IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AMG VANADIUM LLC, Plaintiff, v. GLOBAL ADVANCED METALS U.S.A., INC., Defendant. GLOBAL ADVANCED METALS U.S.A., INC., Counterclaim Plaintiff, v. AMG VANADIUM LLC and AMG ADVANCED METALLURGICAL GROUP N.V. and AMG MINERAÇÃO S.A., Counterclaim Defendants.	)	C.A. No. N17C-03-1637 MMJ [CCLD] **FILED UNDER SEAL**

Submitted: December 18, 2019
Decided: February 6, 2020

On Plaintiff and Counterclaim Defendants' Motion for Summary Judgment AND Defendant and Counterclaim Plaintiff's Motion for Summary Judgment.

OPINION

David Dunn, Esq., (Argued) Ryan M. Philp, Esq. (Argued), Hogan Lovells US LLP, New York, New York, Henry E. Gallagher, Jr., Esq., Ryan P. Newell, Esq., Shaun Michael Kelly, Esq., Connolly Gallagher LLP, Wilmington, Delaware, *Attorneys for Plaintiff and Counterclaim Defendant AMG Vanadium LLC, and Counterclaim Defendants AMG Advanced Metallurgical Group N.V. and AMG Minerção S.A.*

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JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Parties

This action arises from an output contract governing the relationship between a supplier and buyer of tantalum pentoxide from a mine in Brazil. Defendant and Counterclaim Plaintiff Global Advanced Metals U.S.A., Inc. ("GAM") is a Delaware corporation. Plaintiff and Counterclaim Defendant AMG Vanadium LLC ("AMG Vanadium") is a Delaware limited liability company. Counterclaim Defendant Advanced Metallurgical Group, N.V. ("AMG NV") is a Netherlands company that conducts business in the State of Delaware, directly or indirectly, including through its affiliates AMG Vanadium and Metallurg, Inc. AMG Vanadium and AMG NV are collectively referred to herein as "AMG."

Tantalum

Tantalum is a metal used in various applications, including vital components in consumer electronic devices.[1] Tantalum is a transition metal used in the electrical, aerospace, automotive, chemical manufacturing, and other industries.[2] Tantalum is a relatively scarce resource.[3] Many tantalum deposits are located in parts of the world where it is considered a "conflict" mineral because proceeds from mining tantalum have been used to fund civil war, gross human rights abuses, and political violence.[4] Thus, ethical sourcing of tantalum is a priority in the tantalum industry.[5] It is paramount that a purchaser of tantalum know the source of that material.[6]

AMG produces tantalum concentrate from its Mibra Mine in Brazil ("Mibra Mine").[7] The Mibra Mine has one of the largest global reserves of tantalum.[8] AMG's principal business involves extracting tantalum ore concentrate from the Mibra Mine.[9]

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[1] GAM Op. Br., Ex. LL.
[2] AMG Compl. ¶ 17.
[3] GAM Op. Br., Ex. R, O'Donovan Tr. at 311:10-312:11; Ex. T, Meutcheho Tr., at 13:16-14:22.
[4] *Id.*
[5] *Id.* Ex. R, O'Donovan Tr., at 311:10-312:11; Ex. T, Meutcheho Tr., at 16:16-18:4.
[6] *Id.* Ex. V, Schimmelbusch Tr., at 160:5-13; Ex. X, Costa Tr., at 159:23-16015.
[7] *Id.* Ex. W, Frakes Tr., at 18:22-20:10; Ex. X, Costa Tr., at 36:25-37:11; Ex. CC at 9.
[8] AMG Compl. ¶ 17.
[9] See *id.* stating:

> The Mibra Mine is an open pit mine and the tantalum ore is located within an ore body below approximately 100 meters of amphibolite, similar in

GAM processes tantalum to manufacture capacitor powders and metallurgical products.[10] Under industry and Non-Governmental Organization initiatives, tantalum processors and smelters like GAM must conduct due diligence on any tantalum ores and concentrates it sources to ensure that these raw materials are conflict-free and in all other respects ethically sourced.[11]

GAM requires that its tantalum supply comply with rigorous ethical sourcing requirements, including the Foreign Corrupt Practices Act and other anti-corruption laws; customs and export control requirements; various labor provisions; and various shipping requirements, including the International Maritime Dangerous Goods Code regarding Class 7 radioactive materials, which requires extensive documentation.[12] GAM's due diligence involves a mine-to-

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hardness to granite. The tantalum concentration is extremely low (approximately 300 parts per million), present in very small crystals dispersed throughout the ore body. To extract the tantalum, the ore body must be exposed, which involves a massive undertaking including drilling and blasting, and removing large quantities of waste material. Concentrating the tantalum from the ore body then involves crushing and grinding rocks to a small size and then using various mineral processing techniques such as gravimetric separation, magnetic separation, and smelting to concentrate the tantalum into a usable product. The Mibra Mine employs over 400 people and is now one of the world's leading resources for ethically-sourced tantalum raw material supply. *Id.* ¶18

[10] GAM Op. Br., Ex. U, Ellis Tr., at 245:21-246:3; Ex. R, O'Donovan Tr., at 17:25-18:17.
[11] *Id.* Ex. X, Costa Tr., at 151:9-152:8; Ex. R, O'Donovan Tr., at 311:10-312-11; Ex. T, Meutcheho Tr., at 13:16-14:22.
[12] Examples include "government-issued mining licenses, product of origin certificates, export certificates, certificates of assay, and hazardous material documentation, if applicable." GAM Op. Br., Ex. A §§ 6.3, 9.1; Ex. T, Meutcheho Tr., at 15:10-23:16.

smelter chain of custody assessment that requires the smelter know precisely where and by whom its tantalum was mined, sold, and shipped.[13]

GAM and AMG Enter into a Supply Agreement

In 2012, GAM entered into discussions with CIF Mineração S.A. ("CIF Mineração") concerning the supply of tantalum from the Mibra Mine. GAM sought to obtain consistent and reliable deliveries of tantalum in order to satisfy its commercial needs.[14] At the time, CIF Mineração was in negotiations to renew its agreement with its longtime customer, a major competitor to GAM.[15]

In October of 2012, CIF Mineração (succeeded by AMG Mineração, then by AMG Vanadium),[16] as "Seller," GAM, as "Buyer," and AMG NV, as "Guarantor" of Seller's payment obligations and certain performance obligations,[17] entered into a Supply Agreement ("Supply Agreement"). GAM agreed to purchase, and AMG to sell a consistent and reliable supply of tantalum exclusively from the Mibra Mine.[18]

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[13] *Id.* Ex. T, Meutcheho Tr., at 15:10-23:16.
[14] GAM Amended Countercl. ¶ 1.
[15] AMG Compl. ¶ 20.
[16] *See* GAM Amended Countercl., Ex. A., demonstrating that CIF Mineração assigned its rights in the Supply Agreement to AMG on or about August 3, 2015; *see also* AMG Compl. ¶ 22 (noting that AMG Vanadium was AMG Mineração's Assignee).
[17] This included the obligation to supply tantalum to GAM. *Id.* ¶ 15.
[18] *Id.* ¶ 15.

GAM asserts that, in entering the Supply Agreement, it relied on AMG's assurance of its ability—to provide a steady and consistent supply of Mibra Mine-sourced tantalum—as central and essential to the agreement.[19] AMG asserts that, based on GAM's written agreement to purchase the Mibra Mine output of tantalum concentrate, AMG Mineração terminated its relationship with a prior customer and expended substantial capital to modify its mine to accommodate GAM's needs.[20]

The Supply Agreement is a multi-year contract by which GAM agreed to purchase tantalum pentoxide[21] concentrate ("Product") that meets specifications set forth in Schedule 1 to the Supply Agreement. The Supply Agreement required AMG to provide ethically-sourced Product as defined by regulatory and industry standards.[22]

When the parties initially discussed a potential supply agreement, GAM sought stability in the price for tantalum concentrate.[23] AMG alleges that the price was then rising to GAM's disadvantage. AMG committed to provide GAM with tantalum from the Mibra Mine, in exchange for GAM's payment of a premium over the then-market price. GAM also received a right of first refusal on any Mibra Mine tantalum in excess of the annual amounts AMG was obliged to

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[19] *Id.*
[20] AMG Compl. ¶ 1.
[21] Tantalum pentoxide is also referred to as Ta_2O_5.
[22] GAM Op. Br. Ex. A §§ 9.1(e)(g).
[23] GAM Amended Countercl. ¶ 23.

provide. For its part, AMG sought certainty in the price for its Product supply. Thus, the Supply Agreement set a base price for Product.

The Supply Agreement required AMG to supply GAM with "a minimum of [redacted] pounds" of Product per year ("Base Annual Volume") for five years, total[ing] [redacted] pounds, for a Base Price [redacted][24]

AMG Vanadium agreed to sell to GAM one hundred percent (100%) of the Product from the Mibra Mine.[25] As required by contract, GAM is the sole customer for tantalum concentrate produced by AMG Mineração (or AMG Vanadium).[26] AMG alleges that it has already shipped approximately [redacted] pounds of Product to GAM.[27]

The Supply Agreement also provided that GAM would make a $20 million Pre-Payment to AMG in order to "support the Mibra Mine business"[28] ("Pre-Payment").[29] AMG used at least a portion of this Pre-Payment to pay down corporate debt. The Supply Agreement stipulated that in consideration of that payment, the invoiced price for Product delivered to GAM would be the Base Price

[24] AMG Op. Br., Ex. E, Supply Agreement §§ 1, 2.2, 2.3.
[25] *Id.* § 2.2.
[26] *Id.* ¶ 1.
[27] See AMG Ans. Br. at 25-27; Ex. 20, March 13 Letter.
[28] GAM Op. Br., Ex. A § 7.1.
[29] *Id.* Ex. A § 7.2.

[redacted] pound credit until the cumulative amount of the credit equaled $20 million.[30]

The Supply Agreement provided that if AMG breached the Supply Agreement before GAM received the full $20 million credit, GAM would be "entitled to demand an immediate repayment in full from [AMG] of the outstanding amounts of [GAM's] outstanding Pre-Payments."[31] The Supply Agreement also provided that it was "governed by the laws in force in the State of Delaware USA."[32]

GAM and AMG Amend the Supply Agreement

In August 2015, the parties entered into a Third Amendment to the Supply Agreement, which revised the pricing and payment structure for the remaining approximately [redacted] pounds of Product to be delivered ("Third Amendment").[33] The Third Amendment provided that, while the Base Price for Product would remain a [redacted][4] and the total required volume would remain unchanged, AMG would make downward adjustments of the cash price GAM was obligated to pay for future shipments of Product.[35]

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[30] *Id.*
[31] AMG Op. Br., Ex. E, Supply Agreement § 7.3(b).
[32] *Id.* §§ 7.3(b), 21.
[33] AMG Op. Br., Ex. W, Third Amendment.
[34] *Id.*
[35] *Id.*

The Third Amendment provided that "[i]n consideration of the adjustment of the Base Price" of Product,[36] GAM would immediately confe [redacted] in value on AMG in three parts.[37] GAM paid th [redacted] in Third Amendment Consideration to AMG ("Third Amendment Consideration").[38]

Termination of Supply Agreement

On January 18, 2017, a portion of one of the gravimetric separation plants operated by AMG Mineração ("Plant 1") caught fire.[39] The damage at the Mibra Mine severely impacted AMG's capacity to supply tantalum to GAM. Based on AMG's statements, the damage from the fire will necessitate the substantial reconstruction of the processing plant responsible for the majority of AMG's output of tantalum pentoxide.[40]

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[36] *Id.* Ex. B § 7.

[37] GAM Op. Br. ¶ 19 describes the process:

> (i) Th [redacted] mechanism for the remaining PrePayment balance — the [redacted] was eliminated, thereby permitting AMG to retain possession of those funds;
>
> (ii) GAM paid AMG an addition [redacted] a [redacted] for a total of $20 million; and
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> (iii) GAM facilitated th [redacted] issuance of a 10% equity share in GAM's parent company, valued by the parties a [redacted] to Metallurg, Inc., an AMG affiliate, and allowed Metallurg to appoint a representative to serve on the board of GAM's parent company. *Id.* (citing Ex. B § 7(b); Ex. C §§ (iii)-(0v); Ex. S, Williams Tr., at 232:1–6; Ex. R, O'Donovan Tr., at 264:4-18; Ex. S Williams Tr., at 286:16-288:7.)

[38] *Id.* Ex. R, O'Donovan Tr., at 266:8-11.

[39] AMG Compl. ¶ 5.

[40] GAM Ans. & Countercl. ¶ 5.

AMG notified GAM of the fire damage. GAM sent AMG a letter dated February 13, 2017 ("February 13 Letter") requesting adequate assurances that AMG would meet its contractual obligations.[41] GAM noted specific information GAM required in order to approve any third-party supplier of tantalum.[42]

AMG provided a response on March 13, 2017 ("March 13 Letter"). In its March 13 Letter, AMG disclosed to GAM its projected deficiency and its potential plans for a solution.[43] AMG proposed sourcing from a third-party supplier that AMG alleged was ethically-sourced and could supply Product that met contractual requirements.[44] In the March 13 Letter, AMG imposed a March 17, 2017 deadline by which GAM must accept in order to secure that source.[45] AMG did not provide the identity or location of the third-party supplier.[46] AMG also offered to supply GAM with tantalum oxide, which GAM previously had accepted in lieu of tantalum pentoxide.[47]

GAM sent a letter "cancelling the Supply Agreement, effective immediately" on March 22, 2017.[48]

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[41] GAM Op. Br., Ex. G, February 13 Letter.
[42] *Id.*
[43] AMG Ans. Br., Ex. 20, March 13 Letter.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] AMG Compl. ¶ 5.
[48] *Id.* ¶ 6.

On March 28, 2017, AMG filed a Complaint against GAM for breach of contract. On May 8, 2017, GAM filed its Answer and Counterclaims for declaratory judgment, breaches of contract for failure to reimburse the Pre-Payment, unjust enrichment, and breach of contract for undershipment of Product. On August 9, 2017, GAM filed its First Amended Counterclaim. On August 21, 2019, GAM moved to file its Second Amended Counterclaim, adding a claim for breach of contract for misuse of the Pre-Payment.

On October 31, 2019, GAM filed a Motion for Summary Judgment on the issues of adequate assurances and Pre-Payment. On October 31, 2019, AMG filed a Motion for Summary Judgment on the issues of misuse of a Pre-Payment, under-shipment of Product, and unjust enrichment. The parties briefed the issues and the Court heard oral argument on December 18, 2019.

STANDARD OF REVIEW

Summary Judgment/Partial Summary Judgment

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[49] All facts are viewed in a light most favorable to the non-moving party.[50] Summary judgment may not be granted if the record indicates that a

[49] Super. Ct. Civ. R. 56(c).
[50] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[51] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[52] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[53]

ANALYSIS

Assurances

Delaware Code Title 6, Section 2-609(1) provides:

> A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he or she receives such assurance may if commercially reasonable suspend any performance for which he or she has not already received the agreed return.

Pursuant to Delaware Code Title 6, Section 2-609(4), if assurances are not adequate, the contract has been "repudiated" and the non-breaching party may terminate the contract:

> After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurances of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

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[51] Super. Ct. Civ. R. 56(c).
[52] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[53] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The parties do not appear to dispute that the fire in the Mibra Mine gave rise to reasonable grounds for insecurity on which GAM could demand adequate assurances pursuant to Section 2-609.[54] GAM requested adequate assurances in its February 13 Letter.[55] The issue before the Court is whether AMG's March 13 Letter provided adequate assurances or constituted a repudiation justifying GAM's termination of the Supply Agreement.

GAM argues that it is entitled to a summary judgment finding that AMG did not provide adequate assurances following the Mibra Mine fire. AMG responds that: (1) AMG provided adequate assurances that any breach would not be material; (2) even if there was a material breach, AMG provided adequate assurances that an alternative supplier would supplement the projected under-shipment of the Base Annual Volume; (3) the terms of the Supply Agreement permit AMG to make up for deficiencies in subsequent years; and (4) even if there was a material breach, AMG had the contractual right to cure.

[54] *See* GAM Op. Br. at 20, n. 9.
[55] *Id.*, Ex. G, February 13 Letter.

Material Breach

In order to terminate an installment contract for goods,[56] a buyer must demonstrate a material breach that impaired the value of the contract as a whole.[57] Delaware Code Title 6, Section 2-612(2) provides:

> The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

AMG argues that it adequately assured GAM that it would not materially breach the Supply Agreement because neither the projected delay in performance nor the shortfall in Product substantially impaired the parties' contract as a whole.[58]

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[56] GAM does not dispute that the Supply Agreement constitutes an installment contract. Both GAM and AMG submit that 6 *Del.* C. Section 2-612 applies to the Supply Agreement, but disagree as to how it applies in conjunction with Section 2-609. *See* GAM Rep. Br. at 10 n. 11 ("Although GAM would have been entitled to [the Section 2-612] remedy as well, this Motion contends that AMG repudiated the Agreement under [Section] 2-**609**....").

[57] 6 *Del.* C. § 2-612.

[58] AMG Ans. Br. 25-27; GAM asserts that AMG improperly applies the material breach requirement of 6 *Del.* C. Section 2-612 with the adequate assurances requirements of Section 2-609. Section 2-609 entitles a non-breaching party to a contract for goods to terminate the contract based on repudiation arising from failure to provide adequate assurances. The perfect tender rule, codified in Section 2-601, allows a buyer of goods under a contract *not permitting or requiring delivery in installments* to reject the goods if the tender fails in any respect to conform to the requirements of the contract. Unlike the perfect tender rule, Section 2-612 provides that, in the case of an installment contract, the breach must be material to the contract in order to entitle the non-breaching party to terminate the contract. It appears to the Court that repudiation based on *potential* breach likewise requires such a potential breach to be material in order to afford termination rights to the non-breaching party of an installment contract. Neither party offered Delaware authority explicitly addressing this issue. However, this Court applied the rule

Regarding the deficiency in the Annual Base Volume, AMG argues that the deficiency projected in AMG's shipment schedules was immaterial when viewed in the broad context of the contract. AMG asserts that it delivered [redacted] of required Product within the first four Contract Years.[59] AMG confirmed that the shipment would be deficient, but informed GAM that it would supply approximately [redacted] of tantalum before the end of the fifth Contract Year (May 31, 2018).[60] AMG also indicated in its schedules that the remaining deficiency would have been completely satisfied by June of 2018.[61]

As for the projected delay, "[w]hen time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract that will discharge the non-breaching party's obligation to perform its side of the bargain."[62] However, "the use of a 'target date' does not suggest an intent that a failure to strictly adhere to that date would result in a

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that "a party [to a contract] is excused from performance ... if the other party is in material breach" in a Section 2-609 analysis in *Brasby v. Morris*, 2007 WL 949485, at *4 (Del. Super.); *see also, Biolife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003) ("[A] slight breach by one party while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.").

[59] AMG Ans. Br., Ex. 20, March 13 Letter.

[60] *See* AMG Ans. Br. at 25–27; Ex. 20, March 13 Letter.

[61] *Id.*

[62] *HFIN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch.).

material breach of the Agreement."[63] Absent specific language, a delay in performance raises a rebuttable presumption that time is not of the essence, and reasonable delay does not constitute a material breach.[64]

The Supply Agreement provides specified Contract Years, but AMG points out that it does not contain a "time is of the essence" clause. AMG indicated that it could supply the remaining Annual Base Volume deficiency within months of the end of the fifth Contract Year.[65] Thus, AMG argues that GAM is not entitled to summary judgment as it has not proffered evidence for its position that a few months' delay in completing shipments on a five-to-six-year installment contract would constitute a material breach.

GAM counters that "[t]he UCC recognizes that good faith variations in output under an output contract are permissible, 'except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered....'"[66]

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[63] *Id.*, at *10; *see also Brasby*, 2007 WL 949485, at *3 (Del. Super.) (citing *Novozymes v. Codexis, Inc.*, 2005 WL 1278355, at *2 (Del. Ch.)).
[64] *See id.* at *9–10 ("When the contract fails to contain a time of the essence clause, time will only be of the essence if the circumstances surrounding the contract or the parties' course of dealing clearly indicate that strict compliance with a specified timeframe was intended.").
[65] AMG Ans. Br. at 25–27; Ex. 20, March 13 Letter.
[66] GAM Reply Br. at 5 (quoting 6 *Del.* C. Section 2-306(1)).

AMG's argument relies on the premise that a minimum projection of a 10% shortfall in the total required product by the end of the Term is not material. Such an overall shortfall is immaterial, and similar repeated shortages in the Base Annual Volume also are immaterial. Alternatively, AMG argues that repeated delays in delivery would be immaterial.

Under these assumptions, the question arises: what, if any, shortfalls or delays *would* constitute a material breach? Further, these projections rely on an agreement between the parties that AMG shipped the claimed volume of Product. GAM disputes the amount of Product shipped.[67]

Commercially Reasonable

Section 2-609(2) provides: "Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards." Section 2-609(4) provides: "After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

AMG asserts that even if its potential breach would have been material, AMG provided adequate assurances that it would satisfy its contractual obligations by means of commercially reasonable alternatives. GAM argues that AMG's

[67] *See* discussion *infra* pp. 40–47.

response was not commercially reasonable, and even amounted to a repudiation permitting GAM to terminate the Supply Agreement.

This Court has held that in order for a response to a demand for adequate assurances "to constitute an anticipatory repudiation giving rise to an immediate cause of action for breach of a material provision, it must have amounted to an unequivocal statement ... that [the breaching party would] not perform [its] promise."[68] The Court of Chancery has held that "[a]n expression of doubt alone as to one's ability to tender performance on time is not enough to amount to repudiation."[69]

AMG argues that the adequacy of a contractual assurance, especially in this case, is an inherently fact-intensive inquiry ill-suited for summary judgement. AMG cites *Brasby v. Morris*, wherein this Court held that "[w]hat constitutes adequate assurance under Title 6, Section 2-609 of the Delaware Code will vary depending on the factual circumstances of the case."

GAM argues that where the content of the response to a demand for adequate assurances is undisputed—as it is here—the Court may properly determine on summary judgment whether the response constitutes adequate

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[68] *Brasby*, 2007 WL 949485, at *2 (quoting *Manley v. Assocs. in Obstetrics & Gynecology, P.A.*, 2001 WL 946489, at *6 (Del. Super.) (internal quotations omitted)).

[69] *Id.* (citing *Elliott Associates v. Bio-Response, Inc.*, 1989 WL 55070 (Del. Ch.)); *see also* 9-54 Corbin on Contracts § 974 ("It has been thought that a mere expression of inability to perform in the future is not a repudiation of duty and cannot be operative as an anticipatory breach.").

assurance. GAM offers several cases where this issue was resolved on summary judgment in other jurisdictions,[70] to support its assertion that the factual record before the Court sufficiently demonstrates that it is entitled to summary judgment on the matter of adequate assurances.

In the February 13 Letter, GAM specifically addressed "unknown alternative sources." GAM listed difficulties and limitations, including:

> supplier qualifications, physical and chemical characteristics of the materials, assay, shipment and transportation logistics, regulatory requirements, ability to efficiently use the material in GAM's production facility, and potential impacts to GAM's strict customer requirements and specifications.[71]

GAM further stated that "[a]ny reasonable proposal for alternative supply will need to adequately address these concerns and be in accordance with the applicable provisions of the Supply Agreement."[72] GAM also stressed in the February 13 Letter that it contracted with AMG to secure a steady supply from a *known* source.[73]

In its March 13 Letter, AMG did not specifically identify a third party supplier or location thereof, but stated that "AMG will supply GAM with

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[70] *See, e.g., BRC Rubber & Plastics, Inc v. Continental Carbon Co.*, 949 F.Supp.2d 862 (N.D. Ind. 2013); *Smargon v. Grand Lodge Partners, LLC*, 288 P.3d 1063 (Utah Ct. App. 2012); *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.*, 585 F.Supp. 45 (S.D.N.Y. 1983).
[71] GAM Op. Br., Ex. G., February 13 Letter, at 2.
[72] *Id.*
[73] *Id.*

Ethically-Sourced Tantalum."[74] AMG proffered that it "received a commitment from an ethical source of supply, previously audited and certified by the Electronic Industry Citizenship Coalition."[75] AMG also required that GAM agree to this resolution within four (4) days.

GAM argues that AMG's response was unreasonable because AMG had notice of the information GAM needed before accepting alternative sourcing, and AMG opted to omit that necessary information from its response. GAM contends that AMG's March 13 Letter, which set a four-day deadline for acceptance, was commercially unreasonable after GAM had demanded specific information a month earlier. AMG argues that confidentiality and commercial concerns required concealment of the third-party's identity.

GAM contends that even AMG's officers, as well as a third-party involved in sourcing, agreed that the March 13 Letter failed to constitute adequate assurance that AMG would perform:

- Eric Jackson, AMG's COO responded to a question as to whether AMG informed GAM of the country of origin of the alternative source, stating that the Supply Agreement did not require that information, to his knowledge.[76]

- J. Smokovich, a third-party engaged by AMG to source tantalum following the Mibra Mine fire, stated that he would "want to know

[74] AMG Ans. Br., Ex. 20, March 13 Letter.
[75] *Id.*
[76] GAM Ex. Y, Jackson Tr., at 80:14-24.

who the source is" if someone offered product and the only information provided was that it was EICC-certified.[77]

- CEO of AMG NV, Heinz Schimmelbusch, agreed that if he were in GAM's situation, he would probably want to know where the alternatively sourced tantalum was coming from. He continued that he assumed that AMG disclosed the third-party supplier's identity to GAM because "[t]hat would be naturally a communication between the supplier and the customer."[78]

- Regarding what he would do in the same situation, Hoy Frakes, President of AMG Vanadium, stated that "[i]n those documents, based on the documents, there isn't enough information for me to make that decision...."[79]

- Fabiano Costa, CEO of AMG Mineração, answered in the affirmative when asked whether GAM must be able to account for the origin of the product.[80]

Although these statements tend to show that the witnesses find the information relevant, the Court does not find that these statements clearly establish the witnesses' affirmative agreement with the notion that the March 13 Letter was a commercially unreasonable response. AMG rebuts GAM's evidence with reports from David O'Brock, who AMG identifies as an expert in the industry. O'Brock's Initial Report supported AMG's contention that concealment of the supplier's identity as part of an initial overture is standard industry practice.[81] O'Brock noted

[77] GAM Ex. AA, Smokovich Tr., at 188:2-8.
[78] GAM Ex. V, Shimmelbusch Tr., at 164:22-165:7.
[79] GAM Ex. W, Frakes Tr., at 244:3-246:14.
[80] GAM Ex. X, Costa Tr., at 145:25-148:7.
[81] AMG Ans. Br., Ex. 39, O'Brock Initial Report ¶ 43.

that Smokovich had also agreed to keep the source confidential.[82] O'Brock also stated that GAM should have followed-up after receiving the March 13 Letter, and could have quickly conducted its due diligence.[83]

There does not appear to be a case in which a Delaware court has granted summary judgment on the issue of adequate assurances.[84] The summary judgment record before the Court demonstrates the inherent factual questions. The commercial reasonableness of AMG's response is the subject of a multitude of factual disputes as to whether: (1) it was commercially reasonable for AMG to withhold the identity of the third-party supplier in the initial stages for confidentiality and competitive concerns; (2) the deposition testimony establishes an affirmative admission that the March 13 Letter was commercially unreasonable; (3) GAM would be expected to follow-up or conduct due diligence; and (4) the prior correspondence between the parties and AMG's deadline for acceptance rendered follow-up unreasonable.

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[82] *Id.* ¶¶ 43–44.

[83] AMG Ans. Br., Ex. 40, O'Brock Rebuttal Report ¶¶ 25.

[84] It is noted that even GAM's out-of-state authorities recognize that adequacy of assurances is a highly factual question. AMG's Ans. Br. at 13 (citing *BRC Rubber & Plastics, Inc.*, at 874 (explaining that the supplier conceded that it did not intend to deliver goods); *Smaragon*, 288 P.3d at 1070 ("normally…the adequacy of any assurance offered [is a] factual question"); *Creusot-Loire*, 585 F.Supp. at 47–48 (noting that defendant refused plaintiff's request for assurances)).

Carryover Volume

GAM admits that AMG could have fulfilled its requirements with third-party supply if the ethical sourcing assurances were adequate. If the assurances were inadequate, GAM argues that AMG could not fulfill the terms on its own.

The original Supply Agreement provides, in Section 2.2, that "[d]uring each Contract Year Seller agrees to supply to Buyer and Buyer agrees to purchase from Seller a minimum [redacted] ounds contained Ta_2O_5 within the Product per year ("Base Annual Volume"). "[85] Section 2.2 further provides that "Seller shall supply Buyer a total o [redacted] pounds of Base Annual Volume over the Term."[86]

In the event the Seller under-ships on the Base Annual Volume, Section 2.2 permits the Seller to supply the difference between its actual Supply and the Base Annual Volum [redacted] Section 2.2 further provides th [redacted][87]

[85] AMG Op. Br., Ex. E, Supply Agreement § 2.2.
[86] *Id.*
[87] *Id.*

The parties agree that Section 2.2 permits AMG to satisfy a deficiency in Carryover Volume in the Contract Year immediately following the deficiency. The issue is whether AMG may, through the Carryover Volume exception, satisfy the deficiency from consecutive under-shipped Contract Years. GAM argues that Section 2.2 would not permit AMG to satisfy its Carryover Volume if the Annual Base Volume is deficient for consecutive years. Thus, GAM contends that AMG could not use the Carryover Volume provision in the 2019 Term extension to satisfy its projected deficiencies for both Contract Year 2017 and Contract Year 2018.[88] AMG argues that Section 2.2 permits AMG to satisfy its Carryover Volume obligation in any of the five years of the original Term of the Supply Agreement, as well as the Term extension year.

GAM relies on the language of the Supply Agreement, which sets a specific delivery minimum [redacted] pounds of Product per year.[89] GAM contends that this provision is superfluous if AMG is permitted sequential deficiencies. GAM also points out that AMG's interpretation ignores the language indicating that Carryover Volume could be satisfied in "the following contract year...."[90]

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[88] *See* GAM Amended Countercl. ¶ 67 (referencing the projected shipments in the March 13 Letter to show that AMG reduced its original estimates by about half with a 25% margin of error.)

[89] *Id.*

[90] AMG Op. Br., Ex. E, Supply Agreement § 2.2.

AMG argues that the actual performance of the parties supports its interpretation. In the first year of the Supply Agreement, AMG ended with a shortfall of 19,734 pounds.[91] The following year, AMG failed to supplement the shortfall, and GAM did not sue AMG for the deficiency. Thus, AMG argues that, even if GAM's interpretation is correct, GAM's election not to sue over the deficiencies from the first two years: (1) demonstrated the course of performance between the parties; or (2) constituted waiver or acquiescence.

Pursuant to Delaware Code Title 6 Section 1-303(a), a course of performance is established following "repeated occasions for performance" that "[t]he other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection."

GAM admits that it did not object to AMG satisfying its obligations through consecutive years of Carryover Volume after the first instance. AMG nevertheless contends that such failure to object alone does not establish a course of performance contrary to the plain language in the Supply Agreement.[92] GAM

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[91] GAM Amended Countercl., Ex. DD at Ex. A.

[92] *Id.* at 7 (citing *Emerald Equip. Sys., Inc. v. Gearheart Bros. Servs. LLC*, 983 N.Y.S.2d 152, 154 (App. Div. 4th Dep't 2014); *Accord PWI Techs., Inc. v. CMI Worldwide*, 2004 WL 1203126, at *4 (Wash. Ct. App.); *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003); *V.J. Gautieri Inc. v. State*, 599 N.Y.S.2d 766, 768 (App. Div. 3d Dep't 1993); *In re Roberts Holiday Lines, Inc.*, 889 F.2d 1096, at *2 (9th Cir. 1989) (unpublished); *Rotuba Extruders, Inc. v. Ceppos*, 385 N.E.2d 1068, 1071–72 (N.Y. 1978); *accord* Restatement

argues further that even if the election not to litigate the early shortfall were deemed a "course of performance," it would not establish that GAM had waived all its rights to consistent delivery of Product for years pursuant to the Supply Agreement.[93]

GAM relies on *KBQ, Inc. v. E.I. du Pont de Nemours & Co.*[94] In *KBQ*, a distributor sued a manufacturer for breach of contract after the manufacturer terminated their contract.[95] The United States District Court for the District of Massachusetts applied Delaware law to a motion for summary judgment on waiver.[96] The distributer argued that the manufacturer failed to preserve its right to terminate for breach when it elected not to terminate following early complications with the contract.[97] The *KBQ* Court held that the manufacturer did not waive its right to terminate the contract.[98]

The provisions at issue in *KBQ* are different from the ones in this case. In *KBQ*, the manufacturer was pursuing its contractual right to terminate at an unspecified time "with or without cause, upon at least thirty (30) days prior written

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(Second) of Contracts § 202 cmt. G (1981) ("The rule of Subsection (4) [course of performance] does not apply to action on a single occasion.").

[93] Regarding consistency, GAM refers to both the *force majeure* clause in Section 20.3 of the Supply Agreement, and Delaware Code Title 6, Section 2-306(1) which prohibits unreasonably disproportionate variations in output under output contracts.

[94] 6 F.Supp.2d 94 (1998).

[95] *Id.* at 96.

[96] *Id.*

[97] *Id.* at 98–99.

[98] *Id.*

notice."[99] The distributor argued that the manufacturer had no such right because it had agreed to "[c]reate an environment built on trust and openness that allows for continuous improvement and insures long term business success."[100] The distributor asserted that this clause required the manufacturer to provide notice and opportunity to cure prior to termination, but the *KBQ* Court found that such an interpretation would be contrary to the plain meaning of the contract, which clearly permitted unilateral termination.[101]

Here, the parties do not disagree that AMG is permitted to satisfy a deficiency through Carryover Volume. The parties disagree as to *when* that provision applies. Further, AMG also argues that the language in the Carryover Provision does not clearly support GAM's argument. AMG asserts that the context of the Supply Agreement in its entirety supports AMG's argument that Carryover Volume can be supplied in the aggregate at any time over the Term of the contract.

Unlike the vague provision the distributor quoted in *KBQ*, AMG bases its argument on Section 2.3 of the Supply Agreement, which provides.

[redacted]

In

[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] AMG Op. Br., Ex. E, Supply Agreement § 2.3 (emphasis added).

addition, AMG references Section 1, which states tha

[redacted]

..."[103]

Section 6.2 also refers to Carryover *Volumes*, which AMG argues demonstrates that the parties contemplated aggregate amounts of Carryover Volume.

The Court need not resolve this isolated issue of the proper interpretation of the Carryover Volume provision at this juncture. Whether or not the Supply Agreement permits satisfaction of Product delivery deficiencies over consecutive Contract Years, presently is inextricably intertwined with the adequacy of assurance and commercial reasonableness.

Right to Cure

AMG argues that, even if it was in breach, Section 18 of the Supply Agreement grants AMG the right to cure on notice of breach capable of remedy. Section 18 of the Supply Agreement, titled "Termination and Effect of Termination," provides:

> 18.1 The Seller or Buyer may terminate this Agreement by giving written notice to the other if any of the following events occurs:
>
> ...b. the other Party commits a material breach of this Agreement which (in the case of a breach capable of remedy) (i) the breaching party has not within thirty days of notification of such breach, provided the non-breaching party with a plan to remedy such breach, and (ii) the non-

[103] *Id.* Ex. E, Supply Agreement § 1 (emphasis added).

> breaching party fails to cure such breach within 90 days of receipt of written notice thereof from the non-breaching Party....[104]

AMG argues that GAM's failure to provide written notice of breach before it sent written notice of termination on March 22, 2017, bars GAM from asserting its breach claim. GAM responds that AMG's alleged repudiation of the Supply Agreement constituted an effective waiver of any contractual right it might have had to cure.

GAM relies on a case from the United States Court of Appeals for the Eleventh Circuit captioned *Solitron Devices, Inc. v. Honeywell, Inc.* The *Honeywell* Court held that "[a] default termination clause in a contract enables a party to terminate its own performance and bring suit against the breaching party [but w]here the contract has already been terminated by the party allegedly in breach, the suing party's compliance or lack of compliance with the termination clause is irrelevant."[105]

In *Honeywell*, plaintiff, a subcontractor, brought a breach of contract action against defendant, a government contractor. The defendant had terminated the parties' agreement after plaintiff expressed intent not to comply with the contract, and plaintiff sued.[106] Defendant countersued for breach, but plaintiff argued that

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[104] *Id.* Ex. E, Supply Agreement § 18.1(b).
[105] 842 F.2d 274, 278 (11th Cir. 1998).
[106] *Id.* at 275–76.

defendant's counterclaim was barred pursuant to a default termination clause in the contract.[107] The default termination clause provided that defendant could terminate the contract if plaintiff defaulted, provided defendant first gave plaintiff a ten-day cure notice.[108] Plaintiff claimed that the defendant breached by sending a notice of termination without first sending a cure notice.[109] The Court reasoned that because plaintiff had expressly repudiated the contract before the defendant sent its termination notice, the right to cure was moot.[110]

While not binding on this Court,[111] *Honeywell* explains the basic reasoning for finding that repudiation would nullify a right to cure. Nevertheless, there are factual differences between *Honeywell* and this case. Even the Eleventh Circuit has noted that *Honeywell* and cases with similar holdings involved strong factual grounds for finding that futility properly excused a party's failure to comply with a notice and cure provision.[112] For example, the subcontractor in *Honeywell* sent a

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[107] *Id.* at 278.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *See id.* at 277 n. 3 (noting that although government contractor Honeywell was a Delaware corporation, and sub-contractor Solitron was a New York corporation, "[t]he parties specified in the subcontract that it was to "be construed and interpreted according to the Federal law of Government Contracts.").
[112] *Alliance Metals, Inc. of Atlanta v. Hinley Indus., Inc.*, 222 F.3d 895, 905 (11th Cir. 2000) (finding that even if the alleged breach proved to be incurable, notice was nevertheless required where the breaching party *could have* benefitted from notice); *see also Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (finding that the non-breaching party waived its right to cure and notice thereof when its actions made clear "that it had no intention to complete its work unless and until [the other party] acceded to its (unjustified) demands.").

letter to the contractor expressly and unequivocally repudiating "all outstanding contractual obligations [plaintiff] has to [defendant]."[113] Similarly in *United States v. Digital Products Corp.*, the United States Court of Appeals for the Fifth Circuit held that the non-repudiating party was not obligated to send a cure notice where the other party sent a telegram that expressly stated it was "terminat[ing] all efforts on subject contract."[114]

Unlike cases where a party waived its right to cure by expressly repudiating the contract, AMG's alleged repudiation is based the application of the Delaware Code to AMG's failure to provide third-party supplier information. GAM has not offered evidence sufficient for the Court to find at the summary judgment stage that AMG repudiated the Supply Agreement or that notice of a right to cure would have been futile.

The Delaware Code default provisions affording the right of the non-breaching party to terminate based on inadequate assurances do not supersede express contract provisions. Therefore, the Court finds that the alleged repudiation (which would as a practical matter terminate the contract and nullify the contractual right to cure) does not supersede the express language in the Supply Agreement. However, the right to cure is applicable only if there is a *material*

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[113] *Honeywell*, 842 F.2d at 276.
[114] 624 F.2d 690, 694 (5th Cir. 1980).

breach, only if that breach is *capable of remedy*, only if that remedy is provided *within thirty days of notification* of such breach, and the non-breaching party still has the right to terminate if the breaching party *fails to cure such breach within 90 days of receipt*. In other words, Section 18 of the Supply Agreement provides AMG the right to cure under certain circumstances. However, those circumstances activating the right to cure are *all* issues upon which both parties have presented evidence constituting material factual disputes.

The Court notes the absence of any case wherein a Delaware court makes a finding on the issue of adequate assurances at the summary judgment stage. The Court finds that genuine issues of material fact remain as to the issue of adequate assurances. The parties have raised sufficient material facts including whether: (1) the potential shortfall and/or delay were material to the Supply Agreement; (2) AMG's assurances as to ethical sourcing were adequate; and (3) the witness deposition testimony on the record constitutes an affirmative admission that assurances were not adequate.

THEREFORE, GAM's Motion for Summary Judgment on the issue of adequate assurances is hereby **DENIED.**

Pre-Payment

Section 3 to the Third Amendment to Supply Agreement amended the definition of the term "Base Price," and added Clause 7.5.[115] Section 3 adjusted the Base Price, and Section 7.5 provided: "In consideration of the adjustment of the Base Price...Buyer will pay Seller's invoice in the amount [redacted] in immediately available funds on or before August 7, 2015..." ("Third Amendment Consideration").[116]

GAM claims that the payment [redacted] was an advance payment for Product. AMG claims that the payment was *solely* in consideration for the adjustment of the Base Price. Both parties argue that the language in the Supply Agreement and Third Amendment support their claims.

The Third Amendment deleted and retained certain prepayment language from Section 7.3 of the Supply Agreement. The deleted terms includ [redacted] Certain terms that were not deleted include Section 7.3, which provides:

[115] AMG Op. Br., Ex. W, Third Amendment §§ 3 & 7.5.
[116] *Id.* § 7.5(b).

[i]n addition to Buyer's rights available under applicable law, Buyer makes the Pre-Payment...."

The Third Amendment also preserved several provisions, including:

> (1) Section 7.1 "Buyer shall make a pre-payment to Seller for Product to be supplied to Buyer hereunder..."
> (2) Section 7.3 "In addition to Buyer's rights available under applicable law, Buyer makes Pre-Payment..."
> (3) Section 18.1(a) "Buyer may terminate this Agreement by giving notice in writing to Seller and Guarantor in the event Seller has not repaid Buyer the Pre-Payment..."
> (4) Section 18.2(a) "Seller paying any portion then due / the balance (as applicable) of the Pre-Payment immediately in full upon demand by Buyer as provided herein..."
> (4) Section 20.2 "Notwithstanding the foregoing, in no case shall Seller or Guarantor be excused by a *Force Majeure* event to repay Seller the applicable outstanding Pre-Payment amounts."
> (6) Section 21 "This Agreement is governed by the law in force in the State of Delaware..."

In addition to the repeated use of the term "Pre-Payment" among those provisions, in the newly-added Section 7.5 of the Third Amendment, the Third Amendment Consideration is referred to as a prepayment credit. Section 7.5 provides: "Seller, Buyer and Guarantor will enter into a *Prepayment* Credit Assignment Agreement...."[117] The Supply Agreement, according to the Third Amendment, otherwise remained "unamended and in full force and effect."[118]

[117] *Id.* § 7.5(d).
[118] *Id.* § 10.

Interpretation of contracts is a question of law.[119] The Court should interpret contract language as it "would be understood by any objective, reasonable third party."[120] Absent ambiguity, contract terms should be accorded their plain, ordinary meaning.[121] Ambiguity exists when the disputed term "is fairly or reasonably susceptible to more than one meaning."[122] When the policy language is "clear and unambiguous[,] a Delaware court will not destroy or twist the words under the guise of construing them" and each party "will be bound by its plain meaning."[123] "Parol evidence may not be used to create a contractual ambiguity."[124] Only when "the contract is susceptible to more than one reasonable interpretation" may the court consider extrinsic evidence to resolve the ambiguity.[125]

If the Supply Agreement were ambiguous, the Court could consider GAM's extrinsic evidence, including the course of conduct allegedly demonstrating the

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[119] *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *7 (Del. Super.) (citing *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1212 (Del. 2018) ("Whether [a] contract's material terms are sufficiently defined is mostly, if not entirely, a question of law.")); *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1263 (Del. 2017) ("The proper construction of any contract…is purely a question of law…."); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

[120] *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014).

[121] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012); *see also Goggin v. Nat'l Union Fire Ins Co. of Pittsburgh*, 2018 WL 6266195, at *4 (Del. Super.); *IDT*, 2019 WL 413692, at *7.

[122] *Id.*

[123] *Id.*

[124] *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 55 (Del. Ch.2001).

[125] *Salamone*, 106 A.3d at 374 (citing *In re IBP*, 789 A.2d at 55).

parties' understanding that the Third Amendment Consideration was a prepayment. This evidence includes internal memoranda, reports, and presentations from AMG wherein the Third Amendment Consideration was referred to as additional pre- or advance payment.[126] It also includes testimony from AMG officials that the Third Amendment Consideration was, in fact, a prepayment.[127]

The Court finds that the Third Amendment to the Supply Agreement is not ambiguous as to the Third Amendment Consideration. The Third Amendment does not eliminate all Pre-Payment provisions, and clearly and unambiguously provides that the Third Amendment Consideration is a Pre-Payment. GAM's payment o [redacted] is not solely in consideration of an adjustment to the base price.

However, whether or not GAM is entitled to damages is not clear and must be determined by the factfinder. Further, GAM's entitlement to its prepayment is moot if the finder of fact determines that AMG's assurances are adequate or that AMG did not repudiate the contract.

THEREFORE, GAM's Motion for Summary Judgment on the issue of Pre-Payment is **GRANTED IN PART** and **DENIED IN PART**; AMG's Motion for Summary Judgment on the issue of Pre-Payment is hereby **DENIED.**

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[126] *See e.g.*, GAM Exs. L, M, JJ & N.
[127] GAM Op. Br., Ex. R, O'Donovan Tr., at 270–71.

Misuse of Pre-Payment

GAM's counterclaim for misuse of prepayment alleges that AMG breached the Supply Agreement by using the origin[redacted] Pre-Payment to pay down company debt. Section 7.1 of the Supply Agreement provides that the Pre-Payment was "intended for Seller to support the Mibra Mine business...."[128]

Statute of Limitations

Delaware Code Title 6, Section 2-725(1) statute of limitations provides: "An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued...." The alleged breach occurred no later than October 3, 2013. GAM moved to add this claim on August 21, 2019, almost six years after the alleged breach. Thus, AMG argues this claim is time-barred.

Superior Court Rule 15(c)(2) provides: "An amendment of a pleading relates back to the date of the original pleading when (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...."

GAM argues that the transaction set forth in the original pleading of its counterclaims is the same basis for its claim for misuse of prepayment. GAM relies on *Murphy v. Pentwater Capital Management, LP*.[129] In *Murhpy*, this Court

[128] AMG Ans. Br., Ex. 20, Supply Agreement § 7.1.
[129] 2019 WL 3454580, at *3 (Del. Super.).

held that an amendment for additional breaches of contract related back to plaintiff's original complaint because the claims arose from the same conduct complained of in the original complaint.[130]

Here, the misuse of a prepayment relates back to GAM's original counterclaims. GAM's original counterclaims included its unjust enrichment claim, filed on May 8, 2017, and specifically addressed AMG's failure to reimburse GAM's Pre-Payment. This conduct, connected to the transaction memorialized in the Supply Agreement and Third Amendment, is related to AMG's use of that Pre-Payment. Therefore, the Court finds that the misuse of prepayment counterclaim relates back to GAM's original counterclaims, and is therefore, not time-barred.

Merits

AMG also argues that GAM's misuse of prepayment claim otherwise fails on the grounds that: (1) it lacks causation and damages; (2) the language in the provision created no enforceable obligation on AMG; and (3) there is no evidence demonstrating that AMG used the Pre-Payment improperly.

AMG does not refute claims that it used the Pre-Payment to pay down corporate debt.[131] AMG acknowledges that part of the Pre-Payment was used to

[130] *Id.*
[131] AMG Op. Br. at 26.

reduce the debt level for affiliates LSM Brazil and AMG Mineração.[132] AMG instead argues that the record does not support an interpretation of Section 7.1 that restricts AMG from using the Pre-Payment to pay down corporate debt.[133]

GAM argues that such a use does not "support the Mibra Mine business" as stipulated in the Supply Agreement Section 7.1. GAM suggests that AMG could have used the Pre-Payment in a way that GAM asserts satisfies these obligations. GAM also, however, concedes that this counterclaim does not seek any new or different damages, stating that such damages are not quantifiable, and may only be nominal.[134]

The Court finds that "support the Mibra Mine business" in Section 7.1 of the Supply Agreement is not defined. The language is very broad. The Court finds that payment of corporate debt falls within the broad concept of supporting the Mibra Mine business. Further, this counterclaim alleges no damages separate and apart from or in addition to other counterclaims.[135]

THEREFORE, AMG's Motion for Summary Judgment on GAM's counterclaim for misuse of Pre-Payment is hereby **GRANTED.**

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[132] *Id.*
[133] *Id.*
[134] GAM Ans. Br. at 26.
[135] *See EZLinks Golf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209, at *6 (Del. Super.).

Undershipment of Product

Section 4.1 of the Supply Agreement provides the procedures for weighing, sampling and analysis of Product:

[redacted]

GAM's claim for undershipment of Product (Counterclaim Count IV) alleges that AMG overstated the amount of tantalum pentoxide in more than 60 shipments of Product because it improperly pulverized the samples from which the amount of tantalum pentoxide was to be determined before distributing those samples to the parties for their own analyses.[137] GAM's payment to AMG is based on the amount of tantalum pentoxide in each shipment,[138] thus GAM argues AMG overcharged GAM based on overstatements of the amount of tantalum pentoxide in the Product shipments.

[136] AMG Op. Br., Ex. E, Supply Agreement § 4.1.
[137] GAM Amended Countercl. ¶¶ 107–10.
[138] AMG Op. Br., Ex. W, Third Amendment.

AMG argues that it is entitled to judgment on four grounds: (1) GAM has not identified a breach of the Supply Agreement; (2) GAM acquiesced to the breach; (3) GAM cannot establish causation; and (4) GAM's damages are imprecise.

GAM responds that factual issues preclude entry of judgment in AMG's favor on GAM's Counterclaim Count IV. GAM and AMG agree that AMG was to arrange for an Independent Analyst to take a representative sample pursuant to the Supply Agreement. A.H. Knight ("AHK") was selected to complete this task.[139] The parties agree that the Supply Agreement described a process by which the sample was then to be split into four parts, one for each of the two parties, one reserved for contest, and one given to AHK. The parties and AHK would then analyze the samples to compare results.

The disagreement, GAM contends, arises over when and by whom the samples were to be pulverized. AMG argues that it was entitled to pulverize the samples prior to distributing them for testing. GAM asserts that AMG was not permitted to pulverize the samples prior to distribution or analysis.

Both parties have obtained expert opinions on whether, pursuant to industry practice, the pulverization of mineral sub-samples fairly constitutes part of preparation or analysis, and what role AHK should have as the parties'

[139] AMG Op. Br. at 28.

independent representative in determining when and how pulverization is to be conducted.[140]

GAM argues that pulverization prior to sample distribution and analysis was *not* included in the list of steps regarding analysis procedures, and therefore AMG arbitrarily deviated from the clearly outlined procedure. GAM offers internal documents that GAM asserts evidence AMG's acknowledgement that it was performing an extra step absent from the stipulated procedures.[141]

AMG argues that the contract's omission of the pulverization step does not render pre-shipment pulverization a breach of the Supply Agreement. AMG contends that AHK was responsible for directing pulverization and chose to pulverize the sample prior to shipment,[142] thus AMG is not responsible for any breach. In support of its argument, AMG refers to testimony that pulverization was being conducted by AHK, not AMG.[143]

The deposition testimony of Stephen Kraus, GAM's President, suggests that there was a problem stemming from AHK, but also that AMG confirmed to GAM that it was an issue. Krause stated that AHK's post-modification steps resulted in differences between the original sample material and the material AHK ultimately

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[140] GAM refers to *Patton v. 24/7 Cable Co.*, LLC, 2016 WL 6272552, at *4 (Del. Super.) (conflicting expert testimony precludes summary judgment).
[141] GAM Ans. Br., Exs. BBB, YY & VV at 201.
[142] AMG Op. Br., Exs. Y, AA & K.
[143] *Id.*, Ex. OO, Krause Tr., at 141:12-21.

distributed.[144] Krause testified that AHK compromised the samples by adding a milling step, but Krause could not state with any certainty what that extra process was.[145] Kraus stated that the parties *mutually* agreed that AHK's results did not make sense,[146] but neither party could identify the source of the discrepancy.[147]

AMG argues that even if GAM can demonstrate that AMG committed a breach by undershipment, AMG is not liable because GAM acquiesced in the process by failing to stop the ongoing course of conduct. AMG relies on *Klaassen v. Allegro Dev. Corp.*[148] The *Klaassen* Court ruled: "A claimant is deemed to have acquiesced in a complained-of act where he: has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved."[149] AMG argues that it has satisfied these elements. AMG argues that it showed GAM knew the samples were being pulverized before delivery, but acquiesced by confirming that the amount of tantalum remaining to be shipped reflected the content figures in the paid invoices.[150] AMG also refers to

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[144] *Id.*, at 141:8–142:5.
[145] *Id.*, at 123:4–124:11.
[146] *Id.*, at 112:17–113:11.
[147] *Id.*, at 123:4–124:11.
[148] 106 A.3d 1035, 1047 (Del. 2014).
[149] *Id.*
[150] AMG Op. Br., Ex. W, Third Amendment § 3.

GAM's continued acceptance of pulverized samples for nearly two years before requesting that AHK cease pulverizing.

GAM argues that it did not acquiesce to the course of conduct which constituted the alleged breach of the Supply Agreement.[151] GAM acknowledges that it was aware of the problem, but insists that it *repeatedly* raised the issue with AMG over the course of the Term.[152] GAM also asserts that AMG rejected GAM's request for compensation, and agreed to change the sampling procedures in the Sixth Amendment.[153]

AMG urges the Court to dismiss the undershipment claim because GAM cannot prove its damages with the requisite degree of reasonable precision. AMG relies on *Kronenberg v. Katz*.[154] The *Kronenberg* Court held that "plaintiffs must prove their damages with a reasonable degree of precision and cannot recover damages that are merely speculative or conjectural." AMG also asserts that Kraus

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[151] GAM also argues that AMG waived acquiescence as an affirmative defense. GAM cites *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv., LLC*, 2018 WL 3326693, at *41 (Del. Ch.) (noting that in Delaware, acquiescence is an affirmative defense); *James v. Glazer*, 570 A.2d 1150, 1153 (Del. 1990) ("Generally, an affirmative defense must be pled or the defense is waived."). AMG points out that neither of GAM's authorities involve waiver of an acquiescence defense. AMG argues that acquiescence is a "species of waiver." *Frank v. Wilson & Co.*, 9 A.2d 82, 87 (Del. Ch. 1939), *aff'd* 32 A.2d 277, 283 (Del. 1943); *see also Mizel v. Xenonics, Inc.*, 2007 WL 4662113, at *5 (Del. Super.); *Tenneco Automotive Inc. v. El Paso Corp.*, 2004 WL 3217795, at *12 (Del. Ch.). AMG provided waiver as an affirmative defense in its Answer to GAM's Counterclaims and all amended pleadings filed thereafter. Thus, AMG contends that it adequately raised acquiescence under the umbrella of waiver.

[152] GAM refers to AMG Op. Br., Exs. J–L, Z, CC, OO, and Larkin Supp. Aff., Ex. NN, at 045.

[153] Larkin Supp. Aff., Ex. OO.

[154] 872 A.2d 568, 609 (Del. Ch. 2004).

testified that GAM's method of calculation of damages would be based on the difference between the pre-ship samples and its assay of separate samples. AMG argues that GAM's methods are not permitted by the contract and that GAM has yet to produce the record of what type of sample was analyzed.

GAM responds that imprecision of damages is not a basis for summary judgment, as breach of contract can be granted with only nominal damages.[155] GAM also addresses the methodology discrepancy by referring to several documents.[156]

The Court finds that there are genuine issues of material fact as to whether AMG or AHK followed proper procedures pursuant to Section 4.1 of the Supply Agreement. The Court also finds that there are genuine issues of material fact as to whether GAM acquiesced in the process that took place. The Court finds the dispute between AMG and GAM expert reports prevents the Court from granting summary judgment in favor of AMG on the basis that GAM cannot adduce evidence of a breach of the Supply Agreement on the grounds of undershipment.

THEREFORE, AMG's Motion for Summary Judgment on GAM's counterclaim for undershipment of Product is hereby **DENIED.**

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[155] *Thorpe v. CERBO, Inc.*, 1993 WL 443406, at *12 (Del. Ch.); *see also Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *12 (Del. Ch.).
[156] GAM specifically refers to Larkin Supp. Aff., Exs. HHH & MM. GAM Ans. Br. at 35.

Unjust Enrichment

AMG argues that GAM cannot raise a claim for unjust enrichment where a contract already governs the parties' relationship.[157]

This Court in *Affy Tapple, LLC v. Shopvisible, LLC* allowed a claim for unjust enrichment to survive a Motion to Dismiss, but permitted it to remain only as a potential measure of damages.[158]

The Court will not deviate from its approach in *Affy Tapple*.[159] Unjust enrichment is not a standalone claim.[160] The Court considers unjust enrichment more properly a potential measure of damages.[161] GAM may maintain its unjust enrichment allegations, provided GAM proves a breach of contract claim, as well as the elements of unjust enrichment. GAM may pursue unjust enrichment as a potential measure of damages, but cannot duplicate its contract damages with alleged tort claims.

THEREFORE, AMG's Motion to Dismiss GAM's unjust enrichment counterclaim, is hereby **DENIED**.

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[157] *BAE Sys. Info. and Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch.)).
[158] 2019 WL 1324500, at *6 (Del. Super.).
[159] *See id.*; *see also Firmenich Inc. v. Natural Flavors, Inc.*, 2019 WL 6522055, at *7–8 (Del. Super.).
[160] *Firmenich*, 2019 WL 6522055, at *7–8.
[161] *Id.*

CONCLUSION

It appears that no Delaware court has granted summary judgment on the issue of adequate assurances. The Court finds that genuine issues of material fact remain as to the issue of adequate assurances. **THEREFORE,** GAM's Motion for Summary Judgment on the issue of adequate assurances is hereby **DENIED.**

The Court finds that the Third Amendment to the Supply Agreement is not ambiguous about the Third Amendment Consideration. The Third Amendment clearly and unambiguously provides that the Third Amendment Consideration is a prepayment. GAM's payment of [redacted] is not solely in consideration of an adjustment to the base price.

However, whether or not GAM is entitled to damages is not clear and must be determined by the factfinder. Further, GAM's entitlement to its prepayment is moot if the finder of fact determines that AMG's assurances are adequate or that AMG did not repudiate the contract. **THEREFORE,** GAM's Motion for Summary Judgment on the issue of Pre-Payment is **GRANTED IN PART** and **DENIED IN PART**; AMG's Motion for Summary Judgment on the issue of Pre-Payment is hereby **DENIED.**

The Court finds that the misuse of a prepayment relates back to GAM's original counterclaims. GAM's original counterclaims included its unjust enrichment claim, filed on May 8, 2017, and specifically addressed AMG's failure

to reimburse GAM's Pre-Payment. The Court finds that the misuse of prepayment counterclaim is not time-barred.

However, the Court finds that the language in Section 7.1 of the Supply Agreement is very broad, and that payment of corporate debt falls within the broad concept of supporting the Mibra Mine business. Further, this counterclaim alleges no damages separate and apart from or in addition to other counterclaims.[162] **THEREFORE**, AMG's Motion for Summary Judgment on GAM's counterclaim for misuse of Pre-Payment is hereby **GRANTED.**

The Court finds that there are genuine issues of material fact as to whether AMG or AHK followed proper procedures pursuant to Section 4.1 of the Supply Agreement. The Court also finds that there are genuine issues of material fact as to whether GAM acquiesced to the process that took place. The Court finds the dispute between AMG and GAM expert reports prevents summary judgment. **THEREFORE**, AMG's Motion for Summary Judgment on GAM's counterclaim for undershipment of Product is hereby **DENIED.**

The Court will not deviate from its approach in *Affy Tapple*.[163] Unjust enrichment is not a standalone claim.[164] The Court considers unjust enrichment

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[162] *See EZLinks Golf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209, at *6 (Del. Super.).
[163] *See id.*; *see also Firmenich Inc. v. Natural Flavors, Inc* , 2019 WL 6522055, at *7–8 (Del. Super.).
[164] *Firmenich*, 2019 WL 6522055, at *7 8.

more properly a potential measure of damages.[165] GAM may maintain its unjust enrichment allegations, provided GAM proves a breach of contract claim, as well as the elements of unjust enrichment. GAM may pursue unjust enrichment as a potential measure of damages, but cannot duplicate its contract damages with alleged tort claims. **THEREFORE,** AMG's Motion to Dismiss GAM's unjust enrichment counterclaim is hereby **DENIED.**

IT IS SO ORDERED.

The Hon. Mary M. Johnston

[165] *Id.*