IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETROPLAST PETROFISA PLASTICOS S.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4304-VCP
	)	
AMERON INTERNATIONAL CORP.,	)	
	)	
Defendant.	)	

OPINION

Submitted: April 19, 2012
Decided: July 31, 2012

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PARSONS, Vice Chancellor.

This action arises from a technology-sharing relationship between companies engaged in the manufacture of industrial "sand-core" pipe for water and sewer applications. In 2002, the parties entered into an agreement whereby plaintiffs agreed to provide defendant with their technology for more efficiently manufacturing sand-core pipe in exchange for, among other things, data, reports, software, and other information developed by defendant through use of plaintiffs' process. Although defendant used plaintiffs' technology to develop its own manufacturing processes and initially shared some of its findings with plaintiffs, over time, the relationship between the parties disintegrated. As a result, in 2009, plaintiffs brought this action asserting breach of contract and other causes of action related to defendant's alleged nonperformance under their agreement.

This Opinion represents the Court's post-trial findings of fact and conclusions of law in this matter. In many respects, the rulings reported herein result from two things, both of which were within plaintiffs' control. First, plaintiffs devoted very little attention to making sure that the original agreement between the parties provided a clear, accurate, and detailed account of the parties' respective rights and obligations under the agreement. Second, despite having had a number of opportunities during the course of the parties' relationship to press their position or confront directly a potential issue with defendant, plaintiffs consistently opted to be polite and avoid confrontation. As a result, plaintiffs have failed to achieve all of the benefits they allegedly expected. In any case, having carefully reviewed the full record and the parties' extensive post-trial briefs and oral

argument, I find that plaintiffs' breach of contract claims, as well as their claims for misappropriation of trade secrets, are barred under the equitable doctrine of laches.

I. BACKGROUND

A. The Parties

Plaintiff Petroplast Petrofisa Plasticos S.A. ("Petroplast") is a pipe manufacturing company organized and headquartered in Argentina. It is a member of the Grupo Petroplast companies. Petroplast deals primarily in the business of engineering systems for projects involving the processing, transportation, and storage of fluids and also engages in the transportation of electric power. One of Petroplast's core businesses is the manufacture of composite pipe for use in infrastructure projects.

Plaintiff Petrofisa Do Brasil, Ltda. ("Petrofisa") (and collectively with Petroplast, "Petroplast" or "Plaintiffs") is a Brazilian pipe manufacturing company primarily engaged, directly and through its affiliates, in substantially the same business as Petroplast. Petrofisa is the Brazilian affiliate of Grupo Petroplast and is 50% owned by the owners of Petroplast. Like Petroplast, Petrofisa also manufactures composite pipe for use in infrastructure projects. In that regard, it uses the same pipe manufacturing techniques as Petroplast and relies on Petroplast for its engineering design and long-term testing and modeling service needs.

Defendant, Ameron International Corporation ("Ameron"), is a Delaware corporation with its principal place of business in Pasadena, California, manufactures pipe from various materials, including steel, concrete, and fiberglass. Ameron markets its piping systems to utility companies and operators of oil platforms and marine vessels,

among others. It sells its products internationally, serving markets in the United States, Latin America, Europe, Africa, and Asia. In particular, Ameron sells sand-core pipe manufactured using various methods. This litigation relates to a specific type of sand-core pipe Ameron manufactures, reinforced polymer mortar pipe.

B. Facts[1]

1. The Paston System

In 2000, Plaintiffs, through a joint venture, developed a new system of manufacturing sand-core pipe, which they called the "Paston System." The Paston System proved to have many advantages over Plaintiffs' previous method, the "shower system," because, among other things, it uses "a mechanical vibrator . . . which agitates the mortar mixture so it deposits itself neatly and evenly on the mesh" and, therefore, permits Plaintiffs to manufacture an exterior pipe wall of a more uniform size. Petroplast installed this system in both its plant in Argentina and Petrofisa's Plant in Curitiba, Brazil (the "Curitiba Plant"). By 1998, however, Petroplast's joint venture partner had gone bankrupt.

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[1] Many of the facts in this Opinion are taken from the two preceding Memorandum Opinions in this action: *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2011 WL 2623991 (Del. Ch. July 1, 2011) ("SJ Mem. Op.") and *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009). These facts have been updated and supplemented based on the record developed at trial and are supported, where appropriate, by citations to the trial record.

2. Petroplast and Ameron correspond via email

In March 2001, looking to partner with a larger, more sophisticated company, Petroplast's Vice President and part-owner, Pedro Pablo Piatti, contacted Ameron to see if it was interested in negotiating a joint venture between the two companies. After some time, the Group President of Ameron's Fiberglass Pipe Group, Gordon Robertson, visited Piatti at Petrofisa's Curitiba Plant in April 2002 to discuss the possibility of the companies doing business together. Robertson ultimately decided not to pursue a joint venture with Petroplast. Nevertheless, he advised Ameron's Corporate Vice President of Research and Engineering, Ralph S. "Rocky" Friedrich, that Petroplast's Paston System technology could be valuable to Ameron's business.

As a result of follow-up communications, Friedrich arranged to meet with Piatti and Petroplast's chief engineer, Daniel Aragones, at the Curitiba Plant on August 8, 2002. During that meeting, Piatti permitted Friedrich to see Petroplast's design software and the entire Paston System.

After Friedrich's return to the United States, he and Piatti exchanged a series of emails, beginning in late August 2002, regarding a potential technology transfer between the two companies. On August 27, 2002, Friedrich emailed Piatti, thanking him for hosting his visit to the Curitiba Plant and proposing a "one time technology fee of $20,000" in exchange for seven items listed in the body of the email.[2] Those items included, for example, Petroplast's "[e]xcel software for designing the pipe and

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[2] JX 300 at PETRO-00004.

predicting material and labor plus pipe performance."[3] Friedrich mentioned that Ameron already had developed much of the material he requested from Piatti, but suggested that Petroplast's material would accelerate Ameron's internal development program. Friedrich further stated that "as part of the proposed technology sharing program, we [*i.e.*, Ameron] will also share all our test data with you as we proceed in our own development and qualification program."[4]

On August 29, Piatti sent an email to Friedrich, thanking him for his visit to Brazil and his proposal of August 27.[5] Piatti's email stated that "[i]n general terms, your offer is quite interesting regarding the seven points that you explain. We agree with them all."[6] Piatti then requested that the parties negotiate a noncompetition agreement in "South-American countries that [Petroplast] presently suppl[ies]," and stated that Petroplast's "main interest" in an association with Ameron was to establish "a two-way technological cooperation."[7] Finally, he made a counteroffer that included a one-time technology fee of $50,000.[8]

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3 *Id.*

4 *Id.*

5 *Id.* at PETRO-00005.

6 *Id.*

7 *Id.*

8 *Id.*

After trading a few short emails without much substance, Friedrich responded to Piatti on September 5, 2002 (the "September 5 Email") by making a "counter proposal" that included a payment of $25,000, subject to approval by Ameron management.[9] In support of his counter proposal, Friedrich asserted that the "data we [*i.e.*, Ameron] would provide you [*i.e.*, Petroplast] from our long term testing and qualification program with the agencies of the United States could easily exceed the value of the technology [to be received from Petroplast]."[10] The September 5 Email also stated that Ameron would "share all our test data and any manufacturing improvements we learn along the way with you . . . ."[11]

The next day, on September 6, 2002, Piatti responded, saying "[i]t's okay for us. We'll make a bet for the long term" (the "September 6 Email").[12] On September 9, Friedrich thanked Piatti for "accepting the offer."[13] Friedrich cautioned Piatti, however, that he still needed to get corporate approval before he officially could sign off on a deal with Petroplast. The following day, Piatti suggested that he and Friedrich work together

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9 *Id.* at PETRO-00006.

10 *Id.*

11 *Id.*

12 *Id.* at PETRO-00007. Piatti also discussed making arrangements to accommodate Ameron's engineers regarding a follow-up visit to Petroplast's facilities. *Id.*

13 *Id.*

to reduce their agreement to written form "to use it as a guide . . . and frame for the relationship [between the parties]."[14]

In a September 20 email, Friedrich notified Piatti that Ameron had approved the funds needed to execute the agreement (the "September 20 Email").[15] Friedrich also undertook to arrange for Ameron to issue a purchase order for a "one time technology transfer,"[16] and proposed a two-step process for the transaction. As part of the first step, Ameron would send a purchase order to Petroplast and, upon receipt, Petroplast would send to Ameron six enumerated categories of documentation in advance of Ameron's representatives' trip to Petroplast's plant in Argentina.[17] After Ameron received that information, it would pay Petroplast $15,000. The second step involved Ameron visiting the Petroplast plant and paying the balance of the money owed to Petroplast, or $10,000.[18] Friedrich indicated that Ameron also would provide certain information to

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14 *Id.*

15 *Id.* at PETRO-00008.

16 *Id.* Friedrich inquired as to whom the purchase order should be sent. *Id.* ("I am assuming the PO will be issued to Petrofisa, but maybe you prefer Petroplast S.A. Please let me know.").

17 *Id.* These categories included: (1) "[a] copy of the Excel software for designing the pipe and predicting material and labor usage, plus pipe performance"; (2) "[a] copy of all Material Specifications plus names and addresses of suppliers [Petroplast] purchase[s] from"; (3) "[d]etail drawings/sketches of the sand mixing and dispensing equipment"; (4) "[w]ritten process description"; (5) "[p]lans for any improvement in the process that [Petroplast] have learned, but may not have yet implemented"; and (6) "[c]opies of all test reports and the ability to share that data with agencies in the United States." *See id.*

18 *Id.*

Petroplast in the exchange. For example, he explained that upon receipt of Petroplast's Excel software Ameron "will use this software to compare to our own prediction models and refine our models accordingly if necessary. We will share our own model with [Petroplast] when it is complete."[19] In addition, he stated that "Ameron will share all our own test data and reports, developed during our own testing and development program, with [Petroplast] as they become available. This will include data for strain corrosion testing, 'Green Book' specified 'pickle jar' and 'accelerated/strain aging' testing for local agencies in the United States."[20] After describing these terms, Friedrich stated in the September 20 Email that "[i]f the above terms and conditions are acceptable, please let me know, so I can issue the Purchase Order."[21]

That same day, Piatti advised Friedrich that Petroplast would begin putting together the documentation Friedrich specified in his email and would continue to make arrangements for Ameron's visit to Argentina.[22]

3. Ameron issues the Purchase Order

In early October 2002, Ameron issued a Purchase Order ("PO") to Petroplast outlining the terms of their agreement. The PO is a three-page document. The first page

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19 *Id.*

20 *Id.*

21 *Id.* at PETRO-00009.

22 *Id.* Piatti also stated that "[a]s Petroplast is the owner of the technology [sought by Ameron], [he would] prefer" the money to be issued to Petroplast and not Petrofisa. *Id.*

is the front side of an Ameron purchase order form which indicates that Ameron is paying Petroplast $25,000 in exchange for the information listed in Appendix A of the PO.[23] The second page, entitled "Purchase Order Terms and Conditions," is on the reverse side of the form. It is in the form of a small print standard form, containing boilerplate terms and conditions. Appendix A, the third and final page of the PO, contains the specific terms of the exchange.[24] In particular, this page lists six classes of information Petroplast was to transfer to Ameron, as well as Ameron's obligations to Petroplast.[25]

The six categories of information required to be given to Ameron correspond to the categories recited in Friedrich's September 20 Email. Under Appendix A, Petroplast was required to provide Ameron with: (1) "a copy of the Quattro Pro software for designing the pipes and predicting material and labor usage, as well as pipe performance"; (2) "copies of all material specifications, together with names and addresses of suppliers from which it purchases materials"; (3) "copies of detail drawings/sketches of the sand mixing and dispensing equipment"; (4) "copies of its

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23 JX 85.

24 *Id*.

25 Appendix A also states that Petroplast represented to Ameron that it "has full and exclusive ownership rights to the technology which is the subject of [the PO] . . . as well as the right to grant to Ameron non-exclusive perpetual right to use such technology." *Id*.

existing written process descriptions, if any, for its pipes"; (5) "copies of plans for any improvement in its processes"; and (6) "copies of all test reports."[26]

In exchange, Ameron promised to furnish Petroplast with "it['s own prediction] model when it is completed" and "copies of Ameron's test data and reports resulting [from] its testing and development program. . . . includ[ing] data for strain corrosion testing, 'Green Book' specified 'Pickle Jar' and 'Accelerated Strain Aging' testing for local agencies in the United States."[27] Appendix A further reiterated Ameron's promise to pay Petroplast $25,000.[28]

Although earlier in this litigation the parties disputed whether the emails or the PO constituted the contract between them, both parties agreed at post-trial argument that Appendix A of the PO is the controlling contract.[29] In that regard, Ameron essentially abandoned any contention that the boilerplate terms included on the reverse side of the PO were part of the contract.[30]

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26 *Id.* The PO also provided that Petroplast would arrange for a two-day on-site visit by three Ameron representatives at Petroplast's plant in Argentina. *Id.*

27 *Id.*

28 *Id.*

29 Apr. 19, 2012 Hr'g Tr. 6-7 (Petroplast) ("And the Ameron promises are contained in this Appendix A"); *Id.* at 48 (Ameron) ("First off, it does appear that the parties are in agreement as to at least a few things. One is that the operative agreement is the Appendix A without the terms and conditions. We are . . . agreeable to that.").

30 *Id.* at 48 (Ameron); Pls.' Opening Br. 12 ("Because the negotiated terms of the contract are essentially the same in the Friedrich email of September 20, 2002 and the Purchase Order of October 4, 2002, the major dispute between the parties is

4. The post-contractual relationship

In the months following the issuance of the PO, Petroplast performed its obligations under the PO, providing Ameron with the Quattro Pro software, material specifications, supplier information, equipment details, process descriptions, production methods, and test data. Ameron representatives, including Friedrich and another Ameron engineer, Ron Ulrich, also made a successful visit to the Petroplast plant in Argentina.[31] In January 2003, Ameron paid Petroplast $25,000, as required under the PO.

Throughout the spring of 2003, Piatti and Friedrich communicated sporadically regarding Ameron's manufacture and testing of sand-core pipe. Then, on May 22, 2003, Piatti emailed Friedrich seeking to clarify Petroplast's relationship with Ameron because he perceived, based on Ameron's conduct over the previous few months, a lack of receptiveness to his questions and inquiries regarding their business relationship.[32] In a reply later that day, Friedrich apologized for not being more responsive and for failing to keep Piatti updated.[33] He explained that it "ha[d] always been [his] intent to establish a two way communication of knowledge learned in sand core pipe between Petroplast and Ameron," but he did not have authority to discuss the parties' "business relationship or

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whether the pre-printed purchase order form was not intended to be, and was not, a part of the contract.").

31 JX 300 at PETRO-00010.

32 *Id.* at PETRO-00021.

33 *Id.* at PETRO-00022 (Friedrich noted that he had a busy travel schedule and often "gets behind").

joint venture, etc."[34] Friedrich told Piatti that Ameron had run "lots of tests" but did not have any "formal reports" that it could send to Petroplast at that time.[35] He explained that Ameron is "spending so much time trying to learn quickly and make test pipe, [that it is] not having much time to write reports that [Ameron] can send to you."[36] Friedrich also offered to send additional data to Petroplast and invited Piatti to visit Ameron's R&D facility.

In response, on May 23, 2003, Piatti sent an email to Friedrich (the "May 23 Email") that Ameron strenuously contends clarified and narrowed the scope of its obligations to Petroplast. In the email, Piatti acknowledged Friedrich's busy "working rhythm" and stated that "there is no need to send reports or take time to prepare data in progress [for delivery to Petroplast]. Just, whenever you get to conclusions, share them with their fundamentals."[37]

5. The Burkburnett visit

Piatti and Friedrich remained in touch throughout 2003 and early 2004 via email, discussing issues related to, among other things, the production process, product design,

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34 *Id.* (Friedrich expressed a willingness to answer questions and discuss issues with Piatti whenever possible).

35 *Id.* Nevertheless, Friedrich did provide a "general update" by discussing briefly certain information pertaining to Ameron's sand-core pipe work. *Id.*

36 *Id.*

37 *Id.* at PETRO-00023.

and materials usage.[38] In June 2004, Piatti and Aragones visited Ameron's facilities in Burkburnett, Texas and South Gate, California, to observe Ameron's production of sand-core pipe.[39] Piatti and Aragones were given a full tour of the facility and viewed Ameron's manufacture of sand-core pipe using Petroplast technology.[40] Piatti and Aragones were informed that the pipe was being produced as part of a project for the City of Houston (the "Houston Project").[41] According to Piatti, the equipment at the Burkburnett facility was old and outdated, leading Piatti and Aragones to believe that the process they witnessed was merely a "prototype" that was in its "developing stages."[42] Piatti and Aragones also witnessed a mechanical failure in the production process while at the facility.[43]

Following the Burkburnett visit, on September 10, 2004, Ulrich emailed Piatti to inform him that he was in the process of collecting reports to send to Petroplast.[44] In the same email, Ulrich explained that the process at the Burkburnett facility was "running

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38 *See* JX 301 at PETRO-00031-40.

39 Piatti also had visited Ameron's South Gate facility in October 2003.

40 Trial Transcript ("Tr.") 836 (Ulrich). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically after the cited page of the transcript.

41 Tr. 837 (Ulrich).

42 JX 130 at PETRO-00834; Tr. 114.

43 Tr. 836 (Ulrich).

44 JX 301 at PETRO-00045.

quite well and all are quite happy," but that they were "suffering through a number of 'beginners' bad luck hardware, process and operator training situations."[45] Overall, Ulrich told Piatti he believed Ameron was producing "a high quality product," but that they needed to "fine tune the process to get [their] costs down," which was expected.[46] Ulrich also stated that he hoped to send reports to Petroplast by the next week.[47] Piatti responded to Ulrich's email by stating that it was "[g]ood to know that it is only a matter of fine tune, and the product is a high quality one."[48]

On March 3, 2005, Ulrich emailed Aragones to provide a status update.[49] In the email, Ulrich reported that Ameron had completed the installation of a water transmission project for the City of Houston that used a combination of sand-core and solid wall pipe.[50] According to Ulrich, "[e]veryone learned a lot on this project" and the "project went well at the plant level."[51] Both Aragones and Piatti received and read this email, but neither ever responded to it.[52]

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45 *Id.* at PETRO-00045-46.

46 *Id.* at PETRO-00046.

47 *Id.* Ulrich sent reports to Petroplast on September 15, 2004.

48 *Id.*

49 JX 140.

50 *Id.* at A003494. Solid wall pipe is not at issue in this litigation, only sand-core pipe.

51 *Id.*

52 Tr. 337 (Aragones); Tr. 101-02 (Piatti).

6. The parties fall out of touch

Beginning in late August 2005, Piatti sent a number of emails to Friedrich and David Jones, another Ameron engineer, inquiring about updates and developments in Ameron's manufacture of sand-core pipe.[53] Friedrich and Jones did not respond to Piatti's emails, and communication between the parties ceased for more than a year.[54] Then, in February 2007, Piatti again emailed Friedrich, suggesting that "after this long time it would be a good idea to enclose this stage by completing the objectives and points of our contract," including "the transfer of the improvements, developments and approvals made by Ameron over the pipes with the mortar system technology, given originally by [Petroplast]."[55] Piatti also tried to contact Ulrich and Jones, but neither responded.[56] Piatti even contacted Friedrich's secretary to confirm that Friedrich had received his messages.

Having failed to receive any response from Ameron through email, Piatti tried calling Friedrich directly. In May or June of 2007, Piatti reached Friedrich by phone, but

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53 JX 300 at PETRO-00027-28.

54 Tr. 115 (Piatti).

55 JX 300 at PETRO-00029.

56 Tr. 117 (Piatti).

Friedrich said that he was on his way to a meeting and that he would call Piatti the next day.[57] Friedrich, however, never returned Piatti's call.[58]

7. Ameron acquires Polyplaster and the parties enter into the Tolling Agreement

After being unable to reestablish its line of communication with Ameron, Petroplast received notice in October 2007 that Ameron had acquired Polyplaster, Ltda. ("Polyplaster"). Polyplaster is a privately-owned fiberglass manufacturer located in Betim, Brazil, and is a direct competitor of Petroplast in the sewer and water pipe industries. Once they learned of Ameron's acquisition of Polyplaster, Plaintiffs became convinced that Ameron did not intend to perform its obligations under the contract.[59]

On September 8, 2008, almost a year after Plaintiff learned of the Polyplaster acquisition, the parties entered into a Standstill & Tolling Agreement (the "Tolling Agreement"), which, among other things, tolled the statute of limitations for all claims between the parties and preserved any defenses that any party might assert, including defenses based on the statute of limitations.[60]

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57 Tr. 119-20 (Piatti).

58 Tr. 119 (Piatti).

59 Tr. 120 (Piatti).

60 JX 179. This agreement is governed by California law. *Id.* § 9.

8. Petroplast files this action and Ameron receives conditional approval from the City of Los Angeles

Petroplast filed its original complaint on January 22, 2009. Approximately one week later, on January 30, 2009, the City of Los Angeles granted Ameron conditional approval for projects in the municipality using sand-core pipe.[61] The next month, Ameron produced to Petroplast approximately 1,600 pages of documents with the alleged expectation that its production would constitute full performance under the parties' agreement. In particular, Ameron produced test data and reports relating to its production of sand-core pipe for the City of Los Angeles and delivered what it considers its completed prediction model for labor and material usage and pipe performance.[62] The test data and reports Ameron produced related to its conditional approval from Los Angeles included "Green Book" qualification testing results, accelerated aging, strain corrosion, "Pickle Jar" chemical results, testing procedures, testing methods, survey reports, and a host of other information.

C. Procedural History

Plaintiffs' original complaint asserted claims in five separate counts against Ameron based on the parties' information-sharing relationship. On February 18, 2009, Ameron filed a Motion to Stay, or in the Alternative, for Judgment on the Pleadings. The motion sought a stay on the grounds of *forum non conveniens* based, in part, on a related action filed in a California court. Alternatively, Ameron sought judgment on the

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61 JX 171.

62 JX 221 at Ex. 2.

pleadings as to four of the five counts against it. In an October 28, 2009 Memorandum Opinion, I denied the motion to stay because Ameron failed to show that it would suffer overwhelming hardship if this action were allowed to continue in Delaware. I also denied Ameron's request for judgment on the pleadings.[63]

The parties then engaged in extensive discovery. On October 6, 2010, Petroplast moved to amend its complaint to include Petrofisa as a plaintiff. I granted that motion on November 16, 2010, and Petroplast filed its Amended Complaint (the "Complaint") on November 30. That Complaint also contained five counts, including claims for: (1) breach of contract; (2) violation of the California Uniform Trade Secrets Act ("CUTSA");[64] (3) conversion; (4) unjust enrichment; and (5) misappropriation.[65]

On January 7, 2011, Petroplast moved for partial summary judgment on its breach of contract claims on all counts. That same day, Ameron filed its own motion for summary judgment or partial summary judgment. During the course of briefing, Petroplast withdrew its claims for unjust enrichment and conversion. In a Memorandum

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63 *See Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009).

64 Cal. Civ. Code §§ 3426-3426.11.

65 Compl. ¶¶ 89-124. Petrofisa only joins with Petroplast in asserting the breach of contract claim against Ameron.

Opinion on July 1, 2011, I denied the parties' cross motions for summary judgment in all other respects.[66]

A five-day trial was held December 12-16, 2011. After extensive post-trial briefing, the Court heard final arguments on April 19, 2012.

D. Parties' Contentions

Plaintiffs claim that Ameron breached its contractual obligations under the PO by failing to provide in a timely manner its completed prediction model and various test data and reports regarding its manufacture of sand-core pipe using Petroplast's technology. Plaintiffs also assert that Ameron misappropriated Petroplast's protected trade secrets, technical know-how, and other proprietary information in violation of CUTSA. Alternatively, Plaintiffs contend that Ameron's conduct constitutes common law misappropriation of Petroplast's unique process, proprietary "know-how," and intellectual property.

By way of relief, Plaintiffs seek damages in the amount of $6.9 million and specific performance of Ameron's contractual obligations, as well as their costs and attorneys' fees. Importantly, Plaintiffs' damages theory is predicated solely on their contention that they incurred additional raw material and software development costs

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[66] SJ Mem. Op. at *18. At the summary judgment stage, I made certain findings of fact under Rule 56(d) and those facts constitute "Adjudicated Facts." The Adjudicated Facts include, among other things, the facts that: (1) a contract existed between Ameron and Petroplast; (2) Ameron's obligation to produce test data and reports was not limited to test data and reports for the Los Angeles Project; and (3) the prediction model was completed no later than July 2005. *Id.* at *8, *9, *14.

between 2005 and 2009 that they would not have incurred if Ameron had provided its prediction model to Plaintiffs by January 2005 as the PO required.[67]

In denying any liability, Ameron contends that Plaintiffs are estopped from claiming breach of contract because Ameron reasonably interpreted Piatti's May 23 Email as requesting that Ameron wait to produce its tests, reports, and prediction models until after it received approval from the City of Los Angeles, which it did not receive until January 30, 2009. Ameron also argues that Plaintiffs' claims are barred by the equitable doctrine of laches. In addition, Ameron asserts that even if it were liable in some respect, Plaintiffs failed to prove their claims for damages.

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[67] The damages period ends in 2009, because that was when Plaintiffs independently developed their new Matrix Design Plan, which enabled them to accomplish similar cost reductions. In his expert report, Plaintiffs' damages expert, Darrell Chodorow, stated that the raw materials damages discussed in his report were all based on the change in raw materials usage between the Sarplast Design Plans and the Matrix Design Plans. Petroplast suggests that the information Ameron should have shared with it also would have generated even further improvements of its design process before 2009, but they did not seek any additional damages on that basis. JX 1017 ¶ 35. Rather, Chodorow testified that, if Ameron had performed its obligations under the contract, Plaintiffs would have been able to redesign their manufacturing processes by January 2005 and would have begun saving on costs for products manufactured with the new process as early as September 2005. *Id.* at ¶ 8. Overall, those savings during the damages period from September 2005 to December 2009 would have been approximately $4.8 million. *Id.* Chodorow also estimated that if Ameron had not breached the contract, Plaintiffs would have saved $1 million on software development costs they incurred to develop the Matrix Design Plans. *Id.* at ¶ 11. In total, including prejudgment interest, Plaintiffs seek damages in the total amount of $6.9 million. *Id.* at 13.

II. ANALYSIS[68]

A. Breach of Contract Claims

The controversy here centers on Ameron's obligation to provide Plaintiffs with (1) a completed pipe design and prediction program (the "Prediction Model") and (2) test data and reports from Ameron's testing and development program. Although Ameron did produce some test data and reports to Petroplast in the first few years of their collaboration, the parties agree that the bulk of the test data and reports owed to Petroplast were not provided until February 2009, after Ameron allegedly received conditional approval from the City of Los Angeles and after the commencement of this litigation.[69] Ameron also produced the current version of its Prediction Model in February 2009.[70]

In ruling upon Plaintiffs' motion for summary judgment, I determined that "for purposes of trial, the existence of a valid and enforceable contract between the parties shall be deemed established" but that the "form and content of that contract remains to be

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[68] The parties agree that California law governs the contractual issues raised in the Complaint; therefore, I apply California law in analyzing the merits of those claims.

[69] For the reasons discussed *infra*, I deny Plaintiffs' claims for relief on the basis of laches. Nothing in that ruling, however, undermines Plaintiffs' ability to use the information Ameron produced in February 2009 pursuant to Ameron's interpretation of the PO or its voluntary efforts to resolve this dispute.

[70] The parties did not identify any material difference between the Prediction Model as it existed in early 2005 and what Ameron produced in February 2009.

determined."[71] I also determined that, under the contract, Ameron was obligated to provide test data and reports and that the obligation, "in whichever form it takes, [was] not limited to data and reports concerning the City of LA."[72] Thus, for example, the obligation would extend to test data and reports on the Houston Project. As for Ameron's obligation to provide its completed Prediction Model to Plaintiffs, the parties stipulated that the Prediction Model was completed, and, therefore, due, no later than July 2005.[73]

Plaintiffs rely on these Adjudicated Facts to establish that Ameron breached the PO by 2005. These same facts, however, also provide the basis for Ameron's assertion that Plaintiffs' claims are barred by laches. As discussed further *infra*, I agree with Ameron that Plaintiffs had reasonable notice that Ameron had a completed Prediction Model, as well as test data and reports, pertaining to the Houston Project as early as March 2005 and that Ameron failed to produce those materials at that time. Therefore, because Plaintiffs did not enter into the Tolling Agreement until September 2008, their breach of contract claims are barred by laches absent proof that the limitations period was tolled for some reason.

1. The Prediction Model

As I found at summary judgment, the Prediction Model was completed and due to Plaintiffs no later than July 2005 and the Tolling Agreement was entered into in

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71 SJ Mem. Op. at *8.

72 *Id.* at *9.

73 *Id.* at *14.

September 2008.[74] As a result, Plaintiffs' claims will be barred by laches unless they can show the existence of circumstances that would have tolled the laches period until after September 2005.

Under Delaware law, laches bars a plaintiff from proceeding with a cause of action if he waited an unreasonable length of time before asserting his claim and the delay unfairly prejudiced the defendant.[75] To prevail on a laches defense, a defendant must prove that: (1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice.[76] "An unreasonable delay can range from as long as several years to as little as one month, but the temporal aspect of the delay is less critical than the reasons for it."[77]

In determining what constitutes an unreasonable delay for purposes of laches, this Court generally looks to the statute of limitations for analogous claims at law. As the Supreme Court stated in *Whittington v. Dragon Group, LLC,* Delaware courts find that a legal claim is analogous to an equitable claim where "the legal and equitable claim so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity."[78]

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74 *See* SJ Mem. Op. at *14.

75 *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011).

76 *Whittington v. Dragon Gp., LLC*, 991 A.2d 1, 8 (Del. 2009).

77 *CNL-AB LLC*, 2011 WL 353529, at *5.

78 *Whittington*, 991 A.2d at 9 (internal citations and quotation marks omitted).

Here, Plaintiffs have brought a claim for breach of contract, for which the analogous statute of limitations at law is three years.[79] Therefore, because the parties entered into the Tolling Agreement more than three years after the Prediction Model was completed, Plaintiffs must prove that the limitations period was tolled in order to avoid having their claims precluded under the doctrine of laches. To this end, Plaintiffs assert two grounds for tolling the limitations period: (1) the doctrine of inherently unknowable injuries and (2) fraudulent concealment.

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."[80] To justify a delay in filing under the doctrine, the plaintiff bears the burden of demonstrating

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[79] 10 *Del. C.* § 8106(a) ("[N]o action based on a detailed statement of the mutual demands . . . between parties arising out of contractual . . . relations, [and] no action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."); *Martinez v. Gastroenterology Assocs., P.A.*, 2005 WL 1953091, at *2 (Del. Super. July 5, 2005). At summary judgment, I determined that, under 10 *Del. C.* § 8121, Delaware's borrowing statute, the Delaware statute of limitations should apply here. SJ Mem. Op. at *15.

[80] *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); *see also Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 689 (Cal. Ct. App. 2003) (noting that "judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred. These sorts of situations typically involve . . . breaches of contract committed in secret."); *April Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 432 (Cal. Ct. App. 1983) ("[T]he discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.").

that he was "blamelessly ignorant" of both the wrongful act and the resulting harm.[81] 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.[82] 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."[83]

Similarly, a statute of limitations may be tolled, and laches presumptively avoided, where a defendant fraudulently has concealed from a plaintiff facts necessary to put him on notice of a breach.[84] To toll a limitations period under this doctrine, a plaintiff must allege an "affirmative act of 'actual artifice' by the defendant that either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the

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

82 *See id*.; *In re Dean Witter*, 1998 WL 442456, at *5.

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

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

truth."[85] As in the context of the discovery rule, however, a statute of limitations is tolled only until the plaintiff becomes aware of his rights or until he could have become aware by the exercise of reasonable diligence.[86] Thus, both the discovery rule and the doctrine of fraudulent concealment operate to toll a limitations period only until the plaintiff discovers that his rights under a contract have been violated or he is put on inquiry notice that a violation has occurred.[87]

a. When did the breach occur?

To determine whether Plaintiffs' claims were tolled under the discovery rule or as a result of fraudulent concealment, it must be determined, as an initial matter, when the breach occurred. Under the PO, Ameron was required to "furnish Petroplast with its [prediction] model when completed."[88] Therefore, Ameron would have breached its contract by not delivering the Prediction Model to Petroplast within a reasonable period after its completion. Although neither "model" nor "completed" are defined terms under the PO, both parties agree that Ameron's completed Prediction Model is a combination of

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85 *Id*. at 585; *In re Dean Witter*, 1998 WL 442456, at *5 ("Unlike the doctrine of inherently unknowable injuries, fraudulent concealment requires an affirmative act of concealment by a defendant—an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry.").

86 *See In re Dean Witter*, 1998 WL 442456, at *5 ("Mere ignorance of the facts by a plaintiff, where there has been no such concealment, is no obstacle to operation of the statute [of limitations].") (internal quotation marks omitted); *Krahmer v. Christie's Inc.*, 911 A.2d 399, 407 (Del. Ch. 2006).

87 *See In re Tyson Foods, Inc.*, 919 A.2d at 585.

88 JX 85.

two complementary programs: (1) an Excel-based costing program that predicts pipe stiffness and pressure rating, and the cost of the pipe based on those parameters; and (2) a MathCAD program that measures axial and hoop tensile strength.[89] Therefore, Ameron's Prediction Model would have been completed when Ameron had working versions of both programs that it could use to design and produce sand-core pipe.[90]

Ameron contends that the Prediction Model was completed by March 2004, "when it used its Excel design and cost estimating program and MathCAD workbook to estimate material and labor usage and pipe performance in order to make a formal price quotation to the City of Houston for sand-core pipe manufactured, in part, using Petroplast's technology."[91] Plaintiffs do not contest this allegation. Instead, Piatti acknowledged at his deposition that Ameron would have had a completed Prediction Model by at least sometime in 2004, when it "had the capacity to produce and deliver pipes to clients."[92] Similarly, Plaintiffs' technical expert, Frederick W. Van Name, concluded that Ameron's Excel-based design program, which he described as a "stand-alone design program,

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89 Tr. 618-19 (Friedrich); Pls.' Reply Br. 8.

90 According to Friedrich, those two programs, together, performed the same function as Petroplast's Quattro Pro program with respect to "predicting labor and material costs and pipe performance such as pressure rating, stiffness, axial and hoop strength." Tr. 619.

91 Def.'s Ans. Br. 41. The Excel and MathCAD programs, which Friedrich "considered to be equivalent to [Plaintiffs'] Quattro Pro programs," were in use by 2004, as part of the Houston Project. Tr. 621 (Friedrich).

92 Tr. 147.

containing its own input values," was in use no later than June 2004[93] and that Ameron's MathCAD program was completed no later than January 2005.[94] Although he did not give an exact date, Van Name concluded that Ameron's Excel and MathCAD programs were likely in use earlier, with Ameron using a version of its MathCAD program since at least 2003.[95] Indeed, Plaintiffs instructed their own damages expert, Chodorow, to assume that, "had Ameron met its contractual obligations, Petroplast would have been able to develop the new design process [based on the Prediction Model] by January 2005.[96] Therefore, although the precise date the Prediction Model was completed may be unclear, I find that the Prediction Model was completed no later than January 2005 and likely was completed before that time.

b. When did Plaintiffs have notice of the breach?

Because I conclude that the Prediction Model was completed, but not produced to Petroplast, more than three years before the Tolling Agreement was entered into, Plaintiffs must show that the analogous statute of limitations period was tolled to avoid having their claims barred by laches. To this point, Plaintiffs allege that they did not have notice that the Prediction Model was completed, or that Ameron did not intend to perform its obligations, until late 2007, when Ameron publicly announced its acquisition

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93 JX 1016 (Van Name Expert Report) at 8-9.

94 *Id.* at 9 ("The first complete MathCAD design program we received appears to date from January 2005.").

95 *Id.* at 10.

96 JX 1017 at ¶ 8.

of Polyplaster. Until that point, Plaintiffs accuse Ameron of actively misleading them into thinking that the parties were still cooperating and operating at a level of cordiality and cooperation. As a result, Plaintiffs argue that they had no way of knowing, and no reason to suspect, that Ameron had completed its Prediction Model or that Ameron had no intention of performing its contractual obligations.

Based on the evidence, I find Plaintiffs' tolling argument unavailing. According to Plaintiffs' own testimony, they were aware of facts as early as March 2005 that would have put them on reasonable notice that the Prediction Model was completed and that they had not received the Prediction Model. As discussed *supra*, Piatti testified that Ameron's Prediction Model would have been completed when Ameron "had the capacity to produce and deliver pipes to clients."[97] Ameron, in fact, did produce and deliver pipes for the Houston Project in 2004. Plaintiffs knew about the Houston Project and had visited the Burkburnett facility to observe pipes being made for the project in June 2004. Therefore, when Ulrich informed Aragones of the successful completion of the Houston Project in an email on March 3, 2005, this notice reasonably should have led Plaintiffs to conclude that Ameron had a completed Prediction Model and prompted them to request its production.[98] Plaintiffs, however, never responded to Ulrich's email.

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97 Tr. 147.

98 Ulrich further informed Aragones that "[e]veryone learned a lot on this project," and that "[t]he project went well at the plant level." JX 140.

Plaintiffs nonetheless argue that the March 2005 email could not have put them on inquiry notice of Ameron's breach because "[t]here is nothing in [the March 2005 email] that would suggest that Ameron had advanced with the Paston System in a way that suggested performance under the contract was due."[99] This excuse highlights a significant disagreement between the parties as to the proper interpretation of the PO regarding what Ameron was required to produce and when. Plaintiffs apparently interpret the PO to mean that the Prediction Model would be considered "completed" only when it was improved or "refined."[100] On this point, Plaintiffs also assert that Ameron never gave them any reason to believe that it had made much progress in improving the Prediction Model.

Ameron's obligation to provide its completed Prediction Model is set forth in Appendix A of the PO. The full text of the relevant section states that:

> Petroplast will furnish Ameron with a copy of the Quatro Pro software for designing the pipes and predicting material and labor usage, as well as pipe performance. Ameron intends to use this software to compare its own prediction models and to refine its own models accordingly. Ameron will furnish Petroplast with its model when it is completed.[101]

The use of the word "refine" in this context does not obligate Ameron to refine the Paston System. Instead, it states Ameron's general intent to refine its *own* Prediction Model

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99 Pls.' Reply Br. 21.

100 Piatti testified at trial that he understood at the time that Ameron's Prediction Model would be "completed" when it was "refined." Tr. 149.

101 JX 85.

using Petroplast technology. Indeed, even if there were some ambiguity in this regard, which I do not perceive, the Court's interpretation is confirmed by the September 20 Email, which states that "Ameron will use [the Quattro Pro program] to compare to [its] own prediction models and refine [its] own models accordingly *if necessary*."[102] As a result, I find that Ameron's only obligation relating to its Prediction Model was to provide it when it was "completed," whether or not it improved the Paston System.

Thus, I reject as unreasonable Plaintiffs' contention that performance was not due under the PO by March 2005 because Ameron had not improved the Paston System by that time. Ameron's Prediction Model was completed when Ameron had the capacity to produce and deliver pipes to clients. Furthermore, Plaintiffs, in fact, received notice in March 2005 that Ameron successfully had produced and delivered pipes for the Houston Project. Therefore, I find that, by March 2005, Plaintiffs had at least constructive notice that the Prediction Model was completed. Plaintiffs also knew that Ameron had not produced the Prediction Model to them at that time. Hence, Plaintiffs had notice of a breach of the PO by March 2005.

Moreover, to the extent Plaintiffs argue that Ameron actively misled them, through email exchanges as late as October 2005 and early 2006, into thinking that the Prediction Model had not been completed, that argument also fails. Once Plaintiffs had reasonable notice of the completion of the Prediction Model, they could not put the proverbial cat back in the bag and plead ignorance of the facts that put them on notice

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[102] JX 300 at PETRO-00008 (emphasis added).

back in March 2005. In addition, Plaintiffs have not presented any evidence of conduct by, or communications from, Ameron in October 2005 or at any other time that reasonably could be construed as recanting the previous indications that the Prediction Model had been completed by March 2005. Therefore, because Plaintiffs had notice of the completion of the Prediction Model and, thus, Ameron's breach, as early as March 2005, the analogous statute of limitations period began to run at that time. Because Petroplast did not enter into the Tolling Agreement until September 2008, more than three years after they had notice of the breach, Plaintiffs' breach of contract claim regarding Ameron's Prediction Model is barred by laches.[103]

2. Test data and reports

Plaintiffs' claim regarding Ameron's obligation to produce test data and reports also is also barred by laches. In the Summary Judgment Memorandum Opinion, I determined that this aspect of Ameron's obligation was not limited to test data and reports from the City of Los Angeles project (the "Los Angeles Project"), but instead required "Ameron to provide data and reports regarding 'local agencies in the United

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[103] The general rule is that "[a]bsent a tolling of the limitations period, a party's failure to file within an analogous statute of limitations, if any, is typically conclusive evidence of laches." *Whittington v. Dragon Gp. L.L.C.*, 2008 WL 4419075, at *3 (Del. Ch. June 6, 2008); *Brady v. Pettinaro Enters.*, 870 A.2d 513, 526 (Del. Ch. 2005). In such instances, the burden is on the plaintiff to prove tolling or some other excuse. *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005). Here, Plaintiffs have not asserted any other basis for avoiding laches beyond the tolling arguments discussed in the text.

States.'"[104] As a result, Plaintiffs assert that Ameron breached its obligation to produce these materials by not providing test data and reports on an ongoing basis, as they became available. According to Petroplast, because "the vast majority of Ameron's test data and reports were created in 2005 or before," Ameron breached its contract by not producing the bulk of these materials until February 2009, by which time Ameron contends the Los Angeles Project, in fact, had just received conditional approval.[105]

Ameron opposes Plaintiffs' claim on several grounds. First, Ameron argues that if the PO were construed as Plaintiffs argue it should be, it would be too vague to be enforceable, because it fails to establish what Ameron was required to produce in terms of test data and reports or when that production was required. Second, Ameron contends that even if there was an enforceable obligation requiring Ameron to produce test data and reports on an ongoing basis, as Plaintiffs allege, Piatti's March 23, 2003 Email estops Plaintiffs from complaining that Ameron did not produce the test data and reports as they were being created. Finally, Ameron argues that, in any case, Plaintiffs' claims are barred by laches.

Under California law, "[w]here a contract is so uncertain and vague that the parties' intentions with respect to material terms of their agreement cannot be judicially

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104 SJ Mem. Op. at *9.

105 Pls.' Opening Br. 17.

ascertained, the contract is unenforceable."[106] Instead, "[t]o be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."[107] If a contract does not provide a basis for determining the obligations to which the parties agreed so that a court is unable to determine whether a counterparty has breached those obligations, "there is no contract."[108]

Because the parties agree that the PO is the controlling contract between them, I must look to its terms to determine whether Ameron's obligation in terms of test data and reports is sufficiently definite to be enforceable. The PO requires Ameron to "furnish Petroplast with copies of Ameron's test data and reports resulting [from] its testing and development program. . . . includ[ing] data for strain corrosion testing, 'Green Book' specified 'Pickle Jar' and 'Accelerated Strain Aging' testing for local agencies in the United States."[109] I find that the plain language of this provision creates an enforceable contract at least as to the enumerated tests and, further, that the scope of production is

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106 *See Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 599-600 (Cal. Ct. App. 2008); *Ladas v. Cal. State Auto. Ass'n*, 23 Cal. Rptr. 2d 810, 814-15 (Cal. Ct. App. 1993); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (Cal. Ct. App. 1998) ("A proposal cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.") (internal quotation marks omitted).

107 *Ladas*, 23 Cal. Rptr. 2d at 814-15; *Bustamante*, 45 Cal. Rptr. 3d at 699.

108 *Weddington Prods., Inc.*, 60 Cal. App. 4th at 811.

109 JX 85.

reasonably limited to test data and reports from Ameron's testing and development program.[110]

Although the exact contours of Ameron's obligation to produce information regarding its testing and development program may be difficult to ascertain from the contractual language, it is not necessary to define with precision which individual tests and reports were due to Petroplast. Instead, I construe the PO as it relates to the test data and reports as requiring Ameron, upon the completion of a testing and development program on sand-core pipe made using the Petroplast technology for a local agency in the United States, to produce, at the very least, the primary or final test data and reports from that program. As a result, because Ameron would have had such test data and reports for the Houston Project as early as 2004 or early 2005, Petroplast's claim against Ameron for breaching its obligation to produce test data and reports arose at that time.

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[110] Ameron also argues that the PO is unenforceable because it is too indefinite as to the required timing of production. To this point, I note that, although the PO does not provide a time for performance, under California law, where "no time is specified for the performance of an act required to be performed, a reasonable time is allowed." Cal. Civ. Code § 1657. Therefore, "[w]here no time is specified for performance, a person who has promised to do an act in the future and who has the ability to perform does not violate his agreement unless and until a demand for performance is made and performance is refused . . . ." *Leonard v. Rose*, 422 P.2d 604, 607 (1967). Here, Piatti's May 23, 2003 Email constitutes an example of a request for production by Petroplast. The fact that Piatti asked only for "conclusions" and "fundamentals" in that email still triggered, at the very least, an obligation to produce final reports and data on an ongoing basis for any projects completed for a local agency in the United States. Thus, Ameron was required to produce at least some reports from the Houston Project.

Therefore, similar to the Prediction Model, because Ulrich informed Aragones in March 2005 that the Houston Project had concluded, Plaintiff then had reason to know that Ameron had test data and reports from its local agency testing that should have been produced under the parties' agreement. Moreover, even if Petroplast only wanted "conclusions" or "fundamentals" from Ameron's testing, as per Piatti's May 23 Email, the notice of the completion of the Houston Project should have alerted Petroplast to the fact that Ameron was in possession of such information from that project. Plaintiffs also knew they had not received any test data and reports regarding the conclusion of the Houston Project.

Finally, although Plaintiffs did not address directly Defendants' laches defense as to the test data and reports obligation and, instead, focus their argument on the Prediction Model, I briefly note that Plaintiffs seem to argue that they did not have notice that Ameron had test data and reports due under the PO because Ameron's "lack of progress in manufacturing lulled Petroplast into accepting that Ameron did not yet have any information of value to provide . . . ."[111] I find this argument unpersuasive for the same reasons explained in Part II.A.1.b *supra*. There simply is nothing in the plain language of the PO creating Ameron's obligation to produce test data and reports that predicates that obligation on Ameron having produced some improvement or innovation in the Paston System. Therefore, any purported reliance by Petroplast on this erroneous interpretation of the PO does not excuse their failure to pursue in a timely fashion any claim they had

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[111] Pls.' Opening Br. 45.

for test data and reports from Ameron after learning of the completion of the Houston Project in March 2005.

B. Misappropriation and CUTSA Claims

Finally, Petroplast claims Ameron's actions amount to a violation of the California Uniform Trade Secrets Act or, alternatively, that Ameron is liable for common law misappropriation.[112] A cause of action under CUTSA generally arises where the plaintiff can prove: (1) the possession of a trade secret by the plaintiff; (2) the defendant's misappropriation of that trade secret through wrongful acquisition, disclosure, or use; and (3) injury to the plaintiff as a result.[113] According to Petroplast, Ameron misappropriated its trade secrets by misrepresenting that it intended to honor its contractual obligations and then failing to perform under the PO.

Petroplast's misappropriation argument is stated only in the vaguest terms, but, in any case, would require proof that the PO is invalid or ineffective to satisfy the required element of a misappropriation. To the extent Petroplast alleges that the PO was void *ab initio* because Ameron fraudulently misrepresented that it intended to comply with the PO, when, in fact, it did not, that argument fails for lack of proof. The only evidence Petroplast even alluded to in support of its misrepresentation allegations is the transaction in or around 2007 in which Ameron acquired Polyplaster, a competitor of Petroplast.

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112 Compl. ¶¶ 89-124. Petrofisa joined with Petroplast only in asserting the breach of contract claim against Ameron.

113 *Silvaco Data Sys. v. Intel Corp.*, 109 Cal. Rptr. 3d 27, 38 (Cal. Ct. App. 2010).

Petroplast, however, made no effort to adduce evidence that would support a reasonable inference that Ameron's actions regarding Polyplaster constituted a breach of the PO or provided any other basis for disregarding that agreement.

Alternatively, Petroplast might be arguing that misappropriation exists here because Ameron breached the PO. Because Plaintiffs' breach of contract claims are barred by laches, however, Petroplast cannot prove, as an initial matter, that Ameron breached its contractual obligations. Therefore, Petroplast cannot succeed on either its CUTSA or common law misappropriation claims.

Moreover, under CUTSA, "[a]n action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered."[114] To the extent Petroplast's theory of misappropriation turns on a breach of the PO, its trade secrets were misappropriated when Ameron breached its contractual obligations in March 2005. Therefore, because I already have found that Petroplast had reasonable notice of Ameron's breach in March 2005, Petroplast's CUTSA and common law misappropriation claims also are barred by the statute of limitations and laches.

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[114] Cal. Civ. Code § 3426.6; *Snapp & Assocs. Ins. Servs., Inc. v. Malcolm Bruce Burlingame Robertson*, 117 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 2002) ("A plaintiff is under a duty to reasonably investigate, and a *suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause, commences the limitations period.").

III. CONCLUSION

For the reasons stated in this Opinion, I find that Plaintiffs' claims for breach of contract, as well as the claims under CUTSA and for common law misappropriation, are barred by laches. Therefore, I dismiss all of Plaintiffs' remaining claims (Counts I, II, and V of the Complaint) with prejudice.

IT IS SO ORDERED.