IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NARROWSTEP, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 5114-VCP
	)	
ONSTREAM MEDIA CORPORATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Submitted: September 7, 2010
Decided: December 22, 2010

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PARSONS, Vice Chancellor.

This case arises out of a failed merger between Narrowstep, Inc. ("Narrowstep") and Onstream Media Corporation ("Onstream"). In 2008, the parties entered into a merger agreement that required them, among other things, to use their reasonable best efforts to close the merger expeditiously. Curiously, and in retrospect perhaps unwisely, Narrowstep agreed to terms in the merger agreement that required it to cede all operational control to Onstream well before closing in order to expedite the integration of the two companies.

Despite the shift in operational control, the merger never closed. After a number of months and multiple amendments to the agreement, Onstream walked away from the transaction. Thereafter, Narrowstep filed its Complaint in this action accusing Onstream of breaching the agreement and the implied covenant of good faith and fair dealing, converting certain of its property, unjustly enriching itself through the failed integration process, and fraudulently inducing Narrowstep to enter into the merger agreement. Onstream denies these allegations and has moved to dismiss four of the five counts asserted in the Complaint. In this Memorandum Opinion, I grant Onstream's motion to dismiss Narrowstep's implied covenant of good faith and fair dealing count, but deny the motion in all other respects.

I. BACKGROUND

A. The Parties

Plaintiff, Narrowstep, is a Delaware corporation in the business of providing internet TV services and supporting content providers, broadcasters, telecommunications

companies, and corporations worldwide.[1] Defendant, Onstream, is a Florida corporation and a competitor of Narrowstep in the internet TV space.[2]

B. Facts[3]

1. The failed merger process

By late 2007, Narrowstep sought to sell itself to potential acquirors in the internet TV industry. Beginning in early 2008, Onstream, a potential buyer, sought to conduct due diligence in contemplation of making an offer to purchase Narrowstep. During approximately the next six months, Narrowstep granted Onstream full access to documents, contracts with Narrowstep's clients, accounting systems, and financial statements. Onstream also was permitted to speak directly with several of Narrowstep's customers.

On May 29, 2008, after Onstream satisfied itself of the desirability of merging with Narrowstep, the parties entered into an Agreement and Plan of Merger Among Onstream Media Corporation, Onstream Merger Corp., Narrowstep Inc. and W. Austin Lewis IV, as Shareholder Representative (the "Merger Agreement" or "Agreement").[4] Pursuant to the Agreement, Narrowstep agreed to consolidate its operations with

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1 Pl.'s Verified Compl. (the "Complaint") ¶¶ 1, 3.

2 *Id*. ¶¶ 2-3.

3 Unless otherwise specified, the facts are drawn from the Complaint, which I must accept as true for purposes of a motion to dismiss.

4 Compl. Ex. 1, the Merger Agreement. I refer to the Agreement and its subsequent amendments, collectively, as the "Merger Documents."

Onstream before the transaction closed (the "Integration") in order to create immediate synergies and cost savings. As a result, Narrowstep effectively ceded operational control of its business to Onstream before the Agreement closed. In that regard, Onstream required Narrowstep, pursuant to § 4.1(c) of the Agreement, to "use its commercially reasonable efforts to operate its business, in all material respects, in accordance with the plan set forth on Exhibit E hereto (the "Plan")."[5] Specifically, the Plan required Narrowstep to: (1) terminate a number of allegedly critical employees; (2) terminate leases in allegedly key locations; (3) integrate Onstream personnel into Narrowstep's operations; and (4) move its equipment, including large servers, to Onstream's facilities.[6] According to Onstream, the Plan was intended to reduce significantly or eliminate substantial costs related to facility leases, selling, general and administrative expenses, public company headquarter costs, and other professional fees and services.[7] Narrowstep alleges, however, that these actions had the immediate effect of making Narrowstep "completely dependent upon Onstream for its continued survival."[8]

Soon after the ink dried on the Agreement, several issues arose between the parties that delayed the closing of the deal. Onstream, for example, expressed a number of

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5 Merger Agreement § 4.1(c); Def.'s Op. Br. ("DOB") Ex. E. Similarly, I refer to Plaintiff's Answering Brief and Defendant's Reply Brief as PAB and DRB, respectively.

6 DOB Ex. E.

7 *Id*. at 4.

8 *See* Compl. ¶¶ 14-15.

concerns regarding the loss of certain Narrowstep customers, including Virgin Media and ITV, and the fact that a number of Narrowstep customers were delinquent in paying their bills. By August 2008, according to Narrowstep, Onstream, through the Integration process, had undermined its ability to operate independently to such an extent that Narrowstep had to agree to several concessions and time extensions. One such concession was agreeing to sign the First Amendment to Agreement and Plan of Merger dated August 13, 2008 (the "First Amendment"), which, among other things, reduced Narrowstep's acquisition price.[9]

Soon after the parties signed the First Amendment, Onstream raised additional concerns that delayed the merger process—this time regarding Narrowstep's contracts with Vivocom and Baby TV. Although it may have disagreed with these concerns, Narrowstep felt constrained to proceed with the merger because unwinding the Integration process would be costlier than agreeing to Onstream's desired price concessions. Thus, Narrowstep acquiesced to a second price reduction in the form of the Second Amendment to Agreement and Plan of Merger (the "Second Amendment"), dated September 12, 2008.[10]

This was not the end of Onstream's efforts to obtain a lower purchase price. In late 2008, Onstream allegedly used Narrowstep's weakened condition as leverage to

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9 DOB Ex. A, the First Amendment.

10 *Id*. at Ex. B, the Second Amendment.

attempt to extract a third price reduction,[11] and promised that, if Narrowstep acquiesced, the Agreement's closing would follow soon thereafter. But, Narrowstep never agreed to a third reduction.

Notwithstanding its promises, Onstream sent Narrowstep a letter on March 18, 2009 purporting to exercise its right under § 8.1(b), discussed further *infra*, to terminate the proposed merger. After receiving this letter, Narrowstep learned that in late 2007 or early 2008, when it was in play, Onstream entered into an agreement with KIT Digital ("KIT"), which prevented KIT from negotiating an acquisition agreement with Narrowstep. This agreement, according to Narrowstep, prevented KIT, which Narrowstep previously had identified as a potential acquirer, from approaching Narrowstep. Moreover, Onstream never followed through on its assurances to Narrowstep that it would notify KIT that Narrowstep was interested in a deal with KIT if the Agreement did not close.

As a result of Onstream's actions, Narrowstep claims that it has suffered millions of dollars in damages.[12] For example, it claims that the Integration process and

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[11] After the parties signed the Second Amendment, Onstream, again, raised a number of delay-inducing concerns, including tax issues that Onstream claimed necessitated its obtaining a tax opinion from its attorney. Narrowstep accuses Onstream of delaying that process by, among other things, manufacturing a fee dispute with its attorney.

[12] The Complaint also alleges that Onstream took possession of several Narrowstep servers during the failed Integration and sold one worth approximately $90,000 for $36,000 without Narrowstep's permission. It also alleges that Onstream still possesses the remaining Narrowstep servers.

numerous closing delays weakened its operational and financial position and caused a revenue decline of approximately $2.2 million from the time the Merger Agreement was signed.

2. The Merger Agreement

Central to evaluating Onstream's motion to dismiss are certain provisions of the Merger Agreement and the First and Second Amendments. First, one of the conditions precedent to the merger's closing was the filing of a Registration Statement with the Securities and Exchange Commission ("SEC"). Specifically, § 4.3 states, in pertinent part:

> As promptly as practicable, and in any event within sixty days after the execution of this Agreement, the Company [Narrowstep] and Parent [Onstream] will prepare and file with the SEC a preliminary proxy statement . . . and Parent shall, as promptly as practicable after receipt of notification from the SEC that it has no further comments to the Joint Proxy Statement/Prospectus, in cooperation with the Company, prepare and file with the SEC on Form S-4 with respect to the Share Issuance and the CVR Issuance (together with all amendments thereto, the "Registration Statement"). The Joint Proxy Statement/Prospectus shall be included in the Registration Statement as the Parent's prospectus. Each of the Company and Parent will promptly respond to any comments of the SEC regarding the Joint Proxy Statement/Prospectus and the Registration Statement and will use commercially reasonable efforts to have the Registration Statement declared effective under the Securities Act as promptly as practicable after such filing, and, prior the effective date of the Registration Statement, Parent shall take all or any action required under any applicable federal or state securities laws in connection with the issuance by Parent shares of Parent

> Common Stock and Contingent Value Rights pursuant to the Merger. . . . [13]

The parties supplemented this provision with § 4 of the Second Amendment, which requires Onstream to use its "reasonable best efforts to cause the Registration Statement to be filed on or before September 19, 2008, and its reasonable best efforts to timely respond to any comments from the [SEC] regarding such Registration Statement."[14]

In addition, the Agreement contains a number of provisions governing the parties' ability to terminate it. For example, § 8.1 states that the Agreement "may be terminated at any time prior to the Effective Time, whether before or after the requisite approvals of the stockholders of [Narrowstep]"[15] upon the happening of a number of events, including, for example, the mutual written consent of Narrowstep, Onstream, and the merger sub created to consummate the transaction.[16] A nonmutual termination may be

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[13] Merger Agreement § 4.3.

[14] Second Amendment § 4. Onstream did not file the Registration Statement until September 23, 2008. Compl. ¶ 30.

[15] Merger Agreement § 8.1.

[16] *Id*. § 8.1(a). The Effective Time is defined in § 1.2(a) of the Agreement, which states in relevant part: "[t]he closing of the Merger (the "Closing") shall take place at 10:00 a.m. Eastern time, on a date to be specified by [Onstream] and [Narrowstep] (the "Closing Date"), which shall be no later than the second business day after satisfaction or waiver of the conditions set forth in Articles V, VI and VII (other than delivery of items to be delivered at the Closing and other than satisfaction of those conditions that by their nature are to be satisfied at the Closing, it being understood that the occurrence of the Closing shall remain subject to the delivery of such items and the satisfaction or waiver of such conditions at the Closing) . . . unless another date, place or time is agreed to in writing by Parent and the Company.

effected pursuant to § 8.1(b), which states that either Narrowstep or Onstream may terminate the Agreement if "the Effective Time shall not have occurred on or before October 31, 2008 (the "Termination Date")."[17] This section contains a proviso, however, which states that:

> the right to terminate this Agreement pursuant to [§] 8.1(b) shall not be available to the party seeking to terminate if any action of such party (or, in the case of Parent, Merger Sub) or the failure of such party (or, in the case of Parent, Merger Sub) to perform any of its obligations under this Agreement required to be performed at or prior to the Effective Time has been the cause of, or resulted in, the failure of the Effective Time to occur on or before the Termination Date and such action or failure to perform constitutes a breach of this Agreement, including pursuant to Section 4.8[.][18]

If terminated pursuant to § 8.1, the Agreement provides that it becomes void and, with certain limited exceptions, the parties no longer will be liable for obligations or duties under it.[19] The parties supplemented these provisions with § 4 of the First Amendment, which extended the Termination Date from October 31, 2008 to November 30, 2008.[20]

Finally, the parties agreed to use their reasonable best efforts to take all necessary actions required to consummate the proposed merger. In particular, § 4.8(a) states, in relevant part:

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17 *Id*. § 8.1(b).

18 *Id*.

19 *Id*. § 8.2.

20 First Amendment § 4. The Second Amendment did not change the Termination Date.

> Upon the terms and subject to the conditions set forth in this Agreement, each of the parties agrees to use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the [Merger Documents] . . . , including using its reasonable best efforts to accomplish the following: (i) causing the conditions precedent set forth herein to be satisfied, (ii) obtaining all necessary actions or . . . approvals . . . from Governmental Entities and making of all necessary registrations, declarations and filings (including registrations, declarations and filings with Governmental Entities) . . . (v) executing and delivering any additional instruments necessary to consummate the transactions contemplated by, and to fully carry out the purposes of, this Agreement . . . .[21]

C. Procedural History

On December 1, 2009, Narrowstep filed a five count Complaint. The counts, numbered as indicated, assert claims for: (I) breach of contract with respect to the Merger Agreement; (II) breach of the implied covenant of good faith and fair dealing; (III) conversion; (IV) fraud in the inducement; and (V) unjust enrichment. On February 1, 2010, Onstream moved to dismiss Counts I-II and IV-V, but not Count III for conversion. Thereafter, the parties briefed that motion and I heard argument on it on September 7, 2010. This Memorandum Opinion constitutes my ruling on Onstream's motion to dismiss.

D. Parties' Contentions

Onstream argues that Narrowstep has failed to state a claim with regard to Counts I-II and IV-V because they do not have a basis in law or fact and, in a number of

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[21] Merger Agreement § 4.8(a).

instances, rest upon allegations that are contradicted by the Merger Documents. In particular, Onstream contends that Narrowstep has failed to allege facts which plausibly suggest Onstream breached the Merger Documents by failing to file its Registration Statement with the SEC by the contractual deadline, failing to comply with § 4.8(a) of the Agreement, or improperly terminating the Agreement. Onstream similarly asserts that Narrowstep failed to allege sufficient facts to support a reasonable inference that Onstream breached the implied covenant of good faith and fair dealing. In addition, Onstream claims that Narrowstep has not stated a claim for fraudulent inducement because the Complaint does not allege fraud with the particularity required by Rule 9(b) and, even if it did, Narrowstep's fraud claim merely is a revamped breach of contract claim, which cannot be a basis for fraud in Delaware. Finally, Onstream challenges the sufficiency of Narrowstep's unjust enrichment claim as a matter of law because such a claim will not lie where the parties have a valid express contract that covers the subject matter in dispute.

For its part, Narrowstep disagrees with Onstream's characterizations of the Complaint and contends that it has sufficiently stated a claim for each of the four counts contested by Onstream's motion.

II. ANALYSIS

A. Standard for a Motion to Dismiss

When considering a motion to dismiss under Rule 12(b)(6), a court must assume the truthfulness of the well-pleaded allegations in the complaint and afford the party

opposing the motion "the benefit of all reasonable inferences."[22] But, the court need not accept inferences or factual conclusions unsupported by specific allegations of fact.[23] Consequently, to survive a Rule 12(b)(6) motion, a complaint must contain allegations of facts supporting an inference of actionable conduct, not simply a conclusion to that effect.[24] In line with the standard articulated by the United States Supreme Court in *Bell Atlantic v. Twombly*,[25] the court must determine whether the complaint offers sufficient facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks.[26] "If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."[27]

In considering a motion to dismiss for failure to state a claim, a court generally may not consider matters beyond the complaint.[28] If it does so, the motion must be treated as one for summary judgment under Rule 56 and the court must give the parties reasonable opportunity to take discovery and present all material relevant to a summary

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22 *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)).

23 *Ruffalo v. Transtech Serv. P'rs Inc.*, 2010 WL 3307487, at *10 (Del. Ch. Aug. 23, 2010).

24 *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007).

25 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

26 *Desimone*, 924 A.2d at 928-29.

27 *Ruffalo*, 2010 WL 3307487, at *10 (citing *Desimone*, 924 A.2d at 929).

28 *See Robotti & Co. v. Liddell*, 2010 WL 157474, at *5 (Del. Ch. Jan. 14, 2010).

judgment motion.[29] In certain limited circumstances, however, the court may consider documents, including SEC filings, beyond the complaint without being required to convert a motion to dismiss into one for summary judgment.[30] For example, a court may take judicial notice of the contents of an SEC filing, but only to the extent that the facts contained in them are not subject to reasonable dispute.[31] In addition, a court may consider a document beyond the complaint on a motion to dismiss if the proponent establishes that such document is either "[1] integral to, and incorporated within, the plaintiff's complaint; or . . . [2] not being relied upon for the truth of [its] contents."[32] Indeed, "a complaint may, despite allegations to the contrary, be dismissed where the

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29 *See, e.g.*, *Liddell*, 2010 WL 157474, at *5; *Kessler v. Copeland*, 2005 WL 396358, at *4 (Del. Ch. Feb. 10, 2005) (when a Rule 12(b)(6) motion is converted to a Rule 56 motion due to consideration of extrinsic matters, the parties must be permitted to take discovery).

30 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) ("This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'").

31 *See Fleischman v. Huang*, 2007 WL 2410386, at *3 (Del. Ch. Aug. 22, 2007). Under Rule 201, a fact is not subject to reasonable dispute if it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201.

32 *See, e.g.*, *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *Liddell*, 2010 WL 157474, at *5; *Addy v. Piedmonte*, 2009 WL 707641, at *6 (Del. Ch. Mar. 18, 2009).

unambiguous language of documents upon which the claims are based contradict the complaint's allegations."[33]

B. Judicial Notice of Extrinsic Documents on a Motion to Dismiss

Preliminarily, I note that there is no dispute that I properly may consider copies of the Merger Agreement and the First and Second Amendments in adjudicating Onstream's motion to dismiss. All three documents are integral to and incorporated in the Complaint, which alleges, among other things, breaches of contract and related fraudulent conduct pertaining to a failed merger between Narrowstep and Onstream that was memorialized in the Merger Documents.[34] Thus, I have considered these documents for the purposes of deciding the pending motion.

Onstream further contends, however, that this Court should take judicial notice of three SEC documents not attached or referred to in the Complaint but that were filed with its motion. It asserts that these documents contradict or disprove the Complaint's allegation that "[i]n late 2007, Narrowstep was an attractive merger partner for several companies in the internet television industry."[35] Specifically, Onstream relies on: (1)

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33 *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 327 (Del. Ch. 2003).

34 For the same reasons, I properly may consider two additional documents filed by Onstream: (1) the purported termination letter Onstream sent to Narrowstep on March 18, 2009, which is integral to Narrowstep's claims and is referenced in ¶ 42 of the Complaint (DOB Ex. G); and (2) a Mutual Confidentiality Agreement ("Confidentiality Agreement") executed between Narrowstep and Onstream because it is directly incorporated in the Merger Agreement (§ 4.5(a)). *Id*. at Exs. H-I.

35 DRB 4; Compl. ¶ 3.

Narrowstep's Form 10-QSB dated October 15, 2008 for the proposition that Narrowstep was on the verge of failure because, among other things, it had incurred net losses and negative cash flow from operations since its inception;[36] (2) Narrowstep's Form 10-KSB/A-2 dated June 20, 2008 for the propositions that Narrowstep had announced to its investors that it had received an opinion from its independent accountant expressing substantial doubt about its ability to continue as a going concern, and that the parties' restructuring plan was designed to reduce or eliminate substantial costs and operating losses;[37] and (3) Narrowstep's Form 10-Q dated January 14, 2009 for the proposition that, pursuant to the Plan, Narrowstep would attempt to reduce costs and streamline its operations.[38] Narrowstep responds that the Court may not consider these SEC documents for the purposes Onstream cites without converting its motion to dismiss into a motion for summary judgment and allowing the parties to take discovery.

I agree with Narrowstep and have not considered these three SEC documents in evaluating Onstream's motion to dismiss. None of these documents, or the facts contained in them, are referred to or incorporated in the Complaint. Thus, the only grounds for considering them at this preliminary stage would be if Onstream is not offering them for the truth of the matter asserted or if the Court properly may take

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36 DOB 3 & Ex. C.

37 *Id*. at 3 & Ex. D; DRB 4.

38 DOB 4 & Ex. F; DRB 4-5.

judicial notice of them because they are not subject to reasonable dispute. The documents satisfy neither of these two criteria.

First, Onstream offers the challenged statements by Narrowstep regarding its financial condition and cost reduction plans for the truth of the matter asserted—*i.e.*, that Narrowstep was in dire financial straits and that it, in fact, needed or intended to reduce costs and operating losses. This is unlike a situation in which a court takes judicial notice of proxy disclosures, not to determine whether they are truthful, but as evidence of whether certain information has or has not been disclosed. That is, Onstream asks this Court to take notice of the substance of statements by Narrowstep for the truth of those statements and to demonstrate its financial unattractiveness.

Second, I may not take judicial notice of these statements because they constitute facts that are subject to reasonable dispute. In *Fleischman v. Huang*, Chancellor Chandler reached the same conclusion in denying the defendants' request for the court to take notice on their motion to dismiss of the findings of an audit committee summarized in one of the defendants' SEC filings.[39] The defendants argued, in part, that the complaint was deficient because it failed to address the audit committee's conclusions that, contrary to the plaintiff's allegations, the director defendants did not commit intentional misconduct in connection with selecting incorrect measurement dates for certain stock option grants.[40] The Chancellor explained that

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[39] *See Fleischman v. Huang*, 2007 WL 2410386, at *1 (Del. Ch. Aug. 22, 2007).

[40] *See id*.

> [h]ad the motion to dismiss merely argued that the board had sought a report from the Audit Committee, and that the Report had been issued, defendants would have confined themselves to the realm of undisputed facts not [sic] subject to judicial notice. . . .
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> But the motion to dismiss argued far more, asserting that the complaint should fail because it did not address the findings of the Audit Committee. Those findings are not only subject to reasonable dispute, but are at the heart of plaintiff's complaint. They are not subject to judicial notice.[41]

Here, like the defendants in *Fleischman*, Onstream requests this Court to take judicial notice of facts subject to reasonable dispute. Indeed, the parties vigorously contest the allegation in the Complaint that, by late 2007, Narrowstep was an attractive merger partner. Onstream proffered the purported "facts" relating to Narrowstep's financial condition in the subject SEC documents to show Narrowstep was in a precarious financial condition. Because the Complaint disputes these "facts" on its face, they are not subject to judicial notice.

Therefore, finding no basis to consider the three SEC documents Onstream filed with its motion to dismiss, I have excluded those documents from my evaluation of the pending motion to dismiss.

C. Count I: Breach of the Merger Agreement

1. Applicable principles of contract interpretation

To survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must have pled: (1) the existence of a contract, whether express or implied; (2) a

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41 *See id*. at *3.

breach of an obligation imposed by that contract; and (3) damage suffered by the plaintiff as a result.[42] Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss.[43] When interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."[44] As part of that review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."[45] Additionally, when interpreting a contractual provision, a court attempts to reconcile all of an agreement's provisions when read as a whole, giving effect to each and every term.[46] In doing so, courts apply the well settled principle that "contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'"[47]

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42 *See, e.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003); *Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, at *8 (Del. Ch. Aug. 11, 2005).

43 *See, e.g.*, *Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at *6 (Del. Ch. June 13, 2008); *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

44 *Schuss*, 2008 WL 2433842, at *6.

45 *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.*, 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005)).

46 *Schuss*, 2008 WL 2433842, at *6.

47 *Id*.

If the contractual language is "clear and unambiguous," the ordinary meaning of the language generally will establish the parties' intent.[48] A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[49] On a motion to dismiss, a trial court cannot choose between two different reasonable interpretations of an ambiguous document.[50] Where ambiguity exists, "'[d]ismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law.'"[51] Thus, to succeed on its motion, Onstream must establish that its construction of the Merger Documents is the only reasonable interpretation.

2. Application to Count I

It is undisputed that a contract existed between the parties in the form of the Merger Documents. Onstream denies, however, the existence of the other two elements of Narrowstep's breach of contract claim: breach and damages.

Turning to the breach element, Narrowstep alleges that Onstream breached the Merger Documents in at least three ways: (1) by failing to use its reasonable best efforts

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48 *Brandywine River Prop., Inc. v. Maffet*, 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

49 *Pharmathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008). Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. *United Rentals, Inc. v. Ram Hldgs., Inc.*, 2007 WL 4496338, at *15 (Del. Ch. Dec. 21, 2007).

50 *See Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007).

51 *Id.* (quoting *Vanderbilt Income & Growth Assoc. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)).

to timely file the Registration Statement;[52] (2) by failing to use its reasonable best efforts to take actions necessary to consummate the merger;[53] and (3) by improperly terminating the merger.[54]

As to the first alleged breach, Narrowstep contends that Onstream did not use its reasonable best efforts to timely file the Registration Statement by July 28, 2008, a date to which the parties agreed, not in the Merger Agreement, but by way of a letter.[55] Onstream denies this and argues that the Merger Documents contained no firm deadline for filing the Registration Statement and, regardless, the obligation to file the Statement was a joint obligation of both parties and not solely that of Onstream.[56]

Onstream correctly notes that § 4.3 of the Merger Agreement, which governs the obligation to file a Registration Statement, initially did not specify a filing deadline.[57] Moreover, the Complaint and related documents before the Court on the pending motion to dismiss do not support a reasonable inference that the Agreement required Onstream to

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52 Compl. ¶¶ 29-31.

53 *Id*. ¶ 11.

54 *See id*. ¶¶ 9-10, 16-19, 24-25, 34-35, 38-39.

55 PAB 5 n.3.

56 DOB 11-12; DRB 6.

57 Section 4.3 states that "[Onstream] shall, as promptly as practicable after receipt of notification from the SEC that it has no further comments to the Joint Proxy Statement/Prospectus, in cooperation with [Narrowstep], prepare and file with the SEC on Form S-4 with respect to the Share Issuance and the CVR Issuance (together with all amendments thereto, the "Registration Statement").

file the Statement before July 28, 2008. Thus, Onstream's failure to file the Statement by this date provides no basis for Narrowstep's breach of contract claim.

The Second Amendment, however, modified the Agreement to state that "[Onstream] shall use its reasonable best efforts to cause the Registration Statement to be filed on or before September 19, 2008 . . . ."[58] In fact, the Registration Statement was not filed until September 23, 2008,[59] after the prescribed deadline. Onstream attempts to downplay the September 19 date as a soft deadline because the parties only agreed that Onstream would use its "reasonable best efforts" to meet it. Even if this characterization were accurate, I find that the Complaint alleges sufficient facts plausibly to suggest that Onstream did not use its reasonable best efforts to file the Statement by the prescribed date and, instead, deliberately took actions to delay its filing. The Complaint alleges, for example, that Onstream manufactured numerous delays in the Integration process relating to its professed concerns about Narrowstep's customers failing to pay bills on time,[60] problems with certain customer contracts,[61] and various tax issues.[62] Narrowstep further avers that, despite assurances otherwise, Onstream acted in bad faith when it delayed filing the Registration Statement until after the date specified in § 4 of the Second

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58 Second Amendment § 4.

59 Compl. ¶ 30; DOB 12.

60 Compl. ¶¶ 16-19.

61 *Id*. ¶¶ 24-25.

62 *Id*. ¶¶ 34-35.

Amendment. As such, I find it plausible that Onstream may have breached that section by failing to use its reasonable best efforts to file the Statement before September 19, 2008.

In addition, I find no merit in Onstream's position that the obligation to file the Statement was a joint one. While Narrowstep argues that the obligation was Onstream's, Onstream contends that § 4.3 made both parties responsible for filing the Statement because it states that Onstream shall file the Statement "in cooperation with [Narrowstep]."[63] Yet, the Second Amendment, which supersedes the language in § 4.3, omits the phrase "in cooperation with" and states unambiguously that *Onstream* shall use its reasonable best efforts to cause the Statement to be filed. Moreover, even absent the Second Amendment, I am not convinced that the phrase "in cooperation with" must be construed as Onstream contends. Assuming the phrase reasonably could be read that way, I consider it equally plausible to interpret it, as Narrowstep argues, to mean that Narrowstep was obligated merely to assist Onstream, to the extent necessary, in carrying out Onstream's duty to cause the Statement to be filed. Thus, the phrase "in cooperation with" appears, at least, to be ambiguous because it is fairly susceptible to two reasonable interpretations. This Court cannot determine on a motion to dismiss, however, which of these competing interpretations is correct.[64]

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63 Merger Agreement § 4.3; DRB 6.

64 *See Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007).

As to the second alleged ground for Narrowstep's breach of contract claim, Narrowstep asserts that Onstream breached § 4.8(a) of the Agreement by failing to use its reasonable best efforts to "take, or cause to be taken, all actions . . . necessary . . . to consummate . . . in the most expeditious manner practicable, the Merger."[65] Onstream argues that the Complaint fails to identify any specific actions that Onstream was required, but failed to undertake.[66]

I disagree with Onstream and find that the Complaint sufficiently alleges facts that, if true, support a reasonable inference that Onstream failed to take all steps necessary to consummate the merger expeditiously. For example, as discussed above, the Complaint avers that Onstream breached § 4.3 of the Agreement and § 4 of the Second Amendment by purposefully using stall tactics to prevent a timely filing of the Registration Statement, a prerequisite to the closing of the merger. Thus, Onstream arguably violated § 4.8(a)(ii)'s requirement that the parties "mak[e] . . . all necessary registrations . . . and filings (including registrations . . . and filings with Governmental Entities)" in the most expeditious manner.[67] In addition, the Complaint alleges multiple instances in which Onstream caused significant delays in the Integration process and, thus, the closing of the merger. These instances include Onstream's reliance on

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65 Compl. ¶ 11; *see also* Merger Agreement § 4.8(a).

66 DOB 12.

67 Merger Agreement § 4.8(a)(ii).

manufactured concerns regarding the topics mentioned *supra*,[68] all of which previously were disclosed to Onstream when it conducted its due diligence. The Complaint also alleges that Onstream refused to close unless Narrowstep acquiesced to three separate amendments to the Agreement that involved price reductions.[69] Taking these allegations as true, as I must, I find that Narrowstep has stated a claim for breach of § 4.8 of the Agreement because the Complaint plausibly suggests that, rather than take actions to consummate the merger in the most expeditious manner, Onstream did the opposite and may have stalled the process deliberately and in bad faith.[70]

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68 *See supra* notes 60-62.

69 *Id*. ¶¶ 21, 27, 38.

70 Onstream argues that the obligation to act expeditiously to consummate the merger under § 4.8(a) applies to both parties and not exclusively to Onstream. DRB 7. Assuming that is true, it does not excuse Onstream's alleged failure to comply with § 4.8(a).

Furthermore, although the Complaint does not mention it explicitly, Narrowstep also seems to assert that Onstream breached § 8.1(b) of the Agreement, which refers to § 4.8, by impermissibly terminating the Agreement. *See* Compl. ¶¶ 11, 41-42; PAB 6 & n.4. Onstream contends it acted properly, arguing that it issued its termination notice after November 30, 2008, consistent with the timetable provided in the Merger Documents. DOB 13.

Sections 8.1(b) and 8.2, taken together, state that either party may terminate the Agreement, and be free from liability resulting therefrom, if the Effective Time (*i.e.*, the closing of the merger) shall not have occurred on or before the Termination Date, which ultimately was November 30, 2008. Merger Agreement §§ 8.1(b), 8.2; Second Amendment § 3. Onstream evidently sent its notice of termination on March 19, 2009, well after the November 30, 2008 deadline. Section 8.1(b) states, however, that a party may not terminate the Agreement under this section if "any action of such party . . . or the failure of such party . . . to perform any of its obligations under [the] Agreement required to be performed at

I further find that the Complaint sufficiently alleges that Narrowstep suffered damages as a result of the alleged breaches. In particular, the Complaint states that the frequent and significant delays caused by Onstream's breaches of the Merger Documents enabled Onstream to plunder Narrowstep during the Integration period, effectively rendering it unable to operate as a profitable and independent company.[71] Thus, I find that Narrowstep has stated a claim for breach of the Merger Documents and, therefore, deny Onstream's motion to dismiss Count I.

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or prior to the Effective Time has been the cause of, or resulted in, the failure of the Effective Time to occur on or before the Termination Date and such action or failure to perform constitutes a breach of this Agreement, including pursuant to Section 4.8[.]" Merger Agreement § 8.1(b).

For the reasons stated in the text, I find that the Complaint alleges sufficient facts to raise a plausible inference that Onstream deliberately took actions that had the effect of preventing the merger from closing before November 30, 2008. As such, Narrowstep also has stated a claim for Onstream's having breached § 8.1(b) because it terminated the merger despite arguably having purposefully and in bad faith delayed the closing of the merger so that the Termination Date would lapse, which would make it ineligible for the safe harbor mechanism provided for in that section.

[71] Compl. ¶¶ 20, 26, 36 ("By the end of 2008 . . . Narrowstep's cash position was weakening, and sales were declining precipitously, because of the extraordinary delays that Onstream caused."), 37, 49. I do not find persuasive Onstream's argument that, even if it did breach § 4.3 of the Agreement by failing to file the Registration Statement by September 19, 2008, the "Complaint further fails to allege any resultant damage to Narrowstep arising out of this alleged two business day breach." As previously discussed, the Complaint plausibly alleges that Onstream's delay tactics with respect to the filing of the Statement were one of a number of actions taken by Onstream that scuttled the merger and cumulatively resulted in millions of dollars worth of damages.

D. Count II: Breach of Implied Covenant of Good Faith and Fair Dealing

1. Standard for the implied covenant

Under Delaware law, the implied covenant of good faith and fair dealing (the "implied covenant") inheres in every contract and "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[72] Rather than constituting a free floating duty imposed on a contracting party, the implied covenant is only invoked to insure the parties' reasonable expectations are fulfilled.[73] "The Court must focus on 'what the parties likely would have done if they had considered the issues involved.' It must be 'clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter.'"[74] Because general allegations of bad faith conduct are not sufficient to state a

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[72] *See, e.g.*, *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888-89 (Del. Ch. 2009) (internal citations omitted); *HSMY, Inc. v. Getty Petroleum Mktg., Inc.*, 417 F. Supp. 2d 617, 621 (D. Del. 2006).

[73] *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005); *Kuroda*, 971 A.2d at 888-89 (internal quotation marks omitted).

[74] *Lonergan v. EPE Hldgs. LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) (internal citations omitted).

claim, the plaintiff must allege a specific implied contractual obligation and how the violation of that obligation denied the plaintiff the fruits of the contract.[75]

Thus, to state a claim, Narrowstep must "allege a specific implied contractual obligation, a breach of that obligation by [Onstream], and resulting damage."[76] The implied covenant comes into play, however, only where a contract is silent as to the issue in dispute.[77] That is, it does not apply when "the subject at issue is expressly covered by the contract" and cannot override the express terms of a contract.[78] "The doctrine thus operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer."[79] Consistent with its narrow purpose, the implied covenant is rarely invoked successfully.[80]

2. Application to Count II

Narrowstep contends that it states a claim for breach of the implied covenant in two respects. First, Narrowstep argues that, because the Merger Agreement does not

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75 *Kuroda*, 971 A.2d at 888-89.

76 *Id*.

77 *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009).

78 *See, e.g.*, *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009) (internal citations omitted); *Kuroda*, 971 A.2d at 888-89.

79 *Lonergan*, 5 A.3d at 1018 (internal citations omitted).

80 *Kuroda*, 971 A.2d at 888-89.

contain a specific closing date and Onstream did not use its reasonable best efforts to complete the merger in an expeditious manner, it violated the implied covenant.[81] Second, it argues that Onstream took advantage of its position to control the Integration process by repeatedly delaying and extending the closing in bad faith.[82] Onstream denies these accusations and asserts that Narrowstep has not alleged any specific implied contractual obligation which Onstream breached. Furthermore, to the extent Narrowstep has identified such an implied obligation, Onstream contends it is covered by express provisions of the Merger Documents, and, therefore, cannot support an implied covenant claim.

Having considered the allegations in the Complaint, I find that Narrowstep has failed to state a claim for breach of the implied covenant. Narrowstep's allegations are general accusations of bad faith and do not identify, as they must, a specific *implied* contractual obligation that Onstream breached.[83] Both of Narrowstep's alleged grounds for its implied covenant claim essentially accuse Onstream of breaching the Agreement by failing to use its reasonable best efforts to effect an expeditious closing of the merger. As such, and as discussed *supra* Part II.C, Narrowstep has accused Onstream of

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81 PAB 8.

82 *Id*. at 9.

83 *See Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, at *8 (Del. Ch. Aug. 11, 2005) (noting that to state a claim for a breach of the implied covenant, the plaintiff must "identify a specific implied contractual obligation" that was breached).

breaching *express* terms of the Merger Documents that appear to be directly on point. For example, Narrowstep asks this Court to imply a reasonable date by which the closing had to occur because the Merger Agreement does not contain one and Onstream did not attempt to close the merger expeditiously.[84] Section 1.2 of the Agreement, however, is directly on point and governs the terms of the closing. It states, in pertinent part: "[t]he closing of the Merger (the "Closing") shall take place at 10:00 a.m., Eastern time, on a date to be specified by Parent and the Company (the "Closing Date"), which shall be no later than the second business day after satisfaction or waiver of the conditions set forth in Articles V, VI and VII."[85] The express language of this provision shows that the parties did not intend to select a specific deadline for the merger, but rather intended that it close no later than the second business day after the parties satisfied the conditions precedent to closing. The Merger Documents further provided that either party could terminate the merger if the closing had not taken place by November 30, 2008. This further demonstrates that the parties intended not to set a hard and fast closing deadline but rather to have the merger close, if at all, after all conditions precedent to closing had been satisfied, whenever that should occur. Thus, implying a firm deadline in the contract, let alone finding that Onstream breached such a deadline, would contradict the express terms of the contract.

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84 PAB 8.

85 Merger Agreement § 1.2.

In addition, Narrowstep asserts that Onstream breached the implied covenant because it took advantage of its position to control the implementation of the merger by repeatedly delaying and extending the closing in bad faith. Delaware courts have recognized that parties may breach the implied covenant when they act to frustrate the purpose of the contract by taking advantage of their position to control implementation of the agreement's terms.[86] But, a court will not invoke the implied covenant to override the express provisions of a contract.[87] The latter, in essence, is what Narrowstep asks this Court to do.

To the extent Narrowstep bases its implied covenant claim on Onstream's alleged bad faith in manufacturing delays and failing to use its reasonable best efforts to close the merger in an expeditious manner, §§ 4.8(a) and 8.1(b) expressly proscribe the same behavior.[88] Onstream would breach § 4.8, for example, if it did not "take, or cause to be

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86 *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005).

87 *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009).

88 In many respects, this case is like *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.* 2009 WL 1707910 (Del. Ch. June 16, 2009). There, a seller-corporation sued a buyer-corporation after the parties failed to consummate a planned merger, which involved the buyer taking over operational control of the seller before the merger closed. *Id*. at *11. Vice Chancellor Strine granted the defendant-buyer's motion to dismiss with respect to the seller's implied covenant claim because he found that claim to be "essentially the same" as the seller's breach of contract claim, which accused the buyers of wrongfully refusing to close the deal even though they were contractually obligated to do so, there had been no material adverse effect ("MAE"), and all other conditions precedent had been satisfied. *Id*. The Court wrote that, "absent a contractual provision dictating a standard of conduct, there is no legal difference between breaches of contract made in bad faith and breaches of contract not made in bad faith. Both are simply

taken, all actions . . . all things necessary . . . to consummate . . . in the most expeditious manner practicable, the Merger." Narrowstep, therefore, cannot state a separate claim for a breach of an implied term that would proscribe the same behavior as § 4.8(a).

Narrowstep's implied covenant claims are, therefore, duplicative of Count I's allegations regarding breaches of express provisions of the Merger Documents. Hence, I grant Onstream's motion to dismiss Count II.

E. Count IV: Fraud

Count IV of the Complaint accuses Onstream of fraud in that it had no intention of merging with Narrowstep when it entered into the Merger Agreement. Narrowstep contends that the Complaint states a claim for both legal and equitable fraud. Onstream, for its part, denies this and argues that the Complaint fails to plead fraud with sufficient particularity and, in any case, impermissibly attempts to bootstrap Narrowstep's breach of contract claim into a fraud claim. Finally, Onstream asserts that even if I find that the Complaint states a claim for fraud, I should direct Narrowstep to provide a more definite

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breaches of the express terms of the contract." *Id.* In *AQSR*, both Count 1, for breach of contract, and Count 5, for breach of the implied covenant of good faith, alleged that the buyers should have closed because there had been no MAE. The Court observed, however, that "[w]hether there was a Material Adverse Effect is governed by the express terms of the India SPA, which in this case leave no interstitial space in which the doctrine of the implied covenant might operate." *Id.* Similarly, Narrowstep alleges in Count I that Onstream failed to use its reasonable best efforts to close the merger in the most expeditious manner and alleges that Onstream also breached the implied covenant for the same reason because it took the actions complained of in bad faith.

statement of that claim under Rule 12(e). I address each of Onstream's grounds for dismissing Count IV below.

1. Common law fraud

To state a claim for common law fraud, a plaintiff must allege: "(1) that a defendant made a false representation, usually one of fact; (2) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the plaintiff to act or refrain from acting; (4) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of her reliance on the representation."[89]

Additionally, per Court of Chancery Rule 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." That is, "[t]o satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations."[90] State of mind, however, may be averred generally.[91] Essentially, the

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89 *Grunstein v. Silva*, 2009 WL 4698541, at *12 (Del. Ch. Dec. 8, 2009).

90 *See, e.g.*, *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008); *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *2 (Del. Ch. Dec. 21, 1998).

91 *Winner Acceptance Corp.*, 2008 WL 5352063, at *7.

particularity requirement obligates plaintiffs to allege the circumstances of the fraud "with detail sufficient to apprise the defendant of the basis for the claim."[92]

I find that Narrowstep has met these standards here. First, Narrowstep alleges that Onstream made several false representations with respect to its communicated desire to close a merger with Narrowstep in an expeditious manner.[93] Next, the Complaint sufficiently describes details of a scheme to misappropriate assets from Narrowstep, which plausibly demonstrate that Onstream knew its representations regarding its desire to merge with Narrowstep were false when made. For example, the Complaint alleges that Onstream constructed the Agreement so that it immediately would gain operational control of Narrowstep, even before the deal closed, and, in doing so, imposed a series of stringent conditions that effectively prevented Narrowstep from continuing to operate as an independent company.[94] Once it made Narrowstep dependent upon it, Onstream began manufacturing a series of excuses and "concerns" which delayed the merger closing, even though it had learned of many of the facts underlying these concerns during the due diligence it conducted before entering into the Agreement.[95] The Complaint sufficiently alleges that Onstream used these concerns to extract concessions as to price

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92 *Grunstein*, 2009 WL 4698541, at *14.

93 *See* Compl. ¶¶ 8, 12, 13.

94 *Id*. ¶¶ 13, 15, 20, 22, 26, 36.

95 *Id*. ¶¶ 16-19, 24-25, 29, 34-35.

and other terms of the Agreement from a much weakened Narrowstep.[96] All the while, Onstream reassured Narrowstep that a closing was right around the corner if it would just agree to the next round of concessions.[97]

Moreover, the Complaint alleges that during the time Onstream toyed with Narrowstep in this fashion, Onstream was plundering Narrowstep by, among other things, appropriating Narrowstep's customers, customer leads, equipment, and other assets and goodwill.[98] As such, the Complaint sufficiently alleges the third element of fraud—*i.e.*, that Onstream intended Narrowstep to enter the Agreement and the subsequent Amendments as part of this scheme. For the same reasons, Onstream's actions show that it intended to make Narrowstep dependent on it in such a way as to position Onstream to purchase Narrowstep for a bargain basement price after multiple concessions or, if that did not pan out, control Narrowstep for enough time to strip it of its valuable components and leave the scraps behind, as allegedly occurred in this case.

Fourth, the Complaint alleges sufficient facts to allow the Court plausibly to infer that Narrowstep's conduct in entering into the Agreement and holding out hope that Onstream promptly would close the deal was justifiable given Onstream's continuous

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96 *Id*. ¶¶ 21, 26-28, 33, 40. Narrowstep refused to return to the bargaining table to discuss a third price concession requested by Onstream. *Id*. ¶ 38.

97 *Id*. ¶¶ 28, 39 (". . . Onstream continued to assure Narrowstep that a Closing was imminent if Narrowstep would just make a further price concession."), 41.

98 *Id*. ¶¶ 36-37, 42, 48-49, 64, 67.

reassurances.[99] Narrowstep initially believed the merger was a good deal based, in part, on Onstream's apparent willingness to merge and realize synergies. After Narrowstep ceded its independence upon entering the Agreement, it had virtually no choice but to rely on Onstream's continual reassurances that a closing was imminent. Finally, the Complaint sufficiently alleges that Narrowstep was harmed by Onstream's fraud: it details how Narrowstep lost millions of dollars in revenue, customers, and the ability to operate as an independent company.[100]

While the Complaint to some degree lacks details about the time, place, and speaker of Onstream's repeated assurances to Narrowstep, I find that it still "sufficient[ly] [] apprise[s] the defendant of the basis for the claim."[101] Thus, I hold that Narrowstep has met the pleading requirements for a claim for common law fraud.

2. Equitable fraud

Equitable fraud is broader than common law fraud so that generally whatever amounts to common law fraud also amounts to equitable fraud.[102] It "includes all willful or intentional acts, omissions, and concealments which involve a breach in either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or

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99 *Id*. ¶¶ 28, 39, 41.

100 Compl. ¶¶ 36-37, 42, 48-49, 67.

101 *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009).

102 *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 143 (Del. Ch. 2009).

unconscientious advantage over another is obtained."[103] This Court traditionally has loosened the pleading and proof requirements where the facts of the case suggest an equitable reason to do so and, as such, has not required a showing of scienter, "reflecting its willingness to provide a remedy for negligent or innocent misrepresentation."[104] "[T]he elements of equitable fraud, therefore, are the same as those for common-law fraud, except that no showing of scienter need be made."[105] While certain requirements are relaxed, a plaintiff claiming equitable fraud must sufficiently plead a special relationship between the parties or other special equities, such as some form of fiduciary relationship or other similar circumstances, which common law fraud does not require.[106]

Here, the Complaint plausibly alleges a special relationship between the parties. What began as arms-length commercial bargaining between the parties transitioned into Onstream controlling Narrowstep for all intents and purposes, pursuant to the express terms of the Agreement, even before the merger closed. Although this Court is reluctant to extend the "exacting standards of fiduciary duties . . . to quotidian commercial

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103 *Id*. at 144.

104 *Id*. (internal citations and quotation marks omitted).

105 *See BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *7 (Del. Ch. Aug. 3, 2004) (internal quotation marks omitted); *see also Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996).

106 *See, e.g.*, *Airborne Health, Inc.*, 984 A.2d at 144 (citing *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *24 (Del. Ch. June 6, 1996)); *Envo, Inc. v. Walters*, 2009 WL 5173807 (Del. Ch. Dec. 30, 2009).

relationships,"[107] the parties' relationship under the Agreement and the Plan exhibits many of the factual indicia usually associated with fiduciary dealings.[108] In *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, for example, this Court dismissed for failure to state a claim Wal-Mart's contention that certain of its insurance agents occupied a fiduciary relationship with it based upon, among other things, the agents' expertise with respect to the allegedly faulty insurance products at issue, their representations about such products to Wal-Mart, and their knowledge that Wal-Mart was relying on their expertise.[109] The Delaware Supreme Court affirmed the Court's finding that despite the label "agent," the insurance agents were not fiduciaries because: (1) there was no alignment of interests between Wal-Mart and the agents; (2) Wal-Mart did not allege any facts from which the Court reasonably could infer that the agents exerted control or domination over Wal-Mart; and (3) Wal-Mart did not allege facts from which the Court could infer self-dealing on the part of the agents.[110]

By contrast, Narrowstep's Complaint alleges sufficient facts from which I plausibly can infer that: (1) the parties' interests were purportedly aligned in that Onstream took over operational control of Narrowstep to "create synergies and cost

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107 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113-14 (Del. 2006).

108 "Generally, '[a] fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another.'" *Id*.

109 *Id*. at 113.

110 *Id*. (finding the relationship between the parties to be a normal arms-length business relationship).

savings for Narrowstep" in preparation for an expeditious closing;[111] (2) Onstream controlled and dominated Narrowstep's operations, even before the deal closed;[112] and (3) Onstream used such control and domination during the time between entering the Agreement and terminating it to pilfer Narrowstep's assets at Narrowstep's expense.[113]

Therefore, I find that Narrowstep has alleged sufficient facts for the Court to infer that the parties had a special relationship, similar to a fiduciary relationship, so that Narrowstep can state a claim for equitable fraud. Having previously concluded that the Complaint states a claim for common law fraud, I further find that it also states a claim for equitable fraud.[114]

3. Bootstrap

Onstream argues that even if I find Narrowstep pled its fraud claims with sufficient particularity, I still should dismiss Count IV because "Narrowstep impermissibly attempts to bootstrap a breach of contract claim into a fraud claim" by basing its fraud claim on Onstream's alleged misrepresentation of its intent to perform pursuant to the Agreement.[115] Indeed, Count IV does accuse Onstream of defrauding

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111 Compl. ¶¶ 10, 13.

112 *Id*. ¶¶ 13-15.

113 *Id*. ¶¶ 36-37, 42, 48-49, 64, 67.

114 *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 143 (Del. Ch. 2009).

115 DOB 18.

Narrowstep because Onstream had "no intention of merging with Narrowstep" when it entered into the Agreement.[116]

Delaware law holds that a plaintiff "cannot 'bootstrap' a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations."[117] In other words, a plaintiff cannot state a claim for fraud simply by adding the term "fraudulently induced" to a complaint or alleging that the defendant never intended to comply with the agreement at issue when the parties entered into it.[118] Thus, couching an alleged failure to comply with a contract as a failure to disclose an intention to take certain actions arguably inconsistent with that contract is "exactly the type of bootstrapping this Court will not entertain."[119]

If the Complaint merely alleged that the parties had a contract and Onstream intended not to follow through with its obligations under the Agreement and nothing more, Narrowstep's fraud claim would be an impermissible bootstrap of its breach of contract claim. That is not the case here, however. As discussed above, the Complaint alleges sufficient facts, which must be taken as true for the purposes of this motion, for the Court to infer that Onstream repeatedly lied to Narrowstep at multiple steps in the Integration process in order to strip Narrowstep of its valuable assets with no intention of

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116 Compl. ¶¶ 62-66.

117 *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. Dec. 21, 1998).

118 *Id*. at *5.

119 *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004).

closing the merger. This conduct, if true, goes beyond a mere intention not to comply with the terms of the Agreement; it alleges that Onstream intended to plunder Narrowstep and bought time to do so by stringing it along under the guise of working toward an expeditious closing pursuant to the Agreement. That is, the Agreement is not the source of Narrowstep's fraud claim, but rather the instrument by which Onstream perpetrated its broader scheme to loot Narrowstep. For these reasons, I find that Count IV is not a mere bootstrap of Counts I and II and, therefore, I deny Onstream's motion to dismiss Count IV.

4. Onstream's request for a more definite statement

Onstream argues, in the alternative, that absent a dismissal this Court should exercise its discretion under Rule 12(e) to order Narrowstep to provide a more definite statement of its fraud claim.[120] As discussed *supra* Part II.E, the Complaint states a claim for both common law and equitable fraud and, as such, is not "so vague or ambiguous" that it fails to provide Onstream with fair notice of the facts underlying Count IV. Therefore, I also deny Onstream's request for a more definite statement.

F. Count V: Unjust Enrichment

The Complaint alleges that, under the terms of the Merger Documents, Onstream was given Narrowstep's client list and other proprietary information, as well as control

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[120] DOB 21. Rule 12(e) states, in pertinent part: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing the party's responsive pleading." Ct. Ch. R. 12(e).

over Narrowstep equipment, some of which it still retains.[121] Count V asserts that Onstream did not pay for any of this equipment or information and, as a result, has been unjustly enriched by its access to those items.[122] In particular, Narrowstep claims that Onstream has been enriched by: (1) its retention of certain Narrowstep equipment and the proceeds from a sale of some of that equipment, including the Cisco server, and (2) its retention of information about Narrowstep's customers and prospective customers identified during the Integration process that Onstream usurped. It further contends that it validly may plead an unjust enrichment claim in the alternative because the Merger Documents do not address these issues. Onstream, for its part, asserts that Narrowstep has failed to state a claim for unjust enrichment as a matter of law because the parties have a contractual relationship that comprehensively governs their relationship, including the matters upon which the unjust enrichment claim is based.

Delaware courts define unjust enrichment as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[123] To state a claim, the complaint must allege sufficient facts plausibly to show: (1) an enrichment, (2) an

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121 Compl. ¶¶ 69-70.

122 *Id*. ¶¶ 71-72.

123 *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[124]

Before reaching the elements of a challenged unjust enrichment claim, a court first must satisfy itself that no contract already governs the relevant relationship between the parties.[125] That is, "[i]f a contract comprehensively governs the parties' relationship, then it alone must provide the measure of the plaintiff's rights and any claim of unjust enrichment will be denied."[126] In some situations, however, both a breach of contract and an unjust enrichment claim *may* survive a motion to dismiss when pled as alternative theories of recovery.[127] But, "a right to plead alternative theories does not obviate the obligation to provide factual support for each theory."[128]

As a threshold matter, therefore, I find that Narrowstep pleads sufficient facts for the Court plausibly to infer that the Merger Documents and other documents incorporated in them do not comprehensively govern the relationship between the parties with respect to at least the exchange of equipment so as to preclude Narrowstep from pleading unjust

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124 *See, e.g.*, *Nemec*, 991 A.2d at 1130; *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009).

125 *See BAE Sys.*, 2009 WL 264088, at *7.

126 *See id*.

127 *See id*. at *8 (rejecting argument that an unjust enrichment claim *must* survive a motion to dismiss when pled alternatively with a contract claim that will move beyond the motion to dismiss stage).

128 *See id*.

enrichment as an alternative remedial theory. As to the equipment, Narrowstep raises two issues of fact: (1) whether the Merger Documents provided Onstream with a right to sell Narrowstep's equipment and, if they did, (2) who has superior rights to the proceeds of such sales. The Merger Documents do contemplate, to a limited extent, that Narrowstep would turn over to Onstream, before closing, control of some of its equipment as well as the ability to sell some of that equipment.[129] But, the Documents do not specify which pieces of equipment Onstream rightfully may sell, much less what happens to the proceeds of such sales if the merger is not completed.

With regard to the exchange of confidential information, it is less clear whether the Merger Documents and related documents comprehensively govern the parties' relationship. Section 4.5(a) of the Agreement acknowledges, in pertinent part, that the parties previously executed the Confidentiality Agreement and that it "will continue in full force and effect in accordance with its terms."[130] The Confidentiality Agreement, which is directly incorporated into the Agreement through § 4.5(a), contains, among

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129 Section § 4.1(c) of the Agreement provides that "Notwithstanding anything to the contrary contained in this Section 4.1, [Narrowstep] shall use its commercially reasonable efforts to operate its business, in all material respects, in accordance with the plan set forth on Exhibit E hereto (the "Plan")." Merger Agreement § 4.1. The Plan, contained in Schedule E of the Agreement, suggests that the parties contemplated Onstream's ability to sell some of the equipment it acquired from Narrowstep. *See* DOB Ex. E, Schedule E, at 3 ("Proceeds from sale of equipment will be limited to equipment located in recently closed Narrowstep POP located in California.").

130 Merger Agreement § 4.5(a).

other things, a mutual warranty that confidential information will be used only to "further the terms of the th[e] Agreement for the evaluation, establishment and/or continuation of a business relationship with the other. . . . [Any confidential information] supplied by either party shall remain the property of the disclosing party . . . . The parties recognize and agree that nothing contained in [the Confidentiality Agreement] shall be construed as a grant of any property rights to the receiving party . . . to any [confidential information] disclosed . . . ."[131] While this Confidentiality Agreement purports to prescribe the parties' rights to exchanged proprietary confidential information, it is unclear whether it comprehensively governs the relationship between Narrowstep and Onstream as to ownership rights to, and proceeds from, all of the disputed information in situations where the merger was abandoned before closing.

I need not resolve this threshold issue on the pending motion, however, because Narrowstep's allegations regarding misuse of its confidential information are involved in its fraud claim, as well, which is not limited to the terms of the Merger Documents. Because the fraud claim and the unjust enrichment claim are interrelated in that respect and the latter may figure in the determination of an appropriate remedy if Narrowstep succeeds in proving its fraud claim, I reject Onstream's argument that the unjust enrichment claim is precluded by the parties' contractual relationship, even as to the

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[131] DOB Ex. H, Confidentiality Agreement, §§ 3-4 (internal all-capitalization omitted).

alleged misappropriation of Narrowstep's confidential information. Instead, Narrowstep's unjust enrichment claim represents a viable, alternative remedial theory.

Lastly, I find that Narrowstep has alleged sufficient facts to permit the Court plausibly to infer that all the elements of an unjust enrichment claim exist in this case. Based on the allegations in the Complaint and reasonable inferences drawn from them, Narrowstep has alleged sufficient facts to demonstrate that Onstream impermissibly and unjustifiably obtained, used, or sold certain equipment and proprietary information of Narrowstep, even after the merger was terminated, and thereby caused direct harm to Narrowstep.[132] Therefore, I reject Onstream's motion to dismiss Count V.

III. CONCLUSION

For the reasons stated above, I grant Onstream's motion to dismiss in part and deny it in part as follows: Count II is dismissed with prejudice and, in all other respects, the motion is denied.

IT IS SO ORDERED.

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[132] *See* Compl. ¶¶ 6, 13, 48-49, 59-61, 69-72.