IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BAE SYSTEMS INFORMATION AND ELECTRONIC SYSTEMS INTEGRATION, INC.,	:	
Plaintiff,	:	
v.	:	**C.A. No. 3099-VCN**
LOCKHEED MARTIN CORPORATION d/b/a LOCKHEED MARTIN STS-ORLANDO,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: September 29, 2008
Date Decided: February 3, 2009

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NOBLE, Vice Chancellor

The world's largest defense contractor sold a major business unit to the world's third largest defense contractor. The acquirer expected that business unit to continue to do business with its former owner and believed that it had obtained sufficient and binding contractual commitments for those opportunities to persist. Although this arrangement worked well for a while, the acquirer concluded that it had not been receiving the business opportunities for which it contracted and, thus, brought this action in an effort to secure the benefit of its bargain.

Although there are several ancillary disputes, the critical question is how to contract for unknown work in the future while recognizing that price and scope will necessarily depend upon the specific work. Did the parties devise a process that would bring sufficient "definiteness" to their understanding to make an enforceable contractual obligation regarding future work? Or, did they merely execute a normative "agreement to agree" that leaves the Court with a vague understanding of what the parties may have intended generally but simply cannot be enforced?

Before the Court is the Defendant's motion to dismiss the Amended Complaint.

I. BACKGROUND[1]

A. *The Parties*

Plaintiff BAE Systems Information and Electronic Systems Integration Inc. ("BAE") is a wholly-owned subsidiary of the world's third largest global defense company. BAE, a Delaware corporation, specializes in aircraft self-protection systems and tactical surveillance and intelligence systems, as well as automated test equipment, support systems, and other related services.

Defendant Lockheed Martin Corporation ("Lockheed"), a Maryland corporation, is the largest defense contractor in the world. Lockheed operates through numerous unincorporated business units; the three of primary importance in this action are: Lockheed Martin STS-Orlando ("LMSTS"),[2] Lockheed Martin Aerospace ("LM Aero"),[3] and Sanders.

B. *Sanders, The Sale, and The Memorandum of Agreement*

Lockheed's Sanders business unit was the centerpiece of Lockheed's Aerospace and Electronics Systems ("AES") business segment before 2000.

[1] The Court accepts the truthfulness of facts properly alleged by a plaintiff when considering a defendant's motion to dismiss. *Gantler v. Stephens*, 2009 WL 188828, at *5 (Del. Jan. 27, 2009). These facts are as alleged in the Plaintiff's Amended Complaint.

[2] BAE brings this action against Lockheed doing business as LMSTS. LMSTS was formerly known as Lockheed Martin Information Systems Company ("LMISC"). For convenience, "LMSTS" will frequently be used to refer to both LMSTS and LMISC.

[3] LM Aero was formerly known as Lockheed Martin Tactical Aircraft Systems Company ("LMTAS"). For convenience, "LM Aero" will frequently be used to refer to both LM Aero and LMTAS.

Consistent with the company's practice, Sanders and LMSTS executed a Memorandum of Agreement on June 14, 1996, (the "Internal MOA")[4] which outlined the manner by which the two Lockheed business units would approach opportunities for Automated Test Systems ("ATS") business. These opportunities were primarily generated by a third Lockheed business unit, LM Aero, and are the subject of the parties' current dispute.[5] The Internal MOA outlined which business unit would undertake different types of ATS work, freeing each to focus its energies and resources on its own allocated segments. It also addressed both then-current F-16 support equipment opportunities and future support equipment opportunities. In addition, the two business units executed a letter agreement on February 24, 1997, regarding the relationship between them as to the F-16 support equipment work specifically.[6]

Four years later, on July 13, 2000, Lockheed entered into the Transaction Agreement for the sale of its AES business, including the Sanders business unit, to BAE.[7] That transaction closed on November 27, 2000; BAE paid $1.67 billion for Lockheed's AES business.

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[4] Lockheed refers to these agreements between its unincorporated business units as Intra-Lockheed Martin Work Transfer Agreements.
[5] Am. Compl. Ex. A.
[6] *Id.*, Letter at 1.
[7] Hill Aff. Ex. A. The Transaction Agreement (§ 13.8) is to be interpreted in accordance with the laws of Delaware.

The Transaction Agreement provided that the then-current arrangements regarding ATS work would continue after BAE acquired ownership of the AES business. In other words, LMSTS[8] and Sanders would continue to operate under the terms of the Internal MOA even though BAE, a defense industry competitor of Lockheed, would become the new owner of the Sanders business unit. In addition, Lockheed and BAE agreed to execute a new memorandum of agreement memorializing this arrangement reflecting their post-closing rights and obligations regarding AES business opportunities and the Sanders business unit.

That new Memorandum of Agreement (the "MOA")[9] was executed between Lockheed and BAE on the same day the AES transaction closed. The MOA is virtually identical to the Internal MOA executed in 1996 between Sanders and LMSTS, then both Lockheed business units. The only difference between the two versions is the substitution of "BAE/Sanders" wherever "Sanders" appeared in the Internal MOA and the incorporation by reference of the 1997 F-16 letter agreement between Sanders and LMSTS.[10] The MOA purports to define "the strategic relationship between LMSTS and Sanders to pursue LM Aero F-16 support equipment outsourcing and [to] establish the general agreement as to how the

[8] The original (*i.e.*, "Internal") Memorandum of Agreement and the new Memorandum of Agreement (discussed below) refer to LMISC instead of LMSTS. Again, LMSTS is used here for convenience.
[9] Amended Compl. Ex. B.
[10] MOA § 6.1.

partners will approach future [LM Aero]-support equipment outsourcing opportunities and future [Lockheed] corporate-wide internal and non-[Lockheed] external opportunities.[11] The parties expected that the MOA would allow LMSTS and BAE/Sanders to "cooperatively align their respective business strategies to maximize the focus and effectiveness of resources, increase corporate business, and jointly broaden the market aperture for ATS."[12] The parties agreed that they would "seek to utilize each other's technology, market, and production strengths to achieve and exploit the advantages of joint cooperation."[13] In order to allocate the work between them effectively, each party agreed to "focus its business pursuits in its allocated areas and meet together as necessary (as least semi-annually) to review and coordinate pursuit efforts."[14] The parties identified three specific opportunities for joint work: "(a) [LM Aero] F-16 outsourcing (In process/future); (b) [LM Aero] future SE outsourcing (other than F-16); and (c) Internal [Lockheed] corporate (beyond [LM Aero]) and external opportunities."[15] Significantly, the parties agreed "to capitalize on the relationship formed by [the MOA] . . . [by] establish[ing] an ATS Coordination Team (ACT). The ACT [was to] consist of an equal number of BAE/Sanders and [LMSTS] members. The ACT

[11] *Id.* § 2.0
[12] *Id.* § 3.0.
[13] *Id.*
[14] *Id.* § 4.0.
[15] *Id.* § 5.0.

[was required to] meet as necessary (at least four times a year) to decide matters of joint ATS business strategy, bid position, and investment plans."[16]

BAE and Lockheed functioned under the MOA until at least 2004. During this period BAE performed contracts valued at over $2 million in coordination with LMSTS and LM Aero under the MOA.[17]

C. *The Dispute*

As of late-2004, or early-2005, BAE suspected that LMSTS might not intend to behave as expected under the MOA. BAE believed new ATS work was being generated by LM Aero's F-35 fighter-jet project,[18] work that BAE understood as allocated to it under the MOA. While a small engineering services subcontract was allocated to BAE immediately after LM Aero began the F-35 project,[19] the remaining ATS work for the project, $1.3 billion of which BAE claims it should be awarded under the MOA, was not progressing as anticipated.

BAE approached Lockheed to address these concerns, and to ensure proper allocation of ATS work arising from the LM-Areo F-35 project. These efforts were unsuccessful. Because BAE is not a part of the Lockheed family, unlike

[16] *Id.*
[17] Lockheed disputes BAE's contention that contracts in this period were entered pursuant to the MOA. Instead, Lockheed argues they were entered into free from contractual compulsion and based on their independent business value. At this stage, BAE's factual assertions must be accepted.
[18] It is expected that the F-35 will replace the F-16.
[19] Am. Compl. ¶ 37.

LMSTS and LM Aero, and thus not privy to intra-Lockheed work agreements, BAE claims an inability to identify precisely what work, if any, has improperly not been allocated to it. In addition, BAE has learned that, contrary to its reading of the terms of the MOA, LMSTS has developed F-35 support equipment that should have been allocated to BAE under the MOA. As a result, BAE filed this action.

BAE claims that the MOA constitutes an enforceable agreement that Lockheed has now breached. Lockheed argues that the MOA is wholly unenforceable and merely outlines a general approach the two defense industry competitors should follow only when it makes "good business sense" to do so.

D. *Procedural History*

BAE filed suit seeking specific performance, or, in the alternative, damages for breach of contract and breach of the implied covenant of good faith and fair dealing. Lockheed moved to dismiss the complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted, or, in the alternative, for a more definite statement. BAE amended its Complaint and added claims for unjust enrichment and declaratory judgment. Lockheed renewed its motion to dismiss. This is the Court's decision on that motion.

II. ANALYSIS

A. *Standard for Dismissal under Rule 12(b)(6)*

The standard for dismissal pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted is well-established. The motion may be granted only if it appears with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading.[20] In considering a motion to dismiss, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[21] All facts of the pleadings and inferences that can reasonably be drawn therefrom are accepted as true.[22] However, neither inferences nor conclusions of fact unsupported by allegations of specific facts are accepted.[23] That is, the Court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.[24]

B. *BAE's Direct Contract Claims*

The parties dispute whether the MOA is a binding, enforceable agreement. To survive a motion to dismiss, BAE must plead facts demonstrating: (1) the intent of the parties to be bound to (2) sufficiently definite terms supported by

[20] *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).
[21] *Gantler*, 2009 WL 188828, at *5.
[22] *Id.*
[23] *Id.*
[24] *In re Lukens Inc. S'holder Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).

(3) consideration.[25] Lockheed does not assert a failure of consideration, and BAE has pled facts sufficiently demonstrating consideration. The Court, therefore, focuses its attention on (1) whether there is any reasonable possibility that BAE could prevail in its attempt to prove intent to be bound on the part of Lockheed and (2) whether it is reasonable to believe, given the facts pled, that the terms of the MOA might be proven sufficiently definite for enforcement.

1. Intent to be Bound

Delaware adheres to the "objective" theory of contracts: a contract's construction should be that which would be understood by an objective, reasonable third party.[26] When measuring whether parties to an agreement intend to be bound to it, their overt manifestations of assent, rather than their subjective desires, control.[27] The Court looks for allegations suggesting an objective manifestation of intent to be bound by the MOA.

[25] *Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006) (contract); *Vale v. Atl. Coast & Inland Corp.*, 99 A.2d 396, 399 (Del. Ch. 1953) (agreement to agree) (under Delaware law, an agreement to agree "will be enforced if the agreement specifies all of the material and essential terms including those to be incorporated in the future contract").

[26] *Cantera v. Marriott Senior Living Servs, Inc.*, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999).

[27] *Indus. Am., Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 415 (Del. 1971) (citations omitted); s*ee also Diamond Elec., Inc. v. Del. Solid Waste Auth.*, 1999 WL 160161, at *3 (Del. Ch. Mar. 15, 1999).

Such an intention to be bound by an agreement may be evidenced by continued performance in accordance with an agreement's terms.[28] BAE pleads facts suggesting Lockheed preformed under the terms of the MOA for at least four years following its execution. During this period BAE alleges at least fifteen contracts were performed pursuant to the MOA. This alone might not constitute a sufficient pleading to survive a motion to dismiss—it might not be reasonable to infer that these contracts, in light of the size and scope of both businesses, were entered under the compulsion of the MOA. However, that allegation combined with the execution of the MOA at the same time the Transaction Agreement was executed, and the references to the MOA found within the Transaction Agreement, presents a sufficient pleading of objective facts demonstrating Lockheed's intent to be bound to the MOA to survive Lockheed's motion to dismiss.[29]

[28] *Carlson v. Hallinan*, 925 A.2d 506, 525 (Del. 2006); *see also Honeywell Int'l Inc., v. Air Prods. & Chems. Inc.*, 872 A.2d. 944, 951 (Del. 2005).

[29] Moreover, Lockheed, at closing, represented that "[e]ach of the Transaction Documents [including the MOA] to which any Seller Company is a party constitutes or will constitute at Closing a legal, valid and binding agreement of the applicable Seller Company, enforceable against it in accordance with its terms . . . ." Trans. Agr., at § 3.01; Trans. Agr. Ex. B, at § B.02. This fairly shows that Lockheed intended to be bound by the MOA. Thus, if the substance of the agreement can be ascertained, the Amended Complaint fairly alleges that Lockheed intended to perform those substantive obligations. The obverse—if the substance of the agreement cannot be ascertained, then Lockheed did not intend to be subject to some duty that no one can define—may be a trivial observation, but it does reinforce the fundamental aspect of this case, which is whether the MOA is vague and indefinite and, thus, not susceptible of enforcement.

2. Indefiniteness as to Pricing, Work Division, and Party Responsibility

Delaware courts will not enforce an agreement that is indefinite as to any material or essential term.[30] Lockheed argues that the absence of pricing terms or a pricing structure, and insufficiently definite terms governing how future ATS work and responsibility would be allocated renders the MOA unenforceable, and, thus, BAE's breach of contract claim should be dismissed.[31]

A motion to dismiss tests the sufficiency of the allegations made in the plaintiff's complaint. For the purposes of the motion the Court accepts the allegations made in a complaint, and determines whether those allegations are insufficient as a matter of law to sustain a requested cause of action. The standard has been called "plaintiff friendly"[32] because it is. The Court need not determine what a given cause of action will ultimately bear. Rather, the Court passes judgment on whether the facts alleged in the Amended Complaint state a claim. BAE's Amended Complaint narrowly survives this scrutiny and, therefore, cannot be dismissed.[33]

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[30] *Hindes v. Wilmington Poetry Soc'y*, 138 A.2d 501, 503 (Del. Ch. 1958); *Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Del.*, 80 A.2d 294, 295 (Del. Ch. 1951).

[31] Lockheed's Opening Br. at 11-14.

[32] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V.L.P.*, 2009 WL 117563, at *3 (Del. Ch. Jan. 15, 2009).

[33] Lockheed represented that the transaction documents, including the MOA, would constitute a "legal, and binding agreement . . . enforceable . . . in accordance with its terms . . . except as [to circumstances not applicable here]." Trans. Agmt., Ex. B, § B.02. BAE understandably has not taken kindly to Lockheed's advancing a position that is directly at odds with a representation that

The Amended Complaint contains two distinct allegations that preclude dismissal. The first is the allegation that the MOA requires Lockheed to offer BAE an opportunity to participate in the pursuit of ATS business opportunities as they arrive.[34] This allegation sufficiently implicates a situation where the indefiniteness Lockheed complains of might be excused, and as a result renders BAE's Amended Complaint sufficient to survive Lockheed's motion to dismiss.

First, the right BAE claims is something in the nature of a "right to bid" on certain ATS opportunities. Throughout its complaint BAE alleges a scenario where, as ATS opportunities arise, LMSTS and BAE would work together in the hopes of winning pending ATS work opportunities from LM Aero. This scenario would necessarily leave negotiations over pricing, work allocations, conditions, and other responsibilities for later determination on a project-by-project basis.[35] Whether or not BAE would ultimately win a particular ATS opportunity would depend on that price and scope negotiation. Indeed, the Amended Complaint

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induced BAE to enter into the Transaction. *See* BAE's Answering Br. at 23, 47. BAE, although not bringing a claim based on that representation, has suggested that Lockheed has waived, or is estopped from, arguing that the MOA is too vague to be enforced. *Id.* at 23-24. Waiver and estoppel are truly not responsive to Lockheed's indefiniteness argument. Even if Lockheed may fully and fairly be charged with the consequences of both waiver and estoppel, that would not resolve BAE's dilemma if the MOA is indefinite. If the MOA is indefinite and, thus, no one can figure out the contractual duty that it imposed on Lockheed, then there is nothing for the Court to enforce. Waiver and estoppel, wonderful doctrines that they may be, cannot fill the void resulting from the absence of a definitive contractual undertaking.

[34] Am. Compl. ¶ 22, 36; Tr. at 40, 52.

[35] *See Seidensticker v. Gasparilla*, 2007 WL 1930428, at *5 (Del. Ch. June 19, 2007) ("A contract does not fail simply because the price is not specified."). However, there must be some practicable method to determine necessary pricing. *Id.*

suggests that ultimate allocation of ATS work to BAE would depend entirely upon its agreement to pricing and other work terms set by LM Aero.[36] Nevertheless, BAE would be given a "sporting chance" to participate in the work by virtue of the MOA. Given this allegation, the Court cannot dismiss the Amended Complaint for a lack of definiteness.[37]

In addition, the Court cannot, in this context, find the MOA too indefinite for enforcement as to which projects BAE would enjoy such a "right to bid." The structures determining work allocation found in the MOA at Section 4.0, vague as they may seem, might reasonably prove sufficiently definite when viewed in light of industry norms.[38] Indeed, BAE alleges that at least 15 contracts have been preformed with Lockheed since the execution of the MOA, a fact suggesting a workable protocol exists in the MOA. Further, the Court cannot limit that protocol to F-16 work alone. Although Lockheed concedes a separate, binding, agreement governs F-16 related work, the Amended Complaint contains the allegation of at

[36] Am. Compl. ¶ 26, 37. BAE's Answering Brief supplies a clearer discussion of how future pricing issues would be resolved, including a more direct allegation that an existing bid process is already in place from which pricing is objectively determined. Allegations of fact found in a party's briefing, but absent from a party's complaint, however, cannot properly be considered by the Court. *Fagnani v. Integrity Finance Corp.*, 167 A.2d 67, 74 (Del. Super. 1960).

[37] BAE may be contending that its rights under the MOA extend indefinitely. Two of the three opportunities for termination of the MOA relate exclusively to F-16 work, leaving only "mutual written consent" as a means of termination. MOA § 5.4. One wonders if Lockheed intended to subject itself to such an open-ended obligation, but that is a question beyond the scope of the Court's current task.

[38] Industry norms occasionally may supply needed precision. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. e (1981); 12 WILLISTON ON CONTRACTS § 34:12 (4th ed. 2007) (incorporation of usage and custom).

least one F-35 related contract between the parties.[39] The Court cannot simply read the MOA and conclude that F-35 contracts are not subject to the MOA. These contracts support BAE's position that despite the absence of pricing and work allocation terms in the MOA, some structure exists between the parties for determination of those issues, and the Court cannot conclude on a motion to dismiss that the MOA is unenforceable.[40]

Second, BAE alleges obligations that are sufficiently definite for enforcement. Most directly, BAE alleges that the MOA requires the parties to "meet together as necessary to coordinate their pursuit activities."[41] This obligation is allegedly created in Section 6.1 of the MOA, requiring the "ACT" to meet "at least four times a year" for the purposes of discussing ATS opportunities.[42] Although Lockheed suggests that the absence of disclosure obligations from the MOA would render such a "meet and confer" obligation illusory, or valueless, the Court cannot dismiss BAE's position that value exists in this right to meet regularly with a fellow member of the defense industry, even without contractual disclosure obligations. More importantly for the purposes of this motion, BAE has pled facts sufficient to find that this binding obligation

[39] Am. Compl. ¶ 37 ("BAE was awarded purchase order number 99M017234 for JSF [the F-35] Technical Services.").
[40] BAE has not identified any particular work upon any certain terms to which it was entitled.
[41] *Id.* ¶ 51.
[42] MOA §§ 5.0, 6.1; Tr. at 45, 58.

exists, in a form definite enough for enforcement, and has been breached.[43] In sum, a rough skeleton of definite obligations exists in the MOA upon which prior course of dealings and industry custom could, by reasonable inference, add sufficient flesh to justify enforcement of the resulting form. At this stage, such reasonable inferences drawn from the facts pled in the Amended Complaint, and accepted as true, escort this claim past Lockheed's motion.

Finally, BAE seeks an excuse for the lack of definiteness by pointing out that other courts have enforced similar agreements in the government contracting industry, often called "teaming agreements," in the face of similar objections that the agreements were too indefinite to enforce.[44] Simply because other government contracting industry agreements have survived similar challenges in other courts does not mean every agreement should survive those same challenges. A brief survey of cases involving teaming agreements proves the point.[45] Maybe more importantly, comparisons to teaming agreements would not necessarily change the

[43] Tr. at 58.
[44] BAE's Answering Br. at 29-30 (citing *EG & G, Inc. v. The Cube Corp.*, 2002 WL 31950215 (Va. Cir. Ct. 2002)).
[45] *Compare Air Tech. Corp. v. Gen. Elec. Co.*, 347 Mass. 613 (Mass. 1964) (enforcing teaming agreement entered to fulfill U.S. Air Force contract despite a finding that precise pricing and scope of work terms were not identified) *with W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 493 S.E.2d 512 (1997) (refusing enforcement of teaming agreement entered to fulfill U.S. Air Force contract on grounds that parties had not reached mutual agreement on, *inter alia*, product pricing).

standards by which the MOA is evaluated.[46] In light of the Court's earlier conclusion, resolution of this contention is not now necessary.[47]

C. *BAE's Good Faith and Fair Dealing Claim*

BAE, perhaps recognizing that the MOA does not expressly require Lockheed to share news of various work opportunities with it, invokes the covenant of good faith and fair dealing to impose a duty on Lockheed to provide such information, lest the undertaking and agreement be illusory.

The covenant of good faith and fair dealing is implied in all contracts governed by Delaware law.[48] The covenant is designed to protect the "spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain."[49] The covenant functions by requiring the Court to discover additional terms from an agreement; terms in line with the spirit of the agreement but absent from those expressed by the parties.

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[46] There is reason to doubt the validity of such comparisons. Teaming agreements generally cover a single, specific acquisition, project or bid, instead of the indefinite relationship alleged by BAE. *See generally* 48 C.F.R. § 9.6 *et seq* (2004).

[47] BAE, nonetheless, must confront some difficult obstacles as it moves beyond the motion to dismiss stage. If LMSTS and BAE had tried, but failed, to come to an understanding about F-35 work, what would be its claim? How would it be valued? How would it be enforced? Or, is this litigation about the allocation of real work or is simply about the "value of a chance"? This case amply demonstrates the perils and shortcomings of any arrangement that sounds like an agreement to agree.

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

[49] *Id.*

This claim must also survive Lockheed's motion to dismiss. BAE claims that Lockheed's failure to disclose ATS work opportunities allocated to BAE under the MOA constitutes a breach of the covenant. BAE alleges that LMSTS, by virtue of its position as a Lockheed subsidiary, is denying BAE the benefit of their agreement by refusing to implement the MOA. This is accomplished by simply refusing to provide BAE with notice of LM Aero opportunities. LMSTS is capable of this because it will have knowledge of ATS opportunities within the Lockheed family. If true, this behavior could violate the implied covenant.[50]

Although Lockheed accurately notes that the MOA imposes no notification requirements,[51] the covenant might imply a notice provision were BAE successful in proving its reading of the agreement to be correct. If the parties agreed to a "right to bid" arrangement it seems elementary that an obligation to notice bid opportunities would be included where only one party has information regarding those opportunities. BAE accuses Lockheed of a failure to notify it of allocated ATS opportunities as they came available. The covenant could be found to require the addition of a notification term and BAE has pled facts sufficient to sustain a

[50] *See Breakaway Solutions, Inc. v. Morgan Stanley & Co.*, 2004 WL 1949300, at * 12 (Del. Ch. Aug. 27, 2004).
[51] Lockheed's Opening Br. at 17-18.

cause of action for its breach. The Court may not dismiss this claim under Court of Chancery Rule 12(b)(6).[52]

D. *Equitable Claims*

1. BAE's Specific Performance Claim

Under Delaware law, a party seeking specific performance must establish, by clear and convincing evidence, that (1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance.[53] The decision as to the availability of specific performance rests within the sound discretion of this Court.[54]

As discussed above, it is reasonably conceivable that BAE could demonstrate the existence of an enforceable agreement on the facts alleged. Therefore, the Court cannot conclude, on the facts presented here, that BAE would fail the higher clear and convincing standard required for specific performance. BAE has pled facts supporting an enforceable agreement, of some scope, and

[52] The viability, however limited it may be, of the implied covenant is tied to the underlying viability of the MOA. The implied covenant seems not to have any independent application in the absence of a duty imposed by the MOA on Lockheed to allow BAE a "right to bid" on relevant opportunities.

[53] *Szambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007) (citing *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953)).

[54] *Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at * 10 (Del. Ch. June 5, 2006).

claims to be willing and able to perform. The Court, at this stage, is unable to balance the respective equitable justifications for or against the remedy. Thus, BAE's claim for this form of relief survives.

Further, because the scope and obligations of the MOA remains unclear the Court cannot yet find as a matter of law that the enforcement of a specific performance remedy would be unduly burdensome on the Court. Were BAE to prove the MOA to be a binding agreement, but succeeded in establishing only the most rudimentary obligations, specific performance might prove a manageable remedy. Given this possibility the Court cannot dismiss BAE's specific performance claim at this stage.

2. BAE's Unjust Enrichment Claim

Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity or good conscience."[55] In order to recover on a claim of unjust enrichment, a plaintiff must prove: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[56] Of primary importance to BAE's claim for unjust enrichment, however, is not consideration

[55] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988).
[56] *Jackson Nat. Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393-94 (Del. Ch. 1999) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998)).

of the elements necessary to prove the claim, but instead the threshold inquiry a court must first engage in: inquiring whether a contract already governs the relevant relationship between the parties.[57] 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.[58]

BAE claims that it has conferred a benefit upon Lockheed, and is directly impoverished thereby, in two respects. First, BAE paid $1.67 billion under the Transaction Agreement "based (in part) upon Lockheed Martin's agreement to enter into the MOA and the Transaction Agreement's representation that the MOA is a valid, legal and binding obligation."[59] Second, BAE claims that Lockheed is unjustly "enriched at the expense of BAE by keeping ATS work opportunities that should have been allocated to BAE and reaping the profit therefrom."[60] BAE claims to have suffered a direct and related impoverishment "because it has not received the revenue it would have earned from the ATS work opportunities that should have been allocated to [BAE]."[61] In both instances a contract governs the relevant rights between the parties and an unjust enrichment claim cannot lie.

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[57] *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 16, 2006).
[58] *See id.*; *ID Biomedical Corp. v. TM Tech., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995).
[59] BAE's Answering Br. at 46; Am. Compl. ¶ 71.
[60] Am. Compl. ¶ 72.
[61] *Id.*

First, the Lockheed sale of the Sanders business unit to BAE is governed by the Transaction Agreement and BAE does not argue otherwise. Indeed, it is undisputed that a contract governs that aspect of the parties' relationship. Because that relationship is governed by a complex contract negotiated by sophisticated parties, the Court cannot accept BAE's claim for unjust enrichment recovery.[62] If BAE is unhappy with Lockheed's conduct, it must rely upon the contract governing its rights, not an unjust enrichment claim.

BAE's second basis for its unjust enrichment claim, that Lockheed kept ATS work for itself, instead of allocating it to BAE, must fail for the same reason. The entirety of BAE's position that ATS should be allocated to it depends on the MOA. Because the MOA is the sole basis from which BAE can claim access to ATS opportunities that agreement must govern BAE's rights surrounding ATS opportunities. The claim that BAE has been injured by a Lockheed refusal to allocate new ATS opportunities must succeed or fail entirely on BAE's breach of contract claim. Again, unjust enrichment recovery is unavailable when a contract governs the parties' relationship.

[62] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 (Del. Super. 1980). BAE may have chosen not to pursue a breach of the Transaction Agreement and its representations concerning the MOA because such claims may be time-barred. BAE has not argued that a claim for unjust enrichment is a proper method of evading such a bar to a cause of action. How BAE selected its claims and whether a breach of the Transaction Agreement claim is barred are questions that do not affect the Court's analysis of this unjust enrichment claim. It is abundantly clear from the allegations in the Amended Complaint that the relationship arising out of the sale of the Sanders business unit and the execution of the MOA is expressly and pervasively governed by the Transaction Agreement.

BAE's argument that its unjust enrichment claim must survive because it is pled as an alternative to its contract claim, and such a pleading is allowed, does not change this result. In some instances, both a breach of contract and an unjust enrichment claim *may* survive a motion to dismiss when pled as alternative theories for recovery. Such occurrences are factually distinguishable,[63] however, and, more importantly, do not stand for the proposition that an unjust enrichment claim *must* survive a motion to dismiss when pled alternatively with a contract claim that will move beyond the motion to dismiss stage. A right to plead alternative theories does not obviate the obligation to provide factual support for each theory. Here, there is no independent basis for an unjust enrichment claim because the Amended Complaint contains no facts challenging Lockheed conduct on a basis not comprehensively governed by the MOA. Because BAE pleads no right to recovery not controlled by contract there can be no claim for unjust enrichment.[64] BAE cannot, on these facts, use an unjust enrichment theory to rewrite a comprehensive contract governing the entirety of the parties' relevant

[63] *See, e.g., Breakaway Solutions, Inc.*, 2004 WL 1949300, at *14 (both claims surviving a motion to dismiss where plaintiff sought, in the alternative, the disgorgement on an unjust enrichment theory of benefits defendants received *from third parties* by virtue of their improper behavior *vis-à-vis* the plaintiffs, with whom defendants had entered contracts).

[64] *See, e.g., MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *5-6 (Del. Ch. May 16, 2007) (dismissing unjust enrichment claim for the period when obligations were comprehensively governed by the parties' contract).

relationship after finding disappointment in the resulting agreement.[65] The parties here attempted to memorialize their agreement as to ATS opportunities, and whether or not BAE may enforce its interpretation of the arrangement will depend on the MOA. BAE's unjust enrichment claim will be dismissed.

E. *Lockheed's Antitrust Defense*

Lockheed next argues that the Amended Complaint must be dismissed because BAE's reading of the MOA would render the agreement in violation of Section 1 of the Sherman Act.[66] The Court cannot dismiss the complaint on this ground on the present record.

Lockheed claims that the MOA would violate Section 1 of the Sherman Act, but does so in the most cursory of terms, by labeling the MOA, if binding, a *per se* antitrust violation. *Per se* antitrust analysis is generally reserved for "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'"[67]

At the motion to dismiss stage the facts before the Court are limited in nature, and based solely upon the allegations made in a plaintiff's complaint. As a

[65] In a sense, any breach of contract compensable by damages "unjustly enriches" the party in breach. That truism is not the foundation for an independent cause of action.
[66] Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (2006).
[67] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

result, the Court is unable to undertake the proper factual examination required to address fairly the antitrust contention. Thus, Lockheed's motion to dismiss based upon federal antitrust law is denied.[68]

F. *Declaratory Relief*

Parties to a contract may seek a declaratory judgment to determine "any question of construction or validity" and may seek a declaration of "rights, status or other legal relations thereunder."[69] Declaratory relief is in the discretion of the Court and not available as a matter of right.[70]

As previously discussed, whether the MOA is so indefinite that it cannot be enforced is a question that remains for another day. In that context, declaratory relief is simply another forum by which the Court might resolve this matter or, more precisely, implement its ruling. With the contract dispute ongoing, dismissal of the declaratory judgment aspect of the relief sought by BAE is unwarranted.

G. *Lockheed's Laches Defense*

Lockheed asks the Court to dismiss the specific performance claims of the Amended Complaint because of its timing: filed almost seven years after the transaction in question and almost three years after the date BAE suspected that

[68] This, of course, does not foreclose Lockheed's ability to raise this affirmative defense in its answer. Indeed, this is yet another example of why it is frequently difficult to resolve affirmative defenses on a motion to dismiss.
[69] 10 *Del. C.* § 6502.
[70] 10 *Del. C.* § 6506.

Lockheed held the position it now challenges.[71] The essential elements of laches are: (1) a plaintiff with knowledge of the claim and (2) prejudice to the defendant arising from an unreasonable delay in bringing the claim.[72]

This case is one in which application of the doctrine of laches on a motion to dismiss is inappropriate. First, the reasons for delay are often more important than its length.[73] BAE pleads facts that suggest delay was the result of an inability to discover breach because of improper behavior on the part of Lockheed. BAE claims to have "repeatedly" requested information regarding ATS work covered by the MOA; starting upon learning of possible work allocation problems.[74] In response, BAE claims that Lockheed "delayed and/or otherwise failed" to disclose the information necessary to discover breach.[75] Accepting these facts as true, the Court cannot find that dismissal for unreasonable delay is appropriate; BAE pleads that any delay in discovering breach and bringing suit was the fault of Lockheed. Second, Lockheed points to prejudice resulting from the alleged delay; it asserts that, with the passage of time, it is no longer practicable for BAE to participate with it in these time-sensitive and ongoing technical efforts. Lockheed may well

[71] Am. Compl. ¶ 30.
[72] *U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930, 951 (Del Ch. 2004), *vacated on other grounds*, 875 A.2d 632 (Del. 2005) (TABLE).
[73] *Steele v. Ratledge*, 2002 WL 31260990, at *3 (Del. Ch. Sept. 20, 2002).
[74] BAE's Answering Br. at 17.
[75] *Id.* at 18.

be correct in this contention. The facts necessary to support such an argument, however, cannot be gleaned from the Amended Complaint.

III. CONCLUSION

Accordingly, for the foregoing reasons, Defendant Lockheed's motion to dismiss is granted as to Plaintiff BAE's claim for unjust enrichment; otherwise, it is denied.

An implementing order will be entered.