AQSR India Private

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MEMORANDUM OPINION

Date Submitted: April 29, 2009

I. Introduction

This motion to dismiss and motion for judgment on the pleadings arise from a refusal on the part of prospective buyers to complete their proposed purchase of a business. This common factual scenario involves an unusual twist in this case because here the prospective sellers voluntarily ceded operational control of the business to the buyers before the closing of the sale. Thus, the spurned sellers claim that they are not only entitled to relief from the buyers' refusal to close, but also from the fundamental and, in some cases, irreversible changes that the would-be buyers implemented while they were in control of the business.

The business in question is AQSR India Private, Ltd. ("AQSR India"), an affiliate of a group of companies known as the "AQSR Group." The purchase of AQSR India was part of a larger transaction in which defendant Bureau Veritas Holdings, Inc. ("Bureau Veritas") agreed to purchase all of the AQSR Group. Although the AQSR Group and Bureau Veritas acted through different affiliates and individuals at various points in this transaction, for the sake of simplicity I refer to all AQSR-related entities as the "Sellers" and all Bureau Veritas-related entities as the "Buyers" where differentiation is not necessary.

As this transaction was initially conceived, the Buyers agreed to purchase all outstanding equity in each member of the AQSR Group under separate stock purchase agreements, including one covering the purchase of AQSR India (the "India SPA"). All of these transactions closed at roughly the same time, except for the one involving AQSR India, which was held up by regulatory delays.

When the rest of the AQSR sales closed, the Sellers voluntarily turned over operational control of AQSR India to the Buyers, and AQSR India's incumbent directors resigned, in anticipation of the parties closing on the India SPA. In other words, the Sellers handed over control of AQSR India to the Buyers before the sale of that company had actually closed on the assumption that the AQSR India sale would close as uneventfully as the sales of the other AQSR Group members.

But, the sale of AQSR India never closed. After various delays, the Buyers announced that they believed AQSR India had experienced a material adverse effect, discharging their obligations under

the India SPA. The Sellers disagreed that a material adverse effect had occurred, and the parties came to an impasse on the issue of whether the Buyers were required to close.

Rather than seek judicial relief from the Buyers' conduct at this point, the Sellers decided to attempt to salvage what they could of the transaction through a new agreement. The Sellers agreed to terminate the disputed India SPA and replace it with an "Asset Purchase Agreement," under which the Buyers would purchase certain AQSR India customer contracts. The parties agreed to mutually release their obligations under the India SPA once the Asset Purchase Agreement closed. The Asset Purchase Agreement was to close after the parties determined which contracts the Buyers were obligated to purchase through an elaborate process of reviewing all of AQSR India's customer contracts for compliance with specific criteria (the "Review Process").

But, the new Asset Purchase Agreement did not solve the problems between the parties or their apparent disagreement about whether AQSR India and its customer contracts were of the quality that the Sellers claimed them to be. The parties never completed the Review Process as contemplated by the Asset Purchase Agreement, and they never closed that Agreement. The Sellers allege that the fault lies with the Buyers and their failure to cooperate in the Review Process.

This series of failed acquisition attempts purportedly plunged AQSR India into uncertainty, and the Sellers' verified complaint (the "Complaint") alleges that many key employees and customers left AQSR India during this course of events. The Sellers now seek a variety of remedies under both the India SPA and the Asset Purchase Agreement, and through a number of tort and statutory claims. In response, the Buyers filed a "Counterclaim" alleging that the Sellers are obligated to submit their claims to an industry "Referee" as described in the Asset Purchase Agreement (the "Referee Procedure"). The Sellers then filed a motion for judgment on the pleadings with regard to the Counterclaim and a motion to dismiss the Complaint in its entirety.

In this opinion, I deny the motion for judgment on the pleadings, and I grant the motion to dismiss in part and deny it in part. I deny the motion for judgment on the pleadings because the Referee Procedure that the Buyers seek to enforce is a narrow dispute resolution mechanism that is designed to take advantage of the technical expertise, rather than the arbitration skills, of the Referee, and is only triggered when the parties teed up a narrow, technical question in the course of the Review Process. Here, in the wake of the failed Review Process, a number of procedural and factual determinations about how to implement the Referee Procedure must now be made. These determinations properly rest with this court under the Asset Purchase Agreement's broad forum selection clause, and not with the Referee, whose scope of authority is limited to specific, technical questions.

With regard to the motion to dismiss, I deny the motion with respect to Counts 1 and 3, which allege breach of contract claims under the India SPA and the Asset Purchase Agreement. The terms of both of those agreements remain in force, and the Sellers plead sufficient facts to support their allegations

that the Buyers breached both agreements. I also deny the motion to dismiss with respect to Counts 4, 7, 8, 10 and 11, which allege unjust enrichment, tortious interference with economic advantage, conversion, trade secret misappropriation, and unfair competition, because I cannot conclude at this stage, in this atypical scenario, that the Sellers' remedies for harms arising from the Buyers' control of AQSR India are limited to those available under contract law. And, I deny the motion to dismiss with respect to Counts 12, 13, 14, and 15, which allege a variety of secondary and remedy-based claims, such as civil conspiracy and constructive trust, because, as just discussed, the Sellers have adequately pled the underlying claims on which these secondary claims rest.

But, I grant the Buyers' motion to dismiss in several important respects. First, I dismiss Count 2, which seeks specific performance of the India SPA, because the parties expressly agreed as part of the execution of the Asset Purchase Agreement that the India SPA could not be performed and because the Sellers unreasonably delayed any attempt to pursue specific performance. I also dismiss Counts 5 and 6, which bring claims for breach of the implied covenant of good faith and fair dealing, because the conduct that the Sellers complain about falls within the express terms of the contracts at issue.

Finally, I dismiss Count 9 for economic duress because the Sellers have not pled facts supporting a reasonable inference that they were unable to seek adequate legal protection when faced with the Buyers' refusal to close the India SPA.

II. Factual Background

This factual recitation represents the state of affairs described in the Complaint, which I must accept as true for purposes of this motion where supported by well-pled factual allegations.

This case involves a small piece of a complex transaction in which defendant Bureau Veritas purchased one of its competitors, a group of seven or so affiliated companies operating collectively as Automotive Quality Systems Registrar, or the AQSR Group. Both Bureau Veritas and the AQSR Group were in the business of providing auditing and certification services to companies that must comply with certain industry quality control standards. The AQSR Group served the automotive, aerospace, information security, food safety, telecommunications, and chemical industries, among others.

The parties structured this transaction through two layers of agreements: 1) a global Stock Purchase And Sale Agreement (the "Global SPA") outlining the basic terms of the transaction, which was executed on August 28, 2007; and 2) various regional stock purchase agreements relating to specific members of the AQSR Group. This litigation revolves around one of the regional stock purchase agreements, the India SPA, which contained the specific terms of the Buyers' acquisition of AQSR India for $3,036,072.[1]

A. The Global SPA Closes But The India SPA Does Not

The Global SPA closed on September 28, 2007, and the parties to the India SPA executed their agreement the same day. But, unlike the other regional stock purchase agreements, the India SPA did not also close on September 28 or shortly thereafter. This delay was caused, at least in part, by the need to hear from the India Foreign Investment Promotion Board, whose approval of the sale of AQSR India was a condition of closing under the India SPA.

Despite the fact that the India SPA had not closed, the Sellers voluntarily turned over operational control of AQSR India to the Buyers in October 2007, shortly after the Global SPA closed. As alleged in the Complaint, this transfer of control was done to "expedite the integration of AQSR India into [the Buyers'] other Indian operations" and was based on the fact that the Sellers "trusted that [the Buyers] would faithfully perform [their] obligation to close under the [India SPA]" because the Buyers "had closed under the Global SPA and acquired all other AQSR Group companies."[2] A pause is in order here. The decision to turn over operational control of a business to a prospective buyer before closing is, well, astonishing. There are virtually unlimited numbers of reasons why doing so is unwise. As we shall see, this case illustrates a few of them.

Acting as if the India SPA had closed, when it had not, the Sellers ceded full operational control to the Buyers. In fact, ASQR India's directors resigned![3] Directors and managers installed by the Buyers then began to run the business.[4] The new management team obtained confidentiality and loyalty agreements in favor of the Buyers from the remaining AQSR India employees, informed AQSR India customers that AQSR India had been acquired, and closed two AQSR India offices.[5] And, in December 2007, Ryszard Kaszuba, an officer of Bureau Veritas, demanded control of AQSR India's bank books so that the Buyers "could integrate AQSR India's business into [the Buyers'] Indian operations."[6] The Sellers allege that they initially resisted this demand because the India SPA had not closed, but relented when Kaszuba stated that the Buyers would not go through with the sale otherwise.[7]

Meanwhile, the India Foreign Investment Promotion Board provided its approval of the sale of AQSR India on November 30, 2007. The Complaint alleges that all conditions for closing the India SPA were met as of that date, so the closing should have occurred within the next five business days, no later than December 7, 2007.[8] But, the closing never took place, despite repeated demands from the Sellers. Instead, on January 3, 2008, the Buyers informed the Sellers that they believed a "Material Adverse Effect" had occurred at AQSR India.

Specifically, the Buyers claimed that AQSR India suffered a Material Adverse Effect when an oversight board, the International Automotive Oversight Bureau, suspended AQSR India's accreditation to certify compliance with certain automobile quality control standards on December 13, 2007 (the "Suspension"). The Sellers argued that the Suspension was not a Material Adverse Effect for a number of reasons, including the fact that it was partially waived two days after it was issued

and that the Suspension did not prevent Bureau Veritas from certifying AQSR India clients under the Bureau Veritas name. But, ultimately, the Sellers were unable to persuade the Buyers to come to the closing table, and the Buyers never completed their purchase of all of the outstanding equity in AQSR India.

B. The Parties Enter The Letter Agreement And Asset Purchase Agreements

In April 2008, the Buyers proposed that the parties renegotiate the sale of AQSR India, converting it from a sale of equity to a sale of a limited subset of AQSR India's customer contracts. The Complaint characterizes this proposal as "an ultimatum,"[9] as if the Sellers had no choice in the matter, but the reality of the circumstances alleged in the Complaint is that the Sellers had the option to pursue their rights under the India SPA in court or to renegotiate with the Buyers, and the Sellers made a strategic decision to renegotiate. Accordingly, on May 2, 2008, the parties simultaneously executed a "Letter Agreement" and the Asset Purchase Agreement.

In the Letter Agreement, the parties "acknowledge[d] that the transactions contemplated by the [India SPA] were not and cannot be consummated."[10] In light of this acknowledgment, the parties agreed to terminate the India SPA and enter into the Asset Purchase Agreement, and each party to the Letter Agreement further agreed to release each co-party from any obligations or claims arising from the India SPA. Importantly, and perhaps as a result of the Sellers' belated recognition of the importance of waiting for the closing, this release was conditioned on the closing of the Asset Purchase Agreement, which was scheduled to take place in July 2008.

In the Asset Purchase Agreement, the parties set forth criteria for determining which AQSR India customer contracts the Buyers were required to purchase and at what price. These included technical criteria requiring the parties to determine the ratio of fees generated by a particular contract to the expected labor, measured in man-days, needed to perform the contract. These also included more basic criteria, such as a requirement that the customer agree to the transfer of the contract from AQSR India to the Buyers. In accordance with the Asset Purchase Agreement, the Buyers gave the Sellers a $240,000 down payment when the Agreement executed, with the final purchase price to be determined after a review of AQSR India's customer contracts.

The Asset Purchase Agreement envisioned a formal Review Process in which representatives from both the Buyers and the Sellers would review AQSR India's customer contracts together to determine which ones the Buyers would purchase.[11] This Review Process included a requirement that the Buyers submit weekly "Election Notices" indicating the outcome of that week's review and a final "Closing Statement" that provided, among other things, an accounting of purchased contracts and a final purchase price. If, after receiving and reviewing the Closing Statement, the Sellers disagreed as to which contracts met the criteria or what their purchase price should be, they would turn to the Referee Procedure, which required the Buyers and Sellers to engage the services of a representative from the relevant industrial board to make an expert determination.[12] This Referee Procedure did not

apply to all disputes between the parties, which were broadly designated for resolution in the courts of Wilmington, Delaware under the Agreement's forum selection clause,[13] but instead only applied to disputes arising over the contents of the Closing Statement.

C. The Asset Purchase Agreement Does Not Close

Unfortunately, the execution of the Letter Agreement and Asset Purchase Agreement did not resolve the problems between the parties. Rather than cooperate in the Review Process, the Complaint alleges that the Buyers "willfully failed and refused to complete" the Review Process.[14] The Complaint specifically alleges that the Buyers failed to participate in phone calls to elicit customer permission to transfer their contracts and never submitted the weekly Election Notices or final Closing Statement. But, other allegations in the Complaint contradict the general allegation that the Buyers completely abandoned their obligations under the Asset Purchase Agreement. The Complaint alleges that "midway through the review process, [the Buyers] changed the criteria for which [they] judged contracts for purchase, making that criteria more stringent so that fewer contracts could be purchased,"[15] indicating that the Buyers participated in some form of review process, even if not one that was strictly in compliance with the Asset Purchase Agreement.

In any event, the Buyers did not submit a Closing Statement, and the parties were unable to agree on which contracts would be purchased, so the Asset Purchase Agreement never closed.

The uncertainty and turmoil caused by AQSR India's state of ownership limbo for nearly a year allegedly had a profoundly detrimental effect on AQSR India's business, as might be expected for a company operating in the quality control industry, where reputation plays a role in giving industrial customers and their end users confidence that audits and certifications are conducted properly. The Complaint states that "virtually all" of AQSR India's key employees left and "virtually all" of its customers found new providers of auditing and certification services.[16] Amid this upheaval, which supposedly left AQSR India with little hope of becoming a functioning business again, the Sellers filed suit in this court seeking various forms of relief for the Buyers' alleged breaches of the India SPA, the Asset Purchase Agreement, and other legal obligations.

III. Procedural History

The Sellers initiated this action against the Buyers in September 2008. In the Complaint, the Sellers take a splatter-gun approach to pleading. Thus, they advance fifteen separate causes of action arising out of the Buyers' conduct, including breach of contract claims involving both the India SPA and the Asset Purchase Agreement, breach of the contractually implied covenant of good faith and fair dealing, and various tort and statutory claims arising from the Buyers' use of AQSR India's customer lists and other assets after the Buyers took operational control of AQSR India.

In response to the Complaint, the Buyers filed their Counterclaim in October 2008 seeking an

injunction requiring the Sellers to participate in the Referee Procedure set forth in the Asset Purchase Agreement. The Buyers also seek a declaration that once a final purchase price is determined by the Referee and paid, the Asset Purchase Agreement will be deemed to have closed, triggering the release of claims contained in the Letter Agreement.

The Buyers have now filed a motion for a judgment on the pleadings with regard to the Counterclaim and also seek dismissal of all of the counts in the Complaint for failure to state a claim. In addition, certain Bureau Veritas corporate affiliates and individual managers moved for dismissal based on lack of personal jurisdiction. On April 29, 2009, I granted the motion to dismiss for lack of personal jurisdiction with respect to the individual managers.

This opinion addresses the remaining issues raised in the Buyers' motions.

IV. Legal Analysis

A. Motion For Judgment On The Pleadings

The Buyers seek judgment on the pleadings with regard to their Counterclaim to require the Sellers to participate in the Referee Procedure. That is, the Buyers seek the affirmative relief of specific performance of the Asset Purchase Agreement right now, without a trial. A motion for judgment on the pleadings under Court of Chancery Rule 12(c) will only be granted when "no material issue of fact exists and the movant is entitled to judgment as a matter of law."[17] In determining if this standard is met, I must view the pleadings in the light most favorable to the non-moving party and take all well-pled allegations in the Complaint as true.[18]

I note at the outset that the Referee Procedure is not a broad alternative dispute resolution clause meant to direct all disagreements arising out of the Asset Purchase Agreement to an arbitrator. Rather, the Referee Procedure is only triggered in the narrow circumstance of the parties having a disagreement over the contents of the final Closing Statement generated at the end of the Review Process. The benefit of the Referee Procedure is that it allows the parties to obtain a determination that must necessarily be based on an understanding of relevant industry standards from a representative of the industry board that promulgates those standards. As the Agreement itself indicates, it was "understood that in performing such review, the Referee shall be functioning as an expert and not as an arbitrator."[19]

And, the Referee is to have a limited role: to apply her industry-specific knowledge to answer a technical, industry-specific question that are properly teed up for the Referee through the parties' own Review Process. For all other disputes arising from the Asset Purchase Agreement, the parties agreed to a broad forum selection clause requiring them to submit "any actions, suits or Proceedings arising out of or relating to this Agreement and the transactions contemplated hereby" to the courts of Wilmington, Delaware.[20]

The problem here is that the pleadings indicate that the parties did not follow the Review Process as set forth in the Asset Purchase Agreement. The Sellers allege that the Buyers failed to meet their obligations in a variety of ways, including refusing to participate in joint phone calls with AQSR customers to obtain permission to transfer contracts,[21] and failing to make regular Election Notices. And, the Buyers' own papers indicate that the Sellers requested a Closing Statement in June 2008, which was required to trigger the Referee Procedure in the first place,[22] but the Buyers did not deliver one until January 2009, several months after AQSR India initiated this litigation.[23]

The Buyers acknowledge that they did not follow the Review Process to the letter, but argue that they are nevertheless entitled to enforce the Referee Procedure against the Sellers because strict compliance with the Review Process was not a condition precedent to the Referee Procedure. It is a basic principle of contract law, however, that to be entitled to specific performance, which is an equitable remedy that rests in the discretion of the court,[24] the party seeking specific performance must have substantially performed under the contract herself.[25] The Complaint fairly alleges that the Buyers failed to substantially perform their obligations with regard to the Review Process by, among other things, failing to participate in joint phone calls to customers and failing to file the Closing Statement in a timely manner.[26]

This failure to conscientiously adhere to the terms of the Asset Purchase Agreement, whether a material breach or not, also poses a practical obstacle to an award of specific performance of the simplistic kind that the Buyers seek. The Asset Purchase Agreement contemplated that the parties would present the Referee with a neatly packaged question focused on the industry standards in which the Referee has expertise. In contrast, in order to reach any of the technical questions at this point, the Referee would first need to wade through a mire of procedural and general factual issues, such as what presumptions the Sellers might be entitled to given the Buyers' alleged sabotaging of the Review Process.

The Referee, who is an industry expert rather than an adjudicator, is not well-positioned to resolve such issues. Nor did the parties agree that the Referee would resolve such issues. Rather, the determination of what the parties' respective rights are in the wake of a breakdown in the Review Process rests with the courts of Delaware under the Asset Purchase Agreement's general forum selection clause.

This court may ultimately award some form of modified Referee Procedure as an ultimate remedy, but a remedy of that kind would likely have to be based on a factual record shaped by an order of this court providing the Referee with a basis for making the discrete, expert decisions contemplated by the Asset Purchase Agreement. Before reaching that possible point, the court would have to make factual findings, and thus hold an evidentiary hearing, about the parties' conduct during the Review Process in order to determine whether and how to equitably salvage the Referee Procedure. Accordingly, the motion for judgment on the pleadings on the Counterclaim is denied.

B. Continuing Force Of The India SPA

Because a number of the remaining issues rest on whether the India SPA has continuing force, I address that question now. The parties disagree as to when the release of the Buyers' obligations under the India SPA contained in the Letter Agreement was to become effective: at the time the Letter Agreement was executed; or at the time the Asset Purchase Agreement closed. The Letter Agreement states:

[The Buyers] and Sellers hereby agree to terminate the [India SPA] and enter into an asset purchase agreement.... Effective upon the India Closing under the Asset Purchase Agreement, each party hereto... hereby fully, irrevocably and forever releases and discharges each of the other parties hereto of and from any and all claims such releasing party may have against any other party hereto resulting from, arising out of or in any manner relating to the [India SPA]....[27]

Thus, the Letter Agreement expressly states when the parties' obligations under under the India SPA would extinguish: when the Asset Purchase Agreement closed.[28]

The unambiguous corollary to this is that the parties' obligations under the India SPA remained in force until the closing of the Asset Purchase Agreement.

And, this meaning is not contradicted, as the Sellers argue, by the language quoted above stating that parties "hereby agree to terminate the [India SPA]." This is a general statement about the effect the Asset Purchase Agreement will have, but gives no indication of when that effect will occur. Rather, the more specific sentence containing the release of obligations indicates when the termination of the India SPA will occur: "upon the India Closing under the Asset Purchase Agreement." Because that event has not taken place, the parties' obligations under the India SPA remain in force, and it is possible to seek certain relief for breach of that agreement.

C. Motion To Dismiss For Lack Of Personal Jurisdiction

Two Bureau Veritas affiliates, Bureau Veritas International S.A.S. and Bureau Veritas S.A. (collectively, the "French Affiliates") have moved to dismiss the claims brought against them for lack of personal jurisdiction. Both are French entities that do not conduct business in Delaware. The sole basis for personal jurisdiction asserted by the Sellers is the forum selection clause contained in the India SPA, the only agreement the French Affiliates were parties to: "Each party to this Agreement hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of a court sitting in Wilmington, Delaware for actions, suits or Proceedings arising out of or relating to this Agreement and the transactions contemplated hereby...."[29] The French Affiliates argue that the Letter Agreement terminated the India SPA, so its forum selection clause is no longer applicable.

As discussed above, the India SPA is still in force, and as a result, the French Affiliates' consent to

jurisdiction remains effective. Accordingly, the motion to dismiss the Complaint for lack of personal jurisdiction is denied.

* * * With these threshold considerations about the continuing force of the India SPA and who the court may exercise personal jurisdiction over addressed, I now turn to the core of the Buyers' motion to dismiss, which is their assertion that none of the Counts in the Complaint state a claim.

D. Motion To Dismiss For Failure To State A Claim

The Buyers' motion to dismiss the Complaint in its entirety for failure to state a claim is governed by Court of Chancery Rule 12(b)(6). In applying this familiar standard, I must accept all well-pled allegations as true and draw all reasonable inferences in favor of the Sellers.[30] I may only grant dismissal if the Sellers "would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[31]

My analysis of the Sellers' abundant causes of action will proceed in the following order: 1) contract and quasi-contract claims arising from the India SPA; 2) contract and quasi-contract claims arising from the Asset Purchase Agreement; 3) tort and statutory claims arising from the defendants' conduct after they took operational control of AQSR India; 4) the civil conspiracy claim and the remedy-based claims seeking particular forms of relief for the alleged conduct; and 5) the economic duress claim.

1. Counts 1, 2, and 5 - Claims Involving The India SPA a. Breach of Contract

Count 1 alleges that the Buyers breached the India SPA by wrongfully refusing to close the sale of AQSR India. The Buyers seek dismissal of Count 1 on the basis that the Letter Agreement terminated the India SPA. Because I reject the argument that the India SPA is no longer in force, as discussed above, I deny the motion to dismiss the Sellers' breach of contract claims under that agreement.

b. Specific Performance

But, although the terms of the India SPA have continuing force, the Sellers are not necessarily entitled to the remedy they seek in Count 2, specific performance of the India SPA. As noted earlier, specific performance is an equitable remedy available at the sound discretion of this court.[32] A party seeking specific performance must demonstrate, among other things, that it "was ready, willing, and able to perform under the terms of the agreement."[33]

Here, the parties expressly acknowledged in the Letter Agreement that "the transactions contemplated by the [India SPA] were not and cannot be consummated" and "will not be consummated."[34] That express contractual disavowal of an intent or ability to perform the India SPA

alone makes an order of specific performance inappropriate in this case.

Moreover, it is apparent from the face of the Complaint that the Sellers unreasonably delayed any attempt to pursue specific performance of the India SPA, making their claim for specific performance time-barred under the doctrine of laches. The equitable doctrine of laches bars claims where an unreasonable delay in bringing suit has materially prejudiced the defendants.[35] Thus, the relevant inquiry is "whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties."[36]

It is appropriate to dismiss a claim under laches where "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."[37]

This court has noted on a number of occasions the importance of acting with alacrity when a party seeks a compulsory remedy such as specific performance or other form of injunction.[38] But, the Sellers in this case have taken a languid, nap-filled approach, more suitable to the enjoyment of a summer vacation than to the pursuit of a judicial order forcing another party to buy a business. The Complaint clearly pleads that the Buyers failed to close on the India SPA by the scheduled deadline of December 7, 2007 and also declared their intent not to close on January 3, 2008. Thus, the Sellers were aware they had a claim by, at the latest, the first week of 2008. Yet the Sellers waited nearly ten months, until September 2008, to seek a judicial order requiring the Buyers to close on the India SPA. And once they did file suit, the Sellers made no effort to expedite the proceedings, so it has now been two-and-a-half years since the Buyers' purported breach of the India SPA.

The Sellers offer no excuse for this torpid approach to prosecuting specific performance claims concerning a business that would obviously not remain the same if it was plagued by leadership uncertainty for an extended period of time. Thus, while the Sellers' delay in bringing suit does not necessarily bar them from seeking any of relief they may be entitled to under the India SPA, it will bar the Sellers' request that the court order the parties to complete their transaction as contemplated, two-and-a-half years after the fact and after a multitude of changes at AQSR India.

As a result, the remedy of specific performance of the India SPA is unavailable to the Sellers, and Count 2 is dismissed.

c. Breach Of The Implied Covenant Of Good Faith And Fair Dealing

In Count 5, the Sellers allege that the Buyers breached the implied covenant of good faith and fair dealing by arbitrarily and in bad faith claiming that the suspension of AQSR India's authority to certify compliance with certain automobile standards was a Material Adverse Effect.

Delaware courts have "recognized the occasional necessity of implying contract terms to ensure the

parties' reasonable expectations are fulfilled."[39] But, the implied covenant of good faith and fair dealing is recognized only where a contract is silent as to the issue in dispute.[40]

Here, the breach of the implied covenant of good faith and fair dealing claim and the breach of contract claim are essentially the same - that the Buyers wrongfully refused to close the sale of AQSR India even though they were contractually obligated to do so because there had been no Material Adverse Effect and all other conditions of closing were met. The Sellers argue that the two claims are different because the breach of contract claim merely alleges that the Buyers failed to close in the face of a contractual obligation to do so, whereas the breach of the implied covenant claim allege that the excuse the Buyers used for not closing was made in bad faith.

This argument is unpersuasive. Absent a contractual provision dictating a standard of conduct,[41] there is no legal difference between breaches of contract made in bad faith and breaches of contract not made in bad faith.[42] Both are simply breaches of the express terms of the contract. At base, both Count 1, for breach of contract, and Count 5, for breach of the implied covenant of good faith, allege that the Buyers should have closed because there had been no Material Adverse Effect. Whether there was a Material Adverse Effect is governed by the express terms of the India SPA, which in this case leave no interstitial space in which the doctrine of the implied covenant might operate.[43]

For these reasons, I grant the motion to dismiss Count 5.

2. Counts 3 and 6 - Claims Involving The Asset Purchase Agreement

a. Breach Of Contract

Count 3 alleges that the Buyers breached the Asset Purchase Agreement by refusing to complete the Review Process and refusing to purchase AQSR India's customer contracts. The only arguments offered by the Buyers pertaining to Count 3 are part of their motion for judgment on the pleadings regarding their Counterclaim. The Buyers argue that the Sellers' grievances regarding the Asset Purchase Agreement fall within the scope of the Referee Procedure, so the Sellers should be required to bring the Count 3 claims to a Referee rather than this court. But, as discussed above, the allegations of the Complaint raise issues related to the failed Review Process that fall outside the scope of the Referee Procedure and therefore must be adjudicated by a court in Delaware. As a result, I deny the motion to dismiss Count 3.

b. Breach Of The Implied Covenant Of Good Faith And Fair Dealing

In Count 6, the Sellers bring a similar breach of the implied covenant of good faith and fair dealing claim as in Count 5, alleging here that the Buyers arbitrarily and unreasonably refused to purchase AQSR India customer contracts in accordance with the Asset Purchase Agreement. As with Count 5, Count 6 fails to state a claim because the conduct it complains about is addressed by the express

terms of the Asset Purchase Agreement. The Sellers cannot bootstrap their breach of contract claim into an implied covenant claim merely by adding allegations about the Buyers' state of mind when they breached the contract. Accordingly, Count 6 is dismissed.

3. Counts 4, 7, 8, 10, and 11 - Non-Contract Claims

The Complaint alleges several tort and statutory claims - including tortious interference with economic advantage, conversion, misappropriation of trade secrets, and unfair competition - based on the Buyers' use of AQSR India's bank accounts, customer lists, and trade secrets while the closing of the India SPA was pending, as well as the fact that the Buyers informed AQSR India customers that they would be receiving services from Bureau Veritas instead of AQSR India. The Sellers also allege that the Buyers' access to AQSR India's premises and assets unjustly enriched them.

The Buyers move to dismiss all of these counts on the basis that they arise solely from the contracts at issue, so the Sellers can only seek relief under those contracts. Under Delaware law, "where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."[44] The Buyers assert that the Sellers' purported tort claims are grounded in contract because the Sellers' real complaint is that they did not receive the compensation due to them under the India SPA in exchange for turning over control to the Buyers, not that that the Buyers breached a duty they owed to the Sellers outside of the India SPA. The Buyers also argue that the conversion and trade secret misappropriation claims must be dismissed because the Sellers consented to the Buyers' use of AQSR India's customer lists and other assets.

Admittedly, the India SPA contemplates that the Buyers would have access to AQSR India's premises and certain information before closing for specific purposes:

Through the Closing Date, Sellers shall, and shall cause each Company to, provide to the officers, employees and authorized representatives of Buyer... during normal business hours of such Company, reasonable access to the offices, properties, executives, consultants and business and financial records of such Company to the extent Buyer deems necessary or desirable and shall furnish to Buyer or its authorized representatives such additional information concerning such Company or such Company's operations as shall be reasonably requested, including all such information as shall be necessary to enable Buyer or its representatives to verify the accuracy of the representations and warranties contained in this Agreement, to verify that the covenants of Sellers contained in this Agreement have been complied with and to determine whether the conditions herein have been satisfied. Buyer agrees that such investigation shall be conducted in such a manner as shall not to interfere unreasonably with the operations of any such Company.[45]

But, this provision, providing the Buyers with reasonable and non-intrusive access to AQSR India in order to conduct due diligence, does not contemplate the course of events that allegedly occurred,

which involved the Buyers assuming operational control of AQSR India, shutting down AQSR India offices, and advising AQSR India customers that they were now Bureau Veritas customers. In other words, because the Buyers' assumption of control at AQSR India occurred completely outside any rational application of the terms of the India SPA, the India SPA cannot be found, at least at the pleading stage, to provide the sole basis for possible recovery by the Sellers.

Indeed, one can imagine a variety of doctrines that might become applicable when an entity takes control of a business that it does not own based on what seems to be an oral agreement without any concrete terms. For example, the Buyers might be liable for using AQSR India's intellectual property to its detriment under theories of tort, as argued by the Sellers. The Buyers also arguably had a statutory duty not to misuse AQSR India's trade secrets. And, a scenario like this one involving one entity controlling the property of another is likely to raise issues of trust and fiduciary duty. The extent to which any of these doctrines is applicable in this case will depend on how the court, after reviewing the evidentiary record, answers a number of related questions, such as: What was the parties' understanding of how the Buyers would run AQSR India pending the closing of the India SPA? Did the Sellers waive any remedies by allowing the Buyers to integrate AQSR India into their own operations before closing, leaving the Sellers without recourse if the Buyers had a contractual reason not to close under the India SPA? Could the Buyers be faulted for misusing AQSR India's assets by integrating them with their own when the Sellers arguably knew that was the Buyers' plan when they turned over AQSR India's assets? Or were the Buyers duty-bound to put Humpty Dumpty back together again if the India SPA did not close? These are just some of the questions that arise from this bizarre scenario.

Of course, these commercial mysteries cannot be plumbed by the court at this stage in the proceedings. The point of raising them here is to illustrate that, given the unusual events described in the Complaint, it is possible that duties resulting from independent operation of law, rather than the India SPA, governed the Buyers' operation of AQSR India, a business they did not own. Claims based on these independent duties can proceed in parallel with any contract claims the plaintiffs have.[46] This is not say that the India SPA will be irrelevant to the court's analysis, or that some form of expectations might not ultimately be an appropriate remedy. Indeed, it may be that contract law is central, but contract law as applied to the oral understanding that the parties reached to turn over control of AQSR India before the India SPA closed. For now, however, the facts pled in the Complaint support a reasonable inference that the Buyers likely owed non-contractual duties to the Sellers that they breached.

Likewise, with regard to the Buyers' argument that the Sellers consented to the Buyers' conduct, precluding claims for conversion and trade secret misappropriation, I cannot conclude at this stage, given the incomplete factual picture presented in the Complaint of the circumstances and understandings surrounding the transfer of control at AQSR India, that the Sellers consented to the Buyers' alleged use of AQSR India's assets for the benefit of the Buyers and to the detriment of AQSR India. In other words, it is not reasonably certain based on the pleadings that the Buyers had

no duty to preserve the value of AQSR India by keeping its affairs reasonably distinct from those of the Buyers and enabling, in the event that the sale did not go through, the return of AQSR India to the Seller in a healthy state for continuation as a viable, independent business. As a result, the Sellers have stated claims for conversion and trade secret misappropriation by alleging that the Buyers improperly used AQSR India's customer lists and other assets in a way that permanently deprived AQSR India of their value.

And, for the same reasons just discussed, the Buyers' argument that the existence of enforceable contracts between the parties precludes the Sellers' unjust enrichment claim is unpersuasive. The parties agree that a plaintiff cannot bring an unjust enrichment claim where an enforceable contract governs the relationship.[47] But here, the transfer of control over AQSR India from the Buyers to the Sellers happened outside any of the written agreements between the parties. As a result, those agreements do not bar the Sellers' claim that the defendants were unjustly enriched by the transfer of control.

Accordingly, the Sellers may press their non-contract claims in addition to their contract claims, and the motion to dismiss Counts 4, 7, 8, 10, and 11 is denied.

4. Count 12, 13, 14, and 15 - Civil Conspiracy And The Remedy-Based Claims The Buyers' only argument regarding Counts 12, 13, 14, and 15, for civil conspiracy, injunctive relief, an accounting, and constructive trust, respectively, is that these are not independent claims, but instead must rest on an underlying cause of action. The Buyers contend that the Complaint fails to state any underlying cause of action, so Counts 12 to 15 must be dismissed as well. But, as discussed above, the Sellers have adequately alleged breach of contract claims regarding both the India SPA and the Asset Purchase Agreement, and have also adequately alleged several tort claims. As a result, the Sellers may proceed with their secondary claims based on these underlying causes of action, and the motion to dismiss is denied with respect to Counts 12, 13, 14, and 15.

5. Count 9 - Economic Duress

Finally, I turn to the economic duress claim, which appears to be a blanket attempt to preempt any argument by the Buyers that the Sellers are entitled to less relief for the misconduct alleged in the Counts discussed above because they willingly went along with the Buyers' actions.[48] The Complaint alleges that the Sellers were coerced by the Buyers' threat to not close the India SPA into turning over AQSR India's bank books and into entering the Asset Purchase Agreement.[49] But, the Sellers fail to plead facts supporting a reasonable inference that the Buyers wrongfully overcame the will of the Sellers to such an extent that the Sellers could not act freely in the circumstances.

A party alleging actionable coercion or duress must plead (i) a wrongful act; (ii) which overcomes the will of the aggrieved party; and (iii) that the party has no adequate legal remedy to protect itself.[50] A threat to breach a contract is not necessarily wrongful, but such a threat may be wrongful where it is

based on bad faith rather than a legitimate business reason.[51] It reasonably flows from the allegation that the Buyers called a Material Adverse Effect on relatively flimsy grounds that the Buyers were looking for excuses to get out of a deal they now regretted and possibly made the threat to breach the India SPA in bad faith.

But, even where a threat to a breach a contract is wrongful, "the requirement that the victim show that the circumstances permitted no alternative places the burden on the victim of the threatened breach to show that the threat, if carried out, would result in irreparable harm."[52] There is no indication in the Complaint as to why the Sellers, members of large and sophisticated business entities represented by legal counsel, could not have elected to assert their rights under the India SPA rather than acquiesce to the Buyers' demands, or why the Sellers' remedies under the India SPA would have been inadequate. All the Sellers had to do to protect their interests when the Buyers first announced that they would not close on the India SPA was what the Sellers have now done too belatedly - file a suit for specific performance, a remedy the Sellers could have sought on an expedited basis in Delaware. Thus, the Sellers had a viable legal alternative available to them when they relinquished AQSR India's bank accounts and then later entered the Asset Purchase Agreement.

The mere fact that it might have appeared more costly or more difficult, in light of the confusing circumstances arising from their decision to turn over control of AQSR India before closing, for the Sellers to vindicate their contractual rights in court rather than cooperate with the Buyers does not mean that the Sellers were acting under duress. Rather, the Sellers made a strategic decision regarding their legal and business options, as parties to commercial transactions are often forced to do when once-friendly relationships turn sour. In other words, none of the facts alleged in the Complaint rationally suggest that the Buyers took "advantage of an exigent circumstance such that the [plaintiff] could not reasonably be expected to resist and seek legal relief to protect his interests."[53] No aspect of the Buyers' alleged conduct deprived the Sellers of their ability to seek effective legal recourse, and the Sellers have therefore failed to plead a claim of economic duress. Accordingly, Count 9 is dismissed.

V. Conclusion

For the foregoing reasons, the motion for judgment on the pleadings is denied. The motion to dismiss the Complaint is granted with respect to Count 2 (specific performance); Counts 5 and 6 (breach of the implied covenant of good faith and fair dealing); and Count 9 (duress). The motion to dismiss is denied with respect to the remaining Counts.

IT IS SO ORDERED.

1. India SPA § 2.2.

2. Compl. ¶ 29 (emphasis added).

3. Compl. ¶ 28.

4. Compl. ¶ 28.

5. Compl. ¶ 30.

6. Compl. ¶ 31.

7. Compl. ¶ 32.

8. Compl. ¶ 33.

9. Compl. ¶ 44.

10. Letter Agreement ¶ 1.

11. See Asset Purchase Agreement § 3.2.

12. See Asset Purchase Agreement § 3.2(e).

13. See Asset Purchase Agreement § 12.8.

14. Compl. ¶ 55.

15. Compl. ¶ 55 (emphasis added).

16. Compl. ¶ 61.

17. Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199, 1205 (Del. 1993).

18. Id.

19. Asset Purchase Agreement § 3.2(e); see also Buyers' Rep. Br. at 10 ("The parties agree on the intention of the [Referee] Procedure: to have an expert in the relevant field resolve disputes over whether certain contracts meet the Review Criteria and are thus required to be purchased.").

20. Asset Purchase Agreement § 12.8.

21. One of the conditions to the Buyers being obligated to purchase a contract was that: The customer party to such Contract was contacted by a representative of each of [the Buyers] and [the Sellers] jointly and informed of the potential transfer of the Contract from [the Sellers] to [the Buyers] and the benefits of such transfer and, if requested by [the

Buyers], such customer consented to the transfer of such Contract in writing. Asset Purchase Agreement ¶ 3.2(a)(F).

22. Under the Asset Purchase Agreement, the Buyers were supposed to first deliver the Closing Statement to the Sellers, Asset Purchase Agreement ¶ 3.2(c), and then the Sellers would give notice of their disagreements within five days, Asset Purchase Agreement ¶ 3.2(d). If the parties could not resolve the noticed disagreements amongst themselves, they would then resort to the Referee Procedure.

23. Countercl. ¶ 21; Buyers' Rep. Br. Ex. A.

24. See Gildor v. Optical Solutions, Inc., 2006 WL 4782348, at * 11 (Del. Ch. June 5, 2006).

25. See Safe Harbor Fishing Club v. Safe Harbor Realty Co., 107 A.2d 635, 638 (Del. Ch. 1953) (holding that specific performance is not available to a plaintiff who was in default on the contract in a material respect); DeMarie v. Neff, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005) (noting that "a material breach excuses performance of a contract"); SLMSoft.com, Inc. v. Cross Country Bank, 2003 WL 1769770, at *13 (Del. Super. Apr. 2, 2003) ("Before a plaintiff can recover in contract, it must demonstrate substantial compliance with all of the provisions of that contract." (emphasis in original); see also RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time."); 14 WILLISTON ON CONTRACTS § 43:5 (discussing the rule that an uncured, material failure to perform by one party discharges or suspends the other party's duty to perform).

26. The Buyers did not deliver a Closing Statement until January 2009, six months after the parties expected to close. The Buyers argue that the Asset Purchase Agreement did not expressly make time of the essence, so the Buyers' failure to meet the July 2008 closing date cannot be a material breach. But, even "[w]hen time is not of the essence in a contract, a party still commits a material breach when it fails to perform within a reasonable time." HIFN, Inc. v. Intel Corp., 2007 WL 1309376, at *11 (Del. Ch. May 2, 2007); see also Comet Sys., Inc. S'holders' Agent v. Miva, Inc., 2008 WL 4661829 (Del. Ch. Oct. 22, 2008) ("[I]n every contract there is implied a promise or duty to perform with reasonable expediency the thing agreed to be done; a failure to do so is a breach of contract." (quoting 23 WILLISTON ON CONTRACTS § 63:24 (4th ed.))). Here, the Complaint supports a rational inference that the Buyers' delivery of a required item six months late in a transaction that was expected to close within two months and during a time when the subject business was losing customers and employees was unreasonable.

27. Letter Agreement ¶ 1 (emphasis added).

28. This express deferment of the extinguishment of the India SPA refutes the Buyers' argument that a novation occurred. As the Buyers note in their papers, one of the requirements for a novation is "extinction of the old contract." Buyers' Op. Br. at 33 (quoting MacNeil v. Cusato, 1998 WL 1029267, at *3 n.3 (Del. Super. Nov. 30, 1998)). Because, under the Letter Agreement, the India SPA does not become extinct until the Asset Purchase Agreement closes, no novation occurred.

29. India SPA § 9.9.

30. In re General Motors (Hughes) S'holders Litig., 897 A.2d 162, 168 (Del. 2006).

31. Savor, Inc. v. FMR Corp., 812 A.2d 894, 897 (Del. 2002) (quoting Kofron v. Amoco Chems. Corp., 441 A.2d 226, 227 (Del. 1982)).

32. Gildor, 2006 WL 1596678, at *10.

33. BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp., 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009).

34. Letter Agreement ¶¶ 1, 2.

35. U.S. Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc., 677 A.2d 497, 502 (Del. 1996) ("Laches is an affirmative defense that the plaintiff unreasonably delayed in bringing suit after the plaintiff knew of an infringement of his rights, thereby resulting in material prejudice to the defendant.").

36. Reid v. Spazio, 970 A.2d 176, 183 (Del. 2009).

37. Id.

38. See, e.g., State ex rel. Brady v. Pettinaro Enters., 870 A.2d 513, 527 (Del. Ch. 2005) ("Remedies [such as injunction or an order of specific performance] will only issue if the plaintiff acts with dispatch, and are normally foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period."); Whittington v. Dragon Group L.L.C., 2008 WL 4419075, at *7 (Del. Ch. June 6, 2008) (quoting Pettinaro); Certainteed Corp. v. Celotex Corp., 2005 WL 217032 (Del. Ch. Jan. 24, 2005) ("Like any request for an injunction, [a specific performance] claim necessarily invokes a stricter requirement for prompt action by the plaintiff.... Laches, rather, will arise much earlier [than the analogous statute of limitations period], if a plaintiff sits on its claim and does not demand prompt action."); see also 71 AM. JUR. 2d Specific Performance § 115 ("Promptness in seeking specific performance is especially required for contracts involving property that is likely to fluctuate suddenly in market value, such as corporate stock.").

39. Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 442 (Del. 2005) (internal quotations omitted).

40. See In re IAC/InterActive Corp., 948 A.2d 471, 506 (Del. Ch. 2008) ("[I]mplied covenant analysis will only be applied when the contract is truly silent with respect to the matter at hand, and only when the court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them." (quoting Allied Capital Corp. v. GCSun Holdings, L.P., 910 A.2d 1020 1032-33 (Del. Ch. 2006))); Dave Greytak Enters. v. Mazda Motors of Am., Inc., 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play."), aff'd 609 A.2d 668 (Del. 1992).

41. See, e.g., Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 724 (Del. Ch. 2008) (concerning a contract with a liquidated damages clause that capped damages unless a breach was "knowing and intentional").

42. See 17A AM. JUR. 2D CONTRACTS § 712 ("[A]llegations of malicious, knowing, wanton and willful behavior do not give rise to a separate tort action where no wrongful conduct, except the breach of contract, is asserted.").

43. See Fitzgerald v. Cantor, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998) ("The express terms of a contract and not an implied covenant of good faith and fair dealing, however, will govern the parties' relations when the terms expressly address the dispute.").

44. Pinkert v. John J. Olivieri, P.A., 2001 WL 641737, at *5 (D. Del. May 24, 2001) ("As a general rule under Delaware law, where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."); Data Mgmt. Internationale, Inc. v. Saraga, 2007 WL 2142848, at *3 (Del. Super. Jul. 25, 2007) (citing Pinkert); Tristate Courier and Carriage, Inc. v. Berryman, 2004 WL 835886, at *11 (Del. Ch. Apr. 15, 2004) (quoting Pinkert); Diver v. Miller, 148 A. 291, 293 (Del. Super. 1929) ("In order to constitute a tort there must always be a violation of some duty owed to the plaintiff; but generally speaking such a duty must arise by operation of law and not by the mere agreement of the parties.").

45. Global SPA § 5.1.1 (emphasis added). The India SPA expressly incorporates the terms of the Global SPA. India SPA § 2.2. Other incorporated terms of the Global SPA required the Sellers to disclose, among other things, AQSR India's financial statements, major customers, employees, intellectual property, and bank accounts. Global SPA §§ 3.7, 3.17, 3.21, 3.24, 3.30.

46. Segovia v. Equities First Holdings, LLC, 2008 WL 2251218, at *19 (Del. Super. May 30, 2008) ("A plaintiff may... seek relief in tort based on the same facts as a breach of contract claim when the defendant has breached a duty imposed by law that exists outside the agreement binding the parties."); Data Mgmt., 2007 WL 2142848, at *3 ("[T]he same circumstances may give rise to both breach of contract and tort claims if the plaintiff asserts that the alleged contractual breach was accompanied by the breach of an independent duty imposed by law."); FleetBoston Fin. Corp. v. Advanta Corp., 2003 WL 240885, at *11 (Del. Ch. Jan. 22, 2003) ("[I]t does not necessarily follow from the fact that the parties entered into a contractual relationship, that as a result all tort duties are displaced." (applying Pennsylvania law)).

47. See BAE Systems, 2009 WL 264088, at *7 ("If a contract comprehensively governs the parties' relationship, then it alone must provide the measure of the plaintiff's rights and any claim of unjust enrichment will be denied.").

48. I do not dilate here on the question of whether economic duress exists as a standalone cause of action under Delaware law, or whether it can only be raised as a defense, although there is case law suggesting that the claim serves only as a defense. See R.M. Williams Co. v. Frabizzio, 1990 WL 18399, at *3 n.3 (Del. Ch. Feb. 22, 1990) ("Duress, however, is not a cause of action in itself. The use of the doctrine of duress is defensive in nature...."); see also 25 AM. JUR. 2D DURESS AND UNDUE INFLUENCE § 23 ("Economic duress is frequently described as a defense, and it has been held that economic duress may be used only as a defense, rather than as a cause of action." (footnotes omitted)).

49. Compl. ¶¶ 32, 44.

50. Bakerman v. Sidney Frank Importing Co., 2006 WL 3927242, at *15 (Del. Ch. Oct. 10, 2006).

51. See RESTATEMENT (SECOND) CONTRACTS § 176 cmt. e.

52. 28 WILLISTON ON CONTRACTS § 71:14.

53. Bakerman, 2006 WL 3927242, at *15; Cianci v. JEM Enters., 2000 WL 1234647, at *9 (Del. Ch. Aug. 22, 2000).