IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ENVO, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4156-VCP
	)	
KIM WALTERS, JOSEPH AYLOR,	)	
E.S.G., Inc. and ENVIRONMENTAL	)	
SOLUTIONS GROUP, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: April 18, 2012
Decided: July 18, 2012

Henry A. Heiman, Esq., Susan E. Kaufman, Esq., COOCH AND TAYLOR, P.A., Wilmington, Delaware; *Attorneys for Plaintiff.*

David L. Finger, Esq., FINGER & SLANINA, LLC, Wilmington, Delaware; *Attorneys for Defendants Kim Walters and Environmental Solutions Group, Inc.*

Adam R. Elgart, Esq., MATTLEMAN, WEINROTH & MILLER, P.C., Newark, Delaware; *Attorneys for Defendant Joseph Aylor.*

PARSONS, Vice Chancellor.

This action involves a claim for promissory estoppel against Defendants Kim Walters, Joseph Aylor, and Environmental Solutions Group, Inc. Walters and Aylor presented themselves as President and Vice President, respectively, of ESG, Inc. ("ESG") in order to purchase assets from the predecessor of Plaintiff, Envo, Inc. ("Envo"). Unfortunately, after the assets had been transferred, Walters and Aylor learned that ESG did not exist. Defendants kept the assets, however, and used them to run a business under the name Environmental Solutions Group, Inc. Moreover, as of the time of trial, Defendants still have refused to pay Envo for the assets. Envo claims that Defendants' actions are wrongful, it has been damaged by those actions, and it is entitled to relief under the doctrine of promissory estoppel and various other legal and equitable doctrines.

This action currently is before the Court after a full trial on the merits. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law. For the reasons stated, I find Walters, Aylor, and Environmental Solutions Group, Inc. liable to Envo under the doctrine of promissory estoppel. As a result, Envo is entitled to damages in an amount equal to the purchase price of the assets, plus pre-judgment interest, post-judgment interest, and costs. In addition, to the extent that Aylor has asserted a cross-claim for indemnification against Walters for any liability arising out of this action, I deny that claim as unsupported by the evidence.

I. BACKGROUND[1]

A. The Parties

Plaintiff, Envo, is a Delaware corporation formerly known as Environmental Solutions Group, Inc. ("Old Environmental"). Nonparty Basil Kollias founded and owned Old Environmental as an environmental consulting business until he sold all of its assets to Defendants Walters and Aylor on July 21, 2005.

Defendants Walters and Aylor are Delaware residents who purported to buy Old Environmental from Kollias in their capacities as President and Vice President of nonparty ESG. There is a Delaware corporation named ESG, Inc., but it has not been in good standing since 1984 and has no formal relation to Walters or Aylor.[2]

Defendant Environmental Solutions Group, Inc. ("New Environmental") is a Delaware corporation that was incorporated on August 15, 2005. Walters established New Environmental to hold the assets acquired from Old Environmental.

Nonparty Thomas Marconi, Esq. is a lawyer who represented Walters and Aylor in connection with their purchase of Old Environmental's assets.

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[1] In general, only findings as to disputed facts recited in this Memorandum Opinion are accompanied by citations to the evidentiary record.

[2] Nonparty E S G, Inc. ("E S G") is a Delaware corporation in good standing. E S G was listed as a defendant under Count II of the Amended Complaint in this action. Envo later determined, however, that E S G was not associated with Walters or Aylor and Envo dropped E S G as a defendant.

B. Facts

1. Background of the transaction

Kollias formed Old Environmental in 1991. As an environmental consulting business, Old Environmental performed a variety of services, including cleaning up contaminated properties, conducting environmental site assessments, and arranging transportation for the disposal of hazardous waste from various waste generators.

While Kollias was running Old Environmental, he also obtained a law degree from Widener University School of Law and gained admission to the New Jersey and Delaware state bars. In 2001, after joining the law firm Parkowski, Noble & Guerke, P.A., Kollias decided to sell Old Environmental so he could focus solely on practicing law. Kollias, therefore, began reaching out to potential buyers through Old Environmental's clients. Eventually, he was contacted by Walters and Aylor, who worked for another environmental consulting company that Kollias had dealt with in the past. Although Kollias received several offers to purchase Old Environmental, he chose to sell Old Environmental's assets to Walters and Aylor because he wanted the company to remain close to him in Delaware, and the other offerors wanted to move the company to Pennsylvania.

2. The transaction

As Defendants' counsel, Marconi structured the transaction as an asset sale whereby Walters and Aylor would purchase the assets of Old Environmental through ESG, which Marconi would incorporate as an acquisition vehicle for the transaction. Because Walters and Aylor desired to keep the name "Environmental Solutions Group,

Inc." for the new company, the parties agreed that, following the transaction, Old Environmental would change its name to "Envo" and ESG would then change its name to "Environmental Solutions Group, Inc."

Under the Asset Purchase Agreement (the "APA" or "Agreement"), Old Environmental agreed to sell substantially all of its assets (the "Purchased Assets") to ESG for $300,000. The Purchased Assets included accounts receivable, furniture, fixtures, non-construction equipment, vehicles and construction equipment, the name of the business, business records, contracts and contract rights, the goodwill of the business, telephone and fax numbers, advertisements, websites, and domain names. The Purchased Assets did not include, however, certain accounts receivable that Old Environmental's customers owed Old Environmental at the time of closing. Those accounts receivable were listed in Exhibit B of the APA by the date they were invoiced, the invoice number, the amount invoiced, and the amount of pre-paid costs associated with each invoice. Under the APA, as each invoice on Exhibit B was paid, ESG was required to refund to Old Environmental an amount corresponding to the costs that Old Environmental had paid before closing.[3] These costs totaled $60,911.88 and were separate from the $300,000 purchase price.

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[3] Section 2.2 of the APA states that "those items in the 'Cost' column of Exhibit 'B' highlighted in yellow, are costs paid in advance by [Old Environmental] which shall be refunded to [Old Environmental] upon receipt by [ESG] of the entire corresponding receivable." This section is listed under Article II, which is entitled "EXCLUSION OF LIABILITIES." Joint Trial Exhibit ("JTX") 3.

In exchange for the Purchased Assets, ESG was required to pay to Old Environmental $300,000 in the form of $10,000 cash at closing and two promissory notes (the "Notes"). The Notes included a short term promissory note in the amount of $71,632 (the "Short Term Note") and a long term promissory note for $218,368 (the "Long Term Note"). Both promissory notes had an interest rate of 5% per annum. The Short Term Note was due in full on September 15, 2005 and the Long Term Note was to be paid monthly over five years beginning on October 15, 2005. The APA also required ESG to pay Old Environmental 65% of the net proceeds from the sale of construction equipment marked "TBS" ("to be sold") under Exhibit C of the Agreement.[4] The proceeds then were to be applied to reduce the principal balance of the Long Term Note.

Kollias signed the APA as President of Old Environmental, and Walters and Aylor signed the APA and the Notes as President and Vice President, respectively, of ESG. Both the APA and the Notes were signed under seal. Attorney Marconi witnessed all the signatures on the APA and signed as notary on the Notes.

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[4] Section 3.3(d) of the APA states: "After Closing, [ESG] shall undertake its best efforts to sell the construction equipment marked 'TBS' on Exhibit 'C.' With respect to each such sale, [ESG] shall pay to [Old Environmental] sixty-five percent (65%) of the net proceeds of such sale(s) (hereafter the 'proceeds payments'). The proceeds payments, if any, shall be applied to reduce the principal balance of the long term promissory note." JTX 3. Although Defendants acknowledge that they sold some of the equipment listed in Exhibit C, none of the proceeds were ever applied to paying down the Long Term Note. JTX 22; Tr. 94 (Kollias).

3. Post-closing period

At the closing on July 21, 2005, Old Environmental tendered all of the Purchased Assets. Walters and Aylor began occupying what had been the business premises of Old Environmental the next day. As described below, however, certain questions arose as to the completeness of what Old Environmental delivered, and Walters and Aylor initially refused to tender the $10,000 down payment.

After conducting an inventory of the Purchased Assets, Walters claimed that some of the business's assets had been stolen, including a desk, a chair, a computer, and five self-contained breathing apparatuses (SCBAs).[5] Kollias supplied new replacements for the desk, chair, and computer.[6] Walters also expressed concern about the information on the hard drive of the stolen computer. In response, Kollias denied that the stolen computer contained any business data, explaining that the computer had operated only as a console connected to the main computer, which acted as a server. As a result, all of Old Environmental's data was saved on the server instead of the stolen computer.[7] Furthermore, Kollias assured Walters that all of the data was in hard copy files at the office.[8]

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5 JTX 5; Trial Transcript ("T. Tr.") 88 (Kollias), 206-07 (Walters). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the cited page of the transcript.

6 T. Tr. 89 (Kollias), 158-59 (Walters).

7 T. Tr. 89 (Kollias).

8 T. Tr. 90 (Kollias).

According to Walters, a few issues regarding the Purchased Assets remained unsolved well after the closing. As for the SCBAs, Kollias could not find replacements for four of the five missing SCBAs. Kollias testified, however, that he believed the SCBA matter had been resolved, because either Walters or Aylor informed him that ESG did not want any SCBAs because they would not be using them.[9] For his part, Walters denied ever telling Kollias that he did not want the SCBAs,[10] and claimed that he had refused to pay the $10,000 at closing because the matter had not been resolved. Walters further testified that he did not believe Kollias's explanation about the stolen computer and considered that matter to be unresolved as well.[11] In addition, Walters complained at trial that he was missing a photoionization detector, but he had not included that item in what he reported missing to the police at or around the time of the closing.[12]

Walters further avers that the missing assets caused him to doubt whether Kollias would perform his obligations under the contract[13] and to seek to renegotiate the contract between ESG and Kollias. Kollias, however, declined to renegotiate. As a result, Walters directed Marconi to place the $10,000 owed to Old Environmental at closing into an escrow account until the matters were resolved.[14]

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[9] T. Tr. 90-91, 110.

[10] T. Tr. 149-50.

[11] T. Tr. 207-09.

[12] T. Tr. 145, 207.

[13] T. Tr. 157.

[14] JTX 6; T. Tr. 27 (Marconi).

a. The incorporation of New Environmental

On August 15, 2005, Old Environmental changed its name to Envo as required by the APA.[15] At the same time, Marconi incorporated a new company on behalf of Walters and Aylor called Environmental Solutions Group, Inc. ("New Environmental"). As previously noted, the parties had contemplated having the buyer, ESG, change its name to "Environmental Solutions Group, Inc." promptly after the closing. As it turned out, however, Marconi failed to incorporate ESG in conjunction with the closing, as planned. Therefore, because ESG did not exist, Marconi simply incorporated the business Walters and Aylor were operating as New Environmental. As a result, Defendants effectively ended up where they intended, *i.e.*, operating a business under the name New Environmental using the Purchased Assets they received from Old Environmental pursuant to the APA. However, the formal relationship of New Environmental to the APA was murky, at best. While Marconi, Walters, and Aylor all knew about this situation, none of them took any additional steps after closing to modify or amend the APA to include New Environmental as the new corporate buyer or otherwise clarify its relation to the Agreement. Furthermore, none of Defendants ever paid anything to Envo for the Purchased Assets beyond the $10,000 that Walters had placed in escrow and which, eventually, was paid to Envo.

[15] JTX 3 § 7.1.

b. Aylor walks away from the business

Shortly after closing on the APA, the relationship between Walters, Aylor, and Marconi fell apart. On September 30, 2005, Marconi sued Walters and Aylor claiming that Walters and Aylor failed to pay him for the legal services he provided relating to the transaction. Around the same time, Aylor dissociated himself from Walters and the business.[16] According to Marconi, Aylor "got cold feet about going out on his own in business" and "just sort of disappeared."[17] Kollias did not learn that Aylor had left the business, however, until several months or a year after closing.[18]

After Aylor dissociated himself from the business, Walters continued to use the Purchased Assets to operate New Environmental. The company's 2005-2009 tax returns show that it generated significant income during those years.[19] Most of this income resulted from three major contracts and the sale of certain of the construction equipment Defendants had acquired from Old Environmental.[20] According to Kollias's unrebutted

[16] JTX 10-12, 14; T. Tr. 170 (Walters).

[17] T. Tr. 24.

[18] T. Tr. 97 (Kollias).

[19] JTX 26-30 (New Environmental's tax returns show that it achieved gross profits of $27,834 in 2005, $138,259 in 2006, $147,034 in 2007, $219,756 in 2008, and $56,611 in 2009).

[20] According to Kollias, the first contract generated approximately $30,000 to $36,000 a month or every three to four months, with corresponding costs from $15,000 to $20,000, while the second contract generated $100,000 to $150,000 per year with almost no costs, and the third contract generated $40,000 to $50,000 per year. T. Tr. 76, 78-80.

testimony, the equipment was worth approximately $65,000 to $100,000.[21] Yet, despite the gross profits generated by New Environmental under Walters, Envo did not receive a single payment toward the purchase price until after Envo filed its Amended Complaint in this action.[22]

C. Procedural History

Envo filed its initial Complaint against Walters and Aylor on November 11, 2008. On April 27, 2009, Walters separately moved to dismiss for lack of subject matter jurisdiction. On June 26, 2009, I granted Walters's motion, but granted Envo leave to amend its Complaint to assert a basis for equitable jurisdiction.

Envo filed an Amended Complaint (the "Complaint") on July 15, 2009, adding E S G and New Environmental as Defendants. On July 24, 2009, Walters filed a second motion to dismiss for: (1) failure to state a claim pursuant to Court of Chancery Rule 12(b)(6) as to Count V for reformation; (2) laches as to Counts I, III, IV, V, and VI; and (3) lack of subject matter jurisdiction pursuant to Rule 12(b)(1) as to the entire Complaint on the basis that Envo had a full and fair remedy at law.[23] On December 30, 2009, I

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21 T. Tr. 109.

22 Moreover, that payment was limited to the $10,000 that was released from escrow during this litigation.

23 On September 22, 2009, New Environmental joined in Walters's motion to dismiss. Unless the context requires otherwise, I refer to Walters and New Environmental herein, collectively, as "Walters."

granted the motion to dismiss as to Count V of Envo's Complaint for reformation, but denied the motion in all other respects.[24]

On January 14, 2010, Walters answered the Complaint. Aylor filed his Answer, as well as a cross-claim against Walters and ESG, on April 28, 2010. On August 5, 2011, Walters moved for summary judgment, arguing that Plaintiff's claims were barred by laches and the statute of limitations. On September 7, 2011, I denied that motion without prejudice to Defendants' ability to reassert their laches defense at trial.

Trial began on September 12, 2011. After a full day of testimony, the trial was continued because, during Aylor's testimony, he mentioned for the first time a post-closing meeting at which Marconi allegedly notified Kollias, Walters, and Aylor that ESG had not been incorporated. At or about the same time, certain related issues arose regarding the production of new documents. Trial concluded on December 9, 2011 with additional testimony from Aylor. After post-trial briefing, the Court heard argument on April 18, 2012.

D. Parties' Contentions

Envo asserts four counts against Defendants, which seek damages under differing theories of liability for Defendants' allegedly wrongful acts in inducing Envo to enter into the APA with a nonexistent entity, taking possession of the Purchased Assets and using them to operate Envo's former business, and refusing to pay the agreed-upon consideration. As a result, Envo claims that Defendants are liable under alternative

[24] *Envo, Inc. v. Walters*, 2009 WL 5173807, at *12 (Del. Ch. Dec. 30, 2009).

theories of fraud, contract implied in fact, equitable fraud, and promissory estoppel, among others.[25]

Defendants contend that they cannot be held liable under any of the theories asserted by Envo because ESG, an admittedly nonexistent entity, is the only party bound by the APA and the Notes. Defendants further assert that, in any case, Envo's claims are barred by laches.

II. ANALYSIS

A. Evidentiary Issues

Before considering Envo's various theories of liability, I must resolve a disputed question of fact related to Kollias's knowledge of the nonexistence of ESG. During the first day of trial, Aylor testified that a meeting took place shortly after the closing at which Marconi informed all of the parties, including Kollias, that ESG was never incorporated and did not exist.[26] Aylor further testified that, despite this revelation, the parties decided not to amend the APA to account for ESG's nonexistence. Instead, they decided to treat ESG as a "placeholder" entity and have Marconi file a new certificate of incorporation using the name "Environmental Solutions Group, Inc."[27] New Environmental then would assume the place of ESG under the APA and the Notes.[28] The

[25] Count II also asserts a claim against E S G for breach of contract. Envo has waived that claim, however, because neither Walters nor Aylor are associated with E S G. Envo's Opening Br. 13.

[26] T. Tr. 225.

[27] T. Tr. 226.

[28] T. Tr. 226-27 (Aylor).

alleged meeting and Kollias's knowledge of ESG's nonexistence had not been raised at any earlier time in this litigation. Because Aylor's testimony introduced a new, disputed factual issue, I continued the trial after the first day so that the parties could confer, take additional discovery, and supplement the record, if necessary.

On September 26 and October 31, 2011, Aylor proffered new documentary evidence supporting his testimony. The evidence, which Aylor had not identified or produced before trial, included: (1) a letter purportedly written by Walters to Aylor on September 11, 2005 about a meeting with Kollias scheduled for September 15, 2005, at Marconi's office (Exhibit 23); (2) an email allegedly written on September 13, 2005 by Delaware's Assistant Secretary of State, Rick Geisenberger to Aylor explaining that Geisenberger could not find any changes to ESG's corporate record since their last meeting on August 29, 2005 (Exhibit 24); and (3) an email purportedly written on September 16, 2005 by Aylor to Geisenberger about a meeting he had with Walters and Marconi on September 15, 2005 (Exhibit 25).[29]

Envo directed its first request for production to Aylor on February 23, 2009, and served a notice of deposition *duces tecum* on him on or about June 30, 2011. Both of these discovery requests asked Aylor to produce, among other things, all documents, electronically stored information, and tangible things related to this action that were in his possession. Aylor did not produce any of the disputed exhibits in response to either of

[29] The documents later were marked Joint Trial Exhibits 23, 24, and 25. JTX 25 was produced on September 26, 2011, and JTX 23 and 24 were produced on October 31, 2011. Envo has objected to the admissibility of each of these exhibits.

those requests. Instead, Aylor claims that he "discovered" the documents the night before trial.

When the trial continued on December 9, 2011, Envo objected to JTX 23-25 on several grounds, including untimeliness, hearsay, and authentication.[30] Defendants argued that the evidence should be admitted because Aylor did not recall the documents until the night before the first day of trial and their admission would not prejudice Envo.[31] When the trial recommenced, I allowed the cross-examination of Aylor to proceed, took the evidentiary objection under advisement, and invited the parties to address it in post-trial briefing.

1. Aylor's exhibits are inadmissible

In objecting to JTX 23-25, Envo argues that it has been prejudiced by their late disclosure. Because the documents were not produced until after the first day of trial, Envo contends that it did not have a full opportunity during discovery to inquire about additional documents that Aylor may not have disclosed and depose Geisenberger and other witnesses about the documents. Envo also complains that the untimely disclosure prevented it from examining Marconi and Walters about the documents either in discovery or during their earlier trial testimony.

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[30] T. Tr. 241-42. Having concluded that the exhibits are inadmissible because they were not timely identified and produced in pretrial discovery, I need not address Envo's hearsay and authentication arguments.

[31] T. Tr. 243-45.

Defendants, on the other hand, argue that the Court should excuse Aylor's belated production because he made the documents available promptly after he discovered them. Furthermore, Defendants also assert that Envo was not prejudiced by the introduction of the documents because it could have conducted additional discovery between the first and second days of trial, a period of over forty-five days.

Having considered all the circumstances and the parties' arguments, I sustain Envo's objection and exclude JTX 23, 24, and 25 from evidence. Each of these exhibits pertains to an important aspect of the dispute between the parties to this action. Consequently, they are clearly relevant and arguably material. Thus, JTX 23-25 plainly were responsive to requests for production that Envo served as early as 2009, and again in late June 2011, more than two months before the beginning of trial. Nevertheless, Aylor failed to identify or produce any of these documents until almost two weeks after the first day of trial. The only excuse Aylor offers is that he simply forgot that he had the documents and did not remember them until the eve of trial. I find Aylor's explanation hard to believe. Even assuming it is true, however, the failure of Aylor and his counsel to produce the disputed documents before trial is both unreasonable and inexcusable. Responding to discovery requests demands far more than asking an interested party, such as Aylor, whether he *recalls* having any relevant documents. Yet, Aylor presented no evidence that he or his counsel conducted an appropriate search for responsive hard copy documents, let alone electronically stored information, during discovery, and somehow missed or overlooked these exhibits. Furthermore, Aylor and his counsel admittedly knew about the documents before the start of trial and still failed to notify the Court and

opposing counsel of their existence until after the examinations of Marconi and Walters. As a result, Envo was deprived of the opportunity to examine these critical witnesses regarding the alleged meeting.

For all of these reasons, I find Aylor's untimely production to be inexcusable and prejudicial to Envo. Therefore, I sustain Envo's objection and exclude JTX 23, 24, and 25 from the record.

2. Was Kollias advised in 2005 that ESG had not been properly formed?

Having determined that JTX 23-25 are inadmissible, I next consider whether the evidence supports Aylor's claim that a meeting took place shortly after closing at which Kollias was informed of ESG's nonexistence. The only record evidence supporting the occurrence of the meeting is Aylor's own self-serving testimony. None of the other parties, including Walters and Marconi, remembered such a meeting ever taking place.[32] Moreover, although Aylor alleged that the meeting took place at Marconi's office, Marconi's business records from that period do not reflect any such meeting occurring.[33] Indeed, even Aylor himself could not remember when the alleged meeting took place, vacillating in his testimony among dates ranging from before the closing on July 21, 2005

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32 To support their contention that Kollias was advised of ESG's nonexistence at a post-closing meeting, Defendants cite Kollias's inability to deny that the meeting occurred. Specifically, Kollias testified that, "I don't recall the meeting, but I won't absolutely say that I wasn't there." T. Tr. 309-10. "I may have [attended the meeting], but I honestly do not remember." T. Tr. 314. I find this testimony inconclusive and hold that it provides no material support for Defendants' allegation that Kollias was advised of ESG's nonexistence in 2005.

33 JTX 21.

to September 15, 2005.[34] Therefore, I reject as unreliable and unsupported Aylor's testimony that there was a post-closing meeting at which Kollias was apprised of ESG's nonexistence.

Furthermore, even if Defendants were able to prove that Kollias attended a post-closing meeting at which he learned of ESG's nonexistence, that fact would not lead to a different result in this action. It is undisputed that, whether or not such a meeting occurred, Walters continued to possess the Purchased Assets and use them to operate New Environmental after the alleged meeting took place. Therefore, even if Kollias had consented to the alleged restructuring of the asset purchase described by Aylor, implicit in that restructuring was the promise by Walters and Aylor that Envo (and through it, Kollias) would be compensated for transferring the Purchased Assets to New Environmental. As discussed *infra*, for purposes of proving promissory estoppel, it is irrelevant whether Walters and Aylor made that promise as officers of ESG, officers of New Environmental, or in their individual capacities. Instead, what matters is that, at a point when Kollias could have rescinded the transfer, Walters and Aylor induced Kollias to allow them to retain the Purchased Assets by promising to fulfill the compensation obligations under the APA. At no time during 2005 or the couple of years thereafter, did any of the Defendants suggest to Kollias that they might use the nonexistence of ESG as

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[34] T. Tr. 217 (Aylor) ("The meetings when we attended all together were prior to the asset purchase agreement."), 225-26 ("It was about a week. I can't remember exactly. . . ."), 252-53 ("This was some days after the July 21st closing. This would have been some days after that, not—not as far as September."), 265-67 (testifying that the September 15th meeting was a two-part meeting where all four parties discussed what to do after closing).

a basis for avoiding their obligation to pay for the Purchased Assets. Therefore, I find that even if Kollias was aware of ESG's nonexistence and consented to the plan described by Aylor, he would not be precluded from claiming that Walters and Aylor are estopped from reneging on their promise to pay Envo for the Purchased Assets.

B. Laches

Defendants devoted a significant portion of their post-trial answering brief to arguing that Envo's claims are barred by laches. According to Defendants, the applicable statute of limitations for each of Envo's claims is three years because they arise from the APA or a promise underlying the APA.[35] Therefore, because Envo brought its claims on November 11, 2008, slightly more than three years after the closing and three years after the first payment was due on the Notes, Defendants assert that Envo's claims should be barred as untimely.[36] Defendants also make certain procedural arguments in support of their laches defense, including that Envo (1) conceded the statute of limitations argument by not addressing it in its post-trial opening brief and (2) should be precluded from belatedly arguing that its claims should be subject to the twenty-year limitation period applicable to documents executed under seal. In the circumstances of this case, I need not address each and every one of Defendants' contentions. Rather, I find that, even if I were to accept the proposition that the applicable statute of limitations for Envo's claims

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[35] 10 *Del. C.* § 8106 ("[N]o action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action.").

[36] Defendants do not contend that any extraordinary circumstances exist that would shorten the laches period to less than that provided under the analogous statute of limitations.

is three years, those claims would not be barred by laches because they were tolled until well after November 11, 2005, under the doctrine of inherently unknowable injuries. Therefore, I reject Defendants' argument that Envo's claims are barred by laches.

Laches is an equitable defense that stems from the maxim "equity aids the vigilant, not those who slumber on their rights."[37] Although there is no firm rule as to a specific period of time that will constitute laches, it is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant.[38] Therefore, laches generally requires the establishment of three elements: "first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, resulting prejudice to the defendant."[39]

Statutes of limitations operate as a time bar to actions at law, but they are not controlling in equity. Rather, under the equitable doctrine of laches, a court of equity accords great weight to the analogous statute of limitations.[40] In the absence of unusual

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[37] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citing 2 Pomeroy's Equity Jurisprudence §§ 418-19 (5th ed. 1941); *accord Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

[38] *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *13 (Del. Ch. Sept. 30, 2009) (citing *Reid*, 970 A.2d at 182).

[39] *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (internal quotation marks and citations omitted).

[40] *Id.*

or extraordinary circumstances, the analogous statute of limitations creates a presumptive time period during which the claim must be filed or else be barred as stale or untimely.[41]

According to the doctrine of inherently unknowable injuries, sometimes referred to as the "discovery rule," a statute of limitations will not run "where it would be practically impossible for a plaintiff to discover the existence of a cause of action."[42] To justify a delay in filing under the doctrine, the plaintiff bears the burden of demonstrating that he was "blamelessly ignorant" of both the wrongful act and the resulting harm.[43] Thus, if objective or observable factors exist to put the plaintiff on constructive notice that a wrong has been committed, he may not rely on the discovery rule to toll a limitations period.[44] Moreover, a statute of limitations will begin to run when the plaintiff discovers facts "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery[] of such facts."[45]

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[41] *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *5 (Del. Ch. Aug. 14, 2009) (citing *Reid*, 970 A.2d at 183).

[42] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584-85 (Del. Ch. 2007); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998).

[43] *In re Tyson Foods, Inc.*, 919 A.2d at 584-85.

[44] *See id.*; *In re Dean Witter*, 1998 WL 442456, at *5.

[45] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (emphasis in original); *In re Tyson Foods, Inc.*, 919 A.2d at 585 ("[N]o theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong. Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth, no sanctuary from the statute will be offered to the dilatory

Here, Defendants claim that Envo had notice of the breach of the APA as early as July 21, 2005, when Walters failed to make the initial $10,000 payment due at closing or, at the very least, when Defendants failed to make payments on the Notes. According to Defendants, their failure to provide payment on those occasions should have provided Envo with notice of ESG's nonexistence and the fact that neither Defendants nor ESG intended to perform ESG's obligations under the contract.

Although Defendants' nonpayment of the $10,000 and the Notes, at first blush, might appear to provide notice of the breach complained of by Envo, Defendants' arguments oversimplify the more complicated set of interactions that occurred between the parties. According to Walters's own testimony, the reason he did not remit the initial $10,000 payment to Kollias, was not because ESG did not exist or because he had no intention of making the payment, but, rather, because he and Aylor had found certain items to be missing from the offices of Old Environmental when they took possession of the property post-closing. Because Walters and Aylor were uncertain whether Kollias would replace the missing items, they placed the $10,000 in escrow with Marconi and contacted Kollias to have him fix the situation.[46] Therefore, the nonpayment of the $10,000 did not signal a breach of, or even Defendants' intent to breach, the APA as much as it was an act of self-help by Defendants while the parties were working out post-closing problems. If anything, Defendants' actions signaled a willingness to continue

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plaintiff who was not or should not have been fooled.") (internal citations omitted).

46 T. Tr. 157-58.

with the transaction despite Kollias's inability to provide immediately all of the Purchased Assets called for under the APA.[47]

Indeed, the evidence shows that, from the closing on, Kollias and Walters engaged in an ongoing effort to try to work out performance under the APA. For example, Kollias replaced much of the missing equipment within a few days of the closing, but, according to Walters, there "were still things missing," some of which could not be replaced.[48] Walters also stated that, around the same time he was negotiating with Kollias over the missing equipment, Aylor decided to dissociate from the business. Because Aylor's exit would reduce substantially the ability of New Environmental to pay on the Notes, Walters testified that he attempted to renegotiate the APA with Kollias.[49] In fact, Walters's efforts to renegotiate extended over a period of "a couple months" and led to an

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[47] Walters later stated in a fax to Marconi on August 1, 2005 that all equipment that allegedly was stolen, except for five SCBA units and certain files that had been on the stolen computer, had been replaced by Kollias. JTX 7; Joint Pre-Trial Stip. 11. As for the computer files, Kollias credibly testified that the files located on the stolen computer had been backed up on the main computer in Defendants' possession. T. Tr. 126. Kollias also testified that he provided Defendants with hard copy backups of all files. *Id.* As for the missing SCBAs, Kollias provided Defendants with one of the missing SCBAs and testified that each of the four missing SCBAs were worth approximately $100 each. T. Tr. 90-91. Thus, to the extent Defendants argue that Kollias failed to perform fully his obligations under the APA as to either the computer data or SCBAs, Defendants have failed to show that these alleged failures constituted a material breach of the APA.

[48] T. Tr. 159.

[49] T. Tr. 160. There is no evidence, however, that Walters or anyone associated with Defendants informed Kollias that Aylor had withdrawn from the venture.

agreement with Kollias as to the accounts receivable payments owed under the APA.[50] Under this agreement, Walters made monthly payments to Kollias totaling about $10,000 during the year following the closing.[51]

Although Kollias was not interested in renegotiating the APA, he informed Walters that if he was having financial difficulties with the company, he could provide Kollias with a proposal as to how to deal with it and Kollias would at least consider it.[52] As Kollias testified, he wanted to see Walters and Aylor succeed in the business and "didn't want to put any additional pressure on them."[53] Similarly, because Walters and Aylor "were paying [him] the accounts receivables ever so slowly . . . making payments over several months. . . . [he] didn't want to rock the boat there, either, because . . . [the] old corporation needed the money. It had some debts to pay."[54]

Based on the back and forth between Kollias and Walters over many months or even a year following the closing, I find Kollias and Envo had no reason to suspect during that period that Walters did not intend to perform under the APA. Both Walters and Kollias testified that they wanted to work out any outstanding issues between them and it appears that Kollias was willing to accommodate Walters's late payments because

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[50] T. Tr. 161 (Walters).

[51] *Id.*

[52] T. Tr. 98 (Kollias).

[53] T. Tr. 97.

[54] *Id.*

of the financial condition of the company.[55] Thus, the record does not reflect any clear breach by Walters that Kollias subsequently ignored. Instead, the parties confronted an unsettled situation in which each side had performance deficiencies and desired to reconcile those deficiencies, but eventually failed to work out a collaborative solution. As a result, I find that Kollias would not have been aware of Defendants' breach until at least a year after closing, which is when Walters testified he stopped making payments related to the accounts receivable.

Defendants also contend that the nonpayment of the $10,000 and the Notes effectively put Kollias on notice of the nonexistence of ESG and the existence of a breach of the APA, but they failed to provide any logical explanation for why that would be so. Kollias reasonably believed that Walters and Aylor intended to perform their obligations under the APA. The fact that he was not immediately paid on the schedule prescribed in the APA would not have led a reasonable person to conclude that ESG, the company Walters and Aylor represented that they owned and operated, was not incorporated, or that Defendants did not intend to perform the obligations imposed by the APA. In fact, when Kollias sought to confirm the existence of ESG during his due diligence before the execution of the APA, he found both ESG, Inc. and E S G, Inc. listed on the Secretary of State's website.[56] Although Kollias did not confirm that these entities were connected to Walters and Aylor, I find that Kollias reasonably relied on the representations of Walters

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[55] *See* T. Tr. 197 (Walters) (testifying that he expected to renegotiate the agreement so that he would have more time to pay on the Notes).

[56] T. Tr. 85.

and Aylor that they were officers of ESG, Inc. Furthermore, based on the actions of Walters during late 2005 and early 2006, Kollias also had a reasonable basis to believe that Defendants intended to perform their obligations under the APA well beyond November 11, 2005.

For all of the reasons stated above, I find that Kollias did not know or have reason to know of Defendants' breach until at least one year after closing. Therefore, Kollias's claims were tolled until July or August 2006. Hence, because the original complaint in this action was filed on November 11, 2008, well within the analogous limitations period, Kollias's claims are not barred by laches.[57]

C. Defendants Are Liable to Envo under the Doctrine of Promissory Estoppel[58]

Turning to the merits of this dispute, the facts are not complicated. Plaintiff, Envo, through its principal, Kollias, promised to sell the assets of Old Environmental to a

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[57] Although I dismissed the original complaint for lack of equitable subject matter jurisdiction, Envo filed an Amended Complaint within a year of dismissal and, therefore, meets the requirements of 10 *Del. C.* § 8118, Delaware's "Savings Statute." The Savings Statute "provides exceptions to the applicable statute of limitations in certain instances where the plaintiff has filed a timely lawsuit, but is procedurally barred from obtaining a resolution on the merits." *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009). The statute "is designed to allow a plaintiff, within prescribed limitations, one year to file a second cause of action following a final judgment adverse to his position if such judgment was not upon the merits of the cause of action." *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964). Here, because the original complaint was dismissed for lack of subject matter jurisdiction and Envo refiled its claims less than a year later, the Amended Complaint falls within the grace period provided by the Savings Statute.

[58] Because I find Defendants liable under the doctrine of promissory estoppel, I need not discuss the other theories of liability asserted against them. *See EDIX Media Gp., Inc. v. Mahani*, 2006 WL 3742595, at *11 (Del. Ch. Dec. 12, 2006) (declining to give redundant claims more than "only cursory consideration").

business entity, ESG, in which Walters and Aylor purportedly were officers, in exchange for consideration that primarily consisted of two promissory notes signed by Walters and Aylor on behalf of ESG with a combined face amount of $290,000. Throughout the negotiation and the closing of the transaction and for a month or two thereafter, Walters and Aylor were represented by Marconi. Although Marconi expected to create ESG in conjunction with the closing, he could not do so because the name already was in use. Nonetheless, the closing took place on July 21, 2005. Consistent with the parties' agreement, Kollias changed the name of Old Environmental to Envo a few weeks after the closing.

In late July or early August 2005, Marconi disclosed to Walters and Aylor his inability to form ESG. As a result, Walters and Aylor agreed to have Marconi create a corporation under the name Environmental Solutions Group, Inc., *i.e.*, New Environmental, for the purpose of operating the business that had been Old Environmental's, using the Purchased Assets acquired pursuant to the APA. At or around that time, Aylor also purported to withdraw from his business relationship with Walters, but this change was not communicated to Kollias or Envo. Since August or September 2005, Walters has operated the business of New Environmental using the Purchased Assets acquired from Old Environmental. Nothing has been paid to Envo or Kollias, however, under the Notes.

After attempting unsuccessfully to obtain payment of the Notes, Envo initiated this action on November 11, 2008, seeking to obtain the value of what it sold to Defendants. One of Defendants' primary arguments against Envo's claims for payment of the

purchase price is that they owe nothing on the Notes or the APA because both of those documents were in the name of a company, ESG, which has never existed. In response, Envo has sought relief based on several legal and equitable theories. They include, among other things, promissory estoppel, contract implied in fact, and unjust enrichment. In my view, however, the doctrine of promissory estoppel most closely addresses the wrong allegedly perpetrated here.

Under Delaware law, a plaintiff asserting a claim for promissory estoppel must show by clear and convincing evidence that: (1) a promise was made; (2) the promisor reasonably expected to induce action or forbearance by the promise; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) the promise is binding because injustice can be avoided only by its enforcement.[59] Moreover, the promise must be reasonably definite and certain.[60]

Envo contends that Walters, Aylor, and New Environmental are liable to Envo based on the doctrine of promissory estoppel because Walters and Aylor made multiple representations as to the existence of a business entity, ESG, of which they purportedly were officers and promised on behalf of that entity that it would pay for the Purchased Assets. Those representations and promises induced Kollias to transfer the Purchased Assets to ESG in exchange for promissory notes signed by Walters and Aylor in their capacity as officers of ESG. Because Envo has not received any payment for the

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[59] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000) (citation omitted).

[60] *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1233 (Del. Ch. 2000) (citation omitted).

Purchased Assets, it claims to have been damaged and to be at risk of having no corporate defendant to recover from as a result of Defendants' misrepresentations and broken promises.

Defendants deny they are bound by promissory estoppel because Kollias knew that the Purchased Assets eventually would go to New Environmental, so no misrepresentation or false promise was made. Defendants also assert that Envo has not shown by clear and convincing evidence that the existence of ESG, rather than Kollias's desire to focus solely on practicing law, induced Kollias to sell Old Environmental's assets. In addition, Defendants challenge the reasonableness of Kollias's reliance because he is a sophisticated attorney who could have discovered that ESG did not exist by searching the Division of Corporations's website.

Having considered the parties' arguments, I find Defendants liable under the doctrine of promissory estoppel for the value of the Purchased Assets they acquired and used with New Environmental. Walters and Aylor continuously represented that ESG existed and that they had authority to promise that ESG would pay for the assets purchased from Old Environmental. Defendants' argument that no misrepresentation or false promise was made because Kollias knew the Purchased Assets would go to New Environmental is a red herring. The parties agreed in the APA that *ESG* would buy the assets of Old Environmental, not New Environmental.[61] In fact, although the evidence

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[61] *See* T. Tr. 119 (Kollias) ("What I did know was that a company owned by Mr. Walters and Mr. Aylor was purchasing the assets, and I believe shortly thereafter, the name of that corporation was supposed to have been changed to Environmental Solutions Group, Inc."); T. Tr. 84 (Kollias) ("My understanding was that they

shows that at least Walters took control of the Purchased Assets after the closing, there is no evidence that those assets ever were legally transferred to New Environmental by Walters or Aylor or any business entity they controlled.[62]

Moreover, Old Environmental agreed that it would change its name after closing to Envo or something else, so that ESG then could change its name to New Environmental. The last step did not occur only because ESG did not exist. When Walters and Aylor discovered that ESG did not exist, they decided, with the assistance of their attorney, simply to create a new corporation under the name of "Environmental Solutions Group, Inc." and have that corporation use the assets of Old Environmental to operate a similar business. But, rather than being a successor corporation of ESG, as Kollias expected, New Environmental was an entirely new entity with no formal, legal relationship to Old Environmental or the APA.

Therefore, Walters and Aylor did misrepresent, even if unintentionally, that they were principals of a business entity named ESG and that they were authorized to bind ESG to pay the purchase price for the Purchased Assets under the APA. Furthermore, by accepting the Purchased Assets and using them to operate New Environmental, Walters and Aylor promised, as officers of New Environmental, that they or New Environmental

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either had a company or were going to form a company to purchase the assets of my company. And at the settlement table, once everything was said and done at settlement, they were going to -- we were going to have the name of my company changed to something else, and then they were going to immediately change the name of their company to Environmental Solutions Group, Inc.").

62 *See* T. Tr. 58-59 (Marconi).

would pay for those assets. By making these representations and promising that they themselves, ESG, or New Environmental would pay an agreed upon amount for the Purchased Assets, Walters and Aylor should have expected that Kollias would be induced into transferring the Purchased Assets to them. Defendants' counterargument that Kollias's desire to focus on his legal career is what caused him to enter into the APA does not support a contrary conclusion. Kollias received other offers to buy the assets and probably would not have transferred them to Walters and Aylor if he had known that Walters and Aylor failed to create ESG and would attempt to use that fact to avoid the obligations imposed under the APA.

Kollias reasonably relied on Walters and Aylor's promise and representations and, on that basis, took action to his detriment. Walters and Aylor affirmatively represented that they were President and Vice President of ESG, created a letterhead for ESG that was used for correspondence, and referred to the existence of ESG in emails to Kollias. Defendants dispute the reasonableness of Kollias's reliance, arguing that, as an attorney, he should have discovered that ESG did not exist. Kollias, however, did perform a search of the Division of Corporation's website and discovered the existence of ESG, Inc. and E S G, Inc. Defendants presented no evidence that Kollias readily could have determined that these entities were not affiliated with Walters and Aylor. In addition, the fact that Marconi, who was responsible for incorporating ESG, notarized the APA and acted as if ESG existed reinforced Kollias's reliance on Walters and Aylor's representations. Therefore, in these circumstances, I find that Kollias reasonably relied on Defendants'

representations that ESG existed and their promise that payment would be made for the Purchased Assets.

Furthermore, I find the promise is binding because it would be unjust for Defendants to profit from their use of the Purchased Assets without paying for them. Defendants do not deny their lack of payment; instead, they argue that they should be absolved of liability because Kollias carelessly sold his company to a nonexistent entity. To allow Defendants to receive the Purchased Assets without paying for them and without promptly advising Envo of the problem with ESG—when their own actions foreseeably induced Envo to act to its material detriment—offends basic notions of equity. Therefore, I find that Envo has shown by clear and convincing evidence the elements of promissory estoppel.

D. Defendants' Liability

Because I find all Defendants—Walters, Aylor, and New Environmental—liable under the doctrine of promissory estoppel, I address briefly Defendants' argument that there is no basis to hold Walters and Aylor personally liable. Defendants emphatically assert that even if liability is found, it should be in a form "consistent with the parties' intentions" and be corporate, instead of personal, liability.[63] The primary basis for that argument is Defendants' allegation that Walters and Aylor refused to guarantee the obligations of ESG and expressed a clear desire not to be personally liable under the

[63] Apr. 18, 2012 Hr'g Tr. 41.

APA. As a result, Defendants contend that it would be unfair now to hold Walters and Aylor personally liable for any judgment.

Even assuming that Walters and Aylor effectively communicated their intention not to expose themselves to personal liability during the negotiation of the APA, it is the corporate form, not an individual's hopes and desires, that provides a person limited liability protection under our law. Whatever Walters and Aylor's intent, by choosing to forego amending the APA to correct for ESG's nonexistence and forging ahead with the acquisition in a haphazard manner, they exposed themselves to personal liability. Not only did Walters and Aylor not acquire the Purchased Assets through a corporate vehicle, they failed to proceed under a formal contractual agreement. Instead, although Walters and Aylor had the opportunity to correct the situation shortly after the closing, they affirmatively chose not to, creating a quasi-contractual relationship with Envo based on their promises and representations. In that regard, Walters and Aylor compounded their difficulties by severing their relationship with their attorney, Marconi, on or about September 15, 2005,[64] and not hiring another attorney to assist them in clarifying their situation in view of the nonexistence of ESG. Consequently, there is a distinctly hollow ring to Walters and Aylor's claims that it would be unfair to make them personally liable for the Purchased Assets they essentially acquired and benefited from gratis.

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[64] One of the disputes Walters and Aylor had with Marconi related to their nonpayment of certain of Marconi's invoices. T. Tr. 26 (Marconi). The parties evidently settled that dispute, but part of the consideration apparently was a release by Walters and Aylor of all claims they had or might have against Marconi. JTX 13.

Similarly, despite his protestations, Aylor cannot avoid liability to Envo by claiming he dissociated from the business in the fall of 2005 and did not participate in the use of the Purchased Assets. By failing to incorporate ESG, Walters and Aylor entered into the APA not as officers of a corporation, but as general partners.[65] Under Delaware law, "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law."[66] Although a "dissociated partner is not liable for a partnership obligation incurred after dissociation," a "partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation."[67] Therefore, because Walters and Aylor entered into the transaction reflected in the APA, took possession of the Purchased Assets, and made the representations and promises that gave rise to a promissory estoppel here *before* Aylor's dissociation, Aylor is jointly and severally liable for the resulting obligation and cannot disclaim that liability now merely because he did not participate in the business of New Environmental after the fact.

In the alternative, Aylor also asserts a garbled cross-claim for indemnification against Walters alleging that he "dissolved his partnership with Defendant Walters and ESG, Inc. in Fall of 2005" and "[a]s such, any claim after dissolution of his arrangement

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65 *See* 6 *Del. C.* § 15-202(a) (a partnership is "the association of two or more persons to carry on as co-owners a business for profit, whether or not the persons intend to form a partnership").

66 6 *Del. C.* § 15-306(a).

67 6 *Del. C.* § 15-703(a).

with ESG, Inc. is solely the responsibility of Defendant Walters, its successors, and/or assigns jointly and individually."[68] According to Aylor, Walters promised to indemnify him for any judgment in this action by agreeing to "release [Aylor] of any additional liabilities and expenses effective on the date of the partnership termination."[69] The plain language of the proposal that Aylor claims reflects his dissociation from the business on or about August 25, 2005, however, provides only that Aylor will be released from liabilities and expenses incurred *after* his dissociation. The agreement says nothing about indemnifying Aylor for liabilities incurred *before* his dissociation.[70] Therefore, because Walters's and Aylor's liability to Envo arose before Aylor's dissociation, Aylor has failed to establish a right to indemnification from Walters for his liability arising from the transaction with Kollias and Envo.

Finally, I hold that New Environmental is liable as a Defendant to Envo based on New Environmental's use of the Purchased Assets. New Environmental was incorporated after the transaction, but Walters and Aylor, through their actions as officers

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[68] Def. Aylor's Answer to Am. Compl. ¶¶ 45-47.

[69] T. Tr. 170; JTX 10.

[70] In addition, I note that although Aylor relies on his August 24, 2005 letter to Walters as setting the terms of his departure, Aylor did not exit the business until he and Walters reached an oral agreement on September 15, 2005. Marconi sent a letter to Walters and Aylor on September 16, 2005, memorializing that agreement. JTX 14. The letter does not discuss Aylor's ongoing liability to New Environmental, but does state that "[t]he goal is to enter into a resolution that would permit [Walters and Aylor] to part ways with neither party having any further obligation to the other going forward . . . ." *Id.* Therefore, even if the September 16 letter controls Aylor's liability moving forward, it, too, does not absolve him of any obligations incurred before his exit from the business.

or principals of New Environmental, effectively represented that New Environmental was subject to the APA, owned or was entitled to use the Purchased Assets, and would pay for those assets. Therefore, whether or not these representations were enough to legally bind New Environmental to the APA or formally transfer the Purchased Assets to New Environmental, I find that at least Walters and, perhaps, Aylor, as well, were acting both in their personal capacities and as representatives of New Environmental when they made the promises of compensation and performance under the APA to Kollias and Envo that gave rise to liability under the doctrine of promissory estoppel. Any ambiguity in that regard is entirely the fault of Walters and Aylor, who blindly proceeded to keep and use the Purchased Assets acquired from Old Environmental without any attempt to clarify the surrounding legal landscape. Indeed, New Environmental used those assets in its business for years following the transaction. Therefore, it would be inequitable, and would work an injustice, if New Environmental were not held jointly and severally liable to Envo as well.

E. Remedies

Envo has requested that this Court enter judgment against Defendants in an amount equal to at least $391,000, which they allege is the value of the Notes as of September 2011, plus additional pre-judgment interest, post-judgment interest, costs, and attorneys' fees. Envo also has requested reimbursement for pre-paid costs totaling $60,911.88 that, under the APA, were supposed to be refunded to Envo upon receipt of certain accounts receivable.

The fundamental purpose of the doctrine of promissory estoppel is to prevent injustice.[71] Therefore, in awarding damages for promissory estoppel, courts have "(1) [done] nothing, (2) granted restitution, (3) reimbursed the promisee's losses through reliance, [or] (4) secured for the promisee the expectancy or its value."[72] Here, Envo seeks payment of the value of the Notes, which it claims it expected to receive in exchange for the Purchased Assets. Because Defendants took the Purchased Assets and used them to operate their business as contemplated by the APA without tendering the full value they had promised to Envo, I find that Envo is entitled to the value of its expectancy, which is equal to the face value of the Notes, $290,000, plus the interest Envo would have received if they were paid according to their terms.[73]

Envo also claims that it is owed some portion of the $60,911.88 in costs related to accounts receivable that Defendants were supposed to reimburse it for under the APA. Envo, however, has failed to establish what amount remains to be paid on this obligation. In fact, Kollias admitted receiving payment for most of the amount of the outstanding accounts receivable.[74] Therefore, because Envo failed to provide a sufficient basis to

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[71] *Chrysler Corp. v. Quimbly*, 144 A.2d 123, 133 (citation omitted), *aff'd on reh'g*, 144 A.2d 885 (Del. 1958).

[72] *Id*. at 133-34 (citation and internal quotations omitted).

[73] In the circumstances of this case, restitution is not a practical or satisfactory alternative. Kollias had no interest in continuing in the business of Old Environmental and the evidence suggests that the business had deteriorated significantly as of the time of trial and certain assets have been sold.

[74] T. Tr. 92.

determine what remaining amounts are due on this aspect of its claim, I deny any damages relating to Defendants' obligation to reimburse Envo for costs incurred with respect to certain outstanding accounts receivable.

Finally, I consider it appropriate to award Envo pre- and post-judgment interest,[75] as well as its costs under Court of Chancery Rule 54(d).[76] Because Kollias shares some of the blame for the delay in achieving final resolution of this dispute, I award prejudgment interest at the rate of 5%, compounded annually, as specified in the Notes. Post-judgment interest shall accrue at the legal rate under 6 *Del. C.* § 2301. With respect to Envo's request for attorneys' fees, however, I note that the general or American Rule is that a litigant must defray his own attorneys' fees and costs associated with litigation.[77] In exercising its discretion, the Court may award fees and costs for the totality of an action if the party against whom fees are sought has acted in "bad faith and

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[75] *Whittington v. Dragon Group L.L.C.*, 2011 WL 1457455, at *15 (Del. Ch. Apr. 15, 2011) (citing *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) ("In Delaware, prejudgment interest is awarded as a matter of right"); *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000) ("Delaware law provides that Post-Judgment Interest is a right belonging to the prevailing plaintiff and is not dependant upon the trial court's discretion." (citation omitted)).

[76] Ct. Ch. R. 54(d) ("Except when express provision therefore is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs. The costs in any action shall not include any charge for the Court's copy of the transcript of the testimony or any depositions.").

[77] *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

vexatiously."[78] In addition, Delaware courts have awarded attorneys' fees and costs where conduct was so egregious that it caused unreasonable delay or otherwise prejudiced the opposing party.[79] Here, the defenses presented by Defendants, although generally unsuccessful, were nonfrivolous, including especially the laches defense occasioned by Kollias's torpor in commencing this action, and Defendants litigated their case in good faith. Therefore, I deny Envo's request for attorneys' fees.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I hold Defendants Walters, Aylor, and New Environmental jointly and severally liable for the value of Envo's expectancy under the APA, or $290,000, plus pre-judgment interest at the rate of 5% from the dates the various payments would have been due under the Notes and post-judgment interest at the legal rate on the total amount of the final judgment. I also award Envo its costs under Rule 54(d). I deny, however, Envo's requests for reimbursement of any remaining amount relating to accounts receivable and for attorneys' fees. Finally, Defendant Aylor's cross-claim is dismissed with prejudice.

Envo's counsel shall submit, on notice, a proposed form of order and final judgment consistent with the rulings in this Memorandum Opinion within ten (10) days.

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[78] *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *27 (Del. Ch. May 18, 2009) (citing *Fox v. Paine*, 2009 WL 147813, at *6 (Del. Ch. Jan. 22, 2009)).

[79] *Id*. at *27.