IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WORLD ENERGY VENTURES, LLC,	)	
	)	
Plaintiff and Counterclaim-Defendant	)	
	)	
v.	)	C.A. No. N15C-03-241 WCC
	)	
NORTHWIND GULF COAST LLC, NORTHWIND ENERGY PARTNERS, LLC,	)	
	)	
Defendants and Counterclaim-Plaintiffs.	)	

Submitted: July 28, 2015
Decided: November 2, 2015

Plaintiff and Counterclaim-Defendant's Motion for Partial Final Judgment and Motion to Dismiss Counterclaims GRANTED in Part and DENIED in Part

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court are Plaintiff and Counterclaim Defendant World Energy Ventures LLC's ("WEV") Motion for Partial Final Judgment on the Pleadings and Motion to Dismiss Defendants and Counterclaim Plaintiffs Northwind Gulf Coast LLC and Northwind Energy Partners, LLC's (collectively, "Northwind") counterclaims.

I. FACTS

This case arises from an Investment Agreement ("Agreement") entered into by the WEV and Northwind on November 20, 2013. The parties' relationship first began in August 2013, when Northwind was seeking additional capital for its project, the Heritage Program-AMI. The Heritage Program is aimed at developing hydrocarbon assets in areas of mutual interest ("AMI") located in Louisiana. After extensive negotiations, the parties executed the Agreement, whereby WEV agreed to loan Northwind Gulf Coast $7.5 million for "the purchase and/or renewal and development of Hydrocarbon Interests" within the fifteen fields comprising the AMI. [1] The Agreement designated Northwind Energy Partners as guarantor on the loan.[2]

[1] Pl. Compl., Ex. A [hereinafter Investment Agreement], at 1-2. The Agreement defines "Hydrocarbons" to include "crude oil, natural gas, casinghead gas, condensate, distillate, natural gas liquids and all other liquid or gaseous hydrocarbons, together with all products extracted, separated or processed therefrom, and all other minerals produced in association with these substances" and "Hydrocarbon Interests" as:

> (a) mineral servitudes and leases affecting, relating to or covering any Hydrocarbons and the leasehold interests and estates in the nature of working or operating interests under such leases, as well as overriding royalties, net profits interests, production payments,

The $7.5 million was funded through two convertible promissory notes ("Loan" or "Notes"). The first note was executed on November 20, 2013 in the amount of $3.25 million ("$3.25M Note"). The remaining $4.25 million was funded through a second note executed on December 18, 2013 ("$4.25M Note"). Northwind's use of the proceeds was limited by the Agreement to specific development purposes.[3] The Agreement also required Northwind to deliver monthly reports to WEV "summarizing its leasing and development activities within the AMI," and to "consider in good faith" WEV's recommendations and

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> carried interests, rights of recoupment and other interests in, under or relating to such leases, (b) fee interests in Hydrocarbons, (c) royalty interests in Hydrocarbons, (d) any other interest in Hydrocarbons, (e) any economic or contractual rights, options or interests in and to any of the foregoing, including any sublease, farmout or farmin agreement or production payment affecting any interest or estate in Hydrocarbons, and (f) any and all rights and interests attributable or allocable thereto by virtue of any pooling, unitization, communitization, production sharing or similar agreement, order or declaration.

Id.

[2] *See id*. § 3.1 ("If at any time Northwind fails, neglects or refuses to timely or fully pay or perform any portion of the Obligation as expressly provided in the terms and conditions of this Agreement or the Ancillary Documents, then upon the receipt of written notice from Investor specifying the failure, Guarantor shall perform, or cause to be performed, or pay, or cause to be paid, as applicable such portion of the Obligation to the extent required pursuant to the terms and conditions of this Agreement and the Ancillary Documents.").

[3] *See id*. § 6.2. Northwind was permitted to use the proceeds for the following:

> (a) to provide capital for the purchase and/or renewals of Hydrocarbon Interests within the AMI, including the payment of any lease bonuses, lease rentals, lease option payments and land-related and title review costs and expenses, including contract landman costs, title examiner fees and expenses, attorney fees and expenses and filing fees; (b) payment or reimbursement for seismic, geological, geophysical, engineering costs and other necessary costs for drilling, completion and other operational development activities with respect to any Hydrocarbon Interest acquired by a Party or its Affiliate within the AMI; and (c) payment of interest in accordance with the terms of the Notes; provided, however, that a portion of proceeds may be used to reimburse third parties for similar costs incurred prior to the date of the respective Note, with respect to which Northwind has delivered invoices to Investor.

input.[4] Both Notes were to be repaid within one year plus 5% interest,[5] and WEV had the option to convert the unpaid balance on the Notes into equity at any time.[6]

In return for the Loan, the Agreement granted WEV: (1) an undivided 2% overriding royalty interest ("ORRI") in any hydrocarbon interests acquired by Northwind in the AMI after execution of the Agreement, (2) an undivided 1% ORRI in hydrocarbon interests acquired by Northwind within the Napoleonville Field, [7] (3) an undivided 25% of Northwind's carried interest in any hydrocarbon interests acquired in the Napoleonville Field,[8] (4) a right of first refusal to acquire additional hydrocarbon interests within the AMI,[9] and (5) an option triggered upon Northwind's completion of a second well in the Napoleonville Field, "to enter into a joint venture with Northwind to develop Hydrocarbon Interests within the AMI on the terms set forth in the Joint Venture [Memorandum of Understanding]."[10] In the event WEV exercised the option, the parties agreed "to negotiate in good faith to enter in definitive documentation reflecting the terms of the Joint Venture MOU

[4] *See id*. § 6.1(e).
[5] *See id.*, Ex. G-1, G-2.
[6] *See id*. § 6.3 ("As provided in each of the Notes, at anytime, Investor shall have the option, but not the obligation, exercisable at any time, to convert the then unpaid balance on the applicable Note, together with unpaid interest accrued but unpaid at such time, into equity in, at Investor's option, either Northwind, its designees, Affiliates, related companies or any other company or entity in which Northwind owns an interest and which is developing Hydrocarbon Interests within the AMI…").
[7] *See id.* § 6.1(a).
[8] *See id*. § 6.1 (b).
[9] *See id.* § 6.1(c).
[10] *Id*. Art. VII, Ex. E ("World Energy shall have the option, but not the obligation, to join with Northwind as equity members of a NewCo to develop Louisiana and Texas onshore fields under the Northwind Gulf Coast Heritage Program.").

(['MOU']).”[11] Under the MOU, the parties would become equity members of a new entity (JV NewCo) owned 80% by WEV and 20% Northwind.[12] The Agreement additionally provides that JV NewCo would become the sole vehicle through which Northwind and WEV would acquire hydrocarbon interests within the AMI.[13]

The Loan and the Agreement relate to the first phase of financing for the Heritage Program.[14] The objectives established for this preliminary phase included Northwind's drilling of two "initial wells" in the Napoleonville Field and acquisition of leases throughout the Napoleonville, Sorrento, and Iberia fields of the AMI.[15] Northwind began drilling the first well in February 2014.[16] Five months later, in June 2014, Northwind reported to WEV that it was "reviewing possible treatments to the [first] Well in an attempt to establish commercial production."[17] Northwind further relayed that it would be "imprudent to begin drilling a second" well until testing and analysis on the first was complete.[18]

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[11] *Id*.
[12] *See id.*
[13] *See id.* § 6.1(d) (providing that if WEV exercised the option "neither Northwind nor Investor, nor any of their respective Affiliates, shall acquire any Hydrocarbon Interests within the AMI other than through JV NewCo").
[14] Defs. Am. Countercls., ¶¶ 13,16.
[15] *Id. See also* Investment Agreement § 6.2 & Ex. E.
[16] *See* Defs. Am. Countercls., ¶ 14.
[17] *See id.*
[18] *See id.*

According to Northwind, "WEV understood that the cash flow from two wells could take several years to generate $7.5 million to pay off the Notes…in just one year" and that repayment " would require further development and investment of approximately $35 million."[19] This $35 million target represents a "second phase" of development for the Heritage Program and is not expressly discussed in the Agreement.[20] Although, Northwind's Amended Counterclaims cite letters, e-mails, memoranda, and other communications exchanged by the parties which would indicate they contemplated the possibility of continuing their relationship and expanding Heritage Program.[21] To solicit additional investors, Northwind "prepared budgets, term sheets and presentation materials," which were made available to WEV."[22] According to Northwind, it abandoned its fundraising efforts once "WEV represented to Northwind and NEP that [WEV] would arrange the requisite funding for the project."[23] The representations Northwind cites in its pleadings are as follows:

> [O]n February 21, 2014, Eduardo Celis, on behalf of WEV, wrote to Tom Easley of NEP and advised Easley that he was exploring a possible preferred stock investment for the Heritage Program-AMI. Northwind was informed and understood that it should not attempt to find competing sources of funding while WEV was exploring its own funding sources. WEV did not want its investment to be subordinate to the rights of other investors. [24]

[19] *See id.*¶ 13.
[20] *See id*.
[21] *See id.* ¶¶ 17-22.
[22] *See id.* ¶ 16.
[23] *See id*. ¶¶ 17-22.
[24] *Id.* ¶ 17.

> In early May, 2014, Robin French of NEP met with Celis in Mexico City to discuss a business plan to raise the $35 million …Following that meeting, on May 12, 2014, French wrote to Celis to summarize the … meeting…[and] memorialize[] the parties' understanding that $35 million was required to drill the initial twelve (12) wells on the first four (4) projects in the Sorrento, Iberia, Welsh and Hester fields …[and] the parties' discussion about forming a new entity, Aguila Energy LLC, as the vehicle to raise the necessary funds for the project. French also memorialized the following: "As per our discussions it is contemplated that [WEV] will want to put the Founding Investor Group ($35 Million) in the Aquila LLC. [WEV] may have an alternate structure, but this is what we have discussed."[25]
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> On May 19, 2014, French wrote to WEV to follow up on WEV's meetings with potential investors. In advance of those meetings, French sent revised presentation materials for WEV's upcoming investor presentations. Honoring WEV's wishes, French did not send the presentation materials to his own potential investors.[26]
>
> Representatives of WEV reported to Northwind and NEP that they had met with potential investors on May 20, and May 28, 2014.[27]

Given these discussions, Northwind "abided by WEV's wishes and did not pursue specific potential investors that they had identified."[28] It was not until October 17, 2014, weeks before the first Note was due, that "WEV's counsel told Northwind and NEP that they were free to seek or acquire third-party funding for their drilling activities in the Heritage Program-AMI."[29] According to the parties, the market

[25] *Id.* ¶ 18.
[26] *Id.* ¶ 19.
[27] *Id.* ¶ 20.
[28] *See id.* ¶¶ 19-20.
[29] *See id.* ¶ 25.

also took an unfortunate turn around this time and the price of oil dropped "from $107.95 per barrel [in June 2014] to $54.59 per barrel" by December 2014.[30]

On November 20, 2014, the $3.25M Note matured and came due. When Northwind failed to make the payment, WEV issued written notice of default to Northwind Gulf Coast, as Borrower, and NEP as Guarantor, pursuant to the Agreement.[31] Northwind similarly defaulted on the $4.25M Note when it matured and came due on December 18, 2014 and WEV again issued written notice of default. As of March 27, 2015, the total amounts owed on the Notes with interest were $3,471,868.15 and $4,523,018.84.[32]

While it is undisputed that Northwind defaulted on the Notes, questions remain as to whether WEV's conduct prevented Northwind's ability to pay the Notes as they came due. On March 27, 2015, WEV commenced the civil action from which the present motions stem. WEV's Complaint alleges breach of contract on the $3.25M Note, breach of contract on the $4.25M Note, breach of contract on guaranty for the Notes, breach of the Investment Agreement, and breach of the implied covenant of good faith and fair dealing.[33] In its Amended Answer and Counterclaims, Northwind conceded its failure to pay off the Loan [34] and asserted the following counterclaims against WEV: (1) tortious interference

[30] *Id*. ¶ 23.
[31] *See* Investment Agreement § 3.1.
[32] Pl. Mot. for Partial Final J., ¶¶ 5,7.
[33] Pl. Compl., ¶¶ 15-20.
[34] Defs. Am. Answ., ¶¶ 19, 21, 23, 30.

with prospective economic advantage, (2) tortious interference with contractual relations, (3) breach of the implied covenant of good faith and fair dealing, and (4) unjust enrichment. In response, WEV filed the instant Motion to Dismiss Northwind's Counterclaims and Motion for Partial Final Judgment on the Notes. The Court will address each motion separately below.

II. PLAINTIFF & COUNTERCLAIM DEFENDANT'S MOTION FOR PARTIAL FINAL JUDGMENT

WEV requests that the Court grant judgment on the pleadings as to Counts I-III of its Complaint, relating to breach of the Notes and guaranty, and order Northwind to repay (1) the principal and accrued interest under the $3.25M Note and the $4.25M Note, and (2) WEV's attorneys' fees and costs incurred in connection with collecting on the Notes.[35] WEV argues such judgment is appropriate because Northwind has admitted the elements necessary under Delaware law to establish a breach of contract with respect to the Notes.[36] In its Amended Answer, Northwind admitted that (1) it executed the Notes, (2) both Notes matured, and (3) neither Borrower nor Guarantor has paid the Notes or interest accumulating thereon. The parties dispute, however, whether Northwind's tortious interference and breach of implied covenant counterclaims defeat WEV's entitlement to judgment on the Notes.

[35] Pl. Mot. for Partial Final J., ¶ 6.
[36] *See id*. ¶¶ 10-11.

A. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 12(c), a party may move for partial judgment on the pleadings after the pleadings are closed but within such time as not to delay trial.[37] "The standard for granting a motion for final judgment on the pleadings is stringent." [38] The Court will grant the motion only where no material issues of fact exist and the movant is entitled to judgment as a matter of law.[39] Additionally, in reviewing a Rule 12(c) motion, the Court affords the nonmoving party "the benefit of any inferences that may fairly be drawn from its pleading."[40] Moreover, under Delaware law, "judgment on the pleadings is a proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact."[41]

Should the Court find in favor of WEV on its Rule 12(c) motion, WEV asks the Court to exercise its discretionary power to enter final judgment on the amounts outstanding on the Notes pursuant to Superior Court Civil Rule 54(b).[42] Under Rule 54(b), when multiple claims for relief are asserted in an action,

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[37] Super. Ct. Civ. R. 12(c).
[38] *Artisans' Bank v. Seaford IR, LLC*, 2010 WL 2501471, at *1 (Del. Super. June 21, 2010).
[39] *See id.*
[40] *See Gonzalez v. Apartment Cmtys. Corp.*, 2006 WL 2905724, at *1 (Del. Super. Oct. 4, 2006).
[41] *Aveta Inc. v. Bengoa*, 2008 WL 5255818, at *2 (Del. Ch. Dec. 11, 2008).
[42] *See, e.g.*, *In re Explorer Pipeline Co.*, 2001 WL 1009302, at *2 (Del. Ch. Aug. 29, 2001) ("[T]he decision to make an otherwise interlocutory order final is committed to the Court's discretion…").

whether as claims or counterclaims, the Court may "direct the entry of a final judgment upon one or more but fewer than all of the claims …only upon an express determination that there is no just reason for delay …."[43] In making this determination, "the Court must weigh the 'judicial administrative interests,' against the possibility of 'some danger of hardship or injustice which would be alleviated by immediate appeal.'"[44]

Importantly, Delaware Courts have "stressed that entry of final judgment is to be done cautiously and frugally" in light of the reality "that excessive resort to [Rule 54(b)] will increase the already sizeable burden of appellate dockets ..."[45] As a general rule, the Court will often refrain from issuing final judgment on less than all issues if there is a likelihood the Delaware Supreme Court would have to pour over "the facts and issues of the case more than once" on appellate review.[46] Therefore, any potential prejudice alleged by the movant in absence of the judgment must be *severe*.[47]

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[43] Super. Ct. Civ. R. 54(b). *See also Republic Envtl. Sys., Inc. v. RESI Acq. Corp.*, 1999 WL 464521, at *5 (Del. Super. May 28, 1999) ("Superior Court Civil Rule 54(b), modeled after its Federal counterpart, provides that when one or more claims for relief are sought in an action, whether claims or counterclaims, the Court may direct the entry of final judgment on fewer than all claims if there is no just reason for delay of such entry. Because the Delaware and Federal Rule are similar, this Court finds Federal authority on the subject persuasive.").
[44] *See Johnson v. Preferred Prof'l Ins. Co.*, 2015 WL 413608, at *2 (Del. Super. Jan. 28, 2015) (quoting *In re Tri-Star Pictures, Inc., Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989)).
[45] *Id*. at *4.
[46] *See Republic Envtl. Sys., Inc.*, 1999 WL 464521, at *6 (discussing U.S. Supreme Court's reasoning in *Curtiss-Wright*, 446 U.S. 1).
[47] *See Johnson*, 2015 WL 413608, at *2 (emphasis added).

B. DISCUSSION

The terms of both Notes provide for default when "[a]ny part of the Note or interest is not paid when due, whether by lapse of time or acceleration or otherwise."[48] In the event of default, the Notes afford WEV the option to "exercise any or all rights, powers and remedies afforded under the Note and by law, including the right to declare the unpaid balance of principal and accrued interest on this Note at once mature and payable."[49] Further, the Notes obligate Northwind "to pay all expenses, including reasonable attorneys' fees and reasonable legal expenses, incurred by [WEV] in endeavoring to collect any amounts payable [t]hereunder which are not paid when due."[50] Under the Agreement, Northwind Energy Partners, as guarantor on the Notes, "irrevocably and unconditionally guarantee[d] to [WEV] … the full and prompt payment when due of all Northwind's payment obligations under [the] Agreement."[51]

While Northwind does not dispute the terms of the Notes and admits they remain unpaid, it argues the allegations set forth in its Amended Counterclaims raise a question of fact as to whether WEV played a role in Northwind's inability to repay the amounts owed. In support of its argument, Northwind cites *Artisans' Bank v. Seaford IR, LLC*, in which the Court denied a lender's motions for

[48] Investment Agreement, Ex. G-1, G-2 (section 4(b) of both promissory notes).
[49] *Id*. (section 4 of both promissory notes).
[50] *Id*. (section 6 of both promissory notes).
[51] *Id*. § 3.1.

judgment and to dismiss the guarantor's counterclaims.[52] *Artisans'* also involved two admittedly unpaid promissory notes, but the guarantor claimed in defense that the lender breached the implied covenant of good faith and fair dealing by engaging in bad faith lending practices.[53] The Court found that the guarantor's allegations "attest[ed] to many issues of material fact pertaining to complex conduct and transactions," the resolution of which would require a more complete record through discovery.[54] In addition, Northwind cites *Knight Energy Services, Inc. v. Amoco Oil Co.*, in which the Florida Fourth District Court of Appeal found Knight Energy's "affirmative defenses of unclean hands and tortious interference … legally sufficient to preclude the entry of a summary final judgment of foreclosure" because the defenses directly related to "the enforcement of the underlying loan transaction and settlement agreement."[55]

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[52] *See Artisans' Bank*, 2010 WL 2501471, at *2. *See also Daystar Const. Mgmt., Inc. v. Mitchell*, 2006 WL 2053649 (Del. Super. July 12, 2006) (recognizing guarantor's assertion of breach of implied covenant of good faith and fair dealing as a valid defense to breach of contract claim).

[53] *See Artisans' Bank*, 2010 WL 2501471, at *1-2.

[54] *See id.* at *2. The defendant guarantor in *Artisans'* alleged the plaintiff "committed material breaches and bad faith lending practices in the following ways:"

> (1) Artisans' failed to obtain construction plans, conduct inspections, review budgets, or obtain an appraisal for the property; (2) Artisans' disbursed funds in excess of the loan to value ratio; (3) Artisans' over advanced the loans by more than $380,000; (4) Artisans' disbursed loan proceeds for improper uses, such as the buy-out of corporate interests; (5) Artisans' failed to abide by the release requirements and short sales without notice to Croll; and (6) Artisans' failed to exercise good faith in its lending practices in disbursing loan funds.

Id.

[55] *See Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. Dist. Ct. App. 1995).

The Court finds this case is distinguishable from the authorities cited by Northwind. Northwind does not attack the validity of the Notes, their execution, the manner in which funds were disbursed, or WEV's enforcement of the Notes. Moreover, the Notes expressly and unambiguously entitle WEV to collect the sums due upon the Notes' respective maturity dates. Equally clear under the Notes' terms are the grounds for finding the Notes in default, which explicitly include failure to pay upon maturity and authorize WEV to demand payment upon such non-payment. While Northwind's surviving counterclaims, discussed *infra*, may afford relief if successful on the merits at trial and minimize the overall damages that would be available under the Notes, they are not a defense that would negate WEV's ability to obtain partial judgment on two valid promissory notes.[56] Thus, WEV's Rule 12(c) Motion for Partial Final Judgment with respect to its breach of promissory note claims is granted.

However, the Court denies WEV's request for entry of final judgment under the Notes pursuant to Rule 54(b). WEV speculated for the first time at argument that Northwind might be insolvent, such that any delay might harm WEV's ability

[56] *See Bank of Delmarva v. S. Shore Ventures, LLC*, 2014 WL 629961, at *4 (Del. Super. Jan. 15, 2014) ("Finally, the Defendants argue that summary judgment should not be granted on the note/bond because the Plaintiff's Motion ignores the Defendants' counterclaims. As the Plaintiff notes, the merits of the Defendants' counterclaims have nothing to do with the merits of the issue directly before the Court—whether or not the Defendants executed the loan documents and failed to pay down the loan. Therefore, the counterclaims either will prevail or fail solely on their merits and are not defenses which would deny the Plaintiff from obtaining a judgment on its claims.").

to recover on the Notes.[57] Northwind's counsel responded that he did not believe his clients were insolvent or that "insolvency" was the appropriate word.[58] Nevertheless, while insolvency is a factor that weighs in favor of entering partial final judgment, it alone is not dispositive.[59] Had either party been equipped to confirm or deny WEV's allegations regarding Northwind's financial status, the factor of insolvency may have assumed a larger role in the Court's decision-making process. Without any other allegations of potential hardship or extraordinary circumstances warranting immediate appeal, consideration of the potential threat to judicial administrative interests tips the scale heavily in favor of denying entry of judgment. That many of the remaining claims in this case are intertwined presents an increased likelihood the Delaware Supreme Court would be forced to "pour over the facts and issues of this entire case more than once" if this Court were to enter final judgment as to the breach of contract claims.[60] Although the counterclaims are separable from WEV's breach of promissory note

[57] Tr. July 28, 2015, at 6-7.
[58] *See id*. at 47. *See also In re Aetna Indus., Inc.*, 340 B.R. 252, 265 (Bankr. D. Del. 2006) ("Unconvincingly, the defendants suggest that solvency considerations may weigh in their favor. But the defendants do not offer any credible support for this, and they admit that they 'are not privy to AZ's financial status.").
[59] *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 12, (1980) ("Nor is General Electric's solvency a dispositive factor; if its financial position were such that a delay in entry of judgment on Curtiss-Wright's claims would impair Curtiss-Wright's ability to collect on the judgment, that would weigh in favor of certification. But the fact that General Electric is capable of paying either now or later is not a "just reason for delay." At most, as the District Court found, the fact that neither party is or will become insolvent renders that factor neutral in a proper weighing of the equities involved.").
[60] *See Republic Envtl. Sys., Inc.*, 1999 WL 464521, at *7.

claims, both arise out of the same transaction: the Heritage Program under the Agreement.[61] Thus, absent any credible indication WEV would be prejudiced, "it makes sense that the claims be resolved together."[62] Given the Delaware Supreme Court's longstanding policy against piecemeal appeals, the Court finds just reason to delay entering partial final judgment under Rule 54(b). Therefore, the grant of partial summary judgment as to WEV's breach of contract claims will not be entered as final under Rule 54(b).

III. PLAINTIFF & COUNTERCLAIM DEFENDANT'S MOTION TO DISMISS

Northwind asserts the following counterclaims against WEV: (1) tortious interference with prospective economic advantage; (2) tortious interference with contractual relations; (3) breach of implied covenant of good faith and fair dealing; (4) unjust enrichment. In response, WEV filed the instant Motion to Dismiss Counterclaims pursuant to Delaware Superior Court Civil Rule 12(b)(6).

A. STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a claim for "failure to state a claim upon which relief can be granted."[63] When analyzing a motion to dismiss under Rule 12(b)(6), the Court generally must

[61] *See In re Aetna Indus., Inc.*, 340 B.R. at 265.
[62] *See id.* at 265-66 ("Although the defendants' counterclaim is separable from AZ's claims, both arise out of the same transaction. It makes sense that the claims be resolved together. The defendants have provided no indication that this would prejudice them.").
[63] Super. Ct. Civ. R. 12(b)(6).

proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the counterclaim.[64] A counterclaim is "well-plead" if it puts the opposing party on notice of the claim being brought against it.[65] Therefore, the Court may dismiss a counterclaim under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the counterclaim-plaintiff's could prevail.[66] However, documents that are integral to or incorporated by reference in the counterclaim may be considered.[67] "Where an agreement plays a significant role in the litigation and is integral to a plaintiff's claims, it may be incorporated by reference without converting the motion to a summary judgment."[68]

Additionally, although the Court need not blindly accept as true all allegations nor draw all inferences in Northwind's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[69] "Only if the [C]ourt can say with reasonable certainty that

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[64] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996) (citing *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).
[65] *See Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995) (citing *Diamond State Tele. Co. v. Univ. of Del.*, 269 A.2d 52, 59 (Del. 1970) and Super. Ct. Civ. R. 8(e)(1) & (f)).
[66] *See Solomon*, 672 A.2d at 38 (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).
[67] *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[68] *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 (Del. Super. 2014).
[69] *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).

[counterclaim-]plaintiff could prevail on no state of facts inferable from the pleadings may the court dismiss a complaint at this preliminary stage."[70]

B. DISCUSSION

For the reasons set forth below, WEV's Motion to Dismiss counterclaims is DENIED as to Northwind's tortious interference with prospective economic advantage and unjust enrichment claims and GRANTED as to the tortious interference with contractual relations and breach of implied covenant claims.

i. *Tortious Interference With Prospective Economic Advantage*

Tortious interference with prospective economic advantage is the intentional and improper interference with another's prospective contractual relation either by way of "(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation."[71] One who tortiously interferes may be "subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation."[72] Under Delaware law, a tortious interference with prospective economic advantage claim requires: (a) the reasonable probability of a business opportunity, (b) intentional interference with that opportunity,

[70] *Id.* (citing *Rabkin*, 498 A.2d at 1104).
[71] *See* Restatement (Second) of Torts § 766B (1979).
[72] *Id.*

(c) proximate causation, and (d) damages.[73] The Court must consider these elements "in light of [WEV's] privilege to compete or protect his business interests in a fair and lawful manner."[74]

Northwind alleges it had a prospective business opportunity in developing the Heritage Program, which WEV intentionally and tortiously interfered with by (1) impeding Northwind's ability to pursue additional funding for the Heritage Program and (2) falsely claiming full ownership rights, and thus "casting a cloud" over, Northwind's title to the Sorento and Iberia leases. But for WEV's alleged conduct, Northwind claims it would have raised the capital required to develop the Heritage Program and repay the Notes. As a result of WEV's actions, Northwind maintains it lost opportunities to pursue financing from a list of seventeen potential investors and suffered damages, including lost profits as specified in the Agreement.

1. Reasonable Probability of Business Opportunity

In its Motion to Dismiss, WEV first argues Northwind failed to allege facts that, if true, would establish a reasonable probability of a prospective business opportunity. Specifically, WEV claims Northwind's list of investors is insufficient to show the individuals and entities named possessed a "legitimate

[73] *See Kimbleton v. White*, 2014 WL 4386760, at *8 (D. Del. Sept. 4, 2014) *aff'd*, 608 F. App'x 117 (3d Cir. 2015) (applying Delaware law); *see also DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).
[74] *See DeBonaventura*, 428 A.2d at 1153.

interest" in the drilling rights associated with the leases or that they would have actually invested in the Heritage Program.[75]

Prospective business opportunities are "by definition, not as susceptible of definite, exacting identification as is the case with an existing contract."[76] Recognizing this distinction, Delaware courts "permit[] a broad range of legitimate business expectancies, including the 'prospect of ... [any] relations leading to potentially profitable contracts.'"[77] It is required, however, that the factual allegations establish some basis of "a *bona fide* expectancy."[78] The "mere perception" of a prospective relationship or contract will not suffice.[79] "To be reasonably probable, a business opportunity must be 'something more than a mere hope or the innate optimism of the salesman.'"[80] For example, in *Kimbleton v. White*, the United States District Court for the District of Delaware held allegations of interference with "all prospective home buyers" insufficient to establish a

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[75] Pl. Br. in Support of Mot. to Dismiss, at 14; Pl. Reply Br., at 7.
[76] *See Wolk v. Teledyne Indus., Inc.*, 475 F. Supp. 2d 491, 512 (E.D. Pa. 2007).
[77] *See Kimbleton*, 2014 WL 4386760, at *8 (D. Del. Sept. 4, 2014). *See also Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1286 (Del. Super. 2001) ("Viewing these facts most favorably to Plaintiffs, a rational trier of fact could determine that the prospective relations with these surgeons and patients could have yielded profitable contracts in the form of claims for reimbursement for services rendered with respect to these patients."); *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009) ("AMT has pled the alleged incidents in enough detail-including dates and, in the case of the potential customer, the detail that '[t]his particular customer had tested columns with AMT's Halo particles' that I can reasonably infer that specific parties were involved. This level of descriptiveness is enough to support a claim that 'specific prospective business relations' existed and AMT is not required to go further and name the parties involved in the Amended Counterclaim.").
[78] *See Lipson*, 790 A.2d at 1285 (citations omitted).
[79] *See id*. (citing *Wolk*, 475 F. Supp. 2d at 512).
[80] *Agilent Techs., Inc.*, 2009 WL 119865, at *7.

reasonable probability of business opportunity.[81] Additionally, in *Dionisi v. DeCampli*, the Chancery Court emphasized the realities of the graphic design market in finding the reasonable probability element unsatisfied where a small independent graphic design firm received work from institutional businesses on an "as-needed" basis without exclusivity agreements.[82]

Here, Northwind specifically identifies seventeen different investors it claims would have contributed the additional capital necessary to facilitate key development of the Heritage Program, had WEV permitted Northwind to solicit such financing.[83] Northwind alleges it prepared presentation materials that it planned to send to these prospective investors, but abstained from doing so at WEV's request. [84] According to Northwind, WEV represented it would manage the solicitation of additional capital and instructed Northwind not to pursue alternative funding because WEV "did not want its investment to be subordinate to the rights of other investors."[85]

At this preliminary stage in litigation, these allegations suffice to establish Northwind possessed a *bona fide* business expectancy in securing additional capital for the Heritage Program from the investors listed, some of whom it

[81] *See Kimbleton*, 2014 WL 4386760, at *8.
[82] *See Dionisi v. DeCampli*, 1995 WL 398536, at *13 (Del. Ch. June 28, 1995) *amended*, 1996 WL 39680 (Del. Ch. Jan. 23, 1996).
[83] Defs. Am. Countercls., ¶ 50.
[84] *See id.* ¶ 16.
[85] *See id.* ¶ 19.

appears had invested in Northwind's previous ventures. Notably, that oil market prices eventually plunged is of no consequence here because "the probability of the business opportunity must be assessed *at the time of the alleged interference*."[86] Assuming WEV did request that Northwind allow WEV to solicit capital singlehandedly, even they believed it was reasonably probable that investors would contribute the requisite funds. Thus, Northwind, at least at this stage of the litigation, has identified facts sufficient to raise the inference that it possessed a reasonable expectation of business opportunity.

2. Wrongful Interference by WEV

WEV next contends Northwind failed to allege facts sufficient to support the inference WEV knew of and wrongfully interfered with Northwind's prospective business. Northwind argues WEV "intentionally and tortiously" interfered with Northwind's prospective business relations when it allegedly misrepresented it was obtaining funding for the Heritage Program, impeded and delayed Northwind's ability to solicit the required capital from the investors of its choice, and purported to claim ownership rights to certain leases under the Agreement.

The interference with another's prospective business relations is intentional "if the actor desires to bring it about or if he [or she] knows that the interference is

[86] *See Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001) (emphasis added).

certain or substantially certain to occur as a result of his [or her] action."[87] Further, "an alleged interference in a prospective business relationship is only actionable if it is *wrongful*" or improper.[88] Delaware courts refer to sections 766 and 767 of the Restatement (Second) of Torts in assessing whether an actor's conduct was improper in the context of tortious interference claims.[89] Applying the Restatement, the Court considers the following factors: [90]

> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

Additionally, a counterclaimant alleging tortious interference bears the burden of proving the interference was improper and whether he or she has successfully carried that burden "is typically a question of fact for the jury."[91]

In terms of the nature of WEV's conduct with respect to raising the additional capital, Northwind argues WEV's instruction that Northwind abstain from pursuing alternate funding was wrongful and that "WEV should not be

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[87] Restatement (Second) of Torts § 766B (1979).
[88] *Agilent Techs, Inc.*, 2009 WL 119865, at *8 (emphasis added). *See also* Restatement (Second) of Torts § 766B (1979) ("The interference, however, must also be improper.").
[89] *See, e.g., WaveDivision Hldgs., LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012).
[90] Restatement (Second) of Torts § 767 (1979).
[91] *See Lipson*, 790 A.2d at 1287-88.

permitted to prevent Northwind from sourcing its own funding until just weeks before the first Note was due only to abandon its own search at the eleventh hour, and then declare a default."[92] In addition, Northwind contends WEV acted wrongfully when WEV misrepresented it held "a 100% interest in the leases in Sorrento and Iberia to the exclusion of Northwind" because, under the Agreement, WEV was entitled only to "a 2% overriding royalty interest in new leases."[93] Northwind characterizes WEV's "unfounded claim[s] to ownership" as misrepresentations of fact and cites *Aglient Technologies, Inc. v. Kirkland* in which the Court of Chancery acknowledged that, while tortious inference claims "must necessarily be balanced against a party's legitimate right to compete," factual misrepresentations are not "legitimate vehicles of competition." [94] While it is true Northwind neglected to provide how and to whom the misrepresentations were made, for purposes of this motion to dismiss the Court will assume the alleged false claims to ownership were received by prospective investors.

While it is said WEV's motivation for assuming control over fundraising was to ensure its investment rights would not be subordinated, [95] the Court is

[92] Defs. Resp. Br. in Opp'n to Pl. Mot. to Dismiss Countercl., at 22.
[93] *Id*.
[94] *See Agilent Techs., Inc.*, 2009 WL 119865, at *8.
[95] *See* Restatement (Second) of Torts § 766B (1979) ("If the means used is innately wrongful, predatory in character, a purpose to produce the interference may not be necessary. On the other hand, if the sole purpose of the actor is to vent his ill will, the interference may be improper although the means are less blameworthy."). *See also WaveDivision Hldgs., LLC*, 49 A.3d at 1174 (reviewing Superior Court's grant of summary judgment and noting "the Superior Court

concerned by the WEV's alleged misrepresentations and the short notice it provided Northwind on the need to pursue alternative funding in light of the context alleged and the Loan's impending maturity date.[96] Upon review of Northwind's Amended Counterclaims, the Court finds it reasonably conceivable that further discovery could expose wrongful conduct on behalf of WEV with regard to its enforcement of fundraising restrictions and purported exaggerated claims to ownership of the leases.[97] Although it is also conceivable discovery

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properly concluded that the motive factor weighed in favor of justification" because "the IRN Holders and Senior Lenders were motivated at least in part by a desire to protect their investment in Millennium, and not solely by a desire to interfere with a Wave–Millennium deal"); Restatement (Second) of Torts § 769 (1979) ("*Intention to protect interest.* The rule stated in this Section applies for the purpose of protecting the actor's interest. If his conduct is directed to that end, it is immaterial that he also takes a malicious delight in the harm caused by his action; if his conduct is not so directed and is designed solely for some other aim, such as the gratification of his ill will, he is not entitled to the protection of the rule in this Section. *Whether the conduct is so intended is a question of fact*.") (emphasis added).

[96] *See WaveDivision Hldgs., LLC*, 49 A.3d at 1174 (considering use of improper means, such as fraudulent misrepresentation, even where desire to protect investment precluded finding of improper motive). *See also* Restatement (Second) of Torts § 767 (1979) ("*Business ethics and customs.* Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not.").

[97] *See WaveDivision Hldgs., LLC*, 49 A.3d at 1174 ("A fraudulent misrepresentation is ordinarily an improper means of interference and precludes a defense of justification. 'A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient.'" (quoting Restatement (Second) of Torts § 767)). *See also Aglient Techs., Inc.*, 2009 WL 119865, at *9 (noting misrepresentation of fact could support inference of wrongful conduct and holding "although not individually rising to an actionable level, Paragraphs 26 and 27 lend support to the overall inference flowing from the Amended Counterclaim that Agilent consciously marketed its own products by casting doubt and uncertainty on AMT's Halo Particles"); *Am. Original Corp. v. Legend, Inc*., 689 F. Supp. 372, 381 (D. Del. 1988) (in finding plaintiff did not act wrongfully, the Court considered that there was "little evidence plaintiff made fraudulent misrepresentations or threats, or engaged in other types of improper actions as discussed in the Comment to the Restatement (Second) of Torts § 767").

could reveal WEV's conduct was justified, the Court is not so convinced at this juncture as to foreclose litigation of Northwind's claim.[98] Thus, WEV's Motion to Dismiss Northwind's tortious interference with prospective economic advantage claim is denied.

3. Causation & Damages

The final elements required for Northwind's tortious interference with prospective economic relations claim are proximate causation and damages. In its counterclaim, Northwind alleges it "suffered damages, including but not limited to lost profits as specified in the Investment Agreement, as a direct and proximate result of WEV's tortious interference with a prospective business opportunity to develop the Heritage Program-AMI in an amount to be determined at trial."[99] Because the "issues of causation and damages" are generally "left for the jury" to determine,[100] Northwind will have the opportunity to develop its case for these elements during discovery.

ii. *Tortious Interference With Contractual Relations*

The torts of interference with prospective economic advantage and interference with contractual relations "are closely related, except that the former

[98] *See Grunstein v. Silva*, 2009 WL 4698541, at *16 (Del. Ch. Dec. 8, 2009) ("The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it. The question of whether an action is improper is a factual determination not readily amenable to assessment by way of a motion to dismiss.").
[99] Defs. Am. Countercls., ¶ 51.
[100] *See Lipson*, 790 A.2d at 1290 (citations omitted).

requires a mere business expectancy while the latter applies only where there is a legally binding contract between the parties."[101] Thus, to avoid dismissal of its interference with contractual relations claim, Northwind must show the existence of "(1) a contract, (2) about which WEV knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[102]

The contractual relations with which Northwind alleges WEV tortiously interfered involve leases within the AMI.[103] Pursuant to the Agreement, Northwind expended a portion of the Loan proceeds on acquiring leases throughout the AMI. Northwind asserts WEV represented to Northwind that WEV "owned or would own all the leases and drilling rights, deep and shallow, within the Sorrento and Iberia target fields of the AMI," which was "incorrect and inconsistent with the Investment Agreement which identified the Sorrento Field as an area of mutual interest."[104] Northwind claims WEV again represented as such in an email sent on October 2, 2014.[105] Ultimately, Northwind argues WEV's "unfounded claim to ownership of all leases in Sorrento and Iberia" created a "cloud on the title," thus preventing Northwind from marketing those rights to the

[101] *See Grunstein*, 2009 WL 4698541, at *16 n.105 (quoting 44B Am. Jur. 2d Interference § 49).
[102] *See Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265-66 (Del. 2004).
[103] Defs. Am. Countercls. ¶ 53.
[104] *Id.* ¶ 27.
[105] *Id.* ¶ 55.

same seventeen investors it listed in its prospective economic advantage claim and repaying the Notes.[106]

This Court finds Northwind's tortious interference with contractual relations claim must be dismissed because it fails to allege a breach by anyone other than the parties to the Agreement.[107] The contracts at issue here are the leases Northwind acquired with the Loan proceeds. Northwind appears to allege only that WEV falsely represented *to Northwind* that WEV owned certain leases in whole and that such conduct frustrated the Agreement. Again, Northwind does not allege such representations were made to the landowners or to anyone other than Northwind itself. But here, even when the Court infers external contractual relations of Northwind were at the receiving end of the misrepresentations, the claim still fails because it does not allege if or how any *existing* leases were *breached* as a result of WEV's claims to ownership. The breach and related injury Northwind asserts here appear to relate only to the Agreement and the law is well-settled that WEV cannot be held liable for "interfer[ing] with its own contract."[108]

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[106] *Id.* ¶¶ 28 -31.

[107] *See, e.g., Acorn USA Hldgs., LLC v. Premark Int'l, Inc.*, 2003 WL 22861168, at *7 (Del. Super. July 16, 2003) ("Tortious interference with contract requires a breach of contract, which is not present in the instant case.") *aff'd*, 846 A.2d 237 (Del. 2004); *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209, at *9 (Del. Ch. June 17, 2011) (dismissing claim where plaintiff failed to allege any breach of a third-party contract).

[108] *See, e.g., Tenneco Auto., Inc. v. El Paso Corp*., 2007 WL 92621, at *5 (Del. Ch. Jan. 8, 2007)("Imposition of liability for tortious interference with contractual relationship requires that the defendant 'be a stranger to both the contract and the business relationship giving rise to and underpinning the contract.'"); *Overdrive, Inc.*, 2011 WL 2448209, at *9 (finding tortious

iii. *Breach of Implied Covenant of Good Faith & Fair Dealing*

The implied covenant of good faith and fair dealing inheres in all contracts and "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[109] Importantly, the implied covenant will not be invoked to supersede the express terms of a contract.[110] Indeed, Delaware law "prevents a party who has after-the-fact regrets from using the implied covenant of good faith and fair dealing to obtain in court what it could not get at the bargaining table."[111] Thus, the implied covenant will only be recognized "where a contract is silent as to the issue in dispute."[112] In other words, the doctrine "operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer."[113] Ultimately, to survive dismissal, Northwind's breach of implied covenant counterclaim must allege (1)

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interference claim based on allegations that defendant used plaintiff's information to "lure away" plaintiff's customers because it "failed to identify a single contract that ha[d] been breached due to defendant's alleged conduct").

[109] *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

[110] *See, e.g., Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

[111] *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 881 (Del. 2015), *as revised* (Mar. 27, 2015).

[112] *See In re Conex Hldgs., LLC*, 518 B.R. 792, 803 (Bankr. D. Del. 2014) (quoting *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc*., 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009)).

[113] *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009) (noting also that "[i]n the Venn diagram of contract cases, the area of overlap is quite small").

specific implied contractual obligations, (2) a breach of those obligations by WEV, and (3) damage suffered by Northwind as a result of the breach.[114]

In its Amended Counterclaims, Northwind contends WEV breached the implied covenant of good faith and fair dealing by (1) impeding Northwind's ability to fundraise capital for the Heritage Program-AMI when WEV knew repayment of the Notes required further development, (2) interfering with Northwind's development of hydrocarbon interests in the Sorrento and Iberia fields, and (3) refusing to share profits with Northwind for the services it provided with regards to "Deep Drilling Interests." Northwind maintains WEV's conduct deprived it of reaping the "full bargained-for-benefits in connection with the Heritage Program-AMI and the Deep Drilling Interests."[115] As a result, Northwind seeks damages including "lost economic opportunities and lost profits as specified in the Investment Agreement in an amount to be determined at trial."[116]

In response, WEV asks the Court to dismiss the claim because (1) the parties' obligations regarding funding, lease acquisition, and profit distribution are expressly addressed in the Agreement; (2) Northwind failed to allege bad faith; and (3) Northwind conceded deep drilling interests were not governed by the Agreement. Because the deep drilling interests are distinct from the parties'

[114] *See, e.g., Kuroda,* 971 A.2d at 888.
[115] Defs. Am. Countercls., ¶ 72.
[116] *Id*. ¶ 73.

dealings under the Agreement, the Court will consider that claim separately from those pertaining to fundraising and leasing for the Heritage Program.

1. Fundraising & Interference With Leases

Northwind contends the Agreement does not fully address the parties' respective rights in connection with Heritage Program-AMI. Specifically, Northwind maintains it bargained with WEV for the "one-year period of time in which to repay the Notes,"[117] but alleges "WEV knew and understood that the Notes could not be repaid" within that time period "simply from the proceeds from the two test wells" and that repayment would require raising an additional $35 million."[118] By representing that it would secure the necessary capital, keeping Northwind from contacting prospective investors until weeks before the Notes were due, and abandoning its own fundraising at that time, WEV deprived Northwind of receiving the benefits of its bargain. In addition, Northwind alleges that it "bargained with WEV for…the right to purchase and/or renew and develop Hydrocarbon Interests in the AMI without competition from WEV."[119] Northwind asserts WEV breached this implied covenant by misrepresenting its ownership rights to leases in the Sorrento and Iberia fields.[120]

[117] *Id.* ¶ 66.
[118] *Id.* ¶ 65.
[119] *Id.* ¶ 66.
[120] *Id.* ¶ 68.

Northwind's implied covenant claim, as it pertains to fundraising and leases, rests essentially on the same alleged conduct of WEV as set forth in its tortious interference claims. Northwind repeats its position that its default on the Notes was attributable to WEV's interference with Northwind's ability to acquire additional capital. Only here, Northwind asks the Court to grant it additional contractual protection by finding WEV's conduct was impliedly restricted by the Agreement. However, this request ignores Delaware's policy that "[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."[121] Northwind and WEV are sophisticated parties[122] to a heavily negotiated investment contract.[123] Further, Northwind's tort claims illustrate that "the absence of a flat contractual prohibition" on the conduct at issue did not necessarily render Northwind defenseless.[124] Indeed, consistent with the Court's ruling above, Northwind can seek redress in tort for WEV's interferences with its prospective economic opportunities. What Northwind cannot do, however, is pursue a claim that the

[121] *See Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("The form of judicial reformation Allied seeks does not implement any clear interstitial intent discernible from the language in the $10 Million Note, but instead grants Allied additional contractual protections that the original noteholder, SunSub, plainly did not extract through negotiation.").
[122] Defs. Am. Countercls., ¶ 5 ("Northwind and NEP are highly experienced in the oil and gas industry and in developing oil and gas assets."); Defs. Resp. Br. in Opp'n to Pl. Mot. to Dismiss Countercls., at 29 (referring to WEV as a "sophisticated investor with sophisticated technical and legal advisors").
[123] Defs. Am. Countercls., ¶ 8("After extensive negotiations, the parties reached [the] agreement…").
[124] *See Allied Capital Corp.*, 910 A.2d. at 1036.

Notes or Agreement explicitly or impliedly barred WEV's conduct[125] or in any way imposed certain conditions on Northwind's obligation to repay the Notes that are inconsistent with the clear provisions of the Agreement or could have easily been incorporated into the document. The Court should not impose contractual terms or obligations that were available to a party when the Agreement was executed and would have insured their position was protected. Even if the Court was to accept Northwind's position, there is nothing to suggest that the requirement of significant additional funding was unknown to the parties or there is a reasonable business reason for that requirement to be absent from the Agreement. While every contract implies a good faith and fair dealing requirement, not ever bad decision of a party or unartfully crafted deal implies its application. Thus, the breach of implied covenant claim as it relates to the Heritage Program-AMI is dismissed.

2. Deep Drilling Interests

Northwind's second category of breach of implied covenant claims involves an alleged agreement between the parties to develop "deep drilling interests." It is undisputed that these interests fall outside the scope of the Agreement.[126] As a result, WEV argues Northwind's claim that WEV was impliedly obligated to share profits from the deep drilling interests must be dismissed because without a

[125] *See id.*
[126] Defs. Am. Countercls., ¶¶ 35, 69; Pl. Reply Br., at 12.

governing contract, there can be no implied covenant of good faith and fair dealing.[127] Even if deep drilling interests were contemplated in the Agreement, WEV contends the implied covenant claim fails because the Agreement's joint venture option expressly outlines the terms under which the parties would share profits *if* the option was triggered *and* WEV subsequently decided to exercise the option.

The factual allegations upon which Northwind bases its implied covenant claim with regard to the deep drilling interests are as follows. In May 2014, a WEV representative requested Northwind "aggressively pursue a deep rights leasing program" in the Sorrento Field and other fields *outside the AMI* "based on 3D seismic data Northwind provided to WEV's technical consultants."[128] WEV provided $1.5 million towards Northwind's acquisition of the deep drilling leases, which were then assigned to WEV. Northwind contends its services were actually worth $2.5 million, but "because the Deep Drilling Interests *were separate and in addition to the Heritage Program-AMI*, [Northwind] understood that it would

[127] Pl. Reply Br., at 12 (citing *Gallagher v. E.I. DuPont De Nemours & Co.*, 2010 WL 1854131, at *5 (Del. Super. Apr. 30, 2010) (questioning viability of implied covenant claim where Court found no contract existed)). Under Delaware law, "three elements are necessary to prove the existence of an enforceable contract: (1) intent of the parties to be bound, (2) sufficiently definite terms, and (3) consideration." *See Gallagher*, 2010 WL 1854131, at *3. To the extent Northwind's allegations implicate the Agreement was orally modified, WEV argues Section 8.10, requiring written modification, controls. *See* Investment Agreement § 8.10 ("This Agreement may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties.").
[128] Defs. Am. Countercls., ¶ 32.

share in the profits from the Deep Drilling Interests consistent with the terms of the Joint Venture MOU" attached to the Agreement.[129] In other words, Northwind believed WEV would assign Northwind a 20% interest in the leases it had acquired for WEV's benefit.

While Northwind admits the parties "never entered into a formal agreement" regarding compensation for its services[130], it alleges WEV represented in a memo dated July 15, 2014 that "WEV owes Northwind an assignment of 20% of [hydrocarbon interest] in Sorrento Field for deep play."[131] With regard to the Bayou Choctaw Field, the memo clarified that those interests were "not part of AMI," not intended to "trigger ORRI or joint venture option rights in the AMI," and were the "*subject of separate negotiation and agreement* between Northwind and WEV."[132] On September 10, 2014, WEV also allegedly wrote to Northwind confirming "the parties were partners on the Deep Drilling Interests."[133] In May 2015, Northwind alleges WEV lost its deep drilling interest in the Sorrento Field because WEV failed to pay rent.[134] According to Northwind, WEV's forfeiture of

[129] *Id*. ¶ 35 (emphasis added).
[130] *Id*. ¶ 38.
[131] *Id*. ¶ 36.
[132] *Id*. (emphasis added).
[133] *Id*. ¶ 37.
[134] *Id*. ¶ 39.

these interests eliminated Northwind's "opportunity to mitigate [its] investment in the 3D seismic data in that field."[135]

Unfortunately for Northwind, the implied covenant of good faith and fair cannot be used to impose "free-floating dut[ies]...unattached to the underlying legal document."[136] Northwind's counterclaim expressly states the deep drilling interests were separate and distinct from the Agreement. Northwind does not allege that the parties' words or conduct with respect to the deep drilling interests created an enforceable contract or that their respective obligations were governed under another existing contract. Nor does Northwind assert the parties' written communications supplemented or modified the Agreement under Section 8.10.[137] To properly plead a claim for breach of the implied covenant, Northwind was required "to allege some injury to his *contractual interest* as a result of the breach of the implied obligation."[138]

Absent allegations that the deep drilling interests were contemplated by the parties under the Agreement or any other contract, it would appear as if Northwind is attempting to frame the profit-sharing arrangement under the Joint Venture MOU as the contractual benefit of which it was so deprived. In its brief, Northwind maintains "WEV's rejection of [its] commitment [to pay Northwind for

[135] *Id*. ¶ 40.
[136] *See, e.g., Dunlap,* 878 A.2d at 441.
[137] *See* Investment Agreement § 8.10 (requiring that the Agreement's modification, alteration, supplementation, amendment, etc. be accomplished in a writing executed by the parties).
[138] *See Kuroda,* 971 A.2d at 888-89 (emphasis added).

its deep drilling services according to the MOU's 80/20 profit split]" constituted a breach of the implied covenant of good faith and fair dealing.[139] While the MOU articulates an 80/20 profit-sharing arrangement, it does so *only* with respect to parties' joint venture opportunity. Again, "the implied covenant cannot be invoked to override express provisions of a contract."[140] It would be unreasonable for Northwind to expect the express language of the MOU somehow entitled it to 20% of profits generated outside the parties' *potential* joint venture. Any expectation of profit-sharing under the MOU is made especially unreasonable considering that the Agreement clearly preconditioned the possibility of JV NewCo on Northwind's completion of two initial wells. Because neither well had been completed, the joint venture option was never triggered for WEV to exercise even if it wanted to. Thus, the MOU's profit-sharing terms are inapplicable to the parties' conduct under the Agreement and Northwind's breach of implied covenant claim as it relates to the deep drilling interests is dismissed.

iv. *Unjust Enrichment*

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[141] The necessary elements of an unjust

[139] Defs. Resp. Br. in Opp'n to Pl. Mot. to Dismiss Countercls., at 30.
[140] *Kuroda*, 971 A.2d at 888.
[141] *See id.* at 891 (citation omitted).

enrichment claim are: (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.[142] Significantly, a claim for unjust enrichment is unavailable when "there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim."[143] Thus, when it is alleged that an "an express, enforceable contract …controls the parties' relationship ... a claim for unjust enrichment will be dismissed."[144]

Northwind's unjust enrichment claim also stems from the parties' dealings with respect to deep drilling interests outside the Agreement. In particular, Northwind alleges WEV was enriched as a result of the valuable services Northwind performed in acquiring deep drilling interests for WEV in the Sorrento and Bayou Choctaw Fields. WEV paid Northwind $1.5 million to perform these services. However, Northwind claims its agent communicated to WEV in an email dated July 9, 2014 that its "seismic [analysis], geologic analysis, geophysical analysis, processing, interpretation, and other development costs for the Sorrento field alone were worth approximately $2.5 million."[145] Northwind admits the

[142] *See Addy v. Piedmonte*, 2009 WL 707641, at *22 (Del. Ch. Mar. 18, 2009).
[143] *See Kuroda*, 971 A.2d at 891-92 ("In other words, if 'the contract is the measure of [Plaintiff's] right, there can be no recovery under an unjust enrichment theory independent of it.'") (citation omitted).
[144] *See id.* (citation omitted).
[145] Defs. Am. Countercls., ¶ 34.

parties never entered into a formal compensation agreement[146] and instead relies on the same profit-sharing representations from its implied covenant claim as supporting that WEV was enriched by its services. While WEV lost its interests in the Sorrento lease due to its failure to pay rent, Northwind alleges WEV has retained its interests in the Bayou Choctaw Field.[147]

WEV argues for dismissal of Northwind's unjust enrichment claim on the basis that it fails to allege impoverishment, enrichment, and any relationship between the two. In particular, WEV contends Northwind insufficiently identified the specific leases acquired, how it spent the $1.5 million, or that the deep drilling interests were profitable. WEV additionally maintains it was under no obligation to retain the leases assigned to it by Northwind or offer the leases back to Northwind at any point.

As a threshold matter, the Court acknowledges the issue here does not turn on whether the conduct complained of arose from the Agreement.[148] As the parties' pleadings and the Court's implied covenant analysis make clear, the Agreement is not alleged to govern the parties' dealings with respect to the deep drilling interests. With that in mind, the Court cannot find with "reasonable

[146] *Id.* ¶ 38.
[147] *Id.* ¶ 79 ("Upon information and belief, WEV continues to hold the Deep Drilling Interests in the Bayou Choctaw Field, for which it has not compensated Northwind or NEP.").
[148] *See, e.g., Vichi v. Koninklijke Philips Electronics N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012) ("[I]n evaluating a party's claim for … unjust enrichment, courts inquire at the threshold as to whether a contract already governs the parties' relationship.").

certainty" that Northwind's unjust enrichment claim would not prevail at trial. Northwind alleges it provided costly services for WEV's benefit at WEV's request, namely the acquisition and assignment of deep drilling leases, that WEV knew the value of those services, and undercompensated Northwind. WEV is also alleged to remain in the possession of at least one of the deep drilling leases. While further discovery may very well undercut these allegations, they suffice at this juncture to state a claim for unjust enrichment. As such, WEV's Motion to Dismiss the unjust enrichment claim is denied.

IV. CONCLUSION

To avoid any confusion as a result of the rulings made in this opinion, it is perhaps helpful for the Court to articulate its understanding of the present status of this litigation. First, there is no dispute that the Notes here were not paid when due and that Northwind is in default. This situation has led the Court to grant judgment on the Notes and to remove that dispute from the litigation. That decision, however, has not ended the litigation. There are several additional counts in WEV's Complaint and the Court has allowed two of the counterclaims to remain. While the amounts owing on the Notes is undisputed, the determination of the total damage award will await the outcome of the upcoming litigation. If Northwind is successful, the amount of the damage award would be deducted from the judgment

amount that stems from the Notes. This ruling also puts an ending point as to possible collection of attorneys' fees and costs connected to the Notes.

IT IS SO ORDERED.

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