IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IVIZE OF MILWAUKEE, LLC, a Delaware limited liability company, Plaintiff, v. COMPEX LITIGATION SUPPORT, LLC, a Delaware limited liability company, and COMPEX LEGAL SERVICES, INC., a Delaware corporation, Defendants.	)	C.A. No. 3158-VCL

IVIZE OF KANSAS CITY, LLC, a Delaware limited liability company, Plaintiff, v. COMPEX LITIGATION SUPPORT, LLC, a Delaware limited liability company, and COMPEX LEGAL SERVICES, INC., a Delaware corporation, Defendants.	)	C.A. No. 3406-VCL

MEMORANDUM OPINION

Submitted: January 20, 2009
Decided: April 27, 2009

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LAMB, Vice Chancellor.

The purchaser of a litigation support company brings this action over an alleged breach of a representation in an asset purchase agreement to the effect that the company to be purchased operated only in the usual and ordinary course from April 1, 2007 until the closing date of the transaction. During that time period, the company's employees made plans to start a competing entity in violation of their noncompetition agreements, solicited the key salespeople (who represented the essence of the business), met to discuss the business of the competing entity during business hours on the company's premises, rerouted certain of the company's business to the competing entity, stole or destroyed customer records, and stole company equipment. Following trial, the court finds that the representation that the company being sold had been operating in the usual and ordinary course was clearly not true at the time it was made, and thus the sellers breached the asset purchase agreement. Nevertheless, because the purchaser failed to structure the transaction to secure the services of the key salespeople (and, thus, the goodwill) and failed to prove the amount of damages owed to it, the court will award only nominal damages. The asset purchase agreement, however, also includes a fee shifting provision and, because it prevailed on its breach of contract claim, the purchaser is entitled to attorneys' fees and costs.

I.

A. The Parties

These two actions, C.A. No. 3158-VCL (the "Milwaukee Action") and C.A. No. 3406-VCL (the "Kansas City Action"), were tried together on October 2 and 3, 2008.[1]

The plaintiff in the Milwaukee Action is Ivize of Milwaukee, LLC, a Delaware limited liability company with its principal place of business in Milwaukee, Wisconsin. The plaintiff in the Kansas City Action is Ivize of Kansas City, LLC, a Delaware limited liability company with its principal place of business in Kansas City, Missouri. Ivize Milwaukee and Ivize Kansas City are indirect subsidiaries of Ivize, LLC, a provider of litigation support services headquartered in Charlotte, North Carolina. Ivize, through its subsidiaries, operates approximately 30 service facilities in various locations across the country.

A defendant in both actions, Compex Legal Services, Inc., is a Delaware corporation with its principal place of business in Torrance, California. Compex Legal provides litigation support services to law firms and other customers around the United States.

[1] Following trial, post-trial briefing was submitted by the parties and post-trial argument was held on January 20, 2009.

Compex Litigation Support, LLC is also a defendant in both actions. Compex Support is a Delaware limited liability company with its principal place of business in Torrance, California. Compex Support is a wholly owned subsidiary of Compex Legal and provides litigation support services to law firms and other customers through its various locations around the United States, including, until July 26, 2007 (the "Closing Date"), locations in Milwaukee, Wisconsin and Kansas City, Missouri. Compex Support and Compex Legal are referred to collectively as Compex.

B. The Facts

1. Pre-Closing Negotiations

Sometime in early 2007, Compex decided to divest various branch office locations, including its facilities located at 735 North Water Street, Milwaukee, Wisconsin (the "Milwaukee Facility"), and 920 Main Street, Suite 115, Kansas City, Missouri and 8400 W. 110th Street, Overland Park, Kansas (collectively, the "Kansas City Facility"). In or around March of 2007, Compex provided Ivize with a cursory confidential selling memorandum. The three-page memorandum, one page of which was the cover page, listed: (1) revenue and EBITDA by quarter for the Milwaukee and Kansas City Facilities from the fourth quarter of 2003 until the fourth quarter of 2006; (2) receivables for both facilities as of November 30, 2006 and (3) certain lease commitments. The memorandum stated that supplies and

owned equipment had negligible value. Thereafter, Ivize and Compex began negotiating the potential sale of the Milwaukee and Kansas City Facilities to Ivize.

Over the prior two and a half years, Ivize had been an extremely active acquirer, making nearly 30 acquisitions of litigation support companies. Ivize's Chief Executive Officer, Joel Milne, testified that each of those transactions were done in the form of an asset purchase agreement. Milne also testified that Ivize used a "standard transition strategy" that had been very successful in transferring ownership and operations seamlessly between parties in the past. The transition strategy involved a company meeting after the closing where the new employees were welcomed into the Ivize fold, signed welcome packages, and returned to work as usual within about one hour. Milne advised Compex representatives of Ivize's desire to purchase the Milwaukee and Kansas City Facilities as ongoing businesses and that Ivize planned to offer employment, on similar or better terms, to substantially all of the Compex's employees at those locations.

By March 5, 2007, Jeffery Bachmann, Compex Support's then Chief Executive Officer, and Milne had signed a letter of intent, which outlined the terms of the proposed sale of the Milwaukee and Kansas City Facilities to Ivize. Thereafter, on or about April 9, 2007, Bachmann and Ivize's Chief Operating Officer, Malte Bernholz, shared the news of the potential acquisition with the manager of the Milwaukee Facility, Pete Cobb. During the following months, as

Ivize performed due diligence, Cobb served as Compex's primary point person at the Milwaukee Facility.

Unlike in Kansas City, where it had no operations, Ivize already owned a litigation support business in Milwaukee, managed by Jeffrey Crabb.[2] Milne advised Compex and Cobb that Crabb would be running the combined Milwaukee business after closing. Ivize planned to utilize Cobb only for a transition period after closing and to pay him 12 months worth of salary.[3]

Knowing that he would be out of a job in a matter of months, Cobb began quietly taking steps to create a business that would compete with Ivize Milwaukee. During the time leading up to the Closing Date, however, Ivize believed that everything was business as usual at Compex. Milne had no idea before the Closing Date that Compex Milwaukee's key employees were planning to leave.

Testimony at trial showed that Crabb talked to Cobb about Ivize's offer to pay him 12 months' salary in exchange for Cobb's agreement to stay at Ivize through the transition period. Cobb never said anything that caused either Crabb or Milne to believe he was rejecting Ivize's offer. But, Ivize failed to elicit any

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[2] Ivize acquired Action Legal of Milwaukee in early January of 2006 and Milwaukee Legal Copies later in the same month. In both deals, no employees left in the transition.

[3] Milne testified that Bachmann communicated to him early in the negotiation process that he wanted Cobb taken care of because Cobb had been with Compex for a long time. Milne and Bachmann agreed that Ivize and Compex would each pay half of the 12 months of Cobb's salary. Nitin Mehta, Compex Legal's Chairman of the Board, testified that Bachmann and presumably Milne knew that Ivize would have a difficult time retaining Cobb for the transition.

convincing trial testimony that Cobb actually accepted the verbal offer communicated to him by Crabb. Furthermore, Ivize plainly failed to get Cobb to sign any agreement to stay with Ivize for the transition period. By contrast, Ivize was able to get the manager at the Kansas City Facility to sign a written employment agreement before the Closing Date.

Shortly after learning about the potential transaction, Cobb told a number of Compex employees who, as far as Ivize was aware, were all supposed to be kept in the dark until after the transaction was completed.[4] Cobb asked Rebecca Gordon (Compex's leading salesperson), Scott Steinbauer (Compex's second leading salesperson), and others to join him at the business he was creating called Quantum L.S. LLC.[5] Together, Gordon and Steinbauer accounted for roughly 90% of Compex's sales. Gordon accounted for approximately 60% to 65% of Compex's sales and Steinbauer accounted for approximately 25% to 30%. Cobb, Gordon, and Steinbauer met multiple times at the Milwaukee Facility, during business hours, to discuss matters related to Quantum. Ivize representatives were unaware

[4] Milne testified at trial that he believed, up until the Closing Date, that none of the non-manager employees at the Milwaukee or Kansas City Facilities knew about the proposed transaction and that none of them were supposed to know about the transaction until after the Closing Date. Milne further testified that this type of secrecy was typical behavior by target companies in his experience.

[5] Gordon testified at trial that she agreed to go with Cobb in April of 2007, shortly after he conveyed his plan to her. Cobb told Gordon that Crabb would not keep her on board long term, that Crabb never worked with women, and that Crabb hated her. Gordon testified that she believed the comments made by Cobb.

of these discussions and were not allowed to talk to Gordon or Steinbauer about the impending purchase agreement because Compex did not want to frighten its key salespeople. Testimony at trial suggested that Mehta (Compex Legal's Chairman of the Board) and Bachmann did not have any knowledge of Cobb's actions before the Closing Date.

Gordon and Crabb had been fierce competitors for nearly ten years. At trial, the parties sharply disagreed about whether Ivize could have realistically expected Gordon to work for Crabb. Milne convincingly testified that while Crabb was a difficult competitor, he was a great team member. Milne noted that Ivize had successfully overcome similar issues with competitors of Crabb's when Ivize bought Milwaukee Legal Copies in January of 2006. Milne also testified that Ivize was prepared to offer Gordon a significant increase in her then current salary and that he brought an employment agreement to the Milwaukee Facility the day after the closing, confident that Gordon would sign it.[6] In reply to a July 27, 2007 e-mail from Bernholz, Gordon declined Ivize's initial employment offer, writing: "[My decision] has nothing to do with money. It has everything to do with who runs your Milwaukee office. We have had serious issues in the past that I am uncomfortable with."[7] At trial, Gordon explained that while her unpleasant

[6] Ivize's proposed employment offer to Gordon included bonuses amounting to nearly twice her annual salary over the two years following the acquisition.
[7] JX 65.

experiences with Crabb were part of the reason for turning down Ivize's initial offer, Ivize's employment offer was appealing and she would have been willing to negotiate with Ivize if Quantum had not been in the picture. Gordon also testified that she did not feel like she could accept Ivize's initial offer because she had already committed to Cobb. At the time of trial, Gordon had accepted employment with Ivize. Both Crabb and Gordon testified that they now have a very good working relationship

Ivize also expected to retain Steinbauer. At trial, Compex argued that Milne stated that he was not impressed with Steinbauer and thus was not likely to hire him. Milne testified, however, that the statement was taken completely out of context.[8] In fact, Ivize representatives met with Steinbauer the day after the closing and presented him with a proposed employment agreement.

2. The Asset Purchase Agreements

On June 13, 2007, Ivize and Compex signed an agreement to extend the deadline for closing by 45 days. On the Closing Date (July 26, 2007), around 5 p.m., Ivize and Compex executed two separate asset purchase agreements relating to the Milwaukee Facility and the Kansas City Facility. Apart from the

[8] Before the time period at issue, Milne interviewed Steinbauer and had asked Steinbauer if his employment agreement with Compex contained a noncompetition clause. Steinbauer said he did not know and later reported back that his employment agreement did contain a noncompetition clause. Milne said he was unimpressed with Steinbauer's lack of knowledge about his employment agreement, but meant nothing about Steinbauer as a salesperson and still planned to hire him the day after the closing.

location of the facility, the two agreements (collectively, the "Asset Purchase Agreements") are virtually identical. Pursuant to the terms of those agreements, Compex sold all of the "assets and properties of every kind, nature and description used in the operation of the [facilities] except as otherwise provided" to Ivize for a purchase price of $1,650,000 for each facility.[9] Milne testified that Ivize arrived at the purchase price based on a fixed multiple of earnings before interest, taxes, depreciation, and amortization ("EBITDA") and that goodwill was the essence of the business Ivize agreed to purchase.[10] The selling memorandum prepared by Compex focused on the historical EBITDA of the Milwaukee and Kansas City Facilities.

> The Asset Purchase Agreements defined the purchased assets as including:
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> (a) all fixed assets and other tangible personal property owned by [Compex Support] and used at the Facility . . .; (b) all inventories and supplies of the Facility; (c) originals or duplicate copies of all of the Facility's material financial, accounting and operating data and records . . .; (d) all accounts receivable of [Compex Support] generated at the Facility and outstanding on the Closing Date . . .; (e) all of the Facility's telephone and fax numbers; (f) all Intellectual Property . . .; (g) all rights under all contracts . . . relating to the

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[9] Asset Purchase Agreements §§ 1.1, 1.4.

[10] Milne testified that "[t]he desks and chairs and paper clips don't get you anything. So the relationships with employees, the relationships with customers, relationships with vendors, that's in essence, their name, their reputation. Those are the things we're buying. We're not buying the tangible assets." Tr. 39. Crabb testified to the same effect, stating: "I didn't need the office supplies or the desks or any of the used computers or anything of that . . . . We were after the sales and the relationships that go along with those. I have been in the market for 20 years, and if I could have gotten those relationships on my own, I would have." Tr. at 243.

> Facility; and (h) all goodwill associated with the Facility, the Business conducted at the Facility or the Purchased Assets.[11]

Approximately $2.9 million of the approximately $3.4 million in total assets was allocated to goodwill on the estimated closing balance sheet. Fixed assets accounted for only $75,900. If Compex Support received any payment on the accounts included as part of the purchased assets after the Closing Date, the Asset Purchase Agreements required Compex Support to immediately turn such payments over to Ivize.

Under Article 2 of the Asset Purchase Agreements, Compex made various representations and warranties, including that "since April 1, 2007 [Compex Support] has operated only in the usual and ordinary course," and that there existed "no . . . event or condition which individually, or together with any other events or conditions, has had or is likely to have a material adverse effect on the Business of the Facility."[12] Expressly relying on the representations and warranties, Ivize agreed to:

> pay when due, perform and discharge the following liabilities (the "Assumed Liabilities"): the obligations of [Compex Support] for future performance under the contracts and lease[/s] listed on Schedule 1.3, but not obligations under such contracts that should have been paid, performed or otherwise discharged on or prior to the

[11] Asset Purchase Agreements § 1.1.
[12] *Id.* § 2.5.

> date hereof, or to the extent the same arise out of any breach or default by [Compex Support] prior to the date hereof.[13]

Under the Asset Purchase Agreements, Compex agreed to execute and deliver documents to Ivize and take other actions Ivize may reasonably request to transfer the purchased assets and to put Ivize "in operational control of the Business."[14]

Finally, the Asset Purchase Agreements provide that the prevailing party is entitled to its reasonable attorneys' fees and costs associated with litigation arising from the agreements. Pursuant to the Asset Purchase Agreements, the court conducting the litigation will make determinations as to the reasonableness of attorneys' fees and which party (if any) is the prevailing party.

3. Post-Closing Actions In Milwaukee

A few minutes after 9 a.m. on the day after the closing, Milne and other Ivize representatives arrived at the Milwaukee Facility for the first scheduled meeting, a private meeting with Gordon to tell her about the transaction and offer her employment. Ivize had a meeting with Steinbauer scheduled for 10 a.m., and a general meeting to inform the balance of the employees at a welcome party scheduled for 11 a.m. To Milne's dismay, he found the Milwaukee Facility largely abandoned. Cobb, who Milne believed had already accepted Ivize's offer, Gordon, and Steinbauer were not present. Only a few disgruntled employees were at the

[13] *Id*. at § 1.3.
[14] *Id.* at § 1.8.

facility and no work was being done. Crabb testified that the Milwaukee Facility looked like it had been ransacked and that certain equipment, Steinbauer's laptop, the hard drives from the computers in the production area, employee files, customer history files, and job tickets had been removed.

Milne immediately called Bachmann, who told Milne that he had no idea what was going on, but assured Milne that he would find out. Later that day, and in the days that followed, Ivize learned of Cobb's plan to start a competing company called Quantum and take key Compex employees, including Gordon and Steinbauer, with him. The former Compex employees had taken customer records and tangible property with them. Steinbauer had even rerouted payment for at least one large printing job, performed by Compex, to Quantum more than two weeks before the Closing Date.[15] Steinbauer's brother Chad formed Quantum as a Nevada limited liability company on May 8, 2007. Chad Steinbauer and Cobb signed a prearranged deal shortly after the Closing Date, pursuant to which each would receive a 50% ownership interest in Quantum. The former Compex employees were completely ready to begin operation at Quantum on August 1, 2007, less than one week after the Closing Date.[16]

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[15] The order was from Kohl's Department Stores (a client which accounted for a substantial percentage of Steinbauer's sales) and Steinbauer rerouted payment to Quantum on July 11, 2007. The payment of the rerouted Kohl's job was about $35,000 and was eventually turned over to Ivize.

[16] The office lease and equipment leases for Quantum were negotiated and signed weeks, if not months, before the Closing Date.

Ivize also learned that prior to the completion of the transaction, which took place at 5 p.m. on the Closing Date, Compex's human resources department had delivered letters to its employees terminating their employment and failing to explain the transition envisioned by Ivize. In Kansas City, the Compex manager assured the employees that the letter was just a technicality and that they would be fine. In Milwaukee, the Compex employees who were not going to Quantum with Cobb thought they had lost their jobs. In the afternoon after the Closing Date, at the prompting of Ivize, Compex drafted and distributed a letter to all its former employees in Milwaukee encouraging them to consider future employment with Ivize. Ivize also attempted to meet with and convince the key employees to return.

Unsuccessful in its attempts to rehire the lost employees, on August 10, 2007, Ivize filed this lawsuit against Compex making claims of fraud, negligent or innocent misrepresentation, breach of contract, indemnification, and mutual mistake.

4. The Quantum Litigation

Compex urged Ivize to put this lawsuit aside and join forces with it against the real problem makers–Cobb and the former Compex employees. On August, 29, 2007, Compex filed a verified complaint against Quantum, Cobb, Gordon, Steinbauer, and John Does 1-10 in Milwaukee County Circuit Court (the "Quantum Litigation"), alleging, *inter alia*, theft, tortious interference with

contract and prospective business relations, breach of contract, violation of various state and federal statutes, and conspiracy to injure business.[17] Ivize's counsel assisted Compex in the Quantum Litigation. On September 5, 2007, the Milwaukee court imposed a temporary restraining order against Quantum.

During the Quantum Litigation, Compex settled the claims against Gordon in exchange for her consent to execute an employment agreement with Ivize. Gordon executed an employment agreement with Ivize on September 10, 2007 and was officially dismissed from the Quantum Litigation on September 14, 2007.

On October 12, 2007, Compex agreed to settle the Quantum Litigation against the remaining defendants–Quantum, Cobb, and Steinbauer–in exchange for their agreement to not solicit former Compex customers until after November 30, 2007 and to pay $75,000 of Compex's attorneys' fees.[18] Also as part of the settlement agreement, Quantum agreed to use its best efforts to return to Ivize the physical assets removed from the Milwaukee Facility.

Gordon's return helped rebuild Ivize's revenues attributable to former Compex customers from virtually 0% to approximately 50% to 55% of historic

[17] *Compex Litig. Support, LLC v. Quantum, L.S. et. al.*, Case No. 07-CV-010141 (Milwaukee County Circuit Court 2007). Compex, not Ivize, filed the Quantum Litigation because the alleged bad acts were made while Cobb, Gordon, and Steinbauer were Compex employees.
[18] Compex refused to give any of the $75,000 to Ivize to help defray the considerable fees and expenses Ivize's lawyers had run up helping Compex in the Quantum Litigation.

levels.[19] Gordon cited the fact that certain Quantum employees, including her former assistant at Compex, Derrick Black, knew her customers and knew how she did business, as one of the reasons that her revenue numbers had not fully returned to their previous levels.

Crabb testified that, outside of the arrival of Quantum, there had been no significant changes in the Milwaukee legal market that would have prevented Ivize from generating the same revenues from former Compex customers after the transaction as Compex generated from those same customers before the transaction. Both Milne and Gordon testified as to the confusion among former Compex customers created by Gordon's movement from Compex to Quantum to Ivize. Ivize chose not to offer employment to Steinbauer because he redirected payments due to Compex to Quantum and stole computer equipment. At the time of trial, Quantum was Ivize's primary competitor in the Milwaukee area.

5. Accounts Receivable

After the Closing Date, Compex continued to collect and retain certain accounts receivable generated by the Milwaukee and Kansas City Facilities. On October 17, 2007, Bernholtz sent an e-mail to Compex personnel requesting that customer checks on open accounts receivable for the Milwaukee and Kansas City

[19] Ivize's expenses were also about 50% of Compex's historical levels at the Milwaukee Facility because the biggest expense in the litigation support business is labor and a number of former Compex employees stayed with Cobb at Quantum.

Facilities be forwarded to Ivize in compliance with the Asset Purchase Agreements. After numerous other requests, on November 12, 2007, Ivize's attorney sent a formal letter to Compex's attorney demanding that Compex cease collecting accounts receivable belonging to Ivize and demanding the payment of the accounts receivable owed to Ivize. Compex refused to comply, forcing Ivize to seek court intervention.

On February 5, 2008, this court ordered Compex to place the funds from the disputed accounts receivable into an escrow account. In the Kansas City Action, on May 19, 2008, this court granted summary judgment in favor of Ivize as to the disputed accounts receivable generated from the Kansas City Facility and ordered those funds released to Ivize.[20] After trial, Compex voluntarily released the remainder the escrowed funds. Ivize now seeks its attorneys' fees in connection with enforcing its right to the funds placed in escrow.

6. Ivize's Claims Against Compex

Prior to trial, Ivize withdrew its claims against Compex for fraud, negligent or innocent misrepresentation, mutual mistake, and conversion, as well as its request for recision of the Asset Purchase Agreement regarding the Milwaukee Facility. The only substantive claim that Ivize is pursuing against Compex is for

[20] The court left the issue of attorneys' fees related to the Kansas City Action for determination in this case.

breach of contract with respect to the Milwaukee Facility. Ivize is also seeking attorneys' fees and costs.

7. Compex's Counterclaims

In the form of setoff claims, Compex alleges that Ivize breached Section 1.3 of the Asset Purchase Agreements by failing to assume various liabilities, including: (1) the Milwaukee office lease; (2) equipment leases at the Milwaukee and Kansas City Facilities; (3) vehicle leases; and (4) health insurance coverage.

Because of the number of employees who left for Quantum, Ivize no longer needed the extra office space at the Milwaukee Facility and Ivize never utilized the space. Mehta told Milne that he would handle attempting to sublet the Milwaukee Facility or negotiating with the landlord because Compex had a relationship with the landlord. Compex, however, never hired a broker or advertised the facility. The landlord made an offer of approximately $168,000 to terminate the lease. Compex refused the offer and did not communicate the offer with Ivize. The landlord then sued Compex, a judge entered default judgment against Compex, the default judgment was overturned, and Ivize was added as a third party in that still pending case. In this case, Compex seeks approximately $332,000, representing the full amount owed on the lease.

The equipment specified in the Asset Purchase Agreements was covered by master leases which extended beyond Compex's Milwaukee and Kansas City

Facilities. The lessors would not agree to segregate the equipment into separate leases that could then be assumed by Ivize. Compex asked Ivize to pay its pro rata share of the leases. Ivize agreed to pay the amount owed if Compex would send the bills from the lessors or proof that Compex paid the lessor. Compex did not send Ivize adequate back-up information. Instead, Compex repeatedly sent Excel spreadsheets that simply listed the amounts Compex claimed Ivize owed with no supporting documentation.

In late June 2008, Compex entered into settlement agreements with two of the lessors–Dell Financial Services and Churchill[21]– for undisclosed amounts that compromised the amounts owed and transferred ownership of the equipment to Compex. In its setoff claim, Compex requests that Ivize continue to pay the full amount previously owed under the Dell and Churchill lease agreements.

On June 25, 2008, Compex reached an agreement with Canon whereby Canon allowed Ivize to assume its portion of the Canon lease effective in December 2007. Compex settled with Canon for the period prior to December 2007. At the time of trial, Ivize had not assumed its portion of the Canon lease. Ivize continually requested back-up documentation regarding the equipment leases, the amounts owed, and the amount of the settlements. Compex stonewalled those requests until about a week before trial when it provided Ivize with a collection of

[21] The Churchill lease was subsequently bought out by National City Commercial Capital.

approximately 400 pages of redacted information.[22] Crabb testified that he had to rent an extra 1,000 square feet to house the copying equipment from the transaction with Compex. The equipment has been idle since the transaction because the additional business and additional employees brought over to Ivize in the Compex transaction was significantly less than expected.

Compex also seeks reimbursement for vehicle lease payments totaling $3,729 it made on Ivize's behalf and health insurance it paid for employees that went to work for Ivize.[23]

II.

A. Contract Principles

To establish a claim for a breach of contract under Delaware law, a plaintiff must prove: (1) the existence of a valid and enforceable contract; (2) that the defendants breached the contract; and (3) that the plaintiff was damaged as a result of those breaches.[24] Delaware courts adhere to the objective theory of contract interpretation. In determining the parties' shared intent, the court will look "to the

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[22] The information redacted includes the amounts for which Compex settled the equipment leases with the lessors.

[23] The parties have stipulated that Ivize will not be responsible for the insurance provided to Black, Cobb, Daniel Murphy, Nick Shock, Steinbauer, or any other former Compex employee who did not go to work for Ivize after the Closing Date.

[24] *See, e.g., Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *2 (Del. Ch. Dec. 7, 2007); *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003); *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *7 (Del. Ch. Nov. 2, 1995).

most objective indicia of that intent: the words found in the written instrument."[25] Where the words of the contract are unambiguous, "the court ascribes to the words their 'common or ordinary meaning,' and interprets them as would an 'objectively reasonable third-party observer.'"[26]

The parties do not dispute the existence of valid and enforceable contracts: the Asset Purchase Agreements. Therefore, the issues before the court involve questions of breach and damages.

B. Breach Of The "Usual And Ordinary Course" Representation

Ivize claims that Compex breached Section 2.5 of the Milwaukee Asset Purchase Agreement. In the pertinent part of that provision, Compex represented that "[s]ince April 1, 2007 [Compex Support][27] has operated only in the usual and ordinary course."[28] Black's Law Dictionary defines "usual" as "1. Ordinary;

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[25] *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) (citations omitted).
[26] *Id.*; *see also Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) ("If no ambiguity is present, the Court must give effect to the clear language of [the contract.]).
[27] The Milwaukee Facility was held by Compex Support.
[28] Compex makes the strained argument that the court should limit the obligations of Compex under Section 2.5 with "best efforts" language. In support of its argument, Compex points to the June 13, 2007 agreement between the parties which extended the time available to execute the Asset Purchase Agreements. First, and dispositive in the analysis, the June 13 agreement is of no import in analyzing the unambiguous language of Section 2.5–part of an agreement containing an integration clause (Section 6.7) that does not even reference the June 13 agreement. Second, the June 13 agreement itself does not limit Compex's obligations under the representations and warranties. The June 13 agreement clearly states that "[t]he only condition to the obligation of Ivize to cause its subsidiaries to enter into and perform the APAs is that the representations of Compex in each of the APAs *shall be true at and as of the Closing Date*." JX 103 (emphasis added). Compex focuses on the language in the same agreement that says the parties will use their "best efforts to cause all of the representations and warranties contained in the APAs to be true and correct at and as of the Closing Date." This limited "best efforts"

customary. 2. Expected based on previous experience,"[29] defines "ordinary" as "occurring in the regular course of events; normal; usual,"[30] and defines "course of business" as "[t]he normal routine in managing a trade of business–Also termed *ordinary course of business*."[31]

The court finds that a company (such as Compex) whose division manager and/or other employees were (1) making plans to start a competing entity in violation of their noncompetition agreements, (2) soliciting the company's key salespeople (who represent the essence of the business), (3) meeting to discuss the business of the competing entity during business hours on company premises, (4) rerouting certain company business to the competing entity, (5) stealing or destroying customer records, and (6) stealing company equipment is certainly not a company operating in the usual and ordinary course, within the plain meaning of those words. The normal and ordinary routine of conducting business does not include destroying business assets and planning to transfer the essence of the business to a competitor. The evidence at trial established that Cobb, Steinbauer, and other employees were engaged in those types of acts between April 1, 2007

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language is plainly only intended to protect either party from efforts by the other party to avoid closing the deal by failing to take the necessary steps during the extension period to ensure that the representations and warranties would be true as of the eventual Closing Date. It does not limit the clear language of the representations and warranties themselves.

[29] BLACK'S LAW DICTIONARY 1579 (8th ed. 2004).

[30] *Id.* at 1132.

[31] *Id.* at 378 (emphasis in the original).

and the Closing Date. Accordingly, the representation in Section 2.5 was not true at the time it was made, resulting in a breach of the Milwaukee Asset Purchase Agreement.

1. Should The Court Imply A "Knowledge Qualifier"?

At trial, Mehta did not seriously challenge the assertion that Cobb's, Steinbauer's, and other employees' actions between April 1, 2007 and the Closing Date caused Compex to operate outside the usual and ordinary course of business.[32] Instead, Mehta said that he was under the impression that he could only make representations as to what he knew.[33] His impression is wrong. As a default, a representation must be true at the time it is made to avoid a breach, regardless of who knew whether the representation was true or not.[34] "Knowledge qualifiers" *may* be used to limit representations and, in fact, the Asset Purchase Agreements

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[32] At trial, Mehta admitted that the stealing and destruction of customer records that took place at the Milwaukee Facility were not things that occur in the ordinary course of business. Furthermore, Mehta testified that Steinbauer's transfer of the Kohl's invoices to Quantum was not an action taken in the ordinary course of business and that it was not correct for Cobb to solicit Compex employees' before the Closing Date.

[33] Mehta's faulty reasoning was that Compex could only represent what it knew, and Compex (meaning Mehta and Bachmann) did not know about Cobb's actions, therefore Compex could not have breached the representation. Even if the parties had agreed to knowledge-qualify the representation, which they did not, and had defined "knowledge," it is likely Ivize would have insisted on including Cobb within the defined knowledge group at Compex, because Cobb was the due diligence point person and the individual involved in the transaction with the most knowledge of the day-to-day operations at the Milwaukee Facility.

[34] JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS § 7.3.2, at 247 (Law Journal Press 1975) [hereinafter "Freund"] ("It is obvious that a seller *would prefer* every one of his representations to be qualified 'to the best of his knowledge.' . . . [If a representation was untrue] [w]ithout the knowledge caveat, he would be stuck.") (emphasis added).

contain "knowledge qualifiers" in multiple places.[35] The representations in Section 2.5 are not so limited, and the court will not add to them language that could have been negotiated for but was not.

2. Should The Court Import A "Knowledge Qualifier" From Section 2.12 To Section 2.5?

Compex also argues that the court should ignore the plain language of Section 2.5 of the Milwaukee Asset Purchase Agreement and import the "knowledge qualifier" from Section 2.12 into the earlier provision. The one case Compex cites for support, *DCV Holdings, Inc. v. ConAgra, Inc.*,[36] is easily distinguishable. In *DCV Holdings*, the Delaware Supreme Court affirmed the Superior Court's finding that the specific section regarding antitrust representations (which contained a "knowledge qualifier") controlled in a conflict with the general indemnification provision (which did not contain a "knowledge qualifier").[37] In *DCV Holdings*, the indemnification provision governed all company liabilities, thus creating a conflict with the antitrust provision that required knowledge for the imposition of liability resulting from antitrust violations.[38] The Delaware Supreme

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[35] *See, e.g.*, Asset Purchase Agreements § 2.12, 2.17; *see generally* 2 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 11:02 (2001) [hereinafter "Kling & Nugent"]; Freund § 7.3.2, at 247-48.

[36] 889 A.2d 954 (Del. 2005).

[37] *Id.* at 962.

[38] *Id.* at 960-62. Because there is no conflict between the sections and no knowledge requirement in Section 2.5, the court need not address the question of whether Cobb's knowledge as a "managing partner," with no ownership interest, should be imputed to Compex. Even if the court were to accept Compex's argument about implying a "knowledge qualifier" in

Court noted that well settled rules of contract construction require that, in a conflict between provisions, the more specific language should control.[39]

Here, there is no conflict. Section 2.12 (which contains a "knowledge qualifier") deals with the purchasing plans of Compex's customers and Section 2.5 (which does not contain a "knowledge qualifier") deals with the operation of Compex's business.[40] Here, neither section is structured to govern the other. Thus, the court will examine only the words actually written in each of the sections. Compex was capable of negotiating to include a "knowledge qualifier" in Section 2.5 but did not.

C. Damages Resulting From The Breach Of The "Usual And Ordinary Course" Representation

The question of damages is more complex than the question of breach in this case. The proper measure of damages for breach of contract "is an amount sufficient to restore the injured party to the position it would have been in had the

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Section 2.5 (which it does not), it is possible Cobb would be included in the definition of knowledge, which would lead to the same result reached herein. Knowledge is not defined in the Asset Purchase Agreements, leaving the determination of that definition to the court. *See* Kling & Nugent at § 11:02 ("While it might be possible to argue that knowledge of a 'company' would not include that of low level employees, and that only the knowledge of officers should be attributed to the corporate entity, this is by no means clear absent express language to this effect."). To avoid confusion, practitioners should clearly define which individuals' or groups of individuals' knowledge is included in the purchase agreement's definition of knowledge.

[39] *Id.* at 961 (citing *Katell v. Morgan Stanley Group, Inc.*, 1993 WL 205033, at *4 (Del. Ch. June 8, 1993); *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del.1992); *Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. Super. 1960)).

[40] Section 2.12 provides that "[t]o the *knowledge* of [Compex], all material customers intend to continue purchasing, without significant reductions, products or services from the Facility." (emphasis added).

breach not occurred."[41] The proponent must prove its damages by a preponderance of the evidence, and, while absolute precision is not required, mere speculation is not sufficient.[42] Delaware law requires that damages be based on the reasonable expectations of the parties *ex ante*.[43] Therefore, the question here is what Ivize could have reasonably expected to receive pursuant to the terms of the Asset Purchase Agreements at the time the agreements were signed. As discussed below, Ivize only bargained for the physical assets of Compex and a *fair chance* at retaining the employees of Compex (who were the "essence" of the business)–not a contractual right to sign the employees to employment and/or noncompetition agreements.

1. Ivize Argues For Damages Based On The Value Of Lost Goodwill

The plaintiffs' damages expert, Peter Resnick of Huron Consulting Group, was the only expert to testify at trial and opined that Ivize was damaged in the range of $815,000 to $821,000. Resnick's analysis presented a plaintiff-friendly, but reasonable, estimate of the damages in this case *if* Ivize had a contractual right to all of Compex's goodwill, which was inextricably tied up with its sales

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[41] *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 29, 2005) (citations and quotations omitted).
[42] *Id.*
[43] *See, e.g., Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a position as he would have been in had the contract been performed.").

representatives. As discussed below, the Milwaukee Asset Purchase Agreement as written did not entitle Ivize to noncompetition or employment contracts with Cobb, Gordon, Steinbauer, or any of the other employees with whom Compex's goodwill was tied up. Therefore, Resnick's analysis is built on a false premise. At bottom, Resnick's analysis values the goodwill associated primarily with Steinbauer, Black, and the other employees who stayed at Quantum. Ivize failed, however, to negotiate for contractual entitlement to employment or noncompetition agreements with *any* of Compex's Milwaukee employees.

2. Ivize Fails To Structure The Transaction To Secure Compex's Goodwill

The parties could have separated the signing and the closing of the Milwaukee Asset Purchase Agreement and Ivize could have negotiated for making the execution of employment and noncompetition agreements with the main salespeople a condition to closing.[44] Between signing and closing, Compex would probably have been more comfortable allowing Ivize to talk to its employees because Ivize could no longer simply walk away from the deal. In this hypothetical scenario, Ivize would have substantially increased its contractual rights relating to the goodwill for which it thought it was paying. If the key employees did not sign, Ivize would not have to close. If the employees did sign,

[44] Freund § 8.3.2, at 301.

and quit quickly thereafter, Ivize could pursue the former Compex customers without added competition, due to the executed noncompetition agreements.

Ivize also failed to secure an agreement with Cobb. None of Ivize's witnesses clearly and convincingly testified that Cobb verbally agreed to work for Ivize during the transition period. Additionally, Ivize failed to get Cobb to sign a written employment and/or noncompetition agreement, as it did with the manager of the Kansas City Facility.

The way the deal was structured, it was entirely possible that none of the Compex employees would sign on with Ivize. Cobb would have been well within his rights to start Quantum immediately after the Closing Date and could have persuaded Gordon and Steinbauer to join him. Had that happened, Ivize would have received virtually none of the goodwill it expected, yet there would have been no breach.

3. Ivize Fails To Prove Amount Of Damages

Ivize merely negotiated for the chance to present Compex employees with an employment offer, without interference by Cobb from April 1, 2007 until the Closing date.[45]

[45] As discussed above, Section 2.5 protected Ivize from actions taken outside of the usual and ordinary course of business.

So what is the value of a *fair chance* to present the employees with an employment offer? As stated above, Compex was clearly not operating in the ordinary course–among other things, its own manager in Milwaukee was undermining the very essence of its business. Because of the "usual and ordinary course" representation, Ivize had a right to present Gordon, Steinbauer, and the other Compex employees with an employment offer before or at least contemporaneously with Cobb. If Cobb had not been given the opportunity to work toward the establishment of Quantum before the Closing Date, the court finds it unlikely that Gordon and Steinbauer would have turned down the favorable employment offers of Ivize and instead chosen to wait, unemployed, while Quantum prepared for business. But it is possible. Gordon clearly had some negative feelings toward Crabb and all the Compex employees may have felt some loyalty towards their manager, Cobb.

While Compex clearly breached the Milwaukee Asset Purchase Agreement, Ivize should not be rewarded with the same damages it would have been entitled to had it structured the agreement properly. Gordon signed an employment agreement with Ivize, which she was not obligated to do by the terms of the Asset Purchase Agreement, and brought with her approximately 55% of the business Ivize thought it was buying. The other 45% of the business apparently went to

Quantum along with Cobb, Steinbauer, Black, and others. Ivize was entitled to a fair opportunity to control that business, but the business was never guaranteed.

It seems likely that Ivize did suffer some damages reflecting the difference in value between what limited opportunity it received and the clean shot at hiring it negotiated for. Yet, Ivize did not analyze its damages this way at trial. Instead, Ivize's expert simply made plaintiff-friendly calculations of the value of the 45% of the Compex Milwaukee business that Ivize failed to retain. Those calculations do not reflect Ivize's actual damages and must be put aside. Ivize also suffered some minimal damage from Compex's delay in returning to Ivize the purchased physical assets, but Ivize did not attempt to quantify those damages at all.

4. Nominal Damages To Be Awarded To Ivize For Compex's Breach

Ivize certainly incurred some damages due to Compex's breach, but Ivize failed to prove the amount of its damages with the required certainty due to the flaw in its methodology. Given the evidence present in the record, the court is not in a position to determine the value of Ivize's loss in a principled way. Even if compensatory damages cannot be or have not been demonstrated, the breach of a contractual obligation often warrants an award of nominal damages.[46] Nominal damages are "not given as an equivalent for the wrong, but rather merely in recognition of a technical injury and by way of declaring the rights of the plaintiff.

[46] *Palmer v. Moffat*, 2004 WL 397051, at *4 (Del. Super. Feb. 27, 2004).

Nominal damages are usually assessed in a trivial amount, selected simply for the purpose of declaring an infraction of the Plaintiff's rights and the commission of a wrong."[47] Thus, the court holds that Ivize is entitled to nominal damages in the amount of one dollar.[48]

III.

A. Compex's Counterclaims

Compex alleges that Ivize breached Section 1.3 of the Asset Purchase Agreements by failing to take on various "assumed liabilities." By and large, Ivize does not dispute that it should assume the liabilities, but rather argues that it should pay some lesser amount due to Compex's failure to mitigate after it agreed to do so.[49]

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[47] *Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005).

[48] *See LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) ("[W]here the amount of damages may not be estimated with reasonable certainty despite a showing of breach by the [proponent] the Court may still award nominal damages."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 346 (1981) ("There are also instances in which loss is caused but recovery for that loss is precluded because it cannot be proved with reasonable certainty. . . . In all these instances the injured party will nevertheless get judgment for nominal damages, a small sum usually fixed by judicial practice in the jurisdiction in which the action is brought. Such a judgment may, in the discretion of the court, carry with it an award of court costs."); 24 WILLISTON ON CONTRACTS § 64:6 (4th ed.) ("It is axiomatic that when there is a breach of a valid and binding contract, if actual damages cannot be proved with reasonable certainty, the law infers some damages. The party whose legal right has been invaded by such breach is entitled to at least nominal damages, for the law recognizes that every injury imports damage.") (citations and quotations omitted).

[49] Also, Ivize did not initially assume certain liabilities in light of the recision claim that was only dropped shortly before trial.

B. Duty To Mitigate[50]

The trial testimony, primarily from Milne and Mehta, showed that Compex expressly agreed to attempt to mitigate damages associated with the Milwaukee office lease and certain equipment leases. Compex cannot recover damages that it could have easily avoided.[51] Compex failed to reasonably mitigate its damages associated with the Milwaukee office lease and failed to pass on to Ivize the benefits of the mitigation related to the equipment leases.

C. Assumed Liabilities

1. Milwaukee Office Lease

As part of the Milwaukee Asset Purchase Agreement, Ivize agreed to assume the lease for the office space located at 735 North Water Street, Milwaukee, Wisconsin. Because of Compex's breach, Ivize no longer had use for the

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[50] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *4 n.25 (Del. Ch. Feb. 23, 2009) ("Although often described as a 'duty to mitigate,' the injured party is under no obligation to do so, although it will not be awarded damages for any loss that could be avoided.").

[51] *See, e.g.*,*West Willow-Bay Court*, 2009 WL 458779, at *4 ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts."); *NorKei Ventures, LLC v. Butler-Gordon, Inc.*, 2008 WL 4152775, at *2 (Del. Super. Aug. 28, 2008) ("Under contract law, a party has a general duty to mitigate damages if it is feasible to do so.") (citations and quotations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) ("(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss."); 24 WILLISTON ON CONTRACTS § 64:27 (4th ed.) ("[T]he plaintiff simply cannot recover those damages that it could have avoided. Damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, burden, or humiliation will be considered either as not having been caused by the defendant's wrong or as not being chargeable against the defendant.").

additional office space. The trial testimony showed that Compex agreed to attempt to negotiate with the landlord to terminate the lease or sublet the space because Compex had a relationship with the landlord. Mehta testified the landlord said he would try to find someone to lease the space, but that the landlord mentioned there was an excess of space in the market. Compex did not retain a broker, advertise the property, or show the property to any prospective subtenants. On October 10, 2007, counsel for the landlord offered to terminate the lease for unamortized buildout costs plus attorneys' fees (estimated to be $168,000). Compex did not notify Ivize of this proposal by the landlord. Compex now seeks over $322,000 from Ivize, representing the full amount owed to the landlord under the lease.

The court holds that Ivize owes Compex $168,000 for the office lease. Mehta's testimony suggests that it may have been difficult or impossible to sublet the space. Thus the $168,000 offer represents the approximate amount for which Compex could have settled the office lease liability that Ivize agreed to assume.

2. Equipment Leases

As part of the assumed liabilities in both the Milwaukee and Kansas City Asset Purchase Agreements, Ivize agreed to assume certain equipment leases. Master equipment leases covered equipment at Milwaukee, Kansas City, and other Compex locations. After the Closing Date, the lessors of many of the leases refused to divide the leases into the equipment being assumed by Ivize and the

equipment Compex would retain. Compex told Ivize that it would negotiate with the lessors and did not allow Ivize to negotiate with the lessors itself.

Compex thereafter failed to pay the rent owed on the equipment leases for a few months to gain negotiating leverage with the lessors. It then was able to settle, at a discount, the remaining amounts due on the equipment. Compex paid the lessors less than the full amount owed under the leases, but is attempting to pass on the full amount to Ivize.[52] This effort is inequitable and unfair and will not be sanctioned by the court. Instead, the court holds that Ivize is liable to Compex only for a prorated portion of the settlement amount. In order to collect that amount, Compex must provide Ivize with reliable evidence showing the amount paid and justifying the allocation of that amount to equipment Ivize agreed to assume under the Asset Purchase Agreements. Ivize must also pay the prorated amount of the reasonable costs associated with negotiating the settlement of the equipment leases. Again, Compex must provide reliable evidence showing its reasonable and actual costs and the basis for allocating a portion of that cost to Ivize. As to the Canon lease, which the lessor agreed to separate, Ivize must assume its portion of that lease and pay its pro rata share of the amount past due.

[52] Mehta testified that Compex settled with the lessor for about 50% to 60% of the amount owed on at least one of the equipment leases at issue.

3. Vehicle Leases

Ivize does not appear to contest the $3,729 related to the vehicle leases. The court orders Ivize to assume these leases and pay the amounts owed as set forth in the Asset Purchase Agreements.

4. Health Insurance

Compex stipulated at trial that it would not ask Ivize to pay for health benefits for people who did not go to work for Ivize. Ivize should, however, as agreed to in the Asset Purchase Agreements, reimburse Compex for the healthcare costs Compex incurred after the Closing Date that relate to the employees who joined Ivize.

IV.

Pursuant to Sections 5.1 and 5.2 of the Asset Purchase Agreements, Compex and Ivize each agree to indemnify the other for "all claims, liabilities, obligations, costs, damages, losses and expenses (including reasonable attorneys' fees) of any nature (collectively, "Losses") arising out of or relating to . . . any breach or violation of the representations, warranties, covenants or agreements of [Compex] set forth in the Agreement."

Additionally, Section 6.5 of the Asset Purchase Agreements provides that:

> In the event of any litigation among the parties arising out of the this Agreement, each Prevailing Party (if any) shall be entitled to reasonable attorneys' fees and costs associated with such litigation

> from its opposing party. A party shall be deemed to be a "Prevailing Party" if it has generally prevailed in the causes of action and defenses asserted by it. The determinations of which parties, if any, are Prevailing Parties in any litigation, and the reasonable fees and costs in connection with such litigation, shall be made by the court in which such litigation was conducted.

Delaware "generally follows the American Rule under which each party is obligated to pay its own attorneys' fees regardless of the outcome; however, where the parties have determined the allocation of fees by private ordering, departure from this general rule and deference to their agreement are warranted."[53] Unless otherwise stated in the contract, "a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner. This Court has typically looked to the substance of a litigation to determine which party predominated."[54]

The crux of the litigation was Ivize's breach of contract claim. As discussed previously, the court finds that Compex clearly and materially breached the Milwaukee Asset Purchase Agreement. While Ivize did not prove its damages with the required certainty, it did proved Compex's breach. Delaware law is clear that in the usual case, and absent contractual language to the contrary, whether a party has prevailed is determined by looking at the outcome of the substantive

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[53] *West Willow-Bay Court*, 2009 WL 458779, at *9.
[54] *Id*.

issues, not damages.[55] Here, Ivize succeeded on the major substantive issues in the Kansas City and Milwaukee Actions.[56] Additionally, under Section 5.1 of the Asset Purchase Agreements, Compex must indemnify Ivize for reasonable attorneys' fees and costs Ivize incurred assisting in the Quantum Litigation, as those expenditures arose from Compex's breach. Therefore, the court will order Compex to pay Ivize's reasonable attorneys' fees and costs relating to the Kansas City Action, the Milwaukee Action, and the Quantum Litigation.

V.

For the foregoing reasons, the court awards the plaintiffs nominal damages of one dollar and attorneys' fees and costs associated the defendants' breach of the Asset Purchase Agreements. The court orders the plaintiffs to pay the defendants for the assumed liabilities as set forth above. Counsel for the plaintiffs shall submit a form of final judgment consistent with this opinion within ten days from the date hereof.

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[55] *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2-3 (Del. Ch. Apr. 27, 2004); *West Willow-Bay Court*, 2009 WL 458779, at *9.

[56] The court's findings regarding the assumed liabilities generally favored Ivize, as the court generally accepted Ivize's mitigation arguments related to both actions. Moreover, the court previously found that Compex wrongfully withheld accounts receivable in the Kansas City Action. Compex voluntarily released accounts receivable it was holding related to the Milwaukee Action.