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Transaction ID 49229605
Case No. 3663-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HENKEL CORPORATION, a Delaware corporation, Plaintiff, v. INNOVATIVE BRANDS HOLDINGS, LLC, a Delaware limited liability company, Defendant.	:	**C.A. No. 3663-VCN**
INNOVATIVE BRANDS HOLDINGS, LLC, Counterclaim-Plaintiff, v. HENKEL CORPORATION, Counterclaim-Defendant.	:	

MEMORANDUM OPINION

Date Submitted: October 4, 2012
Date Decided: January 31, 2013

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NOBLE, Vice Chancellor

This is a breach of contract action. Plaintiff Henkel Corporation ("Henkel") entered into an Asset Sale and Purchase Agreement (the "Agreement") with Defendant Innovative Brands Holdings, LLC ("IBH") for the purchase by IBH of a segment of Henkel's consumer adhesive business (the "Business").[1] Henkel filed this action after IBH failed to close on the Agreement. IBH has since stipulated to liability for breach.[2] The only issue that remains to be decided is damages, and IBH and Henkel have brought cross motions for summary judgment.

I. BACKGROUND

A. *Factual Background*

Henkel is a Delaware corporation engaged in the business of developing, marketing, and selling products in the United States and Canada under various brands including Duck, Painter's Mate Green, Easy Liner, EZ Start, Roll On and Tape Shark.[3] IBH is a Delaware limited liability company. On December 20, 2007, IBH agreed to acquire the Business for an aggregate purchase price of

[1] Transmittal Affidavit of Scott W. Perkins, Esq. ("Perkins Aff.") Ex. C, Asset Sale and Purchase Agreement (the "Agreement"). Section 14.2 of the Agreement provides that it "shall be construed, performed and enforced in accordance with, and governed by, the internal laws of the State of Delaware."

[2] Oct. 20, 2009 Stip. and Order ¶ 2 ("IBH has determined that it will no longer contest the question of liability on IBH's obligations to close the transactions and hereby stipulates thereto.").

[3] Transmittal Affidavit of Bruce E. Jameson in Supp. of Pl.'s (1) Answering Br. in Opp'n to Def.'s Mot. for Summ. J. & (2) Opening Br. in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Jameson Transmittal Aff.") PSJX 2.

$127,500,000, subject to certain post-closing adjustments.[4] IBH subsequently refused to complete its purchase under the Agreement. After IBH waived all rights to purchase the assets or to enforce the no-shop clause in the Agreement,[5] Henkel sold the Business to an alternative buyer, Shurtape, for $112 million.[6]

B. *Procedural History*

After Henkel commenced this action on March 31, 2008, IBH filed counterclaims seeking, among other things, a declaration that a Material Adverse Event ("MAE") had occurred under the terms of the Agreement.[7] Because of the alleged MAE, IBH claimed that it had the right, but not the obligation, to close under the Agreement, but that Henkel remained bound by the no-shop clause in the Agreement.[8] On June 4, 2008, Henkel filed a motion to dismiss, in part, IBH's counterclaims.[9] Henkel sought a determination that it was no longer bound by the no-shop clause in the Agreement. On August 26, 2008, the Court denied that motion.[10]

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[4] Agreement § 3.
[5] May 4, 2009 Stip. and Order Limiting Relief ¶ 1 ("IBH hereby expressly waives all of its rights to purchase the Business as provided in the Asset Purchase Agreement and IBH waives all of its rights to enforce the "No Shop" clause in the Asset Purchase Agreement.").
[6] Perkins Aff. Ex. E.
[7] Def.'s Verified Countercls. ¶ 23.
[8] Def.'s Verified Countercls. ¶ 29.
[9] Pl.'s Mot. to Dismiss Part of Def's First Countercl. & All of its Second Countercl. ("Pl.'s Mot. to Dismiss").
[10] *Henkel Corp. v. Innovative Brands Hldgs., LLC*, 2008 WL 4131566 (Del. Ch. Aug. 26, 2008).

On March 24, 2009, IBH advised Henkel that it no longer intended to defend this action.[11] On May 4, 2009, IBH stipulated to entry of the Order Limiting Relief in which IBH waived all rights to purchase the Business or to enforce the no-shop clause under the Agreement.[12] On May 29, 2009, Henkel sold the Business to Shurtape.[13] On October 21, 2009, IBH stipulated that it would "no longer contest the question of liability on IBH's obligations" to close the Agreement.[14] On January 25, 2010, Henkel filed its First Amended Complaint directed solely at recovering Henkel's damages.[15] On March 13, 2012, IBH moved for summary judgment.[16] Henkel has filed a cross motion for summary judgment.[17] The Court addresses these motions below.

II. CONTENTIONS

Henkel seeks damages of three kinds: (1) the difference between the sale price of the Business under the Agreement with IBH and the sale price received by Henkel from Shurtape (the "Sale Price Damages"); (2) the cost incurred by Henkel in conducting the second sale process that led to the sale of the Business to Shurtape (the "Transaction Damages"); and (3) the attorneys' fees and expenses

[11] Jameson Transmittal Aff. PSJX 31.
[12] May 4, 2009 Stip. and Order Limiting Relief ¶ 1.
[13] Perkins Aff. Ex. E.
[14] Oct. 20, 2009 Stip. and Order ¶ 2.
[15] Pl.'s First Am. Compl. ¶ 26.
[16] Def.'s Br. in Supp. of its Mot. for Summ. J. ("IBH Br.").
[17] Pl.'s (1) Answering Br. in Opp'n to Def.'s Mot. for Summ. J.; & (2) Opening Br. in Supp. of Pl.'s Cross Mot. for Summ. J. ("Henkel Br.").

incurred in enforcing Henkel's rights under the Agreement as a result of IBH's breach (the "Legal Enforcement Damages").[18]

Henkel estimates the Sale Price Damages at $15,500,000.00,[19] the difference between the price under the Agreement with IBH ($127,500,000.00)[20] and the sale price to Shurtape ($112,000,000.00).[21] Henkel asserts that the operations and assets sold to Shurtape were identical to what would have been sold to IBH had IBH closed under the agreement.[22] Further, Henkel estimates the Transaction Damages at $922,277.57, including any expenses it incurred as a result of having to conduct the second sales process with Shurtape.[23] These include the investment banking transaction fees,[24] data room expenses,[25] and transactional legal fees in connection with Shurtape.[26] Finally, Henkel estimates the Legal Enforcement Damages at $693,595.97 as of April 30, 2012,[27] an amount it intends to supplement post-judgment to include further sums incurred in this action.[28] Henkel also seeks interest on any amounts awarded.[29]

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[18] Henkel Br. 13.
[19] Henkel's calculations may be found at Henkel Br. 13-18.
[20] Agreement § 3.1.
[21] Jameson Transmittal Aff. PSJX 35 (Shurtape Agreement) § 3.1.
[22] Henkel Br. 13.
[23] Henkel Br. 18.
[24] Jameson Transmittal Aff. PSJX 1, 19, 41.
[25] Jameson Transmittal Aff. PSJX 43.
[26] Affidavit of Christopher B. Carson ("Carson Aff.") ¶¶ 2-3.
[27] Carson Aff. ¶¶ 4-5; Affidavit of Bruce E. Jameson ¶¶ 2-3.
[28] Henkel Br. 20 n.67.
[29] Henkel Br. 13.

In response, IBH asserts that the Business generated approximately $30 million in EBITDA[30] for Henkel in the period between the date IBH breached the Agreement,[31] and the eventual sale of the Business to Shurtape on May 29, 2009 (the "Interim Period").[32] In Henkel's agreement with Shurtape, Henkel represented that the Business had generated $27.8 million in EBITDA in calendar year 2008, and an additional $2.8 million in EBITDA for the period of January 1, 2009 through April 30, 2009, for a total of $30.6 million in EBITDA for the period from January 1, 2008 until April 30, 2009.[33] Subtracting the EBITDA that was generated in early 2008, before Henkel filed its Verified Complaint on March 31, 2008 (approximately $2.416 million) leaves $28.184 million in EBITDA that the Business generated for Henkel from March 31, 2008 to April 30, 2009.[34] This does not include the Business's performance between April 30, 2009 and May 29, 2009.

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[30] EBITDA is a generally understood acronym signifying Earnings Before Interest, Taxes, Depreciation, and Amortization.

[31] In its Opening Brief, IBH identified March 1, 2008 as the date of its breach. IBH Br. 10. In its Reply Brief, IBH describes this as a typographical error, and states that IBH's review of the evidence cited confirms that IBH used March 31, 2008 as the basis for its calculations. Def.'s Reply Br. in Further Supp. of its Mot. for Summ. J. and Answering Br. in Opp. To Pl's Mot. for Summ. J. ("IBH Reply & Answering Br.") 12 n. 8. While IBH argues that it breached the Agreement in March 2008, Henkel argues that the breach occurred much later. The date of IBH's breach is addressed *infra*.

[32] Perkins Aff. Ex I (Capasso Dep.) at 104. IBH requested that Henkel provide a deponent who was prepared to testify as to the Business and its financial performance in the period from March 2008 through and including May 29, 2009. The witness provided by Henkel testified that he was prepared to address that topic. *Id.* at 7-8. The numbers he provided were in the form of EBITDA.

[33] Shurtape Agreement Schedule 5.7(a).

[34] Perkins Aff. Ex. H.

Had IBH closed on the Agreement, it claims that it, instead of Henkel, would have received those funds. IBH therefore asserts that any income Henkel received from the Business during the Interim Period should be credited against the damages claimed by Henkel. Because the amount of Interim Period income is evidently greater than the amount of Henkel's claims, IBH requests summary judgment in its favor.[35]

Henkel argues that actual true date of IBH's breach or repudiation was May 4, 2009 (when IBH waived all rights to purchase the Business and to enforce the non-shop clause) instead of March 31, 2008 (when Henkel filed its Verified Complaint), and that therefore even if IBH is entitled to reduce Henkel's damages by some amount of EBITDA generated by the Business post-breach, any such reduction would be negligible.[36] IBH contends, in response, that "the breach occurred no later than April 7, 2008," (five business days after Henkel satisfied the closing conditions under the Agreement) and that whether the date is March 31, 2008 or April 7, 2008 is not material, as the post-breach earnings of the Business almost double the amount Henkel claims in damages.[37]

[35] IBH Br. 13.
[36] Henkel Br. 28.
[37] IBH Reply & Answering Br. 12 n.8.

III. ANALYSIS

The parties have filed cross motions for summary judgment.[38] A moving party must show that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[39] The Court will draw inferences from the record "in the light most favorable to the nonmoving party to determine if there is any dispute of material fact."[40] However, the party opposing summary judgment may not rely on "mere allegations or denials" to try to create a dispute of material fact.[41] Instead, it must "set forth specific facts showing there is a genuine issue for trial."[42] The opposing party can do this by affidavit, deposition, or other discovery.[43] Summary judgment will only be granted if the moving party can show that there is no genuine issue of fact for trial.[44] If "vital facts are either lacking or

[38] Court of Chancery Rule 56(h) only applies where "parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion." Only then will the Court "deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Ct. Ch. R. 56(h). Because IBH has alleged that there are outstanding issues of fact material to the resolution of Henkel's motion, Rule 56(h) does not apply. *See, e.g., Chambers v. Genesee & Wyoming Inc.*, 2005 WL 2000765, at *5 (Del. Ch. Aug. 11, 2005); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[39] Ct. Ch. R. 56(c); *see GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 783 (Del. 2012) (discussing the standard for summary judgment).
[40] *Aeroglobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).
[41] Ct. Ch. R. 56(e).
[42] *Id.*
[43] Ct. Ch. R. 56(e), 56(f).
[44] *Id.* 56(e).

in conflict," it would be "inappropriate to attempt either to assume them or to evaluate them on cross-motions for summary judgment."[45]

On cross motions for summary judgment where "the task before the court is the interpretation of contractual language, the court should initially focus solely on the language of the contract itself."[46] "Delaware adheres to the "objective" theory of contracts—a contract's construction should be that which would be understood by an objective, reasonable third party."[47] In considering the meaning of a contract, "the language of an agreement, like that of a statute, is not rendered ambiguous simply because the parties in litigation differ concerning its meaning."[48] Rather, it is for the court to determine whether the language at issue is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[49] "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[50]

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[45] *Gamble v. Penn Valley Crude Oil Corp.*, 104 A.2d 257, 263 (Del. Ch. 1954).
[46] *Chambers*, 2005 WL 2000765, at *5.
[47] *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007) (citing *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. 1999)).
[48] *City Investing Co. v. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[49] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[50] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

A. *Pertinent Terms of the Agreement*

Section 10 of the Agreement, entitled "Indemnification," sets out the remedies available to each party in the event of breach. Section 10.2 requires that IBH indemnify and hold Henkel "harmless from and against any Losses arising out of or resulting from . . . any failure of [IBH] to perform or observe any term, provision, covenant, agreement or condition on the part of [IBH] to be performed or observed" under the Agreement.

"Losses" are defined by Section 10.1 of the Agreement as any "claim, damages, liability, loss, judgment, cost, expense (including all reasonable attorneys' fees and court costs), deficiency, interest, penalty, impositions, assessments or fines" arising from breach. Section 10.4(c) of the Agreement limits indemnification to exclude any amount "in excess of actual damages, court costs and reasonable attorneys' fees." IBH and Henkel also "expressly waive[d] any right to recover lost profits, lost opportunity, consequential, special, punitive, or exemplary damages."

Section 10.2 of the Agreement grants Henkel the right to recover from IBH "any Losses arising out of or resulting from" IBH's breach of the Agreement.

When a contract is breached, the Court determines damages "as if the parties had fully performed the contract."[51] "Historically, damages for breach of contract have been limited to the non-breaching party's expectation interest."[52] Expectation damages are calculated as the amount of money that would put the non-breaching party in the same position that the party would have been in had the breach never occurred.[53]

As the Delaware Supreme Court has explained:

> [T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties ex ante. This principle of expectations damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breach of contract, and, hence, what the promisee lost.[54]

The Court elaborated:

> [T]he non-breaching party is entitled to recover damages that arise naturally from the breach or that were reasonably foreseeable at the time the contract was made. Contract damages are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed.[55]

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[51] *Reserves Dev. LLC v. Crystal Props., LLC*, 986 A.2d 362, 367 (Del. 2009) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009)).
[52] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996) (citing *Restatement (Second) of Contracts* § 347).
[53] *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *29 (Del. Ch. July 20, 2007), *judgment entered*, 2007 WL 3326119 (Del. Ch. Aug. 15, 2007), *aff'd*, 945 A.2d 594 (Del. 2008).
[54] *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) (citing *Restatement (Second) of Contracts* § 347 cmt. a).
[55] *Paul*, 974 A.2d at 146 (internal quotation marks and citations omitted).

Section 10.2 of the Agreement therefore provides Henkel indemnification for its Sales Price Damages (the difference between the sales price under the Agreement and the sales price with Shurtape), its Transaction Damages (the cost of conducting the second sales process with Shurtape), and its Legal Enforcement Damages (litigation costs incurred as a result of IBH's breach of the Agreement).

B. *Henkel's Mitigation of Damages*

IBH has asserted Henkel's failure to mitigate its damages as an affirmative defense. At this stage, IBH is under no requirement to prove its defense; it simply needs to show that, when the record is viewed in the light most favorable to it, material facts remain in dispute.

"While there is a general duty to mitigate damages if it is feasible to do so, a plaintiff need not take unreasonably speculative steps to meet that duty."[56] Adequate mitigation efforts "do not involve high levels of risk."[57]

IBH does not contest Henkel's efforts to find a suitable replacement buyer. Instead, it argues that Henkel was required to pursue renegotiation of the Agreement with it in order to satisfy its mitigation duties. IBH asserts that it would have been willing to settle the matter, *i.e.*, renegotiate the Agreement, if the Business's financial performance had improved. Apparently, it was willing to

[56] *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 11 (Del. Ch. 1992), *aff'd*, 620 A.2d 856 (Del. 1992) (TABLE).
[57] *Duncan*, 775 A.2d at 1026 n.23.

offer to comply substantially with the other terms of the Agreement subject only to a "holdback" of funds that would have assuaged its concerns.[58] It further argues that Henkel was violating the Agreement's no-shop provision all the while it was pursuing other buyers.

The parties generally agree that the law is not clear about whether a party to an agreement must negotiate with the breaching party as part of its duty to mitigate. In essence, IBH seems to be advocating for a rule that a breaching party has the right to breach and then to renegotiate its contract more favorable to a point just above where the second buyer would agree. "Courts have generally held that it is not necessary for the plaintiff to make another contract with the defendant who has repudiated, even though he offers terms that would result in avoiding loss."[59]

The duty to mitigate is assessed in reference to the exposure of the mitigating party to risk and uncertainty which is, itself, another form of risk. Even if there is a general rule requiring renegotiation with a breaching party, application of that rule is not justified here because of IBH's contentious and "clock running" approach to the Agreement. Also important is Henkel's strategic decision to rid itself of the Business. Having to accept the uncertainty in dealing with IBH while it was seeking to divest the Business would have constituted an imprudent risk and counsels against questioning further Henkel's mitigation strategy. Further,

[58] *See* IBH Reply & Answering Br. 23.
[59] 11 *Corbin on Contracts* § 5715 at 344 (rev. ed. 2005).

difficult economic times were arriving, and they caused even greater risk and uncertainty for Henkel.

For these reasons, IBH's efforts to assert a mitigation defense fail as a matter of undisputed fact.

C. *Whether Henkel's Recovery is Limited*

The Supreme Court has held that damages for breach of contract "should not act as a windfall" for the non-breaching party.[60] Section 10.4(c) of the Agreement limits any such indemnification to exclude "any amounts in excess of actual damages, court costs and reasonable attorneys' fees." Because the Business generated income during the Interim Period, IBH argues that Henkel's damages were reduced and that, therefore, Section 10.4(c) operates to limit Henkel's indemnification.[61] The central question in this case—whether the income generated by the Business during the Interim Period is to be credited against Henkel's damages—turns on what the phrase "actual damages" in Section 10.4(c) of the Agreement means.

Because the Agreement does not define the term "actual damages", the Court presumes that the parties intended its ordinary meaning.[62] The term "actual

[60] *Paul*, 974 A.2d at 146.
[61] IBH Br. 13.
[62] *See, e.g., Bonanza Rest. Co. v. Wink*, 2012 WL 1415512, at *3 (Del. Super. Apr. 17, 2012).

damages" encompasses both "direct" and "consequential" damages.[63] However, the Agreement also separately limits any damages to exclude "lost profits, lost opportunity, consequential, special, punitive, or exemplary damages."[64] Henkel does not (because it may not) seek damages for lost profits and lost opportunity.[65] Therefore, the only component relevant to the analysis of "actual damages" in Section 10.4(c) is "direct" and not "consequential" damages. Direct damages are damages "inherent in the breach," the "necessary and usual result" of the breach, and "flow naturally and necessarily" from the breach.[66]

Henkel asserts that its reasonable expectation was that it would continue to receive all revenues generated by the Business between the time when the Agreement was executed and the time of closing on its sale.[67] IBH responds that had IBH closed on the Agreement, Henkel would have given up control and operations of the Business after closing and would not have kept any income generated.[68] Citing *Corbin on Contracts*, IBH asserts that any income generated

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[63] *Bonanza*, 2012 WL 1415512, at *3; *see also Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 2929552, at *21 (Del. Ch. July 23, 2010) ("Compensatory damages have long been divided into two categories: those which are direct, also referred to as general damages; and those which are indirect and consequential, traditionally referred to as special damages.").
[64] Agreement § 10.4(c).
[65] Pl.'s Reply Br. in Supp. of its Mot. for Summ. J. ("Henkel Reply Br.") 4-5 ("[Lost profits and lost opportunity] normally would apply in circumstances where a party sought to recover hypothetical profits or opportunities that may have resulted from relationships with other parties in the absence of a breach. Henkel seeks no such amounts.").
[66] *Bonanza*, 2012 WL 1415512, at *3.
[67] Henkel Br. 27.
[68] IBH Br. 16.

by the Business after the date IBH would have closed had it not breached the Agreement was obtained by Henkel "by reason of opportunities that would not have been available to [it] but for [IBH's] breach."[69] IBH therefore argues that any Interim Period income should be "deducted from the amount that [Henkel] could otherwise recover."[70]

In *WaveDivision*, the Court calculated damages due to a buyer upon a seller's breach.[71] The Court first determined the expected value of the assets to the buyer at the time of breach. From this amount, the Court subtracted any costs avoided as a result of the breach, as well as any earnings the buyer received from other assets the buyer bought to mitigate damages.[72] After reaffirming that "the proper measure of damages for breach of contract is 'based upon the reasonable expectations of the parties ex ante,'"[73] the Court held that the buyer was "only entitled to recover the net loss it [had] suffered because of [the seller's] breach."[74]

Here, analogously, Henkel is entitled to the net damages it suffered because of IBH's breach. Were it not for IBH's failure to close on the Agreement, IBH would have gained possession of the Business and obtained any income it generated during the Interim Period. Henkel's reasonable expectations are limited

[69] IBH Br. 16; 11 *Corbin on Contracts* § 57.11, at 302 (rev. ed. 2005).
[70] IBH Br. 16.
[71] *WaveDivision Hldgs., LLC v. Millennium Digital Media Sys., LLC*, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010).
[72] *Id.*, 2010 WL 3706624, at *19-20.
[73] *Id.*, 2010 WL 3706624, at *19 (citing *Duncan*, 775 A.2d at 1022).
[74] *Id.*, 2010 WL 3706624, at *20 (citing *Restatement (Second) of Contracts* § 347).

to any revenues generated by the Business until the date it would have sold the Business to IBH under the Agreement. They do not extend to the date the Business was actually sold to Shurtape, because Henkel would not have reasonably expected having to conduct a second sale at the time it entered into the Agreement with IBH.

Awarding Henkel both income generated by the Business during the Interim Period together with Sale Price Damages would do more than just put "the non-breaching party in the same position that the party would have been in had the breach never occurred."[75] It would result in a "windfall" to Henkel,[76] one it would have never expected to receive at the time it signed the Agreement. For the same reason—that the second transaction with Shurtape would not have been part of Henkel's reasonable expectations at the time of the Agreement—any income generated during the Interim Period should also be credited against Henkel's Transaction Damages.

Henkel's attorneys' fees are included within "Losses" as defined in Section 10.1 of the Agreement. Section 10.4(c) limits Henkel's recovery to "actual damages, court costs, and attorneys' fees." This limitation language does not use the term "Losses." Although "Losses" includes both attorneys' fees (and court costs) and a collection of elements that constitute "actual damages" or, in essence,

[75] *Cobalt*, 2007 WL 2142926, at *29.
[76] *Paul*, 974 A.2d at 146.

"economic damages," Section 10.4(c) treats legal expenses separately and different from actual damages. Actual damages are subject to reduction (or offset) by the Business's profits. In other words, the netting out of damages and profits in the Interim Period is a process not involving legal expenses. Thus, regardless of what credit or offset IBH may be entitled to because of the Business's interim success, Henkel has a right to recover its reasonable attorneys' fees and court costs. Because there are no material facts in dispute regarding this specific aspect of its claims against IBH, summary judgment on this narrow issue in favor of Henkel is appropriate.

D. *The Date of IBH's Breach or Repudiation of the Agreement*

Even if income generated by the Business during the Interim Period (between the date of IBH's breach or repudiation of the Agreement and the sale of the Business to Shurtape on May 29, 2009) is to be credited against Henkel's damages, the Court must still determine the date of IBH's breach and repudiation of the Agreement in order to decide when to start calculating the amount of income to be credited.

Under Delaware law, expectation damages (and any mitigating amounts to be credited against them) are to be measured as of the date of the breach.[77] Section 2.1(a) of the Agreement required IBH to "purchase and accept" from

[77] *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553 (Del. Ch. Nov. 23, 2010) (citing *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003)).

Henkel the Business "on the Closing Date", and Section 4 of the Agreement defines the "Closing Date" as the date "five (5) Business Days' after satisfaction or waiver of all conditions precedent set forth in" the Agreement.

Henkel argues that even if IBH is entitled to reduce Henkel's damages by some amount of EBITDA generated by the Business, it is entitled to such reduction "only for amounts generated after IBH breached or repudiated the contract."[78] Henkel claims that the "earliest date on which such breach or repudiation can be deemed to have occurred is May 4, 2009,"[79] when IBH waived its rights to enforce the no-shop clause and to close under the Agreement.[80] According to Henkel, because the Business was sold to Shurtape on May 29, 2009, IBH is entitled only to reduce Henkel's damages by any income generated by the Business between May 4, 2009 and May 29, 2009.[81]

Although Henkel uses the terms "breach" and "repudiation" interchangeably, they mean different things, and have different consequences. Under Delaware law, "a party [to a contract] is excused from performance . . . if the other party is in material breach" of its contractual obligations.[82] The non-breaching party "has the choice to continue to perform under the contract or to

[78] Henkel Br. 28.
[79] Henkel Br. 28.
[80] May 4, 2009 Stip. and Order Limiting Relief ¶ 1.
[81] Henkel Br. 29.
[82] *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

cease to perform, and conduct indicating an intention to continue the contract in effect will constitute a conclusive election."[83] "[T]he nonbreaching party may not, on the one hand, preserve or accept the benefits of a contract, while on the other hand, assert that contract is void and unenforceable."[84]

Whether "repudiation amounts to a present breach," however, is "predicated on the promisee's response."[85] A party confronted with repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform, or (iii) by ignoring the repudiation. "Once the promisee relies on the repudiation—e.g., by filing suit for damages or by engaging in a substitute transaction—or notifies the promisor it regards the repudiation as final, effective retraction is no longer possible."[86]

* * *

IBH argues that its breach of the Agreement occurred either on March 31st, 2008, when Henkel filed its Verified Complaint stating that Henkel had "satisfied all of its necessary obligations under the Agreement," was "ready to close the transaction," that "[a]ll of the conditions precedent to performance by IBH which

[83] *DeMarie v. Neff*, 2005 WL 89403, at *5 (Del. Ch. Jan. 12, 2005) (citing 14 *Williston on Contracts* at 43:15).
[84] *Id.*
[85] *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009).
[86] *Id.*

are under Henkel's control have been satisfied," and yet "IBH has refused to close;"[87] or on April 7, 2008, the day that is five business days after March 31.[88]

IBH claims that the only "condition precedent" keeping it from closing under Section 4 of the Agreement was its counterclaim in response to Henkel's initial Verified Complaint that an MAE had occurred under the Agreement.[89] IBH also cites Henkel's motion to dismiss IBH's Verified Counterclaims to suggest that Henkel understood when IBH breached the Agreement:

> If an MAE occurred, IBH simply had the choice to waive the MAE and proceed with the Closing on the terms in the Agreement or to terminate. If an MAE had not occurred, IBH breached the Agreement by refusing to proceed with the closing.[90]

According to IBH, the only reason it refused to close on the Agreement was because it thought an MAE had occurred.[91] When IBH waived all rights to purchase the Business or enforce the no-shop clause under the Agreement in May 2009, or when it decided to "no longer contest the question of liability on IBH's obligations" to close the Agreement in October 2009, it gave up the right to argue that an MAE had occurred. Without the MAE argument, IBH had no defense to the fact that it had breached the Agreement under its terms, on the Closing Date set

[87] Pl.'s Verified Compl. ¶ 30.
[88] IBH Reply & Answering Br. 12.
[89] IBH Reply & Answering Br. 11-12; Def.'s Verified Countercls. ¶ 23.
[90] Pl.'s Mot. to Dismiss ¶ 7.
[91] IBH Reply & Answering Br. 11-12.

forth in Section 4 of the Agreement—April 7, 2008, five business days after Henkel satisfied all the conditions precedent to performance under its control.[92]

Henkel directly responded to IBH's breach of contract by filing its Verified Complaint seeking "declaratory and injunctive relief specifically enforcing the terms of the Agreement and ordering IBH to consummate the transaction; or in the alternative," damages against IBH.[93] This constituted an indication that Henkel intended to continue to perform under the terms of the Agreement despite IBH's material breach in failing to close on the Agreement.

* * *

IBH committed a material breach under the terms of the Agreement on April 7, 2008. It did not, however, repudiate the Agreement. "A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions."[94] "Repudiation may be accomplished through words or conduct,"[95] but must be "positive and unconditional."[96] IBH did not make any such indication.

Had IBH at the time outright indicated that it no longer wished to proceed with the Agreement, Henkel could have immediately initiated its mitigation process. As discussed above, IBH would then be liable for Henkel's damages as a

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[92] Agreement § 4.
[93] Pl.'s Verified Compl. ¶ 36.
[94] *W. Willow-Bay Court, LLC*, 2009 WL 458779, at *5 (citing *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch. 2004).
[95] *Id.* (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *14 (Del. Ch. May 2, 2007)).
[96] *Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 WL 3010, at *6 (Del. Ch. Jan. 13, 1988) (quotation omitted).

result of IBH's breach, including any difference between the price under the Agreement and the price of the second sale, as well as any costs incurred by Henkel in conducting the second sale. Any income generated by the Business between this breach date and the second sale date would be credited against Henkel's damages.

Instead, IBH sought the Agreement's continuing existence. In its Verified Counterclaims, IBH asked the Court for a "declaration that [IBH] had not repudiated the Agreement," a declaration that IBH had not breached the Agreement because it was "under no obligation to close on the Agreement" due to the occurrence of an MAE, and a declaration that Henkel was still bound by the no-shop clause under the Agreement.[97] IBH wanted to retain its benefits conferred by the Agreement, including (i) the ability to close on the Agreement if it so wished and (ii) assurance that Henkel remained bound by the Agreement.

E. *The Doctrine of Quasi-Estoppel*

Henkel argues that IBH, by asserting that it had not repudiated the Agreement when it filed its Verified Counterclaim (on May 13, 2008) and by benefiting from the Agreement's continuing in effect, is now barred by the doctrine of quasi-estoppel from arguing that IBH had repudiated the Agreement in April

[97] Def.'s Verified Countercls. ¶ 29.

2008.[98] Quasi-estoppel "'precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken.'"[99] The doctrine "applies when it would be unconscionable to allow a person 'to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.'"[100]

In response, IBH argues that the representations it made in its Verified Counterclaims—that IBH had not repudiated the Agreement—cannot be considered in isolation as a blanket assertion of non-repudiation.[101] Rather, IBH claims that they were representations made in the context of IBH's assertions that an MAE had occurred and "in the event that IBH's declaration of an MAE was not itself a breach."[102] In other words, IBH contends that any assertions it made in its Verified Counterclaims denying repudiation must be considered in the context of its belief that an MAE had occurred, and that they were merely statements representing that IBH's refusal to close on the Agreement was because of the MAE and not because IBH independently breached or desired to repudiate the Agreement.

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[98] Henkel Reply Br. 6-7. Initially, Henkel invoked the doctrine of judicial estoppel. Henkel Br. 34-35. It has since focused on principles of quasi-estoppel.
[99] *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd*, 970 A.2d 256 (Del. 2009) (TABLE).
[100] *Id.*
[101] IBH Reply Br. & Answering Br. 10-11.
[102] IBH Reply Br. & Answering Br. 11.

In assessing Henkel's motion to dismiss IBH's Verified Counterclaims, the Court considered what would have happened under the Agreement if an MAE had occurred.[103] The Court determined that—assuming the occurrence of an MAE—the Agreement did not "set any time by which IBH must decide whether to claim that an MAE has occurred or to waive any such claim."[104] In other words, the Agreement did not specify a time limit for IBH to elect (i) to terminate the Purchase Agreement based on its claim that an MAE had occurred, or (ii) to waive the MAE and continue to closing. However, the Court also held that it was unreasonable "to believe that sophisticated parties would have agreed upon an open-ended, unlimited period for making such a decision."[105] IBH could not indefinitely refuse to close on the Agreement by asserting the existence of an MAE and yet at the same time refuse to terminate the Agreement with Henkel.

Questions of material disputed fact remain.[106] After IBH's breach of the Agreement, IBH sought to retain its benefits thereunder by arguing that an MAE had occurred, did IBH truly believe that an MAE had occurred, or was it merely asserting the occurrence of an MAE to stall on its obligations to perform under the

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[103] Under Delaware law, in considering a motion to dismiss, the Court is required to accept as true all of the non-moving party's well-pleaded allegations of fact, and it must draw all reasonable inferences from those allegations in favor of the non-moving party. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

[104] *Henkel Corp.*, 2008 WL 4131566, at *3.

[105] *Id.*

[106] The Court defers its ruling on Henkel's claim that IBH's bad faith supplies an independent basis for awarding Henkel its legal fees. *See* Henkel Br. 44-46.

Agreement? And between IBH's assertion of an MAE in May 2008 and its March 24, 2009 notification to Henkel that it no longer wished to defend against the litigation,[107] did IBH at any point either (i) decide that an MAE had not in fact occurred or (ii) decide that it was not going to pursue the Agreement? While the record indicates that IBH did not conduct an analysis of whether an MAE still existed after March 31, 2008,[108] it does not shed light on whether (i) IBH had legitimate grounds to assert the existence of an MAE in the first place, or why (ii) IBH waited until March 24, 2009, to inform Henkel that it was no longer going to contest its defense to perform under the Agreement.[109]

Henkel is substantially accurate to argue that IBH cannot simply assert the existence of an MAE in order to avoid closing on the Agreement, while indefinitely holding Henkel bound to it, as this would render the Agreement "nothing more than an option contract as to IBH."[110] During the post-breach Interim Period, IBH cannot simultaneously (i) benefit from the Agreement (by preserving its ability to close and holding Henkel liable) and (ii) seek to credit any income generated by the Business during this time against any damages suffered

[107] Jameson Transmittal Aff. PSJX 31.
[108] Jameson Transmittal Aff. PSJX 42 (Najafi Dep.) at 125.
[109] The Court is not attempting to list every material fact that might be in dispute.
[110] Henkel Br. 30.

by Henkel. In determining how much income is to be credited against Henkel's damages, either a better factual record or a factfinding exercise will be required.[111]

IV. CONCLUSION

For the foregoing reasons, Henkel is entitled to partial summary judgment awarding its reasonable attorneys' fees and costs, but otherwise, IBH and Henkel's cross motions for summary judgment are denied. An implementing order will be entered.

[111] While using EBITDA throughout its brief, at one point Henkel argues that "as the Business and its assets were not a stand-alone, segregated business unit with separate employees, assets and books," Capasso Dep. 10-11, 67, it is difficult to "measure the precise cost to Henkel of operating the Business and generating the EBITDA attributable to it." Henkel Br. 36. Whether a further refinement is necessary may depend upon the length of time during which EBITDA may be credited. Although the EBITDA numbers may not be fully accurate, they are the numbers provided by Henkel and, there is no reason to believe that they are not substantially accurate and a reasonable substitute for more precise numbers that one ordinarily obtains from accounting efforts. If the period for determining the Business's profit to be applied to IBH's advantage should narrow, it is possible that material facts relating to EBITDA (or a different measure of income) might exist.