IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ENI HOLDINGS, LLC,	)	
	)	
Plaintiff and	)	
Counterclaim	)	
Defendant,	)	
	)	
v.	)	*Civil Action No. 8075-VCG*
	)	
	)	
KBR GROUP HOLDINGS, LLC,	)	
	)	
Defendant and	)	
Counterclaimant.	)	

MEMORANDUM OPINION

Date Submitted: August 5, 2013
Date Decided: November 27, 2013

William M. Lafferty, John P. DiTomo, and Matthew R. Clark, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Robert Boldt and Michael Shipley, of KIRKLAND & ELLIS LLP, Los Angeles, California, Attorneys for Plaintiff and Counterclaim Defendant.

Kevin R. Shannon, Berton W. Ashman, Jr., and Matthew D. Stachel, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: Vineet Bhatia, Robert S. Safi, and Brian M. Gillett, of SUSMAN GODFREY LLP, Houston, Texas, Attorneys for Defendant and Counterclaimant.

GLASSCOCK, Vice Chancellor

In enacting the statute of limitations applicable to contracts,[1] the General Assembly has determined that justice requires that actions sounding in contract be brought, if at all, within three years of accrual. This determination necessarily represents a balancing of the interests of justice, which include seeing parties to contracts made whole for their breach, as well as preventing allegedly-breaching parties from being unfairly made to address stale claims for which proof becomes progressively less trustworthy over time. The same interests have caused the legislature to erect a barrier of two years after which certain tort claims—even more reliant on circumstantial proof and fallible recollection—may not be brought.[2] In enacting these provisions, the legislature has set an outer limit. Parties to contracts, however, may weigh the interests addressed by statute differently when it comes to the particular circumstances of their agreement. Those parties, it is clear, are in a better position than legislators to know what result is called for by those circumstances peculiar to their relationship. For that reason, and because this jurisdiction respects the right to contract in general, Delaware recognizes the right of contracting parties to impose a shorter period of limitation than that provided for by statute. When parties do so, that determination will be respected as a wholesome determination of the interests of the parties, entirely in keeping with the purposes of the statute: to promote prompt resolution

[1] 10 *Del. C.* § 8106
[2] 10 *Del. C.* § 8107

of issues and eliminate stale claims. This particular case involves such a choice by the parties. Having contractually bound itself to a fifteen-month period within which certain actions must be brought, the counterclaimant must be held to that bargained-for choice. Where, however, the parties have chosen not to impose a more stringent limitation period, the statute must control.

In December 2010, Plaintiff and Counterclaim Defendant, ENI Holdings, LLC ("ENI") sold Roberts & Shaefer Co. ("R&S") to Defendant and Counterclaimant, KBR Group Holdings, LLC ("KBR") pursuant to a Stock Purchase Agreement ("SPA"). The purchase price of R&S was partially based on its working capital at closing.[3] Unable to agree on that amount, the parties sought arbitration, in accordance with the SPA, to determine R&S's working capital at closing.[4] The parties also sued one another in this Court to settle additional disputes arising from KBR's acquisition of R&S. This Memorandum Opinion explains my decision regarding ENI's Motion to Dismiss KBR's First Amended Verified Counterclaim ("Amended Counterclaim"). For reasons I explain below, ENI's Motion to Dismiss is granted in part and denied in part.

[3] Am. Countercl. ¶ 4.
[4] *ENI Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 4877916, at *1 (Del. Ch. Sept. 13, 2013).

I. Background

Prior to the December 2010 acquisition, ENI, a Delaware limited liability company, directly owned 100% of the stock of ENI Holdings, Inc. ("Holdings"), the holding company for R&S.[5] In 2007, ENI and R&S were acquired by OCM/GFI Power Opportunities Fund II ("OCM/GFI"), a joint venture between Oaktree Capital Management, L.P. ("Oaktree") and GFI Energy Ventures, LLC ("GFI Energy"), both private equity firms.[6] As a result of this acquisition, Oaktree and GFI Energy indirectly owned R&S through ENI, while GFI Energy managed OCM/GFI's portfolio.[7]

In mid-2010, KBR, an engineering, procurement, and construction company organized under Delaware law,[8] began discussions with GFI Energy and ENI about acquiring R&S, a contractor that installs material handling systems for industries like mining and power.[9] On October 1, 2010, KBR presented an indicative offer for R&S, and on October 27, 2010, the parties signed a letter of intent.[10] Nearly two months later, on December 21, 2010, KBR purchased 100% of Holdings

[5] Am. Countercl. ¶¶ 2, 13, 15.
[6] *Id.* at ¶ 15.
[7] *Id.*
[8] *Id.* at ¶¶ 12, 17.
[9] *Id.* at ¶¶ 14, 17.
[10] *Id.* at ¶¶ 28, 31.

pursuant to the SPA.[11] The purchase price for R&S was $280 million, but this amount was subject to certain working capital and indemnification adjustments.[12]

Under the terms of the SPA, two escrow accounts were established, each with funds from the $280 million purchase price. In one escrow account, the parties set aside an amount to account for any adjustment to R&S working capital.[13] The parties placed $25 million into a second escrow fund (the "Indemnity Escrow Fund") to satisfy any indemnification claims brought pursuant to the SPA.[14] Section 6.13 governs the release of this escrow amount, stating:

> On the Termination Date [of March 23, 2012], [KBR] shall, and [ENI] shall be entitled to, instruct the Escrow Agent to release to [ENI] an amount equal to the positive difference between (x) the then remaining balance of the Indemnity Escrow Account, including any earnings thereon, minus (y) the amount of Damages for which [KBR] has timely made a claim for indemnification pursuant to Section 6.03 and which claim has not then been finally determined in accordance with this Article VI. . . .[15]

Section 6.03 provides that:

> Subject to the limitations set forth in this Article VI, [ENI] shall indemnify and hold harmless [KBR] and [KBR's] Affiliates, officers, directors and representatives . . . against and in respect of any and all claims, costs, expenses, losses and damages ("Damages") to the extent resulting from (i) any inaccuracy in any representation or the breach of any warranty made by [ENI] in this Agreement or in any certificate

[11] *Id.* at ¶ 2.
[12] *Id.* at ¶¶ 1-2, 4.
[13] *See id.* at ¶¶ 4, 7; *see also ENI Holdings, LLC*, 2013 WL 4877916, at *1.
[14] Am. Countercl. ¶ 1.
[15] Stock Purchase Agmt. § 6.13.

> required to be delivered pursuant hereto, (ii) the breach by [ENI] of any covenant or agreement to be performed by it hereunder . . . .[16]

The SPA's indemnification provisions constitute the "sole and exclusive remedy" for all claims relating to KBR's acquisition of R&S, with two narrow exceptions.[17] First, fraud claims are excepted from this provision, and second, the parties may seek equitable relief if remedies at law are inadequate to "enforce or prevent any violations by" the parties.[18]

The parties also agreed to a survival provision in Article VI of the SPA. Specifically, the SPA provides for three categories of seller representations and warranties, each surviving the closing and terminating on a specified date. First, representations and warranties deemed fundamental, including tax matters and the organization and capitalization of R&S and its subsidiaries (the "Fundamental Representations"), terminate seven years from the closing or thirty days after the applicable statute of limitations expires, whichever occurs first.[19] Second, representations and warranties pertaining to environmental matters terminate three years after the closing.[20] Third, all other representations and warranties (the "Non-Fundamental Representations") terminate on a specified termination date; both

[16] *Id.* at § 6.03.
[17] *Id.* at § 6.06.
[18] *Id.* at §§ 6.06, 7.02.
[19] *Id.* at § 6.01(a)(i).
[20] *Id.* at § 6.01(a)(ii).

parties agree that this Termination Date was March 23, 2012.[21] Additionally, covenants and agreements of the parties to be performed post-closing "survive in accordance with their respective terms."[22]

Further, the parties agreed that there would be a $2.5 million deductible and $25 million cap for indemnification claims against ENI except for the "Excluded Matters," which include claims arising from the Fundamental Representations, covenants, and fraud.[23]

The SPA outlines a dispute resolution procedure for inter-party indemnification claims in Section 6.08. Pursuant to this section:

> In the event that an Indemnified Party determines that it has a claim for Damages against an Indemnifying Party . . . the Indemnified Party shall promptly, but in any event within five (5) Business Days of becoming aware of any facts or circumstances that would reasonably be expected to give rise to a claim for indemnification hereunder, give written notice thereof to the Indemnifying Party, specifying, to the extent then known by the Indemnified Party, the amount of such claim, the nature and basis of the alleged breach giving rise to such claim and all relevant facts and circumstances relating thereto; *provided, however*, that the failure to provide such notice shall not relieve the Indemnifying Party of any obligation it may have under this Article VI except to the extent that it has been prejudiced by such failure.[24]

After notice has been provided, the Indemnified Party must provide the Indemnifying Party with "full access to its books and records," including those of

[21] *Id.* at § 6.01(a); KBR Opp'n Br. at 5.
[22] Stock Purchase Agmt. § 6.01(c).
[23] *Id.* at § 6.04(a)-(b).
[24] *Id.* at § 6.08 (emphasis in original).

R&S and its subsidiaries if ENI is the Indemnifying Party, in order to "allow[] the Indemnifying Party a reasonable opportunity to verify any such claim for Damages."[25] Also, within forty-five days of receiving notice, the Indemnifying Party may dispute its liability.[26] If the Indemnifying Party does not dispute liability, then "such notice shall be conclusively deemed to be a liability of the Indemnifying Party."[27] If, on the other hand, the Indemnifying Party timely disputes liability, the parties must engage in good faith negotiations aimed at resolution of the dispute.[28] SPA Section 6.08 then provides that "[p]romptly following the final determination of the amount of Damages to which the Indemnified Party is entitled (whether determined in accordance with this Section 6.08 or by a court of competent jurisdiction), the Indemnifying Party shall pay such Damages to the Indemnified Party by wire transfer or certified check made payable to the order of the Indemnified Party."[29] KBR provided ENI with notice of claims (now the subject of Counterclaims A, C, D and E)[30] prior to the March 23, 2012 Termination Date.[31] KBR provided notice to ENI of additional claims (including

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] This Memorandum Opinion will follow the parties' briefing convention of reference to each individual counterclaim by reference to the letter with which it is associated in the Amended Counterclaim. *See* Am. Countercl. ¶ 117.
[31] *Id.* at ¶ 97; KBR Opp'n Br. at 7-8.

those now the subject of Counterclaim G) after this date.[32] ENI did not receive notice of Counterclaims B, F, H, I, or J prior to KBR's filing its counterclaims.

On December 3, 2012, ENI filed a Verified Complaint alleging that KBR breached several provisions of the SPA, as well as the implied covenant of good faith and fair dealing.[33] KBR responded with a Verified Counterclaim, amended on May 17, 2013, alleging that ENI had engaged in fraudulent misconduct and breached the SPA by, inter alia, manipulating R&S's financial condition to inflate the purchase price; continuing to provide or promise payments to employees from an ENI long-term incentive plan after the closing; and leaving certain Indonesian tax matters unresolved before closing.[34] KBR seeks to rescind the transaction and recover the purchase price, or alternatively, to recoup the $25 million in the Indemnity Escrow Fund, as well as damages for ENI's fraud and attorney fees.[35] ENI moved to dismiss KBR's Amended Counterclaim on June 17, 2013.[36] On June 19, 2013, KBR filed a Motion for Preliminary Injunction to enjoin arbitration pending the outcome of this matter. Oral argument for both motions was held on August 5, 2013. In a September 13 Letter Opinion, I denied KBR's Motion for

[32] Am. Countercl. ¶ 97; KBR Opp'n Br. at 7-8.
[33] Compl. ¶¶ 72-84.
[34] Am. Countercl. ¶¶ 1-10.
[35] *Id.* at ¶¶ 1, 11.
[36] ENI moved to dismiss KBR's Verified Counterclaim on March 18, 2013. ENI moved to dismiss KBR's First Amended Counterclaim on June 17, 2013.

Preliminary Injunction.[37] For the reasons below, ENI's Motion to Dismiss is granted in part and denied in part.

II. Standard

Under Court of Chancery Rule 12(b)(6), a motion to dismiss will be granted if there are no reasonably conceivable circumstances that would entitle the counterclaimant to recover.[38] Consequently, a counterclaim will only be dismissed if it clearly lacks merit as a matter of law or fact.[39] In considering the motion before me, I must "draw all reasonable inferences in favor of the [counterclaimant], and accept all well pled factual allegations as true."[40] While "[v]agueness or lack of detail, standing alone, is insufficient to dismiss a claim,"[41] this Court "is not required to accept every strained interpretation of the allegations proposed" or "conclusory allegations without specific supporting factual allegations."[42]

Consistent with this standard, I consider those facts alleged in KBR's Amended Counterclaim, as well as the Stock Purchase Agreement, which is

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[37] *ENI Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 4877916 (Del. Ch. Sept. 13, 2013).
[38] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011).
[39] *Sterling Network Exch., LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *4 (Del. Super. Mar. 28, 2008).
[40] *Paul v. Delaware Coastal Anesthesia, LLC*, 2012 WL 1934469, at *1 (Del. Ch. May 29, 2012).
[41] *Sterling*, 2008 WL 2582920, at *4.
[42] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (internal quotation marks omitted).

incorporated by reference therein. At this stage of the proceedings, I decline ENI's invitation to take judicial notice of KBR's SEC filings.[43]

III. Analysis

KBR has based its counterclaims on the indemnification provisions of the SPA and fraud. Specifically, KBR alleges the following: that ENI breached SPA Section 3.07 by knowingly underestimating costs in connection with the contract for the Melawan Crushing Plant & Western Overland Conveyor ("KPC1") project, and by unjustifiably releasing millions of dollars in cost and contingency to margin in October 2010, which inflated R&S's working capital, and ultimately, its purchase price **(Counterclaim A)**; breached Sections 3.06 and 3.07 by understating cost and contingency on the OLC and TBCT Duplication ("KPC2") and KPC1 projects **(Counterclaim B)** and by making improper cost adjustments on the KPC2 project **(Counterclaim C)**; breached Sections 3.11(a), 3.11(e), and 5.14(a) by mishandling certain Indonesian tax issues **(Counterclaim D)**; breached Sections 3.17(n), 3.26, 5.04, and 5.09(b) because R&S employees had a continuing interest in ENI's Long Term Incentive Plan ("LTIP") that was not disclosed

[43] Because KBR does not refer to its SEC filings in its Counterclaim, and because KBR alleges that "the facts for which ENI cites [these filings] are highly subject to dispute," KBR Opp'n Br. at 11, consideration of KBR's SEC filings is improper here. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 168-69 ("When the trial court considers matters outside of the complaint, a motion to dismiss is usually converted into a motion for summary judgment and the parties are permitted to expand the record. . . . Nevertheless, in some instances and for carefully limited purposes, it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint. The trial court may also take judicial notice of matters that are not subject to reasonable dispute.").

(Counterclaim E); breached Sections 3.04(b) and 3.26 because a Polish subsidiary had certain preemptive rights that were not disclosed **(Counterclaim F)**; breached Sections 3.01, 3.08, and 3.26 because R&S Canada lacked a certificate of authorization to practice professional engineering **(Counterclaim G)**; and breached Section 3.13(b) in connection with a rock slide **(Counterclaim H)** and alleged design deficiency **(Counterclaim I)** relating to R&S Canada's Elkview project, as well as in connection with mechanical failures on the KPC1 and KPC2 projects **(Counterclaim J)**. Additionally, KBR alleges that ENI committed fraud in connection with the misrepresentations alleged in Counterclaims A, B, C, and E. The counterclaims and the contractual provisions on which they are dependant are represented graphically in Figure I. Below, I discuss, and reject, alleged procedural defects in connection with the Amended Counterclaim. I then address each of KBR's specific counterclaims in turn.

A. Alleged Procedural Deficiencies

Preliminarily, ENI contends that "Section 6.08 places various conditions precedent regarding notice, information sharing, and good faith negotiation on a party seeking indemnification under the SPA," which KBR has failed to satisfy.[44]

[44] ENI Reply Br. at 31.

First, ENI asserts that KBR did not provide sufficient "pre-litigation notice" for some of its claims, as called for in Section 6.08 of the SPA.[45] Specifically, the notice that KBR provided in March 2012 did not claim breaches of Sections 3.01, 3.04, 3.08, 3.13, 5.04, or 5.14, or reference Counterclaims B, F, G, H, I or J; thus, according to ENI, these counterclaims are barred.[46] Section 6.08, which sets out the inter-party dispute resolution procedure, provides that a party seeking indemnification "promptly . . . give written notice" to the other party.[47] Notably, "failure to provide such notice shall not relieve the Indemnifying Party of any obligation it may have" under the indemnification provisions of the SPA "except to the extent that it has been prejudiced by such failure."[48] ENI does not contend that it was prejudiced by KBR's failure to provide notice.[49] Furthermore, because the notice provision in Section 6.08 corresponds to the "inter-party" dispute procedure, it is not clear from the language of the contract that notice was a pre-litigation requirement. Thus, I do not find that KBR's failure to give notice of each of its counterclaims before bringing this lawsuit provides a basis to dismiss.

[45] ENI Op. Br. at 3, 54.
[46] *Id.* at 53.
[47] Stock Purchase Agmt. § 6.08.
[48] *Id.*
[49] ENI merely describes, generally, the purpose that notice, access, and negotiation provisions serve; specifically, that "they seek to avoid the substantial time and expense associated with litigating inter-party claims for indemnification by channeling the parties' conduct towards a negotiated solution." ENI Op. Br. at 52. However, ENI does not allege any facts that demonstrate it was prejudiced by KBR's lack of notice.

Second, ENI argues that Counterclaims A through J should be dismissed because KBR failed to negotiate in good faith in accordance with Section 6.08.[50] ENI notes that, although KBR "allege[s] that it met with ENI and 'attempted in good faith to resolve the dispute, as contemplated by the SPA,'" this meeting took place on April 8, 2013, whereas KBR filed its counterclaims on January 25, 2013 and ENI filed its first motion to dismiss on March 18, 2013.[51] KBR claims, on the other hand, that once ENI filed suit, KBR was no longer required to comply with the procedures delineated in Section 6.08.[52] I find that KBR's supposed failure to comply with the dispute resolution procedures is an insufficient basis to grant ENI's Motion to Dismiss in light of the fact that KBR alleges that the parties communicated in good faith prior to KBR filing its counterclaims in this Court;[53] the SPA does not explicitly require that the parties meet in person in order to satisfy the requirement that they negotiate in good faith; and ENI itself filed the initial Complaint in this matter, on December 3, 2012, an act that invoked the jurisdiction of this Court and limited the opportunity for extra-judicial negotiations between the parties.

I note that ENI's only basis to dismiss Counterclaim D rests on allegations of KBR's failure to provide "pre-litigation notice" and negotiate in good faith with

[50] *Id.* at 52-53.
[51] *Id.* at 52 (quoting Am. Countercl. ¶ 98).
[52] KBR Opp'n Br. at 48.
[53] *See* Am. Countercl. ¶ 100 (noting that "the parties exchanged many letters between the time KBR served its initial claim notice until the time ENI initiated this litigation").

respect to Counterclaim D, before filing its counterclaims in this Court. Because I have found that both of these contentions are insufficient bases upon which to dismiss KBR's counterclaims, ENI's Motion to Dismiss Counterclaim D is denied.

I turn now to the breach of representation claims themselves, and whether they were timely filed. As described above, the SPA provides for the post-closing survival of three categories of seller representations and warranties, each category with its own termination date. The Fundamental Representations terminate the earlier of seven years from the closing or thirty days after the applicable statute of limitations expires; representations and warranties pertaining to environmental matters—not pertinent here—terminate three years after the closing; and the Non-Fundamental Representations terminated on March 23, 2012.[54] In addition, covenants to be performed after the closing "survive in accordance with their respective terms."[55] Only claims arising from the Non-Fundamental Representations are arguably untimely; I address those directly below.

B. The Non-Fundamental Representations

Under the terms of the SPA, the Non-Fundamental Representations survive until March 23, 2012. None of KBR's counts to redress allegedly false Non-Fundamental Representations was filed before that date.

[54] Stock Purchase Agmt. § 6.01(a).
[55] *Id.* at § 6.01(c).

1. The Survival Clause

The parties dispute the effect of the SPA's survival provision on the Non-Fundamental Representations. ENI asserts that counterclaims based on the Non-Fundamental Representations are time-barred because KBR did not file these causes of action before the March 23, 2012 Termination Date.[56] KBR counters that this Court cannot conclude that the language of SPA Section 6.01 unambiguously and clearly evinces the contractual equivalent of a statute of limitations; therefore, ENI's motion as to these counterclaims should be denied.[57] Additionally, KBR counters that the Survival Clause requires only notice, rather than a court filing, during the survival period; thus, its notice to ENI before the termination date was sufficient to preserve these counterclaims.[58]

Faced with a question of contract interpretation on a motion to dismiss, I must determine whether the contractual language at issue is unambiguous.[59] If so, I must give full effect to its meaning.[60] If, however, the contractual language is

[56] ENI Op. Br. at 13-18.
[57] KBR Opp'n Br. at 13-24.
[58] *Id.* at 2, 18-23.
[59] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011) ("If the contractual language at issue is 'clear and unambiguous,' the ordinary meaning of the language generally will establish the parties' intent.").
[60] *See, e.g.*, *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011) (noting that settled principles of Delaware law "require that unambiguous contractual language be given its 'ordinary and usual meaning'"); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Absent some ambiguity, Delaware courts will not distort or twist contract language under the guise of construing it. When the language of a contract is clear and unequivocal, a party will be bound by its plain meaning because creating an

"reasonably or fairly susceptible of different interpretations,"[61] I must resolve this ambiguity in favor of KBR as the nonmoving party.[62] Having reviewed Chancellor Strine's decision in *GRT, Inc. v. Marathon GFT Technology, Ltd.*, upon which ENI principally relies, and the survival provision of the SPA in conjunction with the SPA as a whole,[63] I find that the parties unambiguously created a contractual period of limitation for breaches of Non-Fundamental Representations, which period expired on March 23, 2012, before KBR brought these claims.

a. *Contracting parties can limit the applicable limitations period.*

In Delaware, parties may contractually agree to a period of limitations shorter than that provided for by statute, so long as this shortened period is reasonable.[64] In fact,

> Delaware law does not have any bias against contractual clauses that shorten statutes of limitations because they do not violate the

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ambiguity where none exists could, in effect, create new contract rights, liabilities and duties to which the parties had not assented.") (footnote omitted).

[61] *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) (quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003)).

[62] *Id.* Therefore, ENI is entitled to dismissal if "the interpretation of the contract on which their theory of the case rests is the *only* reasonable construction as a matter of law." *Id.* (emphasis in original) (internal quotation marks omitted).

[63] *See E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein. Moreover, the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.") (internal citations omitted).

[64] *GRT, Inc.*, 2011 WL 2682898, at *6; *see also Smith v. Mattia*, 2010 WL 412030 (Del. Ch. Feb. 1, 2010) ("It is well-established in Delaware that, in the absence of [an] express statutory provision to the contrary, a statute of limitations does not proscribe the imposition of a shorter limitations period by contract.") (internal quotation marks omitted).

> legislatively established statute of limitations, there are sound business reasons for such clauses, and our case law has long upheld such clauses as a proper exercise of the freedom of contract.[65]

As the Court explained in detail in *GRT*, one convention for creating a shorter limitations period is by drafting a survival clause, which states that representations and warranties survive only through a specified date.[66] Notably, under Delaware law, which respects the freedom of contract, "there is no special rule requiring that in order to contractually shorten the statute of limitations," parties utilize particular, or "particularly 'clear and explicit,' language."[67] Instead, our courts have interpreted language to provide "contractual provisions that limit the survival of representations and warranties as evidencing an intent to shorten the period of time in which a claim for breach of those representations and warranties may be brought, i.e., the statute of limitations."[68] Nevertheless, "the reality that parties to a contract may shorten the statute of limitations does not mean that they did, or did so unambiguously."[69] I find here, however, that the parties unambiguously agreed for a shorter limitations period to govern the Non-Fundamental Representations in the SPA.

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[65] *GRT*, 2011 WL 2682898, at *3.
[66] *Id.*
[67] *Id.* at *12.
[68] *Id.*
[69] *Id.* at *6.

b. *ENI and KBR contractually shortened the limitations period applicable to the Non-Fundamental Representations.*

Section 6.01 of the SPA states that:

> (a) Except as set forth below, all of the representations and warranties of Seller contained in this Agreement shall survive the Closing until, and shall terminate on, the Termination Date; *provided*, *however*, that:
>
> (i) the representations and warranties of Seller set forth in Section 3.01 (Organization of the R&S Parties), Section 3.02 (Authorization of Transaction; Binding Effect), Section 3.04 (Capitalization; Subsidiaries) and Section 3.11 (Tax Matters) (collectively, the "Fundamental Representations") shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and shall continue in full force and effect until, and shall terminate on, the date (the "Fundamental Representation Expiration Date") that is the earlier to occur of (x) the date that is thirty (30) days after the expiration of the applicable statute of limitations (without giving effect to any extensions thereof) and (y) the date that is seven (7) years after the Closing Date; and
>
> (ii) the representations and warranties of Seller set forth in Section 3.18 (Environmental Matters) shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and shall continue in full force and effect until, and shall terminate on, the date that is three (3) years after the Closing Date.
>
> . . . .
>
> (c) All covenants and agreements of Seller and Buyer contained in this Agreement that are to be performed in whole or in part after the Closing Date shall survive in accordance with their respective terms.[70]

Under the SPA, the Termination Date was March 23, 2012.

[70] Stock Purchase Agmt. § 6.01.

Interpreting similar language, this Court held in *GRT* that using such a survival clause evinced the parties' clear intent to effectuate a contractual limitations period, explaining that:

> [A] survival clause . . . that expressly states that the covered representations and warranties will survive for a discrete period of time, but will thereafter 'terminate,' makes plain the contracting parties' intent that the non-representing and warranting party will have a period of time, i.e., the survival period, to file a claim for a breach of the surviving representations and warranties, but will thereafter, when the surviving representations and warranties terminate, be precluded from filing such a claim.[71]

In that case, the Court determined that a survival clause providing that certain representations, as well as their remedies, would terminate after a one-year period evidenced the parties' unambiguous intent to create a contractual limitations period.[72] The effect of the survival clause, this Court found, was to preclude any cause of action involving those representations that was filed after the one-year survival period.[73]

Although KBR attempts to distinguish the SPA from the contract at issue in *GRT*, its arguments are unpersuasive. First, KBR attempts to differentiate the SPA here from the Purchase Agreement in *GRT* based on the fact that the contractual language there provided that not only the representations, but also their corresponding remedies, expired on the termination date. The language here, by

[71] *GRT*, 2011 WL 2682898, at *15.
[72] *Id.* at *2-3.
[73] *Id.* at *3.

contrast, is silent as to the termination of the remedy. As a result, argues KBR, the survival clause here does not serve to set a period limiting actions. I find this contention unpersuasive, because, although the simultaneous expiration of representations and their remedies bolstered the Court's finding in *GRT*, it did not provide the basis for the holding, which was that a period of survival of representations and warranties, followed by a date of termination, limited actions to the survival period only.[74]

Next, KBR contends that the Court's holding in *GRT* is inapplicable here because the intra-party dispute resolution scheme here is inconsistent with the survival clause serving as a limitation period. As explained below, however, my finding that the parties created a contractual period of limitations is consistent with the dispute resolution procedure contained in Section 6.08 of the SPA.

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[74] For instance, the following passage from *GRT* demonstrates that the simultaneous expiration of certain remedies was not central to the Court's finding but only provided further support for it.

> *On its face, the Survival Clause is drafted in a liability-limiting fashion. It plainly states that the Design Representations in § 4.6(b)(i) will "terminate" one year after the Purchase Agreement's closing.* That the parties intended to shorten the time period during which GRT could sue Marathon for a breach of the Design Representations is *also* made clear by their decision to expressly "terminate" § 7.4's remedy for a breach of the Design Representations—the 'sole and exclusive' remedy—simultaneously with the expiration of the Design Representations. This makes plain that the expiration of the Design Representations was intended to foreclose claims filed after the Survival Period.

Id. at *10 (emphasis added) (footnotes omitted). Additionally, Chancellor Strine noted that "[t]he Survival Clause at issue in this case goes a step further. . . . The parties' decision to terminate the Design Representations *and the sole remedy for their breach*, from an objective point of view, is further evidence of an intent to give GRT the one-year Survival Period to either file a claim for breach of the Design Representations, or accept the Demonstration Facility as designed, and move on." *Id.* at *16 (emphasis in original) (footnote omitted).

Finally, KBR asserts that the business context in *GRT* played a significant role in Chancellor Strine's decision-making, and that such a context is absent here. There are many reasons why parties, operating in a variety of business contexts, may contract for an abbreviated limitations period,[75] and the parties negotiated and provided for such a period here; therefore, I find KBR's distinction unpersuasive.[76] I find that the scholarly and thoughtful reasoning of *GRT* is applicable here, consistent with established principles of Delaware law, particularly the significance of the parties' agreement that the representations and warranties "terminate" on a date certain in the context of a contractual survival provision.[77]

[75] *See, e.g.*, *id.* at *12 n.59 ("[T]he shortening of statutes of limitations by contract is viewed by Delaware courts as an acceptable and easily understood contractual choice because it does not contradict any statutory requirement, and is consistent with the premise of statutory limitations periods, namely, to encourage parties to bring claims with promptness, and to guard against the injustices that can result when parties change position before an adversary brings suit or where causes of action become stale, evidence is lost, or memories are dimmed by the passage of time.").

[76] Though the Court did consider the business context in *GRT*, it was not central to the holding. *See id.* at *16 ("The fact that the parties explicitly chose to have the Design Representations live for only one year may only be plausibly read as a way to balance the commercial exigency of addressing design deficiencies promptly against GRT's lack of pre-closing due diligence by giving GRT a limited one-year period to conduct diligence and sue.").

[77] *See id.* at *15 ("[A] survival clause . . . that expressly states that the covered representations and warranties will survive for a discrete period of time, but will thereafter 'terminate,' makes plain the contracting parties' intent that the non-representing and warranting party will have a period of time, i.e., the survival period, to file a claim for a breach of the surviving representations and warranties, but will thereafter, when the surviving representations and warranties terminate, be precluded from filing such a claim.").

c. *Notice was not sufficient to preserve causes of action based on the Non-Fundamental Representations in a court of competent jurisdiction.*

The parties disagree as to whether providing notice, rather than filing a lawsuit, is sufficient to preserve a claim prior to the Termination Date. KBR contends that Section 6.01 is ambiguous when read in conjunction with the inter-party dispute resolution procedures in Section 6.08, as well as Section 6.13, which governs the release of the indemnification escrow funds. Specifically, KBR asserts that Section 6.08 "makes clear that a 'claim' for indemnification is made when the Indemnified Party (here, KBR) provides notice to the Indemnifying Party (here, ENI)."[78] KBR emphasizes that the parties can resolve disputes arising out of the SPA either extra-judicially "in accordance with Section 6.08" *or* in a "court of competent jurisdiction."[79] Accordingly, KBR contends that "nothing in Section 6.08 requires KBR to file suit in order to make a 'claim' against ENI."[80]

Furthermore, KBR asserts that "so long as [it] initiated the claim process in accordance with Section 6.08 by giving notice to ENI before the Termination Date, ENI would not be entitled to the release of the Indemnity Escrow Account until KBR's claims were finally determined," either through inter-party negotiations or a

[78] KBR Opp'n Br. at 18.
[79] *Id.* at 19.
[80] *Id.*

competent court.[81] This reading of the contract, according to KBR, is inconsistent with interpreting Section 6.01 as containing an abbreviated limitations period for certain representations and warranties.

I do not find that KBR offers a reasonable interpretation of the SPA, nor are its various assertions sufficient to cast a cloud of ambiguity over the clear language in Section 6.01. It is not a reasonable interpretation of the SPA that KBR can preserve a lawsuit based on an expired representation or warranty merely by providing notice before the applicable Termination Date.[82] In fact, if I read the SPA as KBR wants me to, then KBR could provide notice of a claim under Section 6.08 before the termination date provided in Section 6.01, and then file a complaint in court any time after the termination date, i.e. *after* the representations and warranties underlying the litigation had *expired*. For the reasons already detailed above, it is clear that the survival language at issue here was intended to create a limitations period, and this is neither how a statutory limitations period nor a contractual limitations period operates under Delaware law.[83]

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[81] *Id.*

[82] *See, e.g.*, *Escue v. Sequent, Inc.*, 869 F. Supp. 2d 839, 849 (S.D. Ohio 2012) ("Just as a party cannot evade a statutory statute of limitations simply by providing notice, so too [a counterclaimant] cannot evade the contractual limitations period by providing notice in the absence of a contractual provision permitting him to do so.").

[83] I note that in *GRT*, the Court rejected a similar argument to that put forth here, noting that "'[i]ndeed,' argues GRT, 'the whole purpose of [the contractual provision at issue] is to allow [the parties] to fix [their] mistakes before the parties head to court, a purpose that would be thwarted by [the defendant's] interpretation.'" *GRT, Inc.*, 2011 WL 2682898, at *9. In that case, the Court determined that the dispute resolution procedure at issue required filing a lawsuit to

I also note that it is not inconsistent that the parties would create a contractual limitations period that requires the parties to preserve rights by filing a lawsuit, but that still provides for extrajudicial dispute resolution procedures. On one hand, a contractual limitations period means that filing litigation is required to preserve a cause of action beyond the limitations period. On the other hand, the parties, in Section 6.08, have outlined a dispute resolution procedure to provide quick, non-judicial resolution where possible when an inter-party dispute arises under the SPA, a procedure that includes providing notice—*within five days of discovery of the claim*—to the other party, followed by abbreviated inspection and rebuttal periods, then by good-faith negotiations. Although providing notice of a claim triggers this dispute resolution process, and requires the escrow agent to reserve the amount in controversy, it does not preserve the notifying party's rights to bring a claim in this Court (or any other court of competent jurisdiction) after the underlying representations and warranties have expired in accordance with the contractual limitations period embodied in Section 6.01, any more than it would preserve such a right if the statutory limitations period were applicable. If either party, after providing notice to the other, runs up against the contractual limitations

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initiate that procedure; thus, the Court rejected the argument that the parties created the procedure as an avenue to avoid litigation. While that is not the case here, I still find that the dispute resolution procedure does not render unclear the parties' intent to create a contractual limitations period via the survival clause. As I explain above, nothing in the SPA prevents the parties from filing litigation to preserve a claim, while continuing to proceed through the dispute resolution procedure.

period, it must bring suit or be thereafter barred. In other words, the SPA contemplates parallel, not mutually-exclusive, dispute resolution procedures.

KBR points out several instances where, in negotiations between the parties and in court filings, ENI has not insisted that KBR had to file suit (rather than simply serve notice) before the Termination Date to preserve a viable claim.[84] However, I need not resort to extrinsic evidence to ascertain the parties' intent, as the language of the SPA is clear and unambiguous.[85] I have therefore not considered these communications in interpreting the language at issue.

Because the Non-Fundamental Representations terminated well before KBR filed its counterclaims, I must dismiss the corresponding counterclaims unless KBR can establish that the contractual limitations period governing the Non-Fundamental Representations was tolled—an issue I address below.

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[84] *See, e.g.*, KBR Opp'n Br. at 13 ("In all the correspondence exchanged between the parties before ENI filed suit, not once did ENI take the position that KBR was required to file suit in order to preserve claims arising from the Non-Fundamental Representations. Indeed, in its complaint, ENI conceded that notice was sufficient.") (internal citation omitted). KBR suggests that these communications are evidence of the parties' intent, but does not allege that it relied on these representations to its detriment. At oral argument, I noted that ENI was not estopped from arguing that KBR was required to file suit, as opposed to merely providing notice of its claims. Oral Arg. Tr. 73:11-18.

[85] *See, e.g.*, *Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, 2013 WL 3369318, at *5 (Del. Ch. June 19, 2013) ("[I]f a contract is unambiguous, then the plain language of the agreement governs, and 'extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or create an ambiguity.'").

2. Tolling

Under Delaware law, the statute of limitations begins to run on the date of accrual, which is generally when the alleged wrong takes place.[86] In situations involving a breach of a contractual representation, the date of accrual is typically the closing date.[87] There are, however, exceptions to this general principal; the statute of limitations may be tolled if the plaintiff (or in this matter, counterclaimant) establishes that an exception applies. KBR alleges that the doctrines of equitable tolling, fraudulent concealment, and inherently unknowable injury apply to prevent those counterclaims based on the Non-Fundamental Representations from being time-barred.[88]

a. *Standard*

KBR bears the "burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled."[89] Notably, allegations of tolling, even on a motion to dismiss, are not governed by the same reasonable-conceivability standard that generally governs Rule 12(b)(6) motions.[90] In fact, though a "court considering timeliness as a basis for a motion to dismiss must draw the same [counterclaimant]-friendly inferences required in a 12(b)(6) analysis," this posture

[86] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).
[87] *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011).
[88] Am. Countercl. ¶¶ 100-05.
[89] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999).
[90] *State ex rel. Brady v. Pettinaro Enterprises*, 870 A.2d 513, 524-25 (Del. Ch. 2005).

"does not govern assertion of tolling exceptions to the operation of a statute of limitation."[91] Instead, a "[counterclaimant] asserting a tolling exception must plead facts supporting the applicability of that exception."[92] The reason for this requirement is plain: having discovered the facts sufficient to bring an action, a counterclaimant is uniquely aware of the circumstances which caused it to fail to do so in a timely manner; consequently, it bears the burden of pleading with specificity the reasons that the defendant should not enjoy the protections of the statutorily-imposed (or bargained-for) limitations period.

b. *Fraudulent concealment and equitable tolling*

KBR alleges that the doctrines of equitable tolling and fraudulent concealment apply here.[93] "Each of these doctrines permits tolling of the limitations period where the facts underlying a claim [are] so hidden that a reasonable [counterclaimant] could not timely discover them."[94] If applicable, the limitations period is tolled only until the counterclaimant is on inquiry notice, *i.e.* "is objectively aware of the facts giving rise to the wrong."[95] The limitations period, therefore, is tolled under equitable tolling or fraudulent concealment only "until a [counterclaimant] discovers, or by exercising reasonable diligence should

[91] *Id.*
[92] *Id.* at 525.
[93] Am. Countercl. ¶¶ 104-05.
[94] *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008) (internal quotation marks omitted).
[95] *Id.*

have discovered, his injury."[96] I assume, without deciding, that these doctrines apply to the limitations period established by the SPA.

i. Fraudulent concealment

Under the doctrine of fraudulent concealment, the statute of limitations is tolled "if a defendant engaged in fraudulent concealment of the facts necessary to put a [counterclaimant] on notice of the truth."[97] This doctrine requires "an affirmative act of concealment or 'actual artifice' by a defendant that prevents a [counterclaimant] from gaining knowledge of the facts,"[98] including "misrepresentations intended to put the [counterclaimant] off the trail of inquiry."[99]

KBR's allegations of fraudulent concealment involve Jeff Rodabaugh, former R&S President who continued as management after the December 2010 closing.[100] KBR states its fraudulent concealment allegations at Paragraphs 104 and 105 of the Amended Counterclaim: "unbeknownst to KBR at the time, ENI [via the LTIP] knowingly created incentives for Rodabaugh that caused him to (1) misrepresent to KBR the amount of cost and contingency that were required for

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[96] *Id.*
[97] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.
[98] *Weiss*, 948 A.2d at 451; *see also In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) ("Under [the doctrine of fraudulent concealment], 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 truth.").
[99] *In re Nine Sys. Corp. Shareholders Litig.*, 2013 WL 4013306, at *8 (Del. Ch. July 31, 2013) (quoting *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *8 (Del. Ch. Jan. 24, 2005) (citations omitted)).
[100] Am. Countercl. ¶¶ 69-71, 104-05.

certain projects in connection with the post-closing working capital adjustment, (2) conceal facts regarding ENI's manipulation of R&S's accounting before the closing, (3) suppress problems that were emerging on various projects, thereby preventing KBR from pursuing certain claims and taking countermeasures in a timely fashion, and, ultimately (4) destroy documents . . . to hide their contents from KBR."[101] As a result, "KBR did not discover all of the facts giving rise to its claims" until Rodabaugh's resignation on February 29, 2012.[102] With respect to ENI, KBR simply recites its belief that Rodabaugh served as ENI's "secret agent."[103] Eliminating the allegations regarding the pre-closing accountings, as well as the destruction of documents, which took place at the very end of the contractual limitations period, KBR's allegations are limited to the assertion that Rodabaugh continued to employ accounting practices and understate project problems post-closing, in a way favorable to ENI. The Amended Counterclaim contains only the conclusory allegation that Rodabaugh's "concealment" caused it not to "discover all the facts giving rise to its claims."[104] This conclusory statement falls short of a pleading of specific facts that an act of fraudulent concealment on ENI's part prevented KBR from discovering specific claims in a

[101] *Id.* at ¶ 104.
[102] *Id.* at ¶ 105.
[103] *Id.* at ¶¶ 70, 105.
[104] *Id.* at ¶ 105.

specific way.[105] KBR has therefore failed to plead facts sufficient to show fraudulent concealment should toll the contractual limitations period.

ii. Equitable tolling

The doctrine of equitable tolling, by contrast to fraudulent concealment, applies to reliance on the actions of a fiduciary. Under this doctrine, "the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a [counterclaimant] reasonably relies on the competence and good faith of a fiduciary."[106] In order for an otherwise time-barred claim to survive under this doctrine, the counterclaimant must plead specific facts to demonstrate its reliance on a self-dealing fiduciary, and that this reliance prevented the counterclaimant from being on inquiry notice of the wrongs perpetuated by its fiduciary. Demonstrating that the counterclaimant was not on inquiry notice requires pleading "when the [counterclaimant] learned of the [challenged transaction] . . . ; when he had notice of facts concerning possible unfairness of the terms; and the reasonable steps he took to oversee his

[105] The provisions of Article VI provide KBR with the opportunity to recover damages for misrepresentations post-closing, but impose an obligation to investigate diligently whether such misrepresentations exist, sufficient to file suit to enforce its rights, if necessary, within the contractually bargained-for fifteen-month limitation period. KBR has failed to allege what actions it took, or would have taken, to discover any misrepresentations, or how "secret agent" Rodabaugh thwarted or diverted those efforts. Consequently, KBR has failed to meet its burden to demonstrate that tolling is appropriate here under the doctrines of fraudulent concealment or, as I describe in the next subsection of this Memorandum Opinion, equitable tolling.

[106] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6.

investment."[107] Unlike the doctrine of fraudulent concealment, "[n]o evidence of actual concealment is necessary in such a case."[108] This doctrine recognizes that "even an attentive and diligent [party] may rely, in complete propriety, upon the good faith of fiduciaries."[109] In fact, this Court has noted that "[t]he obvious purpose of the equitable tolling doctrine is to ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing."[110]

KBR points out that Rodabaugh—who is not a party here—was a fiduciary for R&S, and thus presumably for KBR, post-closing. It then relies on the same allegations discussed above with respect to fraudulent concealment: that Rodabaugh failed to disclose the misleading accounting practices he and ENI had engaged in, pre-closing; that, to some extent, he continued to employ these practices while a fiduciary for KBR; and that he "suppress[ed] problems" occurring on "various projects, thereby preventing KBR from pursuing certain claims and taking countermeasures in a timely fashion."[111] KBR alleges that it relied on "Rodabaugh's competence, good faith and fiduciary duties . . . and did not discover all of the facts giving rise to its claims" until Rodabaugh's departure

[107] *See Buerger v. Apfel*, 2012 WL 893163, at *4 (Del. Ch. Mar. 15, 2012) (citing *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993)).
[108] *In re Tyson Foods, Inc.*, 919 A.2d at 585.
[109] *Weiss*, 948 A.2d at 451.
[110] *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 813 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).
[111] Am. Countercl. ¶ 104.

on February 29, 2012.[112] Because KBR has failed to plead with specificity what reliance on Rodabaugh led to suppression of which specific claims, and when KBR was placed on inquiry notice of those claims, KBR has failed to plead sufficient facts to support equitable tolling here.[113]

ENI argues that, other than a bare allegation that Rodabaugh served as ENI's "secret agent," there is nothing to indicate that ENI controlled Rodabaugh as its agent, or conspired with Rodabaugh post-closing, sufficient to support a finding that equitable tolling on account of *Rodabaugh's* acts should apply to ENI as well. Because the relationship between Rodabaugh and ENI, post-closing—unlike other facts relevant to tolling—is not uniquely within the knowledge of KBR, that relationship need not be pled with specificity; pleading facts that support an inference of agency is sufficient. However, because I have found that KBR has failed to plead facts sufficient to support equitable tolling for Rodabaugh's actions, I need not decide whether the facts support application of the doctrine to the non-fiduciary, ENI.

c. *The discovery rule*

KBR further alleges that the limitations period applicable to Counterclaims I and J, which relate to design deficiencies on two of R&S's projects, should be

[112] *Id*. at ¶ 105.

[113] See *Buerger*, 2012 WL 893163, at *4 ("Nevertheless, the plaintiffs have not met the pleading requirements for equitable tolling because they failed to identify the date when they learned of the [challenged transaction]. Without this information, the doctrine of equitable tolling cannot be applied.").

tolled pursuant to the discovery rule.[114] Under the discovery rule, also known as the doctrine of unknowable injury, this Court will toll the statute of limitations in instances "where it would be practically impossible for a [counterclaimant] to discover the existence of a cause of action."[115] The counterclaimant also must demonstrate that he is "blamelessly ignorant of the wrongful act and injury complained of."[116] In other words, "there must have been no observable or objective factors to put a party on notice of an injury."[117] KBR asserts that, because the design deficiencies in certain R&S projects were latent, and thus inherently unknowable, it has met this standard.[118]

ENI contends, persuasively, that the discovery rule should not apply here to toll a contractual limitations period because this would disrupt "the contractually-negotiated balance of risk the parties agreed to in the SPA."[119] ENI asserts that "[f]reedom of contract allows sophisticated parties such as ENI and KBR to allocate the inherent risks of undetected liabilities associated with the sale of a business—thereby obviating the need for a discovery rule."[120]

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[114] Am. Countercl. ¶¶ 101-03.
[115] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139, at *22 (Del. Ch. Aug. 7, 2012) (quoting *In re Tyson Foods, Inc.*, 919 A.2d at 584).
[116] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (quoting *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)).
[117] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.
[118] Am. Countercl. ¶¶ 101-03.
[119] ENI Op. Br. at 34.
[120] *Id* at 32-33.

There is little Delaware case law directly addressing the availability of the discovery rule to toll a contractual limitations period; however, in *GRT*, this Court addressed in dicta whether the plaintiff in that case had sufficiently alleged tolling under the discovery rule.[121] Having considered Delaware law's respect for parties' contractual choices,[122] and reviewed case law from other jurisdictions addressing that question,[123] I conclude that application of the discovery rule to toll a

[121] *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *17 (Del. Ch. July 11, 2011).

[122] *See, e.g.*, *id.* at *12 ("Under Delaware law, which is more contractarian than that of many other states, parties' contractual choices are respected . . . .") (footnote omitted); *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) ("Parties have a right to enter into good and bad contracts, the law enforces both."); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999) ("Equity respects the freedom to contract . . . .").

[123] *See, e.g.*, *In re Park W. Galleries, Inc. Mktg. & Sales Practice Litig.*, 2010 WL 2640254, at *2 n.1 (W.D. Wash. June 25, 2010) (noting that the discovery rule "was created by the courts to ameliorate the harsh effects of legislatively-enacted limitations periods over which plaintiffs had no control"); *Govaerts v. Suntec Indus. Inc.*, 2010 WL 2178517, at *2 (W.D. Ky. May 26, 2010) (declining to rewrite a stock purchase agreement through equitable tolling because "nothing in the language of the SPA suggests that the parties intended some sort of discovery rule or equitable tolling to extend that deadline" beyond eighteen months; the agreement specifically provided that "the representations and warranties contained in Article V . . . shall terminate on the eighteen month anniversary of the Closing Date . . . [and] no claim shall be made for breach of any representation or warranty contained in Article V . . . after the date on which such representations and warranties terminate . . ."); *New Welton Homes v. Eckman*, 830 N.E.2d 32, 33 (Ind. 2005) ("The agreement [at issue] included a warranty requiring any claims for breach to be brought within one year. Two years after the home was completed, the purchasers experienced foundation damage after substantial rains and sued the seller for breach of contract. They urge that the discovery rule used for determining when a cause of action accrues within the meaning of the statute of limitations be deployed to extend warranty agreements in contracts. We conclude that there is little justification for such judicial alteration of private contracts."); *Burress v. Indiana Farmers Mut. Ins. Grp.*, 626 N.E.2d 501, 504-05 (Ind. Ct. App. 1993) ("For yet another reason we reject [Appellant-Plaintiff's] invitation to adopt a discovery rule. [Appellant-Plaintiff] and her insurers formed expectations about her insurance based on those policies as written. . . . If we were to force a discovery rule upon the parties in place of their agreed upon time limitation, we would burden the insurance companies with obligations they did not anticipate or undertake, and bestow upon Burress a windfall for which she did not pay. . . . When there is no ambiguity in a contractual provision, that provision's plain language

contractual limitations period is inappropriate, at least, as here, where the inherent unknowability of a potential claim is itself knowable or predictable, and thus the proper source of negotiation and resolution between the parties to the contract. In such a case, parties who contract for an abbreviated limitations period must be held to their bargain.[124] Consequently, KBR must be held to the contractually-abbreviated period of limitations unambiguously established in Section 6.01 of the SPA.

Because KBR's claims involving the Non-Fundamental Representations are time-barred, I dismiss the contractual (non-fraud-based) portions of Counterclaims A, B, C, H, I, and J, and, to the extent they involve a purported breach of the Non-Fundamental Representations, Counterclaims E, F, and G. To the extent, however, that those counterclaims are based in allegations of fraud, a different analysis applies, as addressed below.

3. Fraud Based on the Non-Fundamental Representations

KBR alleges that ENI engaged in fraudulent conduct in connection with the facts alleged in Counterclaims A, B, C, and E. KBR contends that ENI made

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controls."); *but see Creative Playthings Franchising, Corp. v. Reiser*, 978 N.E.2d 765, 770 (2012) ("We agree that a contractual limitations provision that did not permit operation of the discovery rule would be unreasonable and, therefore, invalid and unenforceable.").

[124] *See Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *15 (Del. Ch. July 1, 2013) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract.") (quoting *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in part, rev'd in part*, 892 A.2d 1068 (Del. 2006)).

representations and warranties with regards to the Non-Fundamental Representations that were false. KBR alleges that "ENI falsely represented and warranted that R&S had in all material respects conducted its business in the ordinary course consistent with past practice and had not materially changed its accounting methods, principles, or practices" after improperly releasing certain cost and contingency reserves pre-closing in a manner that was inconsistent with past practice and beyond the ordinary course of business; that ENI's representations relating to its financial statements were false because ENI manipulated R&S's contingency reserves to alter the timing of revenue and income recognition; and that ENI falsely represented that the acquisition "would not entitle any employee of R&S to payment, or accelerate the timing of payment or vesting, or increase the amount of compensation or benefits due to any employee of R&S under any Employee Benefit Plan" even though ENI alleged continued employee payments and benefit schemes post-closing.[125] KBR pleads that "ENI had knowledge or belief that the representations and warranties were false when made or the representations and warranties were made with reckless indifference to the truth," and that it justifiably relied on these false representations and warranties, suffering damages as a result.[126]

[125] Am. Countercl. ¶¶ 108-10.

[126] *Id.* at ¶¶ 106-14. Since ENI has not alleged that these fraud allegations are insufficient to state a claim, only that they are time-barred, I do not consider their sufficiency here.

ENI contends that the survival period in Section 6.01 applies to KBR's allegations that ENI intentionally breached certain Non-Fundamental Representations; thus, according to ENI, these causes of action are time-barred. ENI contrasts the survival provision in Section 6.01(a), which does not contain an express exclusion for claims based on fraud, with other provisions governing indemnification within the SPA. For instance, the indemnification provisions in Article VI of the SPA are not the "sole and exclusive remedy" with regards to fraud, and fraud claims are not limited by the indemnification escrow fund or subject to the escrow deductible.[127] ENI asserts that these exceptions, in comparison to the lack of a carve-out for fraud claims in Section 6.01(a), "demonstrate[] that the absence of a fraud exception from Section 6.01 was deliberate."[128]

KBR counters this interpretation by emphasizing that, whereas indemnification claims are "[s]ubject to the limitations set forth in this Article VI," fraud claims are not similarly limited.[129] In fact, fraud claims are not only expressly excluded from the $2.5 million escrow deductible and the cap on damages, but, as KBR emphasizes, indemnification is also not the "sole and exclusive remedy" for "claims relating to the extent [sic] arising from fraud of a

[127] *See* Stock Purchase Agmt. §§ 6.04(a)-(c), 6.06.
[128] ENI Op. Br. at 22.
[129] KBR Opp'n Br. at 28 (quoting Stock Purchase Agmt. § 6.03).

Party."[130] KBR reads these various provisions and carve-outs as demonstrating that "there is no similar express indication that the parties intended to subject fraud claims to the Termination Date or any of the other limitations in Article VI."[131]

It is not clear, from the language of the SPA, that the parties intended, as ENI contends, that fraud involving the Non-Fundamental Representations be governed by the indemnification provisions of Article VI and thus, any cause of action in tort involving these representations be governed by the contractual limitations period in Section 6.01. In fact, Section 6.06 of the SPA, entitled "Exclusive Remedy," reads:

> *Except as provided in* Section 7.02 [governing remedies] and *the last sentence of this Section 6.06, each Party acknowledges and agrees that its sole and exclusive remedy with respect to any and all claims relating to the subject matter of this Agreement and transactions contemplated hereby shall be pursuant to the indemnification provisions set forth in this Article VI.* In furtherance of the foregoing, but without limiting the rights of indemnification expressly provided for under this Article VI, except as provided in Section 7.02 and the last sentence of this Section 6.06, each Indemnified Party hereby waives, from and after the Closing, to the fullest extent permitted under applicable Law, any and all rights, claims, and causes of action (including any right, whether arising at Law or in equity, to seek indemnification, contribution, cost recovery, damages or any other recourse or remedy, including the remedy of recession and remedies that may arise under common law) it may have against any Indemnifying Party . . . .[132]

[130] *Id.* at 6-7, 28; *see also* Stock Purchase Agmt. §§ 6.04(a)-(c), 6.06.
[131] KBR Opp'n Br. at 28.
[132] Stock Purchase Agmt. § 6.06.

The last sentence of that Section carves out fraud from the strictures of the indemnification-remedy provision, stating that "[t]he provisions of this Section 6.06 shall not apply to claims relating to the extent [sic] arising from fraud of a Party."[133] The SPA, by providing that the indemnification provisions do not constitute the "sole and exclusive remedy" for fraud, contemplates that at least some actions grounded in fraud can be brought outside the SPA's indemnification provisions, and thus, can be timely brought within the statutory—rather than contractual—limitations period. Although ENI asserts that, "[r]ead as a whole, the SPA demonstrates that the absence of a fraud exception from Section 6.01 was deliberate,"[134] the SPA, which contemplates fraud claims beyond Article VI, does not clearly and unambiguously establish that the survival provision of Section 6.01 applies to govern even those fraud allegations based on the Non-Fundamental Representations. Because KBR has offered a reasonable reading of the SPA, which is, on this point, ambiguous at best, and because I must resolve any ambiguity in the contract in KBR's favor,[135] ENI's Motion to Dismiss, as time-barred, KBR's claims for fraud based on the Non-Fundamental Representations

[133] *Id.*
[134] ENI Op. Br. at 22.
[135] *See, e.g.*, *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) ("Because any ambiguity must be resolved in favor of the nonmoving party, defendants are not entitled to dismissal under Rule 12(b)(6) unless the interpretation of the contract on which their theory of the case rests is the '*only* reasonable construction as a matter of law.'").

and alleged in Counterclaims A, B, C, and E is denied.[136] Because I so find, I need not reach KBR's argument that claims sounding in fraud cannot be subject to a limitations period shorter than that provided by statute, as a matter of public policy.[137]

C. The Remaining Counterclaims

I now turn to KBR's remaining allegations. These include allegations based on the Fundamental Representations, covenants, and fraud in connection with certain covenants. Under the SPA, the Fundamental Representations include those representations and warranties pertaining to the organization and capitalization of R&S and its subsidiaries; Counterclaims F and G make allegations that ENI breached several of these representations. In Counterclaim E, KBR contends that ENI breached certain covenants governing employee benefit matters, which are contained within Article V of the SPA, and committed fraud in connection therewith. None of these matters are subject to the abbreviated contractual limitation period discussed in detail above; ENI seeks dismissal on other grounds.

[136] KBR also alleges, in Counterclaim E, that KBR committed fraud in relation to two covenants: Sections 5.04 and 5.09(b). I address these allegations separately in the next section of this Memorandum Opinion.

[137] At this stage, I need not decide whether restricting the limitations period for indemnification claims arising from losses that result from fraudulent misrepresentations made in the SPA violates public policy, as KBR suggests. This issue, however, may become ripe if damages for fraudulent misrepresentation are sought from escrow, or if either party otherwise requests release of the funds in escrow during pendency of this action.

1. Counterclaim E

Prior to the December 2010 acquisition, ENI had in place for its employees a Long Term Incentive Plan ("LTIP"). That plan provided that "qualified employees received non-transferrable, performance-based awards of [common stock] of ENI to encourage them to contribute and participate in the success of ENI and its three subsidiaries," and "vesting could be accelerated on the sale of ENI."[138] KBR contends that R&S President Jeff Rodabaugh, who remained an R&S employee after the closing, was 1) in a position to manipulate the purchase price ultimately paid by KBR to ENI, and 2) able to benefit from manipulating a "low" price; in other words, Rodabaugh was able to engineer a kickback for himself at the expense of KBR via the LTIP.

KBR was aware of the existence of the LTIP, as it was disclosed in a schedule to the SPA. However, KBR argues that ENI's continuing to grant awards under the LTIP post-closing violated Sections 3.17(n), 3.26, 5.04, and 5.09(b) of the SPA. As explained above, KBR's claims that ENI violated the Non-Fundamental Representations contained in Sections 3.17(n) and 3.26 must fail, since those claims are time-barred. However, KBR makes additional claims that are not time-barred, as they relate to breaches of covenants under Article V of the SPA, rather than Non-Fundamental Representations. KBR makes three allegations

[138] ENI Op. Br. at 43.

arising from these purported breaches of covenants. First, KBR contends that the LTIP constitutes an Employee Benefit Plan as defined in the SPA, and that ENI's continuing to grant awards under the LTIP therefore violated a covenant contained in Section 5.09(b), which provides that "Transferred Employees shall cease to participate in each Employee Benefit Plan sponsored or maintained by Seller . . . ."[139] Second, KBR argues that granting awards under the LTIP violated the covenant in Section 5.04, which provides that ENI shall not "in any way interfere with the relationship between Buyer . . . and any employee . . . ."[140] Specifically, KBR contends that the LTIP created perverse incentives for KBR's new management in a way that constituted interference under Section 5.04. Third, KBR alleges that ENI's continuing to grant awards under the LTIP post-closing in violation of Section 5.09(b), and "interfering" with employees by creating incentives in violation of Section 5.04, constitutes fraud. For the reasons that follow, I find that the portions of Counterclaim E arising out of a breach of Sections 5.09(b) and Section 5.04 fail to state a claim upon which relief could be granted, and are therefore dismissed. Since KBR has, independent of those breaches, failed to plead fraud with particularity as required by Rule 9(b), the claims of fraud in connection with the LTIP fail as well.

[139] Stock Purchase Agmt. § 5.09(b).
[140] *Id.* at § 5.04.

a. *Breach of Section 5.09(b)*

KBR alleges that ENI's continuing to pay awards under the LTIP post-closing breached Section 5.09(b). Section 5.09(b) provides:

> Effective as of the Closing Date, the Transferred Employees shall cease to participate in each Employee Benefit Plan sponsored or maintained by Seller or its Affiliates (other than any Employee Benefit Plan established solely for an R&S Party pursuant to the Transition Services Agreement or at the request of Buyer). . . .[141]

KBR argues that the LTIP constitutes an Employee Benefit Plan as defined in Article I of the SPA and that Section 5.09(b) prohibits ongoing participation in such plans. Thus, KBR argues that by continuing to pay awards under the LTIP, ENI has breached its covenant to ensure that Transferred Employees "cease to participate in each Employee Benefit Plan."[142] Further, KBR alleges generally that continuing to grant awards under the LTIP, in violation of its promise not to do so under Section 5.09(b), constitutes fraud.

ENI makes two arguments in response to these claims. First, ENI argues that KBR misreads the plain language of the SPA's definition of Employee Benefit

[141] *Id.* at § 5.09(b).

[142] *See id.* KBR also argues that the LTIP is an Employee Benefit Plan because Section 3.17(a) provides that Schedule 3.17(a) "lists each Employee Benefit Plan," and the list in Schedule 3.17 includes the LTIP; thus the LTIP is an Employee Benefit Plan notwithstanding the definition of that term in Article I. That argument is unavailing; the Disclosure Schedule (including Schedule 3.17) provides that "[c]apitalized terms used and not otherwise defined in this Disclosure Schedule shall have the meanings ascribed to them in the Agreement" and that "[t]he disclosure of any information in this Disclosure Schedule shall not be deemed to constitute or imply an acknowledgement or admission that such information is required to be disclosed in connection with the provisions of the Agreement." *See* Campbell Transmittal Aff. Ex. 10 (Disclosure Schedules).

Plan, which clearly indicates that the LTIP is not included in that definition. Second, ENI contends that the language of Section 5.09(b) and the SPA as a whole unambiguously evidences the parties' intent not to include the LTIP within the purview of that section. I agree.

Article I of the SPA defines the term Employee Benefit Plan as including:

> . . . any stock bonuses, stock ownership, stock option, stock purchase, stock appreciation rights, phantom stock, or other stock plan . . . any material bonus or incentive compensation plan or arrangement, any severance, retention, or change of control plan, policy, or agreement, any deferred compensation plan, policy or agreement, *any executive compensation or supplemental income arrangement . . . sponsored, maintained, contributed to, or entered into by the R&S Parties* for the benefit of any of the present or former directors, officers, employees, or individual consultants providing services to or for the R&S Parties in connection with such services . . . .[143]

ENI reads the italicized language above as precluding from the definition of Employee Benefit Plan the LTIP—which is an ENI-sponsored plan—because ENI is termed "Seller" under the SPA and is not included in the definition of the "R&S Parties."[144] Under that reading, a benefit plan must be "sponsored, maintained, contributed or entered into" by an R&S Party to qualify as a defined Employee Benefit Plan, which the LTIP was not. KBR has not alleged in its Amended Counterclaim that an R&S Party had any obligations under the LTIP, which was a

[143] Stock Purchase Agmt. at 3 (Art. I Definitions) (emphasis added).
[144] ENI Op. Br. at 45.

benefit plan sponsored by ENI.[145] Therefore, argues ENI, the covenant in Section 5.09(b) unambiguously does not apply to the LTIP.

KBR counters that the covenant in Section 5.09(b) specifically applies to "each Employee Benefit Plan sponsored or maintained by Seller or its Affiliates,"[146] and thus argues that the SPA is, at least, ambiguous as to the LTIP. However, ENI concedes that the definition of Employee Benefit Plan can include a "Seller"—that is, an ENI—sponsored plan, but "*only* if that plan is *also* contributed to or otherwise participated in by R&S."[147] In other words, ENI asserts that the definition of Employee Benefit Plan "requires the involvement of an R&S party"—thus excluding the LTIP.[148]

I find the definition of Employee Benefit Plan unambiguous: it applies only to such plans sponsored by the R&S Parties, the entities being acquired under the SPA. This definition would include any plan sponsored by both ENI and R&S—if

[145] KBR did suggest for the first time at oral argument that the LTIP is "sponsored" by R&S under the definitions section of *the LTIP*, which defines "Sponsor" as OCM/GFI and its "Affiliates"—"Affiliates" is defined in the LTIP as, among other things, an entity controlled by OCM/GFI. Oral Arg. Tr. 71:8-24; Campbell Transmittal Aff. Ex. 9. Since R&S was a wholly-owned subsidiary of OCM/GFI, KBR contends that R&S is a "Sponsor" of the LTIP as defined in the LTIP; as a result, the LTIP is "sponsored by" an R&S Party as provided in the definition of Employee Benefit Plan in the SPA. This argument must fail, however, because the undefined term "sponsor," as used in the SPA, is unambiguous. To "sponsor" means to "accept responsibility for." Webster's Third New International Dictionary 2204 (3d ed. 1961). That is the meaning that controls in the SPA. Because that term is unambiguous, KBR, who is not even a party to the LTIP, cannot use the definition of "Sponsor" in the LTIP as extrinsic evidence of the intent of *the parties to the SPA*.

[146] KBR Opp'n Br. at 44-45.

[147] ENI Reply Br. at 28.

[148] *Id.*

any such existed—but not plans solely sponsored by ENI, such as the LTIP. This reading is consistent with the provisions of Section 5.09. Subsection (a) of that section provides that KBR will give credit for service under such plans through closing; subsection (b) provides that KBR will not provide benefits under such plans after closing. The purpose of Section 5.09 is to relieve KBR of responsibility for *R&S employee benefit plans*, post-closing. This Section does not covenant that ENI will not make payments due to former employees under non-R&S benefit plans. Therefore, continued payments by ENI under the LTIP do not violate the covenant, and the portion of Counterclaim E based on Section 5.09 is dismissed.

KBR also alleges a fraud claim arising out of a breach of Section 5.09. Logically, this claim must fall for the reasons articulated above. In any event, as ENI points out, KBR has failed to meet the pleading standard for fraud under Rule 9(b).[149] Because KBR has failed to articulate its fraud claim with respect to Section 5.09(b), other than to state that ENI "knowingly breached" the covenant, this fraud claim is dismissed.

b. *Breach of Section 5.04*

Next, KBR claims that ENI's continued payment of awards under the LTIP breached Section 5.04 of the SPA. Section 5.04 is a non-solicitation provision within which ENI covenants:

[149] ENI Op. Br. at 29; ENI Reply Br. at 13, 17.

> From the Closing until the date that is eighteen (18) months after the Closing Date, neither Seller nor any of its Controlled Affiliates shall, directly or indirectly, induce or attempt to induce any employee of the R&S Parties to terminate his employment, induce or attempt to induce any consultant or independent contractor of the R&S Parties to discontinue work with Buyer or its Affiliates (including the R&S Parties), or *in any way interfere with the relationship between Buyer* or its Affiliates (including the R&S Parties) *and any employee*, consultant or independent contractor of the R&S Parties.[150]

Essentially, KBR argues that ENI's payments under the LTIP have interfered with KBR's relationship with Transferred Employees—former employees of ENI, who still receive or are set to receive grants under the LTIP, but who after the sale became employees of KBR. KBR alleges that it "bargained for R&S employees who would not have an ongoing relationship with ENI after closing," and that, in violation of Section 5.04, "certain key R&S managers who stayed on with R&S and KBR after the sale—most notably, [R&S President] Rodabaugh—continued to participate in the LTIP after the Closing Date."[151] According to KBR, these managers "have received and/or will receive payments under the LTIP, including distributions from ENI that may flow from the release to ENI of funds held in the Adjustment Escrow Account and the Indemnity Escrow Account."[152] According to KBR, the LTIP's creation of perverse incentives for R&S management constitutes

[150] Stock Purchase Agmt. § 5.04. The SPA further explains that this covenant "imposes a reasonable restraint on Seller . . . in light of the activities and business of Buyer on the date of the execution of [the SPA] and the current plans of Buyer for the Business from and after the Closing." *Id.*
[151] Am. Countercl. ¶¶ 68, 72.
[152] *Id.* at ¶ 68.

"interference" in breach of Section 5.04. KBR asserts a fraud claim based on these facts as well.

As noted above, ENI's LTIP was disclosed as an Employee Benefit Plan on Schedule 3.17(a). However, KBR contends that it was not disclosed that closing payments under the LTIP would "create[] incentives for those R&S managers that were diametrically opposed to KBR's interests, thereby interfering with KBR's relationship with those employees."[153] In other words, although KBR acknowledges that the LTIP was disclosed on Schedule 3.17(a), it alleges that "[b]ecause these improper incentives were not disclosed by ENI and not discovered until much later, KBR misplaced its trust and confidence in Rodabaugh," relying on his advice, which KBR thought was provided in order to perpetuate the interests of R&S, and thus, KBR.[154] KBR asserts, however, that Rodabaugh, because of this "hidden interest," actually acted as a "secret agent" of ENI and "conceal[ed] facts surrounding ENI's manipulation of R&S's accounting," resulting in damages to KBR.[155]

i. Section 5.04 is Unambiguous and Does Not Prohibit the Continuance of Payments Under the LTIP.

ENI moves to dismiss KBR's claim that ENI breached Section 5.04 on several grounds. ENI counters KBR's allegations that it breached this covenant by

[153] *Id.*
[154] *Id.* at ¶ 69.
[155] *Id.* at ¶¶ 69-70.

noting that "Section 5.04 is a standard employee non-solicitation restrictive covenant meant to prevent ENI from poaching away R&S's human capital for some time after the transaction closed."[156] ENI contends that the rule of *ejusdem generis* applies, requiring that "the 'interference' subject to this section [] be *of the same general kind* as inducing an employee to terminate or a contractor to discontinue work."[157] Further, ENI notes that, as a restrictive covenant, Section 5.04 should be interpreted narrowly, and that, KBR "seeks to impose liability on ENI for breaching a negative covenant through inaction, a theory that is not viable."[158] ENI emphasizes that KBR fails to "allege any facts describing any affirmative act by ENI that could plausibly be construed as 'interfer[ing]' with KBR's relationship with R&S's employees."[159] Additionally, ENI notes that "[h]ad KBR wanted . . . to otherwise prohibit ENI from having any 'ongoing relationship' with the Transferred Employees at all after the close of the transaction, or to prohibit ENI from paying dividends that the participants were entitled to as shareholders of ENI, KBR could have contracted expressly for a covenant or representation in the SPA providing for that."[160]

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[156] ENI Op. Br. at 48.
[157] ENI Reply Br. at 29; *see also* ENI Op. Br. at 48-49 (citing *Del Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427-28 (Del. 2012)).
[158] ENI Op. Br. at 49.
[159] *Id.* at 50.
[160] *Id.* at 51 (internal citation omitted).

I find that the continuance of an employee benefit plan does not fall within the non-solicitation provision of Section 5.04. Section 5.04 is a negative covenant—it prohibits ENI from affirmatively acting in certain ways— yet, there is no indication that ENI has affirmatively altered its behavior since closing. KBR, instead, has alleged that ENI has continued to perform its pre-existing obligation to pay distributions under the pre-existing LTIP. Further, the LTIP and its impact on R&S—specifically, that certain R&S managers were purportedly incentivized to act in a way contrary to R&S and thus, contrary to KBR's interests—is not the sort of interference typically envisioned in a non-solicitation provision like Section 5.04. Far from alleging that R&S managers receiving or set to receive LTIP distributions have been incentivized to *leave* R&S to work for ENI, KBR has instead alleged that the LTIP gave Rodabaugh an incentive to stay and work mischief; "ENI used the LTIP payments to induce Rodabaugh [during his post-closing employment] to breach his fiduciary duties to KBR and R&S."[161] Whether or not the alleged perverse incentives of the LTIP, and ENI's role therewith, could support liability under another theory,[162] this is not what the parties contemplated as "interference" under the non-solicitation covenant, and KBR has therefore failed to allege a breach of that covenant. For these reasons, I dismiss the portion of Counterclaim E based on a breach of Section 5.04.

[161] KBR Opp'n Br. at 46.
[162] I note the Rodabaugh is not a party to this litigation.

ii. KBR Has Failed to State a Claim for Fraud Based on Section 5.04.

KBR also alleges that ENI failed to disclose that payments under the LTIP would create perverse incentives for R&S management, thereby "interfering" with KBR's employee relationships, and that the failure to disclose those incentives as covenanted constitutes fraud. ENI moves to dismiss these fraud claims because the LTIP was disclosed to KBR, and because "unambiguous contract language precludes these claims."[163]

First, ENI contends that it "did not represent or warrant that Transferred Employees had no ownership in ENI," pointing to Articles III and V of the SPA and emphasizing that "[n]othing in the SPA requires ENI to refrain from paying post-closing distributions [to] any Transferred Employee or to disclose to KBR any such payment that might be made."[164] Further, because KBR includes in its allegations the fact that the LTIP was disclosed as an Employee Benefit Plan on an SPA schedule, ENI maintains that KBR cannot adequately allege that "ENI failed to disclose the existence of the LTIP to KBR before the transaction closed in December 2010."[165]

Though KBR acknowledges that the Employee Benefit Plan was disclosed on an SPA schedule, it asserts that it does not base Counterclaim E "on the mere

[163] ENI Op. Br. at 3.
[164] *Id.* at 43.
[165] *Id.* at 44.

existence of the LTIP."[166] Instead, KBR contends that the fraud claim is based on "the fact that, under the LTIP, key R&S managers would receive a distribution under the LTIP in connection with the release of funds from the escrow accounts established pursuant to the SPA, despite ENI's specific . . . covenants that those individuals would not . . . receive compensation or benefits under the LTIP after the Closing," and that this covenant was breached.[167]

I found above that "interference" with employee relationships under Section 5.04 unambiguously does not apply to the LTIP's creation of management incentives. Because KBR has failed to state a claim for breach upon which it may reasonably recover in relation to Section 5.04, and because KBR has failed to plead with specificity a fraud claim with respect to the LTIP independent of the alleged breach, the accompanying fraud claim must also be dismissed.

2. Counterclaim F

In Counterclaim F, KBR alleges that ENI breached Section 3.04(b) of the SPA,[168] which represents and warrants that the equity interests, including shares of capital stock, of R&S and its subsidiaries are "not subject to any contractual or statutory preemptive or similar rights."[169] To support this allegation, KBR notes that shareholders at one of the three R&S subsidiaries in Poland, known as

[166] KBR Opp'n Br. at 46.
[167] *Id.* at 47 (internal citation omitted).
[168] Am. Countercl. ¶¶ 73-78.
[169] Stock Purchase Agmt. § 3.04(b).

Separator, held preemptive rights at the time of the closing.[170] KBR contends that, at the time of entering the SPA, the parties understood that preemptive rights were "undesirable" and "could constrain KBR's ability to control or divest those subsidiaries."[171] Further, KBR alleges that the preemptive rights held by Separator shareholders "rendered Separator and, in turn, R&S Poland less valuable than if they had been as warranted by ENI."[172] KBR also alleges that "KBR has since divested R&S Poland for $5,018—effectively a total loss directly attributable to ENI's false representation."[173]

In opposition, ENI asserts that Counterclaim F should be dismissed because KBR has failed to sufficiently allege that the misrepresentation caused damages.[174] Specifically, ENI notes that KBR fails to "even allege that the minority shareholders exercised or even threatened to exercise the preemptive rights in their shares to KBR's detriment, or how that resulted in *any* damage to KBR, much less all three of R&S's Polish subsidiaries being reduced to worthlessness."[175] ENI emphasizes that a disclosure attached to the SPA noted that 3,938 of the 4,000 outstanding Separator shares were held by an R&S entity, with "the remaining 62

[170] Am. Countercl. ¶¶ 73-74.
[171] *Id.* at ¶ 76.
[172] *Id.*
[173] *Id.* at ¶ 77.
[174] ENI Op. Br. at 56-58.
[175] *Id.* at 57-58 (emphasis in original).

shares held by four employees and an employee's widow."[176] ENI questions how the purported preemptive rights of these minority shareholders could lead to the "obliteration of the entire value of R&S Poland, including the entire value of two other Polish subsidiaries that were wholly-owned by R&S . . . ."[177]

The allegations of Counterclaim F are that ENI breached a representation that no preemptive rights exist, and that it was damaged as a result, because it received a less valuable property than that for which it contracted. Rule 12(b)(6) requires notice pleading, not a statement of damages with precision.[178] Therefore, ENI's Motion to Dismiss with respect to this claim is denied.

3. Counterclaim G

KBR alleges, in Counterclaim G, that ENI breached Section 3.01(b) of the SPA, which represents and warrants that R&S and its subsidiaries are "duly registered or qualified to conduct business,"[179] because R&S Canada lacked the authorization to practice professional engineering in British Columbia.[180] KBR

[176] *Id.* at 57 (citing Campbell Transmittal Aff. Ex. 10 at Schedule 3.04(b) (Capitalization; Subsidiaries)).
[177] *Id.* at 57.
[178] *See, e.g.*, *Osram Sylvania Inc. v. Townsend Ventures, LLC et al.*, 8123-VCP, at 12 (Del. Ch. Nov. 19, 2013) ("[T]he Court must accept even vague allegations as well pleaded 'if they give the opposing party notice of the claim.'") (quoting *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation)).
[179] Stock Purchase Agmt. § 3.01(b).
[180] Am. Countercl. ¶¶ 79-84.

alleges that this representation also breached Sections 3.08 and 3.26[181] of the SPA; those sections, however, involve Non-Fundamental Representations, and are time-barred for the reasons discussed above. Therefore, unless KBR has stated a claim for breach of Section 3.01(b), Counterclaim G must be dismissed.

KBR argues that the representation in 3.01(b), that R&S's subsidiaries were "duly registered or qualified to conduct business," was false, because R&S Canada had, as of the closing, failed to apply for "a certificate of authorization to practice professional engineering in British Columbia as required by the British Columbia Engineers and Geoscientists Act."[182] According to KBR, this certificate of authorization "is fundamental . . . because engineering services are at the core of its business" and lacking this certificate "limits R&S Canada's rights under British Columbia law," thus making R&S Canada a less valuable entity than it was warranted to be.[183] Further, KBR alleges that R&S Canada's Elkview project "is estimated to lose millions of dollars," a substantial loss that "would have been completely avoided or, in the alternative, substantially mitigated if ENI had disclosed the fact that R&S Canada lacked the certificate of authorization required

[181] Section 3.26 simply provides a warranty that the parties' statements in Article III are accurate; therefore, a breach of either Section 3.01 or 3.08 would also be a breach of Section 3.26.
[182] Am. Countercl. ¶ 80.
[183] *Id.* at ¶¶ 81-82.

by British Columbia law because KBR would not have closed on the acquisition as structured if it had known" otherwise.[184]

ENI contends that the allegations of Counterclaim G state a claim for breach, if at all, of Section 3.08, and not Section 3.01, and that any claim under the former section is time-barred. Section 3.01(b) states that "[e]ach of the R&S Parties is duly registered or qualified *to conduct business* . . . ."[185] Section 3.08(c)(i) provides that "[t]he R&S Parties are in possession of and in material compliance with all material consents, licenses, permits, authorizations and approvals issued or granted by, and have made all registrations or filings . . . as are necessary for the *conduct of the Business* . . ."[186] and Section 3.08(a) reads "[e]ach R&S Party is in compliance in all material respects with all laws applicable to the ownership and *operation of the Business*."[187] "Business" is defined in the SPA as "the businesses carried on by the R&S Parties as of the date of this Agreement, as conducted consistent with past practices."[188]

ENI asserts that a certificate of authorization to practice professional engineering "is not required for R&S Canada to be qualified to conduct business in Canada or British Columbia," and that Section 3.01(b) thus "cannot be read to include an obligation to apply for or obtain a certificate of authorization to practice

[184] *Id.* at ¶¶ 83-84.
[185] Stock Purchase Agmt. § 3.01(b) (emphasis added).
[186] *Id.* at § 3.08(c)(i).
[187] *Id.* at § 3.08(a).
[188] *Id.* at 1 (Art. I Definitions).

professional engineering, as KBR alleges, because that obligation is covered by the separate representation in Section 3.08 of the SPA."[189] ENI notes, in addition, that "[b]y creating this separate category of operation-specific representations in Section 3.08, the parties demonstrated the intention to exclude permits and authorization certificates from the narrower and Fundamental Representation in Section 6.01(a)(i) that the R&S entities sold to KBR were properly organized and in good corporate standing in the jurisdictions where they are authorized to conduct business."[190]

KBR attempts to counter this interpretation of the SPA by asserting that, because the definition of "Business" is "the businesses carried on by the R&S Parties . . ." the term "Business" is merely "the sum total of each 'business' that the R&S Parties collectively carry on."[191] Thus, according to KBR, because R&S Canada "conducts its 'business'—the practice of professional engineering in, among other locations, British Columbia, where its single largest project is located"—ENI effectively represented in Section 3.01(b) that "R&S Canada was registered or qualified to practice professional engineering in British Columbia."[192] I find that KBR has failed to present a reasonable interpretation of Sections 3.01 and 3.08.

[189] ENI Op. Br. at 60-61.
[190] *Id.* at 61.
[191] KBR Opp'n Br. at 54.
[192] *Id.* at 54-55.

Under Section 3.01, ENI warrants that R&S Canada is "registered or qualified and . . . in good standing" to do business as a Canadian entity. That is the Fundamental Representation under the SPA, and the Amended Counterclaim does not allege that R&S Canada is not so qualified. The SPA then provides, in Non-Fundamental Representation 3.08(c), that R&S Canada "is in possession of and in material compliance with all material consents, licenses, permits, authorizations and approvals" from any "Governmental Authority," as necessary to "the conduct of the Business," "Business" being defined as R&S business *being pursued as of the date of the Agreement.*[193] Read together, the two sections are not ambiguous: Section 3.01 provides that as of closing, R&S was an entity qualified to do business in Canada, which it was; Section 3.08(c) warrants that R&S Canada had the licensure to carry on its current business, which KBR alleges it did not. Thus, Counterclaim G states a claim for breach of Section 3.08, which is time-barred, rather than Section 3.01, which is not. Under KBR's proffered construction, Section 3.01 would include, under the rubric "registered or qualified to conduct business," all of the warranties under Section 3.08(c), leaving that section surplusage. Adopting such a reading would therefore transgress the cannon of construction and would, by eliminating the agreed-to limitation period for this claim, fundamentally and impermissibly change the bargain between the parties.

[193] *See* Stock Purchase Agmt. at 1 (Art. I Definitions).

For these reasons, that portion of Counterclaim G purportedly relating to breach of a Fundamental Representation is dismissed.

D. Rescission

ENI challenges KBR's attempts to rescind the transaction. Rescission is not a cause of action but a remedy available only where facts indicate equity so requires.[194] Because such an inquiry is fact specific, I decline to address it in connection with this Motion to Dismiss, except to say that KBR's burden to establish an entitlement to rescission, in light of the likely change in circumstances due to the passage of time here, is heavy.

IV. Conclusion

For the foregoing reasons, ENI's Motion to Dismiss is denied as to Counterclaim D; Counterclaim F; and allegations of fraud based on the Non-Fundamental Representations and made in connection with Counterclaims A, B, C, and E. ENI's Motion is granted as to the remainder of KBR's Counterclaims. An appropriate Order accompanies this Memorandum Opinion.

[194] *See Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 991 (Del. Ch. 2000) (refraining from dismissing claim for rescission at the motion to dismiss stage, and explaining that "[i]n response to a motion to dismiss, I simply determine whether plaintiff has stated a claim for which relief might be granted. If I find that plaintiffs have stated cognizable claims, then 'the nature of that relief is not relevant and need not be addressed.' Because the determination of relief is beyond the scope of this motion and premature without an established evidentiary record, I will not address this issue") (internal citations omitted).

Figure I

Counterclaim	Non-Fundamental Representations	Fundamental Representations	Covenants	Accompanying Fraud Allegations?
Counterclaim A	§ 3.07			**Yes**
Counterclaim B	§§ 3.06, 3.07			**Yes**
Counterclaim C	§§ 3.06, 3.07			**Yes**
Counterclaim D		§§ 3.11(a), 3.11(e)	§ 5.04	No
Counterclaim E	§§ 3.17(n), 3.26		§§ 5.04, 5.09(b)	**Yes**
Counterclaim F		§ 3.04		No
Counterclaim G	§ 3.08	§ 3.01		No
Counterclaim H	§ 3.13(b)			No
Counterclaim I	§ 3.13(b)			No
Counterclaim J	§ 3.13(b)			No