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Case No. 12892-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IMO Ronald J. Mount 2012	:	
Irrevocable Dynasty Trust	:	**C.A. No. 12892-VCS**
U/A/D December 5, 2012	:	

MEMORANDUM OPINION

Date Submitted: July 10, 2017
Date Decided: September 7, 2017

Kevin G. Abrams, Esquire, J. Peter Shindel, Jr., Esquire, Matthew L. Miller, Esquire and April M. Ferraro, Esquire of Abrams & Bayliss LLP, Wilmington, Delaware and Joel M. Silverstein, Esquire and John E. Travers, Esquire of Stern & Kilcullen LLC, Florham Park, New Jersey, Attorneys for Petitioner Trust Protector Kevin M. Kilcullen, Esquire.

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SLIGHTS, Vice Chancellor

Ronald J. Mount died on April 23, 2015. Prior to his death, Ronald's children, Ian and Heather, and his widow, Rene, were embroiled in a dispute in the Florida courts over the proper control and direction of his medical care and the management of his assets.[1] After his death, these same parties turned their focus to litigating over the distribution of Ronald's rather substantial estate. In total, the parties initiated nine separate actions in three different states including Delaware.

To their credit, the parties sought to end their seemingly interminable litigation last summer by negotiating a global resolution of all disputes. This effort resulted in a binding Settlement Agreement, effective July 5, 2016. The Settlement Agreement details, *inter alia*, the consideration each party will receive, the representations and warranties each party would give to the others and the means by which Ronald's estate and trusts would be administered. A Florida Probate Court approved the Settlement Agreement on July 13, 2016. This Court approved the Settlement Agreement and modifications to the trust instrument for the Ronald J. Mount 2012 Irrevocable Dynasty Trust (the "Dynasty Trust") on August 11, 2016.

After the settlement closed, the parties quickly disagreed over the steps necessary to consummate the Settlement Agreement, particularly how to divide the Dynasty Trust. Following a breakdown in the parties' discussions, the Trust Protector, Kevin Kilcullen, Esquire, filed a petition in this Court on November 10,

[1] I use first names for clarity; I intend no disrespect or familiarity.

2016, seeking instructions on how to divide the Dynasty Trust under the Settlement Agreement. The Trust Protector claims that, as part of the Settlement Agreement, Ian committed to pay off a $4.2 million note owed to the Dynasty Trust but has now refused to do so. According to the Trust Protector, the plain language of the Settlement Agreement requires that Ian make this payment as a first step before the Trust Protector can make payments out of the Dynasty Trust as required by the Settlement Agreement.

Ian responds that the Ronald J. Mount Revocable Trust (the "Revocable Trust"), of which he is a beneficiary, is owed $6.9 million by the Dynasty Trust for expenses the parties paid out of the Revocable Trust. Accordingly, Ian believes that, rather than requiring him to pay $4.2 million on behalf of the Revocable Trust to the Dynasty Trust, the Settlement Agreement actually requires the Dynasty Trust to pay the Revocable Trust approximately $1.4 million. He maintains that this transfer can be accomplished by a simple offsetting accounting entry and a payment to the Revocable Trust.

On January 27, 2017, Ian filed his Response to the Petition and his Verified Counterclaim and Claim for Indemnification Against Beneficiary Heather Mount (the "Counterclaims"). The Counterclaims set forth seven counts.[2] On March 13,

[2] Count I is for "Breach of Settlement Agreement"; Count II is for "Bad Faith Breach of Settlement Agreement"; Count III is for "Breach of the Duty of Good Faith and Fair Dealing"; Count IV, which is mislabeled as Count III, is for "Liability for Breach of

2017, the Trust Protector and Heather filed separate motions to dismiss the Counterclaims under Court of Chancery Rule 12(b)(6) for failure to state a claim. Heather also requested indemnification from Ian for having to defend herself in this action.[3] After carefully considering the parties' arguments, I have concluded that both motions to dismiss must be GRANTED, and Heather's request for judgment on her indemnification claim must also be GRANTED.

I. FACTUAL BACKGROUND

The facts are drawn from the admissions in Ian's Response to the Petition, allegations in the Counterclaims, documents integral to the Counterclaims and matters of which the Court may take judicial notice.[4] As it must at this stage of the

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Paragraph 19 of the Settlement Agreement"; Count V is for "Breach of Duties Under the Dynasty Trust"; Count VI is for "Removal of Kicullen as Trust Protector"; and Count VII is for "Mandatory Injunction – Enforcement of Settlement Agreement." Verified Countercl. and Claim for Indemnification Against Beneficiary Heather Mount ("Countercl.") ¶¶ 52–94.

[3] Heather seeks judgment on her indemnification claim against Ian in her motion to dismiss papers, and she reiterated her request for indemnification at oral argument on the motions to dismiss. Heather Mount's Mot. to Dismiss 7–8; Transcript of Oral Argument on Motions to Dismiss Ian Mount's Countercl. at 65–66. Ian has not argued that Heather failed properly to raise her indemnification claim and, therefore, I consider the claim here under Court of Chancery Rule 12(c).

[4] *In re Crimson Exploration Inc. S'holder Litig.*, 2014 WL 5449419, at *8 (Del. Ch. Oct. 24, 2014) ("A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents.") (citation omitted); *In re Gardner Denver, Inc.*, 2014 WL 715705, at *2 (Del. Ch. Feb. 21, 2014) (on a motion to dismiss, the Court may rely on documents extraneous to a complaint "when the document, or a portion thereof, is an adjudicative fact subject to judicial notice") (footnotes omitted) (internal quotation marks omitted); *Narrowstep, Inc. v. Onstream*

proceedings, the Court assumes that all well-pled facts in the Counterclaims are true.[5]

A. The Parties

Ian Mount is Ronald Mount's son and youngest child. He is a current beneficiary of the Dynasty Trust and Revocable Trust. He resides in Short Hills, New Jersey.

Heather Mount is Ronald Mount's daughter and oldest child. She is a current beneficiary of the Dynasty trust and resides in Brooklyn, New York.

Kevin Kilcullen, Esquire is the Trust Protector of the Dynasty Trust. He has served in this capacity since before Ronald's death.

B. The Settlement Agreement

Towards the end of Ronald's life and after his death, nine separate actions were initiated in three different states related to Ronald's probate estate and the various trusts he had established during his lifetime. After active prosecution and defense of these actions, including here in Delaware, the parties ultimately reached

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Media Corp., 2010 WL 5422405, at *5 (Del. Ch. Dec. 22, 2010) (same); *Reiter v. Fairbank*, 2016 WL 6081823, at *5 (Del. Ch. Oct. 18, 2016) ("[W]here a complaint quotes or characterizes some parts of a document but omits other parts of the same document, the Court may apply the incorporation-by-reference doctrine to guard against the cherry-picking of words in the document out of context.").

[5] *E.g.*, *Gloucester Hldg. Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 123 (Del. Ch. 2003).

a global settlement of all pending litigation. The Settlement Agreement, dated July 5, 2016, is by and among Ian Mount, Rene Mount (Ronald's wife), Heather Mount, Kevin Kilcullen (the Trust Protector), Stern & Kilcullen, LLC and Joseph D. Stewart (curator of the Estate of Ronald J. Mount). It sets forth various obligations of the parties in administering Ronald Mount's estate, distributing various assets and modifying certain of the trust instruments.

Relevant to this dispute, the Settlement Agreement details how the parties are to administer two trusts, the Revocable Trust (a Florida trust) and the Dynasty Trust (a Delaware trust). A central part of the scheme devised by the parties is to divide the Dynasty Trust into two separate trusts for the benefit of Ian and Heather. Heather's newly divided trust is to be funded by a payment of $10 million less one-half of certain expenses and Heather's share of the remaining taxes. Ian's trust is to be funded with the balance remaining after the required distributions are made to Heather.

The Settlement Agreement was approved by the Florida Probate Court on July 13, 2016. Because the Dynasty Trust is a Delaware trust, this Court's approval of the Settlement Agreement was also required in order to make certain modifications to the Dynasty Trust Instrument. This Court approved the Settlement Agreement and modifications to the Dynasty Trust Instrument on August 11, 2016.

Following the execution of the Settlement Agreement, the parties began to disagree over the sequence of steps that must be taken before the Dynasty Trust can be split between Ian and Heather. The Trust Protector maintained that the agreement requires Ian to repay a $4.2 million note owed by the Revocable Trust to the Dynasty Trust before any split of the Dynasty Trust. While acknowledging that a debt was due from the Revocable Trust to the Dynasty Trust, Ian took the position that the Dynasty Trust owes the Revocable Trust $6.9 million in satisfaction of expenses that the parties had agreed to pay out of the Revocable Trust. Therefore, netting out the difference between the debts, Ian maintained that the Dynasty Trust owes the Revocable Trust $1.4 million and that this payment should be made without delay.

Unable to resolve their disagreements over the net flow of funds between the two trusts, the sequence of steps prescribed by the Settlement Agreement and the related obligations of the Trust Protector, the parties reverted to old behavior and began several weeks of unproductive, contentious correspondence. When that exercise inevitably proved to be pointless, the Trust Protector filed a Petition for Instructions in this Court.

C. Procedural History

The Trust Protector filed his Petition for Instructions on November 10, 2016. On January 27, 2017, Ian filed his Response to the Petition and Counterclaims. The Trust Protector and Heather filed separate motions to dismiss the Counterclaims

under Rule 12(b)(6) on March 13, 2017. Heather also asserted a claim for indemnification against Ian.

II. ANALYSIS

I begin by addressing the Trust Protector's motion to dismiss Ian's Counterclaims. I then turn to Ian and Heather's dueling claims for indemnification.

A. Motion to Dismiss Standard

In considering this motion to dismiss for failure to state a claim under Rule 12(b)(6), the standard is well settled:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[6]

The court can answer questions involving contract interpretation as a matter of law on a motion to dismiss "[w]hen the language of a contract is plain and unambiguous."[7] Dismissal of a contract dispute under Rule 12(b)(6) is proper, however, "only if the defendants' interpretation is the only reasonable construction

[6] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (citations omitted) (quotation marks omitted).

[7] *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

as a matter of law."[8] If the plaintiff has offered a reasonable construction of the contract, and that construction supports the claims asserted in the complaint, then the Court must deny the motion to dismiss even if the defendant's construction is also reasonable.[9]

B. Breach of the Settlement Agreement

Both parties acknowledge that the Settlement Agreement is clear and unambiguous. After carefully reviewing the operative provisions, I agree. Accordingly, my task is to construe the contract according to the plain meaning of its terms, remaining mindful that my construction of each term must make sense when considering the contract as a whole.[10]

Ian brings four separate claims based on alleged breaches of the Settlement Agreement: Count I for breach of the Settlement Agreement; Count II for bad faith breach of the Settlement Agreement; Count III for breach of the covenant of good

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[8] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) (emphasis omitted).

[9] *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents.") (citation omitted).

[10] *See Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334–35 (Del. 2012) ("We must construe the agreement as a whole, giving effect to all provisions therein. The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.") (citations omitted) (internal quotation marks omitted).

faith and fair dealing; and Count IV for breach of Paragraph 19 of the Settlement Agreement.[11] I address Count I, Count II and Count IV together as all three claims contain overlapping allegations that the Trust Protector has breached the clear and unambiguous terms of the Settlement Agreement. Ian's implied covenant claim does not overlap with his breach of contract claims, at least in theory, so I address that count separately.

1. Breach of Contract Claims

Ian mixes two flavors of alleged breaches together in Count I. First, he alleges that the Trust Protector breached Paragraphs 13 and 14(c) of the Settlement Agreement by noting in proposed distribution calculations that the Dynasty Trust is to pay an "estimated" $150,000 to his firm and his attorneys.[12] Next, he alleges that the Trust Protector breached unidentified provisions of the agreement by not doing a variety of things described in detail below.

Ian's claim regarding the Trust Protector's alleged breach of Paragraphs 13 and 14(c) must be dismissed because (i) he raised no argument in support of this claim in his answering brief and (ii) in any event, the Trust Protector has not violated

[11] To avoid confusion, I note that, in the Counterclaims, Count IV for breach of Paragraph 19 of the Settlement Agreement was mistakenly pled as Count III, despite the fact that breach of the covenant of good faith and fair dealing had already been pled as Count III.

[12] *See* Countercl. Ex. I (noting a deduction for "an estimated $150K ($100K to Stern & Kilcullen and $50K to Abrams [& Bayliss])").

any provision of the Settlement Agreement by earmarking funds in his proposed calculations.

The Trust Protector addressed Count I in his opening brief in support of his motion to dismiss,[13] and Ian failed to respond in any way to the Trust Protector's arguments in support of dismissal either in his answering brief or at oral argument. Thus, Ian has waived this claim.[14] Moreover, despite Paragraph 13's prohibition on the Trust Protector receiving any further "fiduciary compensation,"[15] and Paragraph 14(c)'s prohibition on him receiving further "professional fees,"[16] the Settlement Agreement provides under Paragraph 23 that the Trust Protector, or any other party for that matter, may receive additional funds if he prevails in any litigation related

[13] Trust Protector's Opening Br. in Supp. of Mot. to Dismiss ("Opening Br.") 31–33.

[14] *Hokanson v. Petty*, 2008 WL 5169633, at *6 n.22 (Del. Ch. Dec. 10, 2008) (citing *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr.28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).

[15] Opening Br., Ex. 2 ("Settlement Agreement") ¶ 13 ("Fiduciary Compensation. With the exception of the distributions and payments outlined in paragraphs (3) and (14) of this Agreement, Rene, Heather, Kilcullen, and Stern & Kilcullen, in all capacities waive, and shall not be entitled to, any compensation from the guardianship, the Estate, any trust or any entity established by or for Ronald J. Mount.").

[16] *Id.* ¶ 14(c) ("Professional Fees. The professional fees of the Parties and the Emergency Temporary Guardian shall be charged and paid as follows: . . . c. Except for the $3,400,000 to be paid to Stern & Kilcullen, LLC pursuant to paragraphs 3(a) and 14(a) above, and the attorney's fees and expenses to be paid to Abrams & Bayliss, LLP as counsel for Kilcullen as Trust Protector of the Dynasty Trust pursuant to paragraph 8(c) above (the "Paragraph 8(c) Deductible Fees and Expenses"), Rene, Heather and Kilcullen individually shall be responsible for paying their own attorneys' fees and any additional fees to be paid to Stern & Kilcullen.").

to implementing or enforcing the agreement.[17] In keeping with this provision, the Trust Protector claims that he earmarked certain funds from the Dynasty Trust due to the specter of litigation, which is now underway, under the assumption that he would prevail.[18] Nothing in the Settlement Agreement expressly prohibits the Trust Protector from engaging in such planning. Moreover, Ian does not allege in his Counterclaims nor does he argue in his answering brief that the Trust Protector or his lawyers have actually received the contested funds to date. For that reason alone, the Trust Protector has not breached the Settlement Agreement because he has not received any prohibited "fiduciary compensation" or "professional fees."

The balance of the dispute as to Count I centers on Paragraph 8 of the Settlement Agreement. Paragraph 8, entitled Administration of the Dynasty Trust, lists several steps related to the Dynasty Trust that were to occur at or following the closing of the Settlement Agreement. Most relevant to the current dispute is Paragraph 8(a), which states:

> Ian, as Personal Representative of the Estate and/or the successor trustee of the Revocable Trust, shall repay the $4.2 million note from the Revocable Trust to the Dynasty Trust. It is not anticipated by the Parties that the $4.2 million note, originally reflecting the debt owed by Ronald J. Mount to the Dynast Trust, be forgiven or cancelled without repayment thereof.

[17] *Id.* ¶ 23 ("In any proceeding to implement, or enforce this Settlement Agreement, the prevailing party, if any, shall be entitled to recover its reasonable attorneys' fees and costs incurred, including fees and costs through all appeals.").

[18] Opening Br. 31–33.

This is the first of several steps listed in the section governing administration of the Dynasty Trust.[19]

The placement of the provision relating to Ian's payment obligation into the Dynasty Trust is important because it reveals the parties' intent that this payment is to be the first in a sequence of events listed in Paragraph 8. Each of the subsequent events involve payments out of the Dynasty Trust or a division of the Dynasty Trust once the trust is fully funded.[20] Despite the clear mandatory language in Paragraph 8(a),[21] and its clear direction as to timing, Ian argues that this step is

[19] After Ian pays the $4.2 million note to the Dynasty Trust, Paragraph 8 provides that the following steps will occur in this order: (1) the Dynasty Trust "shall establish" another Delaware LLC for Ian "in all aspects similar" to the current Dynasty Trust; (2) the Trustee "shall pay any and all remaining expenses of the administration of the Dynasty Trust"; (3) the Trust Protector "shall direct the Trustee" to divide the Dynasty Trust in two parts, one part for Heather and one part for Ian, with Ian's part going to fund the new Delaware LLC established for his benefit; (4) the assets and expenses will be distributed between the two remaining trusts according to a schedule incorporated into the Settlement Agreement; and (5) with respect to Ian's trust, Rene, Heather and the Trust Protector shall resign from specified committees and Ian will appoint whomever he wishes to succeed them. Settlement Agreement ¶ 8(b)–(f). Ian suggested at oral argument that some steps listed above may have already happened out of sequence. Transcript of Oral Argument on Motions to Dismiss Ian Mount's Countercl. at 43. Assuming that is true, such extrinsic evidence cannot alter the plain language within the four corners of the Settlement Agreement. *See Engle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232–33 (Del. 1997) (holding that extrinsic evidence may not be offered to create an ambiguity in an unambiguous contract).

[20] *Riverbend Cmty., LLC*, 55 A.3d at 334–35 (holding that the court should construe terms in a manner that is consistent with the contract as a whole).

[21] Settlement Agreement ¶ 8(a) ("Ian . . . **shall** repay the $4.2 million note. . . .") (emphasis supplied).

optional because the parties should perform the agreement according to a more convenient course of conduct—his proposed accounting offset. I reject this construction of Paragraph 8(a) as it ignores the plain meaning of the provision's unambiguous terms and, if adopted, would violate the rule against surplusage.[22]

Absent the existence of the Settlement Agreement, and assuming the facts are as Ian claims them to be, an accounting offset might be one route to accomplish a sensible distribution of the Dynasty Trust to its beneficiaries. But Ian and the other parties, all represented by counsel, entered into a binding contract that spelled out a different route—one that specifically requires Ian to "repay the $4.2 million note from the Revocable Trust to the Dynasty Trust."[23] Ian offers no principled basis in Delaware law upon which the Court could ignore that bargained-for route and force the parties to travel down a different one.

Ian also alleges a variety of steps the Trust Protector has failed to take in performance of his obligations under the Settlement Agreement. These include, *inter alia*, (i) creating a plan for effectuating the split of the Dynasty Trust,

[22] *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) (citation omitted); *see also* 29 Williston on Contracts § 73:7 (4th ed.) (Westlaw version updated May 2017) ("[A]s is true with respect to the interpretation of contracts, generally, an interpretation which gives a reasonable meaning to all of a release's terms and provisions will be preferred over one that renders part of the language superfluous, without meaning, useless, or inexplicable.").

[23] Settlement Agreement ¶ 8(a).

(ii) drafting a letter to the Trustee directing a split of the Dynasty Trust before the $4.2 million loan to the Dynasty Trust is repaid, (iii) providing a written breakdown and back-up documentation of the proposed distribution of funds in the Dynasty Trust and (iv) directing the Trustee of the Dynasty Trust to reimburse the Revocable Trust $6.9 million in expenses.[24] Of course, none of these duties are imposed by the plain terms of the Settlement Agreement, yet Ian would have me declare a breach nevertheless.[25] Because his allegations of breach flatly contradict the Settlement Agreement in some instances,[26] or lack foundation in its clear language in others,[27] Ian has failed to state a claim for breach of contract. Therefore, Count I must be dismissed.

[24] Countercl. ¶ 63(a)–(e), ¶ 67(a)–(e).

[25] To be sure, Paragraph 8(d) does impose a duty on the Trust Protector to direct the Trustee to split the Dynasty Trust as set forth in the Settlement Agreement—but only after Ian pays the Dynasty Trust $4.2 million as required by Paragraph 8(a).

[26] For example, Ian claims that the Dynasty Trust is required to reimburse the Revocable Trust $6.9 million for various expenses, which at least as to certain of those expenses, is contrary to Paragraph 14(a), (b) and (d) of the Settlement Agreement. *Compare* Countercl. ¶ 9, *with* Settlement Agreement ¶ 14.

[27] Indeed, Ian appears to concede that some of his allegations of breach of contract are not tied to express provisions in the contract. Ian Mount's Answering Br. to Trust Protector's Mot. to Dismiss ("Answering Br.") 29 ("[T]he Agreement does not ***expressly*** state that Kicullen shall communicate with the parties, nor does it ***expressly*** state that Kilcullen shall document and provide back-up documentation to the parties to allow them to verify the accuracy of his tabulations.") (emphasis in original).

Ian's second count, a claim for "bad faith breach of contract," must be dismissed for the simple reason that the claim, as styled, does not exist in our law. "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."[28] Ian does not point to any contractual provision in the Settlement Agreement that dictates a standard of conduct. Consequently, his "bad faith breach of contract" claim is legally synonymous with and wholly duplicative of his claim for breach of contract in Count I. Count II is dismissed.

Ian's claim for breach of Paragraph 19 of the Settlement Agreement (Count IV) must also be dismissed because he waived it by failing to respond to the motion to dismiss the claim either in his answering brief or at oral argument.[29] The claim also fails on the merits. The premise of this claim, the same as for Counts I and II, is that the Trust Protector has failed to carry out certain duties under the Settlement Agreement. Once again, the supposed obligations of the Trust Protector that Ian alleges have been breached are not tethered to any provisions of the Settlement Agreement.[30] Count IV is dismissed.

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[28] *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009) (citation omitted).

[29] Opening Br. 36; s*ee also Hokanson*, 2008 WL 5169633, at *6 n.22 (citing *Emerald P'rs*, 2003 WL 21003437, at *43).

[30] In this regard, I note that Ian misreads Paragraph 19 of the Settlement Agreement to support his claim that the Trust Protector is in breach of obligations that exist nowhere in

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

In Count III, Ian alleges that the Trust Protector has breached the implied covenant of good faith and fair dealing. To state a claim for breach of the implied covenant, the plaintiff must first identify a gap in the contract that the court needs to fill[31] or a subsequent development that the parties could not anticipate.[32] "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.'"[33] The implied covenant is not a tool that the parties can employ after the fact to re-write their agreement.[34] It is, instead, an avenue for achieving the "fruits of the bargain" when

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the document. Paragraph 19 sets forth mutual representations and warranties to the effect that each party has "full power and authority to enter into this Settlement Agreement . . . and to carry out [their] obligations hereunder and thereunder." Settlement Agreement ¶ 19; Countercl. ¶ 75. It speaks only to each parties' *authority* to enter into the Settlement Agreement and *authority* to carry out the obligations of the Settlement Agreement; it does not, as Ian alleges, reflect a separate and distinct promise to perform the obligations imposed by the Settlement Agreement. Ian has not alleged that the Trust Protector was without authority to enter into the Settlement Agreement or that he now lacks authority to perform thereunder. Ian's claim, instead, is that the Trust Protector has refused to perform obligations that exist only in his flawed reading of the Settlement Agreement.

[31] *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 183 (Del. Ch. 2014).

[32] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).

[33] *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) (quoting *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986) (Allen, C.)).

[34] *Allen*, 113 A.3d at 183–84.

"the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably."[35] The court will "rarely" and "cautiously" imply terms into a contract that was reached through arm's-length negotiation, and should do so only when driven by issues of "compelling fairness."[36]

Ian fails to identify any gap in the Settlement Agreement that must be filled by an implied covenant or any unanticipated development that would justify a rewrite of the parties' bargained-for contract. Notably, the allegations of breach Ian offers to support his implied covenant theory are the same allegations of breach he made (and that have been rejected) to support his breach of contract claims.[37] Specifically, Ian alleges that the Trust Protector has breached the implied convenant by, *inter alia*, not communicating with Ian's attorneys, refusing to reimburse the Revocable Trust the $6.9 million that Ian alleges is due, refusing to provide a letter of direction to the Trustee specifying the breakdown of the division and distribution of the Dynasty Trust and "filing an action that falsely accuses Ian Mount of breaching the Settlement Agreement when, in fact, the Trust Protector is in

[35] *Nemec*, 991 A.2d at 1125–26.

[36] *Lonergan*, 5 A.3d at 1018 (quoting *Nemec*, 991 A.2d at 1125; *Dunlap*, 878 A.2d at 442).

[37] *Compare* Countercl. ¶ 72, *with* Countercl. ¶¶ 63, 67.

breach . . . ."[38] The Settlement Agreement addresses these issues directly. There are no gaps here.

The Settlement Agreement contains a detailed procedure for division and administration of the Dynasty Trust. Had Ian complied with his end of the bargain by completing the first step of the process as outlined in Paragraph 8, the parties likely would be well on their way to putting their disputes behind them and moving on with their lives. Instead, Ian has twisted the language of the Settlement Agreement and quibbled over sequencing. This has caused further delay and expense. Under these circumstances, it can hardly be said that "compelling fairness" requires that I imply additional terms into the Settlement Agreement.[39] Court III is dismissed.

C. Breach of Fiduciary Duty and the Dynasty Trust Instrument

In Count V, Ian alleges that the Trust Protector has breached his fiduciary duties under the Dynasty Trust Instrument. This claim also fails as a matter of law because (i) under the clear and unambiguous terms of the Dynasty Trust Instrument, the Trust Protector serves in a non-fiduciary capacity and (ii) the breach of fiduciary duty claims are entirely duplicative of Ian's breach of contract claims.

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[38] Countercl. ¶ 72.

[39] *See Lonergan*, 5 A.3d at 1018 (quoting *Dunlap*, 878 A.2d at 442).

First, under the clear and unambiguous terms of the Dynasty Trust Instrument, the Trust Protector serves in a non-fiduciary capacity. Specifically, the Trust Instrument states that "[t]he Trust Protector, acting as such, shall serve in a non-fiduciary capacity . . . ."[40] A settlor's decision to allow the trust protector to serve in a non-fiduciary capacity is valid and will be enforced under Delaware law. The public policy of our State, as articulated by the General Assembly, is to "give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments."[41] As relevant here, 12 *Del. C.* § 3313(a) provides that "the governing instrument may provide that any such adviser (including a protector) shall act in a non-fiduciary capacity."

Here, Ronald, as Settlor of the Dynasty Trust, clearly and unambiguously provided that the Trust Protector would fulfill that role in a non-fiduciary capacity. Ian, nonetheless, attempts to conjure up fiduciary duties on two grounds. First, he argues that the Trust Protector is also a member of the Investment Committee for the Dynasty Trust, a position through which he owes fiduciary duties. Second, he argues, "no Delaware case holds that a Trust Protector with the vaunted powers that Kilcullen granted himself over the Dynasty Trust can be determined to be a non-

[40] Opening Br., Ex. 1 Art. VI.B.5.

[41] 12 *Del. C.* § 3303(a).

fiduciary based on the bare language of a trust instrument."[42] In support of this argument, Ian cites to two law review articles that advocate for a reexamination of statutes or rules that allow trust protectors to act in non-fiduciary capacities.[43]

Ian's first argument is unpersuasive for the simple reason that his Counterclaims do not contain any allegations that the Trust Protector breached any duties in his capacity as a member of the Investment Committee. Rather, his allegations of breach focus exclusively on duties that Kilcullen allegedly owes as Trust Protector.[44]

Ian's second argument fares no better because it fails to account for our General Assembly's express allowance that testators may designate trust protectors to serve as non-fiduciaries. The academic perspectives offered in the articles Ian cites are well-researched and thought provoking. But they are not reflective of, and cannot alter, the law of Delaware. Ronald clearly provided that the Trust Protector

[42] Answering Br. 32–33.

[43] Answering Br. 33–34 (citing Alexander Bove, Jr., Esq., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (Summer 2011); Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard*, 59 Drake L. Rev. 67 (Fall 2010)).

[44] *See, e.g.*, Countercl. ¶¶ 83–84, 86. Ian could have utilized Court of Chancery Rule 15(aaa) to amend his Counterclaims and assert this claim, but he chose to rely on his original allegations.

of the Dynasty Trust would serve in a non-fiduciary capacity. That designation must be respected.

Second, Ian's fiduciary duty claim is duplicative of his breach of contract claims. Our law "respects the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations and does not allow fiduciary duty claims to proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims."[45] Determining whether an independent basis exists for a fiduciary duty claim depends on whether the fiduciary duty claim is broader in scope, depends on additional facts, and involves different remedial considerations.[46] Even a cursory review of the Counterclaims reveals that Ian's breach of fiduciary duty claim alleges breaches of the same supposed duties that form the bases for Ian's contractual claims.[47]

[45] *Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2015 WL 394011, at *7 & nn.81–82 (Del. Ch. Jan. 29, 2015) (collecting cases).

[46] *Id.*

[47] *Compare* Countercl. ¶ 63 ("Kevin Kilcullen has: a) willfully refused to respond to a reasonable request from counsel for the Trustee for a plan for effectuating the split of the Dynasty Trust; b) willfully refused to provide a letter of direction to the Trustee directing a split of the Dynasty Trust, in breach of his clear obligation under paragraph 8 of the Settlement Agreement; c) willfully refused to respond to repeated requests for a written breakdown and back-up documentation of the proposed distribution of funds in the Dynasty Trust . . . ."), *with* Countercl. ¶ 84 ("Kevin Kilcullen has: a) willfully refused to respond to a reasonable request from counsel for the Trustee for a plan for effectuating the split of the Dynasty Trust; b) willfully refused to provide a letter of direction to the Trustee directing a split of the Dynasty Trust, in breach of his clear obligation under paragraph 8 of the Settlement Agreement; c) willfully refused to respond to repeated requests for a

Accordingly, the breach of fiduciary duty claim must be dismissed as duplicative of the breach of contract claims.

D. Removal of the Trust Protector and Mandatory Injunction

In Counts VI and VII of his Counterclaims, Ian seeks an order removing the Trust Protector and a mandatory injunction requiring the Trust Protector to execute the terms of the parties' agreements. Neither Count states a reasonably conceivable claim for relief and therefore both must be dismissed.

Ian's prayer for removal of the Trust Protector rests on the "multiple, willful breaches" of both contractual obligations and fiduciary duties.[48] As I have already determined, Ian has failed to state viable breach of contract or breach of fiduciary duty claims. Having failed to state a claim for any of the predicate breaches on which Ian's claim for removal of the Trust Protector rest, there is simply no reasonably conceivable basis pled that would justify removal of the Trust Protector. Count VI is dismissed.

Through his claim for a mandatory injunction in Count VII of the Counterclaims, Ian once again seeks to impose duties that do not appear in the Settlement Agreement itself. In Paragraph 94 of his Counterclaims, Ian asks the

written breakdown and back-up documentation of the proposed distribution of funds in the Dynasty Trust . . . .").

[48] Countercl. ¶ 89.

Court, following removal of the Trust Protector, to issue instructions that would direct the new trust protector to "provide the beneficiaries of the Dynasty Trust a complete and accurate breakdown of all fees, expenses, taxes and other disbursements that have been made from the Dynasty Trust since the date of Ronald Mount's death," to "provide a letter of direction that directs the Trustee of the Dynasty Trust to pay expenses and divide and distribute the Dynasty Trust, as modified by paragraph and Schedule A of the Settlement Agreement," and to "provide in the letter of direction that the $4.2 million promissory note due from Ian J. Mount shall be cancelled by the Trustee of the Dynasty Trust and delivered to Ian J. Mount along with cash in the amount of $1,426,069 representing the net reimbursement due to him after offsets . . . ."

A search of the Settlement Agreement for the obligations Ian seeks to impose upon the Trust Protector would be in vein. They do not appear there. Ian's burden in seeking a mandatory injunction, *inter alia*, is to demonstrate that he is "entitled to judgment as a matter of law on the merits of [his] claim."[49] It is not reasonably conceivable that Ian will be entitled to a judgment as a matter of law because, once again, Ian's prayer for mandatory injunctive relief is completely disconnected from

[49] *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004) (citation omitted) (quotation marks omitted).

the plain language of the Settlement Agreement. Count VII, therefore, fails to state a claim and must be dismissed.

E. Ian's Indemnification Claim Against Heather

Ian alleges in Paragraph 78 of the Counterclaims that he is entitled under the terms of the Settlement Agreement to indemnification from Heather and others. Specifically, Ian alleges that "[he] is also entitled, under the terms of the Settlement Agreement, to indemnification from Heather Mount, [the Trust Protector] and Stern & Kilcullen, for all costs and damages, including attorneys' fees, incurred in responding to and defending against the Trust Protector's unmeritorious allegations and causes of action in his November 10 Petition . . . ."[50] This allegation appears in Count IV of the Counterclaims, where Ian alleges that the Trust Protector has breached Paragraph 19 of the Settlement Agreement. I have already determined that Count IV is without merit. That alone is a basis to deny Ian's indemnification claim.

Heather has brought a separate motion to dismiss arguing that Ian's indemnification claim against her finds no support in the plain terms of the Settlement Agreement. The indemnity provision of the Settlement Agreement on which Ian relies appears in Paragraph 18 of the Settlement Agreement, and provides in relevant part:

[50] Countercl. ¶ 78.

> Heather agrees that on and after the Closing she shall defend, indemnify and hold harmless Ian from and against any and all damages, claims, losses, and reasonable expenses and costs, including . . . liabilities for all reasonable attorneys'; accountants'; consultants' and experts' fees and expenses incurred, including those incurred to enforce the terms of this Settlement Agreement . . . suffered by Ian by reason of or arising out of (A) any breach of representation or warranty made by Heather or Rene pursuant to this Agreement . . . (B) any failure by Heather or Rene to perform or fulfill any of her covenants or agreements set forth in this Agreement . . . and (E) any claim, lawsuit, or other legal process or proceeding in any forum or tribunal that (1) is brought by one or more of Heather's or Rene's Related Parties and (2) asserts any claim . . . (b) [which] is based upon or relates to this Settlement Agreement . . . .

Ian does not allege that Heather has breached any representation or warranty made by her or that she has failed to perform or fulfill her covenants as set forth in the Settlement Agreement. Ian's allegations of breach are directed only at the Trust Protector—claims I have already determined lack merit. Therefore, the only basis on which Ian could hope to be entitled to indemnification from Heather is if the Petition for Instructions filed by the Trust Protector is a claim that falls within the language of Paragraph 18(b)(i)(E)(1)–(2).

The Counterclaims offer nothing of value with respect to Ian's indemnification claim against Heather; the first indication of Ian's theory appears in his answering brief where he asserts that he is entitled to indemnification from Heather because the Trust Protector is her "Related Party"—specifically, her "counsel"—as those terms are used in Paragraphs 16 and 18 of the Settlement Agreement. Relevant her, Paragraph 16(a) states: "[a] Party's 'Related Parties' shall

mean and refer to the Party's (i) spouse, (ii) issue, (iii) spouse(s) of issue, and (iv) counsel . . ." Of these, the only category that might fit the Trust Protector is "counsel." Yet Ian has not alleged that the Trust Protector was acting as Heather's counsel when he brought the Petition for Instructions. Indeed, the Petition reveals that the Trust Protector brought his claims for instructions in his own name and on his own behalf.

Ian argues that the Trust Protector previously served as counsel to Heather in related actions.[51] He also argues that "perhaps" Heather is still a client of the Trust Protector in some unspecified capacity.[52] Ian does not, however, allege that the Trust Protector is representing Heather in this action.[53] And he does not allege that the Trust Protector represented Heather in negotiating the Settlement Agreement.[54] Ian was obliged to plead that an attorney-client relationship existed between the Trust Protector and Heather in *this action* such that the Trust Protector could reasonably

[51] Countercl. ¶¶ 32, 62, 67 & 84 (noting that Heather was the Trust Protector's "former" client, but not alleging the nature of the representation); Ian Mount's Answering Br. to Heather Mount's Mot. to Dismiss 10.

[52] *E.g.*, Countercl. ¶ 32; Ian Mount's Answering Br. to Heather Mount's Mot. to Dismiss 10.

[53] *See, e.g.*, *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65 (Del. 1995) ("This review [under 12(b)(6)] is generally limited to the well-pleaded facts contained in the complaint."). Again, Ian could have utilized Court of Chancery Rule 15(aaa) to amend his Counterclaims, but he chose to rely on his original allegations.

[54] *See id.*

be considered Heather's counsel in connection with the Petition.[55] Even if the Court stretches the term "counsel" to include the attorney who represented Heather in negotiating the Settlement Agreement, Ian still would not prevail because that person was neither the Trust Protector nor any member of his firm.[56] Because Ian has failed to allege facts sufficient to establish that the Trust Protector was acting as Heather's counsel in bringing the action seeking instructions, it is not reasonably conceivable that Ian is entitled to indemnification from Heather for the losses and expenses incurred in his defense of the Petition and prosecution of the Counterclaims. His claim for indemnification against Heather is dismissed.

F. Heather's Indemnification Claim Against Ian

Heather, on the other hand, does have a valid claim for indemnification against Ian because the indemnification provisions in the Settlement Agreement are

[55] Settlement Agreement ¶ 16(a) ("A Party's "Related Parties" shall mean and refer to the Party's (i) spouse, (ii) issue, (iii) spouse(s) of issue, and (iv) counsel, provided that Heather's Related Parties shall also include each and every person Heather may designate as a successor trustee of the trust to be created for the benefit of Jasper pursuant to paragraph 3(b)(iv) above . . . ."). Black's Law Dictionary defines "counsel" in a manner consistent with the Court's interpretation. Black's Law Dictionary (10th ed.) (Westlaw version updated 2014) ("counsel . . . 2. One or more lawyers who, having the authority to do so, give advice about legal matters; esp., a courtroom advocate"). *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").

[56] It appears from the Settlement Agreement that an attorney named Michael C. Fasano, Esquire, represented Heather. *See* Settlement Agreement (signature pages). Ian does not allege or argue otherwise.

reciprocal and Ian has brought a claim against her relating to the Settlement Agreement. Heather asserts her claim for indemnification under three alternative theories, two of which are supported by the clear language of the Settlement Agreement. First, at Paragraph 18, the Settlement Agreement provides that Ian shall indemnify Heather for her attorneys' fees and costs if he brings a claim against her related to the Settlement Agreement.[57] That clearly has happened here. Second, at Paragraph 23, the Settlement Agreement provides that the prevailing party in any suit brought to implement or enforce the Settlement Agreement shall recover attorneys' fees and costs from the other party.[58] Heather has prevailed here. She is entitled to indemnification from Ian.

Heather has also made a claim for fee shifting under the bad faith exception to the American Rule. I need not reach this issue as I have determined that Heather

[57] *Id.* ¶ 18(b)(ii)(E)) ("ii. Ian agrees that on and after the Closing Date he shall defend, indemnify and hold harmless [Heather] from and against all Loss and Expense suffered by [her] by reason of or arising out of the following causes: . . . (E) . . . any claim, cause of action, action, suit, or other legal process or proceeding in any forum or tribunal that is (1) brought by one or more of Ian's Related Parties, and (2) asserts any claim (a) which, if asserted by Ian, would be a Released Claim, as defined in paragraph 16 above, (b) is based upon the terms of this Settlement Agreement (including, without limitation, any representation, warranty, covenant or agreement made herein), and/or (c) concerns the Estate, the Revocable Trust, and/or one or more other trusts, organizations, corporations, LLCs, partnerships, foundations, charities and/or other entities or associations referenced in paragraph 18(b)(ii)(D) above.").

[58] *Id.* ¶ 23.

may recover her fees and costs from Ian under the plain terms of the Settlement Agreement.

III. CONCLUSION

For the foregoing reasons, the motions to dismiss brought by Heather and the Trust Protector must be GRANTED. Heather's motion for judgment on her claim for indemnification against Ian is also GRANTED. The Trust Protector and Heather shall confer and submit a joint implementing order on notice to Ian within ten (10) days.

IT IS SO ORDERED.