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Re: *Henkel Corporation v. Innovative Brands Holdings, LLC*
C.A. No. 3663-VCN
Date Submitted: February 14, 2013

Dear Counsel:

Motions for reargument were created to address those instances when a judge misapprehends the facts or the law in a material way that would have changed the outcome.¹ In this instance, the judge misapprehended neither the facts nor the law. He did, however, employ less than precise language.

¹ See *MICH II Hldgs. LLC v. Chron*, 2012 WL 3224351, at *1 (Del. Ch. Aug. 7, 2012).

Plaintiff Henkel Corporation (“Henkel”) moves under Court of Chancery Rules 59(e) & (f) for “reargument of and amendment to” the Court’s Memorandum Opinion of January 30, 2013 (and its implementing order), which granted in part and denied in part Henkel’s motion for summary judgment.² The question that prompted Henkel’s motion is from what date could the Business’s profits be set off against Henkel’s damages. The Court referenced “the date of [Defendant Innovative Brands Holdings, LLC (“IBH”)] breach and repudiation of the agreement.”³ The Court also referred to “between the date of IBH’s breach or repudiation of the agreement and the sale of the business . . .”⁴ Breach occurred on April 7, 2008, but the date of repudiation could not be resolved on undisputed material facts.

As Henkel observed, “whether . . . repudiation constitutes a present breach can only be determined by the response of the non-repudiating party.”⁵ This case is somewhat unusual because the non-breaching party (atypically) seeks to push

² *Henkel Corp. v. Innovative Brands Hldgs., LLC*, 2013 WL 396245 (Del. Ch. Jan. 31, 2013) (“Mem. Op.”). A passing familiarity with the Memorandum Opinion is presumed.

³ *Id.* at *7.

⁴ *Id.*

⁵ Henkel Corp.’s (1) Answering Br. in Opp’n to Def.’s Mot. for Summ. J. and (2) Opening Br. in Supp. of Henkel’s Cross-Mot. for Summ. J. 29-30.

the contract-end date as far into the future as possible in order to shorten the period when the Business's profits could offset its losses on the IBH transaction.⁶

There are facts which would support a finding (or inference) that the critical date is March 24 or May 4, 2009, when IBH waived the no-shop and its right to close under the agreement. Henkel's actions could be viewed as reflecting its belief that the agreement was of no force or effect as early as shortly after it filed suit because Henkel sought replacement buyers for the Business shortly thereafter. If the agreement had been in effect, that arguably would have been in violation of the "no shop" restriction. One of two answers to the question of how it could pursue other buyers in the face of the no shop provision seems likely: Henkel relied upon IBH's breach to excuse its compliance with the no shop terms or Henkel was actively violating that provision.

On the other hand, when Henkel filed this action on March 31, 2008, it was seeking, among other forms of relief, specific performance. That suggests its view that there was a viable contract to perform—something other than a claim for damages.

⁶ See Mem. Op. at *7.

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These facts support a range of reasonable inferences—sufficient to require denial of summary judgment on this issue. If one falls victim to the almost inevitable temptation to “weigh” the facts, the outcome may be fairly predictable. That temptation must be avoided; the facts need to be “weighed,” not on summary judgment, but at trial.

Accordingly, Henkel’s motion for reargument is denied.⁷

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

⁷ IBH, in its opposition to Henkel’s motion for reargument, contends that the Court erred in the Memorandum Opinion in its description of certain facts sponsored by IBH in support of its cross-motion for summary judgment. Because IBH did not move for reargument, the Court need not address IBH’s contentions.