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Case No. 9250-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BUTTONWOOD TREE VALUE PARTNERS, L.P., a California Limited Partnership, and MITCHELL PARTNERS L.P., a California Limited Partnership, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 9250-VCG
R. L. POLK & CO., INC., STEPHEN R. POLK (individually and on behalf of a Defendant Class of similarly situated persons), THE ESTATE OF NANCY K. POLK, KATHERINE POLK OSBORNE, DAVID COLE, RICK INATOME, CHARLES MCCLURE, J. MICHAEL MOORE, RLP & C HOLDING, INC., RLP MERGER CO., STOUT RISIUS ROSS, INC., and HONIGMAN MILLER SCHWARTZ AND COHN LLP,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: September 20, 2023
Date Decided: December 29, 2023

R. Bruce McNew, COOCH AND TAYLOR, P.A., Wilmington, Delaware, *Attorney for Plaintiffs*.

David A. Dorey and James G. Gorman, III, BLANK ROME LLP, Wilmington, Delaware; OF COUNSEL: Christopher M. Mason, NIXON PEABODY LLP, New York, New York, Carolyn G. Nussbaum, NIXON PEABODY LLP, Rochester, New York, *Attorneys for Defendants*.

GLASSCOCK, Vice Chancellor

Many things, I find, improve with age. Old trucks, old friends, old judges[1] acquire a pleasing patina and familiarity that enhances their appeal. Old lawsuits, not so much. This case is an example of the latter.

Originally (and to oversimplify), this matter was brought as a breach-of-duty action against the fiduciaries of R. L. Polk and Co. and the entity itself, alleging that a self-tender by that company had omitted material information to the stockholders, including notably that the price offered for the outstanding shares was inadequate in light of a plan by the controller-fiduciaries to sell the company for a higher price per share. This scheme was put in practice nearly two years after the tender offer, resulting in a substantially higher value for the shares than paid in the self-tender. Plaintiffs were tendering stockholders (and those who sold in light of the tender offer). Their theory withstood a motion to dismiss on the part of the controller-fiduciaries,[2] but R. L. Polk and Co. *was* dismissed, based upon the unremarkable proposition that a corporation does not owe, but instead is owed, fiduciary duties.[3] The self-tender, I note, was consummated in *2011*. The initial complaint was filed in 2014.[4]

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[1] That I find the patina that accrues to elderly judges pleasing is, I acknowledge, idiosyncratic.

[2] I dismissed the claims brought against the company's advisors and against the independent directors. *See Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co., Inc.*, 2017 WL 3172722 (Del. Ch. July 24, 2017) ("*Buttonwood II*").

[3] Plaintiffs did not plead, and affirmatively eschewed, any claim of fraud on behalf of the corporation. *Buttonwood Tree P'rs, L.P. v. R. L. Polk & Co., Inc.*, 2014 WL 3954987, at *10–11 (Del. Ch. Aug. 7, 2014) ("*Buttonwood I*").

[4] In other words, before I had incurred my current patina.

Plaintiffs filed a third amended complaint (the "TAC") in April 2023, attempting to state two new causes of action: against the Company for breach of contract in connection with the tender, and against the "Polk Family"—controllers and related parties—for unjust enrichment. These Defendants have moved to dismiss. I find, again to oversimplify, that the contract allegations are simply a back-door attempt to state a fiduciary-duty claim against the company; stripped of fiduciary obligations, the contract action fails to state a claim. That motion to dismiss is, accordingly, granted. The unjust enrichment claim is related to the existing claim for breach of fiduciary duty sufficiently so that it relates back to the long-ago initial complaint. It is true, as Defendants aver, that the unjust enrichment claim will not support independent damages if the breach of duty claim is itself successful.[5] However, I find the two causes of action, as pled, not entirely duplicative. At this pleading stage, I find the TAC states a claim for unjust enrichment.

My reasoning follows.

[5] Plaintiffs seek disgorgement as a remedy for both claims. *See* Third Am. Verified Class Action Compl., at Prayer for Relief, Dkt. No. 337 ("TAC").

I. BACKGROUND

The parties to this action have been litigating for nearly ten years after Buttonwood Tree Partners, L.P., and Michael Partners L.P. (collectively, the "Plaintiffs") filed their verified class action complaint against Stephen R. Polk, the Estate of Nancy K. Polk, Katherine Polk Osborne (collectively with Stephen R. Polk and the Estate of Nancy K. Polk, the "Controlling Stockholders"), David Cole, Rick Inatome, Charles McClure, J. Michael Moore (collectively with the Controlling Stockholders, Cole, Inatome, and McClure, the "Individual Defendants"), R. L. Polk & Co. (the "Company"), RLP & C Holding, Inc., RLP Merger Co., Stout Risius Ross, Inc., and Honigman Miller Schwartz and Cohn LLP.[6] Currently, I have before me Defendants' motion to dismiss Counts II, VI, and Other Elements of Plaintiffs' Third Amended Complaint ("TAC").[7]

A. Factual Background[8]

In 2008, the Board[9] approved a Self-Tender for a limited number of shares.[10] Due to the onset of the 2008 Great Recession, the Self-Tender was abandoned.[11]

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[6] *See* Verified Class Action for Breach of Fiduciary Duties, Dkt. No. 1 (the "Original Complaint").
[7] *See* Opening Br. Supp. Mot. Dismiss Counts II, VI, and Other Elements of the Third Am. Verified Class Action Compl. of Defs., Dkt. No. 347 ("Defs.' OB").
[8] For brevity's sake, I limit my recitation of the facts to only those necessary to understand my analysis. Interested readers may refer to my previous opinion pertaining to this matter for a more detailed restatement of the facts. *See Buttonwood II*, 2017 WL 3172722, at *1–5.
[9] Capitalized terms not otherwise defined in this decision have the same definition previously adopted in *Buttonwood II.*
[10] TAC ¶ 49.
[11] *Id.* ¶ 43.

Once economic conditions began to improve in 2010, the Board began exploring potential stockholder transactions and appointed a special committee to consider the issue.[12] The special committee considered the possible effects of converting the Company to a Subchapter S corporation ("S-Corp.").[13] As of November 2010, the Company had 127 stockholders, but to be eligible for S-Corp. status, the number of stockholders needed to be reduced to less than 100.[14] The special committee did not complete its work as Stephen Polk allegedly halted its consideration of S-Corp. status.[15]

In 2011, the Company revived its once-abandoned Self-Tender.[16] The Company increased the number of shares it was willing to purchase of the then-outstanding shares of common stock, noting that the Polk family members might tender their shares in the Self-Tender.[17] The Self-Tender was initiated on March 31, 2011,[18] pursuant to an Offer to Purchase.[19] Plaintiffs allege that the Offer to Purchase included omissions or misstatements designed to hide "that the Self-Tender was (1) []related to any desire of the Polk Family to freeze-out the minority and (2)

[12] *Id.* ¶¶ 4, 44, 47.
[13] *Id.*
[14] *Id.* ¶¶ 45, 48, 50.
[15] *Id.* ¶¶ 48, 50.
[16] *Id.* ¶¶ 52–54.
[17] *Id.* ¶¶ 54, 58.
[18] *Id.* ¶ 54.
[19] *Id.* ¶ 4.

[]related to any possible corporation transaction or sale of the Company[.]"[20] Specifically, the Offer to Purchase stated:

> The Board did not consider any of the following as there were no firm offers for (1) the merger or consolidation of the Company with or into another company or vice versa; (2) the sale or other transfer of all or any substantial part of the assets of the Company; or (3) a purchase of our securities that would enable the holder to exercise control of the Company. In addition, the Polk family has not expressed interest in exploring any such transactions.[21]

Also contained in the Offer to Purchase was a section titled "No Representations," which advised stockholders that the Company had not authorized any person or entity to make recommendations to stockholders on whether or not to tender their stock.[22] The Offer to Purchase further informed stockholders that the Company had not authorized others to make representations beyond those contained in the materials shared by the Company itself.[23] Any information or representation made by unauthorized persons was "not [to] be relied upon as having been authorized by the Company, its officers and/or directors."[24]

The Self-Tender expired on May 16, 2011.[25] Roughly eighteen months after the Self-Tender expired, the Company retained Evercore Partners to explore

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[20] *Id.* ¶ 61.
[21] Defs.' OB Ex. B, at 6 (the "Offer to Purchase").
[22] *Id.* at unnumbered p. 2.
[23] *Id.*
[24] *Id.*
[25] TAC ¶ 69.

strategic alternatives.[26] This resulted in a sale of the Company to IHS, Inc. ("IHS") that valued the Company three times higher than the Company had valued itself during its 2011 Self-Tender.[27]

B. Relevant Procedural Background

Plaintiffs initiated this litigation in January 2014 against the Company and named individual defendants that included the Polk Family and certain directors on the Company's Board.[28] I granted the Company's motion to dismiss the count for breach of fiduciary duty brought against the Company in August 2014.[29] In June 2016, I granted Plaintiffs' motion for leave to file an amended complaint,[30] which Plaintiffs filed shortly thereafter.[31] In addition to reasserting the counts from the Original Complaint, the First Amended Complaint added three new counts against new defendants RLP & C Holding, Inc. ("Holding Co.") and RLP Merger Co. ("Merger Co.") for breach of fiduciary duties and aiding and abetting breaches of fiduciary duty; Stout Risius Ross, Inc. ("SRR") for aiding and abetting breaches of fiduciary duty; and Honigman Miller Schwartz and Cohn LLP ("Honigman") for aiding and abetting breaches of fiduciary duty.[32] Plaintiffs filed a second amended

[26] *Id.* ¶ 71.
[27] *Id.*
[28] *See* Original Compl. ¶¶ 11–13, 15–18, 49–62.
[29] *Buttonwood I*, 2014 WL 3954987, at *6.
[30] *See* Order Authorizing the Filing of an Am. Compl., Dkt. No. 108.
[31] *See* First Am. Verified Class Action Compl., Dkt. No. 114.
[32] *See id.* ¶¶ 92–132.

complaint in December 2016 that contained the same causes of action as the First Amended Complaint.[33] In May 2017, I dismissed Plaintiffs' counts against the Company, Holding Co., and Merger Co.[34] I later dismissed the counts brought against SRR, Honigman, and the Non-Polk-Family Directors.[35]

The parties then requested the appointment of a special discovery master, which I granted in April 2018.[36] Plaintiffs took exceptions to the special discovery master's final report filed in December 2018. Following an extended briefing schedule,[37] I heard oral arguments on the matter in August 2019.[38] In December 2019, I partially denied Plaintiffs' exceptions and referred the remaining aspects to the special discovery master for consideration.[39] Thereafter, both parties took exceptions to the special discovery master's final report dated November 23, 2020.[40] I largely adopted the final report of the special discovery master in July 2021.[41]

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[33] *See* Second Am. Verified Class Action Compl. ¶¶ 102–142, Dkt. No. 155.
[34] *See* Judicial Action Form- Oral Arg. of Mots. held before VC Glasscock on 05.30.2017, Dkt. No. 193.
[35] *See Buttonwood II*, 2017 WL 3172722, at *11.
[36] *See* Order Appointing Special Discovery Master, Dkt. No. 208.
[37] *See* Order Extending the Time to File a Br. under Ct. of Ch. R. 144(d), Dkt. No. 224; Order Extending the Time to File a Br. under Ct. of Ch. R. 144(d), Dkt. No. 227; Order Extending the Time to File a Br. under Ct. of Ch. R. 144(d), Dkt. No. 230; Order Extending the Time to File a Br. under Ct. of Ch. R. 144(d), Dkt. No. 238.
[38] *See* Judicial Action Form re Oral Arg. on Pls.' Exceptions to Special Discovery Master's Final Report held 8-6-19, Dkt. No. 248.
[39] *See* Judicial Action re Tel. Rulings on Pls.' Exceptions to the Special Discovery Master's Final Report, Dkt. No. 259.
[40] *See* Notice of Exceptions by Remaining Defs., Dkt. No. 264; Pls.' Notice of Exception, Dkt. No. 265.
[41] *See Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co., Inc.*, 2021 WL 3237114, at *1, 14 (Del. Ch. July 30, 2021).

Plaintiffs then moved for certification of a Plaintiff class and a Defendant class; I granted the former and denied the latter in June 2022.[42]

Plaintiffs requested leave to file a third amended complaint in November 2022,[43] which I granted on April 13, 2023.[44] Shortly after that, Plaintiffs filed their Third Amendment Verified Class Action Complaint (the "TAC") on April 24, 2023.[45] The TAC contains two new claims: Count II, a breach of contract claim against the Company, and Count VI, an unjust enrichment claim against the Polk Family.[46] Defendants filed a motion to dismiss the TAC on June 8, 2023.[47] The parties finished briefing Defendants' motion on July 21, 2023,[48] and I heard oral arguments on September 20, 2023.[49] I consider the matter fully submitted as of that date.

[42] *See Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co. Inc.*, 2022 WL 2255258 (Del. Ch. June 23, 2022).
[43] *See* Pls.' Mot. for Leave to File a Third Am. Compl., Dkt. No. 331.
[44] *See* Judicial Action Form re Pls.' Mot. to Am. Compl. before Vice Chancellor Sam Glasscock dated 4.13.23, Dkt. No. 336.
[45] *See* TAC.
[46] *Id.* ¶¶ 103–17.
[47] *See* Defs.' OB.
[48] *See* Def. R. L. Polk & Co., Inc.'s Reply Br. Supp. Mot. to Dismiss Counts II, VI, and Other Elements of the Third Am. Verified Class Action Compl., Dkt. No. 356 ("Defs.' RB").
[49] *See* Judicial Action Form re Oral Arg. Before Vice Chancellor Sam Glasscock dated 9.20.23, Dkt. No. 363.

II. ANALYSIS

A. Count II: Breach of Contract

In the TAC, Plaintiffs add a claim for breach of contract against the Company for violations of the express representations in the Offer to Purchase or, in the alternative, for violation of the implied covenant of good faith and fair dealing.[50] Defendants contend that this claim should be dismissed for two reasons: (1) the claim is barred by the statute of limitations and (2) Plaintiffs fail to state a claim upon which relief may be granted.

1. Choice of Law

While there is no dispute that Delaware law applies to the procedural issue of whether this claim relates back to the date of the original filing under Court of Chancery Rule 15(c),[51] the parties dispute which state's substantive laws apply to the claim: Michigan or Delaware. While Defendants assert that Michigan law applies to Count II,[52] Plaintiffs counter that the Self-Tender is a unique contract that should be governed by Delaware law under the internal affairs doctrine.[53]

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[50] TAC ¶¶ 103–12.

[51] *See Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at *3 (Del. Super. Dec. 29, 2015) (explaining that Delaware law dictates that the forum state's statute of limitations applies unless a contract's choice-of-law provision explicitly adopts another forum's laws for procedural matters).

[52] Defs.' OB 18–24.

[53] Pls.' Answering Br. Opp'n Mot. to Dismiss Counts II, IV, and "Certain Elements" of the TAC 19–22, Dkt. No. 352 ("Pls.' AB").

a. Choice-of-Law Analysis Generally

When parties dispute which state's substantive law applies, Delaware courts invoke a two-part test: "first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is a conflict, the court determines which jurisdiction has the 'most significant relationship to the occurrence and the parties[.]'"[54] Where the conflict between the states' laws is "false[,]. . . the Court should avoid the choice-of-law analysis altogether."[55]

b. The Internal Affairs Doctrine

The internal affairs "doctrine governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationship *inter se* of the corporation, its directors, officers and shareholders."[56] Where the internal affairs doctrine applies, it "requires that the law of the state of incorporation should determine issues relating to internal corporate affairs."[57] The purpose of the internal affairs doctrine is "to prevent corporations from being subjected to inconsistent legal standards" with respect to its internal affairs.[58] The

[54] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015).
[55] *Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1161 (Del. 2010) (internal quotation marks omitted).
[56] *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987) (emphases in original).
[57] *Id.*
[58] *VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005).

Delaware Supreme Court has explained that the "application of the internal affairs doctrine is mandated by constitutional principles, except in 'the rarest situations.'"[59]

At issue in this case is whether the Company's Self-Tender pursuant to the Offer to Purchase should be considered an internal corporate affair for purposes of invoking the internal affairs doctrine. Plaintiff submits that the Self-Tender is covered by the internal affairs doctrine because it was conducted at the behest of the Controlling Stockholders "using the authority granted under DGCL § 160, [who] benefited by caus[ing] [the Company] to engage in a self-tender and acquire the shares of certain minority shareholders."[60] According to Plaintiffs, the alleged circumstances surrounding the Self-Tender implicate the directors' fiduciary duties which are "[u]nquestionably" covered by the internal affairs doctrine.[61]

On the other hand, the Defendants argue that the Offer to Purchase is not an internal corporate affair because "[t]here is nothing 'peculiar' about a corporation buying stock and paying for it."[62] In making this argument, the Company relies on the Delaware Supreme Court's language in *McDermott* noting that "[c]orporations and individuals alike enter contracts, commit torts, and deal in personal and real

[59] *McDermott*, 531 A.2d at 217 (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987)).
[60] Pls.' AB 20.
[61] *Id.*
[62] Defs.' RB 4.

property."[63] With respect to these types of activities, simply put, "[t]he internal affairs doctrine has no applicability in these situations."[64]

I conclude that I need not invoke the internal affairs doctrine nor conduct a further choice-of-law analysis[65] because there is no true conflict between what is required to state a claim for breach of contract under Michigan law and Delaware law.[66]

2. Application of Delaware Law to the Breach of Contract Claim

Because there is no conflict between Michigan and Delaware law regarding breach of contract, I will apply Delaware law to Plaintiffs' claim that the Company breached the contract that effectuated the Self-Tender. To state a claim for breach of contract under Delaware law, a plaintiff must allege "1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff."[67] Contracts, by their very nature, are an exchange of promises.[68] A promise is "[t]he manifestation of an intention to act or refrain from acting in a

[63] *McDermott*, 531 A.2d at 214.
[64] *Id.* at 215.
[65] *See DynCorp Intern., Inc.*, 8 A.3d at 1161 (internal quotation marks omitted) (explaining that where there is no true conflict, "the Court should avoid the choice-of-law analysis altogether.").
[66] *Compare Miller-Davis Co. v. Ahrens Const., Inc.*, 848 N.W.2d 95, 104 (Mich. 2014) ("A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach."), *with VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003) ("[T]o state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff.").
[67] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).
[68] *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *9 (Del. Ch. Jan. 4, 2023).

specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made[.]"[69] Where "a promise creates a legal duty to act, [ ] failure to fulfill that promise will result in a breach of contract."[70]

Plaintiffs allege that the Company breached the Offer to Purchase by allegedly making false or misleading representations therein. In support of this argument, Plaintiffs rely on language in the letter used to communicate the Offer to Purchase to stockholders.[71] The relevant language relied upon in the transmittal letter is titled, "No Representations," and states:

> WE HAVE NOT AUTHORIZED ANY PERSON TO MAKE ANY RECOMMENDATION ON OUR BEHALF AS TO WHETHER YOU SHOULD TENDER OR NOT TENDER YOUR SHARES IN OUR OFFER. **WE HAVE NOT AUTHORIZED ANY PERSON TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATION IN CONNECTION WITH OUR OFFER OTHER THAN THOSE CONTAINED IN THE OFFER TO PURCHASE OR IN THE LETTER OF TRANSMITTAL**. ANY RECOMMENDATION OR ANY SUCH INFORMATION OR REPRESENTATION MADE BY ANYONE ELSE MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY THE COMPANY, ITS OFFICERS AND/OR DIRECTORS.[72]

Plaintiffs argue that, upon acceptance of the Offer to Purchase, the No Representations clause was incorporated as part of the contract.[73] Therefore,

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[69] *Promise*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[70] *Cantor Fitzgerald, L.P.*, 2023 WL 106924, at *9.
[71] Pls.' AB 24–25.
[72] Offer to Purchase at unnumbered p. 2 (emphasis added).
[73] Pls.' AB 24.

according to Plaintiffs, the alleged 18 deficiencies identified by Plaintiffs in the Offer to Purchase are breaches of the No Representations clause.[74]

The Company responds to Plaintiffs' contention by arguing that the No Representations clause does not constitute a contractual obligation, so any alleged omissions or misstatements do not amount to breaches of the Offer to Purchase.[75] I agree. Even when viewed in the light most favorable to Plaintiffs, as I must under Rule 12(b)(6), the No Representations clause contains no commitment from the Company that it intended "to act or refrain from acting in a specified manner[.]"[76] Rather, the No Representations clause on its face is a *disclaimer* by the Company with respect to the accuracy of information stockholders may receive from unauthorized third parties and the resulting consequences stockholders may face if they were to choose to rely upon information not disseminated by the Company itself. The Company's alleged failure to make adequate disclosures does not "breach" the disclaimer contained in the No Representations clause. Only by importing a fiduciary duty to make disclosures into the contract may a breach be said to exist here—such duties apply to the fiduciaries who drove the transaction, but not to the Company, and the TAC does not allege that the Company itself participated

[74] *Id.*
[75] Defs.' RB 23–24.
[76] *Promise*, BLACK'S LAW DICTIONARY (11th ed. 2019).

in fraud. There is simply no express contractual promise that was breached by the Company, under the facts alleged.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

In the alternative to the breach of contract claim, Plaintiffs allege that the alleged disclosure deficiencies that "provid[ed] materially inaccurate and incomplete disclosures" constitute a breach of the implied covenant of good faith and fair dealing.[77]

The parties dispute whether there is a true conflict between Michigan and Delaware law with respect to whether Michigan even recognizes common law claims for breach of the implied covenant of good faith and fair dealing.[78] To the extent that Michigan and Delaware differ in their recognition of a legally cognizable claim for breach of the implied covenant, I still need not make a choice of law analysis. That is because, even if I were to apply Delaware law, which is friendlier to the non-moving Plaintiffs since Delaware *does* recognize such a claim, Plaintiffs have failed to allege facts sufficient to state a claim. Since the outcome will be the same under the law of either jurisdiction, I will apply the more plaintiff-friendly standard under Delaware law.

[77] TAC ¶ 106.

[78] *See* Defs.' OB 18, 37 (citing *Westrick v. Jeglic*, 2010 WL 2793556, at *7 (Mich. Ct. App. July 15, 2010)); Pls.' AB 27–28 (collecting Michigan cases in support of recognizing a claim for breach of the implied covenant); Defs.' RB 25–27 (collecting Michigan cases denying existence of claim for breach of the implied covenant).

To state a claim for a breach of the implied covenant of good faith and fair dealing under Delaware law, a "plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[79] The party requesting the invocation of the implied covenant must "'prove[] that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonable expected.'"[80] Before applying the implied covenant of good faith and fair dealing, the Court must first "ask[] what the parties themselves would have agreed to 'had they considered the issue in their original bargaining positions at the time of contracting.'"[81] If the implied covenant is applicable, "any implied terms must address 'developments or contractual gaps that the asserting party pleads neither party anticipated.'"[82] Therefore, the contract must be "silent as to the subject at issue" to apply the implied covenant.[83]

Plaintiffs assert that the alleged omissions and misrepresentations that they have identified in the Offer to Purchase constitute breaches of the implied covenant of good faith and fair dealing because the Offer to Purchase expressly stated that it

[79] *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).
[80] *Miller v. HCP & Co.*, 2018 WL 656378, at *9 (Del. Ch. Feb. 1, 2018) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)).
[81] *Id.* (quoting *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013)).
[82] *Id.* (quoting *Nemec*, 991 A.2d at 1125).
[83] *Id.*

"contain[ed] important information about [the] offer."[84] As a result, Plaintiffs request that the Court read into the Offer to Purchase representations and warranties that the information contained within the Offer to Purchase was complete and accurate.[85] On the other hand, the Company contends that Plaintiffs fail to allege that the Company would have agreed to include the omitted details as requested by Plaintiffs.[86] The Company further argues that the Offer to Purchase is not silent on the subjects Plaintiffs seek more information about.[87]

Before the Court will venture to read terms into a contract under the implied covenant, the Court must first be satisfied that there is a contractual gap that neither party anticipated at the time of contracting.[88] Here, there was a fiduciary duty to make true and material disclosures on the part of the Controllers. That does not impose the same duty *on the Company* under the guise of the implied covenant. While the Offer to Purchase stated that it contained important information regarding the offer contained therein, that statement does not purport to guarantee the completeness of that information. To the extent there is a duty to fully disclose information when requesting stockholder action, that duty arises from a fiduciary relationship. I have already considered and dismissed Plaintiffs' breach of fiduciary

[84] TAC ¶ 106.
[85] Pls.' AB 26.
[86] Defs.' OB 37–38.
[87] *Id.* at 38.
[88] *See HCP & Co.*, 2018 WL 656378, at *9.

duty claim against the Company because "a corporation does not owe fiduciary duties to its stockholders."[89]

As I noted in *Buttonwood I*, to the extent the internal affairs doctrine applies to Plaintiffs' claims against the Company, such application means that "'any disclosure duty owed by *the corporation* to its shareholders must be predicated upon a theory of legal or equitable fraud.'"[90] Even under Rule 12(b)(6)'s plaintiff-friendly inferences, Plaintiffs have failed to allege either legal or equitable fraud and have further failed to satisfy their burden in proving that there exists an unanticipated contractual gap that requires invocation of the implied covenant of good faith and fair dealing.

Therefore, Defendants' motion to dismiss Count II is granted.[91]

B. Count VI: Unjust Enrichment

In the TAC, Plaintiffs also include a claim for unjust enrichment against the Controlling Stockholders based upon the transfer of wealth from tendering stockholders at an allegedly less-than-fair value to the controlling Polk family, who were able to increase their percentage ownership as a result of the Self-Tender.[92]

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[89] *Buttonwood I*, 2014 WL 3954987, at *4–5s.
[90] *Id.* at *5 (quoting *In re Dataproducts Corp. S'holders Litig.*, 1991 WL 165301, at *6 (Del. Ch. Aug. 22, 1991)) (emphasis added).
[91] Since Count II is dismissed, there is no need for me to reach the issue of whether Count II relates back under Court of Chancery Rule 15(c).
[92] TAC ¶¶ 113–17.

1. Choice of Law

The parties dispute which state's substantive law applies to Count VI. Defendants advocate for the application of Michigan law, while Plaintiffs argue that Delaware law applies. As explained above in Section II.A.1.a, before the Court will conduct a choice-of-law analysis, the Court must first determine whether a true conflict exists between the laws of the proposed jurisdictions. Where there is no true conflict, the Court will "avoid the choice-of-law analysis altogether."[93] Thus, I begin my analysis by determining whether an actual conflict exists between Michigan and Delaware law.

Defendants argue that the laws conflict because (1) Delaware's law has more elements than Michigan's and (2) Michigan, unlike Delaware, requires the plaintiff asserting a claim for unjust enrichment to *directly* transfer the enrichment to the defendant.[94] Plaintiffs first argue that the difference in the number of elements is a red herring that does not actually indicate a true conflict between the laws.[95] With respect to Defendants' second contention, Plaintiffs assert that, under Michigan law, the enrichment does not need to be exchanged *directly* between plaintiff and defendant, rather there needs only to be a relationship between plaintiff's

[93] *DynCorp Intern., Inc.*, 8 A.3d at 1161 (internal quotation marks omitted).
[94] Defs.' OB 40–41.
[95] Pls.' AB 45–46.

impoverishment and defendant's enrichment, which is consistent with the doctrine in Delaware.[96] I address each contention in turn.

a. The Enumeration of the Elements for an Unjust Enrichment Claim

The elements required to state a claim for unjust enrichment under Delaware law are often enumerated as: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[97] The latter element exists solely insofar as Chancery jurisdiction is sought; only the first four elements are necessary to plead the claim.[98] In comparison, Michigan law requires a plaintiff asserting a claim for unjust enrichment to "demonstrate: (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party."[99] While courts in Michigan and Delaware enumerate the elements required to state a claim for unjust enrichment differently, Plaintiff has failed to adequately explain, nor can I deduce, that a substantive difference exists in the allegations necessary to the tort

[96] *Id.* at 46–47.
[97] *Nemec*, 991 A.2d at 1130.
[98] *See Garfield ex rel. ODP Corp. v. Allen*, 277 A.3d 296, 347–51 (Del. Ch. 2022) (explaining the evolution of the elements of a claim for unjust enrichment in the Court of Chancery and concluding that "[o]utside a dispute over jurisdiction [ ], it is not necessary for a plaintiff to plead or later prove the absence of an adequate remedy at law.").
[99] *Karaus v. Bank of New York Mellon*, 831 N.W.2d 897, 906 (Mich. Ct. App. 2012).

in Michigan and in Delaware. I conclude that the difference in the enumeration of the elements is insufficient to rise to the level of a true conflict between the laws.

b. Direct Benefit v. Indirect Benefit

Defendants interpret Michigan law, which states that the benefit must come "*from* the complaining party," as requiring that the benefit pass *directly* from the complaining party to the enriched party, thereby eliminating claims for unjust enrichment where the enriched party used a third party to effectuate that transfer.[100] In support of their interpretation of Michigan law, Defendants primarily rely on *Smith v. Glenmark Generics, Inc., USA*, a case involving an unjust enrichment claim brought by a consumer against a wholesale distributor of a product.[101] The consumer, however, had purchased the product at a pharmacy and not directly from the wholesale distributor.[102] Thus, the Michigan court concluded the consumer could not establish that wholesale distributor directly benefited from the consumer's purchase.[103]

In response, Plaintiffs contend that Michigan, like Delaware, merely requires a relationship between the impoverishment and the enrichment. I agree. Michigan's Supreme Court has recognized a claim for unjust enrichment where a plaintiff

[100] Defs.' OB 41.
[101] 2014 WL 4087968, at *1 (Mich. Ct. App. Aug. 19, 2004).
[102] *Id.*
[103] *Id.*

indirectly conferred a benefit to a defendant.[104] In *Kammer*, a supplier sued a school district after the general contractor failed to make payments owed to the supplier.[105] While the supplier and the school district were not contractual counterparties, the Michigan Supreme Court held that equity demanded the supplier's claim for unjust enrichment against the school district go forward because the school district indirectly received a benefit while assuring the supplier that the general contractor, the party who the supplier directly benefited, would compensate the supplier for the benefit conferred.[106]

Defendants contend that *Kammer* and its progeny comport with Defendants' preferred interpretation of Michigan law because the United States District Court for the Eastern District of Michigan declined to apply *Kammer*'s holding in a subsequent case.[107] Similar to *Glenmark Generics*, the District Court determined that a consumer-plaintiff could not pursue an unjust enrichment claim against a distant manufacturer because, in part, there were no allegations of direct interactions between the consumer and manufacturer, thereby making *Kammer* inapplicable.[108]

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[104] *See Kammer Asphalt Paving Co., Inc. v. East China Twp. Schs.*, 504 N.W.2d 635, 640–41 (Mich. 1993).
[105] *Id.* at 637–38.
[106] *Id.* at 640–41.
[107] *See* Defs.' RB 28 n.15 (citing *Storey v. Attends Healthcare Prods.*, 2016 WL 3125210 (E.D. Mich. June 3, 2016)).
[108] *Storey*, 2016 WL 3125210, at *13.

The comparisons Defendants draw between Michigan and Delaware law pertaining to claims for unjust enrichment are distinctions without a difference. As recognized by both states, the purpose of a claim for unjust enrichment is to prevent a party from unjustly enriching or profiting herself at the expense of another.[109] Both states require that the complaining party demonstrate it suffered an impoverishment that is *related* to an inequitably obtained enrichment held by the enriched party and that the continued ownership by the enriched party is inequitable. Like Delaware, Michigan disallows unjust enrichment claims where the relationship between the impoverishment and enrichment is too attenuated.[110] However, both states permit claims for unjust enrichment where the enriched party interacts with the complaining party in a manner that induces the complaining party to continue to confer a benefit, even indirectly, to the enriched party.[111]

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[109] *Compare Wright v. Genesee County*, 934 N.W.2d 805, 809 (Mich. 2019) ("Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another"), *with Garfield*, 277 A.3d at 343–45 (explaining that the purpose of unjust enrichment is to ensure a defendant does not benefit through her own wrongdoing).

[110] *Compare Glenmark Generics*, 2014 WL 4087968, at *1 (opinion of Michigan Court of Appeals affirming dismissal of plaintiff's unjust enrichment claim on the grounds that the alleged benefit received by defendant was too attenuated where "[d]efendant did not sell the contraceptives directly to plaintiff, and plaintiff admitted that she did not purchase the contraceptives from defendant, but rather from a pharmacy."), *with Vichi v. Koninklijke Philips Elecs.*, 62 A.3d 26, 61 (Del. Ch. 2012) (explaining that "[t]he implicit purpose of the 'direct relationship' requirement is to ensure that a court accurately can reverse the unjust retention of a benefit to the loss of another. Where the relationship between the impoverishment and enrichment is attenuated or speculative, the court has no such assurance.").

[111] *Compare Kammer*, 504 N.W.2d at 640–41 (reversing dismissal of plaintiff's unjust enrichment claim where defendant knew the third-party was failing, and would be unable, to pay plaintiff for work done on defendant's behalf, but repeatedly assured plaintiff that it would be compensated by the third-party), *with Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 728–29 (Del. Ch. 2023)

I conclude that no true conflict exists between Michigan and Delaware law as it relates to claims for unjust enrichment. Therefore, I will apply Delaware law in determining whether Plaintiffs have sufficiently stated a claim for unjust enrichment to survive Defendants' motion to dismiss.

2. Relation Back

Before turning to the substance of Plaintiffs' unjust enrichment claim, I must consider next the procedural hurdle of whether Plaintiffs' claim is untimely. Defendants contend that Plaintiffs' unjust enrichment claim is barred by the statute of limitations and cannot be saved by relation back to the original filing date of the initial complaint filed in this action.[112]

This Court of equity applies the applicable legal statute of limitations, by analogy, under the doctrine of laches. Under Delaware law, the statute of limitations for unjust enrichment claims is three years.[113] Plaintiffs' claim rests on the allegedly unjust enrichment the Controlling Stockholders received as a result of minority stockholders choosing to tender their stock in the Self-Tender, which expired on May 16, 2011.[114] Accordingly, the statute of limitations required Plaintiffs assert

(concluding that providing inadequate disclosures to stockholders to ensure completion of a transaction were sufficient to establish a relationship between the directors' enrichment and the stockholders' impoverishment).

[112] Defs.' OB 39–40, 43.

[113] *Vichi v. Koninklijke Philips Elecs.*, 2009 WL 4345724, at *15 (Del. Ch. Dec. 1, 2009) (citing 10 *Del C.* § 8106(a)).

[114] TAC ¶¶ 69, 105.

this unjust enrichment claim by May 2014.[115] The original complaint alleging breaches of duty against these movants was filed in January of 2014.[116] Given that nearly ten years have now passed, unless Plaintiffs' claim relates back under Court of Chancery Rule 15(c),[117] Plaintiffs are time-barred from asserting such a claim.

Court of Chancery Rule 15(c) dictates when an amended pleading will relate back to the original pleading's filing date.[118] The purpose of Rule 15(c) "is to permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced."[119] Rule 15(c)(2) is the pertinent portion with respect to whether or not Count VI relates back to the original pleading.[120] An amendment to a pleading can relate back to the date of the original pleading under Rule 15(c)(2) if "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[.]"[121] When determining whether Rule 15(c)(2)

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[115] Even if the unjust enrichment claim did not accrue until the enrichment was monetized—that is, at the time of the merger in 2013—the statute has long since run.
[116] *See* Original Compl.
[117] *See Pivotal Payments Direct Corp.*, 2015 WL 11120934, at *3 (explaining that, under Delaware law, the forum state's statute of limitations is applied where a contract's choice-of-law provision does not expressly adopt another forum's laws for procedural matters).
[118] Ct. Ch. R. 15(c).
[119] *Chaplake Hldgs., LTD v. Chrysler Corp.*, 766 A.2d 1, 7 (Del. 2001) (internal quotation marks omitted).
[120] Defendants assert that Rule 15(c)(3) also relates to Count VI, however, that subsection pertains to "chang[ing] a party or the name of a party against whom a claim is asserted[.]" Ct. Ch. R. 15(c)(3); *see* Defs.' OB 44. Count VI asserts a new claim against the Controlling Stockholders who have been parties to this action since its inception in 2014. *See* Original Compl. Therefore, Rule 15(c)(3) is inapplicable to whether Count VI relates back.
[121] Ct. Ch. R. 15(c)(2).

allows an amendment to relate back, this Court "focus[es] upon whether the amendment arose out of the specific conduct of the Defendant alleged in the original complaint."[122] "The determinative factor is whether a defendant should have had notice from the original pleadings that the plaintiff's new claim might be asserted against him."[123]

Plaintiffs contend that Count VI arises from the same factual allegations asserted in their original complaint filed in 2014 such that Defendants were on notice of the potential claim and, therefore, Count VI relates back.[124] I agree. Plaintiffs have been seeking disgorgement of inequitable benefits by Defendants, under a theory of breach of duty, from the time the initial complaint was filed in 2014.[125] Defendants, however, contend they had no reason to expect the unjust enrichment claim because, according to Defendants, the unjust enrichment claim is governed by Michigan law and Plaintiffs previously limited their claims solely to claims under Delaware law.[126] Since I have already concluded that Delaware law applies to Plaintiffs' unjust enrichment claim[127] and that Michigan law would lead to the same outcome, there is no prejudice accruing from applying the relation back doctrine

[122] *Rogers v. iTy Labs Corp.*, 2022 WL 985536, at *7 (Del. Ch. Mar. 31, 2022) (internal quotation marks omitted).
[123] *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1065 (Del. Ch. 1989).
[124] Pls.' AB 48–49.
[125] *See* Original Compl. ¶ 7.
[126] Defs.' OB 43–44.
[127] *See* Section II.B.1.

under the rubric of Rule 15(c). Because Defendants point to no other prejudice, I find that Count VI relates back to the date of the original pleading and, therefore, is not time-barred by the statute of limitations.

3. Application of Delaware Law to the Unjust Enrichment Claim

As laid out above, to state a claim for unjust enrichment under Delaware law, a plaintiff must adequately plead: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, [and] (4) the absence of justification. . . ."[128] Defendants' arguments focus on Plaintiffs' failure to state a claim under Michigan law.[129] I have already concluded that there is no true conflict between Michigan and Delaware law.[130] Defendants' arguments that Plaintiffs' failed to state a claim under Delaware substantive law are entirely relegated to a footnote.[131] "[F]ailure to raise a legal issue in the above-the-line text of a brief generally constitutes waiver of that issue."[132] As such, I need only consider Defendants' above-the-line argument that Plaintiffs failed to plead an adequate

[128] *Nemec*, 991 A.2d at 1130.
[129] Defs.' OB 44–47; Defs.' RB 28–29.
[130] *See* Section II.B.1.
[131] *See* Defs.' OB 47 n.25. Defendants did not address whether Plaintiffs stated a claim for unjust enrichment under Delaware substantive law above-the-line nor in a footnote in their reply brief. *See* Defs.' RB 28–29.
[132] *In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293, at *20 (Del. Ch. Mar. 28, 2018) (citing *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL 6820362, at *3 n.15 (Del. Ch. Dec. 22, 2011)).

relationship between the impoverishment and enrichment, which is equivalent to the third element of an unjust enrichment claim under Delaware substantive law.[133]

At the motion to dismiss stage, I am required to "accept as true all of the well-pleaded allegations of fact and draw reasonable inferences in the plaintiff's favor."[134] The Third Amended Complaint alleges that the Controlling Stockholders were unjustly enriched through their disloyal conduct underlying Plaintiffs' breach of fiduciary duty claim.[135] That conduct impoverished Plaintiffs, who were induced to tender their shares for inadequate compensation, allegedly because of materially misleading disclosures in the Offer to Purchase, the preparation of which the Controlling Stockholders allegedly participated in.[136] Through the materially deficient disclosures, the Controlling Stockholders enticed other stockholders to tender their shares thereby increasing the Controlling Stockholders' equity in the Company and ensuring the Controlling Stockholders received a larger portion of the

[133] Even if I were to examine Defendant's substantive argument about Delaware unjust enrichment law, I find it entirely unpersuasive. Defendants argue that the enrichment must be the increased equity Defendants achieved by the Self-Tender, which is offset by the depletion of corporate funds represented by disbursement of the purchase price. They allege that these are a wash, leading to no net enrichment. *See* Defs.' OB 47 n.25. But Plaintiffs' argument is that the price paid was too low, a windfall to Defendants facilitated by their breaches of duty—the difference between the purchase price in the Self-Tender and the sales price in the merger represents the enrichment. *See* TAC ¶¶ 113–17. Defendants also argue that the enrichment is too remote from the wrong to support the claim, an argument that should be addressed on a record, not at the pleading stage. *See* Defs.' OB 47 n.25.
[134] *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[135] *See* TAC ¶¶ 86–102.
[136] *See id.* ¶¶ 114–17.

sales profits from the IHS transaction.[137] Plaintiffs request that the Controlling Stockholders disgorge "the amount [by] which the Self-Tender price was less than the proportionate share of the valuation of [the Company] at the time of the Self-Tender and the per share value of the IHS merger."[138]

On the other hand, Defendants contend that the relationship between the Self-Tender in 2011 and the benefits the Controlling Stockholders received from special dividends in 2012 and the sale of the Company in 2013 is too attenuated to support a claim, because Plaintiffs have not adequately pled that the Controlling Stockholders were aware in 2011 of these future developments.[139] I disagree. Plaintiffs adequately allege that Defendants conducted extensive preparation for potential transactions for the Company, prior to allegedly misleading the minority stockholders into tendering their shares at a less-than-fair value.[140] Plaintiffs' theory of the case is that, given Defendants' extensive preparation for these transactions, Defendants knew the true value the Company could obtain if the Company was sold. Rather than disclosing this information and Defendants' intention to consider a sale of the Company, Defendants conducted a Self-Tender that was accompanied by an Offer to Purchase replete with misrepresentations or omissions. According to

[137] *Id.* ¶ 116.
[138] *Id.*
[139] Defs.' OB 47 n.25.
[140] *See, e.g.*, TAC ¶¶ 40–43, 44–50, 60–62, 65, 71–72, 77.

Plaintiffs' theory, the Controlling Stockholders caused the Company to issue this materially deficient Offer to Purchase to increase the Controlling Stockholders' equity in the Company, thereby increasing the profit realized by the Controlling Stockholders upon the sale of the Company. It is reasonable (if not exactly compelling) to infer at this stage that Defendants were aware of the true value of the Company that they could receive if they were to sell the Company in the near future. Therefore, the Third Amended Complaint pleads adequate facts to establish a relationship between the impoverishment suffered by Plaintiffs and the enrichment conferred onto the Controlling Stockholders. The attenuated relationship between the impoverishment of the Self-Tender and the enrichment demonstrated by a sale of the Company two years later, is a burden Plaintiffs must overcome in their fiduciary claim, as well as the unjust enrichment claim. But that issue should be addressed on a record; the pleadings are adequate at this stage to state a claim.

Defendants also advocate for dismissal of Count VI because the unjust enrichment claim is "destructively duplicative" of Plaintiffs' claim for breach of fiduciary duty against the Individual Defendants.[141] In part, Defendants assert that the Court should dismiss the unjust enrichment claim in favor of the surviving breach of fiduciary duty claim because the two claims are based on the same underlying

[141] Defs.' OB 48–52; Defs.' RB 30.

allegations.[142] This Court, however, is not required to dismiss an unjust enrichment claim at the motion-to-dismiss stage simply because the allegations underlying it parallel those underlying the breach of fiduciary duty claim.[143] While Plaintiffs would not be able to recover under both theories, "[o]ne can imagine. . . factual circumstances in which the proofs for a breach of fiduciary duty claim and an unjust enrichment claim are not identical, so there is no bar to bringing both claims against" the Controlling Stockholders.[144] Therefore, Defendants' motion to dismiss Count VI is denied.

C. Defendants' Motion to Dismiss "Other Elements" in the TAC

Defendants request that this Court dismiss "other elements" of the Third Amended Complaint.[145] The loci for Defendants' motion are new factual allegations about the adequacy of the Offer to Purchase and the disclosures therein regarding the steps the Company took in considering a transaction to reduce the number of stockholders to a point it would be eligible for S-Corp. status.[146] It is not my practice to "dismiss" allegations in a complaint, nor have Defendants stated a mechanism for

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[142] Defs.' OB 50–52.
[143] *See, e.g., Calma ex rel. Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 591–92 (Del. Ch. 2015) (denying dismissal of an unjust enrichment claim where the breach of fiduciary claim also survived the motion to dismiss on the grounds "that it is reasonably conceivable that [p]laintiff could recover under" the unjust enrichment claim).
[144] *MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *25 n.147 (Del. Ch. May 5, 2010); *see also GigAcquisitions3*, 288 A.3d at 729 (denying dismissal of an unjust enrichment claim that was based on the same allegations underlying the breach of fiduciary duty claim).
[145] Defs.' OB 52–54.
[146] *Id.* at 52.

such nor the counts to which such a "dismissal" would obtain. I interpret Defendants' request as a motion to strike under Court of Chancery Rule 12(f), therefore.

Under Rule 12(f), the moving party must allege that the offending pleading contains "any insufficient defense or any redundant, impertinent, or scandalous matter."[147] Motions to strike "are granted sparingly and only when clearly warranted with all doubt being resolved in the nonmoving party's favor."[148] When deciding whether to grant such a motion, the Court considers: "(1) whether the challenged averments are relevant to an issue in the case and (2) whether they are unduly prejudicial."[149]

Defendants quibble with the factual bases of the "other elements" they seek to have stricken from the Third Amended Complaint.[150] However, Defendants failed to allege that the "other elements" are prejudicial in any manner set forth in Rule 12(f), nor have Defendants adequately contended that these "other elements" are irrelevant to Plaintiffs' contention that disclosures in the Offer to Purchase were inadequate. Moreover, Defendants do not identify the specific allegations they seek

[147] Ct. Ch. R. 12(f).
[148] *Salem Church (Del.) Assocs. v. New Castle County*, 2004 WL 1087341, at *2 (Del. Ch. May 6, 2004).
[149] *Id.* (quoting *Shaffer v. Davis*, 1990 WL 81892, at *4 (Del. Super. June 12, 1990)).
[150] *See* Defs.' OB 52–54.

to dismiss or have stricken. Therefore, Defendants' motion to dismiss "other elements" of the Third Amended Complaint is denied.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Count II is GRANTED and Defendants' motion to dismiss Count VI and "other elements" of the Third Amended Complaint is DENIED. The parties should submit a form of order consistent with this memorandum opinion.