IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

HUNTSMAN INTERNATIONAL, LLC and HUNTSMAN HOLLAND B.V.,	)	
Plaintiffs,	)	
v.	)	C.A. No. N17C-11-242 WCC CCLD
DOW BENELUX N.V. and THE DOW CHEMICAL COMPANY,	)	
Defendants.	)	

Submitted: July 23, 2020
Decided: February 2, 2021

Defendants' Motion to Dismiss –DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendants Dow Benelux N.V. and The Dow Chemical Company's ("Defendants" or "Dow") Motion to Dismiss. For the reasons set forth in this Opinion, Defendants' Motion to Dismiss is **DENIED**.

I. Factual & Procedural Background

Plaintiffs Huntsman International LLC and Huntsman Holland B.V. (collectively, "Huntsman") and Dow entered into a contractual agreement ("Agreement") in 2001 for the purchase of ethyleneamines ("Product").[1] Per the Agreement, Huntsman was permitted to purchase a set amount of Product from Dow every quarter at cost.[2] The invoice for Product includes Dow's cost to operate and maintain the Terneuzen Plant, as well as the cost to produce, store, handle, and deliver the Product and the raw materials used to manufacture the Product.[3] The cost to maintain and operate the Terneuzen plant and the Product are called "Economic Costs," and the Agreement provides how this expense should be allocated.[4]

The Terneuzen Plant is one of seventeen plants at Dow's Terneuzen facility.[5] In January of 2014, a barge owned by an unrelated third-party crashed into one of Dow's jetties at its Terneuzen facility ("Jetty Crash").[6] The crash did not occur at

[1] *Huntsman Int'l, LLC v. Dow Chem. Co.*, 2018 WL 4896668, at *1 (Del. Super.). A more detailed factual and procedural history of this case can be found in the Court's prior Opinion.
[2] *Id*.
[3] *Id*.
[4] *Id*. Pls.' Answ. Br. in Opp'n to Defs.' Mot. to Dismiss the First Amended Compl., at 3 [hereinafter "Pls.' Answ. Br."].
[5] *Huntsman Int'l*, 2018 WL 4896668, at *1.
[6] *Id*.

the Terneuzen plant.[7] A year and ten months after the Jetty Crash, Dow notified Huntsman of the Jetty accident by sending three invoices to Huntsman for the Jetty repairs ("Debetnota" or "Jetty Crash invoices").[8] Dow classified the Jetty Crash repairs as Economic Costs under the Agreement.[9] Huntsman disputed the Debetnota and refused to pay.[10]

In November of 2017, Dow threatened to terminate the Agreement if Huntsman did not pay the Jetty Crash invoices.[11] Huntsman, being completely dependent upon Dow's supply chain to manufacture its Product, paid the Jetty repair invoices plus interest—which totaled $1,736,095.32—under protest and with full reservation of rights.[12] That same month, on November 22, 2017, Huntsman filed its Original Complaint seeking a declaratory judgment that it was not contractually obligated to pay for the Jetty repairs and seeking to recover its payment and attorneys' fees.[13]

After this Court denied Dow's first Motion to Dismiss in October of 2018, Dow produced documents to Huntsman, which ultimately prompted Huntsman to file its First Amended Complaint ("FAC").[14] Huntsman alleges that Dow's internal

[7] Pls.' Answ. Br., at 4.
[8] *Huntsman Int'l*, 2018 WL 4896668, at *1.
[9] Defs. Dow Benelux N.V. and the Dow Chemical Company's Opening Br. in Support of Their Mot. to Dismiss the First Amended Compl. at 4 [hereinafter "Defs.' Opening Br."].
[10] *Huntsman Int'l*, 2018 WL 4896668, at *1.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Pls.' Answ. Br., at 6, 8.

documents show that Dow unsuccessfully attempted to recover the Jetty repair costs from Dow's insurers and the third-party who caused the crash.[15] Thereafter, Huntsman claims that Dow fraudulently billed it for the Jetty Crash by changing its Economic Cost allocation procedures without informing Huntsman.[16] Huntsman also alleges that documents provided in discovery by Dow demonstrated that Dow had been purposefully miscalculating Product invoices so that Huntsman would inappropriately bear the majority of the Economic Costs and had been doing so for a long period of time.[17]

Huntsman filed its FAC on November 14, 2019, which added the following claims: (1) fraud, (2) fraudulent concealment, (3) breach of the implied covenant of good faith and fair dealing, and (4) conversion.[18] So unfortunately, what began as a dispute over the cost of the Jetty repairs has now evolved into a much larger dispute encompassing claims of habitual fraudulent billing.

II. Standard of Review

Under Superior Court Civil Rule 12(b)(6), the Court will dismiss a complaint where a party has failed to "state a claim upon which relief can be granted."[19] In

[15] *Id*. at 6.
[16] *Id*. at 6-7.
[17] *Id*. at 7-8.
[18] First Amended Compl., D.I. 67, ¶ 1, at 1.
[19] Del. Super. Ct. Civ. R. 12(b)(6).

making a Rule 12(b)(6) determination, the Court must consider "whether the claimant 'may recover under any reasonably conceivable set of circumstances susceptible of proof.'"[20] The Court must accept all well-pleaded allegations as true and draw every reasonable factual inference in favor of the non-moving party.[21] At this preliminary stage, dismissal will be granted only when the Court finds with reasonable certainty that the claimant would not be entitled to relief under "any set of facts that could be proven to support the claims asserted" in the pleading.[22]

III. Discussion

A. Waiver of Claims Under the Contract

Dow first argues that all of Huntsman's claims are waived under the Contract's terms.[23] Specifically, Dow relies on Article 15 and Article 21 of the Agreement.[24] Article 15 of the Agreement reads as follows:

> All claims by Customer shall be deemed waived unless made by Customer within ninety (90) days following the receipt of Product; provided, that for any claim which is not readily discoverable within such ninety (90) day period such claim shall be deemed waived unless made by Customer in writing and received by Supplier within one hundred eighty (180) days after receipt of Product or within thirty (30) days after Customer learns or should

[20] *Sun Life Assurance Co. of Can. v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, at *1 (Del. Super. Ct. Aug. 9, 2018) (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[21] *Id.*
[22] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del.1970); *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3 (Del. Super.) (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[23] Defs.' Opening Br., at 7.
[24] *Id*. at 8-9

> have been reasonably aware of facts which should have given rise to such claim, whichever first occurs.[25]

Dow contends that Article 15 requires Huntsman to notify Dow of all claims "180 days from the receipt of Product."[26] Article 21 instructs Huntsman to make all Article 15 claims in writing and to deliver the claim to Dow in person, via facsimile, or via certified mail.[27]

Counterintuitively, Dow maintains that even if a claim has no relation to the Product, Huntsman is still obligated to inform Dow of its claim 180 days from when Huntsman received an order.[28] As a result, Dow believes that Huntsman was required to contest the Jetty Crash invoices 180 days from the receipt of Product.[29] Relying on Article 15, Dow reasons that because Huntsman received Product in the first and third quarter of 2015, which was also when Huntsman was billed for the Jetty Crash, Huntsman had 180 days from the last day of the third quarter to dispute the Jetty invoices.[30] Accordingly, Dow asserts that Huntsman was required to submit a claim by March 28, 2016.[31]

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[25] Defs.' Opening Br., at 8; Pls.' Answ. Br., at 12 (underscoring in original). The Court notes that there is a slight difference in the quoted language presented in Dow's Opening Brief compared to Huntsman's Answer. Huntsman's quotation is missing the words "of facts" in the last portion of the sentence that reads: "…after Customer learns or should have been reasonably aware of facts which should have given rise to such claim…." Because these specific words are not the crux of the parties' arguments and will not have an impact on the outcome of this matter, the Court finds it reasonable to assume that Huntsman's omission was a mistake. Therefore, the Court will use the quotation that includes the words "of facts" in its analysis.
[26] Defs.' Opening Br., at 9.
[27] *Id.*
[28] Rough Oral Argument Tr., at 5-6, 8 (July 23, 2020).
[29] *See Id.* at 5-6, 9; *See* Defs.' Opening Br., at 15-16.
[30] Defs.' Opening Br., at 15.
[31] *Id.*

Dow contends that Article 15's plain language supports its proposition that all claims—Product related or not—are to be made pursuant to Article 15's time limitations.[32] Dow reasons that because the Agreement does not define the term "claims," the term should be given its ordinary meaning.[33] Dow maintains that the plain meaning of a claim is "a demand for compensation, benefits, or payment."[34] Dow then contends that "Article 15 further broadens the term 'claims' with the word 'all'."[35] To further support its broad interpretation of Article 15, Dow, in what can only be described as a desperate Hail Mary, attempts to use the obscured cannon that terms used throughout a document should be given a consistent meaning.[36] Dow notes that Article 16—the neighboring provision—uses the term "all claims" but in a restricted manner.[37] Article 16 specifically governs "all claims" stemming from "the failure of Product."[38] Thus, Dow argues that since Article 16 "materially varies" the term "all claims" in a way that Article 15 does not, the Court should conclude that not only is Article 15's "all claims" language comprehensive, Article 16's variation of the term "denotes a different idea" such that a broad interpretation of Article 15 is bolstered. [39]

[32] *See Id*. at 13-15.
[33] *Id*. at 13.
[34] *Id*.
[35] *Id*. at 14.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 14-15.
[39] *Id*.

Dow also argues that the Agreement's definition of "Economic Costs" supports the notion that the Jetty dispute is governed by Article 15.[40] Per the Agreement, Dow bills Huntsman for the Economic Cost to maintain the Terneuzen Plant and Product.[41] Dow explains that under the Agreement, Economic Costs include variable costs associated with delivering the Product and allocated costs.[42] Dow contends that allocated costs are those expended to produce and deliver raw material in connection with the Product.[43] Dow concludes that since the Jetty repairs were needed to deliver material to Huntsman, the Jetty Crash invoices were appropriately billed to Huntsman as allocated costs, and thus any dispute falls under Article 15.[44]

Considering Dow's proposed definition of "all claims" in Article 15 and Dow's allocated cost theory, Dow maintains that Article 15 is an enforceable "condition[] precedent to recovery" that demands strict compliance with its terms.[45] Because Huntsman did not strictly satisfy the condition precedent in Article 15, Dow argues that Huntsman waived all of its claims under the Agreement.[46]

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[40] Rough Oral Argument Tr., at 5-6 (July 23, 2020).
[41] Pls.' Answ. Br., at 3.
[42] Rough Oral Argument Tr., at 7 (July 23, 2020).
[43] *Id*. at 7-8.
[44] *Id*. at 8-9; *See Huntsman Int'l*, 2018 WL 4896668, at *5.
[45] Defs.' Opening Br., at 9-13.
[46] *Id*. at 17.

To the contrary, Huntsman argues that its claims are not waived because Article 15 is inapplicable in this case.[47] First, Huntsman asserts that its claims are "unrelated to the delivery of Product, which means Article 15 could not possibly apply."[48] Huntsman explains that the language in Article 15 explicitly ties the deadline for claims to the receipt of Product, and therefore the "all claims" language refers to all Product related claims.[49] Huntsman reasons that if Article 15 applied to non-Product claims then Article 15 would not have connected the deadline to the receipt of Product and instead would have used broader language.[50] Moreover, Huntsman notes that "other provisions of the Agreement have their own time limits for assertion or notification of non-Product related claims," which demonstrates that Article 15 is limited to only Product derived claims.[51] Additionally, Huntsman argues that not only did the Debetnota not reference delivery of Product, the invoices for Product delivered did not mention the Jetty repair costs.[52]

Huntsman also asserts that "Dow's interpretation of Article 15 is unreasonable because it would allow Dow to insulate itself from any claims based on improper or fraudulent billing by delivering the invoices, or concealing the

[47] Defs.' Opening Br., at 14, 17.
[48] Pls.' Answ. Br., at 13.
[49] *Id*. at 14.
[50] *Id*.
[51] *Id*. at 15.
[52] *Id*. at 13.

improprieties, until 180-days after the Product in question is received."[53] Moreover, Huntsman argues that a waiver of claims requires an intent to waive that is predicated on knowing all material facts.[54] Huntsman maintains that if the 180-day provision applied in this instance, it would permit a waiver of claims that had yet to exist and would waive claims Huntsman could not have suspected at the time the Product was received.[55] Thus, considering the intent and knowledge requirements for a waiver of legal rights, Huntsman concludes that it "cannot 'waive' a claim that it did not have or know about at the time of the alleged waiver."[56] Because Article 15, if interpreted as Dow suggests, would deny Huntsman a remedy, Huntsman contends that a reasonable person would not enter into such an agreement and the provision is unconscionable.[57]

Furthermore, Huntsman contests Dow's argument that Article 15's neighboring provision proves that Article 15 applies to all possible claims.[58] Huntsman argues that even if Article 15's language encompasses more claims than Article 16, this does not demonstrate that Article 15 includes both Product related and non-Product related claims.[59] Huntsman avers that there are claims that clearly do not fall under Article 15's control, like claims regarding the failure to deliver

[53] *Id*. at 15.
[54] *Id*. at 16.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 15-16.
[58] *Id*. at 17.
[59] *Id*.

Product or the wrongful termination of the Agreement.[60] Huntsman emphasizes that it is nonsensical to require Huntsman to inform Dow of such claims within 180 days from receipt of the Product when these scenarios are based on Huntsman not receiving the Product.[61]

Moreover, Huntsman maintains that Article 15 and Article 16 can co-exist even if Article 15 only covers Product related claims.[62] Huntsman asserts that each Article is included in the agreement to address different and distinct issues that may arise between the parties regarding the providing of Product to Huntsman and comparing the two articles provides no guidance to interpreting Article 15.[63] Finally, regardless of whether Dow's interpretation is reasonable, Huntsman argues that Dow failed to satisfy the motion to dismiss standard because Dow has not shown that its interpretation of Article 15 is the only plausible interpretation.[64]

Based on the plain language in Article 15, the Court finds that Article 15 does not apply to all claims under the Agreement. Article 15 is unambiguous and thus the Court will apply the provision's ordinary meaning.[65] Article 15 instructs that "all claims by Customer shall be deemed waived unless made by Customer within ninety (90) days following the receipt of Product."[66] For claims that cannot

[60] *Id*. at 16.
[61] *Id*.
[62] *Id*. at 17.
[63] *Id*.
[64] *Id*. at 14, 17.
[65] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).
[66] Defs.' Opening Br., at 8; Pls.' Answ. Br., at 12.

be easily discovered, Article 15 grants the Customer 180 days after the receipt of Product to notify Dow of the claim.[67]

Article 15 is patently concerned with the receipt of Product. Specifically, once the Product is received, the Customer then has a prescribed number of days to notify Dow of all claims. Using logic and prudence, it must follow that Article 15 is intended to control all claims directly related to the Product and its delivery. The Court does not believe that the parties intended for Huntsman to assess all its claims—even those claims unrelated to the Product—every time Huntsman placed an order. On its face, Article 15 does not support this outcome.

More importantly, Dow's argument rests on the presumption that the Jetty repair is an allocated cost under the Agreement. The Court cannot accept Dow's presumption because whether the Jetty repair is an allocated cost is highly contested.[68] Although Dow maintains that the damaged Jetty directly impacted the delivery of raw material used to manufacture the Product, Huntsman argues that the damaged Jetty serviced several other manufacturing plants and customers and that the third-party barge that crashed into the Jetty was not delivering raw materials for its Product.[69] As the Court stated in its previous Opinion, Huntsman's obligation to pay for the Jetty repair cannot be resolved by simply reading the

[67] Defs.' Opening Br., at 8; Pls.' Answ. Br., at 12.
[68] *Huntsman Int'l*, 2018 WL 4896668, at *5.
[69] *Id*.

Agreement.[70] Because Dow's argument presents a factual dispute, the Court cannot grant Dow's Motion to Dismiss.

Notwithstanding Article 15, Dow next maintains that Huntsman failed to invoke the Economic Cost Audit process under the Agreement.[71] Because Dow is classifying the Jetty Crash as an Economic Cost and Huntsman contests the Jetty invoices, Dow insists that Huntsman should have used the Economic Cost Audit procedure to resolve the dispute.[72] Dow explains that the Economic Cost Audit process allows Huntsman to audit Dow, via a neutral third-party, to verify Dow's billing and compliance with the Agreement.[73]

Dow further explains that the Economic Cost Audit mechanism in the Agreement would permit "a two-year lookback period," would be confidential, and would be binding.[74] Dow asserts that although Huntsman received the Jetty invoice a year and ten months after the crash, Huntsman still had two months to invoke the Audit process to be within the relevant two year lookback period.[75] In essence, Dow argues that the Audit procedure, coupled with Article 15's 180-day claims window, provided Huntsman with plenty of opportunity to contest the Jetty invoices and therefore Huntsman's claims should be deemed waived.[76]

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[70] *Id*.
[71] Defs.' Opening Br., at 18.
[72] *Id*.
[73] *Id*.
[74] *Id*. at 19.
[75] *Id*.
[76] Defs.' Reply Br., at 4, 6.

In response to Dow's Economic Cost Audit argument, Huntsman asserts that it was not obligated to use the Economic Cost Audit process.[77] Huntsman explains that the Economic Cost Audit provision is not an exclusive remedy under the Agreement and therefore was optional.[78] Moreover, Huntsman contends that even if it initiated the Audit process, the Audit would not have revealed what Huntsman is alleging with respect to the Jetty invoices.[79] Huntsman alleges that not only is Huntsman not liable for the Jetty repair costs, Dow intentionally concealed how it calculated the Jetty costs as not to put Huntsman on notice that it was being wrongly billed.[80] Additionally, under the Audit provision the audited documents are confidential and thus Huntsman claims that it would not have been able to access Dow's records on its own.[81]

The Court finds that the Economic Cost Audit is not a mandatory provision under the Agreement that would bar Huntsman's recovery if not elected. Although Dow argues that Huntsman should have used the Economic Cost Audit procedure, Dow does not contest that the provision was optional. Interestingly, Dow presents its argument that Huntsman was given two months to invoke the Economic Cost Audit as if two months was a gracious amount of time. However, Dow billed

[77] Rough Oral Argument Tr., at 25 (July 23, 2020).
[78] *Id*. at 25-26.
[79] *Id*. at 23.
[80] *Id*. at 26.
[81] *Id*. at 31.

Huntsman for the Jetty repair a year and ten months after the crash. Considering the nature of Huntsman's allegations, the Court can imagine that Huntsman did not invoke the Audit process because not only would it have been a hasty decision, Huntsman could not view Dow's records for itself and would have been bound to the decision.

Because Huntsman alleges that Dow engaged in fraudulent behavior and Dow contends that these claims are waived, the Court finds it important to note that "Delaware's public policy is intolerant of fraud."[82] Delaware courts have only permitted contractual waivers for fraud claims in finite circumstances where the plaintiff clearly agreed not to rely on the statements or documents that they are contending are fraudulent.[83] Dow does not aver that the Agreement contains a contractual provision that would unequivocally bar Huntsman's fraud claim.

Dow's waiver theory is nothing more than a Frankenstein argument—a fusing of facts and irrelevant contract provisions in the hopes that its waiver theory will come alive. Huntsman disputes its responsibility to pay for the Jetty Crash and alleges that Dow fraudulently billed it for the Crash. This dispute is clearly unrelated to the Product itself, and therefore the timing requirements found in Article 15 is inapplicable in this case. Additionally, the Court finds that the

[82] *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).
[83] *Id*. ("In all of the decisions in which this court has found that fraud claims were barred by contractual provisions, the court has concluded that the contract's terms, when read together, constituted a clear statement by the plaintiff that it was not relying on the very factual statements that the plaintiff was contending to be fraudulent.").

Economic Cost Audit provision was a right under the Agreement, not a prerequisite to recovery. Lastly, the Court finds that Dow has not presented the Court with a provision in the Agreement that supports a clear contractual waiver of fraud claims. Thus, the Court finds that Huntsman did not waive its claims under the Agreement.[84]

B. Statutory Statute of Limitations

While the Original Complaint filed by Huntsman was limited to the dispute over the Jetty rebuild, in its FAC, Huntsman has asserted that Dow routinely manipulated Huntsman's invoices as to overcharge Huntsman and actively concealed such fraud.[85] It appears uncontested that the Jetty Crash invoice claim was filed within the statute of limitations. However, the Court is faced with determining whether some or all of Huntsman's fraudulent pattern and practices argument is time-barred.

Relying on Title 10 Delaware Code § 8106, Dow argues that Huntsman's fraud, good faith and fair dealing, and conversion counts are at least partially barred by the statutory statute of limitation of three years.[86] Dow argues that

[84] In the alternative, Dow avers that Article 15 established a 180-day contractual statute of limitations for all claims. Defs.' Opening Br., 19-22. However, this argument presumes that Article 15 encompasses all claims, regardless of whether the claim is Product related. Considering the Court's ruling that Article 15 is inapplicable in this case, the Court will not address Dow's alternative argument.
[85] *Id*. ¶ 4, at 3.
[86] Defs.' Opening Br., at 22-23.

Huntsman's added claims do not relate back to the facts alleged in the Original Complaint as it merely "set[s] forth a story of an overcharge resulting from a crash into a jetty in 2014" and did not allege fraud.[87]

Therefore, Dow asserts that Huntsman's new claims "are subject to a three-year statutory statute of limitations, expiring at the time the First Amended Complaint was filed."[88] Considering the three year statute of limitations and that Huntsman filed their First Amended Complaint ("FAC") on November 14, 2019,[89] Dow maintains that the portion of Huntsman's additional claims that are based on occurrences before November 14, 2016 should be deemed time-barred.[90] In the alternative, if the Court finds Huntsman's new claims relate back to the Original Complaint, which Huntsman filed on November 22, 2017,[91] Dow asserts that the three year statutory limit should be applied to bar Huntsman's claims that occurred before November 22, 2014.[92]

Dow also contends that Huntsman did not exercise reasonable due diligence, which is required for tolling the statute of limitations when fraudulent conduct is alleged.[93] Specifically, Dow believes that Huntsman's failure to invoke its Economic Cost Audit rights under the Agreement proves that Huntsman did not

[87] *Id*. at 25.
[88] *Id*. at 26.
[89] First Amended Compl., D.I. 67, at 1.
[90] Defs.' Opening Br., at 26-27.
[91] Compl., D.I. 1, at 1.
[92] Defs.' Opening Br., at 27.
[93] *Id*. at 28.

exercise reasonable diligence.[94] Dow reiterates that Huntsman should have elected the Economic Cost Audit provision to resolve its contentions.[95] Dow explains that not only was the Audit procedure designed to resolve Economic Cost issues,[96] if Huntsman elected to use the Economic Cost Audit provision, Huntsman would have discovered the alleged fraud.[97] Dow also argues that at a minimum, Huntsman was placed on inquiry notice of any alleged fraud when it received the Debetnota on November 30, 2015.[98] Consequently, Dow concludes that the statute cannot be tolled past the November 30, 2018 date.[99]

On the other hand, Huntsman argues that Delaware's three-year statute of limitations does not bar their claims.[100] Huntsman asserts that the Court does not need to consider the relation back issue as Huntsman filed the FAC within three years of discovering Dow's fraudulent conduct and it's concealment.[101] Therefore, Huntsman avers that "even if the new allegations do not relate back, the statute of limitation does not bar any part of them."[102] In support of its argument, Huntsman references Delaware's discovery rule and fraudulent concealment doctrine.[103]

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[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] Rough Oral Argument Tr., at 21-22 (July 23, 2020).
[98] Defs.' Opening Br., at 29.
[99] *Id*. at 30.
[100] Pls.' Answ. Br., at 21.
[101] *Id*. at 22.
[102] *Id*.
[103] *Id*. at 22-23.

Quoting *Wal-Mart Stores, Inc. v. AIG Life Insurance Company*, Huntsman correctly states that "under the discovery rule the statute is tolled where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of."[104] Huntsman also correctly explains that the fraudulent concealment doctrine applies when a "defendant knowingly took affirmative steps to prevent the plaintiff from learning facts or otherwise made misrepresentations to put the plaintiff off the trial of inquiry."[105] In sum, Huntsman argues that the discovery rule is easily satisfied and that with its fraudulent concealment claims it is entitled to a tolling of the statute of limitations.[106]

Specifically, while in the process of litigating the Jetty Crash dispute—the main focus of the Original Complaint—, Huntsman asserts that it received Dow's internal emails that show Dow has been fraudulently billing Huntsman over the years.[107] Huntsman avers that its FAC alleges "facts which create, at the very least, a reasonable inference that Huntsman's injuries were inherently unknowable and that as a result of Dow's fraudulent misrepresentations and concealment, Huntsman was blamelessly ignorant of Dow's wrongful acts."[108] Huntsman argues that the discovery rule applies and the statute of limitations did not began to run

[104] *Id*. (860 A.2d 312, 319 (Del. 2004)).
[105] *Id*. at 23 (quoting *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch.)).
[106] *Id*. at 24-25.
[107] *Id*. at 7, 26.
[108] *Id*. at 24-25.

until November 22, 2017, when Huntsman filed their Original Complaint.[109] Huntsman maintains that because they filed its FAC—which includes their fraudulent concealment claims—two years after the Original Complaint, Huntsman was within the statute of limitations.[110]

Moreover, Huntsman contests Dow's assertion that it failed to exercise reasonable diligence.[111] Huntsman argues that it did not have a reason to be suspicious of Dow's billings.[112] Huntsman emphasizes that without a suspicion of wrongdoing, Huntsman did not have a reason to invoke the Audit provision.[113] Huntsman notes that the Audit provision was simply a right under the Agreement and does not alter the discovery rule.[114] Huntsman also believes that the Debetnota did not put Huntsman on inquiry notice.[115] Huntsman asserts that although it disputes the Jetty invoices, the Jetty invoices alone do not raise a red flag that Huntsman was being habitually defrauded.[116] Nevertheless, Huntsman contends that granting Dow's Motion to Dismiss would be inappropriate because there are conflicting inferences of fact about whether Huntsman was on inquiry notice.[117]

[109] *Id*. at 25.
[110] *Id*. at 25.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*. at 26.
[116] *Id*.
[117] *Id*. at 27.

It is uncontested that Title 10 Delaware Code § 8106 governs over this case. § 8106 sets a three-year statute of limitation on Huntsman's claims.[118] When deciding a motion to dismiss on statute of limitation grounds, this Court is charged with conducting a three-step analysis.[119] The Court must ascertain the following:

> (1) the date of accrual of the cause of action based on the allegations; (2) whether the plaintiff has pleaded facts sufficient to create a reasonable inference that the statute of limitations has been tolled; and (3) assuming a tolling exception has been pleaded adequately, when the plaintiff was on inquiry notice of a claim based on the allegations.[120]

Generally, in Delaware, the statute of limitation "begins to run at the time of the wrongful act, and, ignorance of a cause of action, absent concealment or fraud, does not stop it."[121] When a plaintiff amends their complaint to include additional claims, a plaintiff must either show that the amended complaint relates back to the original complaint to be within the statute of limitations[122] or a plaintiff must show that a tolling doctrine applies such that relation back is unnecessary.[123]

The discovery rule tolls the statute of limitations when "the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.'"[124] Under the fraudulent concealment doctrine,

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[118] 10 *Del. C.* § 8106.
[119] *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *7 (Del. Super.).
[120] *Id*.
[121] *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).
[122] *See* Del. Super. Ct. Civ. R. 15(c).
[123] *See Rodriguez v. Farm Family Cas. Ins. Co.*, 2005 WL 1654019, at *3 (Del. Super.) (finding that where Plaintiffs' amended complaint did not relate back under Rule 15, "the statute of limitations must have been tolled" making the requirements of Rule 15 "unnecessary.").
[124] *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, 842–43 (Del.2004)).

the statute of limitations is tolled only "until such time as the cause of action is discovered or could have been discovered by the exercise of due diligence."[125] A plaintiff is placed on inquiry notice of the cause of action when they have discovered facts that would form the basis for the action or are aware of facts that would put an ordinary person on inquiry and if those facts were pursued, it would lead the plaintiff to discover the cause of action.[126] Although a plaintiff does not need to have actual knowledge of the harm, the Court must decide whether a plaintiff knew of any "'red flag[s]' that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire."[127]

Huntsman has chosen to use the discovery rule and fraudulent concealment doctrine—instead of proving relation back—to withstand Dow's statute of limitations argument. Because the Court finds that, for motion to dismiss purposes, Huntsman's general fraud claims tolled the statute of limitations, the Court will not address Dow's relation back argument.

It is clear to the Court that the discovery rule and fraudulent concealment doctrine are applicable in this case. Huntsman alleges that Dow actively defrauded Huntsman and hid its behavior from Huntsman.[128] Specifically, Huntsman references an email between Dow employees that suggests Dow strategically

[125] *Van Lake*, 2013 WL 1087583, at *10 (quoting *Layton v. Allen* 246 A.2d 794, 798 (Del. 1968)).
[126] *Silverstein v. Fischer*, 2016 WL 3020858, at *6 (Del. Super.).
[127] *Id*. (quoting *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del.2004)).
[128] First Amended Compl., D.I. 67, ¶ 3, at 2.

planned delivery routes so that Huntsman would be billed for most of the delivery costs and that Huntsman was purposely overcharged for production costs.[129] Accordingly, the Court finds that Huntsman has created a reasonable inference that its injury was inherently unknowable and that Dow took affirmative steps to hide its wrongdoing such that the statute of limitations would have been tolled until the fraud was reasonably discovered. While it is unclear exactly when Huntsman discovered the documents which it alleges has uncovered the fraudulent conduct, it appears to be between the date of the Original Complaint and the filing of the FAC. This is a time period of a little less than two years and thus the FAC would have been filed timely.

Although Dow argues Huntsman was placed on inquiry notice in 2015 when it received the Jetty invoices and therefore the tolling period ended at that time, the Court believes this issue is reasonably subject to debate. Because the Jetty invoices seemed to be a significant deviation from any bill Huntsman was accustomed to receiving, the Court understands that the Debetnota might be perceived as a red flag that indicates more wrongdoings. However, it is equally plausible that although the Debetnota was a highly contested charge, without more the Debetnota does not suggest a larger long-term scheme to defraud Huntsman. More importantly, even if the Debetnota was deemed a red flag, it is unclear whether a

[129] Pls.' Answ. Br., at 7-8.

closer look by Huntsman would have revealed facts "sufficient to enable [Huntsman] to discover the basis" of their general fraud claim.[130] Against what Dow suggests, it is plausible that Huntsman may not have discovered their fraud claim even if it invoked the Economic Cost Audit provision especially when Huntsman claims that Dow concealed its fraudulent billing practices and Huntsman would not be privy to the documents reviewed in the Audit.[131]

What is the true red herring in this motion is Dow's request to place a time limitation on the fraudulent conduct that can be presented by Huntsman. The statute of limitation is not a mechanism to limit the scope or time frame of the fraudulent activity. It simply places a limit on the time one has to file suit once the fraud is discovered or is reasonably suspected. Accepting all well-pleaded allegations as true and drawing every reasonable factual inference in favor of Huntsman, the Court will not dismiss Huntsman's claims on statute of limitations grounds.

[130] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842–43 (Del. 2004).
[131] *Id*. (holding that the court could not as a matter of law determine that an email placed plaintiffs on inquiry notice of improper accounting practices when (1) it was factually unclear whether the email "should have aroused the plaintiffs' suspicions to a degree sufficient to impose upon the plaintiffs a duty of further inquiry" and (2) "it is impossible to determine from the present record whether a more diligent investigation, even if pursued, would have uncovered facts sufficient to enable the plaintiffs to discover the basis of their accounting malpractice claim.").

C. Fraud Claim under Rule 9(b)

Dow finally argues that Huntsman's fraud claim fails to satisfy Delaware Superior Court Civil Rule 9(b).[132] Because Huntsman (1) "provide[d] no specificity or particularity in time," (2) "never mention[s] a place where the allegedly false representations occurred" and (3) "never disclose[d] the identity of the person or persons" who made the alleged false representations, Dow concludes that Huntsman has not complied with Rule 9(b) and thus Huntsman's claim should be dismissed.[133]

However, Huntsman insists that it has satisfied Rule 9(b)'s particularity requirement. Huntsman argues that (1) its FAC alleges that its fraud claims go back to "at least 2011," (2) the place requirement is not necessary in this case because Huntsman's fraud claim is not based on "vague, oral misrepresentations," and (3) its fraud claims were "based on Dow's internal emails" and the FAC contains "the dates and authors of these emails."[134] Huntsman emphasizes that Rule 9(b) does not "require the level of detail that Dow demands."[135] Considering that Huntsman alleges that Dow engaged in fraudulent concealment, Huntsman argues that it "has no way of knowing the specifics of Dow's fraud."[136] Nevertheless, Huntsman

[132] Defs.' Opening Br., at 31.
[133] *Id*.
[134] Pls.' Answ. Br., at 30-31.
[135] *Id*. at 30.
[136] *Id*. at 32.

believes that its FAC has sufficiently placed Dow on notice of the claims against it.[137]

Under Delaware Superior Court Civil Rule 9(b), a party alleging fraud must state "the circumstance constituting fraud…with particularity."[138] Generally, with fraud claims, the particularity requirement may be satisfied by including "the time, place, and contents of the false representation, as well as the identity of the person making the misrepresentation and what he obtained thereby."[139] However, the time, place, and contents directive under Rule 9(b) is not rigid.

A party may also meet the particularity requirement by using an "alternative means of injecting precision and some measure of substantiation into their allegations of fraud."[140] The purpose of Rule 9(b)'s particularity requirement is "to put the defendant on notice so that he can adequately prepare a defense."[141] Therefore, if a plaintiff has provided sufficient detail to place a defendant on notice of the fraud alleged, the Court will not dismiss a fraud claim for lack of particularity simply because specific dates are not listed.[142]

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[137] *Id*. at 31.
[138] Del. Super. Ct. Civ. R. 9(b).
[139] *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. Ct. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984) (quoting *Autrey v. Chemtrust Industries Corporation*, 362 F.Supp. 1085, 1092, 1093 (D. Del. 1973)). *See Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990).
[140] *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). *See Nutt*, 466 A.2d at 23 (holding that "[i]t may not be necessary that all evidence of fraud within the knowledge of the plaintiff be disclosed short of discovery but it is essential that the precise theory of fraud with supporting specifics appear in the complaint.").
[141] *Browne*, 583 A.2d at 955. *See Nutt*, 466 A.2d at 23 (stating that "[f]raud must be pled with sufficient particularity so that the parties may know what claims have been adjudicated.").
[142] *See TEK Stainless Piping Prod., Inc. v. Smith*, 2013 WL 5755468, at *3 (Del. Super.) (holding that "[a]lthough no specific dates are listed, the Counterclaim identifies the parties to the conversations and sets out the content of the

Although Huntsman has not provided a specific date in its FAC, the Court finds that Huntsman has satisfied Rule 9(b)'s particularity requirement. The Court believes that based on the facts alleged Dow is on notice such that Dow can form a defense. Huntsman has taken issue with Dow's Economic Cost invoices.[143] Huntsman believes that Dow disregarded the Agreement's Economic Cost formula and manipulated its Economic Cost invoices with the purpose of overcharging Huntsman.[144] Considering the nature of Huntsman's fraud claims, the Court is unsurprised that Huntsman has yet to know the extent of its cause of action. Additionally, as Huntsman explained, the emails that Dow turned over and in which Huntsman bases its FAC are within Dow's knowledge and possession. Thus, the Court finds that Huntsman's fraud claims inject enough precision and some measure of substantiation to satisfy Rule 9(b).

IV. Conclusion

For the foregoing reasons, Dow' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

discussions with sufficient particularity to place [defendants] on notice of the precise misconduct with which it is charged.").

[143] Pls.' Answ. Br., at 29-30.

[144] First Amended Compl., D.I. 67, ¶ 55, at 20.