IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AMERISTAR CASINOS, INC. and AMERISTAR EAST CHICAGO HOLDINGS, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 3685-VCS
RESORTS INTERNATIONAL HOLDINGS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 19, 2010
Date Decided: May 11, 2010

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STRINE, Vice Chancellor.

I. Introduction

This case arises out of Resorts International Holdings, LLC's ("Resorts") agreement to sell Resorts East Chicago, a casino-hotel (the "Casino") located in East Chicago, Indiana, to Ameristar Casinos, Inc. ("Ameristar"). The dispute centers around a property tax assessment (the "Assessment") that occurred between the time the purchase agreement for the Casino was executed and the time the deal closed. That Assessment increased the Casino's assessed value by 248% over the prior year's value. Allegedly, Resorts did not disclose the magnitude of the Assessment before the deal closed, but rather made a selective disclosure that (1) it had received an Assessment; and (2) it intended to appeal that Assessment.

In its original complaint, Ameristar alleged that the 248% increase in the Casino's assessed value was a Material Adverse Effect under the terms of the purchase agreement. But, Ameristar dropped that allegation in its amended complaint after the property tax appeal, which Ameristar continued to prosecute after it acquired the Casino from Resorts, successfully reduced most of the increase in the Casino's property tax liability. Still, Ameristar argues that Resorts' failure to properly notify Ameristar of the magnitude of the Assessment was fraudulent and a breach of Resorts' representations under the purchase agreement. And therefore Ameristar seeks damages, specific performance, and indemnification in order to recoup the alleged losses it sustained from Resorts' misrepresentations, and the costs of prosecuting the appeal of the Assessment.

Of the various claims included in Ameristar's amended complaint, only the counts for breach of contract, fraud, and indemnification survive this decision on Resorts' motion to dismiss under Court of Chancery Rules 9(b) and 12(b)(6). Ameristar's breach of contract claim survives because it has pled facts adequate to support a reasonable inference that Resorts breached its representation that no extraordinary taxes had been incurred since December 31, 2006. Ameristar's fraud claim survives because it has pled facts indicating that Resorts made a false representation of material fact when it failed to indicate in its closing certificate that its prior representation that no extraordinary taxes had been incurred was no longer true. That failure constituted an affirmative statement that the prior representation remained true. And, Ameristar's claim for indemnification survives because it has adequately pled a willful breach of contract, which can negate application of the threshold the purchase agreement places on the damages Ameristar can recover.

But, Ameristar's equitable fraud claim must be dismissed because Resorts did not owe fiduciary duties to Ameristar, and because Ameristar has not made a credible request for an equitable remedy. And, Ameristar's request that this court specifically enforce a provision of the purchase agreement that requires a party, who has requested the other party's cooperation in a proceeding such as the property tax appeal, reimburse that other party for the costs of that participation must be dismissed because Ameristar's complaint indicates that Resorts never affirmatively requested that Ameristar participate in the appeal. Finally,

Ameristar's unjust enrichment and quantum meruit claims are dismissed because such claims cannot lie when the subject of those claims is addressed by the parties' written contract.

II. Factual Background

These facts are drawn from the complaint and the documents it incorporates.

A. Ameristar Agrees To Acquire One Of Resorts' Casinos

Ameristar is a public company with its principal place of business in Las Vegas, Nevada.[1] It develops, owns, and operates casinos and related hotel, food, and entertainment properties in the United States.[2] Resorts is a limited liability company formed under the laws of Delaware and is also active in the casino gaming industry.[3] Approximately three years ago, the parties entered into negotiations for Ameristar to purchase the Casino, located outside Chicago, Illinois, just across the state line in Indiana.

B. The Purchase Agreement

On April 3, 2007, Ameristar and Resorts executed a purchase agreement (the "Purchase Agreement") whereby Ameristar purchased Resorts' membership interest in the limited liability company that owned and operated the Casino for $675 million. The relevant provisions of the Purchase Agreement are discussed below.

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[1] Compl. ¶ 8.
[2] *Id*.
[3] *Id*. ¶ 10.

1. Representations And Warranties

In the Purchase Agreement, Resorts made a number of representations and warranties relating to the Casino's liability to pay property taxes on the improvements to the land leased from the City of East Chicago.[4] Those provisions were necessary because commercial property taxes in Indiana are paid the year after those property taxes are assessed.[5] For example, property taxes for 2006 are paid in 2007. Therefore, property taxes assessed during Resorts' ownership of the Casino would come due after Ameristar acquired the Casino.

First, Resorts undertook to provide Ameristar with an audited financial statement for the year ended December 31, 2006.[6] In Section 2.4 of the Purchase Agreement, Resorts represented and warranted that the financial statements "[were] prepared in accordance with GAAP applied on a consistent basis . . . and fairly represented in all material respects . . . the consolidated financial positions of" the Casino.[7] The financial statements that Resorts delivered in compliance with this undertaking reflected a property tax accrual for the year 2006 approximately 6% higher than the actual amount paid in 2005.[8] That 6% increase was actually an estimate because there had been a delay in receiving the Assessment for 2006, and the amount of the 2006 increase was as yet unknown

[4] The Purchase Agreement provided generally that the representations, warranties, and covenants would survive the closing. Schiltz Aff. Ex. A § 7.1 (Purchase Agreement (Apr. 3, 2007)) (the "Purchase Agreement").
[5] *See* Compl. ¶¶ 2-3; *Ameristar Casinos Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 23 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT).
[6] Purchase Agreement § 2.4.
[7] *Id*.
[8] Compl. ¶ 13.

when Resorts closed its 2006 books in April of 2007.[9] When the agreement was being negotiated, Resorts explained that the 6% estimated accrual was based on Resorts' expectation of a normal inflationary increase in the property tax.[10]

Second, Resorts gave representations and warranties in the Purchase Agreement about the adequacy of the reserves it had taken for taxes. Specifically, Section 2.6(b) of the Purchase Agreement states that:

> [Resorts] has adequately reserved in the Financial Information according to GAAP for all material Taxes payable by, or in respect of, [Resorts] that have accrued through the date thereof but that were not then due and payable, except for Taxes that are both (i) being contested in good faith and (ii) disclosed in reasonable detail in Section 2.6(b) of the Seller Disclosure Letter.[11]

Resorts made a further representation in Section 2.6(b) about taxes incurred in later periods: "No tax has been incurred by [the Casino] since the date of the Financial Information [i.e., December 31, 2006] other than in the Ordinary Course of Business thereof, in amounts consistent with amounts incurred in prior periods."[12]

2. Covenants

The Purchase Agreement also contains several affirmative covenants that are relevant to this action. First, the parties mutually agreed in Section 4.2 of the

[9] *See id.*; *Ameristar Casinos Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 48 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT).
[10] Compl. ¶ 13.
[11] Purchase Agreement § 2.6(b).
[12] *Id.*

agreement to notify one another promptly of any fact that would render any representation or warranty materially untrue:

> [Resorts] shall promptly notify [Ameristar], and [Ameristar] shall promptly notify [Resorts] in writing of, and will use commercially reasonable efforts to cure before the Closing Date, any event, transaction or circumstance, as soon as practical after it becomes known to such party, that causes or will cause any covenant or agreement of [Resorts] or of [Ameristar] under the Agreement to be breached in any material respect or that renders or will render untrue in any material respect any representation or warranty of [Resorts] or [Ameristar] contained in this agreement.[13]

In other words, Section 4.2 required Resorts to notify Ameristar of a *material* breach of a representation, such as the representations found in Section 2.6(b). Based on the facts supplied by Ameristar, it is reasonable to infer that failure to notify Ameristar of the 248% increase in the Casino's assessed value, which allegedly would have amounted to an annual property tax liability of $18 million for an asset only producing $30 million a year in net income,[14] meets Section 4.2's materiality requirement.

Second, the parties agreed in Section 4.12 to notify one another of any circumstance that would reasonably be expected to result in a failure of a closing condition:

> From the date of this Agreement until the Closing, each party hereto shall promptly notify all of the other parties here in writing regarding any . . . fact circumstance, event or action which will result in, or would reasonably be expected to result in, the failure of such party to

[13] *Id*. at § 4.2.
[14] *See* Compl. ¶ 35; *Ameristar Casinos Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 59 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT).

> timely satisfy any of the closing conditions specified in Article V hereof of this Agreement, as applicable.[15]

And, third, the parties mutually agreed to cooperate with respect to the Casino's tax obligations:

> [Resorts and Ameristar] shall reasonably cooperate . . . as and to the extent *reasonably requested* by the other party . . . with respect to any audit, litigation, ruling request or other proceeding or dispute with respect to Taxes relating to [the Casino] (provided that the reasonable out-of-pocket costs incurred by the non-requesting party shall be reimbursed by the requesting party).[16]

Therefore, each party's duty to cooperate with the other in respect to a tax proceeding was triggered when one party affirmatively requested the cooperation of the other party.

3. Closing Conditions

The Purchase Agreement did not obligate Ameristar to close the deal unless Resorts certified at the time of the closing that: (1) all of Resorts' representations and warranties remained materially true; and (2) Resorts had complied in all material respects with all of its obligations under the Purchase Agreement. To wit, Section 5.2 of the Purchase Agreement provided as follows:

> The obligation of [Ameristar] to effect the Closing is subject to the satisfaction of each of the following conditions on or prior to the Closing date . . . .
>
> (a) Representations and Warranties. The representations and warranties of [Resorts] contained in this Agreement shall be true and correct (without giving effect to any limitation as to "materiality" or "Material Adverse Effect" set forth therein) at and as of the Closing

[15] Purchase Agreement § 4.12.
[16] *Id*. at § 4.18 (emphasis added).

> as if made at and as of such time . . . except where the failure of such representations and warranties to be true and correct would not, individually or in the aggregate, result in a Material Adverse Effect. . . . [Ameristar] shall have received a certificate signed on behalf of [Resorts] by an executive officer of [Resorts] to such effect.[17]

The Purchase Agreement defines "Material Adverse Effect" as, in relevant part, "changes, events or effects that are materially adverse to the business, condition (financial or otherwise), properties, assets or results of operations of [the Casino], taken as a whole . . . ."[18] Under the plaintiff-friendly Rule 12(b)(6)standard, it seems required for me to infer that the property tax liability arising from a 248% increase in the Casino's assessed value would have been a Material Adverse Effect under the terms of the Purchase Agreement.[19] As mentioned before, if the Casino's property tax liability had increased in line with the increase in its assessed value, the Casino's annual property tax bill would have risen to $18 million annually.[20]

As mentioned above, Section 4.12 required Resorts to notify Ameristar if an event occurred which would result in — or would reasonably be expected to result in — a failure of the Section 5.2 closing condition. Therefore, both Sections 4.2 and 4.12 ultimately had similar effects: Section 4.2 required Resorts to notify Ameristar if an event occurred that would render a representation materially

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[17] *Id.* at § 5.2.
[18] *Id.* at § 9.1(a).
[19] *See also Ameristar Casinos Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 48 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT) (Resorts' counsel conceding that "if [the tax appeal had not succeeded] that might, in fact, have been a Material Adverse Effect").
[20] *See supra* page 6.

untrue; and Section 4.12 required Resorts to notify Ameristar if an event would reasonably lead to a material failure of a closing condition, such as the requirement that Resorts' representations and warranties remained true.

4. Indemnification And Remedies

Finally, the parties agreed to a plan of post-closing indemnification for breaches of the Purchase Agreement. Resorts agreed that, after the closing, it would indemnify Ameristar as follows:

> [F]rom and against any and all costs, losses, Liabilities, obligations, damages, claims, demands and expenses (whether or not arising out of third-party claims), including interest, penalties, reasonable attorneys' fees and all amounts paid in investigation, defense or settlement of any of the foregoing (herein, "Damages"), incurred in connection with, arising out of or resulting from:
>
> (i) any breach of any representation or warranty made by [Resorts] in this Agreement, or in any certificate, instrument or agreement provided for in this Agreement, in either case without regard to any reference to materiality or Material Adverse Effect; and
>
> (ii) any breach of any covenant or agreement made, or to be performed by [Resorts] in this Agreement or in any certificate, instrument or agreement provided for in this Agreement.[21]

The parties agreed that indemnity claims would be subject to an aggregate threshold amount of $6.75 million and a cap amount of $50.625 million,[22] and that the indemnity provisions would constitute the exclusive remedy for most breaches, subject to the following relevant exceptions:

> Except as specifically set forth in Section[] 4.18 . . . after the Closing, the indemnities provided in this Article VII shall constitute

[21] Purchase Agreement § 7.2(a).
[22] *Id*. at § 7.6(a).

> the sole and exclusive remedy of any Indemnified Party for Damages arising out of, resulting from or incurred in connection with any claims regarding matters arising under or otherwise relating to this Agreement; *provided, however*, that this exclusive remedy for Damages does not preclude a party from bringing an action for specific performance or other equitable remedy to require a party to perform its obligations under this Agreement . . . . Notwithstanding anything to the contrary in this Section 7.8, in the event of a fraud or any willful breach of the representations, warranties, covenants or agreements contained herein by [Ameristar] or [Resorts], any Indemnified shall have all remedies available at law or in equity with respect thereto.[23]

In short, the indemnity regime, including its threshold and cap, is not the exclusive contractual remedy as to: (1) claims regarding the tax cooperation covenant in Section 4.18; (2) actions for specific performance or other equitable remedies; or (3) actions involving fraud or willful breach of representations, warranties or covenants.

C. After The Purchase Agreement Was Executed, But Before The Deal Was Closed, Resorts Received Notice Of A Dramatic Increase In The Casino's Assessed Property Value

On July 16, 2007, over three months after the parties had signed the Purchase Agreement but before the closing, Resorts received notice from the Lake County, Indiana, North Township Assessor (the "Assessor") stating that the assessed value of the Casino's improvements for 2006 would be $367,132,300 — a 248% increase over the $105,377,900 assessed value for the year 2005.[24] Despite the fact that this huge increase in the assessed value of the Casino would, if not overturned in the tax regulatory process, invariably lead to a higher property

[23] *Id*. at § 7.8(a).
[24] Compl. ¶ 16.

tax bill for the owner of the Casino, Resorts did not correspondingly increase the 2006 tax accrual in its July 2007 monthly financial statements delivered to Ameristar before the closing, and also did not disclose the increased assessed value in any other format to Ameristar before the closing. That is, neither Resorts' seller disclosure letter nor its closing certificate mentioned the Assessment.[25] Instead, the complaint alleges that, sometime after July 16, 2007, an unidentified representative of Resorts made a selective disclosure to Ameristar, indicating only that the Assessment had been received, and that Resorts intended to make a written request for a preliminary conference with the Assessor in order to begin an appeal of the Assessment.[26] Resorts did not provide Ameristar with a copy of the Assessment, and therefore did not disclose the magnitude of the increase.[27] For its part, Ameristar, upon receiving notification that the Assessment was received and that Resorts intended to appeal the Assessment, did not inquire further as to the amount of the increase.[28]

D. After The Deal Closes, Ameristar Discovers The Magnitude Of The Assessment Increase

The transactions contemplated by the Purchase Agreement closed on September 18, 2007.[29] A day later, Resorts' outside tax consultants, rather than

[25] *Id.* ¶¶ 15-17.
[26] *Id.* ¶ 17.
[27] *Id.*
[28] *Id.*
[29] *Id.* ¶ 2.

Resorts itself, revealed the magnitude of the Assessment to Ameristar.[30] Ameristar asserts that this revelation took it entirely by surprise.[31] After learning of the increase, Ameristar unilaterally chose to continue the appeal of the Assessment that Resorts had initiated.[32] There is no indication in the complaint that Resorts made any request that Ameristar pursue the property tax appeal.[33]

On January 7, 2008, Ameristar sent Resorts an indemnity claim under the process outlined in Article VII of the Purchase Agreement.[34] The claim demanded the full amount of indemnity up to the cap and specifically asserted claims of fraud, equitable fraud, and willful breach of contract. On April 10, 2008, when efforts to resolve the dispute out of court failed, Ameristar filed its original complaint in this court, which sought specific performance, damages, and indemnification based on theories of fraud, equitable fraud, and breach of contract by Resorts under the Purchase Agreement.

After that complaint was filed, the property tax appeal was resolved through a settlement between the Casino, the Assessor, and the Lake County Treasurer. The settlement was limited to the years 2006 and 2007, years in which Resorts, as the owner of the Casino, was primarily responsible for the payment of property taxes.[35] The settlement decreased the property tax liability from 248% to

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[30] *Id.* ¶ 20.
[31] *Id.*
[32] *Id.* ¶ 34.
[33] *Id.* ¶¶ 6, 34.
[34] *Id.* ¶ 31.
[35] *Id.* ¶ 35.

26%.[36] In particular, the appeal decreased the property tax liability for the 2006 tax year by $11,509,302.30 and the property tax liability for the 2007 tax year by $16,239,057.42.[37] Prosecuting that appeal cost Ameristar $3,869,796.92 in legal fees and consultant costs.[38] Although the tax settlement materially reduced the amount of property taxes Resorts was required to pay for the period before closing, Resorts refused to reimburse Ameristar for the fees and costs it sought.[39]

In light of Resorts' refusal to compensate Ameristar for prosecuting the appeal, Ameristar filed its amended complaint on August 12, 2009. The amended complaint continues to seek declaratory relief and rescissory relief as to the transaction on theories of fraud (Count I), equitable fraud (Count II), willful breach of contract (Count III), and contractual indemnity (Count IV). The amended complaint also adds a count for reimbursement of Ameristar's costs in prosecuting the tax appeal — that is, for enforcement of Section 4.18 of the Purchase Agreement (Count V).[40] And the amended complaint adds claims for restitutionary relief under principles of unjust enrichment (Count VI) and quantum meruit (Count VII).[41]

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[36] *See Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 4-5 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT) (Resorts' counsel indicating that half of the tax increase could be attributed to the property's increased assessed value).
[37] *Id*. ¶ 38
[38] *Id*.
[39] *Id*. ¶ 39.
[40] The amended complaint includes two counts titled "Count IV." Ameristar's specific enforcement claim is the second count in the complaint numbered "Count IV." I therefore refer to this count as Count V. *See* Compl. at 26-27.
[41] In the amended complaint these counts are incorrectly numbered "Count V" and "Count VI" respectively. *See id*. at 27-28.

Notably, because the property tax appeal resulted in a large reduction to the Casino's property tax liability, the amended complaint eliminates the claim in the original complaint that the Assessment resulted in a Material Adverse Effect. Nevertheless, Ameristar continues to allege that the Assessment was an event that, at the time it occurred, was reasonably likely to have a Material Adverse Effect. That is, Ameristar still alleges, as discussed below, that Resorts' failure to disclose the magnitude of the increased Assessment breached both the representations and warranties and the covenants it made in the Purchase Agreement.

Resorts has moved to dismiss those claims under Court of Chancery Rule 12(b)(6). The issues raised in Resorts' motion are addressed in detail below.

III. Legal Analysis

A. Standard of Review

A motion to dismiss under Rule 12(b)(6) will be denied "unless it can be determined with reasonable certainty that the plaintiff could not prevail on any set of facts reasonably inferable" from the pleadings.[42] Accordingly, the Court must accept as true all well-pled facts and afford plaintiffs "the benefit of all reasonable inferences."[43] Nevertheless, a complaint "must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief" sought.[44]

[42] *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).
[43] *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006).
[44] *DeSimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).

B. A Number Of Ameristar's Claims Must Be Dismissed Under Rule 12(b)(6)

As outlined above, Ameristar's amended complaint alleges a number of inter-related claims against Resorts. At oral argument, it became clear that the common assertion underlying most of Ameristar's claims is that Resorts breached its representations in Section 2.6(b) of the Purchase Agreement. Obviously, that alleged breach is central to Ameristar's breach of contract claim (Count III). But Ameristar also argues that Resorts' alleged misrepresentations under Section 2.6(b) form the basis for its fraud and equitable fraud claims (Counts I and II). And, because willful breach of the representations and warranties in the Purchase Agreement negates application of the limitation of damages under Section 7.6, Section 2.6(b) is also central to Ameristar's indemnity claim (Count IV). Therefore, I first determine whether Ameristar has adequately stated its claim that Resorts breached its representations in Section 2.6(b).

1. Ameristar Has Stated A Claim That Resorts Breached The Representations It Made In Section 2.6(b) Of The Purchase Agreement

Ameristar's complaint alleges that Resorts breached its representations in Section 2.6(b) by not revising its accrual for the 2006 taxes after receiving the Assessment. Ameristar also claims that Resorts breached Sections 4.2 and 4.12 by not notifying Ameristar that its representations in Section 2.6(b) were no longer true, and that the breach of Section 2.6(b) caused the closing conditions set forth in Section 5.2 to fail. Therefore, the predicate issue to all of Ameristar's breach of contract claims is whether Resorts' decision to not revise its accrual for the 2006

taxes rendered the representations Resorts made in Section 2.6(b) untrue. If the integrity of those representations in Section 2.6(b) are still intact, then the relevant covenants and closing conditions are not triggered.

Section 2.6(b) includes two important representations, which are italicized in the full text of the provision below:

> [Resorts and the Casino] have timely paid all Taxes that have become due and payable, and *have adequately reserved in the Financial Information according to GAAP for all material Taxes payable by, or in respect of, [Resorts and the Casino] that have accrued through the date thereof but that were not then due and payable*, except for Taxes that are both (i) being contested in good faith and (ii) disclosed in reasonable detail in Section 2.6(b) of the Seller Disclosure Letter. *No Tax has been incurred by [Resorts or the Casino] since the date of the Financial Information other than in the Ordinary Course of Business thereof, in amounts consistent with amounts incurred in prior periods*. Other than Transfer Taxes described in Section 4.9, the transactions contemplated hereby will not result in a Tax Liability to [Resorts or the Casino].[45]

That is, in Section 2.6(b), Resorts first represented that it had properly followed GAAP when reserving for taxes in the "Financial Information." Section 2.4 of the Purchase Agreement defines "Financial Information" as follows:

> On or prior to April 12, 2007, Seller shall deliver to Buyer, a true and complete copy of the Casino's audited consolidated balance sheet as of December 31, 2006 and consolidated income and cash flow statements for the twelve (12) months ended December 31, 2006 (collectively, the "Financial Information"). . . . The Financial Information was prepared in accordance with GAAP applied on a consistent basis throughout the periods involved . . . and fairly represented in all material respects . . . the consolidated financial position of the [Casino] as of such date.[46]

[45] Purchase Agreement § 2.6(b) (emphasis added).
[46] *Id*. at § 2.4.

And, Resorts' second representation in Section 2.6(b) is that the Casino has incurred no taxes since December 31, 2006 other than in the ordinary course and consistent with past experience.

Thus, the two representations Resorts made in Section 2.6(b) work in tandem: the first representation covers reserves taken for 2006 taxes known by the time the Casino's audited 2006 financial statements were closed, and the second representation covers any extraordinary taxes that were "incurred" after the Casino's books for the twelve-month period ending December 31, 2006 were closed. This arrangement appears to be in part a protection for Ameristar from any surprises created by a system where the Casino's property taxes were payable in arrears, and where the Casino might receive an unexpected property tax bill or assessment after its 2006 books were finalized but before the deal's closing.

In regard to the first representation in Section 2.6(b), Ameristar's complaint has not stated a claim because it has presented no facts supporting an inference that the representation meant anything other than that the historical Financial Information was accurate. The definition of Financial Information in Section 2.4 is clear: the consolidated financials, which were prepared according to GAAP, covered the twelve months ending on December 31, 2006. Section 2.6(b) is also clear: Resorts represented that all taxes payable by the Casino had been adequately reserved in the Financial Information according to GAAP *at the time the Casino's books were closed*. In April 2007, when the audited financials were prepared, the extraordinarily high Assessment had not yet been received. Therefore, Resorts

could not have anticipated it, which is why it reserved for an estimated 6% increase in the Casino's property tax liability.[47]

To overcome Section 2.6(b)'s plain language, Ameristar must argue that GAAP required Resorts to take action regarding the reserve taken in the Financial Information — for example, to take a catch-up reserve, and to notify Ameristar of the new reserve — when it received the Assessment in July 2007. But, Ameristar's complaint does not make that allegation, and is devoid of any particular facts regarding GAAP's requirements in this regard. Detail on GAAP's requirements is also entirely absent from Ameristar's answering brief. And, given the opportunity at oral argument to explain why GAAP required Resorts to take action, Ameristar could not reference any applicable accounting rules.[48] Without any basis to infer that the Financial Information was tainted by GAAP violations, I cannot conclude that Ameristar has stated a claim that Resorts breached its representation in the first sentence of Section 2.6(b).

But, Ameristar has adequately alleged that Resorts breached its representation in the last sentence of Section 2.6(b) that no extraordinary taxes had been incurred since December 31, 2006. Resorts' first argument in this regard is that Ameristar did not plead that the property tax based on the Assessment was "incurred" before the deal closed in September 2007. But, Resorts does not develop this argument beyond asserting that Ameristar's complaint did not allege

[47] *See supra* page 4.
[48] *Ameristar Casinos Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 77 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT).

"the tax based on the [Assessment] had been billed or otherwise 'incurred,' or even that the amount of that tax or the applicable tax rate had been determined by the responsible taxing authorities."[49] The meaning of "incur" in this context is not readily apparent. For example, different editions of Black's Law Dictionary define the verb "to incur" as "[t]o suffer or bring on oneself (a liability or expense),"[50] and "[t]o become liable or subject to."[51] Given the size of the Assessment, at the pleading stage, I must infer that a large increase in the Casino's property tax liability was imminent unless the assessment was reversed, even if the exact amount of the increase was unknown at the time. I am also not prepared to assume on a motion to dismiss that it was common practice in East Chicago, Indiana for the local authorities to issue high initial property assessments and then turn around and settle appeals of those assessments at a drastically reduced amount. Therefore, it is reasonable to conclude that receiving the Assessment, which tripled the Casino's assessed value, was that point in time where the Casino "suffered" or "became subject to" the increased property tax liability, especially when that Assessment, if not reversed through an appeal, would establish the property tax for the year 2006 due in 2007. Of course, additional information might reveal that the Casino did not "incur" the property tax liability until some later time when the property tax bill became more concrete. But Resorts has not

[49] Def.'s Reply Br. 11.
[50] BLACK'S LAW DICTIONARY 341 (2d Pocket ed. 2001).
[51] BLACK'S LAW DICTIONARY 691 (5th ed. 1979).

focused serious attention on this issue, and under Rule 12(b)(6), I must draw reasonable inferences in Ameristar's favor.

Resorts' second argument in this regard is that Ameristar has failed to state a claim because the increased Assessment of the Casino's value may not have necessarily led to a corresponding increase in property tax liability. In Resorts' view, it is "patently erroneous" that an increase in the value of the property necessarily leads to an increase in property tax liability. For support, Resorts cites the following language from an Indiana Supreme Court opinion:

> In broad brush, the amount of property taxes owed for each individual property is set by allocating the total amount of property taxes to be raised in a taxing district among all pieces of property in proportion to their assessed valuations. . . . If all assessed valuations go up or down by the same percentage as the result of a reassessment, even if there is a large change in the dollar amount of the assessed valuation on each property, there is no change in the tax burden or any individual property. In simplified terms, if the assessed valuation of every property doubles, it would have no effect on the tax bills of any of them. *If, however, some assessed valuations go up or down more than others, as is always the case in the real world, some taxes go up and some go down*.[52]

Because it is hypothetically possible that an increased valuation may not lead to an increased property tax liability (if, for example, the values of all the properties in the tax district increased in lock-step), Resorts argues that Section 2.6(b) of the Purchase Agreement was not breached because it was not yet absolutely certain that the Assessment would increase the Casino's tax exposure.

[52] *State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240, 1244 (Ind. 2005) (emphasis added).

It may be true, as a matter of deductive logic abstracted from the real world, that a 248% increase in a property's value need not lead to an increase in the property's tax liability. But, this court must decide real world cases under certain procedural guidelines. Those guidelines include the requirement that all reasonable inferences be drawn in the plaintiff's favor on a motion to dismiss. Given that standard, the plausible inference I must make is that such a large increase in a property's assessed value would likely, if sustained, lead to a correspondingly large hike in its property tax liability. That is especially the case for a casino property, whose property taxes likely provide one of the largest revenue streams for the local government. In other words, the local tax authority is unlikely to let an increased assessment for the Casino go by without taking the opportunity to levy higher taxes. Indeed, the Indiana Supreme Court language Resorts cites in its brief concedes that increased assessments lead to increased property tax liabilities: because "some assessed valuations go up or down more than others, *as is always the case in the real world*, some taxes go up and some go down."[53] Resorts' own behavior reflects that reality: it initiated an appeal of the increased Assessment,[54] illustrating that it too presumed that the Assessment would lead to a greater property tax burden. Furthermore, Resorts' counsel conceded at oral argument that half of the actual 26% increase in the Casino's property tax liability could be directly attributed to the ultimate increase in the

[53] *Id*.
[54] *See supra* page 11.

Casino's assessed property value that resulted from the conclusion of the appeal process.[55] Therefore, it is reasonable to infer in accordance with the Rule 12(b)(6) standard that such a causal connection between the Casino's property valuation and its property tax liability exists.

Thus, Ameristar has adequately stated a claim in Count III that Resorts breached its obligations under the Purchase Agreement.

2. Ameristar Has Stated A Claim For Fraud But Not For Equitable Fraud

Under Delaware common law, the elements of fraud are as follows: "(1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance."[56] For a claim of equitable fraud, however, "there is no requirement that the defendant have known or believed its statement to be false or to have made the statement in reckless disregard of the truth."[57] Thus, to state a case for equitable fraud, a plaintiff must satisfy all the elements of common-law fraud with the exception that the plaintiff need not demonstrate that the misstatement or omission

[55] *See Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, C.A. No. 3685-VCS, at 4-5 (Del. Ch. Feb. 19, 2010) (TRANSCRIPT) (Resorts' counsel indicating that half of the tax increase could be attributed to the property's increased assessed value).
[56] *Zirn v. VLI Corp.*, 681 A.2d 1050, 1060-61 (Del. 1996) (citations omitted).
[57] *Id*. at 1061 (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).

was made knowingly or recklessly.[58] Court of Chancery Rule 9(b) requires that the plaintiff claiming fraud allege with particularity "the time, place, and contents of the false representation, the identity of the person(s) making the representation, and what he intended to obtain thereby. Essentially, to satisfy that requirement, the plaintiff must allege circumstances sufficient to fairly apprise the defendant of the basis for the claim."[59]

a. Ameristar Has Adequately Pled A Fraud Claim Against Resorts

Under Delaware law, a fraud claim can be based on representations found in a contract or on material statements or omissions outside of the contract.[60] Here, Ameristar has alleged that the representations Resorts made in the Purchase Agreement were false. In particular, Ameristar has alleged that Resorts' representation in Section 2.6(b) of the Purchase Agreement — that it had incurred no taxes since its 2006 books closed — was incorrect, and that the closing certificate Resorts delivered to Ameristar as required under Section 5.2 of the Purchase Agreement did not indicate that the representations Resorts had made regarding taxes were no longer true.[61]

Resorts raises a couple of arguments in response, both of which must be rejected. First, Resorts argues that it did not have the necessary scienter to commit

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[58] *Id.*
[59] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (citations omitted).
[60] *Phoenix Equity Group LLC v. BPG Justison P2 LLC*, 2010 WL 1223619, at *1 (Del. Ch. Mar. 25, 2010); *see also Abry*, 891 A.2d at 1050-51.
[61] Compl. ¶ 46.

fraud because, at the time the Assessment was received up until the transaction closed, it was uncertain whether the Assessment would lead to a greater property tax liability because the appeal process had not yet run its course.[62] But, as discussed above, it is reasonable to infer from the facts Ameristar has pled that: (1) a massive increase in the assessed value of the Casino would lead to a corresponding increase in its property tax liability; (2) Resorts, a sophisticated operator well-familiar with property tax regimes due to its holdings throughout the country,[63] understood that the Assessment would lead to an increased property tax liability; and (3) Resorts did not disclose the full truth about the Assessment for fear that Ameristar would not proceed with closing the deal if it was told about the magnitude of the increase in the Casino's assessed value.[64] Therefore, the complaint has adequately pled facts upon which one can infer that Resorts had the requisite intent to commit fraud.

Second, Resorts argues that Ameristar could not justifiably rely upon Resorts' representations because Ameristar could have discovered the true magnitude of the Assessment by simply asking Resorts about it. Resorts argues that the disclosure that it made to Ameristar put Ameristar on inquiry notice, and therefore Ameristar can have no claim upon Resorts for fraud because it chose to ignore the obvious. Further development of the record may unearth the details of

[62] This is the same argument that Resorts made in the context of Section 2.6(b). *See supra* pages 20-22.
[63] *See supra* page 3.
[64] Compl. ¶ 29.

what Resorts communicated and what Ameristar learned from that communication, but at this stage in the proceeding, when I am constrained to make factual inferences in Ameristar's favor, I cannot conclude that Ameristar was put on adequate inquiry notice of a disturbingly large increase in the Casino's assessed value and, therefore, could not justifiably rely upon Resorts' representations. Ameristar's complaint indicates that Ameristar believed that Resorts' disclosure that it was meeting with the Assessor was immaterial because requesting a meeting with the Assessor was a routine measure taken in order to preserve the right to contest an assessment.[65]

b. Ameristar Has Not Stated An Equitable Fraud Claim Against Resorts

Although Ameristar has adequately pled a common law fraud claim against Resorts, it has not stated an equitable claim. "[E]quitable fraud can only be applied in those cases in which one of the two fundamental sources of equity jurisdiction exist: (1) an equitable right founded upon a special relationship over which equity takes jurisdiction, or (2) where equity affords its special remedies, *e.g.*, 'rescission, or cancellation; where it is sought to reform a contract . . . or to have a constructive trust decreed.'"[66] Here, there is no allegation that Resorts owed Ameristar any fiduciary duties, or that there was another relationship from

[65] *Id.* ¶ 17.

[66] *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *26 (Del. Ch. June 6, 1996); *see also NACCO Indus., Inc. v. Applica Inc.*, __ A.2d __, 2009 WL 4981577, at *29 (Del. Ch. 2009) ("NACCO is a sophisticated party, none of the defendants occupied a special relationship towards NACCO, and nothing about the case suggests any other equity that has traditionally moved this Court to relax the pleading requirements for fraud.").

which equitable duties sprung. Furthermore, Ameristar has requested no equitable remedies. Therefore, Ameristar has not stated an equitable fraud claim.

3. Ameristar Has Stated A Claim That Resorts Must Indemnify Ameristar Under Section 7.6 Of The Purchase Agreement

Section 7.6(a) of the Purchase Agreement provides that no party will be obliged to indemnify the other party for claims for damages less than $6,750,000.[67] Resorts argues that this provision precludes Ameristar's request for indemnification for the costs it incurred in prosecuting the property tax appeal because those costs only amount to $3,869,796.92. But, Section 7.6's threshold requirement does not apply if a party "willfully breached" the Purchase Agreement:

> [I]n the event of a fraud or any *willful breach of the representations*, warranties, covenants or agreements contained herein by [Ameristar] or [Resorts], any Indemnified shall have all remedies available at law or in equity with respect thereto.[68]

As discussed above, Ameristar has pled sufficient facts to support a claim that Resorts willfully breached the representations it made in the Purchase Agreement by intentionally failing to disclose that its representation in Section 2.6(b) was no longer true. Ameristar has also pled a viable fraud claim. For both reasons, Ameristar has adequately alleged that the threshold in Section 7.6 does not apply, and its indemnity claim survives.[69]

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[67] *See supra* pages 9-10.
[68] Purchase Agreement § 7.8(a) (emphasis added).
[69] Ameristar has other arguments as to why the threshold and cap of Section 7.6 do not apply. I need not, and therefore do not, reach them.

4. Ameristar Has Not Stated A Claim For Specific Performance Of Section 4.18 Of The Purchase Agreement

Ameristar's complaint alleges that Section 4.18 of the Purchase Agreement requires Resorts to reimburse Ameristar for the expenses of appealing the Assessment. Section 4.18 of the Purchase Agreement provides in pertinent part that Resorts and their respective affiliates:

> [S]hall reasonably cooperate . . . as and to the extent reasonably requested by the other party . . . with respect to any audit, litigation, ruling request or other proceeding or dispute with respect to Taxes relating to the Company or the Company Subsidiary (provided that the reasonable out-of-pocket costs incurred by the non-requesting party shall be reimbursed by the requesting party).[70]

But, because the complaint did not allege any facts that Resorts affirmatively *requested* that plaintiffs undertake the property tax appeal, there is no basis for Ameristar's claim for specific performance of Section 4.18. The complaint only avers as follows: "[a]fter the Closing, Resorts *agreed* that [Ameristar] would prosecute the Tax Appeal on behalf of [the Casino] through legal counsel and tax consultants retained by [Ameristar]. [Ameristar] kept Resorts apprised of the status and outcome of the Tax Appeal."[71] That is, the complaint does not allege that Resorts made any type of request of Ameristar to pursue the appeal. Therefore, under these facts, the requirements of Section 4.18 of the Purchase Agreement cannot be satisfied, and Ameristar's claim for specific performance must be dismissed.

[70] Purchase Agreement § 4.18.
[71] Compl. ¶ 34 (emphasis added).

5. Ameristar Has Not Stated Claims For Unjust Enrichment And Quantum Meruit

As an alternative to its claim for specific performance under Section 4.18, Ameristar attempts to recover the costs of prosecuting the property tax appeal — that is the $3,869,796.92 of attorneys' and property tax consultants' fees allegedly incurred in appealing the Assessment — through claims for unjust enrichment (Count VI) and quantum meruit (Count VII).[72] But, those claims must be rejected because there is an enforceable contract governing the subject of the parties' dispute.

Under Delaware law, "[c]ourts generally dismiss claims for quantum meruit on the pleadings when it is clear from the face of the complaint that there exists an express contract that clearly controls."[73] And, "[w]hen the complaint alleges an express, enforceable contract that controls the parties' relationship, . . . a claim for unjust enrichment will be dismissed."[74] The logic behind those rules is simple: if a contract covers the subject matter, the defendant's conduct either violates the contract or not. If the defendant did not violate the contract governing the subject of the dispute, then the plaintiff cannot attempt to hold the defendant responsible by softer doctrines, and thereby obtain a better bargain than he got during the contract negotiations.

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[72] *Id.* ¶¶ 78, 84.

[73] *WalMart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 619 (Del. Ch. 2005), *aff'd in part and rev'd on other grounds*, 901 A.2d 106 (Del. 2006).

[74] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *24 (Del. Ch. May 5, 2010) (quoting *Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006)); *see also Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979) ("Because the contract is the measure of plaintiffs' right, there can be no recovery under an unjust enrichment theory independent of it.").

Therefore, because the Purchase Agreement governs the subject of the parties' dispute, Ameristar's claims for unjust enrichment and quantum meruit must be dismissed.

IV. Conclusion

For the reasons stated above, Resorts' motion is GRANTED in part and DENIED in part, and Ameristar's claims for equitable fraud, specific performance, unjust enrichment, and quantum meruit are dismissed.[75] IT IS SO ORDERED.

[75] As I pointed out in notes 40 and 41, the counts in the amended complaint are misnumbered. The parties shall collaborate and clean up the pleadings in conformity with this decision.