center Board approved a transaction on December 6, 2018 that required such consent,[144] Kahn asked for documents related to the transaction,[145] and Fadel sent the documents to Kahn on December 17, 2018.[146]

E. Termination of the Merger Agreement

1. Rent-A-Center's Board Decides to Terminate the Merger Agreement *If* Given the Opportunity

Rent-A-Center held regularly scheduled Board meetings on December 5 and 6, 2018.[147] During the meetings, the Board discussed Rent-A-Center's financial and operational performance, which had improved since the Merger Agreement was signed on June 17, 2018.[148] Legal counsel to the Board "reminded" the Board that the Merger Agreement's "initial end date" was December 17, 2018, but could be extended by either party through written notice beforehand.[149] Legal counsel to the Board explained that in the event Vintage did not extend, the Board would need to decide whether Rent-A-Center should extend the End Date or terminate the Merger Agreement.[150] Legal counsel also "reminded the Board of the Provisions in the Merger Agreement relating

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[140] *Id.* at 45:24–47:23, 49:2–7, 73:15–74:1 (Kahn); *id.* at 530:5–18, 579:21–580:7 (Fadel).

[141] *Id.* at 61:16–62:19 (Kahn); *id.* at 597:9–14 (Fadel).

[142] JX 272 § 5.01.

[143] Trial Tr. 30:7–32:14 (Kahn); *see also*, e.g., JX 296; JX 326.

[144] JX 558.

[145] JX 652.

[146] JX 619, at 1.

[147] *See* JX 546; JX 558.

[148] JX 546, at 1; *see also* JX 556.

[149] JX 546, at 2.

[150] *Id.*

to payment of a termination fee."[151] The Board then determined that if Vintage Capital did not extend the End Date, it would be in the best interests of Rent-A-Center's stockholders for the Board to also not extend the End Date, and to instead terminate the Merger Agreement.[152] The Board and legal counsel believed that Rent-A-Center would receive written notice electing to extend the End Date from Vintage Capital before the Section 8.01(b)(i) deadline, that is, before midnight Eastern Time on December 17, 2018.[153] In the meantime, the Board decided that Rent-A-Center's management "should continue with its efforts to consummate the merger."[154] The determination by the Board to terminate the Merger Agreement, if given the opportunity, was kept confidential.[155] For example, Rent-A-Center's General Counsel was not told of this decision until December 14, 2018, and O'Rourke was not told until December 17, 2018.[156]

As previously described, following the December 5 and 6, 2018 Rent-A-Center Board meetings, Vintage and Rent-A-Center continued to work together toward antitrust approval, integration planning, and arranging financing for the Merger. Specific actions that took place after the December 5 and 6 Board meetings included joint discussions with the FTC, Fadel's in-person meetings with Kahn and B. Riley, exchanging information, financial modeling, and integration planning. During the course of these joint interactions, the Rent-A-Center Board's discussions and its decision to terminate the Merger Agreement, if given the opportunity, were not shared with anyone from the Vintage Entities or B. Riley.[157]

Rent-A-Center's Board held a special meeting at 9 p.m., Eastern Time, on December 17, 2018.[158] Legal counsel to Rent-A-Center and legal

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[151] *Id.*

[152] JX 546, at 2; JX 558, at 4; Trial Tr. 384:6–24 (Ressler); Trial Tr. 519:2–11, 519:23–521:21 (Fadel); Brown Dep. 50:21–51:3, 56:15–57:14.

[153] Trial Tr. 404:24–405:8 (Ressler); *id.* at 519:17–22, 555:4–5, 577:10–19 (Fadel); *see also* Hetrick Dep. 133:20–134:6.

[154] JX 558, at 4.

[155] Trial Tr. 389:6–14, 411:16–18 (Ressler); *id.* at 533:15–18 (Fadel).

[156] *Id.* at 275:17–258:10 (Korst); *id.* at 483:13-16 (O'Rourke). The Board also did not tell Rent-A-Center's antitrust counsel. *Id.* at 584:5–7 (Fadel).

[157] *See, e.g., id.* at 50:19–51:2, 58:2–7, 59:21–61:6, 61:4–15 (Kahn); *id.* at 333:5–10 (B. R. Riley); *id.* at 582:6–12 (Fadel).

[158] JX 617.

counsel to its Board[159] told the Board that they had not yet received a notice to extend the End Date in accordance with the Merger Agreement, which extension, under the Merger Agreement, must be made, if at all, by 11:59 p.m. that night.[160] During the special meeting, the Board "reviewed their previous discussions regarding [Rent-A-Center]'s strong financial performance and outlook, as well as their view that terminating the Merger Agreement was in the best interest of the Company's stockholders."[161] The Board resolved to terminate the Merger Agreement and demand the Parent Termination Fee if Rent-A-Center did not receive an extension notice before the deadline in the Merger Agreement.[162]

2. Rent-A-Center Purports to Terminate the Merger Agreement

On December 18, 2018, shortly after midnight, Rent-A-Center's General Counsel[163] advised the Board that he had "not received any communication from Vintage or Vintage attorneys."[164] As a result, at 6:55 a.m., Eastern Time, on December 18, 2018, Fadel e-mailed Kahn a "notice of termination and demand for payment" (the "Termination Notice").[165] The Termination Notice indicated that Rent-A-Center was "exercising its right to terminate the Merger Agreement pursuant to Section 8.01(b)(i) thereof, effective immediately."[166] The Termination Notice also demanded payment of the $126.5 million Parent Termination Fee.[167] At 7:00 a.m., Eastern Time, Rent-A-Center issued a press release announcing the Merger Agreement had been terminated because Rent-A-Center had not received a notice of election to extend and the Rent-A-Center Board, "in light of the current financial and operational performance of [Rent-A-Center]," decided not to extend either, and instead to terminate.[168]

Kahn responded to Fadel by letter on December 18, 2018.[169] Kahn

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[159] Legal counsel were required recipients of notice under Section 9.02. *See* JX 272 § 9.02.

[160] JX 617, at 1.

[161] *Id.*

[162] *Id.*

[163] Rent-A-Center's General Counsel was a required recipient of notice under Section 9.02. *See* JX 272 § 9.02.

[164] JX 646.

[165] JX 660.

[166] *Id.*

[167] *Id.*

[168] JX 627.

[169] JX 657.

disputed that the Termination Notice was valid and insisted that Rent-A-Center continue to comply with the Merger Agreement.[170] Rent-A-Center did not respond, nor did Fadel respond to Kahn's other attempts to reach him.[171]

F. Procedural History

The Vintage Entities filed a Complaint against Rent-A-Center on December 21, 2018. Vintage also sought a Temporary Restraining Order ("TRO") against Rent-A-Center in an attempt to force compliance with the Merger Agreement. I held a TRO hearing on December 31, 2018; from the Bench, I denied in part and granted in part the TRO. I subsequently entered a Status Quo Order on January 7, 2019. On January 3, 2019, I granted B. Riley's Motion to Intervene; it filed its own Complaint against Rent-A-Center on the same day. On January 8, 2019, Rent-A-Center filed a Counterclaim. The parties pursued discovery and trial on an expedited schedule. Trial took place over two days on February 11 and 12, 2019. I heard Post-Trial Oral Argument on March 11, 2019.

II. ANALYSIS

Plaintiffs Vintage Capital, Vintage Parent, and Vintage Merger Sub seek declaratory judgment, and bring claims for breach of the implied covenant of good faith and fair dealing and estoppel—all, in one way or another, to prevent Rent-A-Center's termination of the Merger Agreement. They also bring a claim for breach of contract and specific performance to enforce the Merger Agreement. Intervenor-Plaintiff B. Riley seeks declaratory judgment on several counts, which are largely duplicative of the relief the Vintage Entities ask for, with the exception of a request for a declaratory judgment that the Parent Termination Fee is an unenforceable penalty. The Vintage Entities and B. Riley are collectively referred to below as "the Plaintiffs." Defendant Rent-A-Center has brought a counterclaim for breach of contract, seeking payment of the Parent Termination Fee. I begin with the contractual claims surrounding the termination of the Merger Agreement.

A. Rent-A-Center Had the Right to Terminate the Merger Agreement Pursuant to Section 8.01(b)(i)

The Plaintiffs did not introduce evidence at trial, nor do they argue,

[170] *Id.*
[171] Trial Tr. 41:4–41:7 (Kahn).

that they sent a written notice of election to extend to Rent-A-Center that explicitly used the term "End Date" or otherwise referenced Section 8.01(b)(i) of the Merger Agreement or the date March 17, 2019. Nor do they argue that they sent any document that could be construed as a written notice of election to extend in a manner compliant with the Merger Agreement, which required notice to Rent-A-Center to be delivered personally or sent by fax or email to Rent-A-Center's General Counsel and certain of Rent-A-Center's outside counsel. The Plaintiffs do, however, argue that Rent-A-Center's termination of the Merger Agreement pursuant to Section 8.01(b)(i) was not valid. The Plaintiffs seek declaratory judgment and put forward four contractual arguments that the End Date had been extended before termination, or that Rent-A-Center had waived notice: first, that the purpose of the notice requirement in Section 8.01(b)(i) of the Merger Agreement was satisfied, and no "additional"[172] notice was therefore required; second, that Rent-A-Center extended or waived the notice requirement of Section 8.01(b)(i) in accordance with Section 8.05; third, that if notice of election to extend was required, a financial model prepared by Rent-A-Center itself listing a "Transaction Close" date of January 31, 2019 fulfilled the notice requirement and complied with the general provision on notice in Section 9.02; and fourth, that Rent-A-Center did not have the right to terminate the Merger Agreement under Section 8.01(b)(i) because it had breached the Merger Agreement by failure to employ commercially reasonable efforts toward the closing. The Plaintiffs, as the parties seeking declaratory judgment, assume the burden of proving their position.[173] The Plaintiffs also argue that if Rent-A-Center had the right to terminate under Section 8.01(b)(i), the implied covenant of good faith and fair dealing prevents Rent-A-Center from exercising that right. I begin with the clear and unambiguous language of the Merger Agreement itself, before addressing the Plaintiffs' arguments in turn.

1. The Merger Agreement and the End Date

The provisions of the Merger Agreement at issue are clear and

[172] Post-Trial Answering Brief of Pls. and Intervenor-Pl. at 7.

[173] *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 818760, at *50 (Del. Ch. Feb. 12, 2018), *aff'd in part rev'd in part sub nom. Oxbow Carbon & Minerals Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 2019 WL 237360 (Del. Jan. 17, 2019).

unambiguous,[174] and all the provisions are assumed to have meaning.[175] As parties to the Merger Agreement, Vintage and Rent-A-Center are assumed to have knowledge of the terms of the contract that they bargained for and entered into.[176] The Merger Agreement binds the parties until its termination; Section 8.01 details various rights to terminate, but the Merger Agreement would also "terminate" after a successful closing of the Merger. While bound, the parties agreed to use commercially reasonable efforts to work toward closing, as well as for obtaining antitrust approval, for integration planning, and for achieving financing for the transaction.

Section 8.01(b)(i) of the Merger Agreement states that the "End Date" of the Merger Agreement is "11:59 p.m., Eastern Time, on December 17, 2018."[177] If the Merger is not consummated by the End Date, either Vintage or Rent-A-Center have the right, but not the obligation, to terminate the Merger Agreement upon written notice. Either party, however, can elect to extend the End Date to March 17, 2019, if FTC approval has not yet been achieved, and if the party electing to extend delivers written notice of its election to the other party by 11:59 p.m., Eastern Time, on December 17, 2018. Section 9.02 of the Merger Agreement governs notices and, relevant here, specifies the names and addresses of the recipients of such notices. Extension of the End Date is not permissible if there is a "Legal Restraint" that "makes the Merger illegal or otherwise prevents the consummation of the Merger . . . ,"[178] or "[a]ny applicable waiting period under the HSR Act shall have expired or been earlier terminated and all other required consents under any Antitrust Laws shall have been obtained."[179] Those conditions did not obtain here, and either party was entitled to file a notice of election to extend, upon which the obligations of the Merger Agreement would be binding on all

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[174] The parties also agree that the language is clear and unambiguous. *See* Post-Trial Answering Br. of Pls. and Intervenor-Pl. at 5 ("Quite the opposite, the parties agree on the meaning of the clear words of Section 8.01(b)(i) . . . .").

[175] *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

[176] *See, e.g.*, *Chapter 7 Tr. Constantio Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *6 (Del. Ch. Sept. 22, 2016) ("[A] party who enters into a contract governed by Delaware law will be charged with knowledge of the contents of the instrument and will be deemed to have knowingly agreed to the plain terms of the instrument absent some well-pled reason to infer otherwise.").

[177] JX 272 § 8.01(b)(i).

[178] *Id.* § 7.01(c).

[179] *Id.* § 7.01(b).

parties until the new End Date. In other words, the Merger Agreement creates a reciprocal, unilateral right to extend the End Date.

Therefore, each party to the Merger Agreement was faced with a decision concerning the End Date in Section 8.01(b)(i), and had to make that decision in accordance with the following decision matrix. The party could elect to extend the End Date, and thereby bind itself and its counterparty to the Merger Agreement until at least March 17, 2019,[180] or the party could choose not to extend the End Date, at which point its options were contingent on its counterparty. If its counterparty chose to extend, then the first party had no choice—it would remain bound by the Merger Agreement. If the counterparty did not elect to extend, the party could terminate the Merger Agreement at any time after the End Date. If both parties did not elect to extend but also both chose not to immediately exercise their termination rights, then both parties would continue to be bound by the Merger Agreement, *but* by their own volition and with the understanding that either party could terminate at will.

Rent-A-Center was faced with this decision matrix during its December 5 and 6, 2018 Board meetings. The Board knew that Vintage had the unilateral right to bind Rent-A-Center to the Merger Agreement until at least March 17, 2019. The record shows that the Rent-A-Center directors did not believe that Vintage had already effected an election to extend the End Date; their discussion would otherwise have been moot, as the right to extend was unilateral. Rent-A-Center's Board also believed that it would likely receive a written notice from Vintage electing to extend the End Date.[181] However, from the Board's perspective, it had no assurance that Vintage would definitely make such an election, nor does the record show that *Rent-A-Center* had reason to believe that Vintage did not also think it was faced with the same decision matrix. Rent-A-Center's Board, then, late in the process but appropriately, considered the options available to Rent-A-Center under Section 8.01(b)(i) and made the decisions that it found to be in the Company's best interest. It decided not to extend the End Date. Furthermore, the Rent-A-Center Board decided that, should Vintage not bind Rent-A-Center through an election to extend, the Board would exercise its right to terminate immediately after the End Date and walk away from the Merger. This litigation is the result of that decision.

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[180] The parties could extend the End Date again to the further and final End Date of June 17, 2017. *Id.* § 8.01(b)(i).

[181] *See, e.g.*, Trial Tr. 404:24–405:8 (Ressler); *id.* at 519:17–22 (Fadel).

2. The Joint Timing Agreement Was Not An Election to Extend the End Date

Section 8.01(b)(i) of the Merger Agreement requires written notice of election to extend the End Date. Section 9.02 details how and to whom notices must be sent. The Plaintiffs, nonetheless, contend that under the circumstances a written notice— in accordance with Section 9.02—of election to extend the End Date was not required because "the purpose of [the] contractual notice requirement" had already been satisfied.[182] The Plaintiffs' reasoning is as follows: the purpose of Section 8.01(b)(i) was to "define the parties' rights if the merger did not close by December 17, 2018 due to the ongoing FTC clearance process,"[183] and this purpose is satisfied by an [implicit] election to extend the End Date and notice to the other party of that election.[184] The Plaintiffs suggest that the true purpose of Section 8.01(b)(i) is to provide notice that the counterparty intends to go forward towards closing, post-End Date. The purpose evidenced by the clear and unambiguous language of Section 8.01(b)(i) is, to my mind, different: It is to give notice that the counterparty has elected to bind itself, and the party receiving notice, to the strictures of the Merger Agreement pending the extended End Date.

The Plaintiffs argue that the Joint Timing Agreement, in addition to other communications between the parties, represented notice[185] to Rent-A-Center that the Plaintiffs had elected to extend the End Date, because the parties represented to the FTC therein that closing would not take place until after the End Date. Since any closing would be post-End Date, per the Plaintiffs, this must represent an election to extend, thus satisfying the purpose of Section 8.01(b)(i).[186] According to the Plaintiffs, once the purpose was satisfied, there was no obligation to provide "separate" or "additional" notice in literal compliance with Section 8.01(b)(i) and Section 9.02's specific requirements regarding recipients.[187]

First, I note that Rent-A-Center bargained for a right in the Merger

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[182] Written Closing Argument of Pls. and Intervenor-Pl. at 3.

[183] Post-Trial Answering Br. of Pls. and Intervenor-Pl. at 6 (quoting Def. and Counterclaim-Pl. Rent-A-Center's Opening Post-Trial Br. at 17).

[184] *Id.*

[185] The Plaintiffs go so far as to claim that the Defendant has "actual knowledge" of the election to extend. Written Closing Argument of Pls. and Intervenor-Pl. at 11; Post-Trial Answering Br. of Pls. and Intervenor-Pl. at 6.

[186] Post-Trial Answering Br. of Pls. and Intervenor-Pl. at 6–7.

[187] *Id.* at 7.

Agreement: the right to cancel the merger after six months unless Vintage gave written notice of election to bind itself and Rent-A-Center to an additional three-month term. The Plaintiffs essentially ask that I go beyond the written words of the provision to consider its "purpose," which, the Plaintiffs contend, if satisfied, constitutes substantial compliance, negating the need for literal compliance.[188] However,"[c]ontracts are to be interpreted as written,"[189] which is why judicial review generally stops if the terms are clear and unambiguous.[190] In order to deviate from clear and unambiguous contract terms without consequence, a party must justify its deviation, by, for instance, showing that it has acted reasonably, in light of the circumstances, to substantially comply in a way that preserves the benefits of the contract to the counterparty.[191] To the extent a reviewing court contemplates condoning such deviation, it must be scrupulous to preserve the benefits of the counterparty's bargain.

In that regard, this Court has, at times, accepted substantial compliance with notice provisions in lieu of literal compliance,[192] when the circumstances so justified.[193] The Court's precedent on substantial compliance with notice provisions focuses almost entirely on the *manner*

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[188] Written Closing Argument of Pls. and Intervenor-Pl. at 11.

[189] *Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (Del. 2006).

[190] *See Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at *6 (Del. Ch. June 5, 2005) ("The language of [the notice provision] is clear and unambiguous, which means that the language alone would typically dictate the outcome.").

[191] For example, in *Corporate Property Associates 6 v. Hallwood Group Inc.*, this Court found substantial compliance with a notice provision when the executive designated to receive notice had left the company—making literal compliance impossible—but executives at the receiving company did receive and review the notice. 792 A.2d 993, 1000–01 (Del. Ch. 2002), *rev'd on other grounds*, 817 A.2d 777 (Del. 2003).

[192] As then-Vice Chancellor Strine explained, "when confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision. The requirement of substantial compliance is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met.' When literal compliance is not possible, that is a sensible rule, and it is one which would not require [the defendant] to search to the ends of the world for [the plaintiff]. Substantial performance is 'that which, despite deviations from contract requirements, provides the important and essential benefits of the contract.'" *Gildor*, 2006 WL 4782348, at *7 (internal quotations and citations omitted).

[193] In *PR Acquisitions, LLC v. Midland Funding LLC*, the Defendant argued that the Plaintiff had received actual notice and that the notice provision did not require strict compliance. 2018 WL 2041521, at *6 (Del. Ch. Apr. 30, 2018). This Court, after reviewing prior case law, rejected the defendant's arguments on notice, writing "[the defendant] offers no reason other than its own error for its failure to comply with the notice provision it negotiated." *Id.* at *7.

in which notice was provided.[194] The Plaintiffs here argue that the Court should find substantial compliance not only in the *manner* in which notice was given, but also in the *substance*. They argue that implicit in Vintage's actions, such as Vintage causing Buddy's to enter the Joint Timing Agreement, was Vintage's intent to close after the End Date, thus putting Rent-A-Center on notice of Vintage's desire to go forward to closing beyond the End Date. In the Plaintiffs' view, this made contractual notice a meaningless formality. Again, however, the notice of election to extend had a different purpose: to bind the parties after the End Date.

The Joint Timing Agreement, as testimony made clear, was an attempt by the parties to encourage a favorable outcome from the FTC. By agreeing not to close for a period, the parties gave the FTC, which was otherwise under a time constraint, a chance to consider the parties' argument that less than full divestiture of Buddy's was necessary. By agreeing not to close, however, the parties were not binding one another past the End Date. If Vintage had found it in its business interest to do so, it could have terminated the agreement after the End Date, unless Rent-A-Center elected to extend. The reciprocal must be true. It is worth pointing out that, even if neither party elected to extend, the parties could nonetheless have gone forward to a closing after the End Date, consistent with the Joint Timing Agreement. Under Section 8.01(b)(i), the Merger Agreement remained in force until notice of termination. Contractually, the parties could have gone forward to closing after the End Date. Each would have done so suffering the daunting uncertainty of knowing that the counterparty could terminate at will, but with the advantage that the party itself could cancel if a change in circumstances warranted.

In addition to the Joint Timing Agreement itself, the Plaintiffs point to all the other actions and expense they devoted to moving toward a closing. They argue that Rent-A-Center must have known the Vintage intended to extend, because no reasonable party would have undertaken the effort Vintage did without that intention. But Rent-A-Center itself did that very thing. Both parties had a bargained-for right to terminate the agreement at any time after the End Date, unless the counterparty elected to extend. All the Plaintiffs really point to is that market conditions

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[194] For example, in *Gildor v. Optical Solutions, Inc.*, the notice provision did not contain an address for a required recipient, making literal compliance impossible; this Court found that substantial compliance would have sufficed. 2006 WL 4782348, at *6–9. Additionally, in *Kelly v. Blum*, the Court found that notice sent by fax and a confirmation copy by *overnight commercial delivery* substantially complied with the notice provision, which required fax and a confirmation copy on the same day by *first class mail*. 2010 WL 629580, at *8 (Del. Ch. Feb. 24, 2010).

changed in a way that made it attractive only for Rent-A-Center to terminate. However, nothing in the parties' changed financial circumstances, the Joint Timing Agreement, or the other actions of the parties is a replacement for a notice of election to extend the End Date.

Finally, I note that much, if not all, of the effort Vintage expended toward closing was required contractually; both parties were required to use commercially reasonable efforts to obtain FTC permission and otherwise advance the merger. If undertaking contractually-required action to consummate the merger is the equivalent of an election to extend the End Date, bind the counterparty, and give notice thereof, the notice of election to extend requirement of Section 8(b)(i) is meaningless. I must avoid such an interpretation of contractual language.[195] The parties bargained for a reciprocal, unilateral right to extend the End Date of the Merger Agreement via written notice of election to exercise that right. The parties could have written Section 8.01(b)(i) to provide for automatic extension of the End Date if the Merger was still under antitrust review, or the parties could have imposed a different standard of notice, but they did not. They are bound by their contract.

3. The Notice Requirement in Section 8.01(b)(i) Was Not Extended or Waived by the Joint Timing Agreement

The Plaintiffs argue that they were not required to provide notice of election to extend the End Date according to Section 8.01(b)(i) of the Merger Agreement because the Defendant agreed, pursuant to Section 8.05, to extend the time to submit the notice and/or waived the requirement to submit the notice at all. According to Section 8.05, an agreement of extension or waiver is only valid if "set forth in an instrument in writing signed on behalf of" the party agreeing to extend or waive.[196] According to the Plaintiffs, the Defendant signed such an instrument in writing when it agreed to the Joint Timing Agreement. Furthermore, the Plaintiffs argue, "an instrument in writing" is not subject to the general notice requirements in Section 9.02; that is, it need not be sent to specific individuals of the counterparty.[197]

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[195] *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'") (internal quotations and citations omitted).

[196] JX 272 § 8.05.

[197] Id.

I have found above that the Joint Timing Agreement, as well as similar agreements, actions, and communications, did not function as an election to extend the End Date. For the same reasons, to the extent that the Joint Timing Agreement *could serve* as an extension or waiver under Section 8.05 of the End Date itself,[198] it is not such an extension or waiver.

As an initial matter, the Joint Timing Agreement governs the relationship between the FTC, on one side, and Vintage[199] and Rent-A-Center, on the other side. The Joint Timing Agreement says nothing of the Merger Agreement or the relationship between Vintage and Rent-A-Center, although it certainly has implications for the Merger. The Merger Agreement requires a writing to work an extension or waiver, and that requirement implies an explicit, not implicit, release of such rights.[200] Furthermore, even *implicit* references to obligations or agreements related to Section 8.01(b)(i) are lacking in the Joint Timing Agreement. As explained in detail above, a promise to the FTC not to close before the End Date is not an implicit election to extend the End Date.

I accept, as do the parties, that the Joint Timing Agreement functions to push the *anticipated* time of closing into 2019. The Joint Timing Agreement, however, is not the equivalent of a promise that a post-End Date closing shall occur and that the parties agree to be bound by the Merger Agreement until that time. An actual extension or waiver of the right to notice of election to extend the End Date would extend the time in which both parties are definitively bound by the Merger Agreement. I find that Rent-A-Center never expressed in writing such an intent, and that it did not waive its right to terminate the Merger Agreement post-End Date.

4. The Notice Requirement in Section 8.01(b)(i) Was Not

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[198] I use "could" because it is not clear that Section 8.05 can be used to extend or waive the End Date. Section 8.05(a) allows for the extension of the "the time for the performance of any of the *obligations or other acts of the other parties*" and Section 8.05(c) allows for the waiver of "compliance with *any covenants and agreements* contained" in the Merger Agreement. *Id.* § 8.05(a), (c) (emphasis added). The right to extend the End Date in Section 8.01(b)(i), does not obviously qualify as an obligation, an act, a covenant, or an agreement in the Merger Agreement. I assume, however, for purposes of this analysis that waiver or extension are available here.

[199] It is, in fact, Buddy's, and not Vintage, that is a party to the Joint Timing Agreement.

[200] *See, e.g., Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *34 (Del. Ch. Mar. 30, 2017) ("The standard for demonstrating waiver is 'quite exacting;' because waiver is redolent of forfeiture, 'the facts relied upon to demonstrate waiver must be unequivocal.'") (quoting *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 27 A.3d 522, 529 (Del. 2011)).

Otherwise Satisfied

The Plaintiffs argue that if written notice in literal compliance with Section 8.01(b)(i) was required to elect to extend the End Date, this requirement was satisfied—not by Vintage, but by Rent-A-Center itself. On September 24, 2018, O'Rourke of Rent-A Center sent a financial model of "NEWCO" to Kahn. The financial model had an assumption for "Transaction Close" of January 31, 2019 that was an update from an earlier version, which listed a close date of September 31, 2018. Fadel approved the change in the closing date assumption of the financial model, and knew that the financial model would be sent to Kahn. The Plaintiffs contend that when O'Rourke sent the financial model to Kahn, Rent-A-Center

effectively gave a written notice of election to extend the End Date, because the

closing date assumption was past the End Date. The Plaintiffs further argue this

"written notice" complied with Section 9.02, because Kahn was one of the

designated recipients in Section 9.02—although so were certain of Vintage's attorneys. In other words, Vintage argues that Rent-A-Center bound both Vintage *and itself* by creating the financial model, and sending it to Vintage. For the same reason I have rejected the Plaintiffs' arguments regarding the Joint Timing Agreement, this argument fails.[201] Rent-A-Center's statement that it expected closing to occur in 2019 is not contractual notice extending the End Date. I do not find that Rent-A-Center sent Vintage written notice of its own election to extend through O'Rourke's financial model.

5. Rent-A-Center Did Not Lose Its Contractual Right to Terminate Under Section 8.01(b)(i)

According to the Merger Agreement, a party does not have the right to terminate under Section 8.01(b)(i) if that party has breached the Merger Agreement and its breach "cause[d] the failure of the Closing to be consummated by the End Date."[202] The Plaintiffs argue that the Defendant failed to use commercially reasonable efforts to consummate the Merger, and thus cannot exercise the right to terminate pursuant to Section

[201] The financial model, including the assumption on time of closing, was also required by the Merger Agreement because Rent-A-Center had agreed to use commercially reasonable efforts to help Vintage achieve financing for the Merger. *See generally* JX 272 § 6.11.

[202] *Id.* § 8.01(b)(i).

8.01(b)(i). The Plaintiffs base their allegation of breach on the fact that the Defendant did not tell them that the Rent-A-Center Board had resolved to terminate the Merger if it did not receive a written notice electing to extend the Merger Agreement. The Plaintiffs not only allege a failure to disclose in this regard, but also claim that the Defendant took affirmative action to conceal, which they contend conflicts with Rent-A-Center's obligation to use commercially reasonable efforts.

The Plaintiffs argue that Rent-A-Center's efforts and actions in support of the merger—at least, after the Board's termination decision at the December 5 and 6, 2018 Board meetings—were deceptive, because its "business as usual" conduct hid the fact that Rent-A-Center did not believe that the End Date had been previously extended. The Plaintiffs suggest that if they had known that Rent-A-Center did not consider the End Date extended, then they would have re-read the Merger Agreement, recognized the upcoming termination of the period in which to elect to extend, and sent the required written notice. In support of their argument, the Plaintiffs compare their situation to those in *Williams Companies. v. Energy Transfer Equity, L.P.*[203] and *Hexion Specialty Chemicals., Inc. v. Huntsman Corp.*[204] In both *Williams* and *Hexion*, a party to a merger agreement was obligated to use its reasonable best efforts[205] to achieve a condition precedent to the contemplated merger; when the party became aware of a problem that threatened the condition precedent, however, the party stayed silent and did not share its concern with its counterparty.[206] In *Hexion*, the "reasonable best efforts" clause "impose[d] obligations to take all reasonable steps to solve problems and consummate the transaction."[207] In *Williams*, our Supreme Court wrote that the "reasonable

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[203] 159 A.3d 264 (Del. 2017).

[204] 965 A.2d 715 (Del. Ch. 2008).

[205] In *Williams*, the party was obligated to use both "reasonable best efforts" and "commercially reasonable efforts." 159 A.3d at 273.

[206] In *Williams*, where the contemplated merger was conditioned on the issuance of a tax opinion by the defendant's counsel; the Supreme Court found that there was evidence that the defendant did not use reasonable best efforts where the defendant "did not direct [its counsel] to engage earlier or more fully with [the plaintiff's] counsel, failed itself to negotiate the issue directly with [the plaintiff], failed to coordinate a response among the various players, went public with the information that [its counsel] had declined to issue the [tax opinion], and generally did not act like an enthusiastic partner in pursuit of consummation of the [Merger Agreement]." 159 A.3d at 273 (quoting *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *17 (Del. Ch. June 24, 2016)). In *Hexion*, where the contemplated merger was conditioned on financing, the buyer did not use reasonable best efforts when it developed concerns about the solvency of the combined entity, but instead declined to share those concerns. 965 A.2d at 755–756; *see also Williams*, 159 A.3d at 272 (discussing *Hexion*).

[207] *Williams*, 159 A.3d at 272 (discussing *Hexion*).

best efforts" and "commercially reasonable efforts" clauses "placed an affirmative obligation on the parties to take all reasonable steps to obtain the [condition precedent] and otherwise complete the transaction."[208] The Plaintiffs point to the inescapable fact that, as the minutes ticked down to the passing of the End Date, Rent-A-Center's principals watched Vintage closely. Rent-A-Center personnel acted entirely in the corporate interest, anticipating the stroke of midnight, when Rent-A-Center's termination right would ripen and could be exercised. A friendly heads-up, argues Vintage, would have allowed it to bind Rent-A-Center to the Merger Agreement, going forward.

Here, according to the Plaintiffs, the Defendant breached its obligation to use commercially reasonable efforts by not informing Vintage that Rent-A-Center considered the operative End Date to be the initial End Date defined by the Merger Agreement—that is, December 17, 2018. The result, per the Plaintiffs, was that Vintage was not put on notice of its need to comply with the notice requirement in Section 8.01(b)(i). *Williams* and *Hexion* are, I find, distinguishable from the case before me. The defendants in those cases were aware of a "problem," impending failure to obtain a condition precedent, and chose not to make the effort to alert, and to work with, their counterparties. The "problem" posed by the Plaintiffs here is not the sabotage of achieving a condition precedent to the Merger, but Vintage's lack of understanding of its explicit rights under the Merger Agreement. Under Delaware Law, parties are assumed to have knowledge of their own contractual rights.[209] For *Williams* and *Hexion* to be analogous here would require me to find that Rent-A-Center was aware that Vintage misunderstood its contractual rights, but Rent-A-Center nonetheless chose not to raise the confusion with its counterparty.[210] I need not decide whether, in such a case, failure to raise the issue would

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[208] *Id.* at 273.

[209] *See, e.g., Chapter 7 Tr. Constantio Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *6 (Del. Ch. Sept. 22, 2016).

[210] I note that I am faced here with the exercise of a contractual right, and not compliance with contractual commitments. To the extent that precedent provides guidance here, I find helpful the analysis of "reasonable best efforts" (presumably also applicable to "commercially reasonable efforts") described in *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *91 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018). In *Akorn*, this Court described the analysis of "reasonable best efforts" as "whether the party subject to the clause (i) had reasonable grounds to take the action it did and (ii) sought to address problems with its counterparty." *Id.* This Court also noted that prior decisions "criticized parties who did not raise their concerns before filing suit, did not work with their counterparties, and appeared to have manufactured issues solely for purposes of litigation." *Id.* (internal citations omitted).

violate Rent-A-Center's duty to use commercially reasonable efforts, because the record fails to demonstrate that the Defendant had such knowledge.

The record is bereft of any evidence that the Rent-A-Center Board had knowledge Vintage was mistaken as to its contractual right to extend the End Date by giving notice.[211] In fact, testimony at trial indicates that the Board was told, and believed, that Rent-A-Center was likely to give notice before the end date.[212] The Plaintiffs argue that the Defendant's behavior was nonetheless fraudulent or deceptive, and that this is therefore evidence that Rent-A-Center knew Vintage was working under a mistaken understanding.[213] The Plaintiffs offer—among other documents and conduct—the "white paper," which was submitted to the FTC on December 14, 2018, as evidence of the deceit. The Plaintiffs also offer as evidence the fact that the Board kept its conditional decision to terminate the Merger Agreement confidential, including confidential from many within Rent-A-Center who frequently interacted with Vintage, among them antitrust counsel, O'Rourke, and Rent-A-Center's General Counsel.

In the white paper the filing parties represented to the FTC that the Merger was an opportunity to "revitalize" Rent-A-Center, and that "[o]ver the last five years, [Rent-A-Center] has been experiencing declining revenues and its store count has reduced significantly because it has closed underperforming stores."[214] This representation was literally true; the Plaintiffs, however, submit it was deceitful, indeed it is the quintessence of their fraud claim, because Rent-A-Center's operational performance had, in fact, recently improved, and the Board had, by this time, decided it was in the corporate interest to terminate the Merger, if given the opportunity, and proceed without Buddy's and Vintage. Per the Plaintiffs, the white paper is evidence of Rent-A-Center's active deception. I find the facts otherwise.

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[211] The Plaintiffs argue that the Chairman of Rent-A-Center admitted at his deposition that given the extension of the closing date in the Joint Timing Agreement, the End Date had to be extended. Written Closing Argument of Pls. and Intervenor-Pl. at 17–18. However, the Plaintiffs quote from the question posed by counsel, not the Chairman's response. *See* Written Closing Argument of Pls. and Intervenor-Pl. at 17–18; Lentell Dep. 157:3–7. The Chairman, in fact, answered, "That was the intent." Lentell Dep. 157:3–7. This is consistent with Rent-A-Center's belief that Vintage would bind them with a notice of election to extend before the deadline, not evidence that Vintage had already done so.

[212] *See, e.g.*, Trial Tr. 404:24–405:8 (Ressler); *id.* at 519:17–22 (Fadel).

[213] The Plaintiffs seek to shoehorn this deception under the commercially reasonable efforts rubric—I suspect, because Vintage's behavior does not constitute actionable legal fraud.

[214] JX 600, at 21.

Prior to submitting the white paper, I note, Rent-A-Center's counsel informed *Vintage* that the white paper's comment on declining operational performance no longer reflected Rent-A-Center's operations, which had turned for the better, and that the white paper argument had thus lost some of its force.[215] If the statement in the white paper on operational performance was misleading, it was only misleading to the FTC, not Vintage. I find no fraud or deceit as to Vintage in the white paper, or in similar documents and conduct.

The Plaintiffs also contend that the Board's decision to keep the plan to terminate confidential is evidence that Rent-A-Center knew that Vintage was mistaken about the extension of the End Date. According to this view, by keeping their decision confidential, the Board hoped to avoid tipping off Vintage, which supposedly the Board knew would, if clued in, timely perfect its unilateral right to extend the End Date through compliance with Section 8.01(b)(i). However, the Plaintiffs' only evidence of this theory is the fact that the Board kept the plan to terminate confidential.

Fadel testified at trial that decisions made by the Board during executive sessions are, by nature, confidential.[216] There are also business reasons why the Board may have chosen to keep this specific decision confidential. Legal counsel told the Board that Vintage was likely to send written notice extending the End Date, and the Board resolved to continue working toward a close. However, had Rent-A-Center shared its desire to terminate—again, an option *only if* Rent-A-Center was given the contractual opportunity—it could have upset its merger partner and complicated their relationship going forward, as Rent-A-Center would have been bound to continue working toward a close if Vintage extended the End Date as expected. Additionally, sharing the decision—even internally—could have affected the level of effort Rent-A-Center staff put towards closing, including in ongoing interactions with the FTC, and could have put Rent-A-Center at risk of breach by falling short of using commercially reasonable efforts.

There are many possibilities as to why the Board kept its decision

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[215] JX 1215, at 1 ("Given our recent improving financial and business performance, this argument loses some of its impact or relevance in any event . . . .").

[216] Trial Tr. 533:14–18, 555:19–23, 556:19–557:1, 567:16–22, 568:16–569:6 (Fadel).

confidential, and the Plaintiffs have not shown that this confidentiality was to avoid "tipping off" Vintage.[217] In fact, the evidence shows that the Board was informed by counsel, and believed, that Vintage would give notice of election to extend, which implies a reasonable assumption that Vintage was aware of the End Date, its implications, and Vintage's explicit rights therewith.[218] I do not find that Rent-A-Center was aware of Vintage's mistaken belief about its contractual rights.

What remains of the Plaintiffs' argument is, effectively, that commercially reasonable efforts means that Rent-A-Center had a "duty to warn."[219] In other words, the Plaintiffs argue that a commercially reasonable effort by Rent-A-Center required notice that Rent-A-Center would not extend, and would terminate if Vintage did not extend, which would thereby remind Vintage of the impending End Date and its related rights. Finding that commercially reasonable efforts require such notice is inconsistent with the terms of the Merger Agreement. Section 8.01(b)(i) does not require advance notice, either of the election to extend or of termination. Advance notice provisions, however, are common; in fact, the Merger Agreement requires a party to give advance notice before it exercises several of the other termination rights in Section 8.01 itself.[220] As a matter of contractual interpretation, I should refrain from writing a provision into a contract when the parties could have done so themselves, but chose not to.[221] In any event, I need not consider imposing an advance notice provision, because commercially reasonable efforts under these circumstances do not require it. The Plaintiffs argue that Rent-A-Center's

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[217] Written Closing Argument of Pls. and Intervenor-Pl. at 38.

[218] I do not doubt that the Rent-A-Center Board hoped for, and welcomed, the opportunity to terminate, whether that opportunity arrived by conscious decision or inadvertence on Viintage's part.

[219] The Plaintiffs also suggest, in a footnote in their briefing, that the Defendant had a duty to disclose under Delaware Law, independent of its contractual obligation to use commercially reasonable efforts. Written Closing Argument of Pls. and Intervenor-Pl. at 37 n.67. In *In re Wayport, Inc. Litigation*, this Court wrote that "[a] duty to speak can arise because of statements a party previously made. A 'party to a business transaction is under a duty to disclose to the other party before the transaction is consummated subsequently acquired information that the speaker knows will make untrue or misleading a previous representation that when made was true.'" 76 A.3d 296, 323 (Del. Ch. 2013) (quoting Restatement (Second) of Torts § 551 (1977)). However, no such duty to disclose attaches here; Rent-A-Center did not make a representation that it would not terminate the Merger Agreement if given the opportunity, nor did it make a representation that it considered Vintage to have already made an election to extend the End Date.

[220] *See* JX 272 §§ 5.03(d)(ii), 8.01(d), 8.01(c).

[221] *See Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract easily could have been drafted to expressly provide for it.").

apparent enthusiasm for the merger misled Vintage about Rent-A-Center's decision to terminate if possible, and that had Vintage known the truth, it might have informed itself of its contractual rights, and given notice of an election to extend. Commercially reasonable efforts do not require that sophisticated parties remind one another of their contractual rights.[222]

I have attempted, in the preceding paragraphs, to grapple with the Plaintiffs' contentions that Rent-A-Center failed to use commercially reasonable efforts. However, the Plaintiffs' argument fails for a more fundamental reason. For Rent-A-Center to lose its right to terminate under Section 8.01(b)(i), its breach must be one that causes a failure to consummate the Merger by the End Date.[223] The Defendants point out that what prevented consummation of the Merger by the End Date was the ongoing antitrust approval process, with respect to which Rent-A-Center was, I find, using commercially reasonable efforts. Even had the Plaintiffs demonstrated a breach of commercially reasonable efforts inhering in Rent-A-Center's failure to warn, they have, nonetheless, not shown that such a breach prevented consummation of the Merger by the End Date.

Rent-A-Center's efforts toward closing cannot be a breach of the commercially reasonable efforts provision. If Rent-A-Center had not entered into the Joint Timing Agreement, participated in meetings with Vintage, and shared financial information, it would have, by such inactions, presumably breached the commercially reasonable efforts clauses of the Merger Agreement. A party's obligation to use commercially reasonable efforts must be cabined by its bargained-for contractual rights.[224] If an agreement to use commercially reasonable

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[222] The Plaintiffs also argue that Rent-A-Center's efforts towards closing in fact *exceeded* what was required by commercially reasonable efforts. *See* Written Written Closing Argument of Pls. and Intervenor-Pl. at 33–38. This excess was, to the Plaintiffs' eyes, deceptive. However, the Plaintiffs have not shown, or even argued, that if Rent-A-Center had displayed only the bare minimum "commercially reasonable enthusiasm," the Plaintiffs would then have been aware that Rent-A-Center did not consider the End Date extended. As a result, it makes no difference, for purposes of this analysis, whether Rent-A-Center did only what commercially reasonable efforts required, or went beyond.

[223] The right to terminate the Merger Agreement under Section 8.01(b)(i) is not available "to any party whose breach of any provision of [the Merger Agreement] causes the failure of the Closing to be consummated by the End Date." JX 272 § 8.01(b)(i).

[224] This Court expressed a similar sentiment in Akorn, writing that:

> [T]he parties agreed in the Reasonable Best Efforts Covenant to seek 'to consummate and make effective' the transaction that they had agreed to in the Merger Agreement on the terms set forth in that contract. They *were not committing themselves to merge at all costs and on any terms*. Instead, they

efforts to comply with obligations in a contract means that a party cannot exercise its bargained-for right to terminate that contract, that bargained-for right would be illusory. The Plaintiffs have argued that the Defendant's actions after the December 5 and 6, 2019 Board meetings were not commercially reasonable, in a way that vitiates the termination right, because the Defendant did not share with the Plaintiffs its decision not to extend the End Date and to terminate, should Vintage not so extend. I reject this argument. Given the foregoing, I find that the Defendant retained its right to terminate the Merger Agreement under Section 8.01(b)(i).

6. The Implied Covenant of Good Faith and Fair Dealing Does Not Prevent Termination

As our Supreme Court has recognized, "the implied covenant attaches to every contract."[225] It is "the doctrine by which Delaware law cautiously supplies terms to fill gaps in the express provisions of a specific agreement."[226] Caution in this regard should be underscored.[227] Furthermore, a gap must exist to invoke the implied covenant, "because '[t]he implied covenant will not infer language that contradicts a clear exercise of an express contractual right.'"[228]

The Plaintiffs argue that the implied covenant of good faith and fair dealing should be applied here to prevent the Defendant from exercising its termination right under Section 8.01(b)(i), because the implied covenant provides a "no deception" term.[229] However, the Plaintiffs do not claim that Rent-A-Center committed fraud, per se. What the Plaintiffs

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> were committing themselves to fulfill the contract they had signed, which contained representations that formed the basis for the transaction, established conditions to the parties' performance, and gave both sides rights to terminate under specified circumstances. As I see it, the Reasonable Best Efforts Covenant *did not require either side of the deal to sacrifice its own contractual rights for the benefit of its counterparty*.

Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *91 (Del. Ch. Oct. 1. 2018) (emphasis added), aff'd, 198 A.3d 724 (Del. 2018).

[225] *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

[226] *Allen v. El Paso Pipeline GP Co., LLC*, 2014 WL 2819005, at *10 (Del. Ch. June 20, 2014).

[227] *See NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *16–17 (Del. Ch. Nov. 17, 2014).

[228] *See id*., at *16 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010)).

[229] Written Closing Argument of Pls. and Intervenor-Pl. at 47.

ultimately seek is equitable fairness,[230] which is not promised by the implied covenant.[231] The parties vigorously negotiated the right to extend the End Date—a right that Vintage had, but failed to exercise. There is simply no gap in Section 8.01(b)(i) for the implied covenant to fill.

B. Rent-A-Center Is Not Estopped From Exercising Its Right to Terminate

The Plaintiffs argue, and seek declaratory judgment, that the Defendant is estopped in equity from exercising its right to terminate under Section 8.01(b)(i). The Plaintiffs argue that either equitable estoppel or quasi-estoppel bar the Defendant from exercising its termination right. Similar to their contractual arguments, the Plaintiffs base estoppel primarily on the course of conduct between the parties, which reflected an expected time of close in 2019. I assume, without finding, that in some circumstances these equitable principals could trump contract law, and could thus save a contract terminated under an explicit contractual right.[232] Because I find no grounds for estoppel, I need not reach that issue.

1. Equitable Estoppel

The Plaintiffs claim that equitable estoppel bars the Defendant from

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[230] *See* Written Closing Argument of Pls. and Intervenor-Pl. at 49 ("This Court should, using the implied covenant, prevent that *unjust* result . . . .") (emphasis added).

[231] As Vice Chancellor Laster explained in *NAMA Holdings, LLC v. Related WMC LLC*:

> When used with the implied covenant, the term "good faith" contemplates "*faithfulness to the scope, purpose, and terms of the parties' contract*." . . . The concept of "fair dealing" similarly refers to "a commitment to deal 'fairly' in the sense of consistently with the terms of the parties' agreement and its purpose." These concepts turn not on whether a court believes that a particular action was morally or equitably appropriate under the circumstances, but rather "*on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally*."

2014 WL 6436647, at *17 (Del. Ch. Nov. 17, 2014) (emphasis in original) (quoting *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 419 (Del. 2013), *overruled in part on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)).

[232] In *Genencor International, Inc. v. Novo Nordisk A/S*, our Supreme Court, "[i]n analyzing whether the remedy [the appellant] seeks is equitable estoppel," found it "important to consider that [the apellant] is seeking to enforce a contract supported by valid consideration. 766 A.2d 8, 12 (Del. 2000). Our Supreme Court noted that it had "previously observed that a promissory estoppel analysis is not applicable to cases in which the alleged promise is supported by consideration," and "this observation also applies to equitable estoppel." *Id.* "Therefore," our Supreme Court wrote, "because this is a dispute about enforcement of a bargained-for contract right, we conclude that the remedy [the appellant] seeks is not equitable estoppel." *Id.*

terminating the Merger Agreement. "[E]quitable estoppel is invoked 'when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.'"[233] As the party asserting equitable estoppel, the Plaintiffs bear the burden of proof, which is clear and convincing evidence.[234] The Plaintiffs "must demonstrate that: (i) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) they suffered a prejudicial change of position as a result of their reliance."[235] This Court does not lightly turn to equitable estoppel to enforce contract rights which cannot be vindicated as the contract is written.[236]

The Plaintiffs claim that they had no reason to doubt the impression they received from Fadel and O'Rourke—that Rent-A-Center remained in enthusiastic support of the merger—and had no way to discover the Board's plan to terminate the Merger Agreement. The Plaintiffs contend that they reasonably relied on Rent-A-Center's "business as usual" act following the December 5 and 6, 2018 Rent-A-Center Board meetings. The Plaintiffs' argument for equitable estoppel suffers from the same flaw as their contractual arguments: an agreement to extend the time of closing into 2019 is not agreement to extend the End Date. Fatal to the Plaintiffs' equitable estoppel claim, though, is the Plaintiffs' own ability to unilaterally extend the End Date and bind Rent-A-Center.

The Plaintiffs argue that they lacked knowledge of, or the means to obtain, the truth that Rent-A-Center did not consider the End Date extended based on the Joint Timing Agreement and other conduct between the parties. However, what Rent-A-Center believed about the End Date would have been immaterial had Vintage merely exercised its contractual right and sent a written notice explicitly extending the End Date. Vintage negotiated for this right, and was constructively aware of it. Therefore, the Plaintiffs cannot have reasonably relied on the demeanor of Rent-A-Center's principals. Nor did they change positions based on any reliance. Again, Vintage did not make a *decision* that it need not send notice of election to extend before the End Date based on some action by Rent-A-

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[233] *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005) (quoting *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1965)).

[234] *Id.*

[235] *Id.*

[236] *See Genencor Inter., Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000).

Center.[237] It appears that Vintage simply forgot the End Date in the Merger Agreement—and its implications. The estoppel argument is another after-the-fact attempt to excuse Vintage's lack of action: Vintage did not change its position based on Rent-A-Center's actions. Vintage's attenuated claim that an honest lack of enthusiasm on the part of Rent-A-Center might have caused Vintage to read the Merger Agreement and act accordingly is another version of the misplaced duty to warn.

2. Quasi-Estoppel

Quasi-estoppel applies "when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit."[238] Reliance is not required for quasi-estoppel to apply.[239] However, the Plaintiffs' argument for quasi-estoppel is unavailing because the Defendant's position is consistent with its position prior to the extension of the expected time of closing. Prior to the End Date, the Defendant at all times complied with its contractual obligations to use commercially reasonable efforts. After it became clear that closing would be impossible in 2018, such efforts included working toward a closing at some uncertain time in 2019. When faced with an opportunity to exercise its contractual termination right, the Defendant seized that opportunity. For the reasons explained above, these actions are not inconsistent.

C. The Parent Termination Fee

The Plaintiffs seek declaratory judgment that the Parent Termination Fee is unenforceable. They advance arguments that the Fee is a penalty, is untethered to anticipated damages and would be a windfall to the Defendant. They also argue that the contract by, its explicit terms, does not require the Fee to be paid here. The Defendant disputes these allegations and has counterclaimed for breach of contract to force payment of the Fee. Both sides have submitted expert reports to advance their position. However, I have an additional concern: whether the Parent Termination Fee is applicable here, in light of the implied covenant of

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[237] Or, if it did so, it is not reflected in the record.

[238] *RBC Cap. Mkts., LLC v. Jervis*, 129 A.2d 816, 873 (Del. 2015) (internal quotations omitted).

[239] *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *6 (Del. Ch. Nov. 19, 2013).

good faith and fair dealing.

The implied covenant of good faith and fair dealing, as discussed above, serves primarily to fill gaps, including providing terms so obvious that contracting parties fail to include them.[240] Such "quasi-reformation, however, 'should be [a] rare and fact intensive' exercise, governed solely by 'issues of compelling fairness.'"[241] "Only when it is clear from the writing that the contracting parties 'would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections."[242]

Despite the limited application of the implied covenant, I am dubious whether the parties meant for a reverse breakup fee to apply in this situation. Specifically, Rent-A-Center was bound through the End Date to use commercially reasonable efforts to close the Merger. The End Date was set at six months beyond the entry of the Merger Agreement, but either party could extend it another three months by giving written notice. Inadvertently, Vintage failed to notice election to extend. Rent-A-Center then exercised its right to terminate, for business reasons of its own. Immediately on learning of the termination, Vintage attempted to give notice and bind itself and Rent-A-Center to an extended End Date. It is clear that there was no gamesmanship in Vintage's actions—it simply forgot to exercise its contractual right. Vintage is ready to move to closing; it is Rent-A-Center that is causing the merger to terminate. That is Rent-A-Center's contractual right. However, I question whether the parties considered this scenario in contracting for the reverse break-up fee. As neither side has raised the applicability of the implied covenant of good faith and fair dealing, I request supplemental briefing, on this issue alone, before rendering a decision on whether the Parent Termination Fee must be paid.

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[240] *See NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) ("[T]he implied covenant 'seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them.'") (quoting *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013), *overruled in part on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)).

[241] *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (quoting *Cincinnati SMSA Ltd. P'Ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998)).

[242] *Id.* (quoting *Katz v. Oak Industries, Inc*., 508 A.2d 873, 880 (Del. Ch. 1986)).

III. CONCLUSION

The Plaintiffs were surprised by Rent-A-Center's termination of the contract. They had expended six months of effort and considerable funds toward closing; it is understandable that they are angered by what they see as Rent-A-Center's sharp practice. However, the Plaintiffs have failed to show that the Merger Agreement's End Date was extended or that the Defendant should otherwise be barred from exercising its right to terminate. As a result, the Defendant's termination of the Merger Agreement pursuant to Section 8.01(b)(i) was valid. I reserve decision on the parties' requests for relief pertaining to the Parent Termination Fee, pending supplemental briefing.

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RE: ***James W. Owen, Jr., et al. v. Tavistock Civic Association, Inc.***, C.A. No. 2017-0571-MTZ

Dear Counsel:

Plaintiffs and Counterclaim Defendants James W. Owen, Jr. and Jana L. Owen (the "Owens") have petitioned for costs and legal fees incurred in connection with this deed restriction action against Defendant and Counterclaim Plaintiff Tavistock Civic Association ("Tavistock"). The Owens seek court costs of $1,127.50 under Court of Chancery Rule 54(d), $5,340.40 in attorneys' fees incurred in connection with a motion to compel (the "Motion to Compel") under Court of Chancery Rule 37(a)(4)(C), and $18,906.16 in additional attorneys' fees under the bad faith exception to the American Rule. For the following reasons, I decline to shift costs under Court of Chancery Rule 54(d) or award attorneys' fees under the bad faith exception. I do, however, exercise my discretion to apportion the Motion to Compel expenses in the Owens' favor.

I. Background

The Owens, homeowners in the Tavistock development, filed this case under 10 Del. C. § 348 seeking a judicial declaration that Tavistock improperly enforced a deed restriction in denying the Owens' request to erect a privacy fence. The Owens also sought injunctive relief prohibiting Tavistock from enforcing the deed restriction against them on the basis that it was unenforceable.

Tavistock moved for judgment on the pleadings, arguing that its board decisions in applying the deed restriction were insulated by the business judgment rule and the Owens did not plead facts sufficient to overcome that presumption. On February 21, 2018, serving as Master in Chancery, I heard argument on the motion for judgment on the pleadings and issued an oral draft report concluding that Tavistock's corporate status does not trump or render inapplicable this State's well-settled contract law or statutory provisions under Section 348 regarding the enforceability of deed restrictions. No party took exceptions to the report, and it became final on March 6, 2018, and was adopted as an order of this Court on March 19, 2018.

On June 8, 2018, the Owens moved to compel additional documents and revised discovery responses, arguing that Tavistock was improperly limiting discovery in two ways. The first was temporal: despite Tavistock's representations that it had consistently enforced the deed restriction since April 9, 1984, Tavistock limited its interrogatory responses and document production to the three years preceding this action. The second related to claims of privilege for documents and communications with a board member turned in-house counsel. The Owens sought both information as to when the board member began advising the board in a legal capacity, and the production of any non-privileged documents and communications. Tavistock opposed the Motion to Compel and moved for a protective order. Tavistock argued that using April 9, 1984 as the starting point for discovery "for a fence dispute, was ridiculous, was abusive on its face," "outrageously excessive," and "abusive and outlandishly overbroad," and accused the Owens of using that time period "as a weapon to beat Tavistock into approving" the fence application.[1] Regarding the privilege concern, Tavistock explained that the in-house counsel began providing legal

[1] Docket Item ("D.I.") 44 at ¶¶ 14-15.

advice on May 3, 2017, and confirmed that it would withhold communications with her in connection with the provision of legal advice as privileged.

On August 14, 2018, I granted the Motion to Compel in part and denied it in part, ordering that (1) the discovery period for certain categories of documents would run from April 9, 1984 through the initiation of this action to allow discovery into Tavistock's assertions that "it has uniformly upheld the deed restrictions regarding fences from April 9, 1984, to the present," and (2) Tavistock could only assert privilege over the in-house counsel's documents dated after May 3, 2017, and should log all documents withheld as privileged.[2] I denied without prejudice the Owens' request for attorneys' fees in connection with the Motion to Compel.[3]

On September 11, 2018, Tavistock informed the Court that, a few days prior, Tavistock's board had passed two resolutions that permitted the Owens to construct their fence. Tavistock asked that discovery be stayed and the action be dismissed as moot. The Owens agreed that the action was mooted and that a stay of discovery was appropriate, but requested leave to petition for fees and costs prior to dismissal of the action. The Owens so petitioned on October 22, 2018 (the "Petition"). Briefing on the Petition was completed on December 14, 2018, and oral argument was held on January 7, 2019. I grant the Petition in part and deny it in part.

II. Analysis

Through the Petition, the Owens seek to shift fees and costs. While the so-called American Rule dictates that each party is responsible for its own legal fees, this Court recognizes several exceptions, including the bad faith conduct of a party to the litigation[4] and where fees are authorized by statute.[5] Likewise, the right of a party to recover court costs "depends on statutory authority, express or implied [and] Court of Chancery Rule 54

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[2] D.I. 51

[3] *Id.* In denying the fee request, I referenced Section 348's fee-shifting provision, which muddied my explanation. As I clarified during oral argument on the Petition, that language did not foreclose a request for attorneys' fees or expenses under Court of Chancery Rule 37 or other exceptions to the American Rule. Hearing Tr. 44-45, January 7, 2019.

[4] *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997).

[5] *See, e.g.*, 10 Del. C. § 348(e).

provides that costs shall be allowed as of course to the prevailing party unless the Court otherwise directs."[6]

The Owens seek recovery of fees and costs via three exceptions to the American Rule: (1) Court of Chancery Rule 54 (to shift costs as a prevailing party); (2) Court of Chancery Rule 37 (to shift expenses, including attorneys' fees, in connection with the Motion to Compel); and (3) the bad faith exception to the American Rule (to shift the remainder of the Owens' attorneys' fees incurred in this action).

Tavistock argues that all three avenues are closed to the Owens because this deed restriction case was brought under Section 348, which provides for preemptive statutory fee shifting. I disagree. Section 348 provides in pertinent part: "The nonprevailing party ***at a trial*** held pursuant to the provisions of this section must pay the prevailing party's attorney fees and court costs, unless the court finds that enforcing this subsection would result in an unfair, unreasonable, or harsh outcome."[7] This narrow statutory exception to the American Rule requires prevailing "at a trial." Because this action was mooted and did not proceed to trial, Section 348(e) does not apply. Because Section 348(e) does not apply, it does not foreclose other avenues of shifting fees or costs.[8]

A. Because The Owens Are Not The Prevailing Parties, Costs Are Not Shifted.

The Owens argue that they should be allowed their costs as prevailing parties because Tavistock approved their fence and mooted the main issue while this case was pending. Tavistock argues that because there was no settlement and the mooting occurred outside this litigation, there is no prevailing party.

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[6] *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *4 (Del. Ch. Apr. 27, 2004) (internal citations and quotation marks omitted).

[7] 10 *Del. C.* § 348(e) (emphasis added).

[8] *See McCaulley Court Maint. Corp. v. Davenport*, 2018 WL 4030781, at *2 (Del. Ch. Aug. 23, 2018) (awarding costs under Rule 54 to the prevailing party in a Section 348 deed restriction case that did not proceed to trial), *adopted*, 2018 WL 4301338 (Del. Ch. Sept. 7, 2018); *see also Vill. of Fox Meadow Maint. Corp. v. Kinton*, 2016 WL 6995362, at *3 (Del. Ch. Nov. 14, 2016) (finding that "a fee-shifting deed restriction may operate independently from the fee-shifting provision of Section 348"); *Marriott v. Host Marriott*, 1993 WL 513230 (Del. Ch. Nov. 19, 1993) (addressing both a statutory ground for attorneys' fees and costs and the bad faith exception as coexistent alternative grounds).

Court of Chancery Rule 54(d) provides: "Except when express provision therefor is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs." Section 348 does not expressly shift costs in cases that do not proceed to trial, and no other express statutory provision or rule applies, so Rule 54 permits costs to be shifted in favor of the prevailing parties in a deed restriction case that is resolved short of trial.[9]

This Court has found that a party prevailed through resolutions short of a judicial determination, like settlements and consents to judgment.[10] A party's actions outside of litigation (e.g., board actions) can inform a determination of prevailing parties under Court of Chancery Rule 54. "Under Delaware law, a presumption of causation arises by chronology; that is, where claims against a defendant are mooted while litigation is pending, the actions mooting the claims are presumed to have resulted from the litigation."[11] This presumption applies here and is borne out by Tavistock's board minutes, which indicate that the board meeting was a "special meeting . . . called to ask the board, on advice of counsel, to vote on two resolutions with regard to litigation against the board."[12]

But the fact that Tavistock mooted this case because of this litigation does not end the prevailing party inquiry: the Owens must still prevail on "the merits of the main issue or . . . on most of [their] claims."[13] As the Owens represented during the Motion to Compel briefing, "[the Owens] brought this action to contest [Tavistock's] interpretation and enforcement of the Fence Restriction."[14] The mooting board actions amended "the policy of the Board with respect to the approval of fences," then approved the Owens' request.[15] These actions do not comprise a "win" for the Owens on the merits of Tavistock's previous interpretation

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[9] *See McCaulley Court Maint. Corp.*, 2018 WL 4030781, at *2 (awarding costs under Rule 54 to the prevailing party in a Section 348 deed restriction case that did not proceed to trial).

[10] *See, e.g., FGC Holdings Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *18 (Del.Ch. Jan. 22, 2007) (finding a party prevailing in connection with a consent to judgment); *Nowak v. Nonantum Mills Maint. Corp.*, 2005 WL 1252401, at *2 (Del. Ch. May 18, 2005) (finding a party prevailing in connection with a settlement).

[11] *In re Riverbed Tech., Inc. Stockholders Litig.*, 2015 WL 5458041, at *7 (Del. Ch. Sept. 17, 2015), *judgment entered sub nom. In re Riverbed Tech., Inc.* (Del. Ch. 2015).

[12] D.I. 52.

[13] *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *52 (Del. Ch. Sept. 30, 2013) (internal citations omitted).

[14] D.I. 47 at 3.

[15] D.I. 52.

and enforcement of the Fence Restriction. I conclude that the Owens have not "prevailed" on the issue for which they sought a judicial determination under Court of Chancery Rule 54.

Even if I were to find the Owens were the prevailing parties, I would exercise my discretion to withhold an award of costs.[16] The Owens ultimately won approval of their fence, and this litigation played a part. But the Owens knew about the deed restriction, and that their application would be rejected under that restriction, before they purchased their home. In my view, it would be inequitable to cause Tavistock to bear the costs of litigation the Owens knew they would initiate when they chose to purchase a home in Tavistock.

B. Reasonable Motion to Compel Expenses Are Apportioned In the Owens' Favor.

I turn next to the Owens' application for attorneys' fees incurred in connection with the Motion to Compel. Because the Motion to Compel was granted in part and denied in part, the Owens' request falls under Court of Chancery Rule 37(a)(4)(C), which provides that the Court "may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner."[17] This subsection "leaves the assessment of fees to the discretion of the court,"[18] unlike Court of Chancery Rule 37(a)(4)(A), which mandates fee shifting for motions granted in full unless the opposing party's conduct was "substantially justified" or shifting would be unjust under the circumstances. I find that apportionment of reasonable fees is justified here because the Owens succeeded in nearly all of their requests in the Motion to Compel.

The Owens' Motion to Compel sought discovery from April 1984 to present rather than Tavistock's proposal of a three-year discovery period. The Owens also sought clarity over Tavistock's assertion of privilege related to its in-house counsel. Over Tavistock's objection, I concluded the longer time period was warranted in relation to fence requests, specified the bounds of privilege for the in-house counsel's documents,

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[16] *See* Ct. Ch. R. 54 (d) (providing that "costs shall be allowed as of course to the prevailing party unless the Court otherwise directs").

[17] Ct. Ch. R. 37(a)(4)(C).

[18] *Pharmerica Long Term Care Inc. v. New Castle RX, LLC*, 2010 WL 5130746, at *1 (Del. Ch. Dec. 8, 2010).

and ordered Tavistock to supply a privilege log. While Tavistock highlights that this was only a partial win for the Owens in that I limited the extended time period to specific requests and permitted Tavistock to withhold documents as privileged, the vast majority of the Owens' requests were granted over Tavistock's objections.

Further, Tavistock's opposition to the proposed date range and Motion was not substantially justified.[19] Tavistock affirmatively, voluntarily, and repeatedly represented that it had interpreted and applied the deed restriction consistently since April 9, 1984, and relied on that representation in defense of this action. Yet Tavistock balked at discovery aimed to confirm its representation.[20] Tavistock's resistance was not substantially justified under the circumstances.

Because I find that Tavistock was not substantially justified in its opposition to the Motion to Compel and the Motion to Compel was largely granted in the Owens' favor, I exercise my discretion under Rule 37(a)(4)(C) to apportion the reasonable expenses incurred in bringing the Motion to Compel—the amount of which I conclude is $5,000.00—to Tavistock.[21]

C. Fees Are Not Shifted Under the Bad Faith Exception.

Finally, I turn to the Owens' request for attorneys' fees based on alleged bad faith litigation conduct. The bad faith exception to the American Rule is premised on the theory that "when a litigant imposes unjustifiable costs on its adversary by bringing baseless claims or by improperly increasing the costs of litigation through other bad faith conduct, shifting fees helps to deter future misconduct and compensates

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[19] *See Kaye v. Pantone, Inc.*, 1983 WL 18012, at *2 (Del. Ch. Mar. 28, 1983) ("If a motion to compel is granted in part and denied in part the Court may apportion the reasonable expenses, but if the Court finds the opposition to production to be substantially justified, the allocation of expenses may be denied.").

[20] *See, e.g.*, D.I. 44 at ¶¶ 14-15 (arguing that, despite its own reliance on the 1984 date, using 1984 as the starting date for discovery "**for a fence dispute**, was ridiculous, was abusive on its face," and the time frame proposed was "outrageously excessive," "abusive and outlandishly overbroad" and "a weapon to beat Tavistock into approving" the fence application) (emphasis in original).

[21] The Owens submitted invoices showing $5,340.40 in legal fees incurred in connection with the motion to compel. D.I. 60, Ex. B-3 (entries preceded by "*"). In light of the factors identified in Rule 1.5(a) of the Delaware Lawyer's Rules of Professional Conduct and the discretion provided to me in Court of Chancery Rule 37(a)(4)(C), I cap those expenses at $5,000.00. *See Bragdon v. Bayshore Prop. Owners Assoc., Inc.*, C.A. No. 2017-0539-JTL (Del. Ch. Jan. 25, 2019) (ORDER).

the victim of that misconduct."[22] But "this quite narrow exception is applied in only the most egregious instances of fraud or overreaching."[23] "[A]nd the party seeking to invoke that exception must demonstrate by clear evidence that the party from whom fees are sought . . . acted in subjective bad faith."[24]

The Owens have not met this high bar. In briefing, the Owens argued that bad faith was evident in Tavistock's pre-litigation conduct, which unnecessarily required the filing and continuance of this litigation; misleading discovery conduct, necessitating the Motion to Compel; and alleged misrepresentations that Tavistock mooted the case out of financial and business concerns rather than as an inevitable concession to the Owens' claims.

Concerns over Tavistock's discovery conduct are fully addressed by apportionment of expenses in the Owens' favor under Court of Chancery Rule 37(a)(4)(C), as explained above. As to Tavistock's pre-litigation conduct and representations as to the mooting of this action, the Owens admitted that there was no clear evidence that Tavistock acted with subjective bad faith before or during this litigation.[25] Instead, the Owens suggested that if I "connect[ed] the dots,"[26] I would find bad faith. I make no such finding. I conclude that the Owens have failed to show clear evidence of subjective bad faith conduct by Tavistock or its counsel. No further fee shifting is warranted.

III. Conclusion

For the foregoing reasons, I hereby grant in part and deny in part the Owens' Petition and award the Owens $5,000.00, representing the reasonable expenses incurred in connection with the Motion to Compel under Court of Chancery Rule 37(a)(4)(C).

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[22] *Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Tr.*, 117 A.3d 549, 559-60 (Del. 2015).

[23] *Arbitrium (Cayman Is.) Handels AG*, 705 A.2d at 231-32.

[24] *Lawson v. State*, 91 A.2d 544, 552 (Del. 2014).

[25] Hearing Tr. 11.

[26] *See id.* at 11, 13-16.

Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

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